Article XXIV and the World Trading System

By

Sikder Mohammad Mashooqur Rahman

THESIS

Submitted to

KDI School of Public Policy and Management

in partial fulfillment of the requirements

for the degree of

MASTER OF PUBLIC POLICY

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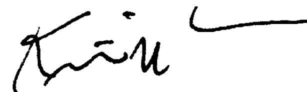
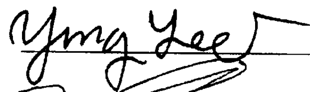
Professor KIM, Jong Bum, Supervisor 

Professor Lee, Young S. 

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ABSTRACT

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The WTO is a member driven organization, as of April 2011 it has 153 members. The main objective of WTO is liberalizing the trade around the world and become the catalyst of multilateral trading system. Accordingly, GATT/WTO is governed with the spirit of non-discrimination rule or Most-Favoured Nations (MFN) treatment to all members but exceptions remain in non-discrimination rules. GATT Article XXIV of 1947, Enabling Clause, 1979 and GATS Article V are prime examples of MFN exceptions. Using the scope of these articles contracting parties/members states are forming Regional Trading Arrangements (RTAs).It's quite alarming that Preferential tariff Agreements in the form of Custom Union(CU), forming Free Trade Agreement (FTA), more closure in terms of Economic Integration Agreement (EIA) as well as Partial Scope Agreement (PS) are being concluded around the world. As of July 2010 there are 283 RTAs have been notified to the Secretariat and which are actively enforced by the parties. Thus RTAs under exception clauses become the salient feature of the Multilateral trading systems with its cross regional and hub- spokes dimensions. All these are being happened under the rules and regulations of agreed agreements but in some cases contracting parties/members are exercising beyond that of Agreements. As a result there are lots of deviations from GATT/WTO non-discrimination principle MFN and others. Henceforth question arises "Does the Article XXIV serve the World trading system? Eventually this is the thesis question as well. This paper will examine the answer of thesis question with discussion on the historical pursuit and the scope of Article XXIV or related articles mentioned by different authorities, describing the oversight functions of Working Party or Committee on Regional Trade Agreement of GATT/WTO, legal implications of article XXIV and related or relevant decisions of Contracting Parties, Panel and Appellate body in DSB case on disputes under article XXIV. Finally, development of the current Doha Round negotiations and its dimension related to RTA rules will also be reflected in this paper.

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First of all, I am expressing my in depth gratitude's to Almighty Allah for blessing me with a unique opportunity to study in Master of Public Policy in KDI School of Public Policy and Management. It is worth mentioning that KDI School of Public Policy and Management has gained worldwide reputation for its academic excellence and patronising and keeping the spirit of intellect in policy related issues. I am really very grateful to the KDI authority for providing all facilities during my study over there. All out support from KDI is really commendable and days in KDI are unforgettable. I am also indebted to Professor Mr. KIM, Jong Bum for his excellent teaching and guidance, which encouraged me to study all of his courses and declared my concentration in Trade and Industrial Policy (TI) and International Relations (IR). Without his patronization and mentorship, I could not be able to learn much about the World Trading System and its related implications. After completion of MPP course from KDI, I could be able to work in the WTO Cell, Focal Point of dealing WTO issues under the Ministry of Commerce of the Government of the People's Republic of Bangladesh. Moreover, I am currently assisting the Permanent Mission of Bangladesh in Geneva as an LDC Group Coordinator Intern awarded by the WTO in coordinating among the Least Developed Countries in forming a common position in different negotiating areas under Doha programme. I am fortunate with the knowledge gained from KDI which is instrumental to achieve all these things in my service career. My acknowledgement also goes to all distinguished Professors who taught me in KDI and librarian, Academic affairs division for their concerted support to complete study in KDI.

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ABBREVIATIONS

AB	Appellate Body (WTO)
ABR	Appellate Body report (WTO)
CRTA	Committee on Regional Trade Agreement
CTG	Committee on Trade in Goods
CTD	Committee on Trade and Development
CU	Customs Union
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
EFTA	European Free Trade Association
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreements on Trade in Services
GSP	Generalized System of Preference
ITO	International Trade organization
MFN	Most Favoured Nation
Mercosure	Southern Common Market
MTS	Multilateral Trading System
NT	National Treatment
PTA	Preferential Trade Agreements
RTA	Regional Trade Agreement
TM	Transparency Mechanism
TPRM	Trade Policy Review Mechanism
WP	Working Party
WTO	World Trade Organization

Chapter I

Introduction:

1.1 Purposes of Thesis:

After the World War II, “General Agreement on Tariffs and Trade (GATT)” was in force in 1947. This was a provisional agreement for creating conducive atmosphere with a view to liberalizing trade in case of goods among parties to the agreement. From 1947-1994, there were eight multilateral rounds for negotiations on various issues related to trade liberalization in goods. With the positive wrapping up, Uruguay Round mandated to establish World Trade organization (WTO) which came into existence on 1 January 1995.It is responsible for ensuring free, fair and smooth trade relations among the member countries upon the basis of four essential principles: non-discrimination, reciprocity, market access and fair competition. Since the principle of non-discrimination underpins trade liberalization objective and one of this dimension is known as the Most-Favored Nation (MFN) rule. It means every member of the WTO requires to be treated equally and any kind of favorable treatment given to any member it should be extended unconditionally to all trading partners of the WTO. Another dimension of non-discrimination is called National Treatment (NT). It states that after paying relevant tariffs every foreign goods should be treated equal so as to the domestic goods in every member country.

However GATT article XXIV 1947 provides exceptions to the most-favored nation rule and thus facilitates contracting parties (during GATT) and member countries (WTO) to conclude Regional Trading Agreements (RTAs) inquest of forming custom union, free trade agreements or interim agreement which may establishment either the previous two and it is noticed that there are multifarious diversifications have been taking place in invoking this exceptions clause. However these initiatives should be done within the purview of stipulated terms of Art. XXIV, 1994 and enabling clause (1979) and must be consistent with other WTO disciplines. In this regard more clarifications have been made in Uruguay Round Agreement by including "Understanding on the Interpretation of Article XXIV of the general Agreement on tariffs and Trade".

By invoking Article XXIV's scope, contracting parties had or member states have been actively concluded bilateral agreement giving less effort to the ongoing multilateral negotiations which is crying need for ensure Multilateral trading System under the realm of WTO.

Being a member of WTO each party to RTAs is giving more preferences to other party to the agreement and thus the progress of ongoing negotiations is at a snail pace. They claim that they are trying to make consensus regionally on some issues which are very tough to negotiate in multilateral level. So they argue that they are creating positive platform in certain fields which may contribute for stepping the WTO regime move

forward. For this reason scholars are in debate whether RATs are the "building blocks" otherwise "stumbling blocks" in multilateral trading arrangement. So extensive scrutiny of the provisions are followed by the RTA parties need to be discussed in this regard with focusing provisions of Art. XXIV.

Notification of any RTA to the Contracting Parties or to the Trade in Goods' Council for reviewing through Working Party or Committee on Regional Trade Agreement of GATT/WTO in prescribed manner and examining the compatibility of any such initiative as per article XXIV or related articles mentioned by different authorities is another aspect to be discussed here.

There is another contentious issue that is how far DSB (Dispute Settlement Body) can interpret the spirit of Article XXIV without jeopardize the interests of members of WTO with relation to any members of RTAs or third parties interests and make an effective compliance of the rules embedded in multilateral trading system.

From the above perspectives, purpose of the Thesis paper will try to explain historical pursuit of article XXIV, its scope and legal implications and ultimate significance of RTAs concluded under the provisions of this article and other related provisions in promoting trade liberalization both in regional and international level within the GATT/WTO disciplines and current state of play of Doha Round negotiations on RTA issues.

1.2 Scope of the Thesis:

The overall significance related to “GATT Article XXIV” and “Enabling Clause” and their scopes are taking into due consideration to proceed with discussion throughout the thesis. With the advent of these Articles, Members are deviating from basic rules of WTO, so it is very much pertinent to discuss the evolvement of RTAs and its cautionary signals for multilateral system. Panel’s observations as well as the observations of the Appellate Body on legal implications related to Art. XXIV are also the part of the discussion. Finally current state of play on the rules making body on RTA within the ambit of Doha Development Round negotiations is a significant source of drawing a conclusion in this regard.

1.3 The Methods and Strategies of Thesis:

The proposed research is completely theoretical in nature. So pertinent provisions of the Art. XXIV along with other associated rules with the same spirit of XXIV, RTAs agreements and Working Party or CRTA reports along with the Panel and Appellate Body reports, WTO Secretariat reports and other books and journals written by various scholars in this regard will be the guiding and important materials to finalize this thesis. In short, the pursuing thesis will be the accomplishment of study in searching the answer of un-resolving questions based on previous and ongoing discussions and formulating a conclusion.

1.4 Structure of Thesis:

This thesis consists of seven chapters including introduction and a conclusion. Chapter I of thesis paper provides introductory remarks and Chapter II covers the historical pursuit of article XXIV and its scope regarding the Regional Trading Arrangements. In this context, scope of the Enabling Clause (1979) will also be discussed as it provides non-reciprocity of preferences and concluding the regional arrangements among the developing countries with maintaining stipulated rules prescribed in this clause. This will also cover the differences between Article XXIV and enabling clauses provision as well.

Chapter III deals with the evolving of RTAs in GATT/WTO with focusing on the caution of deviations from the provisions of article XXIV for facilitating regional efforts to strengthen the Multilateral Trading systems.

Chapter IV focuses on the over sighting procedures of GATT/WTO and discuss the Transparency Mechanism on this issues.

Chapter V is about the legal Implications of Article XXIV and Decision in Turkey Textiles case by the Panel and Appellate Body.

Chapter VI covers the ongoing negotiations on RTA and its update and chapter VII consists of the summary of the all chapters with a view to answering the research questions “Does Article XXIV serve the WTO trading system?” along with the

pragmatic hope of ensuring free, fair and liberal trade among the WTO members or other countries either the member of any Custom Unions or Free Trade Agreements bilateral, regional, or global perspective.

Finally, concluding remarks.

Chapter II

2. A. Historical pursuit and scope of article XXIV and scope of the enabling clause:

2. A.1 History of Article XXIV:

Though the regional formation like customs unions territories had long received exemption from the MFN or Most favoured Nation principle in bilateral arrangement, this sort of practice was carried forward up to Havana Conference and the final ITO Charter. The provisions for free-trade areas and the other provisions of this Article XXIV were included in the Havana (1948) ITO Charter as Article 44 of part IV, titled Commercial policy (Jackson).These provisions replaced the earlier Geneva charter (1947) text by a special protocol.[1]According to Haight, the new text, including for the first time the provisions for the free-trade area exception, was recommended by the subcommittee and was approved without any substantive debate.[2]So it is evident that

[1] J. Jackson, Supra note 7 at p.578, citing at note 14, "Special Protocol on GATT Art. XXIV",1948 (No.7 Agreement in app.C). However, during the Havana process, the Article was referred to as Article 42," "Territorial Application OF Chapter IV, Traffic Frontier and Custom Union", rather than Article 44,its numbered Article in the final Havana Charter. This reflected the charter's division of article 42 into three separate Articles.

[2] F.A Haight, "Customs Unions and Free Trade Areas under GATT: A Reappraisal , Journal of World trade Law", V. 6,No.4,1972,pp.391-404,at p 393,citing E/CONF.2/C.3/SR.44 and 47 and http://www.gsid.nagoya-u.ac.jp/bpub/research/public/forum/21/all.pdf).This point is often cited

throughout negations there was a compromise of the MFN principle and thus incorporating the provisions of Article XXIV in the GATT 1947.Whatever exceptions are made possible by the article XXIV would serve as the primary gateway to offer or accept a preference outside the parameter of Article I MFN.[3]And it also facilitates for the members to engage in the future preferences with certain conditions as illustrated in the Article XXIV. Besides this for any preferential arrangements among the developing countries are facilitated under the enabling clause under certain objectives.

2. A.2 Scope of the Article XXIV:

"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."[4]

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to support the proposition that the free-trade area exception was not particularly well considered in the drafting ,and occasionally to reflect upon the quality of drafting itself.

[3] James H. Mathis, "Regional Trade Agreements in the GATT/WTO; Article XXIV and the Internal Trade Requirment",p,44 and see also in http//www2.warwick.ac.uk/fac/soc/csgr/events/conferences/2005_conferences/8_annual_conference/krishna.doc.

[4] paragraph 5's Chapeau of Art, XXIV, GATT, 1947.

2. A.3 Purpose:

"They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."[5]

2. A.4 Conditions:

(i) "With respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be."[6] and

(*ii*) "With respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of

[5] Second Sentence of the paragraph 4 of Art. XXIV, GATT 1947 and see also http://www.twnside.org.sg/title2/FTAs/General/TheGreatMazeUNDPDiscussionPaper.pdf

[6] Paragraph 5 (*a*) of the Art. XXIV,GATT 1947.

commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be."[7] and

(ii) "Any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time."[8]

After fulfilling the above conditions what would be the scope of CU and FTA is clearly stated in the Article XXIV.

2. A.5 "Customs Union:

For the purposes of this Agreement:

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

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[7] Paragraph 5 (*a*) of the Art. XXIV,GATT1947.

[8] Paragraph 5 (c) of the Art. XXIV,GATT 1947.

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

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

"(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."[10]

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[9] Paragraph 8 (a) of the the Art. XXIV,GATT 1947.

[10] Paragraph 8 (a) of the the Art. XXIV, GATT 1947.

2. A.6 Other Conditions:

Among other conditions notification issues is a must. For this reason a clear provision is stated in this Article as well i.e. as per the para 7(*a*), Art. XXIV, Contracting Parties after becoming the member of a custom union, free trade area or any agreement intends to form either two shall be obliged to make notification to "CONTRACTING PARTIES" about such arrangement. Besides this, for making an appropriate reports or recommendations, parties is obliged to provide information in this regard as well.

From the above provisions, it is clear that the core purposes of the deviation from MFN principles are to provide more flexibility among the trading partners to such agreement with no intention to increase barriers against other party's related to trade.

If we look at the conditions and scope of the formation of CU or FTA highlights are as follows:-

- Parties to the custom union or interim arrangement for forming custom union could not increase "duties" or "other regulations of commerce" more stringent from the level as prevailed before the establishing of such union or temporary arrangement.

- Parties to the free trade area or interim arrangement for making such shall also comply with the previous rules towards third parties.

- Parties will eliminate “duties” and “other restrictive regulations of commerce” in respect of “substantially all the trade”; however under Article (XI, XII, XIII, XIV, XV and XX) there are some exceptions. It depends on necessity which is permitted under the WTO rules provided in those Articles.

- In CU there will be a common external policy;

- In a free-trade area elimination of “duties” and “other regulations of commerce” on “substantially all the trade” among the parties is a condition also. However exceptions are there under Articles (XI, XII, XIII, XIV, XV and XX). It depends on necessity which is permitted under the WTO rules.

- Every party either in CU or FTA, promptly notify to the WTO Secretariat regarding the provision and details scope for consideration/examination of the formed CU or FTA or any interim Agreement leading to the end of forming either one.

According to the James H. Mathis “ there are two sets of primary requirements for the formation of a regional trade arrangement to operate as an exception from its Article I MFN ; one is definitional and other is external effects.”

2. A.7 Definitional requirements:

The provisions stated in Article XXIV: 8 (paragraph 8) determine the characteristics of the regional agreements being qualified with deviations from principle of MFN. Thus, custom union or free-trade area, "…shall be understood to mean an area (or territory) where duties and other regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories"[11]From these provisions two types of actions have to be taken; one is to address the substantially all trade and other is to eliminate of duties as well as other regulations which are restrictive for commerce. Paragraph requires that opted to be characterized as either customs union or a free- a trade area that trade to be considered is the trade between the members for their goods of origin.[12] This requirements also supported by the provision of paragraph 10 which retains additional mechanism of qualifying as such arrangements by 2/3 majority vote of the contracting parties .But this waiver is explicit however in only being available where "such proposals lead to the formation of a customs union or a

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[11] Para 8 (a)(1) of GATT Article XXIV : for custom union, and para 8(b) of GATT Article XXIV for free-trade area(emphasis added).At this point we are not treating the listed articles exceptions stated in para 8(a) as well as (b). Complete text of Article as provided in GATT-1947 is attached by appendix.

[12] The term "free trade" is applied in this context to refer to the elimination of tariffs and quantitative restrictions .For now, the article's term "other restrictive regulations of commerce" is applied here to indicate the removal of quantitative restrictions.

free-trade area in the sense of this Article."[13] There is other definitional requirement stated in paragraph 7 for submission of plan and schedule to demonstrate that the arrangements made are sufficient to meet this requirement. Under this provision contracting parties can fulfill the obligation by giving recommendations whether an agreement falls either in recognized forms. In case of the internal trade requirement elimination of duties as well as different barriers will be done mutually in a period of time. In case of custom union, it is indicated by para 8(a)(i) of article XXIV: which refers to "…trade between the constituent territories of the union.." in free trade area, analogous prerequisite is found in para 8(b) of Article XXIV: which indicates , "…trade between the constituent territories in products originating in such territories."[14] There is an additional element of having a "common external trade policy" for other parties in custom union. It is mentioned para 8(a)(ii), Article XXIV: whereby , "substantially the

[13] The paragraph 10 provision is applicable for custom union and free-trade area between GATT parties and non-parties of GATT. GATT, Analytical Index, Guide to GATT Law and practice, Geneva (6th ED), 1994, p.770.

[14] Emphasis added. It may be that the obligation would be better expressed as a "mutuality" requirement rather than that of reciprocity .The latter term is however consistently used to designate the requirement. Over the period of implementation there is no stated requirement that duties be reduced between the parties at the same rate. The inference is that within the time contemplated by the plan and schedule, a result shall be reached whereby both parties have eliminated their respective barriers to trade.

same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union."

2. A.8 External effects requirements: Article XXIV: 5 Paragraph is all about how the exception accorded by Article XXIV for custom union or free-trade area creates external effects towards non-parties to an agreement. It is imperative that such kind of formation do not impose higher barrier to trade upon the GATT Parties. Thus, it is required in respect to the trade of other parties, that the duties and other regulations (maintained or imposed), "shall not on the whole be higher or more restrictive" than "prior to the formation".[15]

2. B Scope of the Enabling Clause[16]:

The enabling clause is an extension of the provisions for the special and Differential Treatment for Developing and Least-developed countries.[17] In terms of this provision the least-developed countries are required to undertake commitments and

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[15] GATT Article XXIV :5(a) for custom union, GATT para 5(b) of Article XXIV for free-trade areas. There is a difference for free-trade areas where the higher duties shall not be "maintained". For customs unions, they may not be "imposed at the institution".

[16] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf; Leticia Anthea Grimett ,Protectionism and compliance with the GATT Article XXIV in selected regional trade arrangements,January 1999,p 30-35.

[17] Enabling Clause "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", 1979.

make concessions only to the extent consistent with their individual development, financial and trade needs or their needs or their institutional and administrative capabilities.[18] Beneficiary of this provisions are out of reciprocity principle. Due to the unitary commitment on the side of developed countries only, it has similarity with MFN principle. Enabling Clause endows with constant exceptions offers to least developed countries and even it provides opportunity for least-developed countries to become the party in the regional trade initiatives with no compromise of its developmental needs. In paragraph 1(c) of Enabling Clause permit for creating arrangements both in regionally and globally between less-developed countries with the objective of tariff reduction or elimination mutually. This reduction or elimination of tariffs is to be done in accordance with criteria or conditions to be prescribed by other GATT contracting parties.[19]

In other word, endeavour of such groupings in regional level is to mutually reducing or eliminating the measures related to non-tariff upon the products of each contracting parties.

"A footnote to this provision provides for such differential and more favourable treatment to take account of the following requirements:

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[18] GATT (1994), Article XI (2).

[19] Article XXIV of GATT and regional arrangements in Southern Africa (1995), Kumar U, p 10- 11.

a) the regional groupings should be designed to facilitate and promote the trade of developing countries and not to raise or create undue difficulties for the trade of any other contracting parties;

b) the provisions should not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a MFN basis; and

c) Where MFN treatment is accorded by the developed contracting parties to developing countries, it should be designed and if necessary, modified to respond positively to the development, financial and trade needs of developing countries."[20] So as per the para 1(c), developing countries are allowed to enjoy special and differential treatment from developed countries with addressing the special needs of the developing countries. Moreover such treatment also addresses economic needs of developing countries which attributes in finance, trade and development aspects of developing countries. With its theme of standard treatment, the general Enabling clause is far cry from the MFN clause

[20] The Multilateral Trading System and Regional Integration: Implications for SADC, Carim X, (1997) p 11 and see also http://eprints.ru.ac.za/208/1/grimett-thesis.pdf, page 31.

which aims at the achievement of perfect symmetry in trade relations amongst its contracting parties.[21]

The trend to unevenness started cautiously through GATT Article XVIII,1947. Since 1947, hopes of contracting parties were to materialize their gradual development through the agreement of GATT 1947. So thrust was to maintain defensive and another measure which distressing imports so that they could accomplish their development policy and programmes to raise standard of living. Such steps definitely be consistent to the extent for achieving the aims of the agreement of GATT.

"The contracting parties were therefore given additional facilities which allowed them to: a) maintain sufficient flexibility in their tariff structure which would give these countries the tariff protection necessary to establish industries necessary for development; and b) apply quantitative restrictions for balance of payment purposes." [22] It is to be completed taking with full account on constant higher demand in case of import which is the results the programme of economic. Amid of legality of quantitative restrictions, it is noticed that it is being diminished with forward looking concessions made between developing countries and developed economies under GATT 1994. The

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[21] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf; Leticia Anthea Grimett ,Protectionism and compliance with the GATT Article XXIV in selected regional trade arrangements,January 1999,p 31.

[22] Para (1) and (2) of Article XXVIII, GATT (1947).

most important concessions made to development and the developing economies were that of the Enabling Clause.[23]

In its footnote 2, a magnificent scope is given for developing countries to be regionally integrated among themselves. It contains that: "it remains open for the Contracting Parties to consider on an ad hoc basis under the GATT provisions for joint actions any proposals for differential and more favourable treatment ..."

In doing so, derogation is allowed from principle of MFN which extends more favourable and differential treatment to the developing countries. The joint action mentioned in footnote 2 of the Enabling Clause refers to Article XXV (5) [24] , it allows to waiver obligations of WTO Members. It is only possible with two-thirds vote is in favour of this waiver. The Enabling Clause would thus provide those developing countries who wish to create a regional trade area greater flexibility than provided for in Article XXIV and its Understanding.[25]Still unsettled things are revolving on functioning Enabling Clause. As in enabling clause, there is no mention of Article XXIV. Pertinent

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[23] Kumar U, Article XXIV of GATT and regional arrangements in Southern Africa (1995) p 10.

[24] GATT (1947). This provision allows for the waiver of the obligations of contracting parties under the GATT in exceptional circumstances which are not provided for in the 1947 GATT. See also http://eprints.ru.ac.za/208/1/grimett-thesis.pdf;

[25] Carim X, The Multilateral Trading System and regional integration; implications for SADC (1997) p 11-12.

question on does Enabling Clause gives developing countries to create regional arrangement other than Article XXIV. This question was to be debated by the WTO Working Party towards the end of 1995 when the Southern Common Market (Mercosur) was examined.[26] Although developing countries believe that they have this option, the WTO Working Party has, as yet, made no ruling on the matter.[27] Given that provision 1(c) of the Enabling Clause makes provision for both the reduction and abolition of tariffs and non-tariff barriers within the context of a regional grouping, whereas Article XXIV provides only for the elimination of all tariffs and other restrictive barriers to trade, on substantially all trade, the developing countries have good cause to believe that the Enabling Clause is meant to be read separately from Article XXIV.[28] The wording of provision 1(c) is much looser and forgiving, making allowances for development and leaving room for parties to adapt the reduction and abolition of tariffs and non-tariff barriers to their individual countries' needs.[29] The

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[26] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf; Leticia Anthea Grimett ,Protectionism and compliance with the GATT Article XXIV in selected regional trade arrangements,January 1999,p 33.

[27] Kumar U, Article XXIV of GATT and regional arrangements in Southern Africa (1995) p 10-11.

[28] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf; Leticia Anthea Grimett ,Protectionism and compliance with the GATT Article XXIV in selected regional trade arrangements,January 1999,p 33.

[29] Ibid, P.33

Enabling Clause does, however, provide for non-restricted trade with third parties, a provision which it shares with Article XXIV. [30]Parties are also obliged to ensure that the regional arrangement is not an impediment to tariff reduction on an MFN basis. [31]

Article XXIV, 1947 and Enabling Clause are significant because both of these make sure that unless overall development, developing countries are not eager to maintain shielding on concessions in trade. Although the developing and the least-developed economies are currently enjoying lower tariff rates than the rest of the GATT contracting parties, the tariff rates negotiated during the Uruguay Round are much lower than those previously adopted by the contracting states. [32] As the gap between the Generalized System of Preferences (GSP) and the tariff rates negotiated on the MFN basis is shortened, the competitive advantage of these states is reduced. [33] With the liberalization of trade, the developing counties will be forced to compete on an equal basis with the developed states. [34] So enjoying comparative advantage in the terms of GSP thus diminished. Hence obstruct to reduce the MFN tariff would be their benefit.

[30] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf; Leticia Anthea Grimett ,Protectionism and compliance with the GATT Article XXIV in selected regional trade arrangements,January 1999,p 34

[31] Ibid, P.34

[32] Ibid, P.34

[33] Ibid, P.34

[34] Ibid,P.34

The third provision under the Enabling Clause states that the regional arrangements must be designed or modified to respond positively to the development, financial and trade needs of the developing countries.[35] Given that Article XXIV was designed for regional arrangements between developed states [36]these are depicted a changed norm of Article XXIV. Had the drafters intended the Enabling Clause to stand separate from Article XXIV, however, they would probably have mentioned the new guidelines within the Enabling Clause.[37] The only other possible alternative is that the Enabling Clause was intended to be an extension to Article XXIV, thus ensuring it can be applied to both developed and developing contracting parties to the WTO.[38] Despite the uncertainty surrounding the application of the Enabling Clause, it is not a barrier to trade nor does it facilitate protectionism between the contracting states.[39] Whereas the Enabling Clause makes provision for regional groupings to be formed between developing economies, the Article XXIV provisions of GATT 1947 are a much stricter set of guidelines meant

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[35] Ibid, P.34

[36] When the GATT 1947 was adopted, it contained no concessions to the developing countries. All the provisions where aimed at the developed western countries who made up the majority of the contracting parties (http://eprints.ru.ac.za/208/1/grimett-thesis.pdf).

[37] http://eprints.ru.ac.za/208/1/grimett-thesis.pdf, page 34.

[38] Ibid, P.34

[39] Ibid, P.34

for the formation of regional trade groupings between developed economies and not developing economies, although this point is still unclear. [40]

The Article XXIV rules are there to ensure that the regional trade arrangements facilitate trade within regional groupings without raising barriers to trade with countries outside the grouping.[41] The rules are thus intended to ensure that regional integration complements the multilateral trading system, instead of threatening it.[42]

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[40] Ibid, page 34-35

[41] Ibid, P.35

[42] World Trade Organisation, Trading into the Future (1995) p 16 and see also (http://eprints.ru.ac.za/208/1/grimett-thesis.pdf, page 34)

Chapter III

3.0 Evolving of RTAs in GATT/WTO:

If we look at figure of RTAs , being notified to the Secretariat of WTO, then we see near maximum number of Members participated in at least one RTAs or additional RTAs. In some cases, a few Members are involved with twenty and more. Notifications may also refer to the accession of new parties to an agreement that already exists, e.g. the notification of the accession of Bulgaria and Romania to the European Union Customs Union.[43] "In the period 1948-1994, the GATT received 123 notifications of RTAs (relating to trade in goods), and since the creation of the WTO in 1995, over 300 additional arrangements covering trade in goods or services have been notified."[44]

3.1 "Evolution of Regional Trade Agreements in the world, 1948-2009": [45]

RTAs have turn into a very important characteristic of MTS i.e Multilateral Trading System. Following graph demonstrate notified RTAs to WTO/GATT (1948-2009), together with RTAs which are not active, with year when comes in force.

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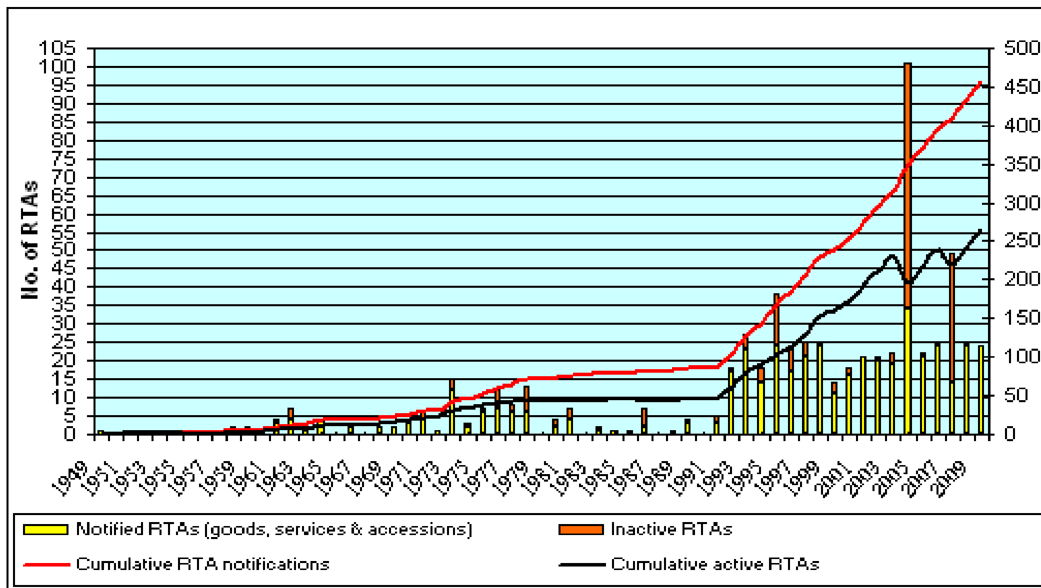
[43] http://www.wto.org/english/tratop_e/region_e/regfac_e.htm,11 am.date 06.12.2010.

[44] Ibid.

[45] Ibid



Source: WTO Secretariat website.

RTAs have been unabatedly increased near the beginning of 1990s. "As of 31 July 2010, some 474 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO. Of these, 351 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 31 under the Enabling Clause; and 92 under Article V of the GATS. At that same date, 283 agreements were in force. These WTO figures correspond to 371 physical RTAs (counting goods and services together), of which 193 are currently in force. The overall number of RTAs in force has been increasingly steadily, a trend likely to be strengthened by the many RTAs currently under negotiations. Of these RTAs, Free Trade Agreements (FTAs) and partial scope agreements account for 90%, while customs unions account for 10 %."[46]

[46] http://www.wto.org/english/tratop_e/region_e/region_e.htm#facts,12.40pm, 6.12.2010

With above increasing picture, RTA common thinking indicates the reason of such proliferation. In this respect it is mentionable here that RTAs increase opportunities for economic of scale by creating larger market for goods and serviceberries and engendering a more competitive environment , whereby it raises efficiencies in business and ensure more economic development for the citizen. "In its recent report WTO secretariat mentions two reasons why standard economic analysis would justify a country's decision to pursue preferential trade agreements-

I. in a world of second best a case may be made for an individual country to reduce trade barriers on a selective basis;

II. some countries may be able, through trade diversion, to secure gains that they could not otherwise achieve."[47]

Generally governments are putting emphasis on multilateral approach but for more viable integration at first then multilateral with the common platform and vision for trade liberalization.

However, in this context, there is also "**A note of caution**: RTAs can complement the multilateral trading system, help to build and strengthen it. But by their

[47] WTO Secretariat, World Trade Report 2003, page 49 and see also http://www.rieti.go.jp/en/events/bbl/03103101.pdf, page 6

very nature RTAs are discriminatory: they are a departure from the MFN principle, a cornerstone of the multilateral trading system. Their effects on global trade liberalization and economic growth are not clear given that the regional economic impact of RTAs is ex ante inherently ambiguous. Though RTAs are designed to the advantage of signatory countries, expected benefits may be undercut if distortions in resource allocation, as well as trade and investment diversion, potentially present in any RTA process, are not minimized, if not eliminated altogether. An RTA's net economic impact will certainly depend on its own architecture and the choice of its major internal parameters (in particular, the depth of trade liberalization and sectoral coverage). Concurrent MFN trade liberalization by RTA parties, either unilaterally or in the context of multilateral trade negotiations, can play an important role in defusing potential distortions, both at the regional and at the global level.

The increase in RTAs, coupled with the preference shown for concluding bilateral free-trade agreements, has produced the phenomenon of overlapping membership. Because each RTA will tend to develop its own mini-trade regime, the coexistence in a single country of differing trade rules applying to different RTA partners has become a frequent feature. This can hamper trade flows merely by the costs involved for traders in meeting multiple sets of trade rules.

The proliferation of RTAs, especially as their scope broadens to include policy areas not regulated multilaterally, increases the risks of inconsistencies in the rules and procedures among RTAs themselves, and between RTAs and the multilateral framework. This is likely to give rise to regulatory confusion, distortion of regional markets, and severe implementation problems, especially where there are overlapping RTAs."[48]

However, RTAs are considered as the platform to minimize the gaps through the closer partnership and understanding of the regional partners first, and then come forward to resolve issues related to multilateral negotiations under the umbrella of multilateral trading system facilitated by the WTO.

[48] http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm, 12.40, 6.12.2010

Chapter IV

4.0 Over sighting practice by GATT/WTO on RTAs and Transparency Mechanism:

From the GATT period to now on WTO era there is a procedural requirements to oversight the Regional Trade Agreements to go under scrutiny on certain issues. Accordingly, RTAs must be notified to other WTO members who, in turn, can then request the establishment of a working group to examine the compatibility of such an agreement with the GATT.[49] Exercising this procedure, members are exerting to make available information on proposed CU i.e Customs Union or else FTA i.e Free Trade Area so as to all members could understand the provisions in line with the provisions of GATT/WTO.

However, The WTO membership does not give the 'green light' to RTAs; at best, WTO members may show a 'red light' to a RTA[50]. The Singapore Ministerial Meeting (1996) called for an end to the ad hoc Working Party Review system of the GATT parties by establishing a standing review committee for regional trade

[49] Article XXIV (7) of GATT 1994.

[50] When and how Is RTA Compatible with the WTO?, by Gabrille Marceau and Cornelis Reiman, Legal issues of Economic Integration, page number 311,

agreements, the Committee on Regional Trade Agreements (CRTA).[51] This committee is responsible to make examination on notified RTAs under Article XXIV to the Goods' Council (CTG). It is also exercised its over sighting mandate over the RTAs within the framework of GATS Article V as well as Enabling clause. The mandate of the CRTA also includes consideration of 'the systemic implications of RTAs and regional initiatives for the multilateral trading system and the relationship between them.'[52]

"At the time of the launch of the Doha Round in November 2001, the CRTA had made no progress on its mandate of consistency assessment, owing to the endemic questions of interpretation of the provisions contained in Article XXIV of the GATT 1994."[53] For this reason for ensuring transparency on RTAs General Council adopted the provisional transparency mechanisms in the regional agreements on 14 December 2006 which is being implemented in line with the Doha mandate stated in paragraph 47 and at the end of this round there will be a permanent mechanism to be adopted by the

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[51] Decision of the General Council on February 6, 1996 (WT/L/127) and February 7, 1996.The CRTA convened its first meeting on the 21st of May, 1996.Minutes reported as WT/REG/M/1.

[52] WT/L/127,para 1(d)

[53] Fiorentino, Crawford and Toqueboeuf, The landscape of Regional Trade Agreements by published in the Multilateralising Regionalism,Challenges for the Global Trading System edited by Richard Baldwin and Patrick Low,published by World Trade organization and CambridgeUniversity Press in 2009.(page no-56)

members on TM. With the adoption of TM procedural requirements are introduced for RTAs, inter alia an early announcement of RTAs either it is signed or under negotiation, yet to be enforced, press release from the participating members with basic information to be uploaded in the WTO websites, in case of signed RTAs members have to provide information on the scope and date of signature, nominated contact point and website address to the WTO.

The early announcement contributes to have comprehensive knowledge on RTAs by the members and thus increased transparency. The TM strengthens existing provisions on notification by stipulating that notification is to "take place 'as early as possible…no later than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement and before the application of preferential treatment between the parties'."[54]

Section E related to transparency mechanism deals with the implementation mechanism of Transparency through CTD i.e Committee on Trade and Development and CRTA i.e Committee on Regional Trade Agreements. CRTA examines RTAs notified on GATT Art. XXIV,1994 and GATS Art. V where CTD is responsible for RTAs which notified as per the Para 2(c), Enabling Clause.

[54] Ibid, page 60.

For proper examinations, every notified RTAs is placed before the Members for consideration without prejudice the obligations and rights of Members. Details are stipulated in para 6 through 13 of Art. 5 of this mechanism. Besides this, according to the Art. 7 of TM "to assist Members in their consideration of a notified RTA: (a) the parties shall make available to the WTO Secretariat data as specified in the Annex, if possible in an electronically exploitable format; and (b) the WTO Secretariat, on its own responsibility and in full consultation with the parties, shall prepare a factual presentation of the RTA."[55] As per Article 9 "The factual presentation provided for in paragraph 7(b) shall be primarily based on the information provided by the parties; if necessary, the WTO Secretariat may also use data available from other sources, taking into account the views of the parties in furtherance of factual accuracy. In preparing the factual presentation, the WTO Secretariat shall refrain from any value judgment."[56] For doing so members are engaged in a single meeting to consider notified RTAs .But fact is, such presentation in no way can be the basis of contentions in dispute mechanism. Moreover, it does not confer any obligations or rights upon membership. So from this point of view, we see there are significant differences on the remarks of the concerned bodies to examine the RTAs in invoking the DSB procedures.

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[55] TN/RL/W/252, Page 3

[56] Article 9 of TM and see also in WT/L/671.

WTO secretariat has made this factual presentation on every notified RTAs stating the detailed summary on the data provided by the parties. It includes the total scenario inter alia, the trade environment, regulatory features, comprehensive tariff, trade and regulatory reforms on the implementation of RTAs. The purposes of this factual presentation is to produce objective , homogenous reports containing no value judgment which are used by members in their consideration of an RTA under review.[57]One thing is mentioned here at CRTA every notified RTA was examined but in TM emphasis given on consideration. It is because after examining by the CRTA for the ten years of its existence, no report was approved by the members. This was owing to various factors including differing interpretations of key provisions of the existing legal texts, members' inability (or, in some cases, unwillingness) to provide adequate statistics, and political difficulties stemming from the need to produce a consensual report acceptable to all members, including the RTA parties under review.[58]However, with limitation of availability of the factual presentation creates dimension on the work of CRTA and already members are satisfied with the quality of information made

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[57] The landscape of Regional Trade Agreements by Fiorentino, Crawford and Toqueboeuf published in the Multilateralising Regionalism,Challenges for the Global Trading System edited by Richard Baldwin and Patrick Low,published by World Trade organization and CambridgeUniversity Press in 2009.(page no-60)

[58] Ibid, page 61.

available. Under this Mechanism, consideration of the RTA notified under enabling clause, the CTD shall convene in dedicated session."

So from this context, it is found that there were series of working group reports where Members expresses their satisfaction about compatibility requirements on RTAs or its aspects thereof. And all the functions are done by CRTA or CTD by the way of working group are merely views to share with the members.

For ensuring full transparency and overcoming the shortfalls mentioned above, review or modification of this process as per the mandate of Doha Round is needed and thus make it a permanent mechanism rather a provisional one. And in that pursuit, members are engaged in negotiations on this issue actively which could be discussed in the chapter VI.

Chapter V

5.0 Legal Implications of Article XXIV: Decision in Turkey Textile dispute:

Para 12 on Understanding of Article XXIV clearly gives jurisdiction to the Panel and Appellate Body for examining the issues derives from any non-compliance of rules contained in Article XXIV.

DSB (Dispute Settlement Body) can interpret the spirit of Article XXIV without jeopardize the interests of members of WTO with relation to any members of RTAs or third parties interests and make an effective ruling for compliance of the rules by the parties embedded in this article. In discussion about this, we will try to provide findings on Turkey Textiles dispute made by Panel as well as Appellate Body under dispute settlement understanding.

Regarding the jurisdiction of the Panel and Appellate Body, it is clear from the texts of the understanding of the GATT 1994 that WTO adjudicating bodies are able to look at any issue occurs under Article XXIV.

Panel was, however, in view that the CRTA appeared to be, generally, in a better position to review on the whole GATT/WTO consistency for custom union, since it involves a broad multilateral assessment of any such custom union, i.e. a matter that concerns the WTO membership as whole.[59]But since such consideration is subject to

[59] See para 9.52 of the Panel Report.The Panel also added (at para 9.53).

political will of the members in the regional level and it is not possible for CRTA to make compliance of WTO rules by the parties without having member's consensus.

However, the Appellate Body indicated –albeit in an obiter dictum-that WTO Panels or the Appellate Body has jurisdiction and, thus, the capacity to assess whether any specific custom union is completely compliance to the prerequisites of Article XXIV, GATT and V, GATS.[60]

Now questions be whether the provision of Article XXIV is an exception or defense and what would be the requirements to invoke these provisions in the formation of RTA. To find out the answer of these questions we can follow the test suggested by the Appellate body:

Generally XXIV provides members deviations from compulsion MFN rules enshrined in GATT Art. I and others rules under GATT are also required to comply in pursuing RTA among them. The Appellate Body established an arguably more restrictive test: [61]first, it emphasized the legal fact that Article XXIV is an exception and, as such can be invoked as a defense, but under strict conditions. Thus, the member invoking such an exception has to proof that the conditions in Article XXIV have been

[60] See para 60 of the Appellate Body Report.

[61] When and How Is an RTA Compatible with the WTO, Gabrielle Marceau and Cornelis Reiman, (page no 313)

respected. Then, it again stated that it is sufficient for justifying WTO compatibility of any initiative under this article, only if three conditions are respected by the member invoking Article XXIV. The conditions are as follows:

First- derogation must be taken place ahead of forming RTA; they cannot be adopted following the formation or conclusion of the RTA,

Second, member invoking rules on RTAS to justify its actions must provide evidence regarding such RTA is completely comply provisions stated in paragraph 5 along with 8 in Article XXIV;

Third, the particular steps challenged (i.e. the measure was, otherwise, inconsistent with the GATT rules) be required to form and conclusion RTA. Statement of Appellate Body in paragraph 52, 58, 59 are respectively given bellow:

"52. Given this proviso, Article XXIV can, in our view, only be invoked as a defense to a finding that a measure is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in subparagraph 5(a) of Article XXIV relating to the 'duties and other regulations of commerce' applied by the constituent members of the customs union to trade with third countries….(emphasis added)"[62]

"58. Accordingly, on the basis of this analysis of the text and the context of the

[62] WT/DS34/R, October 22, 1999 page 14

chapeau of paragraph 5 of Article XXIV, we are of the view that article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. **First,** the party claiming the benefit of this defence must demonstrated that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of the Article XXIV. And**, second**, that the party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV. (Emphasis added)"[63]

"59. We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there is a custom union…"[64]

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[63] Ibid, page 16

[64] Ibid page 16

However from above discussion it is not clear how much compliance with these conditions could be showcased. So in questions of compatibility of a customs union with the conditions provided in the 5 and 8 of the XXIV of GATT and inquest of justifying the third condition above in the case violations of WTO rules which is essential in shaping custom union.

While meeting requirements of the paragraph 5 and 8, any RTA must take considerations of the parameters of paragraph 4 of the Article XXIV. "It is not unreasonable to assume that paragraph 5 and 8 of the Article XXIV were drafted with a view to suggesting criteria that would ensure the respect of the parameters of paragraph 4, i.e some balancing between, on the one hand, the desirability of facilitating trade between the constituent territories and, on the other hand , the undesirability of raising barriers to the trade of other WTO Members."[65] It is also stated in Para 57 of its report, "57. ..This objective demands that a balance be struck by the constituent members of a custom union, A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries. We note that the Understanding on Article XXIV explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union , the constituent

[65] When and How Is an RTA Compatible with the WTO,Gabrielle Marceau and Cornelis Reiman, (page no 315)

members should 'to the greatest possible extent avoid creating adverse affects on the trade of other Members'(emphasis added)."[66]

Since there is a direct relation on internal and external trade policy in CU so we need to examine this issue in line with the Turkey case and other references. In doing so, our discussion is as follows:

i. Internal requirements under Art. XXIV , subparagraph 8(a)(i):

As per the Article (a)(i) of 8 internal requirements is that **"**A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that, (i)duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to *substantially all the trade* in products originating in such territories." But long debate is still going on what would be the meaning of "substantially all the trade" and its scope with coverage. The classic reference is the statements made in working party report on EEFTA-Convention in Stockholm (albeit an FTA) "substantially all the trade" connotes both qualitative and quantitative aspects –since 90 percent of trade was covered –such an FTA would be

[66] WT/DS34/R, October 22, 1999 page 15

considered to cover substantially all the trade , even if agriculture was excluded.[67] So there are two views to the concept of *substantially all the trade i.e.* one is for quantitative assessment and qualitative assessment and debates are still taking place on this issue.

ii. External requirements under Art. XXIV, subparagraph 8(a)(ii):

As per the (*a*)(ii)8 " A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that, (ii) subject to the provisions of paragraph 9, *substantially the same duties* and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union."

So from the above provision , CU states should have harmonized trade policy and follow external common trade policy .In this context, the appellate Body states that it agreed "with the panel that: [t]he ordinary meaning of the term 'substantially in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression 'substantially the same duties and other regulations of commerce are applied by each of the members of the [customs] union' would appear to

[67] Working Party Report on EFTA-Examination of the Stockholm Convention, L/1235, adopted on 4 June 1960, BISD 9S/70.

encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties."[68]

"The Appellate Body agreed with the Panel that, in the terms of subparagraph 8(a) (ii), and in particular – the phrase 'substantially the same'... offer[s] a certain degree of 'flexibility 'to the constituent members of a custom union in 'the creation of a common commercial policy'. Here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially 'qualifies the word 'the same'. Therefore, in our view, something closely approximating 'sameness' is required by Article xxiv: 8(a) (ii) (emphasis added)."[69] In this case, Turkey's trade with third country was less than 4.5 percent. It was, thus, considered that, for the Turkey –EC CU to be GATT compatible, Turkey's duties and regulations concerning textiles with third countries did not need to be harmonized with those of the EC.[70]

So from the above discussion we can see members could invoke the article XXIV as a defense as well as exceptions upon fulfillment of specific conditions and

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[68] See para . 49 of the Appelate Body Report on Turkey- Textiles , which contains this quote from para. 9.148 of the Panel report.

[69] At para. 50 of the Appellate Body Report in Turkey-Textiles case.

[70] When and How Is an RTA Compatible with the WTO, Gabrielle Marceau and Cornelis Reiman, (page no 318)

tests. And every CU or FTA also needs to have compatibility with provisions stated in paragraph 5, 8 of Art. XXIV and conditions stated in paragraph 4 of the same Article.

Chapter VI

6.0 Current issues and concerns including the Doha mandate and ongoing state of play of negotiations on RTAs

6.1 DDA Negotiations on WTO Rules (on RTAs)[71]:

In the Doha Ministerial Declaration, WTO Members recognized “that RTAs could play an important role in promoting trade liberalization and in fostering economic development, and stressed the need for a harmonious relationship between the multilateral and regional processes. On this basis, Ministers agreed to launch negotiations aimed at clarifying and improving the relevant disciplines and procedures under the existing WTO provisions with a view to resolving the impasse in the CRTAs, exercising better control of RTAs’ dynamics and minimizing the risks related to the proliferation of RTAs.”

The negotiations on RTAs have been conducted on two tracks: issues of “procedural” nature, and “systemic” or “legal” issues of a more substantive matter. Negotiations on the first have made some progress. However, the scope of issues under consideration is wide and complex, given the fact that clarifying or improving WTO rules on RTAs relates to several other regulatory areas which are under negotiation and

[71] Substantial part of this issues have been taken from the RTA gateway of WTO website; http://www.wto.org/english/tratop_e/region_e/region_e.htm

this adds to further complexity.

Negotiations on procedural issues which are, by nature, less contentious have instead been very fruitful, with Members reaching a formal agreement on a Draft Decision in 2006 on Transparency Mechanism for RTA. The decision was applied on a provisional basis in December 2006 while waiting for making it permanent with concluding of Doha Round.

6.2 Negotiations Issues[72]:

Paragraph 29 of the Doha Ministerial Declaration states that "negotiations aim at clarifying and improving disciplines and procedures under the existing WTO provisions as regards RTAs, and take due account of the developmental aspects of these agreements."

Negotiation Groups have had substantive progress on this task. As regard identification of issue, this part has already been completed, where subjects are divided primarily as "procedural" and "systemic". Issue related to procedural, particularly "RTAs" "transparency", was recognized as initial issue to consider since 2007 through informal way. Till now issues Systemic in nature are being considered during formal

[72] Substantial part of this issues have been taken from the RTA gateway of WTO website; http://www.wto.org/english/tratop_e/region_e/region_e.htm

meetings.

As part of procedural issue steps forward on "RTAs' transparency indicates that negotiation is going towards a general acceptance of more pragmatic approach in evaluation method of RTA including its time period, substances of notification of RTA.

Development as well as RTAs; coverage RTAs especially meaning of "substantially all trade" Art. XXIV (8), GATT); "other (restrictive) regulations of commerce" particularly issues attached to Rules of Origin and Safeguards, predominance of "multilateral trading system" and probable negative impacts of RTA to non-parties.

However, since every Member of WTO is party to RTA or those who were not, now are opting for becoming the part of RTA, so it is very difficult for having negotiations on this issue. For this reason achievement is less than expectation and situation remains the same but some results are visible in transparency issues. Substantial debate for the last few years "as to the requirements imposed by the GATT Article XXIV, as well as the other WTO provisions on RTAs, which extend from the definition of mere procedural requirements to the meaning of key elements of the definitions of free trade areas and custom unions."

In the area of "procedural issues" ambiguity remains on the timing of

notification of RTA to WTO for examination. If RTA is notified by Members after the conclusion of negotiations, it is evident that there is little room for addressing the recommendations of WTO even if derives within the ambit of Article XXIV. Apart from the timing, disagreements are there regarding information to make available. Again difficulty occurs about the spectrum of examination procedure through CRTAs that is responsible for gathering data on RTA for examining its consistency with prevailing rules. Specifically, consensus among developing countries within the ambience of Enabling Clause is not frequently assessed. Moreover, due to differences on substantive yardstick likely to follow in case of RTA, method of review in general remains indecisive, as highlighted earlier. This difficulty is termed by Secretariat as "dispute-settlement awareness": "Members seem reluctant to provide information or agree to conclusions that could later be used or interpreted by a dispute settlement panel."

On more substantive issues, "it is unclear whether paragraph 4 of Article XXIV adds to the other provisions of Article XXIV, or simply states a general principle that is interpreted in the other provisions. This disagreement may be more apparent than real, since at a minimum, the Appellate Body has made it clear that paragraph 4 provides important context for interpreting the other provisions. However, there may be some inconsistencies between paragraphs 5 and 8. Paragraph 8 focuses on the removal of

internal trade restrictions, while paragraph 5 focuses on not raising barriers to external trade. One can imagine situations where compliance with one requirement might lead to problems with the other."

Interpretation of requirements which are crucial as per Art. XXIV remains very contentious. Among those, most prominent one is "substantially all the trade", frequently used word in CUs and FTAs. There are two fundamental views in interpreting this prerequisite where "RTA should cover substantially all the trade between the constituent members are: (i) that the requirement is a quantitative one, which is met if the RTA covers actual trade between the parties at an appropriate statistical level (e.g. 90%); and (ii) that the requirement is (or is also) a qualitative one, which is met only if no important economic sector is excluded from the RTA."

In CU, it is also not clear that parties should maintain "substantially the similar duties" and "other regulations of commerce". At the Turkey-Textiles disputes , there is a disparity between Panel and the Appellate Body to what extent CU members allowed to enjoy flexibility. As per the Appellate Body "a high degree of sameness" was compulsory but obviously that requirement is quite vague in realistically. The conditions that "restrictive regulations of commerce" shall be abolished have an exception i.e. "where necessary, those permitted under Articles XI, XII, XIII, XIV, XV

and XX".

Debates are going on whether the "anti-dumping" and "safeguard measure" falls within the category of regulations as restrictive or not. If thus, no reason to use this, though these are used in different free trade areas. In the case of safeguards, "the issue is further complicated by the debate over whether selective safeguards should ever be permitted – if not, then it would seem that even regional partners should be subject to any general safeguard measure that is imposed. Panels and the Appellate Body have explicitly avoided these issues thus far." But negotiations are continuing to make more clarification on implications of Art. XXIV and finding viable way forward for its better implementation.

6.3 Current Negotiations on RTA:

Current negotiations on RTA are administered by the "Negotiating Group on Rules (NGR)" and NGR regularly updates "the Trade Negotiations Committee (TNC)". In doing such tasks, it is pursuing in one side to identify matters which is worthy to negotiate in formal meetings and in another side through convening informal discussions on RTAs, stressing on transparency issue with full participation of Memberships.

6.4 Updates:

Chairman of the Committee on RTA, special session is relentlessly consulting with the groups of members on two main topics, namely the review of the transparency mechanism (TM) for RTAs, and systemic issues.

6.4. i Transparency Mechanism(TM) in RTA as of today:

From the present text on transparency mechanism of RTA, it is anticipated that Negotiating Group on Rules would be capable to shape this mechanism a permanent by the conclusion of Doha Round. In advent of discussing the overall development on this matter, the issues where no significant convergences are yet to visible remained square bracketed with the reference of the texts as well as comments of chair of NGR. Easter documents on DDA issues published on 21 April 2011, the following updates have seen in TM procedures including the proposal for maintaining specific RTA database in this pursuit:

a. Regarding the early announcement, Members are close to convergence on informing jointly to the WTO Secretariat on their participation of negotiations which lead them in conclusion of an RTA and also agree to inform like where they are a party to newly signed RTA. In this case, such information will also be posted on the specific database for RTA

b. In the Notification obligation, Members are trying to have consensus on joint notification by all members of RTA with clarification of the provisions under which RTA are being notified either goods or services.

c. There are few changes are proposed to be finalized in procedure to enhance transparency stated in section C. In Article 6 it is stated that notified RTA shall normally be considered by the members within one year of notification. Article 8, timing of data submission for only developing countries is 20 weeks for notified Agreements.

d. Circulation of a Factual presentation and related other information are proposed not less than ten weeks instead of eight weeks so that Members could get in advance copy before fixed date of consideration. Related questions or comments made by the members on any RTA shall be communicated with parties via the WTO Secretariat minimum five weeks instead of four before the subsequent meeting; they shall be disseminated, along with responses, for the update of members minimum three days earlier of related meeting.

e. Joint responsibility lies on all Members of the RTA is proposed on any subsequent notification and reporting.

f. Regarding Entrusted Bodies for implementing the Mechanism in section E of the TM, Members are heavily engaged in the following two options to be finalized in Article 18: [73]

(i) "The Committee on Regional Trade Agreements (CRTA)" would be instructed to implement the Transparency Mechanism, OR

(ii) "The Committee on Regional Trade Agreements (CRTA)" as well as "the Committee on Trade and Development (CTD)" would be responsible for implementing such Mechanism.[74] Domain of CRTA shall be on those RTAs which will be notified on GATT Art. XXIV and GATS Art. V. All RTAs notified under para 2(C), Enabling clause would be reviewed in CTD. [The CTD shall also implement this Transparency Mechanism for RTAs where the goods part is notified under both Article XXIV of the GATT 1994 and paragraph 2(c) of the Enabling Clause.][75] Performing the activities as per this Mechanism, there shall be the CTD shall convene a dedicated session.

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[73] http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc;TN/RL/W/252, Art. 18

[74] http://www.wto.org/english/news_e/news06_e/job06_59rev5_e.doc).

[75] There is visible divergence on this square bracketed issue among developing and developed countries on current Negotiations under TM.

g. At any point of time, if any Member state thinks that information on any RTA is required to place before Members within this TM framework, that member could draw the attention of concerned bodies in WTO [entrusted to implement the Transparency Mechanism].[76]

h. "The WTO Secretariat shall maintain electronic database with updates on each RTAs. This database shall include relevant tariff and trade-related information, and give access to all written material related to announced or notified RTAs available at the WTO, this database shall be easily accessible to the public".[77]

i. This Decision shall apply regarding every RTA including which has already been notified under the relevant WTO transparency provisions and now also in force.[78]

j. Under the Reappraisal of the Mechanism, [79] the following texts are being negotiated: **"**[The ...][Members] shall [undertake an appraisal of] [review] the

[76]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc,TN/RL/W/252, Art. 20

[77]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc,TN/RL/W/252, Art. 21

[78]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc,TN/RL/W/252, Art. 22

[79]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc,TN/RL/W/252, Art. 23

operation of the Transparency Mechanism not more than [five] years after […],The results of the appraisal will be presented to the General Council. [It] [Members] may subsequently undertake appraisals of the Transparency Mechanism at intervals to be determined by the General Council."

k. In section 2 (e) and section 3 of ANNEX on Submission of Data by RTA Parties respectively for goods and services aspect of RTA, it is stated that parties should provide data related to import during immediate past three years of date of entry into force for which are available.[80]

6.4. ii Systemic Issues on RTA:

The coverage of the current negotiations on RTA systemic issues is much comprehensive. Priority issues [81] those were identified by the Members in 2004 and 2005 include the followings:

- Defining "substantially all the trade",
- Duration of transition time ,

[80]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc,TN/RL/W/252,Annex section 2(e) and 3.

[81] http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/systemic_issues_e.doc,Para 2 , TN/RL/W/253, page 1.

- Parameter to assess impacts of "other regulations of commerce" on third parties,
- Flexible provisions in favour of developing countries ,
- Maintaining coherence rules where parties are developing countries.

There are two issues is brought under comprehensive scrutiny: "substantially all the trade", and "special and differential treatment for developing countries".[82] In Para 4 of the Easter documents chair remarked that [on "substantially all the trade" (SAT), several proposals focused on the criteria for measuring SAT. Around a third of the proposals that have been made concerned the setting of a minimum benchmark for SAT, on the basis of bilateral trade, tariff lines, both, or a combined average of both. It was proposed that SAT should be measured both at entry into force and at the end of the transition period. Also, proposals were made with respect to a clarification of the qualitative assessment of SAT (such as the treatment of major sectors and tariff-rate quotas), as a necessary complement to any quantitative assessment.][83]

Chair further more commented that "Regarding Special and differential treatment, proposals suggested incorporation of additional flexibilities for developing

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[82]http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/systemic_issues_e.doc, Para 3 , Ibid, page 1.

[83] http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/systemic_issues_e.doc,Ibid, page 1.

countries in either Article XXIV of the GATT 1994, the Understanding on the Interpretation of Article XXIV of GATT 1994, and/or the Enabling Clause. A proposal made early in 2011 for amendments to Article XXIV of GATT 1994 has reactivated discussions for additional special and differential treatment in respect of agreements involving developing and developed countries, but sharply divergent views exist on the modifications being proposed." [84]

However, the discussion on this systemic issues are not getting impetus because of the proposal for making a post-Doha work programme on systemic issues by few developed Members. But with the developing countries concern on development issues of DDA, it is not possible to frame out any post Doha work programme in this regard.

Finally, no significant progress is achieved till now for having the divergent views of Members on these issues, perhaps it would be possible in future as per the work programme of the post 8th Ministerial Conference, which would be adopted during the Ministerial Conference in December 2011 for conclusion of all negotiating issues including the above mentioned areas under the DDA mandate.

Chapter VII

7.0 Quest for answering the thesis question:

[84] http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/systemic_issues_e.doc

From the above discussion, it is evident that by taking the opportunity of the exceptions provided under the Art. XXIV of GATT 1994 and Enabling Clause of 1979, there is a huge evolvement of RTA. There are number of reasons behind this surge according to the exponents of RTAs. They argue that RTAs assist countries step by step heading towards free trade globally and increase the altitude of contest progressively and pave the way for domestic industries for adjustment. Moreover, RTAs could be viable arrangement in dealing unpredictable "trade issues" like subsidies in agricultural as well as in services' trade. Diplomatic effort in regional level along with strong political will may work out with pragmatic results by breaking the deadlock prevailing in multilateral negotiations. In traditional, conceptual debate on "regionalism vs. multilateralism" it has been argued that RTAs, by moving generally at a faster pace than the MTS and sharing its goals, represent a way of strengthening the latter. [85,86]

Other policy experts articulate suspicion on probable gains from booming RTAs.

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[85] "This view is expressed in *Regionalism and the World Trading System*, WTO Secretariat, 1995."and see also TN/RL/W/8/Rev.1, First sentence of para 114, page 27

[86] "A study by the WTO Secretariat showed that there had been a definite trend toward broader as well as faster market access liberalisation of non-tariff measures in RTAs, in parallel to developments in the MTS (*Inventory of Non-Tariff Provisions in Regional Trade Agreements,* WT/REG/W/26, para. 32)." And see also TN/RL/W/8/Rev.1, First sentence of para 114, page 27

Some illustrates that with the using of the scope of Article XXIV and enabling clause, a complex surge of contending trade wellbeing thwart multilateral agreements. As RTAs facilitate preference systems which go beyond regional boundaries, some argue that such arrangement may guide to make a hostile environment and augmented retaliation. There is a chance of increasing the anti-dumping charges and with self contained RTA dispute settlement procedures might jeopardize the WTO legal potentials. In overlapping disputes jurisdictions, few factors play a vital role to chose the forum whether it would be WTO or PTA dispute settlement for getting redress of any diputes among the Members of both fora. According to Horlick and Pierola (2007) these are the types of measure that is being challenged, the applicable law, issues of standing, the time-frame of the proceedings, the remedies available, and the possibility of other countries participating in the dispute as third parties. For this reason, according to them "the cautious decision-making process to choose the appropriate forum requires weighing and balance of all these factors in accordance with the ultimate needs and objectives of the complainant." Since the interpretation of WTO agreements by the Panel and Appellate body ensures much certainty so according to Drahos (2005) proposes that where a dispute concerns a matter regulated under both the WTO and the PTA, it be brought to the WTO. In another concern on parallel or consecutive decision may be taken in both of theses fora , "one way of reducing the risks of this happening is

through stricter jurisdictional clauses in PTAs that preclude a dispute to the WTO over a matter regulated under the PTA"(Marceau and Wyatt, 2010).But there is limitation as well on the extent of such provisions whether it would bind the adjudicatory bodies of the WTO or not. Even with few concerns over these issues, PTA partners are still invoking WTO dispute settlement against each other which stands for 19 percent of the total disputes up to 2010. This reflects the predictability of the multilateral dispute settlement system governed by the WTO. In favour of this assertion, Porges (2010) offers some possible explanations for the continued use of WTO dispute settlement procedures that are partners in a PTA: the WTO's " familiar institutions" and "unblockable" dispute settlement procedures; the possibility to suspend MFN tariffs and other WTO obligations (particularly where the PTA's margin of preference is low); the broader pool of neutral panelists; the broader issue scope of the WTO; the possibility of forming alliances; access to assistance from the Advisory Centre on WTO; the multilateral surveillance process; the institutionalized framework for taking countermeasures; and the fact that the cost of WTO dispute settlement is included in a members' annual assessment , while in most PTAs the parties pay the panelist , or pay for the cost of the tribunal .[87] Although there is potential risks on undermining WTO

[87] World Trade Report 2011, The WTO and preferential trade agreements: From co-existence to coherence, page 177-178.

dispute settlement procedures by invoking PTAs self contained dispute settlement procedures, it is evident that Members of the PTAs are mostly dependent on WTO dispute settlement process in case of conflict arises in between them. Besides these, RTAs could divert full liberalisation in the multilateral aspects and benefiting members of the RTAs, may be unwilling to opening their markets if they get less returns from the multilateral system. However, conversely , the potential benefits to be gathered from the development and application of trade disciplines in individual RTAs or RTA networks have been highlighted , in particular their potential contribution to further multilateral liberalization.[88] There is wide recognition, however, that there is need to find ways to coordinate different approaches to particular problem areas or trade disciplines developed regionally, so that they interact positively with the progress of multilateral disciplines in those areas.[89]

With the divergent view like the above, we see the growth of regional arrangements is going ahead hands in hand with the ongoing multilateralism. Most of RTAs are notified for examination or consideration under the provision of Art. XXIV or Enabling Clause. From the GATT to WTO period there is significant over sighting

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[88] First sentence of para 119 in TN/RL/W/8/Rev.1, page 28, This reflects the "laboratory" role of RTAs.

[89] Second sentence of Para 119 in TN/RL/W/8/Rev.1,page 28

mechanism is going on. In the eyes of some observers, it is revealing that the Transparency Mechanism for Regional Trade Agreements is the only result of the Doha Round negotiations that has been allowed to go forward independently of the full results of the Round. [90] This suggests both that WTO members are aware of the need to understand better what regional trade agreements are about and that they continue to privilege a cautionary approach (Low, 2008). Others go even further and consider that the Transparency Mechanism advantageously substitutes the "old" review process (Mavroidis, 2010). With trade diversion reduced as a result of multilateral tariff reductions, along with empirical evidence suggesting that PTAs (*WTO Secretariat uses this term to covers RTAS*) can be welfare improving, and with PTAs covering a number of issues not covered by the WTO, existing rules are considered to be of limited relevance.[91] Mavroidis (2010) argues that the Transparency Mechanism should become the de jure new forum to discuss PTAs within the multilateral trading system.[92]As per

[90] Note that in December 2010 the WTO "General Council" adopted a "Transparency Mechanism" for "Preferential Trade Agreements" (WTO document WT/L/806), which extends the Transparency Mechanism for RTAs to non-reciprocal preferences.

[91] World Trade Report 2011, The WTO and preferential trade agreements: From co-existence to coherence, page 189.

[92] Evenett (2009) emphasizes that the WTO General Council Decision establishing the provisional Transparency Mechanism (WT/L/671) mentions "consideration" rather than "examining" or an "evaluation" of RTAs, which, in his view, suggests that the collective WTO membership does not want this new mechanism to have "teeth".

the provisional transparency mechanism now such monitoring system is developed a lot. However, for more pragmatic transparency mechanism, Members are trying to review the existing system and give it a permanent structure through reflecting the desired amendment as per the mandate enshrined in the Doha declaration.

To all intents and purposes, it is in progress to the better understanding of the Members regarding the overall scope and purposes of RTAs before its implementation. Since stipulated provisions are already in the Art. XXIV and its interpretations, these clear guidelines should be followed by the members while forming RTAs within the ambit of multilateral trading systems. Even if, regarding the legal implications of Article XXIV, Panel and Appellate Body have already given in depth analysis and directions on what would be the basis of invoking the provisions of Art. XXIV as an exception and under which criteria Members could exercise its provision as defense and in this case to whom burden of proof lies. In this context, the Turkey Textiles case is ground breaking one where we can find the spirit of compatibility of any RTAs with the provisions of WTO rules.

Currently under the Doha Mandate, negotiations are taking place to make clear and advance procedures and regulations within the purview of existing related

provisions of RTAs in WTO placing main spirit of development notion into the heart of this negotiation. And there is significant progress is visible in procedural aspects i.e reviewing the transparency mechanism and its permanent form may be finalized with the conclusion of DDA. But on systemic issue there is no convergence to proceed with discussion among the developed country Members, therefore limitation remains in overcoming the legal implications which are required to be negotiated among the Members for addressing the developing countries demand to introduce special and differential treatment provision in Article XXIV, clearly defined the substantially all trade term and providing more flexibilities for developing country partner in PTAs. Since the enabling clause was designed only to facilitate the trade among the developing countries and there is no reciprocity notion in that provision so no developing countries are willing to renegotiate this rather to ensure the preference given by the developed countries. For this reason , Developed countries pushing to have discussion on the post Doha work programme on these issues which is not supported by developing members. So it is pertinent to be within the mandate of Doha and make a positive step to forward the negotiation and make this Round a final conclusion in near future.

Therefore, from previous discussion, we observe that with some inherent limitations, Article XXIV is still serving to the world trading system among the regional, cross- regional trading partners and bridging the gap between the Members of WTO and

as well as between the members of South –South , North-South trading partners through formation of CU and FTA or any provisional Agreement leading to formation of either of two. Keeping this view, we see there is a great synergy in the policy cohesion and implementation of the provisions of the signed Agreements in order to be benefitted by eliminating or reducing "tariffs and other regulations of commerce" among partners and facilitating trade among them with the notion of not creating unnecessary barriers to third countries as it is done prior to the formation of such arrangement on the MFN basis. However, it is also noted that there is still scope to develop the rules and disciplines in Art. XXIV and if it is well negotiated by the negotiators under the current DDA mandate, it would bring the enormous trade off among the parties, in particular for developing countries to the RTAs vis-a–vis it would help the other Members to have clear and identical understanding on the provisions of RTAs and make a balanced strategy to gain trade off in international trade as well as from regional trade.

In conclusion, we can say that with some limitations Article XXIV is serving the WTO trading system as a guiding resort for forming RTAs as per the ambit of such exception clause and parties of such arrangements can reap the benefit of trade gains. But there still hope on the conclusion of Doha Development Round which could be reinvigorated, well reviewed this Article for formulating the provisions as per the expectations of two third majority of WTO Members i.e. developing countries by

incorporating the special and differential treatment, clear definition of substantially all trade, more flexibilities for countries like developing to be accommodated in Art. XXIV. With this pragmatic hope on the ongoing negotiations, we can say that even if there are some limitations in the context of the expectations of developing countries provisions related to the Art. XXIV will be the source of ensuring free, fair and liberal trade among the WTO members or other countries either the member of any Custom Unions or Free Trade Agreements bilateral, regional, or global perspective.

Conclusion:

From the chapter one to chapter seven, it is noted that with the sound historical background, RTAs are being evolved within the framework stipulated in Article XXIV and Enabling clauses. There is other provision in “General Agreement on Trade in Services (GATS)” but the issue related to this is not pertinent for this discussion. Although overall features of the RTAs should be ensuring the consistency with the WTO provisions, legal implications in this regard are being addressed properly through the Panel and Appellate Body of the WTO with in-depth explanation and concrete decision. Moreover, over sighting mechanism is being exercised with due caution and in line with the mandate of DDA, more clarifications on the rules and procedures of the existing provisional TM mechanism will be finalized for giving it permanent shape to ensure the broader expectations of the Membership to examining the PTAs under Article XXIV and enabling clause during examination by the Members through the entrusted bodies. Besides this, since developed countries are putting aside the systemic issues of RTAs for future negotiations, it is a significant limitation on discussion of the developing countries gains from this DDA negotiation on systemic issues related to PTAs . There is no impetus to discuss it now without having finalization of the post-Doha work programme advocated by the developed country Members. For this reason, we could say that for broader reflection of developing countries concern and interest, it

is crucial to negotiate systemic issues related to the Article XXIV pragmatically and incorporating the special and differential treatment, clear definition of substantially all trade, and more flexibility for countries like developing to be in Art. XXIV, so that existing loopholes could be overcome for better cohesion and coherence of PTAs with the WTO rules and procedures. However, in the present context, with some concurrent limitations of Article XXIV, it is serving the multilateral trading system a lot with some set of deviations among the Member states. Finally, it is anticipated that results of DDA negotiation could improve more significant disciplines of the Article XXIV in streamlining the regional and multilateral trading system with ensuring better cohesion and RTA within the ambit of Article XXIV would be complement multilateral trading system and thus become an instrumental for making building block in advancing the ongoing multilateral trade negotiations among the trading partners both regionally and globally.

Appendix-A

***[GATT Article XXIV:** Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas.*

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

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

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

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

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

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

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the

adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

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

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

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

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

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

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

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

8. For the purposes of this Agreement:

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

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

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

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

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

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

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

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.][93]

[93] http://www.wto.org/english/docs_e/legal_e/legal_e.htm

Appendix-B

[UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 , *Members, Having regard* to the provisions of Article XXIV of GATT 1994.

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

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

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

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

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

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;Hereby *agree* as follows:

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

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs

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

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

Article XXIV:6

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

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable,

negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

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

Review of Customs Unions and Free-Trade Areas

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

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

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

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

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

Dispute Settlement

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

Article XXIV:12

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

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

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.] [94]

[94] http://www.wto.org/english/docs_e/legal_e/legal_e.htm

Appendix-C

[DIFFERENTIAL AND MORE FAVOURABLE TREATMENTRECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES.

Decision of 28 November 1979 (L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

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[1]The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[2]It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[3]As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[1]

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

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[1]Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.][95]

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[95] http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm

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