Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
Mathis, J.H.

Citation for published version (APA):
3 The Overseas Association: Article XXIV in Practice

"(B)ut how many delegates could have foreseen that these provisions would be used also for forging closer Commercial ties between developed and developing countries? Such a colonial-type pact was surely a thing of the past."


3.1 Introduction

Having reviewed drafting history and some of the requirements contained in GATT Article XXIV, we turn now to its application in early practice in order to survey the interpretation issues raised by the Article. Although the EEC Association of Overseas Territories was not the first free-trade area agreement to be submitted to the GATT for review according to Article XXIV, it remains a most important agreement reviewed in the GATT, and for a number of reasons. Besides the size of the arrangement encompassing eighteen separate free-trade areas between former colonies of the original six member states and the declared European Economic Community, the review parties were required to directly confront the most difficult issues regarding the requirements of Article XXIV in respect to free-trade area formations.

Complicating the issues presented in the Review was the nature of the parties to the Association, this being the developed economies of the European Economic Community on one hand, and a large number of lesser or least developed territories on the other. Certain issues raised in the review are distinct to this type of formation, especially the question of whether the reciprocity requirement for forming free-trade areas between countries at vastly differing development levels should be imposed at all. This aspect of the Association made resolutions of the legal issues more difficult, particularly at this juncture of the early GATT practice. Since the EEC continued through the 1960's and 1970's to invoke Article XXIV for a number of Associations and agreements with developing countries, this Review remains a most valuable precedent as it established the pattern.

The approach taken in this chapter will be to address the legal questions in the order they were raised by the Working Group report and then to summarise the positions of the parties. Commentary is provided with each section following the parties' positions.

3.2 Overview of the Association issues

Of interest to the free-trade area requirements of Article XXIV was the work of Sub-Group D. This was established to examine the Association of Overseas Territories, as arrangements were submitted to establish a number of bilateral free-trade areas between the Community as a single territory and the individual territories. The plan was contested. As the report indicated, "most" of the Working Group members did not consider that the Overseas Association provisions of the Rome Treaty were


2 Several arguments advanced by Working Group members have been long recognised as unsustainable under a current understanding of the Article's requirements. Except for passing reference a discussion of these questions is omitted. This includes particularly the question raised as to whether Article XXIV could condone the simultaneous establishment of a customs union (the EEC) and a free-trade area with the Association parties (the Ceylon note). The argument has a slight relevance in its bearing on another issue that was central to the review, that being whether the volume of trade between the parties could add intra-EEC trade. This is discussed below.
compatible with the requirements of Article XXIV. Therefore the territories involved should not be entitled to a deviation from the Article I MFN requirement of GATT.3

The following reasons were listed in the report. First, the EEC Treaty provisions failed to contain an indication that such an association would constitute a free-trade area.4 According to the reported EEC position, whether the Rome Treaty did or did not call the association a free-trade agreement would not alter the nature or legal structure of the resulting formation. Other matters such as investment were also to be covered in the association and the limitation of the terminology to that of a "free-trade area", as applied to these associations, would not be appropriate.5

Second, the internally restrictive aspects of the association were contrary to Article XXIV:4, which stated that the purpose of regional arrangements should be to facilitate trade between the constituent territories. This GATT Article requirement was contrary to EEC Treaty Article 134 authorising the six to take measures in respect to association member duties on imports.6

Third, Paragraph (8)(b) of Article XXIV required that a free-trade area formation must be accompanied by the elimination of the duties and other restrictive regulations of commerce on "substantially all the trade". This GATT sub-paragraph authorised where necessary the maintenance of certain regulations of commerce which were otherwise permitted under the GATT (from Articles XI-XV inclusive, and Article XX). These restrictions on commerce which were permitted between GATT parties generally according to certain requirements, were also therefore permitted between the parties to a free-trade area. However, this did not authorise other restrictions of commerce between free-trade area parties that were not listed in the paragraph. The EEC association appears to have deviated from these GATT requirement in several respects as enumerated:

a) Association countries were not required to eliminate export duties on goods bound for the EEC six;

b) EEC Article 133(3) granted the overseas territories a latitude to install new duties, either for fiscal requirements or for purposes of meeting development goals;8

c) prior international obligations did not permit certain members of the EEC six to reduce duties discriminatorily in reference to the trade of particular association territories;

d) no provision was included in the Treaty for a complete and permanent elimination of quantitative restrictions on exports from the six to the association countries.

In view of the points made above, the construction was viewed by "most" of the Working Group members as a preferential agreement or an agreement to extend existing preferences, rather than as an agreement for the formation of free-trade areas.9 In this view, existing preferences between several of

3 L/778, page 91, para. 9.
4 Ibid., para. 10.
5 Dam has suggested that the arrangement was not initially conceived of as a free-trade area by the EEC, and the seeking of qualification under Article XXIV actually emerged as something of a "legalistic afterthought" Dam, Kenneth W. Regional Economic Arrangements and the GATT, the Legacy of a Misconception, University of Chicago Law Review, V. 30, No. 4, pp. 615-665 (1963), at p. 648.
6 EEC Article 134 permitted measures by the Community to avoid trade deflection. There is no identification in the report of a response particular to this concern.
7 L/778, para. 15.
8 EEC Article 133 stated, "The countries and territories may, however, levy customs duties which meet the needs of their development and industrialization or produce revenue for their budgets".
9 According to Dam, "(O)only two members of the EEC were members of the Working Party: France and the Netherlands. Except for the United States and Greece, which apparently remained neutral throughout the
the EEC six and certain associated countries should be permitted to be continued in force, but should not be permitted to be expanded according to GATT Article I:2. This Article and paragraph committed certain preferential arrangements to a standstill provision. The provisions of the Association necessarily extended the preferences on behalf of all of the six in the customs union contrary to the Article I:2 requirement.\textsuperscript{10}

### 3.3 Issues regarding 'permitted exceptions'

In the Overseas Territories report, the issues raised by the substantially-all trade requirement were central. For a more comprehensive treatment, they can be further divided for discussion.

#### 3.3.1 Permitted internal restrictions and the "exhaustive list"

Article XXIV (8)(b) provides a list of GATT Articles that outline the restrictions to internal trade that are permitted to be retained in a free-trade area.\textsuperscript{11} The primary exceptions contemplated by these listed Articles include, 1) export restrictions to prevent shortages of foodstuffs or other essential products; 2) restrictions connected with the classification, grading and marking of commodities; 3) restrictions necessary to safeguard the country's external financial position in balance of payments and related exchange control restrictions; and 4) the general exceptions to protect human, animal or plant life or health, etc.

By permitting the re-introduction of duties on behalf of the association territories for the purposes of development, some Working Group members took the position that the EEC was invoking an application of the GATT's development Article XVIII to the Associations. Since the development provisions of Article XVIII were not included in the listing of GATT excepted Articles permitted to be applied by regional partners under Article XXIV:8(b), it was argued that the re-imposition of duties for the purposes of development could not be entertained in a free-trade area.

#### 3.3.1.1 The argument for a non-exhaustive listing

Dam singled out this line of argument particularly for his criticism of the "highly legalistic" nature of the report.\textsuperscript{12} However, the passage of time has also revealed that the failure to reach a determination of the status of the listed articles as either exhaustive or non-exhaustive has remained a key element in the difficulties of applying Article XXIV. On a number of occasions it has also been a source of granting a degree of flexibility for regional members that may have extended well beyond what was contemplated by the drafters.\textsuperscript{13}

The EEC's response to the objection also had a significant bearing on later developments regarding the qualification of free-trade areas. According to the EEC view, Article XXIV:8(b) requirements could not have been intended to be exhaustive in enumerating the only restrictions that could be permitted between members of a free-trade area. This was demonstrated \textit{a contrario} by the fact that Article XXI, GATT's basic exception for national security measures, was also not listed under Article XXIV (8)(b). Given the omission of this important GATT exception from the listing,

---

\textsuperscript{10} L/778, para. 20.

\textsuperscript{11} "...duties and other restrictive regulations of commerce (except where necessary, those permitted under Article XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." Article XXIV:8(b).

\textsuperscript{12} K. Dam, Supra note 5 at p. 649, his note 101.

\textsuperscript{13} The EC would affirm its 1958 position on the role of the development Articles as late as the first and second Banana panel cases in the 1990's, discussed in a following chapter.
"(it) would be difficult ...to dispute the right of contracting parties to avail themselves of that provision... and it must therefore be concluded that the list was not exhaustive."\(^{14}\)

The report does not indicate that other Working Group members raised any effective rejoinder to the EEC position regarding the omission of the security exception. By implication, the EEC position that the Article XXIV:8(b) listing was not intended by the drafters to be exhaustive appears to have been tacitly accepted.

In addition, according to the EEC position, any restrictions that regional parties decided to impose upon their mutual trade that did not cumulatively detract from the substantially-all trade requirement should be permitted in any case. The GATT Article exceptions under XXIV:(8)(b), according to this view, could only then have been intended as an indicative listing.\(^ {15}\) The importance of this question is demonstrated when one considers that the Article XXIV:8(b) listing, if understood to be exhaustive, would provide the basis for a leading interpretation that other GATT exceptions to MFN could also not be applied between regional parties. Thus, as between regional parties, Article XXIV would not authorise the use of contingent measures such as anti-dumping and countervailing duties under Article VI and, although certain additional considerations would apply, the use of safeguards between regional members under Article XIX.\(^ {16}\) None of these Articles are listed in GATT XXIV:8(b). Thus, if the EEC's understanding of Article XXIV:8(b) would hold, this would also have significant implications for future practice, as it would necessarily follow that regional parties would have the flexibility to engage in any practice to restrict the trade of their partners, as long as some overall cumulative criteria of meeting substantially-all of the trade was met. Effectively, if the listing of GATT Article restrictions provided in the Article would be understood to be non-exhaustive, then they also must be considered to be essentially redundant.

Völker also visited this question, but followed a somewhat different line of reasoning to reach a conclusion similar to that advanced in part by the EEC in the report.\(^ {17}\) He noted that GATT Article XXI is prefaced by the phrase, "Nothing in this Agreement shall be construed to prevent..." This suggests that nothing in Article XXIV shall prevent the operation of the basic security exception, which would infer that there would have been no need to include Article XXI in the listed Articles operating as exceptions under Article XXIV. However, since Article XX, which is listed as an exception in Article XXIV:8(b), also contains this same preamble language, one would reasonably conclude that the Article XXIV (8)(b) listing was not intended to be exhaustive.

### 3.3.1.2 Interpretation supporting an exhaustive listing

Another reading contrary to the EEC conclusion is possible, although it was neither raised in the Report nor in later commentary. This results from the conversion of the Havana Charter to the GATT. The Havana Charter contained separately titled chapters, including a commercial policy chapter, but also a separate chapter for general provisions. This general provisions chapter included the security exception which applied to all of the Havana Charter. The resulting GATT contained consecutively numbered Articles. Article XXIV's predecessor in the final Havana Charter was numbered as Article 44. The restrictive regulations of commerce permitted between free-trade area partners in the Havana

---

\(^ {14}\) L/778, para. 26. The issue is still raised in the WTO. "With regard to the list of exception in Article XXIV:8, his delegation's position... was that the fact that Article XXI (security exceptions) had not been included indicated that the list was not exhaustive..." Committee on Regional Trade Agreements, comment by Japan representative, (CRTA) WT/REG/M/15, para. 18, p. 6.

\(^ {15}\) As though the clause was intended to read that duties and other restrictive regulations of commerce were to be eliminated on substantially-all trade, except where necessary in cases, such as Article XI, etc.

\(^ {16}\) For now we do not raise the question of whether such restrictions would be permitted in the interim period to formation.

\(^ {17}\) E.L.M. Volker, Barriers to External and Internal Community Trade, Kluwer, Dordrecht, 1993, p. 27.
Article as those, "under Section B of Chapter IV and under Article 45". Chapter IV of the Charter is titled "Commercial Policy" and is that part of the Havana Charter that later became the GATT. Section B of this Chapter IV contains Havana Charter Articles 20 through 24. These Articles match GATT Articles XI through XV and recount them in the same sequence.

Article 45 was also a part of the Commercial Policy Chapter IV and was titled, "General Exceptions to Chapter IV." With some other changes to the text, this Article later came to be incorporated as GATT Article XX, the General Exceptions Article for the General Agreement. In its original Havana position, this Article operated as an exception only to one part of the Havana Charter, the chapter on Commercial Policy, and, by its placement in the Commercial Policy Chapter, was not intended to operate as an exception to the ITO Charter provisions generally.

However, the GATT security exception of Article XXI, the non-listed Article that was raised by the EEC as the basis of its argument for a non-exhaustive interpretation, was not a part of the original Havana Chapter IV dedicated to Commercial Policy. Instead, the security exception was located under Chapter IX of the Havana Charter and numbered as Article 99. It was titled there as "General Exceptions". The rationale for its location outside the commercial policy chapter is quite clear from its preamble, as, "Nothing in this Charter shall be construed..." (emphasis added). Thus, within the Havana drafting context, this exception was not likely placed before the Working Group of the sub-committee considering the provisions for free-trade areas and for customs unions. Nor would it likely have been placed before the Commercial Policy Committee after referral of the draft by the sub-committee.

As Havana Charter Article 44 resided within the Commercial Policy chapter, it was reasonable that it would list only those articles within its own chapter which were intended to be excepted by its operation. Given the overall structure of the Charter, it would have been redundant for the Article to recite exceptions which were provided outside the Chapter on Commercial Policy and which in any case applied to the entire Havana Charter, as did Article 99. The most plausible interpretation is simple mistake. In transferring the provisions from the ITO Charter to the GATT, the security exception, now also brought within the GATT as Article XXI, was simply omitted by oversight in failing to make a reference to an exception that was not originally found within the confines of the Commercial Policy Chapter.

In point, a referral by the drafting sub-committee at Havana that would have included the security exception from the general provisions would have been incongruous as the customs union chapter exceptions were drafted within the context of the Commercial Policy Chapter. This would have had the effect of stating the exception two times. Thus, as recited form our earlier chapter on the Havana drafting, the referral to the larger Committee stated the following:

"(1)In paragraph 4 the definition of a customs union, which was contained in the second sentence of paragraph 4 of the Geneva draft, has been amended and a definition of a free-trade area has been added. This describes a free-trade area as a group of two or more customs territories within which tariffs, etc. (except where necessary, those permitted under section B of Chapter IV and under Article 43) are eliminated on substantially all the trade between the constituent territories... or at least on substantially all the trade in products originating in such territories."^18

There would have been no reason for this listing of articles to include any of the provisions that would govern as exceptions to the Havana Charter as a whole and found outside the parameters of the Commercial Policy Chapter.

---

^18 As cited in Chapter two of the text.
Since Article 99 referred to the entire Charter in its preamble, Völker's point that it would have precedence over Article XXIV remains valid. If one were to interpret the exceptions listed in the Havana Charter Article 44 as though operating under the original Havana Charter, we would certainly conclude that the security clause must also be viewed as an additional exception to the requirements, even though it was not listed. However, since the listing in Article 44 only referred to those articles within its own Chapter that were to be permitted between regional partners, one would finally conclude that the Articles listed in the exceptions were intended to be exhaustive for all those Articles determined applicable by the process of decision making in the subcommittee in reference to Articles of the Commercial Policy Chapter.

This interpretation leads one to a somewhat stronger conclusion that other GATT Articles, notably Article VI and Article XIX, (antidumping and safeguards) were not listed in Article XXIV:8(b) because they were not intended by the drafters to be permitted as exceptions to the restrictions under Article XXIV. This view admittedly serves as a legal basis for a far more restrictive interpretation of the Article than was advanced by the Overseas formation proponents and most regional proponents thereafter. However, a strict view which would require the elimination of commercial defence and general safeguard measures for completed formations does derive support from the conclusions in the previous chapter in regard to the alignment of provisions between customs unions as these were extended to free-trade areas.

If we understand that free-trade areas and customs unions under Article XXIV were to be generally equated in their requirements regarding the substantially-all trade requirement, then a more restrictive but more coherent view of Article XXIV:8(b) is presented. The argument for preserving such measures in a completed customs union is questionable, as it appears inherently inconsistent with the formation of an external common tariff and supposedly, a common commercial policy. 19 In a completed customs union acting as a substitution for other customs territories, members would be met with inconsistency in employing continuing trade measures against goods originating in the other members, just as trade measures would be difficult to effect between provinces in a single national customs territory.

In a free-trade area where a constituent territory retain its sovereign commercial power, the possibility of directing trade measures between members remains real unless all the members are compelled by treaty law to suspend their use, or otherwise agree to do so. As noted in the previous chapter, there was no prior pattern of practice before the GATT for any agreements known as free-trade areas. Therefore, it cannot be assumed that just because other pre-GATT preferential systems retained the use of contingent measures, that such a retention of country prerogative was also consciously envisioned for the free-trade area exception. To the contrary, if a difference was intended to have been recognised between customs unions and free-trade areas, it would have been easy for the drafters to simply provide a different list of exception Articles for free-trade areas. Such a list would have acknowledged that these formations preserved commercial policy to other members. Instead, the

19 While it is not inconceivable that members would retain internal authority while relieving themselves of external authority, such a situation would be not be easy to sustain beyond a transitional period. Just as deviations in the external application of a common tariff would cause the raising of internal trade measures to avoid trade deflection, the application of internal measures would lead to a failure of free circulation. Origin determination would then be required for goods crossing internal borders in order to distinguish those subject to internal measures. In the EEC regime, Article 115 provided for such derogations, but restricted in application to problems incurred by the member states in reference to trade from third countries. As for internal trade, EEC Article 12 eliminated the use of customs duties and charges of equivalent effect, and EEC Article 30 eliminated quantitative restrictions and measures of equivalent effect. EEC Article 91 only authorised the Commission to redress dumping within the common market during the transition period. The placement of this Article in the Treaty's competition policy chapter indicates that the possibility of re-exportation of goods in a completed common market would alleviate the need for individual member-state anti-dumping remedies.
provisions regarding customs unions, including its listed article exceptions were “extended” to the case of free-trade areas.

If Article XXIV:8(b) exceptions had been determined by decision at the time of the Overseas Association review to have been exhaustive, a rather strict equivalency between the internal requirements for the two types of formations would have been obtained at the outset. Neither type would have found a legal basis under paragraph 8 of the Article to apply internal contingent measures to other members for originating goods. Although GATT party practice according to the Article has not respected this line of interpretation in any manner, under different circumstances of review, Article XXIV(8)(b) could have been interpreted to deny the re-introduction of restrictive regulations of commerce other than those necessary as provided in GATT Articles XI through XV, the general exceptions according to Article XXI. This interpretation would have applied to the resulting formations after the completion of interim periods. Under what conditions certain transitional measures would have been permitted would have been addressed on a case by case basis in reviewing the plan and schedule of the parties.20

3.4 Issues regarding “Substantially-all trade”

3.4.1 Internal-duty adjustments

A second issue relating to the internal trade requirement was discussed in The Working Group regarding permitted restrictions between regional partners. In response to the question of whether the GATT Articles listed in XXIV:8(b) were exhaustive or not, the reported EEC position was that, "In any case, the only question at issue was whether the protective duties that were authorized applied to a proportion of the trade of the area consistent with the requirement that duties should be eliminated on substantially all the trade."21

This opinion was elaborated in more detail as,

"...the representatives of the Six pointed out that the elimination of duties within the area - as required by paragraph 8(b) - could not be interpreted as meaning that a duty could not be reimposed or introduced. In the absence of any precise provision to that effect, such a restrictive interpretation could not be accepted...The General Agreement merely provided that the duties in force at a given moment should not affect more than a fraction of the trade, so as not to jeopardize the requirement that substantially all the trade should be liberalized."22

The net effect of providing for such flexibility for a completed free-trade area, would be that, "...if the percentage subject to protective duties reached 20 percent, the institutions of the EEC would then, but only then,...apply for such waivers as they deemed necessary." 23

It is unfortunate that the issue of re-balancing sectors within a completed free trade agreement was not resolved by the Working Group at this juncture. However, an implicit EEC argument was also not addressed. This suggested that the substantially-all trade requirement only applied to the question of protective duties. Although the report indicated earlier that concern was expressed regarding the use between the regional parties of quantitative restrictions, the narrow question at hand during the discussion above was the matter of re-establishing protective duties relative to fiscal charges. In this

20 Non-members have tended to strenuously object to any interpretation of Article XXIV which would permit regional members to take measures against third country trade which would not likewise apply internally. This view is inconsistent with Article XXIV requirements as they are outlined here.
21 L/778, para. 26, italics added.
22 Ibid., at para. 28.
23 Ibid., at para. 32.
regard, the EEC appeared to be making an interpretation of the substantially-all trade test that would limit its scope only to the question of duties to be employed between parties, without consideration of the cumulative effects of other restrictive regulations of commerce.

Thus, even if one adopted a strict position that only those Articles listed as exceptions under paragraph 8(b) could be employed between the parties, the sum total of these restrictive regulations of commerce would also not be included in calculating the substantially-all trade requirement. Since the EEC had already determined that the list of Article exceptions were non-exhaustive, one can only conclude that a qualified free-trade area would permit the use of duties between parties and the adjustment of duties up or down to re-balance and exclude sectors as necessary within the parameter. In addition, whatever other restrictive regulations advisable to be applied between the members would not have any bearing on the substantially-all trade test.

3.4.2 The scope of the requirement as to duties and/or measures

This EEC position presented the Working Group with a question regarding the scope of the substantially-all trade requirement. Shall it be read to permit flexibility for the partners for both duties and measures, for duties only, or for measures only? The EEC view in the report can be read to support the notion that the requirement was being applied only to duties.

Commentator have not been active in setting a response to the question of the scope of the substantially-all trade requirement. One can be reminded of Jackson's suggestion that the term "substantially" was not accidental but reflected the result of careful consideration in the negotiation and drafting of the text. At the same time, Dam left us with a somewhat more cryptic definition of "substantial" in suggesting that it must refer to something less than "all of the trade", but certainly something more than "some of the trade". Neither offered an opinion as to whether the requirement is to be imposed upon only duties or only measures or both. This, however, was the concise issue that was presented by this aspect of the formation as a result of the EEC position taken.

The most restrictive interpretation that can be offered would state that duties are to be eliminated on all of the trade. Then, other restrictive regulations as measures would be entertained according to the Article XXIV(8)(b) listing of excepted Articles and as applied according to those provisions. In this reading the SAT requirement grants flexibility for listed restrictive regulations but does not permit the continuing application or re-imposition of any duties after the interim period.

A "middle" view would permit duties together with other restrictive regulations to be counted together in determining whether substantially-all trade was being covered by the agreement. This would appear to coincide most closely with the punctuation of the text, which provides that, "duties and other restrictive regulations... are eliminated." However, this construction, as does any other permitting maintenance of duties after formation, also forces the question of what exactly is an appropriate quantity of coverage to satisfy the SAT requirement. While the stricter view above does not provide flexibility for any duties, it does resolve the definitional problem of coverage by permitting only those measures that would be permitted between GATT parties as listed exceptions in any case. Although more rigorous, the stricter reading is easier to apply and confers a higher degree of legal certainty regarding the nature of the obligation to be imposed upon regional members.

It is not clear from the report whether the Working Group appreciated that the EEC was advancing the "least strict" interpretation. It is possible that the question of the scope of the SAT requirement was passed over by the group due to the overriding problem as to "how much" trade would be required to be covered in order to qualify for the Article XXIV exception.

3.4.3 The extent of coverage required by "substantially-all trade"

The EEC stated the position that, if the Working Group was not able to advance a clear fraction of what constituted "substantially all the trade", then it was likewise not in a position to determine that a small volume of trade still operating by duties would violate the SAT requirement. The EEC argued that only a small percentage of total trade (1.5%) would be affected by such duties. However, as noted in the report, this volume of trade appeared to include intra-EEC trade flows, a notation that was understood by the Working Group to be inconsistent with the formation of the customs union which would function as a single party to the Associations.

When challenged to present a better calculation to permit an analysis of how much trade was being covered, the EEC note indicated a refusal to provide such data unless the Working Group was prepared to first present its definition of substantially-all the trade. Although it was somewhat disingenuous to attempt to apply the SAT standard to internal EEC trade, the EEC concern in revealing the actual bilateral trade between territories was that once revealed, the Working Group would retroactively determine that the volume of trade covered was inconsistent with the SAT requirement. Thus, the Working Group should "go first" in enunciating the percentage standard to apply, and then the EEC would supply the data. Without such a definition being first provided, the EEC was prepared to consider (unilaterally) that a free-trade area covering 80% of the trade between the parties should be considered as a qualified agreement.

In this exchange it is apparent that both parties were confronted with the problem of enunciating a quantity test which would then provide the other an opportunity to tailor the associations to the requirement. For the EEC's part, bilateral trade flows were not going to be disclosed since the Working Group could then set the fraction of trade at a level which would disqualify the association. However, given the inconclusive form of the agreements being reviewed with their lack of a clear plan or schedule showing reciprocity, and their retained right to re-impose future duties, one can also conjecture that the actual bilateral trade covered by the agreement might not have reached the 80% threshold advanced by the EEC. Later reviews of the Associations do tend to suggest that 80% may never have been reached. Moreover, given these other problems, one could also argue that coverage should have been the last thing to actually consider, and perhaps not considered at all until the other difficulties were addressed to the satisfaction of the Working Group. That however suggests a process that was not in application during this or later GATT Working Group reviews.

3.4.4 Reverse flexibility

While the Overseas Association review concentrated on the subject of reverse preferences, perhaps an impression has thereby been left that only the developing countries were granted flexibility in the preferences they were required to make. This is likely incorrect, and although the flexibility granted to the EEC as a party to the arrangements is not considered in the review, this aspect is also relevant to the legal criteria and forms a part of the necessary story that is to be disclosed in a review process.

Why there is such an absence of attention to the EEC's obligations under the Association is not clear from the review, but it is apparent that no adequate data to assess the EEC's market opening commitment was ever forwarded by the proponents. The EEC assertion that only 1.5% of the trade between the parties was uncovered by the commitment was correctly rejected outright not only for its

---

25 L/778, para 29.
26 Ibid., at para 31.
27 Ibid.
28 Ibid., at para 30. This is the first reference in a GATT Working Group review report of the so-called 80% requirement. It has been occasionally applied in commentary to suggest that some type of finding was made in this Working Group that this percentage level met the requirement. There was no such finding in this review.
inclusion of intra-Community trade flows. In this figure there was also the likelihood that "covered" referred to partial reductions of duties as well as to duty levels committed to be taken to zero. In the EEC's refusal to table the bilateral trade data the degree of trade affected by restrictive measures was also necessarily undisclosed.²⁹

As we know, the result of this exchange was the proponents' self-declared 20% designation, but how would review parties ever determine the meeting of that requirement in the absence of disclosure? From the EEC position, it appears that the proponents would apply for a waiver as necessary according to Article XXV if this 20% threshold were ever breached. Although not taken up by the Working Group, three ramifications are apparent. First, the EC never did concede that the 20% parameter would exclude intra-community trade. If the trade between member states was factored, then substantially all of the trade between the EC and the Association parties could be subjected to measures without breaching the 20% limit. Second, flexibility was intended by the 20% limit in regard to substituting one measure for another, or one sector for another. The EC made it clear that the parties intended to be free to open and close as they wish within the percentage parameter. This would supposedly apply to both measures invoked by the EEC and to measures invoked by the other partners. Third and related, the blanket limit as set made no allocation in regard to the limit to be applied by each party. If the 20% restriction referred to overall bilateral trade, The EC could avail itself of 19% of the limit, granting the partners 1%, or perhaps the limit could relate to 20% of each party's trade to the other.

### 3.5 Chapter Conclusion: 'commitment' as a standard for review

It is conceivable that in a Review presented with different facts, that some progress toward formulating the application of Article XXIV to a free-trade area might have been realised. It is hard to imagine a worse set of facts to challenge the Article, devoid as it was of any previous interpretive framework for the tests to be applied. However, the Overseas Association Working Group did attempt to isolate the various standards to be applied to a submitted formation, and at least sought to determine whether or not the formation was compatible with the Article. One might suggest that but for the proponent's opinions, the balance of the Group might have well voted a resounding 'nay' on the Associations. Nevertheless, from this review forward, commentary has been normally quick to commence its criticism of the process by reference to the imprecision of the drafting of the Article and lack of clarity of the legal terms to be applied. After summarising the review, one is more inclined to lay fault on the lack of transparency in disclosure and upon certain institutional weaknesses in the process, an argument we will develop in the next chapter.

For now, to demonstrate that the Working Group was in control of an appropriate line of analysis which could have led to the development of meaningful criteria over time, the following report statement is offered:

"(M)any members of the Sub-Group said that each case of a proposed customs union or free-trade area had to be considered on its merits and that it was, therefore, inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers without running counter to the definition in paragraph 8 (b) of Article XXIV. A matter to be considered was whether the provisions of a free-trade area pointed towards a gradual increase of barriers affecting the trade between the constituent parties or a gradual reduction of such barriers."³⁰

The comment poses the foundation for a workable test in that it calls for a demonstration of whether regional members intend to reduce barriers over time. Absent documentation to support such a commitment, it is hard to imagine why Article XXIV should be available to grant an exception from GATT's other obligations. As indicated by paragraph 7 of the Article, this demonstration is required

---

²⁹ L/778, para. 30-32.
to be made by the submission of a plan and schedule. With reasonable disclosure, an initial determination can be exacted and examined in combination with the declaration of parties and the provisions of the applicable agreement.

The key element required to apply such a test is that of "commitment". The inquiry should be seen to revolve on the question of whether the parties have demonstrated a quality of commitment sufficient to pass the interim period with a gradual decrease of barriers. If the provisions of an agreement are silent on this point, or actually point to a possible gradual increase of barriers over time, then the quality of commitment is low. The chances of completion are diminished and the agreement should not be supported according to the terms of the Article.31 As minimal as this test is in imposing any precise criteria, arguably the Overseas Association did not even reach this first rung on the ladder. As a number of regional plans submitted after the Overseas Association also failed to exhibit qualities of commitment as suggested, it is not so difficult to understand why so many reviews failed to reach any consensus in support of the regional proponents. It is to a number of systemic problems that flowed from these later reviews that the discussion will now turn.

31 Article XXIV:8 together with Article XXIV:7 is an indication that GATT Contracting Parties are entitled to receive a credible demonstration of commitment.