AIELN Inaugural Conference – Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance

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Open Accession Provisions in FTAs: A Bridge Between Regionalism and Multilateralism?

This paper suggests adopting a pragmatic approach to the Article XXIV problem that would entail a) clarifying the meaning of "substantially all the trade" in Article XXIV; b) holding new FTAs to the agreed-to definition; and c) permitting existing FTAs to either conform to the new definition or to amend their agreements to include an open accession provision, if one is not already in place. The paper first briefly discusses the nature of the Article XXIV problem. Second, it discusses the potential for an FTA to be declared inconsistent with Article XXIV in WTO dispute settlement and the ramifications such a decision would have. Third, the paper suggests a pragmatic approach is needed to stave off the possibility of undesirable dispute settlement proceedings. In this section the paper acknowledges and addresses some of the difficulties with the proposed approach, and also identifies some systemic benefits of the open accession option.

I. The Article XXIV Problem

Free Trade Agreements (FTAs) are endemic, yet they are problematic for the multilateral trading system. While the WTO notionally only permits FTAs that cover "substantially all the trade" between the FTA parties,[1] in practice the vast majority of FTAs among WTO members exclude some portion of trade – often entire sectors –

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[1] GATT Article XXIV.

from their coverage. As a result, the balance envisioned by the framers of the General Agreement on Tariffs and Trade (GATT) – whereby FTAs and their trade diverting effects will be tolerated so long as the agreements fully liberalise trade among the FTA parties – has not been realized.[2] Even though the WTO has a mechanism for reviewing FTAs,[3] there is still no institutional method or practice of regulating whether FTAs comply with the conditions set out in GATT Article XXIV, and no consequences for FTAs that do not so comply.[4]

Furthermore, the overlapping commitments and inconsistent rules existing between the various FTAs – commonly referred to as a "spaghetti bowl"[5] – further diminish the potential for FTAs to serve as stepping stones to multilateralism rather than stumbling blocks. Finally, the proliferation of WTO-inconsistent FTAs is threatening the ability of World Trade Organization (WTO) members to conclude the current Doha Round of trade negotiations.

This troubling situation has led many to identify the spread of WTO-inconsistent FTAs as undermining the MFN principle and threatening the continuing

[2] *See, e.g.*, Sydney M. Cone, III, 'The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference"', 26 *Michigan Journal of International Law* 563, 567 (2005) (examining the history of Art XXIV and describing it as representing an effort to encourage a European customs union while requiring most-favored nation (MFN) treatment).
[3] This is the Committee on Regional Trade Agreements (CRTA). See World Trade Organization, Work of the Committee on Regional Trade Agreements, at http://www.wto.org/english/tratop_e/region_e/regcom_e.htm. The CRTA is tasked with examining the specific regional trade agreements and with considering the systemic ramifications of such agreements. However, the CRTA's findings are not to be used as evidence with respect to the WTO-consistency of any particular agreement. Thus while it may speed up the review of agreements, it is still a mechanism with little obvious impact on the bigger Article XXIV problems.
[4] The WTO has taken some steps in this direction. The General Council's Decision of 14 December 2006 regarding transparency mechanisms for RTAs calls for the Secretariat to prepare factual presentations on FTAs that have been notified to the WTO and for the CRTA to implement this mechanism. Although the Decision states that these factual presentations cannot be used for dispute settlement, it also provides that this mechanism will be replaced with a permanent mechanism to be adopted as a part of the Doha Round. In this context, Members will review the legal relationship between this mechanism and relevant WTO provisions relating to RTAs. WTO Negotiating Group on Rules, 'Report by the Chairman to the Trade Negotiations Committee' (13 July 2006) TN/RL/18.
[5] Jagdish Bhagwati, 'U.S. Trade Policy: The Infatuation with Free Trade Areas' in Jagdish Bhagwati and Anne O Krueger (eds) *The Dangerous Drift to Preferential Trade Agreements* (American Enterprise Institute, Washington DC 1996) 2-3.

vitality of the WTO as an institution.[6] These concerns are not new; indeed nearly 40 years ago Ken Dam was writing about the flaws in Article XXIV and the problems that could arise out of the inability to ensure that FTAs would satisfy the Article.[7] As well as identifying the problems with Article XXIV and the proliferation of FTAs that do not cover "substantially all the trade", academics and other commentators have proposed a range of potential solutions to this problem.[8] However, most commentators are sceptical about the likelihood that WTO members will ever reach agreement as to what "substantially all the trade" should mean, or that members will agree to discipline FTAs in any meaningful way. This scepticism is understandable – in fact it seems quite justified in light of the seeming inability of the WTO membership to make any substantive progress towards resolving these issues. Indeed, members have not shown a strong interest in negotiating new substantive provisions to ameliorate the current problems. This is logical. Presumably WTO members that are party to relatively few FTAs – or to "clean" FTAs that would likely comply with any interpretation of "substantially all the trade" would balk at the idea of implementing stricter rules prospectively only. This would give a free ride to hundreds of agreements, and would institutionalize and legitimize the overbroad use

[6] *See, e.g.*, Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press, New York 2008); Nuno Limão, 'Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States' (2006) 96 *American Economic Review* 896 (finding that FTAs have impeded multilateral trade liberalization); Colin B. Picker, 'Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat', 26 *University of Pennsylvania Journal of International Economic Law* 267 (2005); Meredith Kolsky Lewis, 'The Prisoners' Dilemma and Free Trade Agreements: An Application of Game Theory to Trade Liberalization Strategy', in Laurence Boulle et al (eds) *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer 2008); Meredith Kolsky Lewis, 'The Free Trade Agreement Paradox', 21 *New Zealand Universities Law Review* 554, 557-59 (2005)*;* Thomas Cottier, 'The Erosion of Non-Discrimination: Stern Warning without True Remedies', 8 *Journal of International Economic Law* 595, 597 (noting problem of noncompliant FTAs as stumbling blocks); WTO Consultative Board Report to the Director-General Supachai Panitchpakdi, 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium' (WTO Geneva 2005).

[7] *E.g.* Kenneth W. Dam, *The GATT: Law and International Economic Organization* (1970).

[8] *See, e.g.*, Picker, supra note 6; Cottier, supra note 6 at 599 (clarifying the meaning of "substantially all the trade" through negotiations or case law).

of this significant exception to the MFN principle. On the other hand, the vast majority of WTO members are party to at least one FTA that would be unlikely to satisfy any measure of "substantially all the trade", and these members have reason to resist any change that isn't solely prospective as they would need to revisit the terms of agreements that have already been negotiated and implemented.

II. The Nuclear Option – Challenging Article XXIV-Consistency in WTO Dispute Settlement

While members may in large part be willing to disregard noncompliant FTAs because their own agreements suffer the same flaws, it is possible that at some point a member will put Article XXIV to the test substantively in WTO dispute settlement.

To date dispute settlement panels and the Appellate Body have assiduously avoided making a substantive determination as to the WTO-consistency of a given FTA.[9] Some have argued that it should not be possible for members to challenge the consistency of FTAs with Article XXIV;[10] however, it seems clear that this is a justiciable issue, and it therefore could arise at some point in WTO dispute settlement. Section 12 of the WTO Understanding on Article XXIV GATT provides that: "The provisions of Articles XXII and XXIII of GATT 1994 …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 a free-trade area." The Appellate Body in the *Turkey*

[9] In the GATT era three panels were faced with claims arguing that a given FTA was inconsistent with the GATT. One of these panels was never activated; the other two (*EC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* and *EEC – Import Regime of Bananas*) resulted in unadopted panel reports. For a discussion of these GATT Panels see Petros Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules,' 40 *Journal of World Trade* 187, 204-05 (2006); see also discussion in Sungjoon Cho, 'Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism', 42 *Harvard International Law Journal* 419, 437-38 (2001).
[10] Frieder Roessler, 'Are the Judicial Organs Overburdened?' Paper presented at Conference in Honor of Raymond Vernon, Harvard, Kennedy School, 23 June 2000, cited in Mavroidis at 194.

– *Textiles* case also made clear that it would expect a panel to require the country defending the FTA as falling within the Article XXIV exception to prove the conditions of Article XXIV (paragraphs 8(a) and 5(a)) are met.[11] A dispute settlement panel, faced with the issue of whether the North American Free Trade Agreement was consistent with Article XXIV, found that the United States had made a prima facie case that NAFTA was consistent with Article XXIV. However, no counter-evidence was offered by the complainant, Korea, and the panel did not engage in a detailed review of this issue.[12]

Thus a panel would very likely have the jurisdiction to determine whether a given FTA was consistent with Article XXIV. However, in the first instance, one might ask what WTO member could bring such a challenge? The answer is likely "plenty of members". Standing likely would not present an obstacle, at least not for many challenges. The Appellate Body has stated that any WTO member that is a "potential exporter" has standing – framed as "sufficient legal interest" – to initiate a panel proceeding.[13] It is not necessary for the member initiating the dispute to demonstrate a specific trade effect in order for a measure to be found to be inconsistent with WTO obligations.[14] Thus it has been said that "the burden of persuasion allocated to complainants is relatively low."[15] Indeed there have been a number of successful "as such" challenges to measures of WTO members. In these cases the laws have been challenged as being inconsistent with WTO commitments even though such laws had not actually been applied as yet in a WTO-inconsistent

[11] *Turkey – Textiles*, WT/DS34/AB/R, 22 October 1999 at paras. 58-59.
[12] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, 29 October 2001 at Sections 7.142-44.
[13] See WTO Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, adopted 25 September 1997 at para. 136; see also discussion in Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the WTO and RTAs', in Lorand Bartels and Federico Ortino, eds., *Regional Trade Agreements and the WTO Legal System* (Oxford (UK) 2006) at 467 n5.
[14] See Kwak and Marceau, supra note 13 and Dispute Settlement Understanding (DSU) Article 3.8.
[15] See Mavroidis, supra note 9 at 187.

manner.[16] In the context of Article XXIV consistency, the complaining member could simply argue that it was not being given MFN treatment by the parties to the FTA, and the burden would then fall upon the respondent member or members to demonstrate that MFN did not need to be provided because the Article XXIV exception was applicable.[17]

A further question one might ask is, even accepting that many WTO members *could* initiate such a dispute, what WTO member *would* bring such an action? Thus far this has been why the dispute settlement system has not been forced to address the issue – cases are not being brought – there appears to be little appetite for the pot to call the kettle black. The reasons for this are likely several-fold and a number of rationales have been suggested.[18] For purposes of this paper the reasons are not important – what matters is that there is no bar on members from utilizing the dispute settlement system to challenge the Article XXIV consistency of an FTA, and that it is not impossible to imagine that a panel will eventually be faced with this sort of complaint and have to address the issue substantively.

The implication of such a complaint would be potentially quite destabilizing for the WTO. Were a panel ever to determine that a given FTA does not comply with Article XXIV, the question would arise as to how the offending member should comply with the decision – would it have to re-negotiate its FTA or alternatively

[16] E.g., *United States – Antidumping Act of 1916*, WT/DS__/AB/R, adopted ___.
[17] See Mavroidis, supra note 9 at 208.
[18] See Joost Pauwelyn, 'Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV', paper presented at the Conference on Multilateralising Regionalism Sponsored and organised by WTO – HEI (10-12 September 2007, Geneva) at 2 n 4. Pauwelyn identifies various reasons why WTO members may refrain from challenging regional trade agreements in WTO dispute settlement: that because RTAs are ubiquitous it is in no member's interests to tighten up the rules as it may affect one's own arrangements; that members may not trust panels with the complicated analysis of conformity with Article XXIV; and that third parties may not want to challenge agreements that don't cover "substantially all the trade" as the solution may be that more of the areas in which they compete with one of the FTA partners become covered by the agreement, rather than less. See Id. See also Mavroidis, supra note 9 at 211-12.

provide the terms of the FTA on an MFN basis to all WTO members? Either of these possibilities would likely be quite difficult for WTO members to accept. There would also be significant ripple effects for the dozens if not hundreds of other FTAs that could equally have been challenged. WTO members presumably have little interest in sparking this form of chaos and have therefore been in a holding pattern of accepting each other's non-compliant agreements. However, this state of affairs may not continue indefinitely. A member may feel that it is losing trade liberalization ground as a result of the proliferation of FTAs, and if its own agreements are largely defensible, could take its chances by initiating a dispute. While there is no reason to think either member would initiate such a dispute, New Zealand and Singapore are examples of members that have relatively "clean" FTAs and that may see their most significant market opportunities as being those obtained via the WTO rather than via FTAs, where any comparative advantage gained is soon lost due to the creation of other FTAs.

Thus, although at present only hypothetical, it is certainly possible that a dispute could be brought that would require a panel to make a substantive determination as to the Article XXIV-consistency of an FTA. Should this possibility become a reality, the WTO would face serious threats to its institutional stability. As a result, although members are not particularly interested in addressing the Article XXIV problem, they should nonetheless consider whether there are any modifications that could be made to the current rules that would assist in ameliorating the FTA problem and would therefore reduce the threat of the "nuclear solution" of a WTO dispute settlement action.

III. A Pragmatic Path Forward?

It is easy enough to identify the problems with FTAs and Article XXIV, but identifying a potential solution that is realistic is far more difficult. Entrenched interests of WTO members mean that reaching consensus on change will be very challenging.

Given the very large number of FTAs already in existence, it would be highly unlikely members would agree to reform the process in a way that would apply retroactively to their agreements. At the same time, it would be unsatisfactory to develop new rules that would give a free pass to the existing agreements as there are so many of them covering such a large amount of trade.[19]

Commentators have proposed a range of solutions. These include focusing efforts on reducing all tariffs to as close to zero as possible to negate the preferential effects of FTAs (Bhagwati);[20] clarifying the meaning of "substantially all the trade" and having non-compliance trigger an obligation to extend MFN treatment to affected third parties (Cottier);[21] abandoning efforts to preference the WTO over FTAs and to treat the two as of equal status and encouraging multilateralization by including MFN provisions in FTAs (Pauwelyn);[22] and deeming WTO rules to be supreme over any RTA provisions that conflict with them (Picker).[23]

This paper proposes another approach, whereby new disciplines would be proposed and implemented with respect to *future* FTAs, while *existing* agreements would have the option of following the new rules or of making their agreements open to accession to any member that is willing to accede to its terms or terms deemed

[19] See, e.g., Picker, *supra*, note 6 at 306 ("the sheer number and coverage of existing RTAs suggests that reform of Article XXIV must apply to extant agreements, not just to future agreements").
[20] Bhagwati, supra note 6, at 97-100.
[21] Cottier, supra, note 6.
[22] Pauwelyn, supra, note 18.
[23] Picker, *supra*, note 6 at 307.

equivalent. This part will first discuss the proposal, and second it will argue that the proposal proffered may also assist in bridging the gap between regionalism and multilateralism.

A. The Proposal

The aim is to offer a pragmatic suggestion, in recognition of the entrenched nature of this problem and the difficulties that will arise in attempting to enact a modification to GATT Article XXIV. Although this suggestion could not possibly resolve all of the many difficulties caused by the proliferation of noncompliant FTAs, the hope is that it may be gentle enough to be acceptable to WTO members while still improving the situation currently at hand.

As noted above, the proposal has two parts. First, for *future* agreements, members should agree to substantive criteria to be applied in determining an agreements' consistency with GATT Article XXIV. In other words, consensus needs to finally be reached as to the meaning of "substantially all the trade". Because this standard would only be applied as a matter of course on a prospective basis, members would not necessarily have to alter pre-existing agreements. Second, for *existing* agreements, parties to those agreements would have two options. First, they could conform their agreements to the substantive criteria agreed to for future agreements; or second, avail themselves of a "grandfathering" provision which would deem their agreements unchallengeable on "substantially all the trade" grounds so long as the agreement adopted an open accession policy if it did not already have one.

In addition, a failure to adopt either option would render the FTA susceptible to challenge in WTO dispute settlement. It is suggested that if an FTA was found to

fall afoul of the newly clarified rules, the remedy should be that the terms of the FTA have to be offered on an MFN basis to the WTO membership. If an FTA does not cover "substantially all the trade" it should not be entitled to exempt itself from the general Article I obligations.

Thus "clean" agreements would not require any change. For members with agreements that come close to meeting the "substantially all the trade" requirement, perhaps this rule would nudge them to liberalize a bit more so as to satisfy the newly clarified Article XXIV. And for members with dodgier FTAs, they wouldn't have to radically change their FTAs if they did not want to, so long as they opened their agreement up for others to join if they so wished.

With respect to the open accession provision requirement, this could prove difficult to monitor and administer because accession would still need to be negotiated. Thus it would need to be clear on what bases a potential new member could legitimately be excluded. In addition, this might be seen as being too soft on the existing FTAs and therefore not be attractive enough to newer participants in bilateral agreements. Notwithstanding these difficulties, open accession provisions would at least provide the potential for further liberalization and for a degree of multilateralization of existing regionalism.

It bears examining whether an agreement that does not cover "substantially all the trade" but that is open to all members to join is even in need of special treatment (such as a special status under Article XXIV), or whether it is instead consistent with GATT Article I in that the terms are open to all. It would seem that such an agreement would not satisfy the requirements of GATT Article I because even if the agreement were open to accession by any member, the terms of accession would need to be negotiated at least to some degree and thus would not be being offered

"immediately and unconditionally" as required by GATT Article I. Therefore permitting such agreements would require a waiver. Enacting such a waiver – which could be seen as a form of "grandfather clause" for existing FTAs – would be an improvement over the status quo and might be pragmatic enough to be a credible proposal. This would only be offered as a way of grandfathering the existing inconsistent FTAs. Future notified FTAs would need to satisfy the Article XXIV requirements.[24]

As noted above however, careful consideration would have to be given to how to monitor whether open accession clauses were being administered in good faith.

B. Open Accession Provisions and Multilateralizing Regionalism

In the debate over whether FTAs are stepping stones or stumbling blocks, those who tout regionalism sometimes argue that FTAs have the effect of chipping away at barriers and ultimately will be aggregated into bigger and bigger blocks of liberalization. Jagdish Bhagwati has criticized as unrealistic this notion that FTAs could be aggregated to lead to increasingly multilateralized trading blocks. In particular, he notes that the "spaghetti bowl" of differing rules of origin and differences in levels of tariff reduction commitments and other FTA provisions makes it unlikely that FTAs will be able to be amalgamated into agreements comprising more parties.[25]

[24] In general however, open-access FTAs should be encouraged. These are the types of FTAs that could best serve as building blocks rather than stumbling blocks. W.H. Cooper, 'Free Trade Agreements: Impact on U.S. Trade and implications for U.S. Trade Policy' 14 (Congressional Research Service Report for Congress, Library of Congress, 1 August 2006); C.F. Bergsten, 'Open Regionalism' Working Paper 97 (Institute for International Economics 1997).
[25] Bhagwati *supra*, note 6 at 92-97.

Bhagwati's argument seems unassailable with respect to FTAs that have very different terms and coverage. But the situation may be less hopeless with respect to highly comprehensive FTAs. If two different FTAs both reduce tariffs on all goods to zero for example, it would seem to be easier to join these FTAs than two that featured significant sectoral exclusions and differed from one another in terms of what specifically was excluded. Indeed this has long been the vision of Singapore – that its FTAs would "pave the way for APEC-wide trade area."[26]

A further way that regional trade could contribute rather than hinder multilateral trade liberalization is through policies of open regionalism such as that espoused by APEC. At the 1994 APEC summit in Bogor, members agreed to a policy of open regionalism as an objective. Open regionalism, while not fully defined, would entail members liberalizing unilaterally and on an MFN basis rather than by pursuing bilateral free trade agreements.[27] As FTAs nonetheless began to proliferate in the Asia-Pacific, the Pacific Economic Co-operation Council, an entity associated with APEC that provides it with policy guidance, submitted Best Practice Recommendations for APEC's FTAs to the 2004 APEC meeting. These practices, which were adopted at the meeting, included one which provides that FTAs should have open accession clauses.[28] This is consistent with the open regionalism concept. Prior to the agreement on the Bogor goals, Senior Minister Lee Kuan Yew of Singapore even suggested that the United States should open NAFTA to accession by all APEC members. He used the concept of competitive liberalization to support his

[26] Singapore Prime Minister Goh Chok Tong in 2001, *quoted in* Christopher M. Dent, *New Free Trade Agreements in the Asia-Pacific*, 227 (Palgrave MacMillan, Hampshire and New York, 2006) and discussed in Bhagwati, *supra*, note 6 at 96.
[27] *See, e.g.*, Dent, supra, note 26 at 45-47.
[28] *Ibid.* at 221.

idea, arguing that some APEC members would quickly accept such an offer, and this would then impel the rest of the APEC membership to do so as well.[29]

This raises the question – what is the value of open accession provisions? These clauses feature in a minority of FTAs and generally provide that other members may accede to the agreement on terms to be negotiated and agreed to.[30] While most such provisions are never acted upon, they at least provide an opportunity for broadening or multilateralizing regional arrangements. Most of the FTAs that do have open accession provisions are FTAs that are comparatively comprehensive in their coverage. For example, New Zealand and Singapore frequently use open accession provisions, and both countries have highly liberalised economies and tend to enter into high-quality comprehensive trade agreements. It also bears noting that Taiwan has proposed that it be a WTO requirement that FTAs contain open accession provisions.[31]

As a general proposition I believe that FTAs are stumbling blocks in the path of multilateral trade liberalization. And competitive liberalization seems unlikely to materialize as a result of the proliferation of the usual non-comprehensive FTAs. However, comprehensive, open accession agreements may provide the best possibility to prove the exception to the rule as they provide a more realistic opportunity to

[29] C. Fred Bergsten, 'Toward a Free Trade Area of the Asia Pacific', paper presented at a Joint Conference of the Japan Economic Foundation and Peterson Institute for International Economics on "New Asia-Pacific Trade Initiatives" November 27, 2007, Washington D.C., at 14 n.16.

[30] Open accession provisions are somewhat unusual but not unheard of. They are more common amongst APEC partners than elsewhere. Agreements featuring such provisions include the Thailand – New Zealand FTA (Article 18.5); the Thailand – Australia FTA (Article 1905); the North American Free Trade Agreement (NAFTA) and the Armenia – Moldova FTA (Article 18). Within APEC, agreements centred in Oceania all have open accession provisions; of the agreements centred around the United States, some have open accession provisions (*e.g.* the United States – Australia FTA and the United States – Singapore FTA) but others do not (*e.g.* the United States – Chile FTA); and among agreements centred in East Asia, very few FTAs contain open accession provisions. See Christopher M. Dent, 'Full Circle? Ideas and Ordeals of Creating a Free Trade Area of the Asia-Pacific', 20 *The Pacific Review* 447, 459, Table 1 (2007).

[31] TN/RL/W186, August 3, 2005; *see also* discussion in Matthew Schaefer, 'Ensuring that Regional Trade Agreements Complement the WTO System: US Unilateralism a Supplement to WTO Initiatives?' 10 *Journal of International Economic Law* 585, 595 (2007).

"multilateralize" regionalism.[32] This could particularly take hold in the APEC context where open regionalism has long been a central tenet, even if never fully defined.[33] It has been suggested that APEC's open regionalism experience may serve as a useful model for making trade agreements more susceptible to being multilateralized, and in turn to defragmenting the world trading system.[34]

The process of multilateralizing regionalism may become more realistic if the growth arises not out of the combination of disparate bilateral agreements, but rather from particular open accession agreements expanding to become larger and larger, as is contemplated by the expansion of the P-4 Agreement into a broader Trans-Pacific partnership.

The Trans-Pacific Economic Partnership Agreement (P-4 Agreement) between New Zealand, Singapore, Brunei and Chile is a highly comprehensive trade agreement which has an open accession provision. The goal of the P-4 countries was to negotiate a strategic agreement that could serve as a template for a broader Asia-Pacific agreement. In the past some have suggested that the P-4 could serve as a "dock" for other interested APEC members, with there being resultant scepticism that the P-4 "is clearly too small provide a foundation for APEC-wide arrangements."[35] However, this scepticism may soon give way because negotiations have been initiated to expand that agreement to include the United States, Australia, and Peru. If the

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[32] *See generally* Sungjoon Cho, 'Defragmenting World Trade', 27 Northwestern Journal of International Law and Business 39, 77-78 (2006); Cho, supra note 9 at 454-57; Pauwelyn, supra note 18. *See also* Robert Z. Lawrence, 'Regionalism and the WTO: Should the Rules be Changed?' *in* Caroline Freund, (ed.), *The WTO and Reciprocal Preferential Trading Arrangements* (Edward Elgar 2007) at 494 ("dynamics of regional groups that are open to all newcomers will differ from those of exclusive or selective ones.").

[33] E.g. Srikanta Chatterjee, 'Regionalism, Open Regionalism, the APEC and the WTO: An Economic Perspective from New Zealand' (Department of Applied and International Economics, Massey University, Discussion Paper No. 99.03 April 1999), accessible at http://econ.massey.ac.nz/publications/discuss/dp99-03.pdf

[34] Cho, *supra*, note 32 at 77-78.

[35] Bergsten, 'Toward a Free Trade Area of the Asia Pacific', paper presented at a Joint Conference of the Japan Economic Foundation and Peterson Institute for International Economics on "New Asia-Pacific Trade Initiatives" November 27, 2007, Washington D.C. 14 n.16.

United States does accede, the P-4's prospects to serve as a gateway agreement will seem much stronger. In addition, the fact that the P-4 Agreement contains an open accession provision will facilitate its expansion to include more and more countries.

IV. Conclusion

This paper has suggested a pragmatic method for breaking the current deadlock regarding Article XXIV-inconsistent FTAs. A solution of some sorts should be pursued, no matter how difficult, because it is a real possibility that a member could challenge such an FTA in WTO dispute settlement, with potentially significant destabilizing ripple effects for other members. The solution offered here provides non-compliant FTA members with a choice – conform their agreements to the to-be-clarified "substantially all the trade" requirement, or add an open accession clause to their existing agreement. The latter option may be perceived as too soft, but open accession clauses have an independent benefit in that they may assist in multilateralizing regionalism, as is currently being seen with the expansion of the open accession P-4 Agreement into a broader Trans-Pacific Partnership Agreement that will include, *inter alia*, the United States and Australia.