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THE MULTILATERAL TRADING SYSTEM AND FREE TRADE AGREEMENTS

The Case of the East African Community

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INTRODUCTION

At the recently held WTO 8th Ministerial Conference, the Chairman's concluding remarks included inter alia the need to study trends on the systemic implications of regional trade agreements (RTAs) on the Multilateral Trade System (MTS). This issue note examines the MTS provisions with regard to RTAs, their relationship, ongoing negotiations and proposals tabled, as well as recommendations on the way forward for the East Africa Community (EAC) with regard to this issue.

The MTS is premised on the principle that reductions in trade barriers are applied to all World Trade Organization (WTO) members on a most-favoured nation basis. In effect, no member should discriminate against another's trade regime. RTAs are an exception to this principle in that reductions to trade barriers apply only to parties in the RTA.

TREATMENT OF RTAS UNDER THE MTS

RTAs under the MTS are categorised in two main types of customs union and free trade areas, including interim agreements, which operate during a transition period towards creation of either customs unions or free trade agreements. The provisions applicable under the MTS in relation to RTAs are GATT Article XXIV, covering trade in goods; the Enabling Clause, considering the mutual reduction of tariffs on trade in goods among developing countries; and GATS Article V, covering trade in services. However, the existing WTO rules on FTAs have often been weak in addressing the realities of RTAs, and the bilateral agreements, sometimes also formulated between different Customs Unions or Communities.

During the Fourth Ministerial Conference of 2001 in Doha, WTO members agreed to clarify the existing disciplines and procedures governing RTAs under WTO rules and to overcome the impasse faced by the Committee on Regional Trade Agreements (CRTA) when

considering RTAs against these disciplines. The lack of clarity is manifested in the absence of rules of interpretation and inconsistency between WTO rules and rules effective in some RTAs. This inconsistency was also raised in the Sutherland Report of 2004 titled "The Future of the WTO: Addressing institutional challenges in the new millennium" that called for meaningful review and effective disciplines of RTAs, in the WTO. Currently there are hundreds of RTAs in force, many of them varying considerably in content and coverage.

WHY OR WHY NOT RTAS

The principle benefit of RTAs is that they also secure trade liberalization. The main drawback has been that such arrangements can result in trade diversion. Research, however, has suggested that there has been little trade diversion and that in general RTAs have contributed to wider trade liberalization.

Among the reasons countries resort to RTAs is the well known advantage of their being less cumbersome to negotiate than multilateral trading agreements, given that there are fewer parties; RTAs are often concluded within shorter periods of time as opposed to the MTS where negotiations take longer to conclude.

There is also an obvious practical advantage of access to the markets of the other members (trade creation). In addition, RTAs are more flexible with regard to areas of coverage because they often include investment, competition and other areas, where there is no consensus for their inclusion in the MTS. Members with similar interests and common values are able to include these in the RTAs.

In the case of RTAs between developed countries and developing countries, including the least developing countries, there are often geopolitical considerations leading to exclusive preferential benefits for the later. An example is the Cotonou Agreements between the European Union and Africa Caribbean and Pacific (ACP) countries that include development assistance and other non-trade benefits.

RTAs have offered useful experience in enhancing countries' capacity to negotiate,

hence enabling them to better participate in the MTS.

On the other hand, RTAs need to be negotiated and laid out within the right framework of policies to avoid welfare diminishing drawbacks; and, RTAs are not beneficial in sectors of the economy where parties' exterior to the agreement can have a major influence. On the practical side, the disadvantages would be concluding a RTA with a not significant trading partner.

In addition preferences obtained under RTAs tend to be short term since non-members will also have an incentive to join through a party to the RTA, hence whittling away the preferences over time, with the increase in membership.

It is also worth noting that RTAs negotiated between weaker economies and the big ones, often means the formers' lack of capacity to ensure its interests in the agreement. This is manifested in conclusion of agreements that may include issues or areas detrimental to their immediate development needs. Issues such as labour and environmental standards have been included in RTAs between big economies and small developing countries, and yet these could easily become protective measures preventing access to the bigger countries' economies.

RTAs add to the significant complexity of the international trading system, with different rules of origin (ROO), dispute settlement mechanisms, and different harmonization standards negotiated under different agreements, their enforcement and compliance by the wider business community is complicated and often results in their non-use.

Negotiation of RTAs requires resources, and in the case of the smaller developing countries and least developing countries already constrained by the requisite expertise, this proves quite challenging and a stretch for the already thin resources.

RTAS AND EAC

The EAC currently constituted by five member countries, is a re-establishment of the demised EAC originally constituted by Kenya, Tanzania and Uganda. It was re-launched amongst the

three original members as a customs union, later increasing in membership, and has advanced to a common market, with a laid out path towards adapting a common currency and political federation. Of the five member states, four are also members of the Common Market for Eastern and Southern Africa (COMESA), a 21 member free trade area (FTA) working towards a customs union; while one is a member of the Southern Africa Development Cooperation (SADC), a 15 member FTA.

Being a customs union the EAC already applies a common external tariff (CET). It is notified as an RTA in the WTO. The WTO trade policy reviews for the members are also undertaken simultaneously.

Membership in different RTAs by the EAC member countries has sometimes been viewed as a contradiction that could result in implementation problems, however the three regional economic communities of EAC, COMESA, and SADC in June 2011, adopted a roadmap for the establishment of a Tripartite FTA as well as the negotiating principles, processes and institutional framework. The purpose is to have one economic area leading to the African continental free trade area as envisioned by the 1980 Lagos Plan of Action, and now re-affirmed by the recent Africa Union summit on "boosting intra African Trade", that set 2017 as the year when this should have been achieved.

Besides the above arrangements, the EAC currently has a framework economic partnership agreement with the EU, and negotiations are on-going towards a comprehensive agreement. So far the framework agreement covers trade in goods, and makes provision for further negotiations for other areas including trade in services, intellectual properties, and public procurement among others. Negotiations on some of these issues with the EU a developed region, have been viewed as whittling away the achievements made in the multilateral system, where developing and least developing countries have successfully resisted their inclusion or been given special and differential treatment in areas such as services, intellectual properties and others. The challenge is to ensure that similar privileges apply for the EAC in the comprehensive EPA, so as to avoid losing

out on opportunities already achieved in the MTS.

WTO NEGOTIATIONS ON RTAS

In the ongoing Doha round of WTO negotiations, negotiations on RTAs seek to clarify and improve disciplines on WTO compatibility, as well as enhancing their development content. In doing so, the negotiations have focused on procedural aspects, where a transparency mechanism, under which members are obliged to announce RTAs, notifications to the WTO on conclusion of RTA agreements, and updating of information and procedures for examination of notified RTAs amongst others, at an early stage, was agreed on. This calls for early announcement of RTAs, notifications to WTO on conclusion of RTA arrangements, updating of information and procedures for examination of notified RTAs among others. WTO Members agreed to implement the transparency mechanism and it has since been effected, it seen as an early outcome of the ongoing negotiations.

The other aspect of the negotiations on RTAs is on the substantive rules. In this regard, the Africa, Caribbean, and Pacific (ACP) group to which EAC member countries also subscribe, submitted a proposal, to the negotiating group on rules, under which RTAs are being negotiated. The 2004 proposal seeks to ensure that developmental aspects referred to in the negotiating mandate are included, as well as special and differential treatment in the WTO rules. The proposal calls for revision of the substantive provisions of GATT Article XXIV and GATS Article V in order to facilitate the possibility of development-oriented RTAs between developed and developing countries.

THE WAY FORWARD FOR THE EAC ON RTAs

The EAC integration process has greatly advanced with the coming into force of the common market protocol, this provides opportunities for the region including in trade

and related negotiations at the bilateral, regional and multilateral level, given that it has a bigger market to offer. However member states have continued to negotiate trade agreements individually and are yet to leverage the opportunities coming with the integration.

There is need for structure and institutional mechanism within the EAC to provide for coordinated trade policies for the region. This would call for joint negotiation strategies and coordination of all bilateral, regional, and multilateral negotiations and agreements entered into, in order to ensure uniformity. Pooling the resources available in the region would also provide the manpower for careful studies and analysis to ensure that trade agreements benefit the region, and prevent scenarios where the region is encumbered with counterproductive trade agreements.

Lessons can be drawn from the EU system, in which the directorate for trade implements the common trade policy of the EU that covers a wide range of issues including goods, services, commercial aspects of intellectual property and foreign direct investments, transport and capital movements among others. This mandate gives the EU a stronger position and stance during negotiations given that member states enhance its bargaining power. Although the EU is constituted by a number of developed countries, there are lessons to be drawn for the EAC on a possible institutional framework that would enable the region to leverage its bigger size and pooled resources. This calls for faster harmonisation of trade policies and institutions, for instance customs administration, before moving towards formation of joint policies, which would be the next step. It is also imperative to build capacity in the member countries in order to prevent a scenario of hugely differing levels of capacity that would undermine attempts by the region to achieve solidarity on all issues.

In addition, it is critical for the EAC to continue supporting the ACP proposal as presented to the WTO negotiating group on rules, under which negotiations on rules concerning RTAs are taking place. The current rules and disciplines on RTAs must be clarified and modified in such a way as to lock in the possibility of development oriented RTAs especially those between developed and developing countries. A positive outcome on

this issue would contribute to the possibility of concluding RTAs that allow for sustainable growth in the case of developing and least developing countries, as well as facilitating their effective integration in the MTS.

CONCLUSION

RTAs can and indeed have co-existed with the MTS; however despite their advantage of faster and increased pace of trade liberalization by going beyond agreements in the MTS, they also tend to erode flexibilities achieved under the MTS. It is essential that the current rules on RTAs under the MTS are improved to ensure that they allow for development oriented RTAs, which would then enable RTAs to better compliment the MTS.

Besides, statistics indicate that despite the existence of a multitude of preferential trade agreements, worldwide trade in goods is predominately based on the MTS MFN rates. This begs for further investigation to establish whether indeed the MTS is the more appropriate and conducive avenue through which to trade. This question needs to be addressed through a comparative analysis of trading relations where both the MTS and RTAs exist.

Bibliography

Australia. Dept. of Foreign Affairs and Trade., and Australian APEC Study Centre. "An Australia-USA Free Trade Agreement: Issues and Implications". [Canberra]: Dept. of Foreign Affairs and Trade, 2001.

Crawford, Jo-Ann, Roberto V Fiorentino, and World Trade Organization. *The Changing Landscape of Regional Trade Agreements*. Genève, Switzerland: World Trade Organization, 2005.

Omilola, Babatunde. "To What Extent Are Regional Trade Arrangements in Africa Fulfilling the Conditions for Successful RTAs?" *Journal of African Studies and Development*

Matambalya, Francis A.S.T: *Building the East African Common Market: Opportunities, concerns and options*. CSAE Conference Discussion Paper ID – 468. (<http://www.csae.ox.ac.uk/conferences/2011-EDiA/papers/468-Matambalya.pdf>)

Chiumya, Chiza Charles, N: *Regional Trade Agreements: An African perspective of challenges for customs policies and future strategies*. *World Customs Journal*.