



Asia-Pacific
Economic Cooperation

2006/SOM1/CTI/FTA-RTA/003

WTO Rules on RTAs/FTAs from Perspective of Developing Economies

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**APEC Workshop on Best Practices in Trade
Policy for RTAs/FTAs: Practical Lessons and
Experiences for Developing Economies
Ha Noi, Viet Nam
27 February-1 March 2006**

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Provisions in Modern RTAs/FTAs

- Subject to WTO Rules on RTAs/FTAs
 - Trade in Goods
 - GATT Article XXIV
 - Enabling Clause of 1979
 - Trade in Services
 - GATS Article V
- Potentially within Scope of WTO Rules on RTAs/FTAs
 - Trade Remedies
 - SPS and TBT
- Not Regulated by WTO Rules on RTAs/FTAs
 - Investment
 - Competition policy
 - Government procurement
 - Intellectual Property
 - Labour and Environmental Standards
 - Dispute Settlement

WTO Rules on Trade in Goods

- Rules for developing countries differ according to status of partner
- Developing country partner
 - Enabling Clause available (common)
- Developed country partner
 - GATT Article XXIV must apply (increasingly common)

Enabling Clause

- RTAs/FTAs between developing countries
 - Limited exchange of preferences permitted
 - Partial tariff reductions
 - Limited product coverage (“positive list”)
- Non-discriminatory non-reciprocal preferences by developed countries in favour of
 - all developing countries (GSP)
 - all least developed countries (e.g. EU’s EBA)
 - unique groups of developing countries (AGOA? US and EU Andean Preferences)

Other non-reciprocal preferences require a waiver (e.g. Cotonou Agreement, CBI)

GATT Article XXIV (1)

- format must be FTA or CU
- prohibition against raising barriers to non-members
 - interpretation issue for customs unions
- preferences must be reciprocal
- requires elimination of
 - tariffs on “substantially all the trade” (SAT) between the parties
 - other restrictive regulations of commerce
- implementation with a “reasonable period of time”
- no specific provisions on
 - special and differential treatment
 - flexibilities for developing countries
- Role of CRTA

GATT Article XXIV (2)

- “Substantially all trade”
- no definitive rule or agreed definition
 - possibilities include
 - percentage of tariff lines (95% at HS 6-digit level?)
 - percentage of trade (85%? 90%?)
 - actual v. potential trade
 - non-exclusion of entire sectors
 - scope for flexibility
 - openness to interpretation
 - asymmetry possible eg in North-South agreements
 - key is perception of likelihood of challenge
 - economic implications can vary
 - exclusion of competitive sectors may limit trade creation
 - exclusion of non-competitive sectors may limit trade diversion

GATT Article XXIV (3)

Transition periods

- Article XXIV: “reasonable period of time”
- 1994 Understanding: 10 years unless there are “exceptional circumstances”
- current practice
 - up to 20 years in North-South agreements
 - up to 18 years in North-North agreements

GATT Article XXIV (4)

Trade-off between coverage and flexibility

- older agreements often have substantial exclusions
- newer agreements often have more complete coverage (100% in some cases) balanced by facilitation of adjustment through
 - longer transition periods
 - use of tariff-rate quotas (TRQs), special safeguards (SSG), bilateral emergency actions (BEA)
- question: whether permanent availability of SSG or TRQ (usually with “continuous expansion”) counts as exclusion for SAT purposes?

Rules of Origin (ROO)

- crucial to liberalising effects of RTAs/FTAs
- may be trade-restrictive or trade-facilitating
- degree of restrictiveness determines offset to liberalising effect of tariff reductions
- effects tend to be non-transparent
- preferential v. non-preferential ROO
 - Uruguay Round mandated negotiation of agreement on non-preferential ROO (via WTO and WCO)
 - no rules exist on preferential ROO
- “spaghetti bowl” concerns
 - potential problems for exporters in economies involved in multiple RTA/FTAs with inconsistent ROO

Trade Remedies (anti-dumping and safeguards)

- various approaches
 - prohibition of AD in some FTAs (rare)
 - modification of WTO provisions (e.g. increased ‘de minimis’)
 - WTO provisions left fully intact
- differing views on implications of prohibitions or modification of WTO provisions
 - enhancing liberalisation
 - discrimination
(note: harmonisation of standards between RTA/FTA members might also be argued to be discriminatory)
- controversy over whether FTA partners can be exempted from multilateral safeguard actions

Prospect of Changes to WTO Rules on RTAs/FTAs

- possibility of changes to WTO rules on RTAs/FTAs included in DDA agenda (part of “rules” negotiations)
- significant changes widely viewed as unlikely
 - “glass house” syndrome
 - conflicting objectives
 - relaxation v. strengthening
- provisions for improved transparency more likely

WTO Rules on Trade in Services

- GATS Article V provides rules for agreements for services liberalisation “between or among” parties to the agreement
- no Enabling Clause for services
- flexibility for developing countries provided within GATS Article V

GATS Article V (1)

- requires “substantial sectoral coverage”
 - relates to number of sectors, volume of trade affected
 - no *a priori* exclusion of any mode of supply
 - in sectors covered
 - absence or elimination of “substantially all discrimination” (in the sense of national treatment) via
 - elimination of existing discriminatory measures
 - prohibition of new or more discriminatory measures
 - allows consideration to relationship to “wider process of integration”
- prohibition on raising barriers to non-members
- GATS procedures must be followed if agreement leads to withdrawal or modification of commitments under GATS schedule

GATS Article V (2)

- flexibility for developing countries
 - no distinction between North-South and South-South agreements
 - flexibility for developing countries
 - in accordance with level of development
 - overall and in individual sectors and subsectors
 - applies to both sectoral coverage and absence/elimination of discrimination (especially the latter)
 - in practice allows wide latitude to developing countries

Relation to GATS Provisions

- Agreement provisions may involve modifications of standard GATS provisions e.g.
 - clearer and/or broader definitions of services “supplied in exercise of government authority”
 - inclusion of appropriate safeguard provisions
 - provisions strengthening or weakening restricted application to government procurement
 - provisions for review of commitments

Relation to Investment Provisions in RTAs/FTAs

- Mode 3 commitments involve liberalisation of foreign direct investment (“pre-establishment” commitments)
- wide variations in investment provisions of RTAs/FTAs
 - some limited to post-establishment
 - investor protection, rights and obligations of host/home countries and investors/investments
 - post establishment commitments and limitations on post-establishment commitments will typically apply to services sectors as well as non-services sectors
 - others may include pre-establishment
 - typically services sectors will be excluded from pre-establishment commitments in investment provisions
 - avoids overlap with Mode 3