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TRADE INTEGRATION IN THE CIS REGION: A THORNY PATH TOWARDS A CUSTOMS UNION

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ABSTRACT

One of the peculiarities of trade integration in the Commonwealth of Independent States (CIS) is that it was launched by non-WTO members. Nevertheless, their wish to integrate into the multilateral trading system induced them to incorporate WTO standards into their RTAs. Another distinctive feature is that integration in the CIS proceeds at diverse speed and different levels. CIS integration towards a customs union has taken place in three directions within the CIS economic union, the Eurasian Economic Community (EurAsEC) and the Single Economic Space (SES), though only the EurAsEC project has remained operational. Overlapping disciplines adopted within different regional frameworks are a barrier to intense trade integration, so certain coordination is needed. The formation of a EurAsEC customs union in parallel with the WTO accession talks is very challenging. Thus it is suggested to finalize the creation of the customs union either before or after the WTO accession of all EurAsEC members.

I. INTRODUCTION

Since the dissolution of the Soviet Union in 1991, the newly independent States in the post-Soviet area have been involved in various integration processes. They have aimed to maintain and further develop historically established relations through new regional arrangements that can roughly be grouped into political, military and economic categories.[1] In the political field, the Commonwealth of Independent States (CIS) comprising 12 ex-Soviet republics and excluding Estonia, Latvia and Lithuania; the Belarus–Russia Union; the organization of 'GUAM' (which stands for

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[1] This classification is not official. Some regional blocs deal with quite a broad scope of issues, so that they can be placed in more than one category.

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Georgia, Ukraine, Azerbaijan and Moldova); and the Shanghai Cooperation Organization (which also includes China in addition to five CIS countries) have emerged. In the military field, the Collective Security Treaty Organization was established. Finally, the economic sphere includes Free Trade Agreements (FTAs), the Single Economic Space (SES) between Belarus, Kazakhstan, Ukraine and Russia, and the Eurasian Economic Community (EurAsEC[2]).

Among these integration schemes, free trade initiatives have been an important component in intra-CIS cooperation. The idea of duty-free trade has been reflected in the concepts of a free trade area, customs union and single economic space that were developed in numerous legal instruments. Regional integration towards a customs union has taken place in three directions, notably within the framework of the CIS economic union, the EurAsEC and the SES. Once the idea of the creation of a customs union within the entire CIS region failed the feasibility test, smaller groups of like-minded CIS countries have embarked on new initiatives that finally resulted in the EurAsEC and the SES.

This article aims to analyze the process, peculiarities and legal issues of the formation of a customs union in the CIS region, as well as to examine them from the perspective of WTO rules.

II. CIS ECONOMIC UNION

On 24 September 1993, CIS countries signed the Economic Union Treaty under which an economic union would be established following the formation of a multilateral free trade association, a customs union, a common market and a currency union.[3] Such an economic union was perceived to comprise free movement of goods, services, capital and labor; coordinated policy in monetary, budgetary, fiscal and external economic issues; harmonized economic legislation as well as a single statistical database.[4] With respect to the external economic and trade policy in intra-relations, the signatories agreed on, *inter alia*, gradual reduction and removal of customs duties, taxes and quantitative restrictions; harmonization of customs laws and simplification of customs procedures.[5] As for the CIS customs union, it targeted full removal of tariff and non-tariff barriers to the movement of goods and services, and the establishment of a common customs tariff and coordination of external trade policy towards non-signatory countries.[6]

[2] The other frequently used abbreviation for the Eurasian Economic Community is 'EAEC.'
[3] Article 4 of the Economic Union Treaty.
[4] Article 3 of the Economic Union Treaty.
[5] Article 5 of the Economic Union Treaty.
[6] Article 6 of the Economic Union Treaty.

Table 1. Bilateral FTAs between CIS countries

	Armenia	Azerbaijan	Belarus	Georgia	Kazakhstan	Kyrgyzstan	Moldova	Russia	Tajikistan	Turkmenistan	Ukraine	Uzbekistan
Armenia	–			1995	1999	1994	1993	1992		1995	1994	
Azerbaijan		–		1996	1997		1995	1992		1996	1995	1996
Belarus			–				1993	1992	1998		1992	1993
Georgia	1995	1996		–	1997			1994		1996	1995	1995
Kazakhstan	1999	1997		1997	–	1995	1995	1992	1995		1994	1997
Kyrgyzstan	1994				1995	–	1995	1992			1995	1996
Moldova	1993	1995	1993		1995	1995	–	1993			2003	1995
Russia	1992	1992	1992	1994	1992	1992	1993	–	1992	1992	1993	1992
Tajikistan			1998		1995			1992	–			1996
Turkmenistan	1995	1996		1996				1992		–	1994	1996
Ukraine	1994	1995	1992	1995	1994	1995	2003	1993	2001	1994	–	1994
Uzbekistan		1996	1993	1995	1997	1996	1995	1992	1996	1996	1994	–

Based on the data contained in the Memorandum on the Foreign Trade Régime of the respective CIS country submitted to the WTO, and the WTO Regional Trade Agreements Information System (RTA-IS), <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> accessed 15 April 2009. The years in this table indicate the year of signature of the FTA concerned.

The treaty bound the parties not to practice price discrimination between economic operators.[7]

The Economic Union Treaty was just a framework agreement to be put into practice by a number of more specific agreements, including the Agreement on the Formation of a Free Trade Area of 15 April 1994 (hereinafter the 'CIS FTA'). The CIS FTA provides for removal of customs duties, taxes and other charges with equivalent effect as well as quantitative restrictions on importation and exportation of goods made in the CIS countries. The text of the agreement is quite simple. It covers mainly trade in goods and opens the door for liberalization of services market.

However, multilateral trade integration within the CIS-12 framework has faced certain challenges. First, as the signatories failed to work out a single list of goods not falling within the scope of the multilateral regime, they agreed to identify such exceptions in bilateral documents and then to gradually abolish them.[8] Second, the provisions recognizing the possibility of the transition to a customs union dropped from the text as a result of amendments introduced by a protocol of 2 April 1999. Third, neither the CIS FTA nor the protocol has been ratified by Russia yet.[9] Finally, the integrity of a single multilateral free trade regime has been questioned by a web of bilateral FTAs between CIS countries, as illustrated in Table 1.

Both the multilateral CIS FTA and bilateral FTAs have many provisions with similar substance and scope of commitments. However, the CIS FTA prevails to the extent of a conflict with a bilateral FTA. Notably, Article 20.1 of the CIS FTA states:

> "Nothing in this Agreement prevents any of the Contracting Parties from implementing the obligations under other international agreements of which this Contracting Party is a signatory or can be a signatory, *provided these obligations do not contradict the provisions and objectives of this Agreement*." (emphasis added)

Nevertheless, the CIS FTA is without prejudice to the right of its parties to the independent external economic policy *vis-à-vis* non-party countries, and rights and privileges of its parties under economic associations, frontier trade, preferential treatment for developing countries, free economic zones.[10] Thus, Ukraine, for example, concluded an FTA with the Former Yugoslav Republic of Macedonia which is not a CIS member. Moldova is a party to the Central European FTA. Moreover, the provisions of the CIS FTA do not contradict WTO rules; on the contrary, at the time when the majority

[7] Article 8 of the Economic Union Treaty.
[8] Article 3.2 of the CIS FTA.
[9] See CIS Executive Committee, 'Information on CIS Documents as of 1 September 2008' [in Russian] <http://cis.minsk.by/main.aspx?uid=8926> accessed 19 December 2008.
[10] Article 20 of the CIS FTA.

of the CIS countries have not yet joined the WTO, the parties to the CIS FTA agreed to rely on the GATT/WTO agreements for the sake of interpretation of the FTA text.[11]

While the CIS FTA coexists with bilateral FTAs, and provides the only legal basis for free trade where there is no bilateral FTA, the idea of creation of a customs union in the CIS as initially envisaged in the Economic Union Treaty has failed to materialize for several reasons. Diverse exceptions to free trade and the lack of progress in harmonization of external commercial policy have been major stumbling blocks. These factors coupled with different standpoints of CIS countries on the prospects of mutual cooperation generated the so-called 'diverse speed' or 'diverse level' integration where each consecutive stage of integration would involve only those countries that were mostly prepared to accept it.[12] The concept of 'diverse speed' integration has brought about two economic blocs, notably the EurAsEC and the SES.

III. EURASIAN ECONOMIC COMMUNITY (EURASEC)

The EurAsEC's history goes back to January 6, 1995 when Russia and Belarus signed the bilateral Customs Union Agreement.[13] On January 20, 1995, these two countries and Kazakhstan signed the trilateral Customs Union Agreement according to which the signatories assume the rights and obligations accruing under the Belarus–Russia agreement above. Kyrgyzstan and Tajikistan acceded to both agreements in 1996 and 1999, respectively. On February 26, 1999, the five countries concluded the Treaty on Customs Union and Single Economic Space where they specified two stages of regional integration: (i) completion of the formation of a customs union with a single customs territory and (ii) establishment, on the basis of the customs union, of a single economic space.[14] While a customs union is a free trade area with a common external tariff, a single economic space is a more comprehensive integration form that includes a common market of goods, services, capital and labor, common economic policy, single infrastructure and harmonized legislation.[15] With the purpose to institutionalize the formation of the customs union and the single economic space, the presidents of the five countries gathered in Astana (Kazakhstan) on October 10, 2000 to sign the Treaty on the Establishment of the Eurasian Economic Community. The treaty entered into force on 30 May 2001.

[11] Article 1.3 of the CIS FTA.
[12] Grigory Rapota *et al.*, *EurAsEC: Economic Gravity* [in Russian] (Moscow 2005) 33–4.
[13] The factual information on the EurAsEC is summarized from Sherzod Shadikhodjaev, 'Eurasian Economic Community (EurAsEC): Legal Aspects of Regional Trade Integration', KIEP Working Paper 08-05, 2008.
[14] Article 7 of the Treaty on Customs Union and Single Economic Space.
[15] Article 1.1 of the Treaty on Customs Union and Single Economic Space.

With Uzbekistan's accession in January 2006, the EurAsEC incorporated the Organization of Central Asian Cooperation. However, at the end of 2008, Uzbekistan's membership in the EurAsEC was suspended in accordance with this country's request.[16] Since the suspension as such does not automatically mean a withdrawal from the EurAsEC, this article considers Uzbekistan as a *de jure* member of the EurAsEC.

The EurAsEC has all the attributes of an international organization, such as treaty-based international personality, membership consisting of sovereign States, organizational structure and a decision-making mechanism. As of February 26, 2008, 113 treaties including 47 pre-EurAsEC agreements concerning the creation of the customs union and the single economic space have constituted a significant part of 'EurAsEC law'.[17]

With a view to establishing a customs union in the EurAsEC, member States first committed themselves to provide, on the basis of the existing multilateral and bilateral FTAs, a full-scale regime of free trade in goods 'with no exceptions and restrictions'[18] that would include the following components:[19]

(a) non-application of customs duties and quantitative restrictions in mutual trade;
(b) application of a single indirect taxation system;
(c) reservation of a party's right to take temporary protective measures on imports from another party in accordance with international rules and national legislation;
(d) non-granting, without consent of the parties, of more a favorable trade regime, *vis-à-vis* third countries, than that provided to the parties;
(e) removal of competition restrictions caused by the conduct of business entities or government interference to the extent that this may affect trade between the business entities of the parties; and
(f) non-discrimination between products of the parties.

The concept of a EurAsEC free trade area has two peculiar features. First, it is free trade 'with no exceptions and restrictions'. This implies that all goods without exception involved in intra-trade can freely cross the internal borders of the EurAsEC without being subject to tariff or non-tariff restrictions. Second, it has some elements related to extra-trade. Notably,

[16] See EurAsEC, 'Notice of the Press Service of the EurAsEC Integration Committee Secretariat' [in Russian], 12 November 2008 <http://www.evrazes.com/ru/main/messagepage/821/> accessed 17 April 2009.
[17] For the list of the EurAsEC treaties, see EurAsEC Inter-Parliamentary Assembly, 'State of Play on the Entry into Force of EurAsEC Agreements as of 26 February 2008' [in Russian], <http://www.ipaeurasec.org/evra/?data=interdocs> accessed 7 May 2008.
[18] Article 8 of the Treaty on Customs Union and Single Economic Space.
[19] Article 9 of the Treaty on Customs Union and Single Economic Space.

as mentioned above, granting of more favorable treatment to a third country than that provided to other EurAsEC members is, in principle, not allowed. Moreover, the members pursue a single order of extra-trade regulation that includes (i) tariffs, (ii) non-tariff measures, (iii) establishment of a trade regime, (iv) indirect taxes and (v) currency regulation.[20] A noteworthy point about the single order is that it is recognized as 'an important basis and necessary condition for establishment, on a reciprocal basis, of the free trade regime with no exceptions and restrictions'.[21] Thus, a withdrawal of a member from this order can be considered by the rest of the members as grounds for terminating the free trade regime with respect to that member.[22] The existence of these extra-trade requirements does not seem to be a common case for FTAs. They are normally attributable to customs unions. The linkage of the extra-trade factor to free trade among and between EurAsEC countries obviously indicates the strong will of the members to finalize the formation of a customs union in the EurAsEC.

The harmonization of indirect taxation is another important factor ensuring free movement of goods in the EurAsEC. At present, the members accept the principle of destination whereby they impose a zero-rate value added tax (VAT) on exported goods and refund VAT on inputs incorporated into the goods for export. This is in line with the international practice of applying border tax adjustments for indirect taxes.[23] Nevertheless, each member has introduced different time frames and procedures for the VAT refund. Moreover, some national laws prohibit VAT refund for certain products.[24] Therefore, the EurAsEC needs more coherent border-tax-adjustment policy. The harmonization of the excise policy aimed at reducing the number of excise taxes and unification of their rates is now under way.[25]

As to the creation of a customs union, the EurAsEC members are currently working on the development of a common customs tariff (CCT) *vis-à-vis* third countries and unification of external trade regimes.

A. Common Customs Tariff (CCT)

Ideally, the CCT would apply to all products classified in the EurAsEC commodities nomenclature,[26] but this is hardly possible. For instance, on

[20] Article 12 of the Treaty on Customs Union and Single Economic Space.
[21] Article 19 of the Treaty on Customs Union and Single Economic Space.
[22] Ibid.
[23] See eg GATT, *Report of the Working Party on Border Tax Adjustments*, L/3464, adopted 2 December 1970.
[24] See EurAsEC Interstate Council Decision on 'Practice of Implementation of the Destination Principle in Imposition of Indirect Taxes in intra-EurAsEC Trade' (20 September 2002).
[25] Rapota *et al.* (n 12) 137–9.
[26] Since 2003, the EurAsEC has used the ten-digit Common Commodities Nomenclature of Foreign Economic Activity of the EurAsEC which reiterates Russia's commodities nomenclature. The latter is based on the WCO's Harmonized System and the CIS Single Commodities Nomenclature of Foreign Economic Activity. The EurAsEC commodities

the basis of the 1995 Customs Union Agreement and an Action Program of its Implementation, Russia, Belarus and Kazakhstan were able to agree on the unified tariff with respect to 95% of products, but in 2000 the level of unification fell to 60%.[27] The harmonization of EurAsEC members' tariffs is hampered by various factors, such as inclusion of new products in the commodities nomenclature, the difference between tariff rates of Russia and Belarus on the one hand and those of the rest of the membership on the other, as well as the WTO accession of EurAsEC members.[28]

On 17 February 2000, Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan signed the Agreement on Common Customs Tariff of the Customs Union Member States (hereinafter the 'CCT Agreement'). The CCT would consist of *ad valorem*, specific and combined customs duties, as well as seasonal or other kinds of duties (such as anti-dumping, countervailing duties or safeguards) if necessary.[29] The CCT rates would escalate depending on the processing of goods—whether they are raw materials, semi-manufactured goods or ready-made goods.[30] The common tariff is to be formed in stages within the transition period of five years of the date of entry into force of the CCT Agreement (31 August 2000), though this period may be extended if the members so agree.[31] Given the complexity of the establishment of the common tariff, at the outset only Russia, Belarus and Kazakhstan would set up the CCT to be subsequently accepted by the other members. The unified customs duties of Russia, Belarus and Kazakhstan constitute a CCT base list of the EurAsEC which will gradually be expanded through harmonization of customs duties contained in two other lists: a commodity list where the difference in duties among customs union members does not exceed 5% and a commodity list with the margin greater than 5%.[32] To date, Tajikistan has adjusted its tariff to 80% of the CCT base list. Uzbekistan's level of adjustment amounts to 30%.[33] Kyrgyzstan will adjust its tariff rates after the complete formation of the CCT base list and accession of the remaining EurAsEC members to the WTO.[34]

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nomenclature is periodically updated in accordance with international standards and practice. See the Agreement on Common Commodities Nomenclature of Foreign Economic Activity of the Eurasian Economic Community (20 September 2002).

[27] Rapota *et al*. (n 12) 43.

[28] Ibid.

[29] Article 2 of the CCT Agreement.

[30] See Article 5 of the CCT Agreement.

[31] Article 6 of the CCT Agreement.

[32] See Articles 6 and 7 of the CCT Agreement.

[33] Ministry for Economic Development and Trade of the Russian Federation, 'EurAsEC Integration Stages' [in Russian], 1 February 2008 <http://www.economy.gov.ru/wps/wcm/myconnect/economylib/mert/resources/6b79468048bbcc3d9f489f4621b7471d/etapy_integratcii.doc> accessed 25 May 2008.

[34] Ibid.

The CCT does not apply to the so-called 'sensitive goods', ie (i) the goods which are important for domestic consumption and manufacture but are not produced or produced in insufficient amounts in the EurAsEC country concerned, and (ii) the goods from the importation of which domestic industry needs to be protected.[35] During the transition period, national governments annually prepare lists of sensitive goods to be approved by the EurAsEC Integration Committee. The permissible amount of such products is subject to a quota which was initially set at the level of 15% of the total value of imports made in the previous year. With respect to Tajikistan, the members agreed that alumina was the only sensitive product for this country, and the quota for alumina would be 25% instead of 15%. The members are free to establish their own tariff rates for sensitive goods.[36] In order to facilitate the unification of customs duties, the next step would be to change the approach above from quotas to the number of allowed sensitive items. In this case, the smaller the number of sensitive goods, the greater coverage of the common tariff would be.

B. Unification of trade regimes *vis-à-vis* third countries

There are three types of trade regimes applicable to third countries: a free trade regime, an MFN-regime and tariff preferences. With respect to the first type, if a EurAsEC member has an FTA with a third country, it must reach agreement with other members to the list of exceptions to the free trade regime or forms of compensation for emerging inconsistencies in trade regimes.[37] This is the case of bilateral FTAs between EurAsEC countries and non-EurAsEC CIS countries (Armenia, Azerbaijan, Georgia, Moldova, Turkmenistan and Ukraine) where different products are exempt from free trade. In 2004, the EurAsEC approved a single list of exemptions (7 categories of sensitive products) under these FTAs that will have to be phased out over the period between 2006 and 2012.[38] As a result, by 2012 all goods will be accorded duty-free access in accordance with the FTAs in question.

Currently, only Kyrgyzstan as a WTO member provides MFN treatment on a multilateral basis. The remaining EurAsEC countries are parties to bilateral MFN agreements. Namely, Russia and Belarus grant MFN treatment to over 120 countries, followed by Kazakhstan and Tajikistan (45 countries each),[39] and Uzbekistan (44 countries).[40] The EurAsEC countries agreed that they would impose doubled CCT duties on products from the

[35] Article 1 of the CCT Agreement.
[36] Article 8 of the CCT Agreement.
[37] Article 15 of the Treaty on Customs Union and Single Economic Space.
[38] Rapota *et al.* (n 12) 36–8.
[39] Ibid, at 46.
[40] Ministry for Foreign Economic Relations, Investments and Trade of the Republic of Uzbekistan, 'Foreign Trade Regime of the Republic of Uzbekistan' <http://www.mfer.uz/external.htm> accessed 5 June 2008.

countries which have not been granted MFN treatment.[41] Once the CCT is introduced, the EurAsEC countries that have joined the WTO will apply it *vis-à-vis* all WTO members. If a particular member has not yet acceded to the WTO at that point, it will apply the common tariff on a bilateral MFN basis.

It is also necessary to unify tariff preferences granted to developing and least-developed countries.[42] The members of the EurAsEC will draw up lists of both products and developing/least-developed countries eligible for preferential treatment. A preferential tariff rate for developing country beneficiaries will be 75% of the applicable CCT or national tariff. Least-developed countries will enjoy duty-free market access.[43]

Finally, in 2008 the EurAsEC adopted common rules with respect to third countries, such as trade remedies, rules of origin, tariff and non-tariff barriers, customs valuation and other issues that have generally been designed in accordance with the corresponding WTO standards.

IV. SINGLE ECONOMIC SPACE (SES)

On 19 September 2003, the presidents of Belarus, Kazakhstan, Russia and Ukraine signed the Agreement on the Formation of a Single Economic Space (hereinafter the 'SES Agreement'). This is a third major trade integration trend in the CIS region. The concept of this single economic space is very similar to that of the EurAsEC. As a matter of fact, EurAsEC experts were directly involved in drafting of SES documents.[44] Although the rationale behind the decision to establish the SES is not clear enough, it appears that the SES project was launched mainly to induce Ukraine into more intense economic integration with the other three counties, as it was not possible in the EurAsEC. In the Astana meeting of 15 September 2004, the presidents of the four countries agreed to the list of 29 agreements to be accepted by each country as a single undertaking.[45]

However, in the aftermath of the presidential election in December 2004 and subsequently Mr. Viktor Yushchenko's accession to power, Ukraine has radically changed its stance towards the SES. Notably, Ukraine agreed to participate in the SES to the extent that it would not contradict its policy towards European and Euro-Atlantic integration such as the possible accession to the EU and the NATO, and would facilitate its WTO accession.

[41] Article 12 of the CCT Agreement.
[42] Article 11 of the CCT Agreement.
[43] Rapota *et al.* (n 12) 46–7.
[44] Serik Primbetov, 'Experience and Lessons from Central Asian Integration and Single Economic Space', in First Integration Forum, *Single Economic Space between Belarus, Kazakhstan, Russia and Ukraine: Importance, Opportunities, Prospects* [in Russian], 2005, at 60.
[45] Wikipedia, 'Single Economic Space' [in Russian] <http://ru.wikipedia.org> accessed 15 October 2008.

Ukraine's parliament ratified the SES Agreement with a reservation that this and subsequent agreements will not be in breach of the Ukrainian constitution.[46] Although Ukraine has both bilateral and multilateral (CIS) FTAs with SES countries, some products are still excluded from the free trade regime. Thus, for the Ukrainian government, the main objective of the SES would be free trade without restrictions.[47] Furthermore, in the first SES Integration Forum held on 7 April 2005, Ukraine's economy minister declared that his government would insist on review of the SES Agreement so as to preclude the creation of supranational bodies that according to the Agreement would conduct coordinated economic policy. During a summit of the SES heads of State in August 2005, President Yushchenko stated that his country wished to sign only 15 documents relating to the free trade regime and was not intending to approve the remaining agreements on the creation of supranational bodies and a customs union because this would require certain amendments to Ukraine's constitution.[48] Thus, mainly because of Ukraine's very passive attitude the SES initiative could not, so far, be implemented.

V. THE FORMATION OF A CUSTOMS UNION IN THE CIS AND THE WTO-COMPATIBILITY TEST

While Armenia, Georgia, Kyrgyzstan, Moldova and Ukraine are currently WTO members, the remaining CIS countries, except Turkmenistan, are still in the process of WTO accession. This section aims to examine some issues emerging in the context of the formation of a customs union in the CIS and the WTO accession. Since among the three regional initiatives considered above, only the EurAsEC has proved to be operational, this analysis will focus on the EurAsEC customs union project.

A. Customs union and WTO accession

On 3 June 1997, the heads of governments of Russia, Belarus, Kazakhstan and Kyrgyzstan signed the Protocol on International Trade Negotiations of the Parties to the Customs Union Agreements during Accession to the WTO. Uzbekistan acceded to the protocol following its entry into the EurAsEC. The protocol recognizes the right to independent accession to the WTO, and calls on the parties to coordinate their accession negotiations through the exchange of information and consultations on the strategy and tactics of the negotiations.

[46] WTO, *Working Party on the Accession of Ukraine – Report of the Working Party on the Accession of Ukraine to the World Trade Organization*, 25 January 2008, paras 506–7.
[47] Ibid, para 506.
[48] Wikipedia (n 45).

Table 2. WTO Accession Status of EurAsEC Members

	Belarus	Kazakhstan	Russia	Tajikistan	Uzbekistan
Application received	23 September 1993	29 January 1996	June 1993	29 May 2001	8 December 1994
Working party established	27 October 1993	6 February 1996	16–17 June 1993	18 July 2001	21 December 1994
Memorandum	16 January 1996	23 September 1996	1 March 1994 25 October 1995 27 October 1995 7 April 1997	21 February 2003	21, 26 and 27 October 1998
Questions and replies	17 January 1997	3 February 1997	2 June 1995	9 September 2003	12 October 1999 27 April 2000 19 January 2001
Meetings of the working party	5 June 1997 28 April 1998 5 March 2001 24 January 2003 30 January 2004 30 September 2004 24 May 2005	19–20 March 1997 9 October 1997 9 October 1998 12–13 July 2001 13 December 2002 4 March 2004 3 November 2004 1 November 2006	17–19 July and 4–6 December 1995 30–31 May and 15 October 1996 15 April, 22–23 July and 9–10 December 1997 29–30 July and 16–17 December 1998 25–26 May and 18–19 December 2000 26–27 June 2001 23–24 January, 25 April, 20 June and 16 December 2002 10 January, 6 March, 10 April, 10 July and 30 October 2003 5 February, 2 April, 16 July and 8 November 2004 17 February, 15 April, 24 June and 19 October 2005 23 March 2006	18 March 2004 26 April 2005 6 October 2006	17 July 2002 29 June 2004 14 October 2005

(continued)

Table 2. Continued

	Belarus	Kazakhstan	Russia	Tajikistan	Uzbekistan
Recently submitted documentation					
(a) Additional Questions & Replies	14 September 2005	29 May 2006	24 January 2005	29 March 2006	2 August 2006
(b) Information on agriculture	13 September 2004	18 May 2005	18 March 2008	4 April 2006	1 June 2004 21 September 2005
(c) Information on services		19 September 1997	25 October 1995		
(d) SPS/TBT checklists	8 September 2004	16 November 2005 (SPS) 16 November 2005 (TBT)	10 July 1997 (TBT) 26 June 2007 (SPS)	27 February 2004 (SPS) 27 February 2004 (TBT)	2 June 2005 (TBT) 2 June 2005 (SPS)
(e) TRIPS checklist	14 January 2003	22 September 2000	25 October 2000	27 February 2004	7 October 2005
(f) Legislative Action Plan	15 December 2006	31 October 2006 (General) 25 May 2005 (TRIPS) 30 October 2006 (TBT) 16 November 2005 (SPS)	14 August 2007	2 June 2006	27 March 2007
Market access negotiations					
Goods Offer	17 March 1998	19 September 1997	16 February 1998	27 February 2004	2 September 2005
(a) initial	30 May 2006	28 June 2004	15 February 2001	2 June 2006	
(b) latest					
Services Offer	25 February 2000	19 September 1997	8 October 1999	27 February 2004	7 September 2005
(a) initial	18 September 2006	28 June 2004	15 February 2001	9 June 2006	
(b) latest					
Factual summary	22 July 2004 25 June 2007	9 October 1997 3 September 2004		13 April 2005 9 May 2006	
Draft working party report		20 May 2005 29 September 2006	28 March 2002 15 October 2004		

Based on each candidate country's accession profile, available at WTO, 'Members and Observers', <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 January 2009.

In 1998, Kyrgyzstan joined the WTO with substantially lowered national tariff. Kyrgyzstan's bound tariff envisages zero-rate import duties for 45% of the goods in the EurAsEC commodities nomenclature. The level of coincidence of the Kyrgyz tariff with the EurAsEC commodities nomenclature states at 19%, or at 33% if compared to the EurAsEC CCT base list.[49] This has been a serious impediment in the process of the unification of the CCT. Therefore, in 2002 the members agreed to improve the coordination mechanism for negotiations through a number of the following measures. First, they decided to follow, to the largest extent possible, Russia's accession positions. For instance, Belarus has fully accepted Russia's market access offers. Tajikistan's goods and services offers submitted to the WTO Secretariat are based on Russia and Kazakhstan's offers. Second, the members agreed to promptly coordinate their negotiating positions through both bilateral and multilateral consultations. In particular, every three months the heads of national negotiation delegations hold consultations in which they report on the progress in their accession talks. Third, should a EurAsEC member join the WTO, it will support the other members in entering the WTO.[50] The current status of WTO accession of five EurAsEC members is demonstrated in Table 2.

In April 1999, Kyrgyzstan notified the Customs Union Agreement to the WTO.[51] The agreement in question covers only trade in goods, so the notification was made under GATT Article XXIV. The agreement, which was characterized as an 'interim agreement' leading to the formation of a customs union, is currently under review by the WTO Committee on Regional Trade Agreements (RTAs).[52] This case is in fact very peculiar in that although most RTAs have been implemented by stages, only a few have expressly been notified as 'interim agreements'.[53] The following analysis is currently pertinent to Kyrgyzstan, and becomes of relevance to any other EurAsEC member once it joins the WTO in the future.

B. WTO-membership requirement

The notified Customs Union Agreement is concluded between a WTO member (Kyrgyzstan) and non-WTO members (other relevant CIS

[49] Rapota *et al.* (n 12) 44–5. For the EurAsEC CCT base list, see Section III:A of this article.
[50] Rapota *et al.* (n 12) 52–3; Grigory Rapota, 'Eurasian Economic Community: Purposes, Tasks and Prospects' [in Russian], 2004 <http://www.evrazes.com/ru/main/infopage/81/> accessed 10 June 2008.
[51] WTO, *Working Party on the Accession of the Kyrgyz Republic – Accession of the Kyrgyz Republic – Notification from the Kyrgyz Republic*, WT/ACC/KGZ/30, WT/REG71/1, 6 April 1999.
[52] See WTO, 'Regional Trade Agreements Notified to the GATT/WTO and in Force' <http://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 5 June 2008.
[53] See WTO, *Committee on Regional Trade Agreements – Synopsis of 'Systemic' Issues Related to Regional Trade Agreements – Note by the Secretariat*, WT/REG/W/37, 2 March 2000, para 47.

countries). Article XXIV:5 of the GATT reads:

> [T]he provisions of this Agreement shall not prevent, *as between the territories of contracting parties*, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area. (emphasis added)

The language of this provision allows one to draw the following conclusions. First, RTAs between a WTO member and a non-member would run counter to this provision.[54] WTO members would arguably oppose such RTAs, because products from the non-member would be treated more favorably to the detriment of other WTO members' products. Second, what is not prevented by the GATT is the 'formation' of RTAs and the 'adoption of the interim agreement', rather than RTAs as such. Finally, RTAs between non-WTO members do not fall within the scope of GATT Article XXIV.

Notwithstanding this provision, RTAs between a WTO member and a non-WTO member are not entirely outlawed. For instance, the WTO member who is a party to such an RTA can secure approval by a two-thirds majority of the WTO members pursuant to GATT Article XXIV:10. A waiver under Article IX:3 of the Marrakesh Agreement Establishing the WTO would be another possible option.[55]

With respect to the EurAsEC customs union, one needs to draw a line between the existing free trade area among its members and a customs union which is expected to be created some time in the future. The free trade area was established prior to Kyrgyzstan's WTO accession according to the CIS FTA and bilateral FTAs. Given that Kyrgyzstan is the first EurAsEC country that entered the WTO, the fact is that the EurAsEC free trade area was created among non-WTO members. As for the Customs Union Agreement, this 'interim agreement' was also adopted before Kyrgyzstan's accession to the WTO. Accordingly, the provision in question does not apply to the FTA and the interim agreement concerned. The only challengeable aspect of the EurAsEC customs union may be the 'formation' of this union. Since on 16 August 2006, the heads of State of the EurAsEC countries decided that a customs union would be launched first among Russia, Belarus and Kazakhstan—the countries with most similar external trade policy—with the remaining members joining subsequently, the Article XXIV:5 requirement for intra-WTO RTAs remains irrelevant to Kyrgyzstan at this point.

[54] For a comprehensive study on this issue see Won-Mog Choi, 'Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States', 8 JIEL 825 (2005).

[55] Ibid, at 859. See also GATT Analytical Index, *Guide to GATT Law and Practice*, vol. 2 (Geneva 1995) 798–9 and 829.

C. Internal requirement

GATT Article XXIV sets forth both internal and external requirements for customs unions. The internal requirement as formulated in GATT Article XXIV:8(a)(i) states that:

> [D]uties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.

The words 'substantially all' suggest that custom union members do not necessarily have to liberalize the whole trade between them. Unfortunately, WTO members have failed to clarify the extent of intra-RTA trade, namely RTA's product coverage. While some have supported a quantitative approach specifying a statistical benchmark for intra-RTA trade, others have emphasized the need for a qualitative approach that would prevent the exclusion of any (major) sector of trade from intra-RTA liberalization.[56] Since no approach has prevailed so far, one way of compromise would be to combine them. In this respect, Australia, for instance, has proposed that the 'substantially all' threshold include 95% of all six-digit tariff lines listed in the Harmonized System, to be complemented by an assessment of prospective trade flows at various stages of implementation of an RTA. Such assessment would prevent the 95% figure from exempting sizeable trade flows in a situation where trade is concentrated in only few products.[57] Australia's approach sets out a numerical standard and seems to prevent the exclusion of major trade sectors. As another option to break the deadlock in this long-lasting debate, this author suggests that WTO members accept both quantitative and qualitative approaches as alternatives and adopt clear criteria for both of them, including the definition of 'sector'.[58] Accordingly, any notified RTA satisfying the criteria under one of the approaches could be said to meet the internal requirement.

Given that the free trade regime among EurAsEC members applies 'with no exceptions or restrictions' as to the product coverage, the 'substantially all the trade' standard in relation to duties is fully met.

[56] See WTO, WT/REG/W/37, above (n 53), paras 52–5.

[57] WTO, *Committee on Regional Trade Agreements – Communication from Australia – Addendum*, WT/REG/W/22/Add.1, 24 April 1998.

[58] The determination of 'sector' in goods trade, however, seems to be quite a difficult task. For example, for the purpose of retaliation, DSU Article 22.3(f) defines 'sector' in trade in goods as 'all goods', whereas giving more specific definitions for 'sector' in services trade and TRIPS.

As for 'other restrictive regulations of commerce' such as trade remedies,[59] it is not clear whether anti-dumping, countervailing and safeguard measures are (or must be) prohibited in the intra-RTA trade. A clue to this puzzle lies in the questions as to (i) whether the exceptions list in the parenthesis is exhaustive and (ii) whether the prohibition or permission of trade remedies is absolute. Concerning the first question, the claim that the list is exhaustive (trade remedy rules of GATT Articles VI and XIX are not mentioned in the list) suggests that the abolition of trade remedies in intra-RTA trade is mandatory,[60] while the proposition to the contrary[61] suggests non-prevention of trade remedies in intra-RTA trade. The answer to the second question sheds some light on this controversial issue. Notably, the alleged prohibition (elimination) of trade remedies is qualified by the words '*substantially* all the trade', whereas the alleged permission is qualified by the phrase 'where necessary' in parenthesis. Thus, neither prohibition nor permission of trade remedies is absolute. This leaves some room for the application of trade remedies in intra-trade, albeit subject to different limits depending on whether the 'permission' or 'prohibition' viewpoint is prevailing.

The EurAsEC trade remedy rules in their present version seem to perfectly fall within this 'permission/prohibition' dichotomy. According to the Protocol on Mechanisms of Application of Safeguards, Anti-dumping and Countervailing Measures in Trade of the Customs Union Member States (adopted on 17 February 2000 and amended on 28 October 2003), in case of an intra-RTA trade remedy, the member seeking that measure invites, not later than 30 days prior to the expected termination of investigations, the interested member(s) to enter into consultations and suggests settlement methods alternative to the trade remedy sought. In the course of consultations, the parties should endeavor to reach a mutually satisfactory solution precluding the anti-dumping, countervailing or safeguard measure—as the case may be.[62] If such a solution is not reached, the matter is to be referred to the Commission for Protection of Domestic Markets under the Integration Committee.[63] The Commission should basically recommend an alternative means of settlement or a less-restrictive measure than that sought

[59] The purpose and effect of anti-dumping, countervailing and safeguard measures is to restrict importation of certain goods.

[60] See eg Angela T Gobbi Estrella and Gary N Horlik, 'Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling', in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP, Oxford 2006) 121–36.

[61] See eg Dukgeun Ahn, 'Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules', 11 JIEL 107 (2008) 120–1.

[62] Article 4 of the Protocol on Mechanisms of Application of Safeguards, Anti-dumping and Countervailing Measures in Trade of the Customs Union Member States.

[63] Articles 3 and 4 of the Protocol on Mechanisms of Application of Safeguards, Anti-dumping and Countervailing Measures in Trade of the Customs Union Member States.

by the investigating member. The investigating member should endeavor to implement Commission's recommendations. If the member does not agree with the Commission's recommendations, it is free, subject to a prior notification of the Commission, to apply measures to protect its domestic market in accordance with its legislation.[64] In case of urgency, the member concerned may take, prior to consultations, provisional measures provided that the consultations will immediately be held and the measures applied will be notified to the Integration Committee.[65]

From the protocol it is evident that trade remedies are not desirable protective measures in intra-trade. This is even more obvious from the Decision of the EurAsEC Interstate Council of 13 May 2002 where the members explicitly stated their intention not to apply trade remedies in their mutual trade in the future. While Belarus, Kazakhstan, Kyrgyzstan and Tajikistan have supported the idea of a treaty-based principle of non-application of trade remedies in EurAsEC trade, Russia has considered this approach premature. It was thus agreed to implement the non-application principle on a step-by-step basis with developing alternative mechanisms of protection of domestic industries.[66]

D. External requirement

The external requirement for customs unions consists of three elements, such as:

(1) the harmonization of external trade regimes of customs union members;
(2) constraints on more restrictive trade barriers *vis-à-vis* third countries;
(3) adequate compensation for unjustifiable trade barriers *vis-à-vis* third countries.

The first element deals with the creation of a common commercial policy of a custom union whereby 'substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union'.[67] The first-element test has both quantitative and qualitative features with the quantitative aspect more

[64] Article 4a of the Protocol on Mechanisms of Application of Safeguards, Anti-dumping and Countervailing Measures in Trade of the Customs Union Member States.
[65] Article 12 of the Protocol on Mechanisms of Application of Safeguards, Anti-dumping and Countervailing Measures in Trade of the Customs Union Member States.
[66] EurAsEC Inter-Parliamentary Assembly, 'Comparative Legal Analysis of EurAsEC Member States' Legislations in the Field of Safeguard, Anti-Dumping and Countervailing Measures with Particular Reference to the Provisions of the GATT 1994, SCM Agreement and Safeguards Agreement' [in Russian], Annex to Resolution No. 4-16 of 16 June 2003.
[67] Article XXIV:8(a)(ii) of the GATT.

emphasized in relation to customs duties.[68] A customs union with a uniform external trade regime consisting of the same duties and regulations of commerce would be an ideal way to satisfy the first-element criterion. However, the words '*substantially* the same' give its constituent members some latitude in deviating from the common commercial policy.[69] Accordingly, with respect to duties, there seem to be three ways to meet the requirements of the first element. The first possibility for the member countries would be to unify their external tariff to as the highest as a degree of convergence as possible. In other words, they would apply the same duties to the largest portion of goods in the commodities nomenclature whereas maintaining different duties for residual goods. Unlike this 'radical unification' approach, another option for them would be to apply virtually the same duties to all products in the commodities nomenclature. The third alternative would combine the two approaches by maintaining identical duties on certain products and nearly the same duties on the rest of the products. In this context, it should be recalled that a customs union is understood to mean 'the substitution of a single customs territory for two or more customs territories'.[70] The term 'customs territory' is defined as being 'any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories'.[71] The language of these inter-linked provisions seems to suggest that the common commercial policy for the single customs territory (customs union) should apply to the 'substantial part' of the trade with third countries. Thus, the aforementioned 'radical unification' approach would be the most appropriate way of satisfying the first-element standard. As a result, in order to accomplish the first-element test, one needs to look at the degree of convergence of national tariffs.

As to Kyrgyzstan's case, one WTO member raised a question as to whether the general 15% threshold for 'sensitive goods' not covered by the CCT[72] satisfies the 'substantially all the trade' requirement. Since the 'substantially all the trade' requirement is pertinent to intra-trade rather than extra-trade which involves, *inter alia*, sensitive goods, the 15% threshold does not have anything to do with this requirement. Rather the question is whether it satisfies the above-mentioned standard of 'substantially the same duties'.[73] Each member of the EurAsEC is free to use its own tariff

[68] WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, WT/DS34/AB/R, adopted 19 November 1999, para 49.
[69] Ibid, paras 49–50.
[70] Article XXIV:8(a) of the GATT.
[71] Article XXIV:2 of the GATT.
[72] See Section IV:A of this article.
[73] WTO, *Committee on Regional Trade Agreements – Customs Union between the Kyrgyz Republic, the Russian Federation, Belarus, Kazakhstan and Tajikistan – Questions and Replies*, WT/REG71/6, 3 January 2001, Answer to Question 4.

rates for sensitive goods. The sensitive goods threshold is subject to regular change. Under the 'radical unification' test, it would be more appropriate to look at the range of products excluded from the CCT scope rather than this threshold which is based on the value of imports. In 2005, the consolidated EurAsEC list of sensitive goods included about 3000 items or 25% of the EurAsEC commodities nomenclature. Accordingly, the remaining 75% of tariff lines were subject to unification. Given that the modification of the sensitive goods threshold has shown a downward trend so far,[74] it may be expected that the unification rate will exceed 75%. The higher this rate, the higher the probability of compliance with the first-element requirement will be.

With respect to 'other regulations of commerce', the Appellate Body in *Turkey – Textiles* observed that 'comparable' trade regulations having similar effects with respect to the trade with third countries were not sufficient to meet the terms of sub-paragraph 8(a)(ii). Rather a higher degree of 'sameness' was required.[75] Since the EurAsEC members have adopted, through corresponding agreements, single rules on trade remedies, non-tariff measures and common rules of origin *vis-à-vis* third countries that mostly reiterate relevant WTO provisions, it can be concluded that the EurAsEC customs union satisfy the first-element requirements set forth for 'other regulations of commerce'.

The second element of the external requirement implies that a customs union must not result in increased trade barriers *vis-à-vis* third countries. Specifically, GATT Article XXIV:5(a) states that:

> [W]ith respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not *on the whole* be higher or more restrictive than *the general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be. (emphasis added)

The words 'on the whole' and 'the general incidence' suggest that the comparison of duties before and after the formation of a customs union should not be conducted with respect to each individual product, but for a broader or even the entire range of products.[76] In particular, this would require an 'overall assessment of weighted average tariff rates and of customs

[74] According to the most recent data available, the 15% threshold was reduced in 2004 and 2005 to 8% and 5% respectively. Rapota *et al.* (n 12) 44.

[75] See WTO Appellate Body Report, *Turkey – Textiles* (n 68) para 50.

[76] For the drafting history and debate on this issue, see GATT Analytical Index (n 55) 803–5.

duties collected' where applied rates of duty (ie not bound rates) should be taken into account.[77] As to 'other regulations of commerce' such as eg trade remedies, 'for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required'.[78]

Finally, the third element is formulated in GATT Article XXIV:6 as follows:

> If, in fulfilling the requirements of subparagraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the [customs] union.

If Kyrgyzstan increases its WTO bound duties to comply with the CCT, it will have to compensate for the increase by granting a new concession. However, Kyrgyzstan should enter into GATT Article XXVIII negotiations and consultations 'before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union'.[79] WTO members that have an 'initial negotiating right', 'principal supplying interest' or 'substantial interest' in the concession concerned are entitled to participate in the Article XXVIII procedures. If no agreement on compensatory adjustment is reached, Kyrgyzstan is free to proceed with the modification of its WTO schedule, but the affected members are entitled to withdraw substantially equivalent concessions.[80] The second sentence of Article XXIV:6 will be pertinent only when at least one more EurAsEC member joins the WTO, and the establishment of the customs union will result in lowering of that member's duties. In this case, such reductions of duties will be taken into account if Kyrgyzstan will be intending to increase its duties on the same tariff lines. Should these reductions be insufficient, compensatory adjustment may be offered on other tariff lines. It should be noted that other WTO members benefiting from such duty reductions will not have an obligation to provide compensation to the constituents of the EurAsEC customs union.[81]

[77] Paragraph 2 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[78] Ibid.
[79] Paragraph 4 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[80] Article XXVIII:3 of the GATT.
[81] Paragraphs 5–6 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

E. Transition period

Finally, any interim agreement for a customs union or a free trade area is required to 'include a plan and schedule for the formation of such a customs union or of such a free trade area within a reasonable length of time'.[82] The 'reasonable length of time' is considered maximum 10 years, and may be prolonged only in exceptional cases, provided that WTO members parties to the interim RTA submit to the WTO Council for Trade in Goods 'a full explanation' of why a longer period is needed.[83]

As for the EurAsEC case, the CCT Agreement seems to contain a sort of the 'schedule' required by the GATT. As noted above, the transition period for the introduction of the EurAsEC CCT—the indispensible element of a customs union—is 5 years with a possible prolongation. Given that the EurAsEC members determine the time frames for the complete formation of the customs union 'with account of generally recognized international norms and rules',[84] WTO requirements for the 'reasonable length of time' can serve as such norms.[85] Since the CCT Agreement took effect on 31 August 2000, the 'reasonable length of time' for the EurAsEC customs union would be till 31 August 2010 unless it is properly extended. If the EurAsEC Secretary-General's recent announcement that the customs union will be created by 2010[86] is indeed put into practice, the EurAsEC customs union will be able to satisfy the requirements of the 'reasonable length of time'.

VI. CONCLUSION

One of the peculiarities of CIS trade integration is that it was launched by non-WTO members. After the collapse of the Soviet Union, the re-establishment of free trade that had *de facto* functioned within the Soviet Union was a priority issue on the political agenda of the newly independent States. At the same time, their wish to integrate into the multilateral trading system induced them to incorporate WTO standards into their RTAs. From this perspective, CIS regionalism serves as a stepping stone rather than a stumbling block to the multilateral trading system. Another distinctive feature is that integration in the CIS proceeds at diverse speed and different levels. This ensures that CIS countries remain integrated at least at the

[82] Article XXIV:5(c) of the GATT.
[83] Paragraph 3 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[84] Article 23 of the Treaty on Customs Union and Single Economic Space.
[85] See also WTO, WT/REG71/6 (n 73) Answer to Question 2.
[86] Interfax, 'Trade Turnover between EurAsEC Countries Reached about $100 billion, Customs Union on the Agenda' [in Russian], 25 April 2008 <http://www.evrazes.com/ru/main/messagepage/769/> accessed 19 June 2008.

FTA level while being given the opportunity to upgrade their integration on flexible conditions.

In search of an appropriate integration paradigm, the CIS countries have produced a large number of documents that often have a similar subject matter. Overlapping disciplines adopted within different frameworks such as the CIS, the EurAsEC and the SES, coupled with bilateral instruments with similar content are today's reality in CIS trade integration.[87] Under these circumstances, it is no surprise that in the course of the WTO review of the notified RTAs, WTO members have frequently questioned new-comer members from the CIS about eg the relationship between trade agreements concluded in different frameworks.[88] The existence of overlapping rules is itself a barrier to intense trade integration, and may bring about confusion in their application. Certainly, there is a need to revise and coordinate the existing norms.

The formation of a customs union has proved to be a more difficult task for the countries in the region than initially expected. The lack of compromise over consolidation of foreign policy caused the CIS economic union and the SES projects to come to a deadlock. Only the EurAsEC has remained as a functional project in terms of the formation of a long-awaited customs union, though it still faces certain challenges from its members' WTO accession bids. Although the members chose to operate the customs union project in parallel with the forthcoming WTO accession, the WTO accession of a EurAsEC member prior to the creation of the customs union may overshadow the future of the project. Thus it is suggested that the EurAsEC countries first create the customs union and then join the WTO (individually or as a customs union) with the market access offers based on the CCT. This pre-WTO scenario would preclude the risk of widening the gap in the harmonization of external trade regimes[89] and possible countermeasures within the EurAsEC.[90] Alternatively, the EurAsEC members

[87] For example, the Agreement on the Fundamentals of Harmonization of Technical Regulations of the EurAsEC Member States (24 March 2005) and the CIS Agreement on Technical Barriers within a Free Trade Area (20 June 2000) are both applicable to the EurAsEC members. There is some difference in the definition of 'technical regulation' given in the two agreements, so a conflict of norms may arise.

[88] See eg WTO documents, WT/REG173/4/Rev.1 (11 May 2007), WT/REG74/5 (12 March 2004) and WT/REG71/6/Add.1 (11 May 2001).

[89] This is what happened after Kyrgyzstan's WTO entry.

[90] For example, according to Degree No 1042 (29 December 2008) 'On Measures of the State Regulation to Regulate Imports from Ukraine into the Customs Territory of the Russian Federation,' the Russian government extended the existing customs duty on Ukraine's sugar and ordered its customs authorities to monitor imports of certain food products and alcohol from Ukraine so as to decide on further customs measures on the Ukraine's imports. After Ukraine's accession to the WTO in May 2008, Russian officials became wary of possible duty-free re-exports from third countries due to the existing free trade regime between Russia and Ukraine. BNA International Trade Daily, 'Russia to Regulate Ukrainian Imports due to Concerns of Possible Re-Exports', 13 January 2009.

could continue to coordinate WTO-entry negotiations but finalize the formation of the customs union once they all (or at least Russia, Belarus and Kazakhstan as original founders) will be able to join the WTO. In this case, the coordination mechanism would ensure smooth modification, in the future, of each member's bound concessions needed for the establishment of the CCT.