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NOTIFICATION OF REGIONAL TRADE AGREEMENTS UNDER WTO LAW

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ABBREVIATIONS

AB	Appellate Body
ABR	Appellate Body Report
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ATP	ASEAN Plus Three
BOP	Balance of Payments
CAFTA	Central America Free Trade Agreement
CARICOM	Caribbean Community
CCT	Common customs tariff
CEPA	Comprehensive Economic Partnership Agreement
CET	Common external tariff
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CTPA	United States – Colombia Trade Promotion Agreement
CU	Customs Union
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EAS	East-Asia Summit
EC	Enabling Clause
EU	European Union
FCN	Friendship, commerce, and navigation treaties
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade

GCC-CU	Gulf Cooperation Council Customs Union
ITO	International Trade Organization
LDC	Least developed country
MERCOSUR	Southern Common Market
MFN	Most-favored nation principle
NAFTA	North American Free Trade Agreement
NT	National treatment principle
NTBs	Non-tariff barriers
PR	Panel Report
PTA	Preferential Trade Arrangement
RTA	Regional Trade Agreement
S&DT	Special and Differential Treatment
SAT	“Substantially all the trade”
TM	Transparency Mechanism
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

ABSTRACT

Multilateralism and bilateralism, though antagonistic, find a form of reconciliation and harmonization in the notification of regional integration agreements to the WTO. However, the notification rules of this Organization are ineffective, since they contain some legal loopholes that generate uncertainty among their Members and make this procedural requirement a mere formality, commonly unobserved by parties to FTAs and CUs. Accordingly, analyzing possible reforms to this regulation is of high significance, so that the multilateral trading system and, specifically, principles such as Non-Discrimination in international trade and the WTO itself, are safeguarded, as bilateral relations continue to proliferate.

Key words: WTO, Bilateralism, Notification, RTAs.

INTRODUCTION

Notification, a recognized requirement established in order to ensure transparency of regional trade agreements (RTAs), is governed by the provisions of Article XXIV of the General Agreement on Tariffs and Trade (GATT), paragraph 4 of the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, otherwise known as the “Enabling Clause”, and Article V of the General Agreement on Trade in Services (GATS).

In instituting such a requirement, the World Trade Organization (WTO) has sought to examine the consistency of the agreements with its multilateral rules (Technical Cooperation Handbook on Notification Requirements, 1996).

Nonetheless, a significant issue arises from the lack of legal development regarding the specifics of the notification. In this regard, the provisions set forth by the GATT, the Enabling Clause, and the GATS do not provide an exact and definitive format to be followed by countries wishing to form a regional trading arrangement (Ibid.).

In light of the foregoing, the 14th of December 2006, the WTO General Council established a new “Transparency Mechanism” for the early announcement of negotiations and notification of concluded RTAs, which was discussed in the Negotiating Group on Rules started under the Doha Development Agenda. Also, on the 14th of December 2010, the General Council established the Transparency Mechanism for Preferential Trade Arrangements (PTAs).

Taking into consideration that the Transparency Mechanisms are implemented on a provisional basis and that they cannot be considered as covered agreements, since they amount to decisions of the WTO General Council, multiple questions arise concerning, in specific, the practical

application of these mechanisms, and, in general, notification of regional trade agreements under WTO law.

The above-mentioned topic is of utmost importance in the current dynamics of international commerce, considering the increasing dominance of RTAs in trade relations worldwide. It is well known that, since the 90s, RTAs have not only increased in number, but also in depth and complexity (“Regional trade agreements and the WTO”, n.d.), causing the Most-Favored Nation Principle (MFN) to fall into disuse.

The MFN clause is an essential component to the WTO’s Non-Discrimination Principle, which encompasses both, the MFN and the National Treatment (NT) principles, and, in general terms, consists on a trading system free of unequal treatment among Members –MFN– and between foreigners and locals –NT– (“Online course of introduction to the WTO”, 2012).

Given this thesis’ subject matter, it is necessary to specially focus on the MFN clause under WTO law in order to further understand the effects of the rapid emergence of free trade agreements (FTAs) on the multilateral trading system.

The above, given that the MFN principle consists on granting advantages, favors, privileges, and immunities to all WTO Members (hereinafter Members) alike. Hence, if one contracting party grants any advantage to another, that same privilege should be granted immediately and unconditionally to other Members; the above, in an effort to promote economic openness and trade liberalization among states on a level playing field.

However, regional trade agreements constitute admissible exceptions to the application of the MFN; they allow for a discriminatory trade through the establishment of free-trade areas (FTAs) and customs unions (CUs). Still, as they keep increasing over time, bilateral relations appear to be not the exception, but the general rule.

Furthermore, international trade is evolving way faster than legal developments on this subject; hence, not surprisingly, questions with no clear solution have arisen.

This is the case of notification of FTAs and CUs under WTO law, given that there is not a solid legal framework on notification put forward by the GATT or any of the covered agreements.

As mentioned above, Article XXIV of the GATT, paragraph 4 of the Enabling Clause, and Article V of the GATS describe notification of trade agreements as a requirement under WTO law. Nevertheless, there has been no legal development or interpretation on this topic, and the WTO panel or Appellate Body reports have not advanced on the issue. In this way, controversies pertaining to the notification procedure are solved in a speculative manner.

Moreover, there is no consensus among members of the Committee on Regional Trade Agreements (CRTA) and the Committee on Trade and Development (CTD) on how to solve problems in respect to the lack of consent of the RTA's parties in regards to under which article to notify their treaty, as well as the effects of a notification that is not performed in due time, amid other issues.

The sole references to particular notification procedures are found on the Transparency Mechanism for RTAs, the Transparency Mechanism for PTAs, and the terms of reference and provisions concerning the CRTA and the CTD.

Still, none of the above-mentioned provisions deal with the implications of their infringement or other fundamental aspects of notification.

Thereby, controversies surrounding the notification of RTAs under WTO law will remain as a general rule, if no detailed regulation is issued on this topic; first and foremost, taking into account the ever-increasing amount of RTAs in international trade relations, a self-explanatory consideration given the fact that, as of June 2016, all WTO members have an RTA in force.

For this reason, potential solutions to address this issue will be presented, after an overview of the existent legal framework on notification (the GATT, the Enabling Clause, and the GATS), as well as an examination of its treatment by the CRTA and the CTD. Also, the analysis will take into account the views of professionals in this field, who have spoken about the existent legal vacuums in regards to the topic of notification of RTAs under WTO law. The bibliography of this paper cannot refer to panel or Appellate Body reports regarding notification of FTAs or CUs, since none of them has referred specifically to this topic of discussion.

That said, the present degree dissertation aims at, first, developing a general analysis of the notification of RTAs under WTO law and, then, presenting the controversies that have arisen given the lack of legal development and interpretation in terms of notification procedure, as well as potential solutions in regards to the existent legal vacuums surrounding this issue. The adequate procedure to achieve the aforementioned objective consists on a careful study and research that sets the basis for a critical and analytical reflection paper. The above, considering not only how RTAs have increased in number and scope, but also how bilateral trade relations have been perceived as eroding the Non-Discrimination Principle, promoted by the MFN.

CHAPTER I: The MFN Clause under WTO Law

For the purpose of fully understanding the MFN clause, this Chapter will, in principle, further analyze its application under Article I: 1 of the GATT referring to goods and Article II of the GATS referring to services. Then, it will study the complex reality of the increase of bilateral agreements in WTO regulation. The above, in an effort to set the proper theoretical framework that leads to a correct understanding of, first, the exceptions to the MFN, *i.e.* the conclusion of regional trade agreements and, second, the notification requirements of both, free-trade areas and customs unions.

1. ARTICLE I: 1 OF THE GATT

The MFN principle goes back to the times of treaties of friendship, commerce, and navigation (FCN)¹ and resembles the provision that was included in the draft charter for the International Trade Organization (ITO)² (McRae, 2012, p. 3). Today, in regards to trade in goods, Article I: 1 of the General Agreement on Tariffs and Trade (GATT) enshrines the most important aspects of the MFN clause:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of

¹ FCN treaties amount to agreements covering trade, intellectual property, human rights, and investment disciplines. They were initially concerned with commercial matters, and after the Second World War, developed a significant investment protection component. Nevertheless, they have been largely replaced by more specialized international treaties (Alschner, 2013, pp. 456-457).

² The ITO was the precursor of the WTO, except the organization never came into being. By the end of 1950, the efforts to create an organization for the regulation of trade were diminished when the U.S. government decided to drop out of the negotiation of a charter for the ITO –the Havana Charter–, due to domestic opposition (Toye, 2012). Still, the ITO was relevant for the creation of the GATT, which stands at the core of the WTO.#

*levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, * any **advantage, favour, privilege or immunity** granted by any contracting party to any product originating in or destined for any other country shall be accorded **immediately and unconditionally** to the **like product** originating in or destined for the territories of all other contracting parties [emphasis added].*

First of all, Article I: 1 defines the principle's scope of applicability; the MFN applies to "customs duties" and "charges of any kind" that are imposed or that are related to importation or exportation activities (e.g. the international transfer of payments for imports and exports, the method of levying the customs duties and charges, and the formalities that have to be met in order to fulfill all requirements surrounding imports and exports of goods).

In simple terms, the Oxford Dictionaries define "customs duties" as the duties levied by a government on imported goods (Oxford Dictionaries, n.d.) and "charges" as the prices asked for goods or services (Oxford Dictionaries, n.d.).

However, an overall interpretation of Article I: 1 reveals that the MFN treatment concerns tariffs, regulations on exports and imports, internal taxes and charges on imported products³, and internal regulations⁴ (Japanese Ministry of Economy, Trade, and Industry, 2016, pp. 263-264); in

³ Article III: 2 of the GATT.

⁴ Article III: 4 of the GATT, which refers to laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product.

other words, the MFN principle applies to tariff and non-tariff related provisions, and to both, border measures and internal measures⁵.

Specifically, the MFN requires that an advantage, favor, privilege or immunity be granted, in whichever of the above-mentioned aspects, in regards to a product originating in or destined for any other member state. Such a concession, whatever form it takes, should then be extended “immediately” and “unconditionally” *i.e. ipso facto* to the “like products” of other contracting parties.

There is not consensus on the meaning of the term “like product”. The WTO dispute settlement has addressed this issue under GATT Article III when addressing the NT principle, and not the MFN principle. Still, the guidelines set forth by the AB in regards to NT can also shed a light in the determination of which products are “like” when applying Article I: 1.

In the *Japan – Alcoholic Beverages II* case, the Appellate Body (AB) noted that the practice under the GATT 1947 of determining whether imported and domestic products are “like” had to be done on a case-by-case basis. In its words:

“The Report of the Working Party on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting “like or similar products” generally in the various provisions of the GATT 1947:

⁵ Border measures include customs duties, other charges on importation and exportation, import and export prohibitions and quotas, tariff quotas, import licenses, and customs formalities (Van den Bossche and Zdouc, 2013, p. 321). Internal measures include internal taxes and internal regulations, such as those affecting the sale, distribution or use of products (Van den Bossche and Zdouc, 2013, p. 321). In the *China – Auto Parts* case the Panel concluded that it is the temporal element what distinguishes ordinary customs duties from internal charges; whereas the obligation to pay customs duties appears at the moment the good enters the importing’s country territory, the obligation to pay internal charges arises because of internal factors, such as internal sale or use of the product (Shadikhodjaev, 2012, p. 200).#

(...) The interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is ‘similar’: **the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality**”⁶(Japan – Taxes on Alcoholic Beverages, 1996, p. 20) [emphasis added].

Additionally, the AB compared the concept of “likeness” with the image of an accordion by claiming that, “the accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied” (Japan – Taxes on Alcoholic Beverages, 1996, p. 21); this meaning that, depending on the GATT provision in which it is included, as well as on the specific circumstances of the case, it should be interpreted narrowly or extensively.

That said there are no reasons to exclude the above-mentioned criteria –included on the 1970 Report of the Working Party on Border Tax Adjustments– from the determination of the “like products” that fall under GATT Article 1: 1. Still, these cannot be understood as the only criteria that should be analyzed, since the specifics of the case could require other aspects to be taken into account, *e.g.* the tariff regimes applied in each member state⁷.

Furthermore, the term “immediately” does not demand for any other explanation besides the logical and literal meaning of the word, *i.e.* at once, instantly, without any intervening time or

⁶ In this precise point, the AB quotes the Report of the Working Party on Border Tax Adjustments, BISD 18S/97, para. 18.

⁷ In *Spain – Unroasted Coffee* three criteria were used in order to determine the “likeness” between ‘Colombian mild’, ‘other mild’, and the other three types of unroasted coffee – ‘unwashed Arabica’, ‘Robusta’, and ‘other’–: their physical characteristics, their end-use, and their tariff regimes.

space (Oxford Dictionaries, n.d.). On the contrary, WTO case law has discussed thoroughly the meaning of the term “unconditionally”, since it can give rise to different questions, *v.gr.* Does the MFN principle promote the existence of “free rider” states?

In brief, the panels have admitted that conditions that are not related to the product itself are at times discriminatory and, thus, are incompatible with the MFN clause, meaning that the MFN’s definition of “unconditionally” is not absolute: conditions that are related to the product are accepted (Indonesia – Autos, 1998); on the contrary, conditions that discriminate in consideration of the products’ origin are not accepted (Canada – Autos, 2000). Still, this is not a fully pacific issue in WTO law, since the Panel in *EC – Tariff Preferences* determined that there was no reason not to give the term its ordinary meaning, *i.e.* “not limited by or subject to *any* conditions” (EC – Tariff Preferences, 2003, para. 7.59). That to say that, against the panels’ findings in *Indonesia – Autos* and *Canada – Autos*, the Panel in *EC – Tariff Preferences* considered that any condition is a condition and, thereby, no conditional treatment is admitted under GATT Article I: 1.

That said, in *Canada – Autos* the Appellate Body made another realization of utmost importance. It acknowledged that discrimination contravening the MFN principle not only refers to *de jure* discrimination or discrimination that appears clearly, “*on the face*” of the measure, but also to *de facto* discrimination or discrimination that does not emerge from the wording of the measure, *i.e.* “on its face” the measure appears to be “origin-neutral”, but in reality it discriminates against certain Members (Canada – Autos, 2000, para. 78).

2. ARTICLE II OF THE GATS

The MFN principle is also included in the General Agreement on Trade in Services (GATS), which means that the multilateral trading system not only protects against discrimination affecting goods, but services and service suppliers as well.

Article II: 1 of the GATS establishes that:

1. *With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member **treatment no less favourable than that it accords to like services and service suppliers of any other country** [emphasis added].*

By simply reading the text, it appears that the MFN treatment, though not identical, is similar in both, trade of goods and services. Still, some reflections must be carried out in this respect.

First, the slight differences plausible in the wording of both provisions –GATT Article I: 1 and GATS Article II: 1– do not provide for dissimilar interpretations of these articles; instead, MFN under the GATS should be interpreted in line with the GATT disposition (McRae, 2012, p. 16)⁸.

Second, irrespective to differences in the goods’ origin in respect of which the service activity is being performed –*e.g.* bananas of EC origin, on the one hand, or with respect to bananas of third-country origin–, if the individual service activities are virtually the same, they can be considered as “like services” provided by “like service suppliers” (EC – Bananas III, 1997, para. 7.322, Reports of the Panel).

Third, as established by the AB in *EC – Bananas III*, like GATT Article I: 1, GATS Article II: 1 applies to *de jure* and *de facto* discrimination:

⁸ The author quotes *EC – Bananas III*, Appellate Body Report, para. 230.

“The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would not be difficult —and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods— to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

For these reasons, we conclude that ‘treatment no less favourable’ in Article II: 1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination” (EC – Bananas III, 1997, paras. 233-234).

Lastly, the second paragraph of Article II⁹ contains exceptions to the application of the MFN, which include those listed on Annex II of the GATS, *v.gr.* exceptions in financial¹⁰, maritime transport services¹¹, and basic telecommunications¹².

3. MULTILATERALISM V. BILATERALISM

From the ruins and misfortunes of the Second World War came the illusion of creating an International Trade Organization (ITO) that would “reduce tariffs, eliminate quotas and preferences, discipline the use of other trade instruments, and deal with such diverse subjects as

⁹ The second paragraph of GATS Article II reads as follows:

A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex of Article II Exemptions.

¹⁰ For more information on this specific exception, one can consult the Fifth Protocol to the GATS, adopted the 14th of November 1997, by the Committee on Trade in Financial Services: https://www.wto.org/english/tratop_e/serv_e/5prote_e.htm

¹¹ See the Decision on Maritime Transport Services, which was adopted by the Council for Trade in Services at the meeting, held on June 28, 1996: https://www.wto.org/english/tratop_e/serv_e/18-mar_e.htm

¹² See the Fourth Protocol to the GATS, which was adopted by the Council for Trade in Services at the meeting, held on April 30, 1996: https://www.wto.org/english/tratop_e/serv_e/4prote_e.htm#

labour rights, boycotts, exchange controls, subsidies, restrictive business practices and commodity agreements” (VanGrasstek, 2013, p. 43). However, the idea remained as merely wishful thinking, after the U.S. Congress did not approve the Havana Charter, designed to rule the Organization. Still, the GATT of 1947 took the place of the ITO and was later transformed during the course of the Uruguay Round negotiations (1986-1994) into the WTO we know today (VanGrasstek, 2013).

The Preamble to the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994 by 124 nations, noted that the parties *resolved, therefore, to develop an integrated, more viable and durable **multilateral** trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations* [emphasis added].

A little more than two decades after the creation of the WTO, the multilateral trading system backed by the WTO encompasses 164 nations (“Members and Observers”, n.d.). Nonetheless, over the years, bilateralism has become stronger than ever: as of June 2016, all WTO Members now have a Regional Trade Agreement (RTA) in force (“Regional trade agreements and the WTO”, n.d.). From the facts provided by the WTO’s RTA database¹³ up to the works of authors worldwide¹⁴, one can witness how the ever-increasing regional agreements have taken the world

¹³ In order to view a list of all RTAs currently in force, one can consult: <http://rtais.wto.org/UI/PublicAllRTAList.aspx>

¹⁴ International trade relations between two or more states, e.g. RTAs have been analyzed under the multilateral trading system promoted by the WTO, among others, in: Lee, Y.S. (2006). Bilateralism under the World Trade Organization. *Northwestern Journal of International Law & Business*, 26(2), 357 – 372; Maswood, S.J. (2006). Bilateralism in a Multilateral World. In *The south in international economic regimes: Whose globalization?* (pp. 145-160). New York, NY: Palgrave Macmillan; Gerber, J. (2007). *Preferential Trade Agreements and the Most Favoured Nation Principle*, presentation at the Conference on “Multilateralising Regionalism” in Geneva; Saggi, K. & Yildiz, H. M. (n.d.). *Bilateralism, multilateralism, and the quest for global free trade*

of international trade relations by storm. On the winter of 2006, Y.S. LEE¹⁵ claimed that, “the bilateralism represented by these RTAs is as much a factor as the multilateralism of the WTO in shaping international trade today” (Lee, 2006, p. 357). Nevertheless, we believe that today, eleven years later, the coexistence between both these forms of trade liberalization is getting harder by the time, with 274 RTAs in force as of 5 May 2017 (“Regional trade agreements”, n.d.). As foreseen by the Report on the Future of the WTO, the Most-Favored Nation clause is in danger of becoming the Least Favored Nation clause (Maswood, 2006, p. 145):

“Yet nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the ‘spaghetti bowl’ of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment” (Sutherland et al., 2004, p.19).

As a matter of fact, as a result of the crisis of the Latin American integration schemes, e.g. the Andean Community of Nations (Spanish: “Comunidad Andina de Naciones”, CAN) and the poor

(pp. 1-47); Kluwer Law International. (2008). Buckley, R., Lo, V., Boule, L. (Eds). *Challenges to Multilateral Trade: The impact of Bilateral, Preferential and Regional Agreements*. The Netherlands: Kluwer Law International; Sutherland et al. (2004). *The Future of the WTO: Addressing institutional challenges in the new millennium*. Retrieved from: http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf; Ibarra, G. (n.d.). *El auge del bilateralismo en las relaciones comerciales internacionales*. Biblioteca jurídica virtual del Instituto de Investigaciones Jurídicas de la UNAM. Retrieved from: <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2552/25.pdf>

¹⁵ As established on the 2006 article under reference, Dr. Y.S. Lee graduated from the University of California at Berkeley (A.B., economics) and the University of Cambridge (B.A., Ph.D., law).#

results of the Doha Round¹⁶, developing countries have turned to the negotiation of FTAs, especially with the U.S.¹⁷ (Ibarra, n.d., p. 534).

Thus, this scenario has led to the erosion of the Non-Discrimination Principle promoted by the multilateral approach to international economic cooperation (Sutherland et al., 2004). For example, countries that are not able to effectively negotiate a FTA are marginalized and, consequently, show a competitive disadvantage to the extent that new agreements are concluded (Ibarra, n.d., p. 516).

The prior, without ignoring that the WTO's rules-based system allows for the establishment of customs unions and free-trade areas as an exception to the application of the MFN requirement (Lee, 2006, p. 358), as will be discussed in the next chapter.

¹⁶ The Doha Round, aimed to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules, is the latest round of trade negotiations among WTO Members ("The Doha Round", n.d.). For more information on the Doha Round, visit: https://www.wto.org/english/tratop_e/dda_e/dda_e.htm

¹⁷ The U.S. has celebrated FTAs with the following Latin American countries: Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, and Peru. This information was taken from: <http://www.trade.gov/fta/#>

CHAPTER II: Regional Trade Agreements under WTO Law: Exceptions to the Application of the MFN Principle

Notwithstanding the importance of Non-Discrimination among WTO Members, the GATT recognizes some exceptions that disregard compliance with the MFN principle under restricted circumstances: i) the establishment of a customs union¹⁸ (CU), ii) of a free-trade area¹⁹ (FTA), and iii) the granting of unilateral preferences by developed economies to developing countries²⁰. This chapter further analyzes each of these exceptions and the requirements to use them as a valid defense and justification of treatment that is incompatible with the MFN principle. The former bears the ultimate objective of studying regional trade agreements under WTO law, in order to really grasp the idea that FTAs and CUs are definitely admitted by the multilateral trading system.

1. CUs AND FTAs UNDER ARTICLE XXIV OF THE GATT

Article XXIV of the GATT allows for the conclusion of regional integration arrangements, *i.e.* customs unions or free-trade areas:

5. (...) The provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

Still, in order to establish a customs union or a free-trade area that is consistent with the GATT/WTO system, certain conditions must be met.

¹⁸ Article XXIV of the GATT.

¹⁹ Article XXIV of the GATT and V of the GATS.

²⁰ Decision of 28 November 1979 on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, otherwise known as the “Enabling Clause”.#

Upon formation of a customs union under paragraph 8(a) (i) of GATT Article XXIV, a single customs area supersedes two or more customs territories, so that preferential treatment is granted to trade between constituent parties or products originating in them, *v.gr.* the European Union (EU), the Andean Community, the Southern Common Market (MERCOSUR), and the Caribbean Community (CARICOM). In addition, by imposing a common external tariff (CET) regarding imports from the rest of the world, its members substantially apply the same restrictions to trade with territories not part of the union (GATT, 1994)²¹. Moreover, the CET distinguishes the CU from a free-trade area (OECD, 2013).

Thus, a free-trade area amounts for a group of two or more of these customs territories provided with the same comparative advantages as in the case of a single customs union (GATT, 1994)²², except for the CET. For example, the North American Free Trade Agreement (NAFTA), the Central America Free Trade Agreement (CAFTA), and the United States – Colombia Trade Promotion Agreement (CTPA), among others, enable the maintenance by member states of their own distinct external tariff in relation to imports from third countries (OECD, 2013).

Nevertheless, both these forms of regional integration require that, at the time of their constitution, duties and other regulations of commerce, regarding trade with Members not subject to the agreement, are not higher than those applicable prior to the formation of the union or free-trade area (GATT, 1994)²³.

²¹ Paragraph 8(a) (ii) of GATT Article XXIV.

²² Paragraph 8(b) of GATT Article XXIV.#

²³ Paragraph 5(a) and (b) of GATT Article XXIV.

In this sense, *they [the Members] (...) recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories* (GATT, 1994)²⁴.

The AB in *Turkey – Textiles*, noted that the Preamble to the “*Understanding on Article XXIV*” reaffirms this purpose and claims that *in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members* (Turkey – Textiles, 1999, para. 57). According to the AB, this means that, in respects with the establishment of a CU –in this case, the Turkey/European Communities customs union, the aforementioned objective “demands that a balance be struck by the constituent members (...)” (Turkey – Textiles, 1999, para. 57). By doing so, two conditions must be met in order to invoke Article XXIV as a valid exception to MFN treatment: (i) “the party claiming the benefit of this defense must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV”, and (ii) that same party should demonstrate that if it were not allowed to introduce such a measure, the constitution of the CU would be prevented (Turkey – Textiles, 1999, para. 58).

Similarly, but in regards to an agreement concerning a free-trade area, the Panel in *Canada – Autos* set the basis for a proper defense construed upon Article XXIV, that would allow for non-compliance with other GATT provisions, specially GATT Article I: 1. The Panel reasoned that an import duty exemption in the automotive sector, granted by Canada allegedly in the context of the NAFTA, could not be characterized as a RTA measure, therefore exempted from MFN observance, since: first, it was not imposed to all like products of NAFTA parties and, second, it

²⁴ Paragraph 4 of GATT Article XXIV.#

did not apply exclusively to the FTA's partners, but also to products originating from third countries not subject to the agreement (Canada – Autos, 2000, paras. 10.55–10.56). Thereby, it is reasonable to conclude that a proper implementation of the exception introduced by GATT Article XXIV requires for the adoption of preferential measures that are applied to the products originating from *all* FTA members, without granting those same concessions to non-parties.

2. REGIONAL TRADE AGREEMENTS UNDER THE ENABLING CLAUSE

In an effort to *ensure that developing countries, and specially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development* (Marrakesh Agreement, 1994)²⁵, the Marrakesh Agreement not only established the WTO, but set the foundation for the preferences awarded to developing nations with the advent of this Organization and the promotion of its multilateral trading system.

However, preferential non-reciprocal treatment conceded to the most vulnerable economies was recognized long before the creation of an organization governing trade worldwide. On 28 November 1979, the GATT Council adopted the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, otherwise known as the “Enabling Clause” (EC), concerning:

(a) Preferential tariff treatment granted to developing countries in accordance with the Generalized System of Preferences,

(b) Preferential non-tariff treatment set forth by instruments negotiated under the auspices of the GATT,

²⁵ Preamble to the Marrakesh Agreement Establishing the World Trade Organization.

(c) RTAs negotiated between less-developed countries for the mutual reduction or elimination of tariffs or non-tariff measures, and

(d) Greater special treatment given to the least developed among all developing economies (Enabling Clause, 1979).

Accordingly, from the actual text of the Enabling Clause²⁶, *regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs*²⁷ are excluded from the application of GATT Article I: 1, *i.e.* the MFN principle. The same applies in respect to other Preferential Trade Arrangements (PTAs), that correspond to non-reciprocal preferential schemes of WTO Members and include the Generalized System of Preferences, under which developed nations grant preferential tariffs to imports from developing territories (“Regional trade agreements and preferential trade arrangements”, n.d.).

To this end, all arrangements concluded pursuant to the provisions of the Enabling Clause must comply with three precise requirements:

(a) They shall facilitate and promote trade of developing countries without raising barriers or creating undue difficulties in regards to other parties’ commercial relations.

²⁶ The first paragraph of the Enabling Clause describes the existing relationship between the MFN clause and differential and more favorable treatment granted to developing countries:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.

As stated by the Appellate Body in *EC – Tariff Preferences*, “by using the word ‘notwithstanding’, paragraph 1 of the Enabling Clause permits Members to provide ‘differential and more favorable treatment’ to developing countries ‘in spite of’ the MFN obligation of Article I: 1. Such treatment would otherwise be inconsistent with Article I: 1 because that treatment is not extended to all Members of the WTO ‘immediately and unconditionally’ (EC – Tariff preferences, 2004, para. 90). In this sense, the Enabling Clause is a more specific rule that, consequently, prevails over GATT Article I: 1, since only one provision –article I: 1 or the Enabling Clause– can apply at a time (EC – Tariff preferences, 2004, paras. 101-102).

²⁷ Subparagraph 2(c) of the Enabling Clause.#

(b) They shall not restrict the scope of the MFN principle to the point that all other reductions or eliminations of tariffs and further restrictions to trade are impeded.

(c) They shall be designed and modified if necessary so as to respond positively to the development, financial, and trade needs of developing countries (Enabling Clause, 1979). To this extent, preference-giving countries are legitimized to treat developing countries differently in accordance with their respective needs (EC – Tariff Preferences, 2004, paras. 161-162).

Likewise, consistency of the differential and more favorable treatments with the WTO rules-based system should be determined upon consideration of: first, GATT article I: 1 and, second, the Enabling Clause general guidelines (EC – Tariff preferences, 2004, para. 101). Therefore, any measure resulting in an infringement of the MFN should then be scrutinized under the standards of the Enabling Clause (Ibid.). For example, if a measure incompatible with the MFN meets the criteria designated by the Decision of 28 November 1979, a challenge to this measure could not, in any way, succeed (Ibid.)²⁸.

Finally, it is important to emphasize that the Enabling Clause does not require for reciprocity. As stressed on paragraph 5:

The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are

²⁸ In the words of the AB in *EC – Tariff preferences*:

“(…) A dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I: 1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I: 1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I: 1 can be made”.

inconsistent with their individual development, financial and trade needs (Enabling Clause, 1979).

3. REGIONAL TRADE AGREEMENTS UNDER ARTICLE V OF THE GATS

In the matter of trade in services, Article V of the GATS also renders MFN treatment –as illustrated on Article II of the GATS– more flexible in terms of authorizing agreements that liberalize trade in services between or among the parties. Still, as in the case of RTAs under Article XXIV and FTAs under the EC, RTAs negotiated under Article V must follow two specific directives:

First, the agreement should have substantial sectoral coverage when it comes to number of sectors, volume of trade affected, and modes of supply, to such a degree that it does not provide for the *a priori* exclusion of any mode of supply²⁹.

Second, at the entry into force of the agreement or on the basis of a reasonable time frame, all forms of discrimination –in terms of Article XVII regarding NT– must be eliminated among the parties and with reference in particular to the sectors comprised under the RTA and/or new discriminatory measures must be strictly prohibited in favor of greater economic integration among the corresponding trade partners³⁰.

That said, the exception put forth by Article V of the GATS, refers to the same consideration brought forward by Article XXIV and the EC. In specific, paragraph 4 describes the aim of these agreements to facilitate trade between the parties without raising barriers to trade in services, in

²⁹ Paragraph 1(a) of GATS Article V, including the footnote contained in its original text.

³⁰ Paragraph 1(b) (i) and (ii) of GATS Article V.

As a matter of fact, as the second paragraph of GATS Article V states:

In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.#

comparison to those applicable prior to the agreement. It is in light of this purpose that, as mentioned before, Article V prescribes a minimum level of liberalization that such agreements must attain in order to qualify for the exemption from the MFN obligation of Article II (Canada – Autos, 1999, para. 10.271). With the establishment of these minimum directives, ambitious liberalization takes place at a regional level, while at the same time preventing that the MFN obligation is undermined by minor preferential arrangements (Ibid.).

The Panel in *Canada – Autos* practically followed the same line of argument it presented with regards to trade in goods –as exposed on Section 1 of the present chapter– when analyzing the issue of preferential treatment within trade in services. In its words:

“The [measures at issue], (...) provide more favorable treatment to only some and not all services and service suppliers of Members of NAFTA, while, according to Article V: 1(b) an economic integration agreement has to provide for ‘the absence or elimination of substantially all discrimination, in the sense of Article XVII’, in order to be eligible for the exemption from Article II of the GATS” (Canada – Autos, 2000, 10.269).

Taking this into account, the AB rejected any possible dissimilar treatment between parties in all economic integration agreements under Article V of the GATS.

Thus, there are not many differences surrounding the application of agreements signed under Article V of the GATS and those concluded with respect to the provisions on Article XXIV of the GATT or the EC.

In light of all the foregoing, it is submitted that, even though these exceptions constitute an undeniable reality of ever-increasing relevance in the dynamics of modern trade relations, “(...) whenever the Appellate Body has had to interpret the scope of exceptions to the MFN provision

(...), it has done so by interpreting those exceptions restrictively. It has asserted the primacy of MFN over the exceptions and thus given the impression at least that MFN under the WTO agreements has a broad scope” (McRae, 2012, p. 13).

In conclusion, each of these provisions, Article XXIV of the GATT, the Enabling Clause, and Article V of the GATS provide effective exceptions to the MFN principle, but cannot diminish the hierarchy the latter holds in the context of the WTO. In this sense, as it was previously stated, these provisions include various requirements for Members to be able to use them as a justification of a breach to GATT Article I: 1 or GATS Article II. The prior, not only means that under specific circumstances regional integration arrangements are admitted by the WTO’s rules-based system, but also that they can be harmonized with it, *e.g.* through tools as important as their notification. For this reason, the following chapter will explore the notification procedure by evaluating all references to notification under WTO regulation.

CHAPTER III: Notification of Regional Trade Agreements

It is important to study the existing regulation on notification of RTAs in order to then be able to analyze its legal loopholes (Chapter IV), propose the WTO a reform in the matter (Chapter V) and, thus, achieve this thesis' main goal. Accordingly, this chapter will begin by exploring the purpose and benefits of the notification requirement in WTO law, to later analyze the provisions that refer to this specific topic in the covered agreements, as well as in General Council and Ministerial Conference decisions. Finally, the present chapter includes an overview of the application of the notification procedure norms through the CRTA and the CTD with the aim of providing an insight to the role both committees play in terms of bringing into life the notification's regulation.

1. PURPOSE AND BENEFITS OF THE NOTIFICATION OF REGIONAL TRADE AGREEMENTS

The main purpose of the notification procedure is to achieve transparency between the Members and specially to make the essential information on new customs unions or free-trade areas available to them. In this way, as the purpose of the notification requirement is to enhance transparency of the agreement under consideration, it is important to keep in mind that the notification procedure does not prejudice the substance of the relevant provisions of the EC or any other instruments, nor affects Members' rights and obligations under the WTO Agreement in any way (Transparency Mechanism for PTAs, 2010).

In addition, this requirement has evolved since Article XXIV was created under the GATT back in 1947. On its first 40 years of existence, Members did not completely engage with its importance, though there had been various FTAs and CUs notified to the multilateral system. As Gantz properly notes, "the notification procedures were formally tightened in 1994" (Gantz, 2009). The prior, taking into consideration that it was on that year that the Understanding on

Article XXIV of the GATT acknowledged that there was a “need to reinforce the effectiveness of the role of the Council of Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new enlarged agreements, and improving the transparency of all Article XXIV agreements (...)” (Understanding of Article XXIV of the GATT, 1994).

Since then, notification has become increasingly important for Members to know the real status of the international trading system, as the amount of RTAs has risen dramatically after the creation of the WTO. In the period from 1948 to 1994, the GATT received 124 notifications of RTAs. In addition, the 274 RTAs in force as of May 2017 correspond to 440 notifications from WTO Members, counting goods, services and accessions separately (“Regional Trade Agreements: Facts and Figures”, n.d.). This thesis’ Annex I includes a chart created by the WTO Secretariat that illustrates the evolution of RTAs since 1948. A quick analysis of the data shows that FTAs and CUs have been progressively important for world trade law.

The current state of the multilateral trading system, marked by the severe expansion of FTAs and CUs, not only represents a real threat to multilateralism, but also makes the notification procedure essential for members to possess the information they need to correctly assess and analyze their economic situation. Moreover, as indicated in the previous section, “the situation has even been dramatized to speak of a break-up of the most-favored-nation clause. It is true that parallel rules to the general agreement are appearing, with increasingly frequent attributions of exceptions, to the point where it has been argued that Article I has become the exception and that the exception has become the rule” (Krieger-Krynicky, 2005).

Therefore, it can be understood that the only way to ensure a transparent commerce among nations is to encourage the fulfillment of the notification procedure, so as to promote compliance with regional rules governing the multilateral trading system.

2. EXISTING LEGISLATION

2.1. Article XXIV of the GATT

The notification requirement is only present in WTO legislation in specific articles: Article XXIV of the GATT, the Enabling Clause –regarding goods–, and Article V of the GATS –with reference to services–. Each of these provisions approaches this procedural requisite in a similar manner, but with distinct wording.

For instance, paragraph 7 of GATT Article XXIV states that any contracting party deciding to enter into a FTA or CU *shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.*

Likewise, part b) of the article refers to the possibility that the members have studied an interim agreement leading to the formation of a FTA or a CU. In that case, if the contracting Members make recommendations, the parties of the interim agreement shall not maintain or put it into force, if they are not prepared to modify it in accordance with these recommendations. Additionally, paragraph 7 of Article XXIV of the GATT stipulates that if there is a substantial change in the plan and schedule of an interim agreement, the mentioned change must be informed to WTO Members.

It is appropriate to make a series of assessments with regard to the provisions of Article XXIV of the GATT:

Firstly, the above-mentioned regulation is ambiguous and does not provide a comprehensive definition of the notification procedure of RTAs. It does not specify the effects of failing to comply with the notification requirement. Instead, it only refers to the consequence that could result from a notified interim agreement not following the Members' recommendations. Consequently, the drafting of paragraph 7 of GATT Article XXIV causes uncertainty and difficulty in its application. If there are no implications resulting from its infringement, can one consider notification as an actual requirement?

Secondly, the article's first sentence addresses notification and making the information available to the Members as two different matters. As it states that any contracting party shall promptly notify and shall make available to WTO Members the information associated to the proposed union or area, it appears that this provision actually involves two different obligations: one concerning the notification and a different one regarding the information.

Taking into account the Transparency Mechanism of RTAs, which will be further analyzed in greater detail, the notification's most important aspect relates to the information that is provided to the Members, since, in so doing, its purpose of instructing them on the characteristics and the general provisions of a newly signed agreement is achieved. Therefore, if information and notification consist on two different obligations, as the wording of the article suggests, notification would turn into a simple notice of negotiations that will not include any information in regards to the CU or FTA.

Thus, the purpose of the notification would be different from the one described previously and from the one enshrined in the transparency mechanisms of the WTO, which will be addressed further on in the text.

Lastly, Article XXIV of the GATT is not clear on the procedure that should be followed in order to properly notify an agreement, since it does not include a time frame in which Members must comply with this requirement.

The sole reference to the time in which the notification should be executed is given by the word “promptly”. Although some authors consider that “Article XXIV 7 (a) of the GATT contemplates the notification of a PTA should occur prior to the completion of the agreement by requiring any contracting party deciding to enter to a PTA or interim agreement “promptly notify” the CONTRACTING PARTIES” (Davies, Lester, and Mercurio, 2012), it is not possible to reach this conclusion by only interpreting the literal text of Article XXIV of the GATT. If one interprets this provision “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”, as the general rule of interpretation of the Vienna Convention on the Law of Treaties (VCLT) suggests in its article 31, the word “promptly” cannot be interpreted to mean that one must notify before the completion of the agreement.

The GATT and Marrakesh Agreement Preambles, the purpose of FTAs and CUs as established in paragraph 4 of GATT Article XXIV³¹, nor any of the other paragraphs of Article XXIV refer to the time requirement in this article and do not include the necessary content to conclude that the notification should be done before the agreement enters into force.

³¹ Paragraph 4 of GATT article XXIV states that;

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

As Hestermeyer, Stoll, and Wolfrum briefly sum it up, “the provision does not make it clear at what time notification needs to be made. Some have interpreted the terms ‘deciding to enter’ and ‘shall promptly notify’ to mean that notification must take place before the entry into force of the agreement. Others have pointed out the need for a flexible interpretation, as notifications before ratification by national parliaments may pose political difficulties. A result of insecurity with regard to the timing requirement is that, in practice, notification often occurs, if at all, only rather late in the process. In fact, notification generally takes place only after the entry into force of the respective RTAs” (Hestermeyer, Stoll, and Wolfrum, 2011, pp. 643-644).

Nevertheless, the Transparency Mechanism for RTAs does refer to this time frame, as will be discussed later on.

Furthermore, the Understanding on the Interpretation of Article XXIV of the GATT only develops paragraph 7 of Article XXIV to state that all notifications shall be analyzed by a working party. This working party shall submit a report to the Council for Trade in Goods on its findings on the examination of the FTA or CU in light of the WTO relevant provisions. Finally, the Council may make such recommendations to Members, as it deems appropriate. This understanding clears out the question on who would be the competent body to take these notifications into account. However, in this point, it is convenient to clarify that today in the actual WTO legislation the Committee on Regional Trade Agreements (CRTA) takes into consideration notifications under Article XXIV, while the Committee on Trade and Development (CTD) examines those regarding the Enabling Clause, as it will be established hereinafter.

2.2. The Enabling Clause

The next provision that refers to the notification of FTAs is the Decision of 28 November 1979, *i.e.* the Enabling Clause. Notwithstanding the provisions of Article I of the General Agreement,

contracting parties may accord differential and more favorable treatment to developing countries if they meet the specific requirements of this decision. Paragraph 2 (c) refers to the relevant provision concerning RTAs, since, as mentioned before, it states that a breach of Article I: 1 is justified by “regional or global arrangements entered into amongst less developed contracting parties”. Thus, the EC covers FTAs between developing Members.

Regarding notification, paragraph 4 of the EC states that any party taking action to introduce preferential arrangements under the EC, shall furnish the Members with all the information they may deem appropriate, and shall afford the opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. In regards to this consultation procedure, contracting parties shall, if requested to do so by any one of them, consult with all Members concerned with the matter, with a view to reaching solutions, which are satisfactory to all of them.

This wording relates to the previously mentioned notification disposition. It is similar to Article XXIV of the GATT, since it suggests that notification and the available information correspond to two different obligations.

However, it differs from Article XXIV, since it includes a consequence for not complying with the notification procedure, instead of solely an outcome for not following Members’ recommendations in interim regimes. Also, it is different from Article XXIV of the GATT, since paragraph 4 of the EC proposes a consented solution to the problems that may arise between the Members in relation to a FTA’s specific notification. The WTO Members can manifest any problems they find in the FTA during the consultations and the parties to the FTA and the Members concerned will try to find a satisfactory solution together. This view of solving

problems through dialogue between the Members is unusual regarding notification legislation in WTO.

2.3. Article V of the GATS

Ultimately, the text of Article V of the GATS is the last of the notification procedures established under WTO legislation. The wording of this article is nearly the same as the one presented in Article XXIV of the GATT. Still, some differences can be mentioned, since it regards services and notification under the GATS shall be made to the Council for Trade in Services. It is also true, that “examination is optional under GATS where it is mandatory under the GATT” (Davies, Lester, and Mercurio, 2012), because the Council on Services may decide to form a working party or to submit the treaty to the CRTA for examination. The only working party that has examined a PTA consistency with the GATS so far is the one that was created for the NAFTA.

Now, as a final remark on this provision, it is important to mention that the first section of paragraph 7 of Article V of the GATS refers to the possibility of implementing an agreement on a reasonable time frame. This is, in fact, very similar to the idea of interim regimes under Article XXIV of the GATT and, when this is the case, the notifying Member shall report periodically to the Council for Trade in Services on its implementation.

3. THE TRANSPARENCY MECHANISMS

3.1. Transparency mechanism for RTAs

The Transparency Mechanism (TM) for RTAs was created by a General Council decision and was discussed in the WTO’s Negotiating Group on Rules. This group was created due to the fact that the Doha Declaration mandated negotiations aimed at “clarifying and improving disciplines

and procedures under the existing WTO provisions applying to regional trade agreements” and that the negotiations were to take into account the developmental aspects of regional trade agreements (Doha Ministerial Decision, paragraph 29). In this sense, at the 10th Ministerial Conference in Nairobi, ministers instructed WTO Members to continue their work on RTAs.

This mechanism was implemented on 14 December 2006 in a provisional basis and with the intention of regulating the notification procedure. On the day of the approval of the Decision, the Director General of that time, Pascal Lamy, spoke as follows: “This decision will help to break the current logjam in the WTO on RTAs. This is an important step towards ensuring that regional trade agreements become building blocs and not stumbling blocks to world trade” (Lamy, 2006).

Taking a deep look at the Transparency Mechanism today, it may be suggested, without fear of error, that the Decision did help to increase transparency of RTAs, but that it cannot be seen as a definitive solution to the problem, as will be exposed in future chapters.

The mechanism does not provide an express definition of the agreements that should follow its procedure. Nevertheless, as part of its considerations, it notes that trade agreements of a mutually preferential nature ("regional trade agreements" or "RTAs") have greatly increased, and it also alludes to the transparency provisions on Article XXIV of the GATT 1994, the Understanding on the Interpretation of Article XXIV, Article V of the GATS, and the EC. Therefore, it can be concluded that it applies to agreements contained under this list of provisions and in general to all RTAs.

The first substantive article of the mechanism creates the possibility for an early announcement of the future FTA or CU. Before the actual notification of the agreement, Members participating in new negotiations shall inform their intentions to the WTO. Also, Members, who are parties to

a newly signed RTA, shall present all the relevant information on the RTA to the Organization. This information will be posted in the WTO website and will periodically provide Members with a synopsis of the communications received.

Similarly, paragraph 3 of the Transparency Mechanism provides that the notification of an RTA shall take place as early as possible, this meaning before the application of the preferential treatment by the notifying Member. This is the first time that a notification regulation refers to a mandatory time period in which the requirement must be fulfilled. Hence, this article is essential for the true enforcement of the mechanism, since without a time frame to notify, there is no way to oblige Members to comply with the requirement.

Continuing with the mechanism's provisions, the Transparency Mechanism creates a one-year consideration period for RTAs. During the first 10 weeks (or 20 if the Members concerned are developing countries) certain information about the FTA or CU must be made available for the WTO Secretariat. The Annex of the mechanism specifies the data that should be submitted for this purpose. It includes a full listing of preferential duties under the PTA per beneficiary partner, MFN duty rates applied on the year of the PTA's implementation and on the year preceding it, product specific preferential rules of origin as defined by the PTA, and import data of the most recent three years preceding the notification from each of the beneficiary partners, in value for total imports, imports entered under MFN and imports entered under PTA benefits, among others.

After the Members submit the information, the WTO Secretariat uses the information received to create a factual presentation. The Secretariat can include data available from other sources to complete this document, but only in full consultation with the notifying Member and taking into account its views in furtherance of factual accuracy. This document shall be circulated in all

WTO official languages not less than 13 weeks in advance of the meeting devoted to the consideration of the PTA. Members may make comments and questions to the notifying Members and the questions and answers also circulate through all WTO Members. The procedure ends with a single meeting destined to consider each PTA that has been notified.

Regarding subsequent notification and reporting, the TM indicates that in the case of changes affecting the implementation of an RTA or the operation of an already implemented RTA, notification shall take place as early as possible. Changes that must be notified include modifications to the preferential treatment between the parties and to the RTA's disciplines, among others.

Likewise, the TM provides that the CRTA and the CTD are instructed to work on its implementation: the CRTA for RTAs falling under Article XXIV of the GATT and Article V of the GATS and the CTD for RTAs falling under paragraph 2(c) of the EC.

Last, issues about technical support for the application of the mechanism for developing countries and its provisional application close the whole provision. The foregoing, taking into account that this agreement, just as the Transparency Mechanism for PTAs of 2010, which will be analyzed next, consists on a provisional measure. The drafters created both of them with the aim of implementing a posterior permanent mechanism, after having witnessed the experience of the Members applying the 2006 and the 2010 TMs' provisions.

As a matter of fact, at the 10th Ministerial Conference in Nairobi, Kenya in December 2015, WTO Members reaffirmed the need to transform the provisional Transparency Mechanism into a permanent mechanism. In the conference Members established that:

“28. We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. In

this regard, we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism in accordance with the General Council Decision of 14 December 2006, without prejudice to questions related to notification requirements” (Nairobi Ministerial Decision, 2015).

3.2. Transparency mechanism for PTAs

The General Council Decision of 14 December 2010 created a Transparency Mechanism for PTAs. This mechanism addresses, as enshrined by its first paragraph, PTAs falling under paragraph 2 of the EC except for those included under paragraph 2(c), *i.e.* PTAs taking the form of preferential treatment accorded by any Member to products of least developed countries (LDCs) and any other non-reciprocal preferential treatment authorized under the WTO Agreement.

In addition, this mechanism does not include an early announcement provision and the subsequent notification and reporting are treated differently.

Thus, any changes affecting the implementation of a PTA during a calendar year shall be notified in an annual basis, no later than the 30th June of the next immediate calendar year. In this manner, the elements that must be notified electronically include: legal changes as well as schedules, annexes and protocols, changes in the implementation of the PTA, and changes in preferential tariffs per beneficiary partner applied under the PTA.

On the other side, although the procedures to enhance transparency and the period of consideration of the agreement are very similar to the TM of 2006, this mechanism includes certain special provisions.

For instance, it establishes that in order to assist Members in their consideration of the PTA, “the WTO Secretariat shall prepare a guide indicating where specific types of information can be found, following, as appropriate, the template contained in Annex 2. The guide shall be made available as soon as possible after the notification. Members shall be free to present the guide themselves when notifying PTAs” (Transparency Mechanism for PTAs, 2010)³². This provision shows that as one of the effects of the first Transparency Mechanism of 2006 was that Members could not easily access the information they required from the factual presentation, it was necessary to include a guide prepared by the Secretariat explaining where to find this information.

The 2010 Mechanism also provides the possibility for the Secretariat to include in the factual presentation the elements it deems appropriate. Some of these include the background information, scope and coverage (products and countries), exceptions, and special and differential treatment (S&DT) provisions. This alternative was not explicitly accepted in the Transparency Mechanism of 2006, but through an interpretation of its wording, it can be concluded that it was also covered by that TM. As it states that “the WTO Secretariat may also use data available from other sources”, it could be submitted that, in respect of the Transparency Mechanism for RTAs, the Secretariat can also provide the information it deems appropriate from the sources it considers as relevant during the course of the factual presentation.

³² Paragraph 7 of the Transparency Mechanism for PTAs.

Besides that, the Transparency Mechanism for PTAs also refers to the Integrated Data base. In this sense, the notifying Member shall not be expected to make available the annual information required in the TM, if it has already been submitted to the Integrated Data Base or has otherwise been provided to the Secretariat in an appropriate electronic format. This inclusion evidences technological advances in terms of notification. Also, by creating this possibility, Members are encouraged to use electronic databases and, therefore, RTAs may be subject to more effective, immediate, and assertive statistics.

Lastly, paragraph 21 of the PTA TM includes another new responsibility for the WTO Secretariat, which consists on the preparation of a factual abstract, in full consultation with the notifying Member. The template for the factual abstract is included in Annex 3 of the Mechanism.

All the previously mentioned specialized provisions in the 2010 TM are a product of the experience gained in the application of the 2006 Mechanism. Since the Members were not easily finding the information they required, the creation of a guide and a factual abstract was necessary. Also, these specialized provisions prove the need of Members to access technology and electronic databases in order to properly consider and analyze FTAs and CUs. Hence, this can be considered to be the real reason for the inclusion of the Integrated Data base.

3.3. Legal nature of the transparency mechanisms

The Transparency Mechanisms consist on General Council decisions and, therefore, their legal nature is not as clear as a provision in the covered agreements or a decision contained in an Appellate Body report. The TMs actually constitute subsequent agreements in terms of the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties.

This conclusion derives from applying to the mechanisms the same test used by the AB in *US – Clove cigarettes* to analyze paragraph 5.2 of the Doha Ministerial Decision.

In the referenced dispute, the AB analyzed the legal nature of paragraph 5.2 of the Doha Ministerial Decision while interpreting article 2.12 of the Agreement on Technical Barriers to Trade (TBT Agreement)³³.

First, the AB analyzed if the measure at issue was an authoritative interpretation in the terms of Article IX: 2 of the WTO Agreement. This, taking in consideration that the requirements that apply to the adoption of interpretations in the context of Multilateral Trade Agreements are (i) that a decision by the Ministerial Conference or the General Council to adopt such interpretations is taken by a three-fourths majority, and (ii) that such interpretations shall be taken in the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement.

Since the Doha Ministerial Decision did not comply with the second requirement, the AB did not consider that it introduced a real authoritative interpretation (*US – Clove Cigarettes*, 2012).

In accordance with the AB's conclusion, in the present case, the Transparency Mechanism cannot be an authoritative interpretation for the above-mentioned reason, *i.e.* it is not a recommendation of the council overseeing the treaty.

Furthermore, the AB continued its analysis by establishing that the Doha Ministerial Decision was a subsequent agreement. The above, since it considered “that a decision adopted by

³³ The TBT Agreement is a covered agreement that recognizes the important contribution of international standards and conformity assessment systems in improving efficiency of production and facilitating the conduct of international trade. Therefore, it encourages the development of such international standards and conformity assessment systems. Article 2.12 precisely provides that “members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member”. The Doha declaration interprets the wording of this article, specifically the terms “reasonable interval”.

Members, *other than* a decision adopted pursuant to Article IX: 2 of the *WTO Agreement*, may constitute a ‘subsequent agreement’ on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the *Vienna Convention*” (US – Clove Cigarettes, 2012, para. 260).

The requirements to qualify as a subsequent agreement are “(i) that the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between the Members on the interpretation or application of a provision of WTO law” (US – Clove Cigarettes, 2012, para. 262).

Because of this, the AB concluded that article 5.2 of the Doha Declaration was a subsequent agreement as it aimed to interpret article 2.12 of the TBT Agreement and was adopted after this provision entered into force.

In light of the foregoing, it can be considered that the TM for RTAs is also a subsequent agreement, since it was adopted in 2006 after the entry into force of the GATT, GATS, and the EC and, in turn, this mechanism aims to interpret the transparency provisions for RTAs which are established in paragraph 4(a) of the EC, paragraph 7(a) of GATS Article V, and paragraph 7(a) of Article XXIV of the GATT. Therefore, as the TM is on a temporary basis, posterior to the relevant covered agreements and contents to interpret a provision of WTO law, it fulfills both conditions established by the AB in order to be taken for a subsequent agreement. For all that, it should be considered as such in the interpretation of the notification requirement of RTAs.

This same reasoning must apply to the 2010 TM for PTAs. Since this mechanism was created on 14 December 2010, it is subsequent to the EC and aims at interpreting the transparency provisions of its paragraph 2, *i.e.* of PTAs authorized under the WTO Agreement. For this reason, it should also be considered as a subsequent agreement in the terms of Article 31 of the VCLT.

4. TREATMENT BY THE CRTA AND THE CTD

The previous sections of this chapter analyzed the existing norms of the notification procedure in WTO regulation. As mentioned before, this section will include an overview of the treatment that the committees in charge of the notification procedure, the CRTA and the CTD, have given to notification of RTAs in light of the previously stated provisions. The prior has the intent of further understanding the application of this regulation in practice.

4.1. General statement of the CRTA

The CRTA is basically the heritor of the GATT working parties. Today, it is responsible for examining RTAs and considering the systemic implications of such agreements within the multilateral trading system.

Its terms of reference, as established by the Decision of 6 February 1996, consist on carrying out the examination of agreements, considering how required reporting on the operation of such agreements should be carried out, and formulating the appropriate recommendations to the relevant body, in order to develop procedures that facilitate the examination process.

What is more, the Committee has additional obligations with reference to the General Council: it must develop annual reports and carry out any other functions assigned by the Council.

However, the initial terms of reference changed substantially with the implementation of the Transparency Mechanism of 2006, as the CRTA was mandated to apply the consideration process of RTAs falling under Article XXIV of the GATT and Article V of the GATS.

4.1.1. *Historical background: 1996-2006*

The CRTA was in charge of the RTA examination under Article XXIV of the GATT and only when requested under Article V of the GATS. Agreements were notified to the Council for Trade in Goods and then were transferred to the CRTA for examination. The Council for Trade in

Services received the notifications under Article V of the GATS and could remit them to the CRTA for examination. Agreements that were notified as falling into paragraph 2 (c) of the Enabling Clause were sent to the CTD, but no examination was done in general. The objective of the agreements' examination was to ensure transparency to the Members and to carry out an evaluation on its consistency with WTO law.

A factual presentation was created and afterwards the Secretariat drafted the examination report. Because this report had to be performed in consensus, its adoption by the Committee was highly improbable (“Historical background on Committee work 1996-2006”, 2017).

After the Transparency Mechanism of 2006 was implemented by the WTO Members, the procedures and work of the Committee changed substantially. It now referred to notifications of RTAs falling under Article XXIV of the GATT and Article V of the GATS. Also, the procedure transformed into the one previously explained, involving a one-year consideration period³⁴.

4.2. General statement of the CTD

The Committee on Trade and Development is responsible for the developmental matters in WTO regulation. It therefore considers different substantial issues that concern developing countries.

There are no clear terms of reference for the CDT in WTO law, since its work depends on the new responsibilities that it has progressively received from other WTO institutions. Still, the CTD is mandated to provide guidelines for the technical assistance activities of the WTO and to periodically review these activities.

For instance, in relation to Special and Differential Treatment Provisions, the Doha Ministerial Declaration of 2001 claimed that S&DT provisions for developing countries should be reviewed and, in this regard, the Committee initiated a work program.

³⁴ See Section 3.1 in regard to the TM for RTAs.

Moreover, on the 1st of March 2002, the General Council agreed that small economies would be part of its agenda. With a view of promoting economic growth among developing countries, it claimed that the Committee should provide regular reports concerning these vulnerable economies.

In this sense, at a later date, in the context of the Ninth Ministerial Conference in December 2013, the Ministerial Decision on Aid for Trade was adopted and it served to reaffirm the continuing need for aid in trade as regards to developing countries.

Also, the CTD has engaged on discussions on how to fulfill the mandates of the Ministerial Conference of December 2011, specially with reference to the pressing need of a group within the Committee focused on the link between trade and development, electronic commerce, duty-free quota-free implementation review, developing countries and the multilateral trading system, as well as regional trade agreements and preferential schemes all together (“Committee on Trade and Development”, 2017).

Similarly, of great importance is the Committee’s duty of implementing the 2006 TM in regard to RTAs falling under paragraph 2 (c) of the Enabling Clause, as well as the Transparency Mechanism for Preferential Trade Arrangements in general. The procedure used to fulfill these examinations corresponds to the one assigned for each of these mechanisms³⁵.

Finally, even though the CTD has plenty of work on other areas of development, it dedicates full sessions to the matter of trade agreements and looks for the further growth of developing countries in international trade.

³⁵ See Section 3.1 regarding the TM for RTAs and Section 3.2 with respect to the TM for PTAs.

CHAPTER IV: Problems regarding the Notification Procedure

The previous chapter resumes notification norms under WTO law. However, the application of this procedural requirement has led to a series of difficulties that have not been resolved by the CRTA, the CTD, the AB or any existing panel reports. This chapter will further analyze problems concerning the notification procedure by addressing each one of them in a different section. In this regard, it will discuss (i) the lack of consensus of parties on the provision that should be invoked by the notifying Member, leading to dual notifications of the same FTA or CU, as well as (ii) the consequences of an infringement of the notification procedure's regulation.

1. LACK OF CONSENSUS ON THE NOTIFICATION PROVISION INVOKED BY THE NOTIFYING MEMBER

Given the fact that WTO law is full with various provisions regarding notification of FTAs and CUs, it is not uncommon for parties to disagree on the norm that should be invoked when notifying their agreement. For example, if the treaty has been concluded between developing Members, they should complete the notification as regulated under the EC, but legitimate questions in regards to notification under GATT Article XXIV may arise. This alternative can lead to a lack of consensus between parties, raising the issue that while one party notifies an agreement under one provision; the other carries it out through a different disposition.

This specific situation brings forth numerous questions that remain unanswered under WTO law, *v.gr.* Can Members choose freely under which provision to notify their agreement?

By analyzing the text of GATT Article XXIV, GATS Article V, and the EC it can be ascertained that none of them contain an exclusivity clause, meaning that their wording does not prohibit the use of multiple provisions when notifying a single agreement. Conversely, the referred dispositions only include requirements that Members should follow when notifying. Thus, as the

only condition to notify an agreement under any of these provisions is to comply with their requirements, notification of a FTA or CU under several of them is plausible, as long as the corresponding arrangement conforms to the norm's factual situation. Hence, it appears that although Members may notify their agreements under more than one provision, they are not compelled to notify under *all* the possible alternatives that pertain to their arrangement. Therefore, if the respective FTA or CU complies with more than one provision, Members can choose among them and, in accordance with the requirements set forth by the one they selected and invoked, perform the notification.

Under this scenario, it may be questioned: What should be the course of action followed by the CRTA or CTD when faced with notifications of the same agreement by different notifying parties, invoking dissimilar provisions? *I.e.* what should the committees do if there is no consensus among parties of an agreement regarding the applicable notification norm? How should the WTO address dual notifications of a single FTA or CU? Are dual notifications truly compatible with WTO standards? If this is not the case, what solution should be undertaken when receiving different notifications by the parties of the same regional integration arrangement?

The simplest of solutions would consist of validating exclusively the first notification and, therefore, foreclosing the second one, since it would be seen as void action by the second notifying party. The problem with accepting the "first-come first-served notification" solution is that it would go against the rights of whoever notifies in second place. If one of the parties to an agreement receives more benefits from one specific provision, why should it lose those advantages solely because of notifying after another member of the FTA or CU?

Consider for example a scenario where developing country “A” and two least developed countries “B” and “C” enter into a FTA. They do not agree on the provision under which to notify their agreement. “A” notifies it under GATT Article XXIV and “B” and “C” notify it two days after under the EC. One year later, “B” enters into a severe Balance of Payments (BOP) problem and, therefore, has to apply a very rigorous external trade scheme. Since “B” had only signed the arrangement one year before, it decides not to include its fellow FTA parties in the BOP scheme and continue giving them a preferential commercial position. Surprised by “B”’s actions, “D”, a neighbor country, brings a controversy to the Dispute Settlement System (DSS), since it believes that “B”’s BOP system is illegal, as it should provide all Members the exact same treatment. “D” considers that not applying the BOP scheme to “A” and “C” contravenes Article I: 1 of the GATT.

In this sample case, it would benefit “B” to use the EC as a defense in the dispute, since it has a lower burden of proof than Article XXIV of the GATT³⁶. Therefore, if only the first notification that reaches the Secretariat is validated, “B” could not use the EC as a lawful defense and would have to resort to GATT Article XXIV. Thus, this “first-come first-served” notification analysis would undermine “B”’s right to argue that the EC provides its conduct with strong, effective justification, even though the FTA concluded with “A” and “C” complies with the conditions established under this provision.

³⁶ An important difference between GATT Article XXIV and the EC is determined by the fact that while Article XXIV requires for the elimination of “duties and other restrictive regulations of commerce” on “substantially all the trade” –also known as the SAT requirement–, the EC allows for parties of a RTA to simply “reduce” tariffs, rather than “eliminate” them, in accordance with paragraph 1 (c) of the Enabling Clause. Moreover, tariff concessions under the EC must be “mutual”, but not “reciprocal”. Thus, the EC is more permissive in regards to compliance with the internal trade liberalization requirement (Kim, 2012).

This same reasoning applies when arguing that the amount of parties notifying under one provision cannot be a criterion to estimate notification as valid or void. If two parties notify the agreement by the same provision and only one by another, concluding that the sole valid notification corresponds to the completed by the two Members, would undermine the rights and interests of the third party. For instance, if in the prior sample case, “A” and “C” would have notified the FTA under GATT Article XXIV and only “B” under the EC, and the same dispute is being examined by the WTO, validating the notification performed by the major part of the members, would have the same negative impact on “B”. Specifically, it would again undermine “B”’s right to use the EC as a reasonable defense.

Thus, as the above criteria do not promote solutions adjusted to law and equity, the WTO faces two imminent challenges: first, regulating the adequate factors that should be taken into account by the CRTA or the CTD when examining notifications of FTAs and CUs and, second, clarifying under which circumstances, if any, could dual notifications coexist.

Accepting dual notifications could be a possibility when all parties comply with the requirements set forth by the provisions invoked, which, in turn, could result in all of them benefitting from whatever is included on those dispositions.

Still, little or nothing has been developed in this respect by the WTO rules-based system, and, consequently, special attention should be paid to the fact that if Members disagree on the provision under which they notify their treaty, and a dispute arises between them, the specific panel or even the AB will be forced to resolve a way out of this loophole.

1.1. Dual notification case analysis

As stated on the previous section, the preceding questions led us to the possibility of a dual notification, an issue that has never been considered by the AB or any panel in the DSS.

Moreover, this eventuality was not foreseen by any of the previously explained notification provisions either. Therefore, dual notifications are not regulated under WTO law. Nevertheless, as it appears as a necessary means for the integral protection of Members' rights and as the universe of existing WTO standards and recommendations has not prohibited it, it has happened in practice.

In this sense, the most important cases in which dual notifications of RTAs have been further discussed and called into question will be presented hereunder.

1.1.1. *Mercosur's notification to the CTD and the CRTA*

Mercosur, an economic and political bloc comprising Argentina, Brazil, Paraguay, Uruguay and Venezuela, was established on the basis of the Treaty of Asunción in 1990 (Renwick, 2016). As Krieger-Krynicky asserts, this market had suffered from a growth crisis and was in danger of declining (2005). The illusion of creating a regional integration formed by these economies represented not only the hope for a better prospect in international trade relations, but also the implementation of political institutions aimed at harmonizing strategies among its members, *e. g.* macroeconomic policies (Renwick, 2016). In fact, Mercosur's founders went far beyond the idea of establishing a free-trade area, by considering the creation of a common market, the introduction of a common currency, and actually creating joint political forces such as the Common Market Council, the Common Market Group, a parliament known as Parlasur, and a Structural Convergence Fund (FOCEM) (Ibid.). However, Mercosur's grand ambitions were overshadowed by the devaluation of Brazil's currency in 1999, the 2001 economic crisis in Argentina (Ibid.), and internal conflicts between the countries –with Venezuela's suspension from the group on December 1, 2016.

When it was first created, the Mercosur scheme was notified to the 1947 GATT under the EC, since its participants considered themselves as developing countries (Mavroidis, 2015). However, at the entry into force of the WTO on January 1st 1995, the GATT 1947 Committee of Trade and Development had established a working party to examine the agreement. The Organization's creation encouraged the working party to, on its meeting on 14 September 1995, adapt its terms of reference for them to include Mercosur's evaluation under GATT (1994) Article XXIV. In this sense, the CTD adapted its terms of reference as follows³⁷:

“To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV, and to transmit a report and recommendations to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods. The examination in the Working Party will be based on a complete notification and on written questions and answers” (Note on the Meeting of 16 February 1996, 1996).

Also, this same decision by the working party stated that the examination report was to be transmitted to the CTD for submission to the General Council, with a copy of the report sent to the Council for Trade in Goods (WT/COMTD/M/3)³⁸.

³⁷MERCOSUR was notified to the GATT 1947 under the Enabling Clause (GATT 1947 document L/6985 and L/4044). See also documents in the WT/COMTD/1 series and GATT documents L/7370/Add.1 and L/7540. Original footnote (83) retrieved from the WTO's Analytical Index: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#fnt-83

³⁸ For more information regarding the decision by Mercosur's working party, as well as other working parties examining regional trade agreements, please consult the WTO's Analytical Index: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm#fntext-1437

As a result, Mercosur was notified to both, the CTD and the CRTA; this meaning that, later, the CRTA took over the review of MERCOSUR³⁹. This caused confusion and uncertainty among other Members, who argued that no legislative framework enabled dual notifications. Specifically, China, Egypt, and India sent a joint communication withholding the application of GATT Article XXIV to such regional integration and emphasizing on the ambiguity surrounding the impact of the different notification provisions, as well as the role of both committees (Mavroidis, 2015).

However, as Kim notes, “when all 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” (2012, p. 663). Still, this is not always the case, provided that an RTA between developing countries could find legal justification under Article XXIV, but not under the EC:

“(…) GATT Article XXIV accords legal defense to all GATT 1994 provisions, whereas the legal defense under the Enabling Clause is limited to GATT Article I violation. In addition, the internal⁴⁰ and external⁴¹ trade requirements of Article

³⁹ The tasks of this working party, as well as all other working parties established by the Council for Trade in Goods for the examination of regional trade agreements notified under Article XXIV of GATT 1947 or 1994, were taken over by the Committee on RTAs after its establishment on 6 February 1996. See WT/L/127 (...). Original footnote (85) retrieved from the WTO's Analytical Index: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#fnt-85#

⁴⁰ For information on the differences in relation to the internal trade liberalization requirement under GATT Article XXIV and the EC, consult footnote (36) of this thesis.

⁴¹ The external trade requirement amounts for restrictions imposed on RTAs in respects to the preservation of non-parties' trading relations. For instance, paragraph 5 of GATT Article XXIV requires that a RTA should not be accorded “to raise barriers” to trade of non-parties. In contrast, the EC stipulates that a RTA should not “create *undue difficulties* for the trade of any other contracting parties”. As Kim suggests, in this regard, the EC “is wider in scope, but not necessarily more rigorous” (2012, p. 664).

XXIV are distinct from those of the Enabling Clause, without the latter being subsumed by the former” (Kim, 2012, p. 665).

1.1.2. Notification of the India – Korea CEPA and the ASEAN – Korea FTA

Negotiations for the India – Korea Comprehensive Economic Partnership Agreement or CEPA launched on 23 March 2006, but the treaty was not signed and in effect till January 1st, 2010 (“Trade and Investment: India – [Republic of] Korea Comprehensive Economic Partnership Agreement”, n.d.). With the belief that the CEPA would improve their attractiveness to capital and human resources, and create larger and new markets, enabling them to expand trade between them and in the region, India and Korea entered into this FTA, directed at establishing clear and mutually advantageous trade rules, and industry as well as regulatory cooperation⁴².

Shortly before, on June 2007, May 2009, and June 2009 three major agreements under the ASEAN – Korea free-trade area entered into force (“About ASEAN-KOREA FTA”, n.d.). Korea and the ASEAN parties –Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, The Philippines, Singapore, Thailand, and Vietnam– had first initiated sectoral negotiations on 1989 and after years of dialogue finally agreed on facilitating access to their markets and investment regimes, as well as on cooperating at a political level⁴³ (Ibid.).

⁴² These considerations resume part of the India – Korea CEPA’s Preamble. The whole text of the agreement can be retrieved from: <http://commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf#>

⁴³ Political cooperation in the ASEAN – Korea FTA is achieved through mechanisms such as the ASEAN Regional Forum (ARF), ASEAN Plus Three (APT), East-Asia Summit (EAS), ASEAN-ROK Summit, and Ministerial Meetings. For a more detailed overview of this FTA, please consult: <http://akfta.asean.org/index.php?page=about-akfta>

The Council on Trade in Goods on its meeting of November 30th, 2010 was informed of the notification to the CRTA of both, the FTA on goods and services between Korea and India⁴⁴ and the one between the Republic of Korea and ASEAN⁴⁵ (Report of the Council for Trade in goods, 2010). Likewise, it was indicated that these agreements had also been notified to the CTD (Ibid.). Specifically, the Republic of Korea had notified both agreements under GATT Article XXIV, whereas India⁴⁶ and the ASEAN countries⁴⁷ notified them respectively under the EC (Kim, 2012).

In the case of Mercosur's disparate notification issue, examination of the agreement by the CRTA and the CTD was merely circumstantial, *i.e.* it responded to the advent of the WTO and aimed at broadening the terms of reference for its evaluation of GATT/WTO consistency. In contrast, in the cases of the India – Korea CEPA and the Korea – ASEAN FTA, dual notifications resulted from actual disagreement among the parties. Furthermore, the lack of consensus present on both RTAs was marked by the significance of economic development status in determining under which provision to notify a treaty. Namely, when a party considers all of the agreement's members as developing countries, it will normally notify it under the EC. On the contrary, if it considers itself as a developed nation, even if the others are developing economies, it will be required to pursue notification under Article XXIV of the GATT. In these

⁴⁴ Notification of the India – Korea CEPA under GATT Article XXIV corresponds to WTO document WT/REG286/N/1.

⁴⁵ Notification of the ASEAN – Korea FTA under GATT Article XXIV corresponds to WTO document WT/REG287/N/1.

⁴⁶ Notification of the India – Korea CEPA under the EC corresponds to WTO document WT/COMTD/N/36.

⁴⁷ Notification of the ASEAN – Korea FTA under the EC corresponds to WTO document WT/COMTD/N/33.#

two cases, Korea notified the RTAs pursuant to GATT Article XXIV, whereas its partners notified the corresponding treaties under the EC.

Accordingly, the above circumstance questions Korea's authentic level of development. Moreover, it evidences the role played by "self-selection" on choosing a provision under which to notify a trading agreement.

Under this scenario, the "self-selection" principle refers to the possibility a country has to come about its own economic development status. In the context of the WTO, developing nations are, in general terms, designated through "self-selection", though this is not automatically accepted in all WTO bodies ("Least-developed countries", n.d.).

Still, this principle can be of utmost importance when resolving a way out of the notification loophole in WTO law, since, as it was previously explained, through this criterion, "we may infer the economic development status of the notifying RTA party based on the notification" (Kim, 2012, p. 669). The relationship between the "self-selection" principle and the design of a solution to the notification's problems that are currently being addressed will be further analyzed on the next chapter.

1.1.3. *Notification of the GCC customs union*

Established in May of 1981, the Gulf Cooperation Council (GCC) encompasses six (6) member states: Bahrain, the United Arab Emirates, Saudi Arabia, Oman, Qatar, and Kuwait (Lester, 2009). It was created with an aim to foster economic integration between members, increase their bargaining power in international relations, and to guard themselves against any threat from neighboring states; today, more than three decades later, it represents a major success of integration among Arab countries (Malkawi, 2015). In fact, the GCC accorded a free-trade area on 1983 and the Gulf Cooperation Council Customs Union or GCC-CU on 2003 (Ibid.).

The GCC customs union was initially notified by Kuwait under the Enabling Clause; nonetheless, the Kingdom of Saudi Arabia, following its accession to the WTO, notified it under Article XXIV of the GATT, but then requested a change in notification status to paragraph 4 (a) of the EC (Bahrain: Business and Investment Opportunities Yearbook, 2016). Hence, on 19 November 2007, the GCC-CU was notified to the CTD under the Enabling Clause (Systemic and Specific Issues arising out of the Dual Notification of the Gulf Cooperation Council Customs Union, 2010). In this way, there was a change in the notification status of the GCC-CU from GATT Article XXIV to the EC.

Though this could be seen as a case of “change in notification” (Kim, 2012, p. 666), rather than of a “dual notification”, it is included under this section, because (i) it raises the same questions as when one single FTA or CU is notified concurrently under two different provisions, and (ii) because truth is none of the notifications was withdrawn.

Among others, the United States raised concerns in regards to this variation in notification status, and, accordingly, encouraged the GCC countries to re-notify the CU under GATT Article XXIV, by arguing that it did not fall under the parameters established by the EC (Note on the Meeting of 13 March 2009, 2009). For example, as held by the representative of the United States, the agreement went far beyond the reduction or elimination of tariffs and, thus, beyond the scope of paragraph 2 (c) of the EC (Ibid.), because it covered the elimination of non-tariff barriers (NTBs)⁴⁸ and, moreover, the GCC common external tariffs⁴⁹ exceeded their tariff bindings (Ibid.)⁵⁰.

⁴⁸ According to the U.S. representative, “non-tariff barriers (NTBs) could be eliminated on a reciprocal basis only where the General Council had established the conditions for such elimination, which it had not yet done” (Note on the Meeting of 13 March 2009, 2009).

On the contrary, the representative of Oman, on behalf of the GCC countries, made it clear that the EC provided a proper basis for their CU's notification to the CTD, given that it constituted an agreement between developing countries (Ibid.). Also, it was stressed that though they understood concerns in relation to real compliance with the obligations set forth by Article XXIV, the GCC did not pretend, in any way, to evade this GATT provision (Ibid.). However, they were puzzled by the arguments pointing that the sole permissible basis for notifying the GCC-CU corresponded to GATT Article XXIV (Ibid.). The representatives of Saudi Arabia, Egypt, Qatar, and Morocco expressed support of the GCC countries' intervention, whereas the European Communities coincided with the U.S. that the EC did not provide legal coverage for the CU's notification (Ibid.).

Finally, on 6 October 2009, the GCC-CU was re-notified by the Kingdom of Saudi Arabia to the CRTA under Article XXIV: 7 (a) of GATT 1994 (Systemic and Specific Issues Arising out of the Dual Notification of the Gulf Cooperation Council Customs Union, 2010).

The latter denotes the political pressure that can be exerted by the major economic powers, not only at the level of bilateral trade relations, but also within the framework of international organizations, such as the WTO. Although the GCC countries had expressed their reluctance to notify the agreement under Article XXIV of the GATT, they did so in response to the US and the EU's concerns.

⁴⁹ The Common Customs Code of the GCC “provides a uniform set of general rules to be implemented by national customs authorities to harmonize the application of duties and procedures for processing imports into the GCC” (Malkawi, 2015, p. 190). Among others, it sets a 5% common external tariff or common customs tariff (CCT) to all third-country imports (Ibid.).

⁵⁰ “The USA stated that if members of the GCC have tariffs 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” (Kim, 2012, p. 665, footnote 97).#

Furthermore, on 30 September 2010, China, Egypt and India submitted a joint communication regarding the “Systemic and Specific Issues arising out of the Dual Notification of the Gulf Cooperation Council Customs Union”. We consider this document to be of particular relevance, since it proposes a significant overview of the complexities that may result from dual notifications, and, to that extent, a convenient approach to what should be discussed, in this regard, under the WTO bodies.

Aside from enumerating some of the concerns raised by certain developed nations, *e.g.* whether or not the EC provides adequate legal basis for agreements that involve the reduction or elimination of non-tariff measures, the communication also questions the mandate and terms of reference of the CTD, as well as the TM for RTAs. Likewise, it points out “the need to address the systemic concerns regarding the extent to which a Member’s accession commitments to notify a certain RTA on the basis of Article XXIV should have precedence over or deny the other Members party to the same RTA the right to notify this agreement to the CTD under the Enabling Clause” (Systemic and Specific Issues arising out of the Dual Notification of the Gulf Cooperation Council Customs Union, 2010, p. 2).

Specifically, in respects to the mandate and terms of reference of the CTD, it indicates that although some developed Members consider that WTO bodies different from the CTD should analyze dual notifications,

“Several developing Members have submitted that the CTD is the more appropriate forum (...) since paragraph 1 of its Terms of Reference stipulated that it is ‘*to serve as a focal point for consideration and coordination of work on development in the World Trade Organization (WTO) ...*’. Moreover, paragraph 4 of the Terms of Reference of the CTD entrusts this Committee ‘*to consider any*

questions which may arise with regard to either the application or the use of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members (including the invocation of the Enabling Clause to notify custom unions among developing countries) and report to the General Council for appropriate action” (Ibid, pp. 2-3)⁵¹.

What is more, the CTD is capable of addressing notification issues along other WTO bodies. As paragraph 3 of its Terms of Reference states:

*To review periodically, **in consultation as appropriate with the relevant bodies of the WTO**, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least developed country Members, and report to the General Council for appropriate action [emphasis added] (Ibid, p. 4).*

From the above, it is evident that, within the WTO, questions have arisen on how to deal with cases of dual notifications. There is no consensus as to who is the competent body to take action on this issue and, particularly, the Communication denotes a certain preference of the least developed to resolve it within the CTD, without prejudice to it working hand in hand with other agencies of the Organization.

On the other hand, in relation to the RTAs TM, the statement by the three countries makes it clear that it does not envisage a factual situation of a dual notification and, as a response, “does not provide procedures for a dual consideration of an RTA” (Ibid, p. 3). In this way, the communication submitted by China, Egypt, and India draws attention to this specific legal

⁵¹ Developing countries have gone as far as to claim that if examination of a RTA notified under the EC is to be performed by the CRTA, it should be done according to the procedures and terms of reference provided by the CTD to the CRTA (Ibid, p. 3).

vacuum, by mentioning how the TM did not contemplate the event in which a single agreement is notified under two different provisions.

Finally, a list of other systemic issues is provided including more dilemmas, which are also noteworthy:

- What are the legal and procedural implications of notifying the GCC-CU on the basis of the EC and Article XXIV of GATT 1994, without either notification having been withdrawn?
- In the context of a dual notification, what should be the role played by the CTD and the CRTA in considering the RTA?
- Can one Member notify a RTA unilaterally under a specific legal provision without the other parties' consent?
- What are the implications arising from Members retaining a notification under the EC but not conducting a factual consideration of the RTA in the CTD?

It is essential to exalt the fact that these three countries have shown interest in discussing all these concerns within the multilateral system; however, despite the acute tensions that the subject of dual notifications has raised, there is still no clarity as to how the above questions should be resolved. Accordingly, with this lecture, a contribution to the analysis of the issue in the context of the WTO is made, by hopefully generating more answers than questions and, in this way, providing some insights that can help give certainty to its Members on how to solve the complexities that have emerged in regards to the notification of FTAs and CUs.

Continuing with this task, a review of another of such challenges will be presented below.

2. CONSEQUENCES OF THE INFRINGEMENT OF THE NOTIFICATION PROCEDURE

WTO regulation does not refer to the consequences of an infringement to the notification procedure in any of its provisions. Therefore, it is possible to speculate about the different outcomes that could result from a member notifying late, notifying without the required information or not notifying at all. This chapter will address two possible consequences for these WTO deviations: i) considering a belated or incomplete notification to be void and, therefore, withdrawing the Member's right to construe a legal defense upon the provision on which it could have based notification of the FTA or CU and ii) not being subject to any severe repercussions in the aftermath of any of the above-mentioned situations. This last alternative reveals the possibility of considering the notification issue as a mere formal requirement with no substantial effects deriving from its non-compliance.

2.1. Interpreter's limits

After an examination of the notification provisions in WTO law under Chapter III, it may be concluded that the specific consequence arising from their non-fulfillment is not expressly defined. They contain certain rules that, though not solely rigorous and precise, determine the notification's method and time. However, no reference of any kind, regarding the implications of a tardy, incomplete or non-existing notification, is found. In this sense, there is not a clear incentive for Members to notify, as there is no plausible negative impact originating from not coping with this process. Under this scenario, it could be thought that the interpreter has two choices: assuming that there is no consequence at all, since it is not explicitly established in WTO regulation, or construing an outcome by applying the rules of interpretation to the covered agreements. Nonetheless, both of these options are strongly limited by the WTO rules-based system, as will be shortly analyzed.

2.1.1. Assuming there is no consequence: The effectiveness principle

According to the effectiveness principle described by the AB⁵², the interpreter must give meaning and effect to all the terms of a treaty. Hence, it “is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility” (US-Gasoline, 1996, p. 23).

For this reason, in the present case, it cannot be assumed that there is no applicable consequence for not complying with the notification requirement in GATT Article XXIV, GATS Article V, and the EC, since it would leave these specific provisions without a compelling effect.

2.1.2. Construing a consequence: Modifying the rights and obligations under the covered agreements

Still, the interpreter is not authorized either to construe a consequence that is not mentioned under these provisions (*e.g.* making the notification void), since it would modify the pre-established parameters in terms of Members’ rights and obligations. As declared by Article 3.2 of the Dispute Settlement Understanding (DSU), “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”. Thus,

⁵² Some of the references of the *effectiveness principle* by the AB include: (i) “A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*)” (Japan-Alcoholic Beverages II, 1996, p. 12). (ii) “The common, day-to-day, implication which arises from this language is clear to us: the restraint is to be applied in the future, after the consultations, should these prove fruitless and the proposed measure not [be] withdrawn. The principle of effectiveness in treaty interpretation sustains this implication” (US-Underwear, 1997, p. 16). (iii) “The task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility” (Canada-Dairy, 1999, para. 133). (iv) “A treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this ‘inseparable package of rights and disciplines’ must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements” (Argentina-Footwear (EC), 1999, para. 81).

not even the AB, or the WTO panels, may alter the specific provisions set forth by the covered agreements, in a way that generates new obligations or rights for WTO Members. Accordingly, it can be concluded that only these agreements are entitled to conceive new rights or obligations and that, thereupon, the formulation of sanctions or any consequences, not justified by their content, would be an unlawful response to the infringement of the notification procedure under WTO regulation.

Due to all the above, it can be deduced that the main problem that faces whoever interprets the notification provisions is practically “having its hands tied”. This, due to the fact that neither assuming that no effects accrue from noncompliance with the notification procedure, nor instituting a novel consequence that results from this transgression, is admissible under WTO law.

2.2. Analysis of the possible consequences that could make it into future WTO regulations

Even though the interpreter is constrained to take sides and establish the consequence, if any, arising from the violation of these notification provisions, this matter could be definitely settled within the framework of the WTO regulation. For this reason, the present section will continue to analyze the different outcomes that could result from non-compliance with the notification requirement, in an effort to provide a basis for the analysis that the WTO should follow when putting the subject back on the table and regulating the issue.

In this sense, it is not the interpreter, but a modification in the regulation what could shed a light on the repercussions following the failure to comply with the notification provisions.

2.2.1. *First Possibility: Considering void a notification that does not comply with WTO standards.*

In order to ensure the observance of the effectiveness principle, as described by the AB, one could argue that the consequence for a notification that does not comply with the Transparency Mechanism or the rest of the notification provisions in WTO regulation should be its nullification. In this vein, a void notification would ensue from disregarding the requirements provided by such dispositions. Accordingly, notifying late or improperly would equalize the circumstance of not notifying the FTA or CU at all.

However, by regulating the matter in this way, the rights of WTO Members could be diminished, *v.gr.* Parties to the arrangement would not be able to justify measures that are incompatible with MFN treatment by invoking the notification provisions relevant to this effect. Namely, when a controversy arises in regards to the FTA or CU's compatibility with the WTO's multilateral system, Members would lose their right to call upon Article XXIV of the GATT, Article V of the GATS or the EC as a valid defense.

Moreover, not only would the parties' rights be undermined, but also those pertaining to all WTO Members, since the adoption of this rule would hinder their access to the agreement's relevant information. In other words, if an improper notification is nullified, the notification procedure would not take place and, consequently, Members will lose their right to, in the sake of transparency, thoroughly consider the newly signed agreement on the basis of the information provided by its parties.

In the interest of understanding the importance of the prior reflections, consider the scenario where "X", "Y", and "Z" create a FTA covered by paragraph 2 (c) of the EC. The three countries forget about notifying their agreement, because they are focused on implementing all of its clauses. A year after the entry into force of the treaty, when all its provisions, as well as the

preferential treatment among them are being applied, they realize they have not fulfilled the notification requirement and, as a consequence, turn to the WTO Secretariat to begin the procedure. Nevertheless, the Secretariat does not receive their notification, under the argument that it does not comply with paragraph 3 of the TM of 2006, which states that the notification must be done “as early as possible”.

In this example, if the Secretariat considered void a notification that did not comply with WTO regulation, this decision would affect the members’ rights to invoke the EC as a legitimate defense in case of a dispute, but also it would prevent other WTO Members from getting information about the FTA between “X”, “Y”, and “Z”. Furthermore, as the Secretariat would not receive all the relevant data, a factual presentation of the agreement could not be elaborated. Therefore, the other contracting parties would not have an insight to the details required by the TM⁵³. Thus, the goal of transparency would not be achieved and Member states would face the problem of not having enough information regarding this private agreement.

Still, the issue is not as black and white as it has been presented. While enshrining the aforementioned consequence into WTO regulation could disfavor the agreements’ parties and

⁵³ The annex of the Transparency Mechanism of 2006 establishes the information that Members must provide as follows: For the goods aspects in RTAs, the parties shall submit the following data: at the tariff-line level: Tariff concessions under the agreement: (i) a full listing of each party's preferential duties applied in the year of entry into force of the agreement; and (ii) when the agreement is to be implemented by stages, a full listing of each party's preferential duties to be applied over the transition period. Regarding MFN duty rates: (i) a full tariff listing of each RTA party's MFN duties applied on the year of entry into force of the agreement; and (ii) a full tariff listing of each RTA party's MFN duties applied on the year preceding the entry into force of the agreement. Where applicable, other data (e.g., preferential margins, tariff-rate quotas, seasonal restrictions, special safeguards and, if available, ad valorem equivalents for non-ad valorem duties). Also, product-specific preferential rules of origin as defined in the agreement and finally import statistics, for the most recent three years preceding the notification for which they are available: (i) each party's imports from each of the other parties, in value; and (ii) each party's imports from the rest of the world, broken down by country of origin, in value.

WTO Members alike, it could also create an incentive for countries to notify in time and in accordance to the notification procedures established under the referenced dispositions.

In the aforesaid scenario, if “X”, “Y”, and “Z” are aware that not notifying in due time or without closely following the regulation’s guidelines, would stop them from alluding to the EC as an admissible defense in future disputes, they will have a major incentive to correctly perform the notification. In so doing, the purpose of the notification requirement is achieved, *i.e.* to obtain transparency between the Members and specially to make the essential information on new customs unions or free-trade areas available to them.

That said it is important to emphasize that this consequence of considering the notification as void does not only derive from the application of the effectiveness principle, but also from the implementation of the principle of estoppel⁵⁴. This rule, which has been for long recognized and accepted by the international law, is based on good faith and, as a consequence, prevents states from acting inconsistently to the detriment of others (Wagner, 1986). In this sense, a party is not entitled to allege or invoke certain facts that contradict its previous actions.

Full of the persuasive moral weight that characterizes it (Wagner, 1986), the principle of estoppel, applied to the specific case of an inexistent or undue notification under WTO law, will result in the failing party being stopped –unable– to invoke the corresponding notification provision as a valid argument to exclude application of the MFN treatment in a future dispute brought to the DSS. The preceding, due to the fact that it is understood that by not notifying or notifying incorrectly, the Member state revealed it did not intend to benefit from the exceptions

⁵⁴ The panels and the AB have applied this principle in different cases, including: Panel Report (PR), *Guatemala-Cement II*, para. 8.23; Appellate Body Report (ABR), *EC-Export Subsidies on Sugar*, para. 312; ABR, *Mexico-Taxes on Soft Drinks*, para. 101; ABR, *EC-Bananas III (2nd Recourse to Article 21.5)*, para. 227; ABR, *US-Corrosion-Resistant Steel Sunset Review*, para. 89.

granted by the notification dispositions. If this was not the case, and the notifying Member were allow to take advantage from such norms, the legitimate expectations of third parties to the agreement would be undermined.

Hence, the application of the estoppel principle to the determination of the effects resulting from non-compliance with the notification provisions leads to a void procedure that, consequently, diminishes the rights of the agreement's parties and of WTO members in general, but that could also foster careful observance of the requirements established under these norms, just as it was previously analyzed in the context of the effective treaty interpretation rule.

2.2.2. Second Possibility: Absence of a consequence for not complying with the notification procedure.

There could be a positive impact produced by the fact that, under the current WTO regulation, there is no explicit consequence for not coping with the notification procedure. The above, taking into account that the absence of negative implications following the infringement of notification provisions, might result in Members not being afraid to, at any time, provide the WTO with information regarding their regional integration arrangements and, therefore, making it easier to create a multilateral database of FTAs and CUs.

Continuing with the preceding sample example, “X”, “Y”, and “Z”, are not compelled to guard the secrecy of their agreement, when realizing they did not meet the notification requirement as established under the TM. For example, if they did not execute notification in a timely manner, *i.e.* “as early as possible”, it might be easier for the parties to remain silent in respects to the conclusion of their agreement, if they know that notifying late would most likely bring about the problem of invalidation. In this sense, “X”, “Y”, and “Z” would prefer to overlook the WTO's notification requirement, rather than to call the attention of all contracting parties into their agreement and be subject to the penance derived from an improper notification: not being able to

justify measures adopted in the context of the FTA or CU with the MFN exceptions –GATT Article XXIV, GATS Article V, and the EC–. But, if there is no consequence inflicted upon countries contravening the notification dispositions, “X”, “Y”, and “Z” will most probably end up notifying the FTA to the multilateral trading system.

Nonetheless, actual data taken from the WTO proves that, on the contrary, the permissive character of the notification’s regulation, far from fostering notification by the Members, discourages compliance with this requirement.

In fact, in the last meeting of the CRTA in April 2017, the Committee discussed the situation of non-notified FTAs and CUs:

“The Chairman said that an updated list had been circulated on 27 March in document WT/REG/W/115 and contained 81 RTAs issued in factual presentations up to 27 March 2017. Following the notification of the GUAM agreement by the delegation of Moldova, the Agreement would be removed from the list of non-notified RTAs the next time it was circulated” (Note on the Meeting of 3-4 April 2017, 2017).

Moreover, as of today, there are more than 80 RTAs that have not been notified to the WTO. Some of these agreements are already in force and, as stated by the CRTA in 2017, (List of RTAs which have appeared in factual presentations –issued up to 27 March 2017– and have not yet been notified to the WTO, 2017), include: El Salvador-Venezuela (09 July 1986), Brazil-Guyana-St. Kitts and Nevis (31 May 2004), Belize-Guatemala (04 April 2010), and China-Chinese Taipei (12 September 2010).

Furthermore, several FTAs have entered into force months before their notification. For instance, the FTA between ASEAN, Australia, and New Zealand entered into force on January 1st, 2010 and was notified on 8 April 2010; the FTA between the EU and Serbia entered into force on

February 1st, 2010 and was notified on 31 May 2010; also, the FTA between ASEAN and India entered into force on January 1st, 2010 and was notified on 19 August of that same year (Mavroidis & Wu, 2013).

In accordance with this data, it can be concluded that, in reality, the lack of an explicit consequential effect arising from non-compliance with WTO notification provisions is not an incentive, but an obstacle for Member states to give the notification the importance and hierarchy it deserves. The above, because there is not a widespread belief among them that not complying with the notification provisions could inhibit them from invoking these dispositions in a future dispute under the DSS. In contrast, the CRTA's alarming statistics could really showcase that the notification procedure is regarded as a formal requirement that does not interfere with Members' rights and obligations. However, this general understanding in respects to the notification's non-substantive character brings into inutility the notification procedure and contravenes both, the effective treaty interpretation rule and the estoppel principle, as set forth under the present chapter.

In this sense, when analyzing the issue, the WTO should have into consideration the information presented by the CRTA, as prove that the current state of affairs discourages actual enforcement of the notification procedure. Ergo, the design of a specific consequence or "penalty" in this matter should be at the top of the WTO's agenda in order to take a stand against the increased infringement of notification provisions. In this way, notification of FTAs and CUs could serve as a plausible solution in the dispute, until now irreconcilable, between bilateralism and multilateralism. In other words, encouraging Members to notify their FTAs and CUs to the WTO, without downplaying this requisite as an empty formality, could serve as a step towards harmonizing bilateral and regional trade relations with the multilateral system.

CHAPTER V: Regulation Proposals for Effectiveness in the Notification of FTAs and CUs to the WTO

This chapter will analyze the possible solutions to the previously stated problems regarding the notification provisions in WTO law. For this purpose, (i) it suggests a way out of the dual notification issue and, afterwards, (ii) addresses the alternative of making the notification procedure mandatory. In this last section, the multiple limitations to this scenario are explored, since its advantages have already been examined under Chapter IV's Section 2 and, finally, (iii) other alternatives are proposed, which could be assessed if these obstacles cannot be overcome.

1. A WAY OUT OF THE DUAL NOTIFICATION ISSUE: COULD SELF-SELECTION BE THE ANSWER?

The economic development status of a country could be inferred from the application of the “self-selection” principle in cases where the party has notified the FTA or CU under the EC, but not if it has performed notification pursuant to GATT Article XXIV (Kim, 2012, p. 669). The prior, due to the reasoning set out under Section 1.1.2 of Chapter III.

Thus, the question arises of what to do with parties notifying under Article XXIV? How to know whether they notified alluding to this provision because they consider themselves to be developed economies and, to that extent, are convinced that, as a matter of fact, the CTD is not competent and that notification under the EC would be inappropriate? Or, how to know if they did so because despite recognizing themselves as developing, they judge that their agreement does not conform with the EC requirements, since, for example, it creates undue difficulties to the trade of non-parties?

In this sense, Kim suggests that in order “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 developed country for the purposes of the WTO review” (2012, p. 669).

On another note, during the course of the Doha Round, conducted on February and March 2011, parties discussed the issue of dual notifications and a proposal was made to require that, first, an agreement was reached on the status of the RTA in order to, then, proceed with the execution of its notification to the WTO (Kim, 2012). Kim rejects this proposition, by arguing that a single RTA could find legal basis under two different dispositions. In his words, “(...) this proposal incorrectly assumes that an RTA must have its legal basis solely under either Article XXIV or the EC but not under both” (2012, pp. 669-670).

However, in this point, Kim could be mistaken, since, from a legal standpoint, this proposal is, in fact, adequate. The above, since even if a RTA can conform to the requisites of both, the EC and Article XXIV, it cannot be ignored that the former is special and specific to RTAs concluded between developing countries with the aim to facilitate and promote their trade and development (Enabling Clause, 1979).

Moreover, even if the specialty and supremacy of the EC are put into question, this proposal does not suggest that a single RTA cannot have bases under the two articles; on the contrary, it consists on a simple solution to a problem that would otherwise be much more complex, if not impossible, to solve. This, since it does not grant a corrective to the issue, but rather acts by preventing it: if parties tend to have discussions between them in this respect and truly consent on the status that their RTA deserves, they will all notify under the same provision, thus avoiding any kind of misunderstanding.

Even so, the actual problem that lies behind this potential solution relates to parties that fail to reach an agreement on the status of their regional arrangement. It is under this scenario where

dual notifications are truly meaningful and applicable. The above, taking into account that, as discussed in Section 1 of Chapter IV, dual notification procedures are not expressly prohibited under WTO law –notification norms do not contain an exclusivity clause. This does not mean that parties have to notify by *all* the provisions applicable to their treaty, but rather that they can choose between them and act accordingly, provided that they comply with the requisites of the specific disposition they invoke and that the FTA or CU is within those regulated by it.

After all, real significance should be specially given to the fact that Members to a regional integration arrangement are aware of the utmost importance its notification entails, so as to promote that this procedural requirement becomes an essential part of their agenda when negotiating the conclusion of a bilateral trade agreement.

2. A MANDATORY NOTIFICATION: ELIMINATING THE POSSIBILITY TO INVOKE MFN EXCEPTIONS AS A VALID DEFENSE FOR NON-NOTIFIED FTAs AND CUs

The legal texts of Article XXIV of the GATT, Article V of the GATS, and the Enabling Clause enshrine the notification procedure as an actual requirement. Nevertheless, as it was formerly established, WTO Members do not regard it as obligatory and have not considered it as a fundamental part of their trading relations. The notification procedure should be thought-about as necessary for WTO Members to boost the transparency of international trade and to achieve the purposes these provisions foresee. With the aim of achieving this goal, the notification procedure could be instituted as an essential requisite for being entitled to present GATT Article XXIV, GATS Article V or the EC as a binding defense in any WTO dispute.

2.1. Limitations to a mandatory notification procedure

Still, it should not be ignored that making the notification a necessary requirement to invoke the exceptions provided under the covered agreements has various limitations, which relate to: (i) the

purpose behind transparency provisions, (ii) the possible diminishment of Members' rights, (iii) non-notified RTAs, and (iv) the challenges this proposal could face within the framework of the WTO voting system.

2.1.1. The purpose behind transparency provisions

The transparency provisions are numerous under WTO law and are not confined to the notification of regional integration agreements. As stressed by Daunton, Narlikar, and Stern:

“Many of the WTO processes and requirements aim at the generation of information through notification requirements, formal surveillance, the possibility of cross notification, review of proposed measures in committees, etc. There are over 200 notification requirements embodied in various WTO agreements and mandated by Ministerial and General Council decisions”. Furthermore, “the secretariat is required to provide a listing of notification requirements and members' compliance on an ongoing basis and to circulate this semi-annually to all members” (Daunton, Narlikar, and Stern, 2012, p. 765).

In this sense, making the notification procedure mandatory and, thus, invalidating the possibility of referring to the notification dispositions as a means of justifying non-compatible MFN treatment –on the ground of non-compliance–, could hamper, in the short term, the transparency provisions' purpose of gathering information in matters within the field of action of the WTO, but not in the long run, as discussed under Chapter IV, Sections 2.2.1 and 2.2.2.

2.1.2. Diminishment of members' rights

Also, as argued under Chapter IV, Section 2.2.1, a mandatory notification could be seen as a diminishment of the Members' right to allude to the exceptions provided in Articles XXIV of the GATT, V of the GATS, and the EC in the context of the DSS.

However, in the same way, it could be considered, not as a violation to the rights of Members, but as a proportional requirement to achieve the WTO transparency goal. It is clear that reluctance to comply with this requisite has prevented transparency in RTAs from being substantially accomplished and, therefore, this proposal could be regarded as an effective approach to achieve this long-pursued objective.

Moreover, the overall observance and consistent and fair implementation of the notification procedure does not demand Members to undertake exaggerated efforts and, thus, considering it as mandatory, serves as a proportional solution to the presented regulation problems. In this sense, it is important to note that the 2006 TM does not require all the information to be handed in the exact moment of the notification. Conversely, the WTO official website specifies that “parties to a RTA shall make data (described in detail in the Annex to the Transparency Decision) available to the Secretariat, if possible in electronic format, as soon as possible, but normally within a period of ten weeks (or 20 weeks in the case of RTAs involving only developing countries) after the date of notification of the agreement” (“Transparency Mechanism for RTAs”, n.d.). Furthermore, as there is a reasonable time period before the factual presentation is actually circulated to WTO Members, real adherence and completion of these procedures should be considered as a legitimate imperative.

2.1.3. *Non-notified RTAs*

Also, given the fact that, as mentioned under Chapter IV, Section 2.2.2 there are various regional trade arrangements that though currently in force, have not been notified to the WTO, the legal enforceability promoted by the notification’s demanding character would pose the question of how to deal with these non-notified agreements.

In this respect, it is worthwhile to mention a previous proposal that was discussed on 2002 in the Negotiating Group on Rules, when analyzing a compendium of different issues related to RTAs, before either of the transparency mechanisms came into force.

Particularly, this compendium emphasized on the many questions and concerns that had been raised in relation to non-notified RTAs during the course of previous WTO meetings. Still, the practice of merely questioning such an unfortunate circumstance was deemed “insufficient as a means of gathering adequate information”. Hence, it was further suggested, “a possibility of counter-notification of RTAs be provided for” (Compendium of issues related to regional trade agreements, 2002, TN/RL/W/8/Rev.).

Following the guidelines lay down by the Negotiating Group, a potential proposal to solve this issue could consist on authorizing new notifications of non-notified RTAs by subjecting them to a fast track notification procedure.

2.1.4. A majority's decision: Could WTO Members accept this solution?

The Marrakesh Agreement contains a very strict mechanism for decision-making in the WTO.

Specifically, Article IX of the Marrakesh Agreement establishes the mechanism to adopt authoritative decisions. It enshrines that *except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.*

Furthermore, *decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.*

In turn, the second paragraph of this article provides that,

“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade

Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members”.

Thus, in order to constitute the notification’s mandatory character as an authoritative interpretation, a recommendation of the councils overseeing the GATT and GATS would be needed, as well as a very high standard of a three-fourths majority in the context of the respective voting.

Also, another possibility could consist on the implementation of a subsequent agreement.

As previously established under Chapter III, Section 3.3, the conditions to qualify as a subsequent agreement are “(i) that the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between the Members on the interpretation or application of a provision of WTO law” (US – Clove Cigarettes, 2012, para. 262).

Therefore, a subsequent agreement, which is concluded with three-fourths of the votes and that seeks to interpret the covered agreements, exactly as the TMs do, could be adopted as a means to explicitly define notification as binding.

Still, agreeing on the mandatory nature of the notification provisions would most likely be a controversial issue. It would oblige members to vote on an authoritative interpretation or a subsequent agreement that creates a punishment for their own countries. Accordingly, and especially in those Member states that have not notified their FTAs and CUs, it is less likely that the voting would favor this proposal.

2.2. Alternative proposals to a mandatory notification

2.2.1. *New domestic policies*

New domestic policies could be an important aspect in assuring that FTAs or CUs concluded under the auspices of the MFN exceptions are properly notified. In this sense, Narlikar, Daunton and Stern conclude that Members should commit, (possibly in a document) “to establish an entity that would have the mandate to review and report on national trade and related regulatory policies. A good example of a model that has proven to be very effective is the Australian Productivity Commission” (Daunton, Narlikar, and Stern, 2012).

Created on 1998 and established as the replacement of the Industry Commission, the Productivity Commission is “the Australian Government’s independent research and advisory body on a range of economic, social, and environmental issues affecting the welfare of Australians” (“About the Commission”, n.d.). The Commission's four main “output streams” are “public inquiries and research studies requested by the government, performance monitoring and benchmarking and other services to government bodies, self-initiated research and annual reporting on productivity, industry assistance and regulation and competitive neutrality complaints” (“A quick guide to the Productivity Commission”, n.d.). Using this scheme, as an exemplary model for other countries, would contribute to the establishment of entities specialized on gathering strengthened information that could be submitted, among others, to the WTO, in an effort to create a more effective transparency system.

2.2.2. *Creating a “notification compliance label”*

A special “label” for RTAs that comply with the notification procedures could result in more prestigious and, why not, more international acclaimed agreements. Moreover, it could be a positive indicator that the specific regional arrangement is WTO consistent and, therefore, it

could prevent a dispute in this regard. In this sense, this possibility evokes WTO regulation in terms of environmental labeling, as it has been discussed under the Committee on Trade and Environment (CTE): Eco-labels are part of the Committee's program "to consider the relationship between the provisions of the WTO's agreements and the requirements governments make for products in order to protect the environment" ("Environment: issues - Labeling", n.d.). Additionally, their reception has been outstanding, to the point that "the use of eco-labels (i.e. labeling products according to environmental criteria) by governments, industry and non-governmental organizations (NGOs) is increasing" (Ibid.).

Moreover, the positive effects of this mechanism have already come to light: One of the working papers of the Economic Research and Statistics Division of the WTO states that results from studies by Cason and Gangadharan (CG) (2002), Bjorner, Hansen, and Russell (BHR) (2004), and Teisl, Roe, and Hicks (TRH) (2002), "show evidence that the presence of an eco-label has had a significant impact on consumers' behavior, and that information also plays an important role. In turn this may affect producers' behavior. If the share of green consumers is significant in the market, then an eco-labeling scheme may provide firms with the right incentive to change their production decisions and differentiate their product towards one with higher environmental quality characteristics" (Valentini, 2005). Other studies, like the one conducted by Alfnes, Chen, and Rickertsen on 2014 or Quynh and Nguyen on 2010, have also shown that eco-labeling plays an important role on consumers' choices.

The same "domino effect" could generate from the establishment of a "notification compliance label", *i.e.* if the share of labeled treaties is significant, others would feel enthusiastic on complying with the notification provisions, knowing that this eliminates the possibility of a determination under the WTO that the specific FTA or CU is incompatible with the multilateral

trading system. Hence, like eco-labels, the “notification compliance label” will provide Member states with the right incentive to differentiate their bilateral agreements towards one that the WTO certifies that harmonizes with both: the multilateral and bilateral trading schemes.

CONCLUSION

It is an irrefutable reality that the non-discrimination principle of the multilateral trading system, and, in particular, the most-favored nation clause that it promotes, have given way to the rapid emergence of bilateral relations, which are precisely the exceptions to this system.

In this sense, free-trade areas and customs unions are seen as the antithesis of the rules-based system of the World Trade Organization. In fact, this contrast between WTO multilateralism and growing bilateralism has often been seen as an irreconcilable struggle, in which it appears that bilateral trade relations are destined to ultimately win the battle and most likely put an end to the WTO.

Nonetheless, those of us who advocate for the realization of a global commerce free of deviations and marked by economic openness and authentic trade liberalization do not give up trying to find solutions that will give credence to the ideals that initially promoted the creation of an international body in charge of overseeing trade relations worldwide, without, through this effort, ignoring the importance of the conclusion of regional integration agreements.

In this regard, a reference to the notification of FTAs and CUs to the WTO has been submitted with the intention that it be subject to certain reforms within the regulation of this Organization, in order to make it an effective, solid tool, which is comprehensive and complete and that, accordingly, harmonizes the conflicting trends concerning the way in which international trade must be executed and, above all, to generate transparent commerce relations among Member states.

In view of the above, it was necessary to analyze the problems related to the existing WTO law on notification, leading us to the conclusion that the legal gaps in these provisions are aggravated under the consideration that there is no consequence resulting from non-compliance, which, in

turn, discourages parties from granting this procedural requirement the importance and hierarchy it deserves. Likewise, the frequent practice of dual notifications evidences the need to resort to the "self-selection" principle, so that parties autonomously agree on the status of their treaty and subsequently proceed to perform the notification. The foregoing denotes the importance that the economic development of a country has on the way in which it must notify its FTAs or CUs.

Even so, the present reflection paper did not pretend to ignore the difficulties that could arise in the context of the realization of this task, so it offered primary and subsidiary reform proposals, under the premise of, first and foremost, always safeguarding the rights and obligations of WTO Members.

In the future, the picture will remain uncertain until not the covered agreements' interpreters, but rather WTO regulation itself takes action in response to this issue. If it does, the present dissertation could shed some light on the matters to be discussed and taken into account within the framework of the Organization.

The foregoing, without neglecting the ever imminent possibility that a dispute in this respect be resolved by the panels or the Appellate Body; in either case there would be no room for hesitation and a position on the matter would have to be unfailingly adopted.

Still, there is the hope that, under this last scenario, the interpretation that is reached does not ignore the effectiveness principle or Article 31 of the VCLT, given that it would be a pity that the benefits of the notification procedure were not taken advantage of, by not giving its provisions their true significance, *i.e.* all notification provisions contain a binding requirement and not a mere formality, as erroneously suggested by the current general belief of WTO Members.

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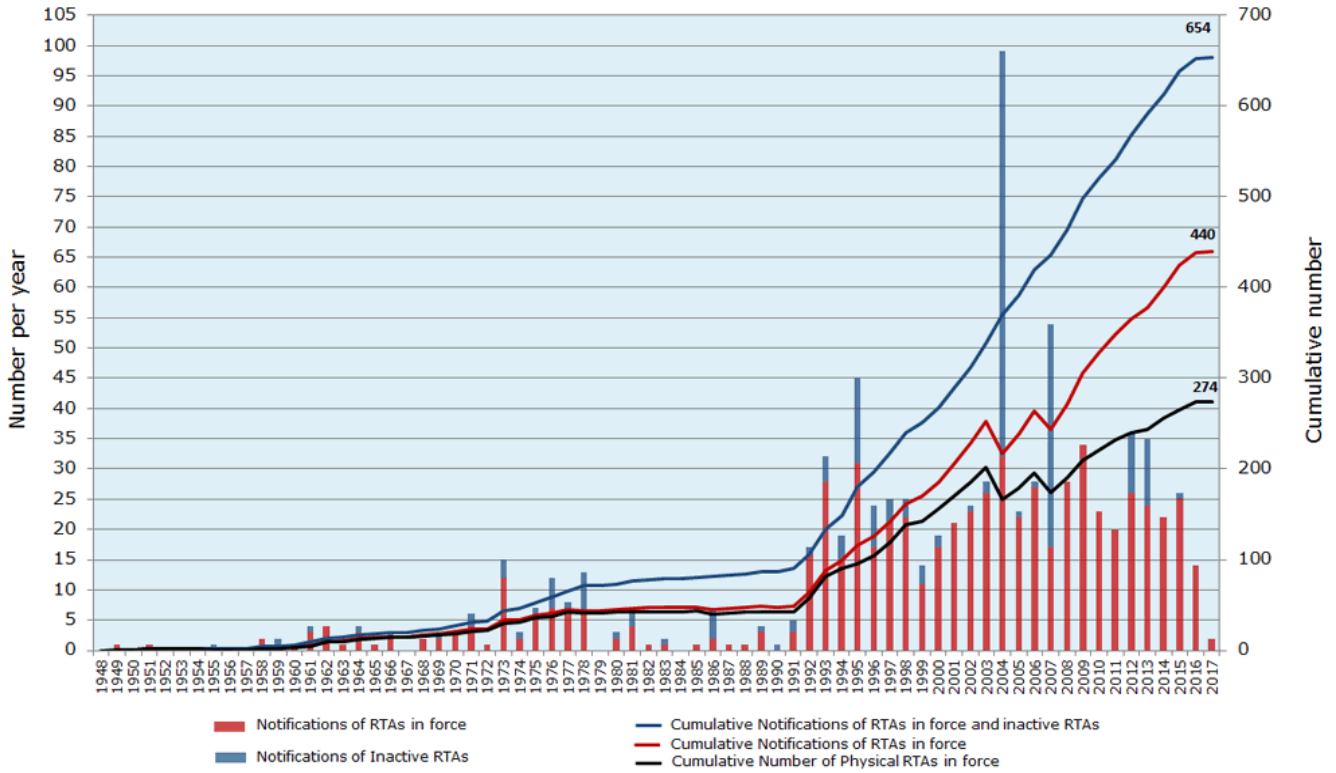
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ANNEX I

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, 5 May 2017.