Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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9 Internal Measures and Article XXIV

9.1 Introduction

An argument has been developed over the last chapter that members to a free-trade area have a practical opportunity to apply certain intra-regional trade restrictions that may otherwise be difficult to apply to the trade of non-members. It appears that a primary difference between a customs union that offers this possibility is the preservation of individual territory residual commercial power that is incumbent to members of a free-trade area. Thus far, the discussion has centred upon the movement of goods where external duties are not harmonised and the manner in which origin may be conferred between members so as to affect the quality of these movements.

This chapter turns to the general question of the WTO legality of internally-applied trade-restrictive measures. The discussion can apply to deviations from most-favoured nation treatment as between regional members generally, but also to measures in the form of contingent commercial instruments such as anti-dumping or safeguards, or in the form of measures other than duties as contemplated by the prohibition of GATT Article XI. The context refers to where a regional member applies a trade-restrictive measure to another, but which does not also operate to exclude the trade of non-members. Since the ability to discriminate between GATT parties would be essential to the exercise of this policy, the contingent-policy instruments of safeguards and anti-dumping actions should both be considered. However, anti-dumping actions are not especially treated within the provisions of most regional trade agreements. Since these actions do fall under the question of permissibility as between regional members, anti-dumping will be treated in the concluding chapter as a consideration of the exhaustive listing of exceptions according to Article XXIV, paragraph 8. While regional trade agreements do often provide for specialised safeguard procedures and regimes, these instruments and their relationship to GATT Article XIX are given a further separate treatment in the next chapter. As for Article XI types of measures, if a quantitative restriction is not excepted by the operation of GATT Article XIX as a qualified safeguard measure, it then falls under the Article XI prohibition and subject to its own exceptions or the exceptions of GATT Article XX. Thus, there is a discussion of these measures both in this chapter and in the following one.

The sequence for the discussion below will be first to treat the applicability of GATT Articles to Article XXIV arrangements generally, and then to consider the question of bilateral modifications to multilateral treaties in the context of GATT and then GATT law under the WTO. The final section of the chapter will discuss whether Article XXIV acts within the GATT as a provision granting a right for permissive modification, and if so, to what extent may members suspend the applicability of GATT Articles in the course of their regional agreements.

9.2 The Applicability of GATT Articles to regional members

The question of whether GATT obligations apply to trade between regional members can be raised whenever treatment between them is different than MFN treatment, but not conducted according to free trade (zero duty). The question may occur both in the case where the treatment provided is more favourable than MFN as well as less favourable than MFN, although the focus here is on the latter situation. At the outset, if Article XXIV were interpreted to require free trade for all the trade of the parties in a completed formation, excepting only those exceptions as listed in paragraph 8 of Article XXIV, then the question would not seem to arise in the same degree. In such a case, regional

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1 The positive-preference aspect asks whether tariff preferences between members short of zero are exempt from MFN, and/or whether they can be included as coverage for Art. XXIV:8 internal requirements. The concluding chapter addresses this second aspect in reference to the CRTA discussion.
members would not have a legal right to take measures falling under Articles VI or XIX, since they are not listed exceptions. Article XI and Article XX measures could be applied, but arguably only as according to the non-discrimination requirements imposed by GATT Article XIII and XX. However, even in this strictest of interpretations, there still may be the question of the application of these GATT Articles as to interim agreements. Then the issue would be whether or not transitional restrictive measures employed between regional members must comply with GATT Articles.

9.2.1 Two views of Article XXIV's exceptional nature

For so-called completed arrangements, there is certainly no consensus that all trade must be covered by zero-duty treatment, and so there remains the question of how to treat this “uncovered” trade in respect of a number of possible applications for GATT Articles. One view, which was initially raised in Chapter three, is that uncovered trade in an otherwise qualified regional agreement is beyond the scope of the GATT. This would suggest that Article XXIV acts as a type of exception from GATT for all of the trade activities of the regional members, except for the application of Article XXIV itself for that trade which must be free in order to qualify the agreement. However, having invoked Article XXIV and been treated accordingly by those procedures, members then become independent of the GATT regime and therefore become free actors to establish their autonomous regional legal regimes, at least as applicable to the goods in trade which are of origin to these members. This view would provide a broad field of play upon which regional members could act to restrict the movement of intra-regional trade.

The opposing view holds that since regional members remain WTO Members, that GATT law, in all of its recognised sources, has a continuing lawful application to the trade of regional members. Thus, for example, where a GATT Article states that “Members shall...”, regional members are also compelled to act in accordance with this instruction, or in the alternative, seek to apply an exception or waiver according to the same procedures that govern GATT parties generally. This view would characterise Article XXIV as providing for no exception for the deviation from GATT Articles other than those that members necessarily undertake in order to complete regional integration requirements, as directed by Article XXIV, in order to grant the MFN exception for the positive preferences.

Each of these views of the Article displays its own characterisation of how MFN should relate to Article XXIV. For the one imposing a more restrictive exception, Article XXIV would be seen to only suspend Article I’s obligation for certain positive preferences exchanged between regional members, and possibly only where these reductions achieve zero-duty treatment. For a view of the Article that provides for an autonomous regime, a consistent interpretation for Article I would suggest that MFN is suspended by Article XXIV in regard to all of the trade of the members, both as to positive and negative preferences enacted between them. Likewise, to the extent that other GATT Articles, such as XI, XIII, XIX and XX, also impose non-discriminatory treatment obligations, these may be considered to be either in force or suspended by Article XXIV, depending upon the view taken of the scope of this exception.

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2 This inquiry could be made necessary whether one asserts that coverage according to Article XXIV:8 refers to either qualitative or quantitative criteria, or both. For example, if regional parties were required to eliminate duties and quotas for x% of their trade, then the question would remain as to how GATT applies to (100% - x%) of the trade. For qualitative, the treatment of excluded sectors or parts of sectors would be considered.

3 We will refer to this position here as the ‘autonomous regime’ view of the Article.

4 MFN treatment may also be the basis of a legal test if a restrictive exception theory of Article XXIV is correct. This test could be stated as, but for the Article XXIV exception, a trade-restrictive measure between regional members would: a) not have been permitted by GATT rules; and therefore, b) would require affirmative validation by invoking an exception or waiver. Depending upon the exception invoked, MFN might require the measure to also be imposed upon other GATT parties.
9.2.2 The example of sectoral agreements

To demonstrate these different outcomes, we can consider the characterisation of sectoral agreements raised by Schoneveld.\(^5\) He stated that the arrangements in question commonly have provisions for quantitative limits upon certain exports coupled with an agreement to manage exports to ensure that trade does not exceed designated quantities. This is accompanied by an additional agreement for the parties to avoid situations that would call for express protective measures and finally, a provision for protective measures to be installed when they are deemed necessary.\(^6\) Whether or not one agrees with his characterisation as to the true intent behind these agreements, a means of determining their legality as they might appear within a free-trade agreement is suggested. This would first consider whether such special provisions would be lawful according to GATT in the absence of any reference to Article XXIV? If not, then a second examination could be undertaken to identify which provision within Article XXIV would act to validate the measures undertaken according to the sectoral agreement. If no such exception can be located there, then a conclusion can be made, for this uncovered trade, that the regional members have violated GATT and the measure must be sought to be validated by some other exception or waiver.

This manner of proceeding identifies first, the legal nature of the restrictive measure itself, and then subjects the particulars to Article XXIV for justification. It does not pre-judge the Article’s capacity to possibly except certain trade restrictive measures enacted. However, it also raises the preliminary question of the initial GATT lawfulness of certain bilateral arrangements made between GATT or WTO Members irrespective of the Article XXIV consideration. Thus, it is necessary to attempt to qualify bilateral modifications between WTO Members at the outset, and in the context of international law provisions which appear to govern the interpretation of WTO provisions on this point. If it is the case that such modifications are generally permitted according to GATT law, as interpreted according to the rules governing treaty interpretation, then it may be concluded that they do not become unlawful solely because they have been contained within an Article XXIV arrangement. Therefore we turn to the question of such modifications at this juncture. Following this treatment, we will return to examine the exceptional nature of Article XXIV as it also may entertain certain permissive modifications.

9.3 Bilateral modifications in GATT (pre-WTO) practice

The issue of whether bilateral agreements between GATT members are permissible under the General Agreement has been raised in a number of contexts. Here we treat the relationship between safeguard agreements and Article I MFN; Article XI violations made by agreement, and the question of special sectoral agreements, such as some of those concluded in the Tokyo Round as “code” agreements.

9.3.1 bilateral safeguards

This question has been raised in discussing the relation between Article I and Article XIX of the GATT, by asking whether bilateral safeguard arrangements are prohibited by operation of most-favoured nation. The view favouring the applicability of MFN to such arrangements was expressed by Dam, who argued that MFN absolutely applied to the invocation of a safeguard measure irrespective

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\(^5\) Schoneveld, F., The EEC and Free Trade Agreements, Stretching the Limits of GATT Exceptions to Non-Discriminatory Trade?, Journal of World Trade, V. 26, No. 5, pp. 59-78 at 68, citing EEC OJ 1981 L 137/21, this legislation as updated is said to have formed the basis for reference by annex in the first generation trade agreements between the EC and certain CEECs, known as the trade and co-operation agreements, and then within the interim agreement provisions of the Europe Agreements.

\(^6\) F. Schoneveld, Ibid., at p. 69. He uses EC-Thailand, Manioc as his example to draw out the provisions, citing OJ 1982 L 219/53. As he concluded, “In almost all the sectoral trade agreements concluded by the Community, particularly when the products concerned are agricultural products, these orderly trade provisions are the real purpose of the agreements.” Here, attention is directed to the inclusion of sector agreements within free-trade areas as annexes.
of the particular source of injury.\textsuperscript{7} He first compared Article XIX with that of Article XXVIII (Modification of Schedules). Dam reasoned that although there was no necessity for the applicant party, under Article XIX, to offer a compensatory readjustment of the tariff schedule,\textsuperscript{6} MFN must be nevertheless applied upon the initial act of suspension even to those parties who were not contributing to the injury. This was based upon his view that, "the general arguments against discriminatory tariffs apply as fully to Article XIX increases as to any other increases."\textsuperscript{9} Thus, in considering how MFN applied to Article XIX, Dam viewed it necessary to observe first the original suspension made by the applicant (MFN is required) and then, the retaliatory suspension made by the affected party. This second action was distinguishable and not, in his view, subject to MFN control since the only party that would be injured if MFN was not applied was the party invoking the safeguard in the first place.\textsuperscript{10}

Dam’s view could be cited to support the proposition that Article I MFN treatment is required when a party seeks to revoke any concession on a selective basis, whether this selective treatment is made by the agreement of another GATT party or not. One may counter the position by reference to a contract-theory argument. This would emphasise a party’s right, according to simple contract to waive the breach of another. Dam may have granted this possibility in the GATT context by indicating that the choice of retaliation is solely the business of the injured party. However, for him, this discretion could not apply as to the original suspension of a GATT obligation. His view may suggest a determination that, while the GATT presents certain contractual elements, it is also not merely a framework for establishing and conducting bilateral relations. Rather, the MFN requirement is suggested to be set unconditionally within the multilateral context and as such, could not therefore excuse the necessity for the original suspension to be made as to all parties as according to the MFN criteria.\textsuperscript{11}

9.3.2 Article XI measures

The question of bilateral modification can also be viewed in the context of GATT Article XI’s prohibition of measures other than duties. The issue of whether these suspension are lawful as between two parties was nearly addressed on point in the EC’s GATT panel challenge to the US-Japan Semiconductor Agreement.\textsuperscript{12} This panel found that Article XI’s prohibition against measures other than duties applied to a system of monitoring exports, which were tantamount to restraints, as


\textsuperscript{6} An underlying assumption applied that a balancing of concessions would be effected by the retaliatory suspension of substantially equivalent concessions or other obligations. K. Dam, ibid., at p. 100.

\textsuperscript{9} K. Dam, ibid., at p. 104.

\textsuperscript{10} Dam found this distinction supported in the drafting of the text, where paragraph 3(a) of the Article dealing with retaliation refers to suspension of, "the application (of concessions) to the trade of contracting party taking such action." This reference is absent in paragraphs 1 and 2 dealing with original suspensions. It is also absent for emergency retaliation. Dam explains this difference as relating to the fact that only in non-emergency (ordinary) retaliation would the contracting parties have the opportunity to review and determine that the retaliatory action was appropriate in not applying MFN. An interpretive note to the Havana Charter is cited by him to support the construction whereby any suspension according to paragraphs 1(a), 1(b) and 3(b), "must not discriminate against imports from any Member country..." However, the note was not provided in the final GATT provisions. Citing, Havana Charter, interpretative note, Ad Article 40, in K. Dam, 1970, ibid., at p. 105, his note 57.

\textsuperscript{11} In regard to the effect of breaches, the character of the multilateral treaty has been recognised as having a significant bearing. Sir Gerald Fitzmouche in his third International Law Commission Report (U.N. Doc. A/CN.4/115), adopted an approach for "Legality of Object" Certain multilateral treaties were not of the mutually reciprocating type, but either \textit{interdependent} by nature (a fundamental breach by one party would justify non performance by all others and not merely just as to the defaulting party) or \textit{integral}, where the force of obligation was self-existent, absolute and inherent for each party, "and not dependent upon a corresponding performance by the others." S. Rosene, \textit{Breach of Treaty}, Grotius Publications, Cambridge, 1985, at p. 87. Dam could appear to suggest that the initial suspension of MFN constitutes a breach of an integral multilateral agreement.

\textsuperscript{12} GATT, 35 BISD 116, 1989.

128
enacted by Japan directed to the EC market. The point at hand would have been treated on these facts if the EC had also framed a complaint to challenge the legality of Japan's controls as they would have also been directed to monitor and restrain its exports to the U.S. market as well. Whether the Japan-U.S. bilateral arrangement also violated Article XI in respect to only those two parties would not turn on the question of whether (or why) any third party, like the EC, would bother electing to make such a claim. Rather, the legal issue is raised whether, as between two GATT parties, an agreed-upon restraint consisting of measures other than duties infringes Article XI?

### 9.4 Vienna Convention (VCLT) and Bilateral Modifications in WTO

One can determine from the above that the question of modifications as between two members has tended to be examined solely in the context of the GATT Articles. With the entry of the WTO, a larger scheme of interpretation appears to frame the issue. While Dam was able to impose Article I upon Article XIX by an analysis of the Agreement's other provisions regarding suspensions, the formation of the World Trade Organisation brings into consideration other instruments of international law, as customary international law. For the WTO dispute settlement context, Article 3.2 of the Dispute Settlement Understanding provides that this system shall function within the WTO to clarify the existing provisions in accordance with the customary rules of interpretation of public international law. Analysis undertaken from this broader perspective may also be seen to validate Dam's position.

#### 9.4.1 The Vienna Convention on Law of Treaties, Article 41

For treaties constituting the constituent instrument of an international organisation, and for those adopted by an international organisation, the Vienna Convention on the Law of Treaties (VCLT) indicates by its Article 5 that this Convention shall apply. A particular Article of the VCLT appears to be directly on point for the question raised above. This is found in VCLT Article 41, titled, "Agreements to modify multilateral treaties between certain of the parties only." This Article provides that,

> "1. (T)wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
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> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (II) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole...."\(^{14}\)

An *inter se* agreement was understood by the drafters to the Vienna Convention to be more likely to disrupt the object and purpose of a multilateral treaty than a treaty amendment which required the participation of all parties.\(^{15}\) Thus, the condition by which such modifications are permissible under

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\(^{14}\) VCLT, Article 41, italics added. The remaining text of the Article states, "2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

\(^{15}\) The term *inter se* was employed by the International Law Commission. The concept of 'modification' is clearly distinguished from other VCLT Articles dealing with treaty amendments. *Inter se* being, "...an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone." Report of the International Law Commission on the Work of the Second Part of Seventeenth Session, Monaco, 1966, Commentary to Article 37, UN General Assembly, 21st Session, Official Records, Supp. No. 9

129
the Convention are more narrowly prescribed. 16 As indicated by the sub-paragraphs cited above, there are two possibilities provided which may grant the right of modification. 17 The first is where the multilateral treaty permits a “contracting out” by its members, as the possibility of providing for such a modification would be expressly provided by the treaty. 18 The second possibility, which is an alternative, is where such modifications are not prohibited by the multilateral treaty. This separate possibility is contemplated by the Vienna Convention in Article 41 in sub-paragraph 1(b), with the additional requirements that the rights of other members are not negatively affected and that the object and purpose of the treaty is not frustrated. That the VCLT Article expressly considers both possibilities of permitted (or not prohibited) suggests some interpretive rules at the outset. If a treaty provides an express permissive right to modification, the conditions stated in 1(b) (i) and (ii) are not relevant considerations, as the terms of the treaty itself would control the circumstances by which modification may be entertained. At the other extreme, if a treaty expressly prohibits modifications, certainly 1(a) is not applicable. Likewise, the conditions provided in 1(b) (i) and (ii) cannot be raised to justify a modification, since the treaty is prohibiting them.

If a treaty is silent on the question of modifications, containing no articles that explicitly refer to the possibility of modification as permitted or prohibited, then it would appear that the conditions of 1(b) are able to applied. Otherwise there would have been little point for the drafters to include the possibility of not prohibited modifications for those cases where the treaty was not expressly permissive. This appears to be the interpretation also accepted by Sinclair, as he stated that, “(a)ccordingly, Article 41 imposes three conditions on the conclusion of inter se agreements, where such agreements are not contemplated in the original treaty” 19 In these cases, the assumption is made that the treaty, since it does not expressly permit modifications, is rather silent on the questions of what modifications should be permitted. Therefore, the sub-paragraph 1(b) goes on to provide its own criteria as listed in (i) and (ii). (The final Article expresses a re-ordering of the conditions. In the 1966 draft, the provision that the treaty not prohibit modifications was listed as the final requirement, (iii). The amendment made it clear that (b) applies only to those cases where the treaty is not expressly permissive. This change altered the structure of the article that may not be reflected by some of the commentary directed to the earlier draft.)

A more complex situation appears to be presented by the GATT as it is a part of the WTO. Here, there may be certain avenues, Article XXV for waivers, and Article XXIV itself, which appear to expressly provide certain means for parties to engage in modifications of their obligations, with certain oversight by the Members. If these GATT provisions can be characterised as providing a

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16 Reprinted from, American Journal of International Law, V. 61, (1967), at p. 384. See also, P. Reuter, *Introduction to the Law of Treaties*, Pinter, London, 1989, at p. 104, para. 207: “(l)f on the contrary, the new text were from the outset directed only at some of the contracting parties, this would amount to a ‘modification’, and this change in terminology involves the application of stricter rules as laid down in article 41.”

17 Under the present article, therefore the main issue is the conditions under which inter se agreements may be regarded as permissible.” ILC Reports, Ibid.


19 Paragraph 1(a) necessarily recognizes that an inter se agreement is permissible if the possibility of such an agreement was provided for in the treaty: in other words, if 'contracting out' was contemplated in the treaty.” ILC Reports, Supra note 15. For example, the United Nations Convention on the Law of the Sea, 10 December, 1982, Article 311, paragraph 3, whereby inter se agreements are stated as permitted according to certain conditions. U.N. Doc. A/CONF.62/122, cited in S. Rosenne, Supra note 11 at p. 85. The vast majority of inter se agreements are unexceptionable. R.D. Kearney and R.E. Dalton, Ibid., at p. 524.

19 I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed., Manchester University Press, 1984, pp.108-9. As for the first provision of Article 41 (b), requiring that the treaty not prohibit modification, Sinclair stated that, “(t)he first of these conditions is self-evident and unexceptionable.” Ibid., at p. 109. One may gather from this comment that the prohibition contemplated must be expressly stated.
permissive opportunity for modifications, then one could conclude that VCLT Article 41 1(a) is in effect. In that case 1(b) should not be considered as being in effect, because the VCLT Article states these two possibilities in the alternative. Either a multilateral treaty is permissive, or a multilateral treaty is not prohibiting. Thus, there appears to be a threshold question of whether GATT Articles XXV and/or XXIV fulfil the conditions of VCLT Article 41 1(a). If so, then any alternative means of modification undertaken by Members would not be permitted modifications under the GATT, as parties would be unable to invoke any of the possibilities provided for by sub-paragraph 1(b) in order to validate them. There is another way of expressing this same construction. If the GATT provisions mentioned do appear to provide certain permissive avenues for modifications, then depending upon how one characterises the exclusiveness of these avenues, it may also follow that non-prescribed alternative forms of modifications are being sought by the object and purpose of the Agreement to be effectively foreclosed. In this case, one may say that while the GATT does not expressly prohibit modifications, the overall structure of the treaty may prohibit be acting to prohibit modifications by implication.20

9.4.2 Permissive Inter se agreements in WTO and GATT

The Marrakesh Agreement Establishing the World Trade Organization (The WTO Agreement) does not provide an Article expressly granting the right of two or more parties to enter into a modifying bilateral agreement. Article X of the WTO Agreement only provides for amendments according to the submission of proposals to the Ministerial Conference, and then acceptance of such amendments only by action of the Members. As for the GATT, Article XXX also provides for amendments, but only by action of the contracting parties. WTO Article XIII does make provision for non-application of the Agreements, but only by reservation at the time of accession of a new Member. GATT Article XXXV referring to non-application imposes the same requirement that such an act of non-application be implemented only upon the act of accession.

9.4.2.1 GATT Article XXV, Joint Action, as modification

For the GATT, Article XXV, titled Joint action, does grant to the contracting parties a right to waive GATT obligations. This may encompass modifications entered by two or more parties to the Agreement. Paragraph 5 of this Article provides that,

"(I)n exceptional circumstances not elsewhere provided for in the Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement."

This provision appears to provide an oversight function on behalf of the contracting parties in regard to the governing of waivers of GATT obligations. This suggests that modifications containing such waivers of obligations are being granted an avenue of permissibility in accord with the procedures stated in the Article. Thus, where two parties have agreed to suspend a GATT obligation between them, it may be suggested that only the contracting parties acting together can “waive an obligation imposed upon a contracting party by this Agreement.” The inference to be drawn is that only one

20 In the 1966 ILC Report, the commentary admits that there is an overlap between the prohibition condition and that one requiring compatibility with the object and purpose of the treaty, since an agreement incompatible with the object and purpose, "may be said to be impliedly prohibited by the treaty." This could suggest that the absence of an express prohibition in the treaty may not absolutely foreclose a finding of prohibition. Article 41 1(b). ILC Reports, 1966, Supra note 15 at p. 384. This comment was framed in the context of an earlier draft of the Article, then titled Article 37. It provided for three cumulative conditions for sub-paragraph (b). To paraphrase, that the modification in question did not (i) affect the enjoyment of the other parties of their rights or performance of their obligations; (ii) did not derogate a provision in an manner incompatible with the object and purpose of the treaty as a whole; and (iii) "is not prohibited by the treaty." In the final accepted Article, (iii) was promoted to the first stated condition of sub-paragraph (b), as quoted in the text above. This suggests that if modifications are not prohibited, only then would one proceed to investigate the other stated requirements (i) and (ii).
party cannot therefore have the power to waive an obligation of another. An early working group appeared to have characterised the inclusive (and perhaps exclusive) nature of GATT Article XXV along these lines as,

(T)he Working Party is of the view that the text of paragraph 5(a) of Article XXV is general in character;...and...stating in respect to the analogous provision of the (ITO) charter that, 'it was finally agreed that all the obligations undertaken by members... should come within the purview of this general provision.'

If so, then one could fairly conclude the GATT, according to Article XXV, has a provision that permits bilateral modifications, subject to joint action.

Regarding the practice, examples can likely be cited where two or more GATT parties have not notified a modification, grey area measures for example, and perhaps this is even the predominant practice over the year of the GATT. However, examples can also be cited where parties have invoked the Article XXV procedure. Either way, the power of contracting parties to engage in the oversight of modifications also has definitely been confirmed on a number of occasions. For example, the Decision of the Contracting Parties regarding the Agreements on Trade in Bovine Meat and Dairy Products (1980), made an affirmative determination that those signatories could not amend the General Agreement. In addition,

"3. The Contracting Parties also note that the existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements." 

It would seem that inherent to the power to secure the rights of non-signatories would also be the power to determine that the modification was not in accord with the GATT rules. Thus, Even while GATT Decisions have (consistently) held that a determination of the rights and obligations between bilateral parties is beyond their competence, the question of whether such agreements are consistent with GATT law has rarely, if ever, been foreclosed. For example,

"(T)his Decision by its terms clearly refers only to the determination of the rights and obligations as between the parties to the bilateral agreement and arising from the agreement. It is, however, within the competence of the Contracting Parties to determine whether action under such a bilateral agreement would or would not conflict with the provisions of the General Agreement." 

If this is a correct view of Article XXV, then it may be concluded that Members to a bilateral agreement waiving the application of a GATT Article have an obligation to seek the approval of the contracting parties according to joint action. Where such a waiver has not been sought, then the

22 Jackson, John H., (1967), The Puzzle of GATT, Journal of World Trade Law, Vol. 1, No. 2, p. 154. As Jackson characterised the early practice, one category of use for Article XXV was for, "waivers granted for import quotas on agriculture goods (primarily to 'legitimize' prior action otherwise in violation of GATT)." Also for MFN, "an action in 1951 that may have been a waiver, which 'took note' of US suspension of GATT treatment towards Czechoslovakia." Ibid., citing GATT, 1952 BISD, Vol. II, p. 36.
24 Decision on Margin of Preference, adopted 9 August 1949, reported in Gatt, Analytical Index, Ibid, at p. 671. The Decision was made in the context of the availability of dispute resolution (Article XXIII) to a party within a bilateral agreement. Similarly, agreements that appear to act as modifications have expressly provided that the rights of other GATT parties shall not be affected. Thus, as to the legality of quantitative restrictions permitted in the Arrangement Regarding International Trade in Textiles, (MFA, 20 December 1973), paragraph 6 of Article 1 states, "The provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT." Gatt, Analytical Index, Ibid., at p. 320.
suspension of GATT obligations contained within the modification may, at the least, be voidable at the later discretion of the contracting parties.  

9.4.2.2 GATT Article XXIV as a modification provision

The VCLT by Article 41 1(a) provides for the right of two or more parties to modify the treaty as between themselves where the treaty permits such modification. GATT Article XXIV:5 provides that, "...the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area...provided that..."

This phrase in Article XXIV appears on its face to grant a permissive, but conditional, right for members who have formed free-trade areas and customs unions to engage in modifications subject to the provisions contained in the Article.

9.4.3 Conclusion on permissive modifications in the GATT

Identification of GATT Article XXIV and XXV provisions regarding the suspension of one or more GATT Articles between two or more parties suggests that GATT has sought to accommodate these possibilities within the framework of the Agreement, as according to VCLT Article 41 1(a). If it is correct that such modifications are permitted by the GATT according to the VCLT, then the possibility of invoking the criteria of VCLT 41 1(b), for multilateral treaties which are not permissive but not expressly prohibitive, would not seem to be provided. This is according to the construction of the VCLT Article made above that would only permits the consideration of non-prohibited modifications according to subparagraph 1(b) in the event that subparagraph 1(a) does not apply to the circumstances presented in the treaty.

An objection to this reasoning would be made that, as between two parties, as long as their suspension of GATT obligations does not harm other Members, or other Members choose not to complain, then modifications should be permitted. This argument essentially invokes the considerations of VCLT 41 1(b) at the outset (no interference with rights, no diminishing of object and purpose). The difficulty with this position is that the considerations of VCLT 41 1(b) should not be raised in the case where the treaty is otherwise permitting modifications according to its own terms. As above, this is made clear by the construction of the Article as "either/or" between permitting or not prohibiting. At the same time, the disregarding of the construction of the VCLT Article in this manner also belies a view of the multilateral treaty in question, as being merely a framework to engage in bilateral arrangements. If this were the case, then one should ask why the treaty would even provide for any conditions regarding the oversight of bilateral arrangements, as according to Articles XXIV and XXV. Rather, the fact that these provisions are included suggests these permitted avenues for modifications are intended to foreclose other possibilities. Thus to summarise, if the multilateral treaty, by its own provisions, accords an express procedure for modifications, then there would be no need to consider whether a modification implemented without regard to that procedure has any affect upon the enjoyment of rights of other parties or is (in)compatible with the object and purpose of the treaty.

Assuming that one chooses to press the interpretation that GATT freely permits modifications, some view of the object and purpose of the agreement appears to be appropriate. For this, we know that the GATT preamble dedicates the Agreement to the expansion of world trade and to the elimination of discrimination in international commerce. In order to achieve these goals, a number of core obligations are stated throughout the agreement. The manner in which these requirements are stated suggests that the object and purpose of the GATT is realised by the imposition of a set of


133
unconditional rules of conduct upon all (not some) of its contracting parties. This is to contrast with merely establishing a framework for future bilateral relations advancing the expansion of trade.26

Thus, GATT Article I:1 declares that any favour granted by any contracting party...shall be accorded. Article XI states that no prohibitions or restrictions other than duties shall be instituted or maintained by any contracting party. Article XIII specifies the conditions for certain permissible quantitative restrictions, but requires that no restriction shall be applied by any contracting party...unless the importation...or the exportation of the like product to all third countries is similarly prohibited. Likewise, for Article XIX and the WTO Safeguards Agreement, Article 2.2 of the Agreement provides that safeguard measures shall be applied to a product being imported irrespective of its source. Article 11 of the Agreement prohibits certain measures by stating that a Member shall not seek, take, or maintain a voluntary export restraint on either the import or export side.

What is seen from these provisions is a pattern of addressing unconditional obligations to each and every GATT contracting party (now WTO Member). The obligations, on their face, do not entertain possibilities for selective application of the rules as to some and not others.27 Likewise the rules do not raise avenues for bilateral suspensions between Members. They do not further appear to be optional only to the extent that parties agree to be bound by them. Although one may always suggest that all obligations are only enforceable to the extent that an injured party chooses to take redress, this appears to deny the unconditional nature of the obligations themselves, as they make no such reference to their applicability subject only to redress.28

Where the rules are fashioned as above, it seems difficult to draw an interpretation that the customary rules of international law would endorse the practice of Members to develop modifications by means other than those laid-out in the General Agreement. Thus, bilateral parties may not argue that all modifications are permitted as long as the rights of other parties are not affected, or that the modification is not incompatible with the object and purpose of the treaty. This may well serve as a criteria for the joint action of the contracting parties in applying GATT Article XXV, but these considerations do not otherwise operate as an independent criteria which serves to endorse a bilateral modification.

A final issue regarding Article XXIV is considered. If this article serves as a permissive right to establish modifications, then what conditions are being imposed upon parties who choose to modify according to this Article? What, if any, GATT obligations may be suspended by such a modification? As drawing from the first section above, this question relates closely to whether Article XXIV allows regional members to establish a self-contained legal regime within which GATT rules apply only to the extent that members agree to be bound. This would provide the broadest field to engage modifications, and would also suspend any need for regional members to refer to GATT waivers to Article XXV, as the Article XXIV framework would have already acted to suspend the obligations.

26 This point is drawn from P. Reuter, Supra note 15 at p. 103. Asking the question, whether or not a multilateral treaty, "can be divided into a series of independent bilateral agreements without losing (its) raison d' être...Some multilateral treaties go beyond the framework of simple reciprocity and cannot be broken down into a collection of bilateral undertakings."

27 The new WTO Safeguards Agreement does provide for selectivity, but also according to its own rules regarding notification and monitoring by the Safeguards Committee.

28 There is tangential support offered by WTO rulings on legal standing. While WTO law does not ignore the requirement of standing, a Member is given a broad discretion in deciding whether to bring a case against another member. This discretion appears to extend beyond just those parties who can show an infraction of their direct legal interest in the matter. European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 22 August 1997, paras. 132-138; at para. 136, and concurring with the panel that, "...with the increased interdependence of the global economy... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."
9.5 The scope of the Article XXIV exception

The autonomous regime theory for Article XXIV would suggest that the Article provides for a complete permission to suspend the GATT’s other Articles as to all of the uncovered trade between regional members. If valid, this view would have a bearing on the relationship between GATT and regional parties, particularly for Articles I, VI, XI, and XIX, as they would no longer be seen to apply to regional members who have qualified to take the exception accorded by Article XXIV. For an example, if Article XIX is suspended by the operation of Article XXIV, then it would follow that any sectoral arrangement, as described above by Schoneveld, would then be rendered lawful by the act of incorporating it within the framework of a free-trade area agreement. This interpretation would grant the widest possible latitude for regional members to compose and implement trade-restrictive measures between them. Thus, any case to be made for applying GATT to the trade of regional parties must first dispel the possibility that Article XXIV functions within GATT as a general right to conduct modification, other than by operation of the Article’s own specialised waiver provision as found in paragraph 10.29

The argument for reading into Article XXIV a general power to suspend other GATT Articles infers that the Article operates to grant an exception for all the preferences that are possible to engage in between regional members. This encompasses two categories of possible exceptions. The first is for all those positive trade-liberalising preferences exchanged between members in the course of meeting the paragraph 8 requirements to eliminate duties and other restrictive regulations of commerce. These are the ones that non-members are most concerned about, as they are sought to be excluded from MFN and thereby are not extended to the non-members, with the resulting risk of external trade diversion.

However, in order to validate the autonomous regime theory, a case must also be made that Article XXIV provides a more general right to conduct modifications, as it would also suspend the application of GATT rules for all of the negative preferences that may be applied between regional members. This exception would then allow parties to treat each other’s trade less favourably than that required as to other GATT parties according to MFN and other rules. The obligation to accord MFN treatment clearly falls under this consideration, as suggested earlier in the chapter, as it also reaches to provide a redress under GATT law for this negative discriminatory treatment. Thus, if “A” wishes to foreclose “B” by raising its import duty only as to “B”, then all other members become most-favoured. “A” must also seek to foreclose upon everyone. Thus, if Article XXIV is to be interpreted as providing a permission to deviate from this aspect of MFN, there must be an interpretation advanced for Article XXIV that would permit negative preferences between regional members as a part of the exception.

9.5.1 Article XXIV’s stated objective

Such an interpretation would be a convoluted result for Article XXIV in direct conflict with the stated objective of the Article’s exception. Paragraph 4 of the Article recognises that it is desirable to increase the freedom of trade by certain of these agreements, and views the purpose of such agreements to facilitate trade between their members. This suggests that regional trade flows should be enhanced as a result of the modification. This purpose would justify the granting of an exception for the positive preferences to be exchanged, since the whole purpose of these preferences would be to liberalise the conditions for intra-regional trade. However, this stated purpose of the article does not appear synonymous with the concept of restricting trade between constituent members. Consider the wider compromise enacted by the Article’s exception. Non-members forego their right to receive MFN treatment in respect to the positive preference being engaged, all in order to facilitate trade

29 This allows the contracting parties to waive certain defects in a free-trade area or customs union plan. However, a customs union or free-trade area must yet result.

135
between members. In view of the purpose of the Article, one must query why its provisions would then go on to grant regional members an additional exception from MFN for measures undertaken between them that restrict trade rather than facilitate it? It would seem rather that the right of engaging a modification according to the Article is limited to the purposes expressed by the Article itself.

9.6 Chapter Conclusion

Although Article XXIV provides the basis for establishing certain bilateral preferential agreements in the form of free-trade areas, these agreements remain, just as Article XXIV remains, within the multilateral framework of the General Agreement and the WTO. It does not follow as plausible that a regional party can derive an exception from Article I or XI by incorporating a trade restriction into an Article XXIV arrangement. One qualification to this conclusion, however, is that Article XXIV:8 also provides its own listing of permitted quantitative restrictions that may be applied between regional partners. As for GATT parties generally, certain MFN considerations continue to apply in the application of all of these measures. A consistent conclusion with the above argument is that these MFN considerations also remain in force as between regional members who find it necessary to apply the restrictions.

Measures that fall within GATT Article XIX deserve more treatment, as this Article is not listed in the exceptions provided by paragraph 8 of Article XXIV. Since special arrangements are also often made between regional members in the taking of safeguards, the treatment of these regimes will consume the next chapter. As we will see, many of the consideration raised above regarding the application of GATT Articles are also applicable in the context of safeguard arrangements made between regional members.

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30 Such restrictive measures may be argued as necessary on an interim adjustment basis in order to assist in the overall formation within a reasonable time. This does not endorse the continuation of such restrictive regimes after the interim period.

31 GATT Article XXIV:8(b) lists as exceptions, Articles XI through XV and Article XX. These Articles also require certain non-discriminatory applications when the exceptions are permitted.