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# Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism

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Sungjoon Cho\*

## I. INTRODUCTION

In a world divided and subdivided according to geographical features, regionalism is a natural path of human civilization. It continuously influences all aspects of life, from culture to politics to the economy. Within the economic, or trade realm, the impact of regionalism has been especially pronounced.<sup>1</sup>

A desire for rapid commercial expansion often creates an incentive for the formation of certain types of preferential regional alliances, which are usually intended to serve the exclusive interests of selected participants. The formation by neighboring territorial units of alliances to boost economic and, subsequently, political integration through free trade areas (FTAs)<sup>2</sup> or customs unions (CUs)<sup>3</sup>—collectively referred to as “regional trading arrangements” (RTAs)<sup>4</sup>—is not a new phenomenon. One of the earliest mani-

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\* Byse/EALS Fellow, S.J.D. Candidate (2001), Harvard Law School. LL.B., Seoul National University, 1989; LL.M., University of Michigan, 1997. I am deeply grateful to Professor Joseph H. H. Weiler for his generous support and mentorship and to Professors William P. Alford and Anne-Marie Slaughter for their continuous inspiration and encouragement. An early draft of this Article was presented in Professor Alford's International Trade Law course at Harvard Law School; I wish to thank those in attendance for their valuable comments. For editorial assistance, I am indebted to Chris Feak at the University of Michigan and to the editors of the *Harvard International Law Journal*, with special thanks to Matt Christensen, Jason Friedman, and Anna Mitescu. I dedicate this Article to my wife, Mehyun, and to my daughter, Hayun.

1. For a non-economic analysis of regionalism, see, for example, *REGIONALISM AND THE UNITED NATIONS* (Berhanykun Andemicael ed., 1979); *REGIONALISM AND GLOBAL SECURITY* (Gavin Boyd ed., 1984); AMITAV ACHARYA, *REGIONALISM AND MULTILATERALISM: ESSAYS ON COOPERATIVE SECURITY IN THE ASIA PACIFIC* (2000).

2. A typical definition of free trade area (FTA) is provided in GATT Article XXIV as “an association of nations with duty free treatments for imports from members.” General Agreement on Tariffs and Trade, October 30, 1947, art. XXIV(8)(b), 61 STAT. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

3. Similarly, GATT Article XXIV provides a typical definition of a customs union (CU) as “an association of nations with duty free treatments for imports from members and a common level of external tariffs for imports from non-members.” *Id.* art. XXIV(8)(a).

4. For the purposes of this Article, RTA includes any form of region-based trading agreement having the characteristics of an FTA, CU, or similar entity.

festations of a regional trade alliance bearing the essential features of contemporary RTAs was the German *Zollverein*. A CU formed in 1834 among eighteen small states, the *Zollverein* functioned as an important catalyst for a united Germany later in the century.<sup>5</sup> Yet trade regionalism has not always yielded uniformly beneficial effects. The inherent exclusiveness of RTAs has always held the potential for conflict with the interests of non-members. To be sure, this conflict does not always manifest itself; members often enjoy regional prosperity relatively free of outside interference. Yet, under certain circumstances, the guild-like exclusiveness of trade regionalism directly collides with the economic interests of non-members when members refuse to share business opportunities with them. More problematically, the zeal for regionalism can be contagious, particularly under circumstances of economic distress. The effects of this situation can be disastrous to members and non-members alike, as was the case with the Second World War. Following a period of robust globalism during the 1920s, the so-called "destructive regionalism" of the 1930s set the stage for the creation of imperial blocs throughout the world, deepened the impact of the Great Depression, and ultimately precipitated the Second World War.<sup>6</sup>

As a partial solution to these developments, the post-war architecture of the international trade system, symbolized by the General Agreement on Tariffs and Trade 1947 (GATT 1947), set forth non-preferential and non-discriminatory principles based on an ethos of globalism or multilateralism.<sup>7</sup>

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5. JEFFREY A. FRANKEL, *REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM* 1 (1997). Major cases of economic and subsequent political integration in post-medieval and modern Western civilization were "region-based." FRITZ MACHLUP, *A HISTORY OF THOUGHT ON ECONOMIC INTEGRATION* 105-15 (1977). For instance, although Colbert's 1664 plan to integrate all French provinces into a customs union with no internal trade barriers failed, it did establish some "uniform duties" in Northern France. *Id.* at 106. After further efforts, such as a "royal edict" establishing a national tariff on some 60 products in 1667, all internal trade barriers were finally abolished in 1789-90 by the revolutionary government. *Id.*

6. See Dennis Kennedy, *Regional Trading Blocs, Multilateralism and the New GATT Agreement: An Introduction* [hereinafter *Introduction*], in *REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE* 1 (Till Geiger & Dennis Kennedy eds., 1996) [hereinafter *COMPLEMENTARY PATHS*]; Patricia Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, in *COMPLEMENTARY PATHS*, *supra*, at 31-33. In fact, globalism in the twenties was never perfect. Unconditionality was questioned among some trading partners such as Germany and France, and indications of trading blocs already had become evident. Yet, one of the most culpable factors of the destructive regionalism that led to the Second World War might be found in a fatal policy failure. After the First World War, victorious nations tried to reconstruct the Western economy through the restoration of the classical "gold exchange." Therefore, governments had to maintain the convertibility of their currencies, which forced them to pursue deflationary economic policies. Central banks tightened money supplies while governments engaged in quota wars. In the meantime, countries under the influence of England pegged their currencies not to gold but to sterling, which naturally led to the formation of a "sterling area." Moreover, the Smoot-Hawley Tariff Act of 1930 in the United States as well as the British Tariff Act of 1932 sparked a chain reaction of protectionism worldwide. More importantly, this mercantilist movement alienated then have-nots such as Germany, Italy, and Japan, causing them to form the "Axis" alliance. It should be emphasized that all of this followed a period of abundant globalism.

7. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 290-91 (3d ed., 1995); see also GATT 1947, *supra* note 2. This historical turn toward multilateralism was largely due to the efforts of the United States, which at that time opposed British attempts to maintain a

Regionalism was permitted only to the extent that it complied with the provisions of Article XXIV.<sup>8</sup> The tension between the multilateralism ethos and the allowance for regionalism as an exception under Article XXIV continues to this day in the 1994 version of GATT.<sup>9</sup>

Yet, as will be discussed below, GATT Article XXIV has proven inadequate in several respects. First of all, it never worked in a *legal* way because it lacked legal discipline.<sup>10</sup> Since GATT panels were unable to interpret the nebulous text of Article XXIV in a consistent manner, GATT contracting parties managed to utilize the provision in self-serving ways,<sup>11</sup> and no case law developed. In this legal vacuum, RTAs mushroomed, abusing or misusing Article XXIV.<sup>12</sup> As RTAs are now the undeniable status quo, this Article argues that an important step in preventing the spread of a discriminatory bloc phenomenon is the strengthening of Article XXIV through jurisprudential efforts.

Even if Article XXIV did not suffer from a lack of legal discipline, there are other inherent flaws that would, if left unaddressed, continue to plague the global trading system. In particular, Article XXIV was designed to address the *formation*, as opposed to the *operation* of RTAs. While the text of Article XXIV provides discipline for the establishment of RTAs, it is regrettably silent on critically important issues pertaining to operational relationships between RTAs and the World Trade Organization (WTO), or among RTAs *after* their formative stage.<sup>13</sup> As argued below, these two key defects of Article XXIV render it incapable of dealing with certain realities: namely, that numerous RTAs do exist, are institutionalized, and have particular roles to play in the global trading system.

For all of these reasons, the global trading system requires a new paradigm capable of overcoming the deficiencies and obsolete elements embedded in Article XXIV in order to make trade regionalism compatible with multilateralism in a constructive, rather than destructive manner. This new paradigm must proceed from a holistic perspective that breaks down the

pre-war Commonwealth Preference. See JAGDISH BHAGWATI, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION AND DEMOCRACY 280 (1998) [hereinafter BHAGWATI, STREAM OF WINDOWS]; JACOB VINER, THE CUSTOMS UNION ISSUE 17–18 (1950).

8. See GATT 1947, *supra* note 2, art. XXIV.

9. "The WTO Agreement includes the 'General Agreement on Tariffs and Trade 1994.' This instrument, known as 'GATT 1994,' is based upon the text of the original [GATT 1947]." WTO, THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, preface (1999) GATT 1994 includes GATT 1947 Article XXIV, subject to the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, arts. I(b), I(c)(iv), Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 6; 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

10. *Legal discipline* refers to normative order or control ensuring stable and predictable governance in a given subject-matter.

11. See discussion *infra* Part IV.A.

12. See *infra* notes 115–121 and accompanying text.

13. GATT 1947, *supra* note 2, art. XXIV.

barrier between regionalism and multilateralism by emphasizing areas of institutional "convergence," rather than the traditional dichotomy between the two. Indeed, this institutional convergence can offer the global trading system much-needed guidance in developing a structure for the effective management of the rapid expansion of economic interdependence and integration.

Once such a structure is in place, the global trading system will still require an operational norm that is sufficiently universal to apply to all trading units and thus capable of facilitating the smooth operation of the system. This unified trade norm—the "*jus gentium*"<sup>14</sup> of international trade"—is a long-standing aspiration of a global trading community that often suffers from complex and conflicting trade rules. The *jus gentium* of international trade could be derived in various ways. For instance, it could be created from the hermeneutical convergence of different trading tribunals or from situations of conflict. But regardless, it is critically important that the substance of the *jus gentium* of international trade be filled in and enriched continuously by active jurisprudential developments that support this new paradigm.

This Article proposes one possible approach to developing such a paradigm. First, Part II examines the origins of trade regionalism through various theoretical lenses. Although no single theoretical perspective can provide a complete explanation for trade regionalism, a combination of different theories does provide useful insights into different aspects of trade regionalism. Each of these various perspectives maintains its own disciplinary hold on the new paradigm, proposed in Part V, thereby complementing and enriching the discourse pertaining to its legal dimensions. As a logical link to these theoretical accounts, Part III describes the conventional debate on the desirability of trade regionalism under the heading of "regionalism versus multilateralism." Careful analysis of the contrasting dynamics of trade regionalism vis-à-vis multilateralism—treated herein under the rubric of "stumbling blocks" versus "building blocks"<sup>15</sup>—tends to highlight the ne-

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14. As a Roman law concept, "*jus gentium*" referred to the "body of law, taken to be common to different peoples, and applied in dealing with the relations between Roman citizens and foreigners." BLACK'S LAW DICTIONARY 865 (7th ed. 1999). More generally, *jus gentium* means "international law." *Id.* As applied to international trade law, *jus gentium* can be defined as a system of legal discipline or legal order, consisting of certain legal doctrines and precepts, that serves to govern and manage complicated trade relationships among various trading units, or between RTAs and the WTO. Reflecting its debt to the original Roman law concept, the *jus gentium* of international trade advocates the development of a common—that is, de-contextualized—perspective out of various trading regimes from different trading units. In this sense, it can be translated into the "law of trading nations." The conceptual significance of using *jus gentium* for the purpose of international trade law lies in its embedded historical dynamism, namely, its gradual ascendancy over *jus civile* to become the common law of the Roman Empire. MALCOLM N. SHAW, INTERNATIONAL LAW 15 (4th ed. 1997).

15. This phrase was coined by Bhagwati and popularized by Lawrence. See JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK 77 (1991) [hereinafter BHAGWATI, AT RISK]; Robert Z. Lawrence, *Emerging Regional Arrangements: Building Blocks or Stumbling Blocks?*, in 5 FINANCE AND THE INTERNATIONAL ECONOMY 22 (Richard O'Brien ed., 1991).

cessity of the new paradigm. In fact, this new paradigm offers a way of realizing in practice the ideal of regionalism as a building block of international trade.

Part IV 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. Restoration of legal order in trade regionalism, particularly in the application of GATT Article XXIV, is an important pre-condition for the new paradigm. Indeed, under circumstances where trading units compete with each other as protectionist blocs, structural convergence and the development of the *jus gentium* of international trade are inconceivable. Nevertheless, even when the law of Article XXIV has been duly established, it will remain incapable of addressing all the aspects of trade regionalism that contribute to the contemporary landscape of international trade. Accordingly, Part IV also explores other inherent flaws of GATT Article XXIV.

Finally, as a potential solution to these problems, Part V describes a new paradigm consisting of converging trading blocs as structure, and the *jus gentium* of international trade as a unified operational norm. The primary purpose in proposing this paradigm is to find a way of overcoming the inherent weaknesses and limitations of Article XXIV in order to reconstruct a global trading system more responsive to a key purpose of the global trading community: market integration through free(r) trade.<sup>16</sup>

## II. ORIGINS OF TRADE REGIONALISM

### A. Theoretical Optics

#### 1. Political Perspectives

Political scientists have attempted to theorize the motivation behind the formation of RTAs from various perspectives. Functionalists and neo-functionalists have been among the most influential, arguing that governments establish RTAs in response to various functional demands, such as enhancing the economic welfare of participating states.<sup>17</sup> By addressing such functional needs, RTAs can marshal necessary support from domestic constituencies and other groups, hence legitimating their further integration.<sup>18</sup>

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16 For dissenting views on WTO-style free trade, see, e.g., COLIN HINES, *LOCALIZATION: A GLOBAL MANIFESTO* (2000); LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION?: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* (1999).

17. Edward D. Mansfield & Helen V. Milner, *Political Economy of Regionalism: An Overview*, in *POLITICAL ECONOMY OF REGIONALISM* 5–8 (Edward D. Mansfield & Helen V. Milner eds., 1997) [hereinafter *POLITICAL ECONOMY*]. See also ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950–1957*, 3–31 (1958); DAVID MITRANY, *A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION* 19–25 (1943).

18. Mansfield & Milner, *supra* note 17, at 6.

Another approach, known as “constructivism,” focuses on a common sense of communal identity in the process of forming an RTA.<sup>19</sup> From this perspective, RTAs are viewed as “ideational products” that play an ultimate role in molding states’ behaviors.<sup>20</sup> Unlike the (neo-)functionalists, this camp finds little functional—principally, economic—need for the formation of an RTA.<sup>21</sup> Instead, it emphasizes strong communal interest, such as collective security guarantees.<sup>22</sup>

Finally, the realist or neo-realist camp highlights power relations in international politics to explain the formation of RTAs.<sup>23</sup> The realist view is rather skeptical regarding the functional need to increase the collective welfare of participating states by forming RTAs because the inevitable asymmetrical distribution of power within an RTA, and the resulting “relative gains,” hinders cooperative efforts among participants.<sup>24</sup> According to this perspective, alliance politics molds patterns of international trade, and hence the formats of RTAs.<sup>25</sup> This in turn leads to a hegemonic role in forming an RTA.<sup>26</sup> In a similar vein, (neo-)realists argue that the degree of institutionalization in an RTA depends on the degree of stability in the distribution of capabilities among participants (the “relative disparity shift”)<sup>27</sup> or on the preferences and bargaining advantages of members.<sup>28</sup>

The lenses described here differ in terms of the particular focal points through which they seek to explain the origins of trade regionalism. These may be summarized as *welfare* (functionalism or neo-functionalism), *community* (constructivism) or *power* (realism or neo-realism). These focal points obviously yield contrasting models of trade regionalism. In the context of the effort to develop a new paradigm, it is important to keep in mind that particular theoretical optics are appropriate to particular circumstances, and familiarity with a number of approaches is almost always preferable to the reflexive application of any one.

19. See Charles A. Kupchan, *Regionalizing Europe's Security*, in *POLITICAL ECONOMY*, *supra* note 17, at 209, 211–15.

20. See *id.*

21. See *id.*

22. See *id.*

23. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 116–28 (1979).

24. See Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *INT'L ORG.* 485, 498–503 (1988).

25. See JOANNE GOWA, *ALLIES, ADVERSARIES AND INTERNATIONAL TRADE* 6–7 (1994); Joanne Gowa & Edward D. Mansfield, *Power Politics and International Trade*, 87 *AM. POL. SCI. REV.* 408, 416–17 (1993).

26. See ROBERT GILPIN, *US POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT*, 20–43 (1975); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 *WORLD POL.* 317, 318–23 (1976).

27. See Joseph M. Grieco, *Systemic Sources of Variation in Regional Institutionalization in Western Europe, East Asia and the Americas*, in *POLITICAL ECONOMY*, *supra* note 17, at 164, 175–85.

28. See Stephan Haggard, *Political Economy of Regionalism in Asia and the Americas*, in *POLITICAL ECONOMY*, *supra* note 17, at 20, 20–22.

## 2. Economic Explanation

Some economists argue that the geographical or regional concentration of trade is attributable to the "natural factor of geographical proximity."<sup>29</sup> Other economists reject this natural factor explanation and instead focus on the "artificial factor of preferential trade policy."<sup>30</sup> These divergent views on the source of trade regionalism among economists also lead to different positions regarding the desirability of RTAs.<sup>31</sup>

The Proximity School contends that distance and the resultant transportation costs create natural trading blocs.<sup>32</sup> Strong empirical confirmation of this thesis can be found in the special trading arrangements that exist between the United States and Canada, and within Europe.<sup>33</sup> 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 products (GDPs) and inversely related to the distance between them.<sup>34</sup>

By contrast, the "Discriminatory Policies School," represented by Jagdish Bhagwati, dismisses the significance of geographical proximity, arguing instead that trade concentration is attributed to discriminatory (preferential) trade policies.<sup>35</sup> Bhagwati refutes empirical findings by the Proximity School with an analysis of India and Pakistan, and demonstrates that there was less trade through the 1960s between these two countries than between India and England.<sup>36</sup>

These contrasting economic viewpoints on the origin of trade regionalism are directly related to the normative debate on the desirability of trade regionalism, particularly vis-à-vis multilateralism.<sup>37</sup> The two foregoing economic explanations are based on contrasting postulations. The "Proximity School" basically views trade regionalism as a natural phenomenon, while the "Discriminatory Policies School" regards trade regionalism as an artificial policy. As with political explanations, the manifestations of trade regionalism are neither so uniform nor so simple as to be satisfactorily explained by either one of these different positions. For example, trade region-

29. Paul Krugman, *The Move Toward Free Trade Zones*, in Policy Implications of Trade and Currency Zones 19–20 (1991), a symposium sponsored by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming; Lawrence Summers, *Regionalism and the World Trading System*, in Policy Implications of Trade and Currency Zones 297–99 (1991).

30. FRANKEL, *supra* note 5, at 29.

31. *Id.* at 30.

32. *Id.* at 29. The Proximity School is represented by Paul Krugman and Lawrence Summers.

33. According to the 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), nor so far that the costs of forming the bloc overrides the benefits ("unnatural" trading bloc). See *id.* at 30, 169–70.

34. *Id.* at 49–50. But cf. Jacques J. Polak, *Is APEC a Natural Regional Trading Bloc? A Critique of the 'Gravity Model' of International Trade*, 19 WORLD ECON. 533, 534–37 (1996).

35. Jagdish Bhagwati, *Regionalism and Multilateralism*, 15 WORLD ECON. 535, 544–45 (1992) [hereinafter Bhagwati, *Regionalism*].

36. *Id.*

37. FRANKEL, *supra* note 5, at 30. See also discussion *infra* Part III.



alism based on a preferential policy may be justified in a given political situation despite higher economic costs. A partial compromise between the two approaches might be achieved by concluding that trade regionalism is initiated and facilitated by certain gravitational forces, but in a manner subject to various policy considerations.

### B. Empirical Observation

As was seen in the case of the German *Zollverein*,<sup>38</sup> empirical examples of RTAs abound throughout history. Yet RTAs formed in the post-war era are particularly relevant due to their closer connection with the current landscape of international trade. In the 1950s, with the approval of the United States, the European Community (EC)<sup>39</sup> emerged onto the international landscape, ushering in a new wave of regionalism.<sup>40</sup> Its main purpose, expressed in the Schuman Declaration,<sup>41</sup> was to prevent another war by binding European states through economic ties.<sup>42</sup> U.S. efforts to rehabilitate war-stricken Europe by means of measures such as the Marshall Plan,<sup>43</sup> which was itself conditioned by concerns about the proliferating Soviet bloc, provided a firm foundation for the establishment of the EC.<sup>44</sup> In the 1960s, what Bhagwati terms the "First Regionalism"<sup>45</sup> flourished across the world in such forms as the Latin American Free Trade Association (LAFTA),<sup>46</sup> the

38. See *supra* note 5 and accompanying text.

39. Before 1991, the European Community (EC) was a term applied collectively to three different international legal entities. JO SHAW, *LAW OF THE EUROPEAN UNION* 5 (2d ed. 1996). These three legal entities were the European Coal and Steel Community (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. *Id.* Of the three, the EEC came to occupy a dominant position. *Id.* Since the 1993 Maastricht Treaty, European integration has been based on a different legal identity, the European Union (EU). *Id.* at 50–53. Maastricht's re-designation of the EEC as the EC, however, has caused some confusion. *Id.* at 5. See generally TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997); TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC Treaty]; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992).

40. BHAGWATI, *STREAM OF WINDOWS*, *supra* note 7, at 280.

41. See PASCAL FONTAINE, *A NEW IDEA FOR EUROPE: THE SCHUMAN DECLARATION, 1950–2000*, at 5–8 (2d ed. 2000), <http://europa.eu.int/comm/dg10/publications/brochures/docu/50ans/en.pdf> (visited May 22, 2001).

42. See *id.* at 36 ("The solidarity in production thus established will make it plain that any war between France and Germany becomes *not merely unthinkable, but materially impossible*." (emphasis added). This functionalist initiative was espoused by Europeans such as Jean Monnet and Robert Schuman.

43. See Remarks by the Honorable George C. Marshall, Secretary of State, at Harvard University on June 5, 1947, Press Release, U.S. Dep't St. (June 4, 1947), reprinted in 3 *FOREIGN RELATIONS OF THE UNITED STATES*, 1947, at 237 (U.S. Dep't St. ed., 1972) [hereinafter Marshall Plan].

44. Cf. Library of Congress, *For European Recovery: The Fiftieth Anniversary of the Marshall Plan*, <http://lcweb.loc.gov/exhibits/marshall/mars7.html> (visited May 22, 2001).

45. Bhagwati, *Regionalism*, *supra* note 35, at 538–39.

46. In 1960 the Latin American Free Trade Association (LAFTA) was created through the Treaty of Montevideo in order to remove trade barriers among member countries over a twelve-year period. By the end of 1978, the eleven signatory countries had acted to restructure the Association through the 1980 Treaty of Montevideo, thereby establishing the Latin American Integration Association (LAIA) as a suc-

proposed North Atlantic Free Trade Area,<sup>47</sup> and the Association of South East Asian Nations (ASEAN).<sup>48</sup> Trade regionalism in this era, however, was driven mainly by strategic motivations. As mentioned above, the United States paved the way for the formation of the European Community in the forties and fifties in order to counterbalance the rising influence of the Soviet bloc in Central and Eastern Europe.<sup>49</sup> Similarly, LAFTA members tried to form their own bloc for the purpose of maintaining internal solidarity against the Western powers, an effort motivated largely by anti-colonialism, dependency theory,<sup>50</sup> and the Calvo doctrine.<sup>51</sup>

Nevertheless, few of these early efforts achieved the desired objectives.<sup>52</sup> The futility of the First Regionalism stemmed mainly from the rationale and format of these initiatives; that is to say, regional trading blocs under the First Regionalism either neglected, or perhaps misunderstood, the economic aspects of their operation since they were motivated principally by political considerations.<sup>53</sup> As a result, their trade-generating effect was

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cessor to LAFTA. See Organization of American States (OAS), Foreign Trade Information System, An Analytical Compendium of Western Hemisphere Trade Arrangements: General Overview, <http://www.sice.oas.org/cp061096/english/01010100.asp#ala> (visited Apr. 22, 2001 06).

47. This idea has recently reemerged in the form of a proposed "Transatlantic Economic Partnership." See Ellen L. Frost, *The Transatlantic Economic Partnership*, INT'L ECON. POL'Y BRIEFS (Institute for International Economics No. 98-6), <http://www.iie.com/policybriefs/NEWS98-6.HTM> (visited Apr. 22, 2001).

48. See The Association of Southeast Asian Nations (ASEAN), Overview, <http://www.aseansec.org/history/overview.htm> (visited Apr. 22, 2001).

49. See, e.g., Marshall Plan, *supra* note 43.

50. "Dependency theory" reflects a hierarchical conception of the global economy in which developed and developing economies are positioned at the "core" and "periphery," respectively. The relationship between core and peripheral economies is characterized by the perpetuation of a fixed division of labor in which peripheral economies exist to provide primary factor inputs to core economies. See JAMES M. CY- PHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT 189-96* (1997). See also, RICHARD PEET, *THEORIES OF DEVELOPMENT 107-11* (1999); STEPHAN HAGGARD, *PATHWAYS FROM THE PE- RIPHERY 16-22* (1990).

51. See Richard Bilder & Brian Z. Tamanaha, Book Review and Note, 89 AM. J. INT'L L. 470, 478 (1995) (book review) (observing that "dependency theory gave rise to aggressive economic nationalism in a number of developing countries, notably in Latin America and India, generating policies that emphasized import substitution, combined with protectionist measures for local industry"). The "Calvo doctrine" asserts "the right of host countries to nationalize foreign investments and make their own determination of what constitutes fair compensation. As such, the Doctrine rejects the right of foreign investors to lay claim to diplomatic protection or to appeal to their home governments for help since this could ultimately result in violating the territorial sovereignty and judicial independence of the host nations." JOAN E. SPERO & JEFFREY A. HART, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 372* (1997).

52. For instance, empirical data shows that preferential tariffs contributed only marginally to the increase in intra-ASEAN trade that occurred during the mid-1970s. See RICHARD POMFRET, *THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS 300* (1997); Pearl Imada, *Production and Trade Effects of the ASEAN Free Trade Area*, 31 DEVELOPING ECONOMIES 3, 4-8 (1993); WTO SECRETARIAT, *REGIONALISM AND THE WORLD TRADING SYSTEM 33* (Mar. 1995), [hereinafter WTO, REGIONALISM].

53. In particular, economic integration through regional initiatives in Asia in the late 1950s and 60s failed to achieve even the modest gains obtained by similar efforts in Europe and Latin America. John Redmond, *ASEAN in a World of Trade Blocs: Pacific Integration in the Asia-Pacific*, in COMPLEMENTARY PATHS, *supra* note 6, at 156-57. The cause of this unimpressive performance can be attributed to various factors, such as "differences in size and in levels of economic development," "the degree of complementarity of the participating economies," and "differences in political ideology." *Id.* at 157. Redmond concludes that "[t]he Asia-Pacific lacks the unifying factors that were present in Western Europe in the post-

greatly limited by their inward-looking orientation<sup>54</sup> and pursuit of import-substitution policies.<sup>55</sup>

The "Second Regionalism"<sup>56</sup> 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.<sup>57</sup> This Second Regionalism, which was unprecedented in its intensity, is represented by the North American Free Trade Agreement (NAFTA),<sup>58</sup> the Southern Cone Common Market (Mercosur),<sup>59</sup> and the Asia Pacific Economic Cooperation (APEC),<sup>60</sup> among others. Between 1948 and 1989, GATT contracting parties notified only 80 RTAs. Since 1995, by contrast, 90 RTAs have been notified.<sup>61</sup> The trade-generating effect of these RTAs has been very impressive.<sup>62</sup> The economic successes of the Second Regionalism stand in stark contrast to the generally poor economic record of the First Regionalism, demonstrating that a strong economic, rather than political, motivation for the formation of an RTA is key to its success. To be sure, the Second Regionalism was greatly facilitated by

war period—a desire for peace, the need to contain Germany and to check the Soviet threat. This has left regional integration in the Asia-Pacific with a lack of purpose and enfeebled the process." *Id.* at 170.

54. See, e.g., Alan C. Swan, *The Dynamics of Economic Integration in the Western Hemisphere: The Challenge to America*, 31 U. MIAMI INTER-AM. L. REV. 1, 3 (2000) (observing that "cut off from the technological advances enjoyed by the rest of the free world, and saddled with cumbersome public enterprises wielding monopoly power, the inward-looking policies had rapidly trapped Latin America in a pattern of ever increasing waste and inefficiency that eroded their resource base, spawned wholesale macroeconomic instability, and left them powerless to grasp the advantages integration might otherwise have offered."). But cf. Sam Laird, *Fostering Regional Integration*, Background Reading Material in the World Bank-WTO Forum on Regionalism, ¶. 61, Mar. 3–31, 1999, <http://www.itd.org/forums/rtal.doc> (visited Apr. 22, 2001) (suggesting that this inward-looking tendency has diminished recently in Latin American countries).

55. "Import substitution" refers to a strategy for economic "development from within" that emphasizes domestic production of basic consumer goods as a substitute for importation of those goods. CY-PHER & DIETZ, *supra* note 50, at 174–75.

56. See Bhagwati, *Regionalism*, *supra* note 35, at 535.

57. The idea of launching a comprehensive new trade round under the auspices of GATT was first proposed in November 1982 at a ministerial meeting of GATT contracting parties in Geneva. WTO, *The Introduction to the WTO (Basics: The Uruguay Round)*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (visited Apr. 22, 2001). At a meeting in September 1986 in Punta del Este, Uruguay, GATT contracting parties concluded four years of consensus building by agreeing to launch the new round. *Id.* A painstaking series of negotiations, sometimes accompanied by political deadlock, ensued. On April 15, 1994, the Uruguay Round culminated with the signing of the Final Act, which created the WTO, by ministers of most of the 125 participating governments at a meeting in Marrakesh, Morocco. *Id.* The WTO system officially entered into force on January 1, 1995. *Id.*

58. North American Free Trade Agreement, Dec. 8–17, 1992, Can.-Mex.-U.S., H.R. DOC. NO. 103-159, 32 I.L.M. 296 [hereinafter NAFTA].

59. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041.

60. See Asia Pacific Economic Cooperation (APEC), <http://www.apecsec.org.sg> (visited Apr. 22, 2001).

61. WTO, *Regionalism in the WTO*, [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (visited Apr. 22, 2001). It is worth noting that the slow progress of Uruguay Round negotiations in the late 1980s and the early 1990s contributed to the proliferation and intensification of regionalism across the globe. Consequently, significant new RTAs appeared during this period in North America (NAFTA), Europe (EU), and Asia (APEC), reflecting a widespread desire for an "insurance policy" in the event of the failure of the Uruguay Round negotiations. WTO, *REGIONALISM*, *supra* note 52, at 1.

62. For instance, the share of intra-regional trade (export plus import) in total global trade increased from 44.1% in 1963 to 50.4% in 1993. *Id.* at 49.

certain other events that help to account for the shift in primacy from political to economic motivations in forming RTAs. These include the end of the Cold War and the subsequent reemergence of globalization as a general trend.<sup>63</sup>

### III. CONVENTIONAL DEBATE ON REGIONALISM VERSUS MULTILATERALISM

Traditionally, the desirability of RTAs has been discussed against the backdrop of the multilateral trading system based on a simple welfare analysis weighing the "trade creation" and "trade diversion" effect of RTAs with respect to the multilateral trading system.<sup>64</sup> This analytical approach has been strongly criticized by new-generation economists for many reasons, but especially because the scope of its inquiry is too narrow.<sup>65</sup> Nowadays, not only static aspects of economic welfare, but also certain other socio-political concerns associated with RTAs are considered in advocating or rejecting regionalism in international trade. Consequently, debate as to the desirability of RTAs now focuses not only on the question of whether they result in trade creation or trade diversion, but also on the question of whether they represent stumbling blocks or building blocks to accomplishing broader goals of the global trading community such as "raising standards of living" and promoting "sustainable development."<sup>66</sup>

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63. Cf. GLOBAL TRANSFORMATION 436 (David Held et al. eds., 1999) (describing contemporary globalization as a product of the "expansory tendencies of political, military, economic, migratory, cultural and economic systems").

64. Viner offers the classical example of this approach:

From the free-trade point of view, whether a particular customs union is a move in the right or in the wrong direction depends, therefore . . . on which of the two types of consequences ensue from that custom union.

Where the *trade-creating* force is dominant, one of the members at least must benefit, both may benefit, the two combined 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 only as the result of the general diffusion of the increased prosperity of the customs union area. Where the *trade-diverting* effect is predominant, one at least of the member countries is bound to be injured, both may be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large" (emphasis added).

VINER, *supra* note 7, at 44.

65. See, e.g., Introduction, *supra* note 6, at 2 ("The original economic theory of customs unions drew heavily on classical exposition of the gains from trade. In the initial treatment of the subject, Viner referred only in passing to the gains from economies of scale and changes in the terms of trade. Moreover, the theory ignored the potential gain through increased economic growth and foreign competition within a customs union . . . . As Lipsey pointed out, the possible welfare benefits of the latter might be quite substantial in a world with imperfect competition. Therefore, before a truly multilateral trade regime has been established, regional trade blocs offer substantial welfare benefits to member states.").

66. WTO Agreement, *supra* note 9, pmb1.

### A. RTAs as Stumbling Blocks

#### 1. External Dynamics

The view that RTAs are stumbling blocks is based on the claim that RTAs eventually cause a reduction in aggregate global welfare as they compete not only with non-member states but also with other RTAs to shift the terms of trade in each bloc's favor by raising tariffs against other blocs.<sup>67</sup> Global welfare is diminished, it is argued, because RTA member products are protected irrespective of whether they are of the same quality or their industries are as efficient as those of their non-member counterparts. As discussed above, realist fears of economic balkanization may be justified by historical lessons from before the Second World War. The stumbling block perspective also focuses on the mercantilist behaviors of trading partners who seek to increase their trade surplus by exporting more and importing less, which amounts to little more than a "beggar-thy-neighbors" policy.<sup>68</sup> Once formed, RTAs follow this path of mercantilism in their interactions with each other.<sup>69</sup> Although this conduct obviously violates the liberal idea of free trade, it nonetheless survives today in the form of policy options reflecting the political reality of protectionism. Mantras such as "national competitiveness" may be understood from this perspective.<sup>70</sup>

#### 2. Internal Dynamics

RTAs provide abundant opportunities for local interest groups, such as producers of trade-sensitive products, to manipulate both the design and operation of RTAs. The eventual effect of such lobbying efforts is to distort the efficient flow of interstate commerce.<sup>71</sup> In NAFTA, for instance, conventional trade barriers such as quotas in the agricultural sector have been phased out only through a tortuous, highly tedious process.<sup>72</sup> Moreover,

67. Many will recognize this situation as a variant of the "prisoner's dilemma," or "Nash non-cooperative equilibrium" phenomenon. FRANKEL, *supra* note 5, at 210.

68. ZISSIMOS & VINES, *supra* note 67 (warning against growing "world inequality" resulting from the formation of trade blocs). *Id.*

69. This path involves a "danger of regional agreement being used to establish competing regional hegemony." Stephen Woolcock, *Regional Integration and the Multilateral Trading System*, in COMPLEMENTARY PATHS, *supra* note 6, at 115. In a similar context, Henderson warns that the "entrenched protectionism" in trade policies of the US and the EC have now become "not only anomalous but also more costly." David Henderson, *The EC, the US and Others in a Changing World Economy*, 16 WORLD ECON. 537, 538 (1993). He further observes that this embedded protectionism in external economic policies undermines the "inescapable leadership role" of the US and the EU. *Id.* at 537-38.

70. See generally Paul Krugman, *Competitiveness: A Dangerous Obsession*, 73 FOREIGN AFF. 28 (1994).

71. FRANKEL, *supra* note 5, at 212; see also Stephen P. Sorensen, *Open Regionalism or Old-Fashioned Protectionism?: A Look at the Performance of Mercosur's Auto Industry*, 30 U. MIAMI INTER-AM. L. REV. 371, 398 (1998) (demonstrating that "industrial realpolitik" in Argentina and Brazil blocked the introduction of a full-blown market principle in auto industry despite a strong shift to economic liberalization).

72. See David Orden, *Agricultural Interest Group Bargaining over the North American Free Trade Agreement*, in THE POLITICAL ECONOMY OF TRADE PROTECTION (Anne Krueger ed., 1996); FRANKEL, *supra* note 5, at 213. This "sector-specificity" in the protection of regional industries reflects an asymmetrical lobbying power of interested groups. Despite its selectivity in protection, the harmful effect it has on global trade

complicated "rules of origin" matrices are deliberately designed to safeguard so-called "originating goods" with preferential treatment vis-à-vis non-originating goods, namely, goods imported from non-member countries.<sup>73</sup> Under the NAFTA regime, for example, arcane and ideosyncratic rules of origin still abound for specific products, such as automobiles and textiles.<sup>74</sup> The complex, almost labyrinthine, character of such rules negatively affects the flow of international commerce by discriminating against non-member trading partners.<sup>75</sup> Therefore, although preferential rules of origin may help to boost intra-bloc trade (i.e., trade creation) to a certain degree, they generally block global trade flows (i.e., trade diversion) to such an extent that any advantages achieved are offset by corresponding disadvantages.

### 3. *The "Selfish Hegemon" Thesis*

Some scholars highlight the essential role of "hegemons" in the formation and operation of RTAs, and argue that these high powers usurp benefits from intra-bloc trade in a disproportionate manner. According to this view, major economic powers such as the United States tend to use the formation of RTAs to extract far superior terms in negotiations with less powerful participants. Jagdish Bhagwati adopts this approach in attacking what he terms the "FTA-cum-301 selfish hegemon strategy" of the United States on the grounds that it is often wedded to a form of aggressive unilateralism embodied in Section 301<sup>76</sup> that results in the exploitation of the weaker participant.<sup>77</sup> Bhagwati finds empirical confirmation of this "selfish regionalism" in trade talks on intellectual property rights between the United States and Mexico. Under NAFTA, the United States coerced Mexico into accept-

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(trade diversion) is still problematic. See L. ALAN WINTERS, REGIONALISM VERSUS MULTILATERALISM (Centre for Economic Policy Research-Discussion Paper Series No. 1525, Nov. 1996) [ftp://monarch.worldbank.org/oub/decweb/WorkingPapers/wps/600series/wps/687/wps/687.pdf](http://monarch.worldbank.org/oub/decweb/WorkingPapers/wps/600series/wps/687/wps/687.pdf). In a much broader sense, selective trade protection in regionalism is but one piece of the larger puzzle of "managed trade," which is often legitimated by anti-dumping and countervailing duties. Henderson, *supra* note 69, at 542-47 (1993).

73 See ANNE O. KRUEGER, FREE TRADE AGREEMENTS VERSUS CUSTOMS UNIONS 13-14 (Nat'l Bureau of Econ. Research, Working Paper No. 5084, 1995); FRANKEL, *supra* note 5, at 213.

74. In the Agreement on Rules of Origin, the WTO harmonized only "non-preferential" rules of origin, which "are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences." Agreement on Rules of Origin, Apr. 15, 1994, art. 1(1), WTO Agreement, *supra* note 9, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31.

75 Bhagwati has termed this the "spaghetti bowl" phenomenon. BHAGWATI, STREAM OF WINDOWS, *supra* note 7, at 290-92.

76 Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices, Action by United States Trade Representative, 19 U.S.C. § 2411 (1994). The purpose of section 301 is to protect U.S. interests from illegal and unfair trade policies by foreign governments through the granting of retaliatory authority to the President.

77 BHAGWATI, STREAM OF WINDOWS, *supra* note 7, at 309. Though Kindleberger once maintained that the United States supported the multilateral trading system as established in the GATT 1947 after the Second World War as a "public good," the United States has now been in the "diminished giant syndrome" where it is eager to take care of its own interest. See Jagdish Bhagwati & Douglas A. Irwin, *The Return of the Reciprocarians: US Trade Policy Today*, 10 WORLD ECON. 109 (1987).

ing a "one-on-one" bargain on intellectual property protection.<sup>78</sup> Moreover, Mexican acceptance of these onerous terms was subsequently touted by the United States as a "model" that others should follow in a multilateral arena such as in the Agreement on Trade-Related Intellectual Property Rights (TRIPS).<sup>79</sup>

Another manifestation of the selfish hegemon phenomenon is the so-called "hub-and-spoke" type of trade regionalism characterized by bilateral arrangements between an economically superior central "hub" and economically inferior, peripheral "spokes."<sup>80</sup> In this trade pattern, the hub country is likely to benefit disproportionately because, while the hub country has duty-free access to a variety of spoke countries resulting from bilateral arrangements, spoke countries do not enjoy similar gains from tariff reduction unless they also sign bilateral trading arrangements, thus forming a "rim" among themselves.<sup>81</sup> Meanwhile, the hub country tends to prevail in its own market over other spoke countries because, in general, industries of the former enjoy economies of scale resulting from expanded export markets.<sup>82</sup> Problems associated with "hub-and-spoke" regionalism could become more serious in the future, considering that the greatest increase in trade regionalism notified to the WTO as of 1995 is in the form of bilateral trade agreements, through which powerful trading units such as the United States and the European Union (EU) could potentially exploit smaller trading partners.<sup>83</sup>

## B. RTAs as Building Blocks

### 1. Laboratory Effect

One of the most powerful arguments for RTAs stems from their experimental or laboratory effect vis-à-vis multilateral trade liberalization. As of November 30, 2000, membership in the WTO numbered 140,<sup>84</sup> which means that negotiation processes can be slow and cumbersome. Especially when it comes to new areas such as services and information technology products, this inefficiency in collective decision-making is compounded by

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78. See Gelvina Rodriguez Stevenson, Note, *Trade Secrets: The Secret to Protecting Indigenous Ethnobiological (Medical) Knowledge*, 32 N.Y.U. J. INT'L L. & POL. 1119, 1127 (2000) (arguing that "developing countries are also coerced by developed countries into adopting stronger intellectual property laws" and observing that "the United States required that Mexico strengthen its domestic industrial property protection laws as a prerequisite for U.S. ratification of NAFTA, which Mexico did in its 1991 Industrial Property Law").

79. BHAGWATI, *STREAM OF WINDOWS*, *supra* note 7, at 311, n.11.

80. See Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539, 557-58 (1995).

81. See *id.* at 558.

82. *Id.*

83. See WTO, *Regionalism*, *supra* note 52, at 31.

84. WTO, *Members and Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (visited Apr. 22, 2001).

the fact that the WTO has no precedents or *acquis*<sup>85</sup> to guide these negotiations.

Under these circumstances, negotiations among a smaller number of regional participants tend to produce better outcomes in less time.<sup>86</sup> Furthermore, 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.<sup>87</sup> 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 this often serves to educate government officials (the “demonstration effect”), 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” the multilateral liberalization process by creating an incentive for other regions or countries to emulate successful initiatives.<sup>88</sup> In sum, RTAs tend to provide test laboratories for the multilateral trading system.<sup>89</sup>

Empirical studies of the foregoing proposition have reached a variety of conclusions.<sup>90</sup> Some scholars stress that most countries involved in RTAs are also “active and committed” participants in the WTO.<sup>91</sup> Others observe that in the long-term, *intra*-regional trade becomes relatively less significant vis-à-vis *inter*-regional trade in terms of average trade flows.<sup>92</sup> Still others offer

85. The term “acquis” is a reference to the “acquis communautaire,” which in the context of the GATT/WTO is the entire body of agreements and decisions that organization has developed over the last fifty years. This concept originated from the European Community/Union experience. See Europa, *Enlargement*, <http://europa.eu.int/comm/enlargement/pas/phare/wip/acquis.htm> (visited May 22, 2001).

86. See MILES KAHLER, *INTERNATIONAL INSTITUTIONS AND POLITICAL ECONOMY OF INTEGRATION* 125–27 (1995); FRANKEL, *supra* note 5, at 218. Small-scale negotiation among a limited number of participants for the purpose of achieving greater efficiency in decision-making and more workable results may be called “minilateralism.” See Jonathan D. Aronson & Peter F. Cowhey, *Prospects for Post-Uruguay Round Trade Management*, 4 *TRANSNAT’L L. & CONTEMP. PROBS.* 47, 53–57 (1994).

87. See C. Fred Bergsten, *Open Regionalism*, 20 *WORLD ECON.* 545, 548 (1997) [hereinafter *Open Regionalism*].

88. *Id.*

89. John H. Jackson, *Regional Trade Blocs and the GATT*, 16 *WORLD ECON.* 121, 130 (1993); Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States–Canada Free Trade Agreement*, 12 *YALE J. INT’L L.* 193, 248 (1987). Of course, diverse regulations from these regional “laboratories” should be based on, or at least oriented to, a congruent framework. Similarly, these test regulations should be screened regularly, assessed and endorsed by the multilateral regulatory regime. Otherwise, the existence of these diverse tests in regional laboratories and the potential “clash” between different tests would impede and hinder international commerce. Hence, there will eventually be a need to “multilateralize” these regional regulatory initiatives. Malloy adopted a “bumper car” model to describe this potential danger of regulatory clash between different jurisdictions. See Michael P. Malloy, *Bumper Cars: Themes of Convergence in International Regulation*, 60 *FORDHAM L. REV.* s1, s21–22 (1992).

90. The laboratory effect described here is analogous to that found in a federal system. Referring to the United States, Barry Friedman points out that “the vast majority of techniques used today to govern were developed at the state and local level.” Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 399 (1997). For additional examples see discussion *infra* Parts V.B.1, V.B.2.

91. Gary Sampson, *Regional Trading Arrangements and the Multilateral Trading System*, in *COMPLEMENTARY PATHS*, *supra* note 6, at 17.

92. For instance, in North America, intra-regional trade accounts for less than 40% of total trade; in ASEAN, trade among members represents only 17% of total trade. Woolcock, *supra* note 69, at 118–19. This phenomenon of relative shrinking of intra-bloc commerce becomes even more salient when includ-



more detailed evidence regarding the success of regional experiments for global trade liberalization: contributions from NAFTA and the EU to the WTO.<sup>93</sup> These success stories reveal one of the characteristics of convergence, that is, assimilation, of different trading units.<sup>94</sup>

## 2. Lock-In Effect

Some scholars emphasize that RTAs often "lock-in" previous liberalization records or reforms in a manner that prevents subsequent backsliding.<sup>95</sup> This lock-in effect can be especially attractive to governments of developing countries where reform efforts are often stymied by deeply rooted local powers. These governments may respond to domestic interest groups who vehemently oppose regional trade liberalization and demand that it be stopped by simply saying that their hands are tied. 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.<sup>96</sup> Also under the Andean Pact,<sup>97</sup> leaders have taken advantage of political support for regional solidarity to pursue economic reforms that would not have been possible otherwise.<sup>98</sup>

## C. Empirical Debate

Economists have conducted empirical studies on the desirability of trade regionalism. Not surprisingly, these studies yield diverse conclusions according to the particular methodological assumptions and limitations of the economic models they employ.<sup>99</sup> Some characterize RTAs as stumbling blocks<sup>100</sup> while others view them as building blocks.<sup>101</sup>

For instance, in the case of the EEC, Peter Robson concluded that "for manufactured products (to which most of the studies are limited) the trade created was considerable and far outweighed trade diverted."<sup>102</sup> However,

ing inter-regional "investment." *Id.*

93. *Id.* at 120–21; C. Fred Bergsten, *Globalizing Free Trade: A Vision for the Early 21st Century*, 75 FOREIGN AFF. 105, 110 (1996); Gary C. Hufbauer & Jeffrey J. Schott, *Toward Free Trade and Investment in the Asia-Pacific*, 48 WASH. Q. 37, 37–45 (1995).

94. See discussion *infra* Part V.

95. FRANKEL, *supra* note 5, at 216; *Open Regionalism*, *supra* note 87, at 548.

96. FRANKEL, *supra* note 5, at 216.

97. Andean Pact; Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, approved July 15, 1988, 28 I.L.M. 1165 (1989).

98. *Id.* at 217.

99. See POMFRET, *supra* note 52, at 261–63.

100. See, e.g., L. Alan Winters, *The EC and Protection: Political Economy*, 38 EUR. ECON. REV. 596, 601–02 (1994) (arguing that protectionist use of anti-dumping and countervailing duties sheltered the EC industries from the global market).

101. See, e.g., Riccardo Faini, *Integration or Polarization?: Regionalism in World Trade during the 1980s*, in MULTILATERALISM AND REGIONALISM AFTER THE URUGUAY ROUND 157 (Riccardo Faini & Enzo Grilli eds., 1997) (arguing that trade between major blocs, such as EU, NAFTA and Asia, and all other regions increased noticeably in the eighties).

102. PETER ROBSON, *THE ECONOMICS OF INTERNATIONAL INTEGRATION* 200 (2d ed. 1984). See also

such general conclusions have invited considerable skepticism in the face of the EEC's notoriously protectionist and inward-looking "Common Agricultural Policy."<sup>103</sup> For agricultural products, at least, the effect of the EEC on global trade creation has been negative.

Nonetheless, based on a dynamic perspective, a majority of economists still emphasizes the long-term building block effect of RTAs.<sup>104</sup> They maintain that enhanced openness due to the adoption of RTAs and further trade liberalization have contributed not to fortresses, but to freer trade throughout the world.<sup>105</sup> These empirical findings are broadly consistent with the language of GATT 1994 regarding trade regionalism.<sup>106</sup>

On the other hand, empirical confirmation of the basic objective of the GATT/WTO system with respect to trade regionalism—"complementarity" or "symbiosis"—does not necessarily mean that the GATT/WTO system has always been capable of achieving these objectives. On the contrary, the past record of GATT Article XXIV indicates almost total impotence in this regard. Against this background, the following Part considers the question of how and to what extent the law of GATT Article XXIV has evolved to overcome inherent flaws toward the establishment of a constructive model of trade regionalism under the GATT/WTO system.

#### IV. LEGAL SOLUTION FOR TRADE REGIONALISM: DEVELOPMENT OF THE LAW OF GATT ARTICLE XXIV

Thus far, the discussion has focused on various aspects of the contemporary discourse regarding the evolution and desirability of trade regionalism. The following section explores how the GATT/WTO system itself has been embracing and addressing trade regionalism from a legal perspective.

##### A. *Lack of Legal Discipline Under GATT 1947 Practices*

###### 1. *Overview*

Under GATT 1947, trade regionalism took the form of FTAs or CUs. Article XXIV was supposed to govern their formation. The legislative background is helpful to clarify the meaning of this provision. In its efforts to establish a post-war international trade order through GATT, the United

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Stephen Woolcock, *The European acquis and Multilateral Trade Rules: Are They Compatible?*, 31 J. COMM. MKT. STUD. 539, 557 (1993). ("On balance therefore European integration appears to have contributed to the process of multilateral liberalization.")

103. *Id.* at 268.

104. FRANKEL, *supra* note 5, 226–27.

105. *Id.* See also ALBERT FISHLOW & STEPHEN HAGGARD, *THE UNITED STATES AND THE REGIONALIZATION OF THE WORLD ECONOMY* 60 (1992).

106. GATT 1947, *supra* note 2, art. XXIV(5), pmbl. ("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 [the duties and regulations of the CU or FTA are not higher or more restrictive than before the CU's or FTA's formation].").

States sought to construct a strong multilateral trading order, illustrated by the Most Favored Nation (MFN) principle,<sup>107</sup> and by the dismantling of trading preferences, particularly the Commonwealth preferences.<sup>108</sup> At the same time, the United States also acknowledged the necessity of certain exceptions to this MFN principle, such as RTAs, in accordance with its own strategic need to unite Western Europe against the Soviet-led communist bloc.<sup>109</sup> Therefore, the United States exerted its political influence to shape the language of Article XXIV such that exempting RTAs would not result in their misuse. The United States position materialized in various paragraphs of Article XXIV, including those prohibiting any disadvantages to non-member countries as a consequence of forming an RTA (paragraph 4), as well as those regulating the formation process itself (paragraphs 5, 7, and 8).

In a sense, it would be fair to say that a literal reading of the text of Article XXIV is consistent with the so-called building block idea.<sup>110</sup> Paragraph 4 recognizes “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.”<sup>111</sup> Yet the same paragraph explicitly stipulates that the purpose of RTAs should not be to “raise barriers to the trade of other contracting parties.”<sup>112</sup> In the same vein, in order to prevent the abuse of RTAs for a discriminatory or protectionist purpose, Article XXIV also provides “external” requirements (paragraph 5)<sup>113</sup> as well as “internal” requirements (paragraph 8)<sup>114</sup> to qualify as an RTA. In addition to the aforementioned substantive requirements, Article XXIV also provides a degree of procedural discipline in the form of, *inter alia*, a notification obligation (paragraph 7).<sup>115</sup>

Though the rationale of Article XXIV is quite understandable and idealistic in light of its legislative background, the text itself is so nebulous as to leave many important issues open to wide speculation. Consequently, actual applications of the black letter law were neither clear nor resolute, rendering Article XXIV a virtual dead letter from its inception. Despite the existence

107. GATT 1947, *supra* note 2, art. I.

108. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 576–77 (1969).

109. *Id.*

110. See GATT Dispute Panel Report on Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/R (Nov. 19, 1999), [http://www.wto.org/english/tratop\\_e/dispu\\_e/1229d.pdf](http://www.wto.org/english/tratop_e/dispu_e/1229d.pdf) (visited Apr. 22, 2001) [hereinafter Turkish QRs, Panel Report]. The Panel observed that

The relationship between the most-favoured-nation (MFN) principle and Article XXIV of the GATT, which deals with free-trade areas and customs unions, has not always been harmonious. In 1947, their coexistence in the framework of international trade relations had been viewed as ultimately positive, reflecting the perception that genuine customs unions and free-trade areas were congruent with the MFN principle and directed towards the same objective, i.e. multilaterally-agreed trade liberalization.

*Id.* at ¶ 2.2. See also discussion *infra* Part III.B.

111. GATT 1947, *supra* note 2, art. XXIV(4).

112. *Id.*

113. *Id.* art. XXIV(5), pmb. (describing the requirements vis-à-vis non-RTA members).

114. *Id.* art. XXIV(8) (describing the substantive requirements pertaining to RTA members).

115. *Id.* art. XXIV(7).

of “working parties” whose mission was to examine the compatibility of proposed RTAs with Article XXIV and to forward their findings to the GATT contracting parties, these working parties failed to reach firm decisions.<sup>116</sup> Among all the RTAs notified under GATT 1947, only one case received a “clear-cut assessment of full consistency with the rules.”<sup>117</sup>

Except for this single case, RTAs have not been formally endorsed by the GATT contracting parties. The GATT contracting parties never took an official position even with respect to the European Economic Community (EEC).<sup>118</sup> What is worse, in many questionable cases, “GATT waivers” (under GATT Article XXV) absolved RTAs of any potential illegality vis-à-vis GATT.<sup>119</sup> John Jackson has noted that “legal arguments have been ignored or [have] resulted in a standoff without resolution.”<sup>120</sup> Unfortunately, the history of failure that has plagued GATT working parties on trade regionalism has continued since the launch of the Committee on Regional Trade Agreements (CRTA) on February 6, 1996.<sup>121</sup>

## 2. *Dispute Settlement Procedure: Article XXIII*

Under GATT 1947 much debate surrounded the question of whether any non-member contracting party could raise the incompatibility of an RTA with Article XXIV in the dispute settlement process provided for in Article XXIII.<sup>122</sup> Since GATT itself was silent on this issue, it would have been possible and even desirable for panels to have adjudicated this issue in specific cases. The lack of due legal consideration in the operation of GATT was most striking on this point.

An unadopted 1985 panel report refused to address issues related to Article XXIV on the grounds that the “examination—or re-examination—of Article XXIV agreements was the responsibility of the Contracting Parties.”<sup>123</sup> The panel concluded that “it should, in the absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral

116. JACKSON ET AL., *supra* note 8, at 471.

117. This was the CU formed between the Czech Republic and the Slovak Republic. See Working Party on the Customs Union Between the Czech Republic and the Slovak Republic: Report of the Working Party adopted on 4 October 1994, GATT L/7501, Oct. 4, 1994; Turkish QRs, Panel Report, *supra* note 110, ¶ 2.4 n.6.

118. JACKSON ET AL., *supra* note 8, at 471.

119. *Id.* at 470.

120. *Id.*

121. Turkish QRs, Panel Report, *supra* note 110, ¶ 2.7. See also WTO, REPORT OF THE COMMITTEE ON REGIONAL TRADE AGREEMENTS TO THE GENERAL COUNCIL, Oct. 11, 1999, WT/REG/8 [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/REG/8.DOC.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/REG/8.DOC.HTM) (visited May 22, 2001) (“The Committee has made substantial headway in the factual examination of a number of RTAs, but has been unable to finalize reports on any of these examinations.”).

122. GATT 1947, *supra* note 2, art. XXIII.

123. European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region: Report of the Panel, GATT L/5776, Feb. 7, 1985 (unadopted), ¶ 4.15 (1985).

agreements.”<sup>124</sup> While the judicial restraint of the panel may have been viewed in many jurisdictions as consistent with “political question” or “act of the state” doctrines, it clearly reflected the comparatively underdeveloped dispute settlement mechanism embedded in GATT 1947 and rendered the dispute settlement process vulnerable to outside political pressure.

The inapplicability of the GATT 1947 dispute settlement mechanism to Article XXIV had the effect of suffocating any meaningful jurisprudential development. Recourse to legislative and diplomatic solutions also was limited by the positional nature of the subject together with the procedural limitations of GATT 1947. Legislative solutions were nearly impossible to achieve because, in most cases, the only workable mechanism available was consensus. Similarly, the divergent views and interests precluded diplomatic intervention from reaching any firm decisions: if anything, diplomatic action tended to result in a record of the various positions and arguments. The emergence of the European Community, combined with the prevailing Cold War ethos, and especially the compelling strategic need felt by the United States for a solid European Community, further undermined any legislative or diplomatic attempts to discipline Article XXIV.

It was only through the launch of the new WTO system that this legal impasse was addressed from a legislative<sup>125</sup> as well as judicial<sup>126</sup> standpoint.

### 3. *Records Without Decisions: Working Party Reports*<sup>127</sup>

The fact that most working party reports dealing with Article XXIV lacked legal discipline or legal certainty does not necessarily mean that they can now be dismissed. On the contrary, some of the views recorded in the reports still hold referential value in understanding and applying the law of Article XXIV within the new WTO terrain.<sup>128</sup> As a matter of fact, certain critical positions in the working party reports were reflected in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (“Article XXIV Understanding”)<sup>129</sup> as well as in a

124. *Id.* ¶ 4.16.

125. See discussion *infra* Part IV.B.

126. See discussion *infra* Part IV.C. In fact, conflict could have occurred with respect to the panel's jurisdiction on legal issues relating to Article XXIV vis-à-vis the mandate of Committee of Regional Trade Agreements (CRTA). Nevertheless, both the panel and the Appellate Body avoided this sensitive issue. See Turkish QRs, Panel Report, *supra* note 110; Turkey—Restrictions on Imports of Textile and Clothing Products, Appellate Body Report adopted November 19, 1999, WT/DS34/AB/R, [http://www.wto.org/english/tratop\\_e/dispu\\_e/34abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/34abr_e.pdf) (visited Apr. 22, 2001) [hereinafter Turkish QRs, Appellate Body Report].

127. Regarding this specific sub-section, see generally 2 WTO, GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 789–872 (Updated 6th ed. 1995) [hereinafter GATT ANALYTICAL INDEX].

128. The contents of the reports are still significant even though the working parties themselves may not be regarded as WTO-guiding “bodies established in the framework of GATT 1947.” WTO Agreement, *supra* note 9, art. XVI(1).

129. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, GATT 1994, *supra* note 9 [hereinafter Article XXIV Understanding]. See discussion *infra*

recent Appellate Body Report.<sup>130</sup> Other portions of the reports may hold historical value in documenting the evolution of GATT 1947 jurisprudence on Article XXIV. The discussion that follows offers a critical analysis of several of the most significant paragraphs of Article XXIV as encountered by GATT working parties.

*a. Article XXIV, Paragraph 4*

not to raise barriers to the trade of other contracting parties<sup>131</sup>

The working party that reviewed the accession of Portugal and Spain to the European Communities noted that although some delegations were concerned that Spain and Portugal introduced new quantitative restrictions that were inconsistent with Articles XI, XIII, and XXIV, the EC delegations argued that paragraph 4 of Article XXIV did not outline an *obligation* but rather an *objective*.<sup>132</sup> According to the EC, members of an RTA can introduce new trade barriers or extend existing barriers to new members if the net impact of all barriers is less than what had prevailed before the creation of the RTA.<sup>133</sup> Similarly, the working party that reviewed the free trade agreement between Canada and the United States also highlighted the main concern of non-member contracting parties that the agreement would take precedence over GATT, thus opening up the possibility of raising a new trade barrier proscribed by GATT.<sup>134</sup>

In fact, paragraph 4 is the most critical legal text in Article XXIV as it sets forth the objective of trade regionalism in light of the multilateral trading system. Nonetheless, certain trading units, in particular powerful ones like the EC and the United States, often have misinterpreted or understated this paragraph to justify the imposition of new trade barriers as a result of the formation or expansion of RTAs.<sup>135</sup> Attempts by such powers to sever the relationship between paragraph 4 and other paragraphs in Article XXIV have resulted from a desire to avoid situations in which the teleology of paragraph 4 controlled rather technical interpretations of paragraphs 5 to 9.<sup>136</sup> As paragraph 4 lost its teleological value, interpretation of other para-

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Part IV.B.

130. See discussion *infra* Part IV.C.

131. GATT 1947, *supra* note 2, art. XXIV(4).

132. Accession of Portugal and Spain to the European Communities: Report of the Working Party adopted on 19–20 October 1988, L/6405, Oct. 19–20, 1988, GATT B.I.S.D. (35th Supp.) ¶¶ 19, 22 (1989) [hereinafter L/6405]; GATT ANALYTICAL INDEX, *supra* note 127, at 796–97.

133. L/6405, *supra* note 132, ¶¶ 17, 22; GATT ANALYTICAL INDEX, *supra* note 127, at 796–97.

134. Working Party on the Free-Trade Agreement between Canada and the United States: Report of the Working Party adopted on 12 November 1991, L/6927, Nov. 12, 1991, GATT B.I.S.D. (38th Supp.) ¶ 76 (1992); GATT ANALYTICAL INDEX, *supra* note 127, at 798.

135. See, e.g., Free Trade Agreement between Canada and the United States: Report of the Working Party, *supra* note 134, ¶ 76.

136. See discussion *infra* Part IV.C.3.

graphs tended toward soft readings that expanded preferential or discriminatory trade barriers world-wide and thus encroached on the multilateral trading system.

Eventually this problem, too, was addressed under the new WTO system in legislative<sup>137</sup> as well as judicial<sup>138</sup> terms.

*b. Article XXIV, Paragraph 5*

agreements between contracting parties and States or governments other than contracting parties<sup>139</sup>

During the Havana Conference in 1948, France proposed the formation of a CU with Italy and accepted the negotiation outcome contingent upon the waiver of one of the obligations of paragraph 5, that Italy first become a GATT member.<sup>140</sup> The waiver was eventually granted in March 1948.<sup>141</sup> Later, the working party reports on both the "European Free Trade Association—Examination of Stockholm Convention" and the "Latin American Free Trade Area—Examination of Montevideo Treaty" noted differing views as to whether paragraph 5 applied to agreements with non-contracting parties.<sup>142</sup>

Certain contracting parties argued for extending Article XXIV to include RTAs involving non-GATT members because they wanted preferential treatment through Article XXIV to be applied selectively to certain non-GATT members free of MFN obligations. Although it ran counter to the plain meaning of paragraph 5, this expansive interpretation seemed to offer a less painful process than making such non-contracting party members enter into GATT prior to joining RTAs. The far-reaching membership of the WTO has effectively marginalized this issue.<sup>143</sup>

the duties and other regulations of commerce imposed at the institution of any such union / maintained in each of the constituent territories

Non-EC members of the working party reviewing the accession of Portugal and Spain to the European Communities felt that the restrictions could

137. See discussion *infra* Part IV.B.

138. See discussion *infra* Part IV.C.

139. GATT 1947, *supra* note 2, art. XXIV(5).

140. GATT ANALYTICAL INDEX, *supra* note 127, at 798.

141. *Id.*

142. European Free Trade Association: Examination of Stockholm Convention: Report adopted on 4 June 1960, L/1235, June 4, 1960, GATT B.I.S.D. (9th Supp.) ¶ 47–58 (1961) [hereinafter L/1235]; Latin American Free Trade Area: Examination of the Montevideo Treaty: Report adopted on 18 November 1960, L/1364, Nov. 18, 1960, GATT B.I.S.D. (9th Supp.) ¶ 31 (1961); GATT ANALYTICAL INDEX, *supra* note 127, at 798.

143. When Article XXIV was drafted, GATT contracting parties numbered only 23. GATT 1947, *supra* note 2, pmbl. By contrast, there are currently 140 members of the WTO. WTO, *Members and Observers*, *supra* note 84.

neither be balanced against the alleged reduction of other barriers nor considered in the assessment of the incidence of changes in "other regulations of commerce" required by paragraph 5(a) of Article XXIV.<sup>144</sup> This view seemed to challenge the EU's position in the face of its expansion: the inevitable increase of discriminatory trade barriers in certain areas, such as agriculture and textiles, could be compensated by more generous trade liberalization in other sectors, such as manufacturing.<sup>145</sup>

This "balancing" idea, which recognizes a trade-off between violations and the benefits to which they give rise, has been consistently rejected by the GATT/WTO jurisprudence.<sup>146</sup> A violation is a violation: it cannot be excused by any circumstance other than a formal exception. Indeed, if it still prevailed today, the EU's position would create severe trade diversion, particularly for agricultural products and textiles, as it continues to enlarge. Trade diversion resulting from the expansion of pre-existing trade barriers in such areas as agriculture and textiles would, in turn, exact its heaviest toll from the less developed countries that enjoy a comparative advantage in those sectors.<sup>147</sup>

Considering the recent WTO jurisprudence, however, it seems difficult to sustain this balancing idea because the introduction of new trade barriers is itself restrained in the formation or expansion of RTAs.<sup>148</sup>

rules of origin<sup>149</sup>

The 1973 Working Party Reports on the EEC Agreements with various countries of the European Free Trade Association recorded the view that the rules of origin inherent in an FTA were "so complex and cumbersome as to be a barrier to trade in and of themselves," and that "once trade shifts of that kind took place, the damage to third countries' exports would be difficult to remedy."<sup>150</sup> Indeed, complicated rules of origin offer the most compelling

144. L/6405, *supra* note 132, ¶ 39; GATT ANALYTICAL INDEX, *supra* note 127, at 800–01.

145. Likewise, the EC argued that a negative incidence in some items should be balanced by other changes in the tariff sector *as a whole*; moreover, in assessing general incidence, rather than a *static* analysis, the *trade-creating* effects of the establishment or expansion of a custom union should be taken into account. L/6405, *supra* note 132, ¶ 39; GATT ANALYTICAL INDEX, *supra* note 127, at 804.

146. *See, e.g.*, United States: Section 337 of the Tariff Act of 1930: Report by the Panel adopted on 7 November 1989, L/6439, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) ¶ 5.14 (1990); United States—Standards for Reformulated and Conventional Gasoline, Panel Report adopted on Jan. 29, 1996, WT/DS2/9, (Panel Report, ¶ 6.14) (1996) [hereinafter Gasoline, Panel Report].

147. *See* discussion *infra* Part IV.C.3; *see also* TPRB: Poland, 47 WTO FOCUS 12 (July–Aug. 2000) (expressing concern for agricultural protection in Poland's accession to the EU).

148. *See* discussion *infra* Part IV.C.3.

149. GATT 1947, *supra* note 2, art. XXIV(5).

150. European Communities—Agreements with Austria: Report of the Working Party adopted on 19 October 1973, L/3900, Oct. 19, 1973, GATT B.I.S.D. (20th Supp.) ¶¶ 4–6, 10, 22–29, 33, 34, 37 (1974); European Communities—Agreements with Iceland: Report of the Working Party adopted on 19 October 1973, L/3902, Oct. 19, 1973, GATT B.I.S.D. (20th Supp.) ¶¶ 4–6, 10, 26–33, 37, 38, 41 (1974); European Communities—Agreements with Portugal: Report of the Working Party adopted on 19 October 1973, L/3901, Oct. 19, 1973, GATT B.I.S.D. (20th Supp.) ¶¶ 5, 6, 10, 23–30, 34, 35, 38



argument for the stumbling block perspective on RTAs.<sup>151</sup> Such rules, representing intricate matrices of industrial interests within RTAs, tend to hurt both member and non-member economies.

In the case of non-member economies, Bhagwati has argued that as preferential trading arrangements proliferate, discriminatory access to markets caused by complex and confusing rules of origin eventually leads to increased transaction costs and invites protectionist capture.<sup>152</sup> Although complex rules of origin may pose a particularly serious problem for non-member economies, their negative effects extend also to member economies. Especially vulnerable are smaller companies that are ill-equipped to bear the administrative costs necessary for compliance. According to one recent survey, approximately twenty percent of American Chamber of Commerce members, did not fill out a certificate of NAFTA origin but instead paid tariffs at the regular rates not only because they found the associated documentation intimidating, but also because they feared the penalties that could be imposed for an improper claim.<sup>153</sup>

This problem seems to be inherent in any RTA when one considers the reality of political economy at the local level. Only inclusive and comprehensive trade liberalization that promotes non-discriminatory trade policies will overcome the invisible trade barriers that result from complicated rules of origin attached to RTAs.

*c. Article XXIV, Paragraph 8*

with respect to substantially all the trade<sup>154</sup>

According to the Report of the Sub-group of the Committee on the European Economic Community, the EEC-member countries proposed that "a free trade area be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached *eighty* percent of total

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(1974); Interim Agreement Between the European Economic Community and Portugal: Report of the Working Party adopted on 26 July 1977, L/4518, July 26, 1977, GATT B.I.S.D. (24th Supp.) ¶¶ 19–23 (1978); European Communities—Agreements with Sweden: Report of the Working Party adopted on 19 October 1973, L/3899, Oct. 19, 1973, GATT B.I.S.D. (20th Supp.) ¶¶ 5, 6, 10, 24–31, 35, 36, 39 (1974); European Communities—Agreements with Switzerland and Liechtenstein: Report of the Working Party adopted on 19 October 1973, L/3893, Oct. 19, 1973, GATT B.I.S.D. (20th Supp.) ¶¶ 5, 6, 10, 26–33, 37, 38, 41 (1974); GATT ANALYTICAL INDEX, *supra* note 127, at 802–03. *See also* the briefer but similar discussion in European Communities: Agreements with Finland: Report of the Working Party adopted on 21 October 1974, L/4064, Oct. 21, 1974, GATT B.I.S.D. (21st Supp.) ¶¶ 6, 21, 22 (1975); European Communities: Agreements with Norway: Report of the Working Party adopted on 28 March 1974, L/3996, Mar. 28, 1974, GATT B.I.S.D. (21st Supp.) ¶¶ 6, 11, 24–29, 32 (1975).

151. *See supra* Part II.A.2.

152. BHAGWATI, *STREAM OF WINDOWS*, *supra* note 7, at 290.

153. *See* Tim Tatsuji Shimazaki, *Proof of Origin as a Trade Barrier*, in *NAFTA: A PROBLEM-ORIENTED COURSEBOOK* 65 (Ralph H. Folsom, ed., 2000).

154. GATT 1947, *supra* note 2, art. XXIV(8).

trade.”<sup>155</sup> However, the report also reveals that many other members of the sub-group argued that it would be inappropriate and unrealistic to fix a general percentage of trade that might be applicable to each different case.<sup>156</sup>

To 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.

Moreover, even if a certain figure, such as eighty percent, were accepted as a legitimate criterion to endorse the formation of an RTA, no one could ensure that “trade restrictive” effects resulting from the non-liberalized or even newly restricted portion (twenty percent) would be fully offset by the “trade creating” effect resulting from the portion of liberalized trade (eighty percent). In this regard, the working party reviewing the European Free Trade Association (EFTA) Stockholm Convention noted differing opinions on whether a specific sector, such as agriculture, might be excluded in assessing substantiality.<sup>157</sup> Some members of the working party argued that even if ninety percent of trade was covered due to the creation of an RTA, that fact alone should not allow the exclusion of any specific sector.<sup>158</sup> Nevertheless, EFTA members argued that some latitude should be granted for different products.<sup>159</sup>

Ultimately, the substantiality test must be conducted on a case-by-case basis. Considering the inherent textual ambiguity of this test, only jurisprudential development through accumulation of a sufficient body of case law is likely to clarify what is substantial in each case.

*B. Legislative Breakthrough: The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*

The Article XXIV Understanding<sup>160</sup> basically purports to strengthen legal discipline in this murky field of international trade, particularly in the face of the continued proliferation of RTAs. In pursuing this goal, the Article XXIV Understanding addresses traditionally controversial issues, on the one hand, and reinforces procedural issues in monitoring and reviewing questionable aspects of any RTA, on the other.

155 The European Economic Community: Reports Adopted on 29 November 1957, L/778, GATT B I S.D. (6th Supp.) § D ¶ 30 (1958) [hereinafter L/778]; GATT ANALYTICAL INDEX, *supra* note 127, at 824.

156 L/778, *supra* note 155, § D ¶ 31; GATT ANALYTICAL INDEX, *supra* note 127, at 824.

157 L/1235, *supra* note 142, ¶¶ 47–58 (1960); GATT ANALYTICAL INDEX, *supra* note 127, at 825.

158 L/1235, *supra* note 142, ¶¶ 41–48; GATT ANALYTICAL INDEX, *supra* note 127, at 825.

159 L/1235, *supra* note 142, ¶¶ 41–51; GATT ANALYTICAL INDEX, *supra* note 127, at 825.

160 See Article XXIV Understanding, *supra* note 129.

### 1. Substantial Clarification

First of all, the preamble to the Article XXIV Understanding is consistent with the building block perspective in acknowledging the increasing importance of RTAs and their contribution to the expansion of world trade.<sup>161</sup> Moreover, by articulating the view that the exclusion of any major sector of trade diminishes the foregoing contribution, the preamble sends member states a strong message regarding the interpretation of substantiality.<sup>162</sup>

In the main text, the Article XXIV Understanding reemphasizes the importance of meeting the requirements of paragraphs 5, 6, 7, and 8. Regarding paragraph 5, it clarifies that the calculation to assess whether the post-RTA level of tariffs outweighs pre-RTA ones shall be based upon an overall assessment of weighted average tariff rates as well as applied (as opposed to bound) tariffs.<sup>163</sup> The Article XXIV Understanding also defines the reasonable length of time as ten years and allows extra time only in exceptional cases and with a full explanation.<sup>164</sup>

The Article XXIV Understanding also elaborates the rebalancing mechanism for tariff concessions through the negotiation of mutually satisfactory compensatory adjustment and modification or withdrawal of pre-existing concessions.<sup>165</sup> This aspect vividly demonstrates the reciprocal nature of tariff binding. Significantly, the foregoing procedure is initiated when a member forming an RTA proposes to increase a *bound*, rather than *applied*, rate of duty. This allows a member state to enjoy some range of leeway in increasing their applied tariffs in the course of forming an RTA without undergoing the tortuous process of a tariff renegotiation, unless those applied tariffs hit the pre-existing bound ones.

Although it achieves some level of progress, this legislative solution is insufficient because it focuses mainly on tariffs or other financial charges, while failing to address other, newly emerging forms of non-tariff trade barriers such as domestic regulations pertaining to labor standards or the environment.<sup>166</sup>

### 2. Procedural Discipline

In the preamble, the Article XXIV Understanding emphasizes that the role of the Council for Trade in Goods needs to be reinforced with regard to

161. *Id.* pmbl. ("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").

162. *Id.* ("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").

163. *Id.* ¶ 2.

164. *Id.* ¶ 3.

165. *Id.* ¶¶ 4–6.

166. See GLOBAL TRANSFORMATIONS, *supra* note 63, at 176.

the review of agreements notified under Article XXIV as well as to the transparency of all Article XXIV agreements.<sup>167</sup>

Furthermore, the Article XXIV Understanding provides five paragraphs under the title of "Review of Customs Unions and Free Trade Area."<sup>168</sup> These provisions pave the way for reports by working parties, recommendations by the Council for Trade in Goods, and other monitoring and surveillance mechanisms. In particular, paragraph 7 requires that a working party shall recommend a plan and schedule for an interim agreement if these are not included in the interim agreement itself.<sup>169</sup> This provision is a strong check against the endless delays encountered during the final stages of integration of some interim agreements.

Finally, paragraph 12 clarifies that the WTO dispute settlement procedure can be invoked with respect to any issue concerning Article XXIV, thus putting an end to this long-standing controversy.<sup>170</sup> Considering that the 1985 Panel Report explicitly refused to adjudicate this issue,<sup>171</sup> paragraph 12 may represent another example of "judicialization"<sup>172</sup> in which what were formerly considered political questions are reinterpreted as justiciable legal issues in a way that mirrors the outcome of *Baker v. Carr* (1962)<sup>173</sup> from U.S. constitutional jurisprudence.

### C. Judicial Breakthrough:

#### *Turkey—Restrictions on Imports of Textile and Clothing Products*

##### 1. Factual Background

*Turkish Quantitative Restrictions (Turkish QRs)*<sup>174</sup> was the first case in GATT/WTO history that directly involved Article XXIV. As a step toward integration into the EC, Turkey followed the EC's lead and introduced quantitative restrictions on imports of textile and clothing products from India.<sup>175</sup> India claimed that these measures were inconsistent with, *inter alia*, Articles XI and XIII.<sup>176</sup> Turkey responded that without these new quantitative restrictions, the EC would have excluded these products from free trade within the Turkey/EC CU, which, in turn, would have prevented Turkey

167. *Id.* pmb. ("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").

168. *Id.* ¶¶ 7–11.

169. *Id.* ¶ 7.

170. *Id.* ¶ 12.

171. See *supra* text accompanying note 123.

172. See Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in *IN WHOSE INTEREST?: DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* 10 (Michael M. Hart & Debra P. Steger eds., 1990).

173. See *Baker v. Carr*, 369 U.S. 186 (1962).

174. See generally Turkish QRs, Appellate Body Report, *supra* note 126.

175. *Id.* ¶ 60.

176. *Id.* ¶ 21.

from meeting the requirement of "substantially all trade," considering the fact that Turkey's exports of these products accounted for forty percent of Turkey's total exports to the EC.<sup>177</sup>

## 2. Teleological Approach and Interpretation

In the *Turkish QRs* decision the panel first found that quantitative restrictions applied by Turkey to textiles and clothing from India were inconsistent with GATT Article XI (General Elimination of Quantitative Restrictions) and XIII (Non-Discriminatory Administration of Quantitative Restrictions).<sup>178</sup> Then, the panel examined the Turkish defense, which relied upon Article XXIV, and particularly paragraphs 5 and 8. In terms of the "external" requirements<sup>179</sup> in paragraph 5 of Article XXIV, the panel concluded that the paragraph does not allow participants in a newly formed CU to deviate from the prohibitions contained in Articles XI and XIII.<sup>180</sup> Likewise, in terms of the internal requirements<sup>181</sup> of paragraph 8, the panel concluded that the provision does not oblige Turkey to impose restrictions on imports of textiles and clothing that violate other provisions of the WTO Agreement.<sup>182</sup> In particular, the panel emphasized that, considering the "flexibility" embedded in paragraph 8 of Article XXIV, the EC and Turkey could have introduced relevant "administrative means," namely, the "system of certificates of origin," to avoid trade diversion resulting from the formation of a CU.<sup>183</sup> Therefore, the Turkish defense of Article XXIV was rejected and the Turkish quantitative restrictions were finally confirmed as violations of GATT Articles XI and XIII.

In its closing comments, the panel attempted to legitimize its findings by invoking and emphasizing the objective of trade regionalism vis-à-vis the GATT/WTO system as a whole. According to the panel, the objective of trade regionalism lies in complementing the global trading system: RTAs are to increase trade, not to raise barriers to trade as a shield against other GATT/WTO prohibitions.<sup>184</sup> The panel thus rejected the Turkish argument that Article XXIV is *lex specialis* and a self-contained regime insulated from the other provisions of GATT and the WTO Agreement by reiterating the objective of trade regionalism embedded in paragraph 4 of GATT Article XXIV, the Article XXIV Understanding, and the Preamble of the WTO Agreement. In so doing, it confirmed the nature of the WTO system as a whole ("single undertaking").<sup>185</sup>

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177. *Id.* ¶ 17.

178. Turkish QRs, Panel Report, *supra* note 110, ¶ 9.86.

179. *See supra* Part IV.A.1.

180. Turkish QRs, Panel Report, *supra* note 110, ¶ 9.134.

181. *See discussion infra* Part IV.A.1.

182. Turkish QRs, Panel Report, *supra* note 110, ¶ 9.156.

183. *Id.* ¶ 9.152.

184. *Id.* ¶ 9.163.

185. *Id.* ¶¶ 9.186–187.

The Appellate Body issued a relatively short report upholding most of the panel's findings.<sup>186</sup> Nevertheless, the Appellate Body indirectly reinforced the panel's teleological approach by basing its own interpretation of paragraph 5 of Article XXIV on the objective of a CU in paragraph 4 of Article XXIV,<sup>187</sup> thereby focusing on the rationale of a CU in light of the global trading system. Indeed, the Appellate Body criticized the panel for handling the *chapeau*, or preamble, of paragraph 5 of Article XXIV<sup>188</sup> only in a "passing and perfunctory" way.<sup>189</sup> For the Appellate Body, the *chapeau* was the key provision for resolving the issue.<sup>190</sup> The Appellate Body regarded the term "accordingly" in the beginning of paragraph 5 as a link referring to paragraph 4.<sup>191</sup> Therefore, it concluded that the *chapeau* of paragraph 5, and the conditions and requirements set forth therein, must be interpreted in light of the purpose of a CU set forth in paragraph 4.<sup>192</sup>

Finally, the Appellate Body concluded by agreeing with the panel that Turkey could have adopted a "reasonable alternative," such as a "system of certificates of origin," capable of addressing the concern of Turkey and the EC regarding any possible diversion of trade, while at the same time satisfying the requirements of sub-paragraph 8(a)(i) of Article XXIV.<sup>193</sup> The Appellate Body legitimated its activist posture by stressing that Turkey and the EC themselves appeared to have recognized such alternatives in Article 12, paragraph 3 of Decision 1/95 of the EC-Turkey Association Council.<sup>194</sup>

Thus, although the Appellate Body criticized the panel's reasoning, apparently regarding it as insufficiently teleological, it ultimately reached the same conclusion.

### 3. *Explication and Implication*

*Turkish QRs* illuminated the relationship between paragraph 4 and paragraphs 5 through 9 of Article XXIV: namely, whether paragraph 4 dictates the interpretation of paragraphs 5 to 9, a proposition that had been controversial throughout the life of the GATT 1947 system. Early in the 1950s, during the examination of the Treaty of Rome establishing the European Economic Community (EEC), the EEC had argued for "interpretive inde-

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186. Turkish QRs, Appellate Body report, *supra* note 126, ¶ 64.

187. GATT 1947, *supra* note 2, art. XXIV(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.")

188. GATT 1947, *supra* note 2, art. XXIV(5) pmb.

189. Turkish QRs, Appellate Body report, *supra* note 126, ¶ 43.

190. *Id.*

191. *Id.* ¶ 56.

192. *Id.* ¶ 57.

193. *Id.* ¶ 62.

194. *Id.*

pendency" between paragraph 4 and paragraphs 5 through 9 of Article XXIV, maintaining that the fulfillment of paragraphs 5 through 9 would "automatically and necessarily" satisfy the requirements of paragraph 4.<sup>195</sup> Nevertheless, most contracting parties objected to the EEC's argument.<sup>196</sup> This debate was revived later in the 1980s. As stated earlier, the working party reviewing the accession of Portugal and Spain to the European Communities noted that the EC delegations did not consider paragraph 4 of Article XXIV an *obligation* but rather an *objective*.<sup>197</sup> Therefore, they argued that paragraph 4 did not prevent members of a CU from introducing *new* barriers to trade, which might be inconsistent with other provisions of GATT, if their net effect remains less trade-restrictive than before the CU was formed.<sup>198</sup>

Had the EC prevailed, discrimination resulting from the establishment or expansion of RTAs would have proliferated, thereby undermining the multilateral trading system. Had the firm objective of trade regionalism set forth in paragraph 4 not served as an interpretive anchor to govern paragraphs 5 through 9, the nebulous language in these paragraphs would have contributed to the unhealthy stumbling block phenomena discussed above. The *Turkish QRs* Appellate Body dispelled this concern by putting an end to the long-standing interpretive debate. The Appellate Body *de facto* invented a new test, analogous to the Article XX, paragraph b "least trade-restrictive" approach<sup>199</sup> to regulation of the trade-diverting effect of RTAs, for specific application to Article XXIV. Of course, the Appellate Body's novel move has not escaped criticism. From the viewpoint of the EC, its action could be construed as unacceptable "judicial activism" which prevented the formation of a perfect union without "border controls" on goods, an outcome desired by both the EC and Turkey.<sup>200</sup> Apparently, though, the Appellate Body felt that a strong warning to RTAs regarding new trade barriers was worth the risk of such criticism.

It is important to note that this emerging rigorous jurisprudence on trade regionalism has the potential to shed considerable light on developmental

195. L/778, *supra* note 155, ¶ 2.

196. *Id.*

197. See *supra* text accompanying notes 132-133.

198. Parties forming RTAs are frequently tempted to erect trade barriers inconsistent with various GATT provisions, such as Articles XI and XIII. In *Banana III* (1997), the Appellate Body dealt with this phenomenon in the context of the EC's banana trading regime. Despite the fact that the ACP-EEC Fourth Lomé Convention is one of the RTAs notified under Article XXIV, the EC's attempt to defend its behavior by invoking the Lomé waiver ultimately failed. Instead, the Appellate Body focused on the trading regime's violations of Article XIII. See European Communities—Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report adopted on November 17 1997, WT/DS27/AB/R.

199. See, e.g., Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, DS10R-37S/200 (panel report adopted on Nov. 7 1990). See also Joel P. Trachtman, *Decisions of the Appellate Body of the World Trade Organization (Turkey-Restrictions on Imports of Textile and Clothing Products)*, 11 EUR. J. INT'L L. 217, 217 (2000), <http://www.ejil.org/journal/curdevs/sr6.html> (visited Apr. 22, 2001).

200. Trachtman, *supra* note 199, at 2.

issues. In particular, two main concerns arise. First, the creation or expansion of preferential regional trading blocs among developed countries, or between developing and developed countries, tends to aggravate the marginalization of the least-developed countries (LDCs) because it results in the spread of sector-specific protections (e.g., agriculture or clothing) to members that did not enjoy such protections prior to the creation or expansion of the bloc.<sup>201</sup> This regional expansion of protection impedes not only North-South trade, but also South-South trade, through serious trade diversion. The end result of such expansive protection is disastrous for LDCs, since their economic development depends upon the export of the few products, such as agricultural products or textiles, where they enjoy comparative advantages vis-à-vis developed countries.<sup>202</sup> Extensive discrimination through preferential trading blocs destroys LDCs' potential comparative advantage, undercutting their developmental base.<sup>203</sup>

This problem raises the question of whether the LDCs should form their own RTAs. In fact, the GATT 1979 Decision on "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (*Enabling Clauses*)"<sup>204</sup> provided for better treatment of such RTAs than under GATT Article XXIV. The developmental impact of such special treatment tends to be limited, given LDCs' inevitably monotonous trade patterns and their lack of division of labor in trade.<sup>205</sup> In any case, many formerly inward-looking RTAs in Asia and Latin America have departed from their strategy of import substitution in favor of extra-bloc trade.<sup>206</sup>

This illustrates that, from the perspective of economic development, an orthodox recourse to multilateralism should be emphasized very strongly.<sup>207</sup>

201. Cf. William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT'L L.J. 293, 301 (1993) (observing that "NAFTA seems to have been negotiated with complete obliviousness on the part of the United States to its impact on the poorer nations of the world, and particularly those of the Caribbean").

202. Cf. Jonathan Carlson, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem*, 70 IOWA L. REV. 1187, 1216-17 (1985).

203. Under certain circumstances, RTAs may broaden the scope of protectionist barriers beyond GATT Article XXIV. For example, if an RTA were unable to absorb a country as a formal member in a free trade area or customs union, it might still be able to form a *de facto* regional trading bloc with respect to specific sectors. Such *de facto* formations are often effected via bilateral trade agreements, which escape the discipline of GATT Article XXIV. See, e.g., the EC-Laos Agreement on Trade in Textiles, 1988 O.J. (L 321) 41.

204. See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.), ¶ 2(c) (1980).

205. Srinivasan argues that the Enabling Clause actually slowed the integration of developing countries into the world economy, because it allowed them to depart from their MFN obligations. T.N. Srinivasan, *Regionalism and the WTO: Is Nondiscrimination Passé?*, in THE WTO AS AN INTERNATIONAL ORGANIZATION 329, 330 (Anne O. Krueger ed., 1998).

206. See FRANKEL, *supra* note 5, at 7-11. One of the main failures of import-substitution policy is its disproportionate distribution of benefits, which hurts smaller and poorer members. POMFRET, *supra* note 52, at 299.

207. Commenting on the recently formed Free Trade Area among the members of the Common Market for Eastern and Southern Africa (COMESA), WTO Director-General Moore re-emphasized that a regional trading initiative can strengthen the global trading system *only* if it is consistent with WTO



Only multilateral trade rules based on the principle of non-discrimination can realistically be expected to prevent the proliferation of protectionist blocs and restore developing countries' lost comparative advantages by repealing developed countries' long-standing trade barriers in agricultural products and textiles. This realization informed much of the Appellate Body Report in *Turkish QRs*.<sup>208</sup>

In sum, the Appellate Body's interpretive stance can be understood as providing enhanced legal rigor to Article XXIV in a way that permits the GATT/WTO system to be harmonized with the proliferation of RTAs. This is a federalist approach, in the sense that RTAs can co-exist with the GATT/WTO system, while remaining subject to multilateral discipline in key areas. Such an approach paves the way for a new perspective on trade regionalism, namely, the *jus gentium* of international trade.<sup>209</sup> This new perspective begins by embracing the convergence of different trading units, and then seeks to supply new trade norms to govern the dense interaction of those converging trading units in the global trading system.

#### *D. Unaddressed Issues: Problems in the Law of GATT Article XXIV*

##### *1. Trade in Services (GATS)*

GATT Article XXIV is limited by its exclusive focus on trade in *goods*. Despite the fact that contemporary trade involves both goods and services, the latter category lies beyond the scope of Article XXIV. Article V of the General Agreement on Trade in Services (GATS)<sup>210</sup> features several provisions for "economic integration." Like GATT Article XXIV, however, GATS Article V is plagued by vague terms such as "substantial sectoral coverage." The problem is compounded by the fact that GATS Article V has little or no recourse to a body of jurisprudence providing interpretive guidelines since the area of trade in services is still marked by vast stretches of uncharted territory, not only under the GATT/WTO system, but also for RTAs.

One might argue that GATS could adopt GATT/WTO jurisprudence in interpreting Article V, given the similarities between the two agreements. For instance, Paragraphs 1<sup>211</sup> and 4<sup>212</sup> of GATS Article V resemble Paragraphs 4 and 8, respectively, of GATT Article XXIV. Unfortunately, these

rules. WTO, Director-General Moore Hails African Free Trade Area, Oct. 31, 2000, [http://www.wto.org/english/news\\_e/news00\\_e/africafta\\_e.htm](http://www.wto.org/english/news_e/news00_e/africafta_e.htm) (visited on Apr. 22, 2001).

208. Cf. Frank J. Garcia, "Americas Agreements: An Interim Stage in Building the Free Trade Area of the Americas," 35 COLUM. J. TRANSNAT'L L. 63, 66, n.8 (1997).

209. See *infra* Part V.

210. General Agreement on Trade in Services, Apr. 15, 1994, art. V, Annex 1B, WTO Agreement, *supra* note 9, [hereinafter GATS].

211. *Id.* art. V(1).

212. "Any agreement referred to in paragraph 1 shall be designed 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." *Id.* art. V, ¶ 4.

surface similarities are eclipsed by fundamental structural differences between GATS and GATT. For instance, GATT Article XXIV presupposes legal concepts such as tariffs and RTAs that have no parallel under GATS. Put another way, the inherent differences between goods and services preclude simple legal conflation, which in turn may complicate the establishment of technically common jurisprudence in trade regionalism.

## 2. GATT Article XXIV as an "Exception"

The current WTO jurisprudence limits the use of GATT Article XXIV, particularly against abuse for discriminatory purposes. Unfortunately, tensions between the WTO and RTAs, often debated in the form of multilateralism versus regionalism,<sup>213</sup> cannot be so easily eliminated as long as the WTO still regards RTAs as an exception (*lex specialis*)<sup>214</sup> to general obligations such as the Most Favored Nation principle.<sup>215</sup> Indeed, this "exception approach" aggravates the tension because the conceptual primacy of multilateralism within the WTO tends to undermine the legitimacy of RTAs.

The legal and conceptual primacy of multilateralism, as expressed in the exception approach, gives rise to a number of concerns. First, although numerous RTAs are already in operation, the Committee on Regional Trade Agreements (CRTA) has failed to examine their consistency as exceptions with GATT Article XXIV.<sup>216</sup> Strictly speaking, RTAs should not be considered exceptions because their legality has never been confirmed by either GATT 1947 or the WTO. Nevertheless, when RTAs are permitted to flourish as "exceptions" without being duly verified, this tends to undermine the legal authority of GATT Article XXIV and, by extension, the integrity of the WTO itself. Second, continued subordination of RTAs to the WTO is not desirable in a "political" sense. As discussed earlier, the political motivations behind the formation of RTAs cannot be ignored. For instance, certain strategic or security considerations often overwhelm the "economic tests"<sup>217</sup> embedded in GATT Article XXIV.

Finally, this exception approach tends either to eclipse or to discourage various functions that RTAs would otherwise undertake in light of trade liberalization. As the general level of tariffs decreases, the potential risk that RTAs could create discriminatory blocs vis-à-vis non-members also decreases, for the simple reason that lower tariff levels leave less room for discrimination. In fact, RTAs can play a more constructive role for trade liberalization in new areas such as telecommunications and financial services be-

213. See discussion *infra* Part III.

214. See, e.g., Turkish QRs, Panel Report, *supra* note 110, ¶ IX.88.

215. Cf. Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exception in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27, 50-51 (1996) (arguing that despite the quite sensible balance that Article XXIV strikes between the concerns for free riders and preferential arrangements, Article XXIV is "substantially imperfect").

216. See, e.g., Turkish QRs, Panel Report, *supra* note 110, ¶ II.9.

217. See *id.* ¶ IX.120.

cause they provide for a laboratory effect and permit more efficient decision-making.<sup>218</sup> Yet if the exception ethos is allowed to persist, these benefits will not be realized.

### 3. *Formation or Operation*

As stated above, GATT Article XXIV concerns only the "formation," i.e., creation or expansion, of RTAs. Its basic purpose is to authorize the formation of RTAs if they comply with requirements stipulated in paragraphs 4 to 8. It is silent, however, on other critical issues such as the post-formative "operation" of RTAs vis-à-vis other trading units including the WTO. This limited scope of Article XXIV is quite obvious on its own terms<sup>219</sup> or in the context of other WTO legal documents.<sup>220</sup> *Turkish QRs* (1999), which was the first case in GATT/WTO history that directly involved Article XXIV, also concerned the expansion of an existing RTA, namely, the European Community.

In light of the institutional life cycle of RTAs, the limited coverage of Article XXIV is ill-equipped to deal with a status quo in which numerous RTAs are in operation, establishing their own niches within the global trading community. Although their trade-generating function contributes to expanding international commerce, new and complex legal questions arising from interactions between RTAs and the WTO as well as among RTAs themselves, presage future tensions and conflicts among these trading units. However, GATT Article XXIV is fossilized not only by the lack of legal discipline that characterizes its use, but also by its inability to address the sophisticated legal issues pertaining to the operation of RTAs that lie beyond its coverage. Thus, problems surrounding trade regionalism clearly exist for which there are at present no legal solutions.

## V. A NEW PARADIGM: CONVERGENCE AND *JUS GENTIUM* OF INTERNATIONAL TRADE

### A. *Convergence: Conceptualization*

Confronted with the daunting problems of trade regionalism, a new paradigm, powered by a new vision, is needed. To build this new paradigm, one must begin with a sober recognition of the irreversible existence of the RTAs currently in operation. Likewise, to govern the subtle legal relationships among the RTAs and the WTO, as well as among the RTAs themselves, in their post-formation stages, there needs to be a much broader perspective in

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218. See discussion *infra* Part III.B.

219. For instance, paragraph 4 of GATT Article XXIV provides that "the provisions of this Agreement shall not prevent . . . 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" (emphasis added). GATT 1947, *supra* note 2, art. XXIV(4).

220. Article XXIV Understanding, *supra* note 129, pmb1.

which the WTO and RTAs exist in the same dimension, rather than in the hierarchical relationship of normalcy and exception. As a reflection of this type of broader perspective, one can imagine a conceptual space—broadly termed “the global trading community”—in which various trading units,<sup>221</sup> such as individual states, RTAs and even the WTO itself, co-exist<sup>222</sup> and interact in a pluralistic and federalistic fashion.<sup>223</sup> pluralistic, in that no formal hierarchy exists among the trading units, and federalistic—though not “federal” per se—in that it contains a certain degree of central legal order.<sup>224</sup>

The dense interaction of trading units, including RTAs, individual states and the WTO, occurs daily within the global trading community.<sup>225</sup> The interactions are conducted in a pluralistic fashion, being influenced by and influencing each other in the same time and space. Varying in relative size and magnitude, their co-existence is only possible through some kind of order.

The interaction of trading units shapes, configures and defines the global marketplace. Since this interaction is highly interdependent, it must necessarily lead to a high degree of economic integration. In turn, economic integration tends to press trading units to find ways to minimize their differences or to maximize their commonality. This entire process leads to the “convergence” of different trading units in terms of their legal operation. To be sure, this convergence is powered by market principles of efficiency, productivity, and predictability. Yet it should also be noted that the direction of this convergence is influenced not only by *centripetal* market forces but also by *centrifugal* forces produced by demand for diversity and subsidiarity. The convergence of trading units as described here should in no way imply universalization or homogenization. That is, if convergence were to entail homogenization, it would immediately betray a cardinal premise on which this global trading community is based: namely, pluralistic interaction among different trading units. Thus, in order to remain consistent with other principles of global trade, convergence will tend to vary in its manifestations.

221. According to Koh, these trading units are different “legal markets.” Koh, *supra* note 89, at 195. He emphasizes that “legal, as opposed to economic and political, considerations will influence and channel the course of the FTA negotiations” (emphasis added). *Id.*

222. *Introduction to COMPLEMENTARY PATHS*, *supra* note 6, at 1 (“A distinctive feature of the contemporary world economy is the *coexistence* of regional trade blocs alongside multilateral trade agreements.” (emphasis added)).

223. Such pluralistic and federalistic order can also be found in the context of an individual trading unit. See John Benington, *Local Democracy and the European Union: The Impact of Europeanization on Local Governance*, 6 COMMISSION FOR LOCAL DEMOCRACY 33 (1994).

224. Successful regional trading initiatives can instill “confidence in trade” and eventually contribute to solidifying stable and peaceful relations with neighboring countries. WTO, Director-General Moore Hails African Free Trade Area, *supra* note 208.

225. For an example of such interaction in the context of the legal relationship between the WTO and the EU, see Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT’L L. 222 (1995); Meinhard Hilf, *The ECJ’s Opinion 1/94 on the WTO—No Surprise, but Wise?*, 6 EUR. J. INT’L L. 245 (1995).

## B. Three Contours of Convergence

### 1. Complementarity: Open Regionalism

"Open regionalism" represents an attempt to eliminate the usual exclusivity and preferentiality of RTAs vis-à-vis non-member countries, in a way that enables RTAs to become more compatible with and complementary to the multilateral trade regime under the WTO.<sup>226</sup> This principle has been fundamental to APEC<sup>227</sup> since its creation. In the first APEC Ministerial Meeting in Australia on November 1989, twelve founding members explicitly heralded their firm commitment to multilateral negotiation under the auspices of the Uruguay Round by reaffirming the importance of open markets and the expansion of trade.<sup>228</sup> This bold proposal was made possible by the "informality" of APEC as represented by its "soft institutionalization" and "non-binding" character. In other words, since APEC was designed as a cooperative *forum*, rather than a formal *organization*, members are not legally bound by APEC's liberalization agenda. Nonetheless, this flexibility has proven to be a source of considerable success.<sup>229</sup>

From the perspective of trade regionalism, it is undeniable that the WTO represents a major step forward vis-à-vis the old GATT system. The WTO contains more refined, binding obligations and stronger enforcement mechanisms than those of its predecessor. Nevertheless, it remains a young organization that still leaves much to be desired. First, the overall level of market access concessions in new areas such as services is still unsatisfactory, even allowing for the fact that they were only recently brought within the ambit of multilateral trade regulation.<sup>230</sup> Second, the WTO still lacks both competence and resources to deal with certain trade-related areas such as investment and harmonization.<sup>231</sup> Moreover, its formal and binding structure and consensus-oriented decision-making process combine to hinder or even block harmonization efforts in new trade-related areas.<sup>232</sup>

226. See Bergsten, *supra* note 87, at 545.

227. See APEC, *supra* note 60. In response to the growing interdependence and integration among Asia-Pacific economies, the Asia-Pacific Economic Cooperation (APEC) was launched in 1989. *Id.* As an informal dialogue group, APEC serves as the primary regional vehicle for the promotion of free trade and economic cooperation. *Id.*

228. First Ministerial Meeting, Joint Statement, Canberra, Australia, Nov. 6-7, 1989, <http://www.apecsec.org.sg/virtualib/minismtg/mrgmin89.html> (visited on Apr. 22, 2001).

229. See generally Merit E. Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947 (1996-97).

230. While the liberalization of *goods* has been promoted for the past fifty years, the negotiation for liberalizing trade in *services* under GATS only began with the launch of the WTO in January 1995. See WTO, *GATS: Why is the Liberalization of Services Important?*, [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction2\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction2_e.htm) (visited Apr. 22, 2001).

231. Although certain side agreements purport to address "trade-related" issues such as investment and harmonization, their functions are limited. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, pmbl, WTO Agreement, *supra* note 9, Annex 1A [hereinafter SPS]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, art. 1, WTO Agreement, *supra* note 9, Annex 1A ("This Agreement applies to investment measures related to trade in goods only").

232. See WTO Agreement, *supra* note 9, art. IX.

Practically speaking, it is extremely difficult to strike official deals in such new fields as services and investment reconciling all diverse interests when the impact of such a deal is uncertain. A great amount of time and resources is required to administer the series of negotiations necessary to conclude such agreements. In other words, it is very difficult to reach a speedy and efficient conclusion on any matter among the members under the current WTO decision-making process, which is based on consensus (or super-majority).<sup>233</sup> The corresponding transaction and administration costs of such consensus, moreover, are hardly negligible among 140 member states.<sup>234</sup> Therefore, in order to reap even modest gains in new areas, especially at a time of rapid expansion, "small-scale informalism" represented by regional memberships, voluntarism, and non-binding commitments seems useful and perhaps even necessary.

Assuming that the aforementioned conditions (regional membership, voluntarism and non-binding commitments) were met, no country would need to carry out liberalization or deregulation under the pressure of future negotiations—a process that inevitably involves complex calculation of its bargaining position. Nor would any country need to fear the difficulty of changing its original position when necessary since commitments would not be legally binding. This would be especially beneficial to developing countries faced with the need to alter prior commitments. An APEC Member country, for example, can freely initiate or introduce a new and advanced policy regime in a rather experimental fashion under the auspices of the APEC, even with the technical assistance of other member countries.<sup>235</sup> This constructive structure is well incorporated in APEC's "Individual Action Plans"<sup>236</sup> and "Early Voluntary Sectoral Liberalization."<sup>237</sup> Moreover, the flexibility embedded in such plans frequently enables them to attach the so-called "best practices" of other developed countries so that they can be easily benchmarked.<sup>238</sup> Furthermore, in cases where a member country—particularly a developing country—has proven successful in adhering to a new voluntarily initiated policy, it may then forward with confidence its commitment to be bound by this policy to a formal forum such as the WTO. APEC thus provides a sort of rehearsal stage for countries hoping later to join the

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233. *Id.*

234. See Mark David Davis, *Multilateral and Regional Efforts to Integrate Markets: The Uruguay Round, NAFTA, Asia Pacific Economic Cooperation Initiatives and the European Communities*, 87 AM. SOC'Y INT'L L. PROC. 340, 343 (1993).

235. In a sense, such unilateral liberalization is being conducted in a *competitive* fashion as a way of attracting more foreign direct investment from the outside. See Bergsten, COMPETITIVE LIBERALIZATION AND GLOBAL FREE TRADE: A VISION FOR THE 21ST CENTURY (Institute for International Economics Working Paper No. 96-15, 1995); FRANKEL, *supra* note 5, at 220.

236. APEC, Electronic Individual Action Plans (e-IAPs), <http://203.127.222.66/default.asp> (visited May 22, 2001).

237. APEC, Early Voluntary Sectoral Liberalization, <http://www.apecsec.org.sg/committee/evsl.html> (visited Apr. 22, 2001).

238. APEC, Statement of Chair, Meeting of Ministers Responsible for Trade (Kuching, Sarawak, June 22–23, 1998) <http://www.apecsec.org.sg/committee/evsl.html>.

WTO. In this sense, APEC makes an important contribution to the WTO enterprise.<sup>239</sup> In sum, to manage effectively a deeper level of integration and liberalization, the multilateralized WTO system alone may not be sufficient. The “flexibility” and “minilateralism”<sup>240</sup> of regional arrangements like APEC play an important complementary role in this respect.

This same flexibility yields quite an open and liberal membership policy.<sup>241</sup> The original APEC enterprise was initiated among twelve Asian and Pacific countries. Nevertheless, as APEC has received greater outside attention, its membership has expanded to include countries from across the Pacific, such as Mexico, Chile and Peru, as well as Russia, which is not usually thought of as a Pacific nation. As of April 2001, APEC members numbered twenty-one.<sup>242</sup>

This expanded membership tends to dilute the exclusive “club” nature of APEC, and thus contributes to its interconnectedness with trading regimes of the rest of the world.<sup>243</sup> The ultimate goal of this process is a condition of “inclusivity,” ideally one that makes possible an RTA encompassing the entire world.<sup>244</sup> This last scenario has been referred to as the “nirvana” of

239. The complementarity of the APEC to the WTO can also be observed in *political* terms. Prior to the launch of the WTO after the Uruguay Round, APEC Members vigorously advocated the success of this enterprise. On the other hand, some scholars have argued that APEC's upgrading from Ministers' Meeting to Leaders' Meeting in Seattle jolted the EU into making greater concessions in the final stages of the Uruguay Round. See Janow, *supra* note 229, at 980 n.116. More importantly, APEC Members actively supported the Information Technology Agreement (ITA I) before it was officially endorsed by the WTO Members. *Id.* at 967, 976–78. In sum, it would be fair to say that the APEC's voluntary and cooperative structure and atmosphere helped APEC Members to reach a speedy yet enduring consensus on trade liberalization.

240. See Aronson & Cowhey, *supra* note 86, at 53–57; see also BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE: THE STRATEGIC ORGANIZATIONAL APPROACH 86–106 (1992); Shara L. Aranoff, *Regional Trade Organizations: Strengthening or Weakening Global Trade?*, 88 AM. SOC'Y INT'L L. PROC. 309 (1994).

241. Bergsten analyzes “open membership” as the first of five proposed definitions of open regionalism. *Open Regionalism*, *supra* note 87, at 551.

242. In addition to the twelve original members—Australia, Brunei Darussalam, Canada, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, The Philippines, Singapore, Thailand, and the United States (1989)—nine additional countries have joined APEC thus far: People's Republic of China, Chinese Taipei, Hong Kong, China (1991); Mexico, Papua New Guinea (1993); Chile (1994); Peru, Russia, Vietnam (1998). APEC, Date of Joining of Member Economies, <http://www.apecsec.org.sg/member/dateofjoin.html> (visited Apr. 22, 2001).

243. Cf. Fred Bergsten, *East Asian Regionalism: Towards a Tripartite World*, ECONOMIST, July 15, 2000, at 26. More recently, regional economic cooperation and integration among Asian economies has achieved considerable success, notwithstanding the recent financial crisis. For instance, a number of Asian countries recently initiated the “ASEAN plus 3 (South Korea, China and Japan),” an expansive economic summit meeting. *Id.* at 23. Yet pan-Asian neo-regionalism should not be *destructive*; on the contrary it must be *constructive* as well as complementary to the current global trading system. Indeed, in this interdependent world, a new Asian bloc cannot realistically be expected to succeed if it isolates its markets from the rest of the world.

244. See Sang-Seung Yi, *Endogenous Formation of Customs Unions under Imperfect Competition: Open Regionalism is Good*, 41 J. INT'L ECON. 153, 153–77 (1996). Similarly, former WTO Director-General Ruggiero highlighted the “gradual convergence of regionalism and multilateralism on the basis of shared aims and principles,” which leads eventually to “one free global market.” Srinivasan, *supra* note 205, at 342 (quoting Ruggiero in WTO, *The Road Ahead: International Trade Policy in the Era of the WTO*, Fourth Annual Sylvia Ostry Lecture, May 28, 1996, WTO Press/49).

worldwide free trade.<sup>245</sup> Although the present condition of international trade remains far from this ideal, incremental advancement toward a global RTA remains for many the principal goal of trade liberalization efforts.

Finally, open regionalism seems destined to materialize considering the changing landscape of international trade. As traditional trade barriers such as tariffs and quotas vanish, *horizontal* discrimination, which is a violation of the MFN obligation, has become less of a problem. Instead, *vertical* discrimination symbolized by non-tariff barriers—*e.g.*, domestic regulations discriminating against foreign commerce—has tended to occupy the center of recent trade disputes. Meanwhile, vertical discrimination is hard to maintain in a selective way in different trade arenas. For instance, it might be implausible to erect different customs procedures and product standards according to different origins, *e.g.*, an RTA or a WTO origin.<sup>246</sup>

## 2. Assimilation

Another phenomenon defining convergence is that trading units assimilate some important features of each other. Supporting evidence for this phenomenon abounds. For instance, NAFTA incorporated into its text the basic legal structure of GATT Article III (National Treatment) as well as the GATT dispute settlement mechanism.<sup>247</sup> Not only did NAFTA co-opt the text of Article III, but by employing the text, it also incorporated the rich jurisprudence of GATT/WTO, including the case law. In addition, paragraph 1 of NAFTA Article 2005 adopted the GATT dispute settlement system as an optional forum for settling NAFTA disputes.<sup>248</sup>

By the same token, Uruguay Round negotiators were able to draw upon the NAFTA experience to deal with a number of emerging issues. For example, the NAFTA service sector provided the GATT/WTO system with a powerful model.<sup>249</sup> Since the service negotiation was conducted on a global scale for the first time under the Uruguay Round, previous experience under NAFTA contributed greatly to agenda-setting as well as to other negotiation details. Similarly, the basic regulatory model that the WTO adopted in new areas such as the Agreement on Sanitary and Phytosanitary Measures (SPS)<sup>250</sup> and the Agreement on Technical Barriers to Trade (TBT)<sup>251</sup> was patterned after the EU's harmonization efforts.<sup>252</sup>

245. FRANKEL, *supra* note 5, at 207.

246. *Open Regionalism*, *supra* note 87, at 557.

247. NAFTA, *supra* note 58, art. 301, ¶ 1 ("Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT)" (emphasis added)).

248. *Id.* art. 2005, ¶ 1.

249. *Open Regionalism*, *supra* note 87, at 557.

250. SPS, *supra* note 231.

251. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 9, Annex 1A.

252. See European Commission, *Guide to the Implementation of Directives Based on the New Approach and the Global Approach*, <http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/>



### 3. Alliance

A more dramatic picture of convergence can be seen in situations of alliance. Alliances and other mergers are formed not only between industries from different continents,<sup>253</sup> but also between different trading units like the EU and Mercosur; the EU and NAFTA; the EU and the United States; and, more broadly, among NAFTA, CACM and Mercosur (Free Trade Agreement of the Americas [FTAA]).<sup>254</sup> A similar phenomenon is occurring between Europe and Asia (ASEM Trade Meeting)<sup>255</sup> and among Central Asia and the Caucasus and Black Sea countries (New Silk Road Agreement).<sup>256</sup> This dense web of alliances or mergers between or among different trading units will likely continue in the future, leading to greater inclusivity<sup>257</sup> and possibly even to a universal RTA.<sup>258</sup>

## C. *Modus Operandi: Jus Gentium of International Trade*

### 1. Necessity

The pattern of institutional convergence described above provides the global trading community with a strong impetus for the harmonious and coherent development of international trade law.<sup>259</sup> Nevertheless, though institutional convergence is a necessary condition for the harmonious and universal development of international trade law, it is not a sufficient one. A common code—or hermeneutics<sup>260</sup>—is still needed in order to resolve

1999\_1282\_en.pdf (visited Mar. 23, 2001).

253. See, e.g., Ken Hijino, *Kawasaki and AK Steel to Link*, FIN. TIMES, Mar. 21, 2001, at 34.

254. Free Trade Area of the Americas (FTAA), FTAA Official Website, <http://www.ftaa-alca.org> (visited Apr. 22, 2001). But see David Lopez, *Dispute Resolution under Mercosur from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas*, 3-SPG NAFTA: L. & BUS. REV. AM. 3, 32 (1997) (arguing that considering dispute settlement experience under Mercosur from 1991 to 1996 any attempt to “transplant NAFTA wholesale” to all of the Western Hemisphere countries, without due political and cultural reflection, could eventually jeopardize the FTAA process); Ana Maria de Aguinis, *Can Mercosur Accede to NAFTA?: A Legal Perspective*, 10 CONN. J. INT’L L. 597, 638 (highlighting diverging trade themes or subjects negotiated under NAFTA and Mercosur and suggesting a functional approach to form a free trade zone between them founded on “common bases”).

255. See ASEM, The Third Asia-Europe Meeting, The Official Website, <http://www.asem3.org/english/index.htm> (visited Apr. 22, 2001).

256. See *Nations Sign “Silk Road” Trade Accord*, FIN. TIMES, September 8, 1998, at 2.

257. See *supra* text accompanying note 244.

258. Viner, *supra* note 7, at 52 (“A universal customs union, . . . , would be the equivalent of universal free trade.”). See also *supra* text accompanying note 245.

259. See Joseph H. H. Weiler, *Cain and Abel—Convergence and Divergence in International Trade Law*, in THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE 1, 3–4 (Joseph H.H. Weiler ed., 2000) (trenchantly observing the emergence of a “nascent Common Law of International Trade” in terms of three phenomena: first, the fact that “the very same regulatory measure comes simultaneously within the jurisdictional reach of more than one trade regime”; second, the fact that “in the material law of disparate international trade regimes we can see considerable convergence”; third, the “strengthening of private parties in all regimes.”).

260. The use of hermeneutics, the theory and practice of interpretation, within the context of international trade is consistent with its origins in the field of biblical interpretation because the text of international trade agreements, like scriptural texts, is fixed. Accordingly, interpretation becomes a powerful tool for adapting fixed provisions to present circumstances in order to regulate and govern the status quo

conflicting legal situations in the microscopic, daily operation of the global trading system, which consists of various trading units, such as the United States, NAFTA, the EU and the WTO itself. In short, we need structure as well as operational norms.<sup>261</sup>

Despite the institutional convergence of trading units, the legal codes or hermeneutics that function as their operating systems remain distinct; they are "contextualized." Thus we have a law of the WTO, a law of the EU, and a law of NAFTA, all of which are particularized by their own path dependency and institutional structure. They remain isolated in the form of *lex*. It seems clear that such fragmented and contextualized sets of trade rules are incapable of addressing the broader and more complicated legal situations—many of which involve multiple trading units—that inhere in a global system in which all trading units co-exist and interact in a federalistic and pluralistic fashion. Such situations require a common operating system, a "*jus gentium* of international trade," to ensure the stability and solidarity of the system and to keep it free from unnecessary conflict and confusion.

If we succeed in establishing such a common operating system, we will be able not only to address cross-jurisdictional cases, but also to avoid potential legal disputes through greater legal predictability in future cross-border transactions. In more practical terms, the various actors involved in international trade demand predictable and transparent trade rules of the sort that make possible the design of long-term business plans. Yet the hoary system of diplomatic intervention, which results in a very high degree of uncertainty, is anachronistic in a sophisticated global marketplace that is broadly characterized by institutional convergence. Rather, the interests of trade and commerce demand a unified and integrated set of trade rules on which individuals can confidently rely regardless of the trading unit, whether an RTA or the WTO.<sup>262</sup> In sum, the multiplicity of trading units should not be allowed to impede or hinder businesspeople from engaging in cross-border transactions without some legitimate public policy or other justification for doing so. This is the practical necessity of the *jus gentium* of international trade.

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more effectively.

261. Although it may be tempting to have recourse to a legislative solution using a treaty-making process almost reflexively, the difficulty and implausibility of this avenue would be apparent, given the poor track record thus far in this field. Therefore, we must turn to a jurisprudential or hermeneutical solution. Cf. Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 J. INT'L ECON. L. 27, 40 (2000) (arguing that the WTO dispute settlement system fosters the "development of principles of international law through judicial decisions at a much faster pace than has occurred under existing international legal institutions").

262. See Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 65 (1997) (arguing that the "growing number of forums may create confusion and contradictory interpretations of international law").

## 2. *Jus Gentium of International Trade: Hermeneutical Convergence*

In response to this demonstrated necessity for a common code or operating system, the next step should be to establish a unified set of norms or a general legal reference on international trade—the *jus gentium* of international trade<sup>263</sup>—against the background of the institutional convergence described above. This task necessarily involves “de-contextualizing” the laws of different trading units, so as to allow them to transcend their structural particularities: to derive a common *jus* out of differing *lex*.<sup>264</sup>

One can imagine various ways in which such a *jus gentium* of international trade could be revealed. For instance, it could be summoned forth from the “hermeneutical convergence” of different trading units involving some fundamental obligation, such as “non-discrimination.” Hermeneutical convergence is rooted in the common application of “general principles of law,” such as equity, estoppel, fairness, and good faith, and is one important mechanism through which a *jus gentium* of international trade could be constructed. To illustrate, most trading units have developed, within their own institutional frameworks, a unique jurisprudence relating to the non-discrimination obligation: National Treatment in the GATT/WTO system,<sup>265</sup> Free Movement of Goods in the EU,<sup>266</sup> and the Dormant Commerce Clause in the United States.<sup>267</sup> Recently, however, these contextualized hermeneutics have been converging markedly in response to a continuing rise in economic interdependency. Indeed, they are increasingly converging in such a way that their hermeneutical foci shift from *substance* or *content* (such as whether U.S. environmental regulation itself is necessary to protect the environment) toward *process* or *manner* (such as whether the United States actually applies its own domestic regulations in a consistent and even-handed way).<sup>268</sup>

The WTO Appellate Body in *Gasoline* took this same approach in shifting its interpretive focus to the *chapeau* of Article XX.<sup>269</sup> First, the Appellate

263. For a definition of “*jus gentium* of international trade,” see *supra* note 14.

264. See ROSCOE POUND, A WORLD LEGAL ORDER: LAW AND LAWS IN RELATION TO WORLD LAW 4 (1959) (drawing a distinction between “legal order,” “law,” and “a law”).

265. GATT 1947, *supra* note 2, art. III.

266. EC Treaty, *supra* note 39, art. 28.

267. The Dormant (negative) Commerce Clause is not an independent clause in the U.S. Constitution, but a doctrine derived from the Commerce Clause. Although Laurence H. Tribe notes that the question of “whether the affirmative grant of commercial power to Congress should be construed to circumscribe state action in some or all cases” remains controversial, the Supreme Court has continued to uphold this doctrine thus far. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-2, at 1030 (3d ed. 2000).

268. Compare *Gasoline*, Panel Report, *supra* note 146, with *Flli Graffione SNC v. Ditta Fransa*, and *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*, 732 F. Supp. 761, 764 (1990). Case C-313/94, *Flli Graffione SNC v. Ditta Fransa* 1996 E.C.R. I-6039.

269. United States—Standards for Reformulated and Conventional Gasoline, Appellate Body Report adopted on Nov. 7, 1989, WT/DS2/AB/R, ¶ 22 [hereinafter *Gasoline*, Appellate Body Report]. The *chapeau* of Article XX provides for general exceptions “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

Body explained that the *chapeau* addresses the manner in which a questioned measure is applied, rather than the measure itself or its specific content.<sup>270</sup> Second, upholding the panel's view, the Appellate Body found that the U.S. argument with respect to inevitable discrimination due to administrative difficulties that would have been generated by individual baselines for foreign refiners (e.g., the impracticability of verification and enforcement of foreign refiner baselines) was insufficient to justify allowing individual baselines for domestic but not for foreign refiners. In responding to the U.S. argument, the Appellate Body underscored U.S. practice in other contexts, such as anti-dumping laws, in which the United States had resorted to other information only when the information was not supplied or was regarded as unverifiable.<sup>271</sup> In the same vein, the Appellate Body stressed that the United States should have explored the possibility of entering into "cooperative arrangements" with both foreign refiners and foreign governments, which would have allowed it to overcome the alleged administrative difficulties.<sup>272</sup> In reaching this conclusion, the Appellate Body made reference to previous instances in which the United States had employed international cooperation to "overcome problems confronting enforcement agencies" in other U.S. regulatory laws of this kind (e.g., in the fields of anti-trust law, securities exchange law, and tax law).<sup>273</sup>

### 3. *Jus Gentium of International Trade: Institutional Conflict*

Besides the above-mentioned hermeneutical convergence, a *jus gentium* of international trade can, and in fact must, be established in order to deal with more difficult situations in which the primary rules of different trading units are directly in conflict. Such conflict is especially likely to occur between the WTO and RTAs due to the tendency for a regional political bias to be embedded in the latter.<sup>274</sup> Nevertheless, it is more difficult to establish the *jus gentium* of international trade in situations marked by conflict than under the circumstance of hermeneutical convergence. This has to do with the nature of legal conflicts, of course, but more particularly with the fact

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between countries where the same conditions prevail, or a disguised restriction on international trade." GATT 1947, *supra* note 2, art. XX, pmbi.

270. Gasoline, Appellate Body Report, *supra* note 269, ¶ 22.

271. *Id.* ¶¶ 26–27.

272. The Appellate Body emphasized that

The U.S. must have been aware that for these established techniques and procedures to work, cooperative arrangements with both the foreign refiners and the foreign governments concerned would have been necessary and appropriate. . . . [I]t appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. . . . But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments and Brazil so as to mitigate the administrative problems pleaded by the United States. *Id.* at 27 (emphasis added).

273. *Id.* n.52.

274. See FREDERICK M. ABBOT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM (1995).

that there is very little relevant case law to offer guidance in such situations. This difficulty stems mainly from the fact that in the past the degree of interaction among different trading units was relatively low compared to today's levels.<sup>275</sup> Whereas such a limited scope of interaction among trading units was not likely to create much tension in the past, the comparatively dense and frequent interaction among such units today is likely to result in more conflict.

Nonetheless, considering an important objective of the global trading community—market integration through free(r) trade—we can reasonably expect that this specific aspect of our attempt to address conflict must stem from “teleological” hermeneutics: the transcendence of conflicting particularities and consolidation of objectives for the global trading system. In this context, the *Tariffication* (1996) case<sup>276</sup> under NAFTA sheds light on this critical legal issue. In this case, the United States accused Canada of violating NAFTA by increasing tariffs<sup>277</sup>; Canada responded that it had merely tariffied quotas (i.e., converted market distorting quotas to more transparent tariffs) in observance of its obligations under the WTO Agreement of Agriculture.<sup>278</sup> Here, two obligations—tariff elimination under NAFTA and tariffication under the WTO—are in conflict. On purely textual grounds, the United States would seem to have had the stronger argument since Article 103 of NAFTA expressly takes precedence over subsequently adopted legislation, such as the WTO Agreement of Agriculture.<sup>279</sup>

However, the panel conducted a “teleological” interpretation to overcome a narrow textual interpretation which might have cast the entire multilateral trading system into a conundrum. Highlighting the NAFTA objective of trade liberalization,<sup>280</sup> the panel adopted a prospective and evolutionary interpretation of the Canada-U.S. Free Trade Agreement Article 710 (“the Parties retain their rights and obligations . . . under the GATT”), which was incorporated into NAFTA, and paved the way for accommodation of WTO rights and obligations within the NAFTA system.<sup>281</sup> Critically, the panel

275. This increased degree of interaction among different trading units is illustrated by the current trend of cross-border mergers and acquisitions (M&A) and investment. For instance, according to the recent “World Investment Report” from the United Nations Conference on Trade and Development (UNCTAD), the total value of international M&A reached \$720 billion in 1999. *Emerging-Market Indicators: Cross-Border Mergers*, *ECONOMIST*, Oct. 7, 2000, at 124. Cross-border mergers rose in value from 0.5% in 1987 to over 2% in 1999 as a share of world GDP. *Id.* Nevertheless, the UNCTAD also shows that “global investment is being done mainly by the largest corporations in the largest economies.” *UNCTAD: Foreign Direct Investment May Top \$1 Trillion—Report*, UN Wire, Oct. 4, 2000, <http://www.unfoundation.org/unwire/archives/UNWIRE001004.cfm#12> (visited Apr. 22, 2001).

276. *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* (U.S. v. Can.), Arbitral Panel Established Pursuant to The North American Free Trade Agreement Article 2008, Secretariat File No. CDA-95-2008-01, <http://www.sice.oas.org/DISPUTE/nafta/english/ca95081a.asp> (visited Apr. 22, 2001) [hereinafter *Tariffication*].

277. See NAFTA, *supra* note 58, art. 302(1)–(2).

278. See *Tariffication*, *supra* note 276, ¶¶ 16, 19.

279. Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 9, Annex 1A.

280. See *Tariffication*, *supra* note 276, ¶ 167.

281. See *id.* ¶¶ 191–201.

viewed the GATT "not as a fixed body of law but as one that was capable of developing."<sup>282</sup> Therefore, the panel was able to legitimize Canada's tariffication pursuant to the WTO Agreement on Agriculture, which would have been otherwise inconsistent with the NAFTA obligation to freeze tariffs.

The panel's finding in this case is highly relevant to the paradigm of convergence and *jus gentium* of international trade proposed here. NAFTA and the GATT/WTO system are separate trading units co-existing and interacting in the global community. Although a high degree of institutional convergence is apparent in these two units,<sup>283</sup> conflicting material obligations remain, due to differences in the respective contexts in which they are based. Nonetheless, considering the ultimate *telos* of the global trading system, these contextual differences should be transcended and de-contextualized in order to escape a legal conundrum. In sum, NAFTA's operations, too, should be based on and conditioned by the same broad objective.

In this regard, RTA-WTO conflicts will only be resolved through "teleological" interpretation, which overcomes narrow textual meanings and in turn fleshes out the *jus gentium* of international trade as a jurisprudential reference.

*Tariffication* represents a model that offers much useful guidance for the task of developing and perfecting a common law (*jus gentium*) of international trade when obligations of different trading units conflict with each other.<sup>284</sup> This case is especially noteworthy in that it was a unanimous decision that transcended the national loyalties of the five panelists.<sup>285</sup> The global trading system stands in desperate need of this type of circumspect jurisprudence amid ever-growing economic interdependency and integration. In the future, this rich jurisprudential development must be allowed to serve as a solid foundation, not only for the development of the *jus gentium* of international trade, but also for the treaty-making enterprise as a whole.<sup>286</sup>

## VI. CONCLUSION

History indicates that regionalism exerts an important influence upon the collective institutional life of human civilization. It is also the basic envi-

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282 *Id.* ¶ 138.

283. See discussion *infra* Part V.B.

284. But see Dale E. McNiel, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffing Bargain*, 22 YALE J. INT'L L. 345, 348 (1997) ("[T]he panel inappropriately interpreted the relevant NAFTA provisions and virtually ignored the relevant provisions of the GATT 1994, the Uruguay Round Agreement on Agriculture, and the Marrakesh Protocol to the GATT 1994.").

285 *Tariffication*, *supra* note 276, ¶ 209.

286. See Roscoe Pound, *Toward a New Jus Gentium*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 2 (F.S.C. Northrop ed., 1949) ("[Law is] experience developed by reason and reason tested by experience."). Cf. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 551 (1993) ("[T]he augmented role of multilateral forums in devising, launching, refining and promoting general international law has provided the international community with a more formal lawmaking process that is used often.")

ronment in which our socio-economic and political relations have been configured. Trade regionalism has created a plethora of institutions collectively known as RTAs. Due to the preferentiality embedded in these RTAs, however, tensions have often arisen vis-à-vis the so-called multilateralism or globalism represented by the GATT/WTO system. Some advocate the formation of RTAs by emphasizing their natural origin and trade-generating effect. Others reject these arguments, attacking the RTAs' protectionist policies and resultant trade-diverting effect. Although the old GATT 1947 Article XXIV attempted to coordinate these two contrasting philosophies on trade regionalism, its success was limited by the weak mandate of the working party as well as by the lack of an effective dispute settlement mechanism. As a result, RTAs proliferated in the absence of legal discipline. It was not until after conclusion of the Uruguay Round that some legal discipline—Article XXIV Understanding as a legislative example and the *Turkish QRs* case as a jurisprudential example—was established to prevent misuse or abuse of Article XXIV.

Nonetheless, these recent legal breakthroughs are limited in breadth as well as depth. Although trade in services under RTAs is becoming increasingly important, GATT Article XXIV sheds little light on this new development, on account of the fundamental distinction between goods and services. More importantly, since most RTAs have already passed the "formation" stage and are operating as real entities, GATT Article XXIV's narrow focus on the formation of RTAs naturally appears obsolete. Moreover, the structural bias against trade regionalism embedded in GATT Article XXIV's treatment of RTAs as "exceptions" is not appropriate to the current trade situation. Therefore, the global trading system requires a new legal vision capable of managing this post-formation situation; that is, an "operational" phase in which numerous trading units, from the WTO to the various RTAs, co-exist and interact in a pluralistic and federalistic fashion. This constructive perspective embraces the recent convergence phenomena of complementarity, assimilation, and alliance. To ensure the proper functioning of these converging trading units, a unified operating system is necessary: the *jus gentium* of international trade, which can result from the hermeneutical convergence of different trading units or from situations of conflict between or among those units.

Finally, one additional point should be noted. The federalistic idea of a global trading community might raise concerns regarding either the over-centralization of global trade governance or else the marginalization of regional trade governance. Nevertheless, the interdependent and interactive operations of the WTO and other regional trading units actually tend to reinforce and solidify regional trade governance. Internally, the degree of cooperation among members of regional trading units will naturally be heightened, because the need to "make one voice" increases as interdepend-

ent interactions deepen. In this regard, the European Court of Justice opinion<sup>287</sup> referred to the “requirement of unity in the international representation of the Community.”<sup>288</sup> Externally, this solidified representation in the global trading community is likely to buttress the identity of certain RTAs and help to retain their position in the community.

To understand the dynamics of the current trading system, and to adjust to future circumstances in an optimal way, the global trading community must overcome the fundamental deficiencies of GATT Article XXIV. Successful completion of this process will be a major step toward breaking down the barriers between regionalism and multilateralism. At the same time, the global trading community must develop a new legal perspective: one that relocates RTAs and the WTO to a common legal terrain. As this process gains momentum, the *jus gentium* of international trade will finally be able to flourish.

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287. Opinion 1/94, In re The Uruguay Round Treaties, 1994 E.C.R. I-5276, [1995] 1 C.M.L.R. 205 (1994).

288. Hilf, *supra* note 225, at 255–56.



