Cast Light and Evil Will Go Away: The Transparency Mechanism for Regulating Regional Trade Agreements Three Years After

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Cast Light and Evil Will Go Away: The Transparency Mechanism for Regulating Regional Trade Agreements Three Years After* 

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Our aim is to test the idea that the World Trade Organization’s (WTO’s) ability to regulate regional trade agreements (RTAs) is likely to decline with the proliferation of RTAs worldwide. According to this idea, (1) ‘people who live in glass houses should not throw stones’; (2) with the proliferation of RTAs, WTO members are likely to place their interests before the interests of the multilateral system; and (3) there would be fewer WTO members demanding stricter disciplines for RTA regulation. However, our finding is that WTO members have at least continued to accord attention to the problems associated with RTA proliferation, and they continue to engage in active scrutiny of individual RTAs. We are not saying that WTO members do not act in their own interest or that they are motivated by altruism but simply that such self-interest has not prevented scrutiny of RTAs under the new transparency mechanism (TM).

The proliferation of RTAs (and any felt need to protect one’s ‘own RTA programme’) has not prevented discussion on improved disciplines. Notwithstanding the intent underlying the establishment of the TM – that is, the prevention of another impasse caused by controversy over various ‘systemic issues’ connected with questions of RTA compliance – WTO members continue to discuss these issues in ways that demonstrate fidelity to important questions of principle and policy. One notable development, however, has been that East Asian members are no longer seen to be as prominent in expressing a strict approach towards RTA regulation as they were a decade ago.

1. Introduction

On 14 December 2006, the General Council of the World Trade Organization (WTO) adopted by consensus a new transparency mechanism (TM) for regional trade agreements (RTAs) thereby consolidating five years of negotiations, which had been mandated by WTO members during the Doha Ministerial Conference in 2001. The purpose of the

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negotiations, as stated in paragraph 29 of the Doha Ministerial Declaration was to ‘clarify ... and improv[e] disciplines and procedures under the existing WTO provisions applying to regional trade agreements’.

The new TM applies to all RTAs covering goods or services whether notified to the WTO under Article XXIV of the General Agreement on Tariffs and Trade (GATT), Article V of the General Agreement on Trade in Services (GATS), or the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (hereinafter ‘Enabling Clause’). It is being applied on a provisional basis pending the final results of the Doha Round. It is subject to review and possible modification and will be replaced by a permanent mechanism adopted as part of the overall results of the Doha Round.

Our aim is to test the idea that the WTO’s ability to regulate RTAs is likely to decline with the proliferation of RTAs worldwide. According to this idea, (1) ‘people who live in glass houses should not throw stones’; (2) with the proliferation of RTAs, WTO members are likely to place their interests before the interests of the multilateral system; and (3) there would be fewer WTO members demanding stricter disciplines for RTA regulation. However, our finding is that WTO members have at least continued to accord attention to the problems associated with RTA proliferation, and they continue to engage in active scrutiny of individual RTAs. We are not saying that WTO members do not act in their own interest or that they are motivated by altruism but simply that such self-interest has not prevented scrutiny of RTAs under the new TM. The proliferation of RTAs alone (and any felt need to protect one’s ‘own RTA programme’) has not prevented discussion on improved disciplines. Although some members such as Hong Kong China, New Zealand, and others have become noticeably less active or vocal in the Committee on Regional Trade Agreements (CRTA), this could be due to various extraneous factors. They include the possibility of ‘negotiation fatigue’ or because delegations now have fewer resources in Geneva due to the proliferation of RTA programmes. It may be hoped that the TM itself, by requiring the systematic provision of information on RTAs, could also have filled some of the information gaps and inconsistencies that in the past gave rise to heated debate.

A related but more difficult question has to do with whether ‘coalition behaviour’ has changed over time, namely, between those members that traditionally demanded stricter regulation of RTAs and those that have called for a more flexible approach. During the debates on systemic issues conducted in the CRTA in the late 1990s, Australia, Japan, Hong Kong China, India, and Korea adopted a relatively strict approach towards RTA regulation. However, in recent years, these members have embarked on active RTA programmes. Has this changed their behaviour (i.e., ‘Do people throw stones despite moving into glass houses’)?

In this paper, we review the debate over RTAs and provide a brief history of events leading to the creation of the TM. We then describe the operation of the new mechanism. In showing that member concerns about RTA regulation are alive, we also offer a
taxonomy of the issues that, to date, have been raised during members’ questions and replies (hereinafter ‘Q&R’), as well as in their discussions in the CRTA and Committee on Trade and Development (CTD).2 Finally, we evaluate the extent to which the TM has been successful in facilitating RTA scrutiny by putting aside the need to determine RTA compliance, thereby circumventing debate on the highly controversial systemic issues that have plagued RTA scrutiny in the WTO.

2. GATT-WTO REGULATION, THE ‘SYSTEMIC ISSUES’ AND THE TRANSPARENCY MECHANISM

2.1. THE GATT MODEL FOR THE REGULATION OF RTAs

The problem of RTA proliferation was not as urgent when Article XXIV was drafted.3 This situation has changed. Since the adoption of the TM some three years ago, ninety-six notifications of RTAs have been made to the WTO and the total number of RTAs both in force and under negotiation continues to escalate. As of June 2010, a total of 278 RTAs are in force,4 of which 199 cover trade in goods and seventy-nine cover services. It is estimated that an additional 100 or so RTAs are currently being negotiated. Many more are in force but have not been notified to the WTO. Three in every four RTAs are a bilateral agreement involving two parties. Such RTAs are faster to negotiate than plurilateral RTAs but have the potential to create greater fragmentation of the trading system since each RTA creates its own regulatory structure.

Sixty years ago, the notion that RTAs had a propensity to cause trade diversion – that is, that while consumer preferences may shift from inefficient local producers to efficient RTA partner country producers, this may be outweighed by a shift from efficient non-RTA partner country producers to inefficient RTA partner country producers – was not as clearly understood.5 The GATT’s framers assumed RTAs generally to be beneficial to global trade liberalization, and this has been reflected in the design of Article XXIV GATT. The GATT and subsequent WTO regulation granted a legal right to enter into RTAs provided that they facilitate trade between the parties and do not raise barriers to trade in relation to non-parties.6

2 There is, however, a genuine methodological difficulty in tracing some of these issues to their principal sponsors in order to determine any significant changes in coalition behaviour.
3 WT/REG/W/37, para. 5.
4 Based on figures available on the WTO website at <http://rtais.wto.org/UI/publicsummarytable.aspx>. It should be noted that WTO statistics on RTAs include accessions to existing RTAs and are based on notification requirements rather than on physical numbers of RTAs. Thus, for an RTA that includes both goods and services, two notifications (one for goods and the other services) are counted, even though it is physically one RTA. This principle is applied throughout this paper.
6 In chronological order: GATT Art. XXIV-4; 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, para. 3(a) (hereinafter ‘Enabling Clause’); Understanding on the Interpretation of Art. XXIV of the GATT 1994, Preamble; GATS Art. V-4.
2.2. ‘SYSTEMIC ISSUES’

The WTO Secretariat’s 2000 ‘Synopsis of Systemic Issues Related to Regional Trade Agreements’ (hereinafter ‘Synopsis’) states the general problem and the members’ various positions prior to the negotiation of the TM.\(^7\) It identified two broad issues of concern:\(^8\) namely, (1) the relationship between RTAs and the multilateral trading system (MTS) and (2) conflicts between the legal framework of the MTS and RTA legal frameworks.\(^9\) We may call this the problem of regulatory fragmentation,\(^10\) a problem that is separate from but related to proliferation.\(^11\)

2.3. ISSUES OF A LEGAL INTERPRETATIVE NATURE

‘Synopsis’ also identified a list of legal interpretative issues relating to the interpretation of the WTO rules on RTAs:

(1) Issues relating to prompt notification and information and transparency requirements.\(^12\)

(2) Difficulties with the legal process for determining WTO compliance.\(^13\)

(3) Questions concerning the relationship between the WTO’s rules on RTAs and other WTO rules.\(^14\)

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\(^7\) ‘Synopsis’ captures member’s positions on RTAs at a given point in time and thus is not necessarily indicative of members’ positions today.

\(^8\) WT/REG/W/37, paras 1–6.

\(^9\) WT/REG/M/15, para. 29 (Japan).


\(^11\) Against this criticism of fragmentation, members such as Canada responded by pointing out the potential ‘test-tube’ effect of RTAs (i.e., they allow smaller scale experiments with regulatory innovation); WT/REG/M/14, para. 8 (Canada).

\(^12\) GATT Art. XXIV.7(a); Enabling Clause, para. 4(a); GATS Art. V.7(a).

\(^13\) Including the question of where the burden of proof lies in determining WTO compatibility. While Hong Kong China and Japan have argued that it was for the RTA parties to prove compatibility; Hungary has argued that it is for other non-RTA party members to prove incompatibility with the WTO’s requirements; see WT/REG/M/16, paras 68, 122, and 127. However, the Appellate Body in Turkey – Restrictions on Imports of Clothing and Textile Products has upheld the ruling of the panel in that case that the burden of proof – at least where a member relies on Art. XXIV as a defence to a GATT violation in dispute proceedings – lies with the member invoking that exception; Turkey-Textiles, Appellate Body Report, WT/DS34/AB/R, para. 59; noted in WT/REG/W/37, para. 24.

\(^14\) For example, during the late 1990s, Korea, Hong Kong China, India, and Japan took a strict view that GATT Art. XXIV provides an exception to GATT Art. I (MFN), but to no other rule; WT/REG/M/14, para. 10 (Korea); WT/REG/M/15, paras 48 and 61 (Hong Kong China and India, respectively), and WT/REG/M/16, para. 64 (Japan). The opposing view, advanced by the European Communities, is that Art. XXIV provides a general ‘defence’ to violations of other WTO obligations because international law allows a subsequent treaty (i.e., the RTA) to take precedence over an earlier one (containing the relevant WTO obligation). This rule is subject only to the rights of third parties. See WT/REG/M/14, para. 13 and WT/REG/M/15, para. 34 (EC). However, the Appellate Body has ruled in the Turkey-Textiles case that Art. XXIV provides a potentially broader exception (i.e., not just to Art. I); Turkey-Textiles, Appellate Body Report, in the work cited, para. 58 (as observed in WT/REG/W/37, para. 28); see also Janies H. Mathis, Regional Trade Agreements in the GATT/WTO (Hague: Asser Institute, 2002), 211–212, and more generally at 195–218 for a discussion of the Turkey-Textiles case.
Debate on whether preferential rules of origin are ‘other regulations of commerce’ (ORCs) under Article XXIV:5 and whether they act as barriers to the trade of third parties by promoting intra-RTA sourcing at the expense of such third-parties.16

Controversy in relation to the propriety of notifying customs unions and free trade agreements (FTAs) under the Enabling Clause.17

Considerable debate on the interpretation of Article XXIV GATT, namely:

(a) Whether RTA parties can take safeguard or anti-dumping action against each other under Article XXIV GATT: 8’s reference to the elimination of ‘other restrictive regulations of commerce’.18 Some countries traditionally favoured the exemption of RTA parties from anti-dumping action, others did not.19 The question concerning safeguards between RTA parties is even more pronounced. If safeguards are forbidden between RTA parties, then a member may exempt its RTA partner from its application.20 Some members took a more permissive view, while others disagreed.21

15 The United States claims that they are not, since the use of PRO is an issue internal to an RTA (i.e., they fall under Art. XXIV:8) and therefore that their effects on third parties are irrelevant; Korea claims that they do, WT/REG/M/15, para. 59 (USA); WT/REG/M/18, para. 23 (Korea).


17 WT/REG/W/37, 15 (n. 74).

18 WT/REG/W/12, para. 5(b); WT/REG/W/16, para. 50(c).

19 Canada argued that RTA parties can exempt each other from anti-dumping measures since MFN treatment disciplines do not apply to the taking of anti-dumping measures. Japan disagreed. See WT/REG/W/12, para. 20; WT/REG/M/15, para. 26 (Canada), contra WT/REG/W/28 (Japan). While Canada is correct in pointing out that anti-dumping measures applied against country x does not mean that they should also be applied to country y and that the WTO does not require members to apply anti-dumping measures, GATT Art. 1.1 does speak of its application to ‘customs duties or charges of any kind’.

20 This argument is supported by the fact that the list of exceptions to the requirement to eliminate ‘restrictive rules and regulations of commerce’ does not expressly exempt safeguards (or indeed, anti-dumping measures and countervailing duties) from elimination, and the Safeguards Agreement (fn. 1 to Art. 2) suggests that Art. XXIV may take precedence over it.

21 Australia has expressed the permissive viewpoint. See WT/REG/M/15, para. 40. The opposing argument, advanced by Japan and Hong Kong China, is that the exceptions stated therein are illustrative only and that safeguards should therefore be applied on an MFN basis. See WT/REG/M/14, para. 7 (Japan); WT/REG/W/29, para. 8–11 (Japan); WT/REG/M/15, para. 22 (Hong Kong China). This issue remains to be fully resolved and tested in WTO dispute settlement. One panel in the Argentina – Safeguard Measures on Imports of Footwear (hereinafter ‘Argentina-Footwear’) case observed that most FTAs include safeguards provisions and that Art. XXIV need not be read so strictly as to prohibit safeguards provisions in FTAs. Argentina-Footwear, Panel Report, WT/DS121/R, 25 Jun. 1999, paras 8.96–8.98. On appeal, the Appellate Body ruled that the point did not need to be decided since the case did not involve the application of a safeguard measure by the Southern Cone Common Market (MERCOSUR) on behalf of Argentina. See Argentina-Footwear, Report of the Appellate Body, WT/DS121/AB/R, 14 Dec. 1999, para. 114. However, the panel in the subsequent United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (hereinafter ‘US-Line Pipe’) case seemed to have gone in the opposite direction instead. The US-Line Pipe panel considered that an FTA party can exempt its fellow FTA members from safeguard measures because GATT Art. XXIV permits the elimination of duties and other restrictive regulations of commerce against fellow NAFTA members (i.e., Canada and Mexico) under GATT Art. XXIV:5. In that case, the safeguard measure was a tariff
Some members have suggested that Article XXIV:4 GATT imposes a trade diversion or ‘economic’ test in addition to the twin requirement that an RTA should eliminate restrictions on intra-trade (paragraph 8) and not raise barriers to trade with third parties (paragraph 5). Others have disputed the existence of this further requirement.22

Continued uncertainty over the regulation of customs unions. Does the requirement not to raise barriers to third countries refer to the net effect of a new customs union’s external tariffs or a more stringent requirement not to raise any barrier beyond levels existing prior to the formation of the RTA?23 Another issue concerns the relationship between paragraphs 5 and 8 of Article XXIV GATT. Is it permissible to raise barriers to third parties in the name of efforts to facilitate trade between the customs union members? This, essentially, was Turkey’s argument in the Turkey-Textiles case.24

Uncertainty over the degree of symmetry between the customs unions and FTA provisions under Article XXIV:5 GATT.25

Debate over interim agreements. Can a small number of products be reserved for liberalization beyond the (ten-year) ‘reasonable period’ stipulated under the Understanding on the Interpretation of GATT Article XXIV?26 A related issue has to do with whether the ‘other restrictive regulations of commerce’ under paragraph 8 are permissible only during the ten-year interim period but must be eliminated thereafter.27

The meaning of ‘substantially all the trade’ (SATT) in Article XXIV GATT, subparagraphs 8(a)(i) and 8(b).28 This issue has been single


(WT/REG/M/15) (Australia, India, Hong Kong China, Japan, and Korea in support of the economic test); also WT/REG/W/25, paras 5 and 8 (Australia); contra. EC, WT/REG/M/15, para. 12 (EC), WT/REG/M/15 (Argentina, Brazil, Canada, and the USA, which disputed this requirement).

Argentina, the EC, and Turkey proposed the more flexible ‘net effect’ test, while Australia and Hong Kong China advocated a more stringent view. WT/REG/M/15, paras 15 (Argentina), 36 (EC); WT/REG/M/16, para. 54 (Turkey); cf. WT/REG/M/14, para. 18 (Australia); WT/REG/M/15, para 14 (Hong Kong China), 31 (Australia). See further, on this issue, Dam, 619–620; Turkey-Textiles, para. 56.

Korea and Japan have taken a stringent view, while Argentina, Turkey, and the EC have adopted a more flexible approach. WT/REG/M/14, para. 10 (Korea); WT/REG/M/16, para. 59 (Japan); cf. WT/REG/M/15, para. 15 (Argentina); WT/REG/M/16, para 54 (Turkey), 63 (EC). See further Turkey-Textiles, Appellate Body Report, para. 57 (‘This objective demands that a balance be struck by the constituent members... A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries’).

WT/REG/W/37, paras 40–44.

Members of NAFTA supported such a view, while the EC argued against it. NAFTA parties, WT/REG/1 and Add.1, Qs. 23 and 24, supra WT/REG/M/4, para. 28 (EC). The EC accepts, however, that the obligation to liberalize substantially all the trade under Art. XXIV:8 enjoys the ten-year grace period, while the obligation not to raise barriers to third parties is immediate and continuing; WT/REG/M/15, paras 36 (EC) and 37 (Argentina). Art. XXIV is, however, ill-drafted in this respect. Technically, the phrases ‘at the institution’ under para. 5(a) and ‘at the formation’ under para. 5(b) of Art. XXIV might suggest that duties and regulatory barriers can be raised subsequently; John Jackson, World Trade and the Law of GATT (Charlottesville: Michie, 1969), 619.

WT/REG/W/37, para. 48(d).

WT/REG/W/12, para. 17; WT/REG/W/16, paras 40–44; WT/REG/W/21/Rev.1 and WT/REG/W/21/Add.1.
out as a principal reason for the CRTA’s work coming to an impasse in the past and goes back to GATT debates following the formation of the EEC in 1957.\(^{29}\) Disagreement has since revolved around two competing approaches. First, the use of a ‘quantitative’ test (e.g., 95% of HS tariff lines) against, second, the use of a more ‘qualitative’ test (e.g., the non-exclusion of any particular sector, agriculture being one example).\(^{30}\) There have been differences over the application of a qualitative test.\(^{31}\)

(7) Similar debates on the proper interpretation of Article V GATS, for example, whether paragraph (a)’s requirement to cover all modes of supply is satisfied once the non-discrimination requirements of paragraph (b) are met,\(^{32}\) or whether the two operate independently.\(^{33}\)

When negotiations in the Negotiating Group on Rules (NGR) first commenced in 2002, Australia and the EC made submissions identifying certain systemic issues surrounding Article V GATS, including the clarification of concepts such as ‘substantial sectoral coverage’, ‘substantially all discrimination’, and a ‘reasonable time frame’.\(^{34}\) The EC also drew attention to the appropriate combination of elimination of discriminatory measures (rollback) and prohibition of new or more discriminatory measures (standstill), which would be required in order to achieve the absence or elimination of discriminatory measures. It emphasized the need to determine an appropriate methodology to ensure that barriers against third parties are not raised when an RTA is created. Chile supported the need for clarification of these concepts and suggested that similarities between Article XXIV GATT and Article V GATS could also be explored.\(^{35}\) In a further submission, Chile explored ways in which coverage in services RTAs could be assessed at different levels through the use of selected indicators and how the evaluation of the elimination of substantially all discrimination could be made.\(^{36}\) Chile’s submission generated considerable debate among members, with a number of participants expressing interest in an elaboration of the indicative criteria proposed by Chile.\(^{37}\) Since 2004, no further submissions regarding Article V GATS have been forthcoming, and no further progress on this topic has been made.

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\(^{30}\) Australia proposed a quantitative test of 95% of HS tariff lines, while Hong Kong China advocated a further refinement, which would measure the percentage of intra-RTA trade conducted under the RTA’s preferential ROOs. See WT/REG/W/22/Add.1, paras 9–10 (Australia), WT/REG/W/27 (Hong Kong China).

\(^{31}\) WT/REG/M/15, para. 32 (Argentina); contra WT/REG/M/15, para. 35 (Switzerland); WT/REG/M/15, para. 38 (Hong Kong China). The US has also ‘doubted the wisdom of accepting any set formula for SATT’ and argued that setting a quantitative figure for coverage would ‘essentially give license to exclude a set amount of trade’. See WT/REG/M/15, para. 66, and also WT/REG/M/17, para. 21.

\(^{32}\) WT/REG/M/15, para. 44 (EC).

\(^{33}\) WT/REG/M/15, paras 38 and 48 (Hong Kong China).

\(^{34}\) TN/RL/W/2 and TN/RL/W/14.

\(^{35}\) TN/RL/W/152

\(^{36}\) TN/RL/W/163

\(^{37}\) TN/RL/M/19
2.4. Coalitions

While we will return to the discussion of such systemic issues since the establishment of the TM in section 5 (below), what the discussion in the previous section shows is that until 2000, some members had pressed for a stricter interpretation of existing GATT disciplines while others have advocated a looser approach. Australia, Japan, Hong Kong China, India, New Zealand, and, to a lesser degree, Korea (i.e., Asia and Australasia) were advocates of strict regulation, while Canada, the EC, Argentina, Brazil, and Turkey tended to take a more flexible view. The US, while favouring enhanced scrutiny of all RTAs, has generally taken the position that Article XXIV GATT and Article V GATS already provide a balanced set of rights and obligations and should remain unchanged.

There are admittedly complex forces at work. Those in favour of tighter disciplines have a range of differing, underlying concerns. There are the ‘economic liberals’ such as Australia, Hong Kong China, and New Zealand, while Japan, India, and Korea have been concerned with the protection of third-party rights (namely, their own). For example, Australia’s disagreement with Hong Kong China and Japan regarding the exemption of RTA parties from safeguard action (i.e., selective application) may be explained on the basis that Australia considers safeguards to be trade restrictive per se, while Hong Kong China and Japan were evidently concerned with the effect of such RTA practices on third parties.

As for the US, while it favours a high level of liberalization in its RTAs, it would nonetheless resist attempts to restrict the design of its RTAs according to its own lights. Such design issues include the use of restrictive rules of origin or the inclusion of TRIPs plus provisions. Just as motivations can come down to ‘preferred philosophy’ or ‘realism’, convictions about the depth of liberalization do not always entail calls for tighter international regulation when dealing with a superpower. US resistance towards alteration of the currently ambiguous terms of Article XXIV GATT might be easier to understand. After all, the US was the author of Article XXIV GATT. So there were different views, even within the group of WTO members favouring more flexible regulation of RTAs. For example, NAFTA countries have argued in favour of a high level of liberalization but with the possibility of carve outs of a small list of products beyond the ten-year period. In contrast, the EC has tended to favour a lower threshold of liberalization achievable within a ten-year time frame.

The picture is not always so clear, however. In some cases, members were clearly defending their individual circumstances. In others, they may have been tempted to subject other countries to the same tough treatment that they have received at the hands of

38 For instance, the US has argued that GATS Art. V is ‘a finely balanced text’ and that it fails to see adequate rationale for a discussion aimed at clarifying its scope or interpretation (WT/REG/M/25, para. 12).
39 For contrary arguments, justifying safeguards on the basis that they produce less, or the least trade restrictive outcomes; see Alan O Sykes, The WTO Agreement on Safeguards (Oxford: OUP, 2006), 59–72.
41 Argentina’s, Turkey’s, and the EC’s views on the relative precedence of paras 5 and 8 of GATT Art. XXIV, for example.
others. We now turn to what the members have tried to do with the TM in order to overcome the impasse caused by such debates over systemic issues. Fidelity to the TM’s aims could explain a reluctance to continue an open debate on the systemic issues, potentially causing a misimpression that since these issues are no longer as contentious as they once were, there is less interest today in improving RTA regulation.

3. The Aims of the Transparency Mechanism

A key objective of the TM is to promote RTA scrutiny in the CRTA. It does so by removing the need for a consistency assessment, thereby avoiding deadlock over questions concerning substantive disciplines (see section 4.6, below). In so doing, it represents a shift in emphasis from the resolution of substantive doctrinal and regulatory disputes towards an emphasis on process and procedure instead. This is not to say that members see the two issues as being wholly unrelated. Indeed, they also hoped that more transparency in the meantime might ‘buy time’ for the resolution of these systemic issues in the future.42 We need to say a few more words about the background of the TM.

Following the Doha Round,43 the NGR had undertaken the negotiation of new RTA disciplines.44 The issues were identified in a 2002 background note by the Secretariat: ‘Compendium of Issues Related to Regional Trade Agreements’ (hereinafter ‘Compendium’)45 and parallel negotiations on the procedural and systemic issues took place between 2001 and 2003. From 2003 to 2006, there was shift in the attention of members from the difficult discussions on systemic issues to procedural issues.46 According to the Compendium, what led to the breakdown in RTA scrutiny in the CRTA from 1996 onwards was ‘Members’ divergent understanding of the criteria contained in the rules themselves’.47

Information gathering was also a problem. What the TM tries to do is to delink these two problems and re-focus attention on information gathering and surveillance.

4. How the Mechanism Has Worked So Far

4.1. The Aims of the Transparency Mechanism

The TM aims to improve the transparency of RTAs in a number of ways from the moment when negotiations commence through to the end of the RTA’s implementation period, which is often many years later. It introduces early announcement of RTAs under negotiation. Notification disciplines are strengthened, and the data required to be provided by RTA parties are streamlined. The TM also charges the WTO Secretariat with the

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43 See Doha Ministerial Declaration, para. 29.
44 Crawford, 136.
46 Crawford, 136.
47 TN/RL/W/8/Rev.1, para. 16.
preparation of a summary, the so-called factual presentation (FP), of each newly notified RTA. The FP, prepared on the Secretariat’s own responsibility but in full consultation with the RTA parties, is circulated to WTO members at least ten weeks before the meeting to consider the RTA. Members have four weeks to submit written questions, and the RTA parties have four weeks to respond. The Q&R document is then circulated at least three days before the meeting. The TM also provides for any modifications of existing RTAs to be notified, for the parties to submit a report at the end of the implementation period, and for the WTO Secretariat to establish a public RTAs database.

4.2. **Early Announcement**

WTO members participating in new negotiations aimed at the conclusion of an RTA should inform the WTO on a best-endeavour basis; once the RTA has been signed, information on it should be conveyed to the WTO. The early announcement of an RTA is distinct from WTO members’ obligation to officially notify an RTA. Early announcements are to be made publicly available and posted on the WTO website. Since the adoption of the TM three years ago, some fifty RTAs have been early announced to the WTO. While a number of WTO members have ‘early announced’ their RTAs, compliance has not been universal.

4.3. **Timing of Notification**

TM, paragraph 3, specifies that notification is to take place as early as possible ‘no later than directly following the parties’ ratification of the RTA or any party’s decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties’. This adds precision to existing legal disciplines, which, in the case of Article XXIV:7(a) GATT and Article V:7(a) GATS, call only for ‘prompt notification’. Past practice often demonstrated a significant time lag between the entry into force of an RTA and its notification. Of the eighty-eight notifications made to the WTO in the three-year period since the adoption of the TM, twenty-three were made before the given RTA’s entry into force and seven were made within the following month. By way of comparison, of the sixty-three notifications made in the three-year period before the adoption of the TM, nine predated the given RTA’s entry into force and seven were made in the month following entry into force.

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48 This number refers to physical agreements, i.e., goods and services are not counted separately. A list of early announcements can be found on the WTO website consulted at <http://rtais.wto.org/UI/PublicEAR TAList.aspx>

49 For instance, of the seventeen distinct RTAs notified to the WTO during the course of 2009, seven were early announced by the parties. Thus, there is room for improvement, but the provision of information on RTAs through early announcements is an important step in enhancing the transparency of RTAs.

50 Emphasis added.

51 Paragraph 4(a) of the Enabling Clause calls for notification without specifying a time period.
4.4. Preparation of the Factual Presentation

TM, paragraph 7(b), provides for the WTO Secretariat’s FP. This is a summary of the RTA in question and is generally composed of four or five main sections. Section I, Trade Environment, provides an overview of trade between the parties in the years preceding the Agreement’s entry into force, including a breakdown of the product composition of merchandise trade. For agreements covering trade in services, an overview of services trade and investment flows is provided. Section II provides background information on the RTA, such as dates of notification and entry into force and internet links. Section III provides details of the provisions relating to trade in goods, in particular, a detailed picture of the liberalization of the trade and tariff lines starting from the entry into force until the end of the transition period for each party to the RTA. Regulatory provisions such as rules of origin, standards, safeguards, and other trade defence mechanisms are described in detail. Section IV, in the case of RTAs covering trade in services, provides a detailed exposition of the parties’ liberalization commitments in trade in services, together with a comparison of the liberalization offered under the agreement compared to the parties’ GATS commitments. Details of provisions relating to trade in services and investment, such as market access, national treatment, domestic regulation, and recognition, are also provided. A final section of the FP deals with other regulatory provisions such as competition, government procurement, and intellectual property. An annex provides margins of preference and a summary of the market access opportunities under the agreement.

In the three years since the adoption of the TM, the WTO Secretariat has prepared FPs on a total of seventy-seven notifications of RTAs.52 These have been used as the basis for these RTAs’ consideration in the CRTA or CTD.53 The FPs cover RTAs involving a broad cross-section of the WTO membership and include customs unions, free trade areas, and partial scope agreements. Most are bilateral RTAs involving only two partners, but some plurilateral RTAs, including the Southern African Development Community (SADC) and MERCOSUR, have also been the subject of an FP.

While the structure of the FP has remained broadly the same, some improvements have been made. For instance, following requests from members for the average tariff on remaining dutiable items, this information is systematically included.

52 Twenty of these relate to goods only RTAs, twenty-seven include both goods and services, and three are services only. See Attachment 2 of the Annual Report of the CRTA to the General Council, WTO document, WT/REG/20 dated 15 Oct. 2009.
53 Paragraph 18 of the transparency mechanism (TM) provides for the WTO’s CRTA to be the responsible body in the case of RTAs falling under Art. XXIV of the GATT 1994 and Art. V of the GATS, while the Committee on Trade and Development does so for RTAs falling under para. 2(c) of the Enabling Clause.
4.5. QUESTIONS AND REPLIES

Provision is made in the TM for a written set of Q&R to be circulated before the FP is considered at the meeting. In addition, provision is made in TM, paragraph 11, for an additional exchange of information following the meeting if necessary.

4.6. THE CONSIDERATION PROCESS

During the GATT years and the early years of the CRTA, WTO members sought to determine the compliance of RTAs with the relevant rules (i.e., consistency assessment) but without success. The long-standing differences of interpretation of some of the key elements of the legal texts pertaining to RTAs, coupled with the specter of dispute settlement, made some members reluctant to provide information that might be used against them. The goal of the TM is to improve the knowledge of RTAs with the tacit understanding that any questions of legal compliance with WTO rules will be dealt with elsewhere. Indeed, paragraph 10 of the TM makes clear that the FP shall not be used as a basis for dispute settlement procedures. This firewall between transparency and dispute settlement (similar to that which exists under the Trade Policy Review Mechanism of the WTO) is designed to foster transparency by encouraging members to provide relevant data.\footnote{Established in February 1996.}

TM, paragraph 6, provides that the consideration by WTO members of a notified RTA shall be concluded in a period not exceeding one year following the date of notification. Paragraph 11 further states that as a rule, a single formal meeting will be devoted to consider each notified RTA. Of the twenty-nine RTAs notified in the first two years since the adoption of the TM (i.e., those for which the one-year time period could have been satisfied), all but two have been completed.\footnote{Nonetheless, para. 1 of the TM makes it clear that the decision does not affect members’ rights and obligations under the WTO agreements in any way, so recourse to dispute settlement is always an option.} It is clear that the circulation of the FP and the round of written Q&R before the meeting devoted to consider the RTA have streamlined the process considerably. Prior to the adoption of the TM, RTAs were often subject to multiple rounds of examination in the CRTA, which, in some cases, dragged on over a period of years. However, given the ever-increasing number of notifications, it is unclear whether the WTO Secretariat will be able to keep up to speed with the FPs under its remit and whether members notifying such RTAs will continue to comply with their obligations of providing data, comments, and written responses to members’ questions within the prescribed deadlines.

\footnote{Excluded from this figure are eighteen RTAs whose parties include non-WTO members as such RTAs were only made subject to consideration in the CRTA as of March 2009. This issue is addressed below.}
4.7. Notification of Changes and Submission of Implementation Report

TM, paragraph 14, provides for any changes affecting the implementation of an RTA to be notified as soon as possible after the changes occur. Such notifications are to be made publicly available on the WTO website. During the course of 2009, seven notifications of changes were received and posted on the RTA website.

TM, paragraph 15, provides for the parties to an RTA to submit a short written report on the realization of the liberalization commitments in the RTA as originally notified at the end of its implementation period. No such reports have been received since the adoption of the TM. It is unclear if this is because none of the notified RTAs have reached the end of their implementation period during this time or whether members have neglected to prepare such reports. Such reports would provide updated information on an RTA since the FP only presents a snapshot of the RTA when it entered into force.

4.8. The RTA Database

TM, paragraph 21, provides for the WTO Secretariat to establish and maintain an updated electronic database on RTAs, which is to include relevant tariff and trade-related information and provide access to all written material related to announced or notified RTAs available at the WTO. The database was launched in January 2009 and is available on the WTO public website.57

4.9. The Backlog of RTAs to Be Considered Continues to Grow

The backlog of RTAs still to be considered in the CRTA continues to grow. As of June 2010, a total of ninety-five RTAs (counting goods and services separately) are still to be considered under the TM. During 2009, in the two sessions of the CRTA dedicated to the consideration of RTAs, a total of twenty-seven RTAs were on the agenda. A further two RTAs were considered by the CTD convening in dedicated session. This suggests that it would take at least four years for the backlog of RTAs to be cleared, assuming (as will clearly not be the case) no new notifications of RTAs are made during this period.

57 Available at <http://rtais.wto.org/>. It contains basic information for all RTAs notified to the WTO (both in force and inactive) such as dates of signature and entry into force, details of the WTO consideration process with links to all relevant documents, a summary of the main topics covered by the RTA, and any trade-related data submitted by the parties. A search facility allows information in the database to be accessed by member or by criteria, and a number of predefined reports are available for consultation and download. For the moment, the database contains only static trade and tariff information, i.e., the tariff phase-down shows a snapshot of the tariff liberalization commitments undertaken by the parties at the time of entry into force. It does not show the current preferential rates applied by the parties, although a second phase of the database is expected to include this type of information.
4.10. The ‘non-member’ issue

In March 2009, WTO members agreed in the CRITA on a way to deal with RTAs involving non-WTO members. The consideration of such agreements had been on hold for several years given differing views over their WTO legal status.58

Some WTO members continue to hold the view that Article XXIV:5 GATT provides for the formation of free trade areas or customs unions only ‘between the territories of contracting parties’ and therefore that non-member RTAs are only permissible if approved by a two-thirds majority of members as provided for in Article XXIV:10 GATT.59

Following months of informal consultations, WTO members agreed in March 2009 to submit agreements involving non-WTO members to the provisions of the TM on the understanding that this had no implication for the views or positions of any member with respect to the consistency of that RTA with the WTO rules and was without prejudice to the rights and obligations of members under the WTO Agreements.60

A total of forty-one RTAs fall into this category. Members agreed that those RTAs notified since the adoption of the TM in December 2006, including future notifications, should be taken up before the others – taking into account practical considerations such as the availability of data and the Secretariat’s established work programme.

As of June 2010, the CRITA or CTD had yet to consider an RTA involving non-WTO members: a number of such RTAs are scheduled in the CRITA’s work programme for 2010. The successful preparation of these FPs would depend on the ability and willingness of the parties to such RTAs to provide the required data and comply with the recognized procedures of the TM.

5. Members’ Questions and Replies and CRITA/CTD Discussions

We now turn to members’ Q&R and CRITA/CTD discussions based on all RTAs considered before the CRITA or CTD since the adoption of the TM three years ago. A total of forty-one RTAs have been considered during this period: thirty-eight RTAs covering trade in goods (in the form of free trade areas, customs unions, and partial scope agreements) and twenty-four covering trade in services (economic integration agreements). These RTAs involve some eighty WTO members – more than half the current membership – in varying geographical and economic configurations, for example, bilateral, plurilateral, regional, cross-regional, and North/South partnerships. Thus, the RTAs considered thus far under the TM are broadly representative of the WTO membership and the diversity of regional partnerships and differing scopes of application that characterize the current landscape of RTAs.

58 For a legal analysis, see, e.g., Won-Mog Choi, ‘Regional Economic Integration in East Asia: Prospect and Jurisprudence’, Journal of International Economic Law (2003): 49, 73–75.
59 In the case of services, GATS Art. V:1 provides for agreements liberalizing trade in services between or among WTO members. There is no analogous provision to GATT Art. XXIV:10 in GATS Art. V.
From the Q&R documents (and the discussions in CRTA and CTD meetings), we see that more questions are posed on RTAs covering trade in goods compared to those in services. For the twenty-four RTAs that have both goods and services provisions, questions on the goods provisions of these RTAs outnumber those on services for all but one RTA. Issues related to goods are broken down into five broad categories: liberalization and market access, safeguards and other defence mechanisms, rules of origin, sanitary and phytosanitary (SPS) and technical barriers to trade (TBT) provisions, and other regulatory provisions or issues. Only issues that recur across a number of RTAs are included. Issues related to services RTAs are broken into liberalization and market access, issues related to modes 3 and 4, and other provisions/regulations. Issues that are common to both goods and services will be considered separately.

We use two measures to analyse the issues raised: frequency, that is, the number of RTAs for which a given issue is raised, and average occurrence, that is, the average number of questions on a given topic per RTA (excluding those where no question on that issue was posed). While the latter is a useful measure, it should be borne in mind that questions are often concentrated in a few RTAs, rather than appearing across the entire spectrum. The results of the taxonomy can be found in Tables 1–3.

5.1. Goods

5.1.1. Liberalization and Market Access

5.1.1.1. The negotiating group on rules comes to a halt (2005–2007)

Negotiations on clarifying the rules relevant to RTAs – for example, on the ‘substantially all the trade’ test and the back-loading of liberalization in RTAs – had ground to a halt in February 2007 (shortly after the adoption of the TM in December 2006). No new submission has been received from members since 2005, and WTO members appear to have little appetite to continue the legal debate. This may be indicative of pragmatism – that members’ views are too diverse to define a SATT benchmark, for instance – or may reflect a preference for the status quo with all the inherent ambiguities that the current legal framework engenders. There is a lack of demandeurs in the process – those favouring more flexibility already make use of the rules as they currently stand, shielding themselves behind the perceived lack of definitions or agreed interpretations, while those favouring more stringent rules may not be willing to make the necessary compromises in other negotiating areas that would be expected, if agreement was reached on applying stricter rules. Nonetheless, it is clear from the questions and issues raised during the consideration of RTAs under the TM that issues of coverage and liberalization continue to generate systemic interest.

5.1.1.2. Discussion on the systemic issues continue in the CRTA and CTD under the transparency mechanism

Issues related to market access and liberalization raised during the consideration of RTAs under the TM have been divided into questions of a systemic nature – for instance,
product coverage under the ‘substantially all the trade’ requirement, conformity with WTO rules, and implications for the multilateral trading system — and technical issues such as those relating to liberalization modalities and the economic benefits of the RTA under consideration. Questions of a systemic nature were further broken down into the following categories: products excluded from liberalization, the disproportionate nature of liberalization between industrial and agricultural goods, reasons for asymmetrical liberalization (either in terms of transition periods or product coverage), low levels of liberalization and how this equates with the parties’ understanding of ‘substantially all the trade’ (Article XXIV GATT) or the ‘facilitation of trade’ (the Enabling Clause), the length of transition periods, and future liberalization. These questions are linked — if a certain number of products are excluded from liberalization, this could raise concerns about how the RTA conforms with the obligation in Article XXIV:8 GATT to eliminate duties on ‘substantially all the trade’ and, in turn, prompt further questions about any planned future liberalization. Similarly, concerns about asymmetry, that is, one partner liberalizing faster or deeper than the other (or others), may raise questions about why it was necessary to exceed the ten-year transition period permitted.61

From the taxonomy of questions, replies, and issues raised in the CRTA and CTD, it is clear that the systemic issues surrounding market access and liberalization of goods in RTAs continue to attract attention from a core group of WTO members.

The issue of low levels of liberalization and its consequences in satisfying the provisions of Article XXIV GATT or the facilitation of trade in the Enabling Clause was raised in more than half the RTAs with goods provisions surveyed.62 This issue was raised most often by the US, followed by the EC, Australia, Turkey, Chile, and Japan. Of the countries whose RTAs were most frequently questioned on this issue – Japan (five) RTAs, EFTA (four), Turkey (four), and Pakistan (three) — Turkey raised this issue twice (in relation to the EFTA-Egypt and Pakistan-China FTAs) and Japan, once (in relation to Korea-Singapore). The disproportionate nature of liberalization between agricultural and industrial products was questioned in thirteen RTAs and raised most often by the United States (in all thirteen RTAs), followed by Australia, Turkey, the EC, and Chinese Taipei. Of the countries whose RTAs were most frequently questioned on this issue – Japan (five) RTAs, EFTA (three), and Turkey (three) — only Turkey raised this issue (in relation to the Japan-Mexico FTA). The issue of products excluded from liberalization was raised in more than two-thirds of the RTAs considered, most often by the US followed by Australia, the EC, and less frequently by Japan, Turkey, Chinese Taipei, Canada, Thailand, and Brazil. Of the countries whose RTAs were most frequently questioned on this issue – Japan (four) RTAs, EFTA (four),

61 Understanding on the Interpretation of Art. XXIV of the GATT 1994, para. 3.
62 In the case of RTAs for Brunei-Japan (WT/REG244/2), Chile-Japan (WT/REG234/2/Rev.1), EFTA-Chile (WT/REG179/5), EFTA-Egypt (WT/REG323/2), EFTA-Korea (WT/REG177/3), EFTA-Tunisia (WT/REG201/4), Egypt-Turkey (WT/COMTD/RTA/1/2), India-Singapore (WT/REG232/2), Japan-Indonesia (WT/REG241/2), Japan-Malaysia (WT/REG216/3), Japan-Mexico (WT/REG198/5), Korea-Singapore (WT/REG10/4), Pakistan-China (WT/REG237/2), Pakistan-Malaysia (WT/COMTD/RTA/3/3), Pakistan-Sri Lanka (WT/COMTD/RTA/2/2), Panama-E Salvador (WT/REG196/4), SADC (WT/REG176/3), Turkey-Albania (WT/REG240/2), Turkey-Morocco (WT/REG209/M/1), Turkey-Tunisia (WT/REG203/4), and US-Australia (WT/REG184/5).
Mexico (four), Turkey (three), and Pakistan (three) – Japan raised this issue twice (in relation to the EC-Albania and Korea-Singapore FTAs) and Turkey, once (in relation to Japan-Mexico). Questions concerning future liberalization prospects occurred in more than half of the RTAs analysed with an average of 2.9 questions for each RTA.

Issues concerning reasons for asymmetrical liberalization (raised by the EC, the US, Japan, Turkey, Australia, and Chinese Taipei) and the length of the transition period (raised by Australia, the US, the EC, Brazil, and Chinese Taipei) were less frequent but still generated interest. Asymmetries in liberalization, due to one partner liberalizing faster or deeper than the others, were particularly resonant in RTAs involving developed and developing countries. For instance, in Japan’s RTAs – with Brunei, Indonesia, Chile, Malaysia, and Mexico – members questioned why Japan had undertaken less liberalization of tariff lines and trade over a longer transition period than its developing RTA partner. Likewise, in the EFTA-Egypt FTA, members questioned why Switzerland had liberalized less tariff lines than Egypt.

Some RTAs attract more questions about their liberalization provisions than do others, which may indicate the level of interest (or lack thereof), in a given RTA due to its potential trade effects. For instance, the RTAs of Japan, the EFTA states, Egypt, and Pakistan were subject to detailed questions about their liberalization provisions, whereas those of Armenia and Ukraine attracted little attention. It may also be indicative of the inherent degree of liberalization in the RTA (if most or all trade is liberalized, then such questions are moot). This is the case, for instance, in the Thailand-Australia and Thailand-New Zealand FTAs.

Technical questions raised in relation to market access and liberalization provisions were divided into five categories: quantitative restrictions (including special safeguard mechanisms), export duties, average tariff on remaining dutiable items, liberalization modalities, and economic benefits or significance of the RTA for the parties’ trade. Of these, questions relating to liberalization modalities (in particular, further clarifications relating to the liberalization of tariffs and trade) were the most frequent. Questions on quantitative restrictions, including preferential tariff rate quotas and special safeguard mechanisms, occurred in about a third of RTAs. Questions on the average tariff on remaining dutiable items, the potential economic benefits or significance of trade between the parties resulting from the RTA, and the application of export duties occurred in a third or more of RTAs analysed.

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Technical questions can be considered representative of areas where the information in the factual presentation (FP) or the RTA itself is deficient and therefore may indicate areas where the FP could be improved. For instance, the FP provides a snapshot of trade between the parties in the three years prior to RTA’s entry into force but does not provide information on the evolution of trade (in value and volume terms) since the RTA entered into force, particularly for tariff lines liberalized, should be included in future FPs, if available. As mentioned earlier, the average tariff on remaining dutiable lines is now systematically included in all FPs. For QRs and export duties, more information could be provided in the FP on the percentage of tariff lines and of the import value accounted for by them. Given that technical questions are of less interest to the systemic debate, a detailed breakdown is not provided.
5.1.2. Safeguards and Other Defence Mechanisms

Questions on safeguards and other defence mechanisms, particularly the definitions and criteria for their application in the RTA, were a source of interest from members, with questions posed in nearly half of the RTAs analysed and an average of nearly four questions for each RTA. Members sought clarification of certain terms used, the rationale for using criteria that differ from the WTO Agreement on Safeguards, and the comparative benefits. Such questions were posed most often by Chinese Taipei (which posed more than half the total questions raised), then by Japan, Canada, the US, Turkey, Australia, the EC, and Switzerland. In about a quarter of the RTAs analysed, members enquired whether safeguards had actually been applied under the RTA. Other questions related to AD/CVD measures and structural adjustment/infant industries were less frequent.

Although the use of safeguards in RTAs has long been of systemic interest to WTO members, few submissions in this regard have been made in the Doha Round. India has proposed that the principle of most favoured nation (MFN) treatment be respected in RTAs, that is, that RTA partners may not be excluded in the event of a global safeguard action. India also proposed that a derogation from the standards of safeguard investigation in the event of an intra-RTA safeguard could be permitted if tariffs were increased from the preferential level up to the MFN level, while the disciplines of the WTO Agreement on Safeguard would apply when raising duty above the MFN level. In response, divergent views were expressed by members on the extent to which parties to an RTA may apply intra-RTA safeguards and how these relate to WTO rules. Members, however, agreed that these issues merited further investigation.

5.1.3. Rules of Origin

Due to their potential to create trade and investment diversion, in particular, to the detriment of third parties, preferential rules of origin are an area of continuing interest. Members hold differing views as to whether rules of origin constitute ORCs under Article XXIV:5 GATT. No definitive list of ORCs exists in the WTO. In submissions to the NGR, India, Korea, and the EC addressed the issue of preferential rules of origin and presented different perspectives.
ORCs. For instance, India, in drawing attention to the potential for trade and investment diversion to the trade of third parties, suggested that value added preferential rules of origin for RTAs between developed countries should be no less stringent than those provided under the developed country’s Generalised System of Preferences (GSP) scheme in order to maintain equality of market access. Both India and Korea highlighted the need to address the issue of diagonal cumulation, which favours certain third parties to a given RTA but discriminates against the rest. The EC in its submission attempted to shift the focus from the definition of ORCs towards a neutrality test, which would establish the criteria necessary to measure the incidence of ORCs on third parties. Rules of origin have also been linked to the discussion on SATT; some members have argued that since preferential rules of origin limit the products covered by an RTA, over-burdensome rules of origin could limit trade volumes and undermine the fulfilment of SATT. Although members have expressed interest in continuing the discussion of preferential rules and ORCs, no further progress on this issue has been made in the NGR.

Members’ continuing interest in rules of origin is demonstrated by the frequency of questions concerning the criteria and legal basis for the determination of rules of origin that occurred in more than half of the RTAs covering trade in goods during their consideration. The average number of questions posed was also relatively high, averaging 2.2 questions for every relevant RTA. Such questions were posed most frequently by the EC, followed by Brazil, Chinese Taipei, the US, Canada, Japan, Turkey, and Hong Kong China. Another question of systemic interest concerns the application of diagonal or full cumulation, which occurred in a fifth of RTAs. Such questions were posed most frequently equally by the US, the EC, and Chinese Taipei, followed by Brazil and Oman. Technical questions with regard to rules of origin, such as certificates of origin, advance rulings, de minimis, and the workings of the committee on customs procedures established under the RTA, occurred less frequently. Issues surrounding rules of origin are also linked to questions regarding the relationship of RTAs with other RTAs.

5.1.4. Other Provisions

Questions on SPS provisions were three times more frequent than those on TBT, which is probably a reflection of the sensitivity of the agricultural sector. There was considerable interest in whether and when a goods-only RTA would include services provisions — this question was posed in nearly a third of RTAs. Government procurement attracted questions in more than a third of the RTAs analysed. Questions on other regulatory issues such as provisions on state aid, competition, intellectual property, and labour and environment were less frequent. Questions on an MFN clause for goods were surprisingly infrequent but may reflect the fact that such provisions, while long standing in services RTAs, are relatively recent in goods and thus have attracted little attention from members thus far.

74 See TN/RL/M/24.
75 Again, as in the case of safeguards, this is an area that would benefit from broader horizontal analysis.
Table 1. Taxonomy of Issues Related to Trade in Goods
(Fr indicates frequency; Avg, average)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Market Access and Liberalization (Goods)</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>Quantitative restrictions</strong>/preferential access for tariff-rate quotas (TRQs)</td>
<td>13</td>
<td>34</td>
<td>1.7</td>
</tr>
<tr>
<td>Products excluded from liberalization</td>
<td>26</td>
<td>68</td>
<td>2.2</td>
<td>Provisions on export duties and charges</td>
<td>13</td>
<td>34</td>
<td>2.4</td>
</tr>
<tr>
<td>Disproportionate liberalization (agriculture)</td>
<td>13</td>
<td>34</td>
<td>2.4</td>
<td>Average tariff on remaining dutiable lines</td>
<td>16</td>
<td>42</td>
<td>1.3</td>
</tr>
<tr>
<td>Reasons for asymmetrical liberalization</td>
<td>14</td>
<td>37</td>
<td>1.6</td>
<td>Liberalization modalities</td>
<td>25</td>
<td>66</td>
<td>4.2</td>
</tr>
<tr>
<td>Low level of liberalization and SATT</td>
<td>21</td>
<td>55</td>
<td>3.1</td>
<td>Economic benefits/significance of trade</td>
<td>12</td>
<td>32</td>
<td>1.5</td>
</tr>
<tr>
<td>Length of the transition period</td>
<td>4</td>
<td>11</td>
<td>3.0</td>
<td>Committee on customs procedures</td>
<td>4</td>
<td>11</td>
<td>2.3</td>
</tr>
<tr>
<td>Future liberalization</td>
<td>20</td>
<td>53</td>
<td>2.9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Safeguards and Other Defence Mechanisms**

- Definitions and criteria for application: 17 Fr, Fr% 45, Avg 3.8
- Anti-dumping/CVD measures: 3 Fr, Fr% 8, Avg 1.7
- Any safeguards applied: 10 Fr, Fr% 26, Avg 1.5
- Structural adjustment/infant industry: 4 Fr, Fr% 11, Avg 2.3

**Rules of Origin**

- Criteria and legal basis for determination: 23 Fr, Fr% 61, Avg 2.2
- Advance rulings: 2 Fr, Fr% 5, Avg 1.5
- Certificates of Origin: 15 Fr, Fr% 39, Avg 1.1
- De minimis: 2 Fr, Fr% 5, Avg 1.0
- Diagonal/full cumulation: 8 Fr, Fr% 21, Avg 2.0
- Committee on customs procedures: 4 Fr, Fr% 11, Avg 1.3

**SPS and TBT Provisions**

- SPS provisions: 15 Fr, Fr% 39, Avg 2.1
- TBT provisions: 5 Fr, Fr% 13, Avg 1.2
- Committee on SPS/TBT: 4 Fr, Fr% 11, Avg 1.3

**Other Regulatory Provisions/Issues**

- Provisions on state aid/subsidies: 4 Fr, Fr% 11, Avg 2.0
- Provisions on intellectual property: 4 Fr, Fr% 11, Avg 3.8
- Competition/anti-competitive practices: 4 Fr, Fr% 11, Avg 1.3
- Provisions on labour or environment: 2 Fr, Fr% 5, Avg 1.0
- Rules on government procurement: 15 Fr, Fr% 39, Avg 2.9
- MFN clause for goods: 2 Fr, Fr% 5, Avg 2.0
- Plans to include services (goods only RTAs)**: 5 Fr, Fr% 31, Avg 2.8

* Based on a total of thirty-eighty RTAs covering trade in goods.
** Based on fourteen RTAs covering trade in goods only.
5.2. **Services**

5.2.1. **Market Access and Liberalization**

In the taxonomy below, questions posed regarding the liberalization in trade in services, like those for goods, have been broken down into technical issues and questions of a systemic nature. With regard to systemic issues, questions concerning the liberalization provisions and resultant compatibility with Article V GATS, together with questions about potential future liberalization of services, were the most frequent, occurring on average in half of the RTAs considered. The issue of compatibility with the provisions of Article V GATS was raised most frequently by the EC, followed by the US, Canada, and Thailand. Members also expressed an interest in the low level of ambition in four RTAs (Japan-Brunei, EFTA-Chile, Japan-Indonesia, and Pakistan-Malaysia). In the case of Chile-Panama, EC-Chile, and EFTA-Chile, members requested justification for the exclusion of a sector – financial and/or audiovisual services.

Technical questions regarding market access and liberalization in services were significantly less frequent. Questions on national treatment, followed by those on market access provisions, were the most frequent. Reasons for choosing a positive rather than a negative approach to liberalization attracted some interest, as did modification/withdrawal of commitments and economic benefits or the significance of the RTA for the trade of the parties.

As in goods, issues of a systemic nature raised with regard to market access and liberalization provisions are indicative of unresolved systemic issues, while technical questions could indicate areas where the FP might be improved.

5.2.2. **Modes 3 and 4**

Questions on mode 3, in particular, relating to the treatment of investment and limitations on foreign equity or ownership limitations, occurred in about a quarter of the RTAs analysed. Questions on the scope of non-conforming measures and the composition of Foreign Direct Investment (FDI) were somewhat less frequent. Issues relating to the movement of natural persons in mode 4 arose in ten of the twenty-four RTAs analysed. Questions on mode 4 were most frequent in the case of the Japan-Indonesia FTA where a number of questions were posed (by Chinese Taipei) on nurses and care workers in relation to the determination of annual ceilings and the impact on the quality of nursing staff and on nursing staff provided from elsewhere. In the case of the Korea-Singapore FTA, questions...
were raised by Japan and the EC concerning the duration of stay for certain categories of mode 4 workers and the take-up and actual use of quotas for mode 4 commitments.

5.2.3. **Other Provisions or Regulations**

Of the issues classified under other provisions or regulations, questions on mutual recognition arrangements were most frequent, followed by denial of benefits and the MFN provision.

**Table 2. Taxonomy of Issues Related to Trade in Services**

*(Fr indicates frequency; Avg, average)*

<table>
<thead>
<tr>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Market Access and Liberalization (Services)</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>Market access provisions</strong></td>
<td>3</td>
<td>13</td>
<td>2.7</td>
</tr>
<tr>
<td>Reasons for limited ambition</td>
<td>4</td>
<td>17</td>
<td>1.8</td>
<td>Liberalization and Article V GATS</td>
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<td>42</td>
<td>1.6</td>
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<td>Article V GATS compatibility</td>
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<td>National treatment provisions</td>
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<td>17</td>
<td>1.3</td>
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<td>Exclusion of a sector/activities</td>
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<td>13</td>
<td>3.7</td>
<td>Positive versus negative approach</td>
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<td>8</td>
<td>1.5</td>
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<td>Future liberalization of services/new services</td>
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<td>63</td>
<td>3.3</td>
<td>Modification/withdrawal of commitments</td>
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<td>Treatment of investment</td>
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<td>13</td>
<td>2.0</td>
<td>Scope of mode 4, ceilings</td>
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<td>42</td>
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<td>21</td>
<td>1.2</td>
<td>Non-conforming measures – investment</td>
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<td>17</td>
<td>3.5</td>
</tr>
<tr>
<td><strong>Modes 3 and 4</strong></td>
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<td></td>
<td></td>
<td><strong>Domestic regulation</strong></td>
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<td>8</td>
<td>1.5</td>
</tr>
<tr>
<td>Denial of benefits</td>
<td>5</td>
<td>21</td>
<td>1.4</td>
<td>Domestic regulation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Definition of legal/judicial person</td>
<td>3</td>
<td>13</td>
<td>1.0</td>
<td>Mutual recognition arrangements</td>
<td>9</td>
<td>38</td>
<td>2.1</td>
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<tr>
<td>MFN provision</td>
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<td>17</td>
<td>1.0</td>
<td>Committee on trade in services</td>
<td>2</td>
<td>8</td>
<td>2.0</td>
</tr>
</tbody>
</table>

*Based on a total of twenty-four RTAs covering trade in services.

5.3. **Issues Common to Both Goods and Services RTAs**

A number of issues common to both goods and services RTAs are classified in Table 3. Of these, three stand out as having a bearing on the systemic debate: the question of the relationship of the RTA to other RTAs, accession provisions, and notification
requirements. In fifteen of the forty-one distinct RTAs analysed, the question of the relationship of the RTA to others was raised. This question included issues of coherence, the creation of building blocks versus stumbling blocks, overlapping RTAs, and the potential burden or confusion caused to exporters due to the multiplicity of bilateral RTAs. Such questions were posed most frequently by the EC, followed by the US, Japan, Chinese Taipei, Korea, and Brazil and were most frequent in cases where there is an overlapping of RTAs. For instance, questions were asked about the nature of the relationship between the Japan-Indonesia and Japan-Malaysia RTAs and the ASEAN-Japan FTA and whether traders would need to choose between separate market access schedules. Likewise, a number of questions were posed regarding the Trans-Pacific Strategic Economic Partnership (which links Brunei, Chile, New Zealand, and Singapore), particularly with regard to the legal relationship between this RTA and pre-existing bilateral RTAs, the benefits of maintaining two RTAs at the same time, and the impact on transaction costs. This is obviously an issue of systemic concern to members and deserves further attention. Issues raised in relation to notification requirements focused on reasons for delayed notification, why non-notified RTAs listed in the FP had not been notified and when the parties intend to notify them, and why the parties chose to notify the RTA under the Enabling Clause rather than Article XXIV GATT. The latter occurred in the case of the Egypt-Turkey FTA where the US and EC asked the parties to explain the reasons for notification under the Enabling Clause.

6. Conclusion

Systemic issues continue to be raised under the TM, and this is likely to continue. The TM is meant to cool debate on the systemic issues, but there is no evidence at present of a great softening of attitudes, even taking into account the risk of self-interest or bias. What our study confirms is that there remains a vibrant core of countries active in the CRTA. These

77 Such questions were raised in the following RTAs: Armenia-Moldova (WT/REG173/4/Rev.1), EC-Albania (WT/REG228/M/1), EC (25) Enlargement (WT/REG170/9), EFTA-Chile (WT/REG179/5), EFTA-Egypt (WT/REG232/2), Japan-Indonesia (WT/REG241/2), Japan-Malaysia (WT/REG216/3), Pakistan-Sri Lanka (WT/COMTD/RTA/2/2), Panama-Singapore (WT/REG227/2), SACU (WT/REG231/M/1), SADC (WT/REG176/5), Thailand-Australia (WT/REG183/5), Thailand-New Zealand (WT/REG267/4), Trans-Pacific (WT/REG229/2), and Turkey-Albania (WT/REG240/M/1).

78 WT/REG241/2, WT/REG216/3 and WT/REG216/M/1.

79 WT/REG229/2 and WT/REG229/M/1.

80 Such questions were raised in the following RTAs: Chile-China (WT/REG230/2), Egypt-Turkey (WT/COMTD/RTA/1/2), India-Singapore (WT/REG228/2), MERCOSUR (WT/REG238/2), Pakistan-China (WT/REG237/2), Pakistan-Sri Lanka (WT/COMTD/RTA/2/2), Panama-Chile (WT/REG239/M/1), Panama-El Salvador (WT/REG196/4), and SACU (WT/REG231/3).

81 It is interesting to note that no questions were asked of developing countries, which chose to notify their RTAs under Art. XXIV rather than under the Enabling Clause. For example, in the three-year period since the adoption of the TM, a dozen or more RTAs involving developing countries have been notified under Art. XXIV rather than the Enabling Clause. The issue of ‘developmental’ RTAs has a long history; see, e.g., L/2136, 13 Feb., UN Doc. E/PC/T/C.II/7, p. 9 (Lebanon).

82 New Zealand and Hong Kong China co-sponsored a submission on transparency of RTAs (TN:RL/W/117), but neither has made a formal submission to the Negotiating Group on Rules (NGR) on systemic issues.
member countries continue to submit written questions and intervene in meetings. The US and the EC are certainly among the most active. Sometimes, it is clear that a systemic concern is truly at issue, such as when the US consistently mentions the low liberalization of agriculture in RTAs. The EC is less vocal on this point, but it, too, has addressed a number of questions on the subject of the exclusion of products from coverage. Another possible explanation is that US and EC behaviour may be due simply to the significance of their role in the world trading system or, more precisely, the need to make that significance felt. If so, the same explanation could apply to Japan’s moderately active participation in CRTA discussions.

A harder question has to do with whether, overall, members have changed their views or positions significantly since the establishment and operation of the TM. Some Asian states, in particular, may have softened their positions since. One reason could be that, while East Asia and South Asia have been relative late comers to the RTA game, they have since become actively involved in RTAs themselves. If so, their behaviour in particular could support the hypothesis that RTA proliferation and scrutiny are related; the more members engage in RTAs, the lesser the likelihood of increased or tighter scrutiny.

For instance, back in 1998, Japan indicated that a number near to 100% of tariff line coverage for SATT would be appropriate, but Japan has since adopted a more flexible approach to SATT, based on trade values rather than tariff lines. At the same time, Japan has been on the offensive, as well as being on the defensive, in relation to debate over the low levels of liberalization and the exclusion of agriculture in its RTAs, but this may be explained by tit-for-tat questioning (i.e., Japan is now going on the offensive because it is on

### Table 3. Taxonomy of Issues Common to Goods and Services RTAs

(\(Fr\) indicates frequency; \(Avg\), average)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
<th>Issue</th>
<th>Fr</th>
<th>Fr%</th>
<th>Avg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules on dispute settlement</td>
<td>6</td>
<td>15</td>
<td>1.8</td>
<td>Relationship of this RTA to others</td>
<td>15</td>
<td>37</td>
<td>3.3</td>
</tr>
<tr>
<td>Application of rules on dispute settlement</td>
<td>6</td>
<td>15</td>
<td>1.3</td>
<td>General review/amendments made</td>
<td>7</td>
<td>17</td>
<td>2.0</td>
</tr>
<tr>
<td>Commission/committee established</td>
<td>7</td>
<td>17</td>
<td>2.3</td>
<td>Notification requirements</td>
<td>9</td>
<td>22</td>
<td>2.0</td>
</tr>
<tr>
<td>Accession to the RTA</td>
<td>4</td>
<td>10</td>
<td>3.0</td>
<td>Measures to promote transparency</td>
<td>3</td>
<td>7</td>
<td>1.7</td>
</tr>
</tbody>
</table>

* Based on a total of forty-one physical RTAs.

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83 The US raised the issue of low liberalization of agriculture in thirteen RTAs and the EC in two. With regard to excluded products, the US raised the issue in twelve RTAs and the EC, in nine RTAs.

84 WT/REG/M/16, para. 114.

85 TN/RL/W/190. In the case of Japan’s RTAs considered under the TM, WTO members drew attention to its low liberalization of agricultural products – in its FTA with Chile, Japan liberalized 60% of its agricultural tariff lines (WT/REG234/1), with Brunei, 59% (WT/REG244/1); with Indonesia, 60% (WT/REG241/1); with Mexico, 42% (WT/REG198/4); and with Malaysia, 64% (WT/REG216/2).
the defensive). Japan has also been on the defensive where its partners have committed to
deeper and faster liberalization than Japan (i.e., asymmetrical liberalization).

Then there are members like New Zealand and Hong Kong China, which previously
spoke in favour of tighter disciplines but have since become more muted. Such examples
need not suggest that active RTA scrutiny is dead. As we have said, countries could be
suffering from negotiating fatigue or the simple need to divide their resources between
Geneva and RTA negotiations. China’s WTO accession could also lead to a less active
WTO role for Hong Kong China.

India, however, presents an interesting case study. While India can afford to be
stringent notwithstanding its entry into the RTA race as it tends to exercise its ‘entitlement’
as a developing country to notify its RTAs under the Enabling Clause\footnote{Since the adoption of the TM in 2006, India has notified four RTAs covering trade in goods: India-Singapore,
India-Bhutan, India-Chile, and the South Asian FTA (SAFTA). All except the India-Singapore FTA were notified under
the Enabling Clause.} and is thereby less
directly affected by questions about the degree to which the WTO should subject RTAs to
rigorous scrutiny,\footnote{Nonetheless, the RTAs that India is currently negotiating with the EC, EFTA, and Japan will need to be
notified under Art. XXIV.} the India-Singapore FTA is one case where an Indian RTA has fallen
short of India’s own proposed standards.\footnote{According to the FP of the India-Singapore FTA (WT/REG228/1/Rev.1, para. 22), India liberalized only 24%
of its total tariff lines under the FTA, corresponding to 75% of imports from Singapore. During the CRTA meeting
devoted to the consideration of India-Singapore FTA, concerns about its coverage were raised by the EC, the US,
Australia, Canada, and Chile. Brazil countered these concerns, arguing that the appropriate forum for discussing SATT
was the NGR, not the CRTA (WT/REG228/M/1).} Yet a rule does not necessarily cease to be one,
even where there is widespread tolerance of violation. Indeed, in the face of widespread
toleration, reputational losses might be considered to be minimal if not negligible. In any
event, it is simply too early to suggest that members like India may have shifted towards a
preference for looser regulation.\footnote{As for the more dismal theory that what we have today, putting aside the systemic issues, is that countries may
simply have descended to tit-for-tat questioning instead, we have found that those countries that have been subjected to
the most questions did not in turn pose the same questions of other members.} As with Korea, India, too, has been active in raising
questions concerning diagonal cumulation and the effect of RTAs on third countries.

Finally, recently acceded members (RAMs) such as Chinese Taipei have become
more vocal, particularly with regard to the effects of RTAs on third parties and
RTA accession.\footnote{TN/RL/W/182 and TN/RL/W/186.} Yet this may be explained by the paucity of Chinese Taipei RTAs. As
with the earlier position of Korea, Hong Kong China, and Japan before East Asia’s rapid
entry into an RTA race, Chinese Taipei may have cause to be concerned about trade
diversion. Like Hong Kong China, which remains concerned with trade diversion, Chi-
nese Taipei has very few RTAs.

Australia has remained actively engaged despite its entry, beginning with the Howard
Administration, into RTA negotiations. Like the US and EC, Australia has engaged in
questioning across the whole gamut of contemporary systemic concerns, from low levels of
liberalization, including in agriculture, to asymmetrical liberalization, and safeguards. This
may be explained by its membership of the Cairms Group and its historic permissiveness as
an economic liberal towards the exemption of FTA partners from safeguards. While
Australia may be relatively less concerned with trade diversion (compared to EC, Brazil,
Chinese Taipei, the US, Canada, Japan, Turkey, and Hong Kong China), this, too, could
be explained by its decision, after what appears to be a period of genuine uncertainty, to
enter into East Asia’s FTA race.

Of those that have in the past taken a more relaxed approach, it is unclear why Brazil
has not been particularly vocal about disproportionate liberalization in agriculture. Might
that be because, as a Cairns exporter, Brazil is less concerned and might quietly welcome
less liberalization in agriculture in RTAs as there is then less potential for its exports to be
affected? If so, Brazil would be playing a different role than that played by Australia. Brazil’s
interest in diagonal cumulation is perhaps more easily explained. It could be due to plans
for entry into an RTA with the European Union (EU) and the Pan-European Rules of
Origin (PERO). A similar explanation might suggest itself in relation to Oman’s interest
in diagonal cumulation (i.e., current negotiations between the Gulf Cooperation Council
and the EU).

It is difficult to determine the role extraneous reasons such as tit-for-tat questioning
plays. As we have seen, this could also explain Japan’s conduct. Turkey could be another
dexample due to the targeting of Turkey’s RTAs by other members. But for the most part,
not only is there a core of countries that remain actively engaged in discussing a range of
systemic issues since the establishment of the TM, also, the greater part of that behaviour is
both rational and explicable.

In addition to these patterns of behaviour, continued scrutiny is also the result of new
kinds of RTAs, which have come into being in recent years. Two issues stand out. First,
East Asia’s entry into the RTA race has raised concern about an emerging Asian ‘noodle
bowl’ of overlapping RTAs and RTA rules. Such concern has been directed at Japan in
particular, which has concluded not only an Economic Partnership Agreement (EPA) with
the Association of Southeast Asian Nations but also overlapping RTAs with individual
ASEAN member countries. Secondly, the issue of low levels of liberalization was raised
in more than half the RTAs with goods provisions. Some of these involve RTAs notified
under the Enabling Clause and demonstrates a resurgent interest in such RTAs.

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92 Namely, Singapore, Malaysia, the Philippines, Indonesia, Brunei, and Thailand.
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ISSN 1011-6702
Mode of citation: 45:2 J.W.T.