



# WTO Rules and Procedures related to RTAs



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



## Overview

The Preamble to the WTO Agreement highlights “... the elimination of discriminatory treatment in international relations” as an objective of the Multilateral Trading System.

The MFN (most-favoured-nation) commitment taken by WTO Members is a fundamental instrument for achieving that aim.

When establishing a preferential trade regime in favour of some trade partners (e.g., through the formation of an RTA), a WTO Member will need some kind of 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

**Common Principles\***

WORLD TRADE ORGANIZATION

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\*GATT Art. XXIV:4. "Enabling Clause" para. 3(a); GATS Art. V:4

**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** → Customs unions or free-trade areas implemented in stages, over a transition period

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**GATT Article XXIV & Understanding**

Establishes two fundamental conditions with which RTA parties must comply in order to benefit from the exception provided:

1. That the RTA qualifies as a customs union, a free-trade area, or leads to one or the other. → According to definitions in XXIV:8
2. That formation of the RTA does not imply the application of more restrictive trade measures *vis-à-vis* other, non-party WTO Members. → XXIV:5

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**GATT Article XXIV & Understanding**

1. Under which criteria can an RTA be deemed to be:

A customs union?      A free-trade area?

Tariffs and other restrictive trade measures are eliminated on substantially all (originating) trade among the parties (Article XXIV:8)

Tariffs and other trade measures are substantially harmonized among the parties (Article XXIV:8(a)(ii))

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**GATT Article XXIV & Understanding**

1. What is implied through these criteria?

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A customs union                      A free-trade area

FREE TRADE AMONG THE PARTIES with BROAD PRODUCT COVERAGE

BROADLY COMMON FORMULATION OF TRADE POLICY

**GATT Article XXIV & Understanding**

1. Some questions about these criteria:

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- What is the meaning of "substantially" (XXIV:8(a)(i) & (b)), and "substantial" (XXIV:7(c))?
- In measuring RTA coverage, how can we better ascertain that "major sectors" are not excluded?
- What if, as often in the real world, RTA parties reduce (rather than eliminate) duties on some products? and more...
- 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?

**GATT Article XXIV & Understanding**

2. How can compliance with the criterion of "trade policy neutrality" vis-à-vis non-parties be assessed?

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Parties to a free-trade area	Standstill in MFN (applied) duties and "other regulations of commerce" (Article XXIV:5(b))
Customs union	<ul style="list-style-type: none"> <li>On average, no increase in applied MFN duties (Article XXIV:5(a))</li> <li>Possible individual analysis of "other regulations of commerce"</li> </ul>

**GATT Article XXIV & Understanding**

"Interim agreements" are also required:

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- To lead to either a free-trade area or a customs union.
- To contain a plan and schedule to achieve that aim (Article XXIV:5(c)).
- To foresee a maximum transition period of 10 years (unless exceptional circumstances can be fully explained and acknowledged by WTO Members) (para 3 of Understanding).
- Not to be put in force or maintained unless any WTO recommended modification has been made by the parties (para 10 of Understanding).

 **GATT Article XXIV & Understanding**

When entering a customs union and applying the common external tariff, a party, Member of the WTO, may break its prevailing MFN tariff bindings.

To maintain the balance of rights and obligations within the GATT, customs unions are thus also required:

- To enter into a re-negotiation of tariff bindings with interested Members (Article XXIV.6).

↓

For procedural details, see paras. 4-6 of the Understanding

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 **GATT Article XXIV & Understanding**


Finally:

Para. 12 of the Understanding specifies that:

**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?

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 **GATT Article XXIV & Understanding**

Jurisprudence – Main points:


- GATT inconsistent measures can be “covered” under Art. XXIV provisions if the RTA is found in conformity with these provisions, and the measures were necessary to the formation of the RTA.
- The panel should assess, in particular, such conformity.
- Burden of proof is with Member using Art. XXIV as a defence.

*Turkey-Textiles (DS34)*

*Argentina-Footwear (DS121)* - “Parallellism” in safeguard actions

**NO RTA HAS BEEN CHALLENGED AS SUCH!**

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 **Enabling Clause**

Authorizes, in its paragraph 2(c), WTO developing country Members to depart from the MFN clause (Article I), when concluding:

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

Only additional criteria are contained in para. 3(a & b).

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**Enabling Clause vs GATT XXIV**

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- Common aspects
  1. Goods only
  2. Neutrality criterion
- Differences
  1. Enabling Clause can only benefit developing countries
  2. No requirement of reciprocity
  3. Reduction OR elimination of tariffs (Enabling Clause) vs. elimination of duties (GATT XXIV)...
  4. ...and reduction OR elimination of non-tariff barriers vs. elimination of ORRCs

Opens the door to partial scope agreements

**GATS Article V**

**RULES AND PROCEDURES**

Provides for agreements "liberalizing trade in services", entered by WTO Members:

"Economic integration agreements"

including those implemented on the basis of a time-frame

**GATS Article V**

**RULES AND PROCEDURES**

Establishes two main criteria for providing the exception:

1. Trade liberalization among the parties should cover a broad range of services activities. **V:1**
2. No non-party WTO Member should encounter a higher overall level of barriers to its services trade as a result of the RTA. **V:4**

**GATS Article V**

**RULES AND PROCEDURES**

More specifically, to comply with the first criterion, the agreement should:

- Have "substantial sectoral coverage"
- Not excluding, a priori, 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

RULES AND PROCEDURES

As to the second criterion:

- No particular guidelines or detailed procedure on how to assess whether 'the overall level of barriers' has been raised for any non-party Member's trade in services.

However, as in GATT Art. XXIV, to maintain the balance of rights and obligations within the GATS:

If, when entering the agreement, a Member's WTO specific commitments are made more restrictive, these should be renegotiated (GATS V:5)



### GATS Article V

RULES AND PROCEDURES

S&D provisions:

Developing countries participating in an agreement are granted flexibility in terms of:

- Substantial sectoral coverage
- Elimination of discrimination ➡ Para. 3a in the sectors covered

When the agreement is concluded among developing countries:

- Preferences may be granted to the parties' "own" service ➡ Para. 3b providers only



### Summing-up

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When entering an RTA, a WTO Member should invoke one of the following provisions, and comply with the relevant conditions:

	RTA parties		
	Developed only	Developing only	Developing & developed
Trade in goods	GATT XXIV	GATT XXIV Enabling Clause	GATT XXIV
Trade in services	GATS V	GATS V	GATS V

... Or else the Member should seek a waiver!