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The WTO and Regional Trade: a family business? The WTO compatibility of regional trade agreements with non-WTO-members

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Abstract: Numerous WTO members pursue regional economic integration with both other members and non-WTO-members. The resulting derogation from the most-favoured-nation principle needs to be justified in accordance with the relevant WTO provisions. Regional integration in the service sector is expressly allowed between WTO and non-WTO members pursuant to GATS Article V. In the absence of clear regulation, it has been questioned whether the same is true for regional trade agreements (RTAs) covering trade in goods. Providing a comprehensive interpretation, this paper argues that neither GATT Article XXIV nor the Enabling Clause require the WTO membership of all the parties to an RTA.

Introduction

The World Trade Organization (WTO) is an almost all-encompassing organization[1] which seeks to regulate all important aspects of multilateral trade. Nevertheless, a significant part of trade is governed by bilateral or Regional Trade Agreements (RTAs) and thereby exempt from the most-favoured-nation (MFN) principle. The WTO consequently provides conditions which RTAs have to satisfy in order to benefit from the RTA exception. These provisions, especially GATT Article XXIV, are however so vague that critics sometimes deny their regulatory function.[2] In view

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1 As of March 2013, it has 159 members.

2 Peter Hilpold, 'Regional Integration Agreements According to Art. XXIV GATT – Between Law and Politics' (7) *Max Planck Yearbook of United Nations Law* 219 (2003), at 242, cautions about 'a blind spot' risking WTO credibility.

of the longstanding controversies on the requirements of RTA justification, it seems that the only consensus on the provisions is that they are 'ill-equipped to deal efficiently with the realities of RTAs'.[3] The legal insecurity is exacerbated by methodical difficulties regarding the RTA evaluation and a rather intermittent scrutiny by the Committee on Regional Trade Agreements and the Dispute Settlement Mechanism.

GATT Article XXIV is however crucial to reconciling the growing number of RTAs with the multilateral trade system that is based on the idea that every WTO member shall enjoy the same advantages and privileges in accessing the market of other WTO members – the MFN principle. In order to counterbalance the RTA's disadvantage of reducing the MFN clause's scope, GATT Article XXIV creates a legal framework that aims to privilege RTAs which increase global trade and prohibit those which merely divert it. Its requirements shall therefore ensure that the RTAs, which WTO members create, are trade increasing without affecting the trade between the parties to such an RTA and third WTO members.

In addition to GATT Article XXIV, the decision on the Enabling Clause, adopted in 1979 and forming part of the GATT 1994,[4] provides a justification for MFN violations and permits the granting of special preferences in favour of developing countries. As for GATT Article XXIV, its scope and requirements are in dispute.

This paper aims to contribute to the debate on RTAs, touching one of the 'hot potatoes': the controversy on WTO membership as a requirement for justification pursuant to GATT Article XXIV and para. 2 lit. c of the Enabling Clause. Are WTO members free to conclude RTAs with non-WTO members? Or is the WTO a family which jealously demands exclusivity regarding regional trade?

The question whether the WTO only tolerates RTAs that its members conclude with each other, even if still controversial between WTO members, has only seldom been the subject of academic discussions. A good number of writers seem to assume that there is no such limitation.[5] Following the publication of Choi's article 'Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States',[6] several other authors have, in contrast, adopted Choi's narrow interpretation of GATT Article XXIV and the Enabling Clause as not permitting

3 Youri Devuyst and Asja Serdarevic, 'The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Gap', *Duke Journal of Comparative and International Law* 1 (2007), at 5, with further references of the many and longstanding critics and the reform proposals.

4 Article 1 lit. b (iv) of GATT 1994.

5 Gabrielle Marceau and Cornelis Reiman, 'When and How is a Regional Trade Agreement Compatible with the WTO?', **28** (3) *Legal Issues of Economic Integration* 297 (2001) and Hilpold, above n. 2, for example do not mention the issue.

6 Won-Mog Choi, 'Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States', **8** (4) *Journal of International Economic Law* 825 (2005).

RTAs with parties other than WTO members.[7] This paper argues that neither the mentioned GATT provision nor the Enabling Clause require the WTO membership of all the parties to an RTA.[8]

Despite the still growing number of WTO members, the issue is of practical relevance because there are still more than 50, mainly small and developing countries, that have not acceded to the WTO.[9] Of the RTAs with non-WTO members that have been notified to the WTO, 57 are in force, of which 12 notified pursuant to the Enabling Clause.[10] Given that several such agreements have been announced as being under negotiation,[11] it does not seem as if their number will diminish in the short run. Even if some major trading partners, such as the USA, China, and Japan, refrain from doing so, other important WTO members, especially the EU, India, Russia, and South Korea, have been concluding preferential agreements with non-WTO members, some of them for decades. The EU alone is party to 11 RTAs with non-WTO members.[12]

Although the bulk of such RTAs make only a modest economic impact,[13] it should be noted that they also include the Commonwealth of Independent States (CIS), regrouping amongst others Russia and Belarus, the Economic Cooperation Organization (ECO), which is composed of Turkey, Iran, and other Asian and Eurasien countries, and the Great Arab Free Trade Area (GAFTA) reaching from Morocco to Oman and thereby including inter alia Algeria, Saudi Arabia, and the United Arab Emirates.[14]

7 See Devuyst and Serdarevic, above n. 3, at 21 ff. and Md. Rizwanul Islam and Shawkat Alam, 'Preferential Trade Agreements and the Scope of the GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence', *Netherlands International Law Review* 1 (2009), at 29 ff.

8 Sabine Pellens, *Entwicklungsgemeinschaften in der WTO. Die internen Rechtsordnungen der regionalen Integrationsgemeinschaften zwischen Entwicklungsländern und ihre Stellung im Recht der Welthandelsorganisation*, 1st edn (Berlin: Duncker and Humblot, 2008), at 177f, 221f was the first to explicitly propose this thesis.

9 Among these countries more than 20 have entered into negotiations on their accession which, however, often take a long time. In July 2012, the WTO General Council has 'approved new guidelines to enable least developed countries to negotiate membership of the WTO more quickly and easily', WTO, Members streamline accession for poorest countries, 2012, available at http://wto.org/english/news_e/news12_e/acc_03jul12_e.htm (visited 4 September 2013). See also WTO, Members and Observers, 2012, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited 4 September 2013).

10 See the WTO homepage, RTA Database, List of all RTAs in force, last updated on 23 August 2013, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (visited 4 September 2013).

11 By way of example, negotiations have been conducted on the Bay of Bengal Initiative on Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) and an agreement between Canada and the Carribean Community and Common Market (CARICOM). See the WTO homepage, RTA Database, List of early announcements, last updated on 23 August 2013, available at http://rtais.wto.org/UI/PublicEARTAList.aspx (visited 4 September 2013).

12 The most important being the RTA concluded with Algeria.

13 The Economic Community of Western African States (ECOWAS) and the FTA between Georgia and Turkmenistan are representative of such RTAs.

14 The GAFTA has not been notified yet to the WTO.

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Despite their minor economic importance, these RTAs are highly relevant from a development perspective. Most of the non-WTO members are small and developing countries and as such are economically and politically vulnerable. Regional integration, especially understood literally, e.g. with neighbouring countries, provides a valuable tool to boost their industrial development – as well as the development of their respective surrounding countries that often are developing countries too.[15] If WTO members were not allowed to enter into trade agreements with non-members, the latters' political and commercial scope would be dramatically restrained and their development perspectives affected adversely. This is not only true with a view to the Enabling Clause but also regarding GATT Article XXIV: because the Enabling Clause is only available to RTAs that are composed exclusively of countries considering themselves as developing, some regional groupings containing mainly economically weak countries must be notified under GATT Article XXIV.[16]

The starting point of our considerations is that an RTA concluded by WTO members with non-WTO members violates the MFN obligation and requires therefore justification. In fact, the MFN treatment obliges the WTO members to extend any advantage granted to goods from any country with respect to custom duties and charges imposed on imported goods to all the WTO members' like products.[17] The MFN obligation consequently does not only apply to advantages granted to WTO members, but also to those accorded to third countries.

As practically only GATT Article XXIV and the Enabling Clause can provide justification for an MFN breach due to regional integration covering the trade in goods, it is important to delimit exactly the scope of these provisions, considering RTAs that WTO members conclude with non-members.

This paper unfolds in two sections, the first focusing on GATT Article XXIV and the second on the Enabling Clause. Following the rules of interpretation as codified in Vienna Convention on the Law of Treaties (VCLT)[18] arts. 31 and 32, each part analyzes the respective provision's wording, its context, object, and purpose. Especially for GATT Article XXIV the history of negotiation can be potentially taken into account as supplementary means of interpretation pursuant to VCLT Article 32. Only an interpretation including all the mentioned aspects corresponds

15 'Trade within the same region can often be more conducive to "diversification, structural change and industrial upgrading than overall trade"', UNCTAD, 'Trade and Development Report, 2007: Regional Cooperation for Development', UN doc. UNCTAD/TDR/2007, at 102 ff, 110.

16 For example the Southern African Development Community (SADC). Won-Mog Choi and Yong-Shik Lee, 'Facilitating Preferential Trade Agreements between Developed and Developing Countries: A Case for "Enabling" the Enabling Clause', **21** (1) *Minnesota Journal of International Law* 1 (2012), at p. 1 ff, regret the fact that less than one third of all RTAs involving only developing countries have been notified pursuant to the Enabling Clause.

17 GATT, Article I. The GATS contains in its Article II a MFN clause as does the TRIPS in its Article 4.

18 Done at Vienna, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

to the 'customary rules of interpretation of public international law' in accordance with which the WTO provisions are to be clarified, DSU Article 3.2.[19] This paper argues that a comprehensive analysis of both GATT Article XXIV and the Enabling Clause para. 2 lit. c demonstrates that these provisions do not contain any WTO membership condition.

1. Art. XXIV GATT

Choi puts forward the thesis that para. 5 of GATT Article XXIV can only justify RTAs among WTO members. If they nevertheless conclude RTAs with non-member states, they should first ask the other WTO members for approval according to para. 10. Choi's thesis relies essentially on the wording of Article XXIV paras. 5 and 10, the GATT 1947 practice, and the drafting history. This paper firstly examines the provision's wording. In the framework of the following context analysis it will reappraise whether the practice concurs with Choi's reading. It will then accord the appropriate weight to teleological arguments and also consider the drafting history.

The wording argument

GATT Art. XXIV para. 5 stipulates, 'the provision of this Agreement shall not prevent, *as between the territories of contracting parties*,[20] the formation of a customs union or of a free-trade area'.

The term 'contracting parties' might imply that the justification of an MFN violation, pursuant to para. 5, may only be open to RTAs concluded between GATT contracting parties or rather WTO members. Now it is often unclear if the literal meaning really corresponds to the parties' intention. Choi believes it does, and refers to the drafting history.[21] As we will see below, the drafting history does however not allow unambiguous conclusions on the parties' intentions. In contrast, the context as well as the teleological analysis promise more guidance.

The context

The context to be taken into account comprises GATT Article XXIV para. 10, GATS Article V and the practice.[22]

19 WTO Appellate Body Reports, *United States – Standards for Reformulated and Conventional Gasoline (US–Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, p. 17; *Japan – Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 10 ff.

20 Authors' italics.

21 Choi, above n. 6, at 836 f.

22 VCLT, Article 31 para. 2, 3 lit. b and c.

GATT Article XXIV para. 10

The existence of GATT Art. XXIV para. 10 seems to support the narrow reading. This provision establishes that:

> The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

According to a note of the GATT Secretary that refers to a negotiation committee, this paragraph has been inserted to 'enable the Organization to approve the establishment of customs unions and free-trade areas which include non-members'.[23] Nevertheless, the inserted paragraph has been formulated in a way that does not exclusively refer to or include only RTAs involving non-contracting parties. Given that the Havana Charter Article on 'Preferential Agreements for Economic Development and Reconstruction',[24] 'which expressly recognized the desirability of such preferential agreements and permitted them as an exception to the MFN obligation after approval by a two-thirds majority, was not incorporated into the GATT',[25] para. 10 could be perceived, by way of example, as providing 'waivers' for the sake of development promotion.

In practice, the para. 10 procedure has only been realized twice, in the 1950s, for the Nicaragua–El Salvador FTA[26] and the Nicaragua–Central American FTA,[27] although the WTO members, as previously the GATT contracting parties, continue to conclude RTAs with non-members.[28] While the Nicaragua–Central American FTA was approved under the condition of a regular five-year review, it has never been reviewed. Instead, the contracting parties had practically abandoned the para. 10 procedure since the 1960s. Choi admits: 'In those days, reaching RTAs with non-GATT-member states was no longer the exception; it actually became a widespread practice occurring in several continents. As a result, the number of countries that were reluctant to go through the strict approval procedure of para. 10, rapidly increased.'[29] To this day no more approval procedures have taken

23 See WTO, *GATT Analytical Index – Guide to GATT Law and Practice* (hereinafter *GATT Analytical Index*), updated 6th edn 2012, at 846 referring to GATT doc. W.12/18, at 5–6.

24 Havana Charter, Article 15.

25 *GATT Analytical Index*, above n. 23, at 847.

26 See GATT Contracting Parties, 'Nicaragua – El Salvador Free-Trade Area', Corrigendum, GATT/CP.6/24/Add.1/Corr., 5 November 1951, referring to the GATT Contracting Parties' Decision of 25 October 1951, BISD II/30.

27 GATT Contracting Parties, Decision of 13 November 1956, BISD 5S/29.

28 'The Contracting Parties' Decision concerning the Customs Union between France and Italy', GATT doc. GATT/1/49, 19 March 1948, does not refer to para. 10 but to para. 5 of GATT Art. XXIV: 'The Contracting Parties decide in terms of para. 5 of Art. XXIV that the provisions of the General Agreement on Tariffs and Trade shall not prevent the establishment of a customs union or an interim agreement for a customs union between France and Italy.'

29 See Choi, above n. 6, at 840.

place. This is not only due to the fact that the number of WTO members is constantly increasing. Since the foundation of the WTO, its members keep concluding RTAs with non-member states;[30] the latter's status is rarely mentioned and never picked out as a central aspect during the RTA evaluation.[31]

The continuous disuse of GATT Article XXIV para. 10 seems to point to its desuetude. Desuetude is a concept of general public law related to the establishment of a customary rule of no longer applying a particular provision. It requires a frequent disuse over a considerable period of time that is is neither interrupted nor objected, and is attributable to the interested parties' governments, and the interested parties' legal opinion that the provision which is in disuse no longer exists.[32] There is however doubt regarding the parties' legal conviction because until recently WTO members persist in discussing the evaluation of RTAs involving non-members. Even after the decision to consider these RTAs under the Transparency Mechanism, single members continue to recall the para. 10 procedure.[33] The permanent disuse of GATT Article XXIV para. 10 thus does not reflect the WTO member's conviction. At the same time, para. 10 neither through its terms nor through its practice necessarily confirms the requirement of WTO membership for all the parties of an RTA pursuant to GATT Article XXIV.

The practice

Choi sees in the contradictory and inconsistent practice of the GATT 1947 proof of a general, i.e. from 'a substantial number' of GATT contracting parties, shared opinion on the supposed condition of WTO membership.[34] Even if he admits that 'this position was never officially declared' and there was no consensus, his conclusions are misleading. Because if there are panel decisions, such as the unadopted one in the *EC Bananas II* dispute, that claim that Article XXIV para. 5 only refers to RTAs among members,[35] there are others – the unadopted in the

30 The currently 57 notified agreements, which concern trade with non-WTO members, are evidence of the continuous practice as they reach back to the 1970s, 1980s, 1990s, and to the last two decades.

31 Choi, above n. 6, at 841 quotes the example of the Interim Agreements of FTAs between the EC and, respectively, Estonia, Latvia, and Lithuania, these countries being not WTO members at the time of entry into force.

32 See Arnold McNair, 'La terminaison et la dissolution des traités', **22** *Recueil des Cours de l'Académie de Droit International de La Haye* 465 (1928-II), at 518; Robert Kolb, 'La désuetude en droit international public', *Revue Générale de Droit International Public* 577 (2007) and Guillaume Le Floch, 'La désuetude en droit international public', *Revue Générale de Droit International Public* 609 (2007).

33 See the US American Statement in CRTA, 'Note on the Meeting of 4 March 2009', WTO doc. WT/REG/M/52, para. 14. See also the 'Report of the GATT Working Parties on the European Free Trade Association', GATT doc. L/1235, 4 June 1960, para. 58 and GATT Working Parties, 'Report on the Latin American Free Trade Area', GATT doc. L/1364, 17 November 1960, para. 31.

34 Choi, above n. 6, at 836.

35 Report of the Panel, 'EEC – Import Regimes for Bananas', 11 February 1994 (unadopted), GATT doc. DS38/R, para. 163. The Panel relies on the same argument as Choi: the wording that the Panel consider to be confirmed by the drafting history.

EC Citrus Products dispute, for example – that argue the opposite[36] or do not mention the issue.[37] A couple of Working Parties' reports expressly refer to the permissive practice and are in themselves proof of the absence of control upon the RTA parties' WTO membership. Already under the GATT 1947, several RTAs involving non-contracting parties have been tolerated by the contracting parties without their approval pursuant to para. 10 of GATT Article XXIV, especially the European Free Trade Association and the Latin American Free Trade Area.[38] This practice has not changed since the WTO was established.

Choi's central proof for his practice argument seems to be the Working Parties' statement in the 1966 *UK–Ireland FTA* dispute. In this case, the Working Party stated that a country's intention to accede to the GATT, this country being party to an RTA, 'may' make contracting parties 'wish to re-examine certain questions relating to the FTA'.[39] The passage that leads Choi to his far-reaching interpretation is the following one:

> The CONTRACTING PARTIES note that Ireland is not currently bound by the provisions of the General Agreement and welcome, therefore, the intention of the Government of Ireland to accede to it; they note that contracting parties may wish to re-examine certain questions relating to the Free-Trade Agreement in light of the negotiations for Ireland's accession.

The statement however does not allow the conclusion to be made 'that RTAs concluded with non-GATT-member States cannot receive benefits of justification' according to Article XXIV.[40] Firstly, note that the report only mentions that some, not all, contracting parties may see the necessity to re-examine the FTA. In a way, the statement reflects a diplomatic manner of embracing every contracting party's interest in order to ensure the unanimous adoption of the report. However, taking into account that certain parties might re-examine the FTA does not imply a consensus on the re-assessment, and even less of a consensus on an assumed condition of WTO membership. Because, secondly, the reason to re-examine an

36 Report of the Working Party, 'Agreements of Association between the European Economic Community and Tunisia and Morocco', 7 April 1970, GATT doc. L/3379, para. 16. GATT Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region (EC–Citrus)*, L/5776, 7 February 1985, unadopted, para. 4.9: 'in the past, RTAs such as EFTA, LAFTA, Arab Common Market, UK–Ireland Free-Trade Area Agreement have already been evaluated by GATT member states based on paragraph 7(b) of GATT Article XXIV'.

37 Report of the Panel, *EEC – Member States' Import Regimes for Bananas (EEC–Bananas I)*, DS32/R, 3 June 1993, unadopted, para. 364–372.

38 See e.g. the Report of the Working Party, 'Agreements of Association between the European Economic Community and Tunisia and Morocco', 7 April 1970, GATT doc. L/3379, para. 16, and the GATT Panel Report, *EC–Citrus*, para. 4.9: 'in the past, RTAs such as EFTA, LAFTA, Arab Common Market, UK–Ireland Free-Trade Area Agreement have already been evaluated by GATT member states based on paragraph 7(b) of GATT Article XXIV'.

39 Choi, above n. 6, at 836 refers to GATT Working Parties, 'Report on the United Kingdom – Ireland Free-Trade Area Agreement', conclusions adopted on 5 April 1966, BISD 14S/23.

40 Ibid, at 836.

RTA's provisions after the accession to the GATT can be other than the supposed condition of membership. The WTO Committee on Regional Trade Agreements (CRTA) noted discussions on the question of whether the existence of a free-trade agreement involving non-members would affect the outcomes of those non-members' accession negotiations with the WTO.[41] The CRTA also raised the issue that the accession negotiations have an impact on the assessment of the RTA's general incidence on trade with third parties, that is on the external requirement's evaluation. The CRTA therefore concludes that the assessment pursuant to GATT Article XXIV para. 5 lit. b can 'only be made when the extent of the preferences exchanged among the parties were measurable, i.e. only once the accession negotiations were completed'.[42] Thus, a re-examination in the light of the WTO accession of a country that is party to an RTA is necessary to verify if the external requirement is fulfilled. In contrast, such a re-assessment does not imply that WTO membership was a condition for RTA justification according to GATT Article XXIV.

Hence, the practice does not provide any proof of conditionality upon GATT or WTO accession, but rather indicates that there is no membership condition.

GATS Article V

Since the Uruguay round, the multilateral trade system does not only regulate trade in goods, but also trade in services. Despite the establishment of the GATS and the multilateral negotiations in services, WTO members continue to promote service sector liberalization in regional agreements.[43] GATS Article V allows WTO members to enter into regional agreements liberalizing trade in services 'between or among the parties to such an agreement'.[44] Because of its clear wording and the corresponding practice, it is generally admitted that this provision can justify any RTA on services that WTO members conclude with non-members.[45]

In practice, trade in services is usually liberalized after the barriers on trade in goods have been lowered.[46] If the parties to an RTA covering trade in services were obliged to become WTO members when they first liberalize trade in goods, the GATS stipulation permitting RTAs, regardless of a potential WTO membership of

41 WTO CRTA, 'Synopsis of "systemic" issues related to Regional Trade Agreements', WTO doc. WT/REG/W/37, 2 March 2000, at para. 67.

42 Ibid.

43 Christopher Findlay, Sherry Stephenson, and Francisco Javier Prieto, 'Services in Regional Trade Agreements', in Patrick F. J. Macrory, Arthur E. Appleton, and Michael G. Plummer (eds.), *The World Trade Organization: Legal Economic and Political Analysis* (New York, NY: Springer, 2005), 293–311, at 294.

44 Para.1 of GATS Art. V.

45 See Choi, above n. 6, at 843 ff., 845 and Pellens, above n. 8, at 178.

46 Markus Krajewski, 'Services Liberalization in Regional Trade Agreements: Lessons for GATS "Unfinished Business"?', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford, New York: Oxford University Press, 2006), 175–200, at 178.

the RTA parties, would be ineffective.[47] Choi's interpretation leads consequently to a recommendation that lacks practical relevance: he suggests to firstly exclude the goods sector from the scope of regional integration and to cover instead only services until convincing the partner to become a WTO member. There are rarely RTAs that reflect this approach. If the GATT wording is not clear, GATS Article V can be considered – depending on your view – as confirmation of the permissive reading or concession to the practical non-effectiveness of the approval procedure.[48]

The object and purpose

RTAs considerably reduce the impact of the MFN principle. Therefore, they are often viewed as opposed to multilateral trade. The WTO system approaches the phenomenon of regional integration nonetheless in a constructive manner, acknowledging its desirability as a means of increasing freedom in trade.[49] For instance, the preamble of the GATT 1994 Understanding on Art. XXIV recognizes 'the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements'. GATT Article XXIV para. 4 reflects the same spirit when it outlines for what reason and to what extent the multilateral trading system tolerates RTAs:

> 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.

Hence, the GATT and WTO trading system recognize the RTAs as trade liberalizing tools, provided that they do not raise additional barriers to the trade of other WTO members. In this way, RTAs can especially help reduce trading barriers of States that do not participate in the WTO.[50] Furthermore, they often extend the scope of WTO provisions by means of rules transfer. The objective of favouring regional trade liberalizations that stimulate global trade does not call for a WTO membership condition. On the contrary, it requires WTO members to be able to conclude RTAs which have a large scope, not only with respect to the covered subject matters, but also with respect to the participating countries. Similarly, the

47 Pellens, above n. 8, at 178.

48 Choi, above n. 6, at 846 explains the different wording inter alia with the fact that 'the phrase "as between the contracting parties" in paragraph 5 of GATT Article XXIV had already lost its ability to control RTAs involving non-GATT member states, and that paragraph 10 approval procedure was largely bypassed'.

49 See Marceau and Reiman, above n. 5, at 309.

50 See Pellens, above n. 8, at 177 f.

Singapore Ministerial Declaration underlines the RTAs' significance for the integration of countries that are not yet strong trading partners, the developing countries which account for the majority of WTO non-members:

> Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system.[51]

The objective of promoting RTAs which liberalize global trade and integrate new countries thus calls for a permissive interpretation.[52]

Furthermore, if we look at the undisputed requirements of Article XXIV, they all reflect the function of para. 4 of ensuring that the RTAs, firstly, significantly liberalize trade and, secondly, do not hinder trade with third party WTO Members. So, what purpose could the requirement of WTO membership serve?

During the negotiations on the ITO Charter, the US seemed to have been concerned about a 'free-rider' problem: it feared that 'by concluding with their major ITO member-trading partners bilateral trade agreements that included an MFN clause, any non-ITO member states could free ride on the benefits of MFN treatment accorded by the ITO-member-trading partners to other ITO members'.[53] This could have meant that non-ITO members had no substantial interest to accede to the ITO and to provide concessions in the framework of multilateral trade.[54] The US therefore suggested inserting an article that prohibited the conclusion of RTAs extending ITO Charter benefits to non-members or that made such RTAs dependent on the Organization's approval.[55] This article has however not been adopted. The free-rider problem was again the subject of discussions in 1955. At that time, the majority of the contracting parties did not share US concerns.[56] Analyzing the practice, we cannot observe a change of mindset over recent decades. Since WTO members are not concerned about the potential free-riding of non-members, a membership condition does not make sense. Besides, there are no indications that the GATT contracting parties or WTO members designed the

51 Singapore Ministerial Declaration, WTO doc. WT/MIN(96)/DEC, adopted on 13 December 1996, para. 7.

52 Pellens, above n. 8, at 177 f.

53 See Choi, above n. 6, at 832.

54 Ibid, at 832.

55 'Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment', UN doc. E/PC/T/186, 10 September 1947, draft Article 93.

56 'Report of Review Working Party IV on Organizational Questions', GATT doc. L/327, 22 February 1955, para. 39: 'The Working Party considered the question of the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of bilateral agreements. It was pointed out in the discussion that noncontracting parties frequently received all the benefits of the Agreement without having to undertake its corresponding obligations, and that this situation could discourage rather than induce other countries to join. Most members of the Working Party felt, however, that the attitude a contracting party wished to adopt in this respect to a non-contracting party was a matter for each contracting party to decide.'

function of Article XXIV to promote the GATT, and subsequently WTO, accession by limiting the non-members political and commercial scope.

One therefore concludes that the teleological analysis implies that GATT Article XXIV does not contain any membership requirement.

The drafting history

The preparatory work of the relevant treaty and the circumstances of its conclusion can help to establish or confirm a provision's meaning as a supplementary means of interpretation, Article 32 VCLT. We will however see that the drafting history does not permit clear conclusions, contrary to Choi's understanding.

Choi argues that the preparatory work on GATT Article XXIV would point to the existence of a membership condition. For this interpretation, he rests upon the fact that the corresponding article which stipulated the justification for RTAs between 'two or more customs territories'[57] in one of the ITO Charter drafts had been modified to 'between the territories of Members'.[58] Choi views this modification as a sign of the negotiating parties' intention to prevent the conclusion of RTAs with non-GATT-members, even if he admits there is no record of discussion on this issue.[59]

However, it is not that certain that the modification reflects the negotiating parties' common intent in the way Choi suggests, because, in parallel with the above-mentioned modification, the USA was seeking to insert an article that explicitly prevents the ITO Charter benefits, and respectively the GATT benefits, from being extended to non-member countries by means of RTAs. The proposal has been rejected several times.[60] This means that the USA did not consider the wording's modification as hindering RTAs with non-contracting parties. Similarly, the majority of contracting parties that rejected a clear regulation on the matter did not intend to give such a meaning to the chosen wording.

57 (London and New York) Draft Charter of ITO, Article 38. 'Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment', adopted on 22 August 1947, at 78.

58 ITO Charter draft as established at the Havana Conference, Article 44. See *GATT Analytical Index*, above n . 23, at 846 for the drafting history of GATT Art. XXIV. The GATT was originally drafted as part of the International Trade Oragnization (ITO) Charter, an international trade body covering employment, commodity agreements, restrictive business practices, international investments, and services. Having been approved at a conference in Havana in 1948, the ITO Charter was ultimately not ratified and therefore never became effective. See *GATT Analytical Index*, above n. 23, at 3 ff. for the drafting of the Havana Charter.

59 Choi, above n. 6, at 836 f.

60 In 1946, 1947, and 1955. See the 'Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment', adopted on 22 August 1947, at 55 and GATT Contracting Parties, 'Report of Review on Organizational and Functional Questions', GATT doc. L/327, adopted on 28 February 1955, para. 39 ff.

Even though one might see a difference between, on the one hand, expressly prohibiting RTAs and, on the other hand, making RTAs with non-members depend on the contracting parties' approval, the fact remains that the preparatory work does not provide any proof of the parties' intention to limit justifiable RTAs to those between contracting parties. The analysis of the preparatory work as well as the discussions on modifications rather reveal a continuous resistance against the introduction of an accession or membership requirement.

Conclusion on GATT Article XXIV

Even if the terms might indicate the opposite, GATS Article V as context, the practice as well as the object and purpose call for the justifiability of RTAs regardless of the potential WTO membership of the RTA's parties. The drafting history, in contrast, does not permit unambiguous conclusions on the matter.

2. The Enabling Clause

Most non-WTO members are developing countries. Therefore, the question whether they can benefit from preferences accorded pursuant to the Enabling Clause is of special interest. Its para. 1 stipulates:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

Paragraph 2 then specifies the different scopes of the derogation. The controversial provision is para. 2 lit. c according to which para. 1 applies to 'Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and . . . of non-tariff measures, on products imported from one another'. Does this provision limit the possibility for developing countries to accord each other preferential treatment to agreements to which all the parties are WTO members? This paper argues that developing countries can accord each other preferences, regardless of their WTO membership. As for GATT Article XXIV, the wording might suggest a narrow reading, but teleological and systematic analysis support a more permissive understanding.

The wording

The clause whose scope is in dispute is para. 2 lit. c. Accordingly, contracting parties may accord preferences in favour of developing countries in the framework of:

> Regional or global arrangements entered into amongst less-developed *contracting parties* for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING

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> PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.[61]

Apparently, the countries eligible to grant each other preferences are limited to GATT contracting parties, respectively WTO members. The wording stands in contrast to para. 1 as well as to the other para. 2 stipulations. These provisions all refer to 'developing countries' without any further WTO membership requirement. Do the different terms permit the conclusion that the contracting parties intentionally established an additional requirement for para. 2 lit. c? Choi answers the question in the affirmative, drawing exclusively upon the supposedly unambiguous wording.[62] However, according to the rules of treaty interpretation, the terms of a provision shall not be considered independently of its context and its object and purpose.[63] Recently Choi and Lee draw attention to the shortcomings of an interpretation which limits the Enabling Clause's scope to WTO members.[64] They concluded that making preferential treatments for developing countries contingent on their WTO membership is inconsistent with the Enabling Clause para. 1.[65] Choi and Lee read this paragraph as 'principle'.[66] Whether this might mean that the paragraph establishes the Enabling Clause's objective or the legally decisive stipulation[67] does not affect the requisite to provide an understanding that reconciles the wording and the context as well as the object and purpose pursuant to the VCLT Article 31 para. 1. This paper suggests such an interpretation.

The context

The derogation from the MFN clause, stipulated in para. 1 without any condition regarding WTO membership, applies not only to preferential trade regimes between developing countries, but also to several other hypothesis pursuant to Enabling Clause para. 2. The provision's scope covers 'preferential tariff treatment accorded by developed contracting parties to products originating in developing countries' (para. 2 lit. a) – the so-called Generalized System of Preferences – as well as 'Differential and more favourable treatment ... concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT' (para. 2 lit. b). When specifying the scope of the para. 1 derogation, para. 2 lit. a and b do not require the WTO membership of the

61 Authors' italics.

62 See Choi, above n. 6, at. 852 who just excludes LDCs from the WTO membership requirement in virtue of para. 2 lit. d. See also Islam and Alam, above n. 7, at 32.

63 VCLT, Article 31 para. 1.

64 See Choi and Lee, above n. 16, p. 9: 'The current legal framework of the Enabling Clause, which allows preferential treatment for RTAs only among developing WTO member countries, deserves criticism.'

65 Ibid, p. 11.

66 Ibid, p. 11.

67 See Pellens, above n. 8, p. 221.

benefiting developing countries. These provisions thus allow preferential measures in favour of developing countries without any condition as to their WTO membership. Admittedly the wording of para. 2 lit. c differs from that of the aforementioned provisions. But there is no reason for this difference. Is the preferential trade of goods between developing countries more detrimental to the MFN principle than preferences granted by developed WTO members? There is no proof for such an assumption, or records of discussions on this issue during the drafting of the Enabling Clause. Do multilaterally negotiated instruments on the reduction of non-tariff-measures pursuant to para. 2 lit. b affect the multilateral trade less than preferential agreements between developing countries? Also in this case, there is no evidence for such a general statement. No reason can be seen that could justify the additional condition of WTO membership in para. 2 lit. c. The GATT parties might have chosen the terms 'contracting parties' since only countries that are contracting parties are subject to the MFN clause and need the exemption.[68]

In the context of the other para. 2 provisions, one should not – without justification – raise the barriers to agreements among developing countries in accordance with lit. c higher than those to the other para. 2 cases, especially the General System of Preferences. The teleological analysis confirms this reading allowing preferential agreements between developing countries regardless of their WTO membership.

The object and purpose

The Enabling Clause shall serve the development promotion. This objective does not only address the developing countries that are WTO members, but all the developing countries.[69] Like the preamble of the Agreement establishing the WTO, the Enabling Clause refers to the fuller participation of (all) developing countries in international trade.[70] While the Preamble of the WTO recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development' the Enabling Clause is officially entitled 'Differential and more favourable treatment, reciprocity and fuller participation of developing countries'. Its para. 1 providing the exception to the MFN clause also reflects the objective of favouring all the developing countries as it refers simply to 'developing countries'.

The non-differentiation of developing countries with regard to WTO membership is not only implied by the purpose – as it arises from the Clause – but also by its

68 Ibid, at 221 f.

69 Ibid, at 222.

70 See the second paragraph of the Agreements preamble and the title as well as para. 1 of the Enabling Clause.

underlying principle. The Enabling Clause's title points expressly to the differential treatment principle. This principle 'is based on the idea that equal treatment of unequals is unjust and that the same rules can therefore not apply to countries at different stages of development'.[71] The Enabling Clause thus follows an approach that solely distinguishes the benefiting countries according to their economic development stage. A supposed WTO membership criterion is thus not consistent with the differential treatment principle that underlies the Enabling Clause.

This interpretation is also confirmed by the understanding of 'development' as a notion which points not only to improvement due to the help of others, but also to an empowerment: the possibility for a group of countries to better their situation without assistance from developed countries. Why should the developed countries be free to provide preferences to any developing country, and the developing countries themselves be restrained from cooperating with each other regardless of their WTO membership? As the possibility to liberalize trade firstly between countries that are in a similar economic situation is of particular interest – the chances of diversification and industrial upgrading being greater[72] – and since the developing countries are not entitled to preferences by virtue of the WTO law, but can just benefit from those that developed countries offer them, their possibility to grant each other preferences should not be restricted.

Making the development promotion dependent on an assumed WTO membership is inconsistent with the Enabling Clause's object and purpose. Thus, the scope of its para. 2 lit. c shall not be limited with regard to the participating developing countries.

Conclusion

WTO members are free to conclude RTAs with non-WTO members covering trade in goods and services. This may seem surprising, given that GATT Article XXIV para. 5 and the Enabling Clause para. 2 lit. c apply according to their wording to 'contracting parties'. This paper has however demonstrated, giving the appropriate weight to systemic and teleological arguments, that WTO membership does not determine the scope of application of these provisions.

Besides the legal arguments there are policy reasons to opt for a permissive interpretation. Most of the non-WTO members are small developing countries and their RTAs are of minor economic impact. These countries may have good reasons not to accede to the WTO. For example, they may lack capacities to fulfil the

71 Abdulqawi A. Yusuf, 'Differential and More Favourable Treatment of Developing Countries in International Trade: The GATT Enabling Clause' (14) *Journal of World Trade Law* 488 (1980), at 492.

72 UNCTAD, 'Trade and Development Report, 2007: Regional Cooperation for Development', UN doc. UNCTAD/TDR/2007, at 102 ff.

requirements of the WTO law,[73] but they might consider regional trade conducive to their economic development. The WTO being committed to development, should not punish them for not promising loyalty by hindering regional trade with its members. As regional trade can be a tool for progressively entering international markets, it should not depend upon belonging to the WTO family.

73 See Choi, above n. 6, at 855 adopts this argument not for all the developing countries, but only for LDCs.