

The GATT'S Exceptions

Preferential Trade Agreements

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- Economics Exceptions: Preferential trade agreements (PTAs), Preferential treatment of developing countries, Restrictions to address balance of payments problems, Trade remedies.
- Non-economic exceptions: Restrictions to address, for example, public morals, health, environmental protection, Restrictions to address national security's needs

Preferential trade agreements are essentially a major exception to the MFN (favorite nation=most favourable conditions must be extended to all members of the GATT) rule:

Why are they permitted?

- GATT Article XXIV:4

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of **closer integration** between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a **free-trade area should be to facilitate trade** between the constituent territories and **not to raise barriers to the trade of other contracting parties** with such territories.

Closer integration among **certain** WTO Members is seen as positive **only if** it is a step towards the goal of a higher level of trade liberalization **for all** of them. There are different forms of closer economic integration among countries.

The GATT refers to

- **FREE TRADE AREAS –FTAs in Article XXIV:8(b):**

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (...) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

- **Customs Unions-CUs in Article XXIV: 8(a)**

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that.

- (i) duties and other restrictive regulations of commerce (...) 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, and,
 - (ii) (...) **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.
- FTAs are by far the most common form of economic integration: e.g. NAFTA (now USMCA); EFTA (European Free Trade Association: Iceland, Liechtenstein, Norway, Switzerland)

- FTAs + CUs are usually referred to as **Regional Trade Agreements**. As ever more often they are entered into by countries that are not geographically close (EU-Korea; EU-Canada, a better name is «**Preferential Trade Agreement**»)
- **As of December 2023**, some 820 notifications of RTAs -**596 in force**- (counting goods, services, and accessions separately) had been received by the GATT/WTO.
- Of those in force: 330 notifications were made under Article XXIV of the GATT, 63 under the Enabling Clause, 203 under Article V of the GATS.
- The overall number of RTAs in force has been increasing steadily, a trend likely to be strengthened by the many RTAs currently under negotiations.
- Of these RTAs, Free Trade Agreements (FTAs) and partial scope agreements account for 90%, while customs unions account for 10%
- • These WTO figures correspond to **362 physical RTAs** (counting goods, services, and accessions together) **currently in force** (Source: WTO website, RTA Database)

Under which conditions free trade areas and customs unions are permitted?

- They have to respect both the definitions found in **Article XXIV:8** and the conditions for their formation in **Article XXIV:5**

For a **FTA** it is necessary that:

- **INTERNAL REQUIREMENT: duties** and restrictions on trade be **eliminated with respect to** substantially all trade **among the FTA members** (par. 8(b)); and
- **EXTERNAL REQUIREMENT: duties** or other regulations of commerce of the FTA members **towards third countries must not increase** («shall not be higher or more restrictive») at the time of the formation of the FTA (par.5(b))

For a **CU** it is necessary that:

- **INTERNAL REQUIREMENT: duties** and restrictions on trade be **eliminated with respect to** substantially all trade **among members of the CU** (par. 8(a));
- **EXTERNAL REQUIREMENT: substantially the same duties** and other regulations of commerce **are applied** by each of the CU's members towards third countries (par. 8(a)); and
- **EXTERNAL REQUIREMENT: external duties** and other regulations of commerce **must not be on the whole** higher than was the case prior to the formation of the CU (par. 5(a)).

What is meant with «**substantially all trade**»?

- **Turkey-Textiles:** «It is clear, though, that «substantially all the trade» (in subparagraph 8(a)(i)) is not the same as all the trade, and also that «substantially all the trade» is something considerably more than merely some of the trade....the terms of subparagraph 8(a)(i) offer **some flexibility** to the constituent members of a customs union...»

Which requirements are stricter, the ones for the formation of a FTA or those for the formation of a CU?

- Paragraph 5(b) (**FREE TRADE AREA**) is stricter, since it prohibits any increase of trade restrictions towards third countries.
- While paragraph 5(a) (**CUSTOMS UNION**) is more lenient: third countries duties and regulations only have to «**not be on the whole higher or more restrictive**» than their general incidence before the CU was formed.

What's the rationale for this difference?

- While the formation of a FTA doesn't need to touch the conditions granted to third countries, to form a CU the constituent countries **have to harmonize their external trade policy** (in FTA you can keep your same policy on tariffs than before. If you enter a CU you all have to have the same policy) : this may require some adjustments upward and downward, depending on what CU member we're looking at.

Procedure

- **Paragraph 7** introduces a duty of **notification** on WTO members in respect of all preferential agreements that they intend to enter into.
- Notification is due to the Committee on Regional Trade Agreements (CRTA) and is aimed at consenting the adoption of recommendations, but this procedure has proven quite inefficient; so in 2006 a new Transparency Mechanism has been adopted.
- **Developing Countries** Preferential agreements among developing Countries undergo less strict requirements: under the Enabling Clause there is no requirement on the elimination of internal barriers.

The **leading case: Turkey-Textiles**

- **Facts:** In 1995 Turkey and the European Community signed a customs union agreement.
- Before 1995 Turkey used to import textiles and clothing from India under a very liberal trade regime. On the contrary, the EU had in place very restrictive quotas on imports of textiles from India.
- In 1996 Turkey introduced quantitative restrictions on Indian textiles on the grounds that such measures were necessary for the entry into force of the CU with the EC.
- **Decision:** To justify the inconsistency of a CU with GATT provisions two conditions have to be satisfied:
 1. party must prove that the measure is introduced **upon the formation of a CU** that meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV;
 2. that party must demonstrate that **without the measure** at issue **the formation of the CU would be prevented**.

The Appellate Body agreed with the Panel's ultimate conclusion that Turkey's measures **were not justified under Art. XXIV** because there were alternatives available (rather than quantitative restrictions) to Turkey that would have met the requirements of Art. XXIV:8(a), which were necessary to form the customs union, other than the adoption of the quantitative restrictions.

Up to now Turkey –Textiles is the only case on Article XXIV: why?

- «**people who live in glass houses should not throw stones**»: every WTO member has at least one PTA in force (the last to sign one has been Mongolia - with Japan - in June 2016)
- For them to seek implementation and compliance with Article XXIV could work against their own interests.
- That's why **Article XXIV is so ineffective**: not only it has been only rarely invoked in the dispute settlement process, but also the Committee on Regional Trade Agreements (CRTA) **has approved only the Czech-Slovak CU**: Being the two constituent parties a former State, the fact that they maintained a CU after secession could not harm any other country.

Multilateralism/Regionalism: recent developments

- The number of RTAs is increasing;
- RTAs tend to become «Mega-Agreements»
- Their content tends to cover new topics such as investments, competition, technical regulation, social and environmental rules

Is there a role for GATT Article XXIV?

- Thanks to the Transparency Mechanism, Article XXIV can play a relevant role acting as a bridge between the two layers of international trade relations among WTO Members (layer 1 regional, layer 2 international).
 - i) in the process of modernization of the multilateral system
 - ii) as a means to counter inequality among WTO members

The role of the WTO might shift to that of a «stabilizer» that binds liberalization commitments agreed at regional/bilateral level.

Study-Case:

Important: origin rule cannot be applied within a CU, but they can be applied in a TA.
Concept of trade diversion

Trade Policy Making in the EU

Common trade policy

- International trade has always been within the purview of the European Union.
- The former European Economic Community itself was assessed in its compliance with the rules of the GATT under Article XXIV
- Now the EU is strongly committed to the system of multilateral trade but at the same time in 2021 it has in force 45 trade agreements with 76 partners.
- The European Union has an **exclusive competence in common commercial policy (CCP)**.
- This means that trade policy in the European Union is drawn at Union level and that member States have no competence in this field.
- What do we mean with “**common commercial policy**”? How does the EU take its decisions in this field, and which of its institutions are involved in the making and in the application of trade rules?
- **In Article 3:5 of the Treaty on the European Union- TEU**, the Union commits to contribute to « free and fair trade».
- But it is **Article 3:1(e) of Treaty on the Functioning of the European Union- TFEU** that provides for the exclusive competence of the Union in the field of CCP.
- The content of this policy has been controversial for a long time.
- In a sentence of 1987 (**Commission vs. Council**, case 45/86) the European Court of Justice stated that CCP (common commercial policy) must be given an evolutionary interpretation, allowing it to adapt to the changes undergoing international relations.
- The **Treaty of Lisbon** (in force as of December 2009) put an end to most -but not to all – of the issues.
- We find the content of the CCP in TFEU Article 207
- TFEU Article 207: Defining CCP
“The **common commercial policy** shall be based on **uniform principles**, particularly with regard to **changes in tariff rates**, the **conclusion of tariff and trade agreements** relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of **liberalization**, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The **common commercial policy** shall be conducted **in the context of the principles and objectives of the Union's external action**”. (When trading, the ways in which laws are passed have to be consistent with the position of the EU with respect to international problems)

The main changes introduced by the Treaty of Lisbon concern:

1. the extension of the scope of CCP (see TFEU Article 207) (areas in article 207)
2. the inclusion of **CCP in the frame of EU's external relations** (this requires strict consistency between trade decisions and foreign policy. If one of the values of the EU is peace, then there should change their CCP with Israel);
3. the stronger role of the European Parliament (need of its prior approval);

- the limited use of unanimity in decision making (TFEU, Article 207:4).

How the EU works with the WTO?

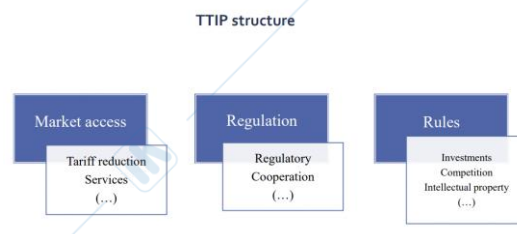
- **The EU in WTO institutions:** The EU Trade Commissioner (Valdis Dombrovski, as Phil Hogan resigned in August 2020) represents the EU in the **Ministerial Conference**, WTO's highest decision making body.
- The Commission represents the EU in the **General Council of the WTO**,
- The Commission also represents the EU in **subsidiary WTO bodies** such as the Council for Trade in Goods or the Committee for Trade and the Environment.

Who represents the EU in WTO negotiations?

- Both the European Union (EU) and the 27 EU Member States are Members of the WTO.
- **The Commission negotiates on behalf of the European Union** authorized by the Council.
- During negotiations, the Commission works in close coordination with EU Member States by consulting the **Trade Policy Committee**, which is a **working group of the Council** in charge of discussing the full range of trade policy issues. The Commission also consults with other interested groups (Civil Society) in the formulation of policy.
- When an agreement is negotiated at the WTO, the Commission needs the **formal authorisation of the Council and European Parliament** to sign the agreement on behalf of the EU.
- The Commission regularly informs the **European Parliament** of key WTO issues, by reporting to the **International Trade Committee (INTA)**.
- The Commission initiates and handles WTO **complaints** with the Council support and may propose retaliatory measures to the Council.

The TTIP negotiations

- Negotiations between Eu and USA started in 2013. There were 15 negotiating rounds. In a last round of trade talks in October 2-7, negotiators dropped the aim of concluding a deal before the end of 2016. No date was set for a new round.
- It aimed to regulate three aspects: market access, regulation, rules



Market Access

- **Goods:** reducing tariff barriers
- **Services:** getting national treatment; policy-space for public services;
- **Public procurements:** more openness

- **Rules of origin:** harmonization

Regulation

- The aim is «cutting red tape» (proactive work)
- Scheme: **general rules** (regulatory cooperation...)
- **9 specific areas** (agriculture, chemicals, cosmetics, engineering, medical devices, telecommunications, pharmaceuticals, textiles, cars)
- It's one of the more **delicate** parts of the negotiations: the fear is to lessen protection of public health, environment...

Rules

Introduction of new rules on

- Sustainable development, environment, social standards
- Energy and raw materials
- Trade facilitation.
- SMEs
- Investments (**controversial ISDS clause. A state changes its legislation, it prejudices a corporation. Does the State have to pay the corporation for this? Case Uruguay and cigars. Since the motive to change the law was public health, they didn't have to pay back. In most cases, the state has to pay to the corporation. The state proposes the arbitrators. There was a disagreement since you are giving up the states freedom to legislate the protection public health , for example, since at the end its a private body the one that decides on this.)**
- Competition
- Intellectual property and geographical indications
- State /State dispute settlement

Attempt to resume negotiations in 2019

UE: Commission draft asking the opening of negotiations on the removal of tariff (only) on industrial goods and on conformity assessment (nontariff barriers).

USA: new negotiating objectives including the elimination of tariff and non-tariff barriers on agricultural products; higher tariffs on EU cars.

Development of negotiations:

April 2019: Council decision mandates the Commission to open negotiations with the US with the aim of reducing tariff on industrial goods.

September 2020: Commission published a draft regulation proposing to cut duties on certain US exports (for an amount of about 168 million euros) in exchange of tariff cuts on European products exported to the US.

This would represent a first step towards de-escalation

15 June 2021: EU-US Summit:

Statement Towards a renewed Transatlantic partnership.

Establishment of the Trade and Technology Council, as a forum for the European Union and the United States to coordinate approaches to key global trade, economic, and technology issues and to deepen transatlantic trade and economic relations based on shared democratic values.

24 July 2020: Appointment of Mr Denis Redonnet as first Chief Trade Enforcement Officer (CTEO)

Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 **concerning the exercise of the Union's rights for the application and enforcement of international trade rules** (the EU can adopt retaliatory measures to counter the "appeal into the void" practice)

22 November 2023: the co-legislators adopted the **Regulation (EU) 2023/2675** establishing an **Anti-Coercion Instrument** aimed at countering the use of economic coercion by third countries against Member States of the European Union (EU). (gas Russia)