Inaugural Conference, Geneva, July 15-17, 2008

The Interplay Between the WTO and the RTAs: Is It A Question of Interrelation Between Different Sources of International Law?

Alberta Fabbricotti
Researcher in International Law, Faculty of Law
University of Rome, “La Sapienza”

June 25, 2008

Published by the Society of International Economic Law

with the support of the University of Missouri-Kansas City (UMKC) School of Law

This paper can be downloaded free of charge from:
The Interplay Between the WTO and RTAs:
Is It A Question of Interrelation Between Different Sources of International Law?

Alberta Fabbricotti *

ABSTRACT

This paper faces the question whether the relationship between the WTO and Regional Trade Agreements (RTAs) would be better qualified as a question of interrelation between different sources of international law (custom and treaty) rather than as a matter of compatibility or conflict between treaties. Initially, this idea was stimulated by the factual remark that RTAs quite systematically diverge from the requirements of GATT Article XXIV and other similar WTO provisions. In a strict international law perspective, to widen the inquiry necessarily means answering the question whether non-compliant State practice could be viewed as a tacit performance of an international custom and not simply as a generalized behaviour being wrong under WTO law. On the basis of a historical overview of the main theories developed over this topic in the past century, the present analysis elaborates the argument of a customary “regional exception” and prospects the existence, in the international trade relations, of an unwritten right or freedom to prefer, i.e. a right or freedom to conclude RTAs and, of course, to continue to take part in these preferential arrangements. It is also quite possible that, as such a custom crystallized before the advent of the GATT 1947 and Article XXIV has always been inoperative, there has been a sort of continuum in the transition from the pre- to the post-GATT period and, hence, that GATT Article XXIV did not properly fall into desuetude. On the practical side, the real dynamics of the WTO-RTAs’ relationship are characterised by a somewhat anarchical situation where it is not the WTO which determines and enforces the legitimacy of the RTAs but it is the RTAs themselves which determine the degree of their adherence to the WTO law, through their concrete autonomous behaviour. This phenomenon might be explained, from an international law general perspective, as being the practical consequence (and a presumption) of the interrelation between a treaty (WTO) and a custom (the RTAs), that is between two different sources which can reciprocally derogate from each other.

_______________________

* Email address: alberta.fabbricotti@uniroma1.it.
‘.I must confess to serious doubts about the tendency [...] to erect the MFN clause into a sort of economic and political ideal. I wonder whether in some situations and in some respects a regime of carefully thought-out discriminations may not be not only preferable but inevitable.’

Sir Robert Y. JENNINGS.

I. INTRODUCTION

The main question faced in this paper is whether the relationship between the WTO and Regional Trade Agreements (RTAs) would better qualify as pertinent to the general topic of the interrelation between different sources of international law (custom and treaty) rather than as a matter of compatibility (read: conflict) between treaties and, in particular, as a RTAs’ duty to comply with the WTO requirements envisaged in Article XXIV GATT (and in other similar WTO provisions, like Article V GATS and Paragraph 2(c) of the Enabling Clause). 1

Since both the WTO and RTAs consist in treaty rules and since the terms of their coexistence are expressly provided for by Article XXIV GATT, the latter approach would appear the most appropriate in principle. Things however get considerably complicated in practice as it is impossible to ignore or underestimate what is abundantly evidenced by facts, that is, that RTAs quite systematically diverge from Article XXIV’ requirements,2 either directly or, more often, disguisedly. This phenomenon of nonobservance emerged since the

---

1 The literature focusing on GATT Article XXIV is immense (more limited the bibliography on GATS Article V and the Enabling Clause). A sample is recently provided by several contributions in L. Bartels and F. Ortino (eds), Regional Trade Agreements and the WTO Legal System (Oxford: OUP 2006).

2 GATT Article XXIV sets down substantial and procedural requirements that RTAs should fulfil. The substantial requirements are essentially two. Summarizing to the extreme, the first, laid down in Paragraph 8 of the article, obliges the WTO Members on entering a RTA to abolish or diminish approximately to zero the customs duties and the other regulations of commerce in respect to nearly all (the text uses the expression ‘substantially all’) trade originating from one of their regional partners (namely, the “internal requirement”), while the second, which is envisaged in Paragraph 5, imposes to the Contracting Parties of a RTA not to increase duties or to render more severe the other regulations of commerce in respect to third States (namely, the “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.
very beginning of GATT’s life, though it has obviously increased in importance and size with the accelerated proliferation of RTAs of these last 15-20 years.

All things considered, what the massive and widespread deviation from Article XXIV would seem to suggest is that non-compliant behaviours and attitudes of RTAs’ should mean something more than simply being wrong under WTO law. If one accepts to go into this conjecture thoroughly, then it becomes crucial to answer the following: could non-compliant RTAs’ practice be interpreted as a tacit performance of an international customary right, freedom or obligation? Would it be possible, in other words, that WTO Members enter RTAs on the legal basis of a custom and not because they are permitted to do so, provided certain conditions are fulfilled, under GATT Article XXIV?

The above question is not so audacious or ex temporary as it could appear at first sight. Instead, perhaps surprisingly, probably no issue has been so extensively discussed in past international law literature on RTAs than the question of the customary foundation and justification of these regional preferences.

It is assumed that, like Article XXIV’s original purpose, the customary norm in question would operate as an exception to the general functioning of the multilateral trade system and, in particular, to the WTO Most-Favoured-Nation (MFN) Treatment Rule. Therefore, this paper will mostly refer to it as the “regional exception”, to indicate the (at the moment hypothetical) unwritten legal regime which might have either supplanted the provisions of Article XXIV or even prevented these treaty rules from ever becoming operative.

Indeed, the question of the regional exception’s customary nature raises at least two interrelated issues which are of a crucial importance in order to formulate in a proper way the principal question addressed to in this paper, that is, the possibility to interpret the WTO-

---

3 Already in 1972 Haight had observed that Article XXIV was the most abused in the whole GATT and the heaviest cross the GATT had had to bear. See F.A. Haight, ‘Customs Unions and Free-Trade Areas under GATT: A Reappraisal’ (1972) 6 Journal of World Trade Law 4, 391-404, at 391.
RTAs’ interplay according to the general criteria governing the relationship between custom and treaty.

First, assumed that a customary regional exception presently exists, did it emerge before or after the entry into force of GATT 1947? Hence, what kind of legal consequences did the formation of such a custom entail on the effectiveness of Article XXIV? And ultimately, has Article XXIV always been inoperative or did it fall into desuetude?

Second, assumed, again, that a custom has evolved in derogation from Article XXIV, how can this unwritten discipline be reconciled with the multilateral treaty rules of the WTO, and in particular with the non-discriminatory principle of the MFN treatment? And even before that, on what *de jure* or *de facto* grounds the WTO legal order and the customary exception for RTAs already coexist?

II. ON THE CUSTOMARY NATURE OF THE “REGIONAL EXCEPTION”

A. Outline

In order to explain the widespread nonobservance of Article XXIV from a strict international law perspective, no theory appears more intriguing than the argumentation of the formation of a derogatory custom.

It is common knowledge, however, that such a proposition cannot be held just in the abstract but it presupposes an investigation of the two fundamental elements constituting custom, that is to say *diuturnitas* (consistent State practice) and *opinio juris sive necessitatis*
(acceptance of State practice as law or as necessity). Prima facie, it could be argued that diuturnitas is already demonstrated by the impressive number of existing RTAs and by the fact that a very small number of States do not actually participate to one or more RTAs, while the opinio juris element can be inferred from this, that since they are treaties, all RTAs are inherently a practice accepted as law.

These initial remarks need of course to be refined and confirmed after further investigation into State practice.

Concomitantly, if not a priori, content and scope of the supposed custom should be clearly identified. Indeed, the above assertion that ‘since they are treaties, all RTAs are inherently a practice accepted as law’ would appear rather superficial and absurd if not accompanied by specification of what precisely is regarded as law by States. To come to the latter point is not an easy task as modern RTAs may have a very wide subject-matter coverage and vary considerably each from the other with regard to a number of major substantive aspects. Moreover, since ‘treaties do not, in most cases, articulate the norm as one of customary

---

4 Literally, the Latin phrase means “belief of law or of necessity”, though probably best rendered by “belief in the legal permissibility or (as the case may be) obligatoriness of the practice”. For this definition, see the Report of the ILA Committee on the Formation of Customary (General) International Law, in: ILA Report of the Sixty-Ninth Conference (London, 2000), 32-33.

5 In the framework of WTO Membership, as of July 2007, a total number of 380 RTAs, of which 205 were in force at that same date, had been notified over time to the GATT/WTO and, besides, all but one WTO Member were parties to one or more RTAs. An up-to-dated list of RTAs notified to the WTO is provided in http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited 27 May 2008).

6 In the North Sea Continental Shelf Case, the International Court of Justice (ICJ) confirmed that the process of treaty norms turning into custom was perfectly possible, see ICJ Reports 1969, at 41 (§71). Though the Court has particularly emphasized the role of multilateral conventions ‘in recording and defining rules deriving from custom, or indeed in developing them’, see, e.g., The Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, ICJ Reports 1985, at 20-21 para 27, and the Military and Paramilitary Activities In and Against Nicaragua Case, ICJ Reports 1986, at 83, para 174, and 86, para 181, the same function could be attributed to regional and bilateral treaties. On the relevance of bilateral treaties in corroborating customs see, among others, R.R. Baxter, ‘Treaties and Custom’ (1970-I) 129 Recueil des Cours 25-105, at 75-91; A. A. D’Amato, The Concept of Custom in International Law (Ithaca-New York: 1971) at 104, and M.E. Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources, 2nd ed. (The Hague - London - Boston: Kluwer, 1997), at 189, para. 296.

7 But see infra, the concluding remarks at Section V.
As regards the scope of the proposed custom, the general rule would be that, upon the formation of a RTA, the preferences granted under the regional dealing would be automatically excluded from the operation of a MFN clause contained in treaties that the participants to the RTA might have concluded with other States. It ensues that, even without an express reservation, the contracting party of a MFN treaty could not successfully claim the privileges accorded by the other parties to the MFN treaty to third States upon their entry into a RTA. Hence, only if so expressly provided for by the MFN treaty, the preferential regime existing under a RTA would be extended to the other participants to the MFN treaty.

In the case of the MFN treaty called GATT, the peculiarity is that an express reservation (Article XXIV) exists therein to the end that RTAs be excluded from the operation of the MFN clause, while prescribing that RTAs conform to certain specified requirements. In this context, the coexistence of a customary regional exception could play either to confirm and reinforce the requirements envisaged in the treaty or as a cause of amendment, invalidation or extinction of these requirements. The latter hypothesis is precisely the one considered in the present paper.

This having been said, it might be opportune at this point to turn one’s attention to the historical background of the regional exception’s configuration as customary law.

---

8 See M. Akehurst, ‘Custom as a Source of International Law’ (1974-1975) 47 British Yearbook of International Law 1-53, at 43, note 7. More recently, the influential Report of the ILA Committee on the Formation of Customary (General) International Law (supra note 4, at 758) adopted the principle that ‘there is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content’.

9 See ICJ, Military and Paramilitary Activities in and against Nicaragua, supra note 6, at 93-94, para. 175.

10 Lord McNair, The Law of Treaties (Oxford: Clarendon Press, 1961) at 282; Sir R. Jennings and Sir A. Watts (eds), Oppenheim’s International Law, 9th ed., Volume 1 (Harlow: Longman, 1992), at 1331-1332. Note that both these treatises deny that an exception (for RTAs or customs unions whatsoever) emerged as a matter of customary law; therefore, the strict operation of the MFN is not excluded by substituting accession to a customs union or RTA for an express grant of privileges by treaty.
B. History

Indeed, the customary nature of the exception to the MFN clause for regional arrangements is not at all a new argument. During the Twentieth Century this idea was resumed from time to time in international law literature with a view of recording and/or interpreting the periodical resurgences of RTAs in the face of the widespread use of MFN clauses in commercial treaties. The fact that, in the past, several writings have already investigated this angle turns into a profitable circumstance, as it is very likely that terms and concepts which delineate today’s argument may be easily inferred by surveying how the debate developed historically.

The question of the customary nature of the regional exception arose and gained its importance during the first half of the last century, when international trade relations were governed by a close net of bilateral treaties. Despite the fact that MFN treatment was an essential component of bilateralism, almost all bilateral commercial agreements concluded during this period contained a sort of saving clause excluding that certain previously negotiated preferences, or even hypothetical future concessions, accorded by one of the contracting party could, by virtue of the MFN standard, be extended to the other party. Such a saving clause could have covered quite heterogeneous types of preferential arrangements: most frequently favours accorded to a neighbouring State to facilitate frontier traffic and concessions made in consequence or prevision of a customs union, but also advantages conceded to colonies, dominions and protectorates, and facilities accorded to specified States, in order to conserve historical, ethnic, geographical or other relationships. The quasi-unanimity of pre-GATT

---

11 See, for a comprehensive survey of this practice, United States Tariff Commission, Handbook of Commercial Treaties. Digests of Commercial Treaties, Conventions, and Other Agreements of Commercial Interest Between All Nations (Washington: Government Printing Office, 1923). On this practice, see also Baron Nolde, ‘Droit et technique des traités de commerce’ (1924-II) 3 Recueil des Cours, 291-475, at 425-436; and ‘La clause de la nation la plus favorisée et les tarifs préférentiels’ (1932-I) 39 Recueil des Cours, 3-130.
doctrine esteemed, however, that the above practice had showed to be sufficiently general and uniform only in respect of the two prevailing instances, that is frontier traffic and customs unions,\(^\text{12}\) and thus concluded that the regional exception had evolved into a custom only within these two accepted meanings.\(^\text{13}\) This idea was furthered by some influential reports of the League of Nations\(^\text{14}\).

It is nevertheless to be noted that these pre-GATT writings all transpire a common major concern: the fear, by widening the scope of the customary exception beyond the frontier traffic and the customs union configurations, to open Pandora’s box of the preferential formulas, with fatal consequences for the MFN clause and, hence, for the whole system of the international trade relations. Though this prudence is understandable, one wonders whether it did not affect the “codification” efforts excessively.

This concern appears even more evident if one compares the narrow definitions supplied by the doctrine above with the 1936 Resolution of the Institut de Droit International on the effects of the MFN clause on trade and navigation matters, where, much more realistically,

\(^{12}\) Clearly, the pre-GATT doctrine had been greatly influenced by the 1931 Advisory Opinion of the Permanent Court of International Justice on the Customs Regime between Germany and Austria providing a legal definition of “customs union”. See PCIJ Series A/B, n. 41, September 5th, 1931, at 51.

\(^{13}\) See, among other pre-GATT authors, R. Riedl, La clause de la nation la plus favorisée (Vienne : Recueil Sirey, 1928) at 96-101; S. Basdevant, ‘La clause de la nation la plus favorisée; effets en droit international privé’ (1929) Répertoire de Droit International, 16-18; N. Ito, La clause de la nation la plus favorisée (Paris : Les éditions internationales, 1930), 284-306; Baron Nolde, supra note 11 (1932), 93-100; A.P. Sereni, ‘Il trattamento della nazione più favorita’ (1932) 24 Rivista di Diritto Internazionale II, 201-211; Henri François Oppenheim, La clause de la nation la plus favorisée dans la pratique internationale de la Suisse (Zurich : Éditions Polygraphiques, 1948), at 103-131. For the different view that, in the absence of any express treaty reservation, the entry into a customs union would hardly be considered as an implied exception to the obligations contained in MFN treaties with other States, see G. Schwarzenberger, ‘The Most-Favoured-Nation Standard in British State Practice’ (1945) 22 The British Yearbook of International Law, at 109, note 5. At the opposite, R.C. Snyder, The Most-Favored-Nation Clause (New York: King’s Crown, 1948), 174-180 holding the customary character even of a “particular nations” exception clause.

\(^{14}\) See, for example, League of Nations, Recommendations of the Economic Committee Relating to Commercial Policy, Doc. C.138.M.53.1929.II, of June 18th, 1929; Société des Nations, La politique commerciale dans le monde d’après guerre, Rapport des Comités économique et financier (Genève: SdN Publ. 1945.II.A.7, 1945); United Nations, Department of Economic Affairs, Customs Unions - A League of Nations Contribution to the Study of Customs Union Problems (Lake Success, New York: UN Publ. 1948.II.D.3, 1947). In the Recommendations of 1929 cited above in this note, at 13, the League of Nations elaborated the following model of saving clause: ‘[…] the advantages now accorded or which may hereafter be accorded to other adjacent countries in order to facilitate frontier traffic, and advantages resulting from a Customs union already concluded or hereafter to be concluded by either Contracting Party, shall be excepted from the operation of this article’. 
though perhaps incautiously, the derogation is admitted in favour of a wide range of preferential arrangements. 15

The question at issue came forward again, though in an often indiscernible manner, at different stages during the drafting of the GATT 1947, and of its Article XXIV in particular. It seems that at least three moments/events should be remembered in this regard. First, the proposal, strongly supported by the French delegation, to add a fifth paragraph to GATT Article I, that is to mention as one of the general aims of the MFN clause, the following: ‘to increase freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the participants’. 16 While this proposal was not accepted as such, it was ultimately transformed in the express recognition, to be found at Paragraph 4 of Article XXIV, of ‘the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements’ (italics added). 17 Second, the continuation of certain pre-existing preferential regimes - typically those inherent to the relationship established by the colonial Powers with their colonies, dominions and dependent territories - permitted under GATT Article I (2 to 4) notwithstanding the apparently successful campaign engaged by the United States against the so-called “imperial preferences” during the whole GATT Preparatory Conference. Third, last

---

15 Paragraph 7 of the Resolution read: ‘La clause de la nation la plus favorisée ne donne droit: ni au traitement accordé ou qui pourrait être accordé par l’un ou l’autre des pays contractants à un Etat tiers limitrophe pour faciliter le trafic frontière; ni au traitement résultant d’une union douanière conclue ou à conclure; ni au traitement résultant des stipulations de conventions ouvertes à la signature de tous les Etats, dont l’objet est de faciliter et de stimuler le commerce et les relations économiques internationales par un abaissement systématique des droits de douane; ni au traitement résultant d’accords mutuels et exclusifs entre Etats, impliquant l’organisation de régimes économiques d’un caractère régional ou continental; ni au régime résultant d’un accord économique entre les membres associés d’une communauté politique’. The final text of the Resolution is to be found in Annuaire de l’Institut de Droit International (Annuaire) 39 (1936), vol. II, at 289. For the Report presented by Baron Nolde and pertinent discussion, see Annuaire 38 (1934), 414-472 and Annuaire 39 (1936), vol. II, 39-90.

16 The French delegate Kojeve explained this proposal noting: ‘[i]n Europe, in Latin America and in the Middle East governments had interested themselves in the establishment of customs unions and it therefore would be appropriate to emphasize their usefulness in Article 1’, see UN Doc. E/CONF.2/C.6/SR.38, of 13 March 1948, at 5. The US delegate Wilcox objected: ‘Article 1 set forth objectives to which each and every country was expected to aim. Customs unions while desirable, would not appeal to the parliaments of all countries represented at this Conference’, ibidem.

but not least, the “mysterious” enlargement of Article XXIV to cover also free trade areas and interim agreements leading to free trade areas, in addition to customs unions and interim agreements leading to customs unions. A recent study demonstrates, by drawing from archival records, what was perhaps already presumable by intuition, that is to say that, behind the provisions for free trade areas, there was the need to provide a legal justification to certain future preferential arrangements which would have fallen short of the requirements for a customs union (without however having the ambition to become customs unions).  

In sum, the preparatory works of Article XXIV seem to confirm that, behind the apparent formalism and precision of the rules set forth therein, the GATT framers (upon initiative of the representatives of the “Great Powers”) had taken all the precautionary measures in order to secure that, in one way or the other, the “bad custom” of according and/or receiving trade privileges would continue.

With the advent of the GATT in 1948 and for many years afterwards, the efforts of the doctrine were obviously devoted to the interpretation of the controversial and ambiguous provisions of Article XXIV and the argument of the customary regional exception was almost completely forgotten. Simply, there seemed to be little room for such a debate, as now it was for the text of a multilateral treaty (Article XXIV) to provide the legal parameters of the RTAs’ legitimacy.

---

18 See K. A. Chase, ‘Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV’ (2006) 5 World Trade Review 1, 1-30, who explains that in fact it was the US policymakers who crafted the provisions of Article XXIV on free trade areas to accommodate a trade treaty they had secretly reached with Canada.

19 Already in 1963, Kenneth W. Dam had remarked: ‘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.’ See K.W. Dam, ‘Regional Economic Arrangements and the GATT: the Legacy of a Misconception’ (1963) 30 The University of Chicago Law Review 4, 615, at 619.

20 Among these “loopholes”, one should consider also Draft Article 15 of the Havana Charter (never entered into force) which allowed a departure from MFN obligations for preferential arrangements on the ground of economic development and reconstruction.
At the end of the Sixties, however, there was a sudden revival of interest for the customary issue when the *Institut de Droit International* adopted its Second Report 21 and Resolution on the MFN clause. The text of the Resolution emphasizes that:

>a) Preferential treatment in favour of developing countries by means of a general system of preferences based on objective criteria should not be hampered by the clause.
b) States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.
c) Derogations from the clause should be linked with appropriate institutional and procedural guarantees such as those provided by multilateral systems. 22

The Report by Pescatore, on which the Resolution was based, specified that the recognition of a customary derogation in favour of RTAs (letter b) was to be interpreted according to the following systematic criterion: only those regional agreements setting up a genuine economic integration, consisting in the elimination of all kind of barriers to trade among the participant States, would be considered as excluded from the operation of the MFN clause, to the detriment of those regional arrangements which, instead, merely aimed at liberalising, that is increasing, the trade between the contracting parties. 23 Thus, in the idealistic opinion of the Rapporteur, it was the intrinsic quality of a given RTA, in terms of full completion of an integrated system, which entitled the arrangement in question to benefit from the derogation.

As far as the free trade areas were concerned, the *Institut* Report took the view that, since they had appeared as original institutions, that is apart from being likely to be used as stepping-stones to customs unions, only in the GATT, they were too young for being considered as having generated a custom. 24 This view was not universally shared by contemporary

---

24 *Ibidem*, at 105.
doctrine,”25 as several signals in the practice had already shown that a custom was emerging also vis-à-vis free trade areas.26

A few years later, the question whether a MFN clause does or does not attract benefits accorded within customs unions and similar associations of States resumed within the framework of the codification work of the International Law Commission (ILC) on Most-Favoured-Nation Clauses. The ILC preferred not to include in the Project an article on a customs union exception, 27 even though this had been done with regard to treatment under a generalized system of preferences, to arrangements between developing States, to frontier traffic and to landlocked States. 28 It was agreed, therefore, to delegate any decision to the States at the final stage of codification. 29 The observations made by governments and international organisations on occasion of the ILC work demonstrate that a majority of the international community did recognise the existence of the exception in favour of the customs


26 On the contemporary practice of a vast majority of bilateral treaties excluding present or future free trade areas from the operation of the MFN Clause, see B. Knapp and E. Sauvignon, supra note 25, at 358 and 246 respectively. On the protests opposed by Great Britain and Sweden against the URSS claim to benefit, under the operation of the MFN clause included in bilateral treaties, of the preferences practised within the EEC and the EFTA, see G. de Lacharrière, and E. Sauvignon, supra note 25, at 242.

27 The text dropped out (Draft Article 23 of the ILC Project) was so formulated: ‘A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member’.

28 See Draft Articles 23, 24, 25 and 26 of the ILC Project.

29 The preparatory works record: ‘[i]t was understood that the silence of the draft article could not be interpreted as an implicit recognition of the existence or non-existence of such a rule, but should rather be interpreted to mean that the ultimate decision is one to be taken by the States to which this draft is submitted, at the final stage of the codification of the topic’. See Report of the International Law Commission on the Work of Its Thirtieth Session, 8 May – 28 July 1978, GAOR Suppl. No. 10 (A/33/10), at 21.
unions, but others, especially the socialist States, dissented. The inclusion in the draft, instead, of an exception in favour of the economic integration agreements among developing countries proves how deeply the whole issue of the regional exception had been affected by political considerations.

Anyway, the ILC’s Draft Articles did not become a treaty and are thus non-binding.

C. Content

As shown above, the question of the customary nature of the regional exception has been extensively debated in the course of the past century. If, in principle, the idea ultimately prevailed among the governments and the doctrine that certain preferential arrangements deserved to be excluded from the operation of the MFN standard, the question remained highly controversial as to which patterns of regional economic cooperation were precisely to be benefited by the exception. In particular, the disagreement hinged upon those regional formations, like free trade areas and partial preferential agreements, being short of the features of a customs union, in so far as they did not establish common trade policies of the participant States vis-à-vis third countries, such as a unique customs tariff. The custom unions’ model was, instead, quasi-unanimously accepted as an exception to the MFN rule on the qualitative ground that it presented itself, thanks to its common external tariff, as a single customs territory.

Not only does referring to the ideal economic qualities of the regional groupings, such as a fully-implemented economic integration and/or a perfect economic union among the Members, not reflect the complex realities of the economic regionalism, neither is it suitable to base the legal eligibility of certain RTAs to the regional exception.33

Perhaps the main difficulty in this reasoning is that it relies on economic models (the complete list comprises the economic union, the common market, the customs union, the free trade area and the partial preferential agreements) which never come as exactly true as they have been conceived in the economic literature. Apart from the proliferation of RTAs as the overwhelming datum, empirical observation of modern regionalism evidences achievement of patterns of more advanced economic integration than free trade areas and customs unions (the only two options taken into account by GATT Article XXIV), performance of hybrid modalities of economic integration (that is, regional groupings halfway between a customs union or a common market and a free trade area), enlargement of the subject-matter coverage to include WTO-plus issues, spreading of North-South RTAs, emergence of RTAs not based on a treaty and devoid of institutional structure, overlapping of RTAs, conclusion of RTAs between RTAs and formation of RTAs between countries geographically distant.34

At present as well as in the past, efforts to distinguish the “good” from the “bad” RTAs - either in terms of economic cohesion among Members, as it was held in the pre-1947 period, or

33 A.P. Sereni, supra note 13, at 206-207, who argues that an economic union or a customs union, however perfect they are, do not create a new international legal person. See also Jennings and Watts, supra note 10, at 1332, who note the difficulty to accept that entry into a customs union is an implied exception to the MFN treaties with other States, because it falls short of creation of a political union which would give rise to the application of the rules of State succession.

In terms of “trade creating” efficiency, as put forward in GATT Article XXIV \(^{35}\) - are not suitable to explain the “anarchical” attitude of States towards the creation of RTAs.

In a different perspective, the present paper suggests that the content of the supposed customary rule, if any, is to be arrived at *negatively*, that is by interpreting non-observant or negligent behaviours of States in respect of the treaty rules of Article XXIV, and not *positively*, that is by considering the provisions of Article XXIV themselves as having potentially turned into a custom.

There is no doubt that to investigate State practice relating to RTAs with the view of evidencing the content of a presumed customary rule, is particularly difficult and troublesome for, as already pointed out above, modern RTAs may vary considerably each from the other with regard to their structural assets as well as in respect to a number of major substantiative aspects.

The principal problem in this methodology is however that RTAs’ texts are themselves largely “unreliable” insofar as they do not impinge directly, but rarely, on the requirements of GATT Article XXIV or on other WTO provisions. \(^{36}\) It is not at all surprising that almost all RTAs’ Preambles reiterate the commitments of the Contracting Parties to the principles of GATT/WTO! Beyond these formal declarations of intents, RTAs systematically disobey Article XXIV’s requirements in a disguised or indirect manner. Significant restrictions to international trade, most likely amounting to an infringement of the substantial requirements

\(^{35}\) It is well-known that the provisions of Article XXIV, and in particular its Paragraph 4, were greatly influenced by the economic theories of Jacob Viner, afterwards set forth in the celebrated essay *The Customs Union Issue* (New York: Stevens, 1950).

\(^{36}\) Evidence to the contrary is for example provided by NAFTA Article 103 (Relation to Other Agreements): ‘1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party. 2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.’
set out in Article XXIV (either the “internal” or the “external” requirement, depending on the circumstances), may for example occur under the misleading name of Technical Barriers to Trade (TBT) or Sanitary and Phytosanitary (SPS) Measures or through misuse of the regional safeguards mechanisms. Even more incisively, RTAs may themselves be instrumental in attaining otherwise intolerable/illegitimate purposes and outcomes.

Given the above mentioned difficulties, any attempt to extract from RTAs’ texts a common essential element, principle or rule, superintending this complex network of different, overlapping, etc. systems of norms, is likely to definitely come to the conclusion that the very essence of all RTAs is the creation of “trade preferences” or, correspondingly, “discrimination against thirds”.

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

To start with, it is commonly undisputed that, under customary international law, with the exception of the jus cogens subject-matter and/or of principles and rules embodied in the UN Charter, States are essentially free to enter any agreement of any kind and content.

---

37 See supra note 2.
Therefore, they are free to discriminate against third countries if they deem it convenient. In the domain of trade, this means a freedom or a right to conclude RTAs.

On the one hand, this supposed customary freedom or right (to enter into RTAs) represents a pillar of the international trade relations and should thus be promoted and safeguarded. The text of the Charter of Economic Rights and Duties of States, which raises the participation of States in sub-regional, regional and interregional cooperation agreements in the pursuit of their economic and social development to the status of a right, whilst ranking the correspondent expectations of third countries (i.e. States not having entered these agreements) as mere legitimate interests, seems to confirm this view.

On the other hand, the customary rule at issue would in no way be limited by a general obligation of non-discrimination, since, as usually admitted in doctrine, MFN and national treatment can hardly be regarded as international customs. It is a common knowledge that this potentially unlimited customary freedom is instead countered by treaty law, mainly through the non-discriminatory clauses contained in the WTO multilateral agreements.

It should be observed at this juncture that while, in the WTO framework, the legal terms under which the MFN treatment rule at the global level and the preferential treatment at the

---

42 See E. Triggiani, see supra note 32, at 124.
43 Article 12 of the Charter reads: ‘1. States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation and have full regard for the legitimate interests of third countries, especially developing countries’. See G.A. Resolution 3281 (XXIX), 12 December 1974, in General Assembly Official Records (GAOR), 29th Session, Supplement N. 31, Doc. A/9631, at 50-55.
44 See, for example, G. Schwarzenberger, ‘The Principles and Standards of International Economic Law’ (1966-I) 117 Recueil des Cours at 74; A. A. D’Amato, supra note 6, at 131; S. Zamora, ‘Is There Customary International Economic Law?’ (1989) 32 German Yearbook of International Law, at 28-29. For an opposite view, see G. Panico, La politica commerciale convenzionale della CEE (Milano: Giuffrè, 1979) at 31, for whom the MFN principle can be even qualified as a jus cogens norm because, even if it has a conventional origin, it implements within the international trade law the peremptory principle of the sovereign equality of the members of the international community, which is a constitutional principle of the international legal order.
45 The Panel on Korea - Measures Affecting Government Procurement, WT/DS163/R, of 1 May 2000, at 183, para. 7.96 noted: ‘Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it.’
regional level should coexist (by permitting members of a free trade area or customs union to grant themselves preferential treatment provided that certain requirements are satisfied) are provided for by the WTO itself, through GATT Article XXIV or GATs Article V, no analogous provisions exist in a different field of the international economic law as is the domain of foreign investments. The regional exception is explicitly spelled out in almost all modern Bilateral Investment Treaties (BITs), exempting the Members of a RTA or REIO (the expression “Regional Economic Integration Organisation (REIO)” is preferred in the law of investment terminology), from the obligation to grant the MFN treatment to non-Members. 46 Moreover, the scope of the regional exception has been discussed all along the course of the negotiations for the drafting of a Multilateral Agreement on Investments (MAI). However, the issue has been particularly contentious and has revealed itself as one of the major obstacles hindering the successful outcome of the negotiations. 47 Unlikely Article XXIV, the provision envisaging the regional exception in investment treaties, the so-called REIO clause, 48 usually does not lay down conditions or criteria. Simply, it excludes from the operation of the MFN treatment rule ‘any customs union, free trade area, common market or monetary union, or any similar international convention or other forms of regional cooperation, present or future, of which any of the Contracting Parties might become a party’. 49 As easily remarkable, this broad formulation is very similar to the model of regional exception contained in the bilateral trade agreements of the pre-GATT period.

In the final analysis, one important lesson from the experience in the international law of investments seems to be that, in the absence of a coordinating function by the MFN treaties (as

---

47 Sacerdoti, ibid., at 353.
49 Quotation of Article 3 of the Chile-Malaysia BIT, as an example. For a collection of texts of BITs, see UNCTAD, International Investment Instruments: A Compendium.
in the case of the WTO), the MFN treatment principle and the regional exception do not mutually exclude each other as both produce their effects, whilst the balance is merely determined by economic or political expediencies. It should be underlined, however, that, in the case of investments and unlike trade, countries worldwide, including REIOs’ Members, actively seek to attract Foreign Direct Investments (FDI), no matter where they come from. Therefore, despite specific cases of preferential treatment for investors from REIO Members, REIOs do not generally discriminate against investors from non-Members. 50

Apart from these specifications of an important economic and political nature, one might wonder whether the typical model of REIO exception in BITs transposes into a treaty clause what States regard as being an unwritten (customary) international rule, that is the freedom or right to conclude preferential agreements with a limited number of trade partners. 51

III. THE “REGIONAL EXCEPTION” V. GATT ARTICLE XXIV?

Supposing that the above reasoning is correct and that a customary regional exception has evolved or is evolving in the broad terms of a right or freedom to enter a RTA, how might this affect or have affected the effectiveness of GATT Article XXIV? It is commonly accepted that, as the result of a lack of hierarchy as between custom and treaty, in principle these two sources of international law can reciprocally derogate from each other, that is, not only can a custom derogate from a treaty but also vice versa. Hence, the priority of a rule generated by one source

---

50 UNCTAD, supra note 48, at 18.
51 The question of the customary character of the REIO clause in BITs is analysed by M.R. Mauro, Gli accordi bilaterali sulla promozione e la protezione degli investimenti (Torino: Giappichelli, 2003), 165-170.
over a rule created by the other is essentially assigned to the later law, as a tribute to the principle \textit{lex posterior derogat priori}. \footnote{Another pertinent principle is that of the prevalence of a special law over a general law (\textit{lex specialis derogat generali}). On the not decisive relevance of this principle to the relationship between the WTO and RTAs, see \underline{infra} Section IV. See also, on this issue, the reasoning of the Panel Report \textit{Turkey – Restrictions on Imports of Textile and Clothing Products}, WT/DS34/R of 31 May 1999, paras 9.186-9.187.}

As a preliminary step, it seems therefore essential to assess the duration of the customary rule and, in particular, to determine whether it formed before or after the entry into force of GATT 1947.

On the one side, it might be argued that the custom at issue has progressively crystallized in the course of an undefined period of time, though surely after 1947, evidencing itself as a generalized disregard for GATT Article XXIV (and other WTO provisions similarly drafted) combined with an acquiescent attitude from other States. \footnote{In this regard, it has been rightly observed that other States, i.e. Thirds \textit{vis-à-vis} the RTA at issue, do not take the initiative of resorting to legal proceedings under the WTO dispute settlement mechanism to enforce the “substantially all the trade” requirement because they are not interested in such enforcement. F. Roessler, ‘The Relationship between Regional Integration Agreements and the Multilateral Trade Order’, in K. Anderson and R. Blackhurst (eds), \textit{Regional Integration and the Global Trading System} (New York: Harvester-Wheatsheaf, 1993) at 322, explains that: ‘A contracting party not meeting this requirement has two options: either to abandon the regional agreement altogether or to expand its coverage. The former is usually not a politically realistic alternative. For a third party to insist that a regional agreement meet the substantially-all-trade requirement means therefore in practice to insist that the countries forming a customs union or free trade area extend it to substantially all trade, which in turn means that the third party asks that the discrimination against it be broadened.’ For this argument, see also G. Sacerdoti, ‘Nuovi regionalismi e regole del GATT dopo l’Uruguay Round’, in G. Sacerdoti and S. Alessandrini (eds), \textit{Regionalismo economico e sistema globale degli scambi} (Milano: Giuffrè, 1994) at 17; P. Hallström, \textit{The GATT Panels and the Formation of International Trade Law} (Stockholm: Jurisförlaget, 1994), at 87; N. Grimwade, \textit{International Trade Policy: A Contemporary Analysis} (London-New York: Routledge, 1996), at 278; A. Fabbricotti, ‘Gli accordi di integrazione economica regionale ed il GATT/OMC. I parametri normativi e l’opera del CRTA’ (2000) 14 Diritto del Commercio Internazionale 2, at 291. But WTO Members refrain from challenging RTAs before a panel also because they are not willing for the panel to strengthen or clarify the provisions of Article XXIV as this might compromise the claimant’s own regional plans (as all but one WTO Members participate to RTAs, this is very likely to occur), and because they do not trust panels to adopt binding decisions on the economically and technically complex question of compliance to Article XXIV. For this view, see P. Mavroidis, ‘If I Don’t Do It, Somebody Else Will (Or Won’t): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules’ (2006) 40 Journal of World Trade 1, 187-214; J. Pauwelyn, \textit{Legal Avenues to “Multilateralizing Regionalism”: Beyond Article XXIV}, Paper presented at the WTO Conference on Multilateralising Regionalism, Geneva, 10-12 September 2007 www.wto.org/english/tratop_e/region_e/con_sept07_e/pauwelyn_e.pdf (last visited 12 June 2008), at 3, note 4.}

Such an argument would take for granted that Article XXIV is (was) a positive, prescriptive treaty provision. As a consequence, a custom derogating from it could only have evolved successively. A slightly different scenario would be that, in turn, Article XXIV had derogated from a pre-existent custom when entering
into force. According to this latter conjecture, since 1947 and until an imprecise date, the treaty norm of Article XXIV might have existed legally and produced its effects only like a (short) parenthesis in between two periods, during which the customary regional exception might instead have prevailed in international trade relations.

On the other side, it could be held that the custom in question might have a long past, dating back to a period even antecedent 1947. It would follow from this that Article XXIV never produced its formal prescriptive effects, its provisions having always been, so to say, “dormant”.

It is beyond the scope of this article to go far into these options. Furthermore, the question might appear today more of a historical interest than of a practical relevance. Suffice it to say that the thesis of the continuity, i.e. the second option described above, is not groundless, or even absurd, as it might appear at first sight. On the contrary, it seems ultimately to be even more coherent, at least on the theoretical plane, than the first option.

In a precedent section of this paper, the idea was put forward (and hopefully demonstrated), on the basis of the practice of bilateral commercial treaties which dominated international trade relations in the pre-GATT era, that a customary regional exception existed already before 1947, permitting States to deviate from their MFN treatment obligations when entering a preferential arrangement or grouping. Though the doctrine was divided as to the precise scope of this exception, the existence of an exception having the nature of a custom in favour of the formation of RTAs was hardly ever objected in principle. 54

Moreover, there are plenty of reasons to doubt of the legal status of Article XXIV, since this provision has always been largely inoperative as a legal discipline.55 As told in the

54 Supra, Section II-B.
55 J.H. Jackson, World Trade and the Law of GATT (Indianapolis-Kansas City-New York: Bobbs-Merrill, 1969), at 621: “It is apparent that the criteria for permissible regional arrangements under GATT are ambiguous and difficult to apply […]. The preparatory work of GATT suggests that at least two goals were desired by various
introduction above, this observation represents the fundamental premise of the present paper, which need not be demonstrated (if for nothing else, for the economy of this paper’s length).

Even more significantly, WTO Members are extremely reluctant to modify any of the provisions of Article XXIV, no matter if the proposed change has the purpose of strengthening the rules or has only mere clarifying and explanatory intents. 56 For example, notwithstanding its renowned inefficiency, Article XXIV was used as a model for the drafting of Paragraph 2(c) of the Enabling Clause and of Article V of the GATS. New evidence of this reluctance, if necessary, is provided by the very modest Transparency Mechanism for Regional Trade Agreements which resulted from the Doha Round negotiations 57 compared to the original mandate of the Ministerial Conference which was to clarify and improve disciplines and procedures applying to RTAs under the existing WTO provisions. 58

Furthermore, not only the WTO Members have persistently failed to check RTAs in the framework of the pertaining WTO political bodies, primarily the Committee on Regional Trade Agreements (CRTA), 59 but they have also avoided to challenge RTAs judicially. 60

Last but not least, in the few instances where Article XXIV is invoked as a defense to justify otherwise non-permitted deviations from other WTO provisions, panels and the Appellate Body usually avoid to scrutinize either the RTA in its entirety or the specific regional measure at issue.

factions of the draftsmen of GATT […]. It is probable that these two goals are inconsistent when applied to specific cases’.


57 General Council Decision, Doc WT/L/671 of 14 December 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’.


59 On this topic, see A. Fabbricotti, supra note 53.

60 See supra note 53.
All the above considerations seem to lead to the conclusion that Article XXIV has always been inoperative. If so, it is quite possible that Article XXIV did not fall into desuetude as a result of a supposed supervening customary rule, as it has never produced legal effects.

IV. THE DYNAMICS OF THE WTO-RTAs RELATIONSHIP

Assumed, again, that the line of reasoning developed so far be persuasive, then how does the customary exception for RTAs actually coexist with the WTO legal order? Indeed, having argued that in their trade relations States are ultimately either “free to prefer” or have a “right to prefer” (the difference seems indeed rather thin) by virtue of an international custom, the practical outcome of this is likely to have devastating effects on the WTO legal system, the raison d’être of which is, on the contrary, non-discrimination.

The actual terms of the interplay between the WTO and RTAs have been recently focused in the Report of the ILC’s Study Group on the Fragmentation of International Law. The Report alludes to an unusual (major?) role played by regionalism 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 […]. The specific justification for RTAs is found in article XXIV GATT and although there has been endemic controversy about the scope of the provision the (understandable) view within the WTO system, as articulated by the Appellate Body, has been
to interpret it restrictively.\textsuperscript{61} Nevertheless, 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’. \textsuperscript{62}

In 2005, the Study Group had already reported that ‘[w]hile members noted that “regionalism” generally fell under the problem of \textit{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{63}

This last passage might well be interpreted as confirming the view suggested in the present paper that the formation and continued existence of RTAs are the produce of an international custom.

Whatever be the case, the Study Group’s Report seems to go even further, to say that: 1) the relationship between the WTO and RTAs is to be construed in terms of priority of the latter over the former; 2) the priority of RTAs cannot be explained simply as an application of the principle \textit{lex specialis derogat generali} (i.e. the special law prevails over the general law); 3) the primacy of RTAs results from the concrete dialectics with the WTO, which is characterised by RTAs influencing the WTO law probably more importantly than it occurs \textit{vice versa}.

It is usually affirmed that RTAs have influenced the WTO law in so far as some of the solutions reached or planned at the regional level have been transplanted at the multilateral level by incorporation in the 1994 WTO agreements. It has also been argued that the law of RTAs, that is the “regional international law”, might influence the WTO law by way of interpretation through the reference to ‘any relevant rules of international law applicable in the

\textsuperscript{63} ILC, 57th Session, Report of the International Law Commission on the Work of its 57th Session (2005), UN Doc. A/60/10, at 211, para 461.
relations between the parties’ contained in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. 64

It seems however, that the “influence” of RTAs over the WTO order can be assessed also from another, more pragmatic (and drastic), point of view. 65

Empirical observation shows that RTAs behave with a large autonomy in respect to both the WTO non-discriminatory rules and the exception of GATT Article XXIV, practically as if they were not subordinated to them. Regarding this sort of anarchical situation, it has been rightly observed that the point has already been reached where it is not the WTO which determines and enforces the legitimacy of the RTAs but it is the RTAs themselves which determine the degree of their adherence to the WTO law, through their concrete behaviour. 66

Therefore, it has been suggested to overturn the perspective from which the issue of WTO-RTAs relationship is usually faced, switching from a “top-down” approach (maintaining the idea of the primacy of the WTO over the RTAs), to a “bottom-up” approach (asserting the somewhat contractual nature and variable scope of the obligations undertaken by the RTAs). 67

This “bottom-up” approach seems to be supported also by a particular sociological perspective, defined as “symbolic-interactionist”, 68 as applied to the WTO/RTAs debate.

---

64 For this view, see I. van Damme, ‘What Role Is There for Regional International Law in the Interpretation of the WTO Agreements?’ in L. Bartels and F. Ortino (eds), supra note 1, 553-575.
65 The word “influence” is here put into brackets, to indicate that it is somewhat euphemistic to use this word to describe the real impact of regionalism over the WTO legal order.
67 Ibidem.
according to which, since ‘the need to generate shared social understandings in the international economic system cannot be effectively fulfilled by the imposition of external, global rules […] [c]ommom norms that embody common understandings on the global level should emerge “from below”, i.e. from the interaction among states and societies in smaller regional groups’. 69

Structurally, this kind of “Copernican revolution” would presuppose the absolute groundlessness of a system based on an automatic MFN general rule with certain exceptions to its operation, ‘with “regionalism” being totally subordinated to the general principles of “internationalism” and made an instrument for indiscriminate and world-scale liberalizing of trade’. 70

It is difficult to imagine how what has just been described as the real dynamics of the relationship between the RTAs and the WTO, with the regional preferences being the Sun and the MFN principle the Earth (to continue paralleling with the Copernican paradigm), could ever turn into the treaty content and language of the WTO. This would be tantamount to founding a completely new multilateral trade legal order!

From an international law general perspective, reforming the WTO would mean only one of the two available options, the second being the maintenance of the status quo. If formation and continued life of RTAs are the materialisation of an international customary right or freedom, as it was suggested above, these groupings would indeed continue, legitimately, to proliferate and to practice opting-out from their WTO obligations.

69 See M. Hirsch, supra note 68, at 293.
From a WTO perspective, however, a structural reform of the system appears inevitable. The 2004 Report by the Consultative Board to the Director-General Supachai Panitchpakdi (better known as Sutherland Report), catastrophically noted: ‘Yet nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, 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. Certainly the term might now be better defined as LFN, Least-Favoured-Nation Treatment. Does it matter? We believe it matters profoundly to the future of the WTO’. 71

V. CONCLUDING REMARKS

The WTO-RTAs’ interplay is likely to be interpreted as a question of interrelation between different sources of international law, that is between treaty and custom, provided it is demonstrated that State practice relating to RTAs not only concerns the domain of the treaty-making power of States but is also evidence and produce of an international customary norm.

The question of the customary nature of a “regional exception” derogating from the world trade legal order, and from the MFN principle, has thus become absolutely central to the present analysis. Although this question has been widely discussed for more than a century in international legal literature, the answer is even more uncertain and controversial today than it was in the past. This is most probably due to the fact that, while until a few decades ago the formation of RTAs was a sporadic phenomenon which did not, apart from the case of the EEC,

71 See the Report on The Future of the WTO – Addressing Institutional Challenges in the New Millennium, at 19, para 60.
affect significantly the global economic relations, regionalism has now developed so exponentially both in number and in quality of RTAs that the MFN standard and the whole world trade system are under threat. Hence, if in the past to debate about the existence of a customary regional exception was almost tantamount to an academic exercise in international law, now it is clear that to go deeply into this argument might mean, as the precedent analysis demonstrates, to unhinge the very essence of the WTO.

Given the somewhat universal participation of States to RTAs, with the consequent difficulty to depict this reality as an “exception”, and that RTAs are extremely different in structure, content and mode of functioning, so that it is impossible to reduce all RTAs to a definite range of economic and legal integration models, it is legitimate wondering whether regionalism might not be just a sort of “way of being” of actual international economic relations, instead of the externalization of an international customary norm.

Ultimately, the question raised just above reflects the endemic need to distinguish the “must be” from the “is”, the law from the mere fact, in order to determine that an international custom has effectively evolved from State practice. While it is usually accepted that the fundamental benchmark for such a determination is constituted by whether or not the opinio juris sive necessitatis occurred or concurred in the process, it is likewise generally admitted that the investigation of this psychological element is one of the most controversial and critical juncture in the study of public international law.

As it was beyond the scope of this paper to analyse the legal foundation and precise content of the opinio juris sive necessitatis, it would have been impracticable to examine closely whether States become parties to RTAs with the feeling of exercising a legal right or freedom or with the feeling of obeying an economic or political or social necessity. And above all, it should be confessed that to widen the inquiry in these directions would have probably
been arduous but fruitless, since it is almost impossible, in practice, to disentangle the two “sentiments”, the law from the necessity, the *opinio juris* from the *opinio necessitatis*. Even more so when investigating the State practice relating to RTAs, where disobedience of Article XXIV’s requirements occurs disguisedly and indirectly. ⁷²

These concluding remarks are therefore intended to stress, and perhaps to explain, the major role played by the element of *diuturnitas* (State practice) in the present paper’s elaboration relating to the existence of a customary regional exception.

---

⁷² *Supra*, Section II-C.