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Notification of the GCC to the WTO as a Customs Union: The Whys and Hows

Bashar H. Malkawi*

I BACKGROUND

The Gulf Cooperation Council (GCC) is generally regarded as a success story for economic integration in Arab countries. The idea of regional **integration** gained ground by signing the GCC Charter. It envisioned a closer **economic** relationship between Member States. Although **economic integration** among GCC Member States is an ambitious step in the right direction, there are challenges ahead.

One of the GCC challenges has been in the context of 'dual notifications' leading to political and legal frictions among World Trade Organization (WTO) members. The issue of 'dual notification' is not only a transparency issue, but also substantive and legal in nature.

2 ESTABLISHMENT OF THE GCC

The current era is characterized by the proliferation of regional trade agreements around the world.¹ In light of the slow progress made to conclude the Doha Round of the WTO, an avalanche of bilateral and regional free trade agreements will fill in the vacuum. The legacy of the failure of multilateralism is a renewed global push toward bilateralism.

Arab countries have embarked upon ambitious continental **integration** efforts designed to fulfil their developmental goals.² The principles surrounding Arab economics, their economic integration focus, are the same as for any regional integration: combining the resources of constituent members in an effort to achieve economies of scale, comparative advantages and development.³

The GCC was established in May of 1981. The GCC consists of six Member States: (1) United Arab Emirates, (2) Bahrain, (3) Saudi Arabia, (4) Oman, (5) Kuwait and (6) Qatar.⁴ While there are many elements which led to the establishment of the GCC, chief among them was to foster economic integration between members, increase their bargaining power in international relations and, through collective security, to guard against any threat from neighbouring states. Structurally, the GCC is helped along by the fact that it has a manageable number of states and a high level of development. Thus, GCC members share an already existent **common** identity and cohesion.

The idea of regional **integration** gained ground by signing the GCC Charter. It envisioned a closer **economic** relationship between Member States. The aim of the GCC was to promote cooperation in all fields of **economic** activity in order to increase and maintain **economic** stability, fostering closer relations among its members, and

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¹ Looking at **regional integration**, one can immediately see the upward pattern of the trend. Between 1978 and 1991, the number of **regional** trade agreements (RTAs) remained nearly static. Since the beginning of the 1990s, the trend was reversed and one could observe a constant dramatic increase in the number of RTAs that are being formed. From forty-two RTAs notified to the General Agreement on Tariffs and Trade (GATT) according to Art. XXIV:7(a) of the GATT in 1991, the number increased by 107% to eighty-seven Agreements in 1998. See Matthew W. Barrier, *Regionalization: The Choice of a New Millennium*, 9 *Currents: Intl. Trade L. J.* 25, 27 (2000).

² Arab Countries are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestinian Autonomous Territories, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

³ See Raj Bhala, *International Trade Law: Theory and Practice* 635–650 (2d ed., 2001).

⁴ See the Cooperation Council Charter, List of Member States (1981), <http://www.gccsg.org/eng/index.php?action=Sec-Show&ID=1> (accessed 3 Dec. 2015).

contributing to the progress and development of the Gulf region.⁵ The other founding documents that established the GCC, its main organizations, and its executive procedures are the Supreme Council Rules of Procedure,⁶ the Ministerial Council Rules of Procedure,⁷ and the Commission for the Settlement of Disputes Rules of Procedure.⁸

The GCC led to the establishment of free trade area among its members in 1983 and customs union in 2003. The basis of customs law in the GCC is the Common Customs Code of the GCC.⁹ The Code 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. The Code mandates the implementation of a common external tariff or common customs tariff (CCT) scheme applicable to all third-country imports by the Member States, as well as requires cooperation between national customs authorities in relation to customs matters.¹⁰ The common external tariff of the GCC Customs Union is 5%.¹¹ The common external tariff is a flat-rate charge thus erecting a single tariff wall which no individual state is free to breach. Nevertheless, some GCC members have, individually, bilateral free-trade agreements, e.g., US–Bahrain and US–Oman.¹²

3 THE RELATIONSHIP BETWEEN GCC AND THE WTO

The GCC does not exist in legal vacuum. Rather, GCC is part of the wider corpus of WTO law.¹³ The GCC and the WTO are not independent of each other; they are highly

interdependent. The GCC interacts with regional and international systems.¹⁴ The GCC integration agreements have paid little attention to its relationships with the WTO. There are references to regional blocks and international organizations and the need for the GCC Member States to coordinate with each other. However, these references are not enough. These references do not provide an ordered legal framework for the relations between the GCC and WTO. Issues such as the status of WTO law within the GCC, how the multiple commitments of GCC Member States under GCC law and WTO law can be reconciled, and the rules for resolving conflicts between WTO law and the GCC law have not been addressed by GCC legal documents.

A large number of regional trade agreements are either customs unions or free trade agreements. The General Agreement on Tariffs and Trade (GATT), in Article XXIV, provides for the possibility of creating customs unions and free trade agreements amongst a number of member countries and under which reciprocal preferences are accorded to the participating countries. In addition, developing countries can enter into trade agreements on the basis of the Enabling Clause. An explanation as to why developing countries choose enter into free trade agreements under the Enabling Clause is that the Enabling Clause, contrary to Article XXIV trade agreements, does not require that tariffs and other restrictive regulations of commerce be eliminated with respect to ‘substantially all the trade’.¹⁵ This means that the Enabling Clause enables trade agreements providing for reduction, and not necessarily elimination, of some but not close to all. In other words, regional trade agreements

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- ⁵ The aim of the establishment of the GCC can be deduced from the Charter’s preamble: ‘to effect co-ordination, integration, and interconnections between them in all fields’. See the Cooperation Council Charter, Preamble (1981), <http://www.gccsg.org/eng/index.php?action=Sec-Show&ID=1> (accessed 20 Jul. 2014).
- ⁶ The Supreme Council is the most powerful GCC institution and is the head of the GCC governance structure. The Supreme Council is composed of the head of each of the Member States. The Supreme Council is the principal legislative body of the GCC and authorizes the other GCC entities to implement its decisions in pursuit of its mandate to realize the objectives of the GCC. *Ibid.* at Art. 7.
- ⁷ The powers of the Ministerial Council are more detailed than the Supreme Council. These powers include proposing policies, prepare recommendations, studies and projects aimed at developing cooperation and coordination between Member States in various fields; endeavouring to encourage, develop and coordinate activities existing between Member States in all fields. *Ibid.* at Art. 12.
- ⁸ The GCC Charter establishes the Commission for Settlement of Disputes (Commission). The Commission is composed of at least three citizens of the Member States. The Commission has jurisdiction to consider matters referred to it by the Supreme Council regarding disputes between Member States as well as disputes over the interpretation and implementation of the Charter. *Ibid.* at Art. 10.
- ⁹ See the *Common Customs Code of the GCC States* (January 2003), <http://library.gcc-sg.org/English/Books/customs2003.htm> (accessed 19 Jun. 2014).
- ¹⁰ The Economic Agreement of the GCC countries state that member states shall establish uniform minimum Customs tariffs applicable to the products of countries other than GCC member states. See *Economic Agreement, Art. 4.1* (31 Dec. 2001) (available at <http://library.gcc-sg.org/English/econagreeng2003.htm>). The Economic Agreement amended and revised the Unified Economic Agreement, which was signed and approved on 11 Nov. 1981. See *Unified Economic Agreement* (11 Nov. 1981) (available at <http://www.gcc-sg.org/Economic.html>).
- ¹¹ See *Implementation Procedures for the Customs Union of the GCC* (2003), <http://www.gccsg.org/eng/index.php?action=Sec-Show&ID=93> (accessed 19 Jun. 2014).
- ¹² See *United States-Bahrain Free Trade Agreement*, (14 Sep. 2004) (available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file418_6280.pdf); and *United States-Oman FTA*, (19 Jan. 2006) (available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file987_8839.pdf).
- ¹³ The WTO Appellate Body in the United States-Reformulated Gasoline case stated regarding Art. 3.2 of the Dispute Settlement Understanding that ‘direction reflects a measure of recognition that the *General Agreement on Tariff and Trade* is not to be read in “clinical isolation” from public international law’. See Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, 29 Apr. 1996, WTO Doc. No. WT/DS2/AB/R, at 17.
- ¹⁴ See Joost Pauwelyn, *Overlaps with the WTO and Other Jurisdictions*, 13 Minn. J. Global Trade 231 (2004).
- ¹⁵ See GATT Art. XXIV:8.

under the Enabling Clause are not required to cover 'substantially all the trade'.

A customs union is basically defined as the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade *between* the members and that substantially the same duties and other restrictive regulations of commerce are applied by each member to the trade of territories *not included* in the union.¹⁶ The main difference between a customs union and a free trade agreement is that a customs union has a common external trade regime, including a common external tariff, while a free trade agreement has different external tariff among the members.

4 NOTIFICATION OF THE GCC: SINGLE OR DUAL NOTIFICATION

Regional Trade agreements under GATT Article XXIV shall be notified in accordance with GATT Article XXIV 7(a) which states that any contracting party deciding to enter into a customs union or free-trade area shall promptly notify the agreement and shall make available such information regarding the proposed union or area. The Committee on Regional Trade Agreements (CRTA) ensures the transparency of customs union and free trade agreements and allows countries to evaluate an agreement's consistency with WTO rules.¹⁷ Interestingly, no examination report of an agreement in the CRTA has been finalized since 1995 because of lack of consensus.

According to the Enabling Clause paragraph 4, free trade agreements among developing countries should be notified no later than its entry into force. The Enabling Clause does not however specify where the notification has to be made. A notification can be made either in the Committee on Trade and Development (CTD) or the CRTA.¹⁸ Both the CTD and the CRTA has rather similar powers to undertake examinations of such free trade agreements.

Free trade agreements have to be notified under a transparency mechanism either pursuant to GATT Article

XXIV or the Enabling Clause or both. This raises a number of questions. Can a customs union be notified under the Enabling Clause or must it be notified under Article XXIV? There is little guidance on where to notify different free trade agreements. It is important to address the issue of notification being possible under two different legal acts and what legal and practical effects that can have. The GCC's notification serves as an example of the controversies surrounding the issue of notification.

The GCC was notified to the WTO as GATT Article XXIV customs union.¹⁹ Later, the GCC wanted to change its GATT Article XXIV notification and notified the CTD under the Enabling Clause since it is designed to facilitate trade among developing countries.²⁰ WTO Members have not reached a consensus on where the GCC will be considered.

After the change in notification made by the GCC, other WTO members seemed bewildered and wary. For example, the EC requested for further elaboration on the reasons for this change in notification. There is no obvious reason for change in notification but one can speculate that the GCC may have determined that its customs union qualifies under both GATT Article XXIV and the Enabling Clause but chose the Enabling Clause given the developing country status of GCC members. In the alternative, the GCC could have thought that its customs union would not pass under Article XXIV, but would under the Enabling Clause. Therefore, the GCC changed its notification. The EC also argued that any change cannot be based on the member's preference to do so but rather requires a sound legal justification.²¹ In addition, the EC contended that paragraph 2(c) of Enabling Clause does not cover customs unions.²² Paragraph 2(c) of the Enabling Clause allows 'MFN-inconsistency of regional or global arrangements entered into amongst less-developed contracting parties 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'. According to the EC, this paragraph can only be invoked to justify preferential non-tariff measures in a regional arrangement among developing countries if

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¹⁶ See GATT Art. XXIV subparas 8(a)(i) and (ii) define a customs union.

¹⁷ On 6 Feb. 1996, the WTO General Council decided to establish the Committee on Regional Trade Agreements. Under its terms of reference, the Committee on Regional Trade Agreements is mandated to examine regional trade agreements referred to it by the Council for Trade in Goods. See Committee on Regional Trade Agreements – Decision of 6 Feb. 1996, WTO Document No. WT/L/127, para. 1.a (7 Feb. 1996).

¹⁸ See WTO, Committee on Trade and Development, Legal Note on Regional Trade Arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), paras 19–20.

¹⁹ See WTO Committee on Regional Trade Agreements, Gulf Cooperation Council Customs Union – Notification from Saudi Arabia, 20 Nov. 2006, WTO Doc. No. WT/REG222/N/1.

²⁰ See WTO Committee on Trade and Development, Notification of Regional Trade Agreement, 31 Mar. 2008, WTO Doc. No. WT/COMTD/N/25.

²¹ See WTO Committee on Trade and Development, *supra* n. 18.

²² See Communication from the European Communities, Committee on Trade and Development, Gulf Cooperation Council Customs Union – Notification, WT/COMTD/66/Add.2, (25 Nov. 2008).

criteria or conditions specified therein are established by WTO members.²³ For this is not the case yet, EC argues, the GCC Customs Union – for its non-tariff provisions – is not justifiable under Enabling Clause.

Furthermore, the US argued that the Enabling Clause is an exception to GATT Most-Favoured-Nation principle.²⁴ According to US, GCC Customs Union has resulted in a common external tariff which is above the tariff bindings of some of its members.²⁵ Whenever regional agreements result in inconsistencies with other GATT provisions, such as Article II on tariff bindings, these inconsistencies can only be justified under GATT Article XXIV. Therefore, the GCC Customs Union should be exclusively reviewed by CRTA rather than CTD.

If the US and EC are right in their arguments, this would mean that Article XXIV prevails over Enabling Clause paragraph 2(c) for all regional arrangements. Thus, few if any Customs Unions with non-tariff measures can be covered by the Enabling Clause. By examining the words of paragraph 2(c) of Enabling Clause, it becomes clear that regional or global arrangements with non-tariff measures can benefit from the waiver under the Enabling Clause when there have been no criteria or conditions which may be prescribed by members. WTO members have not yet drafted such criteria or conditions thus allowing developing countries to act as they see fit in their regional arrangements.

A long discussion followed about whether the GCC notification issue was resolved.²⁶ Because the GCC is notified under both GATT Article XXIV and the Enabling Clause and the latter notification has not been withdrawn yet, there are legal and procedural implications for this. It could lead to the possibility that the GCC customs union could be evaluated under Article XXIV and the Enabling Clause. No precedent exists regarding

dual examination. The Transparency Mechanism for Regional Trade Agreements of 2006 did not envisage a situation where an agreement is notified twice under two distinct legal provisions.²⁷ Thus, there should be a modification to the Transparency Mechanism to clarify this issue. In addition, dual examination could create the possibility of conflicting rulings.²⁸ If, for example, the CTD and CRTA came to opposite debates or arguments, this could complicate the task of the multilateral system to check on regional trade agreements and customs unions. Irreconcilable differences between GCC and some WTO members can be susceptible to challenges under the WTO dispute settlement system.²⁹

Internally, some GCC members such Saudi Arabia undertook in their WTO accession to notify trade agreements under GATT Article XXIV.³⁰ This may lead to a situation where some GCC members would like to notify these trade agreements under the Enabling Clause. There is no obvious way to determine which position prevails.

5 CONCLUSIONS

Customs union and free trade agreements can be notified under either GATT Article XXIV or the Enabling Clause. However, there is controversy about notifying customs unions under the Enabling Clause and GATT Article XXIV which is not prohibited legally. The purpose of the Enabling Clause is to facilitate and promote the trade of developing countries and to support their integration into world trade. The issue of 'dual notification' raises procedural and legal questions that require clarification or eventual resolution.

Notes

²³ *Ibid.*

²⁴ See Communication from the United States, Committee on Trade and Development, Gulf Cooperation Council Customs Union – Notification, WT/COMTD/66/Add.1, (25 Nov. 2008).

²⁵ GCC countries apply the GCC common external tariff. The rates of common external tariff for more than 85% of the tariff lines were 5% or 0%.

²⁶ See WTO, Committee on Trade and Development, Gulf Cooperation Council Customs Union – Notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 Nov. 2008), WT/COMTD/M/79, (3 Sep. 2010), WT/COMTD/W/175, (30 Sep. 2010), WT/COMTD/M/80, (21 Dec. 2010), WT/COMTD/M/81, (16 Jun. 2011), WT/COMTD/M/82, (19 Oct. 2011).

²⁷ See Jo-Ann Crawford, *A New Transparency Mechanism for Regional Trade Agreements*, 11 Sing. Y.B. Intl. L. 133 (2007).

²⁸ There are different scenarios that would result if the GCC is notified under Art. XXIV of GATT or under the Enabling Clause because of the differences between these two systems. GATT Art. XXIV condoned the establishment of customs union subject to several stringent conditions. For example, any agreement must include a plan and schedule for the formation of a free trade area or customs union and the formation should be achieved within a 'reasonable length of time'. Because the GCC was notified under Art. XXIV, the WTO CRTA will examine and scrutinize this agreement more extensively to ensure that the GCC does not adversely affect the interests of non-members and to determine how much trade diversion it created, if any. A plan and schedule for implementation of the customs union is required under Art. XXIV:5(c), but not under the Enabling Clause. The Enabling Clause includes more lenient criteria compared with GATT Art. XXIV. For example, unlike Art. XXIV of GATT, the Enabling Clause drops the conditions on the substantial coverage of trade and allows developing countries to reduce tariffs on mutual trade in any way they wish. See *Different and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903, Art. 4.a (28 Nov. 1979).

²⁹ There are several instances in which regional blocks have been dragged before the WTO Dispute Settlement Body for violating WTO law. See for example Turkey-Restriction on Imports of Textiles and Clothing Products, WTO Doc. No. WT/BS34/AB/R (1999). See also Brazil-Measures Affecting the Imports of Retreaded Tyres, WTO Doc. No. WT/DS32/AB/R (2007).

³⁰ See Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61, para. 314 (1 Nov. 2005).

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