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Facilitating Preferential Trade Agreements between Developed and Developing Countries: A Case for "Enabling" the Enabling Clause

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Facilitating Preferential Trade Agreements between Developed and Developing Countries: A Case for "Enabling" the Enabling Clause

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ABSTRACT

Regional trade agreements (RTAs) have been a salient feature of the world trading system in recent decades, and most of the RTAs in force include developing countries. To assist developing countries with economic development, the Enabling Clause of the General Agreement on Tariffs and Trade (GATT) allows developing countries to enter into RTAs on favorable terms. The Enabling Clause has not been widely used, however. Nor has it been successful in achieving its objectives. This paper examines the reasons behind this apparent failure of the Enabling Clause and proposes regulatory reforms, including a revision of the Enabling Clause and the revitalization of paragraph 10 of GATT Article XXIV.

I. INTRODUCTION

The proliferation of regional trade agreements (RTAs) has become a salient feature of the multilateral trading system. In the early 1990s there was a rapid increase in the number of RTAs, and their numbers have continued to increase without subsiding.[1] As of August 2010, as many as 194 RTAs were in force.[2] RTAs are an important exception to the most favored nation (MFN) requirement of the General Agreement on Tariffs and Trade (GATT) Article I.[3] GATT Article XXIV provides legal cover

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1. *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Sept. 19, 2011).

2. Wog-Mon Choi & Yong-Shik Lee, *Appendix to* Facilitating Preferential Trade Agreements between Developed and Developing Countries: A Case for "Enabling" the Enabling Clause, 21 MINN. J. INT'L L. ONLINE 1 (2012) [hereinafter *Appendix*].

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55

for RTAs that liberalize "substantially all" trade among the signatories and do not raise trade barriers against non-member countries.[4]

The Enabling Clause[5] also favors developing countries entering into RTAs by relaxing some of the requirements under Article XXIV. Article XXIV facilitates RTAs among developing countries to promote their economic development.[6]

Despite this regulatory preference, however, the Enabling Clause has not been widely used. Although 86.5% of all RTAs in force involve one or more developing countries as members, and nearly half of all RTAs in force involve only developing countries, the Enabling Clause has been invoked as legal cover for only 15.4% of all RTAs in force.[7] In total, the Enabling Clause has been used for less than one-third of RTAs involving only developing countries, despite its substantial preference for developing countries.[8] This raises the question of whether the Enabling Clause can effectively assist developing countries by facilitating RTAs.

This article addresses this important question and examines why the Enabling Clause has not been widely used by developing countries, despite the legal preference it shows to developing countries entering into

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U.N.T.S. 194 [hereinafter GATT]. GATT Article I prohibits discriminatory treatment in trade based on the origin of the product. Article I.1 provides: "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 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." *Id*. art. I, ¶ 1.

4. *Id.* art. XXIV, ¶¶ 5, 8. *See generally* Mitsuo Matsushita & Y.S. Lee, *Proliferation of Free Trade Agreements and Some Systemic Issues - In Relation to the WTO Disciplines and Development Perspectives*, 1 L. & DEV. REV. 22, 31–33 (2008) (stating that GATT article XXIV ¶ 8 is unclear as to the meaning and measure of "substantially all" trade, for which the 1979 addition of the "Enabling Clause" added clarity by relaxing the "substantially all trade" provision by exempting less-developed members from adhering to the requirement of liberalizing substantially all trade as long as they offer a mutual reduction or elimination of tariffs).

5. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, ¶ 2(c), L/4903 (Dec. 3, 1979), GATT B.I.S.D. (26th Supp.) at 203, ¶ 1 (1980) [hereinafter Enabling Clause] ("Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."). Containing the "Enabling Clause" at paragraphs one through four, this document is one of the four Tokyo Round agreements called the "Agreements relating to the Framework for the Conduct of International Trade" and has been incorporated into WTO agreements.

6. *See* GATT, *supra* note 3, art. XXIV, ¶ 4.

7. *Appendix*, *supra* note 2.

8. *See infra* section II.

RTAs. If it has not been successful in achieving its stated objectives, then the Clause should be revised. Section II will examine the legal requirements of GATT Article XXIV and the legal interpretation of the Enabling Clause. Section III will discuss the possible reasons why the Enabling Clause has not been widely used and will propose regulatory reforms that may assist developing countries to grow through preferential trade agreements (PTAs).

II. GATT ARTICLE XXIV AND THE ENABLING CLAUSE

A. ARTICLE XXIV

For an RTA covering trade in goods to be consistent with the requirements of the World Trade Organization (WTO), GATT Article XXIV requires that parties to the agreement must eliminate all tariffs and other restrictive regulations on "substantially all the trade" between them.[9] In other words, Article XXIV authorizes only fully-liberalizing free trade agreements (FTAs). The various viewpoints regarding the correct interpretation of the phrase "substantially all" can largely be subsumed under the labels "quantitative approach" and "qualitative approach." [10] Several arguments have been articulated under the quantitative approach. One such argument is that trade barriers with respect to greater than 80% of trade between RTA parties should be eliminated to satisfy the "substantially all" requirement. [11] Another argument advanced is that barriers with respect to greater than 95% of trade at the level of the Harmonized System 6 unit must be eliminated.[12]

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9. GATT, *supra* note 3, art. XXIV, ¶ 8 (allowing customs unions and free-trade areas to eliminate restrictive regulations of commerce on substantially all the trade between them, except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, and XX).

10. *E.g.*, Matsushita & Lee, *supra* note 4, at 31–33 (stating that there has been controversy regarding whether the term "substantially all" requires a quantitative or qualitative measure of compliance in trade restrictions).

11. *See* Won-Mog Choi, *Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States*, 8 J. INT'L ECON. L. 825, 828–29 (2005). *See generally* Treaties Establishing a European Economic Community and a European Atomic Energy Community (ECT) ¶ 30, L/778 (Nov. 29, 1957), GATT B.I.S.D. (6th Supp.) at 70, 99 (1958) ("[T]he Six had proposed the following definition: a free-trade area should be considered as having been achieved for substantially all the trade when the volume of liberalized trade reached 80 per cent of total trade."). For a comparison of the arguments for and against a qualitative measure of trade restrictions see WTO Secretariat, *Systemic Issues Related to "Substantially All the Trade"*, WT/REG/W/21/Add.1 (Dec. 2, 1997). Supporting the EC's original argument, the EFTA States noted that the phrase "substantially all trade" was not the same as "trade in substantially all products." *Id.*

12. *See* Committee on Regional Trade Agreements, *Communication from Australia*, WT/REG/W/22/Add.1 (Apr. 24, 1998) (elaborating on Australia's argument that "substantially all trade" should be defined as an agreement with at least 95% of all the six-digit tariff lines listed in the Harmonized System). The 95% figure is arbitrary, but would lead to more liberalized trade between parties, and the Harmonized System is suggested

A third argument is that the level of trade barrier elimination can be determined only after taking rules of origin into consideration[13]—i.e., if rules of origin are implemented more strictly, more trade barriers should be eliminated.[14] Rather than relying on an absolute quantitative threshold such as 80% or 90%, those advocating a qualitative approach have responded that the range of tariff elimination should cover even those sectors in which there is little trade between the parties. In particular, if lack of trade in an area is due to trade barriers, that area should not be excluded from the scope of tariff elimination.[15] As a result, those advocating a qualitative approach argue that the "substantially all" criterion should be assessed based on the present as well as potential *future* trade between RTA parties, not just trade that is currently taking place.[16]

Despite this variation in criteria, there has been a broad consensus that most of the RTA signatory parties' trade in goods must be subject to the tariff elimination requirement. As a result, mutual exchange of favorable treatment—the elimination of mutual trade barriers to goods—is a necessary condition of concluding an RTA under the authority of Article XXIV. Third-party countries, however, will still be subjected to such barriers. Consequently, the existence of an RTA will result in less-favorable trade conditions for countries not a signatory to the RTA. This strays from the MFN treatment obligation under the GATT.

In order to promote liberalization, the WTO Agreement created an exception to the MFN principle that allowed the establishment of RTAs. Paragraph 5 of GATT Article XXIV stipulates:

> [T]he 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

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because it is a neutral system that counts all goods regardless of whether the parties actually import or export the listed products. *See id*.

13. *See* Committee on Regional Trade Agreements, *Statement by the Delegation of Hong Kong, China on Systemic Issues*, WT/REG/W/27 (July 8, 1998) (arguing that the preferential rules of origin are not real "origin" rules but are instead related to trading arrangements such as RTAs' definition of "substantially all trade").

14. *See* Choi, *supra* note 11.

15. *See, e.g.*, Committee on Regional Trade Agreements, *Note by the Secretariat: Synopsis of "Systemic" Issues Related to Regional Trade Agreements*, WT/REG/W/37, ¶¶ 52, 54–55 (Mar. 2, 2000) (stating that restrictive regulations of commerce should be eliminated with respect to "substantially all the trade" in originating products between parties, and that the qualitative approach requires that no section be precluded from intra-RTA liberalization). *See generally Customs Unions and Free Trade Areas: European Free Trade Association*, ¶¶ 47–58, L/1235 (June 4, 1960), GATT B.I.S.D. (9th Supp.) at 83 (1961). The GATT Working Party's evaluation of the Stockholm Convention, the Agreement establishing the EFTA, also argued that by excluding the agricultural sector, a "major sector of economic activity," the EFTA violated the GATT obligation to substantially include all areas in the elimination of tariff and non-tariff measures. *See id*.; Matsushita & Lee, *supra* note 4, at 31–32 (discussing trade liberalization regarding agriculture).

16. *See* Choi, *supra* note 11.

> the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area.[17]

Without this exception, WTO members would be prevented from becoming parties to RTAs.

B. THE ENABLING CLAUSE

For many developing countries considering regional trade integration, full compliance with Article XXIV's "substantially all the trade" requirement is a demanding task, given the desire to protect their infant industries.[18] Through the Enabling Clause, however, the GATT contracting parties have permitted grants of special treatment for the benefit of developing countries.[19] Before the enactment of the Enabling Clause, special treatment had been accorded to developing countries on a case-by-case basis through a series of waivers. After the Enabling Clause was codified, these waivers became a permanent feature in the GATT system, with the Enabling Clause serving as a permanent and substantive legal basis for according special treatment to developing countries.[20] This allows developing countries to enter into PTAs, which lower trading barriers between them, without fulfilling Article XXIV's requirement of full liberalization of "substantially all the trade."[21]

Paragraph 1 of the Enabling Clause establishes that: "Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."[22] Paragraph 2 of the Enabling Clause specifies which preferential and differential treatments are allowed:

> (a) Preferential tariff treatment accorded by developed contracting parties to products originating in *developing countries* in accordance with the Generalized System of Preferences,
>
> (b) Differential and more favourable treatment granted with respect to the provisions of the General Agreement concerning certain non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
>
> (c) Regional or global arrangements entered into amongst *less-developed contracting parties* for the mutual reduction or elimination of tariffs . . . ;
>
> (d) Special treatment on the *least developed* among the developing *countries* in

17. GATT, *supra* note 3, art. XXIV, ¶ 5.

18. There has been much debate about the validity of protecting infant industries as means to develop an economy. Nevertheless, GATT provisions authorize infant industry protection and allow developing countries to take measures to promote infant industries under provisions such as Article XVIII. *See* YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 56–62 (2006).

19. *See* Matsushita & Lee, *supra* note 4, at 31–33.

20. *See* Choi, *supra* note 11, at 851–53.

21. *See* GATT, *supra* note 3, art. XXIV, ¶ 8.

22. Enabling Clause, *supra* note 5, ¶ 1.

> the context of *any* general or specific measures in favour of developing countries.[23]

Paragraph 3 of the Enabling Clause further stipulates that such differential treatment is permitted only under the condition that "any differential and more favourable treatment provided . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties."[24]

Paragraph 2, subparagraph (c) regulates RTAs "amongst" developing countries, which are a form of "regional or global arrangements . . . for the mutual reduction or elimination of tariffs . . . ."[25] It should be noted that what this provision exempts from the MFN obligation are RTAs entered into "amongst less-developed *contracting parties."*[26] This means that only less-developed countries that are also members of the WTO are covered by this provision. As a result, this exception does not cover an RTA in which one or more of the parties are not members of the WTO or are more-developed countries.[27]

Developing countries can use the Enabling Clause to their advantage in entering into RTAs. All WTO members can derogate from the MFN principle in an RTA as long as the parties to the trade mutually eliminate tariffs across "substantially all trade."[28] This is allowed under GATT Article XXIV for RTAs among WTO members. The Enabling Clause, however, allows developing countries to form an RTA that mutually eliminates or reduces tariffs, without requiring that they do so across "substantially all trade."[29] This allows developing countries to establish RTAs that eliminate or reduce tariffs in certain product sectors while keeping existing tariffs in place for those perceived as vulnerable to foreign competition. [30] Developed countries are not accorded this privilege.[31]

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23. *Id.* ¶ 2(a)–(d) (emphasis added).

24. *Id.* ¶ 3(a).

25. *Id.* ¶ 2(c). Another decision by WTO members provided a legal ground for an exception from the GATT MFN Treatment obligation. *See* General Council Decision, *Preferential Tariff Treatment for Least-Developed Countries*, Decision on Waiver, WT/L/304 (June 17, 1999). This decision did enable developing country members to give general system of preference (GSP) tariff treatment to products from least developed countries, but it did not involve the RTA issue.

26. Enabling Clause, *supra* note 5, ¶ 2(c) (emphasis added). Of course, here "less-developed contracting parties" means "less-developed countries which are parties to the General Agreement on Tariffs and Trade." GATT, *supra* note 3, app. I, art. XXIX.

27. *See* Won-Mog Choi, *Regional Economic Integration in East Asia: Prospect and Jurisprudence*, 6 J. INT'L ECON. L. 49, 75 (2003).

28. *See* GATT, *supra* note 3, art. XXIV, ¶¶ 5, 8.

29. *See* Enabling Clause, *supra* note 5.

30. *See id.*

31. *See* GATT, *supra* note 3, art. I (requiring MFN treatment for all contracting parties).

For example, the South Asian Free Trade Agreement (SAFTA) does not require tariffs to be eliminated, only that they be reduced to between 0% and 5% of current levels within 10 years, in accordance with the phased Trade Liberalisation Programme (TLP).[32] Furthermore, items kept on the Sensitive List by each contracting state are excluded from this reduction program.[33] In the Pakistan-Malaysia FTA,[34] Pakistan agreed to eliminate tariffs on only 43.2% of current imports from Malaysia by 2012, whereas Malaysia is expected to eliminate tariffs on 78% of imports from Pakistan.[35] In both cases, the Enabling Clause, not Article XXIV, was invoked as legal cover for the trade agreement.[36]

Subject to certain conditions, additional benefits may also be granted by the Enabling Clause with regard to non-tariff measures. When forming RTAs, developing countries that are WTO members may choose between the "mutual reduction" and "mutual elimination" of non-tariff measures "in accordance with criteria or conditions which may be prescribed by the contracting parties."[37] Such non-tariff measures include import permits, technical measures, and even certain taxes (on top of tariffs) imposed on imported products. Tax reduction or elimination can involve exempting certain exports of signatory parties from generally applicable taxes paid even by local producers. This exemption disadvantages any other imported products in terms of taxation. Even if this type of measure does not violate the national treatment obligation of the GATT, it may breach the MFN treatment obligation with regard to internal measures.[38] The Enabling Clause thus allows the Contracting Parties to prescribe certain criteria or conditions for this reduction or

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32. *See* Agreement on South Asian Free Trade Area, Jan. 6, 2004, http://www.saarc-sec.org/userfiles/saftaagreement.pdf, (signed by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka).

33. *See id.* art. 7. The sensitive list of each contracting state includes 150 to 1295 items. *Revised Sensitive Lists Under SAFTA*, S. ASIAN ASS'N FOR REGIONAL COOPERATION (Mar. 29, 2011), http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=35 (last visited Oct. 6, 2011).

34. *See* Agreement Between the Government of the Islamic Republic of Pakistan and the Government of Malaysia for a Closer Economic Partnership, Pak.-Malay., Nov. 8, 2007, http://www.commerce.gov.pk/PMFTA/PAk-Malaysia-FTA(TXT).pdf [hereinafter Closer Economic Partnership Agreement]. This agreement was the first bilateral FTA between two Muslim countries. *See* GOV'T OF PAKISTAN MINISTRY OF COM., http://www.commerce.gov.pk/?page_id=195 (last visited Sept. 28, 2011) (discussing the Comprehensive Free Trade Agreement for Closer Economic Partnership between Pakistan and Malaysia).

35. *See* Closer Economic Partnership Agreement, *supra* note 34.

36. *Appendix*, *supra* note 2.

37. *See* Enabling Clause ¶ 2(c) (emphasis omitted).

38. *See generally* Aaditya Mattoo, *National Treatment in the GATS: Corner-Stone or Pandora's Box?*, 31 J. WORLD TRADE 107 (1997) (explaining the interpretation of the national treatment obligation and most favored nation treatment in the GATT, counterpart agreement entered into force by the World Trade Organization in 1995).

elimination of non-tariff barriers, giving a type of "waiver" to the MFN violation problem.

The least developed countries (LDCs) among the developing countries[39] forming an RTA can gain even greater benefits from the Enabling Clause. Under paragraph 2, subparagraph (d), it is possible to accord "special treatment [to] the least developed among the developing countries in the context of any general or specific measures in favour of developing countries."[40] This provision permits WTO members to give "special treatment" to the least developed parties to an RTA that is "entered into amongst less-developed contracting parties" within the context of paragraph 2, subparagraph (c) of the Enabling Clause.[41] In particular, the *least developed* parties to such an RTA may be required to make tariff reductions on a smaller scale than those required of other *developing* country parties.[42]

For example, under the SAFTA, LDCs are required to reduce tariffs to 30% for the initial two-year period and then to between 0% and 5% within an eight-year period. On the other hand, non-LDCs must reduce tariffs to 20% for the initial two-year period and then to between 0% and 5% within a shorter five-year period.[43] Under the ASEAN Free Trade Area (AFTA), the six original members (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) of ASEAN must eliminate tariffs by 2010, and the new members (Cambodia, Laos, Myanmar, and Vietnam) must do so by 2015; but tariffs for certain sensitive products may be eliminated by 2018.[44]

III. CASE FOR "ENABLING" THE ENABLING CLAUSE

A. LIMITATIONS OF THE ENABLING CLAUSE

The current legal framework of the Enabling Clause, which allows preferential treatment for RTAs only among developing WTO member countries, deserves criticism. Many LDCs cannot practically enter into the WTO to take advantage of this preferential treatment, because they do not have the capacity to implement the other obligations of WTO membership.[45] If RTAs formed between WTO members and non-

39. Unless indicated otherwise, "developing countries" throughout this paper are understood to include LDCs.

40. *See* Enabling Clause, *supra* note 5, ¶ 2(d).

41. *Id.* ¶ 2(c).

42. For a detailed discussion, see Choi, *supra* note 11, at 852–56.

43. *See* Agreement on South Asian Free Trade Area, *supra* note 32, art. 7.1.

44. *See* Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, art. 1, Jan. 31, 2003, http://www.asean.org/14183.htm (last visited Sept. 28, 2011).

45. *See* Choi, *supra* note 11, at 855-856.

members are not given preferential treatment, least developed countries will have considerable difficulty keeping pace with the rapid proliferation of regionalism that has come to characterize the world economy.[46] Moreover, limiting the preferential treatment given by the Enabling Clause to only RTAs formed solely between WTO members and LDCs that are also WTO members effectively induces WTO members to discriminate among LDCs.[47] This contravenes the primary aim of the Enabling Clause, which is to give enhanced protection to a single common group of countries classified as the "least developed."[48]

Even if all the signatories to an RTA are WTO members, another problem exists. If even one signatory to the RTA is not a developing country, the agreement is not eligible for benefits provided under paragraph 2, subparagraph (c) of the Enabling Clause. In contrast with developing countries, developed countries are not enabled to accord differential and more favorable treatment to less developed countries when forming RTAs with them.

Because the Enabling Clause does not apply to RTAs formed between developed and developing countries, there is no legal basis on which a developing or least developed country may ask for a smaller tariff reduction when forming an RTA with developed countries. The strict requirement of tariff elimination with respect to "substantially all the trade" under GATT Article XXIV applies to such cases, and developing or least developed countries forming RTAs with developed countries will be required to eliminate most trade barriers against their developed partners.[49]

In this regard, the provisions of Part IV of GATT (Trade and Development), which stipulate differential treatment to developing country members,[50] may also be ineffective. Despite its ambitious objectives to raise the "standards of living" of less developed contracting parties—a task that is "particularly urgent"[51]—and to "enable less-developed contracting parties to use special measures to promote their trade and development,"[52] Part IV does not include any provisions for

46. *See id.*

47. *See id.*

48. *See id.*

49. GATT, *supra* note 3, art. XXIV.

50. Many have viewed the provisions of Part IV and commitments described therein as aspirational and not legally binding on WTO members. *See* ROBERT HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 57–58 (1987); MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 766 (2d ed. 2006); PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 267, 270 (2005); M.J. TREBILCOCK & R. HOWSE, THE REGULATION OF INTERNATIONAL TRADE 475 (3d ed. 2005).

51. *See* GATT, *supra* note 3, art. XXXVI, ¶ 1(a).

52. *See id.* art. XXXVI, ¶ 1(f).

commitments in the context of negotiating RTAs; the only commitments in Part IV are related to negotiations for the reduction or elimination of tariffs under GATT Articles XXVIII, XXVIII*bis*, and XXXIII—not Article XXIV. Therefore, notwithstanding Part IV, GATT Article XXIV applies to developing countries without any modification.

This means that nothing is in fact enabled by the Enabling Clause with respect to RTAs between developed and developing countries and RTAs between WTO Members (developing or developed) and non-member developing countries. This is inconsistent with the statement of principle in the first paragraph of the Enabling Clause, which reads: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."[53]

Paragraph 2, subparagraph (c) of the Enabling Clause effectively nullifies paragraph 1 for RTAs between developed and developing countries.[54] As such, even if a developed country member of the WTO is willing to form an RTA with a developing country that offers smaller tariff reductions that do not satisfy the "substantially all the trade" requirement, no provision in the WTO Agreements would support such an effort. This legal constraint may discourage many developed country members of the WTO from forming RTAs with the poorest nations in the world. It may also discourage the poorest countries from making efforts to integrate their economies with those of developed country members of the WTO. This may be one of the reasons why paragraph 2, subparagraph (c) of the Enabling Clause has not been widely used and why only a small number of RTAs have been reported under it thus far.[55]

Statistics seem to bear out this disabling effect. Less than 40% of all RTAs in force have been formed between developed and developing countries and it is indeed very rare to find RTAs made between developed countries and LDCs,[56] except for PTAs[57] formed between the European Union and its former African colonies.[58] Forming PTAs between developed countries and LDCs can offer considerable benefits to the latter by providing them access to the affluent markets of developed countries, without compromising their industrial growth potentials by

53. *See* Enabling Clause, *supra* note 5, ¶ 1.

54. *See id.* ¶ 2 n.2 (noting that the list of measures in paragraph two is an exhaustive menu of the approved measures that lead to application of paragraph one, whereas anything not mentioned in paragraph two requires WTO members' ad hoc approval).

55. Only 15.4% of all RTAs invoke the Enabling Clause as legal cover. *See Appendix*, *supra* note 2.

56. *See id.*

57. Again, PTAs denote RTAs with limited trade liberalization, whereas FTAs authorized under Article XXIV require full liberalization of "substantially all the trade."

58. *See Appendix*, *supra* note 2.

prematurely opening their markets to the global economy.[59] These PTAs are not currently possible, either under the provisions of GATT Article XXIV, which requires the liberalization of "substantially all the trade," or under the limited Enabling Clause, which gives preferential treatment only to RTAs formed solely between developing country members.

Should the Enabling Clause necessarily enable developed countries to provide PTA preferences to developing countries and LDCs? It could be argued that it is unnecessary to change the Enabling Clause because developed countries can already offer Generalized Systems of Preferences (GSPs) to a large number of these countries in order to assist their economic development by providing preferential trade terms.[60] Extensive GSP schemes, such as the European Union's "Everything-but-Arms (EBA)" preferential trade scheme, have been devised in favor of LDCs.[61] It can be further argued that non-discriminatory GSP schemes represent a better device for providing trade preferences to developing countries than inherently selective and discriminatory RTAs.[62] Indeed, granting trade preferences through PTAs would benefit only those developing countries and LDCs engaged in PTAs and hinder those that are not.[63] Furthermore, the limited use of the Enabling Clause, even among developing countries,[64] suggests that it may not be necessary for developed countries to grant trade preferences under the Enabling Clause.

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59. *See* Choi, *supra* note 11, at 851–53.

60. For more information on GSP schemes, see generally *About GSP*, UNITED NATIONS CONF. ON TRADE & DEV. http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1 (last visited Sept. 24, 2011).

61. The EBA scheme by the European Union is an exemplary trade concession scheme for LDCs. It is an initiative of the European Union that allows all imports (except for armaments) to the European Union from LDCs to be admitted duty-free and quota-free. *See Generalized System of Preferences: Everything but Arms*, EUR. TRADE COMMISSION (last updated Oct. 29, 2009) http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/index_en.htm.

62. *See* Generalized System of Preferences, L/3545 (June 25, 1971), GATT B.I.S.D. (18th Supp.) at 24, 25 (1971) ("[g]eneralized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries. . . ."), *construed in* Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 142–47 WT/DS246/AB/R (Apr. 7, 2004), *available at* http://www.worldtradelaw.net/reports/wtoab/ec-preferences(ab).pdf (interpreting the elements described in the Preamble of the 1971 Decision—"generalized," "non-discriminatory," and "nonreciprocal"—as binding requirements for GSPs); *see also* Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507, 518 (2003).

63. *See* Y.S. Lee, *Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation*, 45 J. WORLD TRADE 629, 632 (2011).

64. Note that less than one third of all RTAs made solely between developing countries have invoked the Enabling Clause. *See Appendix*, *supra* note 2.

Why is the Enabling Clause not widely used, even among developing countries? Two possible reasons may be, first, the prevalence of the neoclassical economic argument since the 1980s, and second, the decline of the infant industry promotion argument in economics.[65] Because free trade and extensive foreign direct investment, rather than trade protection and state facilitation of infant industries, have been advocated as means of economic development, an increasing number of developing countries have been negotiating FTAs entailing full trade liberalization, rather than PTAs entailing limited trade liberalization.[66] Additionally, Eastern European countries, particularly former Soviet republics, have been pursuing complete trade liberalization and economic integration among themselves, rather than PTAs.[67]

B. CASE FOR REFORM

Should developed countries be authorized to enter into PTAs with developing countries, with limited trade liberalization? If authorized to enter into PTAs, more developed countries may be willing to grant trade preferences to developing countries. Unlike GSP schemes, which only allow the unilateral provision of trade preferences, PTAs allow developed countries to receive some reciprocal trade preferences. The very objective of the Enabling Clause supports providing such an inducement; the Enabling Clause was created to "enable," not to "obligate," countries to grant trade preferences to developing countries.[68] As such, enabling developed countries to grant trade preferences through PTAs under the Enabling Clause is likely to benefit developing countries, particularly LDCs.[69]

The MFN principle may be further eroded if developed countries are allowed to enter into PTAs with developing countries. This may well be another ground for objection with respect to the proposed expansion of the Enabling Clause. The erosion of the MFN principle has already taken place to a significant degree, however, as hundreds of RTAs have been

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65. The neoclassical economic policy stance, often referred as "Washington Consensus," reaffirms that the market promotes economic efficiency and fair social distribution. This stance has become the dominant, mainstream academic position worldwide, particularly after the 1980s, and also influenced the positions of international economic institutions such as the International Monetary Fund (IMF), the World Bank, and the WTO. With respect to trade, the pursuit of free trade is an important part of the neoliberal economic stance. *See* Y.S. LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 51–53 (2009).

66. *See id*.

67. As many as 26 bilateral FTAs have been formed among the former Soviet republics and put in effect. *See Appendix*, *supra* note 2.

68. *See* Enabling Clause, *supra* note 5, ¶ 1.

69. Developed countries, particularly the United States, have been inclined to pursue full trade liberalization, not PTAs with partial trade liberalization, with developing countries. *See* LEE, *supra* note 65, at 51–53.

formed since the 1990s.[70] Thus, erosion of the MFN principle should not be considered solely in the context of expanding the authorization of PTAs to include developed countries under the Enabling Clause; instead, it should be considered in the context of the current system, which already authorizes RTAs on a permanent basis.[71]

1. Revision of the Enabling Clause

As discussed above, in this era of rapidly proliferating RTAs, it is necessary to enable developed countries to accord differential and more favorable treatment to developing countries when they form RTAs with one another. One way to allow the inclusion of developed countries in PTA arrangements would be to revise the current language of the Enabling Clause. Specifically, paragraph 2, subparagraph (c) of the Enabling Clause could be amended to enable any member of the WTO to reduce or eliminate tariffs for its developing country partners when forming PTAs, regardless of whether those partners are WTO members. This would also allow the reduction or elimination of non-tariff measures in favor of developing countries, in accordance with any criteria or conditions set. Specifically, the authors propose the following amendment to paragraph 2, subparagraph (c) of the Enabling Clause:

> (c) Regional or global arrangements entered into ***between contracting parties and less developed countries*** for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures on products imported from one another;

The operative language of the amended clause is the phrase "less developed countries." This amendment would allow all WTO members, whether developed or developing, the flexibility to reduce tariffs in the formation of RTAs, not only with other developing country members of the WTO, but also with non-member developing countries. It would also enable WTO members to accord a further degree of flexibility to the LDCs forming the RTA, pursuant to paragraph 2, subparagraph (d).

2. Approval and Control Mechanism in GATT Article XXIV, Paragraph 10

Another way to allow flexibility in tariff reductions in the formation of PTAs involving less developed countries would be to revitalize the special approval procedure under paragraph 10 of GATT Article XXIV, which reads:

> The CONTRACTING PARTIES may by a two-thirds majority approve

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70. *See* Lee, *supra* note 63, at 633.

71. *See id.* at 637–41 (providing a detailed discussion of the arguments in favor of introducing a requirement that RTAs contain a sunset clause).

> proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.[72]

This provision originates from paragraph 6 of Article 44 of the International Trade Organization (ITO) Charter.[73] Under that provision, ITO members could approve by a "two-thirds majority of the Members present and voting" the formation of RTAs that did not "fully comply" with the requirements under Article 44.[74] According to an opinion of the subcommittee responsible for the provision, paragraph 6 of Article 44 had the effect of "enabl[ing] the Organization to approve the establishment of customs unions and free trade areas which include non-Members."[75] Moreover, those states that supported giving automatic permission under Article 44 only to trade areas "between the territories of Members" asserted that paragraph 6 would allow "the formation of customs unions and free trade areas which had one or more non-Members but would give the Organization an essential degree of control" over such agreements.[76] This demonstrates that some states were in favor of allowing the formation of free trade areas between Members and non-Members.

The response of the GATT states to the 1951 Nicaragua-El Salvador FTA demonstrates this "approval and control" process in action.[77] When the FTA was formed, Nicaragua was a GATT Member, but El Salvador

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72. GATT, *supra* note 3, art. XXIV, ¶ 10.

73. It can be said that the WTO is in fact the long-delayed successor to the ITO project. The ITO Charter was agreed upon at the U.N. Conference on Trade and Employment in Havana in March 1948. The negotiators expected the ITO, which was to be created by the Charter, to be "the institutional framework to which the GATT . . . would be attached." However, the U.S. Congress "refused to approve the ITO Charter[,] and that charter was declared dead by 1951." Since then, "the GATT, which came into (provisional) force in 1948, became the focus of attention as a possible institution through which nations could solve some of their trade problems." *See* JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 12 (1998).

74. *See* Havana Charter for an International Trade Organization, art. 44, ¶ 6, Mar. 24, 1948, *in* United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *Final Act and Related Documents*, U.N. Doc. E/Conf.2/78 (1948) ("The Organization may, by a two-thirds majority of the Members present and voting, approve proposals which do not fully comply with the requirements of the preceding paragraphs, provided that such proposals lead to the formation of a customs union or of a free-trade area in the sense of this Article."). Later, to reconcile the text of GATT with that of the ITO Charter, this provision was incorporated into the GATT and became the present-day paragraph ten of GATT Article XXIV. "The sole difference is that for the approval[,] the GATT requires a two-thirds majority of 'members' whereas the Charter required the same majority of 'members present and voting.'" Choi, *supra* note 11, at 838.

75. *See* United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *Report of Committees and Principle Sub-Committees of the United Nations Conference on Trade and Employment*, at 52, ¶ 27, U.N. Doc. ICITO/1/8 (Sept. 1948).

76. *See id.* at 51, ¶ 23.

77. *See* Choi, *supra* note 11, at 839.

was not.[78] When Nicaragua submitted its notice of the RTA to the GATT Secretariat, it used the paragraph-10 mechanism to request permission to enter into an RTA with a non-GATT state.[79] The GATT Contracting Parties granted Nicaragua's request for permission to form the FTA, but instituted an annual review:

> The CONTRACTING PARTIES decide, in accordance with the provisions of Article XXIV, paragraph 10, of the General Agreement, that the Government of Nicaragua is entitled to claim the benefits of the provisions of Article XXIV of the General Agreement on Tariffs and Trade relating to the formation of free-trade areas, and decide to review the above decision, if at any time after study of reports furnished by the Government of Nicaragua and of other relevant data, they find that the operation of the Free-Trade Treaty is not resulting in the maintenance of a free-trade area in the sense of Article XXIV of the General Agreement.[80]

By this decision, the contacting parties approved the RTA, subject to review of the submitted reports to ensure that the parties continued to meet the other requirements of Article XXIV.[81] The decision illustrates the "approval and control" mechanism envisioned by the drafters of paragraph 10.[82]

The "approval and control" mechanism was also employed when Nicaragua decided to join the Central American Free Trade Area (CAFTA).[83] Some of the parties to the CAFTA—Costa Rica, El Salvador, Guatemala, and Honduras—had not acceded to the GATT at the time, so Nicaragua again requested permission from the GATT contracting parties.[84] As before, the parties approved the agreement, but reserved the possibility of withdrawing that approval contingent on subsequent developments.[85] The approval given this time further reinforced the "control" side of the "approval and control" mechanism by setting a

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78. Nicaragua acceded to the GATT on May 28, 1950, and El Salvador acceded to the GATT/WTO on May 7, 1995. *See* Choi, *supra* note 11, at 840, nn.57–58.

79. *See id*. at 839.

80. The Free-trade Area Treaty between Nicaragua and El Salvador, Oct. 25, 1951, GATT B.I.S.D. (Vol. II) at 30 (1952).

81. The review procedure regarding the approval of Nicaragua's accession to the CAFTA, which was expected to occur in 1961, seems to have been aborted; there is no record of such a review. *See* Choi, *supra* note 11, at 839–41.

82. *See id*.

83. *See id*. at 840.

84. *See id*.

85. *See* Participation of Nicaragua in Central American Free-trade Area, Nov. 13, 1956, GATT B.I.S.D. (5th Supp.) at 29, 30 (1957) ("The CONTRACTING PARTIES [*d*]*ecide*, in accordance with the provisions of paragraph 10 of Article XXIV, that the Government of Nicaragua is entitled to claim the benefits of the provisions of Article XXIV relating to the formation of free-trade areas, and [*d*]*ecide* to review this Decision by 1 January 1961 and at any time thereafter if, after study of reports and of the plan and schedule submitted by the Government of Nicaragua, they find that the establishment of a free-trade area in the sense of Article XXIV is unlikely to result within ten years of the entry into force of the Treaty.").

specific timeframe of five years for the review of the approval, followed by subsequent review on a necessary basis.[86] This five-year review period was meant to induce non-GATT states to join the GATT.[87] Failure to accede to the GATT, however, did not automatically lead to a decision to withdraw the approval.[88]

Subsequent examples of the paragraph-10 mechanism in action are few and far between.[89] Because of the highly political nature of the RTA examination procedure in the GATT/WTO, a tacit practice seems to have developed which limits the formal discussion of GATT consistency issues among Working Parties when evaluating RTAs involving non-GATT/WTO states.[90] This, however, does not seem to be a permanent settlement of this issue. As shown in the above two cases, the possibility for claims of inconsistencies in such RTAs has not been removed, and some form of legal affirmation of those RTAs may continue to be necessary.[91]

Revitalizing this approval and control mechanism by requiring formal evaluations on RTAs would provide an alternative avenue of reform. It could provide legal justification not only to the formation of RTAs involving developing countries that are not WTO members, but also to the formation of PTAs between developed and developing countries. If WTO members were to agree on the regular approval of such PTAs, it would effectively overcome the legal constraint imposed by Article XXIV's "substantially all the trade" requirement, which prevents developed and less developed countries from using PTAs to integrate their economies.

It should be noted, however, that the paragraph 10 mechanism cannot serve as a permanent waiver of the obligation to fulfill the "substantially all the trade" condition because paragraph 10 requires that

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86. *See id.*

87. *See* Choi, *supra* note 11, at 840.

88. *See id.*

89. *See id.* at 840–41 ("[In the 1960s,] the number of countries willing to go through the strict approval procedure of paragraph 10 rapidly increased . . . [and] this general trend has become even stronger.").

90. *See id.*

91. A document of record relevant to this issue involves the Interim Agreements of bilateral FTAs between the EC and Estonia, Latvia, and Lithuania. It states: "[t]he representative of Japan said that, despite the fact that Latvia, Estonia, and Lithuania were not members of the WTO, his delegation expected them to respect the obligations of GATT Article XXIV and GATS Article V." Committee on Regional Trade Agreements, *Examination of the Interim Agreements between the European Communities and the Czech Republic, Slovak Republic, Hungary, Poland, Bulgaria and Romania and the Free Trade Agreements between the European Communities and Estonia, Latvia and Lithuania*, ¶ 33 WT/REG1/M/2, WT/REG2/M/2, WT/REG7/M/2, WT/REG8/M/2, WT/REG9/M/2, WT/REG18/M/2 (Oct. 3, 1997), *available at* http://www.wtocenter.org.tw/SmartKMS/do/www/readDoc?document_id=40590 (select "WTREG18M2.doc").

proposals for the approval should "lead to the formation of a customs union or a free-trade area in the sense of this Article."[92] Therefore, any arrangement in RTAs that allows less developed parties to depart from the "substantially all the trade" rule is unlikely to be permanent. But developing-country parties to RTAs could be given more time than the normal 10 years to eliminate trade barriers for a substantial number of product sectors.[93]

Given the nature of this temporary exemption under the paragraph 10 mechanism, a permanent exemption from the "substantially all the trade" rule can only be given by an amendment to the Enabling Clause like the one proposed by this article. Alternatively, paragraph 10 could be amended to exclude developing countries from the application of the condition that "such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article," so as to give a permanent waiver in favor of developing countries when they form RTAs with developed countries.

IV. CONCLUSION

In forming RTAs, WTO members need to take into account the legal problems related to the MFN requirement. GATT Article XXIV provides legal cover for RTAs that would otherwise be in violation of the MFN requirement. The Enabling Clause provides added flexibility in favor of developing countries, but only RTAs formed between WTO-member developing countries can claim this flexibility. Consequently, developing country members of the WTO lack the legal flexibility to favor other developing countries that the commercial reality of development tends to demand. This lack of flexibility limits the ability of less developed countries to form RTAs with developed economies.

The solution to this lack of flexibility is to further "enable" the Enabling Clause through an amendment that would expand the potential reach of PTAs. Although GSPs have been offered as a means for granting trade preferences, PTAs would be more effective. Because GSPs are unilateral trade preferences, whereas PTAs are not completely unilateral, more developed countries might be willing to grant trade preferences to developing countries through PTAs if they were authorized, because PTAs can also grant some trade preferences to developed countries in return. Any LDC parties to such PTAs also deserve more differential and favorable treatment.

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92. GATT, *supra* note 3, art. XXIV, ¶ 10.

93. *See* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, ¶ 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), *available at* http://www.wto.org/English/docs_e/legal_e/10-24_e.htm.

Revitalizing the "approval and control" mechanism in GATT Article XXIV could also significantly facilitate PTAs between developed and developing countries. A consensus among WTO members on this issue would help to temporarily overcome the legal constraint imposed by the "substantially all the trade" requirement, which has discouraged developed and less developed countries from making efforts to integrate their economies. Amending the conditions in paragraph 10 would allow a permanent exemption from the "substantially all the trade" rule to be given for the benefit of developing countries striving to integrate their less developed economies with those of developed countries in this era of rapidly proliferating RTAs. Consequently, this would allow WTO jurisprudence to align more closely with commercial reality and the development needs of developing countries.