THE MEANING OF 'SUBSTANTIALLY ALL THE TRADE' IN ARTICLE XXIV OF THE GATT AND 'SUBSTANTIAL SECTORAL COVERAGE' IN ARTICLE V OF THE GATS

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

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Field of Research: International Trade Law

Submission Date: 05 February 2024

Word Count: 10647 [Incl. the body of the report, footnotes excl. title page, declaration, abstract, table of contents and bibliography]

DECLARATION

I, ______1393191_________, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

There has been an increase in the emergence and reach of custom territories in the form of regional or preferential trade agreements (RTA/PTAs). As of 01 January 2024 361 RTAs relating to trade in goods are in force and about 594 have been notified to the World Trade Organisation (WTO). Economic integration through RTAs has allowed traders from many countries to access the global market and function competitively. More so, economic integration contributes to increasing gross domestic product (GDP), developing new markets and attract new investments. Typically, RTAs provide their Members a trade advantage and are, thus, inconsistent with the Most Favoured Nation (MFN) principle. The WTO establishes an exception for such inconsistencies, provided the RTA in question meets specific requirements. Among these requirements, an RTA must cover 'substantially all trade' in terms of art. XXIV:8 of the General Agreement on Tariffs and Trade 1994 (GATT) and 'substantial sectoral coverage' in terms of art. V:1(a) of the General Agreement on Trade in Services (GATS). These terms have been inconsistently determined and applied by WTO Members, with no sight of a standard definition. Therefore, the purpose of this research report is to determine the definition for the requirements 'substantially all trade' and 'substantial sectoral coverage'. I approach this by first unpacking the purpose and background of RTAs and defining key concepts like FTAs and CUs. Second, I discuss the foundational MFN principle. I then discuss the legal requirements for invoking exceptions to the MFN principle for RTAs. Then I explore what substantially all the trade in art. XXIV of GATT and substantial sectoral coverage in art. V of GATS means. Finally, I determine a standard definition for both requirements.

Keywords: Trade, most favoured nation, national treatment, free trade areas, customs unions, GATT, GATS

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*THE MEANING OF 'SUBSTANTIALLY ALL THE TRADE' IN ARTICLE XXIV OF THE GATT AND 'SUBSTANTIAL SECTORAL COVERAGE' IN ARTICLE V OF THE GATS**

I INTRODUCTION

There has been an increase in the emergence and reach of custom territories in the form of RTAs/PTAs, which take the form of CUs, FTAs, common markets (CMs) or economic unions.[1] As of 01 January 2024 the WTO reported that 361 RTAs relating to trade in goods are in force and about 594 have been notified to the WTO.[2] Economic integration through RTAs has allowed traders from many countries to access the global market and function competitively.[3] More so, economic integration contributes to increasing GDP, developing new markets and attract new investments.[4]

RTAs afford preferential treatment to countries that form part of the agreements as signatories. Thus, likely resulting in unequal treatment towards those countries that are not signatories to the agreement but are WTO Members whom are entitled to MFN treatment and national treatment from other WTO Members, even those who form part of RTAs.[5] Namely, a WTO Member shall not provide trade advantages between 'like' products from different trading partners and between its own and like foreign products. Simply put, WTO Members must not discriminate against other WTO Members through their trade measures and must afford other WTO Members with equal treatment.

[1] World Trade Organisation 'Regional trade agreements and the WTO' available at https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm, accessed 28 December 2023.
[2] World Trade Organisation 'Regional trade agreements' available at https://www.wto.org/english/tratop_e/region_e/region_e.htm, accessed 25 January 2024.
[3] International Monetary Fund 'Global Trade Liberalization and the Developing Countries' November 2001 available at https://www.imf.org/external/np/exr/ib/2001/110801.htm, accessed 28 December 2023.
[4] Ibid. Also see James W. Fox 'An Evaluation of Trade Capacity Building Programs: Regional Trade Agreements: A Tool for Development' (2004) *PPC Evaluation Working Paper No. 15.*
[5] This report will focus on the most-favoured-nation principle because the principles in question are exceptions to the MFN principle.

To avoid the redundancy of RTAs, art. XXIV of the GATT[6] and art. V of the GATS[7] the WTO establishes an exception for inconsistency with the MFN principle.[8] The two provisions incorporate a similar requirement, i.e., 'substantially all trade' in terms of art. XXIV:8 of the GATT and 'substantial sectoral coverage' in terms of art. V:1(a) of the GATS. These terms have been inconsistently determined and applied by WTO Members, with no sight of a standard definition.[9]

The lack of clarity of these terms could create barriers to trade because the absence of legal certainty and significance around what proportion of sectors need to be liberalised by RTAs to qualify under the exception has been applied inconsistently. Additionally, it could lead to the WTO Dispute Settlement Body (DSB) panels applying this requirement as they please and not taking into consideration the contextual differences between WTO Members such as market composition and its nature, trading capacity of the RTA Members, whether a country is developed or developing. To effectively implement art. XXIV of GATT and art. V of GATS it is important to clarify what these terms mean.

Hence, the purpose of this research report is to determine the meaning of 'substantially all trade' and 'substantial sectoral coverage'. I approach this by first discussing the background of RTAs. Second, I discuss the foundational MFN principle, before determining the legal requirements for invoking exceptions to the MFN obligation for RTAs. I then explore what substantially all the trade in art. XXIV of GATT and substantial sectoral coverage in art. V of GATS means. Finally, I determine a standard definition for both requirements.

II BACKGROUND TO REGIONAL TRADE AGREEMENTS

I discuss the background by unpacking key concepts relating to regional economic integration (under (a)) and elaborating on RTAs' purpose.

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[6] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT]. In this dissertation, 'the GATT' will be used to refer to both the agreement concluded in 1947 (GATT 1947) and the text that is included in Annex 1A to the agreement establishing the WTO (GATT 1994). With minor differences, they are identical, so it does not really matter which one is meant in any given context.

[7] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[8] Supra note 6 art. XXIV:9 of GATT.

[9] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis *The World Trade Organization: Law, Practice and Policy* 2 ed (2006) 569.

(a) Unpacking Key Terminology

RTAs are agreements signed by two or more countries to encourage the free movement of goods and services across the borders of its Members.[10] The agreement comes with internal rules that Member countries follow among themselves and include external rules for dealing with non-Member countries.[11] PTAs are unilateral trade privileges and non-reciprocal preferential programmes some WTO Members implement for products from developing and least-developed countries. While RTAs and PTAs are often used interchangeably, in this report, I will focus on RTAS.

The WTO establishes exceptions for inconsistency with the MFN principle, where RTAs provide their Members a trade advantage. First, art. XXIV of GATT deals with exemptions for CUs and FTAs, both of which are custom territories. Second, the Enabling Clause that enables developed Members to give differential and more favourable treatment to developing countries, which is found in the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, which was adopted under GATT in 1979. Third, art. V of GATS dealing with agreements covering trade in services. The two sets of rules that are relevant for this report is art. XXIV of GATT and art. V of GATS because the applicable RTAs must cover substantially all trade or have substantial sectoral coverage, which is not applicable under the Enabling Clause.

While there are four forms of RTAs, namely CUs, FTAs, CMs and economic unions, art. XXIV only focuses on CUs and FTAs, therefore, this report will focus on those two.[12] Article XXIV of GATT applies to custom territories, which is defined as territories in which separate tariffs and other regulations of commerce are agreed upon for a substantial part of the trade of a territory with other territories. Both CUs and FTAs are custom territories and fall under the scope of art. XXIV of the GATT.

CUs are defined in art. XXIV:8(a) of the GATT as

> the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce […] are eliminated with respect to substantially

[10] Supra note 1.
[11] Ibid.
[12] With a common market, regional integration includes trade as well as free movement of all aspects of production while an economic union represents the coordination of all the economic policies of the Member countries.

> all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and […] substantially the same duties and other regulations of commerce are applied by each of the Member States of the union to the trade of territories not included in the union.

From the above, the requirements for a CU include internal barriers to trade must be abolished, and uniform external tariffs must be introduced that are no higher than before. In terms of the part in art. XXIV:8(a)(ii) that outlines that substantially the same duties and other regulations of commerce must be applied by each of the WTO Members of the union to the trade of territories not included in the union,[13] a CU may be limited to goods originating in the territories of the Members of the CU, since a CU must have a common external tariff. In other words, if Member X imports a commodity originating in a non-Member, duties may be imposed on that commodity, depending on the terms of the CU and when the same commodity from a non-Member is exported to Member Y the same tariff applied by Member X applies in the context of Member Y.

A CU is characterised by countries agreeing to adopt restrictive regulations of commerce with regard to trade with countries that are not subscribed to the agreement. That is not to say that Members of a CU are not free to establish trade relations with other countries that do not form part of the agreement as they wish. For example, the European Union (EU) has several trade policies adopting common tariffs in trade relations with other countries not forming part of the EU territory like the EU-Mercosur Trade Agreement which includes the EU and Argentina, Brazil, Paraguay and Uruguay.[14]

An FTA is 'a group of two or more customs territories in which the duties and other restrictive regulations of commerce […] are eliminated on substantially all the trade between the constituent territories in products originating in such territories'.[15] Thus, Members of an FTA agree on duties and other restrictive regulations with respect to trade amongst themselves as signatories but are free to establish trade relations with other countries that do not form part of the agreement as they wish. Notable examples of FTAs include the North American Free

[13] Supra note 6 art. XXIV:8(b) of GATT.
[14] EU-Mercosur Trade Agreement (1 July 2019).
[15] Supra note 6 art. XXIV:8(b) of GATT.

Trade Agreement (NAFTA), Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) and African Continental Free Trade Area (AfCFTA).[16]

The similarity between CUs and FTAs is that in both custom territories, Members agree to economic integration through common duties and restrictive regulations to commerce amongst each other. The economic integration encompasses an agreement to decrease or eliminate barriers to trade between the Members. These may include protectionist barriers like internal taxes that negatively impact domestic pricing, quantity or price quotas limiting trade from other territories or tariff regimes that make goods and services less competitive.

The key difference between CUs and FTAs is that in a CU, the participating countries set a common customs tariff (a single external tariff applied by all Members) against third countries, while in an FTA, they do not and rather enable Members to develop their own trade regulations with third parties. This key difference leads to other differences. First, under a CU, the participating countries must engage in trade negotiations as a single entity e.g. the EU Member countries engage in trade negotiations collectively, while in a FTA, the Members may negotiate individually. Second, in a CU, free movement of goods is allowed among the Member nations, while in an FTA, it is not. Third, under a CU, a customs house is not required between Member nations, yet in an FTA, it is required and its function may even be reinforced. A custom house is a government building or offices situated at a port where officials oversee the functions associated with importing and exporting goods into and out of a country, such as collecting customs duty and clearing ships for entry.[17]

One reason in favour of allowing CUs as an exception lies in the fact that CUs provide for custom free internal trading in all goods once within the customs wall whatever their origin, both external (which is that which involves a Member and a non-Member) and internal trade is encouraged. The same cannot be said for FTAs. Since the FTAs only provide for free trade in goods originating in the territories of the Members of the FTA, external trade is dependent on Members setting up rules to trade with non-Members, to some degree this discourages external trade. Also, since differential treatment in FTAs is made on the basis of origin of the

[16] North American Free Trade Agreement, December 17, 1992; Central American-Dominican Republic Free Trade Agreement, 119 Stat. 462, August 2, 2005 and African Continental Free Trade Area, March 21, 2018.
[17] Collins English Dictionary – Complete and Unabridged, 12 ed (2014) *Harper Collins Publishers* available at https://www.thefreedictionary.com/customs+houses.

goods, FTAs necessitate complex sets of rules of origin.[18] The sheer complexity of these rules can constitute a serious barrier to trade.

According to Andreas Lowenfeld, one argument that has been extended for preferring CUs is that they have the same effect on customs as when two or more countries unite and become one state.[19] If two or more states unite, then the new state will be bound by most of the international obligations of the old, constituent states.[20] If the new state thus continues the old states' membership in the WTO, it will be treated as one Member, with one customs territory. In other words, if two or more states wanted to integrate economically, they could do so by uniting into one state, which would not necessitate any provision like art. XXIV to provide an exception in relation to customs. Realistically speaking, this is not straight forward because the unification of two territories into one may come with disagreements and conflicts.

(b) Purpose of Regional Trade Agreements

The growing demand for regional political and economic integration has seen an increase in the formation of RTAs in the form of CUs and FTAs. According to Henrik Carlborg, there is an increase in regionalisation over globalisation because of the emergence of diverse sets of values and agendas within and among countries that make the uniform and rigid nature of global trade agreements difficult to agree on common universal principles and disregard tailored country needs.[21] CUs and FTAs improve the allocation of existing resources because scarce resources are allocated in a manner that satisfies the wants and needs of consumers and efficient Members of the trade relations sell to less efficient Members.[22]

Furthermore, the existence of CUs and FTAs can lead to an increase in economic growth through the exploitation of static and dynamic scale economies because small economies are given the opportunity to tap into industries that may not be accessible within domestic trade. In addition, small economies can provide companies with access to larger

[18] Rules of origin are used to determine if products are eligible for duty-free or reduced duties under the FTA rules even though they may contain non-originating (non-FTA) components. The rules determining country of origin can be very simple if a product is wholly grown or manufactured and assembled primarily in one country. However, when a finished product includes components that originate in many countries, determining origin can be more complex. Rules of origin can be very detailed and specific, and vary from agreement to agreement and from product to product. See art. 1 of the Agreement on Rules of Origin, 1868 U.N.T.S. 397.
[19] Andreas F Lowenfeld *Public Controls on International Trade* 2 ed (1983) 44.
[20] Henrik Carborg *The 'Substantially all the Trade' - Requirement of GATT Article* XXIV (unpublished LLM thesis, Lund University, 1999) 22 at 280.
[21] Ibid 6.
[22] Butorina, O.V., Borko, Y.A. 'Benefits of Regional Integration: Redefining the Concept' (2022) *Herald of the Russian Academy of Sciences* 92 (Suppl 2) at 105.

markets, improved competitiveness, specialised production, technological advancements, and diversified supply chains, which can help reduce costs and increase efficiency.[23] Additionally, CUs and FTAs result in a higher investment rate brought about by the larger market because countries are able to focus on exports and resources where they have a strong comparative advantage, which in turn attracts foreign investment capital and provides relatively high-paying jobs for local workers.[24]

Regional arrangements assist countries to gain credibility and predictability for domestic policies because it pushes countries to create policies that facilitate transparency and investment worthy markets[25] and it increases their bargaining stance with trade partners because Members of CUs and FTAs are able to use the agreements in question to influence subsequent multilateral negotiation and form part of coalitions to have a stronger voice in decision-making.[26] The trade benefits brought about by CUs and FTAs tend to get lost in global trade systems because the agreements can result in the halting of industrial development within domestic markets in case infant industries having to compete with developed ones.[27]

Another purpose of RTAs is that they fill the gap where WTO rules and principles do not accommodate or address the experiences and special circumstances of developing countries as producers and consumers of the products or services, while RTAs considers these experiences and special circumstances of production chains and consumer patterns. RTAs guard against the possible stringent standards of the WTO that lead to their market-access prospects through tailored standards for Members.[28] The stringent WTO standards may lead other countries being undermined or developed countries using the WTO rules and principles as protectionist instruments and RTAs guard against these possibilities.[29]

For example, RTAs may guard against protectionist taxes on imports by framing the agreement in a manner that avoids unreasonable tax implications through agreed tax rates that accommodate Members. Protectionist systems continuously tax imports in order to best protect

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[23] Ibid.
[24] Ibid.
[25] Kian Cassehgari Posada, Emmanuelle Ganne and Roberta Piemartini 'The role of WTO Committees through the lens of Specific Trade Concerns raised in the TBT Committee' (2020) *Staff Working Paper ERSD-2020-09* at 5.
[26] Kpodar, K. R. and Imam, P. A. 'Does A Regional Trade Agreement Lessen or Exacerbate Growth Volatility? An Empirical Investigation' (2015) *IMF Working Papers* 177 at 177.
[27] Gargee Piplani 'The Detriment of Free Trade on Developing Countries' (2022) *Journal of Arts and Humanities* 11(01) 38 at 41.
[28] Ibid.
[29] Ibid.

domestic industries. Countries protect their own products from foreign competition yet continue to take part in FTAs, leaving developing countries with false hope regarding how their exports will be regarded by foreign powers.[30] Although developing countries are able to tax their own imports now, larger countries can actually afford to pay these increases or simply find a new replacement nation that will not cost them as much.[31]

The AfCFTA is an example of an RTA that takes into consideration the experiences and special circumstances of African countries because it was formed to achieve broader and deeper economic integration and aims to attract investment, boost trade, provide better jobs, reduce poverty, and increase shared prosperity in Africa.[32] African countries have diverse sets of values and agendas as compared to other continents because of the development gaps.[33] The AfCFTA takes into consideration nuanced factors like the continent's underdevelopment, low adaptive capacity to emerging industries, heavy dependence on climate-sensitive sectors and limited access to finance and technology – which is a positive aspect of RTAs amongst countries of similar development paces.[34] The AfCFTA achieves this through the scope of its policies, which intend to reshape markets and economies across Africa with consideration of trade capacities and security threats to trade. In addition, the pace of sustainable development for African countries and understanding the need to close certain barriers like infrastructural development, the large informal market on the continent and the digital divide.[35]

In essence, regions and countries have a diverse set of values and interests, which cannot, at the moment, be overcome at a multilateral level because diverse interests lead to non-consensus at a multilateral level which makes the conclusion of multilateral arrangements challenging. Regional trade through RTAs has greater advantages for developing countries to effectively participate in trade because when it occurs among countries in the same geographical region, the countries enjoy the advantages of proximity like cost efficiency due to lower transportation costs.[36]

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[30] Ibid.
[31] Ibid.
[32] African Continental Free Trade Area 'About the AfCFTA' available on https://au-afcfta.org/about/, accessed 02 March 2023.
[33] Popoola, M. A. 'The Illusion of Neoliberalism: A Construct of African Development Gap' (2023) *African and Asian Studies* 22, 1-2, 135.
[34] World Bank. *The African Continental Free Trade Area: Economic and Distributional Effects.* Washington, DC: World Bank a 1.
[35] Ibid.
[36] Sahar Amidi & Ali Fagheh Majidi 'Geographic proximity, trade and economic growth: a spatial econometrics approach' (2020) *Annals of GIS*, 26:1, 49-63.

Moreover, some countries within RTAs are often closer in terms of their initial development conditions, making for more equally shared gains from trade. When the economic structure of trading partners is similar, gains from trade arise primarily from economies of scale and learning effects, rather than from comparative advantages reflecting pronounced differences in either technology or relative endowments.[37] Further, in relation to demand, the gains from trade are more likely to be retained inside a region when they result from intraregional trade than from extra-regional trade, as trade organised around international supply chains is more prone to profit repatriations to headquarters of foreign multinational enterprises (MNEs). This is because these enterprises create strong operations within countries and have a greater bargaining power for economic success as compared to small and medium enterprises originating from those regional countries.[38] Thus, under these circumstances, UNCTAD predicts that intraregional trade is expected to result in greater multiplier effects than extra-regional trade.[39]

Another reason why RTAs are valuable is that the trade rules found within them, especially for developing regions, are often less stringent because they are characterised by power asymmetry among the participating countries. This means that the agreements and RTA operation take into consideration the differences in status between Member countries and that these differences result in differential ability to take action or cause action to be taken.[40] Finally, from a supply chain approach, the integration of countries into regional value chains may strengthen industrial networks by moving inter-industry linkages from a simple hub-and-spokes cluster to a more complex structure.[41]

III THE MOST FAVOURED NATION PRINCIPLE

One of the basic WTO principles included in almost all WTO agreements is the MFN principle. It is included, for example, in art. I of the GATT, art. II of the GATS and art. 4 of the Agreement

[37] Ibid.
[38] UNCTAD *Trade and Development Report 2022 - Development prospects in a fractured world: Global disorder and regional responses* available on https://unctad.org/system/files/official-document/tdr2022_ch5_en.pdf accessed on 22 November 2023 at 117.
[39] Ibid.
[40] United Nations Conference on Trade and Development. Distr.: General. 1 September 2022. at 2. TD/B/C.I/MEM.8/14 at 3.
[41] Ibid.

on Trade-Related Aspects of Intellectual Property Rights.[42] According to art. I:1 of GATT, the MFN principle is outlined as

> any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties.[43]

This means, for example, that if a Member lowers the tariff on a certain commodity, that same lowered tariff must be applied to all of those commodities irrespective of their origin, as long as they originate in the territory of a Member. Put differently, WTO Members cannot impose a higher tariff on commodities from one country than those imposed on commodities from another Members' country. However, Members are free to impose higher tariffs on products originating in the territories of non-Members, because there is no protection under the GATT and exceptions to the MFN do not apply to them, therefore, discrimination against them is allowed in accordance with the MFN principle.[44]

In addition to the MFN principle in GATT, it is also found in art. II of the GATS, in terms of which Members are required to provide non-discriminatory treatment to services and service suppliers of any other Member that is no less favourable than that which the Member affords to like services and service suppliers of any other country.[45] Members are expected to grant this treatment with no conditions and immediately. This general obligation is similar to art. I:1 of GATT, but is applicable to any measure that affects trade in services in any sector falling under the GATS applying to all Members.

The importance of the MFN principle cannot be overemphasised. It is the cornerstone of the multilateral trading system, which seeks to replace the frictions and distortions of power-based bilateral policies with the guarantees of a rules-based framework where trading rights do not depend on the individual participants' economic or political clout.[46] Rather, the best access

[42] Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[43] Supra note 6 art. I:1 of GATT. The term 'contracting party' as used in the GATT and GATS means, for the purposes of this thesis, the term 'Member(s)' of the WTO or 'WTO Member'.
[44] Supra note 20 at 22.
[45] Supra note 7 art. II of GATS.
[46] World Trade Organisation 'Basic Purpose and Concepts' available at https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm, accessed 01 March 2023.

conditions that have been conceded to one country must automatically be extended to all other Members. This allows every Member to benefit, without additional negotiating effort, from concessions that may have been agreed between large trading partners with much negotiating leverage.[47]

Practically, if country X negotiates tariff concessions from Y, so that Y will lower its tariffs on goods or services produced in X, then X is likely to have had to 'pay' for those concessions by offering something in return. Most likely, X will have had to lower its tariffs on goods or services produced in Y. Now, what happens if country Z also produces some of the commodities that X produces? According to the MFN principle, Y will have to apply the same low tariffs on products or services originating in Z. This will boost Z's exports, without Z having made any concessions at all on its part. In effect, Z will be a free rider on the efforts made. Apart from the obvious tension this is likely going to cause between the countries involved, it may also result in a stop in the liberalisation process.

Another important function of the MFN principle is to 'protect the bargain'.[48] It ensures that one's own trade-off for concessions do not become worthless by trading partners lowering barriers even more in other bargains by stipulating that all trade advantages given to one country must be extended to all Members. Suppose country X negotiates tariff concessions from country Y, and pays for those concessions. What would happen if Y then enters into negotiations with Z, and Y then lowers its tariffs even more on goods or services originating in Z? Goods or services from Z would enjoy a competitive advantage on the market in Y, as against goods or services from X. An MFN clause in the original agreement between X and Y makes sure these situations do not arise at all - if Y lowers its tariff on some products or services originating in Z, then the same low tariffs will have to apply to the 'like' products or services from X, which makes sure X's agreement with Y does not suddenly become worthless. Thus, all WTO Members are protected against other Members suddenly lowering their tariffs in a discriminatory fashion.

According to Henrik Carlborg, the absence of the MFN principle will lead to tariffs on certain products or services varying immensely depending on its origin, and importers would

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[47] Ibid.

[48] Hilf Meinhard, Francis Geoffrey and Ernst-Ulrich Petersmann (eds), *The European Community and GATT* (1986) 7.

be guided by factors other than quality and arguably price considerations for their purchases.[49] This would distort competition and create artificial price advantages for products originating in the 'right countries'. Thus, leading to producers moving to countries that have negotiated the relevant concessions, even if resources and know-how are located elsewhere.[50] While Henrik has a valid point regarding price considerations not being a factor of consideration, it is arguable that prices will increase with the tariffs and thus lead to costly importing, which means price considerations may be a guiding factor.

Another key importance of the MFN principle is that it guarantees that the bargaining and economic power of a country becomes irrelevant in trade by preventing favouritism of allied Members by simply granting it to everyone.[51] The absence of the MFN principle could lead to a global trade system in which some countries would gain more than others due to their bargaining and economic power, which will see a lot of Global South or developing countries being excluded. Legal certainty is created by having a defined trade structure that includes the MFN principles which guarantees trade access in principle.

A trade system without the MFN principle could lead to trade conflicts, instability and a lack of harmonious coordination amongst countries.[52] The complexity of the rules in a non-MFN system would constitute a barrier to trade in and of itself. The lack of predictability and ambiguity of the rules would enable countries to discriminate on other grounds than lack of reciprocity in the concessions, without any other country being able to prove a violation. It may become inevitable that the system would ultimately collapse, hence, a multilateral system, with the same rules for all, is more likely to encourage trade than a large number of bilateral agreements.

IV EXCEPTIONS TO THE MFN PRINCIPLES FOR REGIONAL TRADE AGREEMENTS

Both the GATT and GATs provide for exceptions to the MFN principle where trade advantages are granted within RTAs. The Committee on Regional Trade Agreements (CRTA) confirmed

[49] Supra note 20 at 23.
[50] Ibid at 23-4.
[51] Colin Picker 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat' (2005) *University of Pennsylvania Journal of International Economic Law* 26 267 at 276.
[52] Ibid at 272.

that the party invoking the provision must 'prove' consistency or inconsistency with the exceptions.[53]

(a) Requirements for art. XXIV of GATT

Article XXIV of GATT provides Members of an RTA with the possibility to depart from the MFN principle when trading in goods between themselves, provided the RTA in questions fulfils the six stipulated conditions of art. XXIV of GATT.[54]

The first requirement is that the agreement must form a custom territory which can either by a CU, FTA or interim CU or FTA.[55] The second requirement is that the CU or FTA's duties and other regulations of commerce shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement.[56] Third, the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[57]

Fourth, the purpose of the CU or FTA must be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[58] Fifth, the CU shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce, in terms of the FTA, it shall not be higher or more restrictive than the corresponding duties and other regulations of commerce and in the case of an interim agreement, a plan or schedule for the formation of a CU or FTA within a reasonable length of time.[59] Last, WTO Members who decide to enter into a CU or FTA must notify other WTO Members by making available information regarding the proposed custom territory.[60]

[53] Committee on Regional Trade Agreements *Communication from Hong Kong, China* WTO Doc WT/REG/W19 (17 November 1997) para 7.
[54] Supra note 6 art. XXIV of GATT.
[55] Ibid art. XXIV:1 of GATT.
[56] Ibid art. XXIV:2 of GATT.
[57] Ibid.
[58] Ibid art. XXIV:4 of GATT.
[59] Ibid art. XXIV:5 of GATT.
[60] Ibid art. XXIV:7(a) of GATT.

(b) Requirements for art. V of GATS

Article V of GATS permits a service supplier of a Member that is party to an agreement liberalising trade in services to deviate from the MFN principle towards service suppliers of other Members that engage in substantive business operations in the territory of the parties to such agreement, provided the agreement fulfils the following requirements.[61]

The first requirement is that the agreement liberalising trade in services must have substantial sectoral coverage.[62] Second, the agreement must provide for the elimination of substantially all discrimination between the parties by removal of existing discriminatory measures and/or prohibition of new or more discriminatory measures.[63] Third, where developing countries are all parties to such an agreement, flexibility shall be provided for regarding the conditions outline above, taking into consideration the level of development of the countries concerned.[64] Where only developing countries are parties to the agreement, more favourable treatment may be granted to entities owned or controlled by natural persons of the contracting parties.[65] Lastly, WTO Members who decide to enter into service agreements of this kind must notify the Council for Trade Services by making available information regarding the proposed custom territory.[66]

V GIVING MEANING TO SUBSTANTIALLY ALL TRADE AND SUBSTANTIAL SECTORIAL COVERAGE

While the requirements for both articles are clear, the meanings of the requirements for 'substantially all the trade' and 'substantial sectoral coverage' must be clear and consistently applied by different dispute settlement institutions.

(a) Rigid legal approach and appropriate interpretation method

When identifying the meaning of 'substantially all the trade' in art. XXIV:8(a) and (b) of GATT and 'substantial sectoral coverage' in art. V of GATS, a rigid legal approach, i.e. a method of analysing legal principles using inflexible and strict guiding rules,[67] must be treated with

[61] Supra note 7 art. V of GATS.
[62] Ibid art. V:1(a) of GATS.
[63] Ibid art. V:1(b) of GATS.
[64] Ibid art. V:3(a) of GATS.
[65] Ibid art. V:3(b) of GATS.
[66] Ibid art. V:7(a) of GATS.
[67] Edwin W. Hadley, 'Rigid Legal Theories, with Contractual Illustrations', 10 *Notre Dame L. Rev.* 248 (1935) at 249.

caution. Inflexibility may exclude numerous developing countries with limited trading capacity.[68]

Suggesting to use the Vienna Convention on the Law of Treaties for interpretating art. XXIV of GATT and art. V of GATS is advocating for a flexible approach, instead of a rigid, legal approach, as emphasised by the representative of Hong Kong.[69] While the upside of having a rigid legal approach to analysing these principles means that states would know exactly where the line is drawn between what is allowed and what is not and it would enable Members to have ‘incentives’ to liberalise their trade, it is likely to limit them to only liberalise to the minimum point of being incentivised, but not further.

Another statement of the reluctance to take a rigid legal approach is that of the CRTA officials in which the Australian representative outlines that ‘[t]he Membership should avoid the difficulty of having a pseudo-legal inquiry into the meaning of [substantially all the trade and substantial sectoral coverage] and instead tackle the issue directly’.[70] This means that it is important to avoid pseudo-legal statements which tend to incorporate beliefs or practices that are claimed to be based on accepted law and legal doctrine but often deviate significantly from most conventional understandings of law or jurisprudence – which can mean a rigid legal approach that is misleading.

Both the Council for Trade in Goods (CTG) and the CRTA can only provide recommendations that do not have a legal binding effect, but the CRTA provides ‘persuasive authority’ and thus may be used to guide us in giving the meanings of the two requirements can be. Notably, the WTO’s DSB has also not decided on what ‘substantially all the trade’ or ‘substantial sectoral coverage’ actually means.[71]

However, in accordance with art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreements must be interpreted in accordance with customary rules of interpretation of public international law where clarification is

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[68] Supra note 9 at 43.
[69] Committee in Regional Trade Agreements *Note on the meeting of 16 - 18 and 20 February 1998* WTO Doc WT/REG/M/16 (18 March 1998) para 111.
[70] Committee on Regional Trade Arrangement *Statement by the representative of the U.S* WTO Doc WT/REG/M/15 (13 January 1998) para 65.
[71] Moyombuya Ngubula ‘The SADC Protocol on Trade in Services: A Review of the Protocol in light of the GATS and other SADC Protocols and what it means for Trade in Services in the Region’ (unpublished LLM thesis, University of Cape Town) at 15.

sought.[72] The Vienna Convention on the Law of Treaties (VCLT) is a source of public international law and customary law that can be used to interpret and clarify terminology or provisions that are not clear – and thus will also be used to determine the meaning of the two terms/phrases of 'substantially all the trade' or 'substantial sectoral coverage'.[73]

Article 31(3)(1) of the VCLT outlines that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[74] From this article three determinants can be drawn, first, the ordinary meaning must be determined. This will help inform the rest of the factors used to determine the meanings. Second, interpreting in accordance with the 'object and purpose' of the parties when they signed the WTO and third, interpreting in accordance with the context relevant to FTAs or CUs. I proceed accordingly when determining the meaning of both phrases.

(b) Ordinary Meaning

The ordinary meaning of a text is what its words communicate to ordinary people.[75] In some circumstances, legal theories seek the original ordinary meaning or "original public meaning" of a text, i.e. what its words would have communicated to people at some past time, such as the time a contract or will is formalised, a bill becomes a statute, or a constitution or treaty is ratified.[76] When evaluating ordinary meaning, there is a reliance on dictionary definitions or patterns of common usage, increasingly through legal corpus linguistics approaches.[77]

(i) Substantially all the trade

The ordinary meaning of the phrase substantially all trade relates to the question whether it must be given a narrow or broad reading. Dictionaries are mainly used to determine the ordinary meaning, however, they tend to produce broad definitions which leaves a wide scope of analysis and lack of precision. The majority of governments favour the broad reading, namely that the trade covered by an agreement must be as broad as possible which tend to cover

[72] Understanding on Rules and Procedures Governing the Settlement of Disputes 1869 UNTS 401.
[73] Vienna Convention on the Law of Treaties (1969).
[74] Ibid art. 31(3)(1).
[75] Thomas R. Lee and Stephen C. Mouritsen 'Judging Ordinary Meaning' (2018) 127 *Yale Law Journal* 788 at 826.
[76] Ibid.
[77] Tobia, Kevin, 'Testing Ordinary Meaning' (2020) *Harvard Law Review* 134, 726 at 726.

a wider base leading to potential high coverage of sectors.[78] In additional, in the case of exceptions, there is preference for a narrow ordinary meaning to be used because practically all sectors would be covered, leading to 100% and not 'substantial'.[79] Article XXIV of GATT is an exception to the general principles of MFN and in general, Members must not discriminate between other Members, but instead apply the same tariffs to all products or services, regardless of which WTO Member the products or services originate in. Invoking art. XXIV of GATT could be compared to the granting of waivers under art. IX:3 of the WTO Agreement because they are also applied narrowly.[80]

An important word within 'substantially all the trade' that is worth defining using a dictionary is 'substantial/substantially'. This will assist in understanding the proportion of coverage. Cambridge Dictionary defines substantial as 'large in size, value or importance' or 'relating to the main or most important things being considered'.[81] This indicates that it is a large proportion of the sectors in question but not 100% of the sectors but also not a small amount of the proportion of sectors to be covered. Therefore, the trade or sectors in question must be a considerable size or value. In order for it to be considerable in size, it cannot be less than 50%.

According to the Working Party report on *EC – Agreements with Portugal,* [82] 'there is no exact definition on the expression referring to the term substantially all trade' and this is confirmed in GATT through the absence of a definition.[83] Matsushita suggests that substantially all trade has both quantitative and qualitative components.[84] A qualitative

[78] See following examples: for representation of Hong Kong, China in WT/REG/W/19 para 3, representation of Norway in WT/REG/M/16 para 12 and representation of New Zealand in WT/REG/M/17 para 17.
[79] Roger P. Alford, 'The Self-Judging WTO Security Exception' (2011) *Utah Law Review* 697 at 709.
[80] Marrakesh Agreement Establishing the World Trade Organization 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) art. IX:3 (hereinafter 'WTO Agreement').
[81] Cambridge Dictionary accessed on 04 January 2023 available at https://dictionary.cambridge.org/us/dictionary/english/substantial.
[82] The question of the legal personality of the EC is less problematic. Articles 210 and 281 of the Treaty Establishing the European Community (hereinafter the TEEC) clearly states that 'the Community shall have legal personality'. Applying the test from the Reparations Case, the powers of the EC relating to its Members are far more extensive than those of the United Nation, and a large number of provisions in the TEEC imply that the Community shall have legal personality. As an entity endowed with international legal personality, the EC also has the power to enter into legal agreements with states and other international organisations. However, there are some limitations. It cannot itself become a Member of an international organisation if the statute of that organisation only allows states, and there are several limitations imposed by internal EC law as well. However, the views that come from the EC are very limiting considering that its Global North and First World countries. This means that the standard of determining principles is likely not going to take into consideration Global South and Third World country considerations that are valuable in determining standards or principles.
[83] Working Party report on *EC – Agreements with Portugal* BISD 20S/171 at 16.
[84] Supra note 9 at 568.

approach is one that includes the interpretation and gathering of non-numerical data, whereas, a quantitative approach includes gathering numerical data with the intention of testing a causal relationship between variables.[85]

The quantitative approach was favoured by the European Free Trade Association (EFTA) Working Party where the treaty of Rome was reviewed under the old GATT procedures and in that it was decided that an FTA must be considered consistent with art. XXIV:8 of GATT when the volume of liberalised trade amounted to 80% of total trade.[86] The shortcomings of this approach lie mainly in the fact that it would make it possible for the parties to exclude important sectors of their economy from the agreement, as long as the trade in these sectors did not amount to more than 20%. This has led a majority of the Members of the CRTA to conclude that there has to be a qualitative aspect as well to the requirement.[87] In particular, the trade covered must include all sectors of the relevant economies, or at least all major sectors, as determined by the FTA or CU.

Australia suggests looking using the Australian 'direct tackle' to safeguard the qualitative aspects of 'substantially all the trade'.[88] The idea of this is to look at the number of categories of goods covered and tick them off on a list of goods traded among the Members of the WTO. The list of goods proposed was the Harmonised System, which is originally intended for harmonisation of customs classification, but the Australian representative thought that it might be useful in this context as well.[89] Thus, the suggestion was that an agreement would be deemed compatible with art. XXIV:8 if it covered 95% of products as categorised in the Harmonised System.[90]

The reaction of the other Members of the CRTA was mixed. The EC representative made it clear that his delegation did not support it,[91] and there has been scepticism from others

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[85] Mcleod, S. 'Qualitative vs quantitative research: methods & data analysis' (10 May 2023) *Simply Psychology*.
[86] Working Party report on EFTA, GATT Doc BISD 96/83 para 6.
[87] Committee on Regional Trade Arrangement *Communication from Australia* WTO Doc WT/REG/W/22 (30 January 1998) para 10.
[88] Ibid.
[89] Ibid.
[90] Ibid. The Harmonised System contains an extensive list of goods subdivided into categories and sub-categories, each preceded by a number. The fewer digits the number contains, the rougher the classification, and the more digits, the more precise it is. The Australian proposal referred to 95 % of the 6-digit tariff lines.
[91] Committee in Regional Trade Agreements *Note on the meeting of 16 - 18 and 20 February 1998* WTO Doc WT/REG/M/16 (18 March 1998) para 118.

as well.[92] The weakness of the approach was put succinctly by the EC representative. He explained that in some FTA-s in force, about 50% of the products covered in the six-digit tariff-lines made up about 80% of the trade.

In examinations of agreements under art. XXIV of GATT, questions have often been put to the parties regarding tariff-line coverage, and adequate answers have been given by the parties to the agreements under review.[93] More importantly, there seems to be consensus now that both quantitative and qualitative aspects are important, regardless of their contrast.[94] This makes sense, since any inflexible, one-eyed application of either quantitative or qualitative criteria would inevitably lead to gigantic legal loopholes, which could be used for whatever purposes the WTO Members might need them for.

There are contrasting views regarding what constitutes the quantitative percentage of the term. For example, in the *EEC Working Party,*[95] EC Members suggested that an FTA has covered substantially all trade upon reaching an 80% volume liberalisation of total trade,[96] while highlighting that 'it is inappropriate to fix a general figure of the percentage of trade which would be subjected to internal barriers'.[97] The absence of an adequate reason for selecting an 80% determinant indicates the limitation in selecting an appropriate percentage. In the Working Party report on EFTA,[98] it was recorded that 'the percentage of trade covered, even if it were established to be 90 per cent, was not considered to be the only factor to be taken into account'.[99] In other words, a percentage rate cannot be a conclusive factor in deciding whether substantially all trade has been covered. This speaks to the need to have both qualitative and quantitative components being considered.

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[92] Committee on Regional Trade Arrangement *Statement by the representative of the U.S* WTO Doc WT/REG/M/15 (13 January 1998) para 67.
[93] For example the following CRTA notes confirm this: WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 6, per the representative of Canada, and the following paragraph, per the U.S. representative. The response from the Czech Republic is at paragraph 9. In WT/REG38/M/1, at paragraph 3, the Canadian representative gives information regarding the tariff line coverage of the Canada-Chile Agreement.
[94] For example the following CRTA notes confirm this: WT/REG/W/18, at paragraph12, per the Australian representative, WT/REG/M/15, at paragraph 66, per the U.S. representative, WT/REG/M/16 at paragraphs 111, 122 and 127 per the representatives of Hong Kong, China, Hungary and Japan, respectively.
[95] The EEC is the European Economic Community which was established by the Treaty of Rome of 1957, aiming to foster economic integration among its Members. It was subsequently renamed the European Community upon becoming integrated into the first pillar of the newly formed European Union in 1993.
[96] Working Party report on EEC, GATT Doc BISD 6S/70 at 30.
[97] Working Party report on EEC, GATT Doc BISD 6S/100 at 34.
[98] The European Free Trade Association is a regional trade organisation and free trade area consisting of four European states: Iceland, Liechtenstein, Norway and Switzerland.
[99] Working Party report on EFTA, GATT Doc BISD 96/83 at 48.

Additionally, the Finland EEC Working Party report highlights that the exclusion of a whole sector, no matter what percentage of trade involved, is contrary to the spirit of both art. XXIV of the GATT, and the GATT in its entirety.[100] In Australia's view, there is only a quantitative element that can come under substantially all trade and future negotiations must concentrate on putting a number next to the concept. Australia specifically proposed that substantially all trade must be defined as coverage by an FTA or an agreement establishing a CU of 95% of all six-digit tariff lines listed in the Harmonized System.[101] In its response to questions by other WTO Members, Australia accepted that the 95% figure is an arbitrary figure but intended to move negotiations out of a deadlock and provide a workable and reasonable rule of thumb. Australia was also mindful of the fact that in case trade is concentrated in only a few products, the 95% figure could exempt sizable trade flows. This is why it also proposed an assessment of prospective trade flows under an arrangement at various stages. So far, this proposal has provoked no meaningful discussion and a clear meaning is yet to be determined.[102]

(ii) Substantial sectoral coverage

Similarly, the question is whether the phrase substantial sectoral coverage must be given a narrow or broad reading, in which case, dictionaries tend to produce broad definitions .

To begin with, art. V of GATS is an exception to the general principles of MFN and in general, Members must not discriminate between other Members, but instead apply the same tariffs to all services, regardless of which WTO Member the products or services originate in. Invoking art. XXIV of GATT and art. V of GATS agreements could be compared to the granting of waivers under art. IX:3 of the WTO Agreement because they are also applied narrowly.[103]

As stated above, 'substantial' means 'large in size, value or importance' or 'relating to the main or most important things being considered'.[104] This indicates that it is a large proportion of the sectors in question but not 100% of the sectors but also not a small amount

[100] Working Party report on *EEC - Agreement with Finland,* GATT Doc. BISD 29S/79 at 12.
[101] Committee on Regional Trade Agreements *Communication from Australia* WTO Doc WT/REG/W/18, (17 November 1997).
[102] Committee on Regional Trade Agreements *Communication from Australia- Addendum* WTO Doc WT/REG/W/22/Add. 1 (24 April 1998).
[103] Marrakesh Agreement Establishing the World Trade Organization 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) art. IX:3 (hereinafter 'WTO Agreement').
[104] Cambridge Dictionary accessed on 04 January 2023 available at https://dictionary.cambridge.org/us/dictionary/english/substantial.

of the proportion of sectors to be covered. Therefore, the trade or sectors in question must be a considerable size or value. According to footnote 1 of art. V of GATS, substantial sectoral coverage is to be understood in terms of the sectors that are covered, the modes and the volume of trade affected.[105] It is also a condition for substantial coverage that the agreements must not provide a priori exclusion of any mode of supply.[106] Interpreting this phrase may present challenges because unlike goods, it is difficult to determine the value and volumes of services traded or to measure the volumes of trade in a particular service sector due to its intangible nature.[107]

(c) Rationale/Object/Purpose

I now turn to identifying the rationale behind art. XXIV of the GATT and art. V of the GATS, with the aim of gaining a clearer understanding of their meaning. The object and purpose look into what the Members of the agreement intended to do when concluding the agreement and the aim they had in view. Often the natural meaning of terms used in a particular article corresponds with the real intention of the Members, or that the natural meaning of the terms used falls short of or goes further than such intention.[108]

(i) Article XXIV

The object and purpose of art. XXIV of GATT is to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories. In addition, that in formatting or enlarging constituent territories the parties to them must to the greatest possible extent avoid creating adverse effects on the trade of other Members.[109] In essence, trade liberalisation is at the heart of this principle. However, the EC has disputed that the purpose of the WTO is the liberalisation of world trade. It may have been one of its 'consequences' but was never its purpose and object in 'purely juridical terms'.[110] The EC's view has limited backing because a treaty does not need to have a provision that says 'the

[105] Supra note 7 art. V:1(a) GATS footnote.
[106] Ibid.
[107] Dumeng Bezzola and Andreas Freitag 'The General Agreement on Trade of Services (GATS) Regionalism, Loopholes and Trade Barriers' available at http://www.modelwto.org/media/chairs/chairpaper_gats_dumeng_bezzola_(10-609-634)_&_andreas_freitag_(09-611-013).pdf, accessed on 04 April 2021 at 7.
[108] Buffard, I. and Zemanek, K. (1998). The "Object and Purpose" of a Treaty: An Enigma?. *Austrian Review of International and European Law Online*, *3*(1), 311 at 317.
[109] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[110] European Communities - Regime for the Importation, Sale and Distribution of Bananas Supra AB-1997-3 para 118.

formal purpose and object of this treaty is […]', but rather a purpose can be inferred from its provisions.

Second, there are numerous instances in the WTO Agreement and its preamble where reference is made to the importance of unrestricted trade. For example, the preamble talks about the desirability of 'the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations', art. III:1 of the WTO Agreement charges the WTO with 'further[ing] the objectives, of this Agreement and of the Multilateral Trade Agreements' and art. XXIV:4 of GATT says 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'.

Additionally, art. XXVIII bis of GATT talks about the necessity for 'the substantial reduction of the general level of tariffs and other charges on imports and exports' since they 'often constitute serious obstacles to trade'. Even without these specific allusions to the importance of free trade, the history of GATT could provide useful hints as to what the purpose of the agreement is. It seems it would be fair to say that the liberalisation of world trade is the object and purpose of the WTO. That was also the view of the representative of Hong Kong, China, to whom the representative of the EC had responded so vigorously.[111]

In essence, the GATT provides several means for Members to negotiate agreements among themselves to reduce barriers selectively without having to apply the same benefits to all WTO Members and that is the premise upon which art. XXIV was created. Its main purpose is to ensure that barriers are not raised to other WTO Members because of these agreements and allows Members to reach 'interim' agreements so they can offer preferential treatment prior to the implementation of a full agreement. The analysis of the principles of 'substantially all the trade' ought to made in a manner that does not create trade barriers for countries that choose to enter into a CU or FTA.

The rationale for the inclusion of an exception that allows deviation from the MFN principle within RTAs is due to regional economic integration facilitating regional trade, which in turn facilitates regional economic growth because it allows countries to overcome costly divisions integrating goods, services and factors' markets, thus facilitating the flow of trade,

[111] Committee in Regional Trade Agreements *Note on the meeting of 16 - 18 and 20 February 1998* WTO Doc WT/REG/M/16 (18 March 1998) para 111.

capital, energy, people and ideas.[112] Regional integration can be promoted through common physical and institutional infrastructure.

CUs and FTAs increase intra-regional trade by reducing tariffs and non-tariff barriers (NTBs) to trade.[113] This creates growth for the countries participating in the regional integration arrangement, or as some economists put it, 'a bigger cake'.[114] If the cake increases, both Members and non-Members may benefit because regional integration allows for internal and external trade benefits to occur because CUs develop a single external tariff applied by all CU Members against third countries, while in an FTA, Members develop their own trade regulations with third parties

(ii) Article V of GATS

Article V of GATS serves to facilitate economic integration in services amongst the countries that are involved in the FTA or CU that are also WTO Members.[115] Article V of GATS also aims to facilitate the growth and development of the world economy in trade services by recognising the right of WTO Members to regulate.[116] Further, it introduces new regulations, on the supply of services within their territories in order to meet national or regional policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.[117] Additionally, by promoting the interests of all participants on a mutually advantage basis in service agreements in the context of regional trade, there is an overall balance of rights and obligations, while giving due respect to national policy objectives.[118]

A key and valuable component of art. V of GATS is that it seeks to take into consideration the challenges of the least-developed countries in view of their special economic situation, taking particular account of the and their development, trade and financial needs. It expressly aims to increase the participation of developing countries in trade in services and the

[112] World Bank 'Regional Integration' accessed on 05 January 2024 available at https://www.worldbank.org/en/topic/regional-integration/overview.
[113] Supra note 20 at 274.
[114] Supra note 19 at 44.
[115] Supra note 7 GATS Preamble.
[116] Ibid.
[117] Supra note 19 at 44.
[118] Ibid.

expansion of their service exports including, through the strengthening of their domestic services capacity and its efficiency and competitiveness.[119]

The same reasons outlined in the above section on art. XXIV of GATT, apply in the context of art. V of GATS. Article V of GATS benefits the countries that get into FTAs or CUs and this leads to an increase in their economic growth, elimination of tariff barriers, diversification of their markets, and leads to an increased GDP and job creation. Another rationale behind art. V of GATS is that it leaves behind the figure of the protectionist state, which has its drawbacks. Protectionism generates goods and services with high prices for consumers, little variety of products, high tariffs for imports and in most cases, only protects national companies in the short term.

(d) Context

The VCLT defines context to include agreements between all the parties in connection with the conclusion of a treaty, as well as any instrument made by one or more parties and accepted by the other parties.[120] In addition to the context, relevant subsequent agreements between the parties, relevant subsequent practice of the parties, and any relevant rules of international law must be considered.[121] Context serves as an immediate qualifier of the ordinary meaning and a modifier of any over-literal approach to interpretation. Further, context directs attention to the whole text of a treaty, its preamble and any annexes.[122]

(i) Substantially all the trade

In the context of CRTA's examination of RTAs, Turkey and Czech Republic argue that if trade figures show that both intra-regional and external trade has increased, the agreement is in conformity with art. XXIV:4 of GATT because an increase shows substantial coverage of the trade.[123] However, Members of the CRTA have insisted on further information because, it is not enough and other considerations like nature of sectors, volume of sectors, etc. are essential to consider.[124] Members of the CRTA are of the view that actual increases in intra-regional as

[119] Supra note 7 GATS Preamble.
[120] Supra note 73 art. 31(2) of VCLT.
[121] Ibid art. 31(3) of VCLT.
[122] Richard Gardiner 'Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning' (2015) 2 ed *Oxford Public International Law*.
[123] See WT/REG22/M/2, para 5, per the representative of Turkey, WT/REG11/M/2, WT/REG33/M/2, WT/REG41/M/2 and WT/REG42/M/2, at paragraph 8, per the representative of the Czech Republic.
[124] Ibid.

well as external trade must be taken into account when assessing agreements under art. XXIV of GATT without further elaborating on the rationale for this view.[125] This requires caution because trade figures go up and down for a number of reasons besides tariffs and non-tariff barriers, and can only be used with great caution when assessing agreements under art. XXIV of GATT. From a legal perspective, consideration of the 'preamble approach' which uses the preamble to determine what the intentions of the WTO Members and drafters of the text were, which would be an ideal approach because it gives context to the operationalisation of the agreement.

The 'duties and other restrictive regulations of commerce' that must be eliminated on substantially all the trade include tariffs, but specifically exclude quantitative restrictions and a number of other trade barriers. The idea is that a Member of an FTA can discriminate against non-Members by imposing customs duties on goods originating in their territories, but when the same Member imposes quantitative restrictions, the MFN principle applies. Thus, the restrictions have to be imposed on other Members of the FTA as well as other countries. In short, some restrictions must be taken away in their entirety, while some must remain. In fact, in one case the representative of Hong Kong, China, argued that safeguard measures under art. XIX of GATT could not be applied other than on an MFN basis by Members of regional integration arrangements. This was in spite of the fact that art. XIX is not among those enumerated in art. XXIV:8(i) of GATT.[126]

The logic of Hong Kong's representative's view is not immediately apparent because if the idea is that regional integration must not be allowed unless it is complete, then the parties to such agreements must be encouraged to abolish various safeguard measures as between themselves. For example, the views of Australia and Canada during a CRTA meeting drew the committee's attention to the fact that anti-dumping measures had been abolished between the parties to the Canada-Chile Free Trade Agreement.[127] This went towards showing that 'other restricting regulations of commerce' had been eliminated completely to all sectors.[128] The point is that substantially all the trade must be understood in conjunction with the 'duties and other

[125] Committee on Regional Trade Arrangement *Notes on the Meetings of 23-24 September 1998* WTO Doc WT/REG/M/19 (16 October 1998) para 116 as per the Indian representative. Also see WT/REG11/M/3, WT/REG33/M/3, WT/REG41/M/3 and WT/REG42/M/3 para 27 per the Australian representative.
[126] Ibid para 7.
[127] Committee on Regional Trade Arrangement *Note on the Meetings of 30 September - 01 October 1997* WTO Doc WT/REG/M/13 (05 November 1997) para 9.
[128] Committee on Regional Trade Arrangement *Examination of the Free Trade Agreement Between Canada and Chile* WTO Doc WT/REG38/M/1 (11 June 1998) para 3.

restrictive regulations of commerce' that are aimed to be eliminated. The more of those that are eliminated, the better it is, regardless of whether they are included among the exceptions within brackets in art. XXIV:8 of GATT. In fact, in some cases there could even be reasons to be slightly more lenient on the 'substantially all the trade' requirement if the elimination of duties and restrictive regulations is complete on the trade that is covered.

(ii) Substantial sectoral coverage

Substantial sectoral coverage is to be understood in terms of the sectors that are covered, the modes and the volume of trade affected.[129] It is also a condition for substantial coverage that is no priori exclusion of any mode of supply.[130] Interpreting this phrase is further complicated by the fact that unlike goods, it is difficult to determine the value and volumes of services traded or to measure the volumes of trade in a particular service sector. The GATS principles improve on their GATT equivalent in some respects, for instance, substantial sectoral coverage is more carefully defined, since it disqualifies agreements that exclude any of the four modes of supply. These four modes of supplying services in terms of GATS are cross-border trade, consumption abroad, commercial presence, and presence of natural persons.[131]

The usage of relevant subsequent agreements between the parties, relevant subsequent practice of the parties, and any relevant rules of international law must be considered on a case-by-case basis to determine the context in which substantial sectoral coverage must be interpreted. For example, art. V of GATS does apply to regional economic integration with context in mind by considering the challenges of the least-developed countries in view of their special economic situation, taking particular account of the and their development, trade and financial needs. This kind of consideration will balance a strict application of the principles in question.

VI CONCLUSION

A rigid legal approach to defining what 'substantially all the trade' and 'substantial sectoral coverage' would exclude developing countries from effectively forming part of CUs and FTAs that are consistent with the MFN principle. While regional integration agreements are of a highly political nature, it is important to define principles in a manner that gives room for all

[129] Supra note 6 art. V:1(a) GATT footnote.
[130] Ibid.
[131] Ibid art. 1.

WTO Members regardless of their development status, trade capacity or bargaining power, because that is what trade liberalisation entails. Therefore, it is important to have a flexible definition to the analysis of 'substantially all the trade' and 'substantial sectoral coverage' so that exclusions are not perpetuated.

It is further borne out by the rather half-hearted attempts in the CRTA to clarify the rules and the fact that WTO Members do not use other dispute settlement procedures at their disposal to enforce their rights under both art. XXIV of GATT and art. V of GATS. These articles are mainly enforced simply through the notification procedures and the discussions in the CRTA. Although it is not a very efficient enforcement procedure, it somehow permits developing countries to create effective regional trade areas that are capable of being WTO acceptable. Therefore the use of the ordinary meaning, object and purpose and context is useful in analysing what these principles mean. Furthermore, it is important to take into consideration qualitative and quantitative factors because they assist in contextualising the proportionality to be considered on a case by case basis.

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