

A LATIN AMERICA PERSPECTIVE ON REFORM OF ARTICLE XXIV

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FACTS

- As of November 2000
 - More than 200 RTAs notified (since 1948)
 - 140 in force
 - Only four members are not part in any
 - Half of WTO members are part in at least four.
 - 60% of Rtas concluded among developed countries
 - 15% concluded among developing countries
 - 90% are FTAs

FACTS

- completed.
 - None report yet approved
 - Aladi, Ancom. Mercosur have notified under the 86 RTAs under examination by the CRTA. 62 enabling clause and only the latter is under examination
 - 50% of global commerce
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- Number of RTAs significantly higher

GENERAL OBJECTIVE OF RTAs

- Liberalize or facilitate trade in a regional basis
 - Establishes an element of preference in the trade between the parties to the agreement
- Distinctive element: discrimination

LEGAL BASIS

- A. XXIV of the Gatt 1994 (p. 4-10)
- Understanding on its interpretation of the Gatt 1994
- The 1979 Gatt Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries “Enabling Clause” (p. 2.c, 3 and 4)
- A. V of the Gatts
- The Marrakesh agreement establishing the WTO,
- The Gatt Agreement on Safeguards

LEGAL BASIS

- Key case: Turkey restrictions on imports of textiles and clothing products and the appellate body report (WT/D534/R) (WT/D534/AB/R).
- Also: US definite safeguard measures on imports in Wheat gluten from the EC /WT/DS166/AB/R. US Safeguard measures on imports of fresh chilled or frozen lamb meat from New Zealand and Australia (WT/DS177.178/AB/R).

SCOPE

- A. V and XXIV rules specifically apply to free trade areas and customs unions and interim agreements for their formation.
- The enabling clause rules apply to any preferential agreement between developing countries or developed countries and developing countries, including non-reciprocal preferential agreements (GSP)

EFFECTS

- MFN derogation (cornerstone provision of the WTO)
- Permits to take otherwise Gatt (s)-illegal policy measures in goods (services) trade if necessary to the formation of a RTA subject to compliance of certain criteria

SUBSTANTIVE CRITERIA

- For Custom Unions.
 - not imply and increase in weighted average of tariffs or other barriers. Tariffs or other commercial measures shall not on the whole be higher more restrictive or higher than the general incidence of the duties and other regulation of commerce applied prior to its formation.
 - tariffs and other trade measures should be eliminated on substantially all the trade among the parties or at least with respect to substantially all the trade in products originating in such territories

SUBSTANTIVE CRITERIA

- For Custom Unions.
 - Those should be substantially harmonized for application to non-members (common external tariff an policy)
 - Any resulting increase in MFN tariff bindings should be negotiated with interested members (according to A. XXVIII)
- The new tariff stays
- The member shall compensate
- The union shall compensate
- Right to retaliate
- No reverse compensation

SUBSTANTIVE CRITERIA

- Interesting aspects: Renegotiation of tariff bindings in cases where the adoption of the CU leads a party in the union to apply higher tariffs than those recorded in its WTO schedule of Concessions. There can be new restrictions

SUBSTANTIVE CRITERIA

- For free-trade areas.
 - not imply and increase in tariffs or a making of other commercial regulations more restrictive than those existing prior to its formation.
 - tariffs and other trade measures should be eliminated on substantially all the trade among the parties.
 - Substantial harmonization.

SUBSTANTIVE CRITERIA

- For Interim Agreements
 - Should aim to facilitate trade between parties and not raise barriers to the trade of third parties
 - Have a plan and schedule
 - 10 years or more

SUBSTANTIVE CRITERIA

- For the enabling clause
 - regional or global arrangements among developing countries
 - design shall facilitate and promote trade of developing countries and not raise barriers or create undue difficulties
 - shall not impede the reduction or elimination of tariffs or other restrictions to trade on an MFN basis.
 - tariff preferential arrangements are subject to WTO approval
 - non tariff preferences in goods, are not subject to approval.

SUBSTANTIVE CRITERIA

- Interesting aspect: no in-depth examination is involved. Permit the exchange of preferences on a sub-set of products and the partial reduction rather than the elimination of trade barriers.
- Mercosur case: adequacy of notifying developing countries CU under this clause.

SUBSTANTIVE CRITERIA

- For services:
 - do not raise overall trade barriers compared to prior levels
 - substantial sectoral coverage in terms of sectors, volume of trade and modes of supply
 - Non a priori exclusion of no mode of supply (flexibility for developing countries)
 - Absence or elimination of substantially all discrimination among the parties, in the sectors covered.
 - If commitments are made more restrictive, negotiations should take place
- Do not lead to the erection of new barriers (fortress

SUBSTANTIVE CRITERIA

- Interesting aspect: no “Enabling Clause”. Flexibility for developing countries: takes into consideration the wider process of economic integration or trade liberalization among the countries concerned. The absence or elimination of substantially all discrimination is not required

PROCEDURAL ASPECTS

- Prior Notification by the members
- Review by WTO members
- Consultation on request
- The council for trade in goods mandates examination automatically, the one in services may mandate and the Committee on Trade and Development in principle does not examine. Examinations are carried on by the Committee in RTA.
- No examination is required in agreements covering labour markets.

LESSONS FROM THE JURISPRUDENCE

- Turkey textiles Case:
 -)When an RTA is compatible with WTO it can they violate WTO provisions after it has been formed,
 -)CU should harmonize external trade regulation and tariffs.
 -)Members have the right to form RTAs, but if a member state wants to justify discrimination it must do so in the context of RTAs.
 -)Violation is only acceptable in the context of the formation if it is necessary for such purpose.

LESSONS FROM THE JURISPRUDENCE

- Turkey textiles Case:
 -)The entire agreement has to fully comply customs union criteria and substantial trade.
 -)Exceptional character of RTAs. The invoking country shall prove its nature.
- US safeguard measures Case: Safeguard is a right but cannot be imposed outside the FTA if a third country is not the source of imports.

THE DEBATE (Questions not yet answered)

- Relationship between A. XXIV and other WTO provisions
 - Only MFN derogation
 - Derogation of any other provision of the Gatt 1994 (IPL analysis, EU case)
- Nature of p. 4 of A XXIV (commerce creation/deviation)
 - Shall be satisfied
 - Shall not be satisfied

THE DEBATE (Questions not yet answered)

- Harmonization
 - - Substantially the same or it is necessary to harmonize all
- Substantially all the trade
 - Percentages (actual or potential trade)
 - assesstment of sectoral exclusions
 - coverage
 - tariff acceleration
 - In average not higher than prior.
- elimination of barriers where substantial trade exists.

THE DEBATE (Questions not yet answered)

- Are members authorized to have preferential treatment between them without having a FTA
- Other regulation of commerce:
- Shall all non tariff measures be assessed. Is this valid under the “Enabling Clause”
- Quantitative restrictions can be justified in the light of a CU

THE DEBATE (Questions not yet answered)

- Safeguard application. Exemption to partners
 - Does A. XXIV provide an exception to article 2.2. of the safeguard agreement (MFN basis)?
Can a WTO member party to an RTA exclude from the imposition of a safeguard measure imports from countries of the RTA.
- Rules of origin
- Competition
- Technical Obstacles, Sanitary and Phytosanitary measures
- Shall state aids and subsidies be translated into common obligations

THE DEBATE (Questions not yet answered)

- What is an interim agreement
- How long can the 10 year period be extended
- Which kind of obligations are enforceable at the beginning and during the transitional period
- Are the sectoral and non-discrimination requirements in services independent.

THE DEBATE (Questions not yet answered)

- How to prove consistency. How to know what is WTO consistent. If inconsistent what happens then (Nothing). Nobody has yet failed the test.
- Which are the consequences of none notification. It is mandatory but a green light to go ahead is not required. Only formal violation
- Which is the degree of supervision

FEATURES AND TRENDS

- End of dichotomy opposing multilateralism and regionalism
- Dinamic process: Surge on regional integration in the past decade. Size, scope, coverage, breath, range of topic. The depth of commitmets do not matter. Aims, objectives, models
- Motives vary from country to country, national security, mainteinace of peace, economic growth, political leverage or simple fear of being left behind.

FEATURES AND TRENDS

- Coverage has also expanded. Not only questions of access to the market of goods, but also services, environment, competition, labor, institutional, dispute settlement. Increasingly complex configurations.
- Common line: Regional trade arrangements serve to provide better access to markets.
- **CONCLUSION**
- **NO CLEAR CUT ASSESSMENT OF FULL CONSISTENCY WITH THE RULES**

CRITERIA FOR THE REVISION OF A. XXIV (Next Ministerial)

- The main problem on the table today is whether this proliferation creates a new situation forcing to redefine what is meant by RTAs as this not more only about neighboring states or liberalizing border impediments.
- Practical approach. (wherever there is discrimination)

CRITERIA FOR THE REVISION OF A. XXIV (Next Ministerial)

-)decrease barriers.
-)not eliminating all cost but substantial transaction costs
-)coverage in commitments not in depth.
-)Transparency
-)Consider provisions on special and differential treatment according to Doha. (p44) including the “Enabling Clause” and other relevant provisions of the WTO and issues of reciprocity
-)Consider the development aspects of RTAs (p.29)

CRITERIA FOR THE REVISION OF A. XXIV (Next Ministerial)

-)Consider participation of customs territories that have informed their intention to enter into negotiations for their consideration as members of the WTO.
-)Overlap of jurisdictions. Relation on substantive issues. Paralelling legal framework
-)Consider evolution beyond economics

L.A. COUNTRIES MAIN CONCERNS

- Failure in setting effective RTAs
- Validation of aims different from tariff reduction.
(Rtas responding to strategic reasons)
- What shall be the focus of future integration
- Growing interdependency
- Lost of flexibility

L.A. COUNTRIES MAIN CONCERNS

- Is the establishment of new and more predictable rules required for having a seat as a member?
- Which are the gains of a renegotiating process ?