Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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"If the General Agreement on Tariffs and Trade is to retain a significant influence in world trade policy, a new understanding of the meaning and application of Article XXIV is one of the issues that must be resolved. That Article, permitting the formation of customs unions and free-trade areas, is probably the most abused in the whole agreement and the heaviest cross the GATT has had to bear."


12.1 Introduction

The question of regional agreements in the GATT/WTO has been treated chronologically through the text. Part One covered the pre-GATT historical conditions giving rise to the resurrection of the MFN clause and through the negotiations of the ITO Havana Charter provisions in Geneva and Havana. Part Two placed its focus on the years of the GATT prior to the WTO, with a concentration on the practice of reviews in the GATT working groups assigned to determine the application of Article XXIV to specific proposed agreements. Although GATT-1947 dispute panel practice would lead to non-adopted reports, these panels established the legal reasoning that GATT parties had some right to seek juridical review over the formation of regional agreements, at least when respondent parties invoked a defence based upon GATT Article XXIV. The WTO Understanding on the Interpretation of Article XXIV encapsulated these earlier panel developments in its new paragraph 12 requirement that all matters arising from the application of the Article were within the purview of the WTO Dispute Settlement Understanding.

Thus, the pattern was set for the WTO and GATT-1994 whereby judicial developments could move ahead of the stumbling blocks that had infested the GATT review process since the earliest notified agreements. While many of these stumbling blocks could be said to represent the self-interest of regional members to maintain the status of self-autonomous regimes, others reflect honest and complex differences of opinion regarding the proper interpretation of the Article’s requirements, and the relationship of the Article’s exceptional nature to the balance of other GATT obligations. As some WTO cases have now gone through both Panel and Appellate Body review, one can begin to outline the features of a legal interpretive framework regarding Article XXIV.

As these events have transpired, the WTO standing Committee on Regional Trade Agreements (CRTA) has also continued to attempt to qualify the large number of submitted agreements with the terms of the Article. The reports of the CRTA are valuable to assist the conclusion of the text for a number of reasons. First, some of the old arguments from the early GATT years can be documented as unresolved. Likewise, a number of new complexities have been added by the more extensive nature of regional agreements notified and by the frequent occurrence of overlapping regional agreements. As we have completed the review of the WTO cases, what is perhaps most interesting by way of conclusion is to survey the progress of the CRTA. Especially on the so-called intractable issues, as evidenced by the reports of the Committee and minutes of the proceedings, one can document good statements for the various positions retained on Article XXIV. As these can be set alongside the

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1 To paraphrase the terms of reference for the CRTA: a) to carry out examination of agreements and to present its report for appropriate action; b) to consider how the required reporting on the operation of such agreements should be carried out and to make appropriate recommendations; c) to develop procedures to improve the examination process; d) to consider the system implications of such agreements for the multilateral trading system and the relationship between them, and to make appropriate recommendations to the General Council; and e) to carry out additional functions assigned by the General Council. WTO, Document WT/L/127, para. 1.
relevant dispute rulings, one can also attempt to determine what aspects have been arguably clarified by the process of judicial action in the WTO.

Following this, the book concludes with a look to the future of the EC, now the European Union, in regard to its own regional system and as this system must also accommodate itself to the reality of the WTO. Since the history of regionalism in the GATT was framed by the issues presented in the original EEC Overseas Association, a return to the successor of this arrangement, as it is now proposed to again be constituted as a series of free-trade areas, provides a sense of completing the circle.

12.2 CRTA systemic issues

The status of the work program of the Committee on Regional Trade Agreements (CRTA) can be outlined by way of introduction. According to the Committee's Annual Report for the year 1999, as of the end of third quarter of the year, a total of 118 regional trade agreements had been notified to the WTO. 93 of these were notified under GATT Article XXIV.2 As indicated by the Report, of the 72 agreements under its current purview, draft reports had been distributed and were under consideration for about one-half. While headway had been made in the examination of a number of regional trade agreements, the Committee was unable to indicate that it had finalised reports on any of the examinations.3

Besides the technical and administrative difficulties of reporting and reviewing individual agreements, it is also the case that an absence of consensus in the Committee regarding a number of outstanding interpretive issues continued to delay the review process.4 This leads one to suggest that WTO case developments, as discussed in the previous chapter, can lend some clarity to the settlement of some of the outstanding systemic issues. However in approaching the application of WTO law to the CRTA process, some differences between adjudication and review of regional agreements may also be kept in mind. First, the CRTA is mandated by its terms of reference to carry out evaluation of agreements and to make a report recommending appropriate action. While this implies a judicial action by way of taking a decision, the CRTA process is not a judicial one, but is suggested to be rather political in nature.5 It may be offered in this vein that the CRTA operates within an "executive" sphere akin to administrative action that makes factual determinations having possible legal effect in later judicial review. If this characterisation is correct, it can be said that the CRTA is bound by WTO panel and AB law which has lent interpretations that can be applied to the process. However, it is not so clear as to how bound the CRTA is in exercising its authority in this more consensual process. Particularly, whether its "decisions" or recommendations are also subject to "appeal" in the DSU. This is only to suggest that the DSU legal developments may not be comparable to the situation of "lower" court that is clearly bound to apply its higher court rulings for new cases arriving on point.

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2 CRTA, Report (1999) of the Committee on Regional Trade Agreements to the General Council, WT/REG/8, 11 October 1999, para. 5, attached to this text as Appendix Three. The figure includes accessions and parallel notifications on services arrangements as separate agreements. Fourteen regional trade agreements were notified under the Enabling Clause (Decision of 28 November 1979), and eleven under GATS Article V.

3 CRTA, ibid., para. 15. The comparable number of notified agreements for 1996 was 32. CRTA, First Session, Note on the Meeting of 21-22 May, 1996, WT/REG/M/1, para. 14. This number would reflect the backlog inherited by the CRTA as notified prior to establishment of the Committee.

4 For example, "Two aspects in particular, SAT and ORCs, had been the subjects of lengthy discussions, but without any sign of any consensus being reached, and without sign of much willingness on the part of some to engage in the exercise." Statement by Hong Kong, CRTA, WT/REG/M/18, 22 July 1998, para. 48.

5 F. Roessler, The Institutional Balance Between the Judicial and the Political Organs of the WTO, paper presented at Harvard University, Conference titled, Efficiency, Equity and Legitimacy: The Multilateral Trading system at the Millennium, June 1-2, 2000, 26 pgs, at pg. 9.
Thus, while some case interpretations may appear to have far-reaching consequences for the CRTA process, the CRTA itself may not be so impressed. However, this same consideration of judicial/executive division within the WTO may also give rise to certain positive extensions of WTO case-law development that would not occur even in the context of later cases in the DSU. For example, it is suggested below that the Appellate Body’s test for invoking an Article XXIV exception may apply as well to the rules that govern intra-regional trade. In the DSU context this is an acknowledged abstraction, as it is difficult to identify a complainant for such a case. Not so in the CRTA however, where reviewing parties can determine to apply such criteria without the presence of a complainant. Overall, it is believed that comparing the cases to the positions of delegates expressed in the CRTA is a helpful exercise. Over time, it is more likely than not that the legal interpretations will take hold in the CRTA.

12.2.1 Interaction between regional trade agreements and the multilateral rules – generally

An earlier discussion in Chapter 8 referred to two possible views of Article XXIV in the larger GATT system as either that of an “autonomous regime” or as a “restrictive exception.” These distinct views have also emerged in the CRTA. As reported by the Secretariat, one view has held that Article XXIV only derogates from GATT Article I MFN. The other has held that the Article operates as an exception from any and all of the provisions of the GATT, provided that the regional members do not abridge the rights of third parties to the wider agreement. One proponent of this second view has also cited international law regarding the interpretation of treaties in support. Thus, from the EC,

“(A)rticle XXIV:4 contained a balance between the legitimacy of forming an RTA and the responsibility as a “citizen of the GATT” to do so in a way which did not raise barriers to third-party trade. In other words, where barriers were lowered legitimately and preferentially between the parties to an agreement, the net position of third parties should not be affected. This was not surprising in light of international law on multilateral treaties, which held that generally, parties to a multilateral agreement could form subsequent agreements between a subset of the membership of the wider agreement, varying their rights and obligations as between themselves, provided they did not abridge the rights of third countries to the wider, underlying agreement. Article XXIV:4 seemed to do no more than to translate into the language of trade policy that wider principle.”

It is made clear from the Turkey Textiles Appellate Body Report that the more restrictive view limiting the Article XXIV exception only to Article I MFN has not been sustained. Rather, the proviso of Article XXIV:5 permits the possibility that other GATT Articles might also be violated by regional members when the conditions of the Appellate Body’s test have been met. On first impression, the EC view above accords with the position taken in this text (chapter 8) where it was argued that Article XXIV is a permissive article granting the right of bilateral modification in accord with the VCLT Article 41 1(a). However, there is more at hand here, as also suggested in that chapter. The EC summary above suggests either that the criteria of VCLT Article 41 1(b) applies in addition to the Article XXIV provisions, an interpretation that would not accord with the structure of the VCLT Article, or in the alternative, that Article XXIV recites the conditions of VCLT Article 41 1(b)(i) within its own terms. If the latter is being suggested, there is little support in the text of Article XXIV to support this view.

6 As summarised in CRTA, Synopsis of “Systemic” Issues Related to Regional Trade Agreements, Note by the Secretariat, WT/REG/M/37, 15 February 2000, para. 27.
7 EC Statement, WT/REG/M/14, 24 November 1997, para. 13. It seems clear the reference is being made to the VCLT, Article 41, as discussed in Chapter 8.
8 As formulated, GATT Article derogations are permitted where regional members have met all the requirements of Article XXIV, paragraphs 8 and 5, and where the violation or infringement is necessary in order to implement the regional trade agreement. WT/DS34/AB/R, para. 58.
In light of the Turkey AB Report, the EC’s interpretation of the law on modifications appears overstated, as it can leave the impression that regional members may “(vary) their rights and obligations as between themselves, provided they did not abridge the rights of third countries.” This would suggest that any agreement is possible between regional members as long as non-members were not affected in their enjoyment. However, this interpretation suggests that there is a separate legal test for GATT violations between members which varies from the test to be applied for GATT violations as to non-members. The better approach is to consider that the test employed by the Turkey AB Report interprets the requirements for modifications developed within the context of Article XXIV itself, and as it applies for members and non-members alike. This would mean that regional members are not given a clear field upon which to suspend the operation of GATT Articles between them. Rather, they must also show: a) that the arrangement overall meets the conditions of paragraphs 5 and 8 of Article XXIV; and b) that the infringement between members is necessary in order to complete the arrangement. This application of the test places regional members in the defensive position of justifying trade-restrictive measures as necessary to complete the requirements of paragraph 8 of Article XXIV, a result that is argued here to be an appropriate one. For CRTA practice, this also suggests that the act of “contracting out” by regional members may be viewed as limited to the unusual circumstances of adjustment within prescribed interim periods, or where sub-paragraph 5 considerations dictate internally restrictive measures.

12.2.2 Relationship between article XXIV provisions

Much of the CRTA discussion revolves around the relationship between paragraphs four, five and eight of Article as these paragraphs contain the core legal requirements, or are said to inform the legal requirements. Occasionally, the positions of CRTA members who are not active as regional members appear to be fairly consistent. This is the case in regard to the role of paragraph 4 of Article XXIV and the possibility that economic effects are an aspect of a legal requirement.

12.2.2.1 The legal effect of paragraph 4, the trade-creation test

This interplay between the paragraphs can be seen in the role that different delegations assign to the preamble provisions of Article XXIV:4. Some parties make the point that while paragraph 4 may not actually impose specific legal criteria of its own, it nevertheless informs the provisions overall by imposing certain economic goals within which the legal provisions should be interpreted. Specifically, this question is whether qualified formations should be made to show evidence of external trade creation, or at least be able to indicate that trade diversion will not occur as a result of the elimination of trade barriers between members. Thus, there has been an ongoing question of whether Article XXIV should entertain certain economic tests in conjunction with its legal criteria, and if so, how such a requirement should relate to the legal provisions. For an example From Korea, “(S)ince there was no agreement as to the meaning of the term “substantiall all the trade”, it seemed the examination of trade effects of RTAs was very important.” And, “…the Committee should not limit too narrowly the legal reading of paragraph 4.”

The view taken in the present text has been that subjecting Article XXIV to an economic criteria undermines the paragraph 8 requirements, resulting in a reading that paragraph 4 supersedes paragraph 8. Some CRTA members appear to have also come to this conclusion. From the United States,

9 Thus for example, where regional members included a sectoral arrangement imposing trade intra-regional restrictions. They would be required according to the Turkey AB test to demonstrate that the regional agreement nevertheless complied with paragraph 8 coverage requirements, and if so, that the violation was “necessary” in order to complete the larger arrangement.

10 CRTA, WT/REG/M/15, 13 January 1998, para. 20. According to the CRTA, this view has been supported in varying degrees by Australia, India, HKC, Japan and Korea. CRTA, WT/REG/W/37, 15 February 2000, para. 34 and note 77. This position is similar to Dam’s 1963 argument, that Article XXIV:4 should be creatively re-interpreted to provide for a trade-creation standard. See this text, Part Two Conclusion.
"With respect to the focus on economic rationale, she stressed that in a legal organization, Members needed to focus on what they had committed themselves to legally... A key word in that paragraph (4) was "should"- the language did not read "is to facilitate trade" and "will not raise barriers"; ...There was no test in Article XXIV:4, and it was never intended that there should be one in it."\(^{11}\)

The European Community representative also took the view that legal obligations as expressed took priority over economic considerations:
"...as the United States representative had said, Article XXIV was a set of rights and obligations and part of an Agreement constructed from rights and obligations...The key point made by his delegation earlier was that Article XXIV could not be used to support the argument that there ought to be an economic test applied in addition to the other rights and obligations contained in the Article in clearer terms...The questions arising with respect to trade creation and trade diversion and general questions of economics might fall under the heading of 'what the rules or rights and obligations ought to be'...Article XXIV did not support economic arguments as a basis for evaluating actual preferential trade agreements..."\(^{12}\)

The question of whether paragraph 4 recites a distinct legal obligation within the Article has long been at issue. Given the history of debate regarding the role of the paragraph in determining the conformity of agreements, it may be viewed as helpful that the Turkey Appellate Body has ruled that this paragraph 4 is manifested by the other provisions but does not state a separate legal obligation. As reported in Chapter 10, the Turkey Appellate Body made a clear ruling on the legal effect of paragraph 4, ruling that it contains "purposive" and not "operable" language. Thus, "It does not set forth a separate obligation itself, but, rather, sets for 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."\(^{13}\)

Although it is clear that WTO Members who have been less-active in forming regional agreements are among those supporting a trade-creation criteria, this view of the Article and its paragraph 4 requirements has been rejected. Rather, the legal obligations are understood to control, and as such, the case for restraining future regional agreements in the course of the review mechanism should not be based upon the trade diversion argument. What is given emphasis instead is that the paragraph 8 requirements may now be lawfully liberated from trade welfare criteria. This opens the possibility that its requirements may be given a sufficient reading on their own merits in order to determine the actual coverage obligations for regional parties to meet.

This similar consideration is evident for paragraph 4’s relation also to paragraph 5. As the Community representative indicated in the same comment, the view taken of Article XXIV:4 directly informs the requirements of Article XXIV:5 as that Article describes the 'outward looking' or external requirements of a formation. Where Article XXIV:4 is not given the gloss of an additional economic-effects examination, then it follows that paragraph 5 is essentially a standstill provision, an obligation to not raise new barriers to trade of non-members in the form of either duties or other regulations of commerce (ORCs). As for paragraph 8, paragraph 5 would also not then be viewed as imposing a condition upon regional parties to avoid liberalising measures solely because they may generate externally diverting effects.

\(^{11}\)U.S. Statement, CRTA, WT/REG/M/15, 13 January 1998, para. 24. Similarly, "(T)he representative of Brazil said his delegation was of the view that the question of trade diversion or trade creation was not part of the test of conformity with Article XXIV...." Ibid, at para. 21.

\(^{12}\)EC Statement, CRTA, WT/REG/M/15, Ibid., para 25.

\(^{13}\)WT/DS34/AB/R, para. 57.
As the Appellate Body appears to have cleared away the issue of paragraph 4 and its trade creation overtones, it has also opened the avenue for a more constructive discussion regarding the content of the other paragraphs’ obligations and the relationship between these remaining requirements, particularly paragraphs 5 and 8.

12.2.2 Paragraph 5 and 8, the sequence of findings in examination

If it is understood that Article XXIV:4 can not expand the meaning of paragraph 5, then the important relationship between Article XXIV:5 and XXIV:8 is also illuminated. This text has argued that XXIV:8 requirements are inherently definitional to the qualification of the exception and function as a pre-condition to any assessment of external effects which would then be examinable according to Article XXIV:5. This view has also been taken up by the European Community in the CRTA minutes:

"Paragraph 8 contained the internal definitions or tests which parties forming a customs union or an FTA had to meet in order to benefit form the general derogation contained in the opening sentence of Article XXIV:5, whereas separately paragraph 5(a) and (b) dealt with the relations between the partners to a preferential agreement and third parties."  

The Turkey Appellate Body has also appeared to take a position on this point. The two-part test provided by the AB required first that both paragraph 8 and 5 must be met; and second, that the measure must be necessary in order for the formation to be completed. However, as indicated by the AB, it may not always be possible to make a determination on whether a measure would prevent the formation of a customs union, “without first determining whether there is a customs union.” This determination could not be made in the course of an examination of paragraph 5, as this proviso presupposes by its own terms that the exception is being accorded to customs unions and to free-trade areas. This first suggests that whether a regional agreement constitutes a free-trade area or customs union can be determined prior to its implementation, and by surveying the disclosure of the members in regard to their plan and schedule, according to the requirements established as definitional components according to paragraph 8.

Therefore, for the CRTA process, there is a strong case to make that paragraph 8 matters should be engaged at the outset. If defects are presented in the qualification of an arrangement according to this paragraph, the process is finished. There is no need in going on to determine whether or not the external effects of a formation are detrimental if the notified arrangement does not constitute a free-trade area or customs union in the first place. Thus, what is suggested is a bifurcated procedure whereby the first step must be passed prior to a consideration of the second.

Clarifying the sequence of examination between the paragraphs would also contribute to a determination of what issues should be handled at which juncture. For example, the question of whether a trade liberalising measure undertaken according to paragraph 8 presents negative external effects would appear not to be appropriate until the second step in the procedure. Thus, if the CRTA process would provide the criteria that would describe a qualified formation according to paragraph 8 without reference to the external effects, then it would be possible to move on to paragraph 5 considerations in the second step. In short, paragraph 8 would be viewed as listing requirements and criteria that are expected to be undertaken by regional parties and not as a list of requirements that

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14 CRTA, WT/REG/16, para. 58, p. 14. From the U.S., "With regard to the question of whether Article XXIV:8 was internal or external,...she would argue it was the piece which governed the internal regulations of the RTA, containing the definition of a customs union and an FTA."
15 WT/DS34/AB/R, para. 59.
16 Article XXIV:5 reads in part: "Accordingly, the provisions of this Agreement shall not prevent...the formation of a customs union or of a free-trade area...provided that..."
17 This interpretation was advanced in this text in the introduction to Part Two.
may be undertaken by regional parties as long as they do not hurt non-members. Thus, we turn now to the particulars of paragraph 8.

12.3 Individual Article provisions

12.3.1 Article XXIV:8 (a) and (b), “substantially-all trade”

As reported by the Secretariat, a lack of consensus on the meaning of substantially-all trade (SAT) has repeatedly led to impasse in the examination of regional trade agreements. As described, two approaches, not necessarily mutually exclusive, have been advanced since the GATT-1947 years. One is quantitative, using a type of statistical benchmark to designate a percentage of trade. The other is qualitative, which refers to the notion that no sector (or major sector) could be excluded. The Turkey Panel and the Appellate Body did not address the meaning of “substantially” on point as to the internal trade requirements of either customs unions or free-trade areas respectively according to sub-paragraphs 8 (a)(i) and (b). Rather, the discussion concerned its meaning as found in sub-paragraph 8(a)(ii), providing for the common external tariff requirement of a customs union. Thus, the term “substantially” was raised as to the phrase “substantially-the same” duties and other regulations of commerce. With this distinction in mind, the Appellate body affirmed the Panel’s view that the term “substantially” in this context provided both quantitative and qualitative elements. If applicable to the internal trade context, this would suggest that the CRTA should disband the arguments for an exclusive approach either way, in favour of a combined treatment. While this does not provide a test by itself, it does eliminate the suggestions that one approach should be used in place of the other.

Along the same analogy between “substantially the same” and “substantially-all” is also the difference in emphasis between the more flexible interpretation advanced by the Turkey Panel as compared to the Appellate Body. Although the AB commenced by repeating Damm’s not very helpful quip that “substantially” must refer to something less than “all”, but something considerably more than “some”, it went on refute the Panel’s notion that “comparable” duties and regulations could qualify for the requirement. In this, flexibility is available for regional members, but this flexibility is also limited. Therefore, in our view something closely approximating ‘sameness’ is required…” Thus, “comparable” duties and regulations are not sufficient, and in rejecting this lower threshold, the AB also qualified the term “substantially”. For Article XXIV:8(a)(ii), the phrase “substantially the same” trade regulations required a higher degree of “sameness”, since the term “substantially” was understood by the Appellate Body to qualify the word “same”. While it was not necessary in this case for the Appellate Body to direct the same emphasis as to the internal trade requirement under sub-paragraphs 8 (a)(i) or (b), one can fairly sense that the same interpretation would control. Thus, the word “substantially” would be understood to qualify the word “all” for the purposes of the SAT requirement as well. Although one would certainly not characterise this interpretation as sufficient to settle the longstanding issue over the meaning of the phrase, it does at least generate some guidance in support of a stronger rather than a weaker requirement. It will remain to be seen whether CRTA

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18 An example of this second view is reflected in a number of comments that continue to assert that regional members may not prohibit the use of safeguards upon their internal trade. Here is a clear case where the settling of internal requirements according to Article XXIV:8 would inform the parameters of Article XXIV:5 considerations. For example, Japan comment on the elimination of emergency measures and anti-dumping actions in the Canada-Chile Free-trade area. CRTA, WT/REG/38/M/2, paras. 9 and 10. The issue is discussed in greater detail below.

19 CRTA, WT/REG/W/37, 15 February 2000, para. 54. There are arguments against using each approach exclusively. For quantitative, regional parties would then have license to exclude a set amount of trade. For qualitative, it is claimed that listing all sectors does not necessarily result in free trade. Ibid., para. 54 (a) and (b).

20 There are a number of combined approaches that have been advanced in the CRTA discussion on systemic issues. For one example, see Australia, WT/REG/W/22/add.1, paras. 9-10.

21 WT/DS34/AB/R, paras. 48-50.
parties can derive from this expression a more concrete basis for making examination under this criteria.

One facet that that may be challenged even while a defined standard does not emerge is the situation where trade in a sector is partially liberalised between members by a positive preference, but the remainder is left “uncovered” (assumedly) at MFN level. Ideally, this should be a transitional situation indicating that parties after the interim period would resolve these partial preferences into complete preferences. However, delegate opinions clearly do not agree with this view. For an example, in the Examination of the Interim Agreement between Slovenia and the European Communities in March of 1998, the United States representative commented that it was difficult to discern whether substantially all the trade was being covered. Additionally, "(S)he saw no evidence in Article XXIV that allowed for preferences short of going to zero, and she invited the Parties to the Agreement to react to this. The representative of Hungary responded,

"...since no sector was left out, it was irrelevant whether some sectors were treated in the Agreement itself, or in Protocols, Annexes or separate agreements. It was his delegation's firm view that nowhere in Article XXIV:8(b) was it in any way forbidden to grant preferential treatment to certain products at a level less than the m.f.n. rate but more than zero."

The EC representative's response concurred with the view of Hungary.

"His delegation had consistently argued for decades that it was perfectly possible to form a free trade agreement consistent with Article XXIV:8(b) with preferences contained within the agreement short of elimination. He would go so far as to suggest that that amounted to a sort of consistent subsequent practice within the broader rules of interpretation on international law."

If subsequent practice developed on this point, it did so without acquiescence of a number of other GATT parties. It may well be the case that so-called partial-preferences sectors cannot be included under the concept of “elimination of duties” and thereby be counted as a portion of the trade that has been dedicated to meet the SAT test. While it is apparent that the EC position on this question has not meaningfully advanced since the 1958 Overseas Association, it may also be the case that within the current legal setting this position is tenuous. The challenge would arise to extend, on the basis of MFN, the partial preference to a non-member in regard to a particular product. This would necessitate the Article XXIV defence by respondent and a panel would then have to make the finding that the agreement in question met all the conditions of paragraph 8. It seems possible that that the panel would be inclined to subtract the sectors whereby duties and other restrictive regulations of commerce had not been “eliminated”. As in Bananas I and II reports, the panel may also recite the availability of the enabling clause and/or the general waiver provisions of Article XXV as the appropriate alternative means for these members to proceed.

What comes forward from both the GATT-1947 panels, but especially the WTO cases, is the explicit recognition that Article XXIV is a conditional exception, with the burden placed upon the respondent

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22 WTO, Committee on Regional Trade Agreements, Examination of the Interim Agreement between Slovenia and the European Communities, WT/REG32/M/1, 12 March 1998, paras. 13-17, pp. 3-4. Continuing from the Hungary representative: "Article XXIV:8(b) talked about elimination of duties on substantially all the trade, and if there were some duties which were decreased but not to zero, it did not mean that that was not in compliance with Article XXIV:8(b)." Ibid at para. 15.

23 Ibid., at para. 16. From the EC representative, "...so far as the provision of preference within a free trade agreement short of full elimination was concerned, there was a body of consistent subsequent practice within the WTO embracing Members well beyond the EC and its partners, which suggested that their interpretation was a reasonable one shared by at least a broad, if not a general, community of opinion." Ibid., para. 19. the U.S. representative replied, "While she found interesting the comment on the accepted body of opinion, she noted that in the WTO for tariff preferences they were either given through a waiver or through certain provisions of the Enabling Clause."
who seeks to invoke it. This allocation of burden affects the demonstration necessary to validate a particular GATT violation, but it also has impact upon the process of determining an SAT standard in the CRTA, and the legal effects of non-decisions regarding particular agreements. We will discuss this point further below in the section on institutional considerations, but for now, a single point is offered. The absence of a consensus on the meaning of SAT arguably benefited regional proponents in the past. This may not be the case in the future.

12.3.2 Relationship of listed-article exceptions as to the scope of SAT

One area where more juridical guidance could contribute to defining the SAT requirement is in the relationship of the excepted Articles of XI-XV and XX as to the term “substantially.” Here the interpretation made by both the Turkey reports is not clear as the discussion of the permitted internal measures was only ancillary to the question of externally-applied quantitative restrictions. For the Panel, the exception listing did appear as some evidence of the flexibility intended by the use of the term “substantially”. The Appellate Body agreed that “some flexibility” was offered, but cautioned that the degree of flexibility was, “limited by the requirement that ‘duties and other restrictive regulations of commerce’ be ‘eliminated with respect to substantially all’ internal trade.”

There may be two views possible for these listed Articles that address a common point as to the meaning of substantially-all trade. One is whether the requirement should be calculated so as to deduct from SAT all of the trade that is affected by measures taken according to the listed exceptions. This would suggest that the SAT requirement would not constitute a “once-made” determination. Since regional members could invoke the listed exceptions before, during and after their formation, the amount of trade covered for SAT would necessarily vary over time. In this regard, one may recall an earlier working group review on the Yaounde II Convention (chapter 4.2) whereby the EEC expressly took this position. There the EEC indicated that it would notify the GATT parties at the time when internally restrictive measures exceeded a level necessary to retain coverage for substantially all trade. By this view, regional agreements are necessarily dynamic and may, at any point in time, be within or without the SAT requirement. This would have implications for challenges in the DSU, since the Panel might necessarily determine whether compliance with paragraph 8 was being made for the status of the regional agreement at the moment in time that the defence was being raised. There is also an implication for the CRTA review, since it also suggests that CRTA members have a continuing capacity to alter or withdraw any initial recommendations as based upon later periodic reviews.

An alternative view would consider that the listed exceptions in Article XXIV do not relate to the meeting of the SAT requirement at all. Here, the text of paragraph 8 is read to mean that members must cover SAT, except where necessary for those restrictions permitted in the listed Articles. This interpretation would permit regional members to adopt measures affecting internal trade in the context of the listed GATT Articles, and according to requirements imposed by those provisions for those exceptions. Measures undertaken by members that fell outside the listed Articles would of course remain a factor in determining the availability of the exception. It would seem that an advantage to this characterisation is that the legal security of a recommendation in the CRTA would be promoted, and the defence of Article XXIV for a qualified agreement would be more secure in a dispute proceeding.

It seems from the above report quotations that there is no interpretation advanced either way on this point. The argument here, as developed below, is that the second view is more appropriate to the

24 "We note...the possibility for parties to a customs union to maintain certain restrictions of commerce on their trade with each other, including quantitative restrictions (...where necessary, those permitted under Articles...”). This implies that even for “substantially all trade...”certain WTO compatible restrictions can be maintained.


25 WT/DS34/RAB/R, para. 48.
realisation of an operable standard to qualify agreements. This would mean that the CRTA undertakes an examination of an agreement prospectively as regarding the final outcome to be achieved by regional members. This is based upon details of the plan and schedule forwarded by the members. A condition to this position, however, is that the exception listing of Articles should either be determined as exhaustive, or alternatively, that non-listed exceptions undertaken between members would continue to have a bearing on whether the regional agreement was meeting the SAT requirement. Both for the CRTA and for DSU proceedings, this would infer that the application of restrictive measures between regional members, which did not fall under the provisions of either Articles XI-XV and XX, would be undertaken at the risk of the members in regard to future challenges.

In order to compose this argument in full, it is necessary to turn to a more detailed discussion on the issue of the exhaustive listing and incorporate the reports from the Turkey textiles and Argentina Footwear cases. The safeguards example will provides the vehicle for analysis.

12.4 Paragraph 8 and the exhaustive listing

The debate continues in the CRTA over the Article XXIV:8 listing of exception articles (XI-XV and XX), as they may either constitute an exhaustive or non-exhaustive listing. For an example from Japan,

"With regard to the list of exception in Article XXIV:8, his delegation's position...was that the fact that Article XXI (security exceptions) had not been included indicated that the list was not exhaustive; thus this paragraph should be considered in the context of other provisions and the spirit of the WTO as a whole. Regarding the application of safeguards, it seemed there was discrimination when RTA parties did not apply safeguards to each other."26

The opposing view has been expressed by Australia, that a completed formation should not permit the use of safeguard measures between its members. This view and a middle "permissive" view is summarised in the EC representative comment.

"The Australian paper seemed to argue that Article XIX measures must not be applied between the members of an RTA...His own delegation saw this as permitted but not mandatory."27

However, the EC has also raised the possibility that this conclusion should diverge as between customs unions and free-trade areas. Thus,

"(I)t seemed that within the customs union the definition only made sense if Article XIX were not included in the list of exceptions in Article XXIV:8(a)(i). There could only be the continuation of safeguard measures in the long run, at the end of the transition period, in circumstances where it was not a proper customs union, as it did not make sense to maintain such a restriction within a customs union."28

The argument in favour of an exhaustive listing was made in Chapter 3.3.1. To briefly recount, that analysis referred to the placement of Article XXI in the Havana Charter as a general provision, and not within the Commercial Policy chapter where the other exceptions were located, together with the regional exception itself. Although the text has also acknowledged that there can be differences between customs unions and free-trade areas in regard to their respective abilities to eliminate trade restrictions, it has also cautioned that generalisations on this point are difficult. Examples of incomplete customs union can be raised, as well as more complete free-trade areas.29 However,

26 CRTA, WT/REG/M/15, para. 18, p. 6. The U.S. position is apparently the same, but not elaborating. Ibid., para. 57, at p. 20.
27 CRTA, WT/REG/M/14, para. 9, p. 4.
28 CRTA, REG/M/15, para. 44, p. 17.
29 See Chapter 7.1.
whatever validity is offered by the EC comment regarding the differences between the two forms, this
distinction is not reflected by the text provisions of Article XXIV:8 (a) and (b), as both contain an
identical listing of exception Articles. Further, drafting history, if anything, suggests more of an intent
to convey or "extend" the customs union internal requirements to the free-trade area exception, and
not to provide for a separate legal regime for the qualification of free-trade areas. Thus, one sees in the
stated internal requirements an alignment of the provisions overall for free-trade areas and customs
unions on the point of permitted exceptions.

The issue can be stated as whether the listing of Articles is exhaustive as describing only the measures
that can be permitted between regional members. Here, the Turkey Appellate Body only noted that the
terms of the sub-paragraph provide,

"...that members of a customs union may maintain, where necessary, in their internal trade,
certain restrictive regulations of commerce that are otherwise permitted under Article XI
through XV and under Article XX of the GATT 1994."30

This comment does not say that parties may only maintain such measures, and a determination on this
point was also not at issue. As related in the previous chapter, the Argentina Appellate Body found
that a customs union (or one of its members) violates Article 2.2 of the WTO Agreement on
Safeguards (Safeguards Agreement) any time a safeguard is imposed that excludes another member
from the application. This follows from the Appellate Body's recognition that Article 2.2 of the
Agreement is unequivocal (and pre-eminent) in requiring that safeguard measures shall be applied to a
product imported irrespective of its source. This infringement occurs, according to the Agreement on
Safeguards, whether or not the measure was applied in a manner parallel to the sources of imports
investigated. Thus, Article XIX as elaborated by the Agreement has been interpreted to require that all
WTO Members fashion non-discriminatory application of their safeguards, subject of course to the
detailed provisions of the Safeguards Agreement. Therefore, to validate any selective application by a
member of a customs union, no matter how parallel the investigation was structured, it seems that it
will be necessary for the regional member to successfully invoke an Article XXIV defence.

As recited by the Argentina Appellate Body, and drawing upon the earlier Turkey Appellate Body
Report, two conditions must be fulfilled to overcome a finding of GATT inconsistency. First, the
customs union must meet all the requirements of the Article XXIV sub-paragraphs 8(a) and 5(a); and
second, the formation of the customs union would be prevented if it were not allowed to introduce the
measure. As a part of sub-paragraph 8(a) regional members must meet the SAT test and eliminate
duties and other restrictive regulations of commerce, except where necessary measures undertaken
according to Articles XI-XV and XX (the listed Articles exceptions). It appears clear from the above
description of the nature of the violation, and the defence necessary to validate a selective safeguard
application, that the status of Article XIX as it is omitted from the list of exception Articles is going to
be raised directly by the respondent party.31

For a determination on the question of whether Article XXIV allows regional safeguards to be made
selectively, it would seem that a resolution of the legal status of sub-paragraph 8(a)'s listed exception
of Articles (XI-XV and XX) would be a pre-condition. Since Article XIX is not on the exceptions list,
there is a suggestion that customs union members and free-trade area members may not have authority
according to the requirements to make a non-selective non-discriminatory application of a safeguard.
Thus, the issue could be stated as, whether it is necessary for a customs union (or free-trade area) to
make a selective application of its safeguard (so that other customs union or free-trade area members

30 WT/DS34/AB/R, para. 48.
31 It would argue that members are not permitted (or required) to apply intra-regional safeguards as a condition
to meeting the paragraph 8 requirements. In conjunction with footnote one of the Safeguards Agreement, as long
as member sources of injury are subtracted, the conditions of Article XXIV require that this deviation from the
Article 2.2 of the Safeguards agreement is necessary to meet the Article XXIV requirements.

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are excluded from the measure) in order to meet the requirements as imposed by sub-paragraph 8(a)(i) or 8 (b) of Article XXIV?32

The Argentina Panel addressed this question as Argentina argued that it was compelled by Article XXIV:8 to apply its safeguards selectively and to omit other members. The EC’s position was contrary, that Article XXIV:8 requirements on this point were not prohibitive but permissive. The Panel’s summary of the EC position states that,

“(Article XXIV of the GATT permits the members of a customs union or free-trade area to decide whether, when applying a safeguard measure pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards, to exempt other members of the customs union or free-trade area from the measure.”33

This view could suggest that the customs union would determine in any particular case that a safeguard would be applied selectively or not. By inclusion, it also would encompass the view that a customs union could decide to make all of its safeguards selective or make all of its safeguards non-selective. This could occur by a treaty provision or by an authorised institutional enactment. In short, the permissive approach indicates that a regional grouping can treat the selectivity issue as a matter of choice, without the result having any legal implications on the paragraph 8 requirements.

The Panel appeared to identify this question as one left open by footnote 1 of Article 2.1 of the Safeguards Agreement, as the note states the primary provision is not intended to pre-judge the relationship between Article XIX and paragraph 8 of Article XXIV. The Panel went on to recognise that a larger number of regional trade agreements do impose safeguards upon intra-regional trade, while a few have chosen to prohibit such measures.34 The Panel then ruled outright that Article XXIV:8 did not prohibit the use of intra-regional safeguards:

“(Although the list of exceptions in Article XXIV:8 of GATT clearly does not include Article XIX, in our view, that paragraph does not necessarily prohibit the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion.”35

This conclusion flowed from the Panel’s analysis of the Article, wherein the adoption of a safeguard measure in any particular case may not overall undermine the substantially-all trade requirement. This would be seem to be an explicit adoption of the position for a non-exhaustive listing, and as it was advanced by the EEC also in the original Overseas Association report of 1958. The Panel did leave open the possibility that an infringement of the SAT requirement could occur by the excessive use of safeguards between members.

“Thus we do not exclude the possibility that extensive use of safeguard measures within regional integration areas for prolonged periods could run counter the requirement to liberalise “substantially all trade” within a regional integration area. In our view the express omission of Article XIX of GATT from the lists of exceptions in Article XXIV:8 of GATT read in combination with the requirement to eliminate all duties or other restrictions of commerce on “substantially all trade” within a customs union, leaves both options open, i.e., abolition of the possibility to impose safeguard measures between the member States of a customs union as well as the maintenance thereof.”36

32 This does not mean however that the customs union would necessarily have to include the sources of injury caused by other customs union members in its investigation.
33 Argentina Panel Report, para. 8.94, italics added.
34 Argentina Panel Report, para. 8.96.
35 Argentina Panel Report, para. 8.97.
36 Ibid.
Support for this conclusion by the Panel was found in the difficulty of reconciling the Article’s provisions for interim agreements with any interpretation permitting a selective prohibition. Thus, for transitional arrangements such as MERCOSUR,

"...the temporary lack of full integration of ‘substantially all trade’ due to the maintenance of intra-regional safeguards clauses would still be justifiable within this transitional status of the customs union. Accordingly, pending the completion of integration within MERCOSUR, the requirements of Article XXIV would not force Argentina to apply safeguard measures exclusively against third countries."37

It is not clear why the circumstances of interim arrangements should have any bearing on the issue of the exhaustive listing. A customs union or a free-trade area plan could be required to demonstrate, at the time of CRTA review, that after the interim period, that selective safeguards will be eliminated between the members. Since interim agreements are limited by the GATT-1994 Understanding on the Interpretation of Article XXIV to a ten-year period, except for unusual circumstances, transitional selective measures would normally have ten years to be eliminated as applied to the trade between the members. The factual issue on assessment is whether the customs union or free-trade area plan is demonstrating evidence of a commitment undertaken by the members to eliminate intra-regional safeguards. Following the interim period, the arrangement could be assessed anew on the question of whether this condition had been fulfilled in fact. Thus, the point that such measures might be maintained during the interim period would seem to be entirely irrelevant to the primary legal question, that being the legal status of the listing of Article exceptions as exhaustive or not. After all, the interim period contemplated by the Panel as above is only that: interim. Assuming that a CRTA review was timely prior to implementation, there is no reason to conclude that the maintenance of interim safeguards between members should violate the paragraph 8 prohibition, if the exclusion of Article XIX from the listed exceptions is a prohibition, or have any bearing on whether the arrangement would ultimately comply with the SAT requirement.

The Panel however ruled that the omission was not a prohibition, but rather an option for regional members, by its statement that,

"That there is no doubt in our minds that the letter and spirit of Article XXIV:8 of GATT permit member States of a customs union to agree on the elimination of the possibility to impose safeguard measures between the constituent parties.”38

The Panel adopted the argument made for permissive selectivity that was offered by the EC. Although it was not expanded upon, this EC position, as reported, highlighted the exceptional and temporary nature of safeguards, and the limitation of their application to only single products. These characteristics could also therefore be examined for possibly providing some reason for the omission of Article XIX from the paragraph 8 exceptions, while yet remaining a lawfully permissive option as between members, as according to the Panel. These considerations are discussed further below.

First, perhaps the Panel could have located the ambiguity in the paragraph 8 text that would have permitted a finding that the elimination of intra-regional safeguards was only optional as between members. Reviewing the text,

"8.(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Article XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between constituent territories of the union or at least

37 Argentina Panel Report, para. 8.98.
38 Argentina Panel Report, para. 8.99 (italics added). But, it then went on to apparently indicate that while Argentina and MERCOSUR may have provided as much, that they nevertheless retained the option of imposing selective safeguards when the customs union acts in its entirety. It is not clear how this second point goes to the issue.
with respect to substantially all the trade in products originating in such territories…”

Other restrictive regulations of commerce (ORRCs) are certainly not duties, suggesting that the listed Articles qualify the term “other restrictive regulations of commerce”. The paragraph thus calls for the elimination of such regulations of commerce except when necessary for those circumstances covered by the listed Articles themselves. As such, there seems to be no ambiguity in this text as it appears on its face to only permit the use of measures encompassed by the listed Articles.

However, one might identify that an ambiguity arises when considering the meaning of necessity, as to which events would raise the circumstances of permitting the use of the measures. Necessity could be viewed as a wholly internal phenomenon derived from the trade problems caused by the process of regional integration between the members. The listed articles would be then be those (only) permitted to address these adjustments, and within the context of a final customs union or free-trade area.

Article XIX measures are not one of the remedies permitted. In the alternative, the circumstances of necessity may arise from members taking actions in response to global or external conditions, which then must also necessarily be applied intra-regionally in order to either be effective, or possibly, to avoid undue harm to non-members in the application of such measures. In this construction all other types of restrictions, including those found for Article XIX or Article VI, would always be permitted between members as they may be applied to address intra-regional trade problems, unlike the listed exceptions which must be applied internally when applied at all.

12.4.1 The permissive v. obligatory construction

Hudec and Southwick carefully framed this may or must question and resolved it in favour of the latter view. This was based upon their examination of the types of measures contained in the Articles listing. These would tend to be globally applied to all parties, would tend to apply across a range of products rather than as to particular products, and would also result from the types of problems caused by imports from whatever source. In all cases, great damage to non-members would result in selective applications wherein regional members would unfairly fill the demand caused by the application of the external measures upon non-member sources. Thus, their view of the exception listing is that it only acts to designate the types of exceptions that must be applied upon intra-regional trade when undertaken at all. One difficulty with this position, as acknowledged by the authors, is that in any particular case, an Article XIX action may also fall within this same rubric, considering the damage that can be done to non-members where both members and non-members are sources of the injury.

Their view does however fit well with the Panel’s finding and the EC’s position on the permissiveness of intra-regional safeguards. This is confirmed by Hudec and Southwick’s contemplation that, as regional integration may evolve to an integrated market, that members then may cease to apply the listed measures between them. However, this possibility also suggests an alternative view of the exceptions that would support the exhaustive listing. According to the customs union requirement in paragraph 8,

“(A) customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that…”

Perhaps contrary to Hudec and Southwick, this provision suggests that the exceptions listed in paragraph 8(a) refer to a description of a finally completed customs union. In this completed edifice, the union as a whole or its individual members could certainly continue to encounter the various global problems described by Hudec and Southwick. However, to the extent that the listed articles

permit GATT parties (generally) to address such global problems by the institution of measures which affect trade, as they are exceptions to GATT obligations, this does not mean that the listed measures themselves are in essence commercial policy measures. Thus, a completed customs union could yet even then permit exceptional measures to be applied between its members, and as would be required by the listed Articles’ non-discrimination requirements, also upon non-members.

This point flows from the limitations inherent in the concept of the substitution of a single customs territory, as this substitution does not infer the transfer of all national economic sovereign power. Thus, member states could reasonably be understood to retain power to intervene for domestic agriculture supply purposes, (Article XI:2, (a)-(c)), retain responsibility over their own currencies and external financial positions (Article XII), and be responsible for their individual IMF obligations (Article XV). As important, individual members would be understood to retain national authority for their own health and safety measures and the other legitimate objectives, all as encompassed by GATT Article XX.

What does however fall within the concept of substitution of a customs territory are those matters dealing with commercial policy. These are the measures intended to provide a benefit to domestic producers as in the manner of providing for domestic protection. Included here would be tariff duties (to be eliminated), and other restrictive regulations of commerce, i.e., measures other than duties, such as quantitative restrictions (to be eliminated). Measures undertaken to address injury for either dumping or for emergency action on imports should clearly fall within the ambit of commercial policy. Thus, while agreeing with Hudec’s and Southwick’s characterisation of the listed measures as those addressing global concerns, the listed exceptions also appear to share a broader framework in common in that they do not describe measures intended to address commercial policy concerns at all. Rather, they are measures enacted for purposes that remain well within the sovereign domain of members that would not likely ever be accorded to a customs union by operation of Article XXIV and its requirement of substitution of customs territories. Since the Article employs the term substitution in defining a customs union, it would seem more reasonable to conclude that the measures attributable to individual territory commercial policy are to be substituted by the customs territory as a whole for the purpose of making consistent external applications. Otherwise, there would not be a true substitution of territories, or rather, such a substitution would only be effective for some commercial policy purposes, but not for others. If this reading is correct, then the “permissive” construction argued by the EC, and as adopted by the Argentina Panel is inconsistent and should be rejected.

In the permissive view, a customs union would be required to establish a common external regime by applying substantially the same duties and other regulations of commerce to the trade of territories not within the union (Article XXIV:8(a)(ii)). It would not, however, be likewise obliged to assume any authority for other commercial instruments that could have the effect of undermining this harmonisation entirely. Individual member-states could continue to operate their anti-dumping and safeguard regimes in respect to other members, therefore necessarily retaining the power to conduct individual commercial policy as to the trade of non-members. The resulting territory would not be given the capacity to harmonise these individual measures externally. Alternatively, if the customs union did have the power to harmonise the application of such measures externally, then one must query, by what legal basis its members would continue to derive an authority to apply such measure as to the other members? To summarise, the unlisted measures are argued here to be prohibited as to their possible use by individual members as they constitute commercial policy measures that, if permitted, would be inconsistent with the definition of a customs union as it denotes the concept of the substitution of individual customs territories.

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40 GATT Article XXI also refers to matters that do not fall under the category policy measures, but which affect trade.

41 However, as suggested by Hudec and Southwick, there remains the possibility of severe hardship for non-members which flows from any construction mandating that a safeguard taken by a union must be applied selectively so as to exempt all customs union members from its application. This problem appears to be resolved.
The final argument for the “permissive” construction is found in the provisions of paragraph 8(b) for free-trade areas. For them, there is no compelled substitution of a single customs territory for constituent territories, but rather only a “group of two or more customs territories...” Since no new territory is created, these members may retain national commercial power as a matter of law. However, it should be recalled from Chapter two that the free-trade area provisions of Article XXIV do not inform the customs union provisions. Rather, the drafting history is clear that the opposite transaction occurred whereby the United States proposals for customs unions were forwarded at Geneva and settled there. As indicated, the free-trade area notion was not advanced until the Havana sessions. At this time, the listed exceptions were also included and the term “substantially” was moved to its present position as qualifying the term “trade”, rather than the term “elimination”.

Hudec and Southwick have suggested that this relocation reflected the new flexibility required in the Article by the insertion of the listing of Articles permitted as exceptions. One could also suggest that the term could have been relocated to accommodate the free-trade area exception. As they indicated, this is a speculative matter. However, what is not so speculative is the final result in the provisions whereby the drafters established an identical set of internal requirements for both customs unions and free-trade areas. Thus, while the possibility was evident that a different list of Article exceptions could be entertained at that juncture to vary the requirements between customs unions and free-trade areas, this was not done. Thus, if there is any parallel interpretation to be made between sub-paragraphs 8(a) and 8(b), the customs union provisions should be seen to inform those for free-trade areas, and not the other way around.

In this respect, one can always argue that in order to avoid conflicting interpretations between the provisions, that the customs union requirements should be “read down” to reflect what is only possible for a free-trade area. Essentially, this is the permissive argument. More convincingly, one can argue by the same logic that the free-trade area provisions should be “read up” to those of the customs union. Since free-trade areas need not form a substitution of customs territories, differing commercial policy measures as directed to non-members would occur as a matter of course. This does not however mandate that those same commercial policy measures need to be applied to the trade of other members, nor that they are necessarily permitted to be so applied by Article XXIV. For members enacting such measures, rules of origin would also function as a matter of course to address trade deflection, just as they would be required in any case where there was a meaningful divergence in the tariff duties applied.

12.4.2 Safeguards Conclusion-parallelism and the exhaustive list

A remaining point to clarify is whether the Argentina Appellate Body has foreclosed any later interpretation in favour of an exhaustive listing. The AB did conclude that a customs union member committed an initial violation in excluding other members from the application of a safeguard, whether this application was made in parallel with the sources of investigation or not. As the Appellate Body stated,

“...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.”

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,

by footnote 1 to Article 2.1 of the Safeguards Agreement. There it is provided that a customs union may act on behalf of a single member. Third-party trade to the rest of the union need not be detrimentally affected where this trade is not injuring the other union members.

42 The earlier draft stated, “all tariffs and other restrictive regulations of commerce are substantially eliminated”.

43 Argentina AB Report, para. 114, italics added.
“(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.”

If it is the case that fully fledged customs unions can make meet the requirements of the GATT and its Safeguard Agreement by making selective investigations and applications of safeguards, then a major point of clarity has already been added to the legal practice under Article XXIV. The introduction of “parallelism”, which seems to be installed by footnote 1 to the Safeguards Agreement, calls for equity in the application of safeguards which matches the sources of imports investigated to support the action. If a single member, rather than the union as a whole is being injured, it appears more than reasonable that the trade of third parties to the union should not be disrupted disproportionately. Likewise if the union is injured as a whole, then territory treatment would suggest that its measures be applied to the territory as a unit. What parallelism requires in this case is that injury caused by fellow union members be not attributed to third parties.

The possibility of a permissive choice between these avenues for customs unions and free-trade areas does remain problematic in regard to the structure of intra-regional trade. Following the EC position expressed in the Argentina Panel, the union has the option to either exempt or include other members in the investigation and application of safeguards. This discretion can be employed on a case by case basis. However, parallelism itself does not seem to require this step. In the case where other members would be required to be exempted from the application of a measure, their contribution to injury should also be disregarded. While this may be a burden for transitional unions, for a completed union this would not seem to be an unreasonable requirement in light of the concept of the substitution of territories. The introduction of the concept of parallel investigation and application appears to leave open the possibility that regional members may also be required to exempt their partners from safeguard actions in respect of the exhaustive list, and that this step can be taken without undue injury to third parties.

Where a customs union has retained selectivity as a permissive option, there may be an additional difficulty. This is because the claimant can argue that the respondent customs union was “picking and choosing” which safeguards would be applied globally and which would be applied selectively. Such discretion, whether or not consistent with the requirements of sub-paragraph 8(a), would be at least inconsistent with the respondent’s own position that the customs union was compelled to make a selective application according to the listing of Articles exceptions. Thus, the regional respondent may not have it both ways, arguing on one hand that selectivity is necessary according to the Article, but then permissive in practice. In this situation, a panel could shortcut any finding that the listing of Articles exception was exhaustive by nature. Instead, it could rule that since the customs union at hand had sought to preserve the option of selectivity, that it could not also then raise a defence that selectivity was necessary according to the Article XXIV requirements. The practical effect of this shortcut would be similar to a ruling on selectivity itself, since customs unions that had preserved the option would also have foregone the Article XXIV defence.

12.5 ORCs and ORRCs

An extensive discussion in the CTRA is also engaged over the term “other regulations of commerce”(ORCs) as it is employed in paragraph 5 and paragraph 8(a)(ii), and the term “other restrictive regulations of commerce” (ORRCs) as it is found in paragraphs 8(a)(i) and (b). Issues raised include whether the two terms are synonymous, and whether they are or not, what types of regulatory and internal measures can be captured by either. This last question includes the issue of

44 Argentina AB Report, para. 151. Italics added.
whether rules of origin can be considered an ORC or an ORRC. Again there is a tension between regional members and non-members on these questions, as internal liberalisation across a whole range of so-called regulatory activities would necessarily have the effect of reducing internal barriers at some possible expense to external trade.

The Turkey Panel offered an ambitious definition for ORCs, which was not rebutted by the Turkey Appellate Body. At least in the context of paragraph 5,

"(M)ore 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."

The above definition appears to contemplate the entire range of government actions that can affect external trade, many internal and regulatory by nature, and certainly broader than the category of "measures other than duties" upon importation in the sense of Article XI. While broad, since the analysis of paragraph 5 relates to the impact of undertaken measures upon non-members, there is every reason to believe that the above definition of ORCs would be sustainable. This, at least to the extent that new restrictive regulatory measures undertaken in the course of a customs union or free-trade area formation had the effect of raising new barriers to trade of non-members.

However, the definition provided above may not find a ready application for the paragraph 8(a)(ii) use of the term ORC, as relating to a customs union formation. If the same test were applied, then the adoption of the substantially the same duties and ORCs must be undertaken by customs union members in regard to those factors provided above. This also seems to be an impossible construction, since it would require customs union members to externally harmonise all of the regulatory measures that can possibly affect trade. This is far in excess of what a customs union could reasonably be understood to require.

Thus, one is left with an overwhelming sense that the Panel's definition must either be limited to paragraph 5 considerations, or since the identical term is used in both paragraph 5 and 8, that the definition is simply overstated as it would define ORCs generally. One other possibility is that the definition may only be applicable to measures undertaken by regional members that are distinct and discriminatory as to non-members. Much of the traditional authority held to the view that Article XXIV provides for a derogation only from Article I MFN. Even while the Turkey AB has opened the possibility for violation of other GATT Articles, Article I in any case acts to subject matters falling under paragraph four of GATT Article III to the MFN obligation. Thus, where one regional party accords internal treatment more favourably to another regional partner, for example by an act of recognition, this is an MFN issue as to the non-member, by operation of Article I. Thus, regional parties can only advance selectively under these conditions if the agreement is qualified according to Article XXIV, and assumedly meeting the Turkey AB test for excusing a violation, or falls under other provisions for recognition that accord certain opportunities without reference to regional formations.
However, this is not to say that Article XXIV requires parties to engage in non-tariff barrier liberalisation within the region via external harmonisation of these regulatory aspects, a conclusion that would be forced if the Panel definition applied also to ORCs as it is found in paragraph 8 (a) (ii). Rather, one would take the view that where regional parties advance liberalisation in the field of non-tariff barriers, this action would not be “necessary” for the completion of the formation according to the requirements of paragraph 8. Further, any measures undertaken in eliminating non-tariff barriers should remain actionable according to paragraph 5 where such actions had the effect of raising new barriers to trade to non-members.

A caveat to this view is that ORCs as defined by the Panel also cannot possibly be equivalent to ORRCs as contained in paragraph 8. Unlike the imposition of a quantitative restriction the regulatory aspects considered by the Panel are not easily encompassed in a reasonable definition of "other restrictive regulations of commerce". This limitation is raised outright if one considers that if the definition were to be the same for ORRCs, then any regulatory matter affecting trade between the parties would be required to be eliminated between them. The drafters certainly had no point of reference to contemplate deeper regional integration. This consideration suggests that ORRCs and ORCs are not synonymous, assuming that the Panel definition is now GATT law. If a regulatory matter that is liberalised in the course of a regional formation affects third parties, then the consideration is brought under paragraph 5. If it constitutes a GATT violation, the regional members would not be in the position to argue its necessity, as in the case of the elimination of a tariff duty, since these matters are not, as argued here, ORRCs, and are therefore not required to be eliminated. The effect of this interpretation would be to render discriminatory regulatory harmonisation actionable under GATT law.

Another ORC consideration would relate to the external effects of preferential rules of origin. This has also been raised by working group members through the years and continues as a source of commentary in the CRTA. One notes that origin rules were not listed in the Panel’s definition provided above. A difficulty with forcing the expansive ORC definition to accommodate the external effects of rules of origin is found in the paragraph 5 text. In both paragraphs (a) and (b), there is a clear reference to comparing ORCs at the time of institution to the situation prior to the formation. Since the preferential rules of origin at issue would not have existed prior to the formation at all, there really is nothing to compare, unless one sought to compare the new preferential rules to the non-preferential pre-existing rules granting MFN treatment. That this has been a fairly intractable consideration might explain the obvious omission from the Panels own definition. However, the radical proposition to consider is, in the event new rules are more restrictive than the previous non-preferential rules, whether the burden should be on regional members to indicate why the additional restrictions are actually necessary in order to complete the regional formation.

This raises the question of preferential rules in conjunction with ORRCs. Since it seems that ORCs cannot be the same as ORRCs, one might also contemplate that rules of origin are to be considered in the second term for the purpose of qualifying substantially-all trade. Here there is no obvious requirement of a “pre-formation” comparison other than the expressed duty to eliminate ORRCs. But, this requirement can also be seen to raise a commensurate duty to “not create” ORRCs anew. Since origin-basing is essential for the definition of the territory for which elimination of duties and ORRCs is to occur, both for customs unions and free-trade areas, whether such rules as applied comply with the SAT requirement would seem to fall under the scope of inquiry governed by ORRCs. For an example, consider where a free-trade area contained a declaration liberalising all trade in industrial and agriculture products, but then only recognised as originating products those wholly-obtained from

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49 For free trade areas, the removal of barriers is to be accommodated for substantially all the trade between the parties as to products "originating in such territories." For customs unions, the same removal of barriers is to be accommodated for all the trade between the territories of the union, "or at least with respect to substantially all the trade in products originating in such territories." Article XXIV, paragraphs 8 (a) (i) and (b).
the soil of a member territory. The use of the origin rules in this case would clearly limit the scope of the declaration, and as it would be offered to comply with the SAT requirement.

12.5.1 Overlapping regional systems

It was indicated above that the internal trade requirements for free-trade areas and customs unions are not distinguishable according to the provisions. Nevertheless, the functional distinction imposed by rules of origin is persistent in the choice of formations as these rules are a required aspect in any formation in the absence of a harmonised tariff. While origin rules have been long criticised for the ability to provide a protective effect as to trade with non-members, there is also an aspect of the rules that can serve internal protective purposes, as discussed in chapter seven. One recalls the following comment:

"(T)he solution to these problems will not only condition the functioning of a free trade area; it will also, to some extent, govern its actual scope. The volume of goods which can circulate free of duty within the area will depend on whether these "mixed" products are given exemption from duty in a more or less liberal manner."  

As suggested by Faber in the context of the EC-CEE C relationships, the development of full cumulation among pre-existing free-trade partners is a difficult task. This is subject not only to internal protective pressures opposing mixing of inputs in the larger destination market, but also within the partner markets where even a lesser diagonal treatment can conflict with certain industrial promotion and investment policy goals.

The possibility for reviewing the quality of cumulation intended within a proposed formation may not be so far beyond the purview of CRTA review as to be disregarded as a longer term prospect. This follows if one acknowledges that the design of the rules determines whether a declared free-trade area is in fact an "area", as this term is also entitled to be defined as a requirement, within which duties and other restrictive regulations of commerce have been eliminated. Thus for example, if an agreement between more than two members were proposed without provisions for diagonal cumulation, this might also suggest that a free-trade "area" has not been intended to be formed. If this result were a possibility, then the reverse scenario should also be considered. Thus, where a party establishes distinct free-trade areas with multiple parties but providing only for diagonal cumulation, then the evolution of a regional cumulation system as between all of those members might also suggest that a new and successive free-trade area has been created.

It is more difficult to imagine that the capacity for review could be extended to require a full cumulation among members to a single agreement, even though true "area" treatment does more closely resemble the quality of movement by free circulation possible to achieve in a completed customs union. That this is possible for a customs union is not however equated with a legal mandate that free circulation be achieved. However, between multiple parties to a single agreement, a type of objection could be raised if the arrangement was internally bilateral, i.e., if only one territory retained cumulation with two others and these other two did not provide for cumulation between themselves. This formation could be treated defacto as creating not a single area, but rather two free-trade areas only posing as one.

50 "This is a special problem, therefore, which does not arise in the customs Union when the common external tariff has come into force." OEEC, (1957), p. 11.

51 Dijck, Pitou and Faber, G., (eds), The External Economic Dimension of the European Union, Kluwer Law International, Dordrecht, 1999. "Diagonal" referring here to where the use of materials which is designated as already originating in any of the partner countries is permitted. "Full" cumulation referring here to where processing is permitted to be cumulated between the free trade parties. Both terms can apply to one agreement with more than two parties, or where separate agreements are linked.
The most difficult scenario to contemplate upon review, but also pressing as a systemic issue, is the resulting "area" which may fail to result from multiple (bilateral) free-trade areas with members common to more than one arrangement. The power to examine the overall structure of resulting arrangements, including previously examined formations, would be resisted by proponents, since each review is likely to be understood as limited to an analysis of the single agreement under notification. However, when one country is a party to more than one free trade area, the resulting structure of overlapping free trade areas has also been cited for its potential to provide for protective effects on trade "between the members".

As some of these questions move to contemplate complex regional structures, it does appear that the limitations to the text provisions of Article XXIV become more apparent. As the term “rule of origin” is not even stated in Article XXIV, one acknowledges that there is a stretch engaged in the process of any argument that the Article has been given the instruments to address these aspects. As one notes the continuing work engaged to harmonise non-preferential rules as a result of Uruguay Round undertakings, it can only be hoped that Article XXIV considerations will eventually be brought into this process. An alternative would be to permit the subject of such rules to be expressly undertaken in negotiations regarding GATT Articles in any later Round.

### 12.6 Institutional considerations

The test for excusing a GATT violation posed by the Turkey Appellate Body has raised the distinct possibility for a Panel to examine the compatibility of a regional agreement according to Article XXIV. Only a handful of regional agreements over the history of GATT and WTO have been able to derive affirmative compatibility recommendations regarding the requirements of Article XXIV. In the Turkey case, the Turkey-EC customs union was also without a recommendation from the CRTA. The Panel found it unnecessary to undertake such an assessment, instead going forward from the position that the Turkey-EC arrangement was *arguendo* compatible. This coincided with the Panel’s opinion that compatibility assessments were in any case within the province of the CRTA. This reflected the Panel’s assessment that a division of authority was present between panels and the special procedures of the CRTA. Thus, in a case where the CRTA recommended that a regional formation was compatible with the requirements of Article XXIV, any particular measures could nonetheless be examined, according to the panel’s authority to evaluate particular measures presented by a claimant. Likewise, the absence of an affirmative recommendation would also be irrelevant, at least for the Article XI measures contemplated in that case, since Article XXIV was determined by the Panel to not provide an exception for them in any case.

Since the Turkey Appellate Body reversed the panel’s findings as to which measures can be excepted by Article XXIV, one can see how the AB then moved to the question of the scope of competence for panels to make compatibility assessments. However, there was, arguably, a shorthand prescription available not undertaken by the Appellate Body. Since Turkey had not obtained an affirmative recommendation from the CRTA in regard to the compatibility of its customs union, the defence could have been dismissed outright in the absence of Turkey’s ability to invoke the exception as based upon an affirmative compatibility recommendation from the CRTA. This would have recognised the jurisdictional demarcation suggested by the Panel. It would have presented two difficulties however. First, the question of the compatibility of this particular arrangement was actually not at issue on appeal before the Appellate Body. Thus, the Appellate Body was also limited by the argument that the Turkey-EC customs union was *arguendo* compatible. This particular twist may not likely occur again, since there is guidance now that the appropriate claimant response to a regional member invoking an Article XXIV exception in the future will be that the formation in question is *arguendo* Incompatible. The second consideration is more persistent. If, as the Appellate Body argued, Article XXII and XXIII, as exhibited in the DSU provisions and together with Article XXIV:12, compel the panel to assess any matter arising from the application of Article XXIV, then complaints against measures as well as defences of compatibility must all be taken on board to give effect to the rights of WTO Members to invoke the DSU.
This aspect of the ruling is controversial. Not only from a legal standpoint regarding the balance of powers between the judicial and rulemaking functions within the WTO, but also as a practical matter in that a complex analysis required by the Article XXIV provisions may now be required to be undertaken by future panels. However, as to the second point, having determined that panels have this power, one can also see the practical necessity rising for regional members to make their best efforts to obtain an affirmative clearance from the CRTA.\(^52\) The alternative course would be to assume the legal risk incumbent by the process of panels making compatibility determinations according to paragraphs 8 and 5 on a case by case basis. In point, this appears to be the situation as it stands, but with one clear difference from past practice. The Appellate Body has made it plain, in its description of the two-part test, upon whom the burden of proving compatibility shall reside. Since a regional member invokes the defence, it is this member which must act affirmatively to establish the point. While this ruling was foreseen in the earlier GATT panel cases, now it is explicit.

The panel and AB developments may have also begun the process of shifting the burden to the proponents in an institutional sense as well. This may result in the eventual "judicialisation" of the CRTA special procedure. If one can now say that the legal status of trade agreements remains an open question in the absence of a recommendation or decision from the CRTA, then regional members should be able to calculate the value in seeking affirmative recommendations for their agreements in order to secure some legal security in a later challenge. Thus, although the weakness of a consensus-based process has worked against stricter interpretations in the past, perhaps this same consensus approach will reverse the burden to proponents in the future. If a recommendation or decision is necessary to secure an agreement from legal challenge, then every party with a vote can demand satisfaction on the agreement's compatibility. Instead of the lowest common denominator being tacitly accepted as the coverage requirement to be met, a higher threshold could emerge to satisfy review parties, who otherwise refuse to provide their acceptance of the plan. This would suggest that proponents might need to be far more flexible in amending provisions of trade agreements in the future then they have been in the past and that implementation should be delayed until the Committee has performed its tasks. A final effect on the process may be that the major regional proponents could support the development of more clear compatibility guidelines within which they can make their arguments for recommendations, since this would permit the processing of notified agreements which would result in recommendations.

### 12.7 Conclusion: EC Regionalism in the new millennium

The conclusion of the Uruguay Round in 1994 found the new WTO operating in a dramatically different regional environment then when the round commenced in 1986. Not only had the United States become a major regional actor by concluding Canada and then Mexico free-trade agreements, but the decline of state trading systems unleashed a major foray of regional agreements in central and eastern Europe. Additionally, a new round of Central and South American agreements were initiated, this time with the expressed intent of being outward rather than inward looking.

A number of indicators suggest that European Union's external regional policy is developing toward trade agreements of a more comprehensive nature. Detailed examples are being offered by Faber for the Euro-Mediterranean area, and by Stevens for ACP regional trading groups (REPA's) in the Lomé Convention.\(^53\) Chapters in this last Part also described advances made within the European system of

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\(^{52}\) One aspect that could be helpful for the CRTA is the Panel's affirmation that CRTA reviews need not be concerned with the legality of individual measures, since these are reserved by operation of GATT law for challenge in a later proceeding. See Panel Report, note 338: "The purpose of examination (under) 5(a)...would not be to determine whether each individual duty or regulation existing or introduced ...is consistent with all the provisions of the WTO Agreement ..." Citing therein, Understanding read out by the Chairman of the Council for Trade in Goods, 20, Feb., 1995, (WT/REG3/1).

\(^{53}\) G. Faber, supra note 51. A portion of this conclusion is drawn from Mathis, J., *The Community's External Regional Policy in the WTO*, Ibid. The author reserves the right to update this conclusion pending final
agreements to establish a single European cumulation network for originating products. In addition, the profile of competition policy issues as they affect trade between regional partners and the wider range of technical barriers between regional members are also evidence of this evolution.

Current reports also indicate that the EU external regional policy remains not only active in the post-Uruguay Round era, but also capable of extending beyond the traditional geography of European regional operations, ACP arrangements excepted. This can be seen by references to negotiations for EU free-trade areas with Mercosur, Mexico, South Africa, and suggestions for preferential system exchanges with South or Southeast Asian territories, to name the more ambitious proposals. If Jacob Viner's 1950 recital of "propinquity" as an often-posed justification for regionalism was accurate then, "nearness" also takes on some expanded meaning in the global economy, as the Union is capable of defining its economic interests globally.\(^{54}\)

Undoubtedly, as some of these new developments are translated into legal texts for free-trade area agreements, there will be intensive interaction between the Community with its new regional partners and the GATT/WTO review process, as now encapsulated in the Committee on Regional Trade Agreements (CRTA). Thus, it is important to commence an assessment of the possibilities for the legal environment in which these new agreements will likely be seeking qualification according to GATT Article XXIV.

The European Commission is now advocating a new round of multilateral trade negotiations. While the WTO Members have been attempting to frame terms of reference for such a Round, there has not yet been a call from either the European Union or the United States to include the GATT/WTO rules governing regional agreements on this agenda. Perhaps this should indicate a degree of satisfaction with progress made thus far to close the Article XXIV loopholes. It may however suggest that parties have calculated a benefit in the status quo whereby maximum regional flexibility is preserved for future regional plans. If so, the Community, for its part, might also consider this additional prospect, that a continuing absence of guidelines for free-trade areas appears to increase the risk of regional combat with trading partners who have also chosen to become active. For now, this includes the United States. In the future, larger Asian territories may also appear to consider regional strategies.

Unlike its regional influence within the traditional European sphere, these new regional contests will not always grant the EU the superior hand. For the United States, this partner certainly exerts greater influence on certain territories than does the Union, whether these advantages be locational, economical, or a mix of political and cultural factors. Until now, only the domestic politics of Congressional fast-track approval have operated as a restraint to a new round of US regional declarations. Besides the U.S., Japan appears to be ready to emerge as a regional actor. It holds a greater influence in its region then either the U.S. or the European Union. The likely accession of China to the WTO also appears to have regional implications, and there is some indication from territories throughout Asia that regional trade agreements may well be part of the political balance of power calculations being made there. Thus, while the legal developments discussed above in the WTO are dramatic, economic and political events suggesting the rise of a type of multi-polar trading system are also proceeding apace.

These factors should inform the Community's policy toward regional agreements in the WTO. At the least, the Community will benefit from framing its external regional policy by taking into account not only the prospects for its own projects, but also the implications which flow from the regional projects of other WTO members. For a more severe characterisation, if the Community and its partners choose

\(^{54}\) The concept of "regional", "..frequently reflect(ing) little more than a sentimental contemplation of the desirability in the abstract of closer economic relations with countries with which there were - or it was pleasant to think that there were, or could be developed - specially close ties of sentiment and interest arising out of ethnological, or cultural, or historical political affiliations." Viner, Jacob, (1950) at pp. 5 and 19.

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to ignore the opportunity to settle reforms that are possible for Article XXIV, this choice may be retrospectively frame the moment when the major WTO members escalated the contest to secure their regional zones of influence.

The European Commission's expressed advocacy for a development-oriented round should also be viewed in the light of the regionalism issues. If all can agree that the stake of the least developed territories in the WTO needs to be enhanced and can see a better multilateral system occurring as a result, then the market leaders' regional plans with developing countries should also be viewed in this context. At this point in time, it is apparent that a great number of WTO's least-developed members are reluctant to start a new round without seeing a substantial down payment on the market access issues left over from the last round. If the Community diverts its energy for concessions to the formation of agreements with only a select group of developing countries, a conflict with the interests of the greater set of similarly situated WTO territories will be hard to ignore. This includes not only the question whether the regional plans will undermine the EC's ability to deliver a larger set of concessions undertaken in a multilateral round to all the developing countries, but also the future role of the General System of Preferences (GSP) within the WTO. These preferences will be further marginalised by a new round of free-trade areas.

A consistent approach between these posts would look again at the prospects for the General System of Preferences. While from a purely non discrimination standpoint, GSP can always be criticised for its preferential nature. However, it is certainly "multilateral" in the sense that it is already an endorsed GATT mechanism for granting preferences to lesser developed countries without reference to regions, permits for graduation in respect of development levels, and does not require reverse preferences on behalf of the recipients.

Given the legal developments described above, the possibilities of a new negotiating round, and the ongoing development of new disciplines within the WTO, it is possible that the historical approach to regional formations by the EC can be seen to stand at something of a legal, if not historical, juncture. At the extremes, in one direction lies a continuation of an older policy of establishing incomplete preferential systems by declaration in the absence of clear guidelines in the WTO, and perhaps without third parties ever challenging these preferences. This route provides the greatest flexibility for the Union to conduct its external regional system to its liking and assumedly, to the liking of its regional partners. However, it also grants the same policy flexibility to other major actors who are also learning their way in world of regionalism. The implications for the flexible approach may not only include the prospect of a more strenuous competition between major actors for the formation of preference agreements with developing and transitional markets. There is also the possibility of a greater number of developing territories seeking to become installed as primary "hubs" formed by overlapping free-trade areas with their developed partners.

An alternative to the traditional approach would be to close the chapter on the long and troubling legacy of the Overseas' Association episode once and for all by supporting a new WTO discipline over preferential deviations from the most-favoured nation clause. Building upon the GATT-1994 Understanding regarding regional exceptions, this avenue would seek to finally generate a set of interpretive guidelines to give substantive definition to the Uruguay Round Article XXIV preamble declaration, that the compatibility of regionalism with the multilateral system is better insured when no major sector of activity is excluded.

In these choices, one also sees the Union playing two roles, one as a party like any other, seeking to implement its notion of regional systems in a manner it believes to be in its commercial and political best interests, and in the interests of its regional partners. The other, as a large territory member of the WTO that is called upon to exercise leadership, which together with other members, assumes responsibility for the direction of activities and reforms to be considered in the WTO. While perhaps it is unfair to place any heightened burden of leadership upon the Union when it comes to the issues of regionalism, it is also a fact that the status of regionalism within the multilateral system today is quite
attributable to previous Community practice and policies. No other party in the GATT system has had as much to say about the qualifications of agreements as a proponent, and arguably, no other party has a higher stake in how others will assert these similar interpretations in the future.

Although a middle way which favours some reforms but not others, depending upon the requirements of the particular regional agreement being advanced, can appear as the most practical course to take, the opportunity for some bolder initiative in the next negotiating round can also be considered.

Any WTO developments that reach for more precise standards for regional trade agreements are bound to influence the design of later regional trade agreements and the manner in which proponents go about declaring them in the WTO. However, the interaction between proponents and the review process generally also suggests that the reverse can also be the case, that the quality of agreements submitted, as declared expressions of GATT/WTO compatibility by the WTO's largest members, can also either reinforce or undermine the prospects for advanced interpretations of the rules to emerge. In no area is this more evident than in the declarations for free-trade areas between developed and developing territories, and certainly including those earlier formations to which the EEC or EC was a party.

It is therefore reasonable to inquire whether the next round of formations between the Union and its partners will see the presentation of agreements to the WTO which, once again, raise intractable points of interpretation for the GATT rules and the WTO members who are charged with applying them. Another way of asking the same is to inquire whether the Union and its less developed partners will submit free-trade area plans that can demonstrate a commitment to exchanging a complete set of preferences. The alternative is to insist again that reviewing parties will deadlock over whether partial agreements between parties of unequal economic development should be judged consistent with the GATT rules. This second course would naturally lead the proponents to argue anew for retaining flexibility in the interpretation and application of the rules. This is exactly the opposite of what the MFN principle requires for support at this precarious stage of multilateralism. However the European Commission chooses to finally advance its arguments for new regional compatibility with the WTO, one would prefer to finally observe that the goal of one evolution, the EC regional system, was not necessarily accomplished at the expense of the multilateral trading system.