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DESIGNING A WTO-CONSISTENT CUSTOMS UNION: SELECT WTO OBLIGATIONS IN THE CONTEXT OF GATT ART. XXIV

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ABBREVIATIONS

AB	Appellate Body
ABR	Appellate Body Report
AD	Agreement on the Implementation of Art. VI of the GATT (anti-dumping)
ASEAN	Association of South-East Asia Nations
CRTA	(WTO) Committee on Regional Trade Agreements
CU	Customs Union
CVD	countervailing duty
DSU	Dispute Settlement Understanding
EC	European Community (Communities)
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
FTA	free-trade area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
ITO	International Trade Organization
MERCOSUR	Mercado Comun del Sur (Southern Common Market)
MFN	most-favored nation
NAFTA	North American Free Trade Agreement
ORRC	other restrictive regulations of commerce
ORC	other regulations of commerce
PR	panel report (GATT/WTO)
PTA	preferential trade agreement
RTA	regional trade agreement
SA	Agreement on Safeguards
SACU	Southern African Customs Union
SCM	Agreement on Subsidies and Countervailing Measures
SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
VAT	value added tax
VCLT	Vienna Convention of the Law of Treaties
WTO	World Trade Organization

EXECUTIVE SUMMARY

This memorandum addresses the relationship between Article XXIV of the GATT 1994, which governs the implementation of preferential trade agreements (PTAs), and certain other substantive obligations within the WTO Covered Agreements, namely: 1) the freedom of transit in goods (as reflected in Art. V of the GATT); 2) trade remedies, namely: safeguards measures (as reflected in Art. XIX of the GATT and the Agreement on Safeguards); antidumping measures (as reflected in Art. VI of the GATT and the Anti-dumping Agreement), and countervailing duties (as reflected in Art. VI of the GATT and the Agreement on Subsidies and Countervailing Measures), and 3) certain non-tariff barriers (as reflected in Article XX of the GATT, as well as in the Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade). Although the findings have a general relevance for all PTAs, the legal analysis of this study focuses on relevant issues for customs unions (CU).

Art. XXIV of the GATT operates as an exception that allows Members the flexibility to engage in certain WTO-inconsistent practices, provided that a series of requirements are fulfilled. For example, once a PTA meets the definitional terms set out in Art. XXIV, its parties are able to reduce their tariffs below the MFN level afforded to other WTO Members, even though such action technically violates Art. I of the GATT. But Art. XXIV presents a number of interpretive challenges. For instance, the Art. XXIV does not set out the limits of its application as a defense, and it is unclear whether it could prevail over all WTO obligations, or just a handful. Rather, Art. XXIV only describes the "threshold" of internal liberalization that a PTA must achieve in order to qualify for the exception. Defining this internal liberalization threshold presents a further difficulty. Neither Art. XXIV nor its associated jurisprudence provides a clear indication of precisely what restrictions must be eliminated for PTA members, and for what quantity of trade. This study attempts to provide the best possible guidance on these questions, with specific regard to the three areas mentioned above.

As a starting point for analysis, this study sets out a hypothetical scenario where a CU party ("Member A") enacts a measure generally applicable to all WTO members and wishes to determine whether it i) *must exempt* CU partners from the application of a measure, ii) *may exempt* its CU partners from this measure; or iii) *must apply* the measure to all its trading partners on non-discriminatory basis.

Overview of the memo

General findings on GATT Art. XXIV: Section 1 provides an overview of both the "internal" and "external" trade requirements for a CU to qualify for the Art. XXIV exception, and offers some proposed findings on the meaning of key elements. In particular, Section 1 explores the definition of "other restrictive regulations of commerce" and discusses the nature of the exceptions list to the internal trade requirement of Art. XXIV:8(a)(i). It also discusses whether a CU, as defined under Art. XXIV:8 comprises a "single customs territory" after its formation, or rather remains multiple customs territories within a union. The proposed findings in Section 1 serve as the basis for analysis in each of the three issue areas addressed in this study.

GATT Art. XXIV and Transit Measures: Section 2 analyzes Art. V transit measures in light of the internal trade requirement of Art. XXIV:8(a)(i). We argue that the hypothetical "Member A" is not likely under an obligation to eliminate *legitimate* transit charges, regulations and formalities for its intra-CU trade in order to meet the internal trade requirement of Art. XXIV:8(a)(i) of the GATT. However, we further submit that Member A *may* be able to eliminate such measures for its CU parties, provided that the goods in transit are bound for final sale *within* the constituent territories of the CU.

Section 2 also provides an analysis of transit and transport measures within 18 existing PTAs. It is notable that the majority of these agreements do not appear to accord any special treatment to PTA members in terms of transit requirements.

GATT Art. XXIV and trade remedies: Section 3 analyzes trade remedy measures (safeguards, anti-dumping and countervailing duties) in light of the internal trade requirement of Art. XXIV:8(a)(i). Section 3 also provides an analysis trade remedy provisions within 18 existing PTAs, and considers whether the provisions therein could constitute "subsequent practice", clarifying whether or not trade remedies are subject to the internal trade requirement of Art. XXIV:8(a)(i).

The authors submit that Member A *is likely obligated* to eliminate trade remedies for "substantially all trade" with its CU parties in order to meet the internal trade requirement of GATT Art. XXIV:8(a)(i). However, a number of residual questions remain, and it is not possible to provide a definitive answer on this point. However, at least for the "insubstantial" portion of trade, it would appear that Member A has the flexibility to chose whether to apply trade remedies or not.

GATT Art. XXIV and non-tariff barriers: Finally, Section 4 analyzes non-tariff barriers (GATT XX, SPS, and TBT measures) in light of the internal trade requirement of Art. XXIV:8(a)(i). The authors submit that Member A is not obligated to exempt its CU parties from the application of GATT Art. XX, SPS and TBT measures. In fact, it appears that Member A *must* apply these measures to CU-parties if it wishes to maintain them for other WTO Members. Failure to apply such measures to CU trade would very likely constitute arbitrary and unjustifiable discrimination, and thereby undermine the very basis of the measure itself. However, Member A may have other legitimate options to limit the restrictive impact of its SPS and TBT measures for its CU partners, particularly if all CU parties adopt equivalent measures that achieve the same level of protection.

Section 4 also provides an analysis non-tariff measures within 18 existing PTAs, and notes that none appear to afford the discriminatory treatment of PTA parties.

I. INTRODUCTION

Background and scope of this study: This memorandum responds to a client request submitted to the Trade Law Clinic at the Graduate Institute of International and Development Studies. The client has requested an examination of the relationship between Article XXIV of the GATT 1994, which governs the implementation of preferential trade agreements (PTAs), and certain substantive obligations within the WTO Covered Agreements, particularly those dealing with: 1) trade remedies (as reflected in WTO provisions on safeguards, anti-dumping and countervailing duties); 2) the freedom of transit in goods (as reflected in Art V of the GATT), and finally, 3) certain legitimate non-tariff barriers (as reflected in Article XX of the GATT, as well as the Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade). Although many of the findings have a general relevance for all PTAs, this study specifically focuses on relevant issues for customs unions (CU).

The findings represent the particular view and legal analysis of the authors, and a note of caution is warranted. Art. XXIV of the GATT represents a "black box" of sorts; a number of its provisions are ambiguous, and most have not be subject to satisfactory review and definition by past panels of the Appellate Body. Consequently, we are unable to offer an authoritative interpretation of many elements of Art. XXIV.

Preliminary assumptions: the study bases its analysis on a fictional CU with the following characteristics:

i. <u>All CU parties are also Members of the WTO</u>. In this regard, it is important to note that Art. XXIV:5 refers to "territories of contracting parties," in the sense of contracting parties to the GATT. The question of how to deal with PTAs comprised of WTO Members and non-members has been a subject of dispute in the past. Some Members have argued that mixed-membership agreements, by definition, do not comply with the requirements of Art. XXIV and should be subject to the formal voting procedures set out Art. XXIV:10, which requires a two-thirds majority approval from the contracting parties.[1] Although the issue has not been formally clarified, recent practice seems to indicate a general, tacit acceptance of mixed PTAs. For instance, the EC concluded PTAs with Tunisia and Morocco before they had acceded to the GATT. More recently,

[1] See the un-adopted report of the Panel, *EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776, (7 February 1985), (3.14)

Members have notified agreements to the Committee on Regional Trade Agreements (CRTA) with mixed membership.[2] Although this is an important issue, further exploration is beyond the scope of this study.

ii. The CU contains at least one Member that is considered a developed country. As a consequence, the CU is not eligible for the disciplines of the *Enabling Clause* (which permits the formation of PTAs amongst groups of developing countries). It should be noted that the disciplines of Art. XXIV and the *Enabling Clause* are substantially different, and this analysis will not be appropriate for a CU notified under the *Enabling Clause*.

iii. We will also assume that the CU agreement only concerns *trade in goods*. Therefore, no analysis will be presented for Art. V of the General Agreement for Trade in Services (GATS).

iv. As a point of departure for analysis in each issue area, we will begin with a general, hypothetical scenario. We envisage a situation in which a WTO Member that is also party to a CU (hereafter, "Member A") has enacted a measure applicable to WTO Members generally (be it a transit measure, a trade defense measure, or a sanitary or technical requirement). Member A now wishes to determine whether it should exempt its CU trading partners from the measure's application, or whether it must apply the measure to all of its trading partners.

Questions to be addressed: This study seeks to answer the following specific questions:

i. *Must* Member A give preferential treatment to its CU parties by excluding them from the application of a measure? In other words, must Member A eliminate the measure for substantially all trade with its CU partners in order to comply with the 'internal trade' requirement of GATT Art. XXIV?

ii. Even if Member A is not required to eliminate a certain measure for substantially all PTA trade in order to meet the internal trade requirement of Art. XXIV, *may* it still chose to do so? That is to say, can Art XXIV act as a defense in circumstances where Member A reduces its restrictions on trade for its CU parties beyond the requirements of Art. XXIV, even if this violates WTO obligations?

iii. *Must* Member A apply a measure to its CU partners if that measure is also applied to other WTO Members? In other words, what are the WTO obligations that prevail over the Art. XXIV exception?

Methodology: This study will principally base its findings upon a close textual analysis of elements of Art. XXIV of the GATT, as well as other relevant WTO provisions, as interpreted by panels and

[2] Devuyst & Serdarevic, (2007), 22. (for full citations, refer to the bibliography)

the Appellate Body. The study will also give significant attention to analysis from other scholarly work. Finally, the study will examine existing practice in other PTAs, drawing primarily upon the texts of agreements notified to the WTO. Given that as of 31 July 2010 some 351 PTAs had been notified to the WTO under Art. XXIV[3], existing practice in other PTAs may offer a helpful benchmark to address areas of uncertainty. Practically all WTO Members are now party to some form of PTA, and as a result, there may be little appetite for Members to bring complaints of inconsistency that implicate PTAs, "in fear that their own legal actions might backfire against them."[4] As a result, a new PTA might find that it benefits from a certain margin of flexibility.

We have selected 18 existing PTAs for review, representing a variety of geographic perspectives, and varying levels of economic integration. PTAs surveyed include free trade agreements (FTAs), free trade an economic integration agreements, and CUs. We have taken care to include PTAs with close geographic links, as well as those without. Although all the PTAs reviewed have been notified under Art. XXIV of the GATT, we have selected several that include a mix of developed and developing countries. At the client's request, we have attributed more attention to agreements concluded by the European Union and the United States.

[3]Source: http://www.wto.org/english/tratop_e/region_e/region_e.htm (last accessed, 2 April 2011); the remaining PTAs have been notified under Art V of the GATS (a total of 92) and under the Enabling Clause (a total of 31).
[4] Mavroidis, (2006), 2.

SECTION 1: OVERVIEW OF THE REQUIREMENTS OF GATT ART. XXIV

II. INTRODUCING ARTICLE XXIV

In order to examine the relationship between Art. XXIV and other WTO provisions, particularly those dealing particularly with transit, trade remedies and non-tariff measures, it is critical to first set out the meaning of key elements within Art. XXIV itself. Our interpretation of these elements will be crucial to answering the questions posed above. This section will discuss the following issues: 1) the essential nature of Art. XXIV; 2) the requirements it sets for both internal trade (occurring within the CU) and external trade (occurring with other WTO Members); and, 3) what further conditions must be met for a CU to serve as a defense for WTO-inconsistent measures[5]. However, it should be noted that neither WTO Members nor the Appellate Body have reached authoritative conclusions on the meaning of many of the terms and requirements set out below. The conclusions offered in this section represent authors' own reading of the texts based upon customary methods of interpretation, and backed by the guidance of other scholars.

i. ***Art XXIV is an exception and defense, not a right or an obligation:*** Art. XXIV does not establish any positive obligations for WTO Members, and as a result, there is no way to 'violate' it. Thus, no Member will be able to bring an independent claim on the grounds that a particular CU does not meet the terms set out under Art. XXIV. Rather, Art. XXIV is an exception, and provides a defense for WTO inconsistent behavior,[6] particularly derogation from the cardinal principle of 'most favored nation' (MFN) treatment.[7] However, it is important to note that this defense is only available on *a conditional basis*. In order to qualify for the exception of Art. XXIV, a CU must first meet the definitions set out in Art. XXIV, and further fulfill what are commonly referred to as the "external" and "internal" trade requirements. These are discussed below.

ii. ***Definition of a 'customs union' in Art. XXIV:8:*** Art. XXIV:8(a) states that "a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories." The ambiguity of this wording raises the following question: for the purposes of Art.

[5] The use of the expression "WTO-inconsistent measures" does not prejudge the question as to whether Art. XXIV can be applied as a defense for violations of WTO Agreements other than the GATT 1994. This issue is discussed further in Section 3.
[6] ABR, *Turkey-Textiles*, [45]
[7] Mathis, (2006), 79.

XXIV, do the parties to a customs union remain separate customs territories,[8] or upon formation of the customs union do they become one "single customs territory"? Although this provision has not been interpreted by the Appellate Body, the negotiating history offers some indication. The original text contained in Article 33 of the United States Draft Charter (1946) reads as follows: "... a union *of customs territories* for customs purposes shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce *as between the territories of members of the union* are substantially eliminated and the same tariffs 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."[9] The text of the Draft Charter is broadly similar to what is in place now. The phrase "substitution of a single customs territory fro two or more customs territory" was already present in the earlier version, however the provision discussed a "union" comprised of multiple "customs territories". It then continues by discussing the relationship as between the multiple "territories of members of the union." Thus, the older text clearly maintains an internal distinction between the individual customs territories that come to form a union. This distinction between constituent territories is at least partially maintained within the final text of Art. XXIV:8(a)(i). When describing the relationship between the territories that come to form the union, the text employs the expression "between the constituent territories of the union." However, it is notable that the text does not say "between the constituent *customs* territories of the union."

As a final point, mention should be made of the definition of "customs territory" provided earlier in Art. XXIV:2. According to that provision, "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…with other territories." It is possible that this provision was merely intended to limit scope of application for Art. XXIV.[10] However, it is also conceivable that, once a union of customs territories has achieved a certain threshold of integration and harmonization of tariffs and regulations (for "a substantial part of the trade…. with other territories"), this could

[8] It should be noted that the term "customs territory" is employed upon occasion within GATT to encompass all existing and potential Contracting Parties to the Agreement, and not just sovereign states. Macau is an example of such a non-state Contracting Party.

[9] Reference contained in *Article XXIV and the General Agreement*, *Note by the Secretariat*, MTN.GNG/NG7/W/13/Add.1, 10 August 1988, (2) (emphasis added)

[10] In our view, this is a likely interpretation. We take note of the placement of this definition of "customs territory", which follows directly after Art. XXIV:1, the provision that indeed sets the scope of application 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 Art. XXIV or is being applied under Article XXXIII…" It then goes on to say that "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."

indicate that the CU becomes its own "customs territory". If this interpretation is correct, the treatment of any given CU would ultimately depend upon its relative level of integration.

iii. ***The 'external' trade requirement of a customs union:*** Articles XXIV:5(a) and XXIV:8(a)(ii) establish two conditions that must be met in terms of the external trade of a qualified CU. They are less important to our analysis than those relating to internal trade (discussed below), and are merely summarized here.

Art. XXIV:5(a). This provision limits the extent to which CU members can *increase* their external restrictions on trade for non-CU parties when forming the CU. Accordingly, such increase should not be "on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior" to CU formation. The *Understanding on Art. XXIV* clarifies that for duties, any evaluation shall "be based upon an overall assessment of weighted average tariff rates and of customs duties collected"[11], and the applied rates are to be taken into consideration. For "other regulations of commerce" (ORC), the Understanding does not offer a formula, but notes that evaluation will likely need to be case-by-case, examining "individual measures, regulations, products covered and trade flows affected."

Art XXIV:8(a)(ii). In accordance with this provision, a CU must apply "…substantially the same duties and other regulations of commerce" to non-CU Members. The Appellate Body briefly addressed this question in the *Turkey-Textiles* case, stating that "substantially" implies "something closely approximating 'sameness'," although parties still enjoy "a certain degree of flexibility" in terms of their individual external trade policies.[12]

iv. ***The 'internal' trade requirement of a customs union:*** The 'internal' trade requirement is the most important for the purposes of this memo and requires careful consideration. In order to qualify as a customs union, the following requirement, set out in Art. XXIV:8(a)(i) must be met:

> "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 trade between the constituent territories of the union or at least with

[11] Understanding on Art. XXIV, (Art. 2)
[12] ABR, *Turkey-Textiles*, [49-50]

respect to substantially all the trade in products originating in such territories…"

Each element of this provision is significant for our analysis, and will be examined separately.

The meaning of "duties". The term "duties" should be interpreted to refer only to ordinary customs duties, and not other types of 'special' duties, or charges (such as taxes and fees) that may be imposed at the border. Although the English version of the text is somewhat ambiguous on this point, the French and Spanish versions (which are equally authentic) are clear. The French version uses the term *droits de douane* and the Spanish version uses *derechas de aduana*. Both are translated as "customs duties". The distinction between "customs duties" and "all other duties" is first introduced in GATT Art. II:1(b). When distinguishing between the two, the French and Spanish versions employ *droits de douane* and *derechas de aduana*, respectively, to refer to ordinary customs duties. Therefore, we would exclude special types of duties, such as those used for safeguards, anti-dumping and countervailing measures, from the term "duties" in Art. XXIV:8(a)(i).[13]

The meaning of "other restrictive regulations of commerce" (ORRC). This phrase defines the types of measures, aside from customs duties, that must be eliminated within a CU for substantially trade. To date, the expression has not been analyzed by the Appellate Body, and some disagreement remains among WTO Members as to its meaning.[14] It remains unclear whether this category only includes "protectionist" measures applied to imports, or whether it pertains to all regulations that could impact trade flows in some way. While this study cannot offer a definitive answer, we nevertheless offer some guidance on this expression using customary rules of interpretation, as established in Art. 31 of the Vienna Convention on the Law of Treaties (VCLT). When considering ordinary meaning of the term ORRC in Art. XXIV:8, other sub-paragraphs provide helpful context. It is notable that Art. XXIV:5(a) uses the term "other regulations of commerce" (ORC) in its discussion of the "external trade requirement." The word "restrictive" is absent from this provision. Although it could be argued that any and all regulations of commerce could have a "chilling effect" on trade, and thus be considered restrictive,[15] Art. XXIV appears to distinguish two categories: ORC

[13] It is also notable that other provisions of the GATT which deal with safeguards, anti-dumping and countervailing duties never use the term "customs duties" to refer to them. They are treated as "special" duties (see the language used in Art. VI:3, for example), and are consistently referred to with specific terminology (e.g. "safeguard duties", "anti-dumping duties", and "countervailing duties"). These distinctions are maintained in the French and Spanish versions of the text.
[14] Mitchell & Lockhart, (2009), 97; Mathis, (2006), 82.
[15] Mitchell & Lockhart, (2009), 97.

and ORRC. It thus seems to follow that category of ORRC is comprised of a specific-subset of regulations of commerce that can be identified by their relative restrictiveness.

Several other contextual elements of Art. XXIV provide further guidance. Notably, both sub-article 8(a)(i) and the *Understanding on Art. XXIV* refer to the elimination of restrictions on trade "*between* the constituent territories," which "suggests that the regulations to be eliminated under Art. XXIV:8 are those restricting the cross-border movement of goods between the PTA parties.[16] If this interpretation is accurate, ORRC would comprise those measures that are aimed specifically at imports, rather than measures that are applied to all goods in the normal course of trade. This is further reinforced by the types of provisions listed in parentheses in XXIV:8(a)(i) ("except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX"). These provisions generally address border measures that place quantitative restrictions on imports (Arts. XI – XV), or could lead to *de facto* quantitative restrictions on products by requiring that the products possess certain characteristics, or comply with certain standards (Art. XX). On this basis, and drawing upon a definition that is increasingly used in scholarly work, this study interprets ORRC as generally encompassing "border measures…and importation/exportation restrictions," as well as "domestic regulations (fiscal or non-fiscal) that accord less favorable treatment to like imported products."[17] This definition would include all "protectionist trade measures…and contingency trade defense measures such as anti-dumping and safeguard actions."[18] We will exclude from this definition domestic measures that do not specifically target imports and that are applied to all goods in the normal course of trade.

The meaning of "are eliminated with respect to substantially all the trade between the constituent territories." To understand this provision, one must first explore what is meant by "substantially all trade". Unfortunately, neither the text of the Agreement nor jurisprudence comes close to offering a formula. However, the Appellate Body has stated that this is "considerably more that merely *some* of the trade."[19] Furthermore, it has noted that the provision offers "some flexibility" to CU members when liberalizing ORRC, albeit within limitations that remain undefined.[20] When analyzing the "substantially all" requirement, we anticipate that future panels and the Appellate Body will apply a

[16] Ibid.
[17] Mathis, (2006), 91.
[18] Ibid. 87.
[19] ABR, *Turkey-Textiles*, [48] (emphasis original)
[20] Ibid. The Appellate Body stated: "Yet we caution the degree of 'flexibility' that the 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."

flexible, case-by-case test, that takes both qualitative (number of sectors covered) and quantitative (percentage of trade) factors into consideration.[21]

We next turn our attention the phrase "are eliminated". Again, this element has not been subject to any detailed examination in case law, and thus, it is not possible to supply a conclusive definition. The ordinary meaning of "eliminate" can be interpreted as to "completely remove", "get rid of" and "exclude from consideration".[22] Thus, it would seem that CU parties must not only "remove" ORRC that existed prior to CU formation, but must also exclude them from consideration in the future. This would arguably include individual instances of trade remedies (such as safeguards and countervailing duties), which are imposed in reaction to certain conditions. But the question remains, when and how is this criterion of elimination to be judged? Existing scholarly work appears to respond to this question one of two ways. Mitchell and Lockhart (2009) point out that parties might confine the possible application of ORRCs to "a defined group of products representing no more than an insubstantial portion of trade."[23] Alternatively, CU parties could vary the products to which ORRC are applied, provided that they are limited to an insubstantial portion of trade.[24] Estrella and Horlick (2006) argue forcefully that the elimination requirement *should not be assessed* on the basis of the "portion of trade effected by duties and ORRC," as this would "vary according to the number and type of ORRC imposed within the RTA at any given moment," meaning that "RTA compliance with Article XXIV:8 would be also variable, hence uncertain."[25] Instead, the argument goes, Art. XXIV:8(a)(i) requires that "duties and ORRC must be eliminated, that is *expelled, excluded, removed, gotten rid of,*" and that "no trade restrictions can remain applicable for any part of the intra-RTA trade which is intended to comprise part of the [substantially all trade] threshold."[26] Although such an interpretation might remain more faithful to the ordinary meaning of "eliminate", it is likely to prove impracticable. For any CU, trade flows will vary from year to year, and new situations could arise requiring a change in policy. We thus find it unreasonable to expect any CU to set a fixed policy on the application of duties and ORRC upfront. In the absence of any guidance from the Appellate Body, we anticipate that the assessment of "substantially all" will be judged on a moment-to-moment basis.

[21] Mitchell and Lockhart, (2009), 96.
[22] Oxford Dictionary and Thesaurus, (2007), 329.
[23] Mitchell and Lockhart, (2009), 99.
[24] Ibid.
[25] Gobbi Estrella & Horlick, (2006), 140.
[26] Ibid., 141.

Interpretation of "trade between the constituent territories…or at least with respect to substantially all the trade in products originating in such territories." Initially, this phrase may not seem problematic. But given that this study addresses Art. XXIV in the context of transit of goods, including both those goods *originating* in CU parties whose final destination remains within the CU and those goods destined for trade *outside the CU*, it is important that the meaning be clarified. We note that the phrase "trade between the constituent territories" appears to set the maximum scope of application of the internal trade requirement. Trade between CU parties would most certainly include goods originating within the CU, but also goods originating in third countries. The subsequent phrase "or at least" seems to introduce a minimum threshold for the types of goods considered under the internal trade requirement, namely those *originating* within CU territories. In other words, at the very minimum, CU parties must eliminate restrictions on intra-CU trade of substantially all goods "originating" within the CU. However, we do not consider that this expression obliges the CU to reduce restrictions on trade in goods when that trade does not occur between CU parties. This is particularly relevant for transit measures (Section 2, below), which could be applied to goods originating in one CU party but with a final destination outside of the CU. In such a case, the goods would not be part of "trade between the constituent territories" of the CU.

An exhaustive or non-exhaustive exceptions list? Sub-article 8(a)(i) incorporates a bracketed list of ORRC that do not need to be eliminated in order to meet the internal trade requirement of a CU. These exceptions are briefly summarized in the list that follows.[27]

Art. XI	Prohibits quotas and other restriction on imports and exports other than duties and charges, except for certain import and export restrictions in the agricultural sector, such as those to support domestic supply management regimes.
Art. XII	Permits import restrictions in the event of balance of payments emergencies.
Art. XIII	Requires that in those areas where quotas are allowed (for instance, agriculture) quotes be applied on a nondiscriminatory basis.
Art. XIV	Allows deviations from the nondiscriminatory application of quotas under Article XIII if necessary for balance of payments reasons.
Art. XV	Allows deviation from GATT rules to comply with commitments to the International Monetary Fund.
Art. XX	Allows qualified deviation from GATT rules for measures to protect health,

[27] Reproduced from Hudec and Southwick, (1999), 63.

safety, the environment, and so on.

A great deal of debate has centered around whether the exceptions to the internal trade requirement should be read as a closed list (meaning that only those measures listed in parentheses are to be excluded from the internal trade requirement) or whether it is an illustrative, non-exhaustive list that merely indicates the types of measures subject to the exception. The interpretation of the list as either open or closed will be of major importance for the analysis in this memo, particularly for trade remedies. In the absence of concrete decision by WTO Members or definitive ruling from the Appellate Body, we are not able to provide a final answer to this question. However, we note that there are a number of highly persuasive reasons to interpret the list as an exhaustive one.

First, we note the difference in wording of the exceptions list in subparagraph 8(a)(i) with other provisions within the Covered Agreements that establish open-ended or non-exhaustive lists. In such provisions, the drafters have generally added the phrases "such as", "including" or "*inter alia"* to the text.[28] This type of language is notably absent from Art. XXIV:8(a)(i). A closed-list reading is also consistent with a statement made by the Appellate Body,[29] in which it noted that the list allowed CU parties to retain "*certain* restrictive regulations of commerce that are otherwise permitted *under Articles XI through XV and under Article XX* of the GATT 1994."[30] It is particularly important that the Appellate Body applied the word "certain", which the Oxford English Dictionary treats as synonymous with the term "specific".[31] Had the Appellate Body seen the list as merely illustrative, it had the opportunity to say as much. Instead, it chose to rephrase it, "expressly referring to the provisions in the listing."[32] Finally, we note that if the listing of restrictions "would be understood to be non-exhaustive, then they must also be considered to be essentially redundant."[33]

Some scholars argue for an open-list reading on the basis that GATT Art. XXIV:8(a)(i) fails to mention of other measures that could certainly be deemed necessary, particularly those enacted under GATT Art. XXI (a provision dealing with security exceptions).[34] Given the obvious importance of national security for all Members, it is doubtful that the drafters would have intended

[28] See *Ad Article to GATT XII*, para 4(e); Art XIII:4; and TBT Art. 2.2 for a few examples.
[29] Mitchell & Lockhart, (2009), 99
[30] ABR, *Turkey Textiles*, [48] (emphasis added)
[31] Oxford Dictionary and Thesaurus, (2007), 156.
[32] Gobbi Estrella & Horlick, (2006), 142.
[33] Mathis, (2002), 61.
[34] Art. XXI states: "Nothing in this Agreement…shall prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."

for such measures to be subject to the internal trade requirement of Art. XXIV:8. But the fact that Art. XXI is not included does not mean that the list is non-exhaustive. Rather, it is conceivable that this omission was resulted from the adaptation of the original International Trade Organization (ITO) Charter. The ITO Charter included what is now Art. XXIV in Chapter IV (dedicated specifically to Commercial Policy), but included the current Art. XXI in Chapter IX, which set out the Charter's generally applicable provisions.[35] Whatever the case may be, Art. XXI commences with phrase "nothing in this agreement." Thus, it would be unreasonable to assume that just because Art. XXI is not specifically listed under XXIV:8(a)(i), CU parties must eliminate security measures for substantially all trade.[36]

Given the above, we find it more convincing to interpret the exception list of XXIV:8(a)(i) as exhaustive. However, because we are not able to provide a definitive interpretation, we will consider both possible readings of the exception list in the relevant portions of our analysis. This issue will be particularly important for the discussion of trade remedies. Should the list be deemed open-ended, it is arguable that CU parties would not be required to eliminate such measures at all. However, even if the list were deemed to be exhaustive, Art XXIV:8(a)(i) requires "the elimination of restrictions on 'substantially all the trade'; not the elimination of all trade restrictions except those necessary under the list of GATT provisions explicitly mentioned."[37] Thus, "the degree of flexibility offered in Article XXIV:8 should be wide enough to include the possibility for intra-regional safeguards"[38] or other forms of trade remedies. This will be further discussed below.

Are Members *required* to apply measures within the exceptions list to their CU partners? Prior to the *Turkey-Textiles* case, it was unclear whether the exceptions list of Art. XXIV:8(a)(i) made it mandatory for Members to apply the listed measures to their CU trading partners if those measures were applied to non-CU parties. The Appellate Body clarified this point, stating that "members of a customs union *may maintain*, where necessary…certain restrictive regulations of commerce that are otherwise permitted…"[39] This shows that "article XXIV:8 of the GATT can be construed as *permitting* rather than *mandating* non-application of trade remedies within customs unions."[40] While this permission may be further invalidated by rules applicable to certain measures on the

[35] Gobbi Estreela & Horlick, (2006), 143; Mathis, (2002), 60-63.
[36] Hudec & Southwick, (1999), 66.
[37] Pauwelyn, (2004), 19.
[38] Ibid.
[39] ABR, *Turkey-Textiles*, [48] (emphasis added)
[40] Gobbi Estrella & Horlick, (2006), 135.

exceptions list (as we will discuss in Section 4, dealing with non-tariff barriers), Art. XXIV:8 does not appear to require the non-discriminatory application of these measures.

v. ***Additional requirements to employ Art XXIV as a defense:*** In addition to meeting the definitional requirements for "internal" and "external" trade, the Appellate Body has articulated two additional requirements to use Art. XXIV as a defense, both of which are found in the *chapeau* of Art. XXIV:5.[41] For the Appellate Body, the phrase "shall not prevent" operates to introduce the Art XXIV defense.[42] However, it is only available if the WTO-inconsistent measure at issue was "introduced *upon the formation*" of the CU.[43] Secondly, the defense is only available if the formation CU would have been prevented if the measure in question had not been introduced.[44] This second element includes an implicit "necessity" test that, according to the Appellate Body, will only be met if there is no other "reasonable alternative" measure that would have been less trade restrictive, yet allowed the PTA to be established.[45]

Where are these additional requirements relevant? We argue that these two additional requirements should be seen to apply *only* to WTO-inconsistent measures that result in an *increase* in external trade restrictions for non-CU parties, and not for measures that merely result in a *decrease* in trade restrictions for CU parties. The Appellate Body made these findings in the context of a case that involved an *increase* to quantitative restrictions on textiles coming from non-CU trading partners (Turkey's implementation of quantitative restrictions for textile products). It has not discussed these additional conditions in any other context. Given that Art. XXIV:5 aims to limit Members' ability to use their PTAs as an excuse to raise their restrictions on external trading partners,[46] we argue that the additional conditions of the *chapeau* should be read specifically in this light. If CU parties were required to prove that every decrease in trade restrictions within the CU were necessary to the CU's formation, this would undermine the very purpose of Art XXIV, which is the "elimination between the constituent territories of duties and other restrictive regulations of commerce."[47] Furthermore, since Art. XXIV gives CU parties "discretion as to which internal trade restriction to eliminate and in which circumstances, provided that restrictions are eliminated on substantial all trade…it would

[41] The Art XXIV:5 *chapeau* states: "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:" (emphasis original)
[42] ABR, *Turkey-Textiles*, [45]
[43] ABR, *Turkey-Textiles*, [58] (emphasis added)
[44] ABR, *Turkey-Textiles*, [58]
[45] ABR, *Turkey-Textiles*, [62]
[46] Mitchell & Lockhart, (2009), 88.
[47] *Preamble* to the Understanding on Art. XXIV

go beyond the role of panels and the Appellate Body to second-guess such decisions."[48] This perspective is supported by the findings of the Panel in the *Line-pipe Safeguards* case, in which it determined that the necessity test should not be required for violations caused by the elimination of barriers within a PTA.[49] While this finding was not reviewed by the Appellate Body on appeal and was deemed to be of no formal legal relevance for future disputes,[50] it serves as strong indication of how this provision might be addressed in the future.

[48] Mitchell & Lockhart, (2009), 89.
[49] PR, *US-Line Pipe Safeguards*, [7.148]. Here, the Panel stated in part: *If the alleged violation of GATT 1994 forms part of the elimination of "duties and other restrictive regulations of commerce", there can be no question of whether it is necessary for the elimination of "duties and other restrictive regulations of commerce".*
[50] ABR, *US-Line Pipe Safeguards*, [198-199]

SECTION 2: TRANSIT OF GOODS AND GATT ART. XXIV

III. TRANSIT OF GOODS AND THE INTERNAL TRADE REQUIREMENT OF ART XXIV – INTRODUCTION

This section addresses the relationship between GATT Art. XXIV, and GATT Art. V, which sets out requirements for the treatment of goods in transit. It evaluates whether CU parties must eliminate transit charges, regulations and formalities for "substantially all trade" between them in order to meet the internal trade requirement of GATT Art. XXIV:8(a)(i). In case such elimination is not required, the section examines whether CU parties can chose to do so in any case. As noted above, we seek to respond to the following specific questions with regard to our hypothetical CU party, Member A:

i. In order to meet the internal trade requirement of Art. XXIV:8(a)(i), ***must*** Member A exempt its CU parties from the application of transit "charges and other regulations" that have been legitimately imposed for other WTO Members?
ii. Even if Member A is not required to exempt its CU parties from the application of the transit "charges and other regulations" in order to comply with the internal trade requirement, ***may*** it still choose to do so?
iii. Finally, if Member A applies transit charges or regulations to other WTO Members, ***must*** it also apply such measures to its CU parties? In other words, do the non-discrimination and MFN requirements of GATT Art. V:2 and V:5 prevail over the Art. XXIV exception?

IV. INTRODUCING GATT ART. V – REQUIREMENTS FOR THE TRANSIT OF GOODS

Art. V of the GATT covers transit provisions for movement of goods. In particular, it regulates the conditions under which a WTO Member may impose charges, regulations and other formalities upon goods in transit through its territory to a foreign destination. Its key provisions are summarized below:

- Art. V:2 prescribes freedom of transit in goods via the "most convenient routes" and *prohibits* any distinction between goods in transit "based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport."
- Art. V:3 *prohibits* the collection of customs duties on goods in international transit, as well as other charges. Nevertheless, "transportation charges or charges commensurate with

administrative expenses entailed by transit or with the cost of services rendered" *may be levied*.

- Art. V:4 *allows* for "regulations and formalities in connection with transit" that are "reasonable".
- Art. V:5 requires that "charges, regulations and formalities" in connection with transit be applied on an MFN basis. So, WTO members are *obliged* to treat traffic in transit to, or from the territory of any other member, 'no less favorably' than traffic in transit to or from any third country with respect to transit charges, regulations and formalities. According to the interpretative note to Article V:5, this applies only to like products being transported 'on the same route under like conditions'.

Although GATT Art. V has been subject to little analysis in disputes, the *Colombia-Ports of Entry case* provided some additional guidance on these provisions, which warrants brief mention. The Panel found that GATT Art. V:2 "requires that goods from all Members must be ensured an *identical level of access and equal conditions* when proceeding in international transit."[51] Here, the "level of access" implies the level of entry in order to proceed to "traffic in transit," while "conditions when proceeding in international transit" means treatment "while in transit."[52]

V. THE RELATIONSHIP BETWEEN ART V AND ART XXIV OF THE GATT

As outlined above, the purpose of GATT Art. V is to prohibit certain types of illegitimate transit measures and charges, and to ensure that all legitimate transit measures are applied on a non-discriminatory basis. In terms of the relationship between GATT Art V and Art XXIV, this study focuses primarily on transit charges and measures that are, *as such*, legitimate under Art. V.[53] But before exploring whether GATT Art. XXIV can be used to justify the differential application of legitimate transit measures (in derogation from the non-discrimination and MFN requirements of Art. V:2 and V:5), it is first necessary to explore whether legitimately imposed transit charges and measures qualify as "duties or other restrictive regulations of commerce" in the meaning of GATT XXIV:8(a)(i). We must also consider whether transit measures affect "trade between the constituent territories" of a CU, as further required by GATT Art. XXIV:8(a)(i). If the answer to both of these questions is 'yes', it is arguable that Member A is required to eliminate its transit

[51] PR, *Colombia – Ports of Entry*, [7.399-402](emphasis added)
[52] Azaria, D. Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade. Available at: http://www.wto.org/english/res_e/publications_e/wtr10_8june10_e.htm
[53] Art. XXIV of the GATT will not offer a serviceable defense for the imposition of illegitimate transit measures and charges, unless, in unusual circumstances, the imposition of such measures meets the two tests of the *chapeau* of Art. XXIV:5, as set out in the *Turkey-Textiles* case.

measures for substantially all trade with its CU parties, if it wishes to comply with the internal trade requirement of GATT Art. XXIV:8(a)(i).

What constitutes a "legitimate" transit measure? In accordance with Art. V:3, transit charges are permitted when they are "commensurate" with the cost of "administrative expenses," or "services rendered." A toll charged to each vehicle in order to maintain a highway would typify the type of charge that is permitted under Art. V. On the contrary, it would seem that any transit charge that generates a fiscal surplus (as opposed to simply recouping costs for services rendered or the maintenance of infrastructure) would violate Art. V. Thus, if a Member charged a toll of $15 for a lorry coming from Mexico to transit on a national highway, but only $5 for a lorry from Canada to transit on that same stretch of road, it would seem that the additional $10 charge levied on the Mexican lorry would not be commensurate with the cost of the service rendered (use of the highway), and thus would constitute a violation of Art. V:3.

The situation is slightly less obvious for transit regulations and formalities. Art. V obliges Members to eliminate these types of measures when they are not "reasonable". Unfortunately, the term "reasonable" has not been subject to detailed analysis, either in the text of Art. V or in case law. However, in *Colombia-Ports of Entry*, the Panel indicated that GATT Art. V functions to protect Members "from *unnecessary restrictions*, such as limitations on freedom of transit, or unreasonable charges or delays…"[54] Thus, the Panel appears to equate a "reasonable" transit measure with on that is "necessary". The definition of "necessary" has been discussed at length in past disputes, and these findings could be highly relevant for the scrutiny of transit regulations. In brief, a "necessary" measure fulfills the following three-part test: 1) the measure must protect an important interest or value;[55] 2) it must be "apt to make a material contribution to" achieving the objective;[56] and finally, 3) there must be no other less trade restrictive alternative measure available that would achieve the same result.[57] Accordingly, this sets a very high threshold for the types of regulations and formalities that can be legitimately posed on goods in transit.

Are transit "charges, regulations and other formalities" included in the category of "duties and other restrictive regulations of commerce" under Art XXIV:8(a)(i)? As discussed in Section 1, we interpret the term 'duties' of GATT Art XXIV:8(a)(i) as customs duties only. According to GATT

[54] PR, *Colombia – Ports of Entry*, [7.148](emphasis added)
[55] ABR, *Brazil-Tyres*, [144]
[56] Ibid, [150]
[57] Ibid, [156]

Art. V:3, Members are not allowed to levy customs duties on goods in transit. Therefore, the types of legitimate charges, regulations and formalities included in Art. V cannot fall under the term "duties" in Art. XXIV:8(a)(i).

We next consider whether these types of transit measures fall under the category of ORRC. As discussed in Section 1, this study interprets the term ORRC in GATT Art. XXIV:8(a)(i) to refer to protectionist measures encompassing "border measures…and importation/exportation restrictions," as well as "domestic regulations (fiscal or non-fiscal) that accord less favorable treatment to like imported products." Domestic measures and charges *applied to all products* in the normal course of trade are not considered within this category. We submit that that *legitimate* transit "charges, regulations and formalities" in the sense of GATT Art. V, when applied to all goods, *would not* fall under the category of ORRC. Charges levied to defray the cost of infrastructure maintenance (such as highway tolls) would arguably be applied to all vessels, whether in international transit or not, and would thus not constitute ORRC. However, a transit charge, regulation or formality that does not comply with the requirements of GATT Art. V would constitute an ORRC under Art. XXIV.

We consider that transit measures applied only to imports (customs clearance formalities, for instance) could arguably constitute ORRC even when they meet the requirements of GATT Art. V and are thus deemed "legitimate". If the ultimate goal of a customs union is to eliminate the borders, at least for the free movement of goods and commerce, the presence of customs clearance formalities could be seen as ORRC. While this question awaits an authoritative response, either from the membership or the Appellate Body, we raise this as a consideration for any CU wishing to comply with GATT Art. XXIV. However, as is noted above in Section I, a Member may have the flexibility to apply some customs formalities to its CU trading partners even if such measures constitute ORRC. For example, a Member could require that certain types of goods comply with special customs controls, provided that this requirement does not impact "substantially all trade."

Are transit ORRC applied to "trade between the constituent territories" of a CU? As noted above, in order to be considered under the internal trade requirement of Art. XXIV:8(a)(i), a transit ORRC would also need to be applied to trade *between* CU parties.[58] On this point, we note that such measures would not likely be exclusively applied to trade between CU parties. Taking the EU

[58] According to Art. XXIV:8(a)(i), the ORRC could also be applied to «trade in products originating in» CU territories. While «trade between the parties» could include goods that originated outside of the territory of the CU and would thus lead to a broader application of the internal trade requirement, «trade in products originating» still only refers to trade between CU parties, but narrows the scope of application. See: Mitchell & Lockhart, (2009), 93.

customs union as an example, consider a shipment of goods that originates in France and that transits through Turkey, en route for final sale in India. An ORRC applied to this shipment would not affect "trade between the constituent territories" of the CU. As a contrary example, consider a shipment originating in Spain, transiting through France, and bound for final sale in Germany. In this latter case, the ORRC would affect "trade between the constituent territories" of the CU. On this basis, we submit that only a fraction of the category of transit "charges, regulations and other formalities" in the meaning of GATT Art. V, could also be considered as ORRC applied to "trade between" CU members, and thus fall under the internal trade requirement of Art. XXIV:8(a)(i). Using this analysis as a background, we will now respond to the three questions set out at the beginning of this section.

VI. TRANSIT CHARGES, REGULATIONS AND FORMALITIES AND ART XXIV – SCENARIO ANALYSIS AND FINDINGS

iv. ***Must** Member A exempt its CU parties from the application of transit charges, regulations and formalities that have been legitimately imposed for other WTO Members in order to qualify as a CU under provisions of Art XXIV:8(a)(i)?* As has been argued above, we foresee that the only types of transit measures that Member A is *obliged* to eliminate for its CU parties in order to meet the internal trade requirement in Art. XXIV:8(a)(i) are those that possess two characteristics. First, the charge, regulation or formality must be considered an ORRC. Secondly, the measure must impact goods whose final destination after transit is within the CU. On this basis, we argue that Art. XXIV:8(a)(i) does not likely oblige Member A to eliminate transit measures that already comply with the requirements of GATT Art. V:2 and V:5 and are applied to *all goods* (e.g. toll levied to defray the cost of road maintenance). Furthermore, we argue that even if a transit measure did constitute an ORRC, Art. XXIV:8(a)(i) would not oblige Member A to eliminate it when the goods in transit are bound for final sale outside of the CU. If we follow this line of reasoning, the only transit measures that would remain for consideration under the internal trade requirement of GATT Art. XXIV:8(a)(i) are those that both: 1) constitute ORRC and 2) are applied to products transiting from one CU party through another CU party, with the final destination of a third CU party.

Finally, in accordance with our reasoning, Art. XXIV:8(a)(i) would only *oblige* Member A to eliminate such measures for its CU parties if the measures impact "substantially all trade between

the constituent territories." If the remaining transit ORRC only affect a negligible amount of trade between CU parties, it is arguable that Member A would be under no obligation to eliminate them.

v. ***May Member A exclude its CU partners from the application of transit charges and regulations even if it is not required to do so under Art XXIV:8(a)(i)?*** As is argued above, in a hypothetical situation where a transit measure: 1) is an ORRC, 2) applies to trade *between* parties to a CU, and 3) impacts a substantial portion of this trade, Member A would be required to eliminate the measure in order for its CU to meet the "internal trade" definition of Art. XXIV:8(a)(i). But the question still remains: How far can Member A go in affording preferential treatment to its CU parties? Art. XXIV is mute on this subject, and does not contain a list of all the provisions and obligations for which it can be used as an exception. The answer may differ depending on the nature of the measure in question. Accordingly, we examine three additional hypothetical categories of transit measure:

Type A: the transit measure is an ORRC, is applied to trade between the parties of the CU, but it does not impact the portion of trade defined as "substantially all." It would seem logical that Member A could choose to eliminate this measure for its CU partners and use Art. XXIV as a defense for this preferential treatment. This is, in fact, the type of liberalization that Art. XXIV seeks to achieve. It would make little sense to require Member A to eliminate its ORRCs up to a certain point, only then to prohibit it from going any further.

Type B: the transit measure is an ORRC, but it is not applied to trade between the parties of the CU. Neither Art. XXIV nor any of its associated jurisprudence provides clear guidance on whether Member A could eliminate this type of measure for CU parties and still benefit from a defense. According to the Appellate Body, the purpose of Art. XXIV is to "facilitate trade *between* the constituent territories" of a PTA,[59] and not necessarily to facilitate trade generally. It is questionable whether a defense is available for preferential treatment that does not directly help to achieve this purpose.

Type C: the transit measure is not an ORRC, but it is applied to trade between the CU parties. For example, consider that Member A requires all vehicles traveling on a highway to pay a toll in order to offset maintenance costs. Could Member A waive the toll for its CU parties when the goods are

[59] The Appellate Body has noted that although this article does not contain any legal 'tests', it sets out the recognized purpose of a CU. See ABR, *Turkey-Textiles*, (57) (emphasis added)

bound for final sale in a CU territory, and invoke Art. XXIV as a defense for this preferential treatment? As above, there is no clear answer to this question. However, in keeping with the purpose of Art. XXIV as expressed in paragraph 4, such an action could be viewed as facilitating trade between CU parties.

vi. ***Must Member A apply the same transit charges, regulations and formalities to its CU partners as it applies to non-CU parties?*** Following from the analysis provided above, the answer to this third question will depend largely on the type of measure under consideration (ORRC vs. non-ORRC; applied to goods in trade *between* CU members, etc). Effectively, Member A will be required to apply transit measures on non-discriminatory basis in any situation where Art. XXIV does not offer a valid defense for inconsistent preferential treatment. Although this question cannot be answered conclusively, we find it difficult to imagine that Art. XXIV offers a defense where the preferential treatment does not ultimately facilitate trade *between* CU parties.

VII. THE MEANING OF "FRONTIER TRAFFIC" IN ART. XXIV:3(A):

GATT Art. XXIV:3 states in part: "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." The question arises: does this provision provide special consideration for PTA transit when the PTA is comprised of geographically adjacent countries. The text does not provide any definition of the term "frontier traffic", and this provision has not been subject to interpretation by panels of the Appellate Body. However, analysis of the negotiating history indicates that this provision established a savings clause that was meant to allow communities situated astride frontiers to exchange certain goods on the basis of local arrangements. For example, in a committee discussion, the French delegate recalled that France had signed an agreement with Belgium and Luxembourg "providing for an extremely special regime" for the importation of small quotas certain products, "admitted in France under a frontier regime, either free of charge at a very reduced rate…"[60] In the same committee discussion, the Syrian delegate requested that the term "frontier traffic" be given a precise definition, and recommended the following: "a regime to facilitate, both from the point of view of customs tariff and all formalities, the movement of products belonging to people living along the border and who have interests in both countries," and that "such a zone would be limited to a few kilometers."[61] Although this definition was not adopted, later accounts of

[60] Verbatim Report from the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, 18 August 1947, Doc. E/PC/T/A/PV/42. P. 18.
[61] Ibid., P. 20

the drafting history further confirm this general definition of frontier traffic.[62] Consequently, we do not interpret this provision as automatically affording the possibility of preferential treatment in terms of transit for geographically adjacent countries.

VIII. THE SPECIAL CASE OF TRANSIT OF ENERGY GOODS

In the above scenarios, we have addressed the question of transit in goods generally, and have assumed that elimination of transit measures for CU parties would not immediately result in *increased* restrictions to the transit of goods from other non-CU Members. Thus, for reasons provided in section II (iii), we have not entered into a discussion of whether the two additional tests of the *chapeau* of GATT Art. XXIV:5 ("upon the formation" and "necessary to") would need to be met in order to use Art. XXIV GATT as a defense for inconsistencies arising from the elimination of internal trade restrictions. However, there may be certain situations where the elimination of a transit measure between CU parties could result in a direct *increase* to the restrictions posed for non-CU parties. This issue is particularly relevant for the transit of energy goods, particularly oil and natural gas, that transit over fixed infrastructure with limited capacity.

As an example let us assume that Member A has nationally owned and operated pipelines for oil transit, used by both a CU-party and another WTO Member not party to the CU. Member A might wish to afford a preference to its CU party. For the purposes of argument we also assume that the Art. XXIV defense extends to transit preferences for energy goods. Member A could extend a preference to its CU party in one of two ways, discussed below.

Waiver or reduction of fees for energy transit. Member A could waive or partially reduce the per-unit transit fee for oil from a CU trading partner. This could result in increased demand by the CU party for transit capacity, and as a consequence, decreased access to the pipeline for a non-CU party. This type of situation could be seen as analogous to the elimination of tariffs for a CU party (something which Art. XXIV undoubtedly applies to). A reduced tariff could allow a CU party to sell the good at a more competitive rate, and thus reduce demand for competing goods from non-CU parties, thereby reducing market share for these non-CU goods.

Regulatory action that extends preferential access to a CU party. Member A could also simply decide to offer pipeline access to a CU party. For example, it might declare that its CU party

[62] See *inter alia*, the Draft Report of the GATT Working Party II on Tariffs, Schedules and Customs Administration, 16 Feb. 1955, Doc. W.9/200 ; GATT Analytical Index, 18 December 1985, Spec (85)60, Part III.

benefited from a guaranteed 70% of its pipeline capacity. If another Member not party to the CU had historically absorbed 40% of Member A's pipeline capacity, it would stand to see its access reduced by 10%. In this case, it is not clear how the preference could constitute an elimination of an ORRC for the CU party, but it would likely amount to an increased restriction on the trade of the third party. In such a situation, we anticipate that Art. XXIV would only provide a serviceable defense if the two additional requirements set out in the *Turkey-Textiles* case could be met. Member A would likely need to demonstrate that the preference was afforded "upon the formation" of the CU, and was "necessary to" the formation of the CU.

IX. PROVISIONS ON TRANSIT IN EXISTING PTAS

Of the existing PTAs surveyed, the majority included at least some provisions on transit of goods, or alternatively, transport services. An overview of these various provisions, categorized by agreement, is provided in Annex 1. On the whole, very few (if any) agreements actually seem to accord preferential terms of transit for PTA parties, however a number of the agreements set special terms for cross border *transport services*. Such preferential terms would not likely fall to be considered under GATT Art. V, as they deal with liberalization within the services sector, and not strictly with the conditions for transit of goods. PTA texts varied markedly in terms of their coverage of transit, depending on the level of integration sought between parties and geographical factors. The FTAs surveyed include very little on transit, whereas FTAs with economic integration components (for example, the EU's PTA with Croatia) and CU agreements tend to contain more detailed provisions, some in separate protocols. Although they may afford preferential treatment for transport service providers, detailed provisions on transit tend to focus on the elimination of non-competitive practices generally, the increased harmonization of transit regulations and formalities within the PTA, and the improvement of infrastructure. Some of the European Communities agreements contain national treatment obligations on access to transit infrastructure (such as ports), but such provisions address the provision of transport services, and not simply conditions for transit in goods.

On the whole, the agreements surveyed do not appear to afford PTA parties more favorable terms for the transit of goods in the sense of GATT Art. V. Improvements to infrastructure, simplification of customs procedures and harmonization of transit regulations would have benefits for all goods in transit, not just those coming from PTA parties.

SECTION 3: TRADE REMEDIES AND GATT ART. XXIV

X. ART. XXIV AND TRADE REMEDIES - INTRODUCTION

Taken together, antidumping and countervailing duties, as well as safeguard measures, comprise a broader category commonly referred to as trade remedies. Such measures are restrictions on imports that are temporarily justified under WTO law. They are all exceptions based on economic circumstances. While safeguards respond problems arising from fair trade practices, antidumping and countervailing duties respond to unfair trade practices. All three types of trade remedies may be applied in the form of customs duties on imports. Safeguard measures may also be applied as quantitative restrictions, in the form of import quotas. This section sets out to determine whether the above trade remedies fall within the internal trade requirement of Art. XXIV:8(a)(i), and if not, whether they may nevertheless be eliminated between CU parties. In specific, this section attempts to respond to the following questions:

i. *Must* Member A exclude imports from CU parties from the application of its trade remedies? In other words, does the "internal trade" requirement of Art. XXIV:8(a)(i) require that Member A extend preferential treatment to its CU parties?

ii. *May* Member A choose to exempt the imports of its CU parties from trade remedies, even if Art. XXIV:8(a)(i) does not require such preferential treatment?

iii. *Must* Member A include imports from CU parties in the application of trade remedies? That is, do the obligations for such measures contain non-discrimination and MFN requirements that prevail over the Art. XXIV exception?

In order to better respond to these critical and unresolved questions, we first summarize the most pertinent requirements of each category of trade remedies, and analyze them in light of the "internal trade" requirement of GATT Art. XXIV:8(a)(i).

XI. INTRODUCING TRADE REMEDIES

Key WTO requirements for safeguards. The Agreement on Safeguards (SA) and GATT Art. XIX contain the general WTO rules applying to safeguard measures[63] Accordingly, when applying safeguards, Members must ensure *inter alia* that the following conditions are satisfied:

[63] It should be noted that specific types of goods such as textiles and agriculture have their own rules on safeguards that prevail over the basic rules contained in GATT XIX and the Agreement on Safeguards. For purposes of analysis in this memo, we limit our exploration to the requirements of GATT Art. XIX and the SA.

- GATT Art. XIX:1(a) requires that "unforeseen", or "unexpected"[64] developments have led to the importation of a product such that it causes or threatens to cause serious injury to the domestic industry. This requirement is reaffirmed in SA Art. 2.1, which requires a Member to determine the existence of the importation of a product in "such increased quantities" and that the conditions are such that this increase "cause or threaten to cause" to the domestic industry a "serious injury".
- SA Art. 2.2 .2 SA requires that "Safeguard measure(s)…be applied to a product being imported irrespective of its source." This is a non-discrimination requirement.
- SA Art. 4.1(a) defines the serious injury as "a significant overall impairment in the position of a domestic industry".
- SA Art. 4.2(b) requires that the Member must also demonstrate the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."
- SA Art. 9.1. establishes a specific discipline for safeguards applied to developing countries. Developing country product imports accounting for no more than 3 percent of the imports shall not be subject to the application of a safeguard measure, under the condition that all product imports coming from developing countries of this kind do not account for more than 9 percent of total imports of the product. This is a specific limitation to the non-discrimination requirement of SA Art. 2.2.
- SA Art. 7 sets the duration of safeguard measures which *inter alia* are limited to four years with possibility of extension, but shall not exceed eight years with an exception up to 2 additional years for developing countries provided by article 9.2 .

In addition to these key requirements, the SA contains some language on the application of safeguard measures by a CU. Footnote 1 to SA Art. 2.1. stipulates that a CU may apply a safeguard measure in two different manners: either "as a single unit or on behalf of a member State". However, footnote does not address whether an individual CU party is allowed to apply safeguard measures on its own. If the CU applies a safeguard as a single unit, this means that serious injury would likely be determined for the CU market as a whole, and individual CU parties would be

[64] Ibid.

excluded from the application of the measure by default. The covered trade relations are those between the Customs Union "as a whole" and the other countries.[65]

However, when a CU acts on behalf of a single CU party, "the determination of serious injury….shall be based on the conditions existing in that member State and the measure shall be limited to that member State."[66] Here, the question as to whether CU party imports can be excluded from the application of the safeguard becomes relevant. It is notable that the footnote to SA Art. 2.1 also states: "nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."[67]

Finally, WTO jurisprudence on Safeguards has articulated another requirement for safeguards that are relevant to this study. The first is commonly referred to as "parallelism". Parallelism can be defined as the equivalence between the scope of the investigation used to determine serious injury caused by increased imports of a product, and the scope of application of the safeguard. This requirement was elaborated in the *US-Line Pipe* case, in which the United States sought to justify its non-application of a safeguard measure to NAFTA trading partners by invoking GATT Art. XXIV. According to the Appellate Body, the United States would only hypothetically have been able to do so in two possible circumstances. In specific:

> "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," or "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."[68]

On this point, it is critical to note that the Appellate Body did not prejudge the question of whether GATT XXIV could actually serve as a defense in a situation where SA Art. 2.2 is violated. It explicitly stated that there was no need to "rule on the question whether Article XXIV of the GATT

[65]It is important to highlight the fact that this situation does not raise the question of preferential treatment or non-discrimination with regard to CU members. Indeed, the focus of non-discrimination is on the imports and here the imports are those coming from outside the customs union. CU members imports are always out of investigation as well as application scope.
[66] SA Art. 2.1 *fn*. 1
[67] Ibid.
[68]ABR, *US-Line Pipe Safeguards*, [198]

1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the Agreement on Safeguards."[69] To date, this question remains open and may only be definitively settled in a future dispute, provided the requirement of parallelism is met.

Key WTO requirements for the application of anti-dumping duties. Dumping occurs when "product of one country are introduced into the commerce of another country at less than the normal value of the products" such that it "causes or threatens material injury" to an industry in another contracting party.[70] The requirements to be met when responding dumping are set out in Art. VI of the GATT 1994 and supplemented by the provision of the Agreement on the Implementation of Article VI (hereafter "the AD"). A Member may offset the dumping by levying an anti-dumping duty (in the form of an increased customs duty), provided that the duty is "not greater in amount than the margin of the dumping."[71] Further key requirements can be summarized as follows:

- The responsibility for anti-dumping investigations and responses are devolved to national authorities. AD Articles 2 through 9 set out the general requirements these authorities must follow in their injury determination and imposition of anti-dumping duties.
- AD Art. 4.3 states that, when two or more countries have formed a CU under the terms of Art. XXIV:8(a) with "such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of the integration shall be taken to be the domestic industry referred to in paragraph 1." Thus, an anti-dumping duty *must* be applied respective to the industry within a CU as a whole (provided that the CU has reached a level of integration where it resembles a "single, unified market"). Further specificity on the "level of integration" required is not provided in the text of the article, and has not been discussed by past panels or the Appellate Body. However, it appears that not all customs unions will qualify for this requirement.
- AD Art. 9.2 requires that, "when an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury."

[69] Ibid.
[70] GATT Art. VI:1
[71] GATT Art. VI:2

Neither GATT Art VI nor the AD contains a general non-discrimination clause, and Members retain the flexibility to respond to some cases of dumping and not others. Thus, a member could chose to levy an anti-dumping duty on textiles one day, but to ignore dumped IT products the next. This is particularly important for our analysis of the relationship between anti-dumping requirements and Art. XXIV. Put quite simply, the exclusion of PTA partners from anti-dumping action would not violate the provisions of Art. VI or the AD, unless both PTA and non-PTA parties were dumping the same goods at the same moment in time (the situation envisaged under AD Art. 9.2).

Key WTO requirements for the application of countervailing duties. countervailing duties (CVDs) may be levied on imports in response to "unfair" trade practices – generally, subsidies - taking place in the goods' place of origin. Members may offset such subsidies by imposing additional customs duties on imported goods, provided that they comply with the requirements or GATT Art. VI and the Agreement on Subsidies and Countervailing Measures (hereafter, the SCM). Only a subsidy that meets certain conditions, particularly that of "specificity", may be addressed through CVDs (SCM Arts. 1 & 2). Other key requirements for CVDs can be summarized as follows:

- CVDs can only be levied following an investigation undertaken by national authorities. The requirements to initiate such an investigation are set out in Art. 11 of the SCM, with requirements for evidence, subsidy calculation and determination of injury, set out in SCM Arts. 12, 14 and 15, respectively.
- SCM Art. 19 sets out the requirements for the imposition of a CVD. Accordingly, CVDs must not be imposed "in excess of the amount of the subsidy found to exist (Art. 19:4), and must not be imposed if and when the "subsidies are withdrawn" (Art. 19.1).
- SCM Art. 19:3 requires that CVDs be levied "on a non-discriminatory basis on imports of such products from all sources found to be subsidized and causing injury."
- SCM Art. 16:4 states that when two or more countries have formed a CU under the terms of Art. XXIV:8(a) with "such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of the integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2." Thus, CVDs are to be applied with respect to the industry within a CU as a whole (provided that the CU has reached a level of integration where it resembles a "single, unified market"). This level of integration has not been further defined by panels or the Appellate Body. However, it appears that not all CUs will qualify.

Neither GATT Art. VI nor the SCM contain a general non-discrimination clause, and Members

retain the flexibility to respond to some subsidies and not others. As with anti-dumping duties, the exclusion of PTA partners from the application of CVDs will not violate the provisions of Art. VI or the SCM, unless both PTA and non-PTA parties were subsidizing the same goods at the same moment in time (the situation envisaged under SCM Art. 19:3).

XII. THE RELATIONSHIP BETWEEN ART. XXIV AND TRADE REMEDIES

Before responding to the three questions set out above, it is first necessary to consider safeguard measures, anti-dumping duties and CVDs in terms of the relevant elements of GATT Art. XXIV:8(a)(i), which establishes the internal trade requirement of a CU. In this regard, we follow the general findings and arguments set out above in section II.

Are trade remedies included in the category of "duties and other restrictive regulations of commerce" that impact "trade between constituent parties" of a CU? We argue that all of the three types of trade remedies, whether applied in the form of an increased customs duty on imports, or in the form of a quantitative restriction, it would fall within the category of ORRC, as it is defined in Section 1.[72] Such measures would accord less favorable treatment to imports, with the purpose of protecting domestic industry. Furthermore, all three types of measures, when applied to intra-CU trade, would impact "trade between the constituent territories." At least on this basis, trade remedies appear to be subject to the internal trade requirement of Art. XXIV:8(a)(i), and would need to be eliminated with respect to "substantially all trade."

Is the list of exceptions within Art. XXIV:8(a)(i) exhaustive or open-ended? Where do trade remedies fit? Neither GATT Art. VI or Art. XIX are expressly mentioned within the list of exceptions to the internal trade requirement in Art. XXIV:8(a)(i). As discussed above, we interpret the exceptions list as a closed one, but also note that debate on this issue continues. When the meaning of a provision of WTO law is ambiguous, the provision may be clarified "in accordance with customary rules of interpretation of public international law,"[73] which are codified in Articles 31 and 32 of the VCLT. When a provision's ordinary meaning and context do not resolve the ambiguity, one may look to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[74] As is discussed in further detail, below, many PTAs apply trade remedies to intra-CU trade. Of the 18 PTAs surveyed, 17

[72] As noted in Section I, Art. XXIV appears to equate "duties" with *stricto sensu* customs duties, and not 'special' types of duties such as safeguards, AD duties and CVDs.
[73] Art. 3.2 of the Dispute Settlement Understanding (DSU)
[74] VCLT Art. 31:3(b),

include provisions permitting at least some form of trade remedy. The question thus arises: Is this to be considered "subsequent practice in the application of the treaty which establishes the agreement of the parties" as to its meaning?

While this question alone could merit its own in-depth study, a few remarks are warranted here. In *Japan-Alcoholic Beverages II*, the Appellate Body stated that "subsequent practice" within the meaning of Article 31(3)(b) entails "...'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation."[75] In the *Gambling* case, the Appellate Body further emphasized the need an *implied agreement* between the parties.[76] The Oxford English Dictionary defines concordant as "agreeing in sentiment or opinion; of one heart or mind; harmonious, unanimous." It defines "consistent" as "marked by consistency; constantly adhering to the same principles of thought or action." Thus, it would seem that a majority of agreements would not only need to permit trade remedies to intra-PTA trade, they would need to take a consistent and largely uniform approach. Based upon the small sampling provided in this study, it is questionable whether PTA practice on this issue would satisfy the Appellate Body's requirements for PTAs "subsequent practice". The18 PTAs surveyed for this study do not apply trade remedies in a harmonious fashion. This is discussed in detail below. Furthermore, discussions at the CRTA seem to point to a lack of agreement between the parties on this issue.[77]

Thus, for purposes of analysis in this study, we assume that the list is an exhaustive one, with substantial implications for the findings. However, if the list eventually proves to be non-exhaustive, then there would be little basis to argue that trade remedies must be eliminated with regard to essentially all trade. If a CU party felt it necessary, it could choose to apply trade remedies to other CU members. We note, however, that Article XXIV:8(a)(i) would not *require* the CU party to do so. As clarified by the Appellate Body, measures that fall within the exceptions list to Art. XXIV8(a)(i) *may* be applied to CU parties, but, at least generally speaking, do not have to be applied in all circumstances.[78]

[75] ABR, *Japan – Alcoholic Beverages* II, (106)
[76] ABR, *US-Gambling*, (192)
[77] For a useful analysis on CRTA discussion of this issue, see Sagara, (2002).
[78] See discussion above in section II (ii)

XIII. CAN GATT ART. XXIV OFFER A DEFENSE FOR VIOLATION OF PROVISIONS WITHIN THE SA, THE AD OR THE SCM?

Can Art. XXIV justify the violation of non-GATT obligations? When considering the relationship between GATT Art. XXIV and obligations under the SA, the AD and the SCM, a preliminary question arises: can a GATT exception be applied to a non-GATT violation? The opening sentence of the *chapeau* of GATT Art. XXIV:5, states: "the provisions of *this Agreement* shall not prevent…" (emphasis added). In the *Turkey-Textiles* case, the Appellate Body restated this as follows: "…the provisions *of the GATT 1994* shall not prevent …"[79] This may be an indication that the Appellate Body intends to restrict the application of Art. XXIV to GATT obligations only. However, given that all three trade remedies agreements are an elaboration of substantive articles of the GATT (Arts. VI and XIX), it would seem illogical to maintain that the Art. XXIV exception can be applied only to GATT Art. VI and XIX, and not to the SA, AD and SCM. With regard to safeguard measures in particular, the Appellate Body has made clear that the SA and GATT XIX regulate the application of safeguards cumulatively.[80] The same logic would hold for GATT Art. VI and the AD and SCM. It is also notable that footnote 1 to SA article 2.1 states: "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994". One might deduce that footnote 1 allows not to interpret Art. XXIV:8 "as either permitting or not permitting the use of safeguards as between regional members."[81] Indeed, the footnote appears to leave the issue open. Thus, there is arguably nothing in the SA precluding the possibility to rely on GATT XXIV as a defense against the violation of the Art 2.2, resulting from the exclusion of CU members.[82] Therefore, we maintain that the relationship between the primary obligations of the three agreements on trade remedies on one hand, and the GATT XXIV exception on the other, should be interpreted as a "rule versus exception inter-action."[83]

Applying the additional conditions of the GATT Art. XXIV:5 *chapeau* to trade remedies. As discussed in section II above, we argue that the two additional conditions for a defense under Art. XXIV ("upon the formation of" and "necessary to") should only be required when the formation of the CU leads to an increase in an external restriction on trade. If these requirements were imposed for all violations of WTO obligations (e.g. MFN and non-

[79] ABR, *Turkey-Textiles*, [51] (emphasis added)
[80] ABR, *Korea-Dairy*, [77]
[81] Mathis, (2006), 174.
[82] Pauwelyn (2004), 130.
[83] Sykes (2006),75.

discrimination provisions), this would lead to an absurd result by effectively barring the possibility of further liberalization within a PTA *after* its initial formation. However, this matter is still subject to debate. In the case that these two tests must be met in all circumstances, this would present some particularly vexing challenges to the elimination of trade remedies.

Trade remedies are, by definition, implemented on an incidental basis, and only in response to particular circumstances. Thus, the exemption of a CU party from the application of a trade remedy could not easily be deemed consistent with the first condition of the Art. XXIV:5 *chapeau* ("upon the formation of") unless the measure was enacted at the very same moment that the CU was formed.[84] Furthermore, it would be difficult to argue that the exemption of CU parties from the application of such measures could be "necessary" for the *formation* of the CU, given that the majority of such measures would only be "eliminated" for CU parties after the actually formation of the CU.

In summary, WTO jurisprudence has not provided a conclusive answer "on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of [trade remedies] " under article XXIV[85]. Ultimately, it will be up to the Appellate Body or the membership of the WTO to determine how to interpret the exceptions list, and where to apply the tests set out in *Turkey-Textiles*. However, for purposes of further analysis below, we maintain that the exceptions list is a closed one, and that the *Textiles* tests should only be applied to *increases* in trade restrictions, not decreases.

XIV. TRADE REMEDIES AND GATT ART. XXIV – SCENARIO ANALYSIS AND FINDINGS

i. Must Member A exclude CU parties imports from the application of the trade remedies; that is give preferential treatment to their imports compared to third countries? Trade remedies can be classified either as duties or ORRC. If the exceptions list of Art. XXIV:8(a)(i) is a closed one (as we contend), Member A would effectively be obliged to eliminate trade defense instruments for substantially all of its trade with CU parties in order to comply with the internal trade requirement of Art. XXIV:8(a)(i). However, given that the internal trade requirement of Art. XXIV:8(a)(i) permits "some flexibility," hypothetically speaking, Member A would not be obliged to eliminate *all* intra-regional trade remedies. As argued above, some trade remedies

[84] Pauwelyn, (2004), 24
[85] ABR, Argentina-Footwear, [114]

could be applied, provided that the totality of duties and ORRC in place at any given moment does impact more than the insubstantial portion of trade between CU parties.

ii. Must Member A apply trade remedies to its CU parties, that is, give non-discriminatory treatment to all imports? Here, safeguard measures must be distinguished from anti-dumping duties and CVDs. For safeguards, provided that parallelism is respected, we see very little reason why Member A would be required to apply them to intra-regional trade, unless the two additional tests of Art. XXIV:5 ("upon the formation" and "necessary to") must be met in order to use Art. XXIV in all circumstances. As noted above, it is unlikely that these conditions can be fulfilled for the majority of safeguard measures. Although we feel that such an interpretation of the requirements of the *chapeau* is not only unwarranted but even contradictory to Art. XXIV's very purpose, we note that this question will likely remain unresolved until it is addressed in a future dispute. For anti-dumping duties and CVDs, the question of non-discrimination is not likely to arise. As discussed above, these measures are meant to respond to *individual* cases of dumping or subsidy. Thus, Members generally only apply a particular CVD to imports from a specific subsidy. The application may be even narrower for anti-dumping duties (an individual company within a given Member is generally responsible for the dumping). As a result, the non-application of anti-dumping duties or CVDs to CU parties will not provoke a violation of the AD or the SCM. It is highly unlikely that Art. XXIV would be relevant as a defense when dealing with anti-dumping or CVDs.

iii. May Member A choose to eliminate trade remedies for its CU parties, even if this is not required by Art. XXIV:8(a)(i)? The probable response to this question follows from the analysis already provided above. If the exception list of Art. XXIV:8(a)(i) is deemed to be exhaustive (as we contend), Member A will likely only be able to exercise discretion in the application of intra-regional safeguards for the insubstantial portion of trade . However, if the exceptions list is illustrative and open-ended, we argue that Member A would have full discretion, provided that it would not need to demonstrate that the non-application of an intra-regional safeguard meets the two tests of the *chapeau* of Art. XXIV:5.

It should also be noted that, if the exceptions list were to include trade remedies measures, Member A would still be able to eliminate them for intra-CU trade. As discussed in section II, the exceptions list of does not *mandate* the application the listed measures. It merely *permits* the application of such measures to CU parties.

XV. PROVISIONS ON TRADE REMEDIES IN EXISTING PTAS

Of the 18 PTAs surveyed, 17 of them contain provisions on the application of at least one form of intra-PTA trade remedy. The only PTA agreement that does not do so is SACU, and it appears that such policies are currently under development. However, the agreements display a diversity of rules on how and when trade defense instruments can be applied in practice. For example, out of the 16 agreements that make provision for intra-PTA safeguard measures, six of these limit the application of safeguards to the transitional period of PTA formation. Thereafter, safeguards are prohibited for intra-PTA trade. Seven agreements subject intra-PTA safeguard measures to the decision or intervention of a joint committee or advisory body. This is also sometimes the case for the imposition of anti-dumping duties and CVDs. Of the 13 agreements that contain permissions on intra-PTA anti-dumping duties and CVDs, four require committee or advisory body review before anti-dumping duties are imposed, and six require review before CVDs are imposed. Other differences are apparent as well. For instance, some PTAs limit the timeframe for safeguard actions to two or three years. A number of agreements only allow for the application safeguards in the form of increased tariffs, and not as quantitative restrictions. While these 18 agreements only comprise a small sampling of total PTAs currently in force, they seem to indicate a diversity of practice in the area of trade remedies. In our view, practice in the 18 PTAs surveyed is neither consistent, nor concordant.

SECTION 4: NON-TARIFF BARRIERS AND GATT ART. XXIV

XVI. NON-TARIFF BARRIERS AND THE INTERNAL TRADE REQUIREMENT OF ART XXIV - INTRODUCTION

The term 'non-tariff barriers' can refer to various types of measures that limit the importation of goods, from quantitative restrictions to technical or labeling requirements that a given product must fulfill. This section focuses specifically on those non-tariff barriers permitted through Art. XX of the GATT 1994, as well as the Agreement on Sanitary and Phytosanitary (SPS) Measures and the Agreement on Technical Barriers to Trade (TBT). It will respond to the three questions posed in our introduction, namely:

i. In order to meet the internal trade requirement of GATT Art. XXIV:8(a)(i), ***must*** Member A exempt its CU parties from the application of GATT Art. XX, SPS or TBT measures legitimately imposed on other WTO Members?
ii. On the contrary, if Member A applies GATT Art. XX, SPS, or TBT measures to WTO Members, ***must*** Member A also apply the measure to its CU parties?
iii. Finally, even if Member A is not required to exempt its CU parties from the application of the SPS, TBT or GATT Art. XX measure in order to comply with the internal trade requirement of GATT Art. XXIV:8, ***may*** it still choose to do so?

Before addressing these questions, we briefly set out the pertinent requirements of GATT Art. XX, SPS and the TBT Agreement, as well as key findings from past jurisprudence.

XVII. INTRODUCING NON-TARIFF BARRIERS –REQUIREMENTS OF GATT ART. XX, SPS & TBT

Requirements of GATT Art. XX. GATT Art. XX establishes a closed list of ten legitimate objectives for which derogation from certain GATT obligations is permissible. Art. XX is an exception, but like Art. XXIV, its application is conditional upon meeting certain requirements. The Appellate Body has set out a "two-tiered" test[86] to establish whether a measure is consistent with GATT Art. XX, beginning with the examination of conditions of each sub-paragraph, and then moving onto the conditions within the *chapeau*.

[86] ABR, *Brazil-Tyres*, [139]

The sub-paragraphs set the requirements for a measure's relationship with its objective. For instance, sub-paragraphs (a) and (b) require that the measure be "necessary" to the achievement of the objective. As interpreted by the Appellate Body, this means that the measure must: 1) protect an important interest or value;[87] 2) be "apt to make a material contribution to" achieving the objective;[88] and finally that 3) that there be no other less trade restrictive alternative measure available that would achieve the same result.[89] Other sub-articles include different texts for the relationship between a measure and its objective. For instance, sub-article (g) addresses measures "*relating to* the conservation of an exhaustible natural resource" (emphasis added). The "relating to" test imposes a lower threshold than the "necessary to" test, only requiring that the measure be "primarily aimed at" the objective.[90]

The *chapeau* sets out requirements for the measure's application. Accordingly, a measure: 1) must not arbitrarily or unjustifiably discriminate between countries with the same conditions; and, 2) must not constitute a disguised restriction on international trade. The first requirement is particularly critical for this study, as it has been analyzed in a case dealing with preferential treatment for parties to a customs union. In the *Brazil-Tyres* case, Brazil argued that it was able to exempt its MERCOSUR trading partners from a quantitative restriction enacted to protect human health under GATT Art. XX(b). Brazil cited Art. XXIV to justify its discriminatory application of the measure, and furthermore argued that a ruling from a MERCOSUR arbitral tribunal had in fact compelled it to exempt its CU partners from the measure's application. The Appellate Body disagreed with Brazil. It determined that discrimination would be deemed arbitrary or unjustifiable if "the reasons given for this discrimination bear no rational connection to the objective…or would go against that objective."[91] According to the Appellate Body, Brazil's preferential treatment of its CU parties had no rational connection to a health objective, and was consequently arbitrary and unjustifiable. Therefore, Brazil either had to eliminate the measure completely, or include its CU parties in its application.

Requirements of the SPS Agreement. The SPS is a self-standing agreement, and as such, no prior violation of the GATT is necessary to find violation of SPS.[92] As demonstrated by its negotiating history, SPS was designed to complement and elaborate upon rules for the application of certain

[87] ABR, *Brazil-Tyres*, [144]
[88] Ibid, [150]
[89] Ibid, [156]
[90] ABR, *US-Gasoline*, p. 19.
[91] ABR, *Brazil-Tyres*, [227]
[92] PR, *EC-Hormones*, [8.36]

measures justified under the health exception of GATT Art. XX(b).[93] In order to qualify for the disciplines of SPS, a measure must "protect human, animal or plant life or health" by addressing risks that arise from the closed list of conditions set out in SPS Annex A(1).[94] It should be noted that in addition to health-based measures, measures devised to protect the environment and biodiversity may fall within the scope of SPS.[95]

The SPS Agreement permits members to establish their own appropriate level of protection relative to a risk,[96] and provides several pathways for compliance, set out in Arts. 3.1 through 3.3. The SPS Agreement also requires that measures be "necessary" (Art 2.2), and that they not be "more trade restrictive than required" (Art 5.6). Finally, measures (both in form and in application) must "not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail," (Art. 2.3), and must avoid "arbitrary or unjustifiable distinctions" in the levels of protection applied in different circumstances (Art. 5.5). These requirements, which are reminiscent of key tests within GATT Art. XX, are most relevant for the analysis of this paper.

Requirements of the TBT Agreement. The Agreement on Technical Barriers to Trade applies to technical regulations that set out product characteristics or their related process and production methods with which compliance is necessary, as well as non-mandatory standards.[97] For the purposes of this study, the most important provisions of the TBT Agreement are Art. 2.1., which poses a non-discrimination requirement in the application of TBT measures (encompassing both national treatment and most favored nation requirements), Art. 2.2, which requires that TBT measures be "necessary to" the fulfillment of one of an open-ended list of legitimate objectives (much like Art. 5.6 of the SPS Agreement, this provision requires that the measure be the least-trade restrictive option available), and finally Art. 2.4, which requires that members use international standards, where they exist, "as a basis for" their technical regulations. To date, Art. 2.4 is the only provision within this group that has been subject to substantial analysis in a dispute. Thus, this study will rely upon findings pertinent to analogous provisions of the SPS and GATT Agreements when discussing Arts. 2.1 and 2.2.

[93] See the Preamble to the SPS Agreement; also, PR, *US-Poultry*, [7.478]
[94] Namely, diseases, disease-causing or carrying organisms, additives, contaminants, toxins, and pests.
[95] Gruszczynski, (2008), 5.
[96] SPS Art. 3.3; ABR, *Australia-Salmon*, [199]
[97] See definitions provided in Annex 1 to the TBT Agreement.

XVIII. NON-TARIFF BARRIERS AND ART XXIV – SCENARIO ANALYSIS AND FINDINGS

Having set out the key requirements of GATT XX, SPS and TBT measures, we now attempt to respond to the preliminary questions posed.

i. ***Must** Member A exempt CU parties from the application of GATT Art. XX, SPS and TBT measures in order to comply with the internal trade requirement?* GATT Art. XX, SPS and TBT measures are principally applied to imports and most certainly have some restrictive impact on trade. Therefore, they would certainly classify as ORRC in the meaning of GATT Art. XXIV. However, GATT Art. XXIV:8(a)(i) clearly states that objectives falling under GATT Art. XX are excluded from the internal trade requirement. We can thus safely assume that Member A is under no obligation to exempt its CU parties from GATT Art. XX ORRC. Given that the SPS Agreement is a direct elaboration of the GATT Art. XX(b) exception, it likewise follows that Member A is under no obligation to exclude CU parties from SPS ORRC. This is arguably also the case for many TBT measures, as the most common types of technical regulations (those that protect life, health, the environment, consumers, etc) would also fall within the ambit of GATT Art. XX exceptions. It is possible, however, that Member A could enact a specific TBT ORRC that is not reflected in any of the GATT Art. XX exceptions (recall that the TBT Agreement applies to an open-ended list of objectives that can effectively be decided by the importing country). In this case, the ORRC in question could conceivably be subject to consideration under the internal trade requirement. Nevertheless, even in this most extreme case, it is difficult to argue that Member A would be under any obligation to exempt its CU parties from the application of the ORRC. We recall that in order to qualify for the internal trade requirement of GATT Art. XXIV:8(a)(i), Member A is only obliged to reduce ORRC for *substantially all* trade, not all trade. ORRC that are enacted under the TBT agreement, but not also reflected in GATT Art. XX, are not likely to impact a substantial percentage of trade within the CU, and thus would not necessarily need to be eliminated for CU parties as part of the internal trade requirement. In summary, we argue that Member A is not obliged to exempt its CU parties from the application of GATT Art. XX, SPS and TBT measures in order to meet the internal trade requirement of GATT Art. XXIV:8(a)(i).

ii. ***Must** Member A apply its GATT Art. XX, SPS and TBT measures to its CU parties?* As in the previous section, the response to this question is more clear-cut when we consider GATT Art. XX and SPS measures. Recalling the findings of the Appellate Body in *Brazil-Tyres* (discussed above), non-application of a GATT Art. XX measure to CU parties would constitute "arbitrary and unjustifiable discrimination", given that the reason behind the discrimination (the CU) has no

connection with the objective to be attained (e.g. health protection). Like GATT Art. XX, SPS requires that measures not be applied in an arbitrary or unjustifiable fashion (Arts. 2.3 and 5.5). Therefore, if Member A were to exempt its CU partners from the application of a GATT Art. XX or SPS measure, it would likely be unable to remedy this violation by recourse to Art. XXIV.

The analysis is slightly more complicated for TBT measures. While the TBT Agreement requires that technical regulations be enacted and applied on a most favored nation basis (Art 2.1. of TBT Agreement), it does not incorporate the "arbitrary and unjustifiable discrimination" language within its substantive articles, in contrast with GATT Art. XX and SPS Agreement. However, the phrase "arbitrary and unjustifiable discrimination" is included in the preamble of the TBT Agreement,[98] which can be used for purposes of *interpretation*. The preamble does not create its own rights or obligations. Thus, it could possibly be argued that if Member A were to apply a technical regulation to WTO Members, but exclude its CU parties, it could justify its violation of TBT Art. 2.1 by reference to GATT Art. XXIV. While a definitive answer to this question might await a future dispute, in our opinion, such an outcome is highly unlikely. Given that the "arbitrary and unjustifiable" language is very strongly stated in the preamble, a future panel could likely use this text to inform its interpretation of requirements under TBT Art. 2.1. Furthermore, this preamble language could also inform the interpretation of the term "necessary" found in TBT Art. 2.2. In accordance with TBT Art. 2.2, a Member may only impose a trade-restrictive measure where it is "necessary" to do so. Recalling the three-part test of necessity set out above, if Member A were to exempt its CU parties from the application of a TBT measure, it is possible that a panel would find that the measure lacks the required "genuine relationship" with its objective, or that it does not address a legitimate concern. Given the strong wording in the preamble of the TBT Agreement, we anticipate that Member A would not be able to use its CU to justify violation of the TBT Agreement, particularly Art. 2.1.

iii. ***May* Member A exempt its CU partners from the application of GATT Art. XX, SPS and TBT measures**? For the same reasons outlined above, it is highly questionable whether Member A could, under any circumstances, exempt its CU partners from measures enacted under GATT Art. XX, SPS or the TBT Agreement. As demonstrated in the *Brazil-Tyres* case, the non-application of a

[98] Para. 5 of the preamble states: "Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, *subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;" (emphasis added).

measure to CU parties constitutes "arbitrary and unjustifiable discrimination," which can serve to undermine the very validity of the measure itself. We therefore anticipate that Member A will not likely be able to exempt its CU partners from the application of a GATT Art. XX, SPS or TBT measures if it wishes to keep such measures in place for other WTO trading partners.

XIX. EQUIVALENT MEASURES AND REGULATIONS

While we conclude that GATT Art. XXIV will not likely offer a serviceable defense for the discriminatory application of non-tariff measures such as those found in GATT Art. XX, SPS and TBT Agreements, it is important to note that regional trading partners have other options at their disposal to exempt CU parties from the application of their SPS and TBT measures. In accordance with Art. 4.1 of the SPS Agreement and Art. 2.7 of TBT, Members are able to recognize as equivalent the sanitary and technical regulations of other Members if those measures fulfill the same objectives or reach the same level of protection. This would not mean that the measures must be exactly the same – on the contrary, as long as the "exporting Member…provide[s] appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member," the two measures may be deemed equivalent.[99] An exemption of CU parties from the application of a measure on the basis of equivalence would not be arbitrary or unjustifiable. Rather, it would "bear a rational connection to the objective," in keeping with the test set out in the *Brazil-Tyres* case.

XX. PROVISIONS ON NON-TARIFF BARRIERS IN EXISTING PTAS

Of the 18 PTAs surveyed, none appear to afford preferential treatment to parties in the application of SPS, TBT or GATT Art. XX measures. The majority reserve the rights of parties to take action to protect the objectives listed in Art. XX of the GATT 1994, and some (notably NAFTA) expand the GATT Art. XX list to include direct reference to the environment and *living* exhaustible natural resources. A number of agreements include detailed provisions on SPS measures, but these generally reaffirm the rights and obligations of the SPS Agreement, and include provisions on mutual recognition and harmonization. Provisions on product and technical standards follow the same trend, affirming the rights and obligations of the TBT Agreement, and either encouraging or requiring harmonization. EC Agreements are notable in this regard, and commonly require that PTA parties adopt EC legislation on standards, technical regulations and conformity assessment procedures.

[99] Equivalence Decision, Para. 4 (G/SPS/19) Available at: http://www.wto.org/english/tratop_e/sps_e/equivalence2001_e.htm

ANNEX 1: Summary of Provisions on Transit in Select PTAs

	Type of Transit or Transport Measure						
	PTA	**Preferential access to transit**	**Freedom of transit and/or elimination of non-competitive practices**	**National treatment and/or MFN**	**Harmonization**	**Infrastructure improvement and Technical Cooperation**	**Recognition of goods that have been in transit through non-PTA parties**
Free Trade Areas	**EC-Norway** (1973) GATT XXIV						**Art. 7:** Sets terms and requirements for the recognition of PTA goods that have transited through non-PTA territories.
	EC-Tunisia (1999) GATT XXIV		**Art. 59.1(a):** seeks to ensure fair trade and compliance with trade rules by mandating the simplification of customs procedures.		**Art. 55 (b) & (c):** adaptation and harmonization of Tunisian operating standards with EC standards; improvement of equipment in line with EC standards. **Art. 59.1(b):** use of single administrative document for customs/linking of EC and EC transit systems.	**Art. 55:** establishes aims for cooperation on transit/transport infrastructure improvements.	**Art. 15:** Sets terms and requirements for the recognition of PTA goods that have transited through non-PTA territories; covers products transported by pipeline; sets detailed documentation requirements.

Free Trade Areas	**EC – Switzerland- Liechtenstein** (1973) GATT XXIV		**Joint declaration concerning transport of goods in transit:** relevant for transport *services*. Declares principle of non-discrimination in application of rates and conditions for the transport of goods.				**Art. 7:** Sets terms and requirements for the recognition of PTA goods that have transited through non-PTA territories.
	ETFA-Canada (2009) GATT XXIV & GATS V		**Annex1. Art. 4.1:** seeks to ensure fair trade and compliance with trade rules by mandating the simplification of customs procedures.			**Annex 1. Art 4.2:** provides that parties shall ensure that their customs administration or other competent authority shall adopt or maintain procedures that provide for advance electronic submission and processing of information before the physical arrival of goods to expedite their clearance.	
	ASEAN – Japan (2009) GATT Art. XXIV						**Art. 31**: sets terms for the recognition of goods that have transited through non-PTA territories.

FTAs + Economic Integration Agreements	**NAFTA** (1994) GATT XXIV & GATS V			**Art. 1202:** national treatment requirement for preferences on cross-border services *including transportation services*. **Art. 1203:** MFN requirement for preferences on cross-border services *including transportation services*.			**Art. 411:** provides for recognition of goods that have undergone transshipment in non-PTA territories.
	US-Morocco (2006) GATT XXIV & GATS V						
	US-Australia (2004) GATT XXIV & GATS V						**Art. 5.11**: provides for recognition of goods that have undergone transit or transshipment in non-PTA territories.
	US-Chile (2004) GATT XXIV & GATS V						**Art. 4.11**: provides for recognition of goods that have undergone transit or transshipment in non-PTA territories.
	ASEAN-Australia-New Zealand (2010) GATT XXIV & GATS V						**Chapter 3, Art. 14(b):** sets terms for the recognition of goods that have transited through non-PTA territories.

FTAs + Economic Integration Agreements	**EC-Albania** (2009) GATT XXIV & GATS V	**Protocol 5:** rules on unrestricted road transit traffic across Albania and the Community.	**Protocol 5:** rules on application of the principle of non-discrimination. **Art 59.3(b):** abolishment of administrative, technical and other obstacles that could have discriminatory effects on supply of maritime transport services.	**Art. 59.3(c):** National treatment requirement for access to ports, fees and charges, and use of infrastructure for provision of maritime services.	**Protocol 5:** provisions on progressive harmonization of Albanian transport legislation with EC. **Art. 59.6:** Adaptation of Albanian legislation, including administrative and technical rules, to EC rules for air, maritime and inland transport.		
	EC-Croatia (2005) GATT XXIV & GATS V	**Protocol 6:** rules on unrestricted road transit traffic across Croatia and the Community.	**Protocol 6:** rules on application of the principle of non-discrimination. **Art 58.2&3:** for maritime transport, affirmation of the principle of unrestricted access to market and traffic; abolition of administrative, technical and other restrictive and discriminatory measures; prohibition of cargo-sharing clauses	**Art. 58.3(d):** National treatment requirement for access to ports, fees and charges, and use of infrastructure for provision of maritime services	**Protocol 6:** provisions on harmonization of Croatian transport legislation with EC. **Art. 58.6:** Adaptation of Croatian legislation, including administrative and technical rules, to EC rules for air, maritime and inland transport. **Art. 89.2 (f):** adoption of Combined Nomenclature for customs	**Art. 89.2:** Technical cooperation for possible interconnection of transit systems; improvement of inspection procedures; development of infrastructure and customs information systems; training of customs officers. **Art. 101:** cooperation on energy issues, including improvement of infrastructure and facilitation of transit, transmission and distribution.	**Protocol 6, Art. 13:** Sets terms and requirements for the recognition of PTA goods that have transited through non-PTA territories.

FTAs + Economic Integration Agreements	**EC-Montenegro** (2008/2010) GATT XXIV & GATS V	**Protocol 4:** rules on unrestricted road transit traffic across Montenegro and the Community.	**Protocol 4:** rules on application of the principle of non-discrimination. **Art 61.2&3:** for maritime transport, affirmation of the principle of unrestricted access to market and traffic; abolition of administrative, technical and other restrictive and discriminatory measures; prohibition of cargo-sharing clauses	**Art. 61.3(c):** National treatment requirement for access to ports, fees and charges, and use of infrastructure for provision of maritime services	**Protocol 4:** provisions on harmonization of Montenegrin transport legislation with EC. **Art. 61.6:** Adaptation of Croatian legislation, including administrative and technical rules, to EC rules for air, maritime and inland transport.	**Art. 109:** cooperation on energy issues, including improvement of infrastructure and facilitation of transit, transmission and distribution.	**Protocol 4, Art. 13:** Sets terms and requirements for the recognition of PTA goods that have transited through non-PTA territories.
	US – Singapore (2003) GATT XXIV & GATS V		**Chapter 4, Art. 4.2:** (1). Each Party shall administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions, and rulings governing customs matters. (2). Each Party shall ensure that its laws and regulations governing customs matters are not prepared, adopted, or applied with a view to or with the effect of creating arbitrary or unwarranted procedural obstacles to international trade.			**Chapter 4, Art.4.5(7):** Parties shall endeavor to provide each other technical advice and assistance for the purpose of improving risk assessment techniques, simplifying and expediting customs procedures, advancing the technical skill of personnel, and enhancing the use of technologies that can lead to improved compliance with laws or regulations governing importations.	**Art. 3.12:** provides for recognition of goods that have undergone transit or transshipment in non-PTA territories.

	US-Peru (2009) GATT Art. XXIV & GATS V						**Art.4.13:** provides for recognition of goods that have undergone transit or transshipment in non-PTA territories.
Customs Unions	**European Union** (1993)		**Common Transit Convention (1987)** provides for common transit procedure, aimed at facilitating the importation, exportation and movement of goods to, from and between the European Community and the EFTA countries. The common transit procedure provides for customs and excise duties, VAT and other charges on goods to be suspended during their movement from the office of departure to the office of destination.			**Common Transit Convention (1987)** aims at simplification of formalities in trade in goods between the Community and EFTA countries by means of New Computerized Transit System (NCTS).	**Common Transit Convention (1987)** provides for recognition of goods that have undergone transit or transshipment in non- Community or non -EFTA territories.
	EC-Turkey (1996) GATT XXIV				**Art. 28:** Adoption by Turkey of EC provisions on movement of goods contained in Council Regulation (EEC) No 2913/92 and Commission Regulation (EEC) No 2454/93		

	SACU (2004) GATT XXIV		**Art. 24:** affirmation of freedom of transit for parties without discrimination; exceptions permitted as necessary to protect legitimate interests. **Art. 27.1:** non-discrimination in application of transport rates.	**Art. 27.2:** national treatment requirement for charges for transport of goods by public owned transport/carriage. **Art. 27.3:** national treatment requirements for motor transport operators.			

Annex 2: Summary of Provisions on Non-Tariff Barriers in Select PTAs

	Provisions on SPS, TBT and other non-Tariff Measures			
	PTA	**Sanitary and Phytosanitary Measures**	**Product standards and Other Technical Measures**	**Other Non-Tariff Measures**
Free Trade Areas	**EC-Norway** (1973) GATT XXIV	**Art 15(2):** non-discriminatory application of agricultural rules on veterinary, health and plant health matters. Parties not to introduce any new measures that unduly obstruct trade.		**Art. 20:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.
	EC-Tunisia (1999) GATT XXIV			**Art. 28:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition is not an arbitrary means of discrimination or a disguised restriction on trade.

Free Trade Areas	**EFTA-Canada (2009)** GATT XXIV & GATS V	Art. 6: affirmation of rights and obligations with the SPS Agreement of the WTO.	**Art.7.1:** affirmation of rights and obligations with the TBT Agreement of the WTO. **Art.7.2:** Notwithstanding paragraph 1, the rights and obligations of Canada and the EFTA States in the field of mutual recognition of conformity assessment shall be governed: (a) as between Canada and the Swiss Confederation, by the *Agreement on Mutual Recognition in Relation to Conformity Assessment* of 3 December 1998; and (b) as between Canada, on the one hand, and the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway, on the other, by the *Agreement on Mutual Recognition in Relation to Conformity Assessment* of 4 July 2000. **Art. 7.3:** intensification of cooperation efforts on standards and technical regulations.	**Art.22:** incorporation of Art. XX of the GATT 1994 within the agreement.
	EC- Switzerland - Liechtenstein (1973) GATT XXIV	**Art 15(2):** non-discriminatory application of agricultural rules on veterinary, health and plant health matters. Parties not to introduce any new measures that unduly obstruct trade.		**Art. 20:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.

	ASEAN – Japan (2009) GATT Art. XXIV	**Art. 39:** affirmation of rights and obligations with the SPS Agreement of the WTO.	**Art.45:** affirmation of rights and obligations relating to standards, technical regulations and conformity assessment procedures under the TBT Agreement among those Parties that are parties to the said Agreement. **Art. 46**: intensification of cooperation efforts on standards and technical regulations.	**Art. 7:** incorporation of Art. XX of the GATT 1994 within the agreement.

FTAs + Economic Integration Agreements	**NAFTA** (1994) GATT XXIV & GATS V	**Chapter 7, Section B, Art. 712:** affirms the right of parties to set their own level of health protection and to take sanitary and phytosanitary measure necessary to protect life and health. Chapter 7, Section B generally restates the provisions of the SPS Agreement of the WTO. Requires non-discriminatory application of SPS measures. **Art. 714:** parties to achieve equivalence and recognition of SPS measures to greatest degree possible. **Art. 715:** Parties prohibited from making arbitrary and unjustifiable distinctions between levels of protection in different circumstances.	**Art. 903:** affirms existing rights and obligations under the TBT Agreement of the WTO and *all other international agreements*, including environmental and conservation agreements (to which PTA members are party). **Art. 907:** parties to avoid arbitrary and unjustifiable distinctions between similar goods and services in terms of level of protection, as well as arbitrary and unjustifiable discrimination between parties.	**Art. 2101:** Art. XX of the GATT 1994 incorporated into the agreement. Interpretation of GATT XX(b) to include environmental measures that protect life and health. Interpretation of GATT XX(g) to include measures relating to conservation of living and non-living exhaustible natural resources.
	US-Morocco (2006) GATT XXIV & GATS V	**Section B, Art. 3.9(1):** affirmation of rights and obligations under the SPS Agreement of the WTO. **Section B, Art. 3.9(2):** elimination of recourse to dispute settlement under the agreement, with regard to SPS measures.	**Chapter 7, Art 7.2:** affirmation of rights and obligations under the TBT Agreement of the WTO. **Chapter 7, Art 7.4:** intensification of joint work on standards and technical regulations. **Chapter 7, Art 7.5:** provisions for the mutual recognition of conformity assessment procedures. **Chapter 7, Art 7.7:** provisions on the joint work of coordinators on cooperation, improvement of standards and regulations, etc.	**Art . 21.1:** incorporation of Art. XX of the GATT and its interpretive notes within the agreement.
	US-Australia (2004) GATT XXIV & GATS V	**Art. 7.3:** Affirms the existing rights and obligations established under the SPS Agreement.	**Article 8.4:** Affirms the existing rights and obligations established under the TBT Agreement. **Art. 8.8:** calls for cooperative action in the field of standards, technical regulations, and conformity assessment procedures with a view to facilitating market access.	**Art. 22.1:** incorporates Article XX of GATT 1994 as part of the agreement, and further specifies that measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

FTAs + Economic Integration Agreements	**US-Chile** (2004) GATT XXIV & GATS V	**Art. 6.2:** affirms the existing rights and obligations established under the SPS Agreement.	**Article 7.2:** affirms the existing rights and obligations established under the TBT Agreement. **Art. 7.3:** calls for intensified joint work in the field of standards, technical regulations, and conformity assessment procedures with a view to facilitating market access.	**Art. 23.1:** incorporates Article XX of GATT 1994 as part of the agreement, and further specifies that measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

	ASEAN-Australia-New Zealand (2010) GATT XXIV & GATS V	**Chapter 5, Art. 4:** affirmation of rights and obligations with respect to each other under the SPS Agreement of the WTO. **Chapter 5, Art. 5:** non-binding provisions on enhanced cooperation and achieving equivalence in SPS measures. **Chapter 5, Art. 11:** non-application of dispute settlement provisions for SPS matters.	**Chapter 6, Art. 4:** affirmation of rights and obligations with respect to each other under the TBT Agreement of the WTO. **Chapter 6, Art. 7:** positive consideration to be given to results of parties' conformity assessment procedures. **Chapter 5, Art. 8:** intensification of cooperation efforts on standards and technical regulations.	**Chapter 15, Art. 1:** incorporation of Art. XX of the GATT 1994 within the agreement.
	EC-Albania (2009) GATT XXIV & GATS V		**Art. 75:** Albania to take necessary steps to achieve conformity with Community technical regulations, standardization and conformity assessment procedures. **Art. 76:** Albania to align standards of consumer protection; harmonization of legislation with that of the Community.	**Art. 42:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.

FTAs + Economic Integration Agreements	**EC-Croatia** (2005) GATT XXIV & GATS V	**Art. 92:** cooperation in the agricultural sector for the gradual harmonization of Croatian veterinary and phytosanitary legislation with Community standards. **Art. 91:** cooperation with the aim of improving the level of protection of the health and safety of workers, taking as a reference the *level of protection* existing in the Community.	**Art. 73:** Croatia to take measures to gradually achieve conformity with Community technical regulations, standards and conformity assessment procedures. Provision includes technical cooperation and support to develop infrastructure and new regulations. **Art. 74:** Parties to cooperate to align standards of consumer protection in Croatia to those of the Community. **Art. 100(b)&(c):** removal, in Croatia, of technical and other barriers to the movement of persons and goods; achieve transport operating standards comparable to those of the Community.	**Art. 42:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.
	EC-Montenegro (2008/2010) GATT XXIV & GATS V	**Art. 97:** cooperation in the agricultural sector for the gradual harmonization of Croatian veterinary and phytosanitary legislation with Community standards. **Art. 101:** cooperation with the aim of improving the level of protection of the health and safety of workers, taking as a reference the *level of protection* existing in the Community.	**Art. 77:** Montenegro to take measures to gradually achieve conformity with Community technical regulations, standards and conformity assessment procedures. Provision includes technical cooperation and support to develop infrastructure and new regulations. **Art. 78:** Parties to cooperate to align standards of consumer protection in Montenegro to those of the Community.	**Art. 45:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.
	US – Singapore (2003) GATT XXIV & GATS V	**Annex 6A:** Parties establish a Medical Products Working Group to promote the protection of public health through expeditious, science-based regulatory procedures for new medical products. Working Group shall provide a forum for cooperation on product regulation issues of mutual interest, to the extent permitted by resources, through means other than mutual recognition agreements or other binding commitments.	**Art. 6.2:** intensification of cooperation efforts on standards and technical regulations.	**Art. 21.1:** incorporation of Art. XX of the GATT 1994 within the agreement.

FTA+EIA	**US-Peru** (2009) GATT Art. XXIV & GATS V	**Art. 6.2:** affirmation of rights and obligations under the SPS Agreement of the WTO.	**Art. 7.1:** affirmation of rights and obligations under the TBT Agreement of the WTO. **Art 7.3:** Parties shall intensify their joint work in the field of standards, technical regulations, and conformity assessment procedures with a view to facilitating trade between the Parties.	**Art. 22.1:** incorporation of Art. XX of the GATT 1994 within the agreement.
Customs Unions	**European Union** (1993)	EC legislative acts and regulations affirm rights and obligations under the SPS Agreement of the WTO **REGULATION (EC) No 764/2008:** provides for harmonization of sanitary and phytosanitary regulations for products within the EU´s Internal Market **REGULATION (EC) No 765/2008** ensures that products benefiting from the free movement of goods within the Community fulfill requirements providing a high level of protection of public interests such as health and safety in general, protection of consumers, protection of the environment, while ensuring that the free movement of products is not restricted to any extent greater than that which is allowed under Community harmonization legislation or any other relevant Community rules.	EC legislative acts and regulations affirm rights and obligations under the TBT Agreement of the WTO. **REGULATION (EC) No 764/2008:** provides for harmonization of technical requirements for products within the EU´s Internal Market establishes a principle of mutual recognition within the EU´s Internal Market, which applies to products which are not harmonized at European level. **Technical Standards and Regulations Directive 98/34 (EC):** provides for a separate European notification system for technical regulations. This acts as an 'early warning' system, requiring European countries to notify the commission about its proposals to change technical regulations relating to manufactured and agricultural products. After notifying the commission, the country must then wait for three months before applying its new rules, allowing other countries to comment on whether they believe the new regulations will constitute a technical barrier to trade. This system applies in EU member states, the European Economic Area, European Free Trade Area and Turkey.	Incorporation of Art. XX of the GATT 1994 within the agreement within Community legislation

Customs Union	**EC-Turkey** (1996) GATT XXIV		**Art. 8:** Within 5 years of entry into force, Turkey to incorporate into its internal legal order Community instruments relating to the removal of technical barriers to trade. **Art. 9:** once Turkey has achieved the requirements of Art. 8, trade in particular products to take place in accordance with the requirements of Community instruments on technical barriers. **Art. 10 & 11:** requirements for Turkey relating to application of technical barriers during the transitional period; requirements for Community acceptance of the results of Turkish conformity assessment procedures. **Art. 54:** Harmonization of Turkish legislation with that of the Community (including for technical barriers to trade).	**Art. 7:** permits prohibitions and restrictions for reasons of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Subject to the condition that the prohibition not be an arbitrary means of discrimination or a disguised restriction on trade.
	SACU (2004) GATT XXIV	**Art. 30:** members reserve the right to apply SPS measures in accordance with their national SPS laws and international standards.	**Art. 28:1:** incorporation of WTO rules on Technical Barriers to Trade **Art. 28:2:** non-enforceable provision on harmonization of product standards and technical regulations	**Art. 18:** members have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of: (a) health of humans, animals or plants; (b) the environment; (c) treasures of artistic, historic or archeological value; (d) public morals; (e) intellectual property rights; (f) national security; and (g) exhaustible natural resources.

ANNEX 3: Summary of Provisions on Trade Defense Instruments in Select PTAs

	Provisions on Safeguards, Anti-Dumping and Countervailing Duties			
	PTA	**Safeguards**	**Anti-dumping**	**Countervailing Duties**
Free Trade Areas	**EC-Norway** (1973) GATT XXIV	**Art. 24:** bilateral safeguards can be applied between the parties when, owing to preferences afforded in the agreement, increased imports of a given product is likely to be "seriously detrimental to any production activity" carried out in one of the parties. **Art. 27:** except for in exceptional, urgent cases, parties should not take any safeguard action against one another until the difficulties have been notified to a Joint Committee, which must take a decision within 30 days' time. If a decision hasn't been reached, or the parties have not agreed upon a solution within 30 days, the party may adopt the safeguard measure. **Art. 27.2:** selection of measures should give priority to that which least disturbs the functioning of the agreement.	**Art. 25:** if one of the parties finds that dumping is taking place in trade with a PTA party, it may take appropriate measures in accordance the Agreement on Implementation of GATT Art. VI, and under the conditions and procedures of Art. 27. **Art. 27.3(c):** consultation in the Joint Committee shall take place before parties take any action against dumping. **Art. 27.3(d):** in cases of exceptional circumstances requiring immediate action and making prior examination impossible, parties my take precautionary measures strictly necessary to remedy the situation.	**Art. 23:** public aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is deemed inconsistent with the agreement. Action in the case of incompatible public aids is to be taken in accordance with the terms of Art. 27. **Art. 27.2:** in the case of incompatible public aid, parties shall supply the Joint Committee with the relevant information required to examine the situation, with the view to seeking an acceptable solution. **Art. 27.3(d):** precautionary measures may be applied in response to incompatible public aid in exceptional circumstances requiring immediate action or making prior examination impossible.

Free Trade Areas	**EC-Tunisia** (1999) GATT XXIV	**Art. 25:** bilateral safeguards can be applied between the parties in case of serious injury or the threat thereof. **Art. 27:** except for in exceptional, urgent cases, parties should not take any safeguard action against one another until the difficulties have been notified to the Stabilization and Association Council, which must take a decision within 30 days' time. If a decision hasn't been reached, or the parties have not agreed upon a solution within 30 days, the party may adopt the safeguard measure.	**Art. 24:** if one of the parties finds that dumping is taking place in trade with a PTA party, it may take appropriate measures in accordance the Agreement on Implementation of GATT Art. VI, and under the conditions and procedures of Art. 27. **Art. 27.2:** before any measures are taken in response to the dumping, parties must supply the Association Committee with relevant information with a view to seeking an acceptable solution. **Art. 27.3(d):** in cases of exceptional circumstances requiring immediate action and making prior examination impossible, parties my take precautionary measures strictly necessary to remedy the situation.	**Art. 36.1(c):** official aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is deemed inconsistent with the agreement. **Art. 36.3:** The Association Council shall adopt rules to address incompatible official aid between the parties, until which time the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade shall be applied. **Art. 36.6:** parties shall refer any such practices to the Association Council for consultations. Parties can take appropriate action 30 days after such notification. Such appropriate action is subject to the conditions of the GATT 1994 and other relevant instruments (i.e. the SCM).

	EC – Switzerland – Liechtenstein (1973) GATT XXIV	**Art. 24:** bilateral safeguards can be applied between the parties when, owing to preferences afforded in the agreement, increased imports of a given product is likely to be "seriously detrimental to any production activity" carried out in one of the parties. **Art. 27:** except for in exceptional, urgent cases, parties should not take any safeguard action against one another until the difficulties have been notified to a Joint Committee, which must take a decision within 30 days' time. If a decision hasn't been reached, or the parties have not agreed upon a solution within 30 days, the party may adopt the safeguard measure. **Art. 27.2:** selection of measures should give priority to that which least disturbs the functioning of the agreement.	**Art. 25:** if one of the parties finds that dumping is taking place in trade with a PTA party, it may take appropriate measures in accordance the Agreement on Implementation of GATT Art. VI, and under the conditions and procedures of Art. 27. **Art. 27(c):** consultation in the Joint Committee shall take place before parties take any action against dumping. **Art. 27(d):** in cases of exceptional circumstances requiring immediate action and making prior examination impossible, parties my take precautionary measures strictly necessary to remedy the situation.	**Art. 23:** public aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is deemed inconsistent with the agreement. Action in the case of incompatible public aids is to be taken in accordance with the terms of Art. 27. **Art. 27.2:** in the case of incompatible public aid, parties shall supply the Joint Committee with the relevant information required to examine the situation, with the view to seeking an acceptable solution. **Art. 27.3(d):** precautionary measures may be applied in response to incompatible public aid in exceptional circumstances requiring immediate action or making prior examination impossible.

Free Trade Areas	**EFTA-Canada (2009)** GATT XXIV & GATS V	**Art. 25.11**: parties retain rights and obligations under Article XIX of GATT 1994 and the WTO Safeguards Agreement. **Art 25.1-5**: parties may only apply bilateral safeguard measures during the transition period, and under certain restrictions, *inter alia*: if imports from the other party constitute a substantial cause or threat of serious injury; only to the extent necessary; the measure may only be applied as an increased tariff rate up to the MFN level. **Art 25.6:** a safeguard measure shall have a limited duration of three years, or shall terminate at the time that the transition period ends. No action shall be applied to the import of a product that has previously been the subject of such an action.	**Art.18.1**: Subject to paragraphs 2 and 3, the rights and obligations of the Parties in respect of the application of anti-dumping measures is governed by Article VI of the GATT 1994 and the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. **Art. 18.2:** Each Party shall designate, and provide full contact information for, a person that the other Party may contact with respect to any matter concerning anti-dumping measures. **Art.18.3:** The Parties shall, within three years after the entry into force of this Agreement, meet to review this Article.	**Art. 17.1:** Subject to paragraphs 2 and 3, the rights and obligations of the Parties in respect of subsidies and the application of countervailing measures is governed by Articles VI and XVI of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures. **Art. 17.2:** Each Party shall designate, and provide full contact information for, a person that the other Parties can contact with respect to any matter concerning subsidies or countervailing measures. **Art. 17.3:** Before initiating an investigation under Part V of the WTO *Agreement on Subsidies and Countervailing Measures*, the competent investigating authority of Canada or the EFTA State, as the case may be, shall notify, in writing, the Party whose goods would be subject to the investigation and allow such Party a period of 25 days from the date upon which notification was given, for consultations, with a view to finding a mutually acceptable solution. The outcome of such consultations shall be communicated to the other Parties after the decision has been made on whether or not to initiate the investigation.

Free Trade Areas	**ASEAN – Japan (2009)** GATT Art. XXIV	**Art. 20.2:** parties may take bilateral safeguard measures when increased imports from another party cause or threaten to cause serious injury to a domestic industry. Such measures are limited to duties up to the level of the MFN tariff. **Art. 20.7(d):** parties shall only maintain safeguards as long as is necessary, and not beyond, including any extensions thereof, four years. **Art. 20.3:** Safeguards can not be applied to ASEAN party imports, as long as its share of imports of the good concerned in the importing Party does not exceed three per cent of the total imports from the other Parties, provided that those Parties with less than three per cent import share collectively account for not more than nine per cent of total imports of the good concerned from the other Parties.	No specific provisions on dumping, however, **Art. 13(a)(ii)** defines a "customs duty" as excluding any "anti-dumping duty applied consistently with the provisions of Article VI of GATT 1994, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, as may be amended."	No specific provisions on countervailing measures, however, **Art. 13(a)(ii)** defines a "customs duty" as excluding any "countervailing duty applied consistently with the provisions of the *Agreement on Subsidies and Countervailing Measures* in Annex 1A to the WTO Agreement, as may be amended."

FTAs + Economic Integration Agreements	**NAFTA** (1994) GATT XXIV & GATS V	**Art. 801.1:** *during the transitional period only*, parties may impose bilateral safeguard measures when imports from another NAFTA party constitute a *substantial cause* of serious injury/threat of serious injury. Safeguards may only be applied as increased duties, and may not exceed the MFN level. **Art. 801.2:** No action against a good can be taken more than once during the transition period, and action must be limited to a maximum of three years with the opportunity for a one-year extension. **Art. 801.3:** after the expiration of the transition period, a party may only apply safeguards to other NAFTA parties with their consent. **Art. 801.4:** compensation for the safeguard shall be provided on a mutually agreed basis. **Art. 802:** parties retain the right to apply safeguards on a global basis in accordance with GATT XIX and other WTO instruments on safeguards (i.e. the SA). If NAFTA parties are to be included in the global safeguard action, they must account for a "substantial share of total imports" and "contribute importantly to the serious injury." Quantitative restrictions may not be imposed.	**Art. 1902:** parties retain the right to apply their own national anti-dumping laws, and to modify them, provided that such modifications are consistent with the GATT 1994 and the Understanding on GATT Art. VI. **Art. 1904:** parties shall replace judicial review of final antidumping determinations with bi-national panel review.	**Art. 1902:** parties retain the right to apply their own national countervailing duty laws, and to modify them, provided that such modifications are consistent with the GATT 1994 and any successor agreements (i.e. the SCM) **Art. 1904:** parties shall replace judicial review of final countervailing duty determinations with bi-national panel review.

FTAs + Economic Integration Agreements	**US-Morocco** (2006) GATT XXIV & GATS V	**Chapter 8:** permits for bilateral application of safeguards between parties, with <u>certain limitations</u>: **Art. 8.1**: imports must constitute a *substantial cause* of serious injury. **Art. 8.1**: does not appear to permit for safeguards applied in the form of a quantitative restriction. **Art. 8.1(a) & (b):** the increased rate of customs duty must not exceed the MFN applied rate of duty. **Art. 8.2.4(b):** generally, safeguards must not be applied for a period exceeding 3 years. **Art. 8.2.5:** parties may not apply safeguards more than once against the same good. **Art. 8.2:2:** safeguard investigations shall be conducted in accordance with rules set out in Arts. 3 and 4.2(c) of the SA. **Art. 8.6:** the parties retain the right to apply global safeguards under GATT Art. XIX and the SA.	**Art. 2.9.1:** anti-dumping duties can be applied pursuant to a party's own law.	**Art. 2.9.1:** countervailing duties can be applied pursuant to a party's own law. **Art. 3.3:** generally prohibits export subsidies on agricultural products, with limited exceptions.

FTAs + Economic Integration Agreements	**US-Australia** (2004) GATT XXIV & GATS V	**Art.9.5**: parties retain rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. Nevertheless, Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof. **Art. 9.1**: parties may only apply bilateral safeguard measures during the transition period, and under certain restrictions, *inter alia*: if imports from the other party constitute a substantial cause or threat of serious injury; only to the extent necessary; the measure may only be applied as an increased tariff rate up to the MFN level. **Art. 9.5:** a safeguard measure shall have a limited duration of three years, or shall terminate at the time that the transition period ends. **Art. 9.6**: neither Party may impose a safeguard measure more than once on the same good.	**Chapter 2, Art. 2.9**: Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping duties.	**Chapter 2, Art. 2.9**: Each Party retains its rights and obligations under the WTO Agreement with regard to the application of countervailing duties.

	US-Chile (2004) GATT XXIV & GATS V	**Art. 8.6:** for global safeguard actions, parties retain the rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. **Art. 8.1:** parties may only apply bilateral safeguard measures during the transition period, and under certain restrictions, *inter alia*: if imports from the other party constitute a substantial cause or threat of serious injury; only to the extent necessary; the measure may only be applied as an increased tariff rate up to the MFN level. **Art. 8.2**: a safeguard measure shall have a limited duration of three years, or shall terminate at the time that the transition period ends.	**Art. 8.8:** Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping duties.	**Art. 8.8:** Each Party retains its rights and obligations under the WTO Agreement with regard to the application of countervailing duties.

FTAs + Economic Integration Agreements	**ASEAN-Australia-New Zealand** (2010) GATT XXIV & GATS V	**Chapter 7, Art: 3:** parties may take bilateral safeguard measures when increased imports from another party cause or threaten to cause serious injury to a domestic industry. Such measures are limited to duties up to the level of the MFN tariff. **Chapter 7, Art. 4:** investigations are to be conducted in accordance with Article 3 and Article 4.2 of the Safeguards Agreement **Art. 6:** parties shall only maintain safeguards as long as is necessary, and not beyond two years, with the possibility of a one-year extension. **Art. 6.2:** Safeguards can not be applied to ASEAN party imports, as long as its share of imports of the good concerned in the importing Party does not exceed three per cent of the total imports from the other Parties, provided that those Parties with less than three per cent import share collectively account for not more than nine per cent of total imports of the good concerned from the other Parties. **Art. 6.6:** safeguard measures cannot be reapplied to the same goods for a period of two years, or the duration of application of the original safeguard, whichever is longer.	No specific provisions on anti-dumping measures, however, **Art. 3(e)(ii)** defines a "customs duty" as excluding an "anti-dumping duty applied consistently with the provisions of Article VI of GATT 1994, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, as may be amended."	No specific provisions on countervailing measures, however, **Art. 3(e)(ii)** defines a "customs duty" as excluding a "countervailing duty applied consistently with the provisions of the *Agreement on Subsidies and Countervailing Measures* in Annex 1A to the WTO Agreement, as may be amended."

FTA	**EC-Croatia** (2009) GATT XXIV & GATS V	**Art. 38.1:** bilateral safeguards can be applied if GATT and the WTO SA are applicable between the parties. Safeguards can be applied in circumstances where there is actual or threatened serious injury or serious disturbance in a sector of the economy. **Art. 38.3:** for bilateral safeguards, the remedy should normally consist of increased tariff duties, up to a maximum limit of the MFN rate. The measures should not be applied for more than one year, and in exceptional cases, three years. No bilateral safeguard shall be applied to a product that has previously been subject to such a measure in the three previous years. **Art. 38.5:** except for in exceptional, urgent cases, parties should not take any safeguard action against one another until the difficulties have been notified to the Stabilization and Association Council, which must take a decision within 30 days' time. If a decision hasn't been reached, or the parties have not agreed upon a solution within 30 days, the party may adopt the safeguard measure.	**Art. 37:** parties are not prevented from taking trade defense action in accordance with the WTO Agreement on Implementation of Art. VI of the GATT 1994.	**Art. 37.1(a):** parties are not prevented from taking trade defense action in accordance with the WTO Agreement on Subsidies and Countervailing Measures.

FTAs + Economic Integration Agreements

FTAs + Economic Integration Agreements	**EC-Montenegro** (2008/2010) GATT XXIV & GATS V	**Art. 41.1&2:** the provisions of Art. XIX of the GATT and the WTO SA are applicable between the parties. Safeguards can be applied in circumstances where there is actual or threatened serious injury or serious disturbance in a sector of the economy. **Art. 41.3:** for bilateral safeguards, the remedy should normally consist of increased tariff duties, up to a maximum limit of the MFN rate. The measures should not be applied for more than two year, and in exceptional cases, four years. No bilateral safeguard shall be applied to a product that has previously been subject to such a measure in the four previous years. **Art. 41.5:** except for in exceptional, urgent cases, parties should not take any safeguard action against one another until the difficulties have been notified to the Stabilization and Association Council, which must take a decision within 30 days' time. If a decision hasn't been reached, or the parties have not agreed upon a solution within 30 days, the party may adopt the safeguard measure.	**Art. 40:** parties are not prevented from taking trade defense action in accordance with the WTO Agreement on Implementation of Art. VI of the GATT 1994.	**Art. 40:** parties are not prevented from taking trade defense action in accordance with the WTO Agreement on Subsidies and Countervailing Measures.

FTAs + Economic Integration Agreements	**US – Singapore** (2003) GATT XXIV & GATS V	**Art.7.5**: parties retain rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. Nevertheless, Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof. **Art. 7.1(a-c)**: parties may only apply bilateral safeguard measures during the transition period, and under certain restrictions, *inter alia*: if imports from the other party constitute a substantial cause or threat of serious injury; only to the extent necessary; the measure may only be applied as an increased tariff rate up to the MFN level. **Art. 7.2(6.b):** a safeguard measure shall have a limited duration of three years, or shall terminate at the time that the transition period ends. **Art. 7.2(7)**: neither Party may impose a safeguard measure more than once on the same good.	**Chapter 2, Art. 2.7:** Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping duties.	**Chapter 2, Art. 2.7:** Each Party retains its rights and obligations under the WTO Agreement with regard to the application of countervailing duties.

	US-Peru (2009) GATT Art. XXIV & GATS V	**Art. 8.6:** for global safeguard actions, parties retain the rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. **Art. 8.1:** parties may only apply bilateral safeguard measures during the transition period, and under certain restrictions, *inter alia*: if imports from the other party constitute a substantial cause or threat of serious injury; only to the extent necessary; the measure may only be applied as an increased tariff rate up to the MFN level. **Art. 8.2 (1b)**: a safeguard measure shall have a limited duration of three years, or shall terminate at the time that the transition period ends.	**Chapter 8, Section B:** 1. Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping. 2. No provision of this Agreement, including the provisions of Chapter Twenty-One (Dispute Settlement), shall be construed as imposing any rights or obligations on the Parties with respect to antidumping measures.	**Chapter 8, Section B:** 1. Each Party retains its rights and obligations under the WTO Agreement with regard to the application of countervailing duties. 2. No provision of this Agreement, including the provisions of Chapter Twenty-One (Dispute Settlement), shall be construed as imposing any rights or obligations on the Parties with respect to countervailing duty measures.

Customs Unions	**European Union** (1993)	**COUNCIL REGULATION (EC) No 260/2009:** **Art. 1:** This Regulation applies to imports of products originating in third countries. **Art. 18:** Where it emerges, primarily on the basis of the factors referred to in Article 10, that the conditions laid down for the adoption of measures pursuant to Articles 11 and 16 are met in one or more regions of the Community, the Commission, after having examined alternative solutions, may exceptionally authorize the application of surveillance or safeguard measures limited to the region(s) concerned if it considers that such measures applied at that level are more appropriate than measures applied throughout the Community. **Art. 20.1:** The duration of safeguard measures must not exceed four years, including the duration of any provisional measure. **Art.22.1:** Where imports of a product have already been subject to a safeguard measure, no further measure shall be applied to that product until a period equal to the duration of the previous measure has elapsed. Such period shall not be less than two years.	**Art. 133 of the Consolidated EU Treaty:** states that anti-dumping actions are subject to the EU's common commercial policy. Given the EU's exclusive competence in this area, anti-dumping actions can only be applied as part of the common commercial policy, and only to non-EU countries. Dumping by EU members is to be addressed through EC competition law.	**Art. 133 of the Consolidated EU Treaty:** states that countervailing duty actions are subject to the EU's common commercial policy. Given the EU's exclusive competence in this area, countervailing actions can only be applied as part of the common commercial policy, and only to non-EU countries. Countervailing measures taken by EU members is to be ad authorized through EC competition law.

Customs Unions	**EC-Turkey** (1996) GATT XXIV	**Art. 63:** mechanisms and modalities for safeguards are subject to Art. 60 of the Additional Protocol of 1970 (concluded 23 Nov 1970) **Art. 64:** if a safeguard measure creates an imbalance in rights and obligations between the parties, the other party may undertake rebalancing measures in accordance with the Additional Protocol. **Addl. Protocol, Art 60:** both the Community and Turkey may take "necessary protective measures". Such measures and their rules for application shall be notified to the Council of Association, where negotiations may take place. Preference is to be given to measures that least disturb functioning. Measures shall not exceed what is strictly necessary to remedy difficulties.	**Art. 12:** in relation to countries that are not members of the EC, Turkey must apply substantially similar rules as EC Regulation No 3283/94(7) against dumped imports. **Art. 43:** in case of uncompetitive practices (including dumping) between Turkey and the EC, a party may notify another party and request its competition authority to initiate enforcement action. The authority will consider whether to initiate enforcement action. The notification requirement does not preclude the notifying party from undertaking enforcement action. **Art. 44:** requests to apply trade defense instruments as between the parties shall be reviewed by the Association Council. The modalities for anti-dumping measures are subject to Art. 47 of the Addl. Protocol. **Art. 47 of the Addl. Protocol:** the injured party must notify the Council of Association. If the Council has taken no decision within three months time, and the dumping practices continue, the party may take protective measures. The Council may recommend that these measures be abolished.	**Art. 12:** in relation to countries that are not members of the EC, Turkey must apply substantially similar rules as EC Regulation No 3284/94(8) against subsidized imports. **Art. 34:** establishes the types of 'aid' that is deemed compatible with the functioning of the customs union. **Art. 37:** until the Association Council develops specific rules for the implementation of Art. 34, the GATT rules on subsidies shall apply. **Art. 43:** in case of uncompetitive practices (including subsidies) between Turkey and the EC, a party may notify another party and request its competition authority to initiate enforcement action. The authority will consider whether to initiate enforcement action. The notification requirement does not preclude the notifying party from undertaking enforcement action. **Art. 44:** requests to apply trade defense instruments as between the parties shall be reviewed by the Association Council.

Customs Unions	**SACU** (2004) GATT XXIV	The SACU Agreement currently does not contain detailed rules on the application of bilateral safeguard measures within the CU. The Agreement does not contain any indication that provisions on such measures will be developed. **Annex C, Art: 8:** the provisions provide terms for the investigation and recommendation of global safeguard actions to be implemented by the CU as a whole. Accordingly, National Bodies can initiate investigations, and are required to notify the Secretariat of any investigation, and report to the Tariff Board on the outcome (Art. 8.2). The National Bodies can make recommendations to the Tariff Board (Art. 8.1). Such recommendations must be consistent with the WTO Agreement on Safeguards and any other trade arrangement entered into by SACU.	**Art. 41:** The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement. ***NB:*** the category of 'unfair trade practices' would likely include dumping. To date, no policies and instruments have been adopted, however news outlets report that as of August 2010, SACU issued a tender to support the development of such a policy.[100] **Annex C, Art: 8:** the provisions provide terms for the investigation and recommendation of global anti-dumping actions to be implemented by the CU as a whole. Accordingly, National Bodies can initiate investigations, and are required to notify the Secretariat of any investigation, and report to the Tariff Board on the outcome (Art. 8.2). The National Bodies can make recommendations to the Tariff Board (Art. 8.1). Such recommendations must be consistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) and any other trade arrangement entered into by SACU.	**Art. 41:** The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement. ***NB:*** the category of 'unfair trade practices' would likely include subsidy action. To date, no policies and instruments have been adopted, however they appear to be under development.[101] **Annex C, Art: 8:** the provisions provide terms for the investigation and recommendation of global countervailing duty actions to be implemented by the CU as a whole. Accordingly, National Bodies can initiate investigations, and are required to notify the Secretariat of any investigation, and report to the Tariff Board on the outcome (Art. 8.2). The National Bodies can make recommendations to the Tariff Board (Art. 8.1). Such recommendations must be consistent with the Agreement on Subsidies and Countervailing Measures, and any other trade arrangement entered into by SACU.

[100] Reported in *Engineering News Online*, http://www.engineeringnews.co.za/article/sacu-puts-out-unfair-trade-practices-tender-2010-08-27
[101] Ibid.

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