GATT Article XXIV and Multilateral Trade Liberalisation: A Need for Jurisprudencial Reform

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Introduction

'Ensuring that regionalism and multilateralism grow together – and not apart – is perhaps the most urgent issue facing trade policy-makers today' -Renato Ruggiero, former Director-General of the Word Trade Organisation (**WTO**)[3]

Even after nineteen years, these words remain of fundamental importance, as the rapid proliferation of regional trade agreements (**RTAs**) has created a "spaghetti bowl"[4] of trade arrangements that has the potential to endanger the future of the world trade system. The danger arises as RTAs are engineered to discriminate by providing only members with favourable terms of trade. Whilst Article XXIV of the General Agreement on Tariffs and Trade (**GATT**)[5] contains the exception permitting States to negotiate RTAs, such conduct directly contradicts a fundamental tenet of the GATT; the Most Favoured Nation (**MFN**) principle.[6] This principle prevents a state from discriminating against any of its trading partners.[7]However, an RTA, like the North American Free Trade Agreement (**NAFTA**) provides preferential trade arrangements to member States which can decimate the comparative advantage of other States. This contradictory conduct hinders the original mandate of the WTO, which is to liberalise global trade. Ironically, the drafters of the GATT envisaged that RTAs would only be formed in rare circumstances but today all WTO members

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3 Renato Ruggiero, 'Multilateralism and Regionalism in Trade', (1996) 1 (16) *An Electronic Journal of the U.S. Information Agency* p. 9
4 Jagdish Bhagwati, 'U.S. Trade Policy: The Infatuation with the FTAs' in JagdishBhagwati and Anne O. Kreuger (eds), *The Dangerous Drift to Preferential Trade Agreements* (The AEI Press, 1995) 5.
5 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*').
6 Ibid, Article I.
7 Id.

except for Mongolia are a party to at least one RTA.[8]In fact, as of January 2013, an astounding 546 notifications of RTAs have been received by the WTO, rendering the original mandate of the WTO; to achieve multilateral trade liberalisation, in tatters.[9]Further compounding this problem is that this almost exponential growth shows no sign of abatement. Consequently, 'nearly five decades after the founding of GATT, MFN is no longer the rule; it is almost the exception.'[10]The proliferation of RTAs is diminishing the value of the MFN principle and the importance of multilateral trade liberalisation. Consequently, it is vital to prevent RTAs from being used in a protectionist manner by reforming the application of GATT Article XXIV.

This paper determines whether RTAs that do not comply with the requirements of GATT Article XXIV are an institutional threat to the multilateral trading system. If this is found to be the case, this paper will propose a solution that can ensure GATT Article XXIV fulfils its envisaged purpose by facilitating the achievement of multilateral trade liberalisation.

The objectives of this paper are best achieved by adopting a doctrinal approach to systematically explain the principles that regulate RTAs. This doctrinal analysis is needed to analyse the legal framework of the Article XXIV as well as examining the deficiencies within the Article XXIV framework that prevents RTAs from facilitating multilateral trade liberalisation. In order to accomplish this paper's objectives, this approach will be reform oriented in order to effectively develop a three-pronged solution designed to ensure that RTAs facilitate multilateral trade liberalisation. A normative analysis will be conducted to assess the feasibility of this proposal.

In the accomplishment of this paper, the whole text is organised in four parts. Part 1 explains the development and key aspects of the GATT. In particular, this focuses on the factors influencing the inclusion of the Article XXIV within the original GATT as well as its requirements. Part II explains the economic, political and strategic reasons underpinning the recent exponential growth in RTAs and evaluates the impact that RTAs have in achieving the WTO's original mandate of multilateral trade liberalisation. Part III outlines the numerous deficiencies that have allowed WTO members to exploit and blatantly disregard substantive provisions of the GATT Article XXIV. It focuses on historical defects, definitional uncertainty and

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8 World Trade Organisation, *Regional Trade Agreements* (21 April 2013) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20wt/reg*%20and%20n)%20and%20(%20@Title=%20mongolia%20)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>

9 World Trade Organisation, *Regional Trade Agreements* (10 January 2013) <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

10 Fred Trost, 'Reconciling Regional Trade Agreements with the Most Favoured Nation Principle in WTO-GATT' (2008) 5 *Macquarie Journal of Business Law* p.43

the ineptitude of the Committee on Regional Trade Agreements (**CRTA**) and the WTO as the major factors perpetuating the creation of illegitimate RTAs. Part IV develops a pragmatic new solution based on incentivising compliance with the GATT Article XXIV to protect the institutional integrity of the WTO. It argues that RTAs can facilitate multilateral trade liberalisation after the implementation of a three-pronged reform.

Part 1

Development of GATT Article XXIV in GATT 1947

Prior to the formation of the GATT in 1947, a considerable proportion of world trade occurred in imperial preference trading blocs, which may have contributed to World War II.[11]Consequently, the conclusion of the War saw a U.S. led movement towards a global trading system. However, the strength of the Commonwealth and its preferential trading system meant that Great Britain remained an advocate for a plurilateral trading system.[12]Nonetheless, the economic clout of the U.S. meant that the philosophy behind the GATT 1947 would be multilateralism with the MFN principle being a fundamental tenet. By their definition, RTAs are prejudiced in nature, as they provide trade concessions to members by excluding and discriminating against non-members and should have no place in a trading system based on multilateralism.[13]Nevertheless, it was argued that RTAs could 'facilitate the [GATT's] stated goal of increasing world trade by encouraging the integration of national economies.'[14]Considering the integration efforts occurring in Europe at the time, this exception to multilateralism was argued as being necessary in ensuring 'European (and international) peace and security.'[15]This derogation from the MFN principle is contained within the Article XXIV. This provision was intended to provide States with an alternative avenue to achieving multilateral trade liberalisation.[16]

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11 Ibid, 46.

12 Ibid, 47.

13 Colin Picker, 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat' (2005) 26(2) *University of Pennsylvania Journal of International Economic Law* pp.267, 271.

14 David R. Karasik, 'Securing the Peace Dividend in the Middle East: Amending GATT Article XXIV to Allow Sectoral Preferences in Free Trade Areas', (1997) 18 *Michigan Journal of International Law* 527, 532.

15 Gavin Goh, 'Regional Trade Agreements and Australia: A National Perspective' (Report, Australian APEC Study Centre, 2006) p.5.

16 Warren H. Maruyama, 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 *Stanford Journal of International Law* pp.177, 180.

The Objectives of GATT Article XXIV

The 'overriding and pervasive purpose for the Article XXIV'[17] is to increase 'freedom of trade…through voluntary agreements [leading to] closer integration between the economies of the countries parties to such agreements'.[18]The potential for regionalism to expedite multilateral trade liberalisation is only be possible when a balance is struck that limits 'the scope for discriminatory preferential arrangements, while leaving adequate room for legitimate [RTAs].[19] Consequently, RTAs are only WTO-compliant upon the satisfaction of the following two prerequisites:

1. 'substantially all the trade'[20] between members of the RTA is liberalised 'within a reasonable amount of time' (internal criterion/first test);[21] and
2. the level of trade barriers faced by non-members does not 'on the whole' exceed the trade barriers in existence prior to the formation of the RTA (external criterion/second test).[22]

These prerequisites are well drafted because a proper application by the WTO or the CRTA should theoretically ensure that RTAs which satisfy these criteria will facilitate multilateral trade liberalisation. The underlying rationale behind these conditions is to ensure that RTAs are 'trade-creating as opposed to trade-limiting.'[23] The "substantially all the trade" prerequisite compels the RTA to liberalise a high proportion of trade between the members and ensure that the RTA is not used in a protectionist manner.[24]The rationale underpinning the external criterion is an attempt to preserve the MFN principle by safeguarding the rights of non-members.[25]

If RTAs comply with the above requirements, it is believed that there will be 'elimination between constituent territories of duties and other restrictive regulations of commerce'.[26] Sadly, only one notified RTA has been deemed as Article XXIV

17 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [57].
18 *General Agreement on Tariffs and Trade 1994*, Article I:4.
19 Maruyama, above note 16, 180.
20 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
21 Ibid, paragraph 5.
22 Id.
23 Goh, above note. 15, 9.
24 Jong Bum Kim and Joongi Kim, 'The Role of Rules of Origin to Provide Discipline to the GATT Article XXIV Exception (2011) 14(3) *Journal of International Economic Law* 613, 616.
25 Ibid, 617.
26 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A Article XXIV: C.

compliant.[27] Instead, RTAs have remained self-contained, exclusive trading arrangements with little to no intention of transforming into multilateral trade agreements.[28]It was hoped that the adoption of the Understanding on the Interpretation of Article XXIV of the GATT[29] would remind members that the purpose of RTAs was to facilitate the achievement of multilateral trade liberalisation.

The WTO, the CRTA and the adoption of the GATT Understanding

The GATT Understanding relating to Article XXIV was adopted at the Singapore Ministerial Conference of 1996, shortly after the WTO had been established.[30]It was thought that clarification of contested provisions in Article XXIV through the GATT Understanding, coupled with reiterating that the purpose of RTAs was to complement the multilateral trading system,[31] would assist trade liberalisation. Unfortunately, the GATT Understanding 'is essentially technical and has not really altered the relationship of RTAs to the multilateral trading system.'[32]Moreover, the formation of the CRTA as a regulatory body responsible for ensuring the legitimacy of RTAs was seen as another way to assist the WTO achieve trade liberalisation.[33]Whether or not the CRTA and the GATT Understanding successfully liberalise trade will be assessed in Part III of this paper.

Part II

RTA's –Growth, Burden and Benefit in trade liberalisation

This part of this paper outlines the underlying factors that have influenced the almost exponential growth in global RTAs. These factors will be used to assess whether RTAs in their current form pose a threat to the future of the multilateral trading system.

Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 Preamble.

27 Kim and Kim, above note 24, p.639.

28 Amin Alavi, 'Preferential Trade Agreements and the Law and Politics of GATT Article XXIV' (2010) 1(1) *Beijing Law Review* pp.7- 9.

29 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A Article XXIV: C. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ('*GATT Article XXIV Understanding'*).

30 Peter Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics' (2003) 7 *Max Planck Yearbook of United Nations Law* p. 237.

31 *GATT Article XXIV Understanding.*

32 Picker, above note, 13, p. 283.

33 World Trade Organisation, *Committee on Regional Trade Agreements*, WTO Doc WT/L/127 (6 February 1996, adopted).

Why the sudden popularity?

The rapid proliferation of RTAs is due to numerous economic, political, strategic and non-economic factors. Indeed, the recent surge in RTA popularity has been likened to street gangs because even if 'you [do] not like them, if they are in the neighbourhood, it is safer to be in one.'[34]This fear of being left behind exerts a 'pressure for inclusion' upon States and has been referred to as the "domino-theory".[35] Mike Moore, former Director-General of the WTO summed up the situation when he stated 'despite all I've written about the perils of unilateralism and bilateralism, I'd be doing it if I were in government [as] there is a terrible cost to being left out.'[36]In fact, it has been argued that the opportunity cost for States like the U.S. when they fail to negotiate RTAs means that they 'cannot afford to not be party to such agreements'.[37]

The commercial rationale underpinning the increase in RTAs is the ability to provide exporters with preferential access to important markets.[38] This provide greater efficiency gains for a State by reducing trade barriers and accelerates the achievement of economies of scale. RTAs can also be utilised as a deregulation mechanism to 'simultaneously expand trade flows, remove longstanding barriers to internal and external competition and improve global competitiveness'.[39]In addition, members can negotiate the Article XXIV inconsistent RTAs, which allow States to protect sectors like agriculture and textiles.[40]

RTAs have also been utilised as a political mechanism to ease security concerns and to strengthen important relationships. For instance, the U.S. envisages that providing countries in the Latin America and the Middle East with preferential trade terms will expedite economic and political stability. This will 'strengthen democracy and

34 Alan Winters, (Speech delivered at the Seminar on Regional Trade Agreements, Geneva, 30 June 1999).
35 Hipold, above note30,p. 222.
36 Mike Moore, 'Preferential not Free Trade Deals' *Gulf News* (online) 23 April 2007 <http://gulfnews.com/opinions/columnists/preferential-not-free-trade-deals-1.173593>
37 Donald Calvert, 'How the Multilateral Trade System Under the World Trade Organisation is Attempting to Reconcile the Contradictions & Hurdles Posed by Regional Trade Agreements' (Masters Capstone Thesis, George Mason University, 2002) 6.
38 Maruyama, above note, 16, p.189.
39 Id.
40 Hilpold, above note 30, p.224.

prevent political recalcitrance.'[41] RTAs can also be used as a tool to reward allies for their continued support and can compensate for an ineffective foreign policy.[42]

Furthermore, States negotiate RTAs from a strategic perspective as a way to increase their competitive advantage. For many developing nations, this comparative advantage attracts foreign direct investment and provides exporters with preferential access to larger markets.[43] Conversely, RTAs can also be used to nullify the comparative advantage created by another state through an RTA. This is known as the "me too effect".[44] This strategy is best exemplified by the actions of New Zealand. Australia had entered into an RTA with Thailand which provided its exporters with lower tariffs on similar agricultural products.[45] To redress this comparative disadvantage and ensure that its exporters were on equal footing, New Zealand negotiated a similar RTA with Thailand.[46]

The above analysis indicates that RTAs are only negotiated with the intention of benefitting members. There is no consideration of the impact of the RTA on the multilateral trading system or even on other WTO members. This contravenes the underlying purpose of GATT Article XXIV. Nonetheless, RTAs may facilitate trade liberalisation. However there are debates over whether they hinder or facilitate the achievement of multilateral trade.

RTAs – burden or benefit?

Edward Hudgins argues that regionalism can effectively achieve multilateral trade liberalisation. He believes that any trade liberalisation, no matter how small is beneficial.[47]Put simply, a reduction in trade barriers leads to increased trade gains with an associated increase in global welfare.[48]Reducing these trade barriers is also significantly easier at a regional level with RTAs being much easier to implement. Hudgins argues that RTAs will trigger a positive domino effect by forcing protectionist States to liberalise as a result of political and economic pressure.[49]

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41 Stephen Walsh, 'Addressing the Abuse of the WTO's Exemption for Regional Trade Agreements' (2004) 1 *The European Law Students' Association Selected Papers on European Law* p. 73.

42 Id.

43 Id.

44 Meredith Kolsky Lewis, 'The Free Trade Agreement Paradox' (2005) 21 *New Zealand Universities Law Review* p. 569.

45 Ibid, 570.

46 Id.

47 Edward Hudgins, 'Regional and Multilateral Trade Agreements: Complementary Means to Open Markets' (1995) 15 *The Cato Journal* p. 7.

48 Dr Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism' (2011) 11(2) *Chicago Journal of International Law* p. 624.

49 Hudgins, above note 47, p.7.

Moreover, Freund purports that the regionalism has been the key driver of trade liberalisation, which he believes evidences the fact that it is a better mechanism for the enhancement of global welfare.[50]

However, this is only accurate when RTAs satisfy the two prerequisites of the Article XXIV and adhere to the MFN principle. As the WTO trade system is based on the principle of non-discrimination, it is rendered meaningless when States negotiate RTAs that have the effect of establishing discrimination as the norm.[51]The ability to hand select which areas to liberalise allows States to protect key sectors like agriculture, which does anything but liberalise trade.[52]This problem is compounded by the fact that the proliferation of "illegal" RTAs reduces state enthusiasm for engaging in multilateral trade discussions.[53]

Illegitimate RTAs often have the effect of diverting resources away from the global trading system.[54]This "trade diversion" misallocates global resources and denies 'customers [an] undistorted choice of foreign goods and services.'[55] If members outside the RTA can produce goods more efficiently, there is a global decline in efficiency when members expand production and more efficient non-members are forced to reduce production levels.[56] The impact of NAFTA is demonstrative of such a situation. The preferential treatment given to goods produced in NAFTA countries decimated the comparative advantage of cheap labour that was possessed by many Asian nations.[57] This was because many producers relocated their production from Asian nations to NAFTA countries. The increase in NAFTA production is caused by the diversion of pre-existing trade from Asian nations rather than an increase in global trade.[58] The redistribution rather than creation of trade indicates that illegitimate RTAs can be detrimental in the global pursuit of multilateral trade liberalisation. Indeed, some RTAs 'have not even succeeded in creating more trade among members'.[59]

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50 Caroline Freund, 'Different Paths to Free Trade: The Gains from Regionalism' (2000) 115(4) *The Quarterly Journal of Economics* pp. 1334-6.

51 YouriDevuyst and AsjaSerdarevic, 'The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap' (2007) 18 *Duke Journal of Comparative & International Law* p. 18.

52 Maruyama, above note 16 p.191.

53 Leal-Arcas, above note 48,p 624.

54 Robert Lawrence, 'Regionalism and the WTO: Should the Rules be Changed?' in Jeffrey Schott (eds), *The World Trading System: Challenges Ahead* (Peterson Institute, 1996) 43.

55 Walsh, above note 41, p.70.

56 Lawrence, above note 53, p. 43.

57 Ibid, 48.

58 Id.

59 Maruyama, above note 16, p.191.

The sheer volume of illegitimate RTAs forces exporters to 'comply with complex, confusing and divergent regulations of commerce such as rules of origin'. Consequently, when RTAs fail to comply with the prerequisites of Article XXIV, any hope of harmonising trade requirements becomes virtually impossible.[60] The imposition of "rules of origin" requirements raises protection levels by providing members with an incentive to 'maintain the protection and reduce...[the] willingness to liberalise externally.'[61] For instance, Caribbean nations have been harmed as textile and agricultural sales to the United States have been lost to Mexico as a result of the NAFTA.[62]This also makes it considerably harder to merge RTAs in order to create larger free trade areas.

A hallmark of the envisaged WTO trade system is transparency. However, illegitimate RTAs reduce transparency as WTO members cannot be sure about what RTAs exist. This is especially problematic given the significant volume already in existence as well as the numerous RTAs presently being negotiated.[63]There is also an intrinsic unfairness in the negotiation process which tends to marginalise less developed countries, as they often do not possess a comparative advantage that is attractive to other WTO members.[64]

Consequently, it can be argued that illegitimate RTAs are inherently harmful in so far as they 'solidify protectionist measures towards non-member countries'.[65] Members are also forced to engage in discriminatory trade arrangements, limiting the effectiveness of the market mechanism to distribute resources efficiently.[66] This contradicts the overarching purpose of the GATT.

Clearly, RTAs are extremely popular amongst States despite the numerous problems they cause in the pursuit of multilateral trade liberalisation. Before an analysis of the deficiencies is conducted, it must be explained why free trade is so important. The reason lies with the fact that States willing to embrace multilateral trade

60 Walsh, above note 41, p.70.
61 Lawrence, above note 54, p.50.
62 TT's Article XXIV' in Kym Anderson and Richard Blackhurst (eds), *Regional Integration and the Global Trading System* (Palgrave McMillan 1993) 13.
63 Leal-Arcas, above note 48, p. 624.
64 Ibid, 626.
65 Calvert, above note 37, p.7.
66 JagdishBhagwati, 'Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the US?' in Olga Memedovic, ArieKuyvenhoven and Willem Molle (eds), *Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the EU?* (Kluwer Academic Publishers, 1999) 34.

liberalisation are more likely to 'garner greater economic growth in both the short and long term.'[67]

Seeking economic growth? – Multilateral trade liberalisation is the answer

Empirical studies have shown that multilateral trade liberalisation leads to greater short-term and long-term economic growth than RTAs.[68]This is because when States reduce or eliminate trade barriers on a non-discriminatory basis, there is a direct correlation with higher wealth, higher wages and a reduction in unemployment within the State.[69]Growth occurs at a much quicker rate when States pursue multilateral trade liberalisation,[70] with an associated increase in efficiency and a reduction in costs.[71]Contrastingly, RTAs, 'if anything, lead to slower growth, especially in the short run'.[72]Therefore, it is in the best interests of all WTO members for States to strive towards achieving global free trade.

Nonetheless, regionalism and multilateralism do not have to be mutually exclusive concepts. With RTAs now being an ingrained element of the global trading system, it is vital to develop a solution that allows multilateralism and regionalism to successfully co-exist and flourish together. To that end, part IV of this paper will propose a solution which strengthens the framework regulating RTAs. This will ensure that RTAs can be a springboard towards global free trade and to attaining the associated benefits of multilateral trade liberalisation.

Part-III

Deficiencies of GATT Article XXIV, the CRTA and the WTO in regulating RTAs

The proliferation of illegitimate RTAs and the associated focus on regionalism is preventing the liberalisation of the global trading system. This part outlines the deficiencies of GATT Article XXIV, the CRTA and the WTO that are preventing RTAs fulfilling their envisaged role as a facilitator of trade liberalisation. This is vital as a basis for assessing the proposed reform will be the ability to eliminate or mitigate the deficiencies outlined below. The deficiencies mails concern historical defects none definitional unartuinttry issues relating CRTA.

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67 Walsh, above note 41, 70.

68 Athanasios Vamvakidis, 'Regional Trade Agreements Versus Broad Liberalisation: Which Path Leads to Faster Growth? Time Series Evidence', (Working paper IMF WP/98/40, IMF Research Department, 1998) 5.

69 Centre for International Economics, 'Benefits of trade and trade liberalisation (Report, Department of Foreign Affairs and Trade', 2009) 5.

70 Vamvakidis, above note 68, p. 17.

71 Centre for International Economics, 'Benefits of trade and trade liberalisation (Report, Department of Foreign Affairs and Trade', 2009) p. 5.

72 Vamvakidis, above note 68,p.17

Historical defects

It is not unfair to say that GATT Article XXIV was destined to be ineffective from the outset. This is because consensus amongst members has always been required before any action can be taken against a member that has violated Article XXIV. Such an absurd requirement allowed a 'violating country to veto any condemnation of its violative behaviour.'[73] The effect of this provision was to immediately erode any power possessed by Article XXIV and is a major reason why very few RTAs are actually Article XXIV compliant.[74]This meant that 'the position of RTAs within the multilateral system was essentially unchecked by the time the GATT was replaced by the WTO.'[75]

Definitional uncertainty

As mentioned earlier, an RTA is only legitimate upon satisfying two prerequisites. The first is contained within paragraph 8 of the Article XXIV and dictates the level of internal trade liberalisation within the RTA.[76] The second is contained within paragraph 5 and intends to ensure that the RTA does not have a detrimental impact on other States.[77]These provisions were drafted because RTAs were recognised as having the ability to benefit the multilateral trade system after eliminating internal protectionism and external barriers to trade.[78]Despite the best of intentions, the ambiguous language of these paragraphs and a lack of certainty regarding vital criteria has predisposed this provision to regular exploitation.

Paragraph 8: The "substantially all the trade" requirement

The "substantially all the trade" (**SAT**) requirement was designed to ensure maximum liberalisation of internal trade barriers with the intention that the RTA would transform into a multilateral trade agreement.[79]In addition, the SAT requirement was seen as a mechanism limiting the use of RTAs in a protectionist manner.[80]However, the extent of liberalisation necessary to satisfy the test has never reached a consensus.[81]A further problem is that a literal reading of the requirement allows for some internal trade to be subject to trade barriers. Consequently, two

73 Picker, above note 14, p.282.
74 Ibid, 283.
75 Ibid, 282.
76 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
77 Ibid, paragraph 5.
78 Ibid, paragraph 4.
79 Calvert, above note 37, p. 14.
80 Kim and Kim, above note 25,p. 616.
81 Devuyst and Serdarevic, above note 51, p. 25.

differing interpretive approaches have emerged.[82] The first favours a quantitative approach where liberalisation must exceed a certain statistical threshold to satisfy the SAT requirement.[83] Unfortunately, this approach reinforces the literal interpretation by providing States with the option of not liberalising key sectors if the threshold has been satisfied. Such an approach directly contravenes the overarching purpose of the GATT and impedes the achievement of multilateral trade liberalisation. To minimise the potential for exploitation if this approach was accepted, Australia and Japan have proposed that the SAT threshold should be 95%.[84]The second approach is qualitative in nature and is intended to prevent the exclusion of any sectors from internal trade liberalisation.[85]These definitional problems have been compounded by the failure of the GATT Understanding to adequately define the term. Consequently, given the ambiguity of the requirement, the disagreement over approaches was inevitable. Regrettably, this remains a key factor that has limited the ability of the CRTA to ensure that all RTAs comply with Article XXIV.

The WTO Panel in the *Turkey-Restrictions on Imports of Textile and Clothing Products* (**Turkey-Textiles**)[86] case offered their interpretation of the SAT requirement. The panel held that 'the ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for *both* qualitative and quantitative components'.[87] This interpretation was accepted by the WTO Appellate Body.[88] Nonetheless, it has been argued that requiring a combination of both a quantitative and qualitative approach has 'only exacerbated the confusion and debate surrounding the SAT requirement.'[89]

Paragraph 5: The economic test and its elements

The external criterion or second test was drafted as a way to guarantee that non-members of an RTA would not be detrimentally impacted by ensuring that 'the duties and other regulations of commerce…shall not on the whole be higher or more

82 *Compendium of Issues Related to Regional Trade Agreements*, WTO Doc TN/RL/W/8/Rev.1**,** (1 August 2002) (Background Note by the Secretariat) paragraph, 68

83 *Negotiating group on rules – submission on regional trade agreements – paper by Turkey*, WTO Doc TN/RL/W/32, (22 November 2002) (Discussion Paper) paragraph, 16.

84 *Liberalisation Process and Provisional Conditions in Regional Trade Agreements*, WTO Doc WT/REG/W/46, (5 April 2002) (Background Survey by the Secretariat) paragraph, 9.

85 Calvert, above note 37, p.15.

86 Panel Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999).

87 Ibid, paragraph 9.148.

88 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [45-47].

89 Calvert, above note37, p.16.

restrictive than the general incidence...applicable in the constituent territories prior to the formation.'[90] The general objective of this provision is indisputable; however, the failure to define fundamental terms undermines the ability to determine whether an RTA complies with this economic test. For instance, it can be argued that an interpretation of the words 'on the whole' permits an increase in tariffs in particular areas if offset by reductions in other areas.[91]Such an interpretation would see increased trade diversion by encouraging States to protect key sectors like agriculture and would also decimate the comparative advantage possessed by many developing nations in sectors like agriculture.[92]Unfortunately, the GATT Understanding relating to Article XXIV does nothing to reject this approach.

Further definitional uncertainty

Furthermore, the WTO has also failed to define 'other regulations of commerce' (**ORC**).[93] This continues to plague the effective application of Article XXIV particularly as non-tariff barriers have become considerably more prominent in RTAs.[94]The Panel in *Turkey-Textiles* stated that ORC 'could be understood to include any regulation having an impact on trade'.[95] This interpretation meant that quantitative restrictions could not be imposed as they are prohibited under GATT Article XI and XIII.[96] However, the Appellate Body held that Article XXIV can 'justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency' with paragraph 5.[97]This surprising decision has meant that Article XXIV, which was originally conceived as a mechanism to prevent the introduction of barriers to trade, can now be used to legally justify the imposition of trade barriers.[98]

The drafting of Article XXIV reflects an attempt to appease the varying interests of members but is also one that is clearly inadequate. The overriding purpose was to ensure RTAs were used in a manner that increases multilateral trade liberalisation.

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90 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 5(a)-(c).
91 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) [6].
92 Walsh, above note 41, p.96.
93 Ibid, 97.
94 *Committee on Regional Trade Agreements – Annotated Checklist of Systemic Issues*, WTO Doc WT/REG/M/16 (26 May 1997) (Note by the Secretariat) [60].
95 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999) [9.120].
96 *General Agreement on Tariffs and Trade 1994*', Article XI and XIII.
97 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [45].
98 Picker, above note 13, p.290.

However, the failure to clearly define or subsequently clarify, crucial terms within Article XXIV has meant that they remain 'as impossibly vague as [they] sound'.[99]Consequently, it is unsurprising that Article XXIV, which may actually promote rather than eliminate the use of trade barriers, is 'one of the most controversial provisions in the GATT'[100] where 'ambiguity, rather than precision has reigned.'[101]

Even if these terms were clearly defined and could ensure that RTAs comply with Article XXIV, it would be meaningless without a body that possessed effective enforcement powers. The regulatory body tasked with is onerous role is the CRTA.

CRTA and the WTO – A study of ineptitude

The CRTA was established by the WTO so that there would be one permanent entity responsible for ensuring RTA compliance with GATT Article XXIV102 Unfortunately, the CRTA has failed spectacularly. The 2012 report of the CRTA to the General Council continues the sad trend of the CRTA failing to adhere to its work programme.103 The backlog of unsubstantiated RTAs continues to grow at an alarming rate. This has caused the CRTA 'examination mechanism to be brought to near-paralysis'.104The major cause of this problem is the failure to eradicate a number of the 'systemic issues'105 within RTAs and the WTO. This is compounded by the general hesitation of States to 'provide information or agree to conclusions that could later be used or interpreted [adversely] by a dispute settlement panel.'106Consequently, the CRTA has only ever completed one examination of an RTA in its 17 year history and there has never been a formal sanction against a non-compliant RTA.107This has led to the CRTA being

99 Kenneth Dam, *The GATT: Law and International Economic Organisation* (University of Chicago Press, 1970) 274.

100 Id.

101 Ibid, 275.

102 *Committee on Regional Trade Agreements*, WTO DocWT/L/127, (7 February 1996) (Decision of 6 February 1996) paragraph, 1.

103 *Report (2012) of the Committee on Regional Trade Agreements to the General Council*, WTO Doc WT/REG/22 (26 November 2012) (Committee on Regional Trade Agreements Annual Report) para 15; *Report (2011) of the Committee on Regional Trade Agreements to the General Council*, WTO Doc WT/REG/21 (21 November 2012) (Committee on Regional Trade Agreements Annual Report) para 15.

104 *Compendium of Issues Related to Regional Trade Agreements*, WTO Doc TN/RL/W/8/Rev.1**,** (1 August 2002) (Background Note by the Secretariat) pargraph, 17.

105 Jo-Anne Crawford and Sam Laird, 'Regional Trade Agreements and the WTO' (Paper presented at the North American Economic and Finance Association, Boston, 6-9 January 2000) p.9.

106 Trost, above note 10,p. 63

107 *Committee on Regional Trade Agreements*, WTO Doc WT/REG/W/37, (2 March 2000) (Synopsis of "Systemic" Issues Related to Regional Trade Agreements) para 21.

characterised as 'moribund'.[108] Even if the CRTA was to find that an RTA was not Article XXIV compliant, it cannot effectively enforce the decision.[109] Disappointingly, the WTO has been of little assistance and has even acknowledged that it 'does not have rules and procedures for examination of RTAs that function adequately'.[110] The shortcomings of the WTO have played a significant role in the ineffectiveness of the CRTA Concerning its with ficelim pacedure and revise and enforcement mechanism.

Notification procedures

One of the fundamental reasons for the ineffectiveness of the CRTA is the failure of the WTO to eliminate the uncertainty pertaining to the notification requirement of Article XXIV. The confusion arises as a result of the vagueness of the provision which states 'any contracting party deciding to enter into an [RTA]…shall promptly notify the [WTO].'[111] This provision does not clarify whether notification must occur prior to the formation of the RTA or shortly after the RTA has been implemented. It has been suggested that the use of the words 'deciding to enter' suggests that notification must occur prior to the formation of the RTA.[112] Nonetheless, the failure of the WTO to eliminate the ambiguity in the provision has meant that many RTAs are in force long before the WTO is notified. For instance, the RTA in the *Turkey-Textiles* case was notified to the WTO two months after the RTA was implemented.[113]In this case, the EU argued that 'it might be impracticable for parties to an RTA to notify their agreement before its implementation.'[114] Moreover, there are numerous instances where States feel that it is in their best interests to not even notify the WTO of the existence of the RTA.[115]

This behaviour is of paramount concern to CRTA representatives as late notification or failure to notify the WTO significantly 'hinders any examination

108 World Trade Organisation Director General SupachaiPanitchpakdi, 'The Doha Development Agenda: Challenges Ahead' (Speech delivered at the Fourth European Union-Association of Southeastern Asian Nations Think Tank Dialogue, Brussels, 25 November 2002) <http://www.wto.org/english/news_e/spsp_e/spsp07_e.htm>

109 Devuyst and Serdarevic, above note 49, p.73.

110 *World Trade Organisation Annual Report 2001*, (23 May 2001) (World Trade Organisation Annual Report 2001) p. 40.

111 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 7(a).

112 Walsh, above note 41, p.79.

113 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [15].

114 Ibid, 49

115 Karasik, above note 14, p.544

process.'[116]Furthermore, this conduct means that the CRTA cannot adequately plan meetings, the WTO wastes resources and there is a considerable delay before the first round of an RTA examination can take place.[117]

Paragraph 7(a) of Article XXIV also requires an RTA contracting party to 'make available to [the WTO] such information regarding the [RTA] as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.'[118]Member obligations under this provision are yet again vague and can be exploited. The WTO has not specified a time period within which members are obliged to provide the necessary information. Nor has it be an made expressly clear the extent of information that members are required to provide.[119] The inability of the CRTA to receive timely information that is substantial enough to make an assessment regarding the legitimacy of an RTA is a substantial impediment. This problem is further compounded by the fact that there are no consequences for not complying with this provision of Article XXIV.[120]As a result, the WTO review and enforcement mechanism is rendered virtually redundant.

A redundant review and enforcement mechanism

State disregard for these provisions will continue unless other States challenge conduct through the WTO dispute settlement process. However, the WTO's regulation of Article XXIV is based on a reactive enforcement model, which is entirely appropriate when a strong disciplinary mechanism exists. But the WTO disciplinary mechanism is extremely weak and WTO members 'have little fear that they will be embarrassed by some [WTO] body finding them in violation of their international obligations.'[121]This has been evidenced in the *Turkey-Textiles* decision where Turkey received no penalty for their imposition of qualitative restrictions, which contradicted principles of the GATT.[122]Furthermore, the impact of a WTO decision that finds an RTA to not comply with the Article XXIV exception is not completely known. In fact, such is the weakness of the WTO's review and enforcement mechanism; it would not be unsurprising if States were to intentionally ignore any adverse decision.[123]

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116 Zakir Hafez, 'Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs', (2003) 79 *North Dakota Law Review* p. 916.
117 Calvert, above note 37, p.19.
118 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 7(a).
119 Walsh, above n 41, 73.
120 Hafez, above note 116, p. 916.
121 Ibid.
122 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) p. 64
123 Devuyst and Serdarevic, above note 51, p.69.

Nonetheless, the potential for a WTO dispute settlement body to make an adverse finding that prevents States from forming RTAs down the track has meant that States are not willing to use the dispute settlement process. Jagdish Bhagwati articulately summed up the present situation by stating that forcing WTO members to comply with Article XXIV 'is like asking criminals to decide their own sentencing.'[124] With most WTO members being a party to "illegal" RTAs,[125] the enforcement of Article XXIV would likely be 'hypocritical and perhaps self-incriminating.'[126] The impact of this repeated and very public failure to ensure conformity with Article XXIV 'casts a large shadow over the WTO and its legitimacy as a "rule of law" international organisation'.[127]If the WTO review and enforcement mechanism is not strengthened, there is a very real possibility that the legitimacy of the WTO will continue to be eroded.[128]

The deficiencies highlighted above are crippling the legitimacy of the WTO and the pursuit of multilateral trade liberalisation. More and more WTO members are being forced to focus their efforts on regional, instead of multilateral initiatives.[129] Even Japan, once labelled 'the staunchest multilateralist,'[130] has deviated from its belief that RTAs 'should be the last trade policy option'.[131]Indeed, Japan is currently in the process of negotiating 7 separate RTAs,[132] highlighting the magnitude of this situation.

Therefore, it is of paramount importance for Article XXIV and the WTO system to be clarified, strengthened and amended to combat these deficiencies by mitigating the proliferation of illegitimate RTAs.

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124 Jagdish Bhagwati and Arvind Panagariya, *The Economics of Preferential Trade Agreements* (AEI Press, September 1996) 67.

125 Karasik, above note 14, p.543.

126 Kevin Wechter, 'NAFTA: A Complement to GATT or a Setback to Global Free Trade?' (1993) 66 *Southern California Law Review* 2611, 2620.

127 Picker, above note 15, p. 289.

128 Id.

129 Calvert, above note 37, p.32.

130 Takashi Terada, 'The Making of Asia's First Bilateral FTA: Origins and Regional Implications of the Japan-Singapore Economic Partnership Agreement' in Timothy Tsu (eds) *Japan and Singapore* (McGraw-Hill, 2006).

131 Id.

132 Ministry of Foreign Affairs Japan, *Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA)* (27 May 2013) <http://www.mofa.go.jp/policy/economy/fta/>

Part IV

Reform - A practical solution?

It has been said that 'any law that is rarely complied with is a bad law'.[133]Yet, GATT Article XXIV is not a bad provision; it has merely been applied poorly. It has been widely acknowledged that there is sufficient scope within the Article XXIV for it to successfully regulate RTAs after implementing reforms. Numerous reforms have been proposed by WTO members and academics alike but with little success. This is because a consensus has proved too difficult to reach. Under this part, a new three-pronged reform proposal inspired by some of these previous proposals is made with assessing its feasibility and likelihood for successful implementation.

The three-pronged reform

The purpose of this reform proposal is to develop a feasible solution so that the WTO can ensure that GATT Article XXIV is used only as a mechanism to facilitate the achievement of multilateral trade liberalisation. Each prong of this proposed reform is designed to eliminate, or at the very least mitigate, the deficiencies outlined in part III. This reform proposal will focus on striking a balance between eliminating the creation of illegitimate RTAs but also leaving enough scope for the creation of RTAs that comply with Article XXIV and can facilitate multilateral trade liberalisation. However, given the difficulties associated with WTO law reform, there is no guarantee that this proposal will be implemented. Nonetheless, it is hoped that the reasonable nature of the reform will encourage its acceptance by States.

Prong 1 - Definitional clarity

The key to this reform proposal is incentivising compliance with the requirements of Article XXIV. This can only occur when the scope of fundamental definitions within Article XXIV are sufficiently clarified. Therefore, the first step of the proposed reform is to clarify the definitions of "SAT"[134] and "on the whole".[135]This prong of the reform is not of itself original, but its proposed implementation and the how it can be used effectively alongside the two prongs is unique.

Luckily, the WTO Panel and Appellate Body in *Turkey-Textiles* held that the SAT requirement encompassed 'both qualitative and quantitative components'.[136]This decision limits the potential for WTO members to exploit the SAT requirement.

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133 McMillan above note 62, p.15.
134 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
135 Ibid,paragraph 5.
136 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999) [9.148].

Nonetheless, further clarification of the requirement is necessary. The WTO Panel and Appellate Body failed to specify what percentage of trade between members must be liberalised to satisfy the quantitative requirement. This paper proposes that the 95% coverage threshold suggested by Australia and Japan should form part of the requirement.[137]Thus, WTO members would no longer be able to protect sensitive sectors and almost all trade between RTA members would have to be free. Such an amendment would ensure that RTAs are closer to fulfilling their purpose of liberalising trade.

Moreover, for the SAT requirement to be effective, the definition of "on the whole" in paragraph 5 of Article XXIV must also be clarified. No longer should this provision be interpreted in a manner that can justify increasing tariffs in sensitive sectors by offsetting the increase by reducing tariffs in other sectors.[138] As a minimum, this provision should be amended to require 'any increases [in tariffs] to be offset within the same sector'.[139] This clarification would ensure that non-members of the RTA are not any worse off than prior to its formation. Furthermore, this paper proposes that the text of paragraph 5 should be amended from 'shall not on the whole be…'[140] to "shall be reduced on the whole…"Such an amendment has significant benefits for all WTO members. Firstly, it would mitigate 'some of the trade diversionary tendencies of RTAs'.[141] Secondly, it would clearly evidence the use of RTAs as a mechanism that can facilitate the achievement of multilateral trade liberalisation whilst also highlighting the potential for greater gains through global trade liberalisation.[142] Lastly, it would virtually eliminate the instances of WTO members creating RTAs to protect sensitive sectors.

The clarification of these key terms should be done by the WTO drafting a "Further Understanding on the Interpretation of Article XXIV of the GATT", which would be a supplement to the earlier GATT Understanding. This would be the safest way to guarantee the success of these amendments to paragraphs 5 & 8 of Article XXIV. The clarification of fundamental terms within Article XXIV provides States with the requisite level of certainty in relation to their obligations.

If the proposed Further Understanding was not able to garner the necessary consensus amongst WTO members, the WTO Panel or Appellate Body should

137 *Liberalisation Process and Provisional Conditions in Regional Trade Agreements*, WTO Doc WT/REG/W/46, (5 April 2002) (Background Survey by the Secretariat) para 24.
138 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) [6].
139 Walsh, above note 41, p.96.
140 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 5.
141 Walsh, above note 41,p. 96.
142 Ibid, 96-7.

instead, issue a report that confirms the amendments to paragraphs 5 & 8 as outlined above. However, this process could only occur if the adjudicatory system of the WTO is strengthened considerably.

Prong 2 – Strengthen the role and powers of the CRTA and the WTO

The second prong of this reform proposal requires the powers of the CRTA and the WTO to be reinforced and strengthened. James Mathis has suggested that the CRTA review process can be improved by introducing different stages which must be complied with before the RTA is assessed at the next stage.[143]The review process would end if members do not meet the requirements of a particular stage.[144]However, this proposal is not sufficient in itself. Reform of this provision will only be truly effective when two further requirements are met.

GATT Article XXIV does not expressly require members of an RTA to notify the CRTA of any changes to the RTA.[145] This meants that members can make substantive changes to provisions within their RTA, which may detrimentally impact non-members as well as the pursuit of multilateral trade liberalisation. The WTO has attempted to address this potential problem through the Doha Round Transparency Mechanism which requires changes to an RTA to be notified 'as soon as possible after the changes occur'.[146] Yet, this measure should be furthered. To that end, the first additional requirement in this prong of the author's reform proposal is the creation of a permanent and effective monitoring scheme.[147]The second requirement of this proposal requires the CRTA to be notified of an RTA's existence prior to its implementation.[148] This paper acknowledges that these requirements have the potential to restrict the trade autonomy of WTO members.[149]However, this can be minimised by the WTO appointing representatives to regulate every aspect of the formation, implementation and review process of all RTAs.

This proposal requires the appointed representatives of the WTO to provide feedback and guidance on all aspects of the RTA process.[150] Once members notify the CRTA of their intention to form an RTA, the WTO representative would be responsible to facilitate the creation of an Article XXIV compliant RTA. The WTO representative will be a source of information to members and can guarantee

143 James Mathis, *Regional Trade Agreements in the GATT/WTO* (Asser Press, 2002) 406.
144 Id.
145 *General Agreement on Tariffs and Trade 1994*', Article XXIV.
146 *Transparency Mechanism for Regional Trade Agreements*, WTO Doc WT/L/671 (18 December 2006) (Decision on Transparency Mechanism) para 1-4.
147 Devuyst and Serdarevic, above note 51, 52-3.
148 Walsh, above note 41, p.82.
149 Ibid.
150 Picker, above note 13,p. 309.

members only create RTAs that can facilitate the achievement of multilateral trade liberalisation. Furthermore, the WTO representatives can assess whether any changes to the RTA are compliant with Article XXIV.

The fourth and final requirement of the second prong is to strengthen the WTO adjudication system. This requires the WTO Panel and WTO Appellate Body to be the 'final arbiter of disputes'.[151] In addition, it is vital for the WTO Panel and WTO Appellate Body to develop some judicial consistency when making determinations.[152] This will create the requisite level of jurisprudence in relation to RTAs that can assist members, WTO representatives and the CRTA. Moreover, the security associated with consistent legal decision-making will incentivise compliance amongst WTO members.[153]

Prong 3 – Obligations of RTA members

Clarification of the definitions of contentious terms such as 'substantially all the trade' and 'on the whole' coupled with the appointment of a WTO representative to oversee the creation of RTAs provides an extremely strong foundation. The third prong of this proposal requires all newly formed RTAs to completely comply with all the requirements of Article XXIV. In relation to RTAs already in existence, members must work with their appointed WTO representative to ensure their RTA complies with the clarified requirements of Article XXIV. Compliance must occur within a 5 year period otherwise the RTA shall be deemed as non-compliant.[154]Should States fail to comply with this requirement, it would trigger Thomas Cottier's non-compliance sanction. This obligates members of the RTA to extend MFN treatment to any other State wishing to accede to the RTA.[155]Alternatively, if members of illegitimate RTAs are unwilling to undertake either of these options, another State can challenge the legitimacy of the RTA through the jurisprudentially stronger WTO Panel or WTO Appellate Body. It is proposed that the consequences of finding an RTA to be illegitimate should be the imposition of MFN provisions within the RTA to render it a mechanism that can facilitate the achievement of multilateral trade liberalisation.[156] Lastly, this reform proposes that all RTAs must be amended within 10 years of creation. The

151 Ibid, 308.
152 Id
153 Walsh, above note 41,p. 90.
154 Picker, above note 13, p.306.
155 Thomas Cottier, 'The Erosion of Non-Discrimination: Stern Warning Without True Remedies' (2005) 8(3) *Journal of International Economic Law* 595, 599-600.
156 JoostPauwelyn, 'Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV' (Paper presented at the Conference on Multilateralising Regionalism, Geneva, 10-12 September 2007) 34.

amendment would require RTA member to include an MFN provision and allow any WTO member to accede to the RTA. This will guarantee that RTAs fulfil their envisaged purpose as a mechanism for the achievement of multilateral trade liberalisation.

There is little doubt that this paper's reform proposal involves significant changes to the framework of the GATT. However, it can be argued that substantial changes are necessary to protect the legitimacy of the WTO and its instruments. Nonetheless, it is of paramount importance to assess the feasibility and likelihood of success for these proposed changes.

Will it be effective?

The aim of the proposal is to reconcile RTAs and GATT Article XXIV with the achievement of multilateral trade liberalisation because, when utilised correctly, RTAs can be an effective mechanism in the pursuit of global free trade.

This proposal is designed to improve the problematic CRTA and WTO review and enforcement mechanism by ensuring all RTAs are negotiated under the guidance of a WTO representative. This would guarantee compliance with Article XXIV as definitional clarity is assured, whilst also minimising the barriers to global free trade. As a result, the work undertaken by the CRTA is minimised, which would allow the CRTA to clear the backlog of RTA investigations. Furthermore, the involvement of WTO representatives throughout the formation, implementation and review process can act as a permanent and effective monitoring mechanism.

Additionally, the proposed reform is designed to provide legal security for legitimate RTAs. The burden of proving the legitimacy of an RTA that is challenged in the WTO dispute resolution process lies with RTA members.[157] This burden of proof can be easily discharged if the RTA has been assessed as compliant.[158] Consequently, the proposed reform can successfully mitigate the impact of the deficiencies outlined in part III. However, the proposal may have some drawbacks that will be discussed below.

An inadvertent short-term impact of the proposed reform could be that trade discussions will focus largely on ensuring RTAs comply with the strengthened requirements. This could divert resources away from multilateral trade liberalisation discussions. However, somewhat analogously, the introduction of Antidumping and Countervailing Duty orders saw a short-term increase in 'litigation of the old dumping/subsidies orders, but once the backlog was dealt with, the activity level

157 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [34-36]

158 Walsh, above n 41, 90.

abated'.[159] Similarly, in the long run, these reforms can ensure that RTAs facilitate multilateral trade liberalisation.

It may be argued that the proposed reform will increase the formation of RTAs as contested provisions will be clarified and the appointed WTO representatives will make the formation and implementation process more efficient. However, as long the RTAs comply with the proposed requirements, they will be used to achieve free trade, particularly as an MFN provision will inserted into the agreement within 10 years of formation.

In addition, it can be argued that the reform is excessive, especially as the WTO Panel and WTO Appellate Body have, on the one occasion they have been required to do so, found an RTA provision to not comply with Article XXIV.[160]However, the current system is based on a complaint-based model which requires a WTO member to bring an action. Instead, the proposed reform will be a proactive measure that attempts to address any disputes before they arise.

The biggest obstacle to this reform proposal will be gaining support from the major WTO members; the U.S. and the EU, which is an RTA in itself. This is, particularly, because the proliferation of RTAs by these two States has been described as a race for RTA supremacy.[161] Garnering the necessary consensus to implement the proposed modifications could prove extremely difficult. However, by raising this proposed solution at WTO meetings, the discussion generated from any WTO member objections could be used to develop an acceptable solution for all stakeholders.[162]Moreover, the proposed reform has been designed in a way where each of the three prongs can be implemented separately. Thus, clarifying the definitions of "SAT" and "on the whole" is unlikely to be controversial and can garner the necessary consensus amongst WTO members.

Nonetheless, this proposed reform is not particularly onerous and is based on incentivising compliance, which gives it the potential to be implemented in its entirety. From a practical perspective, the proposal would mitigate the deficiencies outlined in part III by strengthening the enforcement mechanism and substantive requirements. This would reinforce the legitimacy of the WTO by ensuring that RTAs fulfil their purpose of facilitating multilateral trade liberalisation.

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159 Picker, above n 13, 313.

160 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31May 1999); Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999);

161 Mathis, above n 143, 132.

162 Picker, above n 13, 317.

Conclusion

The world trade system is at a crossroads. If the proliferation of RTAs continues, there is a very real possibility that multilateral trade liberalisation will be rendered a failed ideal. It is for this very reason that WTO members must ensure that RTAs fulfil their envisaged purpose by facilitating the achievement of multilateral trade liberalisation. This will only be possible when the substantive provisions of Article XXIV are sufficiently clarified and the institutional framework of the CRTA and WTO is strengthened so that an effective enforcement mechanism exists. This paper has achieved its stated objectives by determining that illegitimate RTAs are an institutional threat to the multilateral trading system. Implementation of this paper's pragmatic three-pronged solution can effectively ensure that RTAs fulfil their envisaged purpose by facilitating the achievement of multilateral trade liberalisation.

WTO members should understand that reform of Article XXIV would have significant short-term and long-term benefits for all members as multilateral trade is more likely to 'garner greater economic growth in both the short and long term.'[163] It is a positive sign that WTO members, at the Fourth Ministerial Conference in Doha, recognised the potential role RTAs may play in increasing trade liberalisation and fostering economic development. It is now up to WTO members to fulfil their promise to launch negotiations designed to clarify and improve the underlying principles of Article XXIV. It is hoped that the reform proposed by this paper will facilitate discussion amongst academics and members in order to ensure RTAs facilitate the achievement of multilateral trade liberalisation. It will be interesting to see what reforms, if any, are implemented and whether they successfully foster multilateral trade.

163 Walsh, above n 41, 70.