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1 ARTICLE XXIV

1.1 Text of Article XXIV

Article XXIV

Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

(*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

(*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, 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.

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 interim agreement leading to a 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;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the

same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (*a*) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*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 subparagraph (*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.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*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 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 Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations

with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

1.2 Text of note *ad* Article XXIV

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

1.3 Text of the Understanding on the Interpretation of Article XXIV of the GATT 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. 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. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions 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.

Dispute Settlement

12. 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.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

1.4 Text of the transparency mechanism for regional trade agreements[1]

The General Council,

Having regard to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement");

Conducting the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the WTO Agreement;

Noting that trade agreements of a mutually preferential nature ("regional trade agreements" or "RTAs") have greatly increased in number and have become an important element in Members' trade policies and developmental strategies;

Convinced that enhancing transparency in, and understanding of, RTAs and their effects is of systemic interest and will be of benefit to all Members;

Having regard also to the transparency provisions of Article XXIV of GATT 1994, the Understanding on the Interpretation of Article XXIV of GATT 1994 ("GATT Understanding"), Article V of GATS and the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause");

Recognizing the resource and technical constraints of developing country Members;

Recalling that in the negotiations pursued under the terms of the Doha Ministerial Declaration[1], in accordance with paragraph 47 of that Declaration, agreements reached at an early stage may be implemented on a provisional basis;

(*footnote original*)[1] WT/MIN(01)/DEC/1.

Decides:

A. Early Announcement

1. Without prejudging the substance and the timing of the notification required under Article XXIV of the GATT 1994, Article V of the GATS or the Enabling Clause, nor affecting Members' rights and obligations under the WTO agreements in any way:

(a) Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO.

(b) Members parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.

2. The information referred to in paragraph 1 above is to be forwarded to the WTO Secretariat, which will post it on the WTO website and will periodically provide Members with a synopsis of the communications received.

B. Notification

3. The required notification of an RTA by Members that are party to it shall take place as early as possible. As a rule, it will occur no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties.

[1] WT/L/671.

4. In notifying their RTA, the parties shall specify under which provision(s) of the WTO agreements it is notified. They will also provide the full text of the RTA (or those parts they have decided to apply) and any related schedules, annexes and protocols, in one of the WTO official languages; if available, these shall also be submitted in an electronically exploitable format. Reference to related official Internet links shall also be supplied.

C. Procedures to Enhance Transparency

5. Upon notification, and without affecting Members' rights and obligations under the WTO agreements under which it has been notified, the RTA shall be considered by Members under the procedures established in paragraphs 6 to 13 below.

6. The consideration by Members of a notified RTA shall be normally concluded in a period not exceeding one year after the date of notification. A precise timetable for the consideration of the RTA shall be drawn by the WTO Secretariat in consultation with the parties at the time of the notification.

7. To assist Members in their consideration of a notified RTA:

(a) the parties shall make available to the WTO Secretariat data as specified in the Annex, if possible in an electronically exploitable format; and

(b) the WTO Secretariat, on its own responsibility and in full consultation with the parties, shall prepare a factual presentation of the RTA.

8. The data referred to in paragraph 7(a) shall be made available as soon as possible. Normally, the timing of the data submission shall not exceed ten weeks – or 20 weeks in the case of RTAs involving only developing countries – after the date of notification of the agreement.

9. The factual presentation provided for in paragraph 7(b) shall be primarily based on the information provided by the parties; if necessary, the WTO Secretariat may also use data available from other sources, taking into account the views of the parties in furtherance of factual accuracy. In preparing the factual presentation, the WTO Secretariat shall refrain from any value judgement.

10. The WTO Secretariat's factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members.

11. As a rule, a single formal meeting will be devoted to consider each notified RTA; any additional exchange of information should take place in written form.

12. The WTO Secretariat's factual presentation, as well as any additional information submitted by the parties, shall be circulated in all WTO official languages not less than eight weeks in advance of the meeting devoted to the consideration of the RTA. Members' written questions or comments on the RTA under consideration shall be transmitted to the parties through the WTO Secretariat at least four weeks before the corresponding meeting; they shall be distributed, together with replies, to all Members at least three working days before the corresponding meeting.

13. All written material submitted, as well as the minutes of the meeting devoted to the consideration of a notified agreement will be promptly circulated in all WTO official languages and made available on the WTO website.

D. Subsequent Notification and Reporting

14. The required notification of changes affecting the implementation of an RTA, or the operation of an already implemented RTA, shall take place as soon as possible after the changes occur. Changes to be notified include, *inter alia*, modifications to the preferential

treatment between the parties and to the RTA's disciplines. The parties shall provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in electronically exploitable format.[2]

(*footnote original*)[2] In their notification, Members may refer to official Internet links related to the agreement where the relevant information can be consulted in full, in one of the WTO official languages.

15. At the end of the RTA's implementation period, the parties shall submit to the WTO a short written report on the realization of the liberalization commitments in the RTA as originally notified.

16. Upon request, the relevant WTO body shall provide an adequate opportunity for an exchange of views on the communications submitted under paragraphs 14 and 15.

17. The communications submitted under paragraphs 14 and 15 will be promptly made available on the WTO website and a synopsis will be periodically circulated by the WTO Secretariat to Members.

E. Bodies Entrusted with the Implementation of the Mechanism

18. The Committee on Regional Trade Agreements ("CRTA") and the Committee on Trade and Development ("CTD") are instructed to implement this Transparency Mechanism.[3] The CRTA shall do so for RTAs falling under Article XXIV of GATT 1994 and Article V of GATS, while the CTD shall do so for RTAs falling under paragraph 2(c) of the Enabling Clause. For purposes of performing the functions established under this Mechanism, the CTD shall convene in dedicated session.

(*footnote original*)[3] The Director-General is invited to ensure consistency in the preparation of the WTO Secretariat factual presentations for the different types of RTAs, taking into account the variations in data provided by different Members.

F. Technical Support for Developing Countries

19. Upon request, the WTO Secretariat shall provide technical support to developing country Members, and especially least-developed countries, in the implementation of this Transparency Mechanism, in particular – but not limited to - with respect to the preparation of RTA-related data and other information to be submitted to the WTO Secretariat.

G. Other Provisions

20. Any Member may, at any time, bring to the attention of the relevant WTO body information on any RTA that it considers ought to have been submitted to Members in the framework of this Transparency Mechanism.

21. The WTO Secretariat shall establish and maintain an updated electronic database on individual RTAs. This database shall include relevant tariff and trade-related information, and give access to all written material related to announced or notified RTAs available at the WTO. The RTA database should be structured so as to be easily accessible to the public.

H. Provisional Application of the Transparency Mechanism

22. This Decision shall apply, on a provisional basis, to all RTAs. With respect to RTAs already notified under the relevant WTO transparency provisions and in force, this Decision shall apply as follows:

(a) RTAs for which a working party report has been adopted by the GATT Council and those RTAs notified to the GATT under the Enabling Clause will be subject to the procedures under Sections D to G above.

(b) RTAs for which the CRTA has concluded the "factual examination" prior to the adoption of this Decision and those for which the "factual examination" will have been concluded by 31 December 2006, and RTAs notified to the WTO under the Enabling Clause will be subject to the procedures under Sections D to G above. In addition, for each of these RTAs, the WTO Secretariat shall prepare a factual abstract presenting the features of the agreement.

(c) Any RTA notified prior to the adoption of this Decision and not referred to in subparagraphs (a) or (b) will be subject to the procedures under Sections C to G above.

I. Reappraisal of the Mechanism

23. Members will review, and if necessary modify, this Decision, in light of the experience gained from its provisional operation, and replace it by a permanent mechanism adopted as part of the overall results of the Round, in accordance with paragraph 47 of the Doha Declaration. Members will also review the legal relationship between this Mechanism and relevant WTO provisions related to RTAs.

ANNEX

Submission of Data by RTA Parties

1. RTA parties shall not be expected to make available the information required below if the corresponding data has already been submitted to the Integrated Data Base (IDB),[4] or has otherwise been provided to the Secretariat in an adequate format.[5]

(*footnote original*)[4] Trade and tariff data submissions in the context of an RTA notification can subsequently be included in the IDB, provided that their key features are appropriate. In this respect, see document G/MA/IDB/W/6 (dated 15 June 2000) for the Guidelines for Supplying PC IDB Submissions and documents G/MA/115 (dated 17 June 2002) and G/MA/115/Add.5 (dated 13 January 2005) for WTO Policy regarding the dissemination of IDB data.

(*footnote original*)[5] Data submissions can be furnished in PC database formats, spreadsheet formats, or text-delimited formats; the use of word-processing formats should be avoided, if possible.

2. For the goods aspects in RTAs, the parties shall submit the following data, at the tariff-line level:[6]

(*footnote original*)[6] References to "tariff-line level" shall be understood to mean the detailed breakdown of the national customs nomenclature (HS codes with, for example, 8, 10 or more digits). It is crucial that all data elements supplied use the same national customs nomenclature or are associated with corresponding conversion tables.

(a) Tariff concessions under the agreement:

(i) a full listing of each party's preferential duties applied in the year of entry into force of the agreement; and

(ii) when the agreement is to be implemented by stages, a full listing of each party's preferential duties to be applied over the transition period.

(b) MFN duty rates:

(i) a full tariff listing of each RTA party's MFN duties applied on the year of entry into force of the agreement;[7] and

(*footnote original*)[7] In the case of a customs union, the MFN applied common external tariff.

(ii) a full tariff listing of each RTA party's MFN duties applied on the year preceding the entry into force of the agreement.

(c) Where applicable, other data (e.g., preferential margins, tariff-rate quotas, seasonal restrictions, special safeguards and, if available, *ad valorem* equivalents for non-*ad valorem* duties).

(d) Product-specific preferential rules of origin as defined in the agreement.

(e) Import statistics, for the most recent three years preceding the notification for which they are available:

(i) each party's imports from each of the other parties, in value; and

(ii) each party's imports from the rest of the world, broken down by country of origin, in value.

3. For the services aspects in RTAs, the parties shall submit the following data, if available, for the three most recent years preceding the notification: trade or balance of payments statistics (by services sector/subsector and partner), gross domestic product data or production statistics (by services sector/subsector), and relevant statistics on foreign direct investment and on movement of natural persons (by country and, if possible, by services sector/subsector).

4. For RTAs involving only developing countries, in particular when these comprise least-developed countries, the data requirements specified above will take into account the technical constraints of the parties to the agreement.

1.5 General

1. In *Peru – Agricultural Products*, although Peru did not invoke Article XXIV to justify the inconsistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, it argued that Article XXIV demonstrates that Members may modify their WTO rights by means of regional trade agreements. To this end, Peru recalled that the Appellate Body in *Turkey – Textiles* had made clear that "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions", provided that certain conditions are met. However, the Appellate Body in *Peru – Agricultural Products* clarified that Article XXIV cannot form a broad defence for measures in FTAs that diminish the rights and obligations of the Members under the WTO covered agreements:

> "In *Turkey – Textiles*, the Appellate Body considered that Article XXIV of the GATT 1994 may provide justification for measures that are inconsistent with certain other GATT 1994 provisions, provided that two cumulative conditions are fulfilled: (i) the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union or FTA that fully meets the requirements of Article XXIV; and (ii) that party must demonstrate that the formation of that customs union or FTA would be prevented if it were not allowed to introduce the measure at issue.
>
> In setting out the above cited conditions for a GATT 1994-inconsistent measure to be justified as part of a customs union or FTA under paragraph 5 of Article XXIV of the GATT 1994, in *Turkey – Textiles*, the Appellate Body relied also on paragraph 4 of this provision, which states that the purpose of a customs union or FTA is 'to facilitate

> trade' between the constituent members and 'not to raise barriers to the trade' with third countries. We further note that paragraph 4 qualifies customs unions or FTAs as 'agreements, of closer integration between the economies of the countries parties to such agreements'. In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements."[2]

1.6 Article XXIV:4

1.6.1 "not to raise barriers to the trade of other contracting parties"

2. In *Turkey – Textiles*, the dispute concerned quantitative restrictions applied by Türkiye on textile and clothing products from India. Türkiye argued that these restrictions were justified by Article XXIV because they had been instituted in order to align Türkiye's import policy with that of the EC within the EC-Türkiye customs union. On the issue of whether parties to a regional trade agreement are required not to raise barriers to trade with other Members overall, or rather not to raise *any* barrier, the Appellate Body identified paragraph 4 as an important element in the context of interpreting the text of the chapeau of paragraph 5, and it stated:

> "According to paragraph 4, 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. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries."[3]

1.6.2 Relationship between paragraph 4 and paragraphs 5 to 9

3. Paragraph 1 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 provides that "Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7, and 8 of that Article."

4. In *Turkey – Textiles*, although the key provision in this dispute was paragraph 5 of Article XXIV, the Appellate Body held that "paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5."[4] The Appellate Body moved on and stated:

> "We note that [the preamble of] the *Understanding on Article XXIV* explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union, the constituent members should 'to the greatest possible extent avoid creating adverse effects on the trade of other Members'. Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5."[5]

[2] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.115-5.116.
[3] Appellate Body Report, *Turkey – Textiles*, para. 57.
[4] Appellate Body Report, *Turkey – Textiles*, para. 56.
[5] Appellate Body Report, *Turkey – Textiles*, para. 57.

1.7 Article XXIV:5

1.7.1 Chapeau

1.7.1.1 "the provisions of this Agreement shall not prevent … the formation of a customs union or of a free-trade area": the "necessity test"

5. The Panel in *Turkey – Textiles* examined Türkiye's argument that its import quotas on textiles and clothing, which were inconsistent with Article XI, could be justified under Article XXIV:5. The Appellate Body agreed with the Panel that Türkiye's measures could not be justified under Article XXIV, but for different reasons. The Appellate Body began by identifying the chapeau of paragraph 5 as "the key provision" for resolving this issue, and examined it in context with paragraph 4:

> "[I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 '*shall not prevent*' the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency.[6]
>
> Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent '*the formation of a customs union*'. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[7]

6. The Appellate Body then indicated the two conditions that a measure otherwise incompatible with WTO law must satisfy in order to be justified by virtue of Article XXIV:

> "[I]n a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. 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 Article XXIV.

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[6] *(footnote original)* We note that legal scholars have long considered Article XXIV to be an "exception" or a possible "defence" to claims of violation of GATT provisions. An early treatise on GATT law stated: "[Article XXIV] establishes an *exception to GATT obligations* for regional arrangements that meet a series of detailed and complex criteria." (emphasis added) J. Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, 1969), p. 576. See also J. Allen, *The European Common Market and the GATT* (The University Press of Washington, D.C., 1960), p. 2; K. Dam, "Regional Economic Arrangements and the GATT: The Legacy of Misconception", *University of Chicago Law Review*, 1963, p. 616; and J. Huber, "The Practice of GATT in Examining Regional Arrangements under Article XXIV", *Journal of Common Market Studies*, 1981, p. 281. We note also the following statement in the unadopted panel report in *EEC – Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, para. 358: "The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to *deviate from their obligations under other provisions of the General Agreement* for the purpose of forming a customs union …". (emphasis added)

The chapeau of paragraph 5 refers only to the provisions of the GATT 1994. It does not refer to the provisions of the *ATC*. However, Article 2.4 of the *ATC* provides that "[n]o new restrictions … shall be introduced *except under* the provisions of this Agreement or *relevant GATT 1994 provisions*." (emphasis added) In this way, Article XXIV of the GATT 1994 is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met.

[7] Appellate Body Report, *Turkey – Textiles*, paras. 45-46.

> We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union."[8]

7. The Appellate Body reiterated its findings from *Turkey – Textiles*, in its Report on *Argentina – Footwear (EC)*, when it examined the Panel's finding that Argentina had violated Article 2 of the Agreement on Safeguards by including imports from all sources in its investigation of "increased imports" of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures.[9]

1.7.2 Paragraph 5(a): "the duties and other regulations of commerce … shall not on the whole be higher or more restrictive"

1.7.2.1 Link with the chapeau

8. In *Turkey – Textiles*, the Appellate Body held that "Article XXIV can … only be invoked as a defence … to the extent that the measure [at issue] is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a)":

> "[I]n examining the text of the chapeau of Article XXIV:5, we note that the chapeau states that the provisions of the GATT 1994 shall not prevent the formation of a customs union '*Provided that*'. The phrase '*provided that*' is an essential element of the text of the chapeau. In this respect, for purposes of a 'customs union', the relevant proviso is set out immediately following the chapeau, in Article XXIV:5(a). …
>
> Given this proviso, Article XXIV can, in our view, only be invoked as a defence 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 Article XXIV relating to the 'duties and other regulations of commerce' applied by the constituent members of the customs union to trade with third countries."[10]

9. In *Turkey – Textiles*, the Panel did not agree with the argument that a WTO right pertaining to a constituent member prior to the formation of a customs union could be extended to other constituent members, and cautioned that the right to form a customs union must be exercised in a manner that respects the rights of Members that are not parties to the customs union:

> "[E]ven if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members. We also consider that the right of Members to form a customs union is to be exercised in such a way so as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration."[11]

1.7.2.2 "The general incidence of duties"

10. With respect to the requirement in paragraph 5(a) regarding the "general incidence" of duties applied before and after formation of a customs union, the Appellate Body in *Turkey – Textiles* noted that the term "general incidence" refers to applied duty rates:

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[8] Appellate Body Report, *Turkey – Textiles*, paras. 58-59.
[9] Appellate Body Report, *Argentina – Footwear (EC)*, para. 109.
[10] Appellate Body Report, *Turkey – Textiles*, paras. 51-52.
[11] Panel Report, *Turkey – Textiles*, para. 9.183.

> "[P]aragraph 2 of the *Understanding on Article XXIV* requires that the evaluation under Article XXIV:5(a) of the *general incidence of the duties* applied before and after the formation of a customs union 'shall … be based upon an overall assessment of weighted average tariff rates and of customs duties collected.' Before the agreement on this Understanding, there were different views among the GATT Contracting Parties as to whether one should consider, when applying the test of Article XXIV:5(a), the *bound* rates of duty or the *applied* rates of duty. This issue has been resolved by paragraph 2 of the *Understanding on Article XXIV*, which clearly states that the *applied* rate of duty must be used."[12]

1.7.2.3 "other regulations of commerce"

11. With respect to the term "other regulations of commerce", the Appellate Body held in *Turkey – Textiles*:

> "With respect to 'other regulations of commerce', Article XXIV:5(a) requires that those applied by the constituent members *after* the formation of the customs union 'shall *not* on the whole be … *more restrictive* than the *general incidence*' of the regulations of commerce that were applied by each of the constituent members *before* the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* explicitly recognizes that the quantification and aggregation of regulations of commerce other than duties may be difficult, and, therefore, states that 'for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.'[13]"[14]

1.7.2.4 Evaluation of trade-restrictiveness under paragraph 5

12. On the issue of increase of barriers *vis-à-vis* third parties, the Panel in the *Turkey – Textiles* case found that:

> "What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies."[15]

13. The Appellate Body in *Turkey – Textiles* agreed with the Panel that the test for assessing trade-restrictiveness under paragraph 5(a) is an economic one:

> "We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the *Understanding on Article XXIV*, provide:
>
> > 'that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.'
>
> and we also agree that this is:
>
> > 'an 'economic' test for assessing whether a specific customs union is compatible with Article XXIV.'"[16]

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[12] Appellate Body Report, *Turkey – Textiles*, para. 53. Regarding the GATT 1947 discussions on this issue, see *GATT Analytical Index*, pp. 803-807.

[13] *(footnote original)* In paragraph 43 of its appellant's submission, Turkey argues that this provision must be interpreted as allowing the constituent members of a customs union to introduce GATT/WTO inconsistent quantitative restrictions upon the formation of the customs union. We see no basis for such an interpretation.

[14] Appellate Body Report, *Turkey – Textiles*, para. 54.

[15] Panel Report, *Turkey – Textiles*, para. 9.121.

[16] Appellate Body Report, *Turkey – Textiles*, para. 55.

14. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, which was found inconsistent with GATT Article I. The Panel, in a finding not reviewed by the Appellate Body, rejected this defence, noting that the import duty exemption was not granted to all products imported from the United States and Mexico and that it was also granted to products from countries other than the United States and Mexico:

> "We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment of imports from the United States and Mexico does not capture this aspect of the measure. In our view, Article XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.
>
> We further note that the import duty exemption does not provide for duty-free importation of all like products originating in the United States or Mexico and that whether such products benefit from the exemption depends upon whether they are imported by certain motor vehicle manufacturers in Canada who are eligible for the exemption. While in view of the particular foreign affiliation of these manufacturers, the exemption will mainly benefit products of the United States and Mexico, products of certain producers in these countries who have no relationship with such manufacturers are unlikely to benefit from the exemption. Thus, in practice the import duty exemption does not apply to some products that would be entitled to duty-free treatment if such treatment were dependant solely on the fact that the products originated in the United States or Mexico. We thus do not believe that the import duty exemption is properly characterized as a measure which provides for duty-free treatment of imports of products of parties to a free-trade area."[17]

1.8 Article XXIV:6

15. The Panel in *US – COOL (Article 21.5 – Canada and Mexico)* ruled that Article XXIV:6 reflects the principle that WTO Members remain bound by their WTO commitments even after entering into a free trade area:

> "In regulating entry into preferential regional and bilateral trade agreements, Article XXIV of the GATT 1994 allows for the establishment of customs unions and free trade areas, stipulating that '[t]he purpose of a customs union or a free-trade area should be to facilitate trade … and not to raise barriers to … trade.' Thus, the formation of regional trade agreements is not meant to undermine WTO concessions and other obligations, or to frustrate WTO market access benefits. Indeed, Article XXIV:6 provides that if a Member entering into a customs union or free trade agreement 'proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply'. This reflects the principle that each WTO Member entering into a free trade agreement remains bound by its WTO commitments, including bound tariff ceilings."[18]

1.9 Article XXIV:7

1.9.1 Legal status of agreements in the absence of recommendations pursuant to Article XXIV:7

16. In *Turkey – Textiles*, Türkiye argued before the Panel that as no Article XXIV:7 recommendation had ever been made to parties to a customs union to change or abolish any import restrictions and, in particular, no such recommendation had ever been made in respect of

[17] Panel Report, *Canada – Autos*, paras. 10.55-10.56.
[18] Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.687.

previous Türkiye/EC trade agreements, this indicated that its measures were WTO-compatible. The Panel cited approvingly the findings of the GATT Panel in *EEC – Import Restrictions* in response to a similar argument:

> "[I]t would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."[19]

1.10 Article XXIV:8

1.10.1 "substantially all the trade"

17. In *Turkey – Textiles*, the Appellate Body addressed the definition in Article XXIV:8(a) for a GATT-consistent customs union:

> "Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all the trade' between them. Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that 'substantially all the trade' is not the same as *all* the trade, and also that 'substantially all the trade' is something considerably more than merely *some* of the trade. We note also that the terms of sub-paragraph 8(a)(i) 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 Articles XI through XV and under Article XX of the GATT 1994. Thus, we agree with the Panel that the terms of sub-paragraph 8(a)(i) offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph. Yet we caution that the degree of 'flexibility' that sub-paragraph 8(a)(i) allows is limited by the requirement that 'duties and other restrictive regulations of commerce' be 'eliminated with respect to substantially all' internal trade."[20]

18. Applying the second step of the test, the Appellate Body in *Turkey – Textiles* examined whether the formation of a EC-Türkiye customs union meeting the requirements of Article XXIV:8(a)(i) would have been prevented if Türkiye were not permitted to impose the textile restrictions at issue. Türkiye argued that without these restrictions, "the European Communities would have 'exclud[ed] these products from free trade within the Turkey/EC customs union'"; since the goods at issue amounted to 40 per cent of Turkey's exports to the EC, Türkiye expressed concern that in that event, the customs union might not cover "substantially all the trade."[21] However, the Appellate Body found that the restrictions were not necessary because there were alternatives available for this purpose:

> "As the Panel observed, there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i). For example, Turkey could adopt rules of origin for textile and clothing products that would allow the European Communities to distinguish between those textile and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of the customs union, *and* those textile and clothing products originating in third countries, including India. … A system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities are required to be terminated under the provisions of the *ATC*. Yet no use was made of this possibility to avoid trade diversion. Turkey preferred instead to introduce the quantitative restrictions at issue.

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[19] Panel Report, *Turkey – Textiles*, paras. 9.172-9.174 (referring to *EEC – Import Restrictions*, para. 28).
[20] Appellate Body Report, *Turkey – Textiles*, para. 48.
[21] Appellate Body Report, *Turkey – Textiles*, para. 61.

> For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities."[22]

19. In *Canada – Autos*, Canada argued that under Article XXIV, it was permitted to grant a selective import duty exemption in the automotive sector to products of its partners in the North American Free Trade Agreement (NAFTA). In a finding not reviewed by the Appellate Body, the Panel rejected this defence. It found that the measure was not properly characterized as an RTA measure, because the exemption applied to products of non-parties to the NAFTA, and was denied to some products of NAFTA parties:

> "We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment of imports from the United States and Mexico does not capture this aspect of the measure. In our view, Article XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.
>
> We further note that the import duty exemption does not provide for duty-free importation of all like products originating in the United States or Mexico and that whether such products benefit from the exemption depends upon whether they are imported by certain motor vehicle manufacturers in Canada who are eligible for the exemption. While in view of the particular foreign affiliation of these manufacturers, the exemption will mainly benefit products of the United States and Mexico, products of certain producers in these countries who have no relationship with such manufacturers are unlikely to benefit from the exemption. Thus, in practice the import duty exemption does not apply to some products that would be entitled to duty-free treatment if such treatment were dependant solely on the fact that the products originated in the United States or Mexico. We thus do not believe that the import duty exemption is properly characterized as a measure which provides for duty-free treatment of imports of products of parties to a free-trade area."[23]

1.10.2 Article XXIV:8(a)(ii): "substantially the same duties and other regulations of commerce"

1.10.2.1 Interpretation

20. In *Turkey – Textiles*, the Appellate Body addressed the requirement contained in Article XXIV:8(a)(ii) that constituent members of a customs union apply "substantially the same" duties and other regulations of commerce to their external trade with third countries. The Appellate Body agreed with the Panel that the term "substantially the same" has both "qualitative and quantitative components":

> "Sub-paragraph 8(a)(ii) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to apply 'substantially the same' duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires

[22] Appellate Body Report, *Turkey – Textiles*, paras. 62-63.
[23] Panel Report, *Canada – Autos*, paras. 10.55-10.56.

that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

> '[t]he ordinary meaning of the term 'substantially' in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression 'substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union' would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.'"[24]

21. The Appellate Body in *Turkey – Textiles* further agreed with the Panel that the phrase "substantially the same" in Article XXIV:8(a)(ii) offered a "certain degree of flexibility". However, the Appellate Body objected to the standard of "comparable trade regulations having similar effects" developed by the Panel and held that this standard did not rise to the required standard of "sameness":

> "We also believe that the Panel was correct in its statement that the terms of sub-paragraph 8(a)(ii), and, in particular, the phrase 'substantially the same' offer a certain degree of 'flexibility' to the constituent members of a customs union in 'the creation of a common commercial policy.' Here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially' qualifies the words 'the same'. Therefore, in our view, something closely approximating 'sameness' is required by Article XXIV:8(a)(ii). We do not agree with the Panel that:
>
> > … as a general rule, a situation where constituent members have 'comparable' trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).
>
> Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to adopt 'substantially the same' trade regulations. In our view, 'comparable trade regulations having similar effects' do not meet this standard. A higher degree of 'sameness' is required by the terms of sub-paragraph 8(a)(ii)."[25]

1.11 Article XXIV:12

22. In *EC – Selected Customs Matters*, the Panel rejected the argument that Article XXIV:12 has the effect of limiting the European Communities' obligations under Article X:3(a) so that it is only required to take "reasonable measures" to ensure uniform administration by the customs authorities of the EC member States: any interpretation of Article X:3(a) that would affect the internal distribution of competence within a Member is incompatible with Article XXIV:12:

> "The Panel notes that Article XXIV:12 of the GATT 1994 is drafted as a positive obligation rather than as a defence. More specifically, the use of the word 'shall' in Article XXIV:12 of the GATT 1994 indicates that that Article imposes an obligation on Members to take all reasonable measures to ensure that local authorities comply with WTO obligations. This would tend to indicate that Article XXIV:12 of the GATT 1994 cannot be relied upon to attenuate nor to derogate from the provisions of the GATT 1994 (including Article X:3(a) of the GATT 1994), to which Article XXIV:12 of the GATT 1994 refers. The Understanding supports the view that Article XXIV:12 of the GATT 1994 imposes a positive obligation rather than attenuating or derogating from the provisions of the GATT 1994. Specifically, it states that '[e]ach Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994', suggesting that Article XXIV:12 of the GATT 1994 does not protect Members from being found in violation of their WTO obligations.[26] In addition, we note that the

[24] Appellate Body Report, *Turkey – Textiles*, para. 49.
[25] Appellate Body Report, *Turkey – Textiles*, para. 50.
[26] *(footnote original)* Further support for the view that Article XXIV:12 of the GATT 1994 does not attenuate nor derogate from the provisions of the GATT 1994, including Article X:3(a) of the GATT 1994 derives from Article XVI:4 of the WTO Agreement. Article XVI:4 of the WTO Agreement provides that: "Each

> Understanding clearly states that, when the DSB has ruled that a provision of GATT 1994 has not been observed by regional or local governments or authorities of a WTO Member, 'the provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance'.
>
> In the light of the foregoing, it is the Panel's view that, irrespective of whether or not Article XXIV:12 of the GATT 1994 is applicable in the context of this dispute, that Article does not constitute an exception nor a derogation from the obligation of uniform administration in Article X:3(a) of the GATT 1994."[27]

1.12 Understanding on the Interpretation of Article XXIV of the GATT 1994

1.12.1 Dispute settlement under paragraph 12 of the Understanding

23. With reference to the question of a panel's jurisdiction to assess the compatibility of regional trade agreements with WTO rules, the Appellate Body, in *Turkey – Textiles*, stated:

> "More specifically, with respect to the first condition, the Panel, in this case, did not address the question of whether the regional trade arrangement between Turkey and the European Communities is, in fact, a 'customs union' which meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV. The Panel maintained that 'it is arguable' that panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994. The Panel also considered that, on the basis of the principle of judicial economy, it was not necessary to assess the compatibility of the regional trade arrangement between Turkey and the European Communities with Article XXIV in order to address the claims of India. Based on this reasoning, the Panel assumed *arguendo* that the arrangement between Turkey and the European Communities is compatible with the requirements of Article XXIV:8(a) and 5(a) and limited its examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue. The assumption by the Panel that the agreement between Turkey and the European Communities is a 'customs union' within the meaning of Article XXIV was not appealed. Therefore, the issue of whether this arrangement meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV is not before us."[28]

24. In *Turkey – Textiles*, the Panel recalled the well-established WTO rules on burden of proof, whereby "(b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met and … (c) it is for the party asserting a fact to prove it", noting a third party's argument that "since Article XXIV was an exception invoked by Turkey, it was for Turkey to bear the burden of proof".[29] In the same case, the Appellate Body stated:

> "[W]e would expect a panel, when examining such a measure [taken by a party to a customs union], to require a party to establish that both of these conditions [the customs union fully meets the requirements of XXIV:8(a) and 5(a) and that without such measure that customs union could not be formed] have been fulfilled."[30]

Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." We understand that Article XVI:4 of the WTO Agreement establishes a clear obligation for all WTO Members to ensure the conformity of its laws, regulations and administrative procedures with their obligations under the covered Agreements, including the GATT 1994. See Appellate Body Report*, EC – Sardines,* para. 213.

[27] Panel Report, *EC – Selected Customs Matters*, paras. 7.144-7.145 (also noting in fn 288 that the Panel "does not need to take a position on whether the member States of the European Communities qualify as 'regional or local governments or authorities' within the meaning of Article XXIV:12").

[28] Appellate Body Report, *Turkey - Textiles*, para. 60.

[29] Appellate Body Report, *Turkey - Textiles*, paras. 9.57-9.58.

[30] Appellate Body Report, *Turkey – Textiles*, para. 59.

25. With respect to a case where an impediment found in another agreement might give rise to a panel's declining jurisdiction, the panel in *Argentina – Poultry Anti-Dumping Duties* referred to Article 1 of the Protocol of Olivos, which provides that, once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forum, that party may not bring a subsequent case regarding the same subject-matter in the other forum, and went on to state:

> "The Protocol of Olivos … does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure."[31]

26. Also with reference to a panel's declining jurisdiction, the Panel in *Mexico – Tax on Soft Drinks* rejected, in a preliminary ruling, Mexico's request "to decline to exercise its jurisdiction in the case in favour of an Arbitral Panel under chapter Twenty of the North American Free Trade Agreement (NAFTA)" and found instead that, "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[32] The Panel added that even if it had such discretion, it "did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."[33] Upon Mexico's appeal, the Appellate Body upheld the Panel's decision:

> "Mindful of the precise scope of Mexico's appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute, and that only a NAFTA panel could resolve the dispute as a whole. Nevertheless, Mexico does not take issue with the Panel's finding that 'neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA … and the dispute before us.' Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA. It is furthermore undisputed that no NAFTA panel as yet has decided the 'broader dispute' to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called 'exclusion clause' of Article 2005.6 of the NAFTA had not been 'exercised'."[34]

1.13 Relationship with other GATT provisions

1.13.1 Article I

27. On the question of whether Article XXIV should be considered as a derogation from the MFN obligation under Article I of the GATT 1994 only, or from other GATT 1994 provisions as well, the Appellate Body in *Turkey – Textiles,* in reversing the Panel's finding, stated:

> "Article 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 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. 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 Article XXIV."[35]

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[31] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.38.
[32] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, para. 7.1.
[33] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, para. 7.1.
[34] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, para. 54.
[35] Appellate Body Report, *Turkey - Textiles*, para. 58.

1.13.2 Article XI

28. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Türkiye on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of GATT 1994 (and consequently with Article 2.4 of the Agreement on Textiles and Clothing). The Panel rejected Türkiye's defence that Article XXIV:5(a) of GATT 1994 authorizes Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of the GATT 1994 (and Article 2.4 of the Agreement on Textiles and Clothing).[36] The Appellate Body upheld the Panel's conclusion that "Article XXIV does not allow Türkiye to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions … which were found inconsistent with Articles XI and XIII of *GATT 1994* and Article 2.4 of the ATC".[37] However, the Appellate Body stressed that it was only finding that Türkiye's quantitative restrictions at issue were not justified by Article XXIV but that it was not making a "finding on the issue of whether quantitative restrictions will *ever* be justified by Article XXIV".[38]

1.13.3 Article XIII

29. See paragraph 28 above.

1.13.4 Article XIX

30. The Panel in *Indonesia – Iron or Steel Products* rejected Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that, for this reason, the specific duty "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a):

> "Indonesia argues that the imposition of the specific duty on imports of galvalume originating in countries including its RTA partners means that the 'GATT obligation being suspended … is the GATT exception under Article XXIV of the GATT 1994'.
>
> We are of the view that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners. Article XXIV of the GATT 1994 is a permissive provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures. Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its ASEAN trading partners is established in the ASEAN Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the ASEAN-Korea Free Trade Agreement, not in Article XXIV. In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, 'suspended' 'the GATT exception under Article XXIV' for the purpose of Article XIX:1(a)."[39]

[36] Panel Report, *Turkey – Textiles*, para. 10.1.
[37] Appellate Body Report, *Turkey – Textiles*, para. 64.
[38] Appellate Body Report, *Turkey – Textiles*, para. 65.
[39] Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.19-7.20.

1.14 Relationship with other WTO Agreements

1.14.1 Agreement on Safeguards

1.14.1.1 Footnote 1 to Article 2.1

31. In *Argentina – Footwear (EC)*, the Panel found that Argentina violated Article 2 of the Agreement on Safeguards by including imports from all sources in its investigation of "increased imports" of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures. The Appellate Body reversed the Panel's finding, holding that footnote 1 to Article 2.1 of the Agreement on Safeguards applied to the facts of the case before it. The Appellate Body opined that "the footnote only applies when a customs union applies a safeguard measure 'as a single unit or on behalf of a member State'"; in the case before it, the Appellate Body found, MERCOSUR had not applied the safeguards measures at issue (the measures had been imposed by the Argentine authorities).[40]

32. In *US – Wheat Gluten*, the Panel found that the United States had acted inconsistently with Articles 2.1 and 4.2 of the Agreement on Safeguards by *including* imports from all sources in its *investigation*, but *excluding* imports from Canada from the *application* of the safeguard measure. On appeal, the United States argued, *inter alia*, that the Panel erred in failing to assess the legal relevance of footnote 1 to the Agreement on Safeguards, and Article XXIV of the GATT 1994 to this issue. The Appellate Body held:

> "In this case, the Panel determined that this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure. The Panel also found that it could rule on the claim of the European Communities without having recourse to Article XXIV or footnote 1 to the *Agreement on Safeguards*. We see no error in this approach, and make no findings on these arguments."[41]

1.14.1.2 Article 2.2

33. The Appellate Body in *US – Line Pipe* avoided ruling on whether Article 2.2 of the Agreement on Safeguards "permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure". Nevertheless, the Appellate Body asserted that the latter question becomes relevant in two circumstances:

> "The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2."[42]

1.14.2 Agreement on Textiles and Clothing

34. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Türkiye on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of the GATT 1994 and consequently with Article 2.4 of the Agreement on Textiles and Clothing. The Panel rejected Türkiye's defence that Article XXIV:5(a) of the GATT 1994 authorizes Members forming a customs union to deviate from the prohibitions

[40] Appellate Body Report, *Argentina – Footwear (EC)*, paras. 106-108.
[41] Appellate Body Report, *US – Wheat Gluten*, para. 99.
[42] Appellate Body Report, *US – Line Pipe*, para. 198.

contained in Article 2.4 of the Agreement on Textiles and Clothing (and Articles XI and XIII of the GATT 1994).[43] The Appellate Body upheld the Panel's conclusion that "Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions … which were found inconsistent with Articles XI and XIII of the *GATT 1994* and Article 2.4 of the ATC".[44] However, the Appellate Body stressed that it was only finding that Türkiye's quantitative restrictions at issue were not justified by Article XXIV but that it was not making a "finding on the issue of whether quantitative restrictions will *ever* be justified by Article XXIV".[45] In this regard, the Appellate Body recalled that Article 2.4 of the Agreement on Textiles and Clothing refers to the "*relevant GATT 1994 provisions*" as an exception to the prohibition of new restrictions to trade and that, therefore, "Article XXIV of *GATT 1994* is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency of Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met."[46]

Current as of: December 2024

[43] Panel Report, *Turkey – Textiles*, para. 10.1.
[44] Appellate Body Report, *Turkey – Textiles*, para. 64.
[45] Appellate Body Report, *Turkey – Textiles*, para. 65.
[46] Appellate Body Report, *Turkey – Textiles*, fn 13 to para. 45.