

GATT Obligations:

Article I (MFN), II (Bound Rates), III (National Treatment), XI (QRs), XX (Exceptions) and XXIV (FTAs)

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GATT - Structure

- **Article I:** **Most Favored Nation (MFN)**
- **Article II:** **Schedules of Concessions**
- **Article III:** **National Treatment (NT)**
- **Article VI:** **Anti-Dumping and Countervailing Duties**
- **Article VII:** **Customs Valuation**
- **Article XI:** **Elimination of Quantitative Restrictions**
- **Article XII:** **Balance of Payment Exceptions**
- **Article XVI:** **Subsidies**
- **Article XX:** **General Exceptions**
- **Article XXI:** **Security Exceptions**
- **Article XXIV:** **Customs Unions and Free Trade Areas**
- **Article XXVIII:** **Modifications of Schedules**
- **Part IV:** **Trade and Development**

The MFN Principle: Art. I GATT 1994

Art. I:1

- With respect to **customs duties and charges of any kind** imposed on or in connection with **importation or exportation** or imposed on the international transfer of payments for imports or exports, and with respect of the **method of levying such duties and charges**, and with respect to **all rules and formalities** in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, **any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product** originating in or destined for the territories of all other Members.

The MFN Principle: The 3 Tier Test

1. Whether the government measure at issue confers a **trade advantage** of the kind covered by Article I:1 GATT
2. Whether the products concerned are **like products**
3. Whether the advantage at issue is granted **immediately and unconditionally** to all like products concerned.

The MFN Principle: “*any advantage*”

- Any advantage granted by any WTO member to any country
- Little debate about the kind of measures covered by Article I (1) GATT
- Both panels and AB have established that it casts a very wide net:
Canada-Autos

The MFN Principle: Like Products

- The concept of 'like products', while found in different provisions, not defined in the GATT
- Basic criteria for determining 'likeness' on a case-by-case basis:
 - ✓ the properties, nature and quality of the products
 - ✓ the end-uses of the products
 - ✓ consumers' tastes and habits
 - ✓ the tariff classification of the products

MFN: “immediately and unconditionally”

- The granting of a trade advantage within the meaning of Article I (1) GATT may not be subject to reciprocity or made conditional on whether a Member has a certain legislation or undertakes a certain action:

Indonesia-Autos

Canada-Autos

Exercise

- A, B, C and D are WTO Members and Z is not
- **Could A's customs authorities levy a customs duty of 10% for imported pocket watches originating in C, while levying a lower customs duty of 5% for imported pocket watches originating in B?**

Exercise

- A, B, C and D are WTO Members and Z is not
 - **Could A levy a customs duty of 5% for Z's watches while applying a 10% rate watches originating in B, C and D?**

Exercise

- A, B, C and D are WTO Members and Z is not
 - **Could A levy a 5% duty for pocket watches from B, C and D and a 100% duty for Z's pocket watches?**

Like Products?



Exceptions

- GATT Art. I:2-4 (Historical Preferences)
- GATT Art. IV(c) (Cinematographic Films)
- GATT Art. XX (General Exception)
- GATT Art. XXIV:3 (Frontier Traffic)
- GATT Art. XXIV:5 (Free-Trade Areas and Customs Unions)
- GATT Art. XXI (Security Exception)
- “Enabling Clause” (1979 Decision)
- Marrakesh Agreement Art. IX:3 (Waivers)

National Treatment: Art. III GATT 1994

- Art. III:1 (General Principle)
- Members recognise that **internal** taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of Products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, **should not be applied to imported or domestic products so as to afford protection to domestic production.**

National Treatment: Art. III GATT 1994

- Art. III:2, first sentence
(Tax discrimination of like products)
- The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to **internal taxes** or other internal charges of any kind **in excess** of those applied, directly or indirectly, to **like domestic products**.

National Treatment: Art. III GATT 1994

- Art. III:2, second sentence
(Tax discrimination of directly competitive or substitutable products)
- Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner **contrary to the principles set forth in paragraph 1.**
- Ad Art. III:2
- A tax conforming to the requirements of the first sentence of para. 2 would be considered to be inconsistent with the provision of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a **directly competitive or substitutable product** which was **not similarly taxed.**

National Treatment: Art. III GATT 1994

➤ **Article III:2 GATT, first sentence** (*Canada-Periodicals*):

- ✓ Whether the imported and domestic products are **like products**
- ✓ Whether the imported products are **taxed in excess of** the domestic products

➤ **Article III: 2 GATT, second sentence** (*Japan-Alcoholic Beverages II*):

- ✓ Whether the imported and domestic products are **directly competitive or substitutable**
- ✓ Whether these products are **not similarly taxed**
- ✓ Whether **dissimilar taxation** is applied so as **to afford protection to domestic producers**

National Treatment: Art. III GATT 1994

Consistency with Article III:2 GATT

Article III:2, first sentence



Like Products
(Basic Criteria)



No *de minimis* Tax
Differential Permitted

Article III:2, second sentence



Directly Competitive/Substitutable
Products
(Basic Criteria + Competitive
Conditions)



More than *de minimis* Tax Differential
to be inconsistent

Exercise

- A, B, C and D are WTO Members and Z is not
 - **Could A impose a sales tax of 5% on domestically produced pocket watches while applying a sales tax of 6% on imported pocket watches from C and D?**

Exercise

- A, B, C and D are WTO Members and Z is not
 - **What if the 6% sales tax only applies to imported pocket watches from Z?**

National Treatment: Art. III GATT 1994

Art. III:4

(Domestic regulation discriminating against like foreign products)

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded **treatment no less favourable** than that accorded to **like products of national origin** in respect of all laws, regulations and requirements **affecting their internal sale**, offering for sale, purchase, transportation, distribution or use. ...

National Treatment: Art. III GATT 1994

- For a violation of Article III:4 GATT, three elements must be established (*Korea-Various Measures on Beef*):
 1. Whether the measure at issue is a **law, regulation or requirement** covered by Article III:4 GATT
 2. Whether the imported and domestic products are '**like products**'
 3. Whether the imported products are accorded **less favourable treatment**

Exercise

- A new law in country A requires that pocket watches imported and sold in A have a minimum of 10% 'local content'.
 - **Is this compatible with the NT-obligation under GATT?**

'Like Products' in Article III GATT

The Accordion Analogy

Japan – Alcoholic Beverages
EC-Asbestos

Article III:2, 1st sent.
'Like Products'



Basic Criteria

Article III:4
'Like Products'



Basic Criteria

+

**Competitive
Relationship**

Article III:2, 2nd sent.
'Dir. Competitive Products'



Basic Criteria

+

**Conditions of
Competition**



Exercise

- **A prohibits advertisement of foreign pocket watches.**
- **Should the consistency of this prohibition with GATT rules be examined under Article III:2 or Article III:4?**

Exceptions to National Treatment

- GATT Art. III:8(a) (Government Procurement)
- GATT Art. III:8(b) (Production Subsidies)
- GATT Art. III:10 and Art. IV (Cinematographic films)
- GATT Art. XX (General Exception)
- GATT XXI (Security Exception)
- Marrakesh Agreement Art. IX:3 (Waiver)

Tariff bindings : The Legal instruments

- Tariff Bindings: *an agreed level of market access*

- GATT 1994 - Art. II: I (a)

“Each contracting party shall accord to the commerce of the other contracting parties **treatment no less favourable than** that provided for in the appropriate Part of the appropriate **Schedule** annexed to this Agreement.”

Plus :

Marrakesh Protocol and schedules of commitments

Schedules

(1) HS 1996 Nomenclature	(2) Product Description	(3) Bound Rate 1/4/96 - 31/3/97	(4) Applied Rates	(5) Internal Taxation
2208.20	Brandy (50° or higher) Brandy (Other)	308.00 ¥/litre 364.00 ¥/litre	193.20 ¥/litre 227.90 ¥/litre	(40°) ¥ 982.30/litre
2208.30	Whiskies: Bourbon Rye Other (over 50° or higher) Other (Other)	19.6%* 22.4% 330.40¥/litre 274.40¥/litre	13.7% 15.7% 207.20¥/litre 172.50¥/litre	(40°) ¥ 982.30/litre
2208.40	Rum and Tafia	36%	Free/20.2% **	(38°) ¥ 377.23/litre
2208.50	Gin and Genever	29.2%**** or 128.33 ¥/litre (whichever is the less)	19.6% or 86.20 ¥/litre (whichever is the less)	(38°) ¥ 377.23/litre
2208.60	Vodka	26.7%***	17.9%	(38°) ¥ 377.23/litre
2208.70	Liqueurs and Cordials	210 ¥/litre	141.10 ¥/litre	(40°) ¥ 328.76/litre
ex 2208.90	Shochu	26.7% ***	17.9%	A (25°) ¥ 155.70/litre B (25°) ¥ 102.10/litre

* Annual percentage reduction: approximately 2.4%

** Intended for use in distilling alcohol for making alcoholic beverages through the continuous still: for the "pooled quota" (free); other (17.9%)

*** Annual percentage reduction: approximately 2.7%

**** Annual percentage reduction: approximately 2.9%

N.B: For applied rates for whiskies, rum and tafia, gin and genever, vodka, liqueurs, and shochu, we use rates valid from 1/4/1995 to 31/3/1996.

Source: Columns (1) - (4): WTO Secretariat; Column (5): paragraph 2.3 of the Descriptive Part.

Tariff bindings in the Uruguay Round

Percentages of tariff lines bound before and after the Uruguay Round

	Before	After
Developed countries	78	99
Developing countries	21	73
Transition economies	73	98

(These are tariff lines, so percentages are not weighted according to trade volume or value)

Tariff bindings : Exceptions

- GATT Art. II:1(b) (Other Duties and Charges - ODCs)
- GATT Art. II:2 (Internal Tax, Anti-Dumping or Countervailing Duty, Customs Fees)
- GATT Art. XXVIII (Modifications of Concessions)
- Marrakesh Agreement Art. IX:3 (Waiver)

Tariff bindings : Agricultural products

For **agricultural products**, as defined in Article 2 of the Agreement on Agriculture, the staging of reductions shall be implemented **as specified in the relevant parts of the schedules.**

For Developed country Members: Reduction in **6 years** (6 equal rate annual reductions)

For Developing country Members: Reduction in **10 years** (10 equal rate annual reductions)

For Least Developed country Members: **No Reduction**

Prohibition of Quantitative Restrictions: Article XI of GATT 1994

Art. XI:1

No prohibitions or restrictions other than **duties, taxes** or **other charges**, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

Prohibition of QRs: Exceptions

- GATT Art. XIX : Safeguards
- GATT Art. XI:2(a) : Critical Shortage of Foodstuffs or Other Essential Products
- GATT Art. XI:2(b) : Removal of a Temporary Surplus of a Like Domestic Product for which the Imported Product can be Directly Substituted
- GATT Art. XI:2(c) : Agricultural Products and Fish -- Agreement on Agriculture (Tariffication)
- GATT Art. XX : General Exceptions
- GATT Art. XXIV:5 : RTAs
- GATT Art. XXI : Security Exception
- Marrakesh Agreement Art. IX:3 : Waivers
- Agreement on Textiles and Clothing (Progressive Integration)

Non-discrimination in the administration of Quantitative Restrictions : GATT Art. XIII

Rules on non discrimination

If applied, restrictions must be non-discriminatory.

Rules on Distribution of Trade

In principle, allocation of QRs as close as possible to the expected shares that could have been obtained in the absence of such restrictions.

Rules on Import Licensing

These Rules are also applicable to Tariff Quotas

Internal Measures v. Border Measures

- At times difficult to distinguish: Would an **import ban** (applied **at the border**) of a product because it fails to meet certain **health or consumer protection requirements**, equally **applicable to like domestic products**, be subject to Article III GATT, or Article XI GATT?
- **Basic Rule:**

Applied at the Border



Article II GATT
or
Article XI GATT

Applied inside the Border



Article III GATT

Internal Measures v. Border Measures

Art. III (Ad)

(Taxes or charges collected at the border)

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph I which **applies to an imported product and to the like domestic product** and is collected or enforced in the case of the imported product at the time or point of importation, is **nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement** of the kind referred to in paragraph I, and is accordingly **subject to the provisions of Article III.**

General Exceptions: GATT Art. XX

Sample Exceptions

- (a) necessary to protect public morals**
- (b) necessary to protect human, animal or plant life or health**
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ...**
- (f) imposed for the protection of national treasures or artistic, historic or archaeological value**
- (g) relating to conservation of exhaustible natural resources...**

General Exception: GATT Art. XX

“Chapeau”

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between countries where the same conditions prevail, or a **disguised restriction on international trade**, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:”

General Exception: GATT Art. XX

Analysis

1. Does the measure fall within one of the exceptions listed in Article XX?
2. If yes, does it satisfy the “chapeau”?
 - => arbitrary discrimination?
 - => unjustifiable discrimination?
 - => disguised restriction on trade?

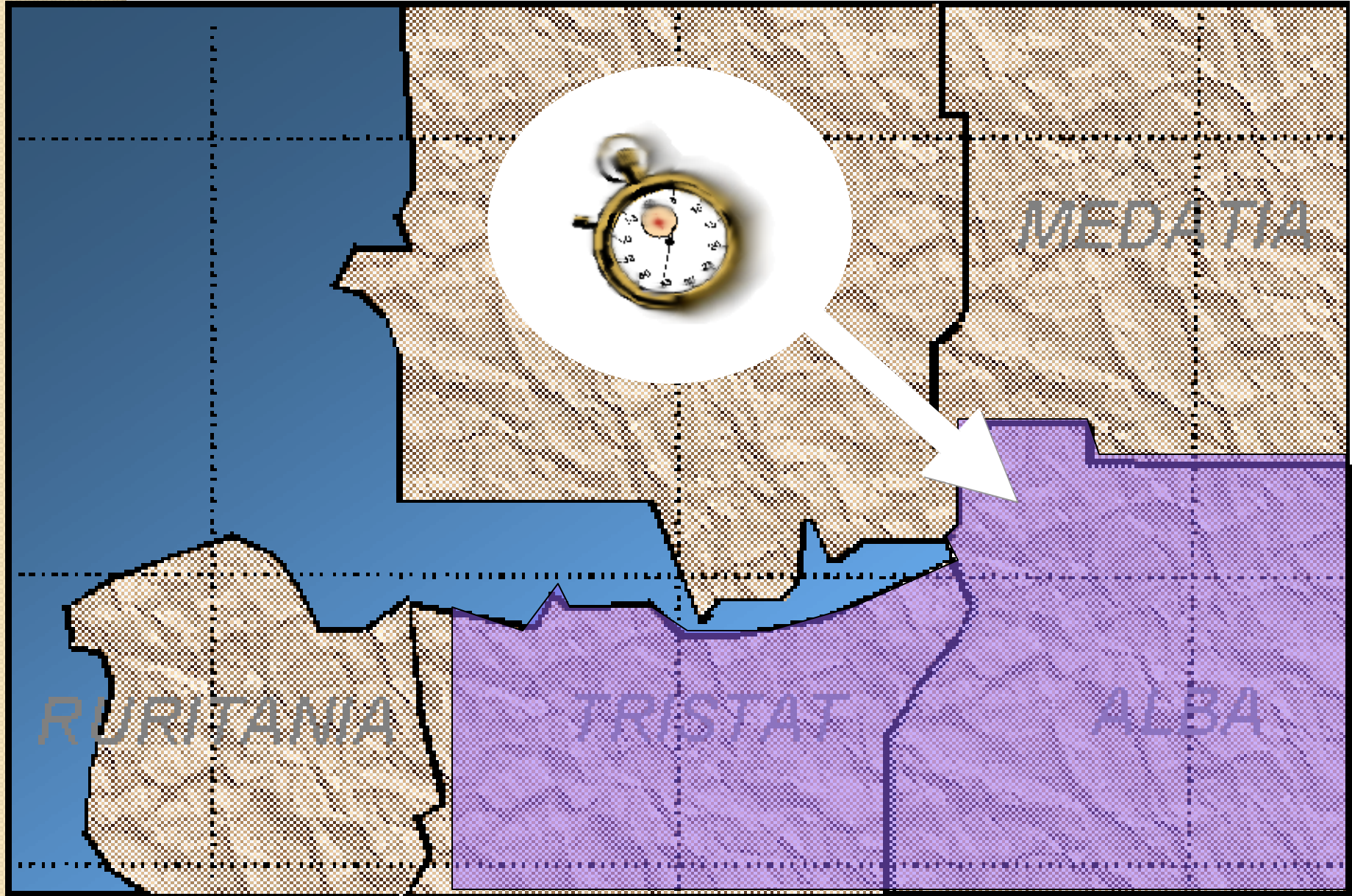
Security Exception

Art. XXI GATT

Nothing in this Agreement shall be construed:

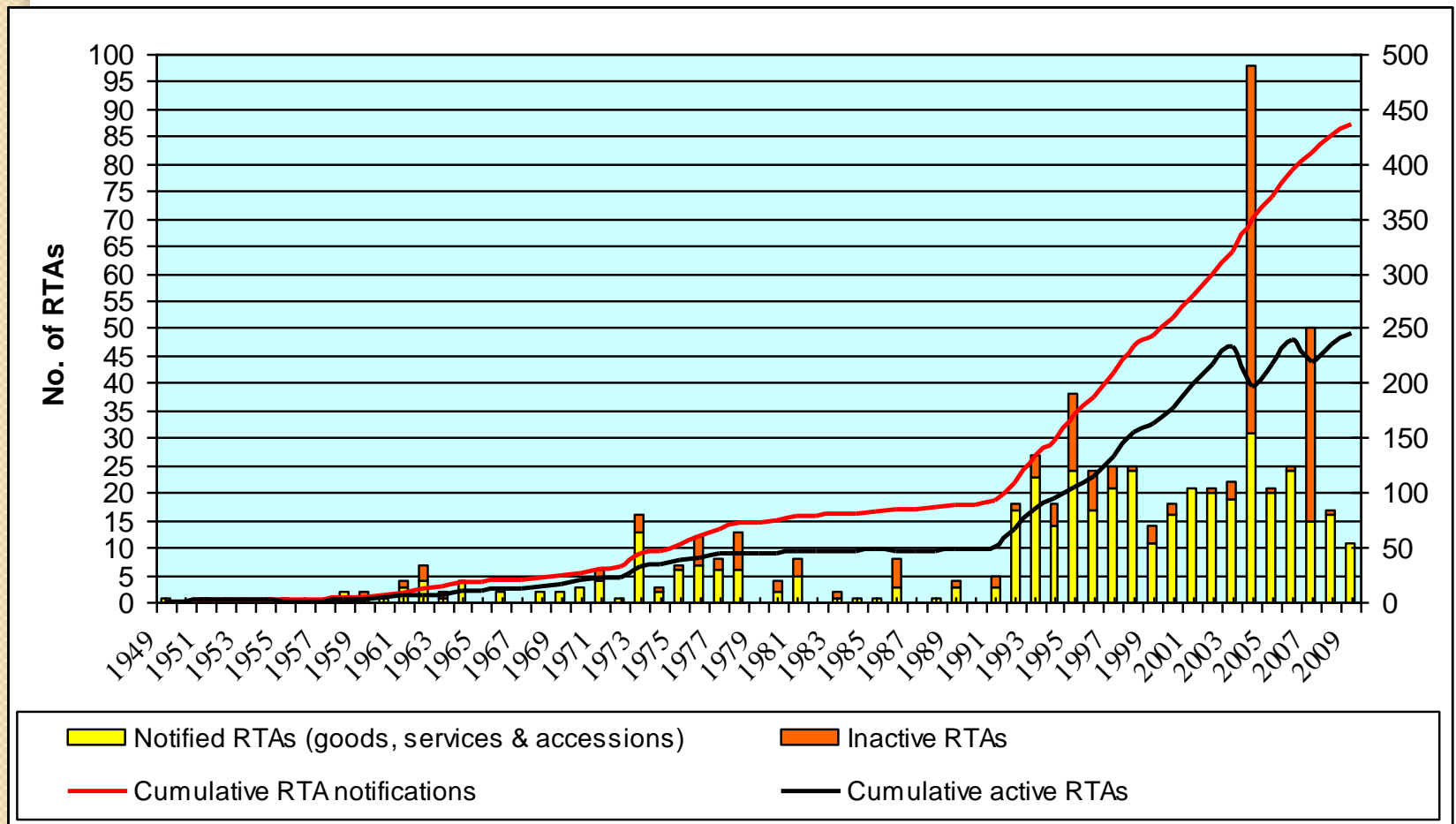
- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any **action which it considers necessary for the protection of its essential security interests**
 - (i) relating to fissionable materials or the derived materials;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its **obligations under the United Nations Charter** for the maintenance of international peace and security.

Regional integration: “building-block or stumbling block?”



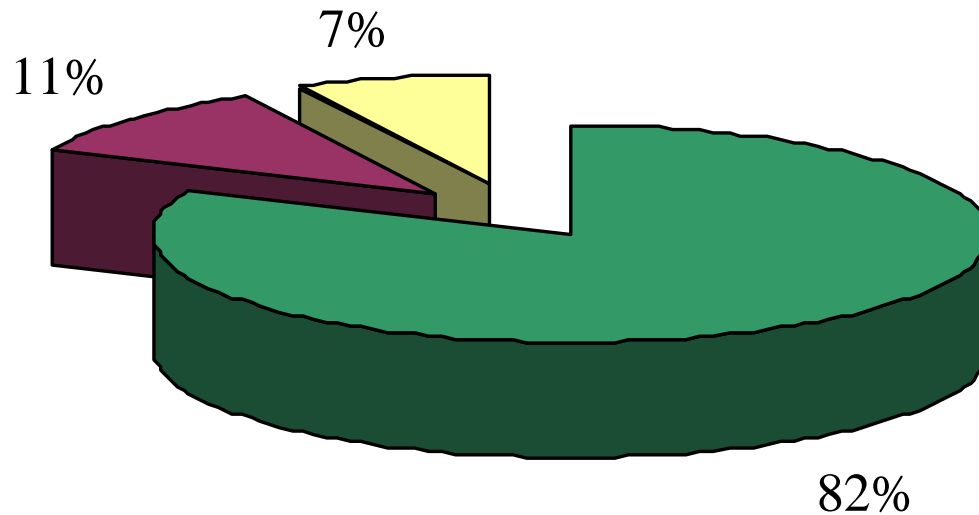
Regional integration

Evolution in number of Regional Trade Agreements
in the world, 1949-2009



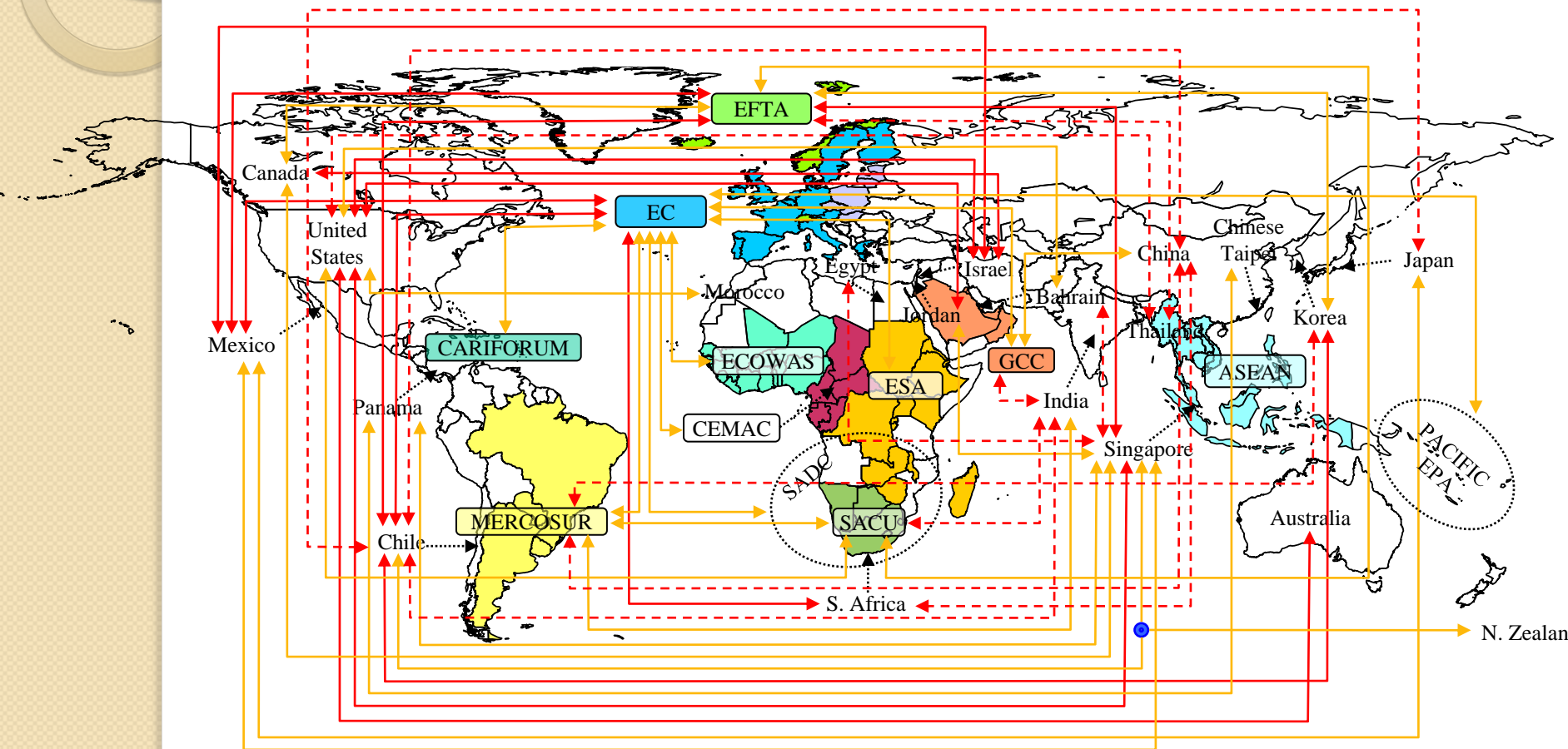
Regional integration

RTAs in force, by type of agreement



■ FTA ■ Customs Union ■ Partial Scope

Regional integration



- Notified RTAs
- - - Under Negotiations/Signed
- Proposed

Regional integration

GATT Art. XXIV

(FTAs and customs unions)

“Enabling Clause” (1979 Decision)

Regional or global arrangements between “less-developed countries” (reduction / elimination of tariffs and NTMs)

Regional integration

Types of agreements covered by Article XXIV:

- Free-Trade Areas
- Customs Unions
- Interim agreements

Conditions:

- “Substantially all trade” among Members
- “Not on the whole more trade-restrictive” towards non-Members
- Limited transition period

Regional integration : Developing countries

“Enabling Clause” (1979 Decision), paragraph 2 (c)

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 PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

Regional integration – GATT Article XXIV

Review by the Committee on Regional Trade Agreements (CRTA)

- More than 250 agreements notified
- Many open questions

Negotiations under the DDA: aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.



Thank You