

## A NEW TRANSPARENCY MECHANISM FOR REGIONAL TRADE AGREEMENTS

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On 14 December 2006, the General Council of the WTO adopted by consensus a Transparency Mechanism (T.M.) for Regional Trade Agreements (R.T.A.s).<sup>1</sup> The T.M., which applies to all R.T.A.s, clarifies and strengthens the notification obligations of WTO Members and introduces new procedures to enhance the transparency of R.T.A.s. In accordance with paragraph 47 of the Doha Ministerial Declaration, the T.M. is being implemented on a provisional basis and will be replaced by a permanent mechanism to be adopted as part of the Doha Round of Trade Negotiations. This paper looks at the evolution of R.T.A.s under the existing WTO legal framework and analyzes the shortcomings of the WTO examination process of R.T.A.s during the late 1990s which precipitated the negotiation of the T.M. It describes the negotiating process of the T.M. and lays out its key elements. Finally, it offers a preliminary assessment of the functioning of the T.M. thus far.

### I. INTRODUCTION

The mandate for negotiations aimed at “clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements” comes from paragraph 29 of the Doha Ministerial Declaration.<sup>2</sup> Such negotiations are to take into account the developmental aspects of regional trade agreements. In WTO jargon, R.T.A.s are agreements of a “mutually preferential nature” and include free trade areas, customs unions and partial scope agreements. Thus, the ASEAN Free Trade Area and the recent India-Singapore Comprehensive Economic Cooperation Agreement are considered R.T.A.s by the WTO, while the Cotonou Agreement, which links the European Communities with its African, Caribbean and Pacific (A.C.P.) partners, and the Generalized System of Preferences (G.S.P.)—both of which are predicated upon unilateral preferences—are not.

Regional trade agreements are a pervasive fixture of today’s trading landscape. All but one of the WTO’s 151 Members are engaged in R.T.A.s of one type or another. Some WTO Members, particularly in Europe and Latin America, have been engaged in R.T.A.s for decades, while other countries, particularly in Asia, have only recently begun an active pursuit of R.T.A. partners. As of June 2007, a total of 223 R.T.A.s have been notified to the WTO and are currently in force.<sup>3</sup> A considerable number of agreements are currently under

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<sup>1</sup> WTO, General Council, *Transparency Mechanism for Regional Trade Agreements—Decision of 14 December 2006*, WTO Doc. WT/L/671, 18 December 2006

<sup>2</sup> WTO Doc. WT/MIN(01)/DEC/1, adopted on 14 November 2001.

<sup>3</sup> This number totals notifications made under GATT Article XXIV, GATS Article V, and the Enabling Clause, as well as accessions to existing R.T.A.s; for a complete list of R.T.A.s notified to the GATT/WTO, see online: <[http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)>.

negotiation, or have been signed and are awaiting ratification; in addition approximately 70 R.T.A.s are in force, but have not, or not yet, been notified to the WTO.<sup>4</sup>

The core principle of the international trading system is non-discrimination, which is embodied in the most-favoured-nation (M.F.N.) clause of the WTO Agreements. Regional trade agreements, together with other forms of discriminatory treatment, such as that offered by developed to developing countries under the G.S.P. scheme, are the principal exceptions to the M.F.N. principle. Four legal instruments provide for the exchange of reciprocal trade preferences among WTO Members. GATT Article XXIV, drafted during the Havana Conference of 1947, provides for the establishment of customs unions or free trade areas between WTO Members, subject to certain criteria. During the Tokyo Round in 1979, GATT Contracting Parties adopted the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (known as the Enabling Clause), which provides the basis for regional integration between developing countries, but subject to less stringent criteria than those prevailing in GATT Article XXIV. The Uruguay Round negotiations in the early 1990s gave rise to the Understanding on Article XXIV, which was an attempt by Members to clarify certain aspects of Article XXIV, particularly in relation to customs unions and interim agreements. Another key outcome of the Round was the negotiation of Article V of the GATS which lays down the legal framework for preferential agreements in the area of trade in services.

During the GATT years (1947-1994) a number of regional trade agreements were established, though growth was sporadic. The practice under the GATT was to establish a separate working party to examine each notified R.T.A. to determine its consistency with the provisions of GATT Article XXIV. The working party reports from that era attest to the difficulties encountered in determining consistency with the GATT rules, principally due to differing interpretations of some of the key elements of GATT Article XXIV, such as the definition of “substantially all the trade” or “other (restrictive) regulations of commerce”. In only one instance, in the examination of the customs union between the Czech and Slovak Republics, did Members find the agreement fully consistent with the rules. In every other instance, the results were inconclusive.

The first major upswing in the number of preferential arrangements occurred during the negotiation of the Uruguay Round. Between 1990 and 1995, more than 70 new R.T.A.s were notified to the GATT/WTO and the GATT practice of establishing a separate working party for the examination of each new R.T.A. became unsustainable.

## II. THE COMMITTEE ON REGIONAL TRADE AGREEMENTS

In an attempt to streamline the examination of R.T.A.s, the General Council of the WTO agreed to establish the Committee on Regional Trade Agreements (C.R.T.A.) in February 1996.<sup>5</sup> The mandate of the Committee, which is open to all WTO Members and Observers, includes carrying out the examination of regional trade agreements and considering their implications for the multilateral trading system. The C.R.T.A. was also charged with taking over the outstanding work of existing working parties. The aim of the C.R.T.A. was not only to provide a single committee to conduct the examination of regional trade agreements, but also to provide a forum for the discussion of systemic questions with a view to their clarification or eventual resolution.

<sup>4</sup> For comprehensive details of the current landscape of R.T.A.s, see Fiorentino, Roberto, Luis Verdeja and Christelle Toqueboeuf, “The Changing Landscape of Regional Trade Agreements: 2006 update”, WTO Discussion Paper No. 12. (Geneva: WTO, 2007); also available online: <[http://www.wto.org/english/res\\_e/reser\\_e/discussion\\_papers\\_e.htm](http://www.wto.org/english/res_e/reser_e/discussion_papers_e.htm)>.

<sup>5</sup> See WTO, General Council, *Committee on Regional Trade Agreements—Decision of 6 February 1996*, WTO Doc. WT/L/127, 7 February 1996, for the terms of reference of the Committee.

Between its establishment in 1996 and the launch of the Doha Development Agenda in November 2001, the C.R.T.A. held thirty sessions of two to three days each and completed the examination of a total of 69 R.T.A.s. In addition to its schedule of examination, the Committee devoted considerable time debating the systemic issues surrounding R.T.A.s. While this debate clarified Members' positions *vis-à-vis* the key elements of the legal provisions, the Committee was unable to make any joint recommendations to the General Council as views among Members were divided. A synopsis of systemic issues prepared by the Secretariat lays out Members' interpretations on key aspects of the legal provisions.<sup>6</sup>

The examination process of an R.T.A. typically proceeded as follows: the notification of an R.T.A. to either the Council for Trade in Goods (C.T.G.) or the Council for Trade in Services (C.T.S.) triggered the adoption of terms of reference for its examination in the C.R.T.A.<sup>7</sup> In order to facilitate the examination process, R.T.A. parties were charged with preparing a summary of the R.T.A., known as the Standard Format, which followed a sample template agreed among WTO Members.<sup>8</sup> During the C.R.T.A. meeting the parties would introduce the agreement and provide responses to Members' oral questions. Outstanding questions were dealt with through an exchange of written questions and replies and an additional round of examination at a subsequent meeting of the C.R.T.A. would be scheduled until Members agreed that the factual examination was complete. In general, this process resulted in a minimum of two rounds of examination, with some agreements requiring multiple rounds. Thus, the time lag from notification of an R.T.A. to completion of its examination was often several years. Once an examination was complete, the Secretariat was charged with drafting an examination report. From 1998 until early 2001, WTO Members engaged in lengthy discussions, both formal and informal, in an effort to agree upon examination reports for a sample group of about a dozen R.T.A.s. Despite considerable efforts, these discussions ended in stalemate as Members failed to agree on either the format or content of the examination reports.

Part of the difficulty stemmed from the fact that Members often lacked information and statistics on the R.T.A. under review. Furthermore, Members had set themselves the ambitious goal of adopting a consensual examination report, in contrast to the inconclusive working party reports of the GATT years. However, the inherent ambiguities in GATT Article XXIV, such as how to quantify "substantially all the trade" and what constitutes "other (restrictive) regulations of commerce", remained unresolved as these issues had not been addressed during the Uruguay Round negotiations on Article XXIV. Another sticking point stemmed from the fact that membership of the C.R.T.A. is open to all WTO Members, including those party to the R.T.A. under examination. Clearly, Members (and those countries party to the same family or networks of agreements) would not judge their R.T.A.s to be incompatible with the rules; third parties to those agreements often held a different view. Thus, by November 2001, when WTO Members met in Doha for their Fourth Ministerial Conference, there was widespread recognition that something had to be done to unlock the stalemate in the C.R.T.A.

<sup>6</sup> WTO, Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements—Note by the Secretariat*, WTO Doc. WT/REG/W/37, 2 March 2000.

<sup>7</sup> R.T.A.s notified under the Enabling Clause were transmitted to the Committee for Trade and Development. An examination of such agreements was not normally mandated.

<sup>8</sup> See WTO, Committee on Regional Trade Agreements, *Standard Format for Information on Regional Trade Agreements—Note by the Chairman*, WTO Doc. WT/REG/W/16, 15 August 1996, for the format applicable to goods R.T.A.s, and WTO, Committee on Regional Trade Agreements, *Standard Format for Information on Economic Integration Agreements on Services—Note by the Chairman*, WTO Doc. WT/REG/W/14, 6 May 1997, for the format applicable to services R.T.A.s.

### III. THE DOHA MINISTERIAL NEGOTIATING MANDATE

The mandate for negotiations on R.T.A.s struck at Doha did not give rise to any discussion, probably because the rules on regional trade agreements affect all members of the WTO and are not the subject of trade-offs as in other negotiating areas. In recognition of the politicised nature of the C.R.T.A., Members agreed that negotiations on R.T.A.s would take place in the Negotiating Group on Rules (N.G.R.) which reports to the Trade Negotiations Committee of the WTO set up by the Doha Ministerial Conference and operating under the authority of the General Council.

The N.G.R. meets in both formal and informal sessions.<sup>9</sup> Initial meetings on R.T.A. rules were devoted to the consideration of the priorities for negotiations and discussion of official submissions by participants. The negotiations themselves, or the consideration of specific texts, is mainly done in open-ended informal meetings. The initial phase of the negotiations on R.T.A. rules, aimed at identifying the issues for negotiation, was rapidly completed. Members benefited from the ongoing experience in the examination of R.T.A.s: discussion of the so-called “systemic issues” had been conducted over many sessions of the C.R.T.A., so most of the issues requiring attention had already been identified. Members were also aided by a compendium of systemic issues prepared by the Secretariat.<sup>10</sup>

### IV. THE NEGOTIATIONS ON TRANSPARENCY

Initially, parallel negotiations on both systemic and procedural issues were foreseen. Up to mid-2003, the N.G.R. pursued this two-track approach, namely, pinpointing issues for priority negotiation in formal meetings, and holding open-ended informal consultations on issues related to the transparency of R.T.A.s. However, recognising that issues of a procedural nature were more rapidly defined and less politically contentious than those of a systemic nature, efforts became increasingly focused on transparency issues with the hope that success in this area would provide impetus to the systemic debate. There was widespread acknowledgement among Members that the existing R.T.A.s’ surveillance mechanism was largely ineffective. Over the C.R.T.A.’s five year existence the quality of the Standard Formats and statistical information provided by Members had varied considerably: some Members had provided detailed statistics at the tariff line level to support the examination process; others had expressed themselves unable or unwilling to do so. In addition to its text, an R.T.A. typically contains a voluminous package of annexes and protocols containing the schedule of liberalization and rules of origin. WTO Members had limited access to such documents and often had insufficient resources to analyze them. The lack of pertinent information had resulted in a perfunctory examination process. Questions were often ducked rather than answered, and the assessment of an agreement’s consistency with WTO rules had become a moot point.

A submission from Chile in July 2002 provided the preliminary basis for the N.G.R.’s discussions on transparency. The Chilean paper focused the attention of the Group on the three “W’s”, i.e. when, where and what to notify.<sup>11</sup> With regard to the question of when an R.T.A. should be notified, experience had shown that the delay between the application of preferential treatment and notification of the agreement to the WTO was often significant. The question of where to notify an R.T.A. was relevant since the practice was for notifications to be treated in one of three separate bodies—the C.T.G, the C.T.S., or the Committee

<sup>9</sup> Minutes are produced for meetings in formal mode; informal meetings are off the record.

<sup>10</sup> WTO, Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements—Background Note by the Secretariat—Revision*, WTO Doc. TN/RL/W/8/Rev.1, 1 August 2002.

<sup>11</sup> WTO, Negotiating Group on Rules, *Submission on Regional Trade Agreements—Chile*, WTO Doc. TN/RL/W/16, 10 July 2002.

on Trade and Development (C.T.D.)—which added more layers and delayed the process of examination. The issue of what should be notified related to statistical information, particularly at which level of the Harmonized System (H.S.) tariff and trade data should be provided by Members to facilitate examination of an R.T.A.

WTO Members' goal as far as transparency was concerned was to improve the knowledge and understanding of R.T.A.s without touching the substantive legal disciplines. While there was a broad understanding among Members that transparency was a cross-cutting issue, some developing countries were keen to maintain a distinction between the procedures to be applied to agreements falling under GATT Article XXIV, GATS Article V, and the Enabling Clause.

The negotiations on transparency began in earnest based on the Chilean submission and continued apace until the WTO Ministerial Conference in Cancun in September 2003. After a brief hiatus following the breakdown of talks at Cancun, negotiations resumed. In December 2005, during the Ministerial Conference in Hong Kong, Members set a deadline of 30 April 2006 for a deal on transparency. Negotiations intensified during the first half of 2006, but although differences between Members narrowed, the April deadline was not met. The issue of whether and in which forum Enabling Clause R.T.A.s should be considered continued to divide the membership. Developed countries and some developing countries favoured a single responsible body, the C.R.T.A., which other developing countries opposed. In addition, some developing countries favoured extending the decision on transparency to other aspects of the Enabling Clause, such as the G.S.P. programme. A compromise was finally reached in July 2006: all R.T.A.s would be subject to transparency procedures; R.T.A.s notified under GATT Article XXIV and GATS Article V would be the responsibility of the C.R.T.A., while those under the Enabling Clause would fall under the auspices of the C.T.D. convening in dedicated session. The decision was approved by the N.G.R. and submitted to the General Council for adoption. The key elements of the Transparency Mechanism for R.T.A.s, are described in detail in the following section.

## V. ELEMENTS OF THE TRANSPARENCY MECHANISM

### A. *Early Announcement*

Section A of the T.M. introduces the concept of an early announcement of R.T.A.s either under negotiation or signed. The idea is to provide a means for a practical, non-burdensome system for provision of basic, press-release type, information. Members participating in new negotiations aimed at the conclusion of an R.T.A. should endeavour to inform the WTO. Once the R.T.A. has been signed, Members are obliged to convey information, such as the scope and date of signature, relevant contact points and/or website addresses, to the WTO. This information is posted on the WTO website and is periodically circulated to Members.<sup>12</sup> As of July 2007, a number of early announcements of R.T.A.s had been received by the WTO.

### B. *Notification of an R.T.A.*

WTO Members party to an R.T.A. are obliged to notify other WTO Members of such participation. Both GATT Article XXIV:7(a) and GATS Article V:7(a) call for Members to “promptly” notify their participation in such agreements. Paragraph 4(b) of the

<sup>12</sup> World Trade Organization, “Regional Trade Agreements—Early announcements made to WTO under the RTA Transparency Mechanism” 10 July 2007, online: <[http://www.wto.org/english/tratop\\_e/region\\_e/early\\_announc\\_e.htm](http://www.wto.org/english/tratop_e/region_e/early_announc_e.htm)>.

Enabling Clause calls for the notification of R.T.A.s in which developing countries are engaged. The obligation for notification has not been complied with in a systematic manner by WTO Members: for instance, while the wording of GATT Article XXIV suggests that an R.T.A. should be notified *before* the entry into force of the R.T.A., notifications are generally received after the entry into force, in some cases months or even years after. There is no provision in WTO rules for counter-notification, i.e. for a third party to notify on behalf of other WTO Members. The T.M. tightens up existing provisions on notification by stipulating in paragraph 3 that notification is to take place “as early as possible... no later than directly following the parties’ ratification of the R.T.A. or any party’s decision on application of the relevant parts of an agreement, and *before* the application of preferential treatment between the parties” [emphasis added]. By requiring notification to take place before the application of preferential treatment, WTO Members will be informed about new R.T.A.s before their implementation, thus promoting transparency.

### C. *The Factual Presentation*

Recognizing that the examination and collective assessment of R.T.A.s’ consistency with the relevant WTO legal provisions is unrealizable, WTO Members have backed away from this goal in favour of a softer approach which aims instead at the “consideration” of an R.T.A. In order to assist Members in their consideration, paragraph 7(b) of the T.M. makes provision for the WTO Secretariat, on its own responsibility and in full consultation with parties, to prepare a “factual presentation” of all R.T.A.s, whether notified under GATT Article XXIV, GATS Article V, or the Enabling Clause. The factual presentation is a summary of an R.T.A., a sort of mini Trade Policy Review of an agreement; it contains no value judgment.

In order to enable the preparation of the factual presentation, R.T.A. parties are to make available data as specified in the Annex to the T.M.. For an R.T.A. covering trade in goods, this includes each party’s concessions applied in the year of entry into force at the tariff line level, together with a full listing of preferential duties to be applied over the transition period, if the agreement is to be implemented in stages. Also required are M.F.N. duty rates applied on the year of entry into force of the agreement and the preceding year; import statistics for the three most recent years preceding the notification of the agreement; and other data such as tariff-rate quotas, seasonal restrictions, and *ad valorem* equivalents for non-*ad valorem* duties, where applicable. It is notable that this data is required for R.T.A.s falling under both GATT Article XXIV and the Enabling Clause.

The data submission should take place within 10 weeks of the notification of the agreement—or 20 weeks in the case of R.T.A.s involving only developing countries. In the case of an R.T.A. covering trade in services, the parties are expected to provide trade or balance of payments statistics (by services sector/subsector and partner), gross domestic product data or production statistics, and relevant statistics on foreign direct investment and on the movement of natural persons. Paragraph 19 of the T.M. makes provision for the WTO Secretariat to provide technical support to developing country Members, especially least-developed countries, with respect to the preparation of the data submission. The standardisation of data submission requirements will enable the Secretariat to produce homogenous factual presentations which provide a comprehensive picture of the tariff and trade liberalization offered under an R.T.A.

According to paragraph 22 of the T.M., factual presentations are to be prepared on all R.T.A.s for which the C.R.T.A. had not completed its factual examination by December 2006, of which there is a backlog of over 60 agreements. As of June 2007, the

WTO Secretariat has prepared nine factual presentations, five of which have already been considered by WTO Members in the C.R.T.A. meeting held in May 2007.<sup>13</sup>

In general, a single meeting is devoted to the consideration of an R.T.A. The T.M. also makes provision for an exchange of written questions and replies following the publication of the factual presentation, but in advance of the meeting devoted to its consideration. According to paragraph 6 of the T.M., consideration of a notified R.T.A. shall normally be concluded within one year from the date of notification. All written material submitted, as well as the minutes of the meeting devoted to the consideration of a notified agreement, will be promptly circulated in all WTO official languages and made available on the WTO website.

#### *D. Subsequent Notification and Reporting*

In accordance with paragraph 14 of the T.M., Members are obliged to notify any changes affecting the implementation of an RTA as soon as possible after the changes occur. In addition, at the end of the R.T.A.'s implementation period, the parties should submit a short written report on the realization of the liberalization commitments. These communications are to be made public on the WTO website.

These elements will replace the largely dysfunctional biennial reporting cycle which applied solely to those R.T.A.s for which a working party report had been adopted during the GATT years. Biennial reports were often late, or not submitted at all, thus depriving Members of up-to-date information on R.T.A.s, while a large number of agreements which were stuck in the backlog of examination reports were subject to no reporting requirement at all.

#### *E. Other Provisions*

Paragraph 18 of the T.M. provides for the C.R.T.A. and the C.T.D. to implement the Transparency Mechanism. The Director-General of the WTO is invited to ensure consistency in the preparation of factual presentations for the different types of R.T.A.s, taking into account the variations in data provided by different Members. As of July 2007, no new notifications of Enabling Clause R.T.A.s have been received, so this division of responsibility remains to be tested.

Paragraph 10 of the T.M. constructs a firewall between the factual presentation and the dispute settlement process, similar to that which exists in the WTO's Trade Policy Review Mechanism.

The Secretariat is also charged with the preparation of a factual abstract or short summary of all R.T.A.s notified to the WTO for which the factual examination has already been completed. The objective of these abstracts is to provide a roadmap, or expanded directory of older R.T.A.s. Such information will be made available on the WTO website.

Paragraph 20 of the T.M. provides for the WTO Secretariat to establish and maintain an updated electronic database on R.T.A.s. including relevant tariff and trade-related information. The database is to be structured so as to be easily accessible to the public.

<sup>13</sup> Those already prepared are Thailand-Australia, goods (WTO Doc. WT/REG185/3, 7 August 2006) and services (WTO Doc. WT/REG185/4, 21 March 2007); Thailand-New Zealand, goods (WTO Doc. WT/REG207/3, 3 January 2007); Southern African Development Community, goods (WTO Doc. WT/REG176/4, 12 March 2007); Armenia-Moldova, goods (WTO Doc. WT/REG173/3, 13 March 2007); EFTA-Chile, goods (WTO Doc. WT/REG179/3, 29 May 2007) and services (WTO Doc. WT/REG179/4, 1 Jun 2007); and US-Australia, goods (WTO Doc. WT/REG184/3, 11 Jun 2007) and services (WTO Doc. WT/REG184/4, 4 Jun 2007).

## VI. A PRELIMINARY ASSESSMENT

The Secretariat has prepared a total of nine factual presentations thus far. Twelve new R.T.A.s have been notified since the adoption of the T.M. and a further 40 or so R.T.A.s are in the backlog. The preparation of the factual presentations seems to have invigorated the C.R.T.A., rekindling Members' interest in the consideration process. In part this stems from more information being available, and from the fact that the issue of consistency assessment is no longer on the agenda. Members of course continue to have recourse to the WTO's dispute settlement mechanism, if they wish to challenge an R.T.A.

Experience thus far has shown that countries have varying difficulties, not necessarily dependent on their developed or developing country status, in complying with the data submission requirement. For some R.T.A.s, tariff schedules with detailed phase-outs are already publicly available on the Internet. For others, the preparation of such information has required considerable resource commitments. On balance, most Members seem to be willing to provide the data required though the timelines are not always respected. It may also be a case of "learning by doing", and that the submission of data will improve over time.

The success of the T.M. depends on a number of factors: Members' willingness to comply with the enhanced notification obligations and to provide the data within the timeline required; the Secretariat's ability to reduce the backlog in as short a time as possible, so that Members' attention can be focused on newly notified R.T.A.s; and WTO Members' willingness to engage in the consideration process to enhance the case of transparency of preferential trading arrangements that affect the multilateral trading system as a whole. Ultimately, the success of the T.M. may be judged upon the degree to which it results in the multilateralization of preferences, as WTO Members become more adept at negotiating R.T.A.s based on enhanced knowledge of existing arrangements.