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DUAL WTO NOTIFICATIONS OF RTAS WITH NON-RECIPROCAL TRADE LIBERALIZATION

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ABSTRACT

Disagreement between the parties involved in regional trade agreements (RTAs) about the legal basis of RTAs has led to dual notifications of some RTAs to the WTO. Dually notified RTAs are characterized by non-reciprocal trade liberalization between developing and developed RTA parties. If all the parties of a dually notified RTA are 'developing' countries, the RTA can find its legal basis both under Article XXIV and the Enabling Clause. In that case, the Committee on Regional Trade Agreements (CRTA) and the Committee on Trade and Development (CTD) may both serve as forums for reviewing dually notified RTAs under the Transparency Mechanism for Regional Trade Agreements. However, if one of the parties of a dually notified RTA is a 'developed' country, the RTA's legal basis is solely in Article XXIV. To determine the development status of the parties to a dually notified RTA, the WTO should require the RTA party notifying under Article XXIV to disclose its economic development status for the purpose of the WTO review based on the 'self-selection' principle. If the party notifying under Article XXIV declares itself a 'developed' country, the CRTA would be the sole forum for the review. However, if the party declares itself a 'developing' country, both the CRTA and the CTD may serve as appropriate forums for the review. A proposal made during the Doha Round to require all RTA parties to make a joint notification under a single legal basis is inconsistent with the WTO law and would not serve the purpose of effective review of RTAs under the WTO.

I. INTRODUCTION

With the increase in regional trade agreements (RTAs) in recent years,[1] questions have been raised whether RTAs concluded between 'developed'

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[1] The total number of notifications, including notifications of the accession of new parties, related to trade in goods during the GATT years was 123, whereas since the creation of the WTO in 1995, more than 300 additional agreements pursuant to Article XXIV and the Enabling Clause have been notified to the WTO as of February 2012. See the WTO Secretariat, 'REGIONAL TRADE AGREEMENTS: Facts and figures, How many regional

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and 'developing countries' conform to World Trade Organization (WTO) law. The practice of WTO members meeting 'substantially all the trade' (SAT) requirements under Article XXIV:8 reveals that some RTAs between developed and developing countries do not feature fully reciprocal tariff elimination commitments between the parties. This problem has received new attention as developed and developing parties to the RTAs have separately and dually notified the WTO of some of the RTAs under Article XXIV and the Enabling Clause,[2] respectively. The dual notifications pose a dilemma for the WTO under the Transparency Mechanism for Regional Trade Agreements (TM) because it is not clear whether a dually notified RTA should be reviewed under both Article XXIV and the Enabling Clause or under one of them.[3]

In this article, we examine the problem of dual notifications of RTAs to the WTO. In the first part of the article, we examine the cause of dual notifications by reviewing the law and practice of the internal trade liberalization requirement for RTAs. We first review RTA parties' practice of complying with internal trade requirements under Article XXIV. Then, we compare the internal trade requirements under Article XXIV and those under the Enabling Clause. This is followed by a review of the enforcement of internal trade requirements under Article XXIV:8 through the TM and the WTO dispute settlement system. In the second part of the article, we analyze the problem of dual notifications of RTAs to the WTO. We ask whether an RTA may have its legal basis under both the General Agreement on Tariff and Trade (GATT) Article XXIV and the Enabling Clause.[4] In conclusion, we suggest how the WTO may proceed, with a review of dually notified RTAs.

II. INTERNAL TRADE LIBERALIZATION REQUIREMENT

GATT Article XXIV and the Enabling Clause respectively provide legal defences for violations of GATT Article I obligations by non-parties resulting from preferential trade liberalization between RTA parties. The defence for

trade agreements have been notified to the WTO?', http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (visited 20 February 2012). The WTO uses the terms RTAs to refer to regional as well as bilateral RTAs.

[2] See GATT Document, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903, Decision of 28 November 1979 (Enabling Clause).

[3] WTO Document, Transparency Mechanism for Regional Trade Agreements, WT/L/671, 18 December 2006, Decision of 14 December 2006.

[4] A dual notification issue does not arise for the service trade liberalization part of an RTA because the service agreement falls under Article V of the GATS irrespective of whether the parties are developing or developed countries.

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violations of GATT Article I is provided under GATT Article XXIV if RTAs are designed to 'facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories'.[5] In comparison, the defence for GATT Article I violation under the Enabling Clause is provided if RTAs are designed to 'facilitate and promote the trade of *developing countries* and not to raise barriers to or create undue difficulties for the trade of any other contracting parties'[6] (emphasis added).

A. The practice of internal trade liberalization

1. Overview of the practice of internal trade liberalization

Significantly more RTAs have been notified under GATT Article XXIV than under the Enabling Clause. As of January 2012, some 511 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO.[7] Of these, 370 RTAs were notified under Article XXIV and 36 RTAs were notified under the Enabling Clause.[8] The relatively fewer number of RTAs under the Enabling Clause may reflect the fact that many of the RTAs notified to the WTO involve at least one developed country. This may also be due to the fact that even RTAs between developing countries were often notified to the WTO under Article XXIV.[9]

Some of the RTAs that were notified to the WTO have disclosed the RTA parties' internal tariff elimination coverage data.[10] In a few of them, the internal tariff elimination coverage was significantly lower than 90%

[5] The Appellate Body in *Turkey – Textiles* ruled that GATT Article XXIV permits defense to violations of other GATT provisions. Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products* (*Turkey – Textiles*), WT/DS34/AB/R, adopted 19 November 1999, para 46.

[6] See para 3(a) of the Enabling Clause.

[7] See the WTO Secretariat, 'Regional trade agreements', http://www.wto.org/english/tratop_e/region_e/region_e.htm (visited 20 February 2012).

[8] Ibid. The remaining 105 were notified under Article V of the GATS.

[9] All RTAs between countries that were part of former Soviet Union, such as free-trade areas between Kyrgyz Republic–Kazakhstan and between Ukraine–Uzbekistan, have been notified under Article XXIV. This may be explained by the fact that the RTAs are concluded between countries that were formerly one nation. See WTO Secretariat, 'List of all RTAs', http://rtais.wto.org/UI/PublicAllRTAList.aspx (visited 20 February 2012).

[10] The average level of tariff elimination coverage of the RTA that disclosed the information to the WTO is near or above 95% on either a tariff line or trade value/volume basis. A more detailed explanation of the descriptive statistics can be found in Jong Bum Kim and Joongi Kim, 'The Role of Rules of Origin to Provide Discipline to the GATT Article XXIV Exception' (2011) 14 Journal of International Economic Law 613 at 620. The figure is close to Australia's proposal to the CRTA as the threshold of tariff elimination coverage satisfying the SAT requirement. Australia proposed 95% of all the six-digit tariff lines listed in the Harmonized System. See WTO Document, Communication from Australia, Addendum, WT/REG/W/22/Add.1, 24 April 1998.

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measured by the tariff line and trade value measures. These RTAs are often characterized by 'non-reciprocal' tariff commitments between the RTA parties.[11]

2. Non-reciprocal trade liberalization

In general, 'non-reciprocal' tariff concessions appear to be characteristic of RTAs between developed and developing countries. In most RTAs, some degree of asymmetry in tariff elimination concessions exists between the RTA parties unless all the parties commit to the elimination of tariffs on 100% of internal trade between them. Examples of 'non-reciprocal' trade liberalization in RTAs go back to the GATT years. In RTAs concluded between the European Economic Community (EEC) and Mediterranean countries during the GATT years, the Mediterranean countries clearly did not enter into 'reciprocal' trade liberalization with the EEC.[12] For example, in the Free-trade agreement between the EEC and Algeria (EEC–Algeria FTA), the EEC eliminated trade barriers on raw materials and industrial products from Algeria, resulting in Algerian exports having unrestricted access to the EEC market.[13] In contrast, Algeria did not make any commitment to the EEC to eliminate tariffs.[14] It maintained existing barriers to trade on imports from the EEC and retained 'the possibility of strengthening its customs protection to the extent necessary for its industrialization and development needs'.[15]

[11] We use the term 'reciprocal tariff commitments' to mean that a party's tariff concession is equivalent to its trade partner's tariff concession in a trade agreement measured in terms of tariff lines subject to tariff elimination within 'a reasonable length of time', which is the time between an interim agreement and the formation of a completed RTA as provided in Article XXIV:5(c). In contrast, the Enabling Clause defines 'reciprocity' in trade negotiations between developed and developing countries as a situation in which developed countries *expect* 'the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs'. See para 5 of the Enabling Clause.

[12] The EEC entered into RTAs with Mediterranean partners including Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Spain, Tunisia, and Turkey. These agreements were presented to the GATT as either interim agreements leading to the formation of free-trade areas (Israel and Spain) or a customs union (Cyprus, Malta, and Turkey). Some of the agreements comprised of free-trade area obligations on the part of the EEC but no reciprocal commitments by the EEC's partners pursuant to Part IV of the GATT (Algeria, Egypt, Jordan, Lebanon, Morocco, and Tunisia). See para 4.4, Report of the Panel, European Community-Tariff Treatment on Imports of Citrus Products From Certain Countries in the Mediterranean Region, unadopted, GATT Document, L/5776, 7 February 1985.

[13] See GATT Document, Report of the Working Party, Agreement between the European Economic Community and Algeria, L/4559, 31 October 1977, para 5. With respect to agricultural products, the EEC's tariff concession to Algeria covered 80% of Algeria's exports of agricultural products to the EEC. Ibid.

[14] Ibid. The EEC–Algeria FTA is a stark example of non-reciprocal tariff concessions. More controlled non-reciprocal tariff concession can be achieved by differentiated transition periods or by a tariff elimination formula with variable tariff elimination geometry.

[15] Some of the examining parties the EEC–Algeria FTA doubted whether the RTA met Article XXIV:8 requirement because no tariff concession was made by Algeria. Ibid.

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During the WTO years, the practice of non-reciprocal tariff liberalization in RTAs persisted. The parties to RTAs between developed and developing countries entered into non-reciprocal trade liberalization between each other.[16] For example, in the EC–Mexico FTA, Mexico's tariff elimination concession on imports from the EC was 55.7% on a tariff line basis, while the EC's tariff elimination concession on imports from Mexico was almost twice that level at 90.3% on a tariff line basis.[17] Similarly, under the India-Singapore CECA, India's tariff elimination concession on imports from Singapore was 23.6% on a tariff line basis while Singapore's tariff elimination concession to imports from India was 100% on a tariff line basis.[18] Both the EC-Mexico FTA and the India-Singapore CECA were notified to the WTO under Article XXIV.[19]

B. Legal basis of non-reciprocal tariff concessions

1. GATT Article XXIV and Part IV

In this section, we ask whether GATT Article XXIV permits non-reciprocal trade liberalization between RTA parties. Article XXIV:8 provides that 'duties and other restrictive regulations of commerce' should be eliminated on 'substantially all the trade' (SAT) between the parties of a customs union or a free-trade area. The SAT requirement is key to the internal trade coverage of both a customs union and a free-trade area. However, the lack of any settled understanding of the meaning of the SAT has contributed to non-reciprocal tariff concessions between RTA parties.

During the Uruguay Round, the interpretation of Article XXIV was put on the agenda and some clarification of the internal trade requirement was made. The preamble to the Understanding on Interpretation of Article XXIV of GATT 1994 (Article XXIV Understanding) provides that the contribution to the expansion of world trade increases 'if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to *all* trade, and diminished if *any major sector* of trade

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[16] The practice of 'non-reciprocal' trade liberalization between developed and developing countries is blamed for tariff peaks in products such as clothing, textiles and agricultural products, where developing countries have export advantage. See Bernard Hoekman, Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 Journal of International Economic Law 405 at 407. See also, Ernst-Ulrich Petersmann, 'Mini-Symposium on Developing Countries in the Doha Round; Introduction' (2005) 8 Journal of International Economic Law 347 at 356.

[17] See WTO Secretariat, 'Summary Fact Sheet (EU-Mexico (Goods))', the Free Trade Agreement between European Community and Mexico (EC-Mexico FTA), April 2007, http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=73 (visited 20 February 2012).

[18] See WTO Document, Factual Presentation, Comprehensive Economic Cooperation Agreement (CECA) between India and Singapore (Goods and Services), Report by the Secretariat, Revision, WT/REG228/Rev.1, 1 October 2008, at paras 22–23.

[19] See WTO Document, Free Trade Agreement between the European Community and Mexico, Notification from the Parties, WT/REG109/N/1, 1 August 2000; WTO Document, Notification of Regional Trade Agreements, WT/REG228/N1, 4 May 2007.

is excluded' (emphasis added). The preamble recognizes the desirability of achieving internal trade liberalization in 'all' trade, thus emphasizing that the exclusion of 'any major sector' from RTA trade liberalization will not facilitate world trade. Therefore, excluding 'any major sector' from the tariff elimination between RTA parties would be considered a violation of Article XXIV.[20]

Later, the Appellate Body in *Turkey – Textiles*, for the first time interpreted the SAT requirement. The Appellate Body stated that ' "substantially all the trade" is not the same as *all* the trade, and also that "substantially all the trade" is something considerably more than merely *some* of the trade'[21] (emphasis original). However, the Appellate Body's ruling has failed to provide clear guidance about the extent of the internal tariff elimination necessary to meet the SAT requirement.

For RTAs between developed and developing countries, an additional uncertainty remains as to whether developing countries can be given any special and differential status with respect to the SAT requirement. When RTA parties enter into non-reciprocal tariff concessions with each other, Part IV[22] of the GATT is invoked to defend non-reciprocity. In particular, the RTA parties invoke GATT Article XXXVI in Part IV, which requires that '[t]he developed contracting parties *do not expect reciprocity* for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties' (emphasis added). The RTA parties defending non-reciprocal tariff commitments claim that the requirement under Part IV also applies to RTAs formed under Article XXIV.

A question arises whether Part IV applies to the tariff elimination between the RTA parties under Article XXIV:8.[23] In this regard, we should note that Article XXIV:8 exempts a list of trade-restrictive measures from the SAT trade liberalization; the list of exempted measures includes 'those permitted under Article XI, XII, XIII, XIV, XV and XX'. Article XXIV:8's exclusion list, however, does not refer to articles in Part IV of the GATT because Part IV was added to GATT in 1965.[24] Comparing Part IV of the GATT with the exclusion list of Article XXIV:8, we find that the exclusion list in Article XXIV:8 permits trade-restrictive measures between the parties of an RTA,

[20] The meaning of 'any major sector' is ambiguous. For example, the agricultural sector as defined in Annex 1 of the Agreement on Agriculture of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) would be deemed a major sector. However, if the excluded sector covers only raw agricultural products such as wheat, milk, and live animals, it would be controversial whether 'any major sector' is excluded.

[21] See Appellate Body Report, *Turkey – Textiles*, above n 5, para 48.

[22] Protocol Amending the General Agreement on Tariffs and Trade To Introduce a Part IV on Trade and Development, 8 February 1965, GATT, B.I.S.D. (13th Supp.) 1–11 (1965).

[23] See Article XXIV:8(a) and 8(b) for a customs union and for a free-trade area, respectively.

[24] See above n 22.

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whereas Part IV does not explicitly permit measures that are otherwise trade restrictive.

The language in Part IV provides a general principle of non-reciprocity in trade negotiations. In contrast, the exclusion list under Article XXIV:8 provides for specific measures that fall outside the scope of internal trade liberalization between RTA parties. Also, the measures falling under the exclusion list of Article XXIV:8 are not measures taken as part of trade negotiations to remove tariffs and other trade barriers as referred to in Part IV; they are emergency measures or measures falling under the general exception clause of Article XX.

In addition, the aims of Article XXIV and the aims of Part IV are *not* incompatible with each other. The aim of 'progressive development of the economies of *all* contracting parties'[25] (emphasis added) under Part IV of the GATT includes economic development of all WTO members. Therefore, this aim is also served by a developing country entering into an RTA that meets the SAT requirement under Article XXIV. The SAT requirement under Article XXIV:8 is intended to minimize the trade diversion[26] effect by preventing the RTA parties from selectively including products in RTA trade liberalization.[27] Selective trade liberalization worsens the trade diversion effect and reduces the effect of trade creation, thus diminishing the RTA's contribution to the world trade. If a developing country's RTA party enters into an RTA that fully satisfies the SAT requirement under Article XXIV, the economic development of all WTO members would be promoted as is required by Part IV of the GATT. Therefore, Part IV cannot provide an exception to the requirements under Article XXIV.

Some GATT panel reports, though unadopted, examining the relationship between Part IV of the GATT and Article XXIV, provide similar arguments as above.[28] The *EEC – Bananas* panel discussed whether the preferential

[25] See Article XXXVI:1(a).

[26] The terms 'trade diversion' refers to Jacob Viner's definition, which explains the shift of purchases from relatively low-cost non-party producers to relatively high-cost RTA party producers. See Jacob Viner, 'The Customs Union Issue', in Jagdish Bhagwati, Pravin Krishna and Arvind Panagariya (eds), *Trading Blocs, Alternative Approaches to Analyzing Preferential Trade Agreements* (Cambridge, MA: MIT Press, 1999) 105–17, at 108.

[27] 'If the GATT were to permit governments to accord preferences selectively for certain products only, trade-diverting preferences would tend to prevail.' See Frieder Roessler, 'Regional Integration Agreements and Multilateral Trade Order', in Kym Anderson and Richard Blackhurst (eds), *Regional Integration and the Global Trading System* (London: Harvester Wheatsheaf, 1993) 311–25 at 314.

[28] There were two panels involving Article XXIV during GATT years: the *EC – Citrus* and the *EEC – Bananas* panels. See Petros C Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)' (2006) 40 Journal of World Trade 187 at 204. GATT Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* (*EC – Citrus*), L/5776, 7 February 1985, unadopted; GATT Panel Report, *EEC-Import Regime of Bananas* (*EEC – Bananas II*), DS38/R, 11 February 1994, unadopted.

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tariff treatment by the EC to the African, Caribbean and Pacific Group of States (ACP) could be considered an RTA permitted under Article XXIV. The panel ruled that the RTA did not conform to Article XXIV:8 since the ACP did not eliminate trade barriers on imports from the EEC countries.[29] The panel reasoned that Article XXIV:8(b) refers to the elimination of duties and other restrictive regulations of commerce 'between the constituent territories' in products 'originating in such territories.'[30] Therefore, a free-trade area under Article XXIV:8(b) can be formed only if trade liberalization occurs 'in products originating in **all** the constituent territories'[31] (emphasis original).

The *EEC – Bananas* panel also examined whether the Article XXIV:8 requirement is affected by Part IV of the GATT, in particular, Article XXXVI:8, which states:

> The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

The note to this provision provides:

> ...
> This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII bis ... Article XXXIII, or any other procedures under this Agreement.

Examining the text of Article XXXVI:8 and the note to this provision, the panel found that Article XXIV was not included in the coverage of Article XXXVI:8. The panel viewed that the procedures under the articles enumerated above were regulated by the General Agreement, whereas the negotiations of free-trade areas did not derive 'their negotiating status from the General Agreement'.[32] Also, the panel pointed out that reciprocal trade liberalization was mandatory under Article XXIV:8(b), but Article XXXVI:8 'provides for or imply a right to demand reciprocal reduction'.[33]

In addition, the panel added a historical reason for non-application of Part IV to Article XXIV. It argued that Part IV did not apply to RTAs under Article XXIV because Part IV of the GATT was added to the GATT in 1965 before the adoption of the Generalized System of Preferences (GSP)[34] in 1971 and the Enabling Clause in 1979. The panel reasoned that if non-reciprocal trade liberalization between developed and developing

[29] GATT Panel Report, *EEC – Bananas II*, para 159.
[30] Ibid.
[31] Ibid.
[32] Ibid, para 161.
[33] Ibid.
[34] GATT Document, Generalized System of Preferences, L/3545, Decision of 25 June 1971.

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countries in RTAs under GATT Article XXIV were justified under Part IV of the GATT, it would not have been necessary for the CPs to adopt the GSP and the Enabling Clause. For the above reasons, the GATT panel found that the provisions of Part IV of the GATT, in particular Article XXXVI:8, could not be interpreted as altering the rights and obligations of the contracting parties under Article XXIV.[35]

In sum, Part IV of the GATT cannot nullify the requirements under GATT Article XXIV:8. Article XXIV:8 does not permit non-reciprocal tariff elimination commitments between the developed and developing RTA parties because the developing RTA parties are also obligated to meet the SAT requirement under Article XXIV:8.[36]

2. The Enabling Clause

In contrast to GATT Article XXIV, the Enabling Clause does not provide an operational internal trade requirement.[37] Instead, paragraph 3(a) of the Enabling Clause provides that the overarching aim of 'more differential and favorable treatment' provided in an RTA under the Enabling Clause is 'to facilitate and promote the trade of *developing countries* and not to raise barriers to or create undue difficulties for the trade of *any other* contracting parties'[38] (emphasis added).

The first part of the aim under paragraph 3(a) is facilitation and promotion of the trade of 'developing countries' that are parties to the RTA. The terms 'developing countries' in the clause should be interpreted to include only the developing parties of the RTA because the terms '*any other* contracting parties' in the latter part of paragraph 3(a) mean non-parties of the RTA[39] (emphasis added). The Enabling Clause serves the purpose of liberalizing trade between the parties of an RTA comprising developing members of the WTO.

An important difference between the Enabling Clause and Article XXIV is that under the Enabling Clause the RTA parties may 'reduce' tariffs rather than 'eliminate' them in accordance with paragraph 1(c) of the Enabling Clause. This allows the RTA parties room for maintaining some internal tariff barriers on goods imported from each other. Therefore, the Enabling

[35] Ibid, para 162.

[36] Reciprocity is required in trade negotiations to conclude RTAs under Article XXIV. See Jong Bum Kim, 'A Legal Review of RTA Tariff Negotiations' (2008) 35 Legal Issues of Economic Integration 157 at 164.

[37] As RTAs under the Enabling Clauses are not subject to the SAT requirement under Article XXIV, they are sometimes referred to as 'partial scope' agreements. See WTO Secretariat, 'RTAs Information System, User Guide' at Section I. C, http://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html (visited 22 February 2012).

[38] See para 3(a) of the Enabling Clause. In addition, para 3(b) proscribes any measures that impede 'the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis'.

[39] Here, 'contracting parties' means WTO 'Members'. See para 2(a) of the introductory note to GATT 1994.

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Clause may permit less extensive tariff liberalization concessions between the RTA parties, although it would not be applicable to RTAs that include a developed country as a party. Moreover, since tariff reduction instead of elimination is permitted between the RTA parties under the Enabling Clause, developing RTA parties should not enter into tariff concessions that fail to 'meet the development needs of developing countries'[40]; tariff concessions have to be 'mutual' but do not have to be 'reciprocal' under the Enabling Clause.[41]

C. Enforcement of the internal trade liberalization requirement

The monitoring mechanisms provided for under Article XXIV and later under the TM have been the primary means of ensuring RTA parties' compliance with the internal trade requirement under Article XXIV. Although the GATT and WTO dispute settlement system have not been actively used to challenge an RTA's legality under the GATT, a few cases involving Article XXIV indicate that a dispute settlement case against an RTA looms as a possibility.[42] In this section, we first review the monitoring mechanism under the GATT/WTO and examine the probability of the WTO dispute settlement challenge to assess its effect on the RTA parties' compliance with WTO law.

1. Transparency mechanism

(a) GATT transparency mechanism

(i) GATT Article XXIV RTAs The system provided by GATT Article XXIV:7 is a monitoring and enforcement mechanism. Under paragraph 7 of Article XXIV, GATT parties 'deciding to enter into' an RTA have two obligations: (i) to notify the CONTRACTING PARTIES (CPs) and (ii) to provide information regarding the RTA to the CPs.[43] Based on the information the RTA parties provide, the CPs will make reports about the RTA and make recommendations to the RTA parties.[44]

Article XXIV:7 requires an RTA party to notify a prospective RTA when it makes a decision to enter into an RTA. If the notification occurs prior to an RTA coming into force, it would be possible for CPs to have an ex-ante review of the RTA before it comes into force. However, the timing of the notification is unclear because the interpretation of the terms 'deciding to enter into' an RTA under Article XXIV:7 is ambiguous. A possible

[40] Paragraph 9 of the Enabling Clause.

[41] Paragraph 2(c) of the Enabling Clause permits RTAs between less-developed countries 'for the *mutual* reduction or elimination' of tariffs and non-tariff measures on products imported from one another (emphasis added).

[42] Mattew Schaefer, 'Ensuring that Regional Trade Agreements Complement the WTO System: US Unilateralism a Supplement to WTO Initiatives?' (2007) 10 Journal of International Economic Law 585 at 599.

[43] Paragraph 7(a) of GATT Article XXIV.

[44] Ibid.

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interpretation of the timing of the decision to enter into an RTA is when an RTA party decides to launch an RTA negotiation. Another possible interpretation of the time is when the RTA parties complete the RTA's ratification process, either immediately before or on the RTA's entry into force. In practice, RTA parties during the GATT years notified CPs after the RTAs became binding. As a result, it was difficult for the GATT CPs to monitor the process of the creation of an RTA prior to its entering into force.

If the interim agreement leading to an RTA is not likely to result in the formation of a customs union or a free-trade area, Article XXIV provides that the CPs shall make recommendations to the RTA parties to amend the agreement.[45] The RTA parties are not allowed to maintain such an agreement if they are not prepared to modify it.[46] GATT Article XXIV clearly envisioned a mechanism under which an RTA would be reviewed for its legal consistency with the GATT laws. Nevertheless, the review process did not work effectively partly because Article XXIV:7 did not provide the details of what should be included in the recommendations.

Among the reviews conducted by GATT CPs during the early GATT years under Article XXIV:7, only a few RTAs were approved by the GATT CPs.[47] These RTAs are as follows: the Customs Union Agreement between South Africa and Southern Rhodesia,[48] the Free-Trade Area Treaty between Nicaragua and El Salvador,[49] and Participation of Nicaragua in the Central American Free Trade Area.[50] The latter two RTAs were not found to be fully in compliance with Article XXIV but were approved pursuant to paragraph 10 of Article XXIV.[51] Later, in 1994, the GATT working party reviewed the Customs Union between the Czech Republic and the Slovak Republic and unequivocally stated that the customs union was consistent with the provisions of Article XXIV.[52]

[45] Paragraph 7(b) of GATT Article XXIV.

[46] Ibid.

[47] See James H Mathis, *Regional Trade Agreements in the GATT/WTO* (Hague: TMC Asser Press 2002) 80.

[48] GATT Document, Customs Union Agreement between the Governments of the Union of South Africa and Southern Rhodesia, L/288, Decision of 17 November 1954.

[49] GATT Document, GATT, Decisions, Declarations and Resolution of the Contracting Parties, At the Special Session, Torquay, March-April 1951 and the Sixth Session, Geneva, September-October 1951, GATT/CP/130, 8 November 1951, at 10. (Decision of 25 October 1951, approving the Free-Trade Area Treaty between Nicaragua and El Salvador.)

[50] GATT Document, Participation of Nicaragua in the Central American Free Trade Area, Decision of 13 November 1956 (B.I.S.D., 5th Supp.) at 29; GATT Document, Summary Record of the Fifteenth Meeting : Held at the Palais des Nations, Geneva, on Tuesday 13 November 1956, at 10 am, SR.11/15, 17 November 1956, at 150.

[51] See above nn 49 and 50. Paragraph 10 of Article XXIV permitted CPs to approve a proposal to establish an RTA that do not fully comply with Article XXIV but leads to the formation of an RTA within the meaning of Article XXIV.

[52] GATT Document, Report of the Working Party on the Customs Union between the Czech Republic and the Slovak Republic, L/7501, 15 July 1994, at 3.

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For other RTAs that had been reviewed, however, the GATT CPs failed to conclude that the reviewed RTAs were *inconsistent* with GATT Article XXIV. One of the most striking examples of an RTA that was *not* found to be *inconsistent* with GATT Article XXIV is the EEC–Algeria FTA.[53] In this RTA, Algeria 'was not obliged to eliminate or reduce its customs duties or other regulations of commerce with respect to imports from the EEC'.[54] Algeria's tariff elimination commitment based on the tariff line measure was 0%.[55] Even the EEC on its part did not significantly raise the level of tariff liberalization on imports from Algeria beyond what the EEC was already offering through the GSP; the percentage of imports exempted from customs duties and levies had been 98.3% under the GSP in 1975 and 98.7% under the RTA in 1975.[56] There had been only a 0.4% point difference between the GSP liberalization and the RTA liberalization.

The parties of the EEC–Algeria FTA defended the RTA based on Part IV of the GATT and claimed that it 'fell within the specific context of the historical and geographical background to the parties' relations'.[57] Although the facts regarding internal trade liberalization clearly show that the RTA did not conform to Article XXIV:8, the GATT working party did not conclude that the RTA failed to meet the requirements of Article XXIV:8.

(ii) The Enabling Clause RTAs The transparency mechanism under the Enabling Clause is an information-gathering and a consultation mechanism. The Enabling Clause requires a GATT party to notify the CPs when it is 'taking an action to introduce' an RTA under the Enabling Clause.[58] The RTA parties are also required to furnish RTA-related information to the CPs.[59] However, there are no provisions regarding the review of a notified RTA and adoption of a report containing the recommendations of the WTO. The RTA parties are only required to 'afford adequate opportunity for prompt consultations' with any interested parties.[60] From the perspective of an RTA party, monitoring under the Enabling Clause is significantly less burdensome than that under Article XXIV.

It should also be noted that, in contrast to Article XXIV, the Enabling Clause does not provide for an 'interim agreement' leading to the formation of a customs union or a free-trade area. As the Enabling Clause does not require 'elimination' of trade barriers in SAT between the parties, drafters of

[53] See above n 13.
[54] Ibid, para 12.
[55] Ibid.
[56] Ibid, para 22.
[57] Ibid.
[58] Paragraph 4(a) of the Enabling Clause.
[59] Ibid.
[60] Paragraph 4(b) of the Enabling Clause.

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the Enabling Clause may have thought it was not necessary to provide for a transitional agreement, which leads to a full agreement.

(b) WTO transparency mechanism During the Doha Round, WTO members agreed to the TM, recognizing the gap between the textual requirement of Article XXIV:7 and actual practice during the GATT years.[61] The TM under the WTO was intended to complement the transparency provisions in GATT Article XXIV and the Enabling Clause.[62] However, the new mechanism instead has substituted the transparency provisions in Article XXIV and the Enabling Clause. As a result, the monitoring of an RTA has been strengthened for both RTAs under Article XXIV and the Enabling Clause. In particular, the TM now provides a review mechanism for RTAs under the Enabling Clause, which was previously not available. However, a significant drawback is that the review of the RTA under Article XXIV for its legal consistency with WTO law has become ineffectual under the TM.[63]

Under the TM, the timing of the notification has become clearer. The notification should be done 'no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties'.[64] Because the notification procedure applies to RTAs under Article XXIV and the Enabling Clause, the RTA parties have to inform the WTO about the legal basis of the RTA. The TM provides for two different WTO committees for the implementation of the TM: the Committee on Regional Trade Agreements (CRTA) is entrusted with RTAs falling under GATT Article XXIV and GATS Article V, while the Committee on Trade and Development (CTD) is entrusted with RTAs under paragraph 2(c) of the Enabling Clause.[65]

In addition to the notification requirement, the TM provides for an early detection system where 'WTO Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO'.[66] When WTO members become party to a newly signed RTA, they shall convey to the WTO information about the RTA, including 'its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application', among others.[67] This notice to

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[61] The TM has been applied on a provisional basis to all RTAs since 14 December 2006. See TM, above n 3, para 22.

[62] See Preamble, the TM. The TM also provides the transparency mechanism for RTAs under GATS Article V. For our purpose, we discuss only the transparency mechanisms for RTAs for trade in goods.

[63] See Petros C. Mavroidis, 'Always look at the bright side of non-delivery: WTO and Preferential Trade agreements, yesterday and today' (2011) 10 World Trade Review 375 at 377.

[64] See the TM, above n 3, para 3.

[65] Ibid, para 18.

[66] Ibid, para 1(a).

[67] Ibid, para 1(b).

the WTO about planned negotiations accomplishes *ex ante* monitoring of an RTA prior to the RTA's ratification and entry into force.

The TM focuses on gathering information about the state of RTAs from the beginning of their negotiations until their final enactment. The procedures regarding information gathering about an RTA are provided in much more detail in the TM than in GATT Article XXIV:7. For example, the data an RTA party is required to make available to the WTO Secretariat must be available in ten weeks, or 20 weeks for developing countries, after the date of notification of the agreement.[68] The ANNEX of the TM specifies in full detail the content of the data to be furnished to the WTO regarding a notified RTA. The required data includes a full listing of preferential duties, most-favoured nation (MFN) duty rates, quantitative restrictions, product-specific rules of origin, and import statistics.[69] If all the required data regarding an RTA are made available to the WTO Secretariat, the data would be sufficient to measure the extent of internal trade liberalization on a tariff-line basis as well as on an import-volume basis.

The TM also requires that the WTO Secretariat shall be responsible for preparing a factual presentation of the RTA to assist members in their consideration of a notified RTA.[70] The WTO Secretariat is not allowed to make a value judgement in preparing the report.[71] The obligation of the WTO Secretariat in this regard is similar to its responsibility in preparing a factual report about a WTO member's trade policy under the WTO Trade Policy Review Mechanism.

The TM in the WTO is viewed as an improvement over the GATT review mechanism, which was hampered by significant delays by the RTA parties in providing information to the GATT working group for the factual examination reports. The reluctance by GATT parties to provide information about RTAs is attributed to a 'dispute settlement awareness' problem. [72] The problem has been partially resolved because the WTO Secretariat now prepares factual reports in consultation with the relevant parties.[73] Reflecting the concern over dispute settlement action, the TM explicitly provides that '[t]he WTO Secretariat's factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members'.[74]

The TM under the WTO on its face supplements GATT Article XXIV:7 by providing that the WTO working party examining an interim agreement 'may in its report make appropriate recommendations on the proposed

[68] Ibid, paras 7(a) and 8.
[69] Ibid, Annex.
[70] Ibid, para 7(b).
[71] Ibid, para 9.
[72] Schaefer, above n 42, at 596.
[73] Ibid.
[74] See TM, above n 3, para 3.

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time-frame and on measures required to complete the formation of the customs union or free-trade area.'[75] The WTO working party examining an interim agreement is given significant authority to determine the fate of the RTA. In practice, however, RTA parties have avoided this scrutiny by notifying all RTAs as 'full' agreements with transition periods for tariff elimination despite the fact that most RTAs at the time of their enactment are *de facto* 'interim' agreements.[76]

In sum, the WTO monitoring and review mechanism is an improvement over the GATT mechanism regarding the monitoring part but the review part for RTAs under Article XXIV is still weak, as the RTA parties notify *de facto* 'interim' agreements as 'full' agreements. Even the monitoring part in practice has been snarled by the reluctance of the RTA parties to furnish information to the WTO in a timely manner, despite the provision that the gathered information cannot be used for dispute settlement. For RTAs under the Enabling Clause, the TM supplements the general obligation to furnish information under paragraph 4 of the Enabling Clause with more detailed procedures regarding the timing and content of the information furnished to the WTO. More significantly, the TM provides a WTO review mechanism in the CTD, albeit ineffectual, for RTAs concluded under the Enabling Clause.

2. WTO dispute settlement

The dispute settlement system has not been actively used to discipline RTAs during the GATT and WTO years. Nevertheless, a few cases under the GATT and the WTO indicate that a dispute settlement challenge against an RTA remains a legal possibility. Setting aside the question of whether the WTO dispute settlement system should be used to discipline RTAs[77], we examine past WTO legal challenges involving RTAs.

The *Turkey – Textiles* case is the first WTO case involving Article XXIV. The Appellate Body held that as one of the requirements of Article XXIV defence, the party claiming the Article XXIV defense must demonstrate that the RTA fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV.[78] Therefore, to decide whether the challenged measure taken by the RTA party is consistent with the GATT, the Appellate Body was obliged to decide whether an RTA meets the SAT requirement under Article XXIV:8.

[75] Article XXIV Understanding, para 8.

[76] Lorand Bartels, ' "Interim agreements" under Article XXIV GATT' (2009) 8 World Trade Review 339, at 339.

[77] Mavroidis argues that the WTO should focus on exercise in transparency instead of disciplining RTAs. See Mavroidis, above n 63, at 386.

[78] See Appellate Body Report, *Turkey – Textiles*, above n 21, at paras 58–9.

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The WTO panel in the *US – Line Pipe*[79] applied the *Turkey – Textiles* test to determine whether the elimination of global safeguard measures on goods from NAFTA countries by the USA was consistent with Article XXIV. The panel ruled that the information the USA provided in the panel proceedings and the information submitted by the NAFTA parties to the CRTA were sufficient to prove a *prima facie* case that NAFTA was consistent with Article XXIV:8(b).[80] The USA claimed that 'NAFTA provided for the elimination within ten years of all duties on 97% of the [p]arties' tariff lines, representing more than 99% of the trade among them in terms of volume.'[81] The tariff elimination coverage by the USA under NAFTA is higher than the 95% level, which is the estimate of the average level of tariff elimination coverage of those RTAs that provided the information to the WTO.[82]

The *US – Line Pipe* panel's decision is significant in that it provides an example of the level of tariff elimination coverage that would meet the *prima facie* standard of consistency with Article XXIV:8. However, the panel's decision does not illuminate what would be the range of possible tariff elimination coverage levels that would also meet the *prima facie* standard.

Later, in the *Brazil – Tyres* panel, the EC challenged whether Mercosur as a customs union fulfilled the requirements of Article XXIV:8(a) and 5(a).[83] One of the challenged measures was the exemption of retreaded tyres imported from Mercosur countries from the import ban and fines on them.[84] Although Mercosur was notified to the GATT only under the Enabling Clause, the EC challenged the measures on both GATT Article XXIV and the Enabling Clause. Ironically, Brazil as a party to the Mercosur did not invoke the Enabling Clause to defend the challenged measures. Instead, it invoked Article XXIV, which was not the legal basis of the notification.[85]

The *Brazil – Tyres* panel exercised judicial economy in declining to rule on Mercosur's qualification for Article XXIV defence. This was based on the reasoning that it had already found that the Mercosur exemption, resulting in the import ban, was being applied *consistently* with the requirements of the chapeau of Article XX.[86] However, the Appellate Body rejected the WTO

[79] WTO Panel Report, United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US – Line Pipe*), WT/DS202/R, adopted 8 March 2002, modified by Appellate Body Report, WT/DS202/AB.

[80] Panel Report, *US – Line Pipe*, at para 7.144.

[81] Ibid.

[82] See above n 10.

[83] WTO Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Tyres)*, WT/DS332/R, June 12 2007, adopted 17 December 2007, modified by the Appellate Body Report, WT/DS332/AB/R, para 4.384.

[84] Ibid, para 2.5.

[85] Ibid, para 4.449. The USA as a third party submitted that 'Brazil's reliance on Article XXIV is misplaced' because MERCOSUR had not been notified under Article XXIV as a customs union as required by Article XXIV:7. Ibid, para 5.156.

[86] Ibid, para 7.456.

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panel's reasoning, stating that the panel should have addressed the separate claims against the Article XXIV exemption for Article I and Article XIII violations if it found that the challenged measures were applied consistently with Article XX.[87] In this case, the Appellate Body found that the import ban was being *inconsistently* applied with the chapeau of Article XX. Therefore, the Appellate Body did not eventually rule on the separate claims based on Article XXIV because the EC's condition for appeal based on the Article XXIV defence was not satisfied.

If the Appellate Body had upheld the panel's finding that the measures are consistent with Article XX, then it would have proceeded to rule on the EC's separate claims of Article XXIV inconsistency. The *Brazil – Tyres* case indicates that a WTO dispute settlement case involving consistency of an RTA with the requirements of Article XXIV remains a significant possibility that the RTA parties cannot ignore.

The Appellate Body's finding also implies that even if an RTA were notified to the WTO pursuant to the Enabling Clause, the WTO panel would still be obliged to examine the claims raised before it based on Article XXIV in order to effectively resolve the dispute. The notification by the RTA party pursuant to an 'incorrect' legal basis does not shield the RTA from the challenge based on the 'correct' legal basis. The responding RTA party should be able to invoke the 'correct' legal basis in order to defend the legality of its measures even if it was not the legal basis of the RTA's notification to the WTO.

III. DUAL NOTIFICATIONS OF RTAS UNDER THE TRANSPARENCY MECHANISM

A. Dual legal bases under Article XXIV and the Enabling Clause

The Enabling Clause permits RTAs only between 'less-developed contracting parties'.[88] It does not apply to preferential trade agreements between developed countries or between developed and developing countries. When all the parties to an RTA are developing countries, dual legal bases under both the Enabling Clause and GATT Article XXIV are possible provided the RTA satisfies the requirements of Article XXIV and the Enabling Clause.

As an operational rule for the internal trade requirement, Article XXIV:8 requires trade liberalization in SAT between RTA parties. In comparison, the Enabling Clause does not provide any operational rule, thus leaving more room for flexibility in meeting the internal trade liberalization requirement. As discussed in Section II.B, the Enabling Clause permits an RTA with tariff

[87] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreated Tyres* (*Brazil - Tyres*), WT/DS332/AB/R, adopted 17 December 2007, para 257.

[88] See para 2(c) of the Enabling Clause. Here, the terms 'less-developing contracting parties' mean 'developing country Member'. See Para 2(a) of the introductory note to GATT 1994.

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reduction rather than tariff elimination concessions. Therefore, an RTA that fulfils the SAT requirement under GATT Article XXIV:8 will also satisfy the Enabling Clause requirement that an RTA should be designed to 'facilitate and promote the trade of developing countries'.[89]

However, regarding the external requirement, the Enabling Clause provides for a criterion that is distinct from Article XXIV:5 criterion. Article XXIV:5 requires that an RTA should not be designed 'to raise barriers' to the trade of non-parties. In contrast, paragraph 3(a) of the Enabling Clause requires that the RTA should not 'create *undue difficulties* for the trade of any other contracting parties'[90] (emphasis added). The 'ordinary meaning' of the terms 'undue difficulties' under the Enabling Clause should be interpreted to encompass a wider range of economic difficulties than those caused by 'higher or more restrictive' duties and other regulations for the trade of third parties after the formation of an RTA as prohibited by Article XXIV:5.[91] For example, 'undue difficulties' for the trade of third parties could be created by restrictive preferential rules of origin in an RTA.[92] Specifically, preferential rules of origin that require producers to use materials produced in the RTA parties would result in 'undue difficulties' to the material exporters who had been exporting to the RTA region prior to the formation of the RTA.

Under Article XXIV:5, restrictive preferential rules of origin may also be considered 'other regulations of commerce' existing in the RTA parties that have become more restrictive to the trade with third parties after the formation of an RTA. However, Article XXIV:5 may not be applicable if there were no prior RTAs between the same parties because it requires a comparison of the preferential rules of origin between the same parties before and after the enactment of the RTA.[93]

Thus, the Enabling Clause is possibly imposing on RTAs a restriction that is wider in scope, but not necessarily more rigorous, than Article

[89] See para 3(a) of the Enabling Clause.

[90] The Enabling Clause does not provide an operational rule to implement the criteria.

[91] Ambiguity still remains as to what would constitute 'undue' in 'undue difficulties'. The See Article 31(1)of the Vienna Convention on the Law of Treaties (VCLT), done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 33.

[92] An example of this is the yarn-forward rule adopted as preferential rules of origin in RTAs, which forces the clothing producers in the RTA parties to use yarns originating from the RTA parties to benefit from preferential tariff treatment on their exports to each other. See Joseph A. LaNasa III, 'Rules of Origin under the North American Free Trade Agreement: A Substantial Transformation into Objectively Transparent Protectionism' (1993) 34 Harvard International Law Journal 381 at 398.

[93] See Robert E. Hudec and James D. Southwick, 'Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly' in Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade Rules in the Making, Challenges in Regional and Multilateral Negotiations* (Washington, DC: Brooking Institution Press 1999) 47–80 at 57.

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XXIV with respect to the external requirement.[94] In the end, even if an RTA is entered into between developing countries, the legal basis of some RTAs must be found solely under Article XXIV because the RTA may fail the Enabling Clause requirement if it causes 'undue difficulties' for the trade of third parties.

Lastly, in contrast to GATT Article XXIV, the wording of the Enabling Clause makes it clear that it is an exception only to GATT Article I violation.[95] Therefore, if an RTA eliminates quantitative restrictions preferentially, departing not only from Article I but also from Article XIII of the GATT, the legal defence under the Enabling Clause is not available.[96] In another case, a customs union may not be justified under the Enabling Clause if a party to a customs union is required to raise its existing duties above its MFN bound rates, in violation of GATT Article II, in order to harmonize its external duties with other customs union parties as part of the formation of the CU.[97]

In sum, an RTA between developing countries could find its legal basis under Article XXIV but not under the Enabling Clause.[98] This is because GATT Article XXIV accords legal defence to all GATT 1994 provisions, whereas the legal defence under the Enabling Clause is limited to GATT Article I violation. In addition, the internal and external trade requirements of Article XXIV are distinct from those of the Enabling Clause, without the latter being subsumed by the former.

[94] It is possible that drafters of the Enabling Clause may have intended that since the internal trade requirement under the Enabling Clause is more lenient than Article XXIV:8, it was necessary to have a restriction on harms to third parties that is wider in scope by adopting the 'undue difficulties' standard.

[95] See para 1 of the Enabling Clause, which states that '[n]otwithstanding the provisions of Article 1 of the General Agreement,' preferential treatment can be given to developing countries. The Enabling Clause is not a waiver from GATT Article I in a strict sense. Instead, it is 'other decisions of the CONTRACTING PARTIES to GATT 1947' referred to in para 1(b)(iv) of the of the 'introductory note' to GATT 1994. See Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 Journal of International Economic Law 507 at 515.

[96] This point was raised by the European Communities in its communication circulated in the Committee on Trade and Development as one of the reasons why the Gulf Cooperation Council (GCC) cannot be legally justified under the Enabling Clause. See WTO Document, Gulf Cooperation Council Customs Union-Saudi Arabia's Notification (WT/COMTD/N/25), Communication from the European Communities, Addendum, WT/COMTD/66/Add.2, 25 November 2008.

[97] The USA stated that if members of the GCC have tariff bindings below the common external tariff of the GCC, then the GCC has to find its legal basis under Article XXIV instead of the Enabling Clause. See WTO Document, Gulf Cooperation Council Customs Union - Saudi Arabia's Notification (WT/COMTD/N/25), Communication from the United States, Communication from the United States, Addendum, WT/COMTD/66/Add.1, 24 November 2008, para 5.

[98] Conversely, an RTA that satisfies the requirements of the Enabling Clause may not satisfy those of Article XXIV.

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B. Dual notifications

Since the provisional application of the TM, two RTAs have been notified under both the Enabling Clause and Article XXIV. They are the India-Korea CEPA[99] and the Korea–ASEAN FTA.[100] Korea notified the India–Korea CEPA under Article XXIV and India notified it under the Enabling Clause.[101] Similarly, Korea notified the Korea–ASEAN FTA under Article XXIV and the ASEAN parties notified it under the Enabling Clause.[102]

In the two dually notified RTAs, the RTA parties entered into tariff elimination concessions that can be characterized as non-reciprocal. In the case of the Korea–ASEAN FTA, the ASEAN members are accorded significantly longer transition periods for tariff elimination concessions than those accorded to Korea.[103] Korea is required to eliminate tariffs on those products falling under Normal Track[104] by 2010. In contrast, the ASEAN 6 are required to eliminate tariffs on products falling under the Normal Track by 2012. For CLMV[105] ASEAN members, tariff elimination for those products on the Normal Track can be completed by 2018 (Vietnam) and 2020 (for Cambodia, Myanmar, and Laos).[106] The transition period of tariff

[99] The India–Korea Comprehensive Economic Partnership Agreement (India–Korea CEPA) entered into force 1 January 2010. See WTO Document, Notification of Regional Trade Agreement, WT/REG286/N/1, 1 July 2010.

[100] The Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the ASEAN (Korea–ASEAN FTA) entered into force between nine ASEAN member states (excluding Thailand) and Korea on 1 June 2007. Thailand later signed the protocol of accession to the agreement on 27 February 2009. See the ASEAN, ASEAN–Republic of Korea Dialogue Relations, available at http://www.aseansec.org/7672.htm (visited 2 February 2012) See also WTO Document, Notification of Regional Trade Agreement, WT/REG287/N/1, 8 July 2010. The GCC customs union was originally notified under Article XXIV but was later changed to under the Enabling Clause. This is a case of change in notification rather than 'dual notifications'. See Gulf Cooperation Council Customs Union, Notification from Saudi Arabia, Corrigendum, WTO Document, WT/REG222/N/1/Corr.1, 31 March 2008.

[101] See WTO Document, WT/REG286/N/1, 1 July 2010; WTO Document, WT/COMTD/N/36, 29 September 2010.

[102] For Korea's notification and the ASEAN countries' notification, see WTO Document, Notification of Regional Trade Agreement, WT/REG287/N/1, 8 July 2010; WTO Document, WT/COMTD/N/33, 8 July 2010.

[103] Differential transition periods should be considered non-reciprocal tariff concessions if they result in significant delays in trade concessions beyond 'a reasonable length of time', which Article XXIV:5(c) provides as the time between the institution of an interim agreement and the completion of the formation of an RTA.

[104] All tariff lines are divided into two groups: Normal Track and Sensitive Track. The maximum ceiling on the number of tariff lines that can fall under the Sensitive Track is 10% of all tariff lines; the rest will fall under the Normal Track. The tariffs will be eliminated on those product lines falling under the Normal Track but for those under Sensitive Track, tariff will be reduced or other quantitative restrictions will remain. See Annexes 1 and 2 of the Korea–ASEAN FTA, http://www.aseansec.org/akfta.htm (visited 20 February 2012).

[105] CLMV stands for Cambodia, Laos, Myanmar, and Vietnam.

[106] See para 3 of the Understanding on the Interpretation of Article XXIV of the GATT 1994, Annex 1A of the WTO Agreement (Understanding on Article XXIV).

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elimination for CLMV countries for products falling under the Normal Track is longer than 10 years, which is considered to be 'a reasonable length of time' for the completion of the formation of a customs union or a free-trade area under Article XXIV. As a result, the tariff concession schedules by CLMV countries would fail to be in conformity with Article XXIV:5(c) unless they can justify the longer transition periods on 'exceptional circumstances'.[107]

Similarly, in the case of the India–Korea CEPA, Korea's tariff elimination coverage within 10 years is 89% on a tariff line basis while India's tariff elimination coverage is 72% on a tariff line basis.[108] The tariff elimination coverages in the two RTAs are substantially low compared to other RTAs that reported the trade coverage information to the WTO.[109]

Under the TM, the forum for an RTA falling under Article XXIV and the Enabling Clause is respectively the CRTA and the CTD.[110] In the case of the two dually notified RTAs, it is likely that the RTA parties disagreed about Korea's economic development status, resulting in disagreement over the legal status of the RTAs.

Under WTO law, the meaning of the terms 'developing countries' is ambiguous. In particular, the Enabling Clause does not define the terms 'less-developed contracting parties'. As a result, WTO members permitted 'self-selection' as a criterion to determine developing country status.[111] The 'self-selection' principle is regarded as 'in itself an expression of the principle of *sovereignty*' and it has never been formally challenged in the GATT/WTO dispute settlement system.[112] The only known instance of a view against a developing country status of a WTO member was made by the EU during the discussion before the Dispute Settlement Body (DSB) regarding the Appellate Body's Report on *Korea – Various Measures on Beef*.[113] In the DSB meeting, the EU stated that '[a]lthough [the developing country] issue did not seem to have been in dispute, the EC was compelled to underline its disagreement with Korea's self-characterization as a developing country'.[114]

[107] Paragraph 3(a) on the Understanding on Article XXIV requires that RTA parties choosing transition periods longer than 10 years should provide 'a full explanation to the Council for Trade in Goods of the need for a longer period'. Ibid.

[108] See Table 1.

[109] See above n 10.

[110] See para 18 of the TM.

[111] Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003) 374.

[112] See Petros C. Mavroidis, George A. Bermann, and Mark Wu, *The Law of the World Trade Organization (WTO)* (New York: Thomson Reuters, 2010) 196.

[113] WTO Appellate Body Report, Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Various Measures on Beef), WT/DS161/AB/R, adopted 10 January 2001.

[114] Ibid. See WTO Document, Minutes of the Meeting, Held in the Centre William Rappard on 10 January 2001, WT/DSB/M/96, 22 February 2001, para 14. The EC noted that 'Korea had been treated as a developing country for the purposes of the Agreement on Agriculture'.

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Table 1. Internal trade coverage of dually notified RTAs[a]

RTA	Party	Tariff line basis (%)	Trade volume basis (%)
The Korea–ASEAN FTA[b]	Korea	91	92
	ASEAN6	90[c]	NA
The India–Korea CEPA[d]	Korea	89	85
	India	72	75

[a]All the trade coverage statistics report tariff elimination coverage in 10 years.
[b]For tariff line and trade volume coverage statistics Korea's concession to ASEAN countries, see 'Main Contents of Korea–ASEAN FTA', Ministry of Foreign Affairs Trade, April 2007.
[c]ASEAN 6 countries are eliminating tariffs on 90% of tariff line by 2012. The 90% is the minimum threshold provided in the agreement; actual trade coverage by individual countries may be above this threshold.
[d]For the trade coverage statistics on the India–Korea CEPA, see 'The Results of India-Korea CEPA Negotiations', Ministry of Foreign Affairs and Trade, 6 August 2009.

Incidentally, Korea is a party in two cases of dual notifications and its developing country status is at issue. Although Korea made notifications of the India–Korea CEPA and the Korea–ASEAN FTA pursuant to Article XXIV, we cannot infer that Korea made a 'self-selection' as a 'developed' country because even an RTA between developing countries may have its legal basis under Article XXIV. However, Korea's counterparts in the India–Korea CEPA and the Korea–ASEAN FTA notified the RTAs in pursuant to the Enabling Clause. Based on these notifications, we can infer that Korea's counterparts deemed Korea a developing country for the purpose of the legal basis of the RTAs. Nevertheless, in the absence of Korea's clear notification of its economic development status to the WTO in connection with the legal status of the above RTAs, Korea's developing or developed country status would remain uncertain before the WTO committees on RTAs.

As illustrated by the above two RTAs, the key question under the TM regarding a dually notified RTA is whether the party notifying the RTA under Article XXIV is a developed country or a developing country.[115] The general practice of the WTO regarding a developing or developed

[115] In the Doha Round Negotiating Group on Rules conducted in February and March of 2011, parties discussed the issue of dual notifications. The USA proposed that all RTA notified to the WTO should be considered in the CRTA. In contrast, India stated that it saw no problem with the respective roles of the CRTA and the CTD. See WTO Secretariat, WTO: 2011 News Items, 'Regional trade agreement negotiators urged to move towards "zone of accommodation"', 17 March 2011, http://www.wto.org/english/news_e/news11_e/rta_17mar11_e.htm (visited 20 February 2012). Later, India stated that the CTD should consider the dually notified RTAs. See WTO Secretariat, WTO: 2011 News Items, 'Rules Group begins review of transparency mechanism for regional trade agreements', 4 February 2011, http://www.wto.org/english/news_e/news11_e/rule_04feb11_e.htm (visited 2 August 2012). The proposals by the USA and India require amendment of the TM, which allocates separate forums based on the respective legal bases.

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country status is 'self-selection'.[116] Relying on this criterion, we may infer the economic development status of the notifying RTA party based on the notification. If an RTA is notified pursuant to the Enabling Clause, we can infer that the notifying party is making a self-selection as a developing country.[117] However, if an RTA is notified under Article XXIV, we cannot infer whether the party notifying under Article XXIV is a developed or a developing country based on the 'self-selection' criteria.

To clarify the economic development status of the RTA party notifying under Article XXIV, the party should be required to inform the CRTA whether it considers itself a developing or a developed country for the purpose of the WTO review. If the party declares itself a developing country, then both the CRTA and CTD are suitable forums for reviewing the RTA because both committees have the authority under the TM to review an RTA between developing countries. However, if the party declares itself a developed country, only the CRTA would be the appropriate forum under the TM, irrespective of the other RTA party's notification pursuant to the Enabling Clause. For a dually notified RTA, the CTD cannot be the sole forum for the WTO review because even if all the parties to the RTA were developing countries, both Article XXIV and the Enabling Clause would serve as the legal bases of the RTA.

In the Doha Round, a proposal was made to require all the RTA parties to reach agreement on the legal status of the RTA before making notifications to the WTO.[118] Procedurally, this would mean notification to the WTO about the legal status of an RTA should take the form of an agreement about the legal status of the RTA among all parties to that RTA. However, this proposal incorrectly presumes that an RTA must have its

[116] For the purpose of GSP treatment, it is the 'developed' countries that determine whether a country is 'developing'. See Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 Journal of International Economic Law 507 at 507, note 1.

[117] An example of an RTA whose legal basis is controversial is the ASEAN-China Trade in Goods Agreement (ACFTA). The ACFTA was notified to the WTO by the ASEAN countries as an RTA under the Enabling Clause and would be reviewed in the CTD. Together with other ASEAN members, Singapore is self-selecting itself as a developing country although it is recognized as an advanced economy by the IMF. See IMF, World Economic Outlook (2011) at 168, http://www.imf.org/external/pubs/ft/weo/2011/02/pdf/text.pdf (visited 29 February 2011). See WTO document, Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China, Notification from the Parties to the Agreement Addendum, WT/COMTD/N/20/Add.1, 26 September 2005.

[118] Ecuador proposed the procedural adjustment for the smooth operation of the TM. See WTO 2011: News Item, 'Rules Group begins review of transparency mechanism for regional trade agreements', above n 115.

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legal basis solely under either Article XXIV or the Enabling Clause but not under both. As noted above, an RTA between developing countries may have legal bases under both Article XXIV and the Enabling Clause.[119]

In the above dually notified RTAs, if Korea declares itself a *developing* country, then Article XXIV and the Enabling Clause would be equally valid legal bases because all the parties to the RTAs are 'self-selecting' themselves as developing countries when they notify the RTAs. However, if Korea informs the CRTA that it considers itself a *developed* country, then the only valid legal basis that the WTO can infer for the RTAs is Article XXIV. The WTO can also infer that the Korea's counterparts notifying the RTAs under the Enabling Clause in the dually notified RTAs are self-selecting themselves as developing countries. The 'self-selection' basis of defining a developing country status would help the WTO to effectively implement the TM without having to reach an agreement about the definition of a 'developing country' status under the Enabling Clause.

We may consider some alternatives to the 'self-selection' principle to determine the developing country status of a WTO member. For example, the WTO may provide that members of the Organization for Economic Cooperation and Development (OECD) at the least should not be deemed 'developing countries' in the WTO. [120] This is not a novel approach as the WTO defined 'least-developed countries' based on the recognition as such by the United Nations.[121] However, the criterion still leaves ambiguity for high-income countries or separate customs territories, which are not members of the OECD, such as Singapore or Hong Kong, China. Another drawback is that only nation states are members of the OECD whereas customs territories may become members of the WTO pursuant to Article XII:1 of the WTO Agreement. As a result, customs territories that are 'developed' economies may remain as 'developing' countries under the criterion based on OECD membership. In another alternative, the WTO may provide that a member country with a certain level of development[122], measured by an objective indicator of development, should graduate from the developing

[119] The dual legal bases would be possible for an RTA if it satisfies the higher standard of the internal trade liberalization in SAT between the parties under Article XXIV and also meets the external trade requirements under both the Article XXIV and the Enabling Clause.

[120] As Korea is a member of the OECD, it should not be deemed a developing country under this definition. See OECD Secretariat, 'List of OECD Member Countries–Ratification of the Convention on the OECD', http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html (visited 16 February 2012).

[121] See Article XI:2 of the WTO Agreement.

[122] Under Part IV of the GATT, 'development' should be interpreted to mean economic development as it refers to 'the progressive *development of the economies* of all contracting parties' (emphasis added). See GATT Article XXXVI:1(a). Under the Enabling Clause, in contrast, the term 'development' may include development other than economic development such as human development as para 9 of the Enabling Clause refers to 'joint efforts by contracting parties to meet the *development needs* of developing countries' (emphasis added).

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country status. The drawback of this approach is that WTO members have to agree on the indicator[123] to measure development and set the threshold level above which countries would be deemed developed countries.

IV. CONCLUSION

Dual notifications of RTAs are partly attributable to the more flexible internal trade liberalization requirement under the Enabling Clause than under Article XXIV. In order to deal with the problem of dual notifications, the WTO should recognize that an RTA can find its legal basis under both Article XXIV and the Enabling Clause. Therefore, the WTO should separately review a dually notified RTA in the CRTA and CTD pursuant to the TM if the dual legal bases under Article XXIV and the Enabling Clause are permissible outcomes based on the determination of the RTA parties' economic development status.[124]

To establish whether a dually notified RTA should be reviewed under Article XXIV and/or the Enabling Clause, the WTO should maintain its practice of determining the developing country status based on the 'self-selection' principle. In particular, the WTO should require the party notifying an RTA pursuant to Article XXIV to declare whether it considers itself a developing or a developed country. If the party declares itself a 'developed' country, the sole legal basis for the WTO review should be Article XXIV, and the CRTA should be the only forum for the review. In contrast, if the notifying party under Article XXIV declares itself a 'developing' country, then it should be possible for the dually notified RTA to find its legal bases under both Article XXIV and the Enabling Clause. In that case, both the CRTA and CTD should serve as appropriate forums for the WTO review. Restricting the review of a dually notified RTA in a single forum without determining the economic development status of the RTA parties would detract from the aim of providing effective monitoring and review of RTAs in the WTO.

As an alternative to applying the 'self-selection' principle, the WTO may pursue an agreement on the definitions of 'developing' and 'developed' members in the WTO. The approach, however, faces significant challenges as WTO members have to agree on the development indicator or other

[123] The WTO may use gross national income (GNI) per capita as a measure of development or alternatively use the human development index (HDI) as a measure of development. See Michael P Todaro and Stephen C Smith, *Economic Development*, 10th ed. (Boston, MA: Pearson, Addison-Wesley, 2009) 43–56.

[124] Even if the TM is amended to consolidate all reviews of RTAs into the CRTA, the problem of dual legal bases remains because the CRTA has to eventually determine whether an RTA has a legal basis under both Article XXIV and the Enabling Clause or under either GATT Article XXIV or the Enabling Clause.

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objective evidence of a developed country status to use in the definition. In sum, even if the definitions of 'developing countries' and 'developed countries' are clearly provided in the WTO, an RTA between 'developing countries' may still find legal bases both under Article XXIV and the Enabling Clause.

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