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Committee on Regional Trade Agreements

ANNOTATED CHECKLIST OF SYSTEMIC ISSUES

Note by the Secretariat

Introduction

1. At the Ninth Session of the Committee on Regional Trade Agreements (CRTA), the Secretariat was requested to prepare an "annotated checklist" based on the "Checklist of Systemic Issues Identified in the Context of the Examination of Regional Trade Agreements" (WT/REG/W/12).

2. The document has been prepared with a view to providing a brief description of the context in which the issues have been raised. In this respect, the document annotates each issue by including three basic classes of information, where applicable: a summary of the treatment of the issue under GATT 1947; a report of how the issue was dealt with during the Uruguay Round; and an account of points made in connection to the issue during CRTA discussions.

3. It should be noted that the material is not extensive with respect to some Checklist issues. As a result, some descriptions in this Note are limited to the references made to date when no substantive debate has taken place.

4. The issues are ordered in parallel with the corresponding paragraphs of Article XXIV, whenever possible. Since they are often interlinked, references to other issues have been noted.

A. Principles set out in Article XXIV:4 and their relationship with other provisions in Article XXIV (WT/REG/W/12, para.3)

5. The second sentence of Article XXIV:4 states that the purpose of a regional trade agreement (RTA) "should be to facilitate trade" among the parties and "not to raise barriers to the trade" of third parties.

6. In the GATT 1947 context, the interpretative problem focused on whether RTAs had to comply with the principles contained in Article XXIV:4 *in addition to* the requirements set out in Article XXIV:5-9, or whether these latter paragraphs (in particular paragraph 5) spelled out the criteria for determining if an RTA met the Article XXIV:4 condition.[1]

[1]A spin-off to this interpretation was the idea that, where a customs union or free-trade area fulfilled the requirements of Article XXIV:5, it was *ipso facto* consistent with Article XXIV:4.

7. Members addressed this question in Paragraph 1 of the WTO Understanding on the Interpretation of Article XXIV of GATT 1994 (Understanding), which reads: "Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article."

8. In CRTA discussions, the emphasis has been on whether "a stable, transparent and predictable framework of trading rules" in an RTA is "the general presumption as to how [it] ought to operate" in the sense of Article XXIV:4. It has been pointed out that some RTA "rules could have the effect of restricting the ability of third parties to benefit from the general liberalizing objective" of the RTA and that, as a result, "the trade creation possibility for third parties became subject to a special restriction which had the effect of raising a barrier to the trade of other contracting parties".[2] This argument has been illustrated, in the case of free-trade agreements (FTAs), by the possibility of sectoral rules of origin,[3] applied tariff increases and "changes in customs valuation procedures"[4] restricting opportunities for third parties.

[See also issues No. C, D and E.]

B. Evaluation of the general incidence of duties and other restrictive regulations of commerce before and after the formation of a customs union (WT/REG/W/12, para.15)

9. Interpretative problems relating to the evaluation provided for in Article XXIV:5(a) have included the following:

> Whether to approach the matter as a global exercise, by automatically applying a formula and judging a common external tariff in its entirety, or to examine individual commodities/sectors on a country-by-country basis.
>
> Whether a given calculation should be based on the bound rates or the actually applied rates, and whether a comparison of duties collected could be used.
>
> Whether arithmetic or trade-weighted averages of the duties of the constituent territories should form the basis for the calculation.
>
> Whether there should be some kind of tariff-equivalent measurement of quantitative import restrictions and variable levies.

10. GATT 1947 bodies examining customs unions could not agree on a methodology for the assessment.

11. The WTO Understanding (paragraph 2) clarified some concepts and defined a methodology for computing "weighted average tariff rates" on which the "overall assessment" of the *tariff* aspects of the evaluation of the general incidence would be based. With respect to the *other-regulations-of-commerce* facet of the exercise, the Understanding provides that, when "quantification and aggregation

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[2]WT/REG4/M/2, para.8.

[3]A number of GATT working parties discussed the operation of FTAs' rules of origin in the light of, *inter alia*, Article XXIV:4 provisions. (See *Analytical Index*, WTO, Geneva, 1995, pp. 802-803.)

[4]WT/REG4/M/2, paras. 12, 42-46.

are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required".

12. It has been stated in the CRTA that problems of interpretation persist, since in the "before-versus-after" tariff test, the assessment is based on averages and therefore ignores "the fact that exports of third parties might be concentrated in a few sectors"; also, the assessment of "the impact of measures other than tariffs, such as anti-dumping, preferential rules of origin, technical standards, subsidies and countervailing measures" remains difficult while "the scope and importance of those measures had increased in the post-Uruguay Round period".[5]

13. Currently under consideration in the CRTA is a Note by the Chairman describing the technical basis on which the Secretariat will proceed with the calculation of weighted averages of duties and charges before and after the formation of a customs union, without prejudice to the substance and legal implications of the provisions involved.

[See also issue No. A.]

C. Differences in the WTO regulatory framework, with respect to tariffs, for customs unions and free-trade areas (FTAs) as contained in Art. XXIV:5 and the Understanding (WT/REG/W/12, para.2(a))

14. The two parallel provisions contained in sub-paragraphs (a) and (b) of Article XXIV:5 refer to the requirement for customs unions and FTAs, respectively, not to increase the restrictiveness of trade barriers with the formation of such RTAs. A comparison of duties and other regulations of commerce "imposed" by a customs union and those "applicable" by its members prior to the institution of the union is required in Article XXIV:5(a); the corresponding language used in Article XXIV:5(b) with respect to FTAs is "maintained" and "existing".

15. GATT 1947 bodies assessing the consistency of RTAs consistently stumbled on the interpretation of these terms with respect to tariffs, most often when examining customs unions and less frequently in the course of FTA examinations. The question was whether "imposed/applicable" and "maintained/existing" referred to bound rates of duty or to applied rates.

16. The WTO Understanding partly solved the ambiguity by elaborating on Article XXIV:5(a) provisions. In paragraph 2 it specifies that, in the assessment of customs unions, "the duties and charges to be taken into consideration shall be the applied rates of duty".

17. Reference to the issue in the CRTA has pointed to the fact that no clarification has been proposed with respect to the terms "maintained/existing" of Article XXIV:5(b).

[See also issues No. A and D.]

D. Trade diversion occurring in cases where a member of an FTA maintains high, and/or increases, the levels of MFN protection, even within the bound tariff rates (WT/REG/W/12, para.8)

18. This issue has arisen twice in CRTA examinations of FTAs: as "a specific difficulty created when a member of a free-trade area maintained - and especially when it increased - high levels of MFN

[5]WT/REG/M/4, para.60.

protection, even within the bound tariff rates"[6] and as "a clear case where trade barriers against third countries were raised through increased duties"[7].

[See also issues No. A and C.]

E. Differences in the WTO regulatory framework for customs unions and free-trade areas (FTAs) as contained in Art. XXIV:5 and the Understanding, with respect to other measures, such as rules of origin (WT/REG/W/12, para.2(b))

19. The only measures specifically identified in this regard have been rules of origin. The use of rules of origin was discussed by several working parties examining FTAs notified under the GATT 1947, though consensus was never reached on whether rules of origin were to be considered as one of the "other regulations of commerce" in terms of Article XXIV:5(b).

20. The WTO Agreement on Rules of Origin aims at the harmonization of rules of origin, other than those relating to the granting of tariff preferences. A "common declaration" annexed to that Agreement is the only WTO reference with respect to the operation of rules of origin on goods which qualify for preferential treatment, such as might be found in an FTA; it provides for enhanced transparency of such origin rules.

21. In discussions of the CRTA, the point has been made that an FTA "could be just as significant in its trade impact as a customs union, but face significantly less stringent rules". Rules of origin have been cited as a characteristic feature on which no disciplines exist in FTAs. It has been argued that "rules of origin … were relevant to the 'other regulations of commerce'-test, found in Article XXIV:5. The core of the concern [has been] that in some sectors … the effect seemed to be to manage trade and to prevent the full trade-creating benefits of the liberalization process from developing".[8]

[See also issue No. A.]

F. Whether, in the context of Art. XXIV:5(b), the duties and other regulations of commerce of a new RTA can be compared with those of a pre-existing FTA with overlapping membership (WT/REG/W/12, para.6)

22. Different views have been expressed in the CRTA on whether a pre-existing FTA can be used for comparative purposes under Article XXIV:5(b). One view has been that a pre-existing FTA was a separate agreement and therefore should not be the basis for comparison; further, Article XXIV:5(b) "mentioned internal regimes, not arrangements".[9] Another view has been that prior arrangements involving the same constituent territories naturally factor into the analysis of whether an FTA has resulted in higher or more restrictive duties and other regulations of commerce, as "the words 'same constituent territories' were not qualified by an assumption that there had been no other previous preferential

[6]WT/REG4/M/2, paras. 3, 10, 46.

[7]WT/REG18/M/1, para. 18.

[8]WT/REG4/M/2, para. 3.

[9]WT/REG4/M/2, para.29.

arrangement, and 'prior' did not assume a sort of perfect, most-favoured-nation world".[10] Within this same context, it has been argued that "given the interlocking networks of various RTAs involving Members, the Committee might have to confront the matter of overlapping tariff schedules and restrictive regulations".[11]

G. The scope of compensation to third parties for any injury caused by the creation of RTAs, as the effect of RTAs on third parties is based on an assessment of the changes in average tariff rates (WT/REG/W/12, para.12)

23. This matter has been raised in CRTA discussions as needing consideration.[12]

[See issue No. C.]

H. Interrelationship between the provisions contained in paragraph 7(a) of Article XXIV and paragraph 7 of the Understanding with respect to notification, supply of information, examination, and appropriate recommendations by WTO Members (WT/REG/W/12, para.4)

24. Noting the GATT 1947 Article XXIV:7(a) requirement for a Contracting Party *deciding to enter into* an RTA (or an interim agreement leading to one) to "promptly notify the Contracting Parties", the Council issued the following decision on 25 October 1972:

> Without prejudice to the legal obligations to notify in pursuance of Article XXIV, the Council decides to invite Contracting Parties that sign an agreement falling within the terms of Article XXIV, paragraphs 5 to 8, to inscribe the item on the agenda for the first meeting of the Council *following such signature*, to the extent that the advance notice of ten days prescribed for inclusion of items on the agenda can be observed. Inclusion of the item should allow the Council to determine the procedures for examination of the agreement. [emphasis added][13]

25. Members have pursued the matter of the timing of notifications and examinations of RTAs in CRTA discussions. It has been suggested that the notification requirement needs to be clarified or strengthened, as practice has shown there to be delayed notifications, so that many examinations could only be conducted *"ex post"*.[14] It has been pointed out that more timely notification would set in motion the examination process early enough for RTA parties to respond to concerns and bring an agreement into line with WTO provisions.[15,16]

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[10]WT/REG4/M/2, para. 38.

[11]WT/REG/M/4, para.65.

[12]WT/REG/M/4, para.60.

[13]19S/13.

[14]WT/REG3/M/1, para.44.

[15]*Id.*, para.45.

[16]Of the RTAs notified under Article XXIV as of October 1997, one third were notified between the date of signature and the date of entry into force, and half were notified after the date of entry into force.

26. To deal with this situation, one idea has been to adopt a "two-tiered" notification procedure, whereby RTA parties would provide preliminary information on an agreement at its signature and follow up with more detailed information upon its ratification.[17] Objections to this idea have been that it would not be practicable and that the CRTA lacks authority to make this a formal requirement.[18] While the Committee addressed many aspects of the examination process in the Guidelines on Procedures to Improve and Facilitate the Examination Process[19], the timing of notifications and examinations remains an open question.

I. Notification of FTAs under the Enabling Clause (WT/REG/W/12, para. 16)

27. At the CRTA meeting of 28 April 1997, several delegations expressed the view that the Committee should ensure it is fully informed about all RTAs notified to the WTO and proposed that the CRTA request the Committee on Trade and Development (CTD) to provide a list of all RTAs notified under the Enabling Clause. Some others questioned the authority of the CRTA to request such information. At the CTD meeting of 20 May 1997, the Secretariat was asked to compile a list of RTAs notified under the Enabling Clause.

J. Which statistics should be provided relating to trade among parties to an RTA (WT/REG/W/12, para. 19)

28. Under Article XXIV:7(a) of GATT 1947, parties deciding to enter into RTAs had the responsibility to make available "such information regarding the proposed union or area as [would] enable [Members] to make such reports and recommendations to contracting parties as they might deem appropriate."

29. In detailing how the evaluation of the general incidence of duties and other regulations of commerce is to be carried out, paragraph 2 of the WTO Understanding provides that "this assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin…." During the negotiation of the GATS, it was recognized that statistics for services (on production, distribution, and trade flows) were not as readily available as those for goods, and that the existing ones were sometimes difficult to use for comparative purposes because Members used different accounting methods. These factors added to the challenges of negotiations and were reflected in footnote 1 of GATS Article V, which describes the substantial sectoral coverage condition as "understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply."

30. In CRTA examinations, the issue of which statistics should be provided has arisen in several contexts, including the following:

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[17]Discussion on "Procedures to Facilitate and Improve the Examination Process," Fourth Session of the CRTA, WT/REG/M/4, para. 15.

[18]*Id.*, para. 18.

[19]WT/REG/W/15, taken note of at the Tenth Session of the CRTA.

> Data from the perspective of each RTA party has been requested, not just on the volume and value of exports and imports, but also on the share of each party's total trade that these figures represent.[20]
>
> Statistical information on the percentage of each party's total trade covered by preferences has been asked for, with some RTA parties responding that this information is not called for in the examination process but rather is relevant to the Committee's discussions on systemic issues;[21] further, it has been noted that statistics on trade enjoying preferences are difficult to provide, as data on these flows often is not collected, or is imprecise due to preferences sometimes not being sought.[22]
>
> Statistics on preferences among the "web" of RTAs has been requested so that Members might have an indication of how the margins mesh.[23]

31. The Standard Format for Information on Regional Trade Agreements on Goods[24] and the Standard Format for Information on Economic Integration Agreements on Services[25] contain guidelines for the provision of trade data. Both documents bear the introductory caveat that "the information requested in this Standard Format does not … replace the requirement for parties … to provide Members with all relevant texts of laws and trade data. Further, it does not preclude Members from posing questions in writing and seeking additional information from parties."

32. Requests for statistics have also been made in the context of the CRTA mandate to consider reporting on the operation of agreements, with the suggestion that biennial reporting be a relatively simple exercise involving statistical updates.

K. Length of transition periods for interim agreements (WT/REG/W/12, para.10)
L. Meaning of the phrase "plan and schedule" of an interim agreement, as stipulated in Article XXIV:5(c) (WT/REG/W/12, para.13)

33. Article XXIV:5(c) requires interim agreements to include a "plan and schedule for the formation of such a customs union or such a free-trade area within a reasonable length of time." However, the terms "reasonable length of time" and "plan and schedule" are not clearly defined. In the past, especially, the texts of many agreements contained no references to completion dates, making it unclear whether a given interim agreement had a definite end-point to the period of transition.

34. The WTO Understanding addressed the question of what constitutes a "reasonable length of time", saying the period "should exceed 10 years only in exceptional cases," and noting that "in cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period."

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[20]For example, WT/REG/12,16,20/M/1, para.6.

[21]*Id.*, paras. 11-15.

[22]For example, WT/REG13,14,15/M/1, para.24.

[23]*Id.*, paras.14-17.

[24]WT/REG/6, taken note of at the CRTA meeting of 31 July 1996.

[25]WT/REG/W/14, taken note of at the CRTA meeting of 2 May 1997.

35. In CRTA discussions, this issue has been mentioned in a list of issues of systemic importance, but not further elaborated.

M. Meaning of "duties and other restrictive regulations of commerce" in Articles XXIV:8(a)(i) and XXIV:8(b) (WT/REG/W/12, para.14)

36. In CRTA discussions, this issue has been mentioned in a list of issues of systemic importance, but not further elaborated.[26]

[See issue No. N.]

N. Application of safeguard and anti-dumping measures among members of an RTA (WT/REG/W/12, para.20)

37. The fact that Articles XIX (Emergency Measures) and VI (Anti-dumping Measures) are not mentioned among the possible exceptions spelled out, within brackets, in Articles XXIV:8(a)(i) and XXIV:8(b) is a source of contention. One aspect of the issue is directly linked to the Article XXIV consistency test of an RTA: Does that omission mean that, where an RTA retains the possibility of safeguard or anti-dumping type actions among parties, it might be violating the requirement to eliminate the "duties and other restrictive regulations of commerce" on "substantially all the trade…" contained in Articles XXIV:8(a)(i) and XXIV:8(b)?[27]

38. In the GATT 1947, reports from bodies examining RTAs most often recounted the disagreement existing in relation to practices limiting the application of safeguard and anti-dumping measures to third countries.

39. Within the CRTA, "the discrepancy between the effects" of intra-RTA safeguard/anti-dumping provisions and the requirements of Article XXIV has been reiterated.[28]

[See issues No. Q(c) and R.]

O. Meaning of "substantially all the trade" in Articles XXIV:8(a)(i) and XXIV:8(b), in terms of sectors (in particular with respect to agriculture), volume or value (WT/REG/W/12, para.17)

40. No criteria have been agreed to for determining what the term "substantially" all the trade in Articles XXIV:8(a)(i) and XXIV:8(b) entails. Different readings of that term are basically linked to two distinct conceptual views, one emphasizing its quantitative dimension, the other calling for a qualitative analysis. Under the quantitative view, shaped in terms of trade coverage, questions include the following:

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[26]References to working party discussions on this subject appear in the *Analytical Index*, WTO, Geneva, 1995, pp. 820-21.

[27]Another aspect of the issue touches upon the relationship between Articles XXIV and XIX provisions: Does the invocation of Article XXIV permit a departure from the non-discriminatory obligation of Article XIX?

[28]WT/REG12,16,20/M/1, para.28.

> Are RTA parties required to liberalize a fixed percentage of the volume of trade among parties, or does the test involve a more flexible quantitative standard, calling for a case-by-case, "merits" type of approach?[29]
>
> Should the effects of an RTA over time (i.e. whether it points toward an increase or reduction in barriers affecting trade among the constituents) also be considered?
>
> Should the dampening effect of pre-existing trade impediments on imports of the constituent parties be taken into account in figuring the percentage of trade liberalized?[30]

The qualitative view of the term "substantially" all the trade basically focuses on the possibility of an RTA to cover a large portion of the parties' trade but still fall shorts of adequate sectoral coverage. In this respect, questions include the following:

> Should the consistency-assessment take into account the tendency of an RTA to facilitate trade expansion in a sector even though provisions might not call for the elimination of trade barriers?
>
> Should the removal of trade barriers have to take place among all the parties in order for the liberalization to be factored into the assessment?

41. In addition to differences in opinion with respect to trade or sectoral coverage, the meaning of the distinction drawn between the phrases "substantially all the trade" and "trade in substantially all the products" in Article XXIV:8(a)(i) has not been clarified.

42. Practically all GATT 1947 bodies examining RTAs were faced with the difficulty of filling the gap between those Members holding a qualitative view of the term "substantially" all the trade, and those favouring its quantitative dimension. In most cases, the stumbling block resided in the exclusion of agricultural products (or the agricultural sector) from intra-RTA trade liberalization. No consensus was ever reached on this point.

43. Though discussed during the Uruguay Round, this interpretative problem is only referred to in the preamble to the WTO Understanding, where Members' "recogniz[e]" that integration among parties to RTAs contributes more to the expansion of world trade when the elimination of intra-trade barriers covers all trade, and less "if any major sector of trade is excluded".

44. In CRTA debates and examinations of RTAs, this long-standing question of unclear interpretation has been repeatedly raised, within virtually the same parameters as before.

P. Relationship between Article XXIV:8(a)(ii) requirements and Article XXIV:6 compensatory negotiations and the procedures for negotiations under Article XXVIII (WT/REG/W/12, para. 5(a))

45. Article XXIV:6 of GATT 1947 provides that contracting parties forming a customs union must follow the procedure set forth in Article XXVIII when proposing to increase any rate of duty in a manner

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[29]This "merits" approach was put forth by the European Communities in the examination of the EEC Treaty. L/778, adopted on 29 November 1957, 6S/100, para. 34.

[30]*Id.*

inconsistent with Article II. Article XXVIII:1 in turn provides that, "by negotiation and agreement" with the "contracting parties primarily concerned", and subject to consultation with substantial suppliers, a contracting party may modify or withdraw a concession. Article XXVIII:3 then stipulates that the contracting party proposing to modify or withdraw the concession is free to do so if no agreement can be reached in this regard.

46. The WTO Understanding elaborates on this requirement and states that "Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn…"

47. Comments made during CRTA meetings have highlighted the interaction of this aspect of Article XXIV:6 with the Article XXIV:8(a)(ii) requirement that members of a customs union apply "substantially the same duties and other regulations of commerce". It has been argued that Article XXVIII was drafted with a view toward providing compensation when a contracting party wished to "break its tariff bindings to protect a domestic industry from foreign competition" and was not designed with reference to the enlargement of a customs union, where there are adjustments to numerous tariff-lines for the common external tariff.[31] This argument has been met by the response that there is no apparent conflict between the requirements of Article XXIV:8(a)(ii) and the procedures to be followed in Article XXVIII.[32]

48. Regarding the timing of compensatory negotiations for the enlargement of a customs union, attention has been drawn to the call in the Understanding for Article XXVIII procedures to "be *commenced* before tariff concessions are modified or withdrawn" [emphasis added].

Q. Article XXIV:8(a)(ii) requirements and their relationship with other WTO provisions (WT/REG/W/12, para. 5)

49. Article XXIV:8(a)(ii) requires that, in a customs union, "substantially the same duties and other regulations of commerce" be "applied by each of the members of the union to the trade of territories not included in the union". In other words, it requires that a "substantially" common external trade regime be in place.

50. Within the context of either the extended scope of WTO obligations after the Uruguay Round, or the characteristics of enlarging existing customs unions, or both, a number of questions have been raised in CRTA discussions:

(a) What methodology should be used to aggregate and/or modify commitments limiting agricultural subsidization (domestic support and export subsidies) when establishing/enlarging a customs union? (WT/REG/W/12, para. 5(c))

Uruguay Round agricultural reduction commitments on domestic support and export subsidies are contained in each Member's WTO Schedule. In accordance with the requirement in Article XXIV:8(a)(ii), the commitments of individual Members forming (or joining) a customs union may need to be changed or, at least, unified.

[31] WT/REG3/M/1, para. 53.

[32] *Id.*, para. 56.

No multilaterally agreed-upon methodology exists as to how to translate individual Members' commitments limiting agricultural subsidization into common commitments.

Whenever parties seek to change agricultural commitments as a consequence of the formation (or enlargement) of the customs union, there are difficulties relating to the lack of procedures for modifying such commitments. Article XXIV:6 and paragraphs 4-6 of the Understanding relate to tariff changes, for which Article XXVIII procedures are used. The Agreement on Agriculture has no procedures with respect to this matter.

(b) Introduction of new quantitative restrictions in the context of Articles XXIV:5 and XXIV:8. (WT/REG/W/12, para.21)

The general question relates to whether compliance with the requirement in Article XXIV:8(a)(ii) justifies that one or more members of a customs union be entitled to introduce new measures to which other WTO provisions might pertain.

Within the CRTA, this issue was raised in connection with Turkey's introduction of textile quotas in the context of the formation of a customs union with the EC. On the basis of the provisions of Article XXIV, it was argued that customs unions were allowed to maintain restrictive measures, among which were quantitative restrictions, "provided those measures were not more restrictive than those in force before the establishment of the customs union." In this regard, it was noted that Article XXIV is one of the "relevant GATT 1994 provisions" within the meaning of Article 2:4 of the Agreement on Textiles and Clothing.[33]

(c) How to deal with the application by new RTA members of anti-dumping/safeguard measures already in place within the RTA? (WT/REG/W/12, para.5(b))

The issue is whether a customs union's anti-dumping measures (against third countries) can or should automatically be extended to new members of the union. The argument linking such "automatic" extension to the fulfilment of the requirement contained in Article XXIV:8(a)(ii) has been challenged in the CRTA on the basis that "fresh investigations to establish injury to the domestic industry" should take place and that the dumping margin to be applied should take into account export prices of the goods sold into the new member markets.[34]

[See issues No. N and R.]

R. Relationship between Article XXIV of the GATT 1994 and other provisions of WTO Agreements (WT/REG/W/12, para.22)

51. The only provisions specifically identified in this regard have been those concerning the relationship between Article XXIV and Article XIX. The fundamental interpretative question is: whenever an RTA member takes a safeguard action, is it entitled/required to exempt from the application of the resulting measures imports from its RTA partners, or does the invocation of Article XXIV not permit a departure from the non-discriminatory obligation of Article XIX? A corollary question relates

[33]WT/REG22/M/1, para.21.

[34]WT/REG3/M/1, para.70.

to the difficulties in the determination of the conditions attached to Article XIX actions in an RTA context, partially addressed in footnote 1 to the WTO Agreement on Safeguards.

52. Within the CRTA, it has been claimed that "when necessity called for emergency action, usually the cause of the problem came from the partners, rather than third parties, because the partners had preferential tariff rates. It thus seemed odd that the FTA partners could be excluded from the emergency action when there was some injury".[35]

[See also issues No. N and Q(c).]

S. Assessment of the consistency of an RTA with WTO rules when at least one of its parties is not a WTO Member (WT/REG/W/12, para.18)

53. Under GATT 1947, it was disputed whether agreements involving non-contracting parties were subject to the procedures of Article XXIV:7 or to those of Article XXIV:10. Reports on discussions at the Havana Conference, however, noted that "a sixth paragraph was added to provide that the Organization may, by a two-thirds vote, approve proposals which do not fully comply with the requirements of the Article provided that they lead to the establishment of a customs union or a free-trade area in the sense of the Article. It was the understanding of the Sub-Committee that this new paragraph 6 will enable the Organization to approve the establishment of customs unions and free-trade areas which include non-Members".[36] The *Analytical Index* indicates that those who favoured the insertion of the words "as between the territories of Members" in Article 44 intended that "this Article, including the new paragraph 6 … would not prevent the formation of customs unions and free-trade areas of which one or more parties were non-Members but would give the Organization an essential degree of control".[37] Paragraph 10 became part of GATT 1947 when the original text of Article XXIV was replaced by the texts of the corresponding articles in the Havana Charter.[38]

54. This issue arose in the CRTA during the examination of the EFTA-Bulgaria FTA, when it was noted that Bulgaria was in the process of acceding to the WTO.

T. Modalities to improve the mechanism of examining RTAs (WT/REG/W/12, para.7)

55. As the first GATT 1947 working party to conduct an Article XXIV examination of an RTA, the Working Party on "The South Africa-Southern Rhodesia Customs Union" was charged with investigating what procedure might be established for examinations. In its Report, the Working Party stated that "no general procedures can be established beyond those provided in the Article itself".[39] In the discussion of this Report during the Third Session of the Contracting Parties, there were statements that "each case should be considered on its own merits," as no two RTAs had the same characteristics,

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[35]WT/REG12,16,20/M/1, para.28.

[36]Havana Reports, p.52, para.27.

[37]*Id.*, p.51, para.23.

[38]See also the excerpts from the Panel Report on "EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region," L/5776, para.3.14, and the discussion above concerning the scope of Article XXIV:5, at page 798.

[39]GATT/CP.3/24, adopted on 18 May 1949, II/176, 181, para.20.

and that "to establish precedents was clearly against the spirit of Article XXIV".[40] This case-by-case, "merits" approach was then championed in subsequent working parties.[41]

56. As soon as the working party process was transferred to the CRTA,[42] the Committee began carrying out its mandate "to develop, as appropriate, procedures to facilitate and improve the examination process", taking difficulties found in its parallel examination experience into account. These problems were largely procedural, involving matters such as the submission of initial information and follow-up questions and replies. The problems were not specific to an individual examination but rather were of a more general nature. The Committee worked with successive drafts of Guidelines on Procedures to Improve and Facilitate the Examination Process and was able to take note of these Guidelines (document WT/REG/W/15) at its Tenth Session.

U. Questions related to overlapping membership of RTAs - e.g. legal implications, rules of origin, parallel disciplines, margins of preference, etc. (WT/REG/W/12, para.11)

57. With the proliferation of RTAs in recent years, overlapping membership of RTAs has attracted attention. In the CRTA, discussion on specific points has led to broader inquiries as to the potential of overlapping RTAs to advance or hinder the multilateral trading system.

58. Concerns have been raised in examinations with respect to negative trade effects of differing rules of origin, with the point made that complex and varying methods of calculating regional content imposes a significant burden on industry.[43] This problem is magnified by the overlap of RTAs. However, it can be argued that the networking of RTAs acts as a positive force for the multilateral system, as parties are moving toward the harmonization of rules of origin for the sake of greater integration.

59. Regarding margins of preference, it has been noted (i) that preferences link the various agreements in Europe and elsewhere together, (ii) that it is unclear how the different RTAs provide for margins of preference to be granted to third parties, and (iii) that there seems to be a tendency toward harmonization of the preferential treatment granted under various agreements, not the least for practical purposes.[44]

[40]GATT/CP.3/SR.13, p. 5, 7.

[41]For example, the Report of the Working Party on "Association of Greece with the EEC," L/1829, adopted on 15 November 1962, 11S/149, 157, para.32, and the Report of the Working Party on "EEC - Agreement of Association with Turkey," L/3750, adopted on 25 October 1972, 19S/102, 103, para.3.

[42]General Council Decision of 6 February 1996, WT/L/127.

[43]For example, WT/REG4/M/1, para.79.

[44]WT/REG12,16,20/M/1, paras.16, 17.

V. Overlapping dispute settlement systems that could lead to conflicting jurisprudence (WT/REG/W/12, para.9)

60. In CRTA discussions, attention has been directed to the potential problem of RTAs developing jurisprudence that conflicts with that of the WTO. This issue arose with respect to NAFTA Article 103, which stipulates that the NAFTA is to "prevail over other agreements to the extent of any inconsistency, except as otherwise provided"; a written question had asked what the scope of the clause is, as far as the parties' obligations as WTO Members are concerned.[45] During the examination, the parties explained that NAFTA Article 103 "was designed to emphasize that if a Party went before a NAFTA dispute settlement panel, rather than a WTO Panel, it would not be able to rely on WTO Article XIII to trump the otherwise applicable rules of the NAFTA."[46]

[45]WT/REG4/1, question 14.

[46]WT/REG4/M/1, para.31.