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

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

Orientador: Prof. Dr. Yi Shin Tang

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Abstract

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

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

Resumo

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

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

List of Acronyms

CARIFTA Caribbean Free Trade Association

CARICOM Caribbean Community

CIF Cost, Insurance and Freight

CRTA Committee on Regional Trade Agreements

CTD Committee on Trade and Development

EFTA European Free Trade Association

FOB Free on Board

FTA Free Trade Agreement

GATS General Agreement on Trade in Services

GATT General Agreement on Trade in Goods

GDP Gross Domestic Product

KORUS Korea- United States Free Trade Agreement

LAIA Latin American Integration Association

MERCOSUR Southern Common Market

MFN Most Favored Nation

NAFTA North American Free Trade Agreement

PTA Preferential Trade Agreement

RCEP Regional Comprehensive Economic Partnership

RTAs Regional Trade Agreements

TPP Transpacific Partnership Agreement

USA United States of America

TRIPS Agreement on Trade- Related Aspects of Intellectual Property Rights

WTO World Trade Organization

List of WTO documents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1. Introduction

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

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

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

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

point of discussion, as a result of the lack of action and difficulties that the CRTA was going through².

Today the studies on the issue have focused in evaluating the positive or negative effects of regionalism on the multilateral trade system. While among the positive effects, the greater trade liberalization between countries that have concluded RTAs has been noted, on the negative side, the regulatory complexity of the RTAs proliferation was stressed as RTAs would be undermining the governance in the multilateral trade system and challenging the role of the WTO to control this phenomenon (Thorstensen, 2002, p.165-166; Crawford; Fiorentino, 2005, p.1). Furthermore, the work of the CRTA, which was established for the compatibility examination of Regional Trade Agreements, is stagnant as it has not adopted any Report on the examination of RTAs since its establishment. The WTO members have also discussed about the role of the CRTA in the Doha Round, which led the General Council to adopt a Decision in 2006 that thoroughly modifies the procedure of RTAs examination and provides the creation of the Transparency Mechanism for RTAs, on whose functions there is no deep analysis in the area of International Relations³.

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

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

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

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

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

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

5. Concluding Remarks

Regarding the governance question, we previously noted that governance requires institutions that guide the activity of groups and these structures in International Organizations require to be well articulated. However, some structures at the multilateral level of international trade have not been performing well, as evidenced in the CRTA work, which never demanded changes in the agreements examined in order to make them compatible with the WTO. Furthermore, considering that some WTO members expressed a strong concern during the examination regarding measures that were openly discriminatory, but those issues were not the object of a deeper analysis⁴.

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

⁴ As observed in the compatibility examination of NAFTA, regarding the application of CIF or FOB by Mexico depending on the origin of the good.

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

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

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

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

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

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

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

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