INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY

Edited by
MEREDITH KOLSKY LEWIS
SUSY FRANKEL


K3943.I558 2010
382'.92--dc22
2010024613


The publisher has used its best endeavours to ensure that the URLs for external websites referred to in this book are correct and active at the time of going to press. However, the publisher has no responsibility for the websites and can make no guarantee that a site will remain live or that the content is or will remain appropriate.
CONTENTS

Notes on contributors  page vii
Acknowledgements  xiii

Introduction  1

PART I  International economic law: conceptions of convergence and divergence  5
1 The end of the globalization debate: continued  7
ROBERT HOWSE
2 Global economic institutions and the autonomy of development policy: a pluralist approach  22
YUKA FUKUNAGA
3 Fragmentation, openness and hegemony: adjudication and the WTO  44
JASON BECKETT

PART II  WTO treaty interpretation: implications and consequences  71
4 Demanding perfection: private food standards and the SPS Agreement  73
TRACEY EPPS
5 Eroding national autonomy from the TRIPS Agreement  99
SUSY FRANKEL
6 The WTO and RTAs: a 'bottom-up' interpretation of RTAs' autonomy over WTO law  116
ALBERTA FABBRICOTTI
CONTENTS

7 'Gambling' with sovereignty: complying with international obligations or upholding national autonomy 141
HENNING GROSSE RUSE-KHAN

PART III Responding to international economic law commitments 167

8 Safety standards and indigenous products: what role for traditional knowledge? 169
MEREDITH KOLSKY LEWIS

9 The GATS and temporary migration policy 193
RAFAEL LEAL-ARCAS

10 A different approach to the external trade requirement of GATT Article XXIV: assessing 'other regulations of commerce' in the context of EU enlargement and its heightened regulatory standards 216
PINAR ARTIRAN

PART IV Transformations in international economic law 241

11 Foreign investors vs sovereign states: towards a global framework, BIT by BIT 243
KO-YUNG TUNG

12 How 'trade in services' transforms the regulation of temporary migration for remittances in poor countries 269
JANE KELSEY

13 Reconceptualising international investment law: bringing the public interest into private business 295
KATE MILES

Index 320
The WTO and RTAs: a ‘bottom-up’ interpretation of RTAs’ autonomy over WTO law

ALBERTA FABBRICOTTI

I Introduction

The relationship between the WTO and regional trade agreements (RTAs) is usually addressed using a top-down approach that questions the compatibility of the RTAs with the WTO, under the assumption that the larger multilateral legal system perpetually prevails over the regional dealings. Another way of tackling the issue is to treat it as a political phenomenon, which cannot be framed in legal terms.

This chapter suggests a third, bottom-up approach to the question, that RTAs’ autonomy over WTO law might be interpreted as tacit performance of an international custom, and not simply as non-compliant behaviours.

II The relationship between the WTO and RTAs according to existing doctrine: criticism

A doctrinal approach to the relationship between the WTO legal system and the RTAs usually starts with Article XXIV GATT, Article V GATS and the Enabling Clause,1 which – it is said – ‘govern’ the formation and further implementation of RTAs, setting down substantial and procedural requirements with which RTAs are obliged to comply.2

---

1 These rules are alternative and somewhat complementary. GATT Article XXIV is applicable to agreements on trade in goods involving industrialised nations as among the contracting parties, the Enabling Clause covers trade in goods integration agreements concluded between developing countries, and Article V GATS deals with agreements providing for liberalisation in trade in services, whether amongst industrialised or developing countries or both.

2 There are two substantial requirements. First, GATT Article XXIV obliges the WTO Members on entering an RTA to abolish or diminish approximately to zero the customs duties and the other regulations of commerce with respect to ‘substantially all’ trade
The intent of the review is to evaluate the degree of consistency of the regional dealings with the multilateral system. Therefore, the extremely complex relationship between WTO law and RTAs is usually tackled in a rather simplified one-way top-down direction.\(^3\)

Another part of the doctrine deals with the subject of the WTO and regionalism, referring to Article 41.1(a) of the Vienna Convention on the Law of Treaties (VCLT). The WTO regulates conditions for *inter se* modifications to its multilateral agreements through its provisions on RTAs, that is, Article XXIV GATT, Article V GATS and the Enabling Clause. Therefore, these provisions should occupy a higher position (a sort of constitutional rank) in WTO law.\(^4\)

A common feature of most writings, whether they address directly the WTO provisions pertaining to RTAs, or rely on Article 41 VCLT, is the assumption that the WTO legal system always prevails over RTAs. However, since there is abundant evidence that RTAs too often diverge from WTO RTA provisions, the doctrine supporting the WTO primacy over RTAs should explain this drawback either as a lack of clarity of the WTO provisions or as inappropriateness of the WTO monitoring functions, or both. Whatever the case, the majority of the doctrine concludes that there is a need to clarify or strengthen WTO rules about the creation and the development of RTAs. However, there are few concrete proposals for reform.\(^5\)

The present chapter adopts a different approach. Unlike the above-mentioned doctrine, a fundamental assumption of this chapter is the originating from one of their regional partners (‘internal requirement’). Second, under paragraph 5, the contracting parties of an RTA must not increase duties or to render more severe the other regulations of commerce with respect to third States (‘external requirement’). The procedural requirements concern the duty to notify the text of the RTA and any subsequent change to it to the relevant WTO political bodies.

---

\(^3\) The literature focusing on GATT Article XXIV is immense (the bibliography on GATS Article V and the Enabling Clause is more limited). A sample is contributions in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006).


impracticability of any solution that involves strengthening of WTO rules relating to RTAs. The history of Article XXIV GATT shows that states are extremely reluctant to modify any of it, regardless of whether the proposed change would make the rules more severe or are merely to clarify and explain. Recent evidence of this attitude is the very modest Transparency Mechanism for Regional Trade Agreements which resulted from the Doha Round negotiations. The original mandate of the Ministerial Conference was to clarify and improve disciplines and procedures applying to RTAs under the existing WTO provisions.

Pauwelyn takes a pragmatic approach and questions the primacy of WTO law over RTAs. Like other authors, he departs from the view that the relationship between the WTO and RTAs is mainly political. According to Pauwelyn, general international law (in particular, the law of treaties) should only intervene to untangle the 'messy maze of preferences' resulting from the overlap between the WTO and RTAs. Panels and tribunals settling disputes, either at the WTO or under an RTA, should use this general international law for this untangling purpose. In applying self-restraint, judicial activism or other attitudes, as the case may be, these jurisdictional fora are entrusted to ‘redirect’, so to say, the

---

6 General Council Decision, 'Transparency Mechanism for Regional Trade Agreements', (WTO Doc. WT/L/671, 2006). Emblematic of the shortcomings of the Transparency Mechanism is its paragraph 10: 'The WTO Secretariat’s factual presentation shall not be used as a basis for dispute settlement procedures or to create new rights and obligations for Members.'

7 Doha Ministerial Declaration, 14 November 2001, para. 29.


9 For instance, this seems to be the view already held by P. Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics', Max Planck Yearbook of United Nations Law, 7,(2003) 219.

10 Reference is made by Pauwelyn, Legal Avenues to 'Multilateralizing Regionalism', supra, note 8, pp. 8–17, to rules on compatibility of successive treaties relating to the same subject matter (Article 30 VCLT), on interpretation of treaties (Article 31 VCLT), on effects of treaties on third States (Article 34 VCLT) and on inter se modifications (Article 41 VCLT).

11 J. Bhagwati, Free Trade Today (Princeton, NJ, and Oxford, Princeton University Press, 2002), pp. 112–13, defines the 'Spaghetti Bowl' in the following terms: 'a messy maze of preferences as PTAs formed between two countries, with each having bilateral with other and different countries, the latter in turn bonding with yet others, each in turn having different rules of origin; an unruly mass of criss-crossing strings that, in any case, is beyond my capabilities!'
choices of the WTO Members being also contracting parties of one or more RTA on adjudicating fora and applicable law.

This line of reasoning is not convincing.\textsuperscript{12} It is not clear whether the coordination of the different dispute settlement mechanisms, their jurisdiction and the law applicable by them etc., would occur either as a result of amendments in the relevant treaty rules (the WTO Dispute Settlement Understanding, or DSU, and of pertinent chapters or annexed protocols of RTAs) or as a 'spontaneous' conformity by panels and tribunals to rules of general international law (to the potential detriment of the specific terms of their mandate under WTO or RTA regimes). If the former option prevails, then again the unfeasibility of changing rules, whether having restrictive or explanatory intent, would apply. If the latter option prevails, that is, the direct reference to general international rules, several arguments of a different nature arise.

First, there is a logical presumption that, since politics, not law, dominates the interplay between the WTO rules and RTAs, there would be even less room for law when conflicts (either of law or of jurisdiction) between the two systems arise.

Second, and this is a point which is core to this chapter, it is doubtful that what is at stake is merely a conflict between treaties, thus suitable to being 'untangled' by rules pertaining to the law of treaties (VCLT), even if these were general or customary. It is suggested in this chapter that the VCLT does not regulate the matter at hand because it is different in essence.\textsuperscript{13} In the author's view, it is a problem which forms 'part of the general relationship between customary norms and treaty norms which is too complex to be dealt only with one aspect of it in [an] article [of a codification convention].'\textsuperscript{14}

The above follows from the author's main conjecture that RTAs' foundation might rely on international custom. This argument will now be developed through a bottom-up interpretation of RTAs' autonomy from WTO law.

\textsuperscript{12} For a critical analysis of Pauwelyn's foundation, see Jason Beckett, 'Fragmentation, Openness and Hegemony: adjudication and the WTO', in this volume, pp. 58–62.


III The bottom-up approach to the WTO and regionalism and its customary law implications

An implicit suggestion of this paper is to overturn the perspective from which the issue of the WTO–RTAs relationship is usually addressed, switching from a ‘top-down’ approach (it is the WTO which determines the conformity requirements for RTAs), to a ‘bottom-up’ approach (it is the RTAs themselves which determine the degree of their adherence to WTO law, through their actual behaviour).15

Empirical observation shows that RTAs choose to abide by WTO obligations. The structure of the WTO–RTAs legal relationship is thus characterised by ‘variable geometry’ rather than by hierarchical order.16

The only way to overcome the impasse, ‘reforms needed/reforms impossible’, is to go beyond the language and scope of Article XXIV GATT, Article V GATS and the Enabling Clause17 (from now on, only GATT Article XXIV will be mentioned, for simplicity). One should, however, resist the temptation to qualify all interactions between the WTO and RTAs as political questions which cannot be tackled from a legal point of view.

Conversely, it might prove particularly useful to look more deeply into State practice relating to RTAs and compare the attitude of WTO Members when they participate in WTO bodies and conferences, creating or implementing WTO rules on RTAs or discussing amendments to them, with the actual behaviour of WTO Members when acting as RTA contracting parties. This may show whether States, whilst appearing laissez faire, negligent or careless regarding relevant WTO obligations

---

15 This suggestion originates from an observation of P. Picone and A. Ligustro, *Diritto dell’Organizzazione Mondiale del Commercio* (Padua, CEDAM, 2002), p. 528.

16 The expression ‘variable geometry’ means that commitments differ for different Members of the WTO. Special and different treatment is a form of variable geometry to give special recognition for developing country needs. RTAs should be considered as another example. See the 2004 Report by the Consultative Board to the Director-General, Supachai Panitchpakdi, on ‘The Future of the WTO – Addressing Institutional Challenges in the New Millennium’ (*Sutherland Report*), para. 292. For a possible resort to ‘variable geometry’ as a strategy to cope with the WTO–RTAs relationship, see A. Fabbricotti, ‘Remarks’, ASIL Panel on ‘Multilateralizing Regionalism and the Future Architecture of International Trade Law As a System of Law’, *ASIL Proceedings*, 103 (2009), forthcoming.

17 The Enabling Clause is a GATT Contracting Parties Decision of 1979. The Clause should be considered as a treaty provision in that GATT 1994 paragraph 1(b)(iv) makes it clear that the GATT 1994 consists of ‘[…] other decisions of the Contracting Parties to GATT 1947’.
concerning RTAs, may in those RTAs conduct themselves in a somewhat general, uniform and systematic way.

At first sight, States’ negligence or carelessness appears so deliberate and widespread as to be logically perceived as symptoms of ‘autonomy’ of RTAs with respect to the WTO. If this is so, then what State practice suggests is that non-compliance with WTO rules should mean something more than being wrong under WTO law. If this is so, then it is crucial to ask whether non-compliant State practice can be interpreted as a tacit performance of an international customary right, freedom or obligation.

The formation of a custom explaining otherwise non-compliant State practice is the ultimate question addressed in this chapter. To the best of the author’s knowledge, this is an argument that has never been investigated. When customary law is injected into the debate relating to the WTO and regionalism, it is done to demonstrate that WTO treaty rules have become or have reproduced international customs.\(^{18}\) Otherwise, customary law is discussed because of the express reference, in Article 3.2 DSU, and thus, in relation to the more far-reaching impact on the WTO system.\(^{19}\) Ultimately, all previous writings have explicitly or implicitly linked the issue of the existence of international customary law to the cause of the primacy of WTO law.

**IV Difficulties with the argument (and overcoming them?)**

Clearly, the proposition submitted in the present chapter is likely to run up against some difficulties. Three potential concerns are canvassed below.

*The attribution of RTAs’ behaviours to the Member States*

First, the idea that the existence of a customary rule could be inferred from RTAs’ attitudes and concrete behaviours poses problems. This view relies on a questionable paradigm of strict direct legal attribution based on the assumption that RTAs’ measures and concrete behaviours coincide with the State practice of the contracting parties. It also relies, rather unrealistically, on the idea that the individual stances of RTA members

---


\(^{19}\) This issue has been so extensively debated in doctrine that there is no point in providing a list of contributions here, even as a sample.
are cumulatively transposed and enforced at a universal level through the intermediation of RTAs’ common organs. Also, it might be suggested that ‘instances of [State] practice have to be attributable to States, for which reason the practice of international organizations ... is excluded’. An answer to these hypothetical comments is that the expression ‘RTAs’ autonomy’ has been used in this chapter more as a methodological fiction than with a strict legal exactitude. Indeed, as noted above, this chapter will consider State practice relating to RTAs’ concrete behaviours inutible only to States, not to the entities they created through the conclusion of RTAs.

The content of the customary rule

Second, this argument requires identifying the exact content of the customary rule relating to RTAs that State practice evidences. This is particularly difficult and troublesome as modern RTAs may have very wide subject-matter coverage and in many substantive ways differ considerably from each other. Consequently, any attempt to extract a common essential element, principle or rule, from this complex network of different, overlapping, systems of norms, is likely to conclude that the very essence of all RTAs is the creation of ‘trade preferences’ or, correspondingly, ‘discrimination against third parties’.

Although this common substance appears too wide and perhaps vague to form the content of an international customary rule prescribing obligations, in my view the validity of such a conjecture should not be excluded in principle, where the international custom instead reflects, transposes or reinforces a freedom or a right.

It is commonly accepted that, under customary international law, States are essentially free to enter any agreement of any kind and content. Exceptions are jus cogens subject matter and/or principles and rules embodied in the UN Charter. Therefore, States are free to discriminate against third countries if they deem it convenient. In the domain of trade, this means freedom to conclude RTAs.

On the one hand, this supposed customary freedom represents a pillar of international trade relations and should thus be promoted and

---


safeguarded. Article 12 of the Charter of Economic Rights and Duties of States, which makes the participation of States in sub-regional, regional and interregional cooperation agreements in the pursuit of their economic and social development a right, and ranks corresponding expectations of third countries as mere legitimate interests, seems to confirm this view. Indeed, although the Charter does not possess a binding legal character per se, given the exhortative function and nature of UN General Assembly resolutions, it is assumed that its Art. 12, which is based on the ethos of Article 52 of the United Nations Charter, reiterates an established principle of international trade and of economic relations generally.

On the other hand, a general obligation of non-discrimination does not limit this customary freedom, since most favoured nation (MFN) and national treatment can hardly be regarded as international customs. It is common knowledge that this potentially unlimited customary freedom is instead countered by treaty law, mainly through the non-discriminatory clauses contained in the WTO agreements.

The International Law Commission's Study Group on the Fragmentation of International Law has highlighted that regionalism plays an unusual role in international trade law compared to the functions it normally performs within other sub-systems of international law:

"It is often assumed that international law is or should be developed in a regional context because the relative homogeneity of the interests or outlooks of actors will then ensure a more efficient or equitable implementation of the relevant norms. ... Nevertheless, one aspect deserves mention here, namely regionalism in regard to trade law. Despite the strong pull for a global trade regime within the GATT/WTO system, the conclusion of RTAs has not diminished, on the contrary ... in view of the difficulties and controversies in developing the universal trade system, there appears presently to be no end in sight to the conclusion of RTAs."
In 2005, the same Study Group had observed that 'while members noted that “regionalism” generally fell under the problem of lex specialis, some still felt that this was not all that could be said about it. In some fields such as trade, for example, regionalism was influencing the general law in such great measure that it needed special highlighting.\textsuperscript{28}

If RTAs' autonomy from WTO law is explained on the ground that, in their trade relations, States are either ‘free to prefer’ or have a ‘right to prefer’, this is likely to have unjustified devastating effects on the WTO legal order, the raison d'être of which is non-discrimination. The WTO and the MFN rules are still important,\textsuperscript{29} though they recently seem to have lost their momentum,\textsuperscript{30} meaning that the issue should be approached with extreme caution. Should the discourse on customary law find some support in State practice, then a proper balance should be drawn in order to coordinate the co-existence of such custom with the treaty law of the WTO and their reciprocal deference. This might be achieved if the interplay between RTAs and the WTO is considered as a question of interrelation between different sources of international law.

\textit{Duration of the customary rule}

Another difficulty is, when did this hypothetical custom that envisages a freedom or right to discriminate in international trade relations come into existence?

It could be that the considered custom has progressively developed in the course of an undefined period of time, though surely since 1947. It has principally manifested itself through a generalised disregard for GATT Article XXIV and other similar WTO provisions successively introduced


\textsuperscript{29} Funnily, several scholars place emphasis on the opposite occurrence: 'like it or not, RTAs are here to stay' or 'the political and legal reality is, therefore, that regional agreements are here to stay'! See Hsu, supra, note 18, p. 524; and Pauwelyn, Legal Avenues to 'Multilateralizing Regionalism', supra, note 8, p. 3; R. Baldwin and P. Thornton, Multilateralising Regionalism: Ideas for a WTO Action Plan on Regionalism, (London, CEPR, 2008), p. 2.

\textsuperscript{30} The Sutherland Report, supra, note 16, para. 60, notes: 'Yet nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception ... what has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment.'
in the system. Such reasoning assumes that Article XXIV is a positive, prescriptive treaty provision. As a consequence, a custom derogating from it could only have formed successively. It could also be that Article XXIV derogated from a pre-existing custom when it entered into force. It follows from this that, since 1947 and until an imprecise date, the treaty norm of Article XXIV could have existed legally, in between two periods during which a supposed customary freedom or right to prefer prevailed in international trade relations.

Alternatively, it could be argued that the custom in question is ancient and dates back to a period before 1947. That would mean that Article XXIV never produced its formal prescriptive effects, having always been ‘dormant’. In the present author’s opinion, this alternate view is not groundless, or even absurd, as it might appear at first sight. A recent study revealing the dubious origins of Article XXIV reinforces this position.

A thorough assessment of the two above perspectives and their implications is beyond the scope of this chapter. However, whatever the answer to the above question might be, it seems likely that a customary right or freedom to agree on trade preferences with some partners and not to extend these preferences to other countries existed before 1947. There are indeed many arguments that support this view.

First, the practice of bilateral commercial treaties, which dominated international trade relations before GATT, showing the steady presence in these dealings of a saving clause preserving the preferences accorded in other treaties. In other words these saving clauses maintained in force certain previously established – or even hypothetical future – preferences, without extending them, in force of the MFN standard, to the partner in the bilateral treaty containing such a saving clause.

Second, a majority of the pre-1947 doctrine and some influential reports of the League of Nations considered that a ‘regional exception’,
recognised by tradition or accepted as custom, existed and that this exception had had the legal effect of precluding the formation of a customary MFN clause. Therefore, it has been argued that ‘throughout the years, a custom has formed, aiming at excluding from the operation of the MFN treatment clause all advantages and favours conceded as among the members of a customs union. Even without an express treaty provision, the practice supports this point of view.’\(^{36}\) Of note in relation to this quotation is that only customs unions were RTAs in the period preceding 1947.

V Is there an international custom behind RTAs’ autonomy from WTO law?

Theory/methodology

Further investigation into State practice should serve to ascertain the existence of the two requirements of international customary law, namely diuturnitas (consistent State practice) and opinio juris (acceptance of State practice as law).\(^{37}\)

As regards the diuturnitas, this requirement is arguably already satisfied by the great number of existing RTAs. As of July 2007, a total of 380 RTAs, of which 205 were then in force, had been notified to the GATT/WTO.\(^{38}\) All but one WTO Member were parties to one or more RTAs. Therefore, it might be said that all these RTAs represent such a ‘pattern of treaties in the same form’\(^{39}\) which produces evidence of an international custom.\(^{40}\)


\(^{37}\) Article 38.1(b) Statute of the International Court of Justice.

\(^{38}\) An up-to-date list of RTAs notified to the WTO is provided at www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 6 October 2008).


As to the other requirement (opinio juris), arguably, since they are treaties, all RTAs are inherently a practice accepted as law. In the North Sea Continental Shelf case, for example, the International Court of Justice confirmed that treaty norms could turn into custom.41 Furthermore, the Court has said that multilateral conventions ‘may have an important role in recording and defining rules deriving from custom or in developing them’.42 The same can be said of regional and bilateral treaties.43

These preliminary arguments based on classical theories should not prevent investigation of further State practice relating to RTAs.44 This should include a survey of the attitude of WTO Members when they participate in WTO bodies and conferences creating, implementing or amending WTO rules on RTAs and of the actual practice of WTO Members when acting as RTA contracting parties.

While a complete analysis of such a practice is beyond the scope of this chapter, the following paragraphs will focus on what this author considers to be two major indicators of State practice: the extent of the ‘regional exception’ and the degree of RTAs’ autonomy in respect to the WTO legal order.

Next, it is appropriate to analyse the relevant WTO jurisprudence in order to evaluate the degree of enforcement and/or enforceability of the WTO provisions relating to RTAs. This step appears indispensable because customary law is established by a pattern of claim and also by acquiescence, of the WTO and by other States (WTO Members not being party to a particular RTA).45 Indeed, as pointed out by one writer, in the development of customary rights the two processes – constant assertion of the right in question and consent in that assertion on the part of the

42 ‘The Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)’, (ICJ Reports, 1985), para. 27. See also ‘Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)’, (ICJ Reports, 1986), paras. 174 and 181.
44 Admittedly the above argument (‘since they are treaties, all RTAs are inherently a practice accepted as law’) is rather simplistic. Regarding treaties giving rise to customary law, ‘treaties do not, in most cases, articulate the norm as one of customary law (unless one assumes that laying down a rule in a treaty automatically means articulating the rule as a norm of customary law’). See M. Akehurst, ‘Custom as a Source of International Law’, British Yearbook of International Law, 47 (1974–1975), p. 43, footnote 7. See also Nicaragua v USA, supra, note 42, paras. 174–82.
affected States or intergovernmental entities – are complementary and mutually interdependent.46

The extent of the ‘regional exception’

Since State practice regarding RTAs is immense, it is inconceivable to review it analytically here and so certain ‘indicators’ are used to overcome this inconvenience.

If one looks at State practice resulting from participation of WTO Members in WTO bodies and conferences creating, implementing or amending rules, significant elements can be inferred from the extent or scope of the ‘regional exception’.47 Rather than focusing on the individual WTO provisions relating to RTAs – each of which has its own role, meaning and scope within the WTO system – this chapter focuses on the overall legal significance and effect of all these treaty clauses on the multilateral trade legal system and, more generally, on the international legal order.

The concept of ‘regional exception’

The term ‘regional exception’ seems suitable to contextualise sociologically the WTO provisions concerning RTAs. Particularly, it gives expression to the fact that WTO Members (in the past, the GATT Contracting Parties) make the provisions. Since, as previously noted, all WTO Members but one are parties to one or more RTAs, the same States make the rules with which they have to comply.

Apart from synthesis and depth, the concept of ‘regional exception’ has the advantage of comprehensiveness. It records and assimilates the effects of both categories of relevant WTO provisions, either those which expressly and directly ‘govern’ the formation of RTAs (the three basic sets of Article XXIV GATT, Article V GATS and the Enabling Clause) or those addressing themselves to RTAs implicitly and indirectly: examples are Article 6.3 of the Agreement on Technical Barriers to Trade (TBT), Article 4.2 of the Agreement on Sanitary and Phytosanitary Measures

47 This terminology does not belong properly to the language of international law. As noted by the ILC Study Group on the Fragmentation of International Law ‘the expression “regionalism” did not figure predominantly in treatises of international law and in the cases in which it was featured it rarely took the shape of a “rule” or a “principle”’. See ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, supra, note 27, para. 450.
(SPS), Article VII GATS and Article 5:2(b) of the Agreement on Safeguards (ASG). Commentary usually ignores the latter group of norms.48

Under WTO law, the extent of the ‘regional exception’ is measurable both in the positive and in the negative. A positive assessment can be approached both horizontally, in other words, from the point of view of its subject-matter coverage, and vertically, or through assessment of the recurrence with which the exception is invoked or restated.

The extent of the exception also depends on a negative assessment of the ‘quantity’ and ‘quality’ of the specific requirements and criteria set down in WTO law, and this limits the possibility of concrete implementation of the exception to a restricted number of legitimate circumstances. However, given the above criticism on the effectiveness of GATT Article XXIV, this assessment will not be addressed in detail in the present chapter as it would likely lead to a deadlock.49 The evaluation of the enforceability of the WTO rules on RTAs will, in part, replace that discussion.

The horizontal dimension of the ‘regional exception’

As regards the horizontal dimension, the extent of the ‘regional exception’ goes beyond what can be deduced from the language and material scope of the specific WTO provisions concerning the RTAs.

On the one hand, Article XXIV GATT coverage exceeds the sphere of application of the agreement to which it belongs. Since its origins in 1947, Article XXIV was conceived as a general exception from all GATT obligations and not an exemption only from the MFN rule.50 This is confirmed by the chapeau of paragraph 5 of Article XXIV which states that ‘the provisions of this Agreement shall not prevent ...’. With the establishment of the WTO in 1995, WTO Members were persuaded that the provisions of this article would stretch to cover any kind of restriction in trade in goods referable to their participation in an RTA, no matter if the measure

48 A rare exception is offered by Cottier and Foltea, supra, note 4, pp. 50–1.
49 With respect to the ‘quality’ of the requirements, suffice it to read the remarks already made by Dam in 1963: ‘Article XXIV appears, on first impression, to set forth a precise set of rules for determining the circumstances under which regional arrangements will be permitted. The apparent precision is quite illusory.’ K. W. Dam, ‘Regional Economic Arrangements and the GATT: the Legacy of a Misconception’, University of Chicago Law Review, 30 (1963) 615, p. 619.
in question was violating the GATT or a different, more specialised, WTO agreement.\(^{51}\) (This is confirmed by the *travaux préparatoires* of the Marrakech Agreement.)

On the other hand, in the intent of the Uruguay Round negotiators, additional special regimes for RTAs, provided for in several treaty texts other than GATT, would have considerably expanded the sphere of applicability of the 'regional exception', to accommodate almost all the remaining practical needs and expectations of RTAs. These additional disciplines are envisaged by those provisions permitting mutual recognition arrangements among a limited number of WTO Members, such as Articles 6.3 TBT, 4.2 SPS and VII GATS, by those provisions allowing selective safeguards in order to exclude regional partners from restrictive measures, such as Article 5:2(b) ASG, and, even more significantly, by the 'waiver' provisions of Article IX.3 of the WTO Agreement.

The domain of safeguards gives a clear example of the interaction between GATT Article XXIV and the additional preferences for the benefit of RTAs provided in other 1994 WTO Agreements.

RTAs usually provide for detailed regulation of the use of safeguards as among the Contracting Parties of such agreements.\(^{52}\) Safeguards are a physiological outcome of Article XXIV, since it would be contradictory to require the WTO Members entering an RTA to liberalise trade almost completely with their regional partners and at the same time prevent Members from using the 'safety valve' of safeguards in case of emergencies in import surpluses. If Article XXIV does not per se prohibit intra-regional safeguards, they are allowed implicitly. It is beyond the scope of this chapter to explain why GATT Article XIX\(^{53}\) is not listed among the

---


52 A few RTAs, like the EU, the ANZCERTA (CER Agreement) and the MERCOSUR, do not contain such a discipline, since they prohibit intra-regional safeguards, other than in exceptional and 'of last resort' circumstances.

53 GATT Article XIX is the predecessor of the ASG. It has not been replaced by the discipline of the 1994 Agreement.
exceptions envisaged in paragraph 8 of Article XXIV. A problem with such intra-regional regimes is that they are more permissive and flexible than the WTO discipline on global safeguards. In some RTAs, there is a diversification of the legitimate objectives that the safeguards can pursue. In others, there is a relaxation of the requirements (for example, absence of the ‘causal link’ between the increase in imports and the serious injury to domestic producers). In others there is neither an obligation for compensation for the State adopting the restrictive measures nor a corresponding right to countermeasure or retaliation for the State affected by safeguards. In sum, RTAs usually pave the way for the use of intra-regional safeguards. Furthermore, arguably the effects of RTA safeguard regimes are tantamount to an inter se agreement to restrict trade between WTO Members falling under the prohibition of ASG Article XI:1(b).

A second related issue is the selectivity of global measures. Can a WTO Member exclude its RTA partners from the application of a WTO safeguard? GATT Article XIX’s silence about the non-discriminatory nature of safeguards led panels (somewhat paradoxically) to exclude selectivity. The controversial question of selectivity has been resolved in WTO jurisprudence through the ‘invention’ of the criterion of parallelism. According to this criterion, the legitimacy of a selective safeguard measure must be assessed on the basis of a strict correspondence between the scope of investigation (in other words, the sphere of the supplier States taken into account for purposes of assessment of the ‘serious injury’ to the domestic producers of like products) and the scope of application of the safeguard restriction (the sphere of the States affected by the measure). As well as ‘parallelism’, which represents an unexpected

54 For this explanation, see Pauwelyn, supra, note 51, pp. 125–8.
55 ASG Article XI:1(b) forbids ‘any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members."
56 See M. C. E. J. Bronckers, Selective Safeguard Measures in Multilateral Trade Relations (The Hague, T.M.C. Asser Institut, 1985).
57 According to Pauwelyn, supra, note 51, p. 121, it is possible to deduce the selective character of safeguards from Article XIX’s requirements of ‘unforeseen developments’ and ‘effect of the obligations incurred under the GATT’.
58 The criterion of parallelism was first enunciated by the Panel in Argentina – Safeguard Measures on Imports of Footwear, (Argentina – Footwear), WT/DS121/R, adopted as modified by the Appellate Body, 12 January 2000, para. 8.80, and later confirmed by the Appellate Body.
outcome of the WTO jurisprudence, there is ASG Article 5.2(b). That article is an additional exception allowing discriminatory safeguards. It permits WTO Members, provided that consultations are conducted at the Committee on Safeguards, to allocate stricter import quotas to selected supplying countries when they can prove that imports from these countries have increased disproportionately to the total increase of imports of the product, ‘in the representative period’ (so-called criterion of proportionality). So far Article 5.2(b) has never been raised successfully in WTO dispute settlement. Both panels and the Appellate Body have discussed the merits of the selectivity issue only when choosing between the non-discriminatory rule of ASG Article 2.2 (‘safeguard measures shall be applied to a product being imported irrespective of its source’) and the parallelism rule. It seems, however, whether parallelism or proportionality is the basis of selectivity, that practical results do not change. WTO Members can either exclude their RTA partners from the application of the safeguard (parallelism) or allocate to them wider quotas of imports (proportionality). The real problem with either of these options might be that the requirements for applying the parallelism or the proportionality criteria could be ‘adjusted’, at the RTA level, through previous arrangements between contracting parties to temporarily restrict intra-regional trade or other kinds of understandings.

NAFTA Article 802 is emblematic in this context. In principle, that Article, entitled ‘Global Actions’, reserves to each NAFTA Member the right to impose global safeguard measures allowed under GATT Article XIX and/or the ASG. However, as paragraph 1 of the Article makes clear, this right is excluded from action under WTO provisions regarding compensation or retaliation, to the extent that such provisions are inconsistent with the NAFTA Article.

Also, any NAFTA Member taking a global action is obliged to exclude from its application imports from another NAFTA Member, unless these imports account for a substantial share of total imports and contribute

---

59 The theory of parallelism came out of the debate on the applicability of footnote 1 to ASG Article 2, concerning the applicability of a safeguard measure by a customs union either as a single unit or on behalf of a member State.

60 For instance, the Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea (US – Line Pipe), WT/DS202/AB/R, adopted 8 March 2002, para. 173, noted that Article 5.2(b) was not applicable in the case at issue since this explicit exception would have been granted in the case of 'serious injury' but not in a situation where only the 'threat of serious injury' persisted (a circumstance which is expressly excluded from the scope of the Article).
importantly to the serious injury, or threat thereof, caused by imports. In *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, it is recorded that the US International Trade Commission\(^{61}\) excluded Canadian imports from the application of the US global safeguard because, although these accounted for a substantial share of US total imports, they did not play a significant role in causing serious injury or threat of injury.\(^{62}\)

As a result, the terms and requirements of ASG Article 5.2(b) are overturned and presumably distorted.\(^{63}\) NAFTA Article 802 also disregards the parallelism rule. It provides for a NAFTA Member, in order to be excluded from the application of the safeguard, not to fall among the five principal suppliers of the product the restrictive measure affected after an investigation covering the last three years.

The vertical dimension of the ‘regional exception’

The appearance of a regional clause in WTO legal instruments from time to time (1947 GATT, 1979 Enabling Clause, 1994 WTO Agreements) occurred concomitantly with structural changes in the multilateral trading system (the ‘institutionalisation’ of non-reciprocity with respect to trade with developing countries and the replacement of the GATT with a fully-fledged international organisation). This reinforces the idea that the ‘regional exception’ is deeply rooted in State practice.

*The degree of RTAs’ autonomy in respect to the WTO legal order*

The three-level sequence of the analysis

Looking at State practice resulting from participation of WTO Members in RTAs, the States’ actual behaviours and attitudes can vary considerably, showing a different degree of autonomy in respect to the WTO legal system.\(^{64}\) To capture the nuances and the dynamics of this phenomenon,

---

\(^{61}\) See Investigation No. TA-201–67 (publication 3088; March 1998).


\(^{63}\) According to the second paragraph of NAFTA Article 802, ‘Substantial Share of Total Imports’ will be assigned only to the top five suppliers of the good subject to the proceeding, and ‘Important Contribution to the Serious Injury or the Threat Thereof’ will not be assessed if the growth rate of imports from the other NAFTA Party is appreciably lower than the growth rate of total imports from all sources over the same period.

\(^{64}\) Consistent with the bottom-up approach suggested in this chapter, it is here preferred to use the expression ‘RTAs’ autonomy’ instead of ‘RTAs’ compatibility’.
the ideal method of analysis involves three sequential levels, which reflect the progressive relaxation of the interdependence between WTO rules and States’ concrete behaviours. First, the autonomous conduct of RTAs (and that of their member states) is appraised through the relevant positive WTO rules. Second, the analysis aims to assess whether RTA Members’ autonomy depends on the existence of gaps in the WTO legal system or on obscure or controversial WTO rules. Third, an RTA’s autonomy is only observed empirically and described as a sociological, political and economical phenomenon.

There are two important points about these three levels. First, the threshold between the first and the second level of the analysis is often missing or undefined. Since it is often unclear what exactly the WTO rules require in respect to a number of implementation issues, such as ‘substantially all the trade’, a considerable portion of State practice falls within a ‘grey area’ hardly capable of appraisal from a legal point of view. Therefore, the same RTA measure can easily be interpreted either as unlawful or as permitted under WTO law. Second, in strict legal terms, it is commonly understood that autonomy in State practice is measurable only if the relevant practice deviates from the positive rules of the State’s legal system. It is only within this narrow interpretation that autonomy in State practice may be considered of relevance for the ascertainment of customary law and/or for identification of other features of the international legal order. There are, however, grounds for suggesting that WTO Members’ conduct resulting from participation in RTAs, which are not directly referable to subjective legal situations under WTO law, and thus come into the second and third level of the analysis, can be of concern as well. The ‘grey area’ conduct is the result of gaps or misconceptions in the WTO rules which are, in turn, ascribable to the WTO Members themselves. Also, these grey areas often conflict with the spirit of WTO law and undermine its objectives and outcomes. It seems, therefore, unavoidable that these grey areas can be taken into account when framing the interplay between the WTO and RTAs. Importantly, such grey area conduct can be challenged under the non-violation complaint or the situation complaint procedures in Article 26 DSU, since they can nullify or impair the benefits accruing to other WTO Members. Under the former

---

65 See above, at sub-section “The concept of “regional exception””.

66 See, for instance, views illustrated above (at sub-section “The horizontal dimension of “regional exception””) à propos intra-regional safeguards and the prohibition on voluntarily restricting trade among WTO Members.
GATT dispute settlement system, Citrus was a non-violation complaint about injurious effects resulting from an RTA. The Panel report was not adopted. The main issue was that the United States had a legitimate expectation over certain benefits accruing from MFN, GATT Article I, and that these benefits had been impaired to the extent that preferential agreements of ‘unresolved GATT legality’ had caused damage.  

The first level
Attention will now be focused on some examples of State practice. The first level of the analysis considers, through comparison to positive WTO law, State practices implementing the ‘substantially all the trade’ requirement of GATT Article XXIV:8. This might appear somewhat provocative since, as it is widely known, this requirement raises a number of interpretative issues. The most relevant interpretation issue is assessment of the threshold, from 85 per cent to ‘all the trade’, and the choice of a formula or technique to calculate the threshold. The 1994 Understanding on Interpretation of GATT Article XXIV suggests that this requirement should be assessed both quantitatively (in other words, the liberalisation should affect almost all the volume of intra-RTA trade) and qualitatively (as the intra-RTA liberalisation should affect all main trade sectors). State practice shows, however, that States do not regard the ‘substantially all’ threshold and its method of calculation as a problem. An overwhelming majority of RTAs exclude from liberalisation both a significant volume of trade and one or more important trade sectors. This is done in several ways, some of which are self-declaratory (such as the use of exemption lists of products and/or of sectors annexed to the RTA deal); others are disguised under permitted procedures with other stated purposes (such as those for the protection of non-trade values or those envisaging a different liberalisation speed among contracting parties in asymmetrical RTAs). Therefore, it seems that, wherever the threshold is placed or whatever the method of calculation chosen, the outcome is always a deviation from GATT Article XXIV:8.

---

69 Fourth recital of the Understanding Preamble.
70 For a similar conclusion, see J. H. Mathis, ‘Regional Trade Agreements and Domestic Regulation: What Reach for ‘Other Restrictive Regulations of Commerce’?’ in Bartels and Ortino (eds.), supra, note 3, pp. 79–108, at p. 82.
The second level

The most evident example of State measures, showing the significant autonomy enjoyed by RTAs (mainly Free Trade Areas) with respect to the WTO legal system, is given by the preferential rules of origin. These rules allow RTA Members, through implementation of an often complex economic ratio or formula, to distinguish among RTA countries and non-RTA countries in order to apply preferential treatment only to the former. Preferential rules of origin are not prohibited, therefore they are permitted under WTO law. Nevertheless, they can have serious diverting effects on trade flows and can implicitly undermine the real purpose of the WTO requirements for RTAs.

The third level

Finally, the empirical observation of regionalism evidences a variety of phenomena which suggest potentially innumerable situations where RTAs’ autonomous behaviours de facto undermine the WTO legal order.

A thorough description of these factual developments is beyond the scope of the present chapter.\textsuperscript{71} It suffices here to list the main features of modern regionalism: proliferation of RTAs; achievement of patterns of economic integration more advanced than free trade areas and customs unions; performance of hybrid modalities of economic integration; enlargement of the subject-matter coverage to include WTO-plus issues; augmentation of North-South RTAs; formation of regional groupings not based on a treaty and devoid of institutional structure; overlapping of RTAs; conclusion of RTAs between RTAs; and creation of RTAs between countries geographically distant.

\textit{The degree of enforceability of the WTO rules on RTAs}

Perhaps the only true innovation relating to RTAs has been the clarification contained in paragraph 12 of the Understanding on the Interpretation of GATT Article XXIV, stating that ‘the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade

areas or interim agreements leading to the formation of a customs union or free-trade area. From this step, panels became clearly competent to judicially review RTAs.\textsuperscript{72}

In the past, the GATT machinery that monitored the conformity of RTAs with Article XXIV was exclusively political. Ad hoc GATT Working Parties were entrusted with the scrutiny of individual RTAs. From 1996 the monitoring of all RTAs notified to the WTO was transferred to a permanent Committee on Regional Trade Agreements (CRTA). Like the former Working Parties, the CRTA has systematically failed to check RTAs.

The first case in which a Panel and the Appellate Body took jurisdiction over RTAs was \textit{Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)} in 1999.\textsuperscript{73} On the merits, the Appellate Body found that Article XXIV justified the regional economic organisation’s adoption of a measure that was inconsistent with other GATT provisions, provided that two conditions are fulfilled: (1) Only if the measure is introduced upon the formation of a customs union which fully meets the requirements of paragraphs 8 and 5 of Article XXIV (timing), and (2) only to the extent that the formation of the customs union would be prevented if the measure were not allowed (necessity).

It is beyond the scope of this chapter to reopen a debate on this report. However, in general the Appellate Body did not escape criticism. This included, for example, that the timing and necessity requirements led to absurd results and that the Appellate Body had practised ‘judicial activism’.\textsuperscript{74}

There is an argument which deserves to be highlighted. The compromise reached in the Appellate Body’s decision on \textit{Turkey – Textiles} has resulted in taking out of their traditional context the overall RTA compatibility conditions laid down in Article XXIV (that is to say, the internal and external requirements).\textsuperscript{75} They are now subsumed, for adjudication purposes, into a category of prerequisites. This leaves the conditions upon

\textsuperscript{72} In the 1947 GATT era, the jurisdiction of Panels and Working Parties had been systematically rejected.

\textsuperscript{73} Panel Report, \textit{Turkey – Restrictions on Imports of Textile and Clothing Products}, WT/DS34/R; Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999. This case has greatly attracted the attention of commentators.


\textsuperscript{75} See \textit{supra}, note 2.
which Article XXIV can justify concrete RTA measures prima facie inconsistent with WTO law. (These conditions are the timing and the necessity tests.)

The problem with this sequence is that WTO judicial bodies are technically unequipped to perform the task of assessing the overall compatibility of RTAs with WTO law.\textsuperscript{76} As a result, the second step of the procedure, that is, the evaluation of legitimacy of specific RTA measures, does not occur because the overall compatibility amounts to a prerequisite for deciding the concrete measure’s legitimacy.

There have been several WTO disputes invoking GATT Article XXIV since \textit{Turkey – Textiles}. In most of these instances, the issue was the discriminatory (selective) application of global safeguards. By introducing the concept of parallelism, the panels and the Appellate Body have avoided answering the question of whether Article XXIV can justify a violation of the non-discrimination rule of ASG Article 2.2.\textsuperscript{77} In one case, the Panel concluded that the United States had demonstrated that the NAFTA was consistent with Article XXIV; however, the Appellate Body found it unnecessary to address this issue and considered the Panel’s relevant conclusions as ‘moot’ and without ‘legal effect’.\textsuperscript{78}

In the other reports, panels have, whenever possible, made use of the principle of judicial economy and, thus, have not scrutinised either the RTA in its entirety or the specific measure. In \textit{Brazil – Measures Affecting Imports of Retreaded Tyres}, the specific RTA measure at issue was a MERCOSUR exemption from an import ban on retreaded tyres.\textsuperscript{79} The European Communities requested the Appellate Body to reverse the Panel’s decision to exercise judicial economy and to complete the legal analysis under GATT Article XXIV. This request was not fulfilled because it was conditioned upon the Appellate Body upholding the Panel’s

\textsuperscript{76} Also, in a WTO dispute it is up to the member state invoking the defence of GATT Article XXIV to demonstrate the full consistency of the relevant RTA with the requirements of paragraphs 5 and 8 of the Article (Panel Report, \textit{Argentina – Textiles and Apparel}, WT/DS56/R, adopted as modified by the Appellate Body 22 April 1998, paras. 6.34–6.40). The satisfying of the burden of proof is always the subject of further dispute. See Panel Report, \textit{Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Tyres)}, WT/DS332/R, adopted as modified by the Appellate Body, 17 December 2007, paras. 4.378–4.402.


\textsuperscript{78} See Appellate Body Report, \textit{US – Line Pipe, supra}, note 60, para. 199.

finding that the MERCOSUR exemption did not result in the import ban being applied inconsistently with the requirements of the *chapeau* of Article XX and, instead, the Appellate Body reversed this conclusion of the Panel.\(^{80}\)

VI Conclusion

In this chapter an attempt has been made to demonstrate that the interplay between the WTO and RTAs, which is usually approached doctrinally either as a challenge to WTO primacy or as a matter essentially political in nature, can equally be interpreted as a practical case of interrelation between different sources of international law. Those sources are the treaty law of the WTO and the customary law deriving from the formation of RTAs as evidenced by State practice and accepted as law. This reasoning was stimulated by the remark that RTAs usually do not conform to the requirements of GATT Article XXIV and other similar WTO provisions. How should one interpret this negligence and disregard with respect to WTO rules? Given the generalised spread of this attitude, it seems reasonable, from an international law perspective, to question whether non-compliant State practice could be interpreted as a tacit performance of an international custom instead of being considered simply as a generalised behaviour that is wrong under WTO law.

The indicators this chapter employs to survey State practice relating to RTAs, viz. the extent of the ‘regional exception’ and the degree of RTAs’ autonomy in respect to the WTO legal order, provide some evidence of an international custom which might have the shape and content of a right or freedom of States to reciprocate trade preferences by way of agreement. The de facto non-enforceability of the WTO rules pertaining to RTAs, as a result of the systematic failure, which is likely to be seen as acquiescence, of the relevant WTO authorities to check regional agreements, confirms this.

Prior to GATT 1947, the idea prevailed that the ‘regional exception’ to the most-favoured-nation clause was a part of international customary law. This deserves close consideration, not only to reinforce the

customary law argument, but also as a suggestion for future further analysis of the relationship between the WTO and RTAs.81

81 Some of the issues discussed in this chapter have been further developed by the author in Fabb ricotti, ‘The Interplay Between the WTO and the RTAs: Is It a Question of Interrelation Between Different Sources of International Law?’, (SIEL Online Proceedings Working Paper No. 12/08, 2008), available at http://ssrn.com/abstract=1151386 (accessed 10 May 2010).