UNIVERSITÀ DEGLI STUDI DI CAMERINO

ANNALI

DELLA

FACOLTÀ GIURIDICA

nuova serie

VOLUME XII - ANNO 2023

ESTRATTO

CAMERINO

2023

UNIVERSITÀ DEGLI STUDI DI CAMERINO

ANNALI

DELLA

FACOLTÀ GIURIDICA

nuova serie

VOLUME XII - ANNO 2023

CAMERINO

2023

COMITATO SCIENTIFICO INTERNAZIONALE

Ignazio Buti, Ignacio De Cuevillas Matozzi, Antonietta di Blase, Luigi Ferrajoli, Giulio Illuminati, Fabian Klinck, Luigi Labruna, Franco Modugno, Pietro Perlingieri, Antonino Procida Mirabelli di Lauro, Francesca Reduzzi, Ingo Reichard, Rosalía Rodríguez López, Martin Josef Schermaier

DIRETTORE SCIENTIFICO

Prof. Rocco Favale

COMITATO DI REDAZIONE

Rocco Favale, Felice Mercogliano, *condirettori*;
Maria Pia Gasperini, Maria Paola Mantovani, Marta Cerioni,
Antonella Merli, Agostina Latino, Stefano Testa Bappenheim

CONTATTI

rocco.favale@unicam.it – felice.mercogliano@unicam.it

SEGRETERIA

Scuola di Giurisprudenza − Università degli Studi di Camerino
Via D'Accorso c/o Campus Universitario
I - 62032 Camerino (MC)

La Rivista subordina la pubblicazione dei contributi alla valutazione positiva mediante referaggio esterno in forma anonima.

ISSN (on line): 2281-3063

Copyright: Scuola di Giurisprudenza. Università di Camerino.

CARLA GULOTTA*

*The Future of Multilateralism and Mega-Agreements: The Hinge Function of GATT Article XXIV***

Table of Contents: 1. Introduction. - 2. The Emerging 'RTAs Economy': Complementing the Multilateral System. - 3. The Capacity of Article XXIV to Extend its Reach to Mega-Agreements. - 4. The Unsatisfactory Past Implementation of Article XXIV and the Transparency Mechanism. - 5. Some '*A Contrario*' Arguments in Favour of a Relaunch of Article XXIV. - 5.1 Article XXIV Potential to Provide for Coherence Between the Multilateral and the Regional/Preferential Levels of Trade - 5.2. Article XXIV Potential for the Modernisation of the Multilateral System - 6. RTA Exceptions as Potential against Inequality. - 6.1. The Role of CRTA and CDT: Time for Convergence- 7. Conclusions: Article XXIV as the Pivot of a New Model of Coexistence between the Multilateral and the RTAs Economy

1. *Introduction.*

Article XXIV of the General Agreement of Tariff and Trade (GATT) is one of the multilateral rules that members of the World Trade Organization (WTO) tended to ignore in the past. Therefore, a reappraisal of its potential could help the WTO to better manage the relationship between multilateral and preferential rules of trading systems. Considering the trend for preferential trade agreements (PTAs[1]) to increase in number, cover new topics

* *Professoressa Associata di Diritto internazionale presso l'Università di Milano-Bicocca, dove insegna International Trade Law, International Economic Law e European Union Law. È co-direttrice del Master 'Sustainability in Law, Finance and Management-SiLFiM' all'Università di Milano-Bicocca.*

** *Contributo sottoposto positivamente al referaggio secondo le regole del single blind peer-review.*

[1] The expression 'preferential trade agreements' will be used in this article as the most general label for trade treaties between two or more countries, independent of their geographical scope and contents, that may spread to further topics, like investments, competition, internal regulation and others. It is noteworthy that in WTO parlance, the expression 'regional trade agreements' is used with almost the same meaning, referring to treaties

and acquire the dimension of mega-regionals, improved interaction between the multilateral and the regional/preferential layers of trade regulations, favoured by a more effective application of Article XXIV, could well lead to a new role for the WTO and to the long-sought new balance of economic power between its members.

This paper intends to discuss this scenario by focusing on the following tools already available to enhance the standing of Article XXIV: the Transparency Mechanism (TM) launched in 2006 and the resulting new functions of the Committee of Regional Trade Agreements (CRTA) and the Committee on Trade and Development (CTD). A new model of interrelation between the multilateral and the bilateral/regional levels of trade regulation, based on procedural improvements and on a substantial evolution of the scope and nature of the 'consideration' of RTAs among WTO members will be proposed. Reshaping the role of the two committees in the broader context of WTO reform could offer an avenue open to external stakeholders – business, workers and civil society – the discussion on a vast array of sensitive topics directly impacting people's lives and related to the effects of preferential agreement on the world economy, increasing the democracy of the multilateral trading system. It could also prevent the formalization of trade disputes in a moment of crisis of the disputes settlement system.

2. *The Emerging 'RTAs Economy': Complementing the Multilateral System.*

Much has been written on the relationship between the multilateral trading system and RTAs. The first wave of studies focused on the effects of the increase in Regional Trade Agreements (RTAs) on the multilateral system[2]. The famous dilemma 'building blocs or stumbling stones' about the role RTAs could play[3] belongs to this phase. The question

providing for reciprocal concessions in the terms of trade among the signing countries, as opposed to 'preferential agreements' where one of the parties unilaterally grants trade concessions to the other party.

[2] The debate on the effects of preferences in international trade dates as far back as the 1940s: for a survey of the literature see J.H. MATHIS, *Regional Trade Agreements in the GATT/WTO. Article XXIV and the Internal Trade Requirement*, Den Haag, 2002, p. 24 ff. and R. SNAPE, 'History and economics of GATT's Article XXIV', in K. ANDERSON, R. BLACKHURST (eds.), *Regional Integration and the Global Trading System*, New York, 1993, p. 273 ff.

[3] Depending on their effect to favour, or at least, not to hinder multilateral trade liberalization or, on the contrary, to prevent multilateral tariff cutting, because of the better terms of trade available inside the preferential area. Jagdish Bhagwaty, who introduced this terminology in 1991, supports the latter theory: see J. BHAGWATY, *Termites in the Trading System. How Preferential Agreements Undermine Free Trade*, Oxford, 2008, p. 81 ff. The third thesis of a neutral effect of regionalism on MFN tariff cutting has been affirmed, based on the

gradually lost its momentum when it became clear that RTAs had already become a relevant, constant feature in the organisation of the international flow of goods and services. Then, attention shifted to how to assure coherence between two different levels of trade regulation bound to merge into the regular structure of global trade.

The first assumption in this paper is that global trade is currently steadily organised within the WTO system and a number of preferential agreements that may or may not have a regional dimension that share sound motives for complementing WTO law[4]. The second assumption is the key role that GATT Article XXIV can play in bridging these two normative levels so that an osmotic and beneficial cross-fertilisation effect can justify the interests of the international economic community in keeping both levels viable and coherent.

This is even more true if the recent tendency towards agreements between several WTO members is acknowledged. From a geographical perspective, this phenomenon affects all continents equally. While the 1992 stipulation of the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico[5] is perceived as a precedent, Europe has become a champion in this practice, with a special format of 'bilateral' agreements of 28 (now, 27) states on one side and one on the other becoming its usual way of regulating external trade.

This format, inherited by the European Union (EU) from the European Community, has developed in two directions. It has spread the substantial coverage of the traditional European arrangements to new areas such as investments, competition, technical regulation, and social and environmental rules (the first example being the 2011 EU-South Korea free trade agreement)[6]. It has also extended the geographical scope of the agreements. Results included starting negotiations with more than one country or allowing countries to join an

results of an empirical study, by R. BALDWIN, E. SEGHEZZA, *Are Trade Blocs Building or Stumbling Blocs? Journal of Economic Integration*, 2010, p. 276 ff.

[4] The thesis that we must start to conceive regionalism 'as a partition if not as a modern structural dimension of universalism itself' (the author's translation) and that this explains the inefficacy of the traditional strict normative assessment of the compatibility of economic integration phenomena, which is due to evolve to new forms of direction and control, was authoritatively expressed by Paolo Picone in P. PICONE, A. LIGUSTRO, *Diritto dell'Organizzazione mondiale del commercio*, Padua, 2002, p. 499 ff., at pp. 531-532.

[5] Previous agreements of regional integration like the European Economic Community, present special features due to the historical and political reasons for their establishment.

[6] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJEU, L 127, 14 May 2011, p. 6 ff., provisionally applied since July 2011 and formally ratified in December 2015.

already signed agreement (e.g. EU–Colombia, Peru and Ecuador)[7], or choosing initially a federal state/regional organisation as a negotiating partner [EU–United States[8], EU–Canada[9]; EU–Mercado Común del Sur (MERCOSUR)][10]. Both lines of change in PTAs can also be witnessed outside the EU and are currently to be considered recurring features of recent agreements of economic integration on the global level.

3. *The Capacity of Article XXIV to Extend its Reach to Mega-Agreements.*

At the root of the introduction of Article XXIV was the idea that among a smaller number of countries, a higher level of economic integration could be reached than among all GATT signatories together[11]. This belief was strengthened by the fact that in the first phase of its application, economic integration agreements mainly involved adjacent countries sharing closer economic needs and cultural traditions, making the creation of an internal market more viable. Today, this format is no longer adopted in most PTAs, which are often stipulated by countries in different regions and tend to acquire the dimension of mega-agreements, both geographically and substantially.

This is the case, for instance, in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which the US initially promoted before eventually withdrawing, leaving the deal to be signed by 11 countries spread over three continents (America, Asia and Oceania)[12]. A similar transcontinental dimension can be found in the

[7] In 2017, Ecuador joined in the Comprehensive Trade Agreement of the European Union with Colombia and Peru, which was provisionally in force for these three countries since 2013.
[8] EU negotiations with the USA for the Transatlantic Trade and Investment Partnership – TTIP, started in 2013, stopped in 2016.
[9] The Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one part, and the European Union and its Member States, on the other part, 30 October 2016, entered into force 21 September 2017, OJ L 11, 14.1.2017, pp. 23-1079.
[10] On 28 June 2019, the EU reached a political agreement for a comprehensive trade agreement with the four countries of MERCOSUR (Argentina, Brazil, Paraguay, Uruguay).
[11] The same introduction of the article in the General Agreement on Tariff and Trade has been criticised with very sharp language in the 1960s and1970s: for a brief as an effective survey of this literature see K. CHASE, *Multilateralism compromised: The mysterious origins of GATT Article XXIV*, in *World Trade Review*, 2006, pp. 1-30, p. 1.
[12] The text of the agreement is available at the following address: https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents.

recent second-generation trade treaties signed by the EU with Canada, Japan and MERCOSUR[13].

The bilateral, multilateral or mega dimension of economic integration agreements does not appear, however, to affect the capacity of Article XXIV to cover them, as the large majority of multilateral preferential agreements still have at their core the creation of a free trade area or customs union (CU), the two forms of economic integration it regulates.

According to the definitions given to these schemes of economic integration in Article XXIV:5 and XXIV:8, participating countries are not required to be adjacent. On the contrary, the case can be made that CUs or free trade areas (FTAs) among non-neighbouring countries better reflect the principle of Article XXIV:4 (i.e., beneficial to trade liberalisation and no infringement of third countries). They tend to be more ready to develop multilaterally. When there is no proximity requirement, all countries could equally aspire to become members of the agreement, thereby achieving what has been called open regionalism[14].

Over the last few years, important examples of more integrated economic areas of a truly regional dimension have come to light. A first example is Africa, where the African Continental Free Trade Area Agreement (AfCFTA) has been in force since 19 February 2023 in 47 of the 54 African states, that signed the agreement on 21 March 2018[15]. We can also mention the Eurasian Economic Union (EAEU) in central Europe[16] and the Regional Comprehensive Economic Partnership (RCEP) among 15 countries in the Asia-Pacific region[17].

Further categorisation of the vast number of PTAs now in force or under negotiation may seem unnecessary. However, the distinction between CUs and FTAs still stands and

---

[13] For an in-depth analysis of the recent praxis of the European Union in the conclusion of preferential agreements see G. ADINOLFI (ed.), *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Turin, 2021.

[14] Where third countries can join in a CU or FTA provided that they are ready to reciprocate tariff reductions on a MFN basis: see J.H. MATHIS, *Regional Trade Agreements in the GATT/WTO. Article XXIV and the Internal Trade Requirement*, *cit.*, *supra* note 2, pp. 140-142.

[15] The text of the agreement is available on the web at the following link: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

[16] On the EAEU integration project among Russia, Belarus, Kazakhstan, Kyrgyzstan and Armenia, which is directly inspired by the model of the European integration process see: https://www.chathamhouse.org/2022/07/what-eurasian-economic-union.

[17] The agreement, which brings together the ten ASEAN members (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), and Australia, China, Japan New Zealand and South Korea, entered into force on the 1st of January 2022.

needs to be stressed, in order to encourage WTO members willing to move towards a more integrated market to choose CUs, if not as the immediate but as the final destination of their roadmap.

CUs are the form of economic integration that the fathers of the International Trade Organization conceived as an acceptable exception to the most favoured nations (MFN) rule, which was then absorbed into GATT. The alternative scheme of the free trade area was unknown before WWII[18] and introduced in GATT Article XXIV at the last moment, perhaps for undeclared US reasons.[19] The long period of application of the European treaties provides a good example of how effective CUs can be as catalysts for economic integration and social welfare enhancement. The frequently repeated statement that the great majority of RTAs are FTAs (and not CUs) should be reread after an accurate analysis of the data.

While it is true that 88% of the 360 RTAs in force as of 30 June 2023 are FTAs[20], what should be duly considered is the geographical dimensions of such agreements. It emerges, perhaps surprisingly, that there is a clear trend towards the formation in almost all the regions of the globe[21], except Asia[22], of one or more CUs providing for duty-free trade and common external tariffs among a varying number of adjoining countries. This is true for Europe (EU); the Commonwealth of Independent States (Eurasian Economic Union)[23]; the Middle East (Gulf Cooperation Council)[24]; Central (Central American Common Market-CACM)[25] and

[18] J.H. MATHIS, *Regional Trade Agreements in the GATT/WTO. Article XXIV and the Internal Trade Requirement*, *cit., supra* note 2, p. 41 ff.

[19] This is the theory proposed by Chase and based on a fascinating investigation in the US National Archives, which revealed the efforts of US policymakers to create leeway in the norm for a free trade agreement that the US Government was negotiating with Canada: see K. CHASE, *Multilateralism compromised*, *cit. supra* note 11, p. 12 ff.

[20] WTO, https://www.wto.org/english/tratop_e/region_e/rtafactfig_e.pdf.

[21] The WTO Committee on Regional Trade Agreements for the operation of the RTAs Data Base comprises the following eleven regions: North America, Caribbean, Central America, South America, Europe, Commonwealth of Independent States (CIS), Africa, The Middle East, East Asia, West Asia, Oceania. <http://rtais.wto.org/>.

[22] Among the main geopolitical areas only Asia - where China, whose adherence to market economy structures is still in doubt, has been conditioning negotiations (think of the RCEP) - does not share this trend.

[23] The members are Armenia, Belarus, Kazakhstan, Kyrgystan and the Russian Federation. See, *supra*, note 16.

[24] The organisation encompasses almost all the Arab States of the Persian Gulf except for Iraq, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates.

[25] Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama.

South America (Southern Common Market-MERCOSUR)[26]; the Caribbean (CARICOM)[27]; Africa (COMESA, EAC, CEMAC, ECOWAS, SACU, WAEMU)[28] and Oceania (Melanesian Spearhead Group-MSG)[29]. While North America cannot be included in the list, given the free trade area nature of NAFTA/USMCA, it must also be acknowledged that the width of the USA internal market spanning 50 states may have rendered the need to create a CU with Canada and Mexico less compelling.

An analysis of the evolution of international trade relations nowadays shows a tendency towards transforming FTAs into CUs over time. An important example is the AfCFTA, where Article 3(d) declares as one of the treaty's general objectives to 'lay the foundation for the establishment of a Continental CUs at a later stage'[30]. A recent study has shown that from 1992 to 2012, the number of countries party to a CU more than doubled[31]. Article XXIV not only covers mega-regionals (including 'across regions agreements') structured as FTAs or CUs but could be used to direct member countries towards this second model of economic integration as more appropriate for complementing the WTO system or to forms of integration open for other countries to join at a later stage, through a relaunch of the paragraph 7 procedure[32].

Affirming the applicability of the Article XXIV exception to the last generation of PTAs does not imply, however, that this provision can cover all their innovative contents. As a typical feature of these agreements, the pursuit of a deeper integration, involving areas external to the WTO mandate, Article XXIV, with its duties of disclosure, can nonetheless

---

[26] Argentina, Brazil, Paraguay and Uruguay.
[27] Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago.
[28] The COMESA Customs Union was launched on 7 June 2009 by Heads of State and Government of the COMESA Authority at Victoria Falls in Zimbabwe. Together with the other African Regional Economic Communities (RECs), COMESA is one of the blocs on which the AfCFTA is being built (Article 1(t) of the establishing treaty, *cit. supra* note 15).
[29] Fiji, Papua New Guinea, Solomon Islands, Vanuatu.
[30] Agreement Establishing the African Continental Free Trade Area, available at https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html
[31] H. GNUTZMANN, A. GNUTZMANN-MKRTCHYAN, *The Silent Success of Customs Unions, Canadian Journal of Economics*, 2019, pp. 178 ff., 179.
[32] This argument is discussed *infra*, Section 6.

offer WTO members a privileged viewpoint to keep pace with the evolution of international trade and investments rules when multilateral trade negotiations are unable to deliver[33].

4. *The Unsatisfactory Past Implementation of Article XXIV and the Transparency Mechanism.*

Contrary to what could be thought, the defence of Article XXIV has only seldom been invoked by WTO members, and its implementation procedure has very rarely been fully applied[34]. According to Article XXIV:7, as updated in 1994 by the relative Understanding on the Interpretation[35], WTO members intending to enter into a CU, FTA or interim agreement leading to the formation of such an area are obliged to notify their intention to the Council of Trade in Goods. A working party (currently substituted by the Committee on RTAs)[36] then draws up a report and submits it to the same Council, which 'may make such recommendations to members as it deems appropriate'[37].

If the notification concerns an interim agreement and no plan/schedule for the formation of such areas within a reasonable length of time is included, Article XXIV:7(b), again as updated[38], mandates the working party to recommend a 'plan and schedule' and forbids the parties in question to maintain or put the interim agreement into force 'if they are not prepared to modify it in accordance with these recommendations'. Under Article V of the GATS and the Enabling Clause, WTO members must also notify RTAs to the Council for Trade in Services or the CTD.

---

[33] Modern PTAs can well serve the present need for normative flexibility and be used to set the rules in new areas (e.g. those that were rejected in the Doha Round), conditioning later regulation at the multilateral level. The effects that the pursuit of 'deep integration' can have on the evolution of the international trading system are examined by Billy A. Melo Araujo, who also investigates the drawbacks of the shift towards preferential agreements on, for instance, the ability of countries to pursue legitimate public interest objectives. See: B. A. Melo Araujo, *Setting the Rules of the Game. The rise (and fall) of Mega-Regionals, Deep integration and the role of the WTO*, *UCLA Journal of International Law and Foreign Affairs*, 2017, p. 151 ff., pp. 156-172.

[34] The only two Appellate Body reports in which Article XXIV has been the object of a thorough process of interpretation are *Turkey – Restrictions on Imports of Textiles and Clothing Products ('Turkey – Textiles')*, circulated on 22 October 1999, WT/DS34/AB/R and *Peru - Additional Duty on imports of certain agricultural products ('Peru - Agricultural Products')*, adopted on 31 July 2015, WT/DS457/AB/R.

[35] WTO, Understanding on the Interpretation of Article XXIV of the General Agreements on Tariff and Trade 1994.

[36] See *infra* note 40 and corresponding text.

[37] WTO, Understanding on the Interpretation, *cit. supra* note 35, para. 7.

[38] *Ibid.*, para. 10.

The procedure was not effective under GATT 1947 and under the 1994 Understanding. A survey of GATT practice reveals that, to date, only four agreements have been considered almost in line with GATT[39], while the only case of declared full consistency is that of the CU formed after the 1993 break-up of Czechoslovakia into the Czech and Slovak republics.

A further attempt to improve Article XXIV implementation procedure was put in place in 1996 when the Committee on RTAs was established with the main task of examining notified agreements and reporting on them to the competent body of the WTO[40].

Despite the establishment of the Committee, open to all WTO members and subject to *consensus* decision making[41], the persisting ineffectiveness of the procedure induced the WTO to launch a new reform in 2006. The introduction of the TM for RTAs marked a substantial step forward on the road to better interaction between multilateral and regional/preferential levels of trade[42].

The aim and merit of the new procedure can be summarised in the WTO's considerable effort to open a permanent channel of communication between the two systems (its own unitary/multilateral one and the scattered/heterogeneous one of the PTAs). This innovative move was intended as a tool of knowledge and harmonisation through discussion rather than a formal but ineffective compatibility assessment[43].

Under the TM, which does not eliminate the previous obligation of notification[44], agreements are to be disclosed in advance through an early announcement of the negotiations

[39] J. J. SCHOTT, *More Free Trade Areas*?, in J. J. SCHOTT (ed.), *Free Trade Areas and US Trade Policy*, Washington, DC, 1989, Institute of International Economics, p. 1 ff.
[40] General Council, Committee on Regional Trade Agreements, Decision of 6 February 1996, WT/L/127, 7 February 1996. On the interpretative activity of the Committee, see A. FABBRICOTTI, *Gli accordi di integrazione economica regionale ed il Gatt/OMC. I parametri normativi e l'opera del CRTA*, in *Diritto del Commercio internazionale*, 2000, p. 281 ff.
[41] Rules of Procedure for Meetings of the Committee on Regional Trade Agreements adopted by the Committee on Regional Trade Agreements on 2 July 1996, WT/REG/1, 14 August 1996, Rule 33.
[42] General Council, Decision on a Transparency Mechanism for Regional Trade Agreements of 14 December 2006 (Transparency Mechanism Decision), WT/L/671, 18 December 2006.
[43] Criticism on the possibility of an overall political assessment of RTAs within a body of diplomatic nature like the CRTA has been expressed by P. HILPOLD, *Regional Integration According to Article XXIV GATT – Between Law and Politics, Max Planck Yearbook of United Nations Law*, vol. 7, 2003, pp. 219 ff., at 239.
[44] *Ibid.*, para. 1.

or of their signing, and all relevant information on entry into force or provisional application is to be communicated to the WTO Secretariat[45].

Compulsory notification has been reinforced, so that it is mandatory for the parties of a forthcoming agreement to make available to the Secretariat all data and texts (schedules, annexes and protocols included), possibly in an electronic format, for uploading on the WTO website[46]. Notification must be swift[47], as it serves a dual purpose. It allows the Secretariat to draw up a factual presentation of PTAs, which, in turn, makes possible the 'consideration' of the agreements by WTO members.

The Transparency Decision seeks to make this part of the procedure effective. The consideration process encompasses a written exchange of information among the parties and interested third countries, that can pose specific written questions requiring thorough answers. An oral discussion is devoted to each PTA before the CRTA for agreements notified under GATT Articles XXIV or V and before the CTD for agreements falling under paragraph 2(c) of the Enabling Clause.

It is noteworthy that RTA considerations among developing countries did not take place under the previous procedure, which merely provided for their notification.[48] Perhaps because of the background of its adoption – in the wake of the first efforts to put into place the Doha Round mandate – the TM devotes special attention to developing countries' needs. Besides extending the consideration process to the treaties entered into by these countries, there is also a commitment to put them in the condition to take a full part in the mechanism and provide them with technical support to fulfil their duties[49].

The requirements briefly described above would reach a considerable level of transparency when duly fulfilled by the parties involved in the PTAs. However, this is not always the case. A considerable number of preferential agreements are either not notified or notified in an incorrect way (late or cumulative notification). To address this problem, the

[45] *Ibid.*, paras. 1-2.
[46] *Ibid.*, paras. 3-4.
[47] It should take place 'as early as possible' which means no later than directly following the parties' ratification and before the application of preferential treatment between the parties: *ibid.*, para. 3.
[48] The fact that now all RTAs 'are treated in the same way and subject to the same procedures' is deemed as one of the great changes brought about by the Transparency Mechanism by R. ACHARYA, *WTO Procedures to Monitor RTAs, ASIL Proceedings*, 2017, pp. 89-90, 90.
[49] Transparency Mechanism Decision, *cit. supra* note 42, paras. 18-19.

RTA Committee periodically publishes the list of the agreements still awaiting notification to induce the parties to comply[50].

Another important step taken to enhance the transparency potential of the 2006 procedure was to begin considering, under TM procedures, RTAs stipulated with non-WTO members[51].

In light of the above, the case can be made that while panels and the Appellate Body (AB) continue with their efforts to elucidate the textual ambiguities in Article XXIV and clarify its 'permissive reach', the potential of this provision has increased enormously with the launch of the TM.

However, the new procedure also has its weaknesses. It has been observed that in the TM decision, the General Council codified the practice of members ignoring the obligation to notify interim agreements and provided them with a way to avoid the risk of facing a binding recommendation not to maintain the agreements or put them into force[52]. Although this argument is correctly grounded in the text of Article XXIV:7(b) and para.10 of the Understanding on the 1994 implementation, which confers this power on WTO members, it is to be acknowledged that it has been only rarely exercised[53].

The mild approach adopted by the WTO in making use of the potential of Article XXIV – clearly influenced by the fear of members that a tough stance towards a PTA signed by some member countries today could result in a similar attitude towards their own PTA tomorrow – is not likely to change now that all WTO members are signatories of one or more preferential agreements[54]. The present situation, and how it is likely to evolve, means that the enhanced transparency obtained with the 2006 procedure is certainly promising. It may be even 'a blessing', as the mild approach of the WTO to RTAs has been judged[55].

---

[50] RTAs already appeared in factual presentations but not yet notified amounted to 56 in June 2023: see document WT/REG/W/178, 26 June 2023.
[51] The decision was issued at the 52nd Session of the Committee on RTAs, WT/REG/M52, 10 March 2009.
[52] L. BARTELS, *Interim Agreements under Article XXIV GATT*, *World Trade Review*, 2009, p. 339 ff.
[53] See *supra* Section 4, note 34 and corresponding text.
[54] The last being notoriously Mongolia, that in 2016 notified to the WTO the Economic Partnership Agreement reached the previous year with Japan.
[55] The expression is formulated by Petros Mavroidis, who also affirms that 'the shift towards a mere exercise in transparency (facilitated be the WTO Transparency Mechanism) should be welcomed with relief': P. MAVROIDIS, *Always look at the bright side of non-delivery: WTO and Preferential Trade Agreements, yesterday and today, World Trade Review*, 2011, pp. 375 ff., 386.

5. *Some 'A Contrario' Arguments in Favour of a Relaunch of Article XXIV*.

An '*a contrario*' reasoning makes very clear the rationale behind enhancing the implementation of Article XXIV in the frame of the WTO reform. Without this provision, the assessment of RTAs falling under Article 41:1(b) of the Vienna Convention on the Law of Treaties (VCLT), WTO members would lose a powerful tool for assessing the evolution of international trade towards an ever more fragmented environment of regional or, more generally, preferential systems of rules (note the provisional application of the 2006 TM). In the absence of the provision, the multilateral system would be deprived of the power to condition the content of preferential agreements (now granted under Article XXIV:7 (b), Understanding on the Interpretation of Article XXIV, par. 10) whose exercise should be relaunched. Finally, it could be argued that disputes on the legality of RTAs might fall beyond the full reach of the DSU and come under the jurisdiction of international arbitrators or judges whose standard of review would probably be inadequate for deciding commercial disputes affecting other WTO members.

Starting with this last point, although cases dealing *ex professo* with claims under Article XXIV have been extremely rare, in the last few years, WTO members have shown rising confidence in WTO panels and the AB. This is confirmed by the increasing number of new cases started every year, unaffected by the present impasse in the dispute settlement system, due to strictly political reasons and completely ascribable to the previous American administration.

In the present situation, the panels and, if functioning, the AB apply the pertinent multilateral trade rules and, where relevant, international law whenever vested with cases on the consistency of PTAs with WTO law. The proceedings are conducted under the Dispute Settlement Understanding, which has incorporated the nearly 40-year-old GATT 47 dispute resolution practice. This amounts to great expertise and standards of review elaborated over time to cope with the special needs of international trade adjudication.

In a multilateral trading system without Article XXIV (and similar provisions for trade in services and developing countries), Article 41 of the VCLT, which regulates the modification of a multilateral treaty among some of the original parties, would apply to

RTAs. This provision has two requirements: that the modification does not impact negatively on third parties and that it is not 'incompatible with the effective execution of the object and purpose of the treaty as a whole.' In its second paragraph, Article 41 states that, unless the treaty itself disposes differently, the parties that have decided to change the terms of their agreement among themselves must notify the other parties of their intention to do so and of the content of the modification.

The application of such a general discipline to the specific case of multilateral trade treaties appears to be highly inadequate. The same legitimacy of *inter se* agreements derogating the rule of the MFN, which is at the root of the multilateral trading system and clearly instrumental in reaching its main purpose, would be questionable.

Arguably, this is the reason why the AB in the *Peru-Agricultural Products* case[56] was so determined to prevent VCLT Article 41 from covering modifications of GATT or GATS. In stating that GATT Article XXIV prevails over Article 41 of the Vienna Convention, the AB explained that the former provision, which 'specifically permits departures from certain WTO rules in FTAs', compensates such departures by imposing 'the fulfilment of the rule that the level of duties and other regulation of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA'[57]. Only on these conditions, therefore, can the system tolerate a failure to respect the MFN principle.

What can be argued from the above excerpt is that the AB identifies in Article XXIV the indispensable provision that coordinates GATT with preferential agreements on trade in goods, while GATS and the Enabling Clause carry out the same function, respectively, for treaties on trade in services and treaties stipulated between developing countries[58].

It can be added that the same coordinating role is performed for CUs by paras. 5(a) and 6 of Article XXIV, which confirm for such agreements the legitimacy of modifying the duties applied on goods from third countries, provided that they 'shall not on the whole be

[56] Appellate Body Report, *Peru – Agricultural Products*, *cit. supra,* note 34.
[57] *Ibid.*, para. 5.112.
[58] *Ibid.*, para. 5.113.

higher or more restrictive' and that the procedure in Article XXVIII is followed and commenced before tariff concessions are modified or withdrawn[59].

Although the decision has been criticised on the grounds that, in the specific case, the requirements in Article 41 of the Vienna Convention were met (and the agreement could have been justified under that provision) given the small influence of Peru's tariffs on the overall equilibrium of multilateral terms of trade, it can be argued that such a line of thought could not be followed for one of the new mega-PTAs, whose effects on international flows of goods and services are far heavier[60].

It is highly unlikely that Article 41 of the Vienna Convention could act as a broad defence for PTAs, and without coverage from it or GATT Article XXIV, all the preferential/regional level of trade regulation would develop outside the perimeter of WTO legality. In other words, the outcome would be to disconnect the multilateral trading system totally from the reality of international trading relations, with disputes between PTA members decided under the special rules provided for in those agreements[61].

5.1 *Article XXIV Potential to Provide for Coherence Between the Multilateral and the Regional/Preferential Levels of Trade.*

The merits of Article XXIV, however, are far greater than those of a purely coordinating tool between autonomous normative systems. Thanks to the procedural rules in paragraph 7, as interpreted and integrated by the 1994 Understanding and the 2006 TM, WTO members are given the possibility to be constantly aware of the changes that new bilateral regional or more recent mega-agreements introduce into international economic relations. This result would be only partially attained under Article 41:2 of the Vienna

[59] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariff and Trade, para. 4.

[60] Gregory Shaffer and Alan Winter, commenting on the decision, express the reported view although they recognise that Peru's Price Range System affected other WTO members' rights: see G. SHAFFER, A. WINTER, *FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law*, in *World Trade Review*, 2017, p. 303 ff., note 21 and corresponding text.

[61] On the current refuse of the Appellate Body to decline its jurisdiction in cases where parallel proceedings have been started at regional and WTO level see STOLL, '*Mega-Regionals: Challenges, Opportunities and Research Questions'*, in T. RENSMANN (ed.), *Mega-Regional Trade Agreements*, Cham, 2017, p. 3 ff.

Convention, which limits the duty of information to the intention to enter into a modification treaty and disclose the modifications to the original agreement.

On the contrary, the reinforcement over time of the notification duties of Article XXIV[62] has led to a multifaceted TM that performs different functions. The first and most obvious function is, of course, informational. Countries deciding to enter a modification agreement (or enlarge the scope of an existing one) are obliged to make an early announcement to the WTO Secretariat, followed, normally directly after the ratification of the RTA, by the notification of the text of the agreement and its annexes and within 10 weeks [63] by the presentation of copious data anticipating the effects of the changes in the terms of trade applied between the parties[64].

The effect of these rules is enhanced by digitalisation. All information and data are submitted in an electronic format, and widespread availability is granted through uploading on the WTO website in a specific RTAs database run by the Secretariat.[65]

Another crucial function of the RTA procedural rules, as developed in the 2006 TM, is to allow WTO members to fully investigate the contents of the new agreements in an open debate among all interested parties and see that the new treaties remain within the limits of the exception granted in Article XXIV (as well as in GATS Article V and in the Enabling Clause). The outcome of this interaction between the two normative levels is the possibility for new PTAs to be adopted without infringing on the previous multilateral obligations of the constituent countries.

At the core of this part of the procedure is the factual presentation by the Secretariat of the new agreements, which are then put to public consideration by WTO members. The document prepared by the Secretariat, in constant cooperation with the parties to the modification agreements, becomes the basis of an exchange of questions and answers that shed light on the whole structure of the treaty. Parties are asked not only to disclose the new

[62] See *supra*, Section 4.
[63] Twenty for agreements involving developing countries.
[64] Transparency Mechanism Decision, *cit. supra* note 42, paras. 1-4, 7-8 and Annex on Submission of Data by RTA Parties.
[65] The website is accessible at <http://rtai.wto.org >.

rules but often also to explain their interrelation with previous ones and face objections possibly leading to adjustments.

Through the 2006 procedure, WTO members can condition the content of the new agreements without the need for formal and binding recommendations. This last feature is particularly relevant considering the scarce use in the past of the recommendations of paragraph 7(b)[66]. However, it has to be stressed that the provisions of Article XXIV:7(b) and paragraph 10 of the 1994 Understanding on Interpretation have never been abrogated or waived by the later TM, which, on the contrary, expressly confirms the substance and timing of notification duties and, more generally, of members' rights and obligations under other WTO agreements[67].

Given that the TM is only provisionally applied, the power conferred on WTO members in Article XXIV should not be undervalued, especially as the increasing complexity of the interrelation of sometimes overlapping agreements might call for a reassessment of the power to intervene with binding recommendations for granting coherence between RTAs and WTO law.

It must also be noted that the need for coherence between the multilateral system and an RTA is at times fulfilled through specific provisions of the latter or its annexes. This happens, for instance, in the Eurasian Economic Union, whose members have stated in a separate 'Treaty on the Functioning of the CUs in the Framework of the Multilateral Trading System' that the provisions of the WTO agreement 'shall become part of the framework of the CUs'[68] for each of the Union members upon its entrance into the organisation. In such cases, the contribution of the TM is to provide a forum in which solutions given in single PTAs to the connection between the preferential and the multilateral systems of trade rules can be disclosed and discussed among WTO members. This could facilitate a debate on how to systematise the reciprocal interaction of the two systems. On this point, however, there is a lack of political consensus[69].

[66] See *supra* Section 4.
[67] Transparency Mechanism Decision, *cit. supra* note 42, para. 1.
[68] Article 1:1 of the Treaty.
[69] For a discussion of this point see, *infra,* the following Section.

The potential of Article XXIV to bring coherence between the multilateral and regional levels of trade regulation has been enhanced by the AB, which has underlined the importance of Article XXIV:4 as a benchmark for assessing whether a measure adopted in an FTA can be deemed compatible or not with WTO law[70]. According to the AB, Article XXIV cannot be considered a broad defence for measures that roll back on members' rights and obligations, given the relevance in paragraph 4 of the purpose of the modification agreement, which is to facilitate trade and closer integration between its constituent members and not to raise barriers to trade with third countries[71]. Taking the AB reasoning further, it can be argued that if the purpose of closer integration and the non-infringement of third parties' rights are recognised as the main criteria for assessing the compatibility of a PTA, the internal requirements in Article XXIV are of secondary importance and a more flexible application of the exception could be allowed.

It may seem unnecessary to observe that more flexibility in the assessment of PTAs could favour the consolidation of a non-competitive relationship between the multilateral and regional dimensions of international trade. It may also be argued that it is the same nature of exception in Article XXIV that – giving way to the acceptance of RTAs in the multilateral system – only allows the recognition of those agreements that respect the aims and values of that very system of rules, except for the derogation from 'certain provisions'. The application of the said Article implies more than prohibiting the modification agreement from violating a provision 'derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole', as of Article 41:1(b)(ii) of the Vienna Convention.

It has previously been argued that Article XXIV does not limit itself to carving out breathing space for FTAs and CUs but introduces requirements that they must satisfy to be compatible with the multilateral system. It can now be added that, with the exception of the limited derogations allowed under Article XXIV, RTAs have to respect all other GATT principles and rules as interpreted and applied by the panels and the AB. Following this line of thought, an RTA could not be justified under Article XXIV if, for instance, it violates the

[70] Appellate Body Report, *Peru - Agricultural Products, cit. supra* note 34, para. 5.116.
[71] Appellate Body Report, *Turkey – Textiles*, *cit. supra* note 34 para. 57.

principle of sustainable development or refuses to grant special or differential treatment to developing countries.

5.2. *Article XXIV Potential for the Modernisation of the Multilateral System.*

In the last 13 years, the need for all categories of RTAs – including, for the first time, developing countries – to undergo members' consideration has led to the collection through the TM of a huge amount of data of central importance for any debate on the systemic relationship between the emerging RTA economy and the multilateral system.

The need to clarify and improve WTO rules applying to RTAs was affirmed in the Doha Declaration and initially bestowed on the Negotiating Group on Rules[72]. Proposals to clarify the text of Article XXIV were advanced without success, and in 2015, the study of the systemic implications of regional/preferential agreements for the multilateral trading system was mandated to the Committee on RTAs[73]. It is, however, somewhat disappointing that in 2018, the item was removed from the Committee agenda on the grounds of a lack of progress on the issue[74].

It can be surmised that the WTO members represented in the CRTA are not at present ready to reach an agreement on a theoretical systematisation of the relationship between the multilateral and regional levels of trade regulation. At the moment, they are capable of tackling single issues as they emerge.

What is clear is that the transparency rules in GATT Article XXIV and in the 2006 mechanism are of invaluable help in connecting RTAs and the WTO system. The drafting of the factual presentation allows the WTO Secretariat to examine the specific contents of the new agreements with the assistance and clarification, where needed, of the contracting parties, thereby ensuring that innovative provisions are correctly understood. The following consideration process broadens this examination by extending it to all WTO members, who are made aware in this way of the lines of development in trade relations among other

[72] Doha Declaration, para. 29.
[73] See Paragraph 28 of the Nairobi Ministerial Declaration, which also reiterated the intention to work for the transformation of the TM into a permanent Mechanism, WT/MIN(15)/DEC, adopted on 19 December 2015.
[74] WTO, Report of the Committee on Regional Trade Agreements to the General Council, 30 November 2018, WT/REG/29, para.10.1.

countries. Through this channel of communication, the most recent trends in regulating trade and investments, competition, domestic regulation, and environmental and social issues enter the multilateral system and become objects of debate among members.

When the documents of the Commission on RTAs are analysed, it emerges that at the heart of the members' interests in the process of consideration are the new chapters of the agreements that go beyond WTO law (investments, e-commerce, competition, small and medium enterprises) or, at least, go beyond its current discipline (new rules on trade in services, intellectual property, internal regulation)[75].

Therefore, innovative solutions begin to circulate, so that possible new regulations are envisaged. The relevance of RTA culture for the modernisation of the multilateral trading system is confirmed by a statement in the WTO 2019 Annual Report that delegations of the 76 members of the Joint Statement on Electronic Commerce 'introduced their proposals, shared their national experiences and provided textual examples from their RTAs, where e-commerce is often covered more thoroughly than it is multilaterally'[76].

Electronic commerce is one of the four 'Joint Initiatives' launched in the 11th Ministerial Conference by groups of like-minded WTO members to start negotiations on areas that have become of interest in the international economic community. It is no coincidence that at least three of these areas (investment facilitation, addressing difficulties for micro, small and medium enterprises, e-commerce), and, at times, a fourth (trade and female empowerment)[77], have recently become the subject of specific, though rarely binding provisions in many preferential treaties. The Joint Initiatives are open to all other WTO members and strongly resemble the function of the EU's enhanced cooperation[78], aiming at allowing a limited number of states to reach an advanced level of integration.

---

[75] See the statements of the representatives of the United States, Canada, the European Union, Japan and Australia at the meeting of the CRTA of 9–10 April 2018, WT/REG/M/88, 16 May 2018, paras. 1.57-1.69.

[76] WTO, Annual Report, 2019, p. 49, available at https://www.wto.org/english/res_e/publications_e/anrep19_e.htm. Research presented on 9 April 2019 by INES WILLEMYNS, PhD candidate at Leuven Centre for Global Governance Studies, identified 87 RTAs containing e-commerce provisions through the technique of text-mining: abstract available at https://ghum.kuleuven.be/ggs/events/giels-ines-willemyns-9-april-2019-draft-edits-iw.pdf.

[77] See AFCFTA Protocol on Trade in Services, Article 27 (d), which calls State Parties, in collaboration with development partners, to mobilise resources to 'improve the export capacity of both formal and informal service suppliers, with particular attention to micro, small and medium size; women and youth service suppliers'.

[78] See Article 20 TUE and Articles 326-334 TFEU.

While the Joint Initiatives are an example of normative schemes and solutions passed from regional preferential agreements to the multilateral trading system, the opposite flow can also be witnessed. A large number of PTAs incorporate provisions taken from multilateral WTO agreements or build on them. The new research methodologies based on big data analysis could be of help in identifying them. It is noteworthy that provisions on general exceptions inspired by GATT Article XX or so-called TRIPS Plus are recurrent. Although this last trend can raise problems of interpretation and coherent application of the competing norms,[79] it can be argued that the osmotic relationship between multilateral and preferential levels of trade regulation offers WTO members the possibility to choose the most appropriate system of rules for all needs. It goes without saying that Article XXIV is the connecting point between the different legal layers.

6. *RTA Exceptions as Potential against Inequality*.

Article XXIV[80], which determined a mechanism for the legal introduction of different terms of trade among WTO members, should enjoy particular respect today, given the recognition that one of the main problems in our modern economies is the growing level of inequality within and between countries. If the law must give way to the evolving needs of society, then we should also recognise that by allowing a regionalisation or differentiation of terms of trade among countries willing to move towards a deeper liberalisation, Article XXIV has gained rather than lost momentum.

At present, even the possible trade-diverting effect of regional integration may appear less threatening than in the past, even worthwhile, if it can reduce the development gap among the members of the multilateral trading system[81]. From this perspective, it can be argued that partnership in an economic integration agreement with more advanced countries

[79] Peter-Tobias Stoll has spoken of a 'hybrid' legal structure that requires a careful design to reach coherence: T. RENSMANN, *Mega-Regionals: Challenges, Opportunities and Research Questions*, *cit. supra* note 54, p. 11.
[80] The argument can be extended to GATS Article V for RTAs in the services field.
[81] The negative trade diverting effect of customs unions was first theorised by J. VINER, *The Customs Union Issue*, New York, 1950. It has been observed, however, that the trade diverting effect of preferential trade areas is less relevant today. The reason is that while duties are no longer the main issue in international trade, non-trade barriers, like internal regulations or standards, which are at the core of modern PTAs, tend to be applied on an MFN basis: P. MAVROIDIS, *Dealing with PTAs in the WTO: Falling through the Cracks between Judicialization and Legalization, World Trade Review*, 2015, pp. 107, ff., 110 ff.

can foster economic growth even more than benefits from a unilateral scheme of preferences or an agreement among developing countries only, signed under the Enabling Clause.

The precedent of the EU shows how, through common membership in a CU evolving in a deeper format of economic integration, less advanced economies can be led into more efficient trade relations conducive to economic and social development. Such an effect cannot be reached through unilateral measures. Neither is it conceivable in an organisation of universal standing like the WTO.

However, a mega-regional like the CPTPP has established a trade and investment environment where Australia, Canada, Japan and Singapore can foster the economic development of their less advanced partners through commitments on cooperation and capacity building, business facilitation, regulatory coherence, common rules on government procurement, cross-border services, competition and other common rules.

In addition, the more worrisome aspects of these preferential agreements, characterised by an asymmetry in economic power between members – TRIPS Plus provisions applied on pharmaceutical products, for instance[82] – could be opposed if an adequate level of transparency were granted.

6.1. *The Role of CRTA and CDT: Time for Convergence.*

The positive effect that the establishment of a more integrated market can produce on the economic growth of its constituents explains why, in 1979, the GATT contracting parties decided to grant special treatment to regional and global arrangements among less-developed countries for the mutual reduction/elimination of tariffs or non-tariff measures on products imported from one another[83]. The double regime they introduced has led, over the years, to debates and even open disagreements among WTO members over the right choice of applicable rules (GATT Article XXIV or Enabling Clause) for specific agreements.

[82] The drawbacks of this scheme on the access to essential medicines in Asia, if the leaked RCEP chapter on intellectual property would ever come into force, are discussed in A. CHANDER, M. SUNDER, *The Battle to Define Asia's Intellectual Property Law: From TPP to RCEP*, *UC Irvine Law Review*, 2018, p. 331 ff. It can be surmised that more effective transparency duties at multilateral level could help civil society organizations and the NGOs of interested countries to lay their claims.

[83] GATT Contracting Parties, Decision of 28 November 1979 (Enabling Clause), L/4903, para. 2 (b).

The most renowned is that of the Gulf Cooperation Council (GCC), a CU among six Middle East countries, that was first notified under GATT Article XXIV, then under the Enabling Clause and finally under Article XXIV of GATT[84].

By extending the consideration procedure to RTAs between developing countries, the TM has entrusted the CTD with their relative implementation. Although the Director-General has been called 'to ensure consistency in the preparation of the WTO Secretariat factual presentations for the different types of RTAs'[85], the time may be right to bring the competence of the CRTA and CDT to converge on the specific issue of RTA considerations.

The blurring boundaries between developed and developing countries, with the appearance of a category of emerging economies of dubious classification, the reduction of the differences between the two procedures after the 2006 introduction of the consideration process for RTAs notified under the Enabling Clause, and the concentration in the CRTA of all other functions dealing with RTAs (relating to services, involving non-WTO members) all render the allocation of the consideration of these agreements to two different bodies obsolete and counterproductive.

The ratio of maintaining a different normative regime has general agreement, but the specific expertise of the two committees on their respective areas of competence calls for a joint examination of all agreements notified (also or only) under the 1979 Decision.

However, it must be acknowledged that one of the most controversial issues hampering the review of the TM and its transformation into a permanent mechanism is the firm refusal by India to have RTAs among developing countries considered before the CRTA, while the United States proposal includes 'consolidating all RTAs under the CRTA'[86].

In short, a first step towards the proposed improvement of the procedure has already been made *de facto,* as cumulative (or dual) notification – to both CRTA and CTD – has now become frequent. Nonetheless, a review of the TM could make this procedure the rule.

---

[84] The reasons for these contradictory choices are investigated by B. SHARP, *Comparing Preferential Trade Agreement Scrutiny under GATT Article XXIV and the Enabling Clause: Lessons Learned from the Gulf Cooperation Council*, *Manchester Journal of International Law*, 2010, p. 56 ff.
[85] Transparency Mechanism Decision, *cit. supra* note 42, para. 18, note 3.
[86] CRTA, Note on the Meeting of 9–10 November 2017, WT/REG/M/87, para. 1.43, para. 1.46.

In conclusion, the case can be made that, in improving the interaction between the multilateral and the regional/preferential layers of regulation of trade, Article XXIV may help reach the long-sought new balance of economic power among WTO members.

7. *Conclusions: Article XXIV as the Pivot of a New Model of Coexistence between the Multilateral and the RTAs Economy*.

For all the reasons mentioned above, a reappraisal of Article XXIV could help WTO members better conceptualise and manage the relationship between multilateral and new preferential trading systems.

In the reform perspective of the World Trade Organization, the GATT Article XXIV enforcement mechanism could be the pivot of a new model for the relationship between the multilateral and the preferential trading systems.

The building blocks of the model should be identified: procedurally, in the strengthening of the TM through (i) the provision of a joint deliberative role of the CRTA and the CTD and (ii) the strengthening of the administrative support-function performed by the Secretariat. From a substantive viewpoint, the model should be articulated in two elements that, at the outcome of the investigation conducted, appear necessary to overcome the inadequacy of Art. XXIV to regulate the coexistence of the multilateral with the various preferential systems of rules: (iii) the extension of the principle of transparency to the content of the preferential agreements under consideration, in order to ensure the certainty of the terms of trade applicable to the transactions, a central value for proper competition between economic operators on international markets;[87] (iv) the attribution to the deliberative phase before the CRTA and the CTD of a permanent monitoring function of the application of the agreements. The joint committees would then perform as a diplomatic forum for the identification and management of possible friction between the different systems (multilateral and preferential) of rules on international trade.

[87] On the importance of ensuring transparency to the content of RTAs, see I. LEJÁRRIAGA, *Multilateralising Regionalism, Strenghtening Transparency Disciplines in Trade*, OECD Trade Policy Paper No. 152, 2013; R. WOLFE, *Letting the sun shine in at the WTO: How transparency brings the trading system to life,* Staff Working Paper ERSD-2013-03.

Concerning the first point, it is sufficient to refer to the previous paragraph, regarding the second, it is noted that the Secretariat can give impetus to the entire transparency mechanism through the preparation and sharing of the factual presentations. The accumulated delay in this respect, attributable to the parties' failure to notify the agreements, could be overcome through the *ex officio* acquisition of the agreements by the Secretariat.[88] The latter, moreover, is already committed to making the transparency procedure more efficient by digital technologies[89].

The success of the proposed model of coordination between the multilateral system and the preferential trade areas that complement it, depends mainly on its ability to attest to the discussion in the CRTA and TDC as the international forum for the 'disclosure' of the contents of trade agreements that complement international trade rules[90]. At a logically later stage, as the place where possible disagreements can be discussed in a diplomatic context conducive to the identification of expedients and mutual concessions capable of preventing the formalisation of disputes.

The minutes of the CRTAs, with the question-and-answer records of notified agreements, reveal how effective the consideration procedure can be in allowing WTO members to enquire into the contents and anticipated effects of the notified treaties. Consideration might be given to issues such as the possibility of RTAs to develop their own rules on trade defense measures, rules of origin and to the compliance of these rules with WTO law[91]. A stronger determination of WTO members to take full advantage of the powerful tools of transparency offered by the implementation procedure of WTO rules on

[88] According to the TM Decision, para. B (3) the notification by the parties must take place "as soon as possible", but in any case, "no later than directly following the parties' ratification of the RTA": once ratification has taken place, inaction by the parties could trigger the acquisition *ex officio* by the Secretariat, possibly at the urging of another WTO member state.

[89] CRTA, Report (2023) of the Committee on Regional Trade Agreements to the General Council, 28 November 2023, WT/REG/34, para. 7.

[90] China has recently expressed this view, proposing the discussion in CRTA of 'novel issues' in RTAs, such as the environment or MSMEs, as aimed at ensuring the consistency of the new rules with the WTO system*: Communication from China, Fulfilling the Mandate and Strengthening the function of the CRTA*, WT/REG/W180, 22 June 2023.

[91] The *lacunae* of Article XXIV in ensuring transparency concerning these (and other) issues are observed by M. OVÁDEK and I. WILLEMYNS, *International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice, The European Journal of International Law,* Vol. 30 no. 2, 2019, p. 361 ff.

RTAs could serve to develop a mutually beneficial relationship among the institutions of the multilateral system and the organisational structures of the new FTAs and CUs.

In this framework, what is most striking is that the so-called 'last-generation trade agreements' and 'mega-regionals' do not appear to raise particular concerns among WTO members, and they undergo standard procedural rules. Proper use of these rules could serve as a tool for anticipating possible conflicts between the multilateral and new preferential systems of trade regulation and tackling non-conformity issues before the emergence of formal disputes. In that preliminary stage, systemic inconsistencies can be dealt with from a political rather than strictly legal aspect. More room for flexibility could also help in reaching acceptable solutions for accommodating non-converging interests.

Although the procedure introduced in 2006 with the TM does not provide for a compatibility assessment of the notified agreements leading to binding recommendations, it may be argued that the strengthening and widening of the transparency outcome of the procedure may serve the interests of multilateralism better than a legalistic, but ineffective, approach[92]. A strong argument in support of this statement is that many of the new-generation PTAs would escape the WTO's reach and that the TM procedure brings them back under a multilateral examination open to all members.

Finally, the fact that the 2006 procedure was introduced to complement the previous system and has only *de facto* come to substitute it,[93] leaves the door open for members to oppose any PTAs non-conforming to the rules and perceived as threats to the WTO system[94].

A retrieval of the recommendations of Article XXIV:7(b) could enable WTO members not only to maintain control over compatibility with the WTO law of economic integration agreements in a phase preceding and hopefully forestalling a formal dispute settlement but

[92] For an assessment of the relevance of non-binding instrument in conditioning the conduct of states, especially in the economic domain, see G. ADINOLFI, *Soft Law in International Investment Law and Arbitration, The Italian Review of International and Comparative Law,* Online Publication, 15 October 2021.

[93] See P. MAVROIDIS, *Always look at the bright side of non-delivery: WTO and Preferential Trade Agreements, yesterday and today*, *cit. supra* note 48, p. 375 ff., p. 377; ID., *Dealing with PTAs in the WTO*, *cit supra* note 81, p. 108.

[94] This leeway with a possible future adoption of recommendations (as of Article XXIV:7(b)) requiring modifications to a PTA whose effects can impair WTO members may become highly relevant if the agreement is, for instance, a mega-regional like the AfCFTA, introducing new terms of trade for more than 50 states covering a whole continent.

could also direct parties willing to enter such agreements towards the establishment of CUs – more beneficial for third countries – or towards treaties designed to enhance the economic growth of developing countries.

A final thought concerns the future relationship between the multilateral and regional/preferential systems of trade regulation. The texts of the main mega-regionals reveal the recurrent intent of the parties of the new agreements to act in conformity with WTO law, and GATT Article XXIV is the provision that allows this result to be reached.

This paper notes the tendency of economic integration agreements to extend content and geographic dimensions and recent times have seen the birth of at least three mega-regionals acquiring continental dimensions: the AfCFTA, and, in the Asia-Pacific region, the CPTPP and the RCEP, which will probably compete to develop into an FTA encompassing the whole region[95].

While the CPTPP has been notified according to all relevant provisions, the AfCFTA still has not[96]. Assuming this is only a delay – as quite often happens – in the accomplishment of notification duties, the full contents of both agreements will be disclosed to other WTO members and will undergo their consideration.

Thanks to GATT Article XXIV (as well as GATS Article V and the relevant parts of the Enabling Clause), these two areas of economic integration have the potential to develop in full harmony with the multilateral trading system. This can happen when they possess characteristics going beyond the sole trade dimension, responding to different needs of the respective contracting parties and possibly assuming different approaches to the regulation of similar subjects. The African and Asian FTAs, while regulating investments, could end up embracing diverging systems of rules. However, their adherence to the main rules and principles of the multilateral trading system can be taken as a precondition, because through the relevant WTO provisions on RTAs (primarily Article XXIV), their content is to undergo the disclosure procedure required by the TM.

In the current impasse of the multilateral trading system, the viability of projects allowing WTO members to move towards stricter economic integration and update their

[95] See X. JI, P. B. RANA, *A Deal that Does Not Die: The United States and the Rise, Fall and Future of the (CP)TPP*, in *Pacific Focus*, 2019, pp. 230 ff., 244.
[96] CPTPP, on the contrary, was notified on 20 December 2018, WT/REG395/N/1 S/C/N/920.

systems of rules regulating, for example, investments or e-commerce remaining within the boundaries of WTO legality is not to be undervalued.

The emergence of such integrated economic areas can produce an even more relevant effect. Through the AfCFTA, African countries are reaching a new standing in the WTO. At present, the fact that more than 50 countries have committed to coordinating their trade and investment policies in a free trade area has certainly increased their political weight. However, if and when the upcoming African CU is established, there will be a considerable shift in the geopolitical power of WTO members. With Africa speaking in the Organization with one voice, its leverage will be greater than the diplomatic pressure that the Group of African Countries currently struggles to exert.

Under this perspective, the possibility granted by GATT Article XXIV and the other RTA exceptions to rebalance the spheres of economic power within the WTO through the legal emergence of mega-regionals without a constitutional reform of the multilateral system deserves to be duly investigated.

The TM has given Article XXIV the potential to act as a bridge between the multilateral system and the new RTAs economy, which has taken hold in the last few decades.

Therefore, the reform of Article XXIV implementation procedure, which began in 2006, should be completed to consolidate a possible new role of the WTO as the guarantor of the intelligent complementary nature of the two different layers of rules currently regulating global investments and trade.

The WTO can no longer retain the exclusive role of rule setter in the sphere of international trade, that is extending far beyond its treaty competence. While waiting for its challenging 'constitutional' reform[97] and taking on the role of rationalising and managing the interrelation between multilateral and regional rules on trade and its developing ancillary realms, the WTO can function as the forum where all the threads of modern trade and investment relations can be woven into a legally sound and politically well-organised net.

[97] A reform that is deemed crucial to avoid an already perceivable decline of the multilateral trading system: see G. SACERDOTI, L. BORLINI, *Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System*, *German Law Journal*, 2023, pp. 17-44.

Abstract

L'articolo sostiene che un'applicazione più efficace dell'articolo XXIV del GATT, attraverso una rivalutazione del *TM* e del ruolo svolto dal Comitato per gli accordi regionali e da quello su commercio e sviluppo potrebbe migliorare l'interazione tra il sistema multilaterale e i sistemi preferenziali di integrazione regionale, conducendo ad un nuovo ruolo per l'Organizzazione mondiale del commercio. A tal fine propone un nuovo modello di interrelazione tra i livelli multilaterale e preferenziali del commercio internazionale, basato sulla modifica e il miglioramento delle procedure esistenti e, sotto il profilo sostanziale, sull'evoluzione dei contenuti e della natura del processo di esame degli accordi da parte dei Membri dell'Organizzazione in sede di comitato.

Abstract

The paper maintains that a more effective application of GATT Article XXIV, through a reappraisal of the TM and of the role of both the Committee of Regional Trade Agreements and the Committee on Trade and Development, could improve the interaction between the multilateral and the regional/preferential layers of trade regulations and lead to a new role for the WTO. To this end, the article proposes a new model of interrelation between the multilateral and the bilateral/regional levels of trade regulation, based on procedural improvements and on a substantial evolution of the scope and nature of the 'consideration' of RTAs among WTO members.

Camerino, dicembre 2023.

Nome file: Gulotta, The future of Multilateralism 15122023.docx
Directory: /Users/bappenheim/Desktop/ aaaa/rivista Annali/Articoli/Gulotta
Modello: /Users/bappenheim/Library/Group Containers/UBF8T346G9.Office/User Content.localized/Templates.localized/Normal.dotm
Titolo:
Oggetto:
Autore:
Parole chiave:
Commenti:
Data creazione: 15/12/23 20:47:00
Numero revisione: 1
Data ultimo salvataggio: 16/12/23 22:12:00
Autore ultimo salvataggio:
Tempo totale modifica 0 minuti
Data ultima stampa:
Come da ultima stampa completa
Numero pagine: 28
Numero parole: 10.942 (circa)
Numero caratteri: 62.371 (circa)