

REGIONALISM AND DEVELOPING COUNTRY PERSPECTIVES IN WTO LAW

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23 October 2017

What are we going to cover today?

1. The Rise of Regionalism
2. Article XXIV GATT
3. The 'Enabling Clause' and Developing Countries
4. Tensions between Regionalism and Multilateralism?
5. Student Presentation

1. The Rise of Regionalism

Terminology in WTO Law! (not in other areas!)

a) Regional TA

- reciprocal agreement
- between two/more countries/REIOs
- intra/inter regional

b) Preferential TA

- reciprocity not required
- 'Enabling Clause' para. 5
- concerns developing countries

1. The Rise of Regionalism

1948-1994: GATT received 124 notifications of RTAs

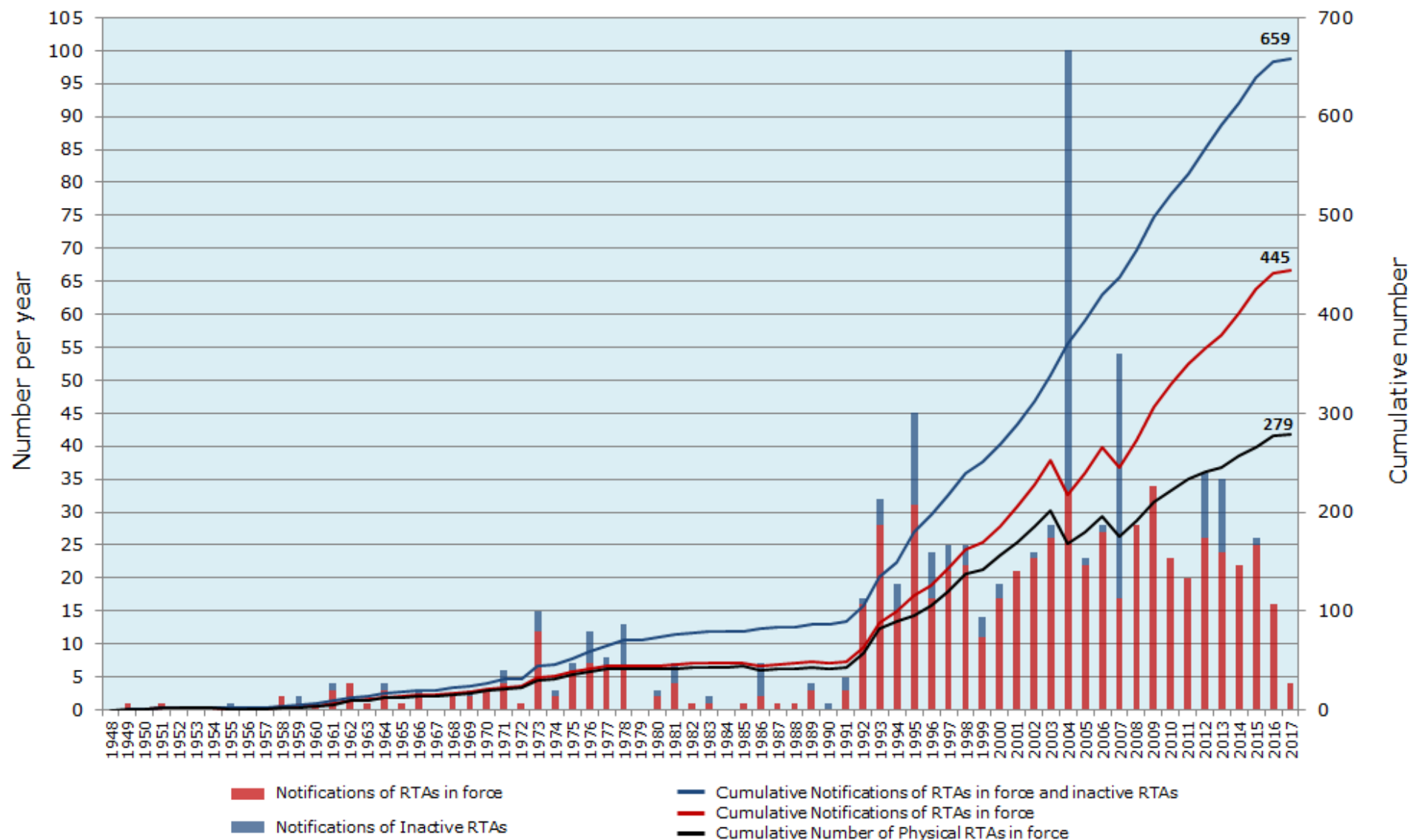
As of 20 June 2017, 659 notifications of RTAs had been received by the GATT/WTO. Of these, **443 in force**:

- 254 under GATT XXIV (20 CU and 234 FTA)
- 49 under Enabling Clause
- 150 under GATS V

WTO RTA Database

<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

Evolution of Regional Trade Agreements in the world, 1948-2017



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. Physical RTAs: goods, services & accessions to an RTA are counted together. The cumulative lines show the number of notifications/physical RTAs that were in force for a given year.
 Source: RTA Section, WTO Secretariat, 20 June 2017.

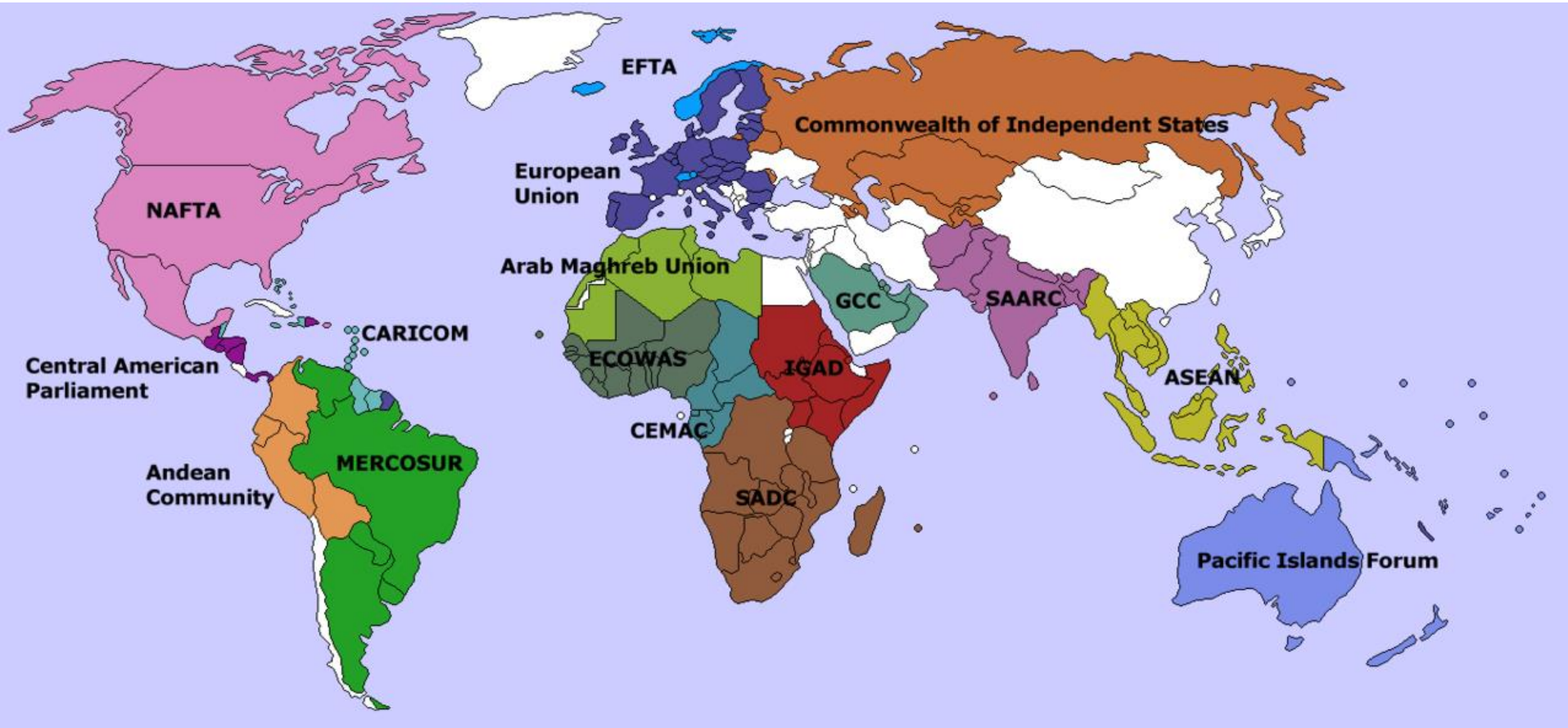
Source: WTO., https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (accessed October 2017)

1. The Rise of Regionalism

General Trends:

- Most are bilateral RTAs → rise of plurilaterals
- Cross-regional RTAs have become more common
- **More cover goods/goods and services than services (alone)**
- FTAs much more common than customs unions
- Increasingly between developing countries
- Increasingly involve deep integration

Some of the Regional Blocks



Why has there been an increase in RTAs?

- Increased market access?
- **Difficulties with multilateral trading system:** negotiation, monitoring and enforcement
- Functional demands of global production chains: reduce differences in business law and regulations
- Regulation of WTO +/-extra relations

WTO Rules on RTAs

- Art. XXIV(4)-(8) GATT, Ad Art. XXIV
- Art. V GATS
- 1994 Understanding on the Interpretation of Art. XXIV
- 'Enabling Clause' of 1979
- WTO AB and Panel reports
- 2006 GC Decision on the RTA Transparency Mechanism
- RTAs?

2. Article XXIV GATT

Prior to 1995 many uncertainties:

- against what inconsistencies could it be invoked?
- is it justiciable?

Post 1995 still uncertainties, but:

- **justify under certain conditions GATT inconsistent measures!**
Turkish Textiles para. 45
- not restricted to art. I GATT

Coverage:

- **customs unions**
- **free trade areas**



XXIV.7(a) obligation to notify
and
Transparency Mechanism

2. Article XXIV GATT

Two tier test, *Turkish Textiles para. 46, 58*

Step 1 – Is the measure introduced upon the formation of a CU or FTA, that meets the requirements of art. XXIV paras. 8 and 5 ?

Step 2 – Would the formation of the CU or FTA have been prevented if the measure was not introduced? (necessity)

What is a Free Trade Area?

- **GATT XXIV: 8(b)** defines as:
 - “... 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.”
- It is an **internal standard**
- **‘substantially’**, *Turkish Textiles, para 48*:
 - some trade < substantially < all trade

What is a Customs Union?

- **GATT XXIV: 8(a)** definition
- **Customs Union = FTA + common external tariff and rules**

So, it sets two standards:

- 1) **Internal standard**: elimination of duties/regulations to substantially all trade between participants
- 2) **External standard**: substantially the same duties/regulations to trade with third countries

2. Article XXIV GATT

Art. XXIV.5(a)-(b) + 1994 Understanding, para.2:

after the creation of the CU/FTA the entirety of **new** duties/regulations **should not be higher/more restrictive** than the entirety of **old** ones

IF NOT

Art. XXIV(6) – follow art. XXVIII procedure + **compensate!**

3. The 'Enabling Clause' and Developing Countries

- 1979 Decision
- Applies as part of GATT
- Allows derogations from MFN (and not just in practice) in favour of developing countries!
- Controversial whether it actually helps developing countries

3. The 'Enabling Clause' and Developing Countries

Examples:

- para. 2(a) – preferential tariffs given to developing countries – *Generalized System of Preferences*
- para. 2(c) – agreements between developing countries for mutual reduction of tariffs

Obligation to notify, Enabling Clause para. 4

WTO PTA Database: <http://ptadb.wto.org/>

Barriers for Developing Countries – Negotiations

Asymmetries in bargaining power

- Less to bargain with
- Fear that hard negotiating will result in reprisal

Resource deficits

- Expensive to be in Geneva and to negotiate
- Technical knowledge and human resources are lacking

Possible remedies?

- Bargain as a block?

Barriers for Developing States – Dispute Settlement

Small market size makes net benefits minimal

- Smaller trade flows make costs of litigation prohibitive
- Inability to take retaliatory measures

Political pressures: risk of losing aid/assistance

Preferential schemes: already exceptions to WTO law

Financial and legal capacity to litigate

Possible remedies?

- Legal assistance: Advisory Centre for WTO Law

4. Regionalism vs Multilateralism

- **Regionalism varies → Fragmentation?**
 - different levels of integration
 - different levels of legalization/institutions
- **Trade creation vs Trade diversion?**
- **Hinders multilateral solution?**
- **Regulatory ‘capture’ by more powerful states**
- **Areas handled that go beyond trade:** labour, environment, human rights, security

4. Regionalism vs Multilateralism

- Overlapping jurisdiction: WTO DSM vs RTA DSM
- ‘Forum shopping’?
- Prolongation of disputes?
- Relationship between WTO law and RTA law?
- Double compensation?

HOWEVER

- RTA DSM for trade is rarely used (investment different story)
- WTO DSM - “compulsory and exclusive” over WTO law
- RTAs often have choice of forum clauses