

SUBMISSION ON REGIONAL TRADE AGREEMENTS

Paper by Chile

The following submission, dated 8 September 2004, is being circulated at the request of the Delegation of Chile.

GATS ARTICLE V

1. Introduction

1. In document TN/RL/W/152, Chile identified a number of elements that could be analyzed in the discussions regarding GATS Article V, in accordance with the mandate of paragraph 29 of the Doha Declaration.

2. In June 2004, the Chair of the Negotiating Group on Rules circulated the document "Roadmap for Discussions on RTAs' Systemic Issues", which divides discussions into three areas: issues related to coverage; issues dealing with neutrality; and other questions. Discussions in each area are then divided into those aspects of Regional Trade Agreements (RTAs) related to trade in goods and those related to trade in services.

3. With the objective of deepening the analysis of GATS Article V in the Negotiating Group on Rules, Chile presents this new contribution, which focuses on the first area identified in the Chair's note, namely the "Determination of coverage in services RTAs". This note takes account of documents tabled by Hong Kong, China and the European Communities in the Committee on Regional Trade Agreements.¹ At this stage, Chile is not making concrete proposals, but rather trying to stimulate the debate.

2. Determination of coverage in services RTAs

4. As stated in document TN/RL/W/152, the GATS permits WTO Members to enter into preferential agreements liberalizing trade in services, provided that three conditions are met (i.e. substantial sectoral coverage; limitation of substantially all discrimination among its parties in the sectors it covers; and not raise the overall level of barriers to members outside those FTAs). Two of these conditions deal with coverage. Therefore the analysis of this concept is key in determining the consistency of RTAs with GATS Article V².

5. In the Roadmap, the Chair proposed an analysis of coverage based on three questions: What is the covered sector? How can compliance with the "substantial sectoral coverage" criteria be

¹ WT/REG/W/34 and WT/REG/W/35.

² This document does not prejudge the discussions on the second area of the "Roadmap".

assessed? What is meant by “elimination of substantially all discrimination”? In this note, only the second and third questions are dealt with, although several aspects of the first question are addressed.

2.1 Assessment of the “substantial sectoral coverage” criteria

2.1.1 Substantial sectoral coverage

6. As footnote 1 to GATS Article V states, **substantial sectoral coverage** is understood in terms of number of sectors, volume of trade affected and modes of supply (no *a priori* exclusion of any mode of supply) covered by the liberalization provisions of the Agreement. These three factors are the basis for the evaluation of substantial sectoral coverage. While each of these factors should be analyzed separately, it must also be acknowledged that it is the relationship among all three that will allow us to determine whether this criteria has been met.

2.1.1.1 *Number of sectors and volume of trade*

7. Concerning the **number of sectors covered**, it seems that Article V allows for exclusions (most RTAs exclude air transport and some exclude financial services)³. This raises a question regarding the assessment of this concept. In services classifications -either based on CPC or in other industrial classification-, the coverage could be measured at different levels, i.e. global level of sectors, at the subsectoral or product/activity levels. Should it be more appropriate to do the assessment in a disaggregate manner, i.e. looking at activities within each sector included (positive list liberalization) or excluded (negative list liberalization) in the schedule?

8. To carry out this analysis, we should evaluate the potential trade involved in terms of sectors included or excluded and the global trade affected. In addition, we should take into account the bilateral volume of trade covered by a RTA⁴ and the effect on total trade resulting from the exclusion of one or more sectors.

9. Nonetheless, the lack of statistical data regarding services trade flows can prove to be an additional impediment. This becomes even more apparent when measuring trade at more disaggregated level (subsectors or product/activities).

10. One useful indicator could be the domestic production figures of Members, in particular to analyze the potential trade involved. In this context, the evaluation could be done measuring the excluded sector (in terms of GDP) vis-à-vis the services sectors included in a RTA. On the other hand, if it is not possible to use statistics to evaluate trade affected by excluding a sector or a subsector, it might be useful (as the EC pointed out in an earlier communication)⁵ to select indicative criteria. This interesting idea was not developed at that time; we can try to develop it in the course of the negotiation.

11. Additionally, some ideas have been presented in the Negotiating Group for the evaluation of “substantially all trade” in the context of goods under GATT Article XXIV. The development of those ideas could provide some insights applicable to the services area.

³ The GATS itself excludes air transport and "services supplied in the exercise of governmental authority".

⁴ An additional question to be asked is why footnote 1 refers to volume of trade rather than value of trade.

⁵ WT/REG/W/35.

2.1.1.2 *Modes of supply*

12. Regarding **modes of supply**, it is clear that no mode can be excluded *a priori*, yet what happens when a mode of supply is excluded from a sectoral activity? For example, when establishment in national territory is required in order to supply a service -excluding those cases where it is necessary for technical reasons- does that imply that there is a prohibition to supply that same service across borders?

13. In this context, Article V could be interpreted in a comprehensive manner, meaning that all four modes of supply must be part of the RTA, but certain activities or subsectors may have restrictions or prohibitions for the supply of services in some modes. Nevertheless, the effect of such restrictions or prohibitions on complying with the criteria of “substantial sectoral coverage” must be evaluated.

14. Other issue is how to measure the trade effect when the services are supplied through mode three (commercial presence). In this context, one question to be considered is whether to assess the trade effect of the services supplied by the foreign company on the domestic market, on third markets and/or on the investment generated as a result of this commercial presence.

2.2 What does “absence or elimination of substantially all discrimination” mean?

15. The **elimination of substantially all discrimination** standard attempts to measure the extent of liberalization in a RTA. In services, this is difficult, particularly the measurement of the economic impact of not eliminating a discriminatory measure within a specific sector.

16. The first issue to be dealt with in this context is the meaning of “substantially all”. Hong Kong, China has pointed out that this concept was probably taken from GATT Article XXIV, thus the clarifications that have been made in that context could be useful.⁶ Overall, the obligation to “eliminate substantially all discrimination” -in accordance with letter b) of paragraph 1 of Article V- can be complied with the elimination of all existing discriminatory measures and/or prohibiting new or more discriminatory measures (“standstill”). This issue came up in the systemic discussions held in the CRTA and many felt that a standstill commitment is insufficient in cases when the existing discriminatory measures are significant. In such cases, in order to comply with the standard of eliminating all discrimination, maybe RTAs should include commitments to eliminate all existing discriminatory measures (“roll-back”).

17. In the overall assessment of this standard, it must be taken into account that discrimination can be eliminated by amending legislation or discriminatory practices, signing MRAs or harmonizing regulations. Although several of these measures are undertaken, in general terms a number of discriminatory measures remain after the signing of a RTA.

18. In addition, there are many “non-discriminatory” measures such as market access restrictions and licenses that in practice can be trade barriers. It will be necessary to discuss if those measures should be considered in the assessment of the “elimination of substantially all discriminations” standard.

2.3 Other issues related with coverage

19. An additional is how to deal with a RTA that excludes a sector at an initial stage, yet sets forth a commitment to carry out future negotiations on such sector. Is that sector covered or not by the RTA? In principle, this would be better than excluding a sector, but it also will depend on the

⁶ WT/REG/W/34.

nature of the commitment. If the parties simply state that they will hold talks in the future regarding the liberalization of a sector, the question of compliance with the future negotiation provisions emerge.

20. One last issue: Article V of the GATS does not require the immediate elimination of all discriminatory measures, but that such elimination is accomplished within a “**reasonable time-frame**”. In the case of goods, the Understanding on Article XXIV of GATT 1994 established that the period can be no longer than 10 years. Should it be different in the case of services? Should there be some sectors that require longer time frames for liberalization?
