WTO Rules and Procedures related to RTAs

RTPC for CEECAC Countries
Istanbul, 4 August – 26 September 2014
WTO Rules on RTAs

- Overview
- GATT Article XXIV and the 1994 Understanding
- The “Enabling Clause”
- GATS Article V
Overview

- WTO Preamble

  “… the elimination of discriminatory treatment in international relations” is an objective of the MTS

- The MFN commitment is a fundamental instrument for achieving that aim.

Any preferential trade regime of a Member in favour of a trading partner (e.g. an RTA) needs a derogation to avoid legal inconsistency with the MFN rule.
Overview

- The WTO Member has always the possibility of seeking a waiver...

- BUT, over time, the System itself has developed a series of conditional exceptions which Members can invoke when departing from their MFN commitment:
  - Since 1947 → GATT Article XXIV
  - Since 1979 → “Enabling Clause”
  - Since 1994 → Understanding on GATT Art. XXIV
  - Since 1994 → GATS Article V
  - Since 2006 → GC Decision on Transparency of RTAs
The purpose of an RTA is to **facilitate trade** among the parties.

The attainment of internal trade liberalization must **not** entail placing **barriers** towards third parties **higher** than those existing before the formation of the RTA.

The RTA must provide for **mutual/reciprocal** trade concessions.

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GATT Article XXIV & Understanding

Provides for agreements which result in the establishment, among WTO Members, of 2 types of trade relations:

- Customs unions
- Free-trade areas

It also provides for:

- Interim agreements
- CU/FTAs implemented in stages, over a transition period
GATT Article XXIV & Understanding

Fundamental conditions:

Type of RTA
The RTA qualifies as a CU/FTA, or leads to one or the other

Neutrality
The formation of the RTA does not imply the application of more restrictive trade measures *vis-à-vis* non-parties that are WTO Members.

Definitions of XXIV:8

Criteria of XXIV:5
1. Definition & Criteria of XXIV:8

**Customs union?**

**Tariffs and ORRCs are eliminated on substantially all trade (originating) among the parties (Article XXIV:8)**

**Free-trade area?**

**Tariffs and ORCs are substantially harmonized among the parties (Article XXIV:8(a)(ii))**
GATT Article XXIV & Understanding

- In practice

- Customs union?
- Free-trade area?

FREE TRADE AMONG THE PARTIES with BROAD PRODUCT COVERAGE

BROADLY, COMMON FORMULATION OF TRADE POLICY

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GATT Article XXIV & Understanding

- Meaning of “substantially” (XXIV:8(a)(i) & (ii), and (b)) and “substantial” (XXIV:7(c))?

- How to ascertain the coverage of “major sectors”?

- Reduction X Elimination of duties?

- What are “other restrictive regulations of commerce”?

- Can parties to an RTA provide for the application of trade remedy actions (anti-dumping measures; countervailing measures; and safeguards) among themselves?

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2. Neutrality of XXIV:5: Criteria

Parties to a FTA
- Standstill in MFN (applied) duties and ORCs (Article XXIV:5(b))

Customs union
- On average, no increase in applied MFN duties (Article XXIV:5(a)): the “general incidence”
- Possible individual analysis of ORCs
GATT Article XXIV & Understanding

3. «Interim agreements»: Requirements

- To lead to either a FTA or a CU
- To contain a plan and schedule to achieve that aim (Article XXIV:5(c)).

- A maximum transition period of 10 years (unless “exceptional circumstances”) (para 3 of Understanding).
  - Transition periods may be asymmetrical
- Not to be put in force or maintained unless any WTO recommended modification has been made by the parties (para 10 of Understanding).
4. Customs Unions: Requirements

- General incidence calculation

- If the application of the CET leads to a break of bindings

  Renegotiation of tariff bindings, as per procedures of paras. 4-6 of the Understanding

Will see later in the Course
GATT Article XXIV & Understanding

4. Dispute Settlement: Para. 12 of the Understanding

WTO dispute settlement provisions “may be invoked with respect to any matters arising from the application of those provisions of Article XXIV…”

Any disputes involving Article XXIV?
Article XXIV Disputes

- Exception to Art. I GATT
- Jurisdiction of Panels
- Nature of §4
- Turkey - Textiles 1999 (DS34)
- Burden of proof
- Other GATT rules: necessity test
- Flexibility CETR: degree of "sameness" higher than "comparable"

- CU compatible with XXIV
- Needed for the establishment of the CU

- “Parallelism” in global /bilateral safeguards: Argentina - Footwear (DS121)

**NO RTA has been challenged as such!**
Enabling Clause

WTO developing country Members are authorized (En Cl, para. 2(c)) to depart from the MFN clause (Article I), when concluding:

1. Preferential regional or global arrangements,
2. among themselves,
3. containing mutual concessions,
4. on (reduced or zero) tariffs,
5. and non-tariff measures subject to WTO guidelines, in principle.

- Para. 4: Notification and “consultations “ (En Cl) at the request of other Members → overtaken by TM disciplines
- Additional criteria are contained in para. 3(a) & (b)
Enabling Clause vs GATT XXIV

=
- Goods only
- Reciprocity
- Neutrality criterion

≠
- Enabling Clause only an option among developing countries
- Reduction OR elimination of tariffs (Enabling Clause) vs. elimination of duties (GATT XXIV)...
- ...and reduction OR elimination of non-tariff barriers vs. elimination of ORRCs

Partial scope agreements
GATS Article V permits Members to establish **economic integration agreements** as a departure from MFN disciplines, but certain **conditions** apply:

- **Trade liberalization among parties** should cover a **broad range of services** activities.

- **No** non-party WTO Member should encounter a **higher overall level of barriers** to its services trade as a result of the RTA.
GATS Article V

1. Intra-trade requirements of Art. V:1:

- EIA has “substantial sectoral coverage”
  
  as regards number of sectors, trade affected, modes of supply

- EIA has no *a priori* exclusion of any of the 4 modes of supply for the sectors covered

- In the sectors covered, substantially all discrimination should be absent
  
  elimination of existing & prohibition of new or more restrictive discriminatory measures
GATS Article V

2. Neutrality requirements of Art. V:4

- Assessment of “the overall level of barriers”? 
  - Unclear!
  - However, as in GATT Art. XXIV, to maintain the balance of rights and obligations within the GATS

3. Additional requirement of Art. V:5

- If, when entering the agreement, a Member’s WTO specific commitments are made more restrictive, these should be renegotiated
  - Procedures of Art. XXI
GATS Article V

4. S&D provisions

- Developing countries participating in an EIA are granted flexibility in terms of:

  Overall and individual sectors and subsectors

  Art. V:3(a)

- If the EIA is only among developing countries:

  Preferences may be granted only to the parties’ “own” service providers

  Art. V:3(b)
### Summing-up

WTO Legal Cover for preferential treatment in the context of an RTA

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**Or alternatively request a WAIVER!**