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REGIONAL TRADE AGREEMENTS AND THE WTO: GENERAL OBSERVATIONS AND NAFTA LESSONS FOR ASIA

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The uneasy relationship of the World Trade Organization and regional trade agreements (RTAs) was thrust into limelight once again as the WTO Cancun ministerial collapsed.[1] In the immediate aftermath of the Cancun failure, major players in the WTO system suggested that, if necessary to make progress, they would turn to the negotiation of regional trade agreements in lieu of pursuing talks in the WTO multilateral system. In the words of Robert Zoellick, the United States Trade Representative:

> [T]he key division at Cancun was between the can-do and the won't-do. For over two years, the US has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the US will not wait: we will move towards free trade with can-do countries.[2]

In this regard, it is worth recalling that the United States traditionally did not pursue regional agreements. It has, however, become more active in concluding RTAs in recent

[1] The fifth WTO ministerial conference held at Cancun in mid-September 2003 was intended to define more precisely the negotiating parameters for the Doha Development Agenda, the round of negotiations launched at the fourth WTO ministerial conference held in Doha in November 2001. The meeting was terminated following an inability to reach consensus on whether to start negotiations on the so-called Singapore issues – competition, investment, trade facilitation and transparency in government procurement. A decision to start such negotiations at Cancun had been taken at Doha, subject to agreement on modalities at Cancun, but the disagreement at Cancun seemed to involve more fundamental issues than modalities. There was also broad disagreement over the basis for proceeding with negotiations on agricultural issues, which could well have led to a breakdown at Cancun even if the Singapore issues had been dealt with satisfactorily. A meeting at the senior officials level is to be held in Geneva before mid-December "to take the action necessary at that stage to enable use to move towards a successful and timely conclusion of the negotiations". WT/MIN(03)/20. It is generally expected that not much progress will be made, and that the target for concluding negotiations by the end of 2004 will not be met.

[2] Robert Zoellick, Op-ed: America will not wait for the won't-do countries, The Financial Times, Sept. 22, 2003.

years: Israel (1986), Canada (1989), Mexico (1994) and Jordan (2001), with negotiations completed in 2003 with Chile and Singapore. As of September 2003, the US was engaged in RTA negotiations with Australia, five Central American countries, Morocco and the South African Customs Union, as well as in respect of a Free Trade Agreement of the Americas covering most of the countries of the Western Hemisphere.

In a similar vein, Pascal Lamy, the EU Trade Commissioner reported to the European Parliament:

> [A]s with all political shocks, and Cancun is a political shock, we must go back to basics. And ask ourselves some questions about the Union's international trade policy in order to confirm whether the foundations on which we have built over several decades remain, or do not remain, unchanged. …
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> The second question: do we remain attached to the priority for multilateralism, which is the defining characteristic of the external policies of the Union? Is this preference shared by our partners? Were this not the case, are we powerful enough to change their minds? Are bilateral or regional agreements still a complement to multilateral disciplines or must come to substitute for them in the event of a standstill [at the WTO]?[3]

The EC, of course, has long pursued a more active policy of concluding RTAs, especially with European and Mediterranean countries, but also with others as well (e.g., Mexico and the ACP countries).[4]

The interest in pursuing regionalism is not limited, of course, to the US and the EC. In the wake of the Cancun failure, Brazil has expressed interest in closer economic ties with northern South America. Singapore and Thailand have recently announced

[3] Pascal Lamy, Result of the WTO Ministerial Conference in Cancun, Speech to a Plenary Session of the European Parliament, Strasbourg, Sept. 24, 2003, p. 5. In raising this question, Lamy noted that a standstill in the WTO "leaves the WTO's dispute settlement mechanism … interpreting incomplete rules and so, in the end, [acting as] a replacement for the international legislator that is the Ministerial Conference …'. Id.
[4] The EC has over 30 preferential trade agreements. WTO Secretariat, World Trade Report 2003, at 51.

their support for an earlier-than-planned creation of an ASEAN common market.[5] Perhaps more significantly, a number of major Asian countries – such as Japan and Korea, as well as China – seem to have recently started pursuing RTAs, something they had not heretofore done.[6]

This increase in regionalism and these threats for more RTAs in the near future raise again issues dealing with the relationship of RTAs and the multilateral trading system, a subject that has long been a difficult and controversial one. While RTAs are explicitly permitted subject to certain conditions under WTO/GATT rules, the application of those rules in specific instances has seldom been possible in a definitive manner. As the formation of RTAs has been proliferating at what appears to be a sharply increasing rate, this lack of workable rules has raised ever greater concerns. These concerns are fed by an uncertainty among economists whether the economic effects of RTAs are on balance negative or positive for the WTO/GATT multilateral trading system and a fear that progress in liberalizing trade at the multilateral level may be hindered by the extent to which the attention of trade policy diplomats is monopolized by these numerous agreements and ongoing negotiations.

This paper will first outline briefly the history and treatment of RTAs in the WTO/GATT and the views of economists on their effects. It will then consider the NAFTA experience and how that may be relevant for Asia.

I. Regional Trade Agreements in the GATT/WTO System

[5] N.Y. Times, October 7, 2003, p. W1.
[6] Japan has negotiated a free trade agreement with Singapore; Korea has negotiated one with Chile; and China has expressed interest in a RTA with ASEAN.

A. The Evolution of RTAs in the WTO/GATT System

One of the basic obligations in the WTO/GATT system is the most-favored-nation principle, which requires that tariff and other trading advantages given to one country must be given unconditionally to all WTO/GATT members.[7] The MFN rule would have precluded regional trading arrangements, a few of which did exist at the time GATT was negotiated. Probably to reflect that fact, the original US proposal for an international trade organization, which ultimately led to GATT, included an exception for customs unions.[8] During the course of the negotiations, the exception for customs unions was broadened so as to include also free trade areas.[9] The basic difference between a customs union and a free trade area is that while both eliminate duties and other barriers to trade amongst members, a customs union also imposes a common commercial policy toward non-members. The North American Free Trade Agreement – NAFTA – is an example of a free trade agreement, while the European Community is an example of a customs union.

The expansion of the Article XXIV exception to include free trade areas meant that it would potentially be used more frequently, as it is much easier to negotiate a free trade area than a customs union since it is not required to create a common commercial policy. However, at the time that the Article XXIV exception was negotiated it is not clear that it was in fact likely to be used extensively. Indeed, only a few regional trading

[7] GATT, art. I.

[8] A customs union is defined in GATT Article XXIV:8(a) as the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce are eliminated on substantially all trade between the constituent members of the union and substantially the same duties and other regulations of commerce are applied by members of the union to nonmembers.

[9] A free trade area is defined in GATT Article XXIV:8(b) as a group of two or more customs territories where duties and other restrictive regulations of commerce are eliminated on substantially all trade between the constituent members of the free trade area.

agreements were notified to GATT in the 1940's and 1950's.[10] At the time that GATT was negotiated, regional trade agreements were not particularly controversial. It was easy to view them as a major step in trade liberalization in a world of 40% tariffs. Moreover, the theoretical concerns of trade diverting versus trade creating effects of such agreements were not explored by Viner until some years after Article XXIV was negotiated.[11]

According to WTO Secretariat statistics, the proliferation of regional trading agreements did not commence until the 1990's, as the following indicates:[12]

	RTAs notified
1958-1969	4
1970-1979	16
1980-1989	8
1990-1999	93
2000-2003	30

While the last thirteen years has seen a huge increase in notified RTAs, the number must be put in context. Around one-third of the agreements signed since 1990 were among transition economies that were trying to makeup for preferences foregone with the splintering of COMECON and another third were the result of integration efforts between the transition economies and the European Union.[13]

Even excluding RTAs related to the transition economies, however, there remains a large increase in formation of RTAs. More significantly, the number of important

[10] The GATT Analytical Index (at 858) lists only five agreements that were notified under Article XXIV that came into force prior to 1960. The Benelux customs union predated GATT.
[11] Joseph Viner, The Customs Union Issue (1950).
[12] WTO Secretariat, World Trade Report 2003, at 47.
[13] WTO Secretariat, World Trade Report 2003, at 46. The Secretariat classifies as transition countries the former Soviet Union, Eastern and Central Europe and the Balkans.

RTAs is increasing, in particular with the decision of the United States to pursue negotiations to form them, and the geographic scope of RTAs is expanding to the point that the word "regional" no longer aptly describes them. For example, the US has free trade agreements with Israel, Jordan, Chile and Singapore. The European Union has a free trade agreement with Mexico and is negotiating other with a wide range of developing countries. Thus, even if the gross statistics overstate the degree to which RTAs are being formed, there has been a very significant increase in recent years and many proposed RTAs, including some quite large ones, are now under negotiation.[14]

What explains this increasing popularity of RTAs? In its recent report, the WTO Secretariat mentions two reasons why standard economic analysis would justify a country's decision to pursue preferential trade agreements – first, in a world of second-best, a case may be made for an individual country to reduce trade barriers on a selective basis; second, some countries may be able, through trade diversion, to secure gains that they could not otherwise achieve.[15] Perhaps more importantly, governments may prefer a multilateral approach, but conclude that a regional or preferential approach is more viable. This may arise, for example, because further integration under the multilateral approach is stymied by the opposition of some countries, thus making it very time-consuming.[16] A regional approach may also be followed because of a desire to protect market access,[17] to signal a commitment to market liberalization generally and/or to attract foreign direct

[14] For example, the EU is supposed to negotiate free trade areas with the ACP nations by 2008; the United States is now negotiating free trade arrangement with several countries, including almost all Western hemisphere countries in connection with the proposed Free Trade Agreement of the Americas.
[15] WTO Secretariat, World Trade Report 2003, at 49.
[16] Id. The comments cited in the introduction above are examples of this.
[17] The Canada-US Free Trade Agreement is an example of this motivation (on the part of Canada).

investment.[18] The Secretariat Report also cites various political reasons for pursuing RTAs.[19]

In any event, given this growth in the significance of RTAs, how does the WTO system deal with them?

B. The Control of RTAs in the WTO/GATT System

1. The basic rules of Article XXIV

GATT Article XXIV and GATS Article V specify conditions that must be met for a RTA to qualify as an exception to the overriding MFN principle that is normally applicable. Because there has been little development to date under GATS and economic integration agreements, this section will focus on GATT Article XXIV. In addition, for developing countries, the so-called Enabling Clause allows the formation of regional or global arrangements amongst developing WTO members.[20]

GATT Article XXIV:4 provides as follows:

> [WTO] members 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 as 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 [WTO] members with such territories.

[18] WTO Secretariat, World Trade Report 2003, at 50.
[19] Id.
[20] Decision of 28 November 1979, 26th Supp. BISD 203. The Decision imposes no conditions on preferential tariff arrangements and applies to the mutual reduction, as well as the elimination of tariffs. It allows for mutual reduction or elimination of non-tariff barriers in accordance with criteria or conditions which may be prescribed by WTO members. Such criteria or conditions have not been prescribed to date.

While Article XXIV:4 sets outs GATT's basic philosophy with respect to RTAs, it is unclear whether it imposes any obligation. The following paragraph, paragraph 5 of Article XXIV, commences with the word "Accordingly", suggesting that paragraph 4 sets out a general principle that is put into practice by paragraph 5. Paragraph 4 is important, however, because its states the general principles, one of which is that RTAs should not raise trade barriers vis a vis non-members.

Paragraph 5 is essentially concerned with the level of restrictions applied to non-members before and after the RTA is brought into effect. For customs unions, paragraph 5(a) specifies that

> the duties and other regulations of commerce imposed at the institution of any such [customs] union … in respect of trade with [WTO] members not parties to such union … shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the union …[21]

The same result is required of free trade areas, where the duties and other regulations of commerce of each of the constituent members of the area are not to be higher or more

[21] The application of this requirement has raised some difficulties. Paragraph 6 of Article XXIV specifies that if a member of a customs union, in the process of establishing the common tariff applicable to non-members, raises a tariff above its bound rate, then the tariff renegotiation rules of GATT Article XXVIII apply. For example, if four parties to a customs union apply tariffs of 5, 10, 15 and 20 per cent, respectively, to a product before the union and propose a new common tariff of 10 per cent, then renegotiations over breaking the 5 per cent tariff binding would be needed. Paragraph 6 specifies, however, that due account shall be taken of the compensation afforded by the reduction of the corresponding duty in the other members of the customs union. Thus, in the example, the reductions from 15 and 20 per cent to 10 per cent could be viewed as offsetting the increase from 5 to 10 per cent. The 1994 understanding on Article XXIV:6 specifies that there is no obligation on WTO members benefiting overall from tariff reductions occurring on formation of a customs union to compensate members of the union for those benefits. Understanding on the Interpretation of Article XXIV of GATT 1994, para. 2.

restrictive than the corresponding duties and regulations existing in the member prior to formation of the area.[22]

Paragraph 5(c) specifies that if the customs union or free trade area is implemented over time, which is the usual case, then the ultimate formation of the union or area should occur within a reasonable period of time. The 1994 understanding specifies that the reasonable period of time should exceed ten years only in exceptional cases.[23] Historically, some RTAs have had very long transition periods.[24]

Paragraph 8 of Article XXIV also provides substantive control of the formation of RTAs, through its definition of what qualifies as a customs union or free trade area.[25] Paragraph 8 defines a customs union as follows:

> A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
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> (i) duties and other restrictive regulations of commerce (except where necessary those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
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> (ii) … substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

[22] The 1994 understanding on Article XXIV:5 specifies the approach to be taken in deciding whether these criteria have been met for a customs union. Understanding on the Interpretation of Article XXIV of GATT 1994, paras. 4-6.
[23] Understanding on the Interpretation of Article XXIV of GATT 1994, para. 3.
[24] GATT Analytical Index 808-810 (6th rev. ed. 1995).
[25] Although phrased as general definitions, it is understood that paragraph 8 contains obligations that must be complied with. See Understanding on the Interpretation of Article XXIV of GATT 1994, para. 1: "[RTAs] to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article."

The definition of a free trade area is essentially that contained in paragraph (i) above.[26]

Over the years, the WTO/GATT system has had considerable difficulty in interpreting these terms. Foremost among the problems have been defining the terms the questions of defining the terms "other restrictive regulations of commerce" and "substantially all trade". For example, are antidumping rules permitted to exist in free trade areas? Is it possible to exclude a significant sector to a substantial degree, such as agriculture, from the coverage of a free trade agreement? Does it matter that there has traditionally been little trade in that sector? The inability to reach consensus on the meaning of these and other terms has made it difficult for the WTO/GATT system to review and oversee the operation of RTAs. After considering the current mechanisms for review of RTAs – the WTO Committee on Regional Trade Agreements and dispute settlement – we will examine these interpretative problems in more detail and consider the status of the Doha negotiations on RTAs, which are one of the subjects of the so-called "rules" negotiations.

2. Review and oversight of RTAs by WTO Members

Paragraph 7 of Article XXIV requires that parties deciding to enter an RTA must "promptly notify" the WTO of that agreement and make such information available as will enable the WTO to make such reports or recommendations in respect of the RTA as

[26] Paragraph 8(b) provides: "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except where necessary those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

may be appropriate.[27] In addition, periodic reporting on the operation of RTAs is also required.[28] Traditionally, RTAs notified under GATT were examined by an ad hoc working party established for that purpose. Early on, the WTO changed that procedure through the creation of a Committee on Regional Trade Agreements, whose charge was to examine all RTAs. Unfortunately, because of the consensus requirements for decisions in WTO/GATT and the imprecision in the definition of several key terms for applying the requirements of Article XXIV, the GATT working parties and the new WTO committee have been incapable of reaching any conclusions in respect of RTAs that have been reviewed by them.[29] While hope springs eternal, it is not clear that the situation will soon change, which has raised the question of whether it would be possible to control use of RTAs through dispute settlement.

3. Review of RTAs in dispute settlement

Prior to the Uruguay Round, there was some uncertainty whether the dispute settlement system could appropriately review the conformity of an RTA with the requirements of Article XXIV. While the issue had been raised, those panel reports where it had been considered had never been adopted.[30] However, paragraph 12 of the 1994 Understanding specifies:

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[27] The notification requirements are elaborated upon in the Understanding on the Interpretation of Article XXIV of GATT 1994, paras. 7-11.
[28] Understanding on the Interpretation of Article XXIV of GATT 1994, para. 11.
[29] The Czech/Slovak agreement was approved in 1994, but beyond that only a few relatively old agreements were approved. For the GATT record, see the GATT Analytical Index 817 (6th rev. ed. 1995). For the WTO experience, see the reports of the WTO Committee on Regional Trade Agreements.
[30] Theofanis Christoforou, Multilateral Rules as a Constraint on Regional Rules: A Regional Perspective, in Paul Demaret, Jean-Francois Bellis & Gonzalo Garcia Jiminez (eds.), Regionalism and Multilateralism After the Uruguay Round 757 (1997). See GATT Analytical Index 840-842 (6th rev. ed. 1995).

> The provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas or interim agreements leading to the formation of a customs union or free trade area.

While there were some questions raised in the WTO as to whether this language was sufficient to give the dispute settlement system general jurisdiction over claims arising under RTAs, two Appellate Body decisions made clear that this was the way that the above text should be interpreted.

The principal case, which was directly on point, was the *Turkey—Textiles* case, in which India challenged certain quotas that Turkey had imposed on textile imports from India.[31] Turkey's defense was that it was required to impose such quotas as a consequence of its entry into a customs union with the EC. The key issue in the case was whether the Turkish measures could be justified under Article XXIV. The panel found that they could not be so justified.[32] This was confirmed on appeal. As explained by the Appellate Body, Article XXIV does not permit the adoption of GATT-inconsistent measures on formation of a customs union unless the absence of those measures would

[31] Turkey – Restrictions on Imports of Textiles and Clothing Products, WT/DS34, panel and Appellate Body reports adopted on November 19, 1999. The second case involved an attempt by India to invoke the Article XVIII balance-of-payments exception to defend its comprehensive system of import quotas and controls. The 1994 understanding on balance-of-payments exceptions contained language related to dispute settlement similar to that contained in the 1994 understanding on Article XXIV. Indeed, while the language related to the jurisdiction of dispute settlement in balance-of-payments cases was arguably less clear than that applicable to Article XXIV, the panel and Appellate Body both found that the dispute settlement system could assess the legitimacy of the justification for invocation of the balance of payments exception. India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90, reports adopted on September 22, 1999. See Frieder Roessler, Are the Judicial Organs of the World Trade Organization Overburdened?, in Robert B. Porter, Pierre Suave, Arvind Subramanian & Americo Beviglia Zampetti (eds.), Efficiency – Equity – Legitimacy: The Multilateral Trading System at the Millenium 308 (2001) (criticizing the decisions) & William J. Davey, Comment, id. at 329 (supporting the decisions).

[32] Panel Report, *Turkey—Textiles*.

prevent the formation of a customs union. In connection with that, it noted that the definition of a customs union in Article XXIV:8(a) allows a degree of flexibility in the extent to which constituent members must adopt the same regulations of commerce *vis a vis* non-members of the union. Accordingly, Turkey could have entered into the customs union without imposing the quotas at issue. Indeed, it noted that the problem could have been handled through application of rules of origin to Turkey-EC trade.[33]

Turkey—Textiles is significant for two other reasons as well. First, in its discussion of Article XXIV, the Appellate Body noted that it provided a defense to a charge of a GATT violation. As such, in the first instance, a member invoking Article XXIV has the burden of proving that the free trade area or customs union at issue complies with the definitional requirements for such entities, as they are specified in Article XXIV. In that regard, it criticized the panel for avoiding that issue by assuming for purposes of its analysis that the EC-Turkey customs union met the terms of Article XXIV. The Appellate Body also indicated indirectly its view that panels have jurisdiction to review whether a free trade area or customs union meets the requirements of Article XXIV, a question that the panel had left open.[34]

At his juncture, it remains to be seen whether the dispute settlement system will become the principal mechanism by which the conformity of RTAs is checked. Given the complex economic issues that would be involved, it would not be an easy task for it to perform, particularly in close cases. However, because the results of dispute settlement

[33] Appellate Body Report, *Turkey—Textiles*, paras. 42-63.
[34] Id., paras. 58-60. On the latter point, the Appellate Body simply referred to its decision in *India—QR*, see note 31 supra..

are adopted quasi-automatically, it could perform such a role. Hopefully, the Committee on Regional Trade Agreements will become functional, but if it does not, dispute settlement may be the only route for review of RTAs. This uncertainty about how effectively the WTO is able to monitor the formation and operation of RTAs is potentially a serious problem, although to judge how serious requires an examination of whether RTAs are generally inimical, supportive or neutral in relation to the WTO and its multilateral rules-based trading system. After considering the state-of-play of the Doha negotiations on RTAs, we will turn to this issue in Part II.

4. The Doha Negotiations on RTAs

As noted above, there has been considerable controversy over the years as to the requirements imposed by GATT Article XXIV, as well as the other WTO provisions on RTAs. This controversy extends from the definition of mere procedural requirements to the meaning of key elements of the definitions of free trade areas and customs unions. It is beyond the scope of this paper to analyze in detail all of these controversies. It is useful, however, to review the major disagreements and consider briefly the work on RTAs that is ongoing in the Doha negotiations.[35]

On a procedural level, it is not clear when RTAs should be notified to the WTO for review. Obviously, notifications received after the completion of the negotiations of an RTA would seem to preclude any serious input from the WTO review (in the sense that changes would be difficult to implement at that point), even thought such input and

[35] This brief synopsis of outstanding issues relies extensively on the background note prepared by the WTO Secretariat on Compendium of Issues Related to RTAs, TN/RL/W/8 and the GATT and WTO Analytical Indices.

changes seem to be contemplated by Article XXIV. Similarly, while GATS Article V calls for prompt notification, no time is specified. In addition, there are disagreements as to what information should be provided.[36]

A further problem arises as to the comprehensiveness of the review process in the Committee on Regional Trade Agreements, which is designed to gather information on RTAs and to judge their conformity with the applicable rules. In particular, agreements between developing countries entered into under the authority of the Enabling Clause are often not reviewed.[37] More significantly, because of the disagreements about the substantive standards that RTAs are expected to meet, the review process is typically inconclusive, as noted above. The Secretariat blames part of this problem on what it calls "dispute-settlement awareness": "Members seem reluctant to provide information or agree to conclusions that could later be used or interpreted by a dispute settlement panel."[38]

On more substantive issues, it is unclear whether paragraph 4 of Article XXIV adds to the other provisions of Article XXIV, or simply states a general principle that is interpreted in the other provisions. This disagreement may be more apparent than real, since at a minimum, the Appellate Body has made it clear that paragraph 4 provides important context for interpreting those other provisions.[39] However, there may be some inconsistencies between paragraphs 5 and 8. Paragraph 8 focuses on the removal of

[36] There are now informal guidelines on this issue, see Standard Formats, WT/REG/W/6 & 14.
[37] TN/RL/W/8, para. 14. The Enabling Clause does not mandate any examination.
[38] TN/RL/W/8, para. 20.
[39] Appellate Body Report, *Turkey – Textiles*, paras. 56-57.

internal trade restrictions, while paragraph 5 focuses on not raising barriers to external trade. One can imagine situations where compliance with one requirement might lead to problems with meeting the other.[40]

The most difficult issues, however, concern the interpretation of the substantive requirements of Article XXIV.[41] Probably the most difficult one is the interpretation of the words "substantially all the trade", as they are used in the definition of customs unions and free trade areas. The two basic approaches to interpreting the requirement that an RTA should cover substantially all the trade between the constituent members are (i) that the requirement is a quantitative one, which is met if the RTA covers actual trade between the parties at an appropriate statistical level (e.g., 90%) and (ii) that the requirement is (or is also) a qualitative one, which is met only if no important economic sector is excluded from the RTA.

There is also some lack of clarity in the requirement that a customs union's constituents impose substantially the same duties and other regulations of commerce. In the *Turkey – Textiles* case, the panel and the Appellate Body seemed to disagree as to how much flexibility this provision provided to members of a customs union. In the view of the Appellate Body a high degree of "sameness" was required.[42] But that requirement obviously is a bit imprecise as a practical matter.

[40] TN/RL/W/8, para. 54 (e.g., the harmonization of standards or the introduction of competition rules could raise barriers to trade in terms of paragraph 5).
[41] There are also many interpretative problems, sometimes involving similar issues, with GATS Article V. See TN/RL/W/8, paras. 85-113.
[42] Appellate Body Report, *Turkey – Textiles*, paras. 49-50.

The requirement that restrictive regulations of commerce be eliminated contains an exception for "where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX". It is disputed whether antidumping and safeguard measures should be viewed as restrictive regulations or not. If so, it would seem that they should not be used, although many free trade areas permit their use. In the case of safeguards, this issue is complicated by the debate over whether selective safeguards should ever be permitted – if not, then it would seem that even regional partners should be subject to any general safeguard measure that is imposed. Panels and the Appellate Body have explicitly avoided these issues thus far.[43]

As the foregoing brief synopsis of GATT Article XXIV issues demonstrates, there is much for negotiators to do in clarifying the meaning and procedures for implementing Article XXIV. To date the negotiations have not advanced much. The report of the chair of the negotiating group as of July 2003 was as follows:[44]

> 16. Paragraph 29 of the Doha Ministerial Declaration states that negotiations aim at clarifying and improving disciplines and procedures under the existing WTO provisions applying to RTAs, taking due account of the developmental aspects of these agreements.
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> 17. The Group has substantively progressed in its work. The issue-identification phase has been practically completed, with issues being broadly structured as primarily "procedural" and "systemic". Procedural questions, and in particular "RTAs transparency", were identified as issues for initial consideration and have been tackled since last October, mostly in an informal mode. Systemic issues have been addressed only in formal meetings until now.
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> 18. After two slow months, discussions in the Group regained momentum at the 11 June meeting, when three formal submissions were tabled. These

[43] TN/RL/W/8, paras. 76-77.
[44] TN/RL/6.

> submissions both built upon the progress achieved in informal discussions on "RTAs transparency" and revived the debate on important systemic issues.
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> 19. Progress achieved on "RTAs transparency" suggests that the Group is heading to a common understanding on the elements to be included in an early package improving *inter alia* the procedures relating to the timing and content of RTAs notification, and a revived, more transparent and efficient RTA review process. It is difficult at this stage to know whether such a procedural package could be ready before the Cancún Ministerial, but it remains a possible achievement. [It was not achieved.]
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> 20. A number of systemic issues are now on the table for priority discussion: RTAs and development; RTAs coverage (in particular the definition of "substantially all trade" in GATT Article XXIV:8); other (restrictive) regulations of commerce (in particular matters related to preferential rules of origin and safeguards); and the primacy of the multilateral trading system and possible RTA negative effects on third parties. The Group has also considered the question of "grandfathering" of existing RTAs and retroactive application of any new rules, but it has been generally held that no useful outcome could be achieved on that issue until the negotiations had progressed significantly.
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> 21. On development, the Group has before it certain RTA-related S & D proposals, referred to it by the Chairman of the General Council on 20 May 2003. The Group held a preliminary discussion of these proposals at its formal meeting of 11 June, and has scheduled a meeting on 21-23 July to further advance its consideration of these proposals.
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> 22. The Group remains committed to achieving significant results in both the disciplines and procedures related to RTAs. It plans to accelerate work on the clarification and improvement of RTA disciplines under the existing WTO provisions in the post-Cancún period.

The negotiations on RTAs are complicated by the fact that most WTO members are parties to some RTAs and even those members that have traditionally not participated much in RTAs have recently started to do so. As a result, the negotiations may well not produce much in the way of change in the current situation, even if transparency is improved somewhat. That, as noted above, raises the question of how much of a threat are RTAs to the multilateral trading system.

II. The Effects of Regional Trade Agreements on the Multilateral Trading System

There is considerable controversy over whether RTAs are desirable in general economic terms for the world at large or compatible with the multilateral trading system. Although there are numerous studies of the effects of RTAs, clear conclusions are difficult to draw. In this section, I first consider several overall attempts to analyze the economic effects of RTAs, based on surveys of the economic literature. Second, I consider the other effects of RTAs on the multilateral system. Third, I contrast the relatively desirability of multilateral and regional approaches.

A. The Economic Effects of RTAs

There is much controversy over the economic effects of RTAs on the multilateral trading system. The classic question that has been asked since Viner's classic work on the economics of RTAs is whether such arrangements are trade creating or trade diverting. This is obviously an economic, not a legal, question, and economists have quite differing views on the issue. This diversity of viewpoints arises because of the difficulty of measuring the effects of RTAs. While this might seem to be a straightforward empirical issue, it is more complicated than that. Whether one attempts to measure the effects of an RTA after the fact or predict them in advance, one is always forced to speculate on what would have happened without the RTA in question and that can never be known with any certainty. Accordingly, this section of the paper will only summarize briefly some recent general surveys of economic studies that touch on the basic questions surrounding the economic impact of RTAs.

In a 2001 OECD review, the authors reviewed the economics literature on the effects of RTAs on trade and investment flows.[45] In examining recent ex post studies, the review concludes that results are "mixed". Some studies showed significant increases in intra-bloc trade, but others did not. As to trade diversion, there was no indication found that it is a major problem, although some evidence indicated that it may exist to a limited degree. The review reports that ex post studies on the economic growth effects of RTAs suggest that they "have had little impact on economic growth".[46] The ex ante studies reviewed showed "weak evidence of trade diversion, but that the recent wave of regionalism has been trade creating on a net basis and welfare improving for member countries and trading blocs as a whole".[47]

The World Trade Report 2003, a WTO publication, concluded that for the most part there is not strong evidence of trade creation in most RTAs. Positive evidence is found in respect of some RTAs, but not in others.[48] In respect of the more general issue of trade creation versus trade diversion, it notes a divergence of opinion amongst economists and studies of specific RTAs.[49] The WTO report also notes that not all trade in RTAs is preferential – often because of the cost of complying with rules of origin and other administrative requirements – and that certain sectors often remain protected under

[45] Regional Integration: Observed Trade and Other Economic Effects, OCED Doc. TD/TC/WP92001)19/FINAL (Oct. 19, 2001).
[46] Id., para. 2.
[47] Id., para. 3. The review notes that the results vary widely depending on the precise model used. Models based on imperfect competition showed greater positive results.
[48] WTO Secretariat, World Trade Report 2003, at 55-57.
[49] Id., at 58-59.

RTAs. Both of these factors would support findings that the economic effect of RTAs on trade creation may not be as great as might otherwise be expected.[50]

The conclusion to be drawn by a non-economist would seem to be straightforward. The overall economic impact of RTAs may not be all that great. Does this mean that the creation of RTAs may not be a major problem for the multilateral trading system? As discussed below, this does not necessarily follow. It is worth underlining, however, that the fact that RTAs may not produce all that much in the way of economic advantage is an important insight that should be given greater attention. It does suggest that too much emphasis may be placed on pursuing regional arrangements when multilateral arrangements would be preferable for all concerned. Of course, RTAs produce more than economic effects on the multilateral trading system, and the next section considers those.

B. Other Effects of RTAs

The WTO Report lists four reasons why RTAs may be inimical to the multilateral trading system.[51] First, it notes the claim that some trade diversion will occur because of the complexity of typical RTA rules of origin. From the non-economic perspective, the complexity of these rules raises compliance costs in the multilateral system. This argument seems irrefutable. It has often been noted that the complexity of administrative rules in RTAs often leads traders to forego benefits under an RTA, such that a significant amount of trade under preferential arrangements does not benefit from available

[50] Id., at 59-62.
[51] Id., at 65.

preferences.[52] This argument, however, mainly suggests that entry into RTAs, particularly complex networks of RTAs with varying rules of origin, may not make good policy sense. It does not necessarily follow that this complexity will hinder development of the multilateral system. Indeed, the simplicity of the multilateral system is highlighted in comparison.

The second problem raised by the WTO Report concerns transparency. For the most part, this is due to the administrative complexities discussed in the proceeding paragraph. But it is broader than that. To the extent that different RTAs take different approaches to resolving trade issues (e.g., rules on standards, services regulation, etc.), they may significantly the transaction costs to business of engaging in international trade.[53] Divergent rules may not only undermine multilateral rules, they may make multilateral rules more difficult to negotiate in the long run, as each participant may prefer its own rules.[54]

The third problem seen in the WTO Report is that RTAs may slow down multilateral liberalization because groups in a country desiring liberalization may be largely satisfied with that achieved in RTAs, while those in sectors wanting protection may be able to gain exclusion from the RTA. Thus pressures for multilateral liberalization will be undermined, and opposition will remain as strong. In addition, it is feared that the creation of preferences will inevitably create lobbies for their retention.

[52] Id., at 59.
[53] OECD, Regional Trade Agreements and the Multilateral Trading System: Consolidated Report, TD/TC(2002)8/FINAL, at 19 (Nov. 20, 2002).
[54] Id. Of course, in some instances RTA rules may end up serving as models for the multilateral system. Id., at 20. Where divergent rules exist, however, they clearly increase the cost of trade.

The fourth concern is a related one – that the negotiation of RTAs will detract from the multilateral negotiations simply because of the limited resources available to many countries.

These last two concerns seem significant. There clearly are limited resources available for trade negotiations. While RTAs often follow basic patterns, they all have to be "customized" to the concerns of the pair of countries involved. That inevitably will detract from multilateral negotiations. While proponents of trade liberalization will presumably remain in favor of multilateral liberalization, there attention and resources will also be diverted. Thus, it would seem that a policy of pursuing multiple RTAs is inevitably going to undermine the multilateral system.

C. The Desirability of RTAs and the Multilateral Trading System Compared

In comparing the effectiveness of RTAs and the multilateral trading system, it is quite noteworthy that the economic benefits of RTAs do not seem to be so clear. While there would seem to be an overall gain, it does not seem to be that significant and may lead to undesirable trade diversion. Since RTAs also undermine the multilateral system in other ways, as noted in the preceding section, it is useful to consider the relative desirability of pursuing a policy of negotiating a network of RTAs as opposed to pushing for more liberalization in the multilateral system.

The recent WTO Report was quite blunt in its conclusions:[55]

[55] WTO Secretariat, World Trade Report 2003, at 66.

> Regardless of whether regional arrangements seek to pursue goals compatible with multilateralism or to short-circuit the discipline of non-discrimination, RTAs can pose threats to a coherent and active multilateral trading system. A proliferation of ill-considered and partial RTAs could turn fears of shortcomings in the multilateral framework into a self-fulfilling reality. The existence of numerous overlapping arrangements can distort trade, raise transaction costs, and undermine the systemic integrity of multilateralism. Regional trading agreements can strengthen vested interests hostile to non-discriminatory outcomes. They can weaken resolve to make multilateralism work by draining away scarce negotiating resources and reducing the effectiveness of pro-liberalization forces in the domestic economy.

To combat this, without denying the possibility of pursuing regional outcomes, the WTO Report suggests two "ground rules of policy behavior". First, WTO members would be urged "to refrain from engaging in regional commitments that [they] would be unwilling , sooner or later, to extend to a multilateral setting".[56] Second, a consultative system would be established "to map and monitor the timing and conditions attached to the non-discriminatory, multilateral application of commitments made in regional arrangements".[57] This second proposal would be designed to ensure that the first proposal was given effect. How quickly the regional commitments would have to be multilateralized would be a key issue. Indeed, in respect of tariff commitments, members of a true free trade area with zero tariffs would be expected to remove their tariffs generally, which might well be difficult to get them to agree to. In other words, application of these proposed rules would potentially make RTAs impracticable. Of course, that outcome is not undesired by the WTO Secretariat, but it may be difficult to get WTO members to accept it, and the current negotiations show no sign that this will happen.

[56] Id., at 66. In making this suggestion, the Report notes that it would only apply where there is a relevant multilateral framework covering the issue. Thus, commitments on labor rights would not fall within this policy since the WTO does not deal with them, whereas tariff reduction commitments would be covered.
[57] Id., at 66.

Whether or not the proposal discussed above could be practically implemented, it is clear that the WTO needs to make it better known that the economic benefits and integration gains from RTAs may not be very great in the typical case and that pursuing such agreements in preference to multilateral trade negotiations may be self-defeating in the long run.

III. The NAFTA Experience and the Lessons for Asia

In the Americas, RTAs have been negotiated over recent years in a rather haphazard and confusing manner. In this section, I will first describe the maze of agreements that is emerging. Thereafter, I will comment on the effects of NAFTA from the perspective of how it has affected trade and how it relates to the multilateral trading system and what lessons it suggests for Asia.

A. The Maze of RTAs in the Americas

In the case of the US, it entered into a free trade area with Canada in 1989, which was expanded as NAFTA to include Mexico in 1994. It has recently negotiated a free trade agreement with Chile, which is expected to enter into force in 2004. The US is currently negotiating a free trade agreement with five Central American countries (all except Belize and Panama) and has discussed the possibility of starting negotiations with the Dominican Republic. The US also has one-way preferential agreements with the Andean Pact countries and with the Caribbean Basin countries in general. It is also pursuing a hemispheric-wide RTA, known as the FTAA. Outside of the Americas, the US has RTAs with Israel, Jordan and (soon) Singapore.

Canada has a similar pattern of agreements and preferences. It has a free trade agreements with the US (1988), Mexico (1994), Israel (1997), Chile (1997) and Costa Rica (2002). It is negotiating a free trade agreement with four Caribbean countries (El Salvador, Guatemala, Honduras and Nicaragua) and has had exploratory discussions with the Andean countries, CARICOM and the Dominican Republic.

Mexico has pursued a more aggressive policy of negotiating FTAs. It entered into NAFTA in 1994 and has also negotiated RTAs with Costa Rica (1995), Colombia and Venezuela (1995), Bolivia (1995), Chile (1999), Guatemala, Honduras and El Salvador (2001). It has also negotiated RTAs with Israel (2000), the EC (2000) and the EFTA countries (2001).

The situation is much more complex when South America is taken into account. Most importantly, Argentina, Brazil, Paraguay and Uruguay have formed a customs union – MERCOSUR (Chile and Bolivia are associated with it, and Peru recently (August 2003) agreed to become an associate as well and other members of the Andean Community may follow). It is negotiating an RTA with the EC. The Andean Community itself consists of Bolivia, Colombia, Ecuador, Peru and Venezuela and is also a free trade area, with the intent to become a customs union shortly.[58] Chile has also pursued a policy of RTAs. In addition to those with Canada, the US and Mexico, it has signed agreements with the EC, EFTA and Korea (all not yet in force)

In the Caribbean, there is the CARICOM customs union, which includes most of the island countries of the Caribbean (but not Cuba, Dominican Republic or Haiti), plus

[58] At the moment, Colombia, Ecuador and Venezuela apply a common external tariff. The other two are expected to follow suit by the end of 2003.

Belize and Guyana. It has signed agreements with Colombia, the Dominican Republic and Venezuela (not yet in force). The Caribbean countries generally benefit from the EC's preferences for ACP countries, which is to become a free trade agreement in due course. The Central American Common Market has five members – Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. It has agreements with Chile, the Dominican Republic and Panama (not yet in force).

What emerges from this pattern? It appears that NAFTA is gradually creeping south, with the US, Canada and Mexico negotiating or already having agreements with the Central American countries and Chile, and granting preferences to the Caribbean and Andean countries. At the same time, Mercosur is creeping north, having two of the five Andean countries as associate members. It remains to be seen if this process will lead to a hemispheric wide free trade agreement. The reason why it may not is that many of the agreements that are described above have not really dealt with a number of difficult issues. At the same time, they have created an enormously complex structure, particularly with regards to rules of origin to determine which countries benefit from preferential treatment in which cases. Finally, another important dimension to this maze is how certain American countries are also reaching out across the Atlantic and Pacific. In that regard, one can point particularly to the countries that have entered into or are negotiating with the EC (and often EFTA, as well) – Mexico and Chile, as well as the ACP countries and those that have participate in APEC and have entered into or are negotiating with Asian countries – Chile and the US are examples.

B. The Effect of NAFTA on Trade and the Multilateral Trading System

1. The Effect on Trade

In dollar terms by far the most important RTA in the Americas is NAFTA. The size of the effect of NAFTA on intra North American trade is not completely clear because of other economic events that occurred more or less simultaneously with the implementation of NAFTA: the US economic boom and subsequent recession; the Mexican financial crisis and subsequent devaluation of the peso.[59] A recent study noted that the impact on the US economy in terms of increased GDP has been on the order of 0.02 to 0.5 per cent.[60] This would suggest a relatively minor impact on the US economy overall. This conclusion is consistent with some analyses of the employment impact, with USTR reporting some 900,000 additional jobs as a result of increased exports,[61] while there have been roughly 525,000 job losses registered with the Labor Department as of the end of 2002.[62] Other estimates are somewhat higher, with the Economic Policy Institute claiming 766,000 jobs lost in the first seven years of NAFTA.[63] These effects - especially if netted out – seem relatively minor given a total US labor force of almost 150 million.

Trade flows between NAFTA partners, however, have changed significantly since NAFTA came into force. Mexican exports to the US and Canada increased 225 per cent between 1993 and 2001, more than twice the rate of growth of its exports to other destinations, and the increase in exports accounted for more than one-half the growth in Mexican GDP during that period.[64] In the case of Canada, exports to the US and Mexico were up 95 per cent in the same period (compared to five per cent for other exports).

[59] Report, at 85.
[60] Report, at 86.
[61] USTR, NAFTA at 8 (May 2002), p. 4.
[62] See www.publiccitizen.org/trade/forms/search_taa.cfm (visited Oct. 7, 2003)
[63] NAFTA at Seven: Its Impact on Workers in All Three Countries (EPI Briefing Paper, April 2001).
[64] USTR, NAFTA at 8 (May 2002), p. 2.

Similarly, US exports to NAFTA partners nearly doubled (compared to a 44 per cent increase for others).[65] More significantly, investment in Mexico increased substantially, with a higher percentage coming from the US and Canada. The degree to which this can be attributed to NAFTA is not agreed upon by those that have studied the matter. As noted above, the US economic boon of the 1990s and Mexican peso devaluation probably had bigger impacts, but it is likely that at least some of the increase in trade would not have occurred in the absence of NAFTA.

Interestingly, one of the major concerns at the time that NAFTA was negotiated was that it would have significant trade diversion effects on Central America.[66] Yet it does not seem that it had particularly serious effects on Central America.[67] That region's trade with the United States continued to grow. This may be explained by the fact that the United States continued and somewhat expanded its already existing preferences for Central America and the Caribbean, the fact that NAFTA rules of origin limited the ability of Mexican exporters to fully exploit NAFTA's preferences, and the liberalization that occurred in Central America, including with respect to policies on foreign direct investment.[68]

[65] Id., at 2-3
[66] Edward E. Leamer et al, How Does the North American Free Trade Agreement Affect Central America?, World Bank Policy Research Working Paper 1464 (May 1995).
[67] Daniel Lederman et al, Trade Structure, Trade policy and Economic Policy Options in Central America 10-11 (World Bank, November 2002)
[68] Id.

All of this is consistent with the economic studies cited above that while NAFTA, and other RTAs as well, probably expand trade to some degree, they may not be all that significant.[69]

2. The Overall Effect of NAFTA on the Multilateral Trading System

In considering the effects of NAFTA on the multilateral trading system, it is interesting in the first instance to consider the extent that NAFTA enabled its constituent parties to achieve the goals that RTA members typically seek. As noted earlier,[70] these are to achieve economic gains through trade diversion, to gain more assured access to desired markets, to signal a commitment to trade and investment liberalization, to move the trade liberalization agenda forward when it is stalled at the multilateral level, and to achieve specific political goals.

In the case of NAFTA, the economic gains appear to have been small, as discussed above.[71] And they do not appear to have come at the expense of others to any great degree. The desire for better market access was a major factor in the Canadian decision to enter into the Canada-US Free Trade Agreement. For the most part, it does not seem that this goal was really achieved. At the time, the Canadian concerns revolved around a resurgence of US protectionism, in large part implemented through antidumping and countervailing duty measures on certain Canadian exports, and, in particular, lumber and agricultural products. The Canadians, however, were unable to convince the United

[69] This conclusion may have to be modified if the RTA is fairly comprehensive and the economies of the constituent parties are not relatively open to begin with. For example, Mercosur – the customs union formed by Argentina, Brazil, Paraguay and Uruguay – presents a somewhat different picture. Trade statistics following its formation appear to show considerable trade creation and some trade diversion. World Trade Report 2003, at 57-59.
[70] See text accompanying notes 15-19 supra.
[71] See text accompanying notes 59-62 supra.

States to restrict the use of its trade remedy rules and US-Canadian disputes over lumber and agricultural products have continued. While the Canadians did obtain a system by which administrative decisions in dumping and countervail cases are reviewable before five-person binational panels instead of national courts, it does not seem that that system has served as much a constraint on US administrators for the most part.[72]

The formation of NAFTA did serve to signal Mexican commitment to more liberal policies, and the increased investment in Mexico that followed NAFTA may be explained by this in significant part. For the United States and Canada, they were more concerned with pushing ahead trade liberalization when GATT negotiations seemed stalled and it is arguable that they succeeded in that. Finally, as to the political aspects, NAFTA probably succeeded in improving US-Mexican relations, compared to where they had been in earlier years.

It is interesting to note, however, that the goals that were achieved seemed to have been more the symbolic or political goals, not the economic ones.

Turning to the issue of how NAFTA has impacted the multilateral system, it is useful to recall the concerns raised earlier.[73] Amongst those problems were that RTAs tend to impede trade because of their diverging rules on trade issues generally and their complex rules of origin – a problem that is exacerbated when there are overlapping

[72] There are certainly many examples of changed decisions under the binational panel system, but because the panels apply the relevant national law, in the end it is unlikely that they will effectively constrain national action in the long run. Indeed, that may explain why a number of dumping and countervail cases involving the NAFTA partners have resulted in WTO dispute settlement proceedings. On the binational panel system generally under the Canada-US Free Trade Agreement, see William J. Davey, Pine and Swine: Canada-United States Trade Dispute Settlement: The FTA Experience and NAFTA Prospects (1996).

[73] See text accompanying notes 51-54 supra.

networks of RTAs – and the related transparency issues. Second, that RTAs may undermine the coalition for freer trade in a country (by giving its companies what they want) while strengthening protectionist forces to the extent they are able to avoid trade liberalization in the RTA. This is a particular problem when RTAs do not cover all trade. Third, that the negotiation of RTAs detracts from multilateral trade negotiations simply because of limited resources available for trade negotiations in general.

In the case of NAFTA and North America more generally, the first problem – that of complex origin rules and lack of transparency – is a serious one. The NAFTA rules of origin are quite complex and were heavily lobbied such that they protect certain industries as textiles and automobiles. The complexity is heightened by the different and also complex rules that the United States applies to trade with its other neighbors in the Caribbean and Andean areas. As noted above, the complexity of the origin rules is viewed as having limited to some degree the impact of NAFTA as companies are unable to take advantages of lower tariffs.[74]

The last two problems – undemining support for the multilateral liberalization and wasting scarce trade negotiation resources – are probably true, but I am not sure how significant they are. Even if there has been some impact on overall support for the multilateral system, the United States and its NAFTA partners seem quite interested in pursuing further trade liberalization – both regionally and multilaterally – and they seem to have the resources to pursue negotiations in that direction. In this regard, it is

[74] Cadot and de Melo conclude that NAFTA tariff preferences are largely offset by its rules of origin and other administrative compliance costs. They note that this provides an explanation for the weakness of NAFTA's measured impact. Cadot, de Melo, Estevadeordal, Suwa-Eisenmann & Tumurchudur, Assessing the Effect of NAFTA's Rules of Origin (rev. version June 2002), at p. 26.

important to note that NAFTA and other RTAs do not really supplant the WTO because they often do not deal some of the more difficult trade problems, which seem to be saved for the WTO. Two prime examples in NAFTA would be agriculture and dumping. Moreover, their dispute settlement systems are often not as robust and effective as the WTO dispute settlement system. For example, there have been 15 US-Canada disputes in the WTO, and only one under the general dispute settlement system, similar to the WTO's, that exists in NAFTA. The same is true of the US and Mexico – there have been nine cases in the WTO, compared to two under the NAFTA procedure. These cases have generally arisen because – despite its relative comprehensiveness as RTAs go – NAFTA excludes a number of difficult issues: dumping, agriculture and culture.[75] It may also be the case that a victory in the WTO dispute settlement system is viewed as more valuable since it has the force of the entire WTO membership behind it, while results in NAFTA seem less definitive, particularly when one of the partners is so much stronger than the others.

C. Lessons for Asia

It is difficult to draw very specific lessons for Asia from the NAFTA experience, but I think a few conclusions flow from what has just been discussed. First, the economic benefits of negotiating RTAs are likely to be limited. This has arguably been the experience of ASEAN to date.[76] To the extent that certain sectors are excluded de facto from the RTA and/or trade remedies are not eliminated within the RTA, the limited economic impact of the RTA will be further lessened. Thus, economic benefits and

[75] The US has initiated four cases against Canada and four against Mexico as of October 1, 2003; Canada has initiated 11 against the US (many involving their lumber dispute), while Mexico has initiated five against the US. Most of the cases have resulted in panel proceedings.

[76] OECD, Regional Trade Agreements and the Multilateral Trading System: Consolidated Report, TD/TC(2002)8/FINAL, at 20 (Nov. 20, 2002).

guaranteed market access may not be assured. If they are principal goals, careful thought should be given to the utility of an RTA. Of course, if the primary goals are political or symbolic (e.g., to demonstrate the region's commitment to liberal trade and economic policies), then the lack of significant economic benefits may not matter.

Second, while free trade agreements are easier to negotiate and much more common than customs unions, free trade agreements typically seem to include complex rules of origin. Even if a customs union is not achievable, an attempt to move toward harmonization at least in part of external tariffs should be pursued, so as to obviate the need for rules of origin.[77] Interestingly, at the most recent meeting of the NAFTA Free Trade Commission on October 7, 2003, the NAFTA leaders called for a study "of our most-favoured-nation tariffs, in order to determine whether harmonizing these tariffs could further promote trade by reducing export-related transaction costs". They also called for "liberalization of the NAFTA rules of origin".[78]

Third, while limited agreements with a limited number of partners are easier to negotiate, the problems of complex networks of RTAs and their interrelationships are such that a single broad-based agreement with broad coverage would be preferable. Such an agreement would be difficult to negotiate, in part because the broader the participation, the more diverse the interests that would have to be accommodated (perhaps turning the RTA negotiations into a mini-WTO negotiation). However, it would be desirable since it would minimize divergent rules (including rules of origin) – on of the particular problems of networks of RTAs.

[77] For a discussion of the work done on this idea, see Cadot, de Melo, Estevadeordal, Suwa-Eisenmann & Tumurchudur, Assessing the Effect of NAFTA's Rules of Origin (rev. version June 2002), at pp. 27-28.
[78] NAFTA Free Trade Commission, Joint Statement, Montreal, October 7, 2003, at page 2.

Fourth, attention should be paid to creating a robust dispute settlement system. Without one, the limited benefits of an RTA are even less likely to materialize. That also may most easily be accomplished with a broad-based agreement, with a large number of members, since that will add more credibility to the decisions.

In conclusion, RTAs do not seem to yield major economic benefits in practice, tend to complicate the business of international trade through divergent rules and complex rules of origin, and may undermine the multilateral system. If they are inevitable because of political or symbolic reasons, efforts should be made to minimize the use of divergent rules and rules of origin.