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Judicialization of the World Trading System
—Implications for Regulation of Regional Integration under GATT/WTO—

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Introduction

With the creation of the World Trade Organization（WTO）in 1995, the world trading system organized in 1947 was infused with new life. Rules regulating world trade have developed both in the scope of coverage and in the depth of intervention. Much have been learnt of the legalization and judicialization process of change in the history of world trade rules[1]. The process culminated in the finalization of the Uruguay Round negotiations. This outcome at the Uruguay Round negotiations has been described in comparative terms as the triumph of lawyers over diplomats[2]. However, the outcome means more than a mere institutional and procedural development. Legalization and judicialization may be characterized with the multiplication of legal norms and the strengthening of the binding nature of these norms and the procedures for enforcing them[3]. Built on this general conception of the present international trade law, this paper is going to examine the impact which the process of legalization and judicialization of the world trading system has on one particular aspect of the international economic relation, namely multilateral regulation and control over establishment of regional economic arrangements.

Long before the development of a trade legal system at the multilateral level, attempts among a number of mostly nations of vicinity to enter into some sort of customs unions[4] took place mainly in Europe or under European auspices. In this sense, GATT 1947 could be viewed as one of the original efforts taken multilaterally to liberalize international trade amidst a long history of economic bloc cultures[5]. For pragmatic political reasons, liberalization under GATT and the defunct International Trade Organization（ITO）had to proceed hand in hand with certain accepted categories of regional arrangements[6]. Therefore, the issue of regional arrangements, regulated under Art.XXIV of GATT, as an exception to the fundamental principle of the most-favoured-nation（MFN）in the international trading system, originally took place in a particular historical and political context[7].

The regulatory mechanism established under Art.XXIV of GATT 1947 left examination of the compatibility of concrete regional integration agreements with GATT provisions to the GATT diplomats[8]. However, mainly since the 1990s discussions related to rules on regional arrangements have also taken place in the WTO dispute settlement organs. Is this

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another proof of the judicialization development? To what extent has the WTO judicialization process brought the "diplomats' jurisprudence"[9] under legal control? These questions will be dealt with in this paper, based on an examination of the multilateral rules on regional arrangements by focusing on the legal analysis and interpretation conducted on different occasions by the WTO panels and the appellate bodies.

This study will lead to a further understanding of the nature of judicialization at work in the field of international economic law regulating regional agreements. Given the current increasing interest in the issue of "multilateralism vs. regionalism"[10], a review and re-evaluation of the issue of implementing Art.XXIV to keep regional agreements compatible with the multilateral rules under the GATT/WTO is an indispensable step to keep the present world trading system from the risk of melting down into hostile economic blocs[11].

Structure of the paper

The first section will examine the relationship between Art.XXIV and other articles of GATT, especially those related to the principle of MFN, as discussed recently at the WTO Committee on Regional Trade Agreements and interpreted by the WTO panels and appellate bodies. In the second section, the function of Art.XXIV under GATT 1947 to regulate ex ante regional arrangements and the evolution of this function on a pragmatic basis until the end of the Uruguay Round negotiations will be closed up for review. The third section will analyze the ex post corrective function in implementing Art.XXIV, made available thanks to the judicializaton process of the WTO. Section four will compare the different natures and effects of these two functions. Finally, this paper will conclude with an assessment of the impact of this judicialization process on the future implementation of GATT Art.XXIV provisions in the framework of the present world trading system.

I. Relationship between Article XXIV and other articles of GATT

Before discussing how regional arrangement proposals have been regulated in the area of trade in goods under the GATT/WTO rules, it is essential that the status, roles and functions of Art.XXIV in the GATT/WTO legal system need be identified. In a general term, this article has been referred to as an explicit exception to the principle of the most-favoured-nation treatment. Some claimed that it enables different countries to exercise their right in entering into some sort of trade arrangements with adjacent countries. Others seeing it as no more than a mere clause of exception maintained that it can only be referred to in defending some trade measures which would otherwise be illegal or prohibited under the GATT rules. Understanding the relationship between Art.XXIV with other provisions of the GATT is important to set up a clear image of the relationship between regional arrangement attempts and the multilateral trading order. For this reason, the first section of this

chapter will focus on the relationship between Art.XXIV of GATT and other GATT provisions, in particular those related to the principle of most-favoured-nation treatment in international trade of goods.

In general, Art.XXIV has been considered both by scholars and practitioners as a provision of exception[12], even though no such reference is explicitly made in the GATT.

The contention is then to what Art.XXIV stands as an exception - Article I or all provisions related to the most-favoured-nation principle. In a note, dated 2 March 2000, prepared by the WTO Secretariat to make a comprehensive review of all issues that have been identified as having a systemic significance in the course of Committee on Regional Trade Agreements discussions to date, two distinct lines of thinking concerning the overall relationship between Art.XXIV and other WTO provisions have been identified in the discussions of the Committee:

> " (a) Art.XXIV should be considered as a derogation only from Art.1 of the GATT 1994; parties to the RTAs must abide by all other WTO provisions;
>
> (b) Art.XXIV should be considered as a derogation from all the provisions of the GATT 1994, and not merely from the MFN principle. "[13]

Korea, Hong Kong China, India and Japan advocated the first position, while the second one was mainly argued by the EC[14]. According to the first view, Art.XXIV provides for exceptional right to derogate from the MFN principle under GATT Art. I to WTO members that enter into a regional arrangement, without offering any additional rights for them to adopt GATT-inconsistent measures or trade policies. The second view, on the contrary, emphasizes the reference to the " provisions of the Agreement " in the opening sentence of Art.XXIV:5[15], claiming that Art.XXIV is a derogation from all provisions of the GATT, not just Art. I. In other words, so long as measures taken in the context of an RTA do not diminish the rights of third parties, their mere differences from the relevant WTO provisions do not matter.

In the case of Turkey—Restrictions on Imports of Textile and Clothing Products, the Appellate Body considered that Art. XXIV could be invoked to justify a measure which is inconsistent with certain GATT provisions. However this is not free of any strict conditions. The Appellate Body ruled that,

> " ..... Art.XXIV can, in our view, only be invoked as a defense to a finding that a measure is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a)of Art.XXIV relating to the ' duties and other regulations of commerce ' applied by the constituent members of the customs union to trade with third countries. "[16]

After further reviewing the text and the context of the chapeau of paragraph 5 of Art.XXIV, the Appellate Body added the following views:

" ..... we are of the view that Art.XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this ' defense ' must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8 (a)and 5 (a) of ArtXXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Art. XXIV. "[17]

However, if one reads the reasoning advanced by the Appellate Body before coming to the above conclusion, one can find some confusing details. The Appellate Body first interpreted the provision of Art.XXIV:4[18] to mean that:

" the purpose of a customs union is to ' facilitate trade ' between the constituent members and ' not to raise barriers to the trade ' with third countries "[19].

It then proceeded to stating that:

" Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, set forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV."[20]

Following the flow of this reasoning, the simple fact that any measure taken to form a regional trade agreement is found raising barriers to the trade with third countries should be enough to disqualify the measure and have it removed right away. Far from making this reasoning, the Appellate Body stated that establishment of a customs union may result in taking measures which are otherwise inconsistent with certain other GATT provisions, provided the two conditions mentioned above are met. How are we going to understanding this line of reasoning? It seems that there is something more important than the only requirement of " not to raise barriers to the trade with third countries " concerning the implementation of Art.XXIV. Given the appreciation that the purpose of a customs union is to ' facilitate trade ' between the constituent members and ' not to raise barriers to the trade ' with third countries, should a customs union, the establishment of which is preconditioned on a breach of certain WTO rules be permitted pursuant to the provisions of Art.XXIV? The second condition identified by the Appellate Body seems to give an affirmative answer to this question. The Appellate Body considered that " Art. XXIV may justify a measure which is inconsistent with certain other GATT provisions ", without qualifying this statement with the provision of Art. XXIV:4 that the inconsistent measure should " facilitate trade between the constituent members and not to raise barriers to the trade with third countries ". Rather, the Appellate Body continued to state that " in a case involving the formation of a customs union, this ' defense ' (by invoking Art.XXIV) is available only when two conditions are fulfilled. First, ...And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure

at issue "[21].

It was exactly on the basis of this second condition that the Appellate Body found that "Art.XXIV does not justify the adoption by Turkey of these quantitative restrictions" simply because "Turkey has not demonstrated that the formation of a customs union between Turkey and the European Communities would be prevented if it were not allowed to adopt these quantitative restrictions"[22]. In other words, according to the Appellate Body, so long as the establishment of a customs union under Art.XXIV meets the requirements of Arts.XXIV:5(a) and XXIV:8(a), it is presumed to work in accordance with the provisions of Art.XXIV:4. If the constituent members of the customs union has to choose between a strict observation of WTO rules and establishment of the union, it may prioritize the latter if it can demonstrate that the formation of that customs union would be prevented otherwise. Obviously, the Appellate Body was in favor of the view that Art.XXIV was not merely a derogation of Art.I of GATT.

The Appellate Body in the case of Argentina — Safeguard Measures on Imports of Footwear maintained this position, when it noted that the Panel erred in conducting an examination of Art.XXIV:8 of the GATT 1994 within the context of that particular case.

It stated:

> "... In our Report in Turkey — Restrictions on Imports of Textile and Clothing Products, we stated that under certain conditions, 'Article 24 may justify a measure which is inconsistent with certain other GATT provisions.' We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure that 'the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article 24' and 'that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.'[23]

II. Ex ante regulatory function of Art. XXIV

Having seen how Art. XXIV relates to the other articles of GATT, in particular provisions concerning the most-favoured nation treatment, this section will look into the preventive mechanism which is built in the Article itself in order to keep off potential abuse. As discussed in the first section of this Chapter, the practice of GATT/WTO as reflected in the position taken by the appellate bodies on the Turkey case and the Argentina case points to the stronger conviction that establishment of regional arrangements is desirable so long as this meets the criteria determined under the multilateral trading order. The panel of the Turkey case refers to the "conditional right" to form a regional trade agreement and notes that this conditional right has to be understood and interpreted within the parameters set out in paragraph 4 of Art.XXIV[24]. Paragraph 4 defines the purpose of a regional trade agreement as that to facilitate trade between constituent territories and not to raise barriers to

the trade of other Members[25]. Even though under Art.XXIV of GATT, the CONTRACTING PARTIES do not deny the right of Contracting Parties to form such regional trade agreements[26], they reserve a chance to have a look at the proposals leading to the formation of such agreements , and of course must give their approval if they are convinced that the proposals are genuinely directed towards a customs union in a reasonable period of time[27]. It is therefore obvious that Art.XXIV incorporates a preventive function under the provisions of paragraph 7 against any possible attempt to abuse the right incurred therein.

If the CONTRACTING PARTIES, by virtue of its power to review the plan "included in an interim agreement referred to in paragraph 5", finds that the agreement "is not likely to result in the formation of a customs union or a free-trade area" as defined in paragraph 8(a) and (b), they "shall make recommendations to the parties to the agreement"[28]. The binding force of these recommendations by the CONTRACTING PARTIES is also clear. The parties to a regional arrangement "shall not maintain or put into force such agreement if they are not prepared to modify it in accordance with these recommendations"[29]. If one still agrees that establishment of a customs union which is not considered appropriate under the multilateral trade order may result in disadvantage or injury to third parties by virtue of a violation of the principle of MFN treatment, and that a regional arrangement which constitutes neither a customs union or a free-trade area, nor an interim agreement necessary for the formation of either of the two, may result in impairment or nullification to the interest of third parties, then it is obvious under paragraph 7 that the CONTRACTING PARTIES do have a task of preventing damages which may be inflicted on third parties due to abuse of Art.XXIV[30].

This preventive function of the mechanism established under paragraph 7 was designed in a way so as to preempt any regional arrangement which would work against the multilateral trend. Together with the CONTRACTING PARTIES' inherent power to issue binding recommendations, the paragraph 7 mechanism automatically activates an ex ante regulatory function of the multilateral trading system over establishment of regional arrangements. Idealistically speaking and taking for granted the GATT economic and political philosophy on the relationship between the most favoured nation principle and the conditional right to form regional trade agreements[31], regional arrangements would not have a chance of creating significant disruptions to the process of multilateral trade liberalization so long as the mechanism under paragraph 7 functions properly and effectively to keep these regional arrangements in check. A regional arrangement found to be inconsistent with the provisions of Art.XXIV would have to be altered or put out of existence at the first place.

However, in practice, technical barriers and perhaps political realities gradually changed the whole picture. The most remarkable turning point might have been the incident of establishing the European Economic Community (EEC). Contrary to some previous cases, the working parties that

was composed of all contracting parties to review the Treaty Establishing the European Economic Community failed to reach a unanimous conclusion on the proposed arrangement. One of the reasons raised by the CONTRACTING PARTIES to justify this failure was that:

" as many contracting parties considered that because of the nature of the Rome Treaty there were a number of important matters on which there was not at this time sufficient information to enable the CONTRACTING PARTIES to complete the examination of the Rome Treaty pursuant to paragraph 7 of Article XXIV, this examination and the discussion of the legal questions involved in it could not usefully be pursued at the present time "[32].

Therefore, the CONTRACTING PARTIES " welcomed the readiness of the members of the EEC to furnish further information pursuant to paragraph 7 (a) of Art. XXIV as the evolution of the Community proceeded "[33]. Without a conclusion to the contrary, the EEC was allowed to proceed with its plan and schedule while making itself ready to furnish the CONTRACTING PARTIES with more relevant information. This went beyond the controversy of whether a lack of conclusion or recommendation by the CONTRACTING PARTIES amounted to an approval or disapproval of the regional arrangement[34]. It was simply that something that had been started could not be terminated without consensus among the CONTRACTING PARTIES for it to be so[35].

After the case of the EEC, several subsequent working parties also sought to employ the same strategy to produce a temporary conclusion for their work[36]. This gradually added to the originally designed ex ante regulatory function of Art.XXIV a more updated and pragmatic approach of engaging in an ex post monitoring and regulatory function. This functional shift practically contributed to the declining effectiveness of the paragraph 7 mechanism. The representative of Korea commented on this problem during the examination of the enlargement of the European Union with the accession of Austria, Finland and Sweden, conducted by the WTO Committee on Regional Trade Agreements, 40 years later in 1997 that:

> " ...Article XXIV:7 (a) seemed to oblige Members entering into RTAs to notify their agreements well in advance, prior to their entry into force, so as to give the WTO the opportunity to examine the Agreement and make recommendations as appropriate… past practices of delayed notifications and subsequent ex post examinations of RTAs could not be used as an excuse. "[37]

The problem of late notification of RTAs, referred to in the comments made by the Korean representative above, could be attributed to both the fact that timing of notifications is neither precisely formulated nor homogeneously expressed in the rules[38], and the customary flexibility allowed to Members in presenting their notifications and in maintaining, without hindrance, the status quo of a regional arrangement plan.

So far, the mechanism to review conformity with Art.XXIV of interim agreements leading to a

customs union or a free-trade area has been analyzed. The next question is what happens after a customs union or a free-trade area has completed its preparatory phase and developed into a full-fledged commercial unit under Art.XXIV? Could it be said that the power of the CONTRACTING PARTIES to review and make recommendations to the plan and schedule of a proposed regional arrangement covers also the case of a completed customs union or a free-trade area? Practice under GATT 1947 left it inconclusive as to whether or not once a customs union or free-trade area had completed its establishment in accordance with the criteria laid down in Article XXIV, it had to submit periodic development reports[39]. However, it was clear that this was without prejudice to the legal rights of all Contracting Parties under Art.XXIV[40].

Specific matters of concern could be raised by the Contracting Parties concerned to the attention of the Council or of the CONTRACTING PARTIES[41]. The CONTRACTING PARTIES attempted to clarify this situation in its 27th Session in 1971 by issuing an instruction to the Council to establish a calendar fixing dates for the examination, every two years, of reports on regional preferential agreements. However, the process did not develop consistently[42]. Finally, the process was revived and strengthened after the adoption of the Understanding on the Interpretation of Art. XXIV of the GATT 1994[43]. Paragraph 11 of the Understanding provides that:

> " Customs union and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18s/38) , on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur. "

Again, this is part of the exercise of the ex post monitoring and regulatory function which was developed on a pragmatic basis throughout the years of GATT 's experience dealing with increasing proliferation of regional arrangements. Of course, this ex post monitoring and regulatory function did not produce any better result than endless statement of positions and inconclusive efforts to seek an appropriate interpretation for the provisions of Art.XXIV which could be accepted by all Contracting Parties[44]. The discussions might have been more sophisticated and complex, but the success was not any more promising than what it used to be at the first place[45]. Finally, together with the Uruguay Round breakthrough another new outlet was found. That is the increasing resort to the dispute settlement mechanism to settle issues related to regional arrangements. We will examine this new development in the following section.

III. Ex post corrective measures in the implementation of Art. XXIV

After having examined legal provisions related to establishment of regional arrangements and briefly illustrated their historical development, we are going to consider how development of these

legal provisions contributed to the silent shift in emphasis of the GATT/WTO practice, from that of taking a preventive approach to that of resorting to a corrective one. Despite the fact that conciliation and dispute settlement have occasionally been resorted to since the early years of the GATT 1947 to deal with disputes involving measures taken pursuant to establishment of regional arrangements under Art. XXIV[46], there was no explicit legal provision on the relationship between implementing provisions of Art. XXIV and taking actions according to dispute settlement procedures. Seeking to justify its refusal to an overall examination of the bilateral agreements between the European Communities (EC) and certain countries in the Mediterranean Region, the Panel on "EC Tariff Treatment on Imports of Citrus Products from Certain Countries in the Meditarranean Region" opined as follows:

> "In the absence of a decision by the CONTRACTING PARTIES and without prejudice to any decision CONTRACTING PARTIES might take in the future on such a matter, the Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a contracting party under Article XXIII:1 (a) .....The Panel considered that the practice, so far followed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT-conformity of measures subject to special review procedures was sound. It felt that the purposes these procedures served and the balance of interests underlying them would be lost if contracting parties could invoke the general procedures of Article XXIII:2 for the purpose of requesting decisions by the CONTRACTING PARTIES, on measures to be reviewed under the special procedures. The Panel therefore concluded that it should, in the absence of a specific mandate by the Council to the contrary, follow this practice also in the case before it and therefore abstain from an overall examination of the bilateral agreements."[47]

The Panel then referred to the conclusions made by the CONTRACTING PARTIES' following their examination, under Art.XXIV:7, of the Rome Treaty, the European Free Trade Association (EFTA), the Latin American Free Trade Association (LAFTA), and Finish Association with EFTA, and noted that:

> "the CONTRACTING PARTIES had recalled that procedures for consultation under Art. XXII had been accepted and had then noted that 'the other normal procedures of the General Agreement would also be available to contracting parties to call into question any measures taken' under the interim agreements…. The reference to 'the other normal procedures of the General Agreement', after the mention of Article XXII, can only be understood to mean the procedures of Article XXIII. The CONTRACTING PARTIES have established in the above conclusions that this procedure could be used to call into question 'any measure'

taken by the parties to the agreements; they did not mention the possibility of calling into question the agreements as a whole, under the procedures of Article XXIII. "[48]

The Panel report was not adopted due to the EC's blockage on the ground that implementation of the Panel 's conclusions, which was in favour of the complainant against EC's tariff treatment of citrus products from certain Mediterranean countries, could disrupt the balance and basis of the agreements concluded with the Mediterranean countries and was therefore not politically viable[49]. However, the Panel's observation seemed to have been reflected in the Understanding on the Interpretation of Article XXIV of the GATT 1994, paragraph 12 of which provides that:

" The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area. "

The Panel on the Turkey — Restrictions on Imports of Textile and Clothing Products analyzed the meaning of this paragraph as follows:

" We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine ' any matters " arising from " the application of those provisions of Article XXIV '. For us, this confirms that a panel can examine the WTO compatibility of one or several measures ' arising from ' Article XXIV types of agreement, as also argued by the United States in its third-party submission. This indicates that, although the right of WTO Members to form regional trade arrangements is ' an integral part ' of the set of multilateral disciplines of GATT and now WTO, the DSU procedures can be used to obtain a ruling by a panel on the WTO compatibility of any matters arising from such regional trade arrangements. For us the term ' any matters ' clearly includes specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union. "[50]

What has been the situation of GATT Contracting Parties or WTO Members having recourse to the dispute settlement mechanism to deal with a controversial issue arising from the establishment of a regional arrangement ? A brief statistical data shows that in the period of 1948 to 1994, right before the WTO came into effect, there were 124 cases of regional arrangements being notified to the CONTRACTING PARTIES for consideration[51]. During the same period, the panels handled only 3 cases of dispute related to establishment of regional arrangements[52]. After adoption of the Understanding on the Interpretation of Art.XXIV of the GATT 1994, the situation of the panels and the appellate bodies dealing with issues arising from establishment of regional arrangements changed dramatically not only from the quantitative but also from the qualitative point of view[53]. As a result of the strengthened dispute settlement procedures, the panels and the appellate bodies can now settle

disputes related to provisions on establishment of regional arrangements decisively. The defending party has lost its privilege of blocking the establishment of the panel[54]. Nor is it possible to block the adoption of the panel report if it is not found in its favour[55]. The only recourse it may have after the finding of the panel has been completed in the report is to seek for review of the report, relying on the appellate procedure[56]. Appeal against the ruling of a panel shall be sent to the standing Appellate Body. The Dispute Settlement Body (DSB)[57] shall adopt the ruling of the Appellate Body unless it decides by consensus not to adopt the Appellate Body report[58]. In case of a non-compliance with the rulings and recommendations of the panel and the Appellate Body reports, the complaining party may ultimately have the right to take retaliatory measures[59].

As a consequence, the WTO legal system helps to ensure that what could not be settled at the discussions and negotiations taken place inside the political bodies, such as the Committee on Regional Arrangements and the previous working parties, might be brought to the attention of the panel and the Appellate Body, in seeking for an ex post solution to the disputes arising from the misuse or abuse of the legal provisions of Art.XXIV. This can be seen as a process of shifting part of the check over regionalization away from the ex ante regulatory process towards the ex post corrective process. Establishment of regional arrangements is a right under the WTO law, but abuse of this right will be confronted by complaints of the parties who believe or claim that their benefits have been impaired or nullified as a result of the regionalization by the defending party, or that a certain measures taken and implemented by the defending party on the ground of the regionalization needs are not compatible with Art.XXIV.

Concerning the panel's explanation of the application of paragraph 12 of the 1994 Understanding made by the Panel on Turkey Textile case, one can see that recourse to this paragraph 12 procedure is limited to a certain situations. Theoretically, as confirmed by the same Panel, the issue regarding the GATT/WTO compatibility of a customs union is " generally a matter for the Committee on Regional Trade Agreements " since " it involves a broad multilateral assessment of any such customs union, i. e. a matter which concerns the WTO membership as a whole "[60]. Ideally, a properly functioning ex ante regulatory plus ex post monitoring mechanism would have made this ex post corrective process unnecessary. If the CONTRACTING PARTIES or the Committee on Regional Trade Agreements reaches a positive conclusion on a regional integration agreement, it is unlikely that a complaint under the DSU mechanism would take place. Even on the presumption that the complaints were made, any disputes related to the establishment of regional arrangements as such would normally go to the attention of the Committee first. On the contrary, if establishment of a regional arrangement, or a certain measure thereof, is found to be inconsistent with the WTO provisions, a recommendation or compensatory adjustment under Art.XXIV would be submitted under paragraph 7.Again as reasoned by the Panel on EC ? Tariff Treatment on Imports of Citrus

Products:

> " .... a decision of the CONTRACTING PARTIES on the agreements would inevitably have amounted to a judgment on their conformity with Article XXIV. Had it been recognized that an agreement was in conformity with the requirements of Article XXIV, the implementation of this agreement could no longer be considered as nullifying or impairing benefits accruing under the General Agreement. On the other hand, had the agreement been considered by the CONTRACTING PARTIES as not being in conformity with the said requirements, its implementation would amount to a clear infringement of the provisions of the General Agreement which would constitute prima facie a clear case of nullification or impairment in the sense of Article XXIII: 1 (a). "[61]

Obviously, a prima facie case of nullification or impairment could be dealt with at the Committee on Regional Trade Agreements by means of a consultation process. Its reference to the DSB would only be the last option, had the Committee itself worked effectively. However, in the present reality, with the least exceptions, no regional arrangements have been examined with a clear-cut conclusion from the legal point of view[62]. A frustrated WTO Member may feel easier to resort to the strengthened and judicialized WTO dispute settlement mechanism than to keep on arguing inconclusively on particular measures taken by another Members, which caused tangible negative effects to its economic or other interests eventuated by the GATT/WTO legal provisions. What does this shift of forum mean for the future of the world trading system? The following Section will examine the nature of this shift, and a general observation of its significance in the process of controlling the force of regionalization under the current WTO legal system will be discussed in the conclusion.

IV. Relationship between the ex ante and the ex post proceedings

① Monitoring and dispute settlement

Customs territories attempting to initiate economic arrangements are bound to comply with explicit conditions and qualifications[63]. They are permitted to enter into either a customs union agreement or a FTA agreement[64]. Other categories of regionalism were provided for as limited preferential exceptions of GATT Art. I.1[65] Since only regional arrangements pursuant to Art.XXIV are taken into consideration in this paper, colonial preferential treatments are not discussed herein. To reign in regional initiatives under the spirit of the GATT legal system and to exclude protectionism under the disguise of regional arrangements, Art.XXIV was equipped with implementation provisions which enables the GATT CONTRACTING PARTIES to approve and to monitor the fulfillment of a legitimate process of regionalization. Any arrangements found to be incompatible with conditions and requirements of those legal provisions were to be corrected and even denied existence[66]. In other

words, the approach was to pre-empt any illegitimate[67] attempts and to make sure that regionalization per se would not hinder trade liberalization at the global level.

However, in practice this ex ante review of the compatibility of regional arrangements with GATT provisions was handicapped by defects in interpretation of some key conditions. The extent to which customs territories have to liberalize " substantially all trades " was subjected to long and indecisive debates and disagreements among Contracting Parties[68]. The Parties could not even agree on the exact contents of the phrase " other regulations of commerce " as provided in Art.XXIV[69].

With the introduction of the 1994 Understanding some ambiguous issues pertaining to interpretation of Art.XXIV were clarified to a certain extent. It was also explicitly provided that disputes arising from establishment of regional integration may be settled through the WTO dispute settlement proceeding[70]. Even though Art.XXIV had been referred to by some parties to justify and defend certain restrictive measures during the pre-WTO dispute settlement proceedings, the present WTO dispute settlement procedures have been such that the nature and the quality of juridical review over individual measures has been substantially improved. Measures taken for whatever reasons related to the provisions of Art.XXIV but found by the DSB to be incompatible with the GATT and other WTO agreements have to be withdrawn or renegotiated. Obviously, two factors can be identified here as the primary means of enforcing the withdrawal or re-negotiation of a trade measure. First, the dramatic change in the process of adopting panel or appellate body reports makes it possible to bring the report into effect against the will of the defeating party. Any parties losing in the process have no choice but to modify their trade measures or enter into renegotiation with the winning parties in order to duck a legitimate retaliation in the form of countervailing or other adjustment measures taken against their interests. Second, as a result of more rulings and recommendations being successfully adopted, there is an increasing number of authoritative reference to facilitate future interpretation and application of Art.XXIV, which subsequent panels and appellate bodies may make use of in dealing with disputes arising from the establishment of regional arrangements. Despite that precedents are not explicitly accepted in the WTO dispute settlement rules, GATT/WTO dispute settlement practices have made it customary that rulings and reasoning of previous cases may be referred to in developing solutions to later disputes[71]. In this way, what has not been agreed to in the history of more than 50 years of experiences of the working parties and the committee in interpreting and applying ArtXXIV may now be gradually settled by the dispute settlement organs, based on established rules of interpretation and application that practically shed lights to future handling of disputes related to establishment of regional arrangements under the GATT/WTO legal system.What could not be satisfactorily addressed by the original efforts to approve and to monitor can now be dealt with more efficiently by means of dispute settlement. Two recent WTO dispute settlement cases may prove the point of this observation. When the Working

Party was established to review the formation of the Canada-US Free Trade Agreement (CUSFTA), a number of members of the Working Party questioned the compatibility of the provisions of Article 1102 of CUSFTA with GATT provisions. Provisions of Art.1102 allowed a party of the CUSFTA to exclude the other party from safeguard actions taken under Art.XIX[72] of GATT. Some members viewed that Art.XIX of GATT did not permit parties to a free-trade agreement to take such selective application of safeguard measures. One member considered such selective measures as diluting the principle of most-favoured-nation application of emergency measures, particularly when imports from the other party to the regional arrangement also contributed to the serious injury. Taking note of those concerns, the Working Party concluded that "(a) s it was unable to reach agreed conclusions as to the consistency of the provisions of the Agreement with the GATT, it considered that it should limit itself to reporting to the Council the views expressed by its members during its discussions"[73]. Since then, this issue of selective application of safeguard measures aimed at excluding regional arrangement partners has become a repeating issue of concern raised at the WTO Committee on Regional Trade Agreement meetings. However, no agreement has been reached[74]. A similar point of disagreement was brought to the attention of the dispute settlement panel on Argentina Safeguard Measures on Imports of Footwear, by the EC against Argentina's application of safeguard measure selectively only against imports from non-MERCOSUR third countries[75]. Even though the Panel confined its ruling on this particular case to the application of safeguard measures by Argentina, it nonetheless conducted detailed analysis, in general terms, of the issue of imposition of safeguard measures in the case of a customs union, by interpreting the provisions of GATT Art.XIX and Art.2[77] and the footnote to Art.2.1[78] of the Safeguard Agreement[76] and also analyzing the relationship of the provisions of Art.2and footnote to Art.2.1with Art. XXIV of GATT on establishment of customs unions. In particular, it gave its own interpretation of the provisions of Art.XXIV:8 (a) (i) and (b)[79] focusing on the question of whether the fact that Art.XIX of GATT was not included in the list of exceptions from the requirement to abolish "all duties and other restrictive regulations of commerce" on "substantially all trade" between the constituent territories of a customs union amounts to Argentina's assertion that Art.XXIV:8 prohibits the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion. The Appellate Body reversed the findings of the Panel on these provisions, but only on the ground that "the Panel erred in assuming that footnote 1 applied (in this case)"[80]. The reversal was not due to the Panel making any mis-interpretation of the provisions.

The second case is the case of Turkey introducing new restrictions on imports of textile and clothing products as a result of launching the final stage of its arrangement of a customs union with the EC. According to Turkey, this introduction of new restrictions was necessary because it had to align its commercial policy in textiles and clothing to that of the EC. India brought complained against

these new restrictions and requested the establishment of the Panel, after failing to make progress in bilateral consultation with Turkey. The Panel conducted a comprehensive overview and analysis of the provisions of Art.XXIV:5(a), Art. XXIV:8(a) and the relationship of these provisions with other articles and provisions of GATT and WTO agreements. The reasoning was revised by the Appellate Body to the extent that the Panel "erred in its legal reasoning by focusing on sub-paragraph 8(a) and 5(a) and by failing to recognize the crucial role of the chapeau of paragraph 5 in the interpretation of Art.XXIV of the GATT 1994".

Logically, those analyses and interpretative details in general terms developed by the panels and/or the appellate bodies and then adopted by the Dispute Settlement Body may become directly relevant to the future debate on the contents and application of some ambiguous provisions of Art.XXIV. They may serve as references with legal authority for the future work of the Committee on Regional Trade Agreements in examining regional integration plans. However, due to the fact that rulings made by the panels and the appellate bodies only bind parties to the particular dispute, it is not clear yet as to how contributive the findings of the panels and appellate bodies are to the actual work of the Committee. It depends on how far the Members of the Committee are ready to absorb these technical inputs. After all, to appreciate and make use of these inputs, political will seems to be more relevant than a technical necessity.

② Political and legal considerations

Another remarkable issue to be raised with regard to the differences between the ex ante monitoring plus regulatory approach and the ex post corrective approach towards the treatment of the question of regional arrangements concerns the fact that in practice the ex ante monitoring and regulatory procedure leaves more room for negotiations and political considerations. With members of the working groups or committees being government representatives, the discussions at the meetings normally end up with a summary report of different assertions and stances. The reports were not due to be adopted on a majority basis. Consensus was the only rule. Harmonization of interests rather than compensation for damages was the main consideration of the whole process. Customs territories wishing to enter into a regional arrangement agreement are required to present their plan and schedule for consideration and approval at the working groups or the committee. In principle, members of the working groups or the committee consider the application for establishment of either a customs union or a free trade area on the basis of the GATT legal provisions. However, in reality political considerations often dominated the discussions and, except for cases involving issues of substantial interests, those considerations often worked in favour of the parties to the arrangement[81]. This is because that, since there is almost no WTO Member who is not party to at least one regional arrangement, few Members could be expected to push far enough on the issue of compliance with and

strict implementation of legal provisions on the establishment of regional arrangements, unless the establishment itself causes actual injury or threat of a serious injury. No Member may want to provoke complaints or counter-complaints against its own regional arrangement with other customs territories. A neutral and political-interest-free body was not there to pass a final judgement over the different assertions either. Therefore, with extremely few exceptions, the reports issued by the working parties or the WTO Committee on Regional Trade Agreements could not but merely summarized the divergent stances and arguments[82]. No finally admitted legal interpretation could be made available in the conclusion. Despite that the working parties examined the issue of consistency with Art.XXIV of GATT primarily from a legal point of view, the members of the working parties often did this in the spirit of taking into account the "major political and economic significance" of the free trade agreement[83].

A second factor that makes ex ante examination different from the ex post correction is that until damages or at least unexpected change of ordinary conditions of competition actually take place, it is very difficult to justify either from a legal or an economic point of view the requirement that measures taken as a result of the arrangement be revised or withdrawn due to its effect to increase the overall level of restriction, and therefore the ex ante review cannot be efficient enough in preventing a regional arrangement that might develop into a safe haven for protectionists. A review of the reasons for which working parties failed to conclude on the consistency of regional arrangements with GATT legal provisions shows that this second factor was explicitly mentioned in many occasions as the cause of inconclusive discussions on the establishment of customs unions or free-trade areas. At the seventeenth session, the CONTRACTING PARTIES felt that there remained some "legal and practical issues which would not be fruitfully discussed further at this stage" of examining the Stockholm Convention establishing the European Free Trade Association[84]. A similar conclusion was also made by the CONTRACTING PARTIES at about the same time, concerning the Montevideo Treaty to set up the Latin American Free Trade Association, that "there remained some questions of a legal and practical nature which it would be difficult to settle solely on the basis of the text of the Treaty and that these questions could more fruitfully be discussed in the light of the application of the Treaty"[85]. Though in a less explicit term, the Working Party established thirty years later to examine the case of CUSFTA considered that it should limit itself to reporting to the Council the view expressed by its members and it agreed to forward the report to the Council and recommended that the CONTRACTING PARTIES invite the parties to the Agreement to furnish reports on the operation of the CUSFTA, in accordance with the decision of the CONTRACTING PARTIES[86].

Conclusion: Towards a patchwork regulation

As proclaimed by the Panel on Turkey — Restrictions on Imports of Textile and Clothing Products, the work of the Panel is not to review the general compatibility of a regional arrangement plan with the global trade liberalization system[87]. Rather, they are established at the request of parties to settle disputes arising from the implementation of the WTO agreements[88]. For this reason, it is difficult to envisage that the dispute settlement panels would be asked to pass a ruling on the general compatibility of a regional arrangement with the WTO agreements. This is particularly so, as long as the ex ante examination process remains active. What have been brought to the dispute settlement panels are particular measures taken by territories as a result of their entering into a regional trade agreement. To defend their trade measures, the parties against whom a complaint was brought about referred to the provisions of Art.XXIV in what is called an affirmative defense[89]. The panel and for obvious reason the Appellate Body have to look into the interpretation and application of those provisions while seeking to settle the disputes involving particular measures complained against. Through this process, the trade measure that is in fact a part of a larger scheme to integrate some customs territories into a regional trade unit could be singled out for legal examination. As seen in the Turkey Textile case, the bigger question of whether establishment of the regional arrangement per se is compatible with WTO agreements, in particular Art.XXIV of GATT and other equivalent provisions, was explicitly evaded. This is due to the express mandate of the panels to deal with concrete and "specific measures at issue" and the "legal basis of the complaint" only[90]. Together with the strengthened dispute settlement function of the WTO and the more confident resort to this WTO function to address issues in connection with establishment of regional arrangements, a patchwork-like process of regulating inappropriate attempts to establish regional arrangements seems to be taking shape. A measure taken in connection with a regional arrangement scheme whose compatibility with WTO legal provisions on regional arrangements has not been cleared or cannot be definitely cleared may now be brought to the arena of the dispute settlement mechanism, subjecting it to exclusive legal consideration by professionals[91]. The WTO dispute settlement procedures are such that compliance to them is almost automatically enforced. Therefore, in addition to addressing controversies inconclusively at the negotiation forums within the larger context of regional arrangement, the same controversies can now be dealt with legally in its own right by virtue of the dispute settlement function of the WTO. In a way, this is like a patchwork regulation process at least to temporarily correct some loopholes in the legal provisions on establishment of regional arrangements. Amidst increasing recourse to the affirmative defense based on Art.XXIV and in light of more confidence in relying on the dispute settlement mechanism to settle disputes of this sort, a patchwork regulatory process aimed at curbing controversies involving regional arrangement

attempts has been in the making. However, one cannot but ask whether this trend contributes to the future progress of the WTO monitoring and regulation of the move towards more regionalization. To address this question, the readiness of the international trade community to subdue political considerations to the rule of law may be required. However that subject is beyond the scope of examination of this paper.

NOTES

[1] In simple terms, " legalization " as used in the context of the development of the world trading system means the increasing trend of codifying rules and procedures to cover the deficits in practice and to create a more predictable dispute settlement process. " Judicialization " on the other hand is used in this context to refer to the increasing trend of resorting to dispute settlement mechanism to settle differences, in place of or in addition to relying on political powers and diplomatic negotiations. See Ernst Ulrich Petersmann, " The GATT/WTO Dispute Settlement System — International Law, International Organizations and Dispute Settlement " , Kluwer, 1997, chapters 2, 5, and 6. " Juridicization process " is also used by some authors to refer to the " growing demand by States to regulate their trade relations by using norms and enforcement procedures that are LEGAL in character, create significant limitations on the sovereignty of the States, and, in extreme cases, even exclude the State 's power to determine policy in certain socio-economic fields. See Arie Reich, " From Diplomacy to Law: the Juridicization of International Trade Relations ", in *Northwestern Journal of International Law and Business*, vol.17, 1996-1997, pp.776-777, and J. H. H. Weiler, " Reflections on the Internal and External Legitimacy of WTO Dispute Settlement " , in *Journal of World Trade*, vol.35, no.2, 2001, pp.191-207.

[2] Michael K. Young, " Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats ", *International Lawyers*, vol.29, 1995; Arie Reich, ibid.

[3] Ibid., Arie Reich, p.775.

[4] " Customs union " in this context does not necessarily share the same definition as the later idea of " customs union " or " free-trade area " incorporated into the provisions of Art. XXIV of the GATT.

[5] For a list of conventions, decrees, etc., concerning customs unions, established from early 19th century up to 1940s, see Jacob Viner, " The Customs Union Issue " , Carnegie Endowment for International Peace, London, 1945, pp.141-169.

[6] On the difficulties of the discussion on elimination of bloc discrimination in favour of a multilateral MFN treatment during the drafting of the ITO Charter and the GATT of 1947, see John H. Jackson, " World Trade and the Law of GATT — A Legal Analysis of the General Agreement of Tariffs and Trade " , 1969, chapter 24; and Richard N. Gardner, " Sterling-Dollar Diplomacy in Current Perspective " , new expanded edition, Columbia, 1980, chapter XVII.

[7] John H. Jackson, " World Trade and the Law of GATT — A Legal Analysis of the General Agreement of

Tariffs and Trade ", 1969, Chapter 24.

[8] The working parties established by the GATT CONTRACTING PARTIES to examine regional agreements were all government representatives.

[9] Robert E. Hudec viewed the early GATT 1947 legal system as a system in which the GATT diplomats who, " working with the tools peculiar to their own profession, .. have developed an approach toward law which attempts to reconcile, on their own terms, the regulatory objectives of a conventional legal system with the turbulent realities of international trade affairs ". Hudec, " The GATT Legal System: A Diplomat 's Jurisprudence ", Journal of World Trade Law, vol.4, 1970, reprinted in Hudec, " Essays on the Nature of International Trade Law ", Cameron May, 1999.

[10] Till Geiger and Dennis Kenedy (eds.), " Regional Trade Blocs, Multilateralism and the GATT ", Cassell Imprint, USA, 1996; Jagdish Bhagwati, Pravin Krishna, and Arvind Panagariya, (eds.), " Trade Blocs ? Alternative Approaches to Analyzing Preferential Trade Agreements ", MIT, 1999; Sungjoon Cho, " Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism ", Harvard International Law Journal, vol.42, Summer 2001.After long and inconclusive debates about regional arrangements in Europe and America, attention has been shifted towards latest attempts in East Asia to establish regional arrangements. See for example, Yorizumi Watanabe, " Perspectives of Free Trade Agreement (FTA) in the WTO System "(in Japanese), 『日本国際経済法学会年報』、第10号、2001, pp.102-125.

[11] A large number of studies in the legal aspect of the implementation of GATT Art.XXIV have been conducted since the early years of GATT. Some of them focused on the issue of interpretation of some key provisions that were ambiguously drafted and central to inconclusive discussions, others drew attention to the institutional weakness of the implementation mechanism under the Art.XXIV provisions. Some of these studies could be found in Kenneth W. Dam, " Regional Economic Arrangements and the GATT: the Legacy of a Misconception ", University of Chicago Law Review, vol.30, no.4, Summer 1963; Jurgen Huber, " The Practice of GATT in Examining Regional Arrangements under Article XXIV ", Journal of Common Market Studies, vol. XIX, no.3, March, 1981; Youri Devuyst, " GATT Customs Union Provisions and the Uruguay Round: the European Community Experience ", Journal of World Trade, vol.26, no.1, February, 1992; F. A. Haight, " Customs Unions and Free-Trade Areas under GATT ? A Reappraisal ", Journal of World Trade Law, vol6, 1972, pp.391-404; Frederick M. Abbott, " Law and Policy of Regional Integration ? the NAFTA and Western Hemispheric Integration in the World Trade Organization System ", Kluwer, 1995, Chapter 3; Jaime Serra Puche, " Regionalism and the WTO ", in From GATT to the WTO — *The Multilateral Trading System in the New Millennium* " , the WTO Secretariat, Kluwer, 2000.

[12] Kenneth W. Dam, " Regional Economic Arrangements and the GATT: The Legacy of a Misconception ", *The University of Chicago Review*, Vol.3, No.4, Summer 1963; F. A. Haight, " Customs Union and Free-Trade Areas under GATT, a Reappraisal " , *Journal of World Trade Law*, vol.6, 1972; John H. Jackson and William J. Davey, " Legal Problems of International Economic Relations — Cases, Materials and Text ", second edition,

American Casebook Series, West Publishing Co., 1986, pp.454-464; Youri Devuyst, " GATT Customs Union Provisions and the Uruguay Round: the European Community Experience ", *Journal of World Trade*, vol.26, no.1, February 1992; Yoshi Kodama, " Asia-Pacific Economic Integration and the GATT-WTO Regime ", International Economic Development Law series, Kluwer Law International, 2000, Chapter 1, Section 3; .

[13] Note by the Secretariat, " Synopsis of ' systemic ' issues related to regional trade agreements ", WT/REG/W/37, 2 March 2000, para.27.

[14] Ibid., footnote 56, 57.

[15] GATT Art.XXIV:5

" Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that…….

(a) with respect to a customs union, or an iterim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be; " ....

[16] Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, dated 22 October 1999, para.52.

[17] ibid., para.58.

Sub-paragraph 8(a) of Art.XXIV: " 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 Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Article XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories ".

" For the text of sub-paragraph 5(a), see supra footnote 12.

[18] Art.XXIV:4 " The contracting parties recognize the desirability of increasing freedom of trade by the devel-

opment through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories. "

[19] Appellate Body report, WT/DS34/AB/R, ibid. op. cit, para.57

[20] Ibid.

[21] Ibid., para.58, emphasis added.

[22] Ibid., para.63.

[23] Argentina — Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, dated 14 December 1999, para.109.

[24] Report of the Panel, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, dated 31 May 1999.

[25] See supra note 18.

[26] GATT Art. XXIV: 7 (a). See infra for further analysis.

[27] Otherwise, they shall make recommendations to the parties to the agreement to make appropriate modifications. GATT Art. XXIV: 7 (b).

[28] Art. XXIV: 7 (b).

[29] Ibid.

[30] Art.3: 8 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes provides that " (I) n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge. "

[31] This is to refer to the political and economic rationales behind the formation of the rules on regional arrangements as embodied in the law of GATT in promoting a multilateral framework for regulating international economic legal relations, based on practical political compromises and economic presumptions. It is not to deny the fact that GATT economic and political philosophy in this regard has been subject to criticisms from different aspects and remains a dynamic subject of research, but merely in order to make the following analyses those criticisms and debates are temporarily set aside. For a general discussion on these political and economic rationales, see for example, John H. Jackson, " World Trade and the Law of GATT ", 1969, Ch.24; Kenneth W. Dam, " Regional Economic Arrangements and the GATT ", *The University of Chicago Law Review*, number 4, Summer 1963; Pierre Lortie, " Economic Integration and the Law of GATT ", Praeger Publishers, 1975; Warren F. Schwartz and Alan O. Sykes, " The Economics of the Most Favored Nation Clause " in Jagdeep S. Bhandari and Alan O. Syke,(eds), " *Economic Dimensions in International Law* —

Comparative and Empirical Perspectives", Cambridge University Press, 1997.

[32] Report on" the Treaty Establishing the European Economic Community", BISD, 7th Supplement, 1959, p.71, conclusion, para.(a).

[33] Ibid., para.(c).

[34] See "GATT, Analytical Index: Guide to GATT Law and Practice", ibid. op. cit., pp.818-819.

[35] Art.XXIV:7 (b)" If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. *The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.*"(emphasis added). However, the decision of the CONTRACTING PARTIES is made on a consensus basis.

[36] "Regionalism and the World Trading System", World Trade Organization, Geneva, April 1995, p.11.

[37] This position was also shared by Canada, Hong Kong, Japan and the US, see "Examination of the Enlargement of the European Union: Accession of Austria, Finland and Sweden", note on the meeting of 29 July, 1996, WT/REG3/M/1, 23 April, 1997, paras.44, 9, 41 and 42.

[38] "Synopsis of 'Systemic' Issues Related to Regional Trade Agreements", ibid., op. cit., para.12.

[39] "GATT, Analytical Index: Guide to GATT Law and Practice", ibid. op. cit., p.815-816.

[40] This includes the right to request a consultation for any damage caused by the continued operation of the regional arrangement.

[41] "GATT, Analytical Index", ibid. op. cit., p.816.

[42] Ibid., pp.815-816.

[43] Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter referred to as DSU), annex 2 to the Agreement Establishing the World Trade Organization, adopted on 15 April, 1994.

[44] See remarks made by the Chairman of the Working Party on the Canada-US Free Trade Agreement, introduced the report to the GATT Council in 1991, as cited in "Regionalism and the World Trading System", ibid., op. cit., p.11.

[45] The only six agreements cited by a WTO study to be agreements whose conformity with Art. XXIV has been explicitly acknowledged by the working party in 1949 (South Africa-Southern Rhodesia CU Agreement), 1951 (El Salvador-Nicaragua FT Area), 1956 (Participation of Nicaragua in the Central American FT Area), 1971 Carribean FT Agreement), 1977 (Caribbean Community and Common Market) and 1994 (Czech Republic-Slovak Republic CU Agreement). See ibid., p.16 and appendix table 1.

[46] See infra footnote 52.

[47] Panel Report on "EC — Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region", L/5776, unadopted, dated 7 February 1985, paras.4.15-4.16, cited from "GATT, Analytical Index: Guide to GATT Law and Practice", ibid. op. cit., p.841.

[48] Ibid., para.4.18.

[49] "GATT Activities in 1984", Geneva, GATT, 1985, pp.43-44.

[50] Panel report, "*Turkey — Restrictions on Imports of Textile and Clothing Products*", WT/DS34/R, ibid. op. cit., para.9.50.

[51] "Regionalism: Facts and Figures", WTO, http://www. wto. org/english/tratye/.... Visited on 29 January, 2001.

[52] The first case was "*EEC — Tariff Treatment of Citrus Products from Certain Mediterranean Countries*", the report of which was put before the Council on 12 March 1985. The second case was "*EEC — Member States' Import Regimes for Bananas*", the report being issued on 3 June 1993.The third case was "*EEC — Import Regime for Bananas*" also complaint by the same Latin American countries against the EEC's banana regime, the report being issued on 18 January 1994. However, none of these reports were adopted. Before that there were a few cases in which the procedural and institutional issues of Art. XXIV:6 and Art. XXIV:12 respectively were addressed. But they were dealt with rather briefly and did not involve the substantial issues related to establishment of a regional arrangement. For example, the "*Canada — Withdrawal of Tariff Concessions*", L/4636, adopted on 17 May 1978; the Panel on "*Newsprint*", L/5680, adopted on 20 November 1984, and the case of "*Canada — Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*", L/6304, adopted on 22 March 1988.

[53] For the period of 1994-2000, arguments on the provisions of Art.XXIV have been made in at least four cases, they are: The EC Banana case (panel report dated 22 May 1997); Argentina Safeguard Measures (panel report dated 25 June 1999); Turkey — Restrictions on imports of textile (panel report dated 31 May 1999); and Canada — Measures Affecting Auto Industry (panel report dated 11 Feb. 2000).

[54] DSU, Art.6.1.

[55] Ibid., Art.16.4.

[56] Ibid.

[57] The DSB is established by the 1994 Understanding to administer the rules and procedures governing the settlement of disputes. See Art.2.1 of the DSU.

[58] Ibid., Art.17.14.This is generally referred to as the "negative consensus"..

[58] Ibid., Arts.21 and 22.

[59] Ibid., para.9.52.

[60] Panel report, "*EC — Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*", ibid. op. cit., para.4.19.

[62] See supra texts accompanying footnotes 45 and 39.

[63] See GATT Art.XXIV:4-9.

[64] Ibid., Art.XXIV:5.

[65] Ibid., Art.I.2 and I.3.

[66] Ibid., Art.XXIV:7.

[67] To avoid confusion, the terms " legitimate " or " illegitimate " used throughout this paper refer to the lawfulness or the lack thereof under the multilaterally agreed rules.

[68] See " *Committee on Regional Trade Agreements — Systemic Issues Related to 'Substantially All the Trade'* ", WT/REG/W/21/Add.1, dated 2 December 1997.

[69] See " Committee on Regional Trade Agreements - Note on the Meetings of 27 November and 4-5 December 1997 ", WT/REG/M/15, dated 13 January, 1998; and background information in " Committee on Regional Trade Agreements? Systemic Issues Related to' Other Regulations of Commerce ' ", WT/REG/W/17, dated 31 October 1997.

[70] " Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ", para.12.

[71] See Panel report on " *EEC — Restrictions on Imports of Dessert Apples* ", complained by Chile, L/6491, adopted on 22 June 1989, para.12.1; Panel report on " Japan — Taxes on Alcoholic Beverages ", WT/DS8 (DS10, DS11) /R, adopted on 11 July 1996, para.6.10 and the modification by the Appellate Body, WT/DS8 (DS10, DS11) /AB/R, adopted on 4 October 1996, Section E.

[72] GATT Art.XIX (Emergency Action on Imports of Particular Products), also referred to as the safeguard provisions.

[73] Report of the Working Party on the Free Trade Agreement between Canada and the United States, para.98, adopted on 12 November 1991, L/6927, in BSID, Suppl. No.38, Geneva, July 1992.

[74] See " Committee on Regional Trade Agreements — Examination of the North American Free Trade Agreement ", note on the meeting of 30 July 1996, Chapter 8; " Committee on Regional Trade Agreements — Examination of the Customs Union between the European Communities and Turkey ", note on the meeting of 23 October 1996, paras.39-48; " Committee on Regional Trade Agreements — Annotated Checklist of Systemic Issues ", note by the Secretariat, WT/REG/W/16, dated 26 May 1997, Section N; " Committee on Regional Trade Agreements - Note on the meetings of 6-7 and 10 July 1998 ", WT/REG/M/18, dated 22 July 1998, paras.39-43.

[75] Panel report on *Argentina — Safeguard Measures on Imports of Footwear* WT/DS121/R, ibid. op. cit., para.8.72.

[76] Agreement on Safeguards, annex 1 A to the WTO Agreement.

[77] Art.2:

" 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to

cause serious injury to the domestic industry that produces like of directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source. "

[78] Footnote 1 " A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure in applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994 ".

[79] See supra, at footnote 17.

[80] Appellate Body report, WT/DS121/AB/R, ibid. op. cit., para.108.

[81] See *Supra* Section II.

[82] All reports of the Working Party, except those listed *supra* at footnote 45.

[83] See for example Report of the Working Party on the Free Trade Agreement between Canada and the United States, para.78, ibid. op. cit.

[84] " Customs Union and Free-Trade Areas — EFTA ", conclusion adopted on 18 November, 1960, para. (c), GATT/BISD, 9th Supplement, 1960.

[85] " Latin American Free Trade Area ", conclusions adopted on 18 November 1960, para. (c), GATT/GISD, ibid.

[86] Report of the Working Party on the Free Trade Agreement between Canada and the United States, para.98, ibid. op. cit.

[87] The Panel reasoned that " (I) t appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the Committee on Regional Trade Agreements ..... " ibid., para.9.52.

[88] The Panel made the following reasoning:

" we consider that a Panel can assess the WTO compatibility of any specific measure adopted by WTO Members at any time and we cannot find anything in the DSU, Article XXIV or the 1994 Understanding on Article XXIV that would suspend or condition the right of Members to challenge measures adopted on the occasion of the formation of a customs union. "(para.9.51)

[89] In deciding on the burden of proof, the Panel of the Turkey Textile case decided that " it is.... For India to demonstrate *prima facie* that Turkey 's measures violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC. Turkey does not deny the existence of quantitative restrictions but submits an affirmative defense based on the application of Article XXIV of GATT ", ibid., op. cit., para.9.58.

[90] In the Guatemala antidumping investigation case, the Appellate Body read Art.7 and Art.6.2 of the WTO

Understanding on Rules and Procedures Governing the Settlement of Disputes together and said that "the 'matter referred to the DSB (Dispute Settlement Body)', therefore, consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims)" and it thus concluded that "(T)aken together, the 'measure' and the 'claims' made concerning that measure constitute the 'matter referred to the DSB', which forms the basis for a panel's terms of reference". See Appellate Body report *Guatemala — Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted on 2 November 1998, paras.72 & 74 respectively.

[91] Arts.8 and 17 of the DSU.