Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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Article XXIV Panel and Appellate Body Practice in the WTO

11.1 Introduction

In the previous chapter we discussed the two unreported GATT panel cases which applied the legal requirements of GATT Article XXIV to the Lomé Convention. As the WTO and its Dispute Settlement Understanding came into force, it was perhaps only a matter of time before a preference or measure enacted in the context of an Article XXIV formation, whether free-trade area or customs union, would be met with a legal challenge. Ironically perhaps, the first WTO challenge did not arise in the context of an MFN complaint regarding the preferences exchanged between free-trade area members. Rather, a customs union formation between the European Community and Turkey provided the context. The question concerned the GATT legality of new quantitative restrictions installed by Turkey on the trade of a third party, India, all in furtherance of the customs union plan.

While this issue concerned the application of external rather than internal measures taken by a regional party, both the Panel and the Appellate Body dealt at length with the legal nature of Article XXIV as it may serve as a type of exception to other GATT Article violations. The legal position of the Article within GATT and the requirements necessary for a party to successfully invoke its exceptional nature have been established, arguably for the first time. As an aspect of this development, the relationship between the various paragraphs of Article XXIV, in particular paragraphs 4, 5 and 8 have also been discussed. The ordering of these paragraphs is especially of note in the Appellate Body’s ruling that paragraph 4 is purposeful by nature but does not establish an independent legal test for the examination of regional trade agreements. In addition, both the panel and the Appellate Body have commenced the process of judicial interpretation of some of the substantive terms provided in the Article’s paragraphs. By so doing, the direction of interpretation for future reviewing parties has been spelled-out for even difficult expressions such as, other regulations of commerce, and substantially all of the trade.

Finally, in a complex and likely controversial determination, the Appellate Body has also arguably established a requirement that future panels must undertake a compatibility assessment of a regional trade agreement when a member is seeking to invoke the Article XXIV defence. While this ruling has a number of institutional implications, one such inference, as discussed below, concerns the WTO Committee on Regional Trade Agreements (CRTA) in those cases where the CRTA does not form an affirmative recommendation regarding the compatibility of a regional trade agreement with the Article’s substantive requirements. Such a non decision can no longer be presumed to grant a self declaratory avenue for regional parties to obtain the benefit of the exception. Rather, invoking regional parties must be prepared to make their entire case for compatibility before the panel. If so, the practical legal effect of notification of a regional trade agreement before the Council on Trade in Goods may be limited. Regional parties may only be deriving for themselves a future right, together with the commensurate burden of proof, to affirmatively establish Article XXIV compatibility as a matter of first impression before a panel. Perhaps time will tell whether any regional party will ever choose to invoke the Article XXIV defence subject to these terms.

Shortly following the Appellate Body Report in the Turkey textiles case, another Article XXIV case came to light, this one dealing with safeguard measures upon footwear taken by Argentina. This case also received Panel and Appellate Body treatment with a reversal specifically on the question of whether Argentina’s individual safeguard measures could be attributed to the MERCOSUR customs union. Since the Appellate Body dealt in depth with the requirements of Article XIX as they might apply to a member of customs union, this case outlines some significant terrain for the relationship between GATT Articles and Article XXIV. It does not however resolve the question of the legality of applying safeguards between regional members, even while the Appellate Body reversed the Panel’s finding that Article XXIV granted a permissive approach to the question, up to some point where substantially-all trade would be undermined. For the Appellate Body, the question of safeguards between regional members was expressly not ruled upon.

The chapter discussion will proceed by outlining the factual aspects as presented in the Turkey Textiles and Clothing case and then moving on to the Argentina footwear cases. A brief conclusion on each case will be provided. The commentary seeking to integrate these rulings will be made in the concluding chapter of the book, together with a treatment of the remaining systemic issues presented for WTO Members in their review of regional agreements.

11.2 Turkey – Restrictions on Imports of Textile and Clothing Products

India requested the panel in February 1998 in light of the GATT and the WTO Agreement on Textiles and Clothing (ATC), claiming that quantitative restrictions (QRs) imposed by Turkey on Indian products were inconsistent with Turkey’s obligations under GATT Articles XI and XIII, and were not justified by Article XXIV.6

The WTO Agreement on Textiles and Clothing requires, by 1 January 2005, that import countries will thereafter be barred from discriminating between exporters in the application of safeguard measures via the Multi-fibre Arrangement (MFA). Although Turkey was a member of the MFA from 1981, at the time of entry into force of the ATC Turkey did not maintain quotas on imports of textiles and clothing (T&C) products. Therefore, Turkey was not able to notify any pre-existing safeguards for preservation under the ATC until 2005. The EC however did notify and therefore retained certain quantitative safeguards according to the provisions of the ATC. Between the two parties, Turkey’s exports of T&C products were also under a restraint as to the EC market, and in accord with the MFA provisions.5

11.2.1 Association Agreement, Turkey-EC customs union

The contested measures originated in the context of the Turkey-EC Association Council Decision 1/95 of March 1995, setting out certain modalities for the final phase of Association between Turkey and the EC for the completion of a customs union.6 This Decision required the elimination of customs duties, alignment of the common customs tariff, and provisions for the harmonisation of certain other policies. The entry into force of the “final phase of the Customs Union” was notified to the WTO in December of 1995 under Article XXIV GATT.7 The Council for Trade in Goods referred the notice to the Committee on Regional Trade Agreements (CARTA). No finalised examination or finding, either negative or affirmative, was made by the CARTA prior to the dispute being brought by India before the panel.

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3 Report of the Panel, 31 May 1999, WT/DS34/R.
4 Discussion of Article 2.4 of the ATC is generally omitted in this summary.
5 Turkey Panel Report, paras. 2.29 and 2.30.
7 Turkey Panel Report, para. 2.17.
11.2.2 Measures undertaken

Turkey applied quantitative restrictions from January of 1996 on imports from India for 19 categories of textile and clothing products. The QRs for 1996 were allocated on a quarterly basis, upon a semi-annual basis for 1997, and annually for 1998. The actions taken to impose the QRs were made by Decrees issued by Turkey's Council of Ministers and published in the Turkish Official Gazette. This resulted following proposals made by Turkey to India to negotiate on a draft memorandum in July of 1995 for the purposes of completing, prior to the formation of the customs union, a series of measures similar to those already existing between India and the EC.

India declined to negotiate on this basis. Turkey went on to effect restraints similar to those applied by the EC with 24 other countries. The unilateral measures described above were installed for T&C products originating from a total of 28 countries, including India.

11.3 Preliminary Issues Before the Panel

The Panel made preliminary rulings on a few points that contribute to an understanding of the legal identity, for WTO purposes, of regional parties and the measures undertaken by them as individual WTO members.

11.3.1 Compelled joinder of parties,

As a first question, Turkey asserted that the EC should have been named as a party to the action as brought by India. Turkey based its claim here on the point that the Turkey-EC customs union had been notified to the CRTA as a customs union, and therefore should be represented as such by its constituent members. The Panel noted that the EC had declined to participate and found that the Dispute Settlement Understanding does not allow for any procedure to join a party other than third-party rights under Article 10 of the DSU. Thus, “We consider that we do not have the authority to direct that a WTO Member be made a third-party or that it otherwise participate throughout the panel process.” In addition, the panel noted that the Turkey-EC customs union was not a member of the WTO and could not therefore be subject to any DSU procedure, “as it lacks WTO legal personality”.

11.3.2 Attribution of measures, customs union legal personality

A related issue presented asked whether the measures enacted were attributable to Turkey, to the EC, or to the Turkey-EC customs union. On this the panel provided a discourse on the conditions by which a customs union may be viewed to have a legal personality distinct from that of the constituent territories for purpose of the attribution of its measures. Such a question should not be seen to turn on quality of movement within the territory, but rather upon the degree of sovereignty actually retired by the parties, and as determinable on a case by case basis.

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8 A formula used by Turkey corresponded either to (i) the arithmetic average of imports into Turkey during the period 1992-1994; or (2), annual amount based on EC imports multiplied by the percentage of the “basket exit threshold” laid down in an EC and India bilateral agreement for 1994, multiplied by the percentage share of Turkish GDP in the EC 15 (2.5 percent). Generally, Turkey Panel Report, paras. 2.37-2.39.
9 Turkey Panel Report, para 2.33.
10 Turkey Panel Report, paras. 2.35 and 2.36.
11 Other preliminary issues were resolved in favour of India and affirmed the preliminary rulings made by the panel in the present case. These included an allegation of insufficient description of the measures in order to permit defence and whether India had properly followed consultation rules as required by the DSU. See generally, Turkey Panel Report, para. 9.1.
12 Turkey Panel Report, para. 9.5, quoting the preliminary ruling.
For the Turkey-EC customs union, there were no arrangements made for a legislative body with constitutional authority. While there was an Association Council provided for the customs union, its powers were understood to be limited to action according to unanimity. This indicated an intent by the constituent parties to preserve each party’s sovereign right to act independently. Therefore, the measures must have been undertaken by Turkey alone and were attributable accordingly. In enunciating what appeared to be a general ruling on this point, the Panel made reference to the existence of the EC customs union and noted,

“In WTO terms, unless a customs union is provided with distinct rights and obligations (and therefore some WTO legal personality, such as the European Communities) each party to the customs union remains accountable for measures it adopts for application on its specific territory.”

11.3.3 Panel jurisdiction to investigate Article XXIV measures

Turkey raised a final preliminary issue. It argued that the Panel was without power to assess the WTO compatibility of any specific measure adopted in the context of the formation of a regional trade agreement, separately, and in isolation from an assessment of the overall compatibility of the agreement with Article XXIV. Such a compatibility assessment was argued to be exclusively within the province of the Committee on Regional Trade Agreements and according to the procedures established in Article XXIV. Turkey argued further that the WTO compatibility of an Article XXIV agreement, together with all of its related measures, is a matter to be determined exclusively within the confines of Article XXIV itself and not by any other provisions of the WTO. By this argument, the role of a panel to review individual measures was called directly into question by Turkey. If a compatibility finding is a pre-condition to examining the legality of measures undertaken to form a customs union, and if the panel does not have any jurisdictional basis to make an overall assessment of compatibility, then it would follow that the Panel can not take up the question of the legality of any particular measure.

The panel found that WTO dispute settlement can be invoked to challenge a measure adopted on the occasion of a customs union formation. The source for this ruling is found in Article XXIV:12 of GATT-1994, providing that a panel may examine,

“any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreement agreement leading to the formation…”

For the Panel, this language meant that it had authority to examine, “one or several measures ‘arising from’ Article XXIV types of agreement…”

However for the Panel, this conclusion was not the same as suggesting that a Panel should also undertake an overall compatibility assessment of a regional trade agreement with the GATT. This larger assessment appeared to the Panel to remain the responsibility of the CRTA together with its special procedures. Thus,

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14 Turkey Panel Report, para. 9.40. Examples of similar situations are provided in the Panel Report’s note 272, citing ICJ, the customs regime of Germany and Austria, for definition, plus the particulars of the Czech and Slovak customs union as an example of regional parties retention of individual independence.
15 Turkey Panel Report, Ibid.
16 Turkey Panel Report, para.9.45.
17 India characterised this as an argument for waiver in asserting that Article XXIV provisions do not constitute a waiver from other WTO obligations. Turkey Panel Report, paras. 9.46 and 9.47.
18 Turkey Panel Report, para. 9.49, emphasis provided by the Panel in its quotation.
19 Turkey Panel Report, Ibid.

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"(W)e consider that regional trade agreements may contain numerous measures, all of which could potentially be examined by panels, before, during or after the CRTA examination, if the requirements laid down in the DSU are met. However, it is arguable that a customs union (or a free-trade area) as a whole would logically not be a "measure" as such, subject to challenge under the DSU."20

In the case at hand, the panel also determined that it was not necessary to rule explicitly on the question of whether a panel can assess the overall compatibility of a regional agreement. Judicial economy was raised to suggest that the panel need not address the question. Rather, the issue could be treated as phrased as follows:

"(I)n this case, on the occasion of the formation of the Turkey-EC customs union, Turkey is permitted to introduce WTO incompatible quantitative restrictions against imports from a third country, assuming arguendo that the customs union in question is otherwise compatible with Article XXIV GATT."21

11.4 Violations of GATT Article XI, XIII and 2.4 ATC

On the substance of India’s complaint, the panel found that the quantitative restrictions violated Article XI and XIII as, "the measures at issue, on their face, impose (QRs) on imports and are applicable only to India."22 In so ruling, the Panel reiterated an earlier ruling on the persistence of QRs through the era of GATT-1947, and dismissed the notion that QRs could ever attain the status of permitted subsequent practice in derogation or modification of Article XI.

"Certain contracting parties were even of the view that (QRs) had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report EEC- Imports from Hong Kong."23

The panel went on to list the newly-devised mechanisms installed during the course of the Uruguay Round in order to assist in the elimination of QRs, including provisions made for the areas of agriculture, textiles and clothing, balance of payments, and safeguards. Obviously, "Participants...recognized the overall detrimental effects of non-tariff border restrictions...and the need to favour more transparent price-based, i.e., tariff-based measures..."24

11.5 Party Arguments and Panel Treatment of Article XXIV

Upon finding of the violation of GATT Articles, the Panel undertook to examine the defence raised by Turkey that these prohibited measures were permitted by the operation of GATT Article XXIV. For this analysis, the Panel first established an interpretative framework to guide the examination of the Article’s provisions, as found in general principles of public international law and the law of treaties.

11.5.1 General interpretative framework

As recited by the Panel, Article 3.2 of the WTO Dispute Settlement Understanding requires that the examination of GATT Article XXIV must be guided by the principles of customary rules of interpretation of public international law, which includes Articles 31 and 32 of the Vienna Convention

20 Turkey Panel Report, para. 9.53. Thus, the Panel basically ruled that the term "matters" as they may arise from application of the Article is limited in its definition by the concept of "measures", a limitation on authority rejected outright by the Appellate Body, as below.
21 Turkey Panel Report, para. 9.55.
22 Turkey Panel Report, para. 9.66. The discussion of the ATC violation is omitted.
23 Turkey Panel Report, para. 9.64.
24 Turkey Panel Report, para. 9.65.
on the Law of Treaties. Thus, the Panel determined that Article XXIV should be first interpreted by using the ordinary meaning of the terms as elaborated by the GATT-1994 Understanding. This should be done in the context and in light of the object and purpose of the relevant WTO agreements. If needed for the purpose of clarification, reference to negotiation history including the historical circumstances that led to the drafting Article XXIV should also be made. In addition, Article XVI of the WTO Agreement indicates that the WTO shall be guided by decisions, practices, and customary practices followed by the contracting parties to GATT 1947 and those bodies established in GATT-1947.  

Another principle raised was that of the need to avoid conflict in interpretation in the context of the WTO as a single undertaking. Thus, the panel chose at the outset to consider that if Article XXIV appeared to authorise measures which GATT Article XI, XIII and 2.4 ATC otherwise would prohibit, that a resolution must bear, “in mind that to the extent possible, any interpretation of these provisions that would lead to a conflict between them should be avoided.”

Finally, the Panel made reference to the principle of effective interpretation in noting that all treaty provisions should be given their full meaning to the extent possible. Application of this principle would prevent a panel from reaching conclusions that would lead to a denial of either party’s rights or obligations.  

11.5.2 Panel overview of Article XXIV

The Article XXIV recognition of the desirability of regional trade agreements is not without certain qualification, as Article XXIV:4, and as re-iterated by the GATT-1994, both indicate that the purpose of arrangements is to facilitate trade between the parties “and not to raise new barriers of trade to other Members…” According to the terms of Article XXIV, Members “have a right, albeit conditional, to conclude regional arrangements.” The linkage between Article XXIV:4 and Article XXIV:5 is made by the word “accordingly” in the first sentence of paragraph 5. This relates back to the previous Article and provides the framework for interpretation of Article XXIV:5. Thus, “the conditional right to form a regional trade agreement has to be understood and interpreted within the parameters set out in paragraph 4.”

While the Panel is not so explicit on the point, the strongest inference that can be drawn from this reference to paragraph 4 is that the Panel made a finding that the purpose of an agreement “not to raise new barriers” constituted a GATT legal requirement not to do so. Having established such a requirement, the issue of conflict between provisions would arise between the paragraph, as interpreted, and especially the requirements of paragraph 8 dictating the degree of internal trade

25 Turkey Panel Report, para. 9.91.
26 Turkey Panel Report, para 9.92. The Panel recounted public international law materials and earlier WTO cases to establish the presumption against conflict in the interpretation of WTO obligations. This proposition appears to have played a significant role in framing one of the Panel’s primary later findings, that Article XXIV:8(a)(ii) should be interpreted in a sufficiently flexible manner in order to permit regional formations without causing violation of other GATT Articles. This in light of Turkey’s (conditional) right to form a regional trade arrangement.
27 Turkey Panel Report, para. 9.95. Also, by footnote 324, the distinction between the issue of conflict and that of lex specialis is mentioned, as the latter, “which is inseparably linked with the question conflict” does not apply if two provisions deal with the same subject from different points of view, are applicable in different circumstances, or one provision is more far-reaching, but not inconsistent, with those of the other (citations provided therein).
28 Turkey Panel Report, para. 9.96. It is somewhat clear from the Panel’s later application of this principle that it led to an error of law in the interpretation of the relationship between paragraphs four and eight of Article XXIV.
29 Turkey Panel Report, para. 9.103.
30 Turkey Panel Report, para. 9.105.
liberalisation to be achieved. Prior to that analysis the Panel proceeded to extensively interpret paragraph 5 in light of the paragraph 4 interpretation.

11.5.3 Treatment of Article XXIV:5(a)
Turkey claimed that Article XXIV:5(a) should be read as permitting parties to introduce new measures in the form of other regulations of commerce (ORCs) as long as the overall incidence of duties and ORCs resulting were not higher or more restrictive after the completion of the formation. The GATT-1994 Understanding confirmed this view by indicating that an assessment is to be made of the incidence of ORCs. Therefore, such measures undertaken as applied to third parties were not intended by the GATT provisions to be outright prohibited by Article XXIV:5.31

A second argument by Turkey referred to Article XXIV:5 as it establishes a derogation, but not confined to any particular GATT rule (such as MFN), but to all GATT rules from which a derogation would be necessary in order to permit the formation of a legal customs union. This was demonstrated by the opening language of Article XXIV:5, and as it is similar to GATT Article XX (General Exceptions) in that, “the provisions of this agreement shall not prevent…”32

India responded that XXIV:5 authorised the formation of a customs union but does not go further in providing any legal basis for adoption of measures otherwise incompatible with GATT/WTO rules. The article’s terms only exempt those measures that are necessarily inherent to the formation of a qualified trade agreement, MFN in Article I for example. There is nothing provided in Article XXIV that would otherwise require a regional member to impose any new restrictions inconsistent with GATT XI, XIII and 2.4 ATC.33 India cited Article XXIV:6 to support this view as a process for renegotiation and compensation for duty increases is provided there. But, no such comparable provision for compensating third parties in regard to quantitative restrictions is indicated by that paragraph. This should suggest that the imposition of QRs was not contemplated by the provisions as being a permitted ORC under the terms of Article XXIV:5.

The Panel recognised that paragraph 5(a), and as elaborated by the GATT-1994 Understanding on Article XXIV, provides an “economic” test for assessing whether a customs union is compatible with Article XXIV.34 Although there is no agreed-upon definition of the term other regulations of commerce by WTO members, it is nevertheless clear that the term includes quantitative restrictions. As determined by the Panel,

“More broadly, the ordinary meaning of the terms ‘other regulations of commerce’ could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g., sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g., environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.”35

The Panel went on to characterise Article XXIV:5(a) as general rather than prescriptive. It authorises regional formations but it does not contain any provision that authorises or prohibits the adoption of import restrictions that are otherwise GATT/WTO incompatible. In the overall assessment to be made, while the wording of paragraph 5(a) assumes that duties and other ORCs may be more restrictive than before, it does not specify whether such a situation may occur only through

31 Turkey Panel Report, para. 9.110.
32 Turkey Panel Report, para. 9.112.
33 Turkey Panel Report, para. 9.113.
34 Turkey Panel Report, para. 9.120. This element of the ruling was affirmed by the Appellate Body, but it does not say that all elements of an Article XXIV assessment are inherently subject to an economic assessment.
35 Turkey Panel Report, para. 9.120.
GATT/WTO consistent actions or may occur through GATT/WTO inconsistent actions. Thus, "...we consider that the terms of paragraph 5(a) do not address the GATT/WTO compatibility of specific measures that may be adopted on the occasion of the formation of a new customs union."\(^{37}\)

Similarly, the assessment required by the CRTA of a regional trade agreement in regard to its compatibility with Article XXIV:5 also does not require the determination of the compatibility of specific measures with GATT rules. On this point the Panel looked to the standard terms of reference granted to the CRTA, "that the CRTA in its overall assessment, shall not determine the WTO compatibility of specific measures."\(^{38}\)

In regard to whether paragraph 5 authorised new QRs upon third-party trade, the Panel employed a type of parallel analysis of both subparagraphs (a) and (b) to conclude that the Article did not so authorise. For free-trade areas, paragraph 5(b) is seen to provide an identical scheme, excepting that duties and ORCs shall not be higher in each constituent territory. This reflects the absence of a single tariff formation in a free-trade area. For free-trade area members, they would never have an occasion to argue that a formation entitled them individually to impose new QRs on other GATT members in harmonizing external trade, since they are not required to do so in any case. It follows that the provisions of the terms of 5(a) and 5(b) should not lead to different interpretations in terms of what the GATT rules require.\(^{39}\)

After referring to aspects of paragraphs 4 and 6, and together with a discussion whether or not the location of Article XXIV in Part II of the GATT carried any legal significance,\(^{40}\) the Panel made its conclusion as based on the ordinary meaning of the terms included in paragraph 5:

"(C)onsequently, we find that there is no legal basis in Article XXIV:5(a) for the introduction of quantitative restrictions otherwise incompatible with GATT/WTO; the working of subparagraph 5(a) does not authorize Members forming a customs union to deviate from the prohibitions contained in Article XI and XIII of GATT or Article 2.4 of the ATC."\(^{41}\)

\(^{11.5.4\) Treatment of Article XXIV:8\)

Turkey argued that Article XXIV:8(a)(ii) requires it as a regional party to impose the same conditions to third countries that are applied by the EC to its external trade. This is why the Association Council

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\(^{36}\) Turkey Panel Report, para. 9.121.

\(^{37}\) Turkey Panel Report, para. 9.122.

\(^{38}\) Turkey Panel Report, para 9.122, and note 338. The Panel thus makes a demarcation in jurisdictional responsibilities between the CRTA and an Article XXIII Panel. The CRTA is not to be concerned with legality of particular measures and panels are likewise not concerned with overall assessment of the resulting economic effects of all regional measures taken together. It follows that a successful overall compatibility assessment by the CRTA should not exempt a challenge as to any particular measure as it may violate a GATT/WTO rule. For support, the Panel cited an Understanding indicating that the purpose of examination under paragraph 5(a) is not to determine whether each individual duty or regulation existing or introduced is consistent with all the provisions of the WTO Agreement. Understanding read out by the Chairman of the Council for Trade in Goods, 20, February, 1995, (WT/REG3/1).

\(^{39}\) Turkey Panel Report, para. 9.125. It is discussed below the same argument can be applied to XXIV:8(a) and (b) in terms of the Article's internal requirements, since that language is also identical for both customs unions and free-trade areas in regard to other restrictive regulations of commerce (ORCs).

\(^{40}\) Turkey argued that the position of Article XXIV in Part II of the GATT indicated a "self-contained" regime for the formation of trade agreements (Article XX and XXI are in Part II). According to the Panel, there is no drafting history to illuminate a legal effect of an Article's placement other than the fact that Part II and Part III entered into effect at different times. In the Havana draft, Article XXIV's predecessor was listed in the Commercial Policy chapter along with the other special provisions, including Article XX. Panel Report, para. 9.132.

\(^{41}\) Turkey Panel Report, para. 9.134.
Decision of 1/95 envisaged the wholesale adoption by Turkey of the EC commercial policy instruments as well as its customs code, all prior to the completion of the customs union.\(^{42}\)

India's contrary view was that paragraph 8(a) merely acts to define the requirements to be fulfilled in order to qualify as a customs union within the meaning of the Article. India noted that Turkey had reserved the right in its Association Council Decision to apply differential external measures in other areas, including agriculture, steel and other industrial products, as well as differential regimes from the EC in measures undertaken for actions concerning anti-dumping, countervailing duties and safeguards. Further, there is no stated requirement in paragraph 8(a) that conditions necessary to qualify a trade agreement must be fulfilled by the regional parties immediately.\(^{43}\)

Turkey responded that the India view of paragraphs 5 and 8(a)(ii) was overly restrictive as, "...any interpretation of Article XXIV which could lead to the conclusion that in certain circumstances, WTO Members with diverging external trade regimes were legally inhibited from forming a customs union, is in contradiction with the objective clearly stated in Article XXIV:4.\(^{44}\)

Turkey relied upon paragraph 8(a)(i)'s obligation to cover substantially all trade in its customs union formation with the EC. In order to meet this requirement, Turkey must obviously be required to cover textiles and clothing products as they together represent 40 per cent of Turkey's exports to the EC. For these goods to be covered, the constituent members of the customs union must have common tariffs and a common foreign trade regime with third countries in accordance with paragraph 8(a)(ii).\(^{45}\)

The Panel determined that Turkey was raising two distinct points in this argument. The first was that Turkey was being required to adopt EC external rules in order to form a customs union compatible with XIV:8(a)(ii). The second was the requirement that Turkey adopt EC external policies as a matter of its own agreement with the EC.

The Panel determined that XXIV(8)(a)(i) was not directly on point in consideration of the case as India's claim itself was not directed to the internal preferences of the formation. As India's claim related to the external regime of Turkey, as it was to result from the customs union formation, Paragraph (8)(a)(ii) was the appropriate sub provision to be considered, since it provides the external customs union requirement.

For sub-paragraph (8)(a)(ii), since the panel would interpret in a manner to avoid conflict between provisions, the question at hand was how to interpret the sub-paragraph (8)(a)(ii) together with GATT Article XI and XIII so as to avoid one being required to yield to the other. The Panel was of the opinion on this point that there was an inherent flexibility within sub-paragraph (8)(a)(ii) that permitted a harmonious interpretation.\(^{46}\) This flexibility was discerned in the use of the term "substantially" within the sub-paragraph as the parties are required to apply substantially the same duties and other regulations of commerce.\(^{47}\) This flexibility may be exhibited further in the

\(^{42}\) Turkey Panel Report, para. 9.135.

\(^{43}\) Turkey Panel Report, para. 9.136.

\(^{44}\) Turkey Panel Report, para. 9.138. The objective being referred to would presumably be that reference in paragraph 4 which indicates that the purpose of a regional trade agreement should be to facilitate trade between the parties a formation.

\(^{45}\) Turkey Panel Report, para. 9.139.

\(^{46}\) Turkey Panel Report, para. 9.147.

\(^{47}\) Turkey Panel Report, para. 9.148. ... Also, "while parties have never reached agreement on the meaning of the term, its ordinary meaning appears to provide for both qualitative and quantitative elements to be considered, the quantitative aspects perhaps more emphasised in relation to duties." Ibid.
relationship between the sub-paragraphs (a)(i) and (a)(ii), which address distinct but "inter-linked" policies. Thus, while the first sub-paragraph may require certain goods in trade to be covered as to the internal requirements, it did not necessarily follow that identical external trade policies in regard to third countries need necessarily result.

"Therefore, the inclusion of a sector within the coverage of a customs union, i.e. the removal of all trade barriers in respect of products of that sector between the constituent members of the customs union, does not necessarily imply that those constituent members must apply identical barriers or barriers having similar effects to imports of the same products from third countries."\(^{48}\)

What can be said to underlay this ruling by the Panel is that the concept of "removal of trade barriers" for the purpose of a customs union formation does not include the required elimination of individual member rules of origin and the associated use of movement certificates. Free circulation is not therefore a requirement of Article XXIV for a customs union.\(^ {49}\)

The Panel also took up the role of the listed GATT Article exceptions in sub-paragraph 8(a)(i). This provision contemplates that certain quantitative restrictions could be maintained between regional parties, as necessary and as described by GATT Articles XI through XV and XX. This suggested for the Panel that even where substantially all trade is provided by the parties, that certain WTO compatible restrictions in the form of quantitative restrictions can be continued to be maintained between them. In relating this to the external requirements of sub-paragraph (8)(a)(ii),

"This implies that internal quantitative restrictions can be used in the event that only one of the constituent territories has in place a restriction on imports from third countries. If such pre-existing import restrictions were WTO compatible, the maintenance of an internal import restriction between the two constituent countries would ensure that the protection afforded by the original WTO compatible quota would not be circumvented. The maintenance of such an internal restriction can obviate the need for identical external trade policies."\(^{50}\)

Finally, the Panel made its holding on interpretation of the second sub-paragraph itself:

"Considering this wide range of possibilities, we are of the view that, as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii). The possibility also exists of convergence across a very wide range of policy areas but with distinct exceptions in limited areas."\(^{51}\)

In this, the Panel emphasised that a number of administrative means were also available to insure that no trade deflection would occur while respecting the parameters of paragraphs (8)(a)(i) and (8)(a)(ii). It recalled that the two sets of policies under the paragraphs were distinct and the relationship between them a flexible one. It was also noted that the Turkey-EC agreement contemplated itself the use of origin certificates where agreements with third parties could not be concluded. Therefore, Turkey was apparently able to establish its internal coverage obligation under sub-paragraph 8(a)(i) without abridging the obligation imposed by the following paragraph, or without violating other GATT Articles. Thus, in the Panel's view, "the terms of Article XXIV:8(a)(ii) do not provide any

\(^{48}\) Turkey Panel Report, para. 9.149, emphasis added for clarity.

\(^{49}\) Earlier the Panel employed a parallel interpretation of paragraph 5 (a) and (b) to draw a conclusion that customs unions could not apply new restrictions upon third parties. The same analysis was foregone on the point made in the text. If the substantially all trade requirement of paragraph 8 as applied to free-trade areas could not be interpreted to require the elimination of member rules of origin and the use of movement documents, then the identical provision should not be viewed as creating such a requirement for customs unions.

\(^{50}\) Turkey Panel Report, para. 9.150. Although, there is not an exception listed in Article XI-XV and XX to maintain internal quantitative restrictions as result of a customs union formation.

\(^{51}\) Turkey Panel Report, para. 9.151.
authorisation for Members forming a customs union to violate the prescriptions of Article XI and XIII of GATT or Article 2.4 of the ATC.\textsuperscript{52}

The panel went on to consider the wider context in forming its final ruling. After referring to a number of preamble provisions in the GATT, Article XXIV and the 1994 Understanding, "(W)e read in these parallel objectives a recognition that the provisions of Article XXIV...do not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of measures which are considered generally to be ipso facto incompatible with GATT/WTO.\textsuperscript{53}

\textbf{11.5.5 Additional considerations by the Panel}

Having reached this conclusion, the Panel then addressed some final arguments which might be characterised as affirmative defences. This included the issue of subsequent practice, the absence of a recommendation according to Article XXIV:7, and the argument of necessity of violating GATT rules for the constituting of the Turkey-EC customs union.

Turkey had made the argument that GATT inconsistent measures as to third parties had been implemented and tolerated in previous customs union formations.\textsuperscript{54} Article 31.3(b) of the Vienna Convention (VCLT) provides that the context of interpretation of a treaty provision also includes, "any subsequent practice in the application of the treaty which establishes the agreement of parties regarding its interpretation." Consistently, Article XVI of the Agreement Establishing the WTO provides that the WTO shall be guided by the customary practices followed by the Contracting Parties.\textsuperscript{55}

For the Panel, the more precise standard to be applied in regard to subsequent practice on this point was enunciated by the Appellate Body in \textit{Japan – Alcoholic Beverages}. This requires a, "... 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant\textsuperscript{56}

The panel reviewed aspects of the record of working group reviews in the GATT and found that no consensus had ever been reached on the interpretation of Article XXIV in relation to certain other GATT provisions.\textsuperscript{57} As indicated by the quotations from working group reviews, expressions such as, "some members felt", or "most members were of the opinion" established the absence of consensus on these practices. In addition, a particular reference to arguments made within a non-adopted GATT panel report confirmed that there was outright disagreement among GATT parties as to whether the absence of a previous challenge to a regional formation (and the measures undertaken) constituted a tacit acceptance that such agreements were in conformity with Article XXIV.\textsuperscript{58}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} Turkey Panel Report, para. 9.154.
\item \textsuperscript{53} Turkey Panel Report, para. 9.163.
\item \textsuperscript{54} Turkey Panel Report, para. 9.164, with reference to paras. 6.58 to 6.61.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Turkey Panel Report, para. 9.165, and citing the sources of Sinclair and Yasseen from the original notes of the Appellate Body.
\item \textsuperscript{57} Turkey Panel Report, para. 9.166, and citing EEC examination, Sub-Group B, working groups on EC accession of Denmark, Ireland and United Kingdom, Greece, Portugal and Spain.
\item \textsuperscript{58} Turkey Panel Report, note 372, quoting, EEC- Tariff Treatment of Citrus Products from Certain Mediterranean Countries, L/5776, paras. 3.12-3.22. "The United States’ statement in response to the European Communities’ argument was that the failure of the Contracting Parties to reject the agreements did not imply acceptance nor did it constitute a legal finding of GATT consistency with Article XXIV."
\end{itemize}
\end{footnotesize}
As the absence of challenge did not confer compatibility, so should GATT rights also not be denied from the absence of a previous recommendation under Article XXIV:7. Thus, the absence of recommendations to change or abolish import restrictions as they might have been adopted in previous regional formations did not have a bearing on whether third parties could assert their GATT claims. Citing EEC-Imports from Hong Kong,

"(T)he Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."

The adoption of paragraph 12 of the GATT 1994 Understanding on Article XXIV also informed this question, as prior to that time it was not so clear whether specific measures adopted upon formation of a customs union could be challenged under Articles XXII and XXIII.

Turkey argued that it was required to adopt the WTO compatible import measures of the European Community. In the Panel’s view, “a bilateral agreement between two Members…does not alter the legal nature of the measures at issue or the applicability of the relevant GATT/WTO provisions.” Also drawing upon Bananas III, the argument that a panel should defer to a common understanding of the parties rather than examine the content of the trade agreement was rejected there. In this context, the Panel raised for consideration Article 41 of the VCLT, stating,

“Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if… (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.”

The Panel did not elaborate on the applicability of this VCLT provision, as it may be applied or not applied in its relation to the GATT Article XXIV. We have taken this up in chapter Eight of the text. There is more to say on this aspect and that discussion is reserved for the conclusion of the book. For now, if, as the Panel appears to have concluded, Article XXIV is not lex specialis, nor existing as a self-contained regime, then various GATT provisions which function as prohibitions may not be lawfully suspended by regional parties in regard to their internal trade.

11.6 WTO, Turkey – Restrictions on Imports of Textile and Clothing Products, Report of the Appellate Body

11.6.1 Panel findings and issues appealed

The Panel found that the wording of GATT Article XXIV does not authorise a departure from the obligations found in GATT Articles XI and XIII, and Article 2.4 of the ATC. While paragraphs 5 and 8 of GATT Article XXIV do not specify which measures may or may not be adopted on the formation of a customs union, they nevertheless do not act to authorise violations of GATT Article XI and XIII. Therefore, the Panel, “draw(s) the conclusions that even on the occasion of the formation of a customs union, Members cannot impose otherwise incompatible quantitative restrictions.”

59 Turkey Panel Report, para. 9.173, quoting EEC-Hong Kong paragraphs 28 and 29. No citation to the EEC-Hong Kong panel was provided by the Panel.

60 Turkey Panel Report, para. 9.178.

61 Turkey Panel Report, para. 9.181.

62 Turkey Panel Report, para. 9.186.

63 22 October, 1999, AB-1999-5, WT/DS34/AB/R.

64 Turkey Panel Report, paras. 9.86, 9.188 and 9.189, as recited in the Turkey Appellate Body Report at para. 42.
Turkey claimed on appeal that the panel erred in its interpretation of GATT Article XXIV on a number of points. As Article XXIV permits (or requires) the common regulation of commerce by customs union members, the adoption by one member of another's legal quantitative restrictions should be lawful as long as unified regulations were not overall more restrictive than those applied before the customs union by these constituent members.\(^{65}\) This flowed in part from Turkey's assertion that Article XXIV, unlike GATT Articles XX and XXI, does not grant an "exception" from other GATT obligations, but rather accords an autonomous right to form a customs union.\(^{66}\) There was no basis in law therefore for the panel to conclude that Article XXIV granted derogation only for GATT Article I, most-favoured nation, but not from other GATT Articles as well. Rather, the text of the chapeau of Article XXIV:5 provided according to its ordinary meaning that, "the provisions of this Agreement" shall not prevent the formation of a customs union. Therefore, other provisions besides Article I can be excepted in the course of customs union formation.\(^{67}\)

According to Turkey, this allegation of Panel error was further supported by the inherent nature of the test required under Article XXIV:5(a). There, an assessment must be made on the resulting duties and other regulations of commerce as a whole. The requirement to assess in this manner would be rendered a nullity by a panel interpretation that the "introduction of an otherwise inconsistent measure could disqualify the customs union even though trade flows were, on the whole, facilitated by the conclusion of the regional formation."\(^{68}\)

**11.7 Appellate Body findings and supporting argument**

The Appellate Body adopted Turkey's arguments in part and reversed the Panel on the specific question of whether GATT Article XXIV could justify measures that were inconsistent with other GATT Articles. Following the Appellate Body's reasoning, a type of "defence" for customs union parties to violate GATT Articles as to other WTO Members could arise where two requirements were demonstrated. First,

"...that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV.

Second, the party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."\(^{69}\)

Both conditions must be fulfilled. In this case, Turkey had failed to demonstrate the necessity of violating GATT Articles XI and XIII as other means were available to accommodate the internal trade requirement imposed by Article XXIV:8(a)(i). On this there was concordance between the Panel and the Appellate Body in noting that Turkey could have adopted rules of origin with certificates of movement as necessary to avoid the potential deflection of third-country goods. This would have allowed Turkey to distinguish between textile and clothing products that were of external origin and not subject to any harmonised external trade regime. In point, the Turkey-EC Association Decision of 1995 contemplated this possibility by providing for use of origin certificates for Turkey-EC trade if needed.\(^{70}\)

In its overview of Article XXIV, the Appellate Body took a different course than the Panel. Rather than viewing the Article as sequential, and primarily flowing from paragraph 4, the pivotal position of...

\(^{65}\) Turkey AB Report, para. 8.

\(^{66}\) Turkey AB Report, para. 9.

\(^{67}\) Turkey AB Report, paras. 10-13.

\(^{68}\) Turkey AB Report, para. 14. In addition, the Panel was claimed to have misinterpreted the context of Article XXIV:5(a) in relation to Articles XXIV:5(b), XXIV:4, XXIV:5(a) and (b), and as to the location of Article XXIV in Part III of the GATT. AB Report at para. 15. Additional arguments made by Turkey are not detailed here.

\(^{69}\) Turkey AB Report, para. 58.

\(^{70}\) Turkey AB Report, para. 62, citing Panel Report, para. 9.152.
the exception as it is enunciated in the head paragraph of Article XXIV:5 was first established. Then, other provisions were referred into the exception as it was stated in order to fill out the meaning of the requirements. Rather than establish the need to avoid conflict between paragraph 4 and paragraph 8, it appears that the Appellate Body demoted paragraph 4 back into the position of a "purposive" or informative position. The sequence of discussion here will follow that of the Appellate Body Report.

11.7.1 The role of the chapeau of Article XXIV:5
The Appellate Body determined at the outset that the Panel had not given sufficient weight to the role of the chapeau of Article XXIV:5, as the introductory paragraph of this Article functions as the key provision for resolving the issues at hand. In respect of its ordinary meaning, the provision "shall not prevent" is to be read to mean, "shall not make impossible". It was clear therefore that under certain conditions, Article XXIV could grant the possibility of adopting measures that otherwise would be considered as inconsistent with other GATT Articles. Article XXIV may therefore be invoked as a possible "defence" to a finding of inconsistency.

Having set forth the elements of other Article XXIV provisions were drawn into the chapeau by its own terms, these elements were then taken up by the Appellate Body in turn to assist in the interpretation of the chapeau's requirements for permitting the exception.

11.7.2 The definitional requirements of Article XXIV:8
The chapeau of Article XXIV:5 makes reference to the "formation of a customs union". Therefore, any inconsistent measures sought to be defended by invoking Article XXIV must be undertaken upon the actual formation of a customs union, and then, only to the extent that such a formation would be prevented if the measure were not allowed to be implemented. Therefore, reference to the definition of a customs union as provided by Article XXIV:8(a) is required in order to determine the interpretation of the Article XXIV:5 chapeau.

The definitional provisions governing a customs union indicate that there are both internal and external aspects to be considered. For the internal trade requirement, Article XXIV:8(a)(i) requires the elimination of "duties and other restrictive regulations of commerce" (ORRCs) in respect to "substantially all the trade" between the constituent parties. While neither GATT Parties nor WTO Members have ever reached agreement on the meaning of "substantially all trade", the term refers to something "considerably more" than some of the trade, even while it is not the same as "all of the trade". Thus, some flexibility was intended for parties in order to meet this internal aspect. This is indicated by the deviations from internal trade coverage that are accorded by the availability of GATT Articles XI-XV and Article XX, and all within the text of sub-paragraph 8(a)(i). However, such flexibility is not unlimited as,

"...we caution that the degree of "flexibility" that sub-paragraph 8(a)(i) allows is limited by the requirement that 'duties and other restrictive regulations of commerce' be 'eliminated with respect to substantially all' internal trade."?

An external trade requirement is also established for customs union members, as "substantially the same" duties and other regulations of commerce must be applied to the external trade with third

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71 Turkey AB Report, para. 43, reciting Article XXIV:5 in part: (A)ccordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union...; Provided that:... (emphasis as supplied in the Appellate Body quotation).
72 Turkey AB Report, para.45, and note 13 therein, reciting scholars supporting the point that Article XXIV operates as an exception or a possible defence to claims of other GATT provisions.
73 Turkey AB Report, para 46.
74 Turkey AB Report, para. 48.
75 Turkey AB Report, para. 48. The question of whether GATT Articles XI-XV and XX form an exhaustive list in describing the parameters of flexibility was not addressed on point by the Appellate Body.
countries, as according to Article XXIV:8(a)(ii). In terms of qualifying this definitional element, the Appellate Body affirmed and reversed the Panel in part. It agreed with the Panel that the requirement has both qualitative and quantitative aspects, and that flexibility was also available here for parties to meet the requirement. However contrary to the Panel’s view, the Appellate Body found that provisions made for “comparable” trade regulations by regional parties would not be sufficient to meet the requirement. Rather, a higher degree of “sameness” was called for, as the term “substantially” was seen in context to qualify the word “same”.

11.7.3 The proviso requirements of Article XXIV:5(a)
Returning then to the requirements of Article XXIV:5, the chapeau also indicates that the provisions of GATT 1994 shall not prevent the formation of a customs union “provided that” the proviso of Article XXIV:5(a) is respected, in that the duties and other regulations of commerce (ORCs), “shall not on the whole be higher or more restrictive than the general incidence” of the duties and ORCs applicable in the constituent territories prior to the formation. On the question of duties, the 1994 Understanding on Article XXIV had already clarified that this examination would be engaged as to the actual applied rates of duties rather than designated bound rates.

For “other regulations of commerce”, the Appellate Body agreed with the Panel, “that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries’ previous policies.” Further, and as also determined by the Panel, the assessment on this point requires an “economic” test for determining whether a specific customs union is compatible with Article XXIV.

11.7.4 The ‘purposive’ requirement of Article XXIV:4
Finally, the chapeau of Article XXIV:5 must also derive its interpretation by reference to the wider context provided by Article XXIV:4. As indicated by the Panel, this linkage is disclosed by the use of the term “accordingly” which introduces paragraph 5 as it follows paragraph 4. This earlier paragraph reveals that the purpose of a customs union is to facilitate trade between the constituent members and not to raise new barriers to the trade with third countries. The Appellate Body noted that this was affirmed by the 1994 Understanding on Article XXIV. As to the legal nature of this provision in its relation to other paragraphs of Article XXIV, the Appellate Body stated that,

“Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV.”

Thus,

“...the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4. The chapeau cannot be interpreted correctly without constant reference to this purpose.”

Thus, whatever else may be inferred from the obligation to make a constant reference to this purpose, the other provisions of the Article are also understood by the Appellate Body to have already incorporated these concerns. Therefore, there is no need to consider paragraph 4 as a separately constituted legal requirement in order to apply the exception.

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76 Turkey AB Report, para. 50. We discuss below whether the same argument can be made in parallel to the use of the term ‘substantially’ as it modifies the word ‘all’ in sub-paragraph (8)(a)(i).

77 Turkey AB Report, paras. 51-53.

78 Turkey AB Report, para 55, reciting PR para. 9.121.

79 Turkey AB Report, para. 57.

80 Turkey AB Report, Ibid.
11.7.5 Appellate Body conclusion on the Article XXIV:5 capeau

As indicated above, the Appellate body concluded that Article XXIV might justify a measure, which is inconsistent with certain other GATT provisions, providing two conditions would be fulfilled. First, the party claiming the defence must demonstrate that the measure being challenged was introduced upon the formation of a customs union that fully meets the requirements of Articles XXIV:8(a) and XXIV:5(a). Second, a party would have to show that the formation would be prevented if it were not allowed to introduce the inconsistent measure. Going further at this point, a sequential relationship between these two requirements to be established was then noted, as the second condition may not be able to be met in the absence of meeting the first. As stated, “(I)n other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there is a customs union.”

This appears to suggest a certain sequence of examination, as has been suggested throughout the text, which would require regional proponents to establish the definitional elements of Article XXIV:8 compatibility at the outset. However, in posing such a requirement, an institutional question of whether panels can make such a determination under paragraph 8 would now necessarily arise.

11.7.6 Turkey Appellate Body Ruling on the scope of review

In considering its two-step test, the Appellate Body noted that the Panel did not address the question of whether the Turkey-EC arrangement constituted a customs union meeting the requirements of Articles XXIV:8(a) and XXIV:5(a). On this point, it noted the Panel’s expressed opinion that panels may not have the jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. While the Appellate Body explicitly noted that it was not being called upon to rule this question, since neither party had raised the issue on appeal, it then went on to cite its previous ruling in India – Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products. This August of 1999 Appellate Body Report addressed the similar question of the jurisdiction of panels to review the justification of balance of payment (BOP) restrictions under Article XVIII:B of the GATT and the GATT-1994 BOP Understanding.

To clarify the reference made to this earlier case, the Appellate Body in the India BOP case concluded that, “…the Panel in the present case was correct in interpreting GATT practice as permitting the member concerned to choose either course of action. Should a member decide to have recourse to dispute settlement procedures under Article XXIII, such action would in no way prejudice the competence of the BOP Committee and the General Council to consider the same matter in accordance with Article XVIII:12.”

This would indicate that panels have retained authority according to GATT Article XXIII and relevant provisions of the DSU to rule upon matters arising form the application of the provisions of Article XXIV. This would include those aspects examinable by the special procedures applied by the Committee on Regional Trade Agreements as according to its granted authority.

81 Turkey AB Report, para. 58.
82 Turkey AB Report, para. 59, emphasis in original.
84 WT/DS90/AB/R, para. 97, and holding, “we conclude that panels have the competence to review the justification of balance-of-payments restrictions. Ibid., at para. 109.
85 As according to Article XXIV:12, “with respect to any matters arising from the application of those provisions of Article XXIV….” The India-BOP AB Report defined “application” as used in footnote one of the BOP Understanding to mean “use or employment”. Ibid., at para. 92.
However, the India BOP Panel had also found in reference to the BOP Committee that,

"By finding that panels can review the justification of balance-of-payments measures, we do not conclude that panels can substitute themselves for the BOP Committee... It is also clear that panels could not ignore determinations by the BOP Committee and the General Council."

A brief comment is offered at this juncture. The CRTA is authorised to receive notifications and to make assessments on the question of Article XXIV compatibility. Where it has made such a determination as to a particular regional trade agreement, such a recommendation should be honoured by a panel in assessing the elements of the first test recited above. Where the CRTA has made no such recommendation, one can conclude that a regional party’s capacity to assert the Article XXIV defence is directly related to its ability to establish the required Article XXIV elements before the panel.

11.8 Comment and conclusion on the Turkey Reports

Both reports discussed above can be compared and contrasted to those rendered in Bananas I and II, as discussed in chapter Five. Those reports concerned MFN Article I, as an exception was not granted for an incomplete free-trade area agreement. There, the emphasis was upon interpretation of the internal trade requirements required under Article XXIV(8)(b), particularly the requirement that barriers be removed between the parties to the formation. Here we have a customs union plan and a complaint deriving not from MFN but from Article XI’s prohibition against certain measures.

Both sets of reports addressed the role of the dispute settlement procedures as they may be invoked to challenge preferences exchanged or measures enacted in the course of regional trade formations. With the undoubted assistance of the WTO Dispute Settlement Understanding, and a revised Article XXIV:12, the development on this front is substantial. While the two Banana panel reports made reference to the necessity of a prima facie review of a trade agreement’s provisions, for those facts at hand, no more was required. Arguably the same can be said of the facts presented in the Turkey case. But rather than draw a narrow view of the panel’s authority to oversee a regional formation’s invocation of the Article XXIV exception, the Appellate Body in particular has determined a panel’s obligations more ambitiously. At the extreme, this would be something akin to “dual track” authority, this term introduced by the Appellate Body in the BOP case. Additional comments on these developments are made below.

In outlining the Article XXIV elements drawn into the paragraph 5 chapeau, the Appellate Body has not only affirmed Article XXIV as exceptional in nature, but has also arguably informed the process of an examination to be applied in order to qualify for the exception. This can be seen to vary somewhat from the approach followed by the Panel, which perhaps emphasised more the desire for paragraph 8 definitions to be interpreted in a flexible manner in order to avoid conflict between the various GATT Articles in question. The Appellate Body appeared to shift attention to the core definitional requirements provided in Article XXIV:8, as they were found to be incorporated as required legal elements by the paragraph 5 chapeau, and in conjunction with that paragraph’s own proviso regarding the overall effect of duties and other regulations of commerce.

86 Ibid., at para. 81, as reciting the India-QR Panel Report at its paragraph 5.114.
87 While one could form an argument that a later panel could reject an Article XXIV defence in the absence of any CRTA recommendation, there is no indication in the Appellate Body Report that such an avenue has been left open for a later panel. One caveat on the interpretation presented in the text above is in order. In arguing in the BOP case for a principle of institutional balance between panels and committees, India cited unadopted Article XXIV cases in support of the point. The Appellate Body noted that those cases referred to the relationship between Articles XXIII and XXIV, and not as between Articles XXIII and XVIII. Ibid., at para. 100.
88 For example, Turkey Panel Report, para. 9.147, “...the flexibility inherent in sub-paragraph 8(a)(ii) allows for harmonious interpretation.”
It can be suggested that the facts at hand in the Turkey case reflect a rather uncommon situation in comparison to regionalism in the WTO generally. Most regional agreements are free-trade area formations. In these cases the issues of externally-applied measures pursuant to the adoption of a common external policy are not at issue. GATT Articles XI and XIII would not in these circumstances be called into play. Rather, the more likely basis for a challenge would be concerned with the obligation of Article I for most-favoured nation as WTO members might seek to obtain the positive preferences exchanged between free-trade parties. In the absence of a CRTA recommendation to insert on the issue of compatibility, a consistent interpretation of this Appellate Body Report would appear to require that the future panel must find whether or not a free-trade area has been formed within the meaning of sub-paragraph 8(b). This suggests that a future panel must be prepared to enunciate in more detail the meaning of “substantially all trade”, at least as applicable to the particular case at hand.

As for Article XXIV:5(b), a free-trade area does not by definition require the establishment of a common external trade regime. One could conclude that the difficulties suggested for this proviso assessment in the case of a free-trade area would also not arise. However, a future panel will not derive much comfort on this point if it recalls the current Panel’s definition provided above for “other regulations of commerce”. As free-trade areas become more ambitious in their treatment of regulatory matters, the examination for such external effects could also be challenging. Interestingly, as broadly as the definition was framed, it also did not include the term “rule of origin”. One is left to question whether such rules cannot be determined to be ORCs, no matter their impact upon trade. This question is explored in some more detail in the concluding chapter.

According to the Panel, Article XXIV is not lex specialis to the WTO and does not constitute a self-contained regime. The WTO is a single undertaking and Article XXIV is a part of it. Although the Appellate Body does grant regional proponents a conditional right to derogate from GATT obligations, a central basis of Turkey’s case throughout was the notion that Article XXIV constitutes a special regime allowing parties to invoke a type of waiver as to GATT obligations owed to other WTO members. While the Appellate Body trimmed the panel conclusion on this point, both reports are in substantial agreement and travelled some length to extinguish this interpretation of Article XXIV in the practice. Regional parties who invoke Article XXIV as a defence in the absence of a CRTA determination of compatibility as to their particular formations run a certain legal risk by subjecting themselves to the juridical process when they choose to invoke this defence. Any criteria evolving from a panel or the Appellate Body in regard to the meaning of the internal trade requirement may be stricter than that which might evolve from the CRTA process. The CRTA is intended to reflect the circumstances of Members’ diplomacy functioning on the basis of consensus. A dispute resolution panel is not so charged. This suggests that regional parties should now have some greater identifiable interest in determining the successful establishment of criteria within the CRTA process itself.

Finally, the Panel may have also introduced a new tool in the determination of what measures may be permitted in the course of intra-regional trade. This is captured in the final paragraphs dealing with Article 41 of the Vienna Convention (VCLT) governing the conditions by which two parties may modify as between them the obligations contained in a multilateral convention. The Panel recited the Article to indicate that two parties do not have a right to make a bilateral waiver if the modification is prohibited by the multilateral agreement governing the subject matter. Here, the adoption of discriminatory quantitative restrictions by Turkey as to India was found to be a violation of Article XI of the GATT, as such measures are prohibited by the GATT. Consider by analogy the situation for internal trade. If a bilateral modification cannot be permitted which would infringe the rights third parties as guaranteed by GATT Article XI, then it may follow that regional members may not likewise modify the obligation imposed by the same Article XI in regard to intra-regional trade.

Although it would be easy to dismiss this legal theory of action for the likely absence of complainants, one can also recall from the GATT-1947 practice that challenges to externally applied
measures undertaken by regional formations were also somewhat rare. Nevertheless, an absence of cases did not deter this Panel from concluding that no precedent of subsequent practice or acquiescence had ever been established. Just as the Panel relied upon GATT-1947 working group reviews to establish an absence of consensus on the legal point, some of these same reviews can also be recalled to identify a lack of consensus regarding the legality of intra-regional trade restrictive measures.

As the WTO jurisprudence developed, an additional case arose concerning the exemption between regional members for measures in the form of safeguards. The discussion now turns to this action between the EC and Argentina.

11.9 Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body

11.9.1 Introduction and factual background
According to the Appellate Body summary, this action resulted from safeguards on certain footwear products applied by Argentina as a result of an investigation and a resolution adopted in 1997. The investigation undertaken and the provisional duties imposed were notified by Argentina to the WTO Committee on Safeguards. On September 1 of 1997, the Committee was notified of the country’s intent to impose a definitive safeguard measure. The EC commenced the action before the Panel arguing that Argentina’s measures were inconsistent with a number of Articles of the WTO Agreement on Safeguards. The Panel determined that Argentina’s measures were inconsistent with Articles 2 and 4 of the Agreement and that there was nullification and impairment of the EC’s benefits to be derived under the Safeguards Agreement within the meaning of Article 3.8 of the WTO Dispute Settlement Understanding. On September 14, 1999, Argentina made notification of its intent to appeal certain issues of law. The EC also raised certain points relevant to Article XXIV. During the course of the appeal, Indonesia and the United States each filed third participant’s submissions.

11.9.2 Issues presented on appeal relating to Article XXIV
Argentina argued on appeal that the Panel had made errors in its legal reasoning concerning the interpretation of the WTO Agreement on Safeguards (the Safeguards Agreement, or the Agreement) as it related to Argentina’s claimed right (or obligation) according to Article XXIV of the GATT. For Argentina, this Article operated so as to exclude its MERCOSUR trading partners from the application of safeguard measures. As the Panel itself framed this issue,

"...the essential question is whether Argentina was permitted under the Safeguards Agreement to take imports into account in the analysis of injury factors...and was at the same time permitted to exclude countries from the application of the safeguard measure imposed."

According to Argentina on appeal, the Panel misinterpreted footnote 1 to Article 2.1 of the Agreement by imposing a requirement to apply safeguards to other customs union members when the investigation of the safeguard action was based upon all sources i.e., including custom union member sources. The Panel had identified the first and third sentences of footnote 1 to apply to the Argentina safeguards, and had also found that the context of Article 2.1 and its footnote was that of Article 2.2, providing that, "(s)afeguard measures shall be applied to a product being imported irrespective of its source." As the Panel found,

90 Generally, Argentina AB Report, paras. 2-6.
91 Argentina Panel Report, para. 8.75, recited in Argentina AB Report at paragraph 100.
92 Argentina AB Report, para. 12.
93 Argentina Panel Report, para. 8.84, recited in Argentina AB Report at paragraph 102.
On appeal, Argentina claimed that Article 2.1 of the Agreement comprehensively addresses all the conditions applicable to a safeguard investigation made by a Member who is also a party to a customs union.footnote 1 That there is no stated requirement to impose the measures on customs union members is indicated by footnote 1, where the fourth sentence indicated an absence of consensus in the drafting of the Agreement as regarding the relationship between the Safeguards Agreement and Article XXIV.footnote 2 Argentina cited negotiating history to indicate that while a proposal had been made to require customs unions to apply measures upon its own members, this proposal was not accepted for the final text of the footnote. Thus, the Panel made an error in incorporating into the Agreement a requirement that had been rejected outright in the process of negotiation.footnote 3

On a related issue of appeal, Argentina argued that the Panel, by requiring a match between the sources investigated for the determination of injury and the sources subject to the application of a safeguard, had introduced a new “parallelism” requirement into the Agreement. No such requirement could be validated in the provisions of the Agreement. Article 5 of the Agreement only required that a measure may not exceed what is required to remedy the injury. “In Argentina’s view, the only “parallelism” on which the Members agreed is that only the market where injury is found can apply safeguard measures.”footnote 4 For its part, the European Communities endorsed the Panel’s conclusion that a parallelism requirement existed as an aspect of the Agreement. Summarising its position, “(B) by taking into consideration imports from MERCOSUR countries for the purposes of making its injury determination, even though it never intended to impose measures on those imports, Argentina violated its obligation under the Agreement on Safeguards and Article XIX of the GATT 1994.”footnote 5

However, at the oral hearing before the Appellate Body the EC objected to the manner in which the Panel had interpreted GATT Article XXIV and Article 2.2 of the Agreement, as it argued that the analysis made of Article XXIV was unnecessary in order to conclude that a parallelism requirement

footnote 1 Footnote 1 of Article 2.1 reads as follows. “A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994. (italics added for sentence four).”

footnote 2 Article 2.1 of the Safeguard Agreement reads, “(A) member (footnote 1) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

footnote 3 Article 2.1 of the Agreement states, “…the two options offered by the footnote to Article 2.1 in conjunction with Article 2.2 imply a parallelism between the scope of… investigation and the scope of the application. (emphasis in original), as recited in Argentina AB Report, para. 103. 

footnote 4 Argentina AB Report, para. 13 with note 27.

footnote 5 Argentina AB Report, para. 14. The Panel’s reference to parallelism is found at paragraph 8.87 of the Report. It states, “…the two options offered by the footnote to Article 2.1 in conjunction with Article 2.2 imply a parallelism between the scope of… investigation and the scope of the application. (emphasis in original), as recited in Argentina AB Report, para. 27.
existed. Since no claim relating to the legal status of MERCOSUR was made in the case before the Panel, it was not necessary for the Panel to engage in an analysis of the safeguard measures at all within the context of an Article XXIV arrangement.\textsuperscript{100} This course undertaken by the Panel resulted from Argentina’s argument that Article XXIV (and certain MERCOSUR regulations) prevented it from imposing safeguard measures on other MERCOSUR countries. As summarised by the Appellate Body, following an analysis of Article XXIV, the Panel concluded that Article XXIV:8 did not prevent Argentina “from applying safeguard measures to all sources of supply, i.e., third countries as well as other member States of MERCOSUR.”\textsuperscript{101}

Indonesia concurred with the EC opinion in its third-party appellate submission stating that Argentina’s interpretation of footnote 1 was incorrect, as no safeguard action had ever been taken by a customs union. Rather, Argentina had acted independently and on its own behalf. Footnote 1 says nothing about the obligation of a member of a customs union acting individually.\textsuperscript{102} Indonesia further questioned whether Article XXIV could apply at all to the circumstances at hand, since the members of MERCOSUR had never notified the customs union under Article XXIV of either GATT 1947 or 1994.\textsuperscript{103}

In its third-party submission, the United States referred to the drafting history of the agreement, as spelled out by the Panel, and noted that footnote 1 followed the word “Member” as contained in Article 2.1. This was done in order to deal with the status of the European Community in the GATT. The United States also argued that the Panel made an error in referring to Article XXIV, as the MERCOSUR had been notified under the Enabling Clause providing for differential and more favourable treatment of developing countries.\textsuperscript{104} Thus, the reference made by the Panel to footnote 1 of Article 2.1 of the Agreement was, “legally irrelevant in this case.”\textsuperscript{105}

11.10 Appellate Body treatment of Article XXIV issues

Based upon the submissions, the Appellate Body stated the legal issue relating to Article XXIV as, “whether the Panel erred in its interpretation and application of Article 2 of the Agreement on Safeguards and Article XXIV of the GATT 1994 as these provisions relate to the application of the safeguard measure at issue in this case.”\textsuperscript{106}

11.10.1 Whether measures were attributable to Argentina

Central to this question is the role of the non-discrimination requirement on the application of a safeguard. As stated in Article 2 of the Agreement, would this requirement prevail or be inferior to a possible exception from MFN provided in Article XXIV for certain regional trade agreements? For the Panel, Article 2 appeared to prevail, at least for member specific investigations, as it concluded that,

“...in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state specific

\textsuperscript{100} Ibid. The Report states that this matter was raised by the EC at oral hearing and stating that EC had indicated there that no parties had appealed on the apparent presumption made by the Panel that Article XXIV was applicable to the case.

\textsuperscript{101} Argentina Panel Report, para. 8.101, receited in Argentina AB Report, para. 104.

\textsuperscript{102} Argentina AB Report, para. 53.

\textsuperscript{103} Ibid.

\textsuperscript{104} Argentina AB Report, para. 64 and 65. The Enabling Clause, “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”, L/4903, adopted 28 November 1979, BISD 26S/203, as cited in the AB Report, note 57.

\textsuperscript{105} Ibid.

\textsuperscript{106} Argentina AB Report, para. 70 (c ).
One should clarify that the Panel did not rule that a customs union is prevented from excluding other members from the application of a safeguard when it acts on behalf of a single member State. Rather, since footnote 1 permits a customs union to investigate on behalf of a single member, the parallelism requirement raised by the Panel throughout would require that, as long as other member sources were excluded from the investigation, other members could also then be excluded from the application. The difficulty for the Panel in this case appeared to be a use of an Article XXIV exception that would allow customs union members to contribute to an injury that would then be remedied only by non-members. The Panel ruling does not suggest that a customs union acts unlawfully in all cases if it excludes application of the measure on other customs union members.

The Appellate Body took a more pre-emptive course in line with the EC, Indonesia and United States’ submissions. It ruled that footnote 1 did not apply at all to the facts at hand. According to it, the investigation and the application of the safeguards were never undertaken by the MERCOSUR customs union on behalf of Argentina, but rather only by Argentina and on its own behalf. The Appellate Body did recognise that the transitional measures undertaken by MERCOSUR decision delegated the investigation and application of safeguards to the member states individually.\(^{108}\) It also recognised that according to the same transitional measures MERCOSUR had established and had exercised the authority of WTO notification for the investigation and application.\(^{109}\) These actions were considered irrelevant in the determination of the application of footnote 1 since, “(I)t is Argentina that is a Member of the WTO for the purposes of Article 2 of the Agreement on Safeguards, and it is Argentina that applied the safeguard measures after conducting an investigation of products into its territory and the effects of those imports on its domestic industry.”\(^{110}\)

To comment, this is a difficult construction if one considers that footnote 1 expressly contemplates the notion that a customs union may act on behalf of an individual member also in regard to its territory and the injury effects on its domestic industry. To the extent that these elements have been chosen to be emphasised by the Appellate Body, this does not appear to create a meaningful distinction between an action to be covered according to footnote 1, and one that would not fall under that footnote. Rather, the distinction being made by the Appellate Body must be oriented to the question of which party acted to investigate and implement the measure, i.e., a customs union or an individual member. It is, however, unclear as to what bearing this distinction should actually have when in the presence of a legal customs union and in the course of determining whether the measure has been investigated and applied in a parallel manner. If a customs union is present, then the heart of the issue would appear to be the parallel application as far as the question of discriminatory investigation and application is concerned.\(^{111}\) However, by eliminating the consideration of footnote 1, the Appellate Body also conveniently avoided any need to determine whether or not MERCOSUR actually is a customs union, a point contested by both the Indonesia and United States submissions, but not the EC. This question is not so easy to answer, if for no other reason, than because of the types of transitional arrangements

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\(^{107}\) Argentina Panel Report, para. 8.102, recited in Argentina AB Report, para. 105.

\(^{108}\) Argentina AB Report, para. 107, citing Common Market Decision 17/96. “According to these transitional provisions, the investigation procedure for the adoption of safeguard measures was to be conducted by the competent authorities of the State Party in question, applying relevant national legislation.”

\(^{109}\) Argentina AB Report, note 96. The measures were so notified by Uruguay acting as Pro Tempore President of MERCOSUR, as indicated by the Appellate Body.

\(^{110}\) Argentina AB Report, para. 108.

\(^{111}\) This can be shown by modifying the facts wherein the customs union framework would allocate investigation to the individual member, like in the case at hand, but then retain the power of approval of the measure in a customs union institution. Then a measure authorised by the customs by the customs union would be applied by the individual member.
employed by MERCOSUR. These demonstrate a significant, although perhaps temporary, residual commercial power held by the individual members. Here, these retained powers may have appeared in any case to be sufficient to have the measure assigned to Argentina rather than to MERCOSUR.

11.10.2 The application of Article XXIV to the Argentina measures

Having reversed the Panel and eliminated footnote 1 from any consideration, the Appellate Body went on to treat the possibility of an Article XXIV exception for Argentina’s actions as a distinct legal issue. Argentina appeared to have claimed that Article XXIV either excused or mandated the selective application. The difference between the two issues can be highlighted. Footnote 1, if applicable, would have only gone so far as to authorise a customs union to act on behalf of an individual member in investigating for whom the measure may be applied (which territory may enact the safeguard). It does not say anything regarding upon whom a measure may be imposed. The Article XXIV question takes up this upon whom aspect by addressing whether members may be exempted from the application of the measures. As the Appellate Body restated,

“(T)his issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of “increased imports” into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures.”

The Appellate Body ruled that the resolution of this question was to be found in the context of the rule enunciated by its earlier Report in the Turkey textiles case wherein it had been found that “Article XXIV may justify a measure which is inconsistent with certain other GATT provisions.” In the instant case however,

“As Argentina did not argue before the Panel that Article XXIV provided it with a defence against a finding of violation of a provisions of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Article 2 and 4 of the Agreement on Safeguards.”

To identify the particular GATT violation in question, a WTO Member, whether a customs union member or not, would have the power to investigate imports for the purposes of undertaking a safeguard measures from all sources. Therefore, the violation of GATT 1994 provisions referred to above must be based upon the selective investigation and application of the measures upon some WTO Members but not others. As the Appellate Body continued on to investigate the Panel’s conclusion of “implied parallelism”, this GATT violation became apparent from its reading of Article 2.2 of the Agreement. Argentina violated this provision since its safeguard was not “applied to a product being imported irrespective of its source.” Thus, the Agreement required that Argentina, “apply those measures to imports from all sources, including from other MERCOSUR member States.” Finally,

“...we find that Argentina’s investigation, which evaluated whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources. Therefore we conclude that Argentina’s

112 Argentina AB Report, para. 109
114 Argentina AB Report, para. 110.
115 Argentina AB Report, para. 112.
116 Ibid.
investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States form the application of the safeguard measures.¹¹⁷

A remaining point to clarify was whether this ruling included a conclusion that customs unions were without a legal right under Article XXIV to exclude members from a parallel application of safeguard measures, either on behalf of the entire union or for an individual member. In either case all customs union members would be excluded from the investigation of sources. As the Appellate Body indicated,

"...we wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure."¹¹⁸

That the possibility remains for a customs union to so exclude one of its own members from a safeguard is also exhibited by the Findings and Conclusions wherein the Appellate Body, "(d) reverses the Panel’s findings and conclusions relating to footnote 1 to Article 2.1 of the Agreement on Safeguards and Article XXIV of the GATT 1994, and concludes that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States."¹¹⁹

11.11 Conclusion on the Argentina Report

The Conclusion leaves open the possibility that Article XXIV acts to permit the exclusion of member sources from the application of a safeguard. The next question to raise is how would members validate a selective application in light of this Appellate Body Report and as it incorporated the test formulated in the Turkey Appellate Body Report. The next chapter will attempt to address this by seeking to integrate the two reports as they also reflect upon the systemic issues outlined by the WTO Committee on Regional Trade Agreements. Assuming that the investigation and application of the safeguard action are handled by the customs union either on behalf of a member or on behalf of itself in its entirety, this issue drops out of the discussion since footnote 1 to Article 2.1 of the Agreement is properly applied. As we will see, that the case concerns Article XIX safeguards raises some distinct issues for Articles XXIV and XIX that have not been resolved by either the Safeguards Agreement, the CRTA in its systemic treatment of Article XXIV issues, or by any consistent practice developed by regional parties. Finally, although the Argentina Panel was reversed on its treatment of Article XXIV, some issues discussed by the Panel would likely be revisited where an Article 2.2 violation was found and the customs union member then properly asserted its Article XXIV defence.

¹¹⁷ Argentina AB Report, para. 113 (emphasis in original).
¹¹⁸ Argentina AB Report, para. 114.
¹¹⁹ Argentina AB Report, para. 151 (emphasis added).