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The Principle of Non-Discrimination in International Commercial Policy

by

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# The Principle of Non-Discrimination in International Commercial Policy

by

Hans R. Krämer

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The legal meaning of "non discrimination" in international trade

In an essay with the legal and institutional aspects of discrimination or non-discrimination in international trade, it is impossible to start without a clear definition of what is meant by the term discrimination. Since in common usage almost any behaviour dealing with camparable cases in different ways can be called discrimination, such a term is too vage a basis for legal considerations.

At first glance, different meanings of the same term seem to imply a high degree of confusion. This is, however, no speciality of the word "discrimination", nor is, in our particular case, the danger of confusion very great. Just because of the fact that in common usage so many forms of behaviour are called discrimination in favour of one party or against another a limited and clear legal definition is such a different thing that a mix-up can easily be avoided. Economists and politicians must only be warned that actions which they describe as discrimination - correct in their own terminology - need not have legal consequences. Only if they have to deal with forms of discrimination which have, at the same time, the characteristics of the legal definition, may they expect or induce legal consequences.

This leaves us with the task of finding a definition of the term discrimination which can be used as the basis for legal considerations. Fortunately, this does not necessitate a lengthy analysis, since there is a fairly broad consensus among international lawyers in this respect. We can start, then, from a generally accepted definition and adopt that of Hyder in his book about trade discrimination: "The term discrimination, though often used in various contexts in international law has seldom been defined. Notwithstanding, the fact that it has different contextual connotations, it is generally used to connote unequal treatment of equals either by the bestowal of favours or imposition of burdens. Therefore, whenever discrimination is referred to in the context of international law, there is an implicit assumption of its relation to a norm, or sets of norms prescribing equality of treat-

ment. In addition, discrimination generally carries with it the idea of unfairness".[1]

As we are concerned,here with the legal meaning of discrimination, or rather non-discrimination, we can safely begin with this characteristic: unequal treatment with regard to a norm which prescribes equal treatment. This underlines the above statement that actions, which in general discussion, especially in economic discussion, are called "discrimination" are not necessarily discrimination in the legal sense. Take, for instance, the case of some countries, non-members of the GATT, demanding most-favoured-nation treatment by the contracting parties of the General Agreement. Probably, they can claim unequal treatment, since the goods exported by them are subject to heavier customs than comparable goods which are supplied by member states of the GATT. Nevertheless, this is not discrimination in the legal sense for there is no legal norm comelling the participating parties of the GATT to give equal treatment to non-members.

In an economic sense, on the other hand, one may speak of discrimination if there is, in fact, unequal treatment with regard to customs duties. At least, this is often done, rather carelessly, I think, for it is seldom that somebody bothers to underline that such discrimination is nothing more than unequal treatment by a country or group of countries with regard to customs duties. A differentiation in this limited field might, however, be justified on account of inequalities in other respects, and should, therefore, not be condemned off-hand. This must be borne in mind even when talking about discrimination in the broad sense described above. Another claim of discrimination may underline this point: non-members of the EEC are known to complain of discrimination almost as long as the EEC exists. True, their exports have to bear the charges laid down in the Common External Tariff of the Community while exports by one EEC-country to another are imported duty-free. Whoever calls this unequal treatment discrimination is free to do so, but it is certainly not discrimination

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[1] Hyder, Equality of Treatment and Trade Discrimination in International Law, The Hague 1968, p.14.

in the legal sense. One may, as EEC officials have often done, point to inequalities in other fields, like the limitations of sovereignty accepted by the member states of the Community, or the "solidarity" with regard to common policies or common funds. States which do not accept the same obligations and are, therefore, not "equal" in this respect should not complain of inequalities with regard to customs treatment.

Although these considerations cannot and maybe should not prevent anybody calling this unequal treatment discrimination in the broad sense, it should be clear that the judgement ought to be modified, if a legal judgement is implied by the usage of the term. If used in a broad sense, the term "discrimination" can serve no other purpose than to state a fact with no judgement intended.

Legally, we find that in our case the norm obliging the EEC to equal treatment in this respect is missing. To be sure, among the contracting parties of the General Agreement, EEC-countries included, Article I GATT exists, prescribing non-discrimination in the form of most-favoured-nation treatment. With regard to the relations between the EEC-states and third countries, however, this norm does not apply on account of the exception in favour of customs unions and free-trade areas, which is to be found in Article XXIV GATT. This statement needs, of course, to be proved and this will be done in a later section. For the moment it was only meant to serve as an example: there is no discrimination in the legal sense even in case of unequal treatment, and in spite of a norm that prohibits unequal treatment, if an exception from the norm does apply.

From these observations, it follows that discrimination in the legal sense can only be established if

1. unequal treatment with regard to certain burdens, favours, measures etc. is ascertained,
2. a norm exists which obliges the states bound by it to grant equal treatment to the partner states concerned,

3. that norm is applicable to the case in question - and is not ruled out by an exception.

Discrimination in this sense can result from different types of unequal treatment, one of them dealing with nationals on the one hand and foreigners on the other, the second dealing with foreigners of different nationalities. Unequal treatment of the first type means that nationals of the country in question are treated in certain differently (as a rule better) than nationals of other countries. With regard to trade this different treatment usually takes the form of charges (customs duties), reglementations, formalities, prohibitions, or restrictions which are applied to imported goods or services but not to goods and services produced at home. This sort of discrimination, although almost generally practised will not be treated here, since the subject of this study is discrimination in international trade alone, and not in comparison to national trade. So, cases in which "national treatment" is claimed or agreed upon, are excluded. This paper only deals with discrimination between foreigners of different nationalities.

Development and contents of the principle of non-discrimination

Legally, on obligation not to discriminate between different countries in international trade can only exist, if there is a norm to this effect. Such norms are, indeed, to be found in public international law. They are contained in several bilateral treaties as well as in some multilateral treaties. These treaties are the only sources of the legal principle of non-discrimination. An international custom, as evidence of a general practice accepted as law[1] to this effect does not exist.[2] Therefore, only those states bound by treaty obligations have the legal duty to refrain from discriminating between partners with regard to whom they have undertaken to do so. These countries are, however, numerous since - apart

[1] Art.38 of the Statute of the International Conct. of Justice.

[2] See the detailed and well documented discussion of this subject by Kewenig, Der Grundsatz der Nichtdiskriminierung in Völkerrecht der internationalen Handelsbeziehungen, Vol. 1, Bonn 1972, Ch.II.

from partner states to other agreements - the number of contracting parties to the GATT alone has reached eighty-one, plus fifteen countries which apply the General Agreement on a de facto basis plus Tunisia which has acceded provisionally.[1]

Historically, the application of the principle of non-discrimination in the form of a most-favoured-nation clause is first recorded in the year 1417.[2] Its extensive use as a safeguard against discrimination in international treaties, however, dates back only a little more than a hundred years. In 1860 England and France concluded the so-called Cobden-Chevalier Treaty by which each partner undertook to give the other the most favourable conditions on the imports from that country, compared with the imports from any other country.

This obligation was valid with regard to trading conditions contained in agreements which already existed prior to the Cobden-Chevalier Treaty, but was to be applied equally with regard to future agreements. So the treaty of 1860 laid down the essentials of most-favoured-nation treatment in practically the same form as the GATT has done in our time:[3] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or distinated for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

This sentence is, of course, a multilateral version of the most-favoured-nation (MFN) clause, which can easily be translated into a bilateral version comparable to the contents of the Cobden-Chevalier Treaty. The further

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1 The position in December 1972. GATT Basic Instruments and Selected Documents (BISD), 19th Suppl., Geneva 1973, p. VII.

2 See Jackson, World Trade and the Law of GATT, Indianapolis 1969, p.249 with extensive references.

3 Art. I para. 1 GATT.

elaboration of Article I GATT is, however, for the most part, a result of the experiences made in the practice of international trade policy since the days of the second half of the nineteenth century. According to the General Agreement, MFN treatment is to be applied[1]

with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation,
with respect to charges imposed on the international transfer of payment for imports or exports,
with respect to the method of levying such duties and charges,
with respect to all rules and formalities in connection with importation and exportation,
with respect to internal taxes,
and with respect to laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of imported products.

No such sophisticated enumeration of possible objects of discrimination was needed in the 1860s. In those days, the predominant tool, in fact practically the only tool, the states used in their international trade policies, was the levying and the variation of customs duties. Due to the gold standard, reglementations with regard to the transfer of payments were not needed, and the other barriers to trade either did not yet exist or were of little importance in comparision to customs duties. This state of affairs, i.e. the gold standard in monetary policy and the predominance of customs charges as instruments of international trade policy remained the same up to the First World War. During the period from 1860 to 1914, the MFN clause became an almost universally accepted part of international commercial treaties. Although the time for international organizations and multilateral commercial treaties had not yet come, this general application of the MFN clause led to a situation in which the system of international trade was, in practice, governed by the principle of non-discrimination. This means, that during the years preceeding the First World War, there existed not only a rather uncomplicated international

[1] Ibid., and Art. III GATT paras. 2 and 4.

monetary system but also a comparably simple or clear system of international trade. Customs tariffs being the principale instrument of the states and this instrument being used without discrimination on all products imported from all major trading nations meant that importers and exporters alike had more or less the same chances irrespective of the country of origin of the goods in question.

Conditions for MFN treatment prior to World War One

Whoever, on this account, tends to regard the period from 1860 to 1914 as a sort of golden age for international trade should, however, remember the following pre-conditions for this impression:

1. There was no question of a "national treatment", of free trade. Customs duties were applied, for fiscal as well as for protective purposes. This means, even in that "golden age", discrimination existed. Although, generally, states gave equal treatment to products imported from different countries, they certainly discriminated against imports in favour of domestic products.

2. The state of non-discrimination with regard to imports was limited to customs charges. That this, practically, meant non-discrimination in international trade, reflected the fact that international trade policy was in a way still "underdeveloped". The many instruments, measures and tricks apart from tariff variations which are now known were not yet in use. One may regret that international trade policy has lost this state of innocence, but it has done so, and now more and new problems must be taken into account.

3. Besides, even in the period before World War One and even when considering tariff policy, states were not totally innocent. They used to differentiate tariffs in order to circumvent the obligation not to discriminate between imports from different trading partners. While formally honouring this obligation, they found ways to split tariffs and to define the new tariff headings in a way that they described only products from countries that should receive favoured (although at the same time, most-favoured) nation treatment. So, in a much-cited commercial treaty with Switzerland of April 12th 1904, Germany wanted to favour imports of Swiss cattle. In order to

make this possible in spite of the German obligation to give her other trading partners MFN treatment, the tariff position was split and a new heading was found which only fitted mountain, especially Swiss cattle: large dapple mountain cattle or brown cattle reared at least 300 metres above sea level and having a grazing period of at least one month each year at more than 800 metres above sea level.

4. The international trading community was much more uniform than it is today. It was composed of the European and American nations, some of which had colonies or protectorates, but which, with regard to international trade, were on a more or less equal footing. Protecting the interest of less developed countries was no problem for the international community. The nations now known as LDCs were then, as colonies, parts of separate systems dominated by an industrially developed state which was responsible for their international relations or they were, although industrially not fully developed, producers of primary or agricultural goods, and had as such comparative advantages in these fields which sufficed to make them on the whole equally privileged partners in international trade.

Points 1 and 3 need no longer concern us here. They have remained unchanged to a large extent: discrimination is still not a subject discussed in relation to national producers, and the splitting of tariff positions in order to favour imports from certain trading partners without violating the MFN obligation is still in use. On the other hand, the situation with regard to points 2 and 3 has changed dramatically.

As far as point 2 is concerned, the art of international trade policy has been "refined" since 1914. All those subjects cited in Article 1 of the General Agreement - apart from the age-old customs duties - are tools which were either not yet used before the First World War or were insignificant if compared with tariffs. Now these non-tariff or para-tariff barriers to international trade have become so prominent that the discussion about non-discrimination cannot be limited to tariffs but must embrace them, too.

Regarding point 4, one is forced to notice that the international trading community has changed enormously since 1914. There are no longer a few dozen

partners which consider themselves, and are considered, as equal, and which apply the same standards to their dealings and agreements with each other. Now we find one group of nations which are industrialized or regarded as industrialized, and either called market economies or capitalist economies. Another group of countries is also industrialized, but their economies are either called centrally planned or socialist. And a third group is called developing countries, some of them in a rather advanced stage of industrialization others with no industry at all, but all of them with claims to privileges in their dealings with the industrialized groups.

MFN treatment and the modern scene in monetary and commercial policy

These changes: the appearance of new tools of international trade policy and the differentiation of the members of the international trading systems according to their methods of organizing their economies and of their stage of industrialization, are the main reasons why the simple system of 1913 no longer exists, and why the most-favoured-nation clause in the old sense has lost its importance and, perhaps, its raison d'être.

The first event to shake the old order was the invention of instruments other than tariffs in the international trade policy. There is no need here to trace this development in all its details. It may suffice to call special attention to exchange controls and quantitative restrictions of imports, leaving aside - at least for the moment - restrictions to exports and other non-tariff barriers. As is well known, exchange controls and quantitative restrictions of imports were the main instruments used during the inter-war period to check balance of payments difficulties. They were caused by the downfall of the old monetary system, the gold standard, and they resulted in the downfall of the old trading system, the main characteristic of which was the MFN treatment.

This was certainly a remarkable event in the history of non-discrimination in international trade. Therefore, some details must be given, not only for historical reasons but also as an experience to be taken into account in further deliberations on this topic.

The "localization" in time is easy: the gold standard can be regarded as being broken-down in the late twenties, when the United Kingdom gave up her attempts to return to the pre-war model. The introduction of exchange controls followed when the partner states of the monetary system "discovered" that they had only scarce reserves of foreign exchange and that they had to economize on them, using them only to pay for "essentials", banning "luxury imports". This meant, of course, that imports had to be reconciled with the availability of foreign exchanges, hence the invention of import restrictions which were qualitatively limited: a fixed amount of US dollars was available for imports of specific goods.

As can easily be seen, this system did not yet mean the break-down of most-favoured-nation treatment. If imports were only limited by the scarcity of an internationally exchangeable currency - such as the US dollar or the pound sterling - MFN treatment was still possible. For US dollars, one could import, say, steel-forming machinery from every country able to supply such goods. But internationally exchangeable currency, became a scarce good, too. It had to be reserved for imports which could not be had from other sources i.e. which could not be obtained in exchange for home-made products. This was the "great invention" of the early thirties: against a certain amount of, say, French exports in automobiles was exchanged an equal amount of, say, Yugoslavien exports of bauxite. In order to realize this transaction, only a common denomination was needed, which could easily be found in one of the generally traded currencies, i.e. US dollars or pounds sterling.

It must be stressed, however, that these currencies had no other purpose than to serve as a common denominator. Payment was not envisaged in either of these currencies. What was intended was a simple barter of automobiles against bauxite, with only the value of both commodities determined by either dollars or pounds. And, on account of this auxiliary role of either currency, the end of most-favoured-nation treatment can be clearly recognized: if only a barter agreement between France and Yugoslavia was intended, and other currencies were no more than a common denominator, there was no room for MFN treatment. Neither could France import bauxite from Hungary on this basis, nor could Yugoslavia import automobiles from Germany.

This was exactly what happened during the Depression: the inventions of new tools in international trade (foreign exchange controls and quantitative restrictions on international trade) served to bring back a situation which many people regarded as a relict from stone age times, i.e. that of barter between two countries with a fixed amount of goods which the one could supply and the other could use and vice versa. These barter agreements were, of course, rather limited in scope, and it is no accident, therefore, that international trade declined dramatically during the third and fourth decades of this century.

Revival of MFN treatment after the Second World War

In order to revise this tendency and to promote the international division of labour to the advantages of every nation, the abolishment of discrimination in international trade was envisaged. Champions of this idea were the United States, whose Secretary of State, Cordell Hull, had, from 1934 onwards fought for the elimination of most barriers to international trade. At the end of World War Two she was in a unique position: being creditor of almost the whole world, one of the victorious nations, and the state with the largest resources and the strongest productive capacities of the world, the US could impress on the war-devasted countries of Europe her ideas of the future world trading order. One of those, and probably the most significant one, was the idea of most-favoured-nation treatment.

MFN treatment in the US proposals was, moreover, something different from MFN treatment in former times. Then the clause was agreed to by two parties to a commercial treaty. In other words most-favoured-nation treatment was arranged bilaterally. It had the purpose of securing for one partner of the agreement the most favourable treatment with regard to trade which the other partner extended to any other country, and vice versa.

Now, in the talks about a new order for international trade after the war, the US proposed multilateral MFN treatment, within the framework of an international organization, the International Trade Organization (ITO). While the ITO did not get started, the idea survived. Mulitlateral MFN treatment became embodied in

the General Agreement, which for most practical purposes has the characteristics of an international organization.

The advantage of a multilaterally accepted obligation to give MFN treatment as compared with the traditional bilateral kind, lies primarily in the much more permanently binding nature of the former. Bilateral agreements can be ended or changed simply by consensus between the two partner states. The more parties there are to an international treaty, the more difficult it becomes to reach an agreement to change that treaty. This simple pschological experience can, to a large extent, be applied to the case in question. This remains true although at a closer look, and if the details are taken into consideration, the actual operation and the effect of the GATT most-favoured-nation clause are rather complicated. There are, on the one hand, the rules and procedures used in negotiations among the contracting parties which influence the effect of the clause to a large extent.

Interpretation of Art. I para. 1 GATT

As has become evident during the history of GATT,[1] the following words or phrases in Art.I para. 1 GATT especially need interpretation or explanation, or should be emphasized:

(a) "Any advantage, favour, privilege or immunity",
(b) "Any product",
(c) "Originating in",
(d) "Any other country",
(e) "Unconditionally",
(f) "Like product".

(a) The fact that the contracting parties have under the MFN clause to extend "any advangate, favour, privilege or immunity" to the other partner states of

[1] For details see especially Jackson, op.cit., with references.

the General Agreement is to be interpreted extensively. This issue came up in a dispute between India and Pakistan, when India did not give excise tax rebates for exports to Pakistan although such rebates were given for exports to other contracting parties. According to a ruling by the chairman, which was accepted by the parties, this different treatment with regard to the tax rebates already constituted a discrimination prohibited by Art. I para. 1 GATT.[1]

(b) In the General Agreement, the phrase "any product" is used deliberately. No objects other than products are included by the GATT and its most-favoured-nation clause, especially no invisibles like the rights of businessmen etc.

(c) The phrase "originating in" refers to the thorny question of the origin of goods which are to be given MFN treatment. This is a difficult matter, especially if a product is composed of parts originating in different countries. What percentage of the value of the final good should come from the exporting country in order for it to qualify as originating in that country? Or by which process can inputs from another country be transformed into goods which are to be regarded as originating in the exporting country? Since origin in a partner state is a precondition for the agreed treatment, i.e. MFN treatment a solution to the problem of origin is of great importance. The EEC and the EFTA have laid down rules which appear to be working alright. This is not the case for the GATT, although the problem has been under consideration since the early fifties.[2]

(d) "Any other country" in Art.I para. 1 really means any other country, including states which are not parties to the General Agreement. If a partner state of the GATT gives an advantage, favour etc. to a non-member, all contracting parties are entitled to the same treatment.

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[1] GATT, BISD vol. 2, p.12.

[2] A detailed description of the work is given in Jackson, op.cit., § 17.8.

This seems to be rather self-evident, if seen in the light of the former experience with bilateral MFN clauses. What use could such a clause have if it did not refer to the treatment given to products of third countries ? But there may be some reason to act differently if the MFN clause is embodied in a multilateral treaty. At least the suggestion was made that the benefits of the General Agreement should be reserved to members only.

(e) The obligation to treat the products of the contracting parties "unconditionally" on a most-favoured-nation basis needs no interpretation. This quality of the clause should be expressly noted, however, since in the reform discussion, the idea that MFN treatment might only be given conditionally may play a role.

(f) According to Jackson[1] the phrase which has presented most difficulties of interpretation is that of "like products", which in some other articles of the GATT returns in different words: "like commodity",[2] "like merchandise",[3] "like or competitive products".[4] As far as products are concerned which fall under the same tariff headings in the countries concerned, it can scarcely be questioned that they are like products. But the reverse is not necessarily true. Small differences in tariff headings may only conceal an almost complete "likeness". Indeed, as already mentioned, tariff headings are sometimes split with the purpose of creating more or less artificial differences just in order to circumvent the obligation to give MFN treatment.

One of the GATT cases in this connection concerns a Norwegian complaint that Germany treated sprats, herrings and sardines differently, preferring sardines, and thereby harming Norway which exported sprats and herrings. The case could be solved without giving an exact definition of the phrase "like products". The panel was not even forced to decide "whether the preparations of clupea

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[1] Ibid., § 11.4.

[2] Art. VI § 7 GATT.

[3] Art. VII § 2 GATT.

[4] Art. XIX § 1 GATT.

pilchardus, clupea sprattus and clupea harengus had to be generally treated as like products." Norway and the Federal Republic reached a settlement and relieved the panel of the burden of decision, an outcome which, by the way, sheds some light on GATT procedure rather than finding general decisions their principal object is conciliation between the parties of the actual case.

As a conclusion of this survey of some phrases contained in the MFN clause of Art. I para. 1 GATT it can be noted that:

- no clear definition has, as yet, been given for "originating in" or of "like products",

- "any advantage, favour, privilege or immunity" is to be interpreted extensively,
- "any other country" includes states which are not parties to the General Agreement,
- the clause applies only to products and not to "invisibles",
- most-favoured-nation treatment is to be given unconditionally.

Multilaterally versus bilaterally agreed MFN treatment

With regard to the merits of the multilateral MFN clause in the GATT, it was noted above that it is, in practice, more stable than a bilaterally agreed clause to the same effect. But before going into some detail, one advantage should be noted which does not need a long discussion but is, nevertheless, rather important: while bilateral agreements tend to bring about a complicated network of differing duty rates depending on the treaty obligations of all members of the international community, a multilateral agreement of the GATT kind to which all major trading nations adhere, is bound to minimize confusion as to which tariff of which country is applicable to which case. Although there may still be a more-column tariff, the column showing MFN rates will be the one generally in use.

This not only makes things easier for exports and imports who obtain a more solid basis for their calculations, thus lowering one of the para-tariff barriers to trade. A clear picture with regard to the valid tariffs in each case,

moreover, lightens the tasks of the customs authorities. It helps to avoid faulty customs charges, and it helps the other side to detect such faulty charges and to start complaining, which, as will be shown later, is also made easier and more effective within a multilateral framework.

Let us now turn to the argument that MFN treatment agree to in the multilateral context of the GATT is more stable than would be the case if MFN treatment were arranged bilaterally. Of course, bilateral treaties to this effect can have as long a duration as the parties wish, and this may be a very long time indeed. But, and this is the point, there is very little ground for hesitation if both partners want to end or change the agreement. In other words: they are practically complete masters of these special rules of international law they have created.

Moreover, one must bear in mind that violations of international obligations do occur, and that they occur more frequently if the fear of retaliation is not great. Crudely stated, the tendency to violate international obligations is negatively correlated with the fear of harmful reactions. If such reactions need only be expected from one partner to an agreement, therefore, this tendency may be stronger than in a case involving more partners.

Similar considerations can be applied if there is no question of a breach of treaty obligations, but of "avoiding" them by means of escape clauses contained in the treaty, or by recourse to the clausula rebus sic stantibus. Normally, if a state takes in an escape clause or in exceptional rules provided for in the treaty or in international law, the other party is entitled to some specified counter measures. So, escape action, although quite legal, is, as a rule, also connected with reactions which are undesirable for the state using the escape clause. Again, the harmful effects of such reactions tend to increase with the number of the partner states of the treaty concerned.

In particular in: Multilaterally agreed MFN treatment as an advantage to less developed countries

One further point must be added. It can be assumed that breaches of treaty obligations and recourse to escape clauses are normally more easily resorted to by economically strong countries if they have to do with smaller partners.

Retaliation or agreed counter measures by such partners will not have a strong effect, simply because the influence of an economically less important partner on the economy of the other is not great. If this is so, and the danger of counter measures can practically be ignored, the temptation to have recourse to either legal or illegal exceptions from a treaty obligation may be greater than in a case in which reactions of an economically strong partner are to be feared.

This being the case, especially smaller countries tend to gain from a multilateralization of the most-favoured-nation clause. The effect just described of their economic weakness vanishes within the multilateral framework. This means that by multilateralization, small and economically weak nations receive some protection against violations of treaty obligations or against frivolous recourse to escape clauses by their stronger partners.

Such result is not only to be expected because of this constellation. There is a further characteristic which works against deviations from MFN treatment, that is the fact that the multilateralization of the MFN clause has taken place within an international organization the GATT. There is no need here to discuss this character of GATT in detail. For our purpose, it is sufficient to state that the GATT has the institutional machinery for a discussion of all issues connected with the agreement. It is, particularly, prepared to discuss complaints and to examine the facts submitted by the parties concerned.

Under these circumstances, every member state, however, small or weak it may be, has the right to present its case to the contracting parties and instigate a complaints procedure. The case may be investigated by a working party. Every member state may raise its voice in assistance to the state which claims to have been harmed. And there may be, although this has not happened very often, a decision to the effect that the accused party should stop violating its obligations under the General Agreement. More often, there is some form of conciliation.

One further point in favour of the multilateral solution must be added. It has nothing to do with the prospects of complaints by smaller countries against economically stronger contracting parties. On the contrary: in the multilateral context, economically weak countries may gain just because their part in international trade is small. This is a consequence of the normal procedure used in negotiations about trade (especially tariff) concessions.

In these negotiations, the countries which are principal suppliers of a product start by submitting lists of requests for tariff reductions. These requests may be answered by offers of such reductions by any country willing to do so. However, of special interest are naturally the offers of those countries or groups of countries which import great quantities of the product in question. So, the outcome of the negotiations largely depends on the actions and reactions of the economically stronger contracting parties.[1] But if concessions are finally reached, they are, because of the obligation to treat any contracting party on an MFN basis, automatically extended to all member states, to the weak ones as well, which may have had nothing to offer in return.

To be sure, less developed countries were complaining at the end of the Kennedy-Round that the concessions worked out in the GATT-round concerned, overwhelmingly, products of particular interest to the industrialized nations, while the products which are the primary export articles of the LDCs had been neglected. A comparision of percentages of concessions shows that this observation is correct. Moreover, during the preparations of the Kennedy-Round it was expressly intended to lower the tariffs on goods exchanged between the industrialized states to a particularly high degree. The most obvious example is the proposal of President Kennedy to abolish the tariffs altogether on products which are traded at a rate of 80 p.c. between the EEC and the USA.

Nevertheless, this argument does not anihilate the advantages of multilateral MFN treatment to small countries as compared with bilateral MFN treatment. For

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[1] For a clear description of the rather complicated procedure see Curzon, op. cit., p.72.

during the Kennedy-Round, at least a number of tariff concessions were negotiated which were also useful to the LDCs. Other concessions may become useful to some of them in the near future. In contrast, there is little chance of concessions without reciprocity being gained by the LDCs by means of bilateral negotiations. So, even if the complaints cited are founded, they do not contradict the conclusion that the multilateral method is helpful for the weak contracting parties.

Some modifications

These observations seem to imply rather clearly that multilaterally agreed MFN treatment is a device that furthers the stability and the extent of MFN treatment over and above the state that can normally be reached by means of a bilateral agreement. While, in my opinion, this is true, the point should not be overemphasized. Although the effects of retaliation by a greater number of partners do more harm than those of a single and possibly economically weak one, it is by no means sure that this sort of collective retaliation will occur.

First, it can legally only occur if every one of the contracting parties concerned is harmed by the measures of the original "culprit". Only member states which have been harmed by violation of the Agreement or by (legally sanctioned) protective ("escape") measures are entitled to retaliation under the GATT. And they are entitled only under circumstances specifically laid down by the Agreement. And only one form of retaliation is allowed: the withdrawal of "substantially equivalent concessions".

From this nature of the legally allowed counter measures it follows, secondly that they are latently dangerous to apply. As Gerard Curzon vividly put it: "... owing to the action of the most-favoured-nation clause, GATT could consequently be unravelled like knitting."[1]

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[1] Curzon, op. cit., p.109.

For, the withdrawal of concessions to one country is likely to harm not only the country which it is intended to "punish", but other as well. These, in turn, being harmed, are entitled to withdraw concessions, and so on.

If such a "chain reaction" can be feared, it is small wonder that the weapon of retaliation by withdrawal of concessions is applied only hesitatingly. This, again, means that the arguments in favour of multilateral obligations to give MFN treatment must be taken cum grano salis. But with this modification, they remain valid.

Another point which may water-down the enthusiasm for multilateral agreements on MFN treatment must be mentioned: to arrange for MFN treatment with one single state is a thing the consequences of which can be estimated fairly well. Moreover, if only two partners negotiate with each other, it is not too difficult to match the respective interests. If, on the other hand, giving most-favoured-nation treatment to one trading partner means giving the same treatment to nearly a hundred nations, there might be some reluctance to ease conditions erga omnes. Therefore, a potential willingness to lower tariff or non-tariff barriers vis à vis one or some particular countries might be given up on account of the spread-effect connected with the GATT version of MFN treatment.

I think that after these general considerations the balance is still in favour of the multilateral version of MFN treatment. But the case now must be considered where one country, contracting party to the GATT, is to gain from multilaterally agreed concessions, but is not willing to make equivalent concessions in return. If this is a small country, possibly not yet fully industrialized, this may be tolerated, or even accepted as a form of assistance to further economic development. If, however, an industrialized country is privileged by multilateral MFN concessions without giving comparable advantages to the other GATT partners, such a reward for non-cooperation will probably be resented, in spite of economic reasoning according to which the country which lowers tariffs is going to gain from this transaction,

This being so, a reluctance might probably result to lower tariffs or non-tariff barriers erga omnes, and, since the multilateral General Agreement leaves no room for bilateral concessions to partners willing to compensate, there might be a reluctance to liberalize at all. Still, in spite of this further disadvantage, I am in favour of the multilateral solution - particulary since it helps small and / or less developed countries. Taking notice of the exceptions to Ar t.I para 1 GATT may, however, tip the balance in the other direction. Or is the opposite true ?

Exceptions to most-favoured-nation treatment according to the GATT

One attractive method to classify the exceptions to the rules of General Agreement has been suggested by John H. Jackson: 1. universal exceptions, 2. particular exceptions and 3. violations of the GATT that have become tacit exceptions from the obligation to grant MFN treatment.[1] Jackson has also pointed out another classification according to whether the recourse to the exception requires (a) prior approval of the contracting parties,[2] (b) notification of the GATT, or (c) neither approval nor notification.

Both classifications refer to important differences either in the rules or in the procedures which are essential for the understanding of GATT practice and also with regard to the reform discussion: it can make a big difference whether general or limited exceptions are provided for particular situations or whether an action is subject to prior approval of the contracting parties or can be resorted to unilaterally.

Universal exceptions can include exceptions to the most-favoured-nation principle as well. For instance, according to Article XXV, the "Contracting Parties may waive an obligation imposed upon a contracting party by this agreement.[3]

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[1] Jackson, op.cit., p.536.

[2] In the General Agreement the contracting parties, if they act as an institution of the GATT are termed as CONTRACTING PARTIES. It will suffice here to use "Contracting Parties."

[3] Art. XXV para. 5 GATT.

This general authority of the Contracting Parties can be used with regard to any obligation of the General Agreement. Naturally, this includes the obligation to grant MFN treatment to the other member states. In fact, the Contracting Parties have already used the waiver authority for this purpose, the most famous example being the waiver authorizing the GATT parties to grant general tariff preferences to less developed countries.

Another rule of the GATT according to which the Contracting Parties may "authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstance", is Article XXIII para. 2. Here, again, the application of the MFN principle might be the one which is suspended.

This does not mean, however, that every universal exception implies an exception to the MFN principle. On the contrary: those universal exceptions which are truly universal, i.e. which concern the whole bundle of GATT obligations at the same time are, as a rule, to be resorted to undiscriminatingly. Take, for instance, the case of a contracting party which is "in the early stages of development"[1] and is entitled to a "specific measure affecting imports which it proposes to introduce in order to remedy" its difficulties.[2] Such a measure must observe the obligation to treat all contracting parties alike, since "nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Article I, II and XIII of this Agreement."[3]

Or, if we look at the exception from the general elimination of quantitative restrictions,[4] we again find a reference to the obligation not to discriminate: "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any contracting party or on the

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[1] Art. XVIII para. 1 GATT.

[2] Art. XVIII para.14 GATT.

[3] Art. XVIII para.20 GATT.

[4] Art. XI GATT.

exportation of any product destined to the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."[1]

As a further "universal" exception may be mentioned emergency action according to article XIX. Here, no express reference to the MFN clause is given. There seems, however, to be a consensus that emergency action should be non-discriminatory. Jackson for one is quite sure of that and cites an Interpretative Note in the Havanna Charter: "It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country, and that such action should avoid to the fullest extent possible, injury to other supplying Member countries."[2]

Preferences admitted under Article I para.1 GATT

Turning now to the "special" exceptions, expressly allowing departures from MFN treatment, it is noted that already Article I of the General Agreement, which lays down the MFN clause, tolerates exceptions to this obligation. These exceptions are due to practices already existing at the time when the GATT was concluded. The most important of them are the Commonwealth preferences to which the partners of the Commonwealth had agreed at the Conference of Ottawa in 1932.

It is hardly surprising that the countries concerned[3] wanted to retain their privileged positions on their respective markets, these being apart from economic advantages, one of the not very numerous legal ties holding the Commonwealth together. So they - and especially the United Kingdom - were not prepared to accede to an agreement which abolished the Ottawa-preferences, and these were legalized as an exception to Article I para. 1 GATT.

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[1] Art. XIII para. 1 GATT.

[2] Jackson, op.cit., p.564, n.5.

[3] They are listed in Annex A to the GATT.

This was done in spite of strong US opposition, because the United States acted as they also did in later times as an advocat of a "pure" multilateral MFN clause as the basis ('conerstone') of a sound order of international trade. This did not prevent the US, however, from claiming and achieving exceptions for her own privileged relations to the Philippines, to the dependent territories of the USA, and to Cuba.

Other preference systems allowed by Article I para. 2 and specified by Annexes to the Agreement concern the territories of the French Union, the Benelux Customs Union and the "neighbouring countries" Argentina/Bolivia/Peru and Syria/Lebanon/Palestine/Transjordan.

Looking at the cases mentioned, it becomes clear that the importance of the preference systems tolerated by Article I para.2 GATT has diminished either because they were given up altogether, as in the case of the US-Cuba relations or the "neighbourhood" of Syria/Lebanon/Palestine/Transjordan, or they have been or are about to be included into other preference systems. This is especially true for the French, Benelux and, now for the Commonwealth system which were or are brought into the EEC system, thereby changing from Article I para.1 preferences to preferences falling under Article XXIV or Article XXV of the General Agreement. It seems, therefore, unnecessary to discuss any special problems of the Article I exceptions.[1]

Customs unions and free trade areas

Undoubtedly, the most important exception from the MFN clause is the provision sanctioning the formation of customs unions and free trade areas, and the conclusion of interim agreements intended to lead to one of the two forms of regional integration. Here the development which has taken place since the conclusion of the General Agreement was, apparently, not foreseen. While in the preference

[1] Such as the margin of preferences allowed. For detailed discussions see Jackson op.cit., p.265, Curzon, op.cit., p.65, and Karin Kock, International Trade Policy and the GATT 1947-1967, Stockholm 1969, p. 111.

provisions of Article I para. 2 just discussed, the initial agitation has in the course of time subsided because the object continually lost in importance, the opposite has been true with regard to the provisions on regional integration. The original intention of Article XXIV paras. 4 to 10 seems to have been to facilitate the close cooperation of a few neighbouring countries primarily with the aim of furthering economic development of LDCs, and it looks as if the actual outcome of the integration movement has been a genuine surprise, not only to the drafters of the General Agreement.

The contents of Article XXIV is - like that of many other privisions of the GATT - rather complicated. Principally it lays down some general basic requirements and describes the characteristics of the regional arrangements which are sanctioned by the General Agreement.

The first condition listed in Article XXIV for the "GATT-conformity" of a customs union or a free trade area is that its purpose should be "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."[1]

However, there is and there will probably be no regional arrangement where the parties claim that their primary intention is to hinder the trade with other countries. But a statement to the contrary alone is certainly not a very solid basis for the decision whether the regional agreement in question should pass the test as to its conformity with Article XXIV para. 4, if indeed such a test is intended by the formula chosen. So, the question is whether para. 4 is only a statement of a principle, with practically no legal consequences, or whether it is a legal requirement. If the second alternative is true, there ought to be some criteria which could serve as a basis for a decision.

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[1] Art. XXIV para. 4 GATT.

Now, economic theory seems to have provided a criterion for differenciating between regional arrangements preponderantly facilitating trade between the partners and those preponderantly hindering trade with third countries. This is Viner's criterion of whether the "trade-creating" or the "trade-diverting" effects of a customs union prevail[1] (which, with some modification, can be applied to a free trade area as well).

It has indeed been suggested that this criterion be applied and only those arrangements accepted which are primarily trade creating. Kenneth W.Dam first in an article "Regional Economic Arrangements and the GATT: The Legacy of a Misconception"[2] and then in his book "The GATT. Law and International Economic Organization"[3] proposed not only to apply the test "trade creation versus trade diversion" within the context of Article XXIV para. 4 but moreover to make it practically the only criterion for judging regional economic arrangements generally. This means, of course, that the other paragraphs of Article XXIV are of little or no value as criteria for the judgement to be passed on a particular regional arrangement.

The other paragraphs have been written into Article XXIV, however, and as will be shown in later sections of this essay, are continually applied in GATT practice when judging the regional arrangements which have been submitted to the Contracting Parties for consideration. Since we have to do here (as a starting point, at least) with the law as it is formulated in the international treaty which is the General Agreement, we cannot, therefore, avoid de lege lata, taking the existing rules into consideration. We must, further, review the practice of the GATT organs, since it may have contributed to the development of this particular branch of international law. This will, however, enable us to form an opinion as to the value of Kenneth Dam's ideas de lege ferenda, i.e. as a basis for a reform of the rules of the General Agreement on the formation of regional economic

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[1] Viner, The Customs Union Issue, New York 1950.

[2] "University of Chicago Law Review", XXX (1963) p.615.

[3] Chicago, 1970.

groupings as an exception to the general principle of non-discrimination.

In this analysis the following course will be following: first the rules laid down in paragraphs 5 to 10 of Article XXIV will be listed. Second a short analysis will be given of the deliberations and decisions in GATT on some of the major regional groupings. Third. as a result of the findings, an opinion will be submitted on whether paragraphs 5 to 10 and the GATT procedure in general can be regarded as adequate methods of judging regional economic groupings. Fourth thus prepared, we shall discuss whether or not there is a necessity to reform Article XXIV, and whether Kenneth Dam's proposals are practicable.

Rules and Problems of Article XXIV paras. 5 to 10

Forming a list of the rules and problems of Article XXIV paragraphs 5 to 10 in the order they are found in the Article, the first one is para. 5 which states the general consent to the effect that "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." The meaning of the three different kinds of arrangements is set out primarily in paragraphs 8(a), 8(b) and 5(c), respectively. Some additional requirements as to customs unions and free trade areas are found in paragraphs 5(a) and 5(b).

Accordingly, "for the purpose of this Agreement" the legal definition of a customs union is

"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)[1] 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."

Phrases which in this definition are particularly open to doubt and which, accordingly, have caused long debates in GATT practice, are "substantially all the trade between the constituent territories" and "substantially the same duties and other regulations." The question is, what part of trade and what degree of unification of duties and other regulations is required in order to be regarded as "substantially all". The only thing that seems to be sure in this connection is that not all trade or all rules must be completely covered. But how much less is admissible has been strongly debated during the deliberations among the contracting parties - as will be seen in the later sections where we shall discuss some of the regional groupings brought before the GATT.

Coming back to the GATT definition of a customs union, we still have to cite paragraph 5(a) of Article XXIV. Here the acceptance of a customs union by the General Agreement is made subject to the condition that

"with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the

[1] The exception concerns the application of quantitative restrictions and its modalities (Art.XI to XV) and the "general exception" with regard to public morals, health, conservation of natural resources etc. (Art.XX).

constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be."

Here, the doubtful phrase is that duties and regulations of the union shall not "on the whole" be higher than those applied formally by the members of the union. What "on the whole" means has again been the subject during the GATT discussions on certain regional arrangements brought before the Contracting Parties. The theme will, therefore, also be taken up in the sections dealing with the different regional groupings.

As for how to determine whether the new duties or regulations are higher or not than the former ones of the member states, this question is closely related to the one already mentioned in connection with paragraph 4 of Article XXIV: what method shall be applied to find out whether a particular regional arrangement facilitates the trade between the partner states more than it hinders the trade with third states? We shall come back to it in the final section dealing with this fundamental problem.

Here it must be underlined, however, that the detailed definition of a customs union also poses and leaves open the question of measurement. This is important: it just might have been possible to avoid this problem, if the legal definition of a customs union did not involve measurement of the different burdens and their effects. Then, from a legal point of view, a customs union would have been admissible under the GATT, regardless of these differences. This, again, would have meant that these problems were only worth discussing from an economic or political point of view and, for a lawyer, de lege ferenda. As we have seen, however, the measurement question is at the same time a legal one, since it is part of the definition given in paragraph 5(a) of Article XXIV.

If we now turn to the definition of a free trade area "for the purposes of this Agreement", we find in paragraph 8(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."

There is nothing in this part of the definition of a free trade area which we have not already encountered in the definition of a customs union. Again, exceptions permitted under Article XI to XV and XX, may be made. Again, we find the phrase "substantially all the trade between the constituent territories". And, again it is a question of products "originating in such territories". I did not expressly point out this latter phrase in connection with the customs unions, since it is of no great importance there. It must, however, be underlined, when speaking of a free trade area. On account of the fact that the member states of such a grouping have different external tariffs and regulations for trade with third countries, the problem of origin is a very grave one, necessitating rules of origin which can be considerable barriers to trade with third countries.

As was the case with the definition of a customs union, the definition of a free trade area must also be completed by a condition for the acceptability of the grouping under the GATT, namely,[1]

"with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulation 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."

We see, free-trade areas and customs unions are treated almost alike in the text

[1] Art.XXIV para. 5(b) GATT.

of the General Agreement. It seems somewhat surprising to meet again the phrase that the duties and other regulations of the newly formed area vis-à-vis third countries should "not be higher or more restrictive" than those which the member states formerly applied. In a customs union which by definition has to have a common external tariff and other common commercial regulations there is the problem of determining the height of that new tariff and the form of those (new) regulations. A free-trade area, on the other hand, has no common tariff and no common commercial policy. Since these subjects remain in the competence of the different member states it is not quite clear why the rules of the GATT concerning regional groupings deal with the external tariffs and regulations in a free-trade area at all. The member states were obliged by the general rules regarding these matters and remain so, irrespective of the formation of a free-trade area.

One reason for the inclusion of a norm with regard to matters of external trade policy in a free-trade area might be to issue a special warning against the raising of tariffs on occasion of the regional arrangement. Although duties are especially mentioned, there seems, however, to be no need for such a warning, since the formation of a free-trade area is in principle no better excuse for a violation of the obligations which the member states have under the General Agreement than any other pretext.

Another reason for mentioning commercial regulations could be that the regulations of the free-trade area might raise additional barriers to trade with third countries, for instance, if a member state has to take recourse to an escape clause. In such a case it could easily happen that the exception will be primarily used against the imports from third countries - and not against those from the other member states. Actually, this outcome is rather unavoidable, given the common internal market which the free-trade area aims at just as does the customs union. So, also seen from this angle, the rule in paragraph 5 (b) seems to be of little practical value, apart from its possible effect as a warning against abuse.

A warning against abuse is also useful in connection with the formulation of rules of origin. These could become non-tariff barriers to trade with third countries, although again, some such effect appears to be an unavoidable symptom of a free-trade area. But, be that as it may, and whatever the value of this rule for a free-trade area, it is to be noted that Article XXIV GATT tries to set a limit for the tariffs and trade regulations of regional arrangements of either kind. They shall "not be higher or more restrictive" than the former tariffs and regulations. This has to be so "on the whole" in a customs unions, while no similar qualification is given (or can be given) for a free trade area.

The same requirements are applicable to the so-called interim agreements as well as to "complete" customs unions or free-trade areas. There is, moreover, an additional special regulation with regard to interim agreements alone:[1]

> "Any interim agreement referred to in sub-paragraphs (a) and (b)[2] 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."

This means two things:

First, an interim agreement must not be "final". It should lead to a definite customs union or free-trade area, with (practically) no duties and other restrictive regulations of commerce between the member states. Since an interim agreement will necessarily contain as first steps only limited preferences between the partner states, it has to be assured that the arrangement in question will develop into a genuine customs union or free-trade area. As a device to further this end the demand to submit "plans and schedules" has been conceived.

The second demand with respect to an interim agreement is that it should not only actually lead to a complete customs union or free-trade area, but do so

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[1] Art. XXIV para. 5(c) GATT.

[2] That is sub-paras 5(a) and 5(b) of Art.XXIV GATT.

"within a reasonable length of time". As was to be expected, this requirement inspired long debates on what was "reasonable" in the relevant cases brought to the attention of the contracting parties.

This was the last of the more important rules of Article XXIV GATT. We are now in a position to form the following summary:

Article XXIV GATT sanctions three forms of regional economic arrangements:

1. Customs unions,
2. Free-trade areas,
3. Interim agreements.

While number 3 only refers to an "interim" phase, numbers 1 and 2 are "final". They have to meet the following requirements:

(a) Duties and restrictive regulations of commerce are to be eliminated with respect to "substantially all" trade between the partner states.

(b) Duties and restrictive regulations applicable to trade with third countries shall "not be higher or more restrictive" than those valid before the formation of the grouping.

(c) With regard to customs unions this requirement concerns duties and restrictive regulations "on the whole".

(d) Likewise only in customs unions "substantially the same duties and regulations of commerce" shall be applied by all member states vis-à-vis third countries.

Requirement (b) is also applicable to interim agreements. Additionally,

(e) Interim agreements shall include "a plan and schedule" for the formation of a final grouping, either a customs union or a free trade area.

(f) Interim agreements shall lead to the final grouping "within a reasonable length of time."

This list will, at the same time, facilitate the task now of analysing some prominent regional economic arrangements which have been based on Article XXIV GATT.

## The European Economic Community

Not only measured by the volume of trade covered, the European Economic Community is by far the most important example of a customs union.

Whether it is a customs union in the sense of Article XXIV was by no means taken for granted. Or, to be precise, when the treaty establishing the European Economic Community was submitted to the contracting parties of the GATT for consideration, it was submitted by the representative of the EEC as an interim agreement leading to the formation of a customs union. This was, of course, correct since the Rome Treaty did not establish such a union at once but was to do so in steps taking twelve (or possibly) fifteen years.

Accordingly, the Rome Treaty was analyzed by the Contracting Parties as an interim agreement, and it was, in fact, scrutinized so thoroughly as never again seems to have been the case with other regional agreements submitted under Article XXIV GATT. The analysis was instituted in the following way:[1]

> "At their Twelfth Session in October - November 1957, the Contracting Parties appointed a Committee comprised of all government parties to the General Agreement to examine the relevant provisions of this Treaty and of the General Agreement and to consider the most effective method of implementing the inter-related obligations which the six governments had assumed under the two instruments. The Committee had the following terms of reference:

[1] Using the words of the report published in GATT, BISD, 6th Suppl. p. 68/69.

A. To examine, in the light of the provisions of the General Agreement on Tariffs and Trade, the relevant provisions of the Treaty of Rome and the problems likely to arise in their practical application. Such examination would include inter alia , the arrangements provided for in the treaty with respect to tariffs, the use of quantitative restrictions, trade in agricultural products and the association of overseas countries and territories with the European common market.

B. To recommend, in the light of the conclusions which result from the examination provided for above, such action as may be appropriate and desirable, including a determination of the means of establishing effective and continuing co-operation between the Contracting Parties and the European Economic Community.

C. To report to the Contracting Parties, and make such recommendations as may be appropriate with respect to the continuation of the work of the Committee.

The Committee appointed four sub-groups to examine the questions enumerated in paragraph A of its terms of reference."

As an example for the preparation of the Contracting Parties with regard to the examination of an agreement under Article XXIV GATT this text is rather instructive. An the activities of the Committee and the sub-Committee are illustrated clearly by their reports reproduced in BISD, 6th Supplement.[1]

Some of the most remarkable findings in these reports were:

With regard to the common external tariff of the Community, a controversy arose over the admissable height of this tariff. As noted above, according to paragraph 5(a) the duty rates of a customs union should not on the whole be higher than the rates of the tariffs of the member states they replace. We have already seen that this rule poses considerable problems of measurement. The Treaty of Rome applied, with some moderations, a very simple calculation, namely the un-

[1] pp. 70 et seq.

weighted arithmetic average of the rates of the member states.[1] The representatives of the member states of the EEC of course found that this method was "strictly in conformity with the provisions of paragraph 5 of Article XXIV."[2] Most members of the competent sub-group felt, however, "that an automatic application of a formula, whether arithmetic average or otherwise, could not be accepted, and agreed that the matter should be approached by examining individual commodities on a country by country basis."[3]

This problem was not solved then. Nor was it at a later date, whether in the examination of the Rome Treaty nor any other regional agreement. With regard to the EEC it lost most of its importance on account of alter tariff reductions so that now there can be little doubt that the Community in elaborating the Common Tariff conformed to the provisions of paragraph 5 (a) of Article XXIV.[4]

The same is true with regard to the "plan and schedule" for the formation of a customs union contained in the EEC Treaty; since in the meantime it has been implemented practically as laid down in the treaty, and within the time foreseen. It is to be noted, however, that at the time of the GATT examination, the plan for the elimination of trade barriers among the member states of the Community was regarded by some delegations as insufficient, since it did not contain a precise time-table for the last stage of the transitional period. This is remarkable because it shows that the Contracting Parties had, in this first big case, very detailed expectations as to the precision of such a time-table in an interim agreement. I wish to underline this as a contrast to later deliberations of the Contracting Parties in analogue situations. In my opinion the growing leniency of the GATT in this matter (as well as in others) is symptomatic for either an increasing sympathy for regional arrangements, or of a decreasing valuation of MFN treatment, or both. This also means, in continuation of our analysis of the GATT-conformity of the Rome Treaty, that, under present standards there could be no reasonable doubt about the sufficiency of the plans and schedules under paragraph 5(c).

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[1] To be precise: the tariffs of the member customs territories, the Benelux countries being one customs territory.

[2] GATT, BISD, Sixth Suppl., p.72.

[3] Ibid.

[4] The similar question arising after the accession of Denmark, Ireland and the United Kingdom is probably to be answered in the same way although some issues are not yet settled.

The next important controversy fell under the competence of sub-group B and concerned quantitative restrictions. This was one of the two matters dealt with in paragraph 5(a). The first, "duties", although not solved but settled by sub-group A left to be considered the second, "other regulations". They had according to the norm, "on the whole" not to be more restrictive than the former regulations of the member states of the EEC. This was, however, feared by the sub-group insofar as the Rome Treaty envisages the introduction of common quotas instead of the quotas of the different member states. In particular they expected that "the effect of such an arrangement would be that some country or countries in the union would be imposing quantitative restrictions not required by their own balance of payments position and would, therefore, be raising barriers to trade with other contracting parties."[1]

Although nothing of this kind has happened up to now in the history of the EEC, the argument had some merits at that time as well as for a possible future situation. It is, however, open to question how a customs union intended to develop into an economic union could possibly work otherwise. But there is no mention of an economic union in the GATT, understandably perhaps, since the General Agreement deals only with (tariffs and) trade. This means, that the construction of an economic and monetary union could possibly be considered illegal if it required common quantitative restrictions imposed for balance of payments purposes which might be an additional burden for the trade relations with third countries, and therefore, not tolerated under the GATT.

Of course, this is not necessarily so. Perhaps the solidarity of an economic and monetary union might make it possible for a member country which would otherwise have resorted to balance of payments restrictions to get along now without these because of the assistance from the partners of the economic and monetary union. Therefore, the question of whether the incidence of quantitative restrictions after the formation of the union is more onerous than before cannot be decided generally, as long as the provision of the treaty founding the union

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[1] GATT, BISD, Sixth Supplement, p.79.

provides only for a "communalization" but not obviously for an intensification of quantitative restrictions. The latter was not done in the EEC-treaty. So, in my opinion, it cannot and could not be said that with regard to quantitative restrictions the Treaty violated the "other regulations" part of paragraph 5(a) of Article XXIV.

In this connection it is appropriate to raise the question as to who has to bear the burden of proof. The text of paragraph 5(a) and the general rules of law seem to imply that this burden is on the parties forming a customs union: he who wants to make use of an exception has to prove that the conditions of the exception are fulfilled. A lawyer might be inclined to follow this line. But is that correct in view of paragraph 4 of Article XXIV, which recognizes the "desirability of closer integration between the economies of the countries parties to such agreements"?

I do not think it is. In my opinion, this formulation makes it quite clear that as a rule regional arrangements are desirable. Bearing in mind the general aims of the GATT, this does imply that, as a rule, and on average, such arrangements are expected to further international trade. If, however, a customs union (or a free trade area, as well) raises, on balance, more barriers to trade than it lowers, that must be regarded as an exception from the rule and, consequently ought to be proved. This means that the burden of proof rests with the Contracting Parties. It means additionally that if such proof fails during the examination of the provisions of the agreement, and in case of doubt, the arrangement in question is to be accepted.

Probably, this sounds rather formally legalistic, and it is, as the rules regarding the burden of proof almost necessarily must be. But we still have the possibility of arguing in another way, i.e. in a teleological way. This would oblige us to find out what is the purpose of setting up rules for the formation of customs unions and free trade areas and, especially, of interim agreements for the construction of such groupings.

One can safely start from the supposition that the rules containing the requirements for an interim agreement do not have the purpose of making customs union or free-trade areas impossible. If, however, an admissible interim agreement must be constructed so as to remove any doubt that either duties or other regulations would (or could be in the future) more onerous to trade with third countries than the old duties or regulations of the member states, then the required perfection could never be reached, if only because the future developments are rather difficult to foresee. It can, therefore, only be required that the agreement should not give rise to serious doubts in this direction. If there are such doubts, they need be substantiated which, again, means that without evidence to the contrary an interim agreement must be regarded as conforming to the aims of the GATT. And, to be sure, in the beginning there will almost certainly be an interim agreement, because the construction of a customs union or a free-trade area can only exceptionally be completed at one single stroke.

This was, of course, another legalistic construction, but now we have two of them which might - just might - sound rather convincing. At least, it is to be hoped that they are as convincing as the statistical and mathematical exercises which are made in the hope of showing one or another regional grouping facilitates trade between the member countries more than it hinders the trade of these countries with the outside world.

But, according to plan we shall come back to this problem again. For the time being, and for the reasons stated I am inclined to justify customs unions, free-trade areas and the Economic Community with regard to the incidence of common quantitative restrictions as compared with the former national ones - if the examining party, sub-group, expert, etc. cannot prove that they will hinder trade with their countries more than they further trade among the member states. Obviously the sub-group in 1958 could not do that. No wonder, since they felt "in view of the uncertainties about the way in which the provisions of the Rome Treaty would be implemented ... that at this stage it was not possible to make a judgement that the application of the provisions of the Rome Treaty concern-

ing the use of quantitative restrictions would or would not be compatible with the relevant provisions of the General Agreement."[1]

The solution offered by the sub-group was "the closest possible cooperation",[2] not, however, "any special consultation procedures",[3] which the Six had rejected - in agreement with the examining sub-group.

Unfortunately, in view of the complexity of the matter, it is quite impossible to deal here at any length with the third subject of the GATT examination:

the agricultural policy of the Community. Only as a statement it may be noted that in pre-EEC-times each one of the member states had had an agricultural policy which had little to do with free international trade but did not necessarily discriminate between the foreign suppliers. Something similar is, it seems to me, true for the common agricultural policy, so that discrimination was not seriously intensified. Whether the regulations of the EEC as a whole are more restrictive than were the regulations of all individual member states put together is doubtful, especially if we take into account that they (most probably) have contributed to intensifying agricultural trade within the Community. And, although many people tend to condemn the CAP for various reasons, it hardly restricted trade with the outside world per saldo more than it facilitated trade with agricultural products among the member states of the EEC. So, since this is the criterion, and given the benefit of the doubt, CAP seems to be compatible with paragraph 5(a) of Article XXIV GATT.

Here, we may leave the EEC, although in 1958 the association with the overseas countries and territories was also examined at the same time. This should, however, be treated separately, because the association can no longer be regarded as a part of the Rome Treaty as it was in 1958.

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[1] GATT, BISD, Sixth Supplement, p.81.

[2] Ibid.

[3] Ibid., p.80.

With regard to the EEC proper we come to the conclusion that on legal grounds with the necessary consideration of economic arguments the Community conforms to the rules laid down in Article XXIV GATT to a sufficient extent.

The European Free-Trade Association

Having already made some principal remarks in connection with the EEC should facilitate the task of analysing EFTA. Moreover, since it is a free-trade area, one problem is avoided which played a considerable role in the examination of the EEC: that of the incidence of the Common External Tariff.

On the other hand, a problem proper to the free-trade area, plagued the Contracting Parties in their examination of EFTA in 1960,[1] that is, the rules of origin which are part of the Stockholm Convention. It was feared that "highly technical process criteria and the requirements of the origin rules could give rise to practical difficulties which could adversely affect the trade of third countries."[2] Rules of origin are, however, necessary for a free-trade area an account of its different duty rates and trade regulations. They are even practically prescribed by the GATT itself if they concern products imported under a preferential system - as in the case of Commonwealth imports in the United Kingdom.[3]

So the question to be decided was whether the rules of origin of EFTA, though necessary, were as liberal as possible under these circumstances. And the report says: "It was generally felt that the rules of origin laid down by the Convention were, on balance, reasonable."[4]

With regard to quantitative restrictions, problems were considered which were somewhat similar to those analysed in connection with the EEC. At first glance surprisingly, even the question of quantitative restrictions for balance of pay-

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1 Report in GATT, BISD, Nineth Supplement, p.70 et seq.

2 GATT, BISD, Ibid., p.71.

3 See "Notes and Supplementary Provisions", and Article CCIV para. 9.

4 GATT, BISD, 9th Suppl., p.73.

ments purposes was considered although one might expect the balance of payments situation of the member states of a free-trade area scarcely to be as much influenced by the formation of the regional grouping as that of the number of a customs union. But also in the case of EFTA it was asked whether there could be a "justification for imposing restrictions on imports from third countries while not restricting imports from member states."[1] The EFTA countries answered the question in the affirmative and rightly so, even according to the rules of GATT, which allow import restrictions within a free-trade area (and a customs union) only "where necessary."[2]

This remark points to another difficulty the EFTA countries had during the examination of the Stockholm Convention. The ban on trade restrictions within a regional grouping has the same source as the demand that substantially all trade among the member states it to be liberalized. Both rules have the purpose of guaranteeing that a free-trade area is not just a preferential arrangement with regard to some instruments of commercial policy and with regard to some products. The question of product coverage, however, was one of the weak points of the EFTA Convention, because in Article 21 it practically excluded agricultural products from the free-trade regulations. Things were not made much better by the fact that, in accord with the Stockholm Convention, some bilateral agreements between EFTA states had been concluded in order to facilitate agricultural trade. "It was pointed out in the Working Party that only in the case of very few products was there a provision for the removal of tariffs in the bilateral agreements and that, in each case, the removal was only to be effected by one member state."[3] The EFTA countries not only found this quite in order, but they felt justified "in including, when estimating the total amount of trade freed from barriers within the area, the amount of trade from which barriers had been removed as a result of the bilateral agreements."[4]

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1 Ibid., p.77.

2 Art. XXIV para. 8(b) GATT.

3 GATT, BISD, 9th Suppl., p.80.

4 Ibid., p.81.

Although this "amount of trade" was rather insignificant the argument was quite important since it was intended to prove that at least some trade with agricultural products was covered by the Stockholm Convention so that it was not "a whole sector" which was excluded. In my opinion (1.) such an argumentation is rather sophistic, (2.) the bilateral agreements are difficult to reconcile with Article XXIV GATT, and (3.) the Stockholm Convention would be "GATT conform" even if limited to industrial products.

The first point may be regarded as a statement of opinion. As to the second it may suffice to state that, presumably liberalization of "trade between the constituent territories" means trade between all, and not just two of them, even if a semblance of intra-region MFN treatment is accorded by the country making a concession. There remains the third point. It is illustrated by a statement to the contrary made by members of the Working Party: "It was also contended that the phrase 'substantially all the trade' had a qualitative as well as a quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. For this reason, the percentage of trade covered even if it were established to be 90 percent, was not considered to be the only factor to be taken into account."[1]

[1] GATT, BISD, 9th Suppl., p.83.

Testing this argument, one must ask where in Article XXIV that qualitative aspect is to be found. I can see no reason why the exclusion of products from different sectors should be preferable to the exclusion of most products of one sector. With regard to the question of whether 90 percent of trade is enough to qualify for the title "substantially all" I may refer to my former argument that the founders of a regional grouping have the benefit of the doubt in their favour. If this is so, 90 percent seems to be rather close to "substantially all".

So, if I have to give an opinion on whether the EFTA[1] is a free-trade area according to Article XXIV GATT, the answer will be positive. It would not change if all agricultural products were excluded from EFTA treatment, since the EFTA trade with these products is so small[2] that the rest will remain "substantially all" trade. The bilateral agreements on trade with agricultural products can, however, hardly be reconciled with Article XXIV GATT.

As a conclusion, it is to be noted that the opinion of the Contracting Parties was divided, and that they, therefore, left things undecided. In their "Conclusion" adopted on 18 November 1960 they stated: "(c) The Contracting Parties feel that there remain some legal and practical issues which would not be fruitfully discussed further at this stage. Accordingly, the Contracting Parties do not find it appropriate to make recommendations to the parties to the Convention pursuant to paragraph 7(b) of Article XXIV. (d) This conclusion clearly does not prejudice the rights of the Contracting Parties under Article XXIV."[3]

## The Latin American Free-Trade Area

When discussing the LAFTA it seems interesting to point to some important differences in the "Conclusion" of the Contracting Parties. With regard to the Latin American Free-Trade Area, letters (c) and (d) have the following text:[4]

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1 In the form (and with the members) it had when it was examined by the Contracting Parties of GATT. This precautionary limitation might be unnecessary, since I find no apparent reason why things should have changed in this respect on account of the withdrawal of Denmark and the UK from EFTA.

2 It has become still less since Denmark and the UK left EFTA.

3 GATT, BISD, 9th Suppl., p.20.

4 Ibid., p.21. (Italics added).

"(c) At this stage of their examination the Contracting Parties feel that there remain some questions of a legal and practical nature which it would be difficult to settle solely on the basis of the text of the Treaty and that these questions could be more fruitfully discussed in the light of the application of the Montevideo Treaty. For these reasons the Contracting Parties do not at this juncture find it appropriate to make recommendations to the parties to the Treaty pursuant to paragraph 7(b) of Article XXIV.

(d) This conclusion clearly does not prejudice the rights conferred on the Contracting Parties under Article XXIV and does not in any way prevent the parties to the Montevideo Treaty from proceeding with the application of that Treaty when it has been ratified."

So, contrary to their conclusion in the EFTA case, the Contracting Parties in the LAFTA case felt that they could not judge the regional arrangement solely on the basis of the Treaty, but that they must wait for the outcome of its practical application. Consequently, the signatories of the Montevideo Treaty were told to go ahead, irrespective of the deliberations and the findings of the Working Party.

With regard to these findings, some peculiarities are to be noted. The following are cited mostly in the phraseology of the report:[1]

The Working Party noted that the tariff reductions would not be linear in nature, but might differ according to products.

The member States declared that it was impossible to indicate at present the products in respect of which customs duties would not have been abolished at the end of the transitional period.

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[1] GATT, BISD, 9th Suppl., pp.88 et seq.

Explanations were requested concerning the compensation regime (payments in goods) in force in Mexico.

With regard to the effects of the Treaty on the system of selling foreign currency by auction, as practised in Brazil, it was explained that the Treaty did not deal specifically with the system.

The member states indicated that the individual signatories were allowed every latitude concerning the choice of the products on which negotiations were to be undertaken each year, subject only to the condition that the sum fo the annual reductions should not be less than 8 percent of the weighted average.

The Working Party expressed concern over the documentation requirements with respect to import from third countries.

The Working Party expressed certain misgivings regarding the absence of a more precise schedule for trade liberalization.

The Working Party was advised that escape clauses had been written into the Treaty in order to take into account the special situation of the less-developed countries within the Area and of the balance of payments difficulties which member states might experience.

The Working Party noted that the systems of prior deposits in force in the member states were a type of restriction to trade and any move to eliminate prior deposit requirements would be most welcome.

The Working Party asked for elucidation of the wording of Article 29 of the Treaty referring to a priority to be given to products originating in the territories of other member states of the Area, which might imply discrimination against third countries.

Member states indicated that it was the intention of the signatories to the Treaty to enter into long-term agreements or into quantitative agreements which would both provide the exporting country with the assurance of a stable market and the importing country with a definite possibility of securing quality products at international prices.

Considering all these findings it is difficult to reconcile the Treaty of Montevideo with any of the legal requirements of a free-trade area elaborated above. It was therefore rather benevolent that the Working Party found that it "could be considered by the Contracting Parties under the procedures relating to interim agreements leading to the formation of a free-trade area in the sense of Article XXIV", even though the sentence began with the word "only". To be sure, they did so in spite of those "misgivings regarding the absence of a more precise schedule for trade liberalization" and without some reliable knowledge as to what "substantial" part of trade between the member states would be liberalized. Since the Montevideo Treaty rather clearly failed these tests it could, from a legal point of view, hardly be brought under Article XXIV, even as an interim agreement.

Recognizing this does not imply that the endeavour of the signatories of the LAFTA Treaty was wrong and that the Contracting Parties were ill advised to wish them well. But was it really necessary to pretend that the prerequisites of one of the Article XXIV arrangements were fulfilled? In order to deal with this question some more evidence may be useful. Let us go on to the association of Turkey with the European Economic Community.

## Association EEC /Turkey

The Agreement creating an association between the European Economic Community and Turkey, presented to the Contracting Parties of the GATT as an interim agreement leading to the formation of a customs union, was first examined by a GATT Working Party in 1964.[1] It is not only of special interest because it is a

[1] Report in GATT, BISD, 13th Suppl., pp. 59 et seq.

regional arrangement between a group of industrialized countries (the EEC) and one developing country but also, because it is intended to bring about a customs union, i.e. the closer grouping of the two envisaged in Article XXIV GATT. Another feature of a technical nature is worth noting, too: the association was examined again by a GATT Working Party in 1972[1] thus presenting an opportunity to evaluate the progress made in the past eight year period.

In the 1964 review the Agreement met with the objection that it contained no sufficient plan and schedule for the formation of the proposed customs union since the time-table was only related to the preparatory stage. Moreover, the period envisaged for the construction of the customs union which is (about) 22 years, was regarded by some members of the Working Party as too long - not "reasonable" in the sense of paragraph 5(c) of Article XXIV GATT. Another point expressly noted was that the Agreement has a largely unilateral character, by far the biggest concessions being made by the EEC. This point, for one, was clearly conceded by the partners of the Agreement, and justified with the very different levels of economic development in Turkey and the EEC.

The outcome of the GATT examination is not surprising in view of the conclusions of the previously cited cases. Since the parties to the Agreement as well as one other member of the Working Party were of the opinion that both the "plan and schedule" was sufficient and the length of the transitional period "reasonable" under the circumstances given, the Working Party proposed no decision and confined "its report to recording the information, classifications and arguments which have been put forward."[2]

During the 1972 examination of the association Agreement some members of the Working Party still did not regard the time period envisaged for the formation of the customs union as "reasonable". Probably with a view to the "substantially-all-

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[1] Ibid., 19th Suppl., pp.102 et seq.

[2] GATT, BISD, 13th Suppl., p.64.

trade" requirement, the "lack of a sufficient commitment to incorporate Turkey's agricultural exports into the liberalization process was also noted."[1]

On the whole, however, the opinion of the Working Party with respect to the Agreement seemed to have been more sympathetic than in 1964. All members stated "that they favour closer economic ties between Turkey and the European Economic Community and recognized that the main objective of the Association, which is to establish a full customs union, is in conformity with the fundamental objection of the General Agreement."[2]

This verdict is supported by the fact that between 1964 and 1972 a considerable progress in the direction of "closer ties" was registered. In comparison, the objections noted seem to be of minor importance. At least they are, in my opinion, not as grave as to violate the rather vage norms regarding the contents of an interim agreement such as that between the EEC and Turkey.

### Association EEC / African States

Just like the Association EEC/Turkey, the Association between the Community and the African and Malagasy States (AMS) was repeatedly examined by the Contracting Parties of the GATT. In this case even three such surveys took place, the first in 1958 when the whole EEC Treaty was considered,[3] the second in 1966 after the conclusion of the Convention of Yaoundé, and the third in 1970 dealing with the second Convention of Yaoundé.

Since the first Association, being part of the Rome Treaty and dealing with the relationship to not yet independent countries and territories, was no genuine integration "agreement" it is only of some historical interest here. It met with

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1 Ibid., 19th Suppl., p. 104

2 GATT, BISD, 19th Suppl., p.108.

3 Report in GATT, BISD, 6th Suppl., p.89 et seq.

considerable resistance in the GATT, and it was even reported - a unique event - "that a majority had advanced the view that the association of the overseas territories under the Treaty was not consistent with the provisions of Article XXIV of the General Agreement."

In the discussion of the first Yaoundé Convention some members of the Working Party stated that in their opinion Article XXIV had "never been meant to apply to free-trade or customs union arrangements between developed and less developed countries."[1] This view was, of course, rejected by the parties to the Yaoundé Convention with the remark that nothing of this kind was written into the article.

Apart from this and some other subjects of a more general character, the discussion concentrated on the three well-known topics: it was objected that not "substantially all" trade was covered.[2] According to some members of the Working Party the Convention did not meet the requirement that its tariffs and other restrictions "should not be higher than the equivalent measures in force prior to the formation of the area."[3] Finally, it was observed that "the requirements of a plan and schedule had not been complied with."[4] Not surprisingly, the representatives of the EEC and the AMS expressed quite different opinions,[5] and the Contracting Parties were content to "note the diverging views which exist."[6]

When the second Yaoundé Convention was under consideration in the GATT, a new objection was raised. A member of the Working Party noted that "the elimination of customs duties on imports from the Community was followed by an increase in other charges on imports from all sources, including the Community, by roughly a similar amount."[7] While they did not (and in fact could not) deny this, the

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1 GATT, BISD, 14th Suppl., p.109.

2 Ibid., p.108.

3 Ibid.

4 Ibid., p.109.

5 For a summary see ibid., p.110.

6 Ibid., p.22.

7 GATT, BISD, 18th Suppl., p.136.

parties to the Yaoundé Convention claimed that the new charges were fiscal charges and that the "elimination of fiscal charges had never yet constituted an element necessary for recognition that a free trade area was consistent with GATT rules."[1]

This view seems to have prevailed, since the Working Party stated in its conclusions that progress in respect of the elimination of duties and restrictions between the constituent territories had been made. Under these circumstances it regarded free-trade areas between the EEC and the eighteen Associated States as sufficiently established. "It noted that while some members had expressed doubt about particular provisions of the Convention they had not expressed the view that the basic requirements of Article XXIV: 8(b) had not been met."[2]

Indeed, if apart from the dubious fiscal charges, free trade between the EEC and the AMS is established, the old controversy with regard to the "plans and schedules" and the "reasonable time" is eliminated for then it is no longer an interim agreement but a free-trade area (or several free-trade areas) which is under consideration.

Agreement EEC / Spain

The agreement of the EEC with Spain which, imprudently enough, in Community circles is called a "preference agreement"[3] was presented to the Contracting Parties of the GATT as an arrangement under Article XXIV. Although the parties expressly undertook to eliminate the barriers to substantially all of their mutual trade, they planned to do so in two steps and laid down a time-table only for the first stage, during which trade barriers were to be lowered by certain percentages. This gave rise, of course, to the well-known objections that the agreement could not qualify as an interim agreement according to paragraph 5(c), since the "plan and schedule" were incomplete.

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1 Ibid.

2 Ibid., p.142.

3 EC, Commission, Fourth Report, Bruxelles 1971, p.306.

The representatives of the EEC and of Spain found, however, surprisingly great understanding for their argument that it would not have "been realistic to fix already from the outset a detailed and complete plan and schedule for the achievement of free trade. More detailed and complete provisions would instead be established in due course taking into account the experiences gained in the first stage."[1]

If this statement was accepted, there was not much left to be examined, and no great choice open but to admit that the agreement was an arrangement under paragraph 5 (c) of Article XXIV. If the "plans and schedules" need neither contain the details for the whole path of the free-trade area or customs union, respectively, nor provide for a time-limit, then the only requirement left for the acceptance as an interim agreement under Article XXIV is a declaration that it is intended to eliminate the barriers to substantially all trade between the parties within a reasonable time.

In the case of Spain, however, a new argument was presented and, as it appears, widely accepted. Referring to the "geographical and political context in which the agreement was situated" some members of the Working Party were prepared "to take a dynamic view" and were "confident that Spain had already attained a sufficient degree of economic development to enable the parties in time to organize their relations in a way that would increasingly approximate a free-trade area".[2]

Somewhat reluctantly, I tend to support this reasoning, which means in essence that every case should be jugded according to its particular circumstances. If such a pragmatic approach leads to a new interpretation of what the "plans and schedules" according to paragraph 5(c) of Article XXIV should contain, this is not excluded by the wording. It might even be more conform with the spirit of the article than the presentation and acceptation of a time-table full of escape clauses or, worse, an apparently illusionary one.

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[1] GATT, BISD, 18th Suppl., p.171.

[2] Ibid., p. 169.

## The legal significance of Art. XXIV GATT and its application: Conclusions

Although there are several other regional arrangements for which the member states have claimed Article XXIV status[1], I think there is now enough material which allows to form a solidly founded opinion on the legal significance of Article XXIV and the practice of its application.

One of the most remarkable results of our survey is that not a single one of the regional arrangements reviewed has been formally accepted by the Contracting Parties as an enterprise conforming to the norms laid down in Article XXIV. This means that in any case some members of the highest institution of GATT had unsurmountable doubts that the grouping surveyed conformed to the letter of the Article.

I have stressed that I do not share this opinion. Neither in the case of the European Economic Community nor in that of the European Free Trade Area are the remaining doubts grave enough to reject the claim to the status of a customs union or free-trade area under Article XXIV respectively. Only a very idealistic purist could regard more conformity to the letter of the Article as indispensable, although certainly some of the criticism voiced is worth serious consideration.

Equally, with regard to some other regional groupings I think that they - not completely but to a decisive degree - conform to the requirements for interim agreements according to paragraph 5(c). I have not concealed that there are grave doubts, especially as to their chance of becoming "final" free-trade areas and to the methods applied or contemplated during the interim period, as well as to whether this period can be regarded as "reasonable". But since the criteria laid down in Article XXIV in this regard are so vague, they leave so much discretion that the associations of the EEC with Turkey and with the associated African States and Madagaskar, and even the agreement

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[1] Some are very similar to the ones which have been discussed, especially the associations and other agreements of the EEC with countries in the Mediterranean Area.

of the Community with Spain need not, on legal grounds, be refused the status of paragraph 5(c). There is in no case a clear and indisputable violation of any of the legal requirements. Due to the indistinct formulation of precisely these requirements, there is, on the other hand, a wide range of possible violations. But mere possibilities do not suffice to reject the claim to Article XXIV status as long as it is only doubtful, whether the agreement in question conforms to the norm of the GATT, the legality is to be assumed.

This is, of course, the crucial point. I may, therefore, repeat that in my opinion the GATT regards regional integration as desirable, if some basic requirements are met. Only if it can be proven that they are not met, the claim can and must be rejected. This follows from the text and from the purpose of paragraph 4 of Article XXIV. It has, in the meantime, also been tacitly recognized as "GATT custom", since none of the regional arrangements brought before the Contracting Parties has been rejected. Even in one of the most dubious, that of LAFTA, the member states have been told to go on with the measures envisaged, which are clearly discriminating against the other contracting parties of GATT, but justified only if they are covered by Article XXIV.

As will be remembered, LAFTA is the only case in which I am of the opinion that the requirements of Article XXIV are not met, so that it should have been rejected on legal grounds. This is so, because the product coverage foreseen is so imprecise and small and the procedure and the length of the interim period are so undefined that even with a most generous interpretation it could neither be claimed that "substantially all trade" is covered nor that the formation of a free trade area will be completed "within a reasonable length of time."

This result, that LAFTA fails while the other arrangements pass, is not at all satisfying. As it turned out, the failure on the one hand and the successes on the other depended largely on the presentation of the cases. Declarations of intent often suffice. Escape clauses are allowed, "transitory" exceptions as well. And what the outcome of the arrangement in question will really be,

cannot be foreseen. The fact is that cleverness in the formulation of an agreement should be decisive is, however, though not at all uncommon in legal practice, scarcely a result worthy of such an important matter as regional integration.

The way out of this dilemma is, of course, to reform Article XXIV GATT. Such a reform is on its way. The review of some Article XXIV cases in the previous section showed a distinct development of the international practice with regard to regional groupings, from rather vigorous standards in 1957 to a very great leniency in 1972. So, if one applies GATT law as it has been developed by the practice of working parties, up to the year 1972, LAFTA should now pass the test as an interim agreement according to paragraph 5(c), too.

To be sure, this leaves us with a state of law with regard to the Article XXIV exceptions from most-favoured-nation treatment that sanctions practically everything presented under the heading of a customs union, a free trade area, or an interim agreement. One is inclined to ask: so what ? This is the state of affairs anyway. Let us do away with rules which only serve the purpose of testing inventiveness of international lawyers and which are only paid lip service or are even openly ignored. The only question is whether they should be abolished entirely or substituted by more appropriate norms.

This is where the suggestion of Kenneth Dam comes in, to apply a test provided by economic theory. Let us recall this seemingly simple test: if a regional arrangement is predominatly trade creating it is welcome and worth being sanctioned by Article XXIV. If it is predominantly trade diverting, it should be rejected, and the partner states have to abide by the MFN rule. The only pity is that the proposed test 1. as yet does not work satisfactorily, 2.if it worked, would not be very illuminating as to the value of a regional arrangement, and 3.in GATT practice, would only replace the inventiveness of the international laywer by that of the statistician or the econometrist.

As to point 1, it is no secret that, although numerous attempts to measure trade creation or trade diversion have been made, the methods to be applied are still in a stage of experiment and the results obtained far from convincing.

Second, such a test could not say much about the value of a proposed regional economic agreement, since as yet no satisfactory way has been found to predict and take into consideration future developments and dynamic factors.

On account of these factors, thirdly, the examination of a proposed regional arrangement would take the form of a competition between the experts presented by the different parties. Since, under these circumstances, no unequivocal result can be expected, the outcome would most probably be the same as that of the as yet habitual competitions between international lawyers: "The Contracting Parties note that the Working Party confined itself to recording information, arguments and clarifications put forward by governments, but they do not find it desirable to pursue at this time an examination of the issues raised in the Working Party and, in the light of further opportunities for consideration under the General Agreement, do not at this stage avail themselbes of the possibility of addressing recommendations under Article XXIV: 7 to the parties of the Agreement".[1]

No further device is known to test the value of a regional arrangement impartially. So,we have to get along without a test. This leaves us with the alternative of abolishing the exception from MFN treatment in favour of regional arrangements altogether or to accept such arrangements more or less on good faith. Apparently, the first course is not open. It would be highly unrealistic to suppose that the existing customs unions, free-trade areas etc. will be abolished and that the contracting parties to the GATT will commit themselves to refrain from forming such groupings in the future.

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[1] Taken from the conclusions adopted on 15 November 1962 with regard to the Association of Greece with the EEC. GATT, BISD, 11th Suppl. p.57.

The second course can be taken, and for all practical purpose is already taken. So I propose to sanction it and change the rule of Article XXIV GATT in an appropriate way. Regional groupings are to be tolerated. They should endeavour to as much liberalization in as short a time as possible. But complete elimination of the barriers to mutual trade need not necessarily be attained. This would do away with norms which are circumvented anyhow. Such a return to honesty might, on the other hand, open an opportunity to replace the sham initial test by a continual review practice.

In oder to achieve this, agreements on regional economic groupings are to be submitted to the Contracting Parties for consultation. At regular intervals reports on their activities with special reference to their influence on the trade with the other members of GATT are to be made. Following these reports there should be an examination, perhaps on the lines of the "country examinations" which are practised in the OECD, preferably with concluding recommendations by the Contracting Parties to the member states of the regional grouping in question. Further, a complaints procedure could be envisaged, which gives GATT members who are harmed by the activities of a regional organization the possibility to instigate an investigation by the Contracting Parties. It need not even be entirely utopian to think of a judicial procedure.

Exceptions on the basis of Article XXV GATT

Apart from paragraph 2 and 3 of Article I and from Article XXIV there is only one further norm of the General Agreement which was expressly designed to sanction exceptions to the rules of non-discrimination. That is Article XXV, which allows under certain circumstances discriminations in the application of quantitative restrictions for balance of payments or development purposes. Some other provisions of the GATT may, among other purposes, offer a basis for deviations from the MFN-rule: Article XX which deals with the General Exceptions to protect public morals, health, scarce natural resources etc., Article XXI, which contains the Security Exceptions, Article XXXV dealing with the non-application of the Agreement between particular Contracting Parties, Article XXIII, which describes the Nullification and Impairment procedure, and Article XXV. From the GATT provisions just cited, this last one has had by far the greatest importance as a basis for exceptions from MFN treatment.

Therefore, it will be dealt with at some length.

According to paragraph 5 of Article XXV the Contracting Parties may authorize a signatory state, a group of signatory states, or all of them, to deviate from one or some obligations of the General Agreement.

> "In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties ... "

Because of the expression "waive", which is used in the paragraph, this power of the Contracting Parties has become widely known as the "waiver power". It has been used extensively and the obligations waived are numerous.[1] With regard to exceptions from the MFN rule an outstanding example is the waiver according to which the United States "is free to eliminate the customs duties at present imposed on automative products of Canada without being required to extend the same tariff treatment to like products of any other contracting party".[2]

The basis for this waiver was an agreement between the US and Canada which provided for duty-free treatment for their mutual trade in automative products. The Contracting Parties "considered" that the close similarity of market conditions offered "exceptional opportunities" to rationalize production, to integrate productions facilities and to increase efficiency. They considered, further, that the government of the United States had no intention to replace imports from other sources by those of Canada. In order to

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[1] Many cases concern import surcharges for balance of payments reasons.

[2] Decision of 20 December 1965. GATT, BISD, 14th Suppl., p.37. A rather impressive "list of automative products referred to in the waiver" is reproduced as annex to the decision. Ibid., p.39.

safeguard the interests of other members of the GATT, however,paragraph 2 of the decision established a consultation procedure:

> "The Government of the United States shall enter into consultation with any contracting party that requests consultation on the grounds (i) that it has a substantial interest in the trade in an automative product in the United States market, and (ii) that the elimination of customs duties by the United States on imports of that automative product from Canada has created, or imminently threatens to create, a significant diversion of imports of that automative product from the requesting contracting party to imports from Canada."

If, during these consultations, the parties fail to reach an agreement, they may refer the question to the Contracting Parties for decision. Moreover, the waiver will be reviewed anyway, on the basis of annual reports to be supplied by the United States.

A further important example for a waiver of the obligation to treat all GATT partners on a MFN basis is that accorded to the European Coal and Steel Community.[1] Here, a vast range of goods is concerned, and, this time, there are six partners to the agreement for which a waiver was necessary.

One might think in this case, that the ECSC Treaty concerned the formation of a free-trade area for the coal and steel sectors, as indeed it is, Only a free-trade area for one sector alone or even for some sectors, is not a free-trade area in the sense of Article XXIV GATT. As will be remembered, such free-trade areas in the legal sense must comprise "substantially all" trade between the partners of the agreement. On this account the ECSC was no Article XXIV case but, since it offended the MFN obligation, only admissible if a waiver was given under the (harder) conditions of paragraph 5 Article XXV.

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[1] Decision of 10 November 1952. GATT, BISD, 1st suppl., p.17.

The Contracting Parties gave such a waiver, which included the requirement,[1] that the Community should report annually on the progress made towards the full application of the Treaty during the transitional period. Obviously, the discussion of these reports proved satisfactory, for on occasion of the final report at the end of the transitional period of the ECSC several members of the GATT Committee "expressed their confidence that the spirit of co-operation that had prevailed between the Member States and the Contracting Parties would be maintained in the future."[2]

The two cases just reviewed concerned agreements on closer trade relations between industrialized states. A waiver granted to further the relationship between less-developed countries (LDCs) is that sanctioning the mutual trade arrangement between India, the United Arab Republic and Yugoslavia.[3] This case is of special interest insofar as the partner states of the agreement can either be regarded as a "region", nor was the agreement intended to eliminate the trade barriers completely nor for substantially all trade. The waiver was given in the hope that the mutual trade preferences might contribute to the economic development of the three countries.

This brings us to one of the most important motives which are brought forward to justify deviations from the MFN rule: the wish to further the economic development of the LDCs. To this end these countries had elaborated a "Protocol relating to Trade Negotiations among Developing Countries." The Protocol was the subject of a decision of the Contracting Parties concerning "Trade Negotiations among Developing Countries."[4]

The purpose is stated quite clearly in the oping passages of the decision, in which the Contracting Parties noted that they might "enable developing

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[1] Para.7 of the decision of 10 November 1952.

[2] GATT, BISD, 7th Suppl., p.124.

[3] Decision of 14 November 1968, GATT, BISD, 16th Supp., p.17.

[4] This is the title of the GATT decision of 26 November 1971. GATT, BISD, 18th Suppl., p.26.

contracting parties to use special measures to promote their trade and development." They consider as one of these special measures, that the LDCs grant expanding access to one another's markets on especially favourable terms "through an exchange of tariff and trade concessions directed towards the expansion of their mutual trade."

Since such preferences were intended to give LDCs better conditions than the industrialized countries, they contradicted the MFN rule. Therefore, a waiver was asked for and the Contracting Parties decided that

> "the provisions of paragraph 1 of Article I of the General Agreement shall be waived to the extent necessary to permit each contracting party participating in the arrangements set out in the Protocol ... to accord preferential treatment as provided in the Protocol with respect to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other Contracting Parties."

The waiver was given "provided that any such preferential treatment shall be designed to facilitate trade between the participants and not to raise barriers to the trade of other contracting parties." A consultation and complaints procedure and an annual review was provided for.

While this waiver allows the LDSs to give preferences to other less-developed countries, a further waiver also sanctions preferences by industrialized countries in favour of the LDSs. The subject of this waiver is the well-known "Generalized System of Preferences"[1] (GSP), which has been demanded by the developing countries since the first United Nations Conference on Trade and Development (UNCTAD) in 1964. It was based on the argument that equal treatment was non-discriminating only if it were applied to comparable cases.[2]

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[1] This is also the title of the decision of the Contracting Parties dated 25 June 1971. GATT, BISD, 18th Suppl., p.24.

[2] See the so-called Prebish-Report UN-Document E/Conf. 46/3 of 12 February 1964, and UNCTAD, Document TD/B/AC. 1/1 of 23 March 1965. For a discussion of this question in international law see Kewenig, op.cit., p.190 et seq.

In unequal cases an adjusted treatment was called for in order to treat them non-discriminatingly. From this point of view, MFN treatment was only non-discriminating if applied by industrialized states on imports from industrialized states or by LDCs on imports from LDCs for that matter.

Following this argument, it was deduced that LDCs, being in an economically underprivileged position, were entitled to preferential treatment. Hence the demand for customs preferences. After long debates lasting seven years, the demand was accepted, not on account of the argumentation mentioned, but as a means to aid the development of the LDCs.

As noted in the preamble to the decision of the Contracting Parties, mutually acceptable arrangements had been drawn up in the UNCTAD "concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the market of developed countries for products originating in developing countries."

In order to bring such a Generalized System of Preferences in accord with the GATT the Contracting Parties waived the MFN obligation for a period of ten years, provided that "any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties." Further conditions of the waiver were that the Contracting Parties are furnished "with all useful information relating to the actions taken pursuant to the present Decision," that opportunities for consultation are given, and that complaints may be brought before the Contracting Parties which will examine them "promptly and will formulate any recommendation that they judge appropriate."

With respect to the legal character of the GSP it should be mentioned that they were not regarded, as the arguments recited above might indicate, as an emanation of the principle of non-discrimination in the proposed sense as an obligation to treat unequal cases differently. Instead, the waiver dealt with "preferences" which were "beneficial to the developing countries in order to increase export earnings, to promote industrialization, and to accelerate the rates of economic growth" of the LDCs. They were treated as an exception from

from Article I paragraph 1, limited in time, and subject to conditions. And they are again, although limited to the group of LDCs, based on the MFN rule, since they have to be non-discriminating within this group.

All these reviewed waivers of the MFN obligation are in a way typical in their motivation and show that Article XXV exceptions cover a wide range of ground. With regard to the volume of trade they concern important sectors of the intra-Western European and the US-Canadian trade as well as all trade among LDCs and all imports of industrialized countries from LDCs. To be sure, the General System of Preferences has not yet been fully introduced, especially by the United States, and the range of goods is neither complete nor are the imports under the GSP unlimited. But an extension in any direction is not at all unlikely and has already been demonstrated, to some extent, especially by the EEC. So, if a possible future development is taken into account, the portion of international trade which is exempted from MFN treatment by Article XXV waivers, is quite considerable.

If we try to systemize the MFN waivers according to subjects we get the folowing list:

1. Preferential agreements between neighbouring industrialized countries for a limited range of goods

2. Preferential agreements between some LDCs for a limited range of goods

3. Preferential agreements among all less-developed countries for possibly all goods

4. General preferences in favour of LDCs by all industrialized countries, possibly covering all goods produced in the LDCs.

Although the exceptions sanctioned by these waivers are not yet fully used and perhaps never will be, they legalize the exemption of all trade among developing countries and all imports from developing countries from the MFN

treatment. They legalize further some regional arrangements which apparently do not comply with the requirements of Article XXIV GATT. If we take into consideration these "preferences" which are based on Article XXIV, we must add to the legalized or at least tolerated exemptions from MFN treatment a big share of the trade among the industrialized countries (viz. intra-EEC, intra-EFTA, inter EEC/EFTA trade) and some reciprocal trade between industrialized and developing countries (viz.trade between the EEC and associated and other LDCs in Africa and the Mediterranean region).

Conclusions

This state of affairs opens, to put it mildly, serious doubts as to the general application of the MFN rule in the GATT. The Contracting Parties have either legalized or tolerated a great number of exceptions and only some of the most important have been dealt with here. In addition, in GATT practice there can be noted an increasing disregard or leniency, depending on the point of view, with regard to the MFN rule. On the whole, it is now difficult to speak of a rule to which there exist or are allowed exceptions. In fact, as the different examples given should show, the MFN rule now only moderates or qualifies the overriding motives of regional integration and of economic growth for the LDCs. In no case has the rule in the end prevented exceptions based on these motives, although it may often have given rise to detailed and thorough considerations, and to useful modifications of the original plans.

One could, of course, plead for a tough course in order to give to the MFN rule the prominent place in the system of international trade it was originally intended to have. Probably, in face of the erosion which already has taken place, this would not be a very realistic course. Moreover, there are some doubts, whether it would be the right one. The development during the last two decades can have, and probably has corresponded to a need felt in the international community to place stronger emphasis on regional integration and on aiding economic development than might have been expected at the end of the Second World War, or, to be precise, than was included in the General Agreement "on Tariffs and Trade".

So, I think that not an attempt to rigorously apply the MFN rule is called for but an attempt to use what is left of the principle of non-discrimination, if no longer as a cornerstone,but as a safeguard for as much order in the international trading system as possible.

For this purpose, one of the first things to do is to give back to the principle of non-discrimination the "respectability" it has lost through many circumventions, dubious interpretations, and outright violations. The way to do this is indicated by the development which international practice has taken. Perhaps from a legalistic point of view one could even argue that by means of this practice, the indicated change has already happened, international custom which gives a diminished value to MFN treatment already being established. Be that as it may, it is time to recognize that the MFN rule should stand in the way of the formation of regional groupings and of endeavours to aid the economic growth of less-developed countries, provided that some conditions are accepted. These conditions are not necessarily vague requirements like the ones in Article XXIV which, as we have been seen, gave rise to so many controversies as to their real meaning but never prevented the establishment of a regional grouping. Instead, they should lie in the field of information, consultation, and complaints settlement, perhaps even adjudication.

This means isolating one of the aspects of multilateral MFN treatment which, as has been demonstrated above, is of particular interest to those partner states which generally or in a special case lack the bargaining power to impress on strong partner states the need to consider their reactions. Certainly, in the usual discussion, the rule of equal treatment and mutual surveillance are regarded as a whole. But there is no necessity for always doing so. According to the philosophy lying behind Article XXIV GATT, the establishment of regional groupings is generally regarded as beneficial, not only to the member states themselves,but to the international trading community as well.

We also found that this beneficial effect has been noted, even in legally rather dubious groupings such as the association between the EEC and the AASM and in a regional arrangement which certainly did not qualify as an Article XXIV grouping, the European Coal and Steel Community. To repeat, in the GATT report on the second Yaoundé agreement, the Working Party stated that during the previous

period progress in the elimination of customs duties and restrictive regulations of commerce between the partner states had been made. It noted further, "that no specific cases of adverse effects to the trade of third countries had been raised."[1] And with regard to the ECSC the final report of the GATT Committee ended: "In conclusion several members paid tribute to the appreciable progress recorded by the Community in the past five years and expressed their confidence that the spirit of co-operation that had prevailed between the Member States and the Contracting Parties would be maintained in the future."[2]

This is some conclusive evidence that deviations from the MFN rule in order to form regional groupings of any kind are not necessarily resented by and may even arouse positive comments from third countries, if a spirit of co-operation prevails so that these countries can be sure that their interests are respected. To this end an information-consultation-arbitration machinery is helpful or probably indispensable.

With regard to deviations from the MFN rule in favour of the LDCs the argument runs somewhat differently but leads to the same conclusion: Since the action is designed to aid the economic growth of the developing nations some open and perceptible discrimination against the industrialized states is intended. What is to be avoided, however, is that real and unproportionately great harm is done to an industry in one of these states. This should not only be avoided in the interest of the country concerned but also in that of the LDCs, for in such a case, escape action from the part of the injured state is to be expected. Therefore, also in this case, rather than to preserve MFN treatment, the desire of the "third" countries is directed towards an international procedure which insures that their interests are guarded against serious damage.

So, what is primarily required is not the conservation or restoration of the MFN rule of Article I GATT, but the conservation and possibly strengthening of the international / multilateral surveillance of deviations from that rule. While the

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[1] GATT, BISD, 18th Suppl., p.142.

[2] Ibid., 7th Suppl., p.124.

international trading community may be lenient, and indeed is lenient, in allowing exceptions from MFN treatment in favour of regional arrangements and in order to aid economic development, a high degree of international surveillance and co-operation is indispensable, if the system of international trade is to survive the disturbances which most probably are to be expected in the (near) future. Indeed, the MFN rule, if it really ever was a "cornerstone" of this system, is anyhow to be modified in order to embrace phenomena such as the advent of co-operation agreements or of new commodity agreements. Much more than one rigid rule flexible institutions are needed which are capable of safeguarding the interests of the small partners of the international community.

From these considerations the following proposals can be deduced:

1. MFN treatment according to Article I GATT applies under principally equal conditions.

2. Equal conditions do as a rule not exist
   a) if contracting parties enter into regional arrangement of a permanent character and take on special obligations. At least, an institutional framework for consultation and arbitration is to be set up.
   b) if contracting parties differ considerably in the level of economic development.

3. In case of deviations from MFN treatment under para. 2(a) and 2(b) above, the Contracting Parties see to it that the interests of all signatories to the General Agreement are safeguarded. To this end
   a) any arrangement to deviate from paragraph 1 of Article I GATT is to be submitted to the Contracting Parties for consultation x months before becoming effective
   b) such arrangements are reviewed annually (bi-annually) on the basis of reports by the member states submitted at least x months before the reviews
   c) every signatory to the General Agreement is entitled to engage the Contracting Parties if its interests are seriously harmed by the activities of arrangements under para. 2(a) and 2(b). The Contracting Parties will put the matter on their agenda within x months.

d) the Contracting Parties may recommend to the member states of arrangements under para. 2(a) and 2(b) such action as they deem necessary to safeguard the interests of other signatories to the General Agreement.

4. Deviations from paragraph 1 Article I which are not covered by para. 2(a) or 2(b) above require the approval of the Contracting Parties according to paragraph 5 Article XXV. Their operation is subject to the rules laid down in para. 3 above.

Probably, these points should be completed by another one concerning emergency protection. Emergency protection is now subject to the MFN clause.[1] As Jan Tumlir has demonstrated convincingly,[2] the need to apply the principle of MFN treatment in case of emergency protection causes so many difficulties for the country in question that the procedure of Article XIX has often been avoided. According to Tumlir, also in case of emergency protection, not so much the conservation of MFN treatment is wanted, but the protection of the interest of the weaker GATT members by means of multilateral surveillance.[3] So, perhaps, the requirement that emergency protection should be non-discriminatory could be given up and replaced by the installation of a procedure analogue to that proposed under para.(3) above.

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[1] This is communis opinio, supported by the practice of the GATT. See Jackson, op. cit., p.564 with reference to the GATT practice and the preparatory work, Dam, op.cit., p.105, Curzon, op.cit., p.118, Tumlir, Proposals for Emergency Protection against sharp Increases in Imports. Trade Policy Research Centre, London, Guest Paper No. 1. p.6.

[2] Tumlir, p.7 et seq.

[3] Ibid., p.19.