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**Metrics and the Measurement of International Trade:
Some Thoughts on the Early Operation of the WTO RTA Transparency Mechanism**

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Metrics and the Measurement of International Trade: Some Thoughts on the Early Operation of the WTO RTA Transparency Mechanism

By Chi Carmody¹

I. INTRODUCTION

The Agreement Establishing the World Trade Organization² (“WTO Agreement”) is often said to be about “trade”, but this is only partly true. Nothing in the WTO Agreement obliges countries to perform *specific amounts* of trade. Rather, the WTO Agreement is about the *trade-related behaviour of WTO member governments*.

The foregoing statements are an indication of the WTO Agreement’s principle of “indirect effect”³ and the way in which the treaty’s legal system works at one remove to achieve its aims. They also emphasize a basic tension in the agreement between deductive reasoning based on an abstract model and inductive reasoning based on empiric observation. The tension is manifested in evidentiary terms in the treaty’s use of presumptions and requirements of proof. In many instances WTO law simply assumes a state of affairs; in other instances it demands real evidence.⁴

One subject of coverage in the WTO Agreement which demands evidence is regional trade agreements (RTAs). RTAs are regarded as a means of achieving further multilateral integration but also pose the threat of trade diversion. In other words, their potential to contribute to the broader aims of the global trading system is tempered by the ever-present “reality” that they may divert trade away from it.⁵ Consequently, the central provision of the WTO Agreement which deals with RTAs, Art. XXIV, demands proof of the magnitude of any such regional agreement as a means of assessing what the potential for trade diversion is. Likewise, many of the unanswered questions in Art. XXIV jurisprudence can

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² 33 I.L.M. 1125 (1994).

³ “It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.” *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.78 (Dec. 22, 1999).

⁴ Perhaps the best-known presumption in WTO law is that found in DSU Art. 3.8 which states that “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement.” For evidence-based requirements see for example *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, para. 162-164 (Jan. 10, 2001) (“determination of whether a measure determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”). Evidentiary requirements can also be found in ADA Arts. 3.4 (impact examination to include an evaluation of all relevant economic factors and indices”), 3.5 (causal relationship determination “shall be based on an examination of all relevant evidence before the authority”), Annex II (determinations permissible on the basis of facts available), 5.3, 5.8 and 6 (accuracy and adequacy of evidence, and opportunity to present), 10.7 (sufficiency of evidence) and 11.2 (evidence required for revocation). See also *US – Softwood Lumber*, B.I.S.D. 40th Supp. 358, para. 332; *US – DRAM*, para. 6.43; *Mexico - HFCS*, para. 7.97; *Guatemala – Cement I*, para. 7.77; *US – Hot Rolled Steel*, para. 7.153; SCM Arts. 4.2, 11 and 12, CVA Art. 8.3, and Annex 1; SPS Art. 3.3 (scientific justification) and *EC – Hormones*, para. 184; PSA Art. 2.2 (evidentiary standards for price verifications); DSU Art. 26.1 (detailed justification in support of non-violation claims).

⁵ GATT Art. XXIV:4 refers to this dual concern in the following language: “The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.”

be seen as attempts to grapple with probative, and therefore essentially empiric, questions. For instance, the requirement that upon the formation of a customs union trade restrictions “shall not on the whole be higher or more restrictive than the general incidence of the duties ... prior to the formation of such union”⁶, or that countries contemplating such a union shall provide “compensatory adjustment” to their trading partners⁷, are essentially questions of measurement. Whether or not the countries which have entered into an RTA have answered them are at the core of what disputes over the application of Art. XXIV are about.

In recent years the number of these disputes has increased as the number of RTAs has grown. By November 2007 385 RTAs had been notified to the WTO, 197 of which were in force. Of the agreements in force, 125 had been notified under GATT Art. XXIV, 22 under the Enabling Clause and 50 under GATS Art. V.⁸ These numbers virtually guarantee that questions of proof – and competing ones of presumption - will remain at the forefront of consideration of the role of RTAs in the WTO system in years to come. The main issue is whether countries will continue to insist on proof concerning the questions referred to above, or whether they will be content to presume that RTAs are a necessary part of trade liberalization. Arguably, the stalemate that has evolved over the approval of RTAs under GATT and the WTO Agreement can be taken to be a sign that while countries are *de jure* committed to measurement and metrifying the impact of RTAs, a *de facto* presumption exists in WTO law that RTAs are useful.

The WTO’s much-vaunted dispute settlement system has only been able cast some light on these questions. Case law furnishes indications about the bare legal requirements for an RTA, yet decisions have not been able to resolve the issue whether individual RTAs comply with the WTO Agreement. Indeed, in *Turkey – Textiles* the panel maintained that “it is arguable” that panels do not have the jurisdiction to do so.⁹ What current experience points to, then, is a need for some means of assessing the compatibility of RTAs with the WTO Agreement.

Provisional approval of an RTA Transparency Mechanism (TM) by the WTO membership on December 14, 2006 is a step in that direction and raises important questions as to why the TM is necessary, what specific functions it is designed to serve, and whether it moves the debate about proof-versus-presumption forward.¹⁰ Briefly stated, the TM seeks to promote transparency – that is, “the quality of being evident or discernible to external sources”¹¹ - about the operation of RTAs by building a database of information concerning them and thereby making comparison between them more straightforward. The hope is that clearer information will eventually allow the development of benchmarks against which fulfillment of the requirements of Art. XXIV can be measured.

⁶ Art. XXIV:5(a)-(b).

⁷ Art. XXIV:6.

⁸ Statistics are from *Draft Report (2007) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/W/51, para. 4 (Nov. 14, 2007).

⁹ *Turkey – Textiles*, WT/DS34/R, para. 9.53. The Appellate Body has likewise been reticent to do so, overturning panel decisions finding that an RTA conforms with provisions of Art. XXIV and therefore constitutes a defence to substantive violations of the WTO Agreement: see *U.S. – Line Pipe Safeguards*, WT/DS202/AB/R, paras. 198-199 (Feb. 15, 2002).

¹⁰ *Transparency Mechanism for Regional Trade Agreements*, WT/L/671 (18 Dec. 2006).

¹¹ SAMULI SEPPÄNEN, *GOOD GOVERNANCE IN INTERNATIONAL LAW* 3-4 (2003).

It is too early to pass judgment on the TM's success or failure. However, the preliminary indications are not encouraging. So far the Mechanism has experienced a number of "teething problems"¹² and WTO reports refer to "delays in the receipt of statistical data, data discrepancies in member submissions and delays in receipt of comments from the parties."¹³ This record has undermined one of the most notable attributes of the new Mechanism – speed – and required the consideration of several RTAs to be postponed. While not stated openly, an unspoken fear seems to be growing that the TM may become an ineffectual appendage of the WTO system, essentially replicating experience with the WTO Trade Policy Review Mechanism (TPRM).¹⁴

A reading of the minutes of the WTO Committee on Regional Trade Agreements (CRTA) also suggests that a careful dance is taking place as countries become accustomed to the TM provisions and warily reveal information about the RTAs they have entered into. TM Art. 10 provides that nothing in the Secretariat's collection of information – known as a 'factual presentation' – "shall be used as a basis for dispute settlement procedures or to create new rights and obligations for [WTO] Members", but the behaviour of countries betrays a different attitude: one of watchfulness and apprehension. No country appears willing to 'bare it all' or, at any rate, to acknowledge the conclusions that information gathered under the TM might suggest – at least not yet.¹⁵

This article is therefore focused on what the TM is, what early experience with it has been, and what functions it could serve in future. Current developments infer that there will soon come a time when a need to *use* the information being gathered by the TM will arise, and this, in turn, raises the question of how customs unions and free trade agreements are to be analyzed. Methodologies will have to be developed. At the same time, a purely quantitative approach to the task seems to be at odds with the evolving understanding of Art. XXIV. New methods of analysis, possibly inspired by techniques of regulatory impact assessment (RIA), may be more appropriate.

This article is divided into four parts. Following the Introduction, Part II deals with the RTA Transparency Mechanism and its requirements. Part III provides a summary of experience with the TM to date. Part IV examines the development of alternatives to quantification by examining the experience of regulatory impact assessment in Canada and other countries.¹⁶ This experience may be relevant to operation of the TM in future. Finally, Part V offers a brief conclusion.

¹² *Note on the Meeting of 14-15 May 2007*, WT/REG/M/46, para. 8 (12 June 2007).

¹³ *Draft Report (2007) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/W/51, para. 16 (Nov. 14, 2007).

¹⁴ Petros C. Mavroidis, *Surveillance Schemes: The GATT's New Trade Policy Review Mechanism*, 13 MICH. J. INT'L L. 374 (1992); but see Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of the Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007) (finding a relationship between issues raised in Trade Policy Reviews and subsequent legal challenges launched in WTO dispute settlement).

¹⁵ In this respect, even a major WTO participant like the United States has expressed the view that it "did not really see the basis for analytical work being pursued in the context of a database" (WT/REG/M/46, para. 24) put together under the auspices of the TM and WTO Secretariat officials have taken pains to assure the membership that they "would be very careful to make sure that none of the information that was on the database would compromise the position of Members vis-à-vis each other." *Ibid.*, para. 26.

¹⁶ David Shortall, *Regulatory Reform and Market Openness: Processes to Assess Effectively the Trade and Investment Impact of Regulation*, OECD TRADE POLICY WORKING PAPER NO. 48, TD/TC/WP (2006) 40/FINAL 11 (Feb. 9, 2007).

II. THE WTO RTA TRANSPARENCY MECHANISM

The WTO TM is designed to enhance the transparency of information concerning RTAs. Contrary to what might be expected, however, the TM is *not* the first attempt to promote transparency in GATT or the WTO Agreement concerning RTAs. A 1996 Note by the WTO Secretariat observed that in early GATT practice parties to RTAs notified under Art. XXIV furnished specific information requested by GATT working parties, but apparently little more.¹⁷ The Note goes on to observe that this *ad hoc* approach led to a lack of consistency in the reporting procedure, something which prompted the GATT Contracting Parties to adopt a Decision in 1971 establishing a calendar of fixed dates for the biennial examination of existing RTAs.¹⁸ The 1971 Decision failed to eliminate all of the shortcomings concerning this issue:

Biennial reports on regional agreements in accordance with the 1971 Decision were regularly received until 1986. From the early 1980s, however, there was very little discussion of the reports in the meetings of the GATT Council of Representatives, and as of 1987, no reports have been received on agreements notified under Article XXIV.¹⁹

In 1994 a further attempt at transparency was introduced in the form of the Understanding on the Interpretation of Article XXIV, which was agreed to as part of the WTO Agreement.²⁰ Nevertheless, the wording of the Understanding is only slightly more formal and precise than what existed previously and in practice did little to solve Art. XXIV's problems.

The TM is the latest attempt to deal with these problems. It has five principal features:

1. early announcement of RTA negotiations
2. notification of concluded RTAs
3. consideration of RTAs through the WTO Secretariat's preparation of a "factual presentation" on each RTA
4. subsequent notification and reporting
5. recordkeeping

Perhaps the most salient feature of the new RTA TM is its stated emphasis on *transparency*, a value that lies at the core of contemporary governance theory. In an age of accountability, transparency has come to be regarded as a chief attribute of good

¹⁷ *Checklist of Points on Reporting on the Operation of Regional Agreements: Note by the Secretariat*, WT/REG/W/3 (20 June 1996).

¹⁸ B.I.S.D. 18th Supp. 37 (26 Nov. 1971) and 19th Supp. 13 (26 Oct. 1972).

¹⁹ *Checklist of Points on Reporting on the Operation of Regional Agreements: Note by the Secretariat*, WT/REG/W/3, para. 2 (20 June 1996).

²⁰ The 1994 Understanding stated that notifications made under Art. XXIV:7(a) shall be examined by a CRTA Working Party, which "shall submit a report to the [WTO] Council for Trade in Goods on its findings". The Council is then left to "make such recommendations to Members as it deems appropriate." These may include recommendations in respect of interim agreements on the proposed time-frame for phase-in of the RTA and "on measures required to complete the formation of the customs union or free-trade area." It also requires notification of "substantial changes" in the plan and schedule of interim RTAs and observes that "parties shall not maintain or put into force, as the case may be, such [interim] agreement if they are not prepared to modify it in accordance with these recommendations." It also requires that with respect to completed RTAs "[a]ny significant changes and/or developments in the agreements should be reported as they occur." A useful document on notification requirements is *The Technical Cooperation Handbook on Notification Requirements*, WT/TC/NOTIF/REG/1 (9 Sept. 1996).

governance. Definitions of good governance confirm the point. They can be found in the work of the World Bank, which is the originating source of good governance theory²¹, as well as in the European Commission, which has determined that the principles of good governance can be summarized as values of *openness*, participation, accountability, effectiveness and coherence. The former United Nations Human Rights Commission (now the United Nations Human Rights Council) likewise has identified five attributes of good governance: *transparency*, responsibility, accountability, participation and responsiveness.

In each definition above what becomes abundantly clear is that transparency is the *first* virtue of good governance. Thought about carefully, it is not hard to imagine why. Transparency involves the dissemination of information so that appraisal and decision-making can take occur. Without it, other governance values will not be realized. Transparency is therefore a pre-condition or requirement for virtually all other aspects of good governance.

The law of a number of domestic and international organizations recognizes this necessity and attempts to promote it. In the European Union, for instance, the first article of the Treaty on European Union (TEU) states that the “Treaty marks a new state of creating an ever closer union among the peoples of Europe, *in which decisions are taken as openly as possible*.”²² Pursuant to TEU Art. 255 the European Parliament and the Council have adopted regulations on public access to Council and Commission documents, and the European Court of Justice has dealt with a number of cases alleging violation of transparency requirements in the EU context.²³ Nevertheless, commentators have also observed that the European Court has not elevated transparency to the status of “a general principle of EC law”.²⁴

In context of the WTO Agreement transparency refers to the openness of each WTO member, and more specifically, to making sure that information provided by each member is “evident and discernible” to the rest of the WTO membership. Experience under GATT and the WTO indicates that this has not always been the case in relation to RTAs.

There is no *generalized* requirement transparency or notification in either GATT or the WTO Agreement. Instead, the WTO Agreement features a number of individual transparency obligations tailored to specific circumstances. Thus, GATT Art. X:1 speaks of the obligation upon countries to publish trade-related legislation “promptly in such a manner as to enable governments and traders to become acquainted with them” but also provides that the obligation does “not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises,

²¹ SAMULI SEPPÄNEN, GOOD GOVERNANCE IN INTERNATIONAL LAW 3-4 (2003).

²² O.J. C 325 (24 Dec. 2002).

²³ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal* L 145, 31 May 2001, at 43-48. See also Peers, The new regulation on Access to Documents: a Critical Analysis (2002). For ECJ case law on transparency see *Svenska Journalistförbundet v. Council*, [1998] ECR II-2289, para. 66; *WWF UK v. Commission*, [1997] ECR II-313, para. 56; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para. 38; *Hautala v. Council*, [1999] ECR II-2489 and also *Council v. Hautala*, [2001] ECR I-9565.

²⁴ PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS (2003) at 393 quoted in SAMULI SEPPÄNEN, GOOD GOVERNANCE IN INTERNATIONAL LAW 43 (2003).

public or private.” The parallel provision in GATS is GATS Art. III and III*bis*. A number of cases in GATT and WTO dispute settlement have also dealt with the extent to which countries as well as “individuals and bodies” have to disclose certain information.²⁵

In GATT Art. XXIV countries are obliged to fulfill the terms of GATT Art. XXIV:7(a) regarding disclosure of RTA arrangements as follows:

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall *promptly* notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.²⁶

This notification is supplemented by the 1996 Standard Format for Information on Regional Trade Agreements, which is designed “to facilitate and standardize the provision of initial information by parties to regional trade agreements.”²⁷ The 1996 Standard Format is, however, purely voluntary and therefore highlights a number of features in the WTO’s institutional culture that make it difficult to expect complete transparency in relation to RTAs.

To begin with, the membership of the WTO is large and varied. In April 2008 it was composed of 151 members, a majority of which are developing countries.²⁸ While all WTO members share many common obligations there are many individualized obligations as well, and although progress has been made in recent years in standardizing WTO reporting requirements, it can be difficult to determine exactly *how* countries have implemented their concessions and commitments. In addition, the staff of the WTO Secretariat remains relatively small and is required to maintain its neutrality and impartiality at all times. This means that it can only provide limited assistance in the task of clarifying national concessions and commitments. Instead, the work of doing so is often left to WTO Committees and the TPRM which operate by means of question-and-answer sessions that diplomats can easily evade or delay. This structure betrays an institutional culture of passivity. Unlike other, more assertive international organizations like the EU,²⁹ the WTO membership remains firmly in the driver’s seat. Formally, there is very little that can be done to *compel* a country to do something in WTO law, including disclosure of the full terms of its participation in an RTA.

What these observations translate into in practice is that GATT Art. XXIV:7(a) has - and can be - interpreted loosely. From the bare text it is not clear at what point “deciding to *enter into* a customs union or free trade area” foresees, and therefore countries have argued

²⁵ See for instance *United States – Shrimp*, WT/DS58/AB/R, para. 104 (Oct. 6, 1998) and *Canada – Aircraft*, WT/DS70/AB/R, para. 185 (Aug. 2, 1999).

²⁶ Emphasis added.

²⁷ WT/REG/W/6 (15 August 1996).

²⁸ Ukraine’s terms of accession were announced on February 5, 2008 and must be ratified by July 4, 2008. Ukraine will become the 152 member of the WTO 30 days after ratification.

²⁹ Reference is made here to various legal actions possible by the European Commission, the European Council, the European Parliament, other bodies and individuals which have the effect of providing an internal system of checks and balances within the Union.

about whether it means at the *outset* of negotiations or just *prior* to their conclusion. In addition, the term “shall promptly notify” is the subject of some ambiguity since some countries have waited considerable time before notifying either the text or any modifications of an RTA, meaning that effective review by the Committee on Regional Trade Agreements is stymied. A final concern with Art. XXIV:7(a) is that the bare requirement of prompt notification, when combined with the voluntary nature of the 1996 Standard Format, says very little about exactly *what* should be notified, an omission which has led over time to incomplete or inconsistent notification of different agreements. This practice deprives third parties of the ability to compare, and therefore to meaningfully challenge, what is being notified, and may even contribute to the institutional culture of passivity referred to above.

The Preamble to the TM recognizes that RTAs “have greatly increased in number and have become an important element in Members’ trade policies and developmental strategies” and that the Mechanism is to apply to GATT Art. XXIV, GATS Art. V and the 1979 Enabling Clause. In the case of notifications under GATT and GATS, implementation of the TM is left to the Committee on Regional Trade Agreements, while notifications under paragraph 2(c) of the Enabling Clause (involving RTAs between developing countries) are left to the Committee on Trade and Development.

An initial attribute of the TM is that it attempts to reinforce the notification obligation by moving the relevant notification dates forward. Under the TM countries that are considering forming an RTA must now report their discussions to the WTO *at the outset* and keep it reasonably apprised during the course of negotiations.³⁰ This is the “early announcement” component of the intensified obligation.

Second, under the existing wording of Art. XXIV:7(a) countries entering into an RTA are required to “*promptly* notify” the WTO membership. What “promptly notify” means is, as mentioned, unclear. The TM therefore requires that when the RTA is signed, information about conclusion of the final agreement is to be provided “*as early as possible*”.³¹ This is the “final announcement” component of the obligation.

The third group of requirements relates to the provision and use of *information*. The most significant change is with respect to the format that the information is to be provided in. Countries are to submit a standard set of information on their RTAs, which is collected by the Secretariat and made available in an electronic database. Over time this requirement should enhance comparability.

What becomes clear is that the WTO Secretariat is given a more pronounced role in the collection and dissemination of this information. Under TM para. 7(b) the Secretariat is now required to prepare an “unbiased factual presentation” about the proposed RTA with the information submitted by the parties, something which should provide a greater degree of neutrality and objectivity to WTO decision-making. An Annex sets out required data on the subject of tariff concessions, MFN duty rates, product-specific preferences, and import

³⁰ TM Art. 1-2.

³¹ TM Art. 3.

statistics for the most recent three years preceding the notification. In respect of services, substantially similar data is required, a formulation necessitated by the fact that such information may be difficult to obtain in relation to intangibles.

The delicacy of the task entrusted to the WTO Secretariat is underlined in TM para. 9, which states that “the factual presentation ... shall be primarily based on the information provided by the parties; if necessary, the WTO Secretariat may also use data available from other sources, taking into account the views of the parties in furtherance of factual accuracy.” It adds that “[i]n preparing the factual presentation, the WTO Secretariat shall refrain from any value judgment.” It also indicates that “[t]he WTO Secretariat’s factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations.”

Fourth, the TM also clarifies a number of process-related obligations. The TM attempts to avoid styming of the consideration process by ensuring that “the timing of the data submission shall not exceed ten weeks – or 20 weeks in the case of RTAs involving only developing countries – after the date of the notification of the agreement.”³² Once notification has taken place and the factual presentation has been prepared, the TM mandates that the “RTA shall be considered by Members under the procedures established” in TM paras. 6 – 13. This consideration of the RTA by the WTO membership shall normally be concluded in the period of a year following notification.

To further minimize any potential for delay, the meeting that is to consider the notified RTA is to be a “single” formal event, although how much attention should be paid to this is probably debatable than real given that astute trade diplomats can potentially meet on an informal basis indefinitely.

Fifth, coupled with the above are obligations that arise as to notification and reporting upon any changes to a previously notified RTA. For instance, in the case of “a change affecting the implementation of an RTA”, the change triggering notification is defined *inter alia* as “modifications to the preferential treatment ... and to the RTAs disciplines”.³³ It is also noteworthy that in TM para. 15 concerning the end of the RTA’s implementation period the parties are required to submit to the WTO a short written report on the realization of the liberalization commitments in the RTA that was the subject of the original notification. This synopsis is to be distributed to the WTO membership, as are periodic updates.

The TM is neither comprehensive nor permanent. TM Arts. 22-23 specify that the TM “shall apply, on a provisional basis, to all RTAs” and that the WTO membership will review and replace it in light of experience with a permanent mechanism adopted as part of the results of the Doha Round.

III. EXPERIENCE UNDER THE TM

Experience with the TM so far has been mixed. Although the EC representative has

³² TM Art. 8.

³³ TM Art. 14.

described the first year of the Mechanism as “successful”³⁴, comments made both by the CRTA Chairman and other countries display a sense of unease at what is unfolding. It is clear that the TM places a certain burden on the WTO Secretariat to prepare factual presentations, but even more to the point, countries themselves are required to comment upon and question the Secretariat’s work and they have not always done so promptly.

In summary, the 2007 Draft Report of the CRTA reveals that prior to the adoption of the TM, the Committee had completed the factual examination of a total of 67 agreements, of which 46 were in the area of trade in goods and 21 in trade in services. During 2007, the Secretariat distributed factual presentations of 13 RTAs, 11 of which were used as the basis for RTAs’ consideration in the CRTA. Seventeen RTAs are scheduled for consideration; factual presentations of these RTAs are currently under preparation. There is a remaining backlog of 64 RTAs, comprised of 36 RTAs for which the factual presentation is still to be done and 28 RTAs for which the factual presentation is on hold.³⁵

The foregoing numbers may appear impressive, but in the final CRTA meeting of 2007 the Chairman noted that progress was slow: only two (of a projected 11) were on the agenda of the meeting, with the rest having been rescheduled for 2008. A number of difficulties have arise with the TM’s process: some Members continue to have problems respecting deadlines for data submission and in some cases the format and quality of data received had not been as expected.

An illustration of some specific problems is apparent from minutes of the final CRTA meeting. Thus, for the EFTA-Tunisia goods agreement the Secretariat had sent the draft factual presentation to the parties, although the data for Iceland and Tunisia was still incomplete. The Secretariat was awaiting comments from Tunisia on the factual presentation which had been sent to it in July 2007. For the India-Singapore goods and services agreement the factual presentation had been drafted but the Secretariat had encountered a problem with India’s tariff and was awaiting clarification from the Indian authorities. For the Japan-Mexico goods and services agreement the Secretariat had received tariff data from both Parties, although there was some data missing in the tariff of Japan. The Secretariat had received import data from Mexico but was still missing trade data from Japan. For the Panama-El Salvador goods and services agreement the Secretariat had received data that was not coherent and was liaising with the Parties for clarification. For Turkey-Tunisia goods agreement the Secretariat had received data from Turkey but was still awaiting the tariff phase down from Tunisia.

These details reveal a number of specific problems with the TM’s operation. First, there is the fact that the deadline for submission of replies to questions is nowhere spelled out. Countries can delay the TM process simply by refusing to reply.³⁶ Second, there is the

³⁴ *Note on the Meeting of 29 November 2007*, WT/REG/M/48 para. 14 (9 Jan. 2008).

³⁵ The WTO Secretariat is also required to prepare a factual abstract for those RTAs for which the CRTA had concluded the factual examination by 31 December 2006 and for RTAs notified to the WTO under the Enabling Clause. As of mid-Nov. 2007 eight factual abstracts were prepared and placed on the WTO website; 30 were still awaiting comments from the parties, and the remaining 39 were under preparation.

³⁶ A number of questions associated with this issue have been canvassed in the CRTA, such as when discussion of an RTA can be considered completed and what ultimately completion means. The U.S. has suggested that the conclusion of the meeting should simply mean “that there was no need for a further meeting and deadlines were provided for receipt of questions and replies.” *Note on the Meeting*

potential for overlap in factual presentations on both goods and services, and the need to do duplicate presentations for each. The U.S., in particular, has expressed concern in this regard given “the distinctiveness of the obligations and of the facts [that need] to be maintained.”³⁷ Third and perhaps most importantly, there is the use that might be made of the information being provided. For instance, Canada has cautioned “against thinking about additions which might depart from the more factual elements of a database to other information that might put [WTO] Members in a slightly uncomfortable position given the legal rules that applied to Members’ obligations on RTAs.”³⁸ Fourth, it remains to be seen how the Mechanism is to deal with the measurement of RTAs between WTO and non-WTO members as well as disciplines in many new RTAs such as those involving investment, environmental protection and human rights that formally fall outside of the WTO Agreement’s scope of coverage. A final issue concerns what review under the TM signifies: transparency or simply the fact that the RTA has been reviewed? No clear answer has been given yet to this question.³⁹

In light of all of the above, it remains difficult to see how the TM will accelerate the WTO’s approval of RTAs and therefore provide the WTO system with any real benefit. Most evidently, the TM does not require actual *approval* of notified agreements. It simply promotes *transparency* in the notifications made.

IV. REGULATORY IMPACT ASSESSMENT: THE CANADIAN EXPERIENCE

Experience with the TM to date suggests a need to look elsewhere for inspiration as to how the Mechanism might be made more effective. There is evidently the issue of compelling countries to cooperate with the TM’s requirements by reporting in a timely, transparent and accurate fashion. If current behaviour continues, it may be necessary for the WTO Secretariat to become involved in a more assertive way by collecting “data available from other sources” as contemplated in TM Art. 9. This could take the form of assembling material publicly disclosed by parties, or by collecting information made available to other international organizations, third countries and NGOs. However, such an approach would be unlikely to resolve the deeper issue of RTA *approval*. That can only be done by countries.

Attention also needs to be given to how the obligations in Art. XXIV might be creatively re-interpreted away from a largely quantitative analysis. Given that most of the information to be collected by the TM is of a quantitative nature, and given the problems that

of 14-15 May 2007, WT/REG/M/46 para. 46 (12 June 2007).

³⁷ Note on the Meeting of 14-15 May 2007, WT/REG/M/46 para. 14 (12 June 2007).

³⁸ Note on the Meeting of 14-15 May 2007, WT/REG/M/46 para. 25 (12 June 2007).

³⁹ See discussion in Note on the Meeting of 14-15 May 2007, WT/REG/M/46 para. 25 (12 June 2007). In addition, there is the issue of backlog. As of Nov. 2007 there were some 48 notified RTAs for which factual presentations must be prepared. Second, there are existing agreements from the period 1987-1994 when no reports were received and which were therefore not subject to *any* transparency provisions. In that case, the compromise agreed to among countries is not to subject them to any more procedures in the CRTA, but to have a brief abstract prepared by the WTO Secretariat. The United States has indicated that it looks forward to more transparency in these agreements and to holding consultations on them because “some are of great importance such as NAFTA”. Note on the Meeting of 14 March 2007, WT/REG/M/45 para. 24 (30 April 2007). TM Art. 22(a) specifies that RTAs for which a working party report has been adopted by the GATT Council and those notified under the Enabling Clause will be subject to subsequent notification requirements. TM Art. 22(b) specifies that RTAs for which the CRTA has concluded the “factual examination” prior to the TM and those notified under the Enabling Clause will be subject to subsequent notification requirements. TM Art. 22 (c) specifies that any RTA notified prior to the adoption of the TM and not referred to in either 22(a)-(b) will be subject to full transparency obligations under the Mechanism.

metrification can cause in terms of estimation and “bottom-line” thinking, alternative measures of market openness will need to be developed. The question remains how to do so.

One possible way forward is the use of methods developed in regulatory impact assessment (RIA). An RIA is defined by the OECD as “an analytical and systematic approach to regulation encompassing a range of tools and techniques aimed at assessing the impacts of regulation.”⁴⁰ The genesis of RIA lies in the realization that regulation can impose costs at the same time as it generates efficiencies. A 2007 OECD report notes that “[m]ost OECD countries rely on RIA to help ensure development of efficient and effective regulation and reduce the burden of regulation.” Although an underlying consideration in a well-developed and comprehensive RIA is to identify regulations which minimize trade restrictiveness, in practice the trade restrictiveness of new regulations is rarely measured explicitly, if it is identified at all.

Such consideration is timely given renewed interest over the past 18 months by the US and EU in developing ways to include international trade impacts in regulatory reviews. In November 2007 the US and EU made a pledge to work together in this respect in a joint paper released in the context of the Transatlantic Economic Dialogue (TED). Later, in February 2008 U.S. and European business groups submitted detailed recommendations on the paper with the aim of revising and strengthening the ability of the U.S. Office of Management and Budget (OMB) and the EU’s Impact Assessment Board (IAB) “to rein in regulations by other agencies seen as damaging international trade.”⁴¹ The proposals are controversial with citizens groups, which regard them as “dangerous to public welfare, because they could be used ... to ambush environmental and safety regulations with the argument that they could impede trade.”⁴² It appears that the OMB and the European Commission are discussing possible regulatory harmonization and the inclusion of international trade impacts in regulatory reviews. This could result in a joint communiqué on the matter in May 2008.

The possibility of focusing on trade impacts appears to run counter to current trends in RIA conduct. Contemporary RIA features *both* “quantitative and qualitative components”, as seen in *Turkey – Textiles*.⁴³ Indeed, the November 2007 US/EU paper proposes three steps for measuring international trade impacts, only one of which is presumptively quantitative:

⁴⁰ David Shortall, *Regulatory Reform and Market Openness: Processes to Assess Effectively the Trade and Investment Impact of Regulation*, OECD TRADE POLICY WORKING PAPER NO. 48, TD/TC/WP(2006)40/FINAL (Feb. 9, 2007).

⁴¹ *Business and Consumer Groups Square Off on EU-U.S. Harmonization*, INSIDE U.S. TRADE 12 (Feb. 29, 2008). In its comments, the U.S. Chamber of Commerce went beyond the paper’s recommendation and proposed that OMB amend its Circular A-4, which governs regulatory impact assessments to include the impact of a regulation on services trade. This would be an expansion because the circular now only covers trade in goods. In addition, the Chamber wants OMB to expand the definition of trade impacts to include more than the impact on the flow of imports and exports. Sean Heather, a Chamber expert, said investment impacts should also be measured on companies that set up subsidiaries in either the EU or U.S., but do not necessarily export. According to the Chamber, cost-benefit analyses should be released for public comment. The EU, the Chamber recommends, should do more to make its regulatory process transparent, enforce rules that require six-week comment periods, and give the IAB the authority to stop bad regulations.

⁴² *Ibid.*

⁴³ “[t]he ordinary meaning of the term “substantially” in the context of subparagraph 8(a) appears to provide for both qualitative and quantitative components. The expression “substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union” would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.” *Turkey – Textiles*, WT/DS34/R, para. 9.148 (May 31, 1999), later quoted with approval in WT/DS34/AB/R, para. 49 (Oct. 22, 1999).

1. demonstrating the need for a regulation that might impede trade;
2. measuring the degree that foreign and domestic businesses are affected, and
3. looking at international best practices for handling the issue subject to regulation.

A 2006 analysis of current trends in RIA reveals that there are five main analytical methods used by top RIA performing countries:

1. forms of benefit-cost analysis (BCA), integrated impact analysis (IIA) and sustainability impact analysis (SIA) to combine issues into broad analytical frameworks that can demonstrate links and trade-offs among multiple policy objectives;
2. forms of cost-effectiveness analysis based on comparison of alternatives to find lowest cost solutions to produce specific outcomes;
3. a range of “partial” analyses such as Small and Medium Enterprise (SME) tests, administrative burden estimates, business impact tests and other analyses of effects on specified groups and stemming from certain kinds of regulatory costs;
4. risk assessment aimed at characterizing the probability of outcomes a result of specified inputs
5. various forms of sensitivity or uncertainty analysis that project the likelihood of a range of possible outcomes due to estimation errors. Uncertainty analysis is used to provide policymakers with a more accurate understanding of the likelihood of impacts.⁴⁴

The same report notes that “[t]he economics thrust of RIA has always favoured benefit-cost analysis (BCA) as the most inclusive and socially responsible method of public decision-making.”⁴⁵ The reason for this is that economics offers the important advantage of comparing costs and benefits occurring at different points in time. BCA is the method used by governments to assess investment projects such as roads and dams, and was adapted to more general regulatory policy issues in the 1970s. It is also the preferred method for regulatory assessment used by the U.S. since 1981 and by Canada since 1992.

Nevertheless, traditional concern about the “over-monetization of impacts”⁴⁶ means that mainstream BCA analysis is of a “soft” form “in which quantitative and qualitative metrics are combined and presented systematically.” Scott Jacobs states that “[t]here is no country in which modern BCA insists on the monetization of all benefits and costs ...”. Instead, he notes that “critics of BCA in RIA usually ignore this fact in favour of an exaggerated and

⁴⁴ Scott Jacobs, *Current Trends in Regulatory Impact Analysis: the Challenges of Mainstreaming RIA into Policy-making* 34 (May 30, 2006), available at www.regulatoryreform.com (site visited March 25, 2008) [hereinafter *Jacobs*].

⁴⁵ *Ibid.*, p. 34.

⁴⁶ *Ibid.*

theoretical version of BCA that lends itself to caricature.”⁴⁷ Today:

BCA is the method best adapted to protecting a broad range of interests. One of the key advantages of benefit-cost frameworks is that they encompass the broadest range of impacts across the social-economic-environmental spectrum, hence they are in line with nearly universal political demands that RIA methods address a wider range of public interests. In response, RIA methods are embracing more and more impacts, including operational, capital, and dynamic costs, and all major benefits using methods based on social welfare theory.⁴⁸

At the same time, soft BCA has been questioned - if not challenged - in recent years by various types of partial analyses, which consist of fragmenting RIA among various kinds of subjects to look at different impacts. As Jacobs observes, “the increase in partial analysis is not ... any reasoned dissatisfaction with [soft BCA] ... [but rather the fact] that RIA is entering the mainstream of policy, and is coming under pressure from the many groups who now understand that they have a stake in RIA.” Consequently, soft BCA is evolving from “a technocratic tool of general interest” to a “political and policy tool with constituency group impacts.”⁴⁹ The outcome is a politicization of the RIA process. Different assessment fragments “into smaller, competing analyses.” Jacobs concludes that:

[u]nfortunately, in more and more countries, use of partial analyses, driven by competitiveness issues and, in part by political intent to serve vocal constituencies, has actually resulted in fragmentation into competing policy agendas, because the larger integrated framework is not clearly defined or emphasized.⁵⁰

How might experience with RIA be assimilated into the WTO’s TM? Two recent harmonization directives introduced by the Government of Canada provide some ideas for an answer. In 2007 the federal government issued the Cabinet Directive on Streamlining Regulation (CDSR), which was followed by the Treasury Board’s release of Guidelines on International Regulatory Obligations and Cooperation (“the Guidelines”).⁵¹ Both are aimed at “managers, functional specialists, and regulatory staff” and are supposed to clarify expectations of the Treasury Board Secretariat when it exercises its “challenge” function – that is, the ability to question, and if necessary postpone, the introduction of new regulations. It is not hard to analogize this function to what is supposed to happen under the TM in its assessment of notified RTAs.

The Guidelines reveal that the overall goal is to “encourage greater regulatory compatibility [with international regulations] when it can provide the greatest overall benefits to Canadians.”⁵² In doing so, the Guidelines state that Canadian federal departments and

⁴⁷ Ibid.

⁴⁸ Jacobs, p. 35.

⁴⁹ Ibid.

⁵⁰ Jacobs, p. 36.

⁵¹ *Cabinet Directive on Streamlining Regulation* [hereinafter CDSR] and the *Guidelines on International Regulatory Obligations and Cooperation* [hereinafter *Guidelines*], both available at www.regulation.gc.ca (site visited March 23, 2008).

⁵² *Guidelines*, p. 1.

agencies must undertake to meet international regulatory obligations and cooperation requirements ... in ways that maintain public confidence in the Canadian regulatory system.”

The goal of regulatory compatibility “with key international counterparts” is to allow the government of Canada to “reach policy goals more readily ... with lower costs to the government and to Canadians ...”. It also makes possible “compliance with applicable international treaty law and its implementation in Canada” through “access to regulatory resources of international bodies and other countries” and “allow[s] Canada to contribute its expertise and promote best regulatory practices internationally, thus influencing standards elsewhere.”

For these reasons, the CDSR and the Guidelines encourage Canadian federal government departments and agencies to:

1. take international regulatory cooperation (IRC) into account throughout the entire life cycle of regulation, including development, implementation, evaluation, and review;
2. think strategically about how IRC can assist in achieving regulatory outcomes;
3. establish regulatory compatibility as a goal for regulators to achieve through the design of regulations and through ongoing regulatory cooperation activities with key international counterparts;
4. actively consider IRC in the ongoing management of regulatory programs and
5. regularly assess the effectiveness of their IRC activities

Most importantly, the Guidelines create a *presumption* in favour of international regulation, which is phrased in the following terms: “[while] it is recognized that there are cases where the pursuit of sound policy objectives may require unique Canadian standards or regulations ... a clear rationale for this unique approach must be evident in the regulatory analysis.”⁵³

At the same time, nothing in either the CDSR or the Guidelines *requires* Canadian departments and agencies to automatically regulate according to international regulations.⁵⁴ Instead, the Guidelines only speak of “cooperation” and set out considerations in choosing partners for regulatory activity. These are Canada’s existing partners in North America (the United States, Mexico) and the European Union. The rest of the world receives little reference. Emerging and expanding economies are identified as the BRIC countries (Brazil, Russia, India and China) and here regulatory cooperation is phrased in defensive terms: it “should be geared to ensuring that Canadian receive adequate protections on the products imported from these countries and that Canadian products, services, and investors have ready access to these emerging markets.”⁵⁵ The Guidelines also recognize the dual nature of international regulation, informing Canadian regulatory practice and outcomes while

⁵³ *Guidelines*, p. 3.

⁵⁴ This is generally true. However, Appendix B of both the CDSR and *Guidelines* draw attention to certain specific requirements applicable to technical regulations, conformity assessment procedures and sanitary and phytosanitary measures. These have more of a prescriptive character.

⁵⁵ *Guidelines*, p. 4.

also enhancing Canada's "leadership role" in international regulatory efforts.⁵⁶

It seems clear from the Guidelines that compatibility with international regulations in Canada is something that the Canadian government now prioritizes, yet the absence of an explicit "trade effects" test is notable. In this respect, the CDSR and Guidelines present an alternative vision to that of the TED. The Guidelines make clear that achieving regulatory harmonization is what is important. There is a belief in the validity of existing international regulations and a subsisting desire to align with them. Canadian 'variants' are to be avoided unless necessary.

The TM might usefully employ a similar methodology in its assessment of RTAs. For example, an RTA might be assessed to the extent that it departs from internationally accepted regulations or, where some numeric assessment is required, from an average calculated among the WTO membership. This kind of measurement is already employed in WTO trade negotiations on such subjects as tariffs and negotiating coefficients.⁵⁷ A focus on more than simply numbers would have the added benefit of drawing attention away from numerical targets and of reaffirming that much of the benefit that arises from international trade is, in fact, incalculable.

V. CONCLUSION

The TM is the latest phase in efforts to bring transparency and consistency to the treatment of RTAs in WTO law. Uniformity is to be welcomed, but there are, as seen, many obstacles to its successful operation, not the least of which is the willingness of countries to provide the necessary information. It is too soon to tell if the difficulties it has experienced to date are simply teething problems or something more serious.

In at least one respect, the accrual of information in the TM database and its comparability should help to move the question of developing disciplines for RTAs forward by emphasizing inconsistencies between RTAs. The comparison will furnish some idea of what the degree of inconsistency should be. At the same time, as noted, it would be unwise to measure those differences in a purely quantitative way. Strictly quantitative analysis is likely to provoke invidious comparisons and poison the negotiating atmosphere. Techniques developed in RIA that involve regulatory harmonization and the justification of deviating measures may ultimately be of greater assistance in this regard.

⁵⁶ Ibid.

⁵⁷ See for instance *NAMA Chair Floats Ideas to Break Logjam*; *U.S. Signals Flexibility*, INSIDE U.S. TRADE (February 29, 2008).