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The Committee on Regional Trade Agreements: A Symptom of WTO Breakdown?

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Dissertação apresentada ao Programa de Pós-Graduação em Relações Internacionais do Instituto de Relações Internacionais da Universidade de São Paulo para a obtenção do título de Mestre em Ciências.

Orientador: Prof. Dr. Yi Shin Tang

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Abstract

The current debate about the consequences of the proliferation of Regional Trade Agreements arises in the middle of a governance crisis in international trade, which has also put into question the role of the WTO as an International Organization governing this scenario through multilateral principles and rules. However, aware of this situation, States seem to keep making efforts to deal with these problems through the negotiation of multilateral mechanisms to enhance the governance of the international trade system. The Committee on Regional Trade Agreements (CRTA), existing for more than two decades, is a key piece to understand why these efforts seem fruitless. This research attempts to analyze its work and evolutions, considering different factors that have incidence in its performance, and to determine if it is possible that a work such as the performed by the CRTA could be an efficient way to govern the relations arising from the current organization of international production.

Key words: Committee on Regional Trade Agreements, Regionalism, Compatibility Examination, Deep Integration.

Resumo

O debate atual sobre as consequências da proliferação de Acordos Comerciais Regionais surge no meio de uma crise de governança no comércio internacional, o qual também questiona o papel da OMC como Organização Internacional que governa este cenário através de princípios e normas multilaterais. No entanto, cientes desta situação, os Estados parecem manter esforços para lidar com tais problemas através da negociação de mecanismos multilaterais para melhorar a governança do sistema multilateral. O Comitê de Acordos Comerciais Regionais (CRTA) que existe há mais de duas décadas é uma peça-chave para compreender as razões pelas quais tais esforços parecem infrutíferos, considerando o fato de que se trata do órgão multilateral encarregado do controle de Acordos Regionais. Assim, a presente pesquisa procura analisar o trabalho e evoluções desse Comitê, considerando diferentes fatores que incidem em seu desempenho, e determinar se um trabalho como o feito pelo CRTA poderia ser uma eficiente forma de governar as relações que surgem da atual organização da produção internacional.

Palavras-chave: Comitê de Acordos Comerciais Regionais, Regionalismo, Exame de Compatibilidade, Integração Profunda.

List of Acronyms

CARIFTA Caribbean Free Trade Association

CARICOM Caribbean Community

CIF Cost, Insurance and Freight

CRTA Committee on Regional Trade Agreements

CTD Committee on Trade and Development

EFTA European Free Trade Association

FOB Free on Board

FTA Free Trade Agreement

GATS General Agreement on Trade in Services

GATT General Agreement on Trade in Goods

GDP Gross Domestic Product

KORUS Korea- United States Free Trade Agreement

LAIA Latin American Integration Association

MERCOSUR Southern Common Market

MFN Most Favored Nation

NAFTA North American Free Trade Agreement

PTA Preferential Trade Agreement

RCEP Regional Comprehensive Economic Partnership

RTAs Regional Trade Agreements

TPP Transpacific Partnership Agreement

USA United States of America

TRIPS Agreement on Trade- Related Aspects of Intellectual Property Rights

WTO World Trade Organization

List of WTO documents

Document JOB(99)/4797/Rev.3 Preparations for the 1999 Ministerial Conference. Compilation of Proposals Submitted in Phase 2 of the Preparatory Process**.** Informal Note by the Secretariat.

Document L/778 Report submitted by the Committee on the Rome Treaty to the Contracting Parties in December 10th, 1957.

Document L/1235 Report of the Working Party of the European Free Trade Association, issued in June 4th, 1960.

Document L/6140 Report of the Working Party on the Free Trade Area Agreement between Israel and The United States, issued in March 19th, 1987.

Document L/4470 Report of the Working Party on the Caribbean Community and Common Market, issued in February 19th, 1977.

Document TN/RL/W/8/Rev.1. Compendium of issues related to Regional Trade agreements prepared by the Secretariat.

Document TN/RL/W/252 Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements. Issued in April 21st, 2011, by the Negotiating Group on Rules.

Document TN/RL/W/253 Negotiations on Regional Trade Agreements: Systemic Issues. Report by Ambassador Dennis Francis, Chairman, Negotiating Group of Rules, issued in April 21st, 2011.

Document WT/L/127 Decision the General Council, adopted on February 6th, 1996, which establishes the Committee on Regional Trade Agreements.

Document WT/L/671 Decision of the General Council, which establishes the New Transparency Mechanism.

Document WT/MIN(01)/DEC/1 Doha Ministerial Declaration. Adopted on November 14th, 2001.

Document WT/DS34/AB/R Appellate Body Report. Dispute DS34 Turkey- Restrictions on Imports of Textile and Clothing Products.

Document WT/DS34/R Panel Report. Dispute DS34 Turkey- Restrictions on Imports of Textile and Clothing Products.

Document WT/DS139/AB/R; WT/DS142/AB/R (Appellate Body Report). Disputes DS139, DS142 Canada- Certain Measures Affecting the Automotive Industry.

Document WT/GC/M/8 Minutes of the Meeting of the General Council held in the Centre William Rappard of November 15th, 1995.

Document WT/L/671. Issued by the General Council. Transparency Mechanism for Regional Trade Agreements. Decision of December 14th, 2006.

Document WT/REG/W/15 Issued by the CRTA. Guidelines on Procedures to Improve and Facilitate the Examination Process. Adopted on May 6th, 1997.

Document WT/REG/1 Issued by the CRTA. Rules of Procedure for Meetings of the Committee on Regional Trade Agreements. Adopted on August 14th, 1996.

Documents WT/REG4/M/1, WT/REG4/M/2, WT/REG4/M/3, WT/REG4/M/4 Issued by the CRTA. Examination of the North American Free Trade Agreement.

Documents WT/REG160/M/1, WT/REG160/M/2, WT/REG160/M/3 Issued by the CRTA. Examination of the Free Trade Agreement between the United States and Chile.

Documents WT/REG125/M/1, WT/REG/125/M/2 Issued by the CRTA. Examination of the Free Trade Agreement between Chile and Mexico. Notes on the Meetings.

Documents WT/REG140/M/1, WT/REG/M/2, WT/REG/M/3 Issued by the CRTA. Examination of the Agreement for a New-Age Economic Partnership between Japan and Singapore.

Document WT/REG234/M/1 Note on the Meeting of the Committee on Regional Trade Agreements on the Strategic Economic Partnership Agreement between Japan and Chile of November 27-28th, 2008.

Document WT/REG281/M/1 Note on the Meeting of the Committee on Regional Trade Agreements on the Free Trade Agreement between Peru and China of March, 14 and 15th, 2011.

Document WT/REG311/M/1 Note on the Meeting of the Committee on Regional Trade Agreements on the Free Trade Agreement between the United States and Korea (goods and services) of November 11th, 2014.

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1. Introduction

To which extent has the Committee on Regional Trade Agreements (CRTA) been fulfilling any role in the governance structure of the World Trade Organization? This is our main question and we have three possible answers. First, the CRTA would be an instrument of governance control because it is able to monitor and identify the incompatibilities between the multilateral and regional trade regulation. Second, the CRTA was established as a governance instrument, but it has worked inefficiently because it is not able for monitoring the multilateral trade in order to get that goal. Third, the CRTA would only be a transparency mechanism in the multilateral system because it only reduces transaction costs through the distribution of information among the member States of the WTO.

Answering this question is important because of the current debate related to the consequences of proliferation of Regional Trade Agreements (RTAs) and the weakening of the World Trade Organization (WTO). Thus, this question arises as a relevant point from the studies and analyses about this governance crisis and the challenges that the WTO is facing. A formal study about the structures of accountability and their effectiveness to solve current potential conflicts within the multilateral trade system and, specifically, about the work of the CRTA throughout the years of the existence of the multilateral system, is fundamental as the CRTA was intended to examine the compatibility between RTAs and the provisions of the multilateral agreements, allowing a better certainty about the rights and obligations of each WTO member, as well as the predictability about their normative application.

The efforts of the World Trade Organization and its members to counter this crisis are portrayed in recent negotiations of the Doha Round, where some provisional Decisions that entail changes in the action of the CRTA have been taken in order to deal with the current RTA proliferation. Thus, the Doha Ministerial Declaration provided in its 29th paragraph the mandate of "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements"[1]. Later, in the Negotiating Group of Rules, one of the negotiating bodies of the Trade Negotiations Committee, the RTAs Transparency was the main

[1] Doha Ministerial Declaration. Adopted on November 14th, 2001. Document WT/MIN(01)/DEC/1

point of discussion, as a result of the lack of action and difficulties that the CRTA was going through[2].

Today the studies on the issue have focused in evaluating the positive or negative effects of regionalism on the multilateral trade system. While among the positive effects, the greater trade liberalization between countries that have concluded RTAs has been noted, on the negative side, the regulatory complexity of the RTAs proliferation was stressed as RTAs would be undermining the governance in the multilateral trade system and challenging the role of the WTO to control this phenomenon (Thorstensen, 2002, p.165-166; Crawford; Fiorentino, 2005, p.1). Furthermore, the work of the CRTA, which was established for the compatibility examination of Regional Trade Agreements, is stagnant as it has not adopted any Report on the examination of RTAs since its establishment. The WTO members have also discussed about the role of the CRTA in the Doha Round, which led the General Council to adopt a Decision in 2006 that thoroughly modifies the procedure of RTAs examination and provides the creation of the Transparency Mechanism for RTAs, on whose functions there is no deep analysis in the area of International Relations[3].

According to the reasons exposed above, the current study attempts to determine the extent to which the CRTA is able to be a governance instrument of multilateral trade and the adequacy or deficiency of its functions as a mechanism of accountability. In our view, this analysis of the work of the CRTA may show us the WTO deficiencies as long as this Committee is part of the institutional set-up of the regime of international trade and a key figure in regionalism.

For the purposes of the foregoing, in this research we briefly analyze the functions of the WTO in the international trade governance as well as its current role the evolution of the interaction of RTAs with the multilateral system in light of some assumptions of the theories of neoliberal institutionalism and neorealism about international regimes and cooperation and the existing definitions about international governance. Afterwards, we discuss some multilateral provisions related to the principle of non-discrimination and their exceptions that are part of the legal

[2] The Background Note issued by the Secretariat (Document TN/RL/W/8) include the Transparency as a principal issue to guide the preparation of submissions and proposals, in the context of paragraph 29th of Ministerial, and the labor of the Negotiating Group on Rules.

[3] Decision of the General Council that establishes the New Transparency Mechanism. Document WT/L/671

underpinnings for the conclusion of RTAs, as well as the phenomenon of regionalism and proliferation of RTAs.

Subsequently, this research focuses in the evolution of the compatibility examination performed since the GATT years by the Working Groups as a background of current deficiencies, considering in particular the evolution of the provisions included in the RTAs examined, as well as the political economy behind these changes. Our analysis of the performance of the CRTA consider the deficiencies observed in its examinations due to systemic issues and factors of political economy in the period of 1996 to 2006 and the consequences of the lack of reports of the WTO consideration process of notified RTAs in the same period. Furthermore, we analyze the new transparency mechanism that took effect since 2006, replacing the previous mechanism of compatibility examination, in order to determine its role in the governance of the multilateral trading system. Finally, it is discussed the relevance of a potential compatibility examination in the current configuration of international production, which has produced an evolution in the provisions of Regional Trade Agreements, resulting in the new Deep Integration Agreements, acknowledged as the current paradigm for regulating international trade.

2. The WTO in the View of International Governance

To explain and tackle the problem of growing RTAs within the WTO system requires a theoretical understanding of certain assumptions regarding the relationship between States in the international trade regime. For this purpose, the approaches developed by the neoliberal institutionalist school are useful to initially address this issue as this theory explains the creation of international organizations, how they would contribute to international governance and makes it possible to recognize as plausible the objectives initially stated by the founding member States in the preamble of the Marrakesh agreement considering the essential contribution of international organizations as the WTO for getting those goals through cooperation. In this context, Keohane's views on the nature of State behavior at the international level may be particularly useful, given that they reject the idea that interdependence

between States would be benign and demonstrate skepticism regarding the possibility that more interdependence would generate cooperation without conflict. However, according to our analysis on the WTO and the stagnation of the work of the Committee of Regional Trade Agreements, some approaches of the realist school shall also be useful in order to explain the current situation of the mechanism of compatibility examination of the WTO, insofar as this theory is less optimistic about the contributions of international organizations to cooperation among States and provides explanations to certain behavior of these actors where neoliberal institutionalism does not, which will provide us with a key element for the conclusions of this study. In this sense, both theories will allow us to thoroughly examine the situation presented herein.

One basic assumption in neoliberal institutionalism comes from the realist school, according to which States are selfish and seek to protect their own interests and welfare, not that of other States (Keohane, 1984, p.29; Mearsheimer, 2001, p.55). According to Keohane, this element of egoism (self-interest) allows us to make predictions on the States behavior within an International Regime in a more accurate way than the expectations of their actions according to the formal text of agreements. This understanding may allow us to better appreciate the current status of the regime of International Trade and of the CRTA, because even if some statements from governments in multilateral instruments are referred to cooperation and the pursuit of a common goal, their actions are at times limited to the selfish benefits of States.

Neoliberal institutionalism's scholars assert that selfish States would cooperate in order to obtain their own benefits. Thus, as cheating is the main problem for cooperation because States are concerned that others breach their obligations, cooperation could only be possible if States get to deal with this problem (Grieco, 1993, p.117). In this sense, Keohane (1984, p.103) assessed the bargaining that would occur among States and its results in terms of cooperation, where interdependence showed patterns of behavior of States in order to get cooperation. Thus, insofar as today there are links among several issues in international politics, States will be constrained to not adopt selfish decisions on a specific issue considering their effects in other linked issues, which could even be retaliations from the affected States. According to this, the actions of States regarding one issue

should take into account the effects in other international issues, as for example, the constant tension among the rights acquired by countries through free trade agreements to improve their market access in any region, and the obligations which these countries are subject to, regarding safety standards of any type such as health, environment among others. Another example would be the barriers to imports from China adopted by several countries due to subsidies applied by that country to its agricultural exports, which refers to the tension among unilateral protectionist measures and the access to international markets.

However, some criticisms regarding this understanding about cheating come from realist scholars, for whom the issue linkage not only does not enhance cooperation between States, but it could make cooperation unattractive as States may be worried about the relative gains of their trade partners, which could be extended to other areas related to the one where the joint action is taken (Grieco, 1993, p.133; Waltz, 1979, p.105 *apud* Baldwin, 1993, p.6). For them, States are concerned about cheating, but also about relative gains, which refers to the division of gains arising from cooperative actions among partners, which produces concern between States regarding the manner their partners are going to use their increased capabilities, therefore, the possibility that a partner may become an enemy emerges. Brooks (1997, p.467) suggested that the case may be different for developing countries, which may "pursue cooperation with potential rivals" because their economic gains from cooperation may supersede their concerns about relative gains. However, we should consider in this regard that developing countries usually follow the trend in global trade already defined by developed countries, as exemplified hereinafter in the case of NAFTA. Thus, the problem of relative gains should mainly consider the situation among developed countries, which are the shapers of the trend. The element of relative gains presented herein will provide us with a different conclusion about the activities of the WTO and its role in the governance of international trade through the years since its foundation.

International Regimes have been defined as the "principles, rules, norms, and procedures around which expectations converge in a given area of international relations" (Krasner, 1983 *apud* Keohane, 1987, p.741). Keohane (1984, p.63) asserts that international regimes serve to the selfish interests of rational States by offering a

new context for their own empowerment, while also increasing the contact among States for getting mutual adjustments through policy coordination. Nevertheless, for neoliberal scholars, these regimes do not improve the patterns of cooperation by the enforceability of rules due to the anarchy in international relations, but they would facilitate cooperation by providing information with reduced costs among partners.

In view of the situation of the Doha Round, we identified a lack of capacity to adopt mutual adjustments at the WTO level, and a declining role of this Organization for coordinating multilateral trade. For Barton et al. (2006), this situation is due to the lack of changes in the WTO rules required by changes in the structure of power among its members. These authors stressed that the power politics in the WTO have been transformed, but these transformations are not echoed as changes in governance practices of this Organization. Furthermore, the rules of consensus and cooperation in the WTO have become more difficult, and there have been no changes in constitutional rules or practices of the WTO. In the same vein, Macmillan (2014, p.600) explained that the single undertaking principle and the consensus decision making have become a veto power for countries with no significant gains from the multilateral system, extracting gains from those who would gain significantly, so the benefits arising from multilateralism for hub countries have diminished to such extent that they are no longer waiting for the conclusion of the Doha Round.

Accordingly, we may conclude, in first place, that the current rules about decision making do not allow policy coordination at all[4], resulting in the stagnation of WTO negotiations at the Doha Round and, in second place, that the rules of consensus and single undertaking are made to attend absolute gains issues, which in fact are focused by multilateral regimes, so the relative gains problem makes those rules difficult to follow. In this point, the realist theory provides a plausible explanation for the situation of proliferation of Regional Trade Agreements and the ability of the WTO to deal with it, as States would bargain tailor-made agreements to cope with their concerns about the distribution of relative gains in favor of their partners in a specific area and in the ones related to it.

[4] The reason of the lack of changes in these rules may be explained by the problem of relative gains, that in the case of the WTO means that each member would be concerned about the relative gains of other WTO members, expressed as problems of a political character during the negotiation, which is exacerbated considering the existing issue linkages described hereinabove, as the gains could include other areas, resulting in greater relative gains to be considered by the concerned country (es).

According to Keohane (1984, p.89), as the effects of agreements are considered in advance if negotiated within the framework of a Regime, bargaining there should lead to better results than ad-hoc negotiations, where there is no room for deliberation of possible effects. Therefore, within an International Regime, issues such as legal liability, transactions costs and problems of uncertainty could be better bargained. Legal liability in the case of the WTO would be related to the expectations of States provided by rules about the behavior of other States, altering patterns of transaction costs. Thereby, the conclusion of discriminatory agreements would have been costlier due to the MFN provisions, which forbid discriminatory agreements, turning them illegitimate, except under specific conditions. However, we observed that these expectations did not match the proliferation of RTAs, which have become the main way for States to govern their relations in international trade, despite being an exception to the MFN multilateral principle. Thus, the conclusion of RTAs since the GATT period suggests that the costs of breaching the MFN obligations were no as high as to become a barrier for this behavior, as for example, the NAFTA concluded in 1994, preceded by an agreement between USA and Canada of 1988, many years before the creation of the World Trade Organization. Additionally, Keohane (1984, p.105) asserts that States would fulfill the rules of International Regimes in order to avoid the creation of precedents of rules breaching, which may lead other countries to default in the same way. However, States with more negotiation power, as the United States and the European Union, concluded agreements also since the GATT years. We noted that the NAFTA is considered the trigger for the multiplication of RTAs between developed and developing countries (Reza, 2015, p.189). Thus, it seems that the cost of breaching the MFN obligation was not significant and USA was not concerned with influencing the actions of other States. Again, the relative gains problem may provide an additional explanation for the phenomenon of proliferation of RTAs in parallel to the multilateral system.

We could identify two possible reasons for the conclusion of RTAs according to the foregoing. First, the costs for the countries that signed tailor-made RTAs, while breaching the multilateral rules, were less than the potential benefits offered by the multilateral system, considering the relative gains problem presented by the neorealism. Furthermore, regionalism offered these countries better relative gains compared to the ones from the multilateral system, where there was not only a trade

liberalization goal but a developmental one, where developed countries were required to make concessions in favor of developing countries. In this sense, such demands could be relativized through agreements of smaller scope. Second, even if the costs of signing RTAs were high, there was no available information to measure the effects of preferences included in RTAs, information that could have been provided by the CRTA or the former Working Groups. Thus, only an *ex-post* control could have been performed through the Dispute Settlement Body of the WTO, which has proven to be very useful for settlement of disputes about incompatible measures included in RTAs[5].

2.1. Governance Structures in the WTO

Regarding the role of the WTO in the international trade governance, its precedents go back to the negotiations of Bretton Woods, which resulted in some agreements aiming the establishment of a new world order for the financial and trade relations (Amaral, 2013, p.424), as the International Bank for Reconstruction and Development, the International Monetary Fund, and the framework for the International Trade Organization, whose creation failed. In spite of this, the GATT was adopted in 1947, which established some trade rules and tariff practices that sought to encourage trade exchanges through liberalization (Amaral, 2013; Witker; Hernandez, 2008, p.53).

The creation of the WTO in 1996 provided an institutional configuration to the GATT, as set forth in article II of the Marrakesh Agreement. At that time, interdependence had intensified in a manner that the regulatory framework established by the GATT was insufficient to cover world trade. The WTO was established to organize and promote cooperation among its members in order to obtain the predefined mutual benefits[6]. In this sense, it has been a forum for the negotiation of a set of multilateral

[5] See Dispute DS34 Turkey — Restrictions on Imports of Textile and Clothing Products. Documents WT/DS34/R, WT/DS34/AB/R

[6] Jackson et al consider that even if International Organizations may not transform the international relations into an orderly system, they are more than subordinates of States and have an autonomous importance, being capable of promoting cooperation. In: JACKSON, Robert, Barbara DUARTE, Arthur ITUASSU. Introdução às Relações Internacionais Rio de Janeiro: Zahar. (2007) p. 166

agreements in different issues, which established some principles to be followed by its members when developing their trade relations. Its rules resulted from complex negotiations held by officials of competent bodies from each of the member countries, however, its agreements only bind governments (direct binding), being required an implementation through national rules to bind individuals (indirect binding).

We found some interesting points of complex interdependence (Keohane, 1988) in the international trade regime. In first place, its regulatory interest refers to trade issues, thus, even if military issues are important, economic interdependence have implications on power resources of countries. Likewise, trade relations demonstrate the existence of asymmetrical power among actors depending on their status as developed and developing or least developed countries. This represents a bargaining resource because, even if there are multilateral rules that define the relationship between powerful and weak actors that aims to diminish that difference of power, it is costlier for minor States to breach rules for their own benefit. Thus, conflict is an essential component in international politics, which States need to deal with, in order to get not-always-probable mutual benefits.

Considering that the WTO goals are focused in absolute gains, a well-articulated governance structure is required within the WTO to reduce the level of conflict that arise from the possibility of cheating between members or, at least, to maintain a system that makes possible the negotiation of mutual adjustments through the WTO rules, because otherwise the conflict could increase (Keohane, 2010, p.168). However, trade relations have increased in such a way that they seem to have surpassed the ability of the WTO to regulate them. We should determine if the WTO could maintain an articulated system given the current proliferation of RTAs, which also seem to be the main alternative for countries to develop their trade relations. For this purpose, we need to evaluate the structures of governance and determine whether they are adequate or not to the current conditions of political economy of multilateral trade[7].

[7] As our analysis develops around the action at the interstate level, it does worth mentioning that, regarding the claim that today we are experiencing some transformations of Multilateralism, due to the growing importance of non- state actors and a declining importance of States, to the extent that "threat has acquired a system- wide significance that urge a transformation of *multilateral governance* as well

Those structures of governance were built around the regulations in international trade of the WTO, which were configured for its worldwide application according to two simultaneous processes, unification and primacy (Amaral, 2008, p.54). Amaral explains that by unification the WTO requires the countries the global acceptance of provisions of multilateral agreements in order to achieve systemic consistency of obligations and postponement of unilateral measures by WTO members, which deteriorate the multilateral system. The primacy, in the other hand, seeks to control the protectionist measures that governments would adopt in reason of unilateral policies in the framework of domestic or regional policies

Thereby, in order to make prevail the WTO system, the transparency principle ensures that WTO members notify to this International Organization their policies on international trade, for subsequent identification of any incompatible measure with WTO agreements. This allows the WTO to ask for modifications to those policies in order to make them compatible with the WTO (Amaral, 2012, p.199). This would be a manner to influence the action of States by an International Regime, as pointed out before. The influence of the WTO is observed through the *ex-post* control performed by the Dispute Settlement Body, which may authorize the suspension of tariff concessions when a violation of multilateral agreements is verified, even though the Regime is not able to apply such sanctions, but only States, due to its decentralized nature that means that any action may only be adopted by its members, the States.

Among the instruments of the WTO that guarantee the primacy of multilateral rules is, in first place, the Mechanism for Revision of Trade Policies, which periodically carries out a review of the trade policies of each WTO member, increasing the transparency through the evaluation of the impact of those policies

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as Institutions to the new context" (Langenhove, 2010, p.265), we consider that State actors perform an important role within the multilateral trade system, as well as in decisions concerning the establishment of a well-structured governance, to the extent that they are the main actors regarding the adoption of policies in international trade and the RTA proliferation. We are skeptical about a current minor importance of States at the international level, due to the fact that even if a global order to the detriment of the importance of Nation- States has been part of many attempts since the end of World War II, the legitimacy of the latter due to its elements of territory, population and government has been a strong point for the maintenance of the order established in the peace treaties of Westphalia. In the other hand, as it was said before, the States are rational egoists and they are going to seek their own benefits, in that sense it is not difficult to understand the most recent changes in the world political order. This does not underestimate the interaction that exists with other actors from the private sector that have transformed the economic relations as we will see later through the analysis on the value chains and their consequences.

and their adherence to WTO provisions. In second place, we find the Committee on Regional Trade Agreements that replaced several working groups, which was created to evaluate the compatibility between the notified RTAs and the multilateral trade system as well as their systemic effects. Finally, the World Trade Organization has a dispute settlement system, which is composed by a dispute settlement body and an appeal body. The Understanding on Dispute Settlement considers that this system is an essential element to contribute security and predictability to the multilateral trade system, as it preserves rights and obligations of the members and interprets the provisions of the multilateral agreements.

Nevertheless, the compatibility examination of RTAs carried out by the CRTA has been described as inefficient (Melo, 2011, p.278; Benini; Plummer, 2008, p.243)[8]. What is more, negotiations in the Doha Round are stagnant and the goals of the WTO informed in the Marrakesh Agreement are not being achieved. This situation has led most of the WTO members to negotiate regional agreements, and the resulting regulatory complexity seems to have superseded all efforts to enhance the trade governance. In order to identify the reasons for the governance crisis in the multilateral trade system, considering the current phenomenon of proliferation of Regional Trade Agreements (RTA) and the actual role of the CRTA therein, we shall carry out an analysis of the following pillars of governance: transparency and accountability. The first one related to the availability of information to States, and the second one, to the control over the action of agents who exercise power.

The first pillar of governance related to transparency, allows a better participation of States in International Regimes, based on the availability of information. Keohane (1984, p.94) pointed out that International Regimes are used by States to accede to unbiased information as it would allow States to reduce uncertainty and make better agreements between them. Thus, the transparency principle is only instrumental since it aims to ensure informed decision-making of the

[8] For example, regarding the CRTA, Melo points out that "given the limited amount of WTO resources, monitoring RTAs should be avoided and the CRTA should strive to focus on devising rules more likely to be welfare improving" In: Melo, 2005, p.278 Also, for Benini and Plummer it should be stressed the recognition that "the current state of WTO provisions relative to regionalism are inadequate. Further, the Regional Trade Agreements Committee has not been able to accept (or reject) the preposition that current trade agreements conform with WTO provisions, no doubt due to the subjective nature of any such assessment (and political resistance against criticism by some of the contracting parties)" In: Benini, Plummer, 2008, p. 273

involved actors, which would lead to a better governance in the system. For Tornos et al (2012, p.41), this pillar may be understood as an ethical principle, applied to the political sphere, as the actors who hold power have the responsibility to explain the reasons and effects of their decisions, but also as a legal principle, which refers to the existence of obligations to provide information, according to the rules of a specific normative system. Transparency is a fundamental principle in the WTO, which requires States to inform other members about their trade regulations in order to facilitate and provide predictability to international trade. The WTO provided some measures to maintain an internal transparency, as reports by which States inform about their trade measures to the Organization, the Trade Policies Review Mechanism or the notification of RTAs concluded by WTO members.

In the case of the second pillar of governance, accountability, it has two dimensions, the first one known as *answerability* and related to the responsibility of officials to inform about their actions and to justify them. The second one refers to *enforcement*, by which these officials may be punished when they are in breach of their obligations (Tornos et al., 2010, p.49; Naessens, 2010, p.2121-2122). The mechanisms of accountability are effective due to their degree of enforcement, as it determines the rules that are costlier to break and constrains the behavior of States in a certain way according to the goals of the International Regime. It also applies to RTAs, as “the stark reality is that, however much bilateral and regional agreements may include provisions that condemn “bad” trade practices, those provisions may be comparatively meaningless if they cannot be enforced” (Trakman, 2008, p.376). This is a controversial point as International Regimes have a formal legal status with broad powers that could condemn practices of States that are incompatible with the own agreed goals of the Regime, but which depends on the decision of a State to retaliate by identifying a certain practice as adversely affecting its own interests.

According to the foregoing, we consider that the compatibility examination of Regional Trade Agreements was created as a potential accountability mechanism because from its conclusions would have been possible for the WTO to require its members to modify certain provisions included in their RTAs in order to make them consistent with the multilateral system. In the following sections, we analyze the examinations performed by the CRTA to identify its contributions to the international

trade governance and the reasons for its failure in fulfilling its mandate in the middle of a context of proliferation of RTAs.

2.2. Regulation of the Most Favored Nation Principle and its Exceptions

The Most Favored Nation (MFN) principle is part of the broad principle of Non-Discrimination, which is one of the most important governing the trade relations among States. Under this principle, the State members are not able to discriminate among their trading partners, that is, advantages granted to a country must be extended to all the other WTO members[9]. This principle is applicable in virtue of Article I GATT to trade in goods, by article II GATS to trade in services, and by article IV TRIPS in the case of Intellectual Property Rights. In this sense, this is a fundamental principle of the Multilateral System as a whole, insofar as it is the main instrument for achieving the goal of global trade liberalization.

We focus on the application of this principle to trade in goods and services, as the examination of each RTA begins by its notification to the WTO, which could only be underpinned on the exceptions to the MFN principle for the case of trade in goods and services, including article XXIV GATT and article V GATS, as well as the Enabling Clause, whose innovation lies in the most favorable treatment granted to developing countries to conclude RTAs.

2.2.1. The MFN Principle on Trade in Goods and its Exceptions

According to the WTO (2014, p.52), this principle would guarantee three situations. In first place, it would promote the efficient assignment of global production as it allows all WTO members to accede under the same conditions to the trade relations with another member. In second place, it would minimize the transaction costs to the extent that the regulations of WTO members do not change depending on the origin of the product, allowing trade partners to accede to cheaper

[9] This principle is applicable to trade in goods, services, investment, intellectual property rights, currency exchange, diplomatic immunities and recognition of foreign judgements, with some exceptions.

information for determining the applicable rights for their transactions. In third place, this principle would multilateralize the preferential treatment that a WTO member grant to another, as it would be extended to the rest of the WTO members. Therefore, further liberalization occurs via the MFN principle.

We should stress that these provisions pursue an ideal situation of absolute gains, which States may consider as difficult to attend, as they are rational egoists attending their own interests, that privilege their own benefits above those of other States, and government officials are accountable to their own population about the advantages or disadvantages negotiated in the international level, in accordance with the relative gains' problem, by which States would not cooperate if the division of gains do not satisfy them. Therefore, granting the same conditions to all WTO members would only be possible in very favorable situations, where the mutual adjustments for granting a MFN treatment between States ensure benefits for all the States involved, and only to the extent that such benefits do not concern the actors involved about the relative gains of their partners. For these reasons, a MFN treatment would be difficult, if not impossible, to achieve. Additionally, in case a MFN treatment is granted during a period, it is possible that the balance among both situations will be broken at some point of the trade relations among those actors.

The precedent case law of the WTO identified that States could provide measures against this principle that are not readily identified as discriminatory treatment, as they may be on a *"de jure"* or *"de facto"* basis[10]. In the first case, the discrimination could be identified through the analysis of the rule. However, a *"de facto"* discrimination is possible even under non-discriminatory rules, and it is only identified by its application, once a preferential treatment has already been granted to certain actors that creates disadvantages to others. This detail will be important later, during our analysis of deep integration agreements.

The exceptions to the MFN principle in the case of trade in goods allow the conclusion of RTAs and are the legal underpinnings for their notification to the WTO. In the one hand, Article XXIV and the 1996's Understanding of article XXIV set forth

[10] These types of discrimination have already been analyzed by the Appellate Body in the case Canada- Certain Measures Affecting the Automotive Industry. Complainants: Japan and European Communities. Report of the Appellate Body. Document WT/DS139/AB/R, WT/DS142/AB/R. Paragraph 78

the conditions to be fulfilled by WTO members to grant a MFN treatment to their partners within a Customs Union (CU), Free Trade Area (FTA) or provisional agreement, without extending this treatment to the other WTO members. In the other hand, under the Enabling Clause, developing countries are subject to more favorable conditions to conclude RTAs than under article XXIV.

CU, FTAs[11] or their Provisional Agreements aim to eliminate customs duties and other restrictive regulations on substantially all the trade between the parties (paragraph 8, art. XXIV GATT). Regarding their restrictive measures in relation with third parties (paragraph 5, art. XXIV GATT), the new duties and other measures related to trade shall not be more restrictive to third parties than the regulations of both countries on the whole before the formation of the CU or, in the case of a FTA, these measures shall not be more restrictive than the regulations each party previously applied to third parties. Thus, the goal of regional integration is liberalizing trade between the parties of the agreement while avoiding the establishment of new barriers to trade with non-parties which are members of the WTO. The agreement shall be notified to the GATT for its examination or possible recommendations in order to determine whether a RTA fulfills the conditions of Article XXIV and, pursuant to paragraph 10 of the Understanding of Article XXIV, the parties shall not maintain or put into force an agreement if they are not prepared to modify the agreement in accordance with these recommendations. Finally, paragraph 13 of the Understanding establishes that each party is fully responsible for the observance of the GATT provisions.

Additionally, the Decision "Differential and more favorable treatment, reciprocity and fuller participation of developing countries", namely the Enabling Clause, establishes that developing countries may benefit from a preferential treatment in spite of the MFN principle, thus, the RTAs concluded among developing countries are subject to less restrictive requirements, which may only reduce and not eliminate the tariffs or non-tariff restrictions applied to products imported in their mutual trade. In Latin America, the Enabling Clause was the legal basis to conclude the LAIA and Partial Agreements signed within the framework of LAIA as well as

[11] Customs Unions are defined as the substitution of a single customs territory for two or more customs territories where duties and restrictive regulations are eliminated on substantially all the trade. Meanwhile, in FTAs, each customs territory maintains its individuality but the elimination of duties and restrictive regulation occurs as well.

MERCOSUR. In the nineties, many agreements were concluded with the aim of forming Free Trade Areas[12].

The Enabling Clause is intended to facilitate and promote trade among developing countries, which should not result in trade barriers against other WTO members or in impediment to the reduction or elimination of tariffs and other trade restrictions under the MFN principle. It is allowed that countries only reduce, and not eliminate, the barriers to trade and it has not been specified that the tariff reduction should be done in "substantially all the trade". However, regarding non-tariff measures, the Ministerial Conference has not adopted criteria for their reduction.

As these provisions are focused in promoting and enhancing the participation of developing countries in international trade, they also led the WTO to deviate from the general goals of trade liberalization in a non-discriminatory basis. It complicates the work of the WTO as its initial goals, which were already focused in absolute gains, are relativized even more, toward equitable development goals of its members, which could make it more difficult to adopt mutual adjustments considering the problem of cheating and, specially, of relative gains. In that sense, it becomes harder for the goals of the WTO to be supported by its developed members as they may have to deal with a difficult scenario to obtain the benefits from their participation in the WTO.

2.2.2. The MFN Principle on Trade in Services

The GATS governs trade in services, including four types of provision as defined in its article I.2, which differ according to the movement of the services supplier or receiver or the commercial presence of the provider. The MFN principle covers any measure affecting trade in services in any sector included by the Agreement, and also includes *de jure* and *de facto* discrimination as described in the case of trade in goods. Any member's requirement to exempt a measure from MFN treatment should have been notified as such at the time the GATS came into force

[12] This information was obtained from the RTA database. Available at <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=135>. [Accessed on May 13th, 2016]. Any information of subsequent RTA analyzed in this research has been obtained from that database.

and new exemptions may only be included at the time of accession of a country to the GATS or through specific procedure defined in article IX:3 of the Marrakesh Agreement.

The conclusion of RTAs in trade in services is allowed by article V which provides that GATS should not be an impediment for the conclusion of an Agreement for liberalization of trade in services. Its paragraph 4 provides that a RTA should facilitate trade among its parties and shall not increase the overall level of barriers to trade regarding third parties compared to the level prior to the RTA. Therefore, some specific conditions shall be fulfilled, which would be verified by the Council for trade in services. These conditions, pursuant to paragraph 1 of art. V GATS, require a substantial coverage measured by number of sectors, volume of trade affected and the non-exclusion of any mode of supply. Meanwhile, discriminatory measures should be eliminated and new ones should be forbidden. A preferential and differentiated treatment for developing countries is also allowed in paragraph 3, regarding the elimination and prohibition of new discriminatory measures, through a variable geometry logic, depending on the level of development of countries. This scenario shows the same problems observed for the case of GATT about the importance in pursuing the trade liberalization goals of the GATS, as well as an equitable development of WTO members in the area of services at the expense of absolute gains from trade liberalization goals.

2.3. Regionalism and Proliferation of Regional Trade Agreements

As we noted, RTAs have currently proliferated in such a manner that they seem to represent the new strategy of States in international trade. For Zalduendo (2010, p.4), they come under a logic of integration framed in the relations of cooperation between States, because even if it generates conflict, States decide to cooperate to get their desired goals. However, our analysis about the situation of RTAs, contrary to multilateralism, has to consider that countries are moved not by concerns in cheating, but also in relative gains problems.

Even though the WTO was created attending to the goal of getting an international trade on a non-discriminatory basis, the number of RTAs concluded has steadily increased since its creation. The WTO data shows that until July 2005, 330 RTAs had been notified since the GATT period, even with some Agreements that were in force but without notification to the WTO. Eight years later, as of July 31, 2013, 575 more Agreements were notified to the WTO and 379 were operational[13]. From these numbers, we notice that the percentage of RTAs notified increased over 50% and this trend seems to continue in the following years. In this context, Crawford and Fiorentino found that RTAs are being adopted by many WTO members as trade policy instruments and, in the best case, as complementary to the MFN clause (Crawford; Fiorentino, p.2005). Baldwin proposed the *domino theory* to explain the proliferation, pointing out that this phenomenon is the result of an equilibrium of forces in international politics between membership and non-membership in RTAs, as the non-members of a specific RTA seek to participate therein, in order to maintain its position in international trade (Baldwin, 1993, p.18).

The World Trade Report of 2011 listed several causes, from political and economic theories, for the conclusion of RTAs. Among the economic ones, RTAs would be a way of neutralizing the beggar-thy-neighbor policies, which benefits the country adopting them, but with negative effects in the multilateral level. A RTA may also include provisions preventing countries from making future inefficient short-term political decisions and its conclusion represent the possibility for a country to accede in preferential conditions to economies of scale, which would be an advantage over countries not participating in them. RTAs would attract investments by granting stability to the policies of the participant countries against possible modifications. Finally, RTAs would allow negotiation of deep integration provisions that favor the insertion in Global Value Chains (WTO, 2011, p.94).

Among the political reasons, the Report pointed out that RTAs perform a fundamental role for regional political integration, as the case of the European Community. Regarding minor States, it was stressed that RTAs help them to pool resources in order to gain influence in broader international negotiations or to counter the influence of others RTAs. However, about this point, Trakman (2008, p.385)

[13] How many regional trade agreements have been notified to the WTO? Available at: <https://www.wto.org/english/tratop_e/region_e/regfac_e.htm> [Accessed on June, 2016]

asserts that developed States might do the same, in favor of their own interests, which would become a disadvantage for developing countries. The Report also noted that RTAs are more likely to be concluded among democracies as these have more possibilities to be ratified and represent a sure sign for the voters about the trade goals that their governments would be pursuing. On the other hand, RTAs could be used by strongest States to strengthen their power relations, so they are capable of shaping provisions according to their own interests. In the same way, countries that are outside of a preferential trade relationship could seek to conclude RTAs to keep their position in trade or to avoid the exclusion from the process of trade liberalization[14]. Finally, regionalism has been seen as an alternative stemming from the stagnation of the multilateral system (WTO, 2011, p.95).

Positions have been adopted for and against the proliferation of RTAs according to their convenience for the multilateral trade system. Favorably, and in line with the foregoing reasons, it has been stressed that preferential trade can help developing economies to implement domestic reforms and to sustainably open up to world markets, which would improve their performance in the multilateral system (Crawford; Fiorentino, 2005, p.16). In this sense, RTAs regulate issues which are still not included in the multilateral system, known as WTO-extra[15] and there is the possibility of being incorporated later in the multilateral system. Thus, a RTA could be seen as an intermediate stage for trade liberalization (Thorstensen, 2002, p.166).

In the other hand, it has been pointed out against proliferation that RTAs are undermining the transparency and predictability of regulations on world trade, which are pillars that guide the activity in the WTO (Crawford; Fiorentino, 2005, p.1). Thorstensen consider that including new issues in RTAs would produce uncertainty about rights and obligations that correspond to each Party, or create dual systems of rules or dispute settlement mechanisms for the same issues, what would be threatening the governance in the international trade (Thorstensen, 2002, p.165).

[14] This was called by Baldwin as “defensive RTAs”, which are signed by States to reduce the discrimination created by other RTAs. See Baldwin and Jaimovich 2010.

[15] WTO-extra provisions are RTAs’ commitments not previously provided under the WTO mandate, and go beyond the competence of this Organization (for instance, labor standards). Different from WTO-plus provisions, which cover commitments already provided by the WTO, but furthering them in a more stringent way (for instance, the further reduction of tariffs).

Bhagwati (1993, p.4) illustrates concerns about proliferation of RTAs through the “spaguetti bowl” expression, which refers to the complex network arising from relations among countries that concluded RTAs. The legal difficulty is the wide range of regulations to be fulfilled by countries with their trade partners as they would have to comply with opposite obligations corresponding to different RTAs or incompatible with the multilateral system. This author also observed that regionalism could generate inefficiencies due to trade diversion and become a threat to global free trade (Bhagwati, 2005, p.6). For Antimiani, Small-Think Regionalism is the one focused on trade creation, trade diversion and terms of trade effects. Meanwhile Big-Think- Regionalism would be focused on the systemic implications of regionalism, such as the formation of Stumbling-Blocks through trade blocks, where States raise their collective welfare above the free trade level at the cost of achieving Global Free Trade (Antimiani; Salvatici, 2015, p.261).

Given the plurality of regulations due to the RTAs’ proliferation, International Law provides that in case of incompatibility and subordination of rules, their application should consider the normative hierarchy or the temporary application of norms or other specific ways as provided in the Vienna Convention of the Law of Treaties (Zalduendo, 2010, p.22). However, it remains to determine the compatibility between the RTAs and the Multilateral Trade System, taking into account the accountability mechanism of the WTO. The legal status of RTAs would be in doubt insofar as the compatibility is not established, and their application may be subject to the possibility of being contrary to the non-discrimination principle. This could produce a governance crisis, which has been warned for some time in the trade regime. Discussions on the proliferation have already taken place in the WTO, as in the II Ministerial Conference in Geneva of 1998, where members expressed their concerns about the proliferation and the need to strengthen the Multilateral Trade System (Thorstensen 2002, p.200). A year later, during the preparatory works for the II Ministerial Conference of Seattle, the proliferation of RTAs, the lack of clarity of rules and the need for compatibility examinations were included in the agenda for further discussion[16].

[16] Preparations for the 1999 Seattle Ministerial Conference. Compilations of proposals presented in the 2nd stage of the preparatory process. Topics proposed by Australia, Hungary, Japan and Turkey. Document JOB(99)/4797/Rev.3. Issued on November 18th, 1999

Since the GATT period, the compatibility examination of RTAs has been supported, which would allow the consistency of the new rules with the multilateral system. This examination would verify if any RTA provides preferences that should have been granted to the rest of WTO members in a MFN basis. However, although the compatibility examination is one of the most important multilateral instruments to solve the governance problem related to RTAs, it is also crucial to analyze the causes and effects of RTAs, as these might be the reason of the stagnation of the issuance of reports on compatibility, along with institutional problems of the WTO.

According to the neoliberal institutionalism school and the goals provided in the Marrakesh Agreement, the WTO's role would be intended to ensure that the multilateral trade system works consistently and to reduce the level of conflict. Nonetheless, as Hafner pointed out, the fragmentation of international law, as materialized through RTAs, has positive effects as it would raise the degree of allegiance to the rules by its specificity, what fits the neorealist theory presented hereinbefore. However, the negative effects would be the incompatible obligations contained in contradictory regulatory processes (Hafner, 2004 *apud* Amaral, 2008, p.39), which would represent the most important concerns related to proliferation of trade agreements. In the following sections, we analyze the mechanisms of compatibility examination created and modified along the years by the GATT or the WTO, considering the waves of regionalism and the political economy behind these changes, in order to identify the reasons behind the problems of those mechanisms.

3. The Mechanisms of Compatibility Examination

3.1. Background

As noted hereinabove, we consider that the WTO's mechanism of compatibility examination, as initially configured, is a mechanism of accountability and, in that sense, it would be an essential component in the structure of governance within the regime of international trade. Several compatibility examinations have already taken place since the GATT period, performed by working groups or ad-hoc committees, whose work we will briefly analyze as we consider that some of the

problems found in their evaluations of RTAs at that time were taken up later by the Committee on Regional Trade Agreements, what will provide us with some evidence about the reasons behind the deficiencies in the work of the CRTA.

Since the beginning of the GATT, even without an agreed procedure, the GATT members notified their RTAs to the GATT Council[17] for examination. Thereby, an ad-hoc Working Group was established for a specific RTA, and this one was distributed among the GATT members, inviting them to submit written questions to the RTA members, whose answers were sent to the Working Group. Once the Working Group received the document with questions and replies, their members examined it during meetings, where more questions, replies and information were submitted by the GATT members and the report of the examination was finally sent to the Council. However, the Workings Groups generally issued reports without a conclusion about compatibility due to either disagreement on the interpretation of GATT provisions or difficulties on reaching a consensus about the compatibility, as the RTA members were members of the Working Group at the same time, leading them to a conflict of interests during the examination. From this situation, we observe that the interpretation of material rules about RTAs and the procedural rules especially related to the consensus decision making were obstacles against the adoption of conclusions on RTAs' compatibility. As we analyze further below, the rules on the aforementioned issues were poorly drafted, even when they were negotiated by the members who also approved the multilateral provisions concerning the MFN principle. We will discuss how the lack of accuracy in rules related to RTAs is due to the lack of willingness of States to strengthen the multilateral system at the expense of a wide-open possibility to bargain tailor-made agreements.

As an example of the situation described, the Working Group on the European Free Trade Association (EFTA) reported that the information and time available for the examination of compatibility were insufficient[18]. What is more, there was no consensus about the interpretation of "substantially all the trade" because the

[17] As described in the WTO Document TN/RL/W/8/Rev.1. This is a compendium of issues related to Regional Trade agreements prepared by the Secretariat in response to a request from the Negotiating Group of Rules, aimed to assist delegations in the preparation of submissions and proposals regarding paragraph 29th of the Doha Declaration.

[18] Report of the Working Party of the European Free Trade Association, issued in June 4th, 1960. Document L/1235.

Working Group and the RTA members had different constructions about the quantitative and qualitative aspects of the removal of trade barriers. Thus, the RTA members, contrary to the Working Group, considered that the trade in agricultural products freed only by one member through previous bilateral agreements should be included in the estimation of the total trade freed. Accordingly, the Working Group, opposed to it, was unable to reach an agreement concerning the interpretation that should be given to the relevant material and procedural provisions of article XXIV.

The examination of the Treaty of Rome in the fifties had also no concluding results and this situation was maintained over the years throughout the examination of the subsequent agreements where additional members were included. In that occasion, the Report[19] informed that four sub-groups were established to consider a) Tariffs, Plan and Schedule b) Quantitative Restrictions c) Trade in Agricultural Products and d) Association of Overseas Territories. In the tariff examination, the subgroup could not get a decision about the application of a mathematical formula to determine the consistency of the rates of the Common Tariff with paragraph 5a) of article XXIV GATT, which provided about the level of the "general incidence of duties". Regarding the examination on restrictions, the subgroup did not get a consensus about the measures that are included in the "regulations" that cannot be more restrictive, which are provided in the same paragraph 5a). In this sense, it was not agreed if these "regulations" included quantitative restrictions for Balance of Payment reasons and were not protective measures, or if they were protective measures and subject to article XII GATT. Additionally, some GATT members were concerned that quantitative restrictions were adopted by RTAs members not based on the situation of their own balance of payments, but on those of other RTA members. Finally, regarding the examination on agriculture, the subgroup noted that there was not a precise plan about how the agricultural provisions would be applied to third party countries and between the members of the Treaty, even more when there was a presumption of "increased external barriers and a substitution of new internal barriers in place of existing barriers and other measures"[20]. In general, the partial reports of the sub-groups submitted to the Committee did not contain definite conclusions because either "the time at the disposal of the subgroups or the

[19] Report submitted by the Committee on the Rome Treaty to the Contracting Parties in December 10th, 1957. Document L/778

[20] Report on the Rome Treaty. Annex III: Trade in Agricultural Products.

information now available did not permit such conclusions to be drawn". In face of this situation, the Working Group just took note and submitted the partial conclusions for consideration of the Contracting Parties. Furthermore, some subgroups suggested that there was no need to take a formal decision, but should be arranged a closest cooperation between the European Community and the Contracting Parties for the attainment of the objectives of the Common Market and the GATT. These first results suggest that the GATT was not able for the control of governance in the case of regionalism, even when the proliferation had not yet begun.

Another Agreement still in force since the GATT period is the United States-Israel Free Trade Agreement, which was examined by a Working Party that did not reach any conclusion about its compatibility[21]. It was noted that the agreement was clear about elimination of tariffs, but not of other restrictive regulations of commerce, as the FTA allowed import restrictions based on agricultural policy considerations. The members of the FTA justified this situation alleging that the elimination of barriers and other restrictive practices was going to be accomplished within a reasonable term. However, in this case the Working Group concluded that these restrictions made it difficult to reach a judgment about the consistency of the FTA with the GATT. For this reason, the Working Party suggested the FTA members to inform about the operation of the agreement until the end of the transitional period, even more when the compatibility of provisions could only be determined by their application, this being the case of a *de facto* discrimination. According to the foregoing, the WTO members reserved their rights under the GATT, as a sort of not validating the controversial measures on agricultural products of the agreement and in order to have the possibility to contradict them before the GATT.

Schmid (2010, p.48) found that during the GATT period, 98 RTAs were notified but a consensus about their compatibility was only reached in four of them, which were the "South Africa- Southern Rhodesia Customs Union Agreement", the "Caribbean Free Trade Agreement" (CARIFTA), the "Caribbean Community and Common Market" (CARICOM) and the "Czech Republic- Slovak Republic Customs Union". Furthermore, there was no report concluding about the incompatibility of a

[21] Report of the Working Party on the Free Trade Area Agreement between Israel and The United States, issued in March 19th, 1987. Document L/6140.

specific RTA, and the vast majority included no conclusion at all and was limited to report shortcomings or facts of the deliberation.[22]

From the Agreements listed above, we found the Caribbean Community & Common Market available at the RTAs database[23], as the other RTAs listed are not more in force or have been replaced for new ones. This agreement has two parts, one regarding trade in goods dated of October 14th, 1974, and other regarding trade in services that was signed more recently, in 2001. The examination of the Treaty establishing the Caribbean Community of 1974 concluded that it was compatible under the provisions of the GATT of 1947[24], even when the agreement included differentiated provisions for its developed members and for the least developed ones, as, for instance, the term for application of the Common External Tariff. In the examination, several members considered that the RTA covered substantially all the trade and its provisions were not more restrictive than the ones existing prior to the establishment of the Agreement. It was also noted that the quantitative restrictions provided in the RTA could be incompatible; however, a RTA member that no conclusion about this issue could be accepted as the rationalization of the restrictions was still being analyzed by a CARICOM's working group at the time of the examination. Furthermore, marketing arrangements provided in the RTA were observed as incompatible as they could cause discrimination against third parties; however, the representative of CARICOM explained that the arrangements were administrative measures aiming to facilitate an increase in production for the less developed members. The representative also asserted that these measures had to be analyzed against the "handicaps faced by these small island States", which had to deal with transport problems within the region that made almost impossible to dispose of their surplus production that formed the base of their economies. Thus, the removal of these marketing arrangements could give an insignificant gain to third countries but a serious adverse effect to the economies of CARICOM's less developed members. Thus, CARICOM "would in no way be considered as affecting

[22] Schmid also found that the literature considers that there were six cases, including "El Salvador-Nicaragua FTA" and the accession of Nicaragua to the CAFTA. But they were conceded with a waiver according to paragraph 10th of art. XXIV GATT, as not all RTAs members were Contracting Parties of the WTO.

[23] RTAs database homesite:
<https://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm>

[24] Report of the Working Party on the Caribbean Community and Common Market, issued in February 19th, 1977. Document L/4470

the legal rights of contracting parties under the GATT"[25], as these marketing provisions did not constitute a barrier to trade with third countries, nor were discriminatory in their effect. In this examination, we should note the relevance of the participation of less developed countries in the analysis of developmental provisions, and the different standards adopted due to the brittle situation of those economies, as the Working Group did not require regular communication on the progress in the application of provisions of the RTA until its full implementation, which was required in the case of the FTA between United States and Israel analyzed above.

In 1971, the Contracting Parties adopted a Decision to standardize the procedures related to periodical reports issued by RTAs members regarding the evolution of their Customs Unions or Free Trade Areas. The Decision instructed the Council for the adoption of a calendar for the evaluation of Reports, which would be carried out every two years. However, these reports lost importance as the countries were no longer issuing them when the Uruguay Round was launched.

In 1979, when the Enabling Clause was adopted, it was also provided that the Agreements among developing countries should be notified to the Committee on Trade and Development (CTD), but a compatibility examination was not provided. Then, without a procedure, these RTAs were scheduled for the CTD meeting and an oral declaration was done. The CTD included its observations in its annual report, but never performed a compatibility test. The only exception was MERCOSUR, for which was created a special Working Group and its compatibility was examined under the Enabling Clause and article XXIV GATT (Schmid, 2010, p.50).

Divergence of opinions regarding the benefits of regionalism among the WTO members before the Uruguay Round led the WTO to analyze its rules on customs unions and free trade zones in order to remove their ambiguities for a tighter application. Therefore, in the Uruguay Round was adopted the Understanding on the Interpretation of Article XXIV and the General Agreement on Trade in Services. The final text of the Understanding was not consensual, with many reservations concerning paragraphs 6 and 12 of article XXIV, due to the lack of measures to counter the trend of regionalism; however, both agreements finally took effect. The paragraph 7 of the Understanding provided the examination of RTAs on trade in

[25] Report of the Working Party on the Caribbean Community and Common Market

goods by a working party, which should submit a report to the Council of Trade in Goods on its findings. This was also required in the case of RTAs on services, which should be notified to the Council of Trade in Services for examination. However, the lack of accuracy of article XXIV GATT continued as noted by Gupta[26], who considered the text of paragraph 4 the most critical of the entire article XXIV GATT as it would not outline an obligation but rather an objective (Gupta 2008, p.267).

3.2. The Committee on Regional Trade Agreements

In February, 1996, due to a proposal submitted by Canada, the Committee on Regional Trade Agreements (CRTA) was created[27], aiming the examination of RTAs concluded under Article XXIV GATT, Article V GATS and the Enabling Clause, which by that year were only 38 RTAs[28] due to their replacement by modern ones or by their consolidation in broader agreements. In practice, the CRTA was only responsible for the RTAs notified under articles XXIV GATT and V GATS, meanwhile, the RTAs notified under the Enabling Clause were still considered by the Committee on Trade and Development. Moreover, the examination of RTAs in services was optional; however, in the vast majority of cases, the RTAs in services were submitted to the CRTA. The CRTA also had to rationalize the procedures for the examination of RTAs, as there was not a common procedure in the GATT period and each Working Group carried out their examinations according to their own rules (Schmid 2010, p.51). The CRTA also had to receive the biennial Reports about the evolution of RTAs and act as a forum for the analysis of the systemic consequences of RTAs.

A Decision regarding rules of procedure for meetings of the CRTA[29] was adopted on July, 1996. This established that the decision-making had to be done in a

[26] Article XXIV. Paragraph 4. “The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories”.
[27] Document WT/L/127. Decision the General Council, adopted on February 6th, 1996, which establishes the Committee on Regional Trade Agreements.
[28] Out of a total of 124 RTAs notified under GATT 1947.
[29] Document WT/REG/1 issued by the CRTA. Rules of Procedure for Meetings of the Committee on Regional Trade Agreements adopted on August 14th, 1996.

consensus basis and its Rule 33 provided that when it is not possible to reach a Decision by consensus "the matter at issue shall be referred, as appropriate, for the General Council, the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development". Thus, in practice, not only the decision about compatibility continued to be adopted on a consensus basis, but also the CRTA decided to issue its Reports only when they were consensual. This complicated the situation of the examination, as it was "in contrast to the inconclusive working party reports of the GATT years" (Crawford 2007, p.135), which were at least issued, even without definite conclusions. Thereby, the lack of conclusions about compatibility continued, but also no Report was adopted since the creation of the CRTA. For instance, the NAFTA, the Enlargement of the European Union by the accession of the Czech Republic, the Republic of Estonia, Cyprus, Latvia and others in 2004, or the Thailand- Australia FTA, do not properly have a Report in the database of the WTO consideration process, where only Notes on the Meetings of the CRTA are shown, which included discussions among the members' representatives without definite conclusions on the examination.

The configuration of these rules shows that States were unwilling to solve the problems arising from the compatibility examination as the rule of consensus continued to be applied and the lack of accuracy in material rules about RTAs continued to exist. This situation is observed from the analysis of several discussions held in a meeting of the General Council in 1995[30], where the creation of a Committee on Regional Trade Agreements was discussed. We observed that the issue directly addressed during that meeting was the rationalization of procedures related to the compatibility examination. Therefore, as the Canada representatives pointed out, at that time there were more than twenty active working groups, which demanded more than 100 meetings and the election of a Chairman for each of them, resulting in several costs for the Organization and the countries themselves. Thus, this problem was effectively solved through the creation of the CRTA. However, those issues dealing with material questions, which would have solved the RTAs' examination problems, as well as the broader issue of regionalism and multilateralism, were not solved. The main interests of States during these

[30] WTO Document WT/GC/M/8 of November 15th, 1995. Minutes of the Meeting of the General Council held in the Centre William Rappard.

discussions were not aimed at finding solutions to difficulties in the examination of compatibility, but at saving resources. We are going to observe that although some WTO members' statements in favor of solving these issues, these were never addressed with effective measures.

According to the foregoing, despite the creation of the CRTA in 1996, the examination of RTAs did not emerge from its stagnation and the CRTA adopted in 1997 some guidelines on procedures to improve and facilitate the examination process.[31] The procedure was performed in four phases: Beginning with the RTA's notification to the WTO, and followed by a Factual Examination, where the RTA members provided information on the agreement and other WTO members had the opportunity to submit questions to be answered by those members. All that information was distributed to the WTO members before the meeting of the CRTA, where the factual examination continued with two rounds of questions, and the conclusions were included in a Report prepared by the WTO Secretariat. Afterwards, the compatibility examination was performed by all WTO members and the conclusions of the discussion were included in a report prepared by the CRTA. Finally, the Council on Trade in goods, the Council on Trade in Services or the Council on Trade and Development decided about the measures included there.

The World Trade Report of 2011 pointed out that the lack of Reports since 1996 was due to some common factors as the ambiguity of interpretation of article XXIV, the lack of consensus regarding the format and content of the Reports, the lack of information provided by the RTAs members, and the fact that all WTO members were part of the examination, even those whose RTA was being examined, which was an impediment for the adoption of a consensual decision (WTO, 2011, p.185). We should observe that the examinations of compatibility by the CRTA had the same deficiencies as the ones presented in the examinations carried out by Working Groups at the GATT period.

We have selected four RTAs signed and submitted for examination to the CRTA from 1996 until 2006, when the examination process was changed. In none of them a conclusion about their compatibility was reached, however we can identify the

[31] Document WT/REG/W/15 issued by the CRTA. Guidelines on Procedures to Improve and Facilitate the Examination Process adopted on May 6th, 1997.

factors exposed above and obtain detailed information about them. These agreements are the North American Free Trade Agreement (NAFTA), the United States- Chile Free Trade Agreement, the Chile- Mexico Free Trade Agreement and the Japan- Singapore Free Trade Agreement.

The Notes of the meetings for examination of NAFTA[32] show that the trade diversion effects were discussed and some countries as Switzerland claimed that the terms of access to the North American market had deteriorated. However, the representative of NAFTA alleged that the creation of a common external tariff would have increased the tariff in some of the members in order to adequate to the conditions of the rest of the members. There was also a discussion about customs procedures, regarding the application of CIF for valuation of non-NAFTA members and FOB for NAFTA members, which could be unfavorable for third countries. Mexico replied that the CRTA had to examine the compatibility of NAFTA with article XXIV, but "not the economic impact on WTO members", thus, that system was applied even before the NAFTA. Regarding this issue, the Chairman of the CRTA considered such situation intriguing, as that suggested that the matter at hand was an MFN issue, rather than an article XXIV. In other words, Mexico was unilaterally in breach of its multilateral obligations, even before the signature of NAFTA. NAFTA was also questioned by Japan regarding the calculation method of value content set up for industries that would become a great burden on industry. In this regard, the NAFTA representatives recognized that matter and informed that they were looking at ways for simplifying the tracing functions. A second meeting was scheduled for the discussion of the remaining issues, such as the concern of countries outside NAFTA about the unfavorable position in which they remained due to the preferential treatment conducted through the NAFTA. Meanwhile, other countries insisted in the existing burden arising from rules of origin within the NAFTA that would prevent the development of full trade creation benefits of the liberalization process. In the case of trade in services, the Swiss delegation said in a later meeting that it could not be determined if NAFTA was complying with the requirements of article V GATS relating to the "substantial sectoral coverage" and the elimination or prohibition of new discriminatory measures. One member of NAFTA noted that the difficulties in

[32] Examination of the North American Free Trade Agreement. Documents WT/REG4/M/1, WT/REG4/M/2, WT/REG4/M/3, WT/REG4/M/4 issued by the Committee on Regional Trade Agreements.

determining this did not mean that the NAFTA did not cover the measures required. According to the foregoing, the members of the CRTA, acting as representatives of their own countries, considered that the NAFTA was affecting their national interests. As the members of NAFTA could not reliably determine the consistency of the rules of the agreement, it was not possible to draw a definite conclusion about how those provisions would be affecting third countries, as for example regarding the application of FOB or CIF for customs valuation, measure that could even be compatible if we consider that the GATT not only prohibits discriminatory trade measures but also allows members of a RTA to provide among them a preferential treatment in order to move towards free trade. For these reasons, although all allegations presented in the CRTA meeting, which covered four dates, there is no further information submitted about any change in the provisions of NAFTA that would have been affecting the rights of WTO members.

The USA- Chile Free Trade Agreement was examined by the CRTA during three meetings[33]. We observed the same concern that WTO members showed at NAFTA, regarding their unfavorable condition as third parties with respect to the FTA. For example, in this case, the European Communities alleged that USA eliminated its merchandise processing fee for products from Chile but maintained it for the rest of WTO members, so the European representatives questioned how this fulfilled the MFN principle related to the obligation of other regulations not to be higher or more restrictive. The representative of USA replied that, *vis à vis* third parties, the FTA did not raise the level of barriers, as required by article XXIV. This suggests that USA was not concerned by the trade diversion effects against third parties, and the net trade creation arising from this FTA would remain in doubt as this could be a result of the trade diverted from other countries. Thus, even if the multilateral provisions had been met, the goals of the WTO would have been disregarded by the WTO members that concluded RTAs. It was also noticed a different level of commitments between the members of the RTA in the case of agricultural safeguards, which were applied over 52 items of USA and 15 of Chile. Regarding this issue, USA only alleged that the scope of the safeguards did not affect the overall coverage of the agreement. We consider that this issue confirms the theory of power games in the negotiation of

[33] Examination of the Free Trade Agreement between the United States and Chile. Documents WT/REG160/M/1, WT/REG160/M/2, WT/REG160/M/3 issued by the CRTA.

agreements, where stronger States can get better deals in the negotiation of RTAs provisions[34]. Finally, we should stress that China referred to the examination as a simple "Transparency Process" during this meeting, even before the changes in the procedure provided in 2006, which turned the examination into a transparency mechanism. This might be due to the fact that examinations only got the distribution of information among WTO members and there was no formal request from the WTO to the RTAs members for an adaptation of the provisions of those agreements to the multilateral rules in order to make them compatible, nor an effective clarification of doubts from WTO members. Finally, once the points presented by the WTO members were clarified, the Chairman requested the Secretariat to draft the Report. In spite of this request, no Report with definite conclusions was submitted, but just a Note on the meeting of the CRTA regarding the examination is shown in the database, which has been a pattern for every examination during this period.

The third agreement under analysis is the Chile- Mexico Free Trade Agreement and Economic Integration Agreement[35]. Although this agreement was concluded among developing countries, its members were especially ambitious as they notified the RTA under article XXIV GATT because they considered that it complied with the requirements of that article. In the examination, the FTA members explained the measures included in the agreement, which liberalized over 99% of bilateral trade. The agreement added some new disciplines as services, investment, Intellectual Property Rights and improvements in the dispute settlement mechanism. It was reported that the restrictions to imports and exports were maintained only if they were consistent with article XXIV GATT, and that technical regulations were harmonized. The only controversial measure was the exclusion of sixty items from liberalization; however, the members reported that they had adopted a commitment to liberalize those products. Regarding trade in services the members adopted a negative list approach, according to which all the services were liberalized, except for those listed. Other questions were related to the definition of terms and, finally, the Chairman requested the Secretariat to draft the Report; however, it was never

[34] This situation was noticed by the WTO in the World Trade Report 2011. p.96

[35] Examination of the Free Trade Agreement between Chile and Mexico. Notes on the Meetings issued by the Committee on Regional Trade Agreements. Documents WT/REG125/M/1, WT/REG/125/M/2

submitted. We observe that no significant remarks or requirements were made in the examination process of this RTA among developing countries, even when it was submitted under article XXIV.

The last examination we analyzed is for the case of the Japan-Singapore FTA and Economic Integration Agreement[36]. Regarding this RTA, some countries like USA and Australia questioned the carve-outs provided for exports to Japan for most of agricultural tariff lines, even more when four chapters of the Harmonized system were not included in the liberalization. USA considered that this measure would not lead to significant trade expansion as this exclusion would not change the patterns of trade existing at that time. Japan replied that the tariff elimination would occur gradually and subsequent negotiations about tariff elimination and other types of cooperation had to be dealt by Japan taking into account the impact they would have on Japanese society and economy. Another measure discussed for clarification were the Procedures of Mutual Recognition applied to conformity assessment related to the issuance of testing results according to the regulations of the importing party, which also allowed the mutual registration of conformity assessment bodies from both countries. This provision is important for the purposes of our current analysis as it represents a new trend in the issues covered by RTAs that we are going to examine hereinafter. There was no additional discussion regarding these issues and the Chairman requested the Secretariat to draft the Report; however, no final report was submitted. According to the information detailed hereinbefore, we found one of the most important conclusions of this section, considering the statement of a developed country such as Japan in the meeting of the CRTA, according to which the Japanese negotiations, more than taking into account the compliance of the multilateral rules or the systemic implications of the provisions included in the RTA, envisaged the national interest of that country. This is in accordance with our assumptions in the theoretical part of this analysis about the self-interest basis (egoism) on which the States act and the difficulty of reaching mutual adjustments as each actor is aiming to obtain its own benefits. Furthermore, if a developed country such as Japan is not willing to fulfill multilateral provisions in favor of absolute gains and according to the rules of the WTO, it would be very difficult for all WTO members

[36] Examination of the Agreement for a New-Age Economic Partnership between Japan and Singapore issued by the Committee on Regional Trade Agreements. Documents WT/REG140/M/1, WT/REG/M/2, WT/REG/M/3

to decide to negotiate more effective provisions that cannot enhance their relative gains.

3.3. The Doha Negotiation and Changes in Examination Procedures

In December 2001, the Declaration of the Fourth Ministerial Conference in Doha provided the mandate for negotiations in some issues that were going to be discussed in the Trade Negotiations Committee. The 29th paragraph of the Declaration contained the mandate for negotiations, which were aimed at "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements". Those negotiations should take into account the developmental aspects of RTAs, that is, to consider special conditions for developing countries. Negotiations took place in the Rules Negotiating Group, a body of the Trade Negotiations Committee established in the Doha Round.

The compendium of issues elaborated by the CRTA[37] identified two main problems: the procedures and transparency of RTAs and some systemic issues, such as the ones relating to the difficulty of definition of specific conditions for the conclusion of RTAs, to the new trade preferences of these Agreements that should be included by "substantially all the trade", to the duration of the transition period, to the criteria for the measurement of incidence of "other trade regulation" in third parties, to the preferential rules of origin, to the flexibility for developing countries (special and differential treatment) and to the coherence of rules regarding RTAs between developing countries[38]. The Negotiating Group on Rules gave priority to the transparency and procedures for the examination of RTAs, while the systemic issues listed hereinabove were considered very controversial, as proved in the previous examinations, to reach an agreement about them. We consider that even if there had been political will among the WTO members to negotiate possible solutions to the systemic issues, it would have been very difficult to decide about them. An example of this would be the possibility of fixing a general percentage to measure the provision of "substantially all the trade", as pointed out by Gupta (2008, p. 267), for whom it would have been unrealistic, insofar as it could not have been applied to

[37] Compendium of issues related to Regional Trade Agreements. WTO Document WT/TN/RL/W/8/Rev.1 of August 1st, 2002.
[38] The text in quotation marks corresponds to the provisions of article XXIV.

each different RTA and would have been hardly accurate in practice as "such measurement is based in *ex-ante* forecast of unrealized transactions". Some of the main actors in this negotiation were the United States of America, European Union, Korea, Chile, Hong Kong China, India, Brazil, Malaysia and New Zealand. It was in December of 2006 when the General Council issued a Decision related to a new Transparency Mechanism for the RTAs[39].

Regarding the Transparency of RTAs, four key issues were considered at the suggestion of the government of Chile: when to notify, where to notify, what to notify and if it was required to notify. With the Transparency Mechanism, the compatibility examination has been left aside, and a procedure has been adopted focusing on the transparency of RTAs and distribution of information among the WTO members, being required certain obligations to enhance the effectiveness of the transparency principle within the regime, as we described in a previous section of this study.

In the other hand, regarding the Transparency of the Preferential Trade Agreements (PTAs), they continued to be analyzed by the Committee on Trade and Development. However, four years later, with the creation of the Transparency Mechanism for PTAs, the same examination procedure as the one for RTAs was established, whereby the notifying member should submit detailed information about the PTA, and the WTO Secretariat should prepare a PTA's Factual Presentation. We observe that the procedures and exigencies for RTAs, concluded with the participation of developed countries, and PTAs, among developing countries, became the same, but not due to an improvement of the procedures for developing countries, but to a reduction of procedural requirements for developed ones.

The configuration of the current Transparency Mechanism includes many stages, and the activities at each stage differ from the previous procedure of examination as follows. In first place, the procedure starts when States make an early announcement to the WTO about their ongoing negotiations. The members that are already part of a RTA should report to the Secretariat the following information: RTA's official name, scope, date of signature, calendar to take effect or provisional application, the contact points or web address and any other not reserved

[39] Transparency Mechanism for Regional Trade Agreements. Decision of December 14th, 2006 issued by the General Council. Document WT/L/671.

information. In second place, the notification of a RTA should be done before its ratification or the application of any of its rules by its members and always before the application of preferential treatment concessions, and the text shall be reported along with the identification of the multilateral provisions under which the agreement is notified (article XXIV GATT, V GATS or the Enabling Clause), within a term of 10 weeks for developed countries and 20 weeks for developing countries, since the date of notification. Subsequently, the WTO Secretariat should draft a Factual Presentation with the available information and distribute it among the WTO members at least 10 weeks before the CRTA or CTD meetings, in order to allow WTO members to submit their questions in this regard until four weeks before the meeting. In fourth place, these questions and their corresponding answers from RTA members are distributed at least three days before the meeting for examination, which is performed at the CRTA for RTAs concluded under articles XXIV GATT and V GATS, and at the CTD for RTAs concluded under the Enabling Clause. Just one formal meeting should be held to examine the RTA and further questions may be submitted in writing, which is a crucial difference regarding the previous procedure where several meetings were held in order to get a conclusion about compatibility, as observed in the foregoing analyzed RTA's examinations. Finally, the WTO Secretariat should draw an Informal Note on the CRTA's Meeting. We selected the USA- Korea Free Trade Agreement (KORUS FTA), the China-Peru Free Trade Agreement, and the Chile- Japan Strategic Economic Partnership for analysis, insofar as they were examined under this new configuration of the mechanism.

In the first case, according to the members of the KORUS FTA[40], this agreement provided for a broad market access, the liberalization of trade in services and issues such as investment, Intellectual Property Rights, government procurement, competition, SPS measures, technical regulations, customs procedures and transparency were included. Generally, the improvement of market access through RTAs is noticed by the adoption of a negative list approach, and this was the case, insofar as under this approach all sectors or sub-sectors are included for eligibility for national treatment and MFN preferences, thus, new services arising in those markets are, by default, included in the liberalization program. Concessions on

[40] Note on the Meeting of the Committee on Regional Trade Agreements on the Free Trade Agreement between the United States and Korea (goods and services) of November 11th, 2014. Document WT/REG311/M/1.

market access were almost the same for each of the parties, with elimination of 82% of the USA's and 80% of Korea's tariffs lines and quotas. Many countries considered that this FTA contained high standards and enhanced WTO commitments. However, Turkey observed that the parties had agreed about exemptions regarding regulations on self-certification upon vehicle emission standards for exports under certain threshold of originating vehicles to Korea. Korea confirmed that the FTA members had negotiated that Korea would accept the equivalent standards of USA regarding motor vehicle safety instead of Korea's regulations, but only for producers with sales below certain threshold. As this would represent an advantage for USA over other WTO members, the Turkey's concern about the unfavorable position in which its trade was left is understandable. However, USA replied that the RTA was a bilateral one and the provisions regarding trade in goods were applied on that basis and, for all purposes, the FTA was consistent with the WTO. Therefore, potential trade diversion effects of the agreement were not considered.

In the examination of the China- Peru FTA[41], China asserted that had participated in FTAs since 2002, considering that it was an effective approach to speed up domestic reforms, integrate into the global economy and strengthen economic cooperation with other economies. In this sense, the FTA under consideration was the first comprehensive FTA China signed with a Latin American country as it had a broad scope of issues such as trade in goods, services, investment, rules of origin, customs procedures, intellectual property rights, trade remedies, technical barriers to trade, sanitary and phytosanitary measures. For China, the FTA was evidence about the two countries commitments to open up and fight protectionism, and both members stressed the measures adopted to provide mutual cooperation in several issues. However, the European Union asked the reason why the FTA did not include provisions regarding elimination and prohibition of export duties applied to goods. Peru replied that its exports were not subject to any duty according to national legislation. In the case of China, because none of its FTAs had provided such duties. There were no further questions at that moment, but the chairman invited the WTO members to submit their questions in writing and, pursuant to paragraph 13 of the transparency mechanism, all that information would be

[41] Note on the Meeting of the Committee on Regional Trade Agreements on the Free Trade Agreement between Peru and China of March, 14 and 15th, 2011. Document WT/REG281/M/1.

circulated among them. However, pursuant to paragraph 11 of the transparency mechanism, it was not possible to convene an additional meeting to analyze new information, but just a single meeting for the examination of any RTA was allowed.

Finally, in the case of the examination of the Strategic Economic Partnership Agreement between Japan and Chile[42], the members asserted that this FTA was expected to develop political and economic relations between both countries and a closer relationship between Japan and the rest of Latin America, insofar as Chile was the most successful in economic modernization. The RTAs concluded by Chile with more than 40 countries was taken as a positive sign for Japan about the open-door policies of that country. The FTA members noted that within ten years, the RTA would have eliminated 92% of tariff lines in terms of volume of trade and that it did not contain restrictions in commerce. However, in this meeting, USA questioned that Japan had undertook significant less tariff elimination than required under GATT, and also asked about the criteria to differentiate the year of negotiation of certain products, whether 2009 or 2011. Japan replied that the products were subject to different year of negotiation in accordance with the interest of each Party. USA insisted on the reservations regarding regulations in services, to which Japan replied that these reservations were adopted to provide appropriate regulations for the protection of new services arising from technological advances. Thus, regulations on those services were not included at that moment as long as they could be construed as contravening the obligations of the FTA.

In 2011, the Negotiating Group on Rules began reviewing the Transparency Mechanism[43], as its 23rd paragraph required Members to "review, and if necessary modify, this Decision in light of the experience gained from its provisional operation, and replace it by a permanent mechanism adopted as part of the overall results of the Round". This Decision also provided that WTO members had to review the legal relationship between this Mechanism and relevant WTO provisions related to RTAs, which entails a nexus between the mechanism and the lack of reports about the RTA examination, but this issue was not addressed.

[42] Note on the Meeting of the Committee on Regional Trade Agreements on the Strategic Economic Partnership Agreement between Japan and Chile of November 27-28th, 2008. Document WT/REG234/M/1

[43] Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements. Document TN/RL/W/252 issued in April 21st, 2011, by the Negotiating Group on Rules.

Regarding the systemic issues, the debate about the interpretation of "substantially all the trade" and the special and differentiated treatment to developing countries was addressed in 2011, but there were no definite conclusions in this regard, due to divergent views among the WTO members. Thus, the Chairman at the Negotiating Group on Rules proposed to address those systemic issues together with a Post-Doha Work Program on all systemic issues; however, reactions to the proposal among the members were different and it was discarded, reflecting the disagreement on these issues at the multilateral level. This situation may be noticed from the Report of the Chairman[44]:

> "8. To conclude, it is clear that notwithstanding the mandate in Doha and the Ministerial Declaration in Hong Kong, China: (i) in essence, the objectives of various Members in these negotiations remain conceptually different; and (ii) gaps persist in Members positions on all elements proposed.
>
> 9. I reaffirm my advice to Members that unless they adopt a pragmatic, flexible and less doctrinaire approach to these negotiations it is unlikely that this impasse will be overcome".

Summary of examinations analyzed

RTA	Examination Body	Specific issue examined	Type of provision
EFTA	Working Group	Insufficient information and time available for the examination.	procedural
		Divergent interpretation of substantially all the trade: inclusions of products lines freed only by one member.	material
		Interpretation about the measurement standard for "the general incidence of duties".	material
		Type of measures that should not be more restrictive.	material
TREATY OF ROME	Working Group	Use of a mathematical formula to determine the "general incidence of duties".	material
		No consensus about the regulations that cannot be more restrictive.	material
		Application of agricultural provisions to 3rd parties and among members.	material
		Time and information were not sufficient.	procedural
US-ISRAEL	Working Group	Agreement was not clear about elimination of restrictive regulations of commerce: non-tariff barriers and timetable, regarding a general open-ended exception to agriculture.	material
CARICOM	Working Group	Different measures according to the level of development of its members.	material
		Substantial coverage.	material
		Restrictive measures that were being analyzed at that	material

[44] Negotiations on Regional Trade Agreements: Systemic Issues. Report by Ambassador Dennis Francis, Chairman, Negotiating Group of Rules, issues in April 21st, 2011. Document TN/RL/W/253.

		moment: not specified.	
		Marketing arrangements that were adopted to increase the production of less developed members.	material
NAFTA	CRTA	Deteriorated term of access for some members.	material
		Different valuation using CIF or NAFTA, depending on the destination.	material
		Calculation method of local content as a burden on industries.	material
		Unfavorable position of 3rd countries	material
		Burden in rules of origin for getting benefits from trade liberalization.	material
		Undetermined if requirements of article V GATS were fulfilled by NAFTA.	material
US-CHILE	CRTA	Unfavorable conditions for 3rd party countries.	material
		Elimination by US of its merchandise processing fee for Chilean products.	material
		Different level of commitments: USA got more scope for application of safeguards.	material
CHILE-MEX	CRTA	Exclusion of 60 items from liberalization.	material
JAPAN-SINGAPURE	CRTA	Carve-outs for exports to Japan.	material
		Mutual recognition for procedures of conformity assessment.	material
KORUS	Transparency Mechanism	Exception for exports to Korea under certain threshold regarding vehicle safety standards.	material
CHINA-PERU	Transparency Mechanism	Provisions regarding elimination or prohibition of export duties.	material
CHILE-JAPAN	Transparency Mechanism	Less tariff elimination by Japan.	material
		Reservations regarding regulation in services.	material

4. Current Relevance of the Compatibility Examination System

Changes in the organization of international production have required the content of RTAs to be adapted. Thereby, the types of RTAs that have emerged throughout this evolution have been identified in accordance to the issues they covered, resulting in two differentiated categories, known as Shallow Integration Agreements and Deep Integration Agreements. It is important to consider these developments in the provisions of RTAs as the relevance of the mechanism of compatibility examination may change according to them, furthermore when new adjustments in the configuration of this mechanism have resulted in its transformation into a transparency mechanism, with less relevance if compared to its previous configurations. Accordingly, in this section, we analyze the issues provided by these categories of RTAs and the relevance of the mechanism of examination of

agreements considering the procedural and material deficiencies in its regulation as analyzed in the previous section.

4.1. Shallow Integration Agreements

In first place, Shallow Integration Agreements are those negotiated since the GATT period that provided the reduction or elimination of tariffs and quantitative restrictions and prohibited tariffs above the bound level, as well as taxes created to protect the domestic industry (Kim, 2015, p.362). The RTAs herein analyzed, which may be considered under this category, are the Treaty of Rome, the CARICOM or the USA- Israel FTA. These aimed the establishment of customs unions, elimination of quantitative restrictions or reduction of rates in tariff lines. Concerning these RTAs, the examination performed by the Working Groups focused on their coverage or the nature of the restrictions allowed under article XXIV GATT.

As pointed out before, the concerns relating to RTAs under the form of shallow integration were the possible negative effects arising from discriminatory provisions that led to a second-best outcome, which may result in a stumbling block tendency[45] (Benini; Plummer, 2008, p.274). However, this type of discrimination is currently less important according to Baldwin, who stressed that there is evidence that little of world trade is favored by tariff preferences, which were usually considered as discriminatory if adopted in a regional basis. Furthermore, the author noted that the tariff cutting was mostly negotiated through RTAs (Baldwin, 2016, p.112). The World Trade Report of 2011 also noted that tariff reduction has lost relevance for the conclusion of RTAs due to changes in the new conditions of international trade. In line with Baldwin's position, the Report also stressed the reduction of tariff averages already made in the last years and the absence of negotiations at the regional level for further decrease of tariffs in Preferential Agreements (RTAs)

We observed the foregoing situation in some compatibility examinations as the Japan- Singapore FTA, the Japan- Chile FTA or the Mexico-Chile FTAs analyzed

[45] Stumbling blocks effect, as opposite to the building block one occurs, according to Baldwin, when the trade blocks, usually established through regional trade agreements, "prevent or slow multilateral tariff cutting", meanwhile, building blocks "accelerate or at least do not hinder multilateralism". In: Baldwin,R.; Seghezza,E., 2007. Accessed on [December 12th, 2016]

herein, where the CRTA addressed the carve- outs of tariff lines in their trade liberalization programs, which proves that no further liberalization through reduction or elimination of tariffs is being done. Likewise, Herz and Wagner (2011, p.16) found that RTAs have been enhancing trade liberalization at a WTO level, even when those effects do not occur in the opposite direction, from the multilateral level to the regional one, what would be a strong reason against the stumbling block theory about regionalism. They also noted the trade enhancing effects of RTAs due to their more comprehensive scope in depth and range of topics as well as to the trade environment, which are characteristics of the latest Deep Integration Agreements.

4.2. Deep Integration Agreements

Regarding the following category of RTAs known as Deep Integration Agreements, they are focused on the erosion of national policies and economic regulations and their provisions cover non-tariff measures as well as harmonization of regulations among their members. The World Trade Report highlighted that this type of agreements has become important due to provisions in market access and conditions of competition, which are useful to the current organization of international production through global value chains. We consider under this category the KORUS FTA in whose examination we noted the concern of WTO members about exemptions provided in the application of safety standards to imports to Korea in order to facilitate their bilateral trade, also involving the recognition of US standards by its partner. This is also the case of the Japan- Singapore FTA, where some WTO countries were interested in the Mutual Recognition of Conformity Assessment Procedures[46] provided in the agreement, which refers to the production of testing results for the safety of certain products in conformity with the regulations of the importing Party, performed by private body duly registered before a bilateral Committee, implying a certain degree of regulatory harmonization.

[46] Korea put into question this issue. Japan replied that the Agreement was similar to the one that country have with the European Community, of which just an early announcement was made. The Mutual Recognition Chapter of the JSEPA covers telecommunications terminal equipment, radio equipment and electrical products and allowed for mutual recognition of conformity assessment procedures. Document WT /REG140/M/1

The last years, deep integration agreements have intended to promote Global Value Chains through regulatory harmonization in order to implement more efficient import and export operations to deal with the rising of off-shoring of goods, services, investment, know-how among others, from high-technological nations to low-wage countries due to comparative advantages of production in each country (Kim, 2015, p.362). Thus, countries are actually seeking opportunities to be integrated into Global Value Chains, as these allow them greater participation in the global production, which includes trade in goods and services. Specifically, countries conclude Deep Integration Agreements to reduce the barriers that affect the competitiveness of suppliers and that increase costs not only in a stage of a Global Value Chain, but in all its stages (Miroudot et al, 2013, p.15). In Global Value Chains, the export competitiveness is increased as much as the producers have access to intermediate inputs with competitive prices, for this reason, tariffs or inefficient customs procedures reduce the competitiveness if the production involves crossing the borders many times (Kowalski et al, 2015, p.11). Furthermore, Kowalski and Büge (2013, p.5) support the thesis of positive links among trade and production, stressing the resulting linkage between different economic sectors and the need for broad-based approaches to facilitate integration with intermediate inputs abroad and final product markets, as well as the importance for countries to be integrated into regional and global value chains[47]. For this reason, these agreements include provisions related to investment not covered by GATT, competition policies, harmonization or mutual recognition of rules on products and processes, movement of capital, movement of people, intellectual property rights not covered by TRIPS, which would be WTO-extra and WTO-plus provisions with a deeper focus driven by a logic of vertically integrated structures of international production. In this sense, if countries do not conclude Deep Integrations Agreements, they would remain with low or inefficient participation in Global Value Chains.

Kowalski et al (2015, p.19) noted that countries are going to include specific provisions in their deep integration agreements depending on the backward and forward linkages they maintain in the Global Value Chains in order to enhance their

[47] For the case of gains for developing countries, Lamy pointed out that “the deeper the level of integration, the more potential benefits there may be. Obviously, combining classical FTAs in goods with liberalized trade in services and efforts to tackle regulatory trade barriers are more likely to generate welfare gains” (Lamy, 2002, p.1406)

integration. Thus, backward participation, involving integration with the previous stages of a Value Chain and a reduction of barriers to imports into the country, will depend on the country own policy. Meanwhile, forward participation, involving integration with the later stages of a Value Chain and a reduction of barriers to exports to other countries, will also confront producers with barriers of export markets. However, the author also asserts that the conclusion of Deep Integration Agreements may not result in an enhancing effect on Global Value Chains as they may just consolidate the already existing Global Value Chains. For example, the author stressed that in East Asia, the Global Value Chain phenomenon may have predated the already existing regional integration.

Regarding the degree of enforcement of provisions on deep integration, which may show the relevance of possible discriminatory provisions included in these agreements, some distinctive features in some agreements concluded by two of the major RTA's hubs, the European Union and the United States, have been identified by Mavroidis et al (2009). These scholars found that agreements concluded by the European Union contains more WTO-extra provisions than agreements concluded by USA, but it would only be legal inflation as those provisions include obligations that are not enforceable. Furthermore, most part of legal enforceable provisions are related to areas already regulated by the WTO, known as WTO-plus provisions, such as investment, capital movement and intellectual property rights. The provisions that are actually ground-breaking are few and in areas related to environment, labor standards (for the case of USA) and competition policy (for the case of the European Union), and they would be dealing with regulatory issues. The study concludes that RTAs would be a means for the export of regulations from these two RTA's hubs. Concerning these provisions on labor, environment and competition policies identified by Mavroidis, which by dealing with regulatory issues would be areas of regulatory harmonization, Baldwin (2016, p.96) observed that, different from the case of shallow integration agreements, discriminatory purposes are less likely under regulatory harmonization, as rules that identify origin in this regard are difficult to write, thus, regulations are applied to any trade partner, not just to RTA members.

Additionally, the potential multilateralization of the WTO-extra and WTO-plus provisions was analyzed, considering their degree of similarity, measured by the

attributes of RTA's representativeness, such as the number of WTO members in the RTA, the homogeneity of measures, the level of discrimination between parties and non-parties of the RTA, the level of enforcement by dispute settlement procedures, predictability, transparency and economic gains and political economic conditions, concluding that they are significantly similar, and more when negotiated by the same trading partners (Lejárraga, 2014, p.5). Similarly, the transparency mechanisms included in RTAs are applied in a MFN basis, what would provide a considerable level of homogeneity across a critical mass of RTAs, "which may facilitate their convergence and adoption at the multilateral level" (Lejárraga 2013, p.3). According to this, we observe that since USA and the European Union are two hubs for the conclusion of RTAs, the degree of multilateralization of regulations provided in RTAs is high, thus, they would be building blocks for trade liberalization.

The interest of countries regarding the negotiation of Deep Integration Agreements such as the Transpacific Partnership Agreement (TPP) or the Regional Comprehensive Economic Partnership (RCEP), shows the importance for countries to be integrated into this new type of international production. The negotiation of these mega-regional agreements reflected the already identified interest regarding the greater gains that larger membership generates for each participant, the growth interest in supply chains based in the fragmentation of production, the growth complexity arising from bilateral trade agreements for doing business, the desire on making greater progress on new issues as traditional barriers decline over time and, finally, the increased negotiating costs when going to the WTO (Findlay, 2013, p.2).

However, in spite of the foregoing, Baldwin (2011, p.3) suggested that Deep Integration Agreements may represent a new threat against the WTO, as these instruments would be assuming the WTO role as rule writers. In this regard, Hearn and Myers (2015) stressed that the principal issue was the two current hubs of these kind of agreements, United States and China, and the normative war between them that relied in the intention of both countries to set the rules of world trade, as well as to determine the ways to manage the economy, either through state intervention or not. For these scholars, the Chinese officials were concerned that the TPP could create divisions within the RCEP by making some of its members favorable to the interests of USA. According to this, China had denounced the TPP as a strategy to

contain China, and even if this country had shown interest in joining the TPP, it would have required many market adjustments for doing so. Therefore, the TPP was increasing the pressures on the Chinese government for economic reforms through more opening measures (Naughton et al, 2015). In the other hand, the current Xi-Li administration has already been seeking the introduction of market reforms as the representative of that country pointed out during the aforementioned examination of the China- Peru FTA, and for this reason the pressure of TPP over China did not seem entirely problematic to them (Hearn; Myers 2015, p.3).

4.3. Current Relevance

According to our analysis hereinabove, we consider that a conclusive report issued by the CRTA about the compatibility of RTAs notified to the WTO is not currently relevant according to the current configuration of international production through Global Value Chains. Accordingly, the first wave of RTAs known as Shallow Integration Agreements showed more explicit discrimination as they addressed a regional elimination of border restrictions, which could have produced stumbling blocks by identifying origin, or a phenomenon of trade diversion, turning it into an inefficient trade policy. However, deep integration agreements represent a different strategy as they intend regulatory harmonization as a form of export of regulations, under which protectionist measures may be adopted, but driven by the logic of integration into global value chains, the trend is for these provisions to be applied on a MFN basis. Furthermore, as these protectionist measures through deep integration are not border measures, they would only be identified through an *ex-post* examination as they would be *de facto* discriminative measures, and an examination by the CRTA could be fruitless. For Reza (2015, p.199), some decisive factors to be deemed for the evaluation of RTAs should be the feasibility of regionalism for the thematic renewal and deepening of commitments at higher levels than in multilateralism, and the current little importance of tariff protection and the effect of non-tariff barriers, which may be better controlled at the regional level.

5. Concluding Remarks

Regarding the governance question, we previously noted that governance requires institutions that guide the activity of groups and these structures in International Organizations require to be well articulated. However, some structures at the multilateral level of international trade have not been performing well, as evidenced in the CRTA work, which never demanded changes in the agreements examined in order to make them compatible with the WTO. Furthermore, considering that some WTO members expressed a strong concern during the examination regarding measures that were openly discriminatory, but those issues were not the object of a deeper analysis[48].

According to our analysis herein, we conclude that the CRTA has not been allowed to carry out an efficient examination of compatibility due to inaccuracies in the disciplines related to RTAs, including the WTO rules. The lack of political will to improve these disciplines were due, in turn, to the WTO members' concerns regarding relative gains of other countries that resulted in actual little control power entrusted to the WTO. Therefore, this situation resulted in the stagnation in the issuance of CRTA's reports. In this regard, the theory of Institutional Neoliberalism stresses that conflict within a regime could prevail and, under this scenario, States would use Institutions to protect their own interest rather than to achieve the goals expected from the establishment of those Institutions, then, an International regime would only be useful for distribution of information. This happened at the multilateral trade system with the transformation of the mechanism of compatibility examination, which could have worked as a mechanism of accountability, into one of transparency. The political will of WTO members in this sense could have been determined since the GATT years, as the Article XXIV included conditions for the creation of RTAs that are broad and difficult of conclusive interpretation. Thus, at the time of negotiation of the GATT, it could have been easily predicted that the examination of RTAs was going to be a difficult work in the future (Benini; Plummer 2008, p.272). Therefore, difficulties in the work of the CRTA were more than an expectation. However, an important and fundamental explanation for this behavior of WTO members is not

[48] As observed in the compatibility examination of NAFTA, regarding the application of CIF or FOB by Mexico depending on the origin of the good.

provided by the neoliberal institutionalist theory, but by the realist school, according to which States behavior is subject to concerns on relative gains from other countries, what would have been playing a negative role against the consecution of the multilateral goals provided in the Marrakesh Agreement, which mainly attend to absolute gains; meanwhile, RTAs would have shaped better provisions in attention to the specific interests of countries and to the relative gains matter.

Accordingly, the conditions are different at the regional level, where these structures are shaped by the political will of States to act efficiently and take decisions that favor their international insertion, as well as to the feasibility to adapt provisions to deal with the concern of relative gains. However, Benini and Plummer (2008, p.278) pointed out in this regard that, as institutionalized Agreements can ensure a coherent background at a regional level, Institutions may represent a condition for trade liberalization. We observed this with some reservations, as we consider that even if institutions may be useful to avoid inconsistencies at the international level, it could only be a matter of time until the domestic interests urge their government officials to change the game rules. This could produce conflicts due to the lack of compromise of certain members regarding compliance with regional governance mechanisms due to their domestic demands. So, in the regional case it could happen what Gonzalez pointed out for the case of multilateral accountability mechanisms, relating to the fact that, currently, the multilateral system does not comply with the promoted global values of post II World Ward period, such as human rights, poverty reduction, governance, and there is a resistance by States to act in a multilateral manner, prioritizing their welfare and security interest (Gonzalez, 2013, p.77). Thus, the regional level is not prevented from this, and States may end up not complying with regional governance mechanisms in order to pursue their national interests.

Regarding the configuration of the mechanism of compatibility examination, we consider that the WTO members' decision about transforming this mechanism into a mechanism of transparency that only improve the distribution of information regarding RTAs notified to the WTO, while maintaining a procedure that is unable for issuing conclusive Reports about the compatibility of the notified RTAs, has been a manner of putting their true expectations regarding this mechanism in the text of the

agreement. This to the extent that the mechanism has never been expected to perform an examination with definite conclusions due to the vagueness and imprecision of article XXIV since its beginnings, which is a decisive provision for a conclusive examination of compatibility. RTAs currently represent a great opportunity for several countries regarding their international trade policies and the challenges arising from the Global Value Chains for their own economies, even more if we consider that the Decision of the Transparency Mechanism was issued in 2006, the highest point of RTA proliferation until then. As the Chairman Ambassador Denis Francis highlighted, there were political interests that did not allow to get a favorable decision to the WTO in the Doha Round negotiations. In this way, according to Melo (2011, p.26), monitoring RTAs should be avoided and the CRTA should strive to focus on devising rules more likely to be welfare improving. In this sense, we conclude that the CRTA has never really been an instrument of accountability of the WTO, because in spite of the Decision that created it, some deficiencies never allowed the CRTA to be more than an instrument of transparency and distribution of information, even if considering that some examinations got a definite conclusion of compatibility, which we consider as exceptions to the general rule, as they included developing or less-developed countries that allowed the inclusion of provisions that were not rigorously examined by the CRTA.

Furthermore, an efficient performance of the CRTA with the issuance of conclusive reports about compatibility would have represented the complete success of the multilateral trade system as the CRTA would have been, together with the Dispute Settlement Body, the most useful instrument for the enforcement of rules of this International Organization. Thus, on the one hand, if the Dispute Settlement Body today represents an *ex-post* control of incompatible measures applied by WTO members, acting efficiently as an accountability instrument in a second stage, on the other hand, the CRTA, as part of the WTO's accountability mechanisms, was expected to be an *ex-ante* control of incompatible measures. Therefore, the CRTA was created to monitor such measures prior to their implementation in trade relations between the WTO members, acting as an accountability instrument in a first stage, which we consider as rather ambitious for an International Institution. Nevertheless, an *ex-ante* control was never feasible in relation to rules that included *de-facto* discriminatory provisions, which could only be identified in specific cases, after their

implementation and application. Moreover, the success of a mechanism of compatibility examination would have meant the existence of a new international order, where International Organizations would have held more power than States.

Finally, it should be taken into account the possibility of applying a subsidiarity principle regarding the conclusion of Regional Trade Agreements, as explained by Reich. This author refers that the subsidiarity principle turns the article XXIV on its head as “instead of requiring special justification for a bilateral agreement, with this principle it is required justification for an exclusively multilateral approach” (Reich, 2010, p.272). This is in accordance to the logic of bilateralism, which allows governments to conclude agreements in attention to their own interests and which best suits the needs and interest of the members in a “tailor-made” manner. Meanwhile, multilateralism aims “some ambiguous and elusive common denominator of the many national interests involved, because of the need of the political consensus” (Reich, 2010, p.273). Furthermore, regarding the argument of some scholars that regionalism may only be a complement to multilateralism, but not a substitute for it, since governance could only be done in a global basis (Leal-Arcas, 2011, p.629), we consider that regarding the CRTA’s activity and only for the case of RTAs within the scope of this research, in accordance with Thompson and Verdier (2013, p.15), that multilateralism is wasteful in incentives, as the same agreement is offered to all States without considering their level of compliance and the costs of pursuing it, meanwhile, bilateralism allows more tailored agreements, even if in the process, the transaction costs are multiplied by requiring many of these agreements.

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