Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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Part Two: Regionalism in the GATT

Part Two continues the story of legal developments occurring for free-trade areas under Article XXIV from the establishment of the General Agreement on Tariffs and Trade (1947). Chapter Three discusses the application of GATT Article XXIV in its first major application between developed and developing territories in the working group review of the EEC-Overseas Association (1958). The legal issues raised in this review set a pattern for most of the later GATT free-trade area reviews within which it became routinely difficult to apply the trade-coverage requirements for free-trade areas between territories exhibiting unequal development levels. This is demonstrated in the chapter by notation to a number of later GATT reviews, mainly dealing with EC external regional formations through the 1960's and early 1970's. Many of the issues raised in the Overseas' Association remain unresolved by the practice of reviewing formations to the present time.

The following Chapter Four discusses a number of "systemic" issues that have been raised in GATT practice when attempting to apply Article XXIV to particular types of regional trade agreements. Not all identified issues are treated by the chapter. Rather, the selection is limited to those which are viewed as having had a bearing on the failure of the GATT working groups to make recommendations disqualifying regional agreements notified for review according to Article XXIV. These include definitional issues, such as what constitutes sufficient coverage for the regional members. However, more emphasis is placed upon the types of arrangements, particularly for regional formations between developed and developing territories. This raises the so-called "reverse preference" problem of exacting high coverage requirements for developing country members. Institutional aspects of working group reviews in the GATT are also discussed, particularly in regard to the consensus requirement and the conflict of interest posed to reviewing parties who are charged with applying the Article XXIV to particular agreements.

Chapter Five turns to the GATT dispute panel jurisprudence concerning Article XXIV. This considers in chief two unreported 1990s GATT dispute panel cases concerning the legal qualification of the Lomé Convention. These two panels serve as the primary source of judicial interpretation for Article XXIV's free-trade area provisions prior to the WTO. Although not official, they established the process whereby judicial action would gradually bring the use of Article XXIV under a more meaningful legal control. They retain importance for their implications for the qualification of free-trade areas between developed and developing countries, and the legal effects of GATT review procedures which fail to result in recommendations or decisions affirming or denying the compatibility of regional arrangements with the Article XXIV requirements.

The Conclusion of this Part contains two components. The first addresses an economic issue that is characterised here as systemic. This is to critique Article XXIV from an economic perspective to determine whether economic welfare considerations of trade creation and diversion are an existing component of the Article's requirements, and if not, whether they should be? The position here is that the imposition a trade creation or diversion analysis contradicts the Article's provisions, at least as these considerations could conceivably be imposed upon the trade coverage requirements of Article XXIV:8. Part Two concludes with a summary of the arguments that have been made to justify an Article XXIV requirement imposing a higher standard of internal trade coverage for regional members. The conclusion is made here that the old problem of national prerogative, as exhibited in the selective exchange of preferences, remains an issue in contemporary international economic diplomacy. While MFN retains the authority to reduce the incidence of partially preferential agreements, the absence of agreement on coverage criteria and the institutional mechanism to provide for a more rigorous application of Article XXIV remains a primary loophole in the GATT/WTO legal system.