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Handbook of International Economic Law
Chapter on International Trade: Regionalism

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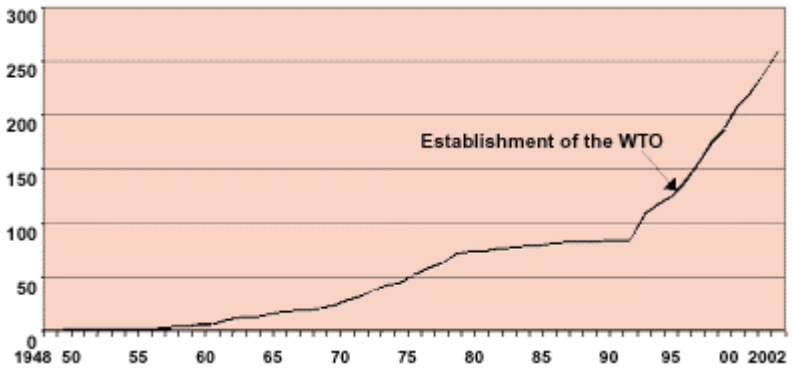
1. Introduction

Regional integration agreements (RIAs), like other forms of international economic institutionalization or law, are generally aimed at economic integration: the reduction of barriers to movement of economic factors across borders. However, there can be other aims: the original European Economic Community and European Coal and Steel Community were famously motivated by a desire to make war between Germany and France impossible. Monetary union in the European Union has been criticized by financial economists, but may play a broader role in political or social aspects of integration.

Regionalism is an accelerating phenomenon, as shown in the table below, although in 1963, Kenneth Dam was able to say that the last dozen years had "seen a proliferation of customs unions and free-trade areas of unforeseen proportions." (Dam 1963, p. 615) One estimate suggests that more than half of international trade could be covered by RIAs by 2005. (OECD 2003, p. 12) By July 2005, 330 RIAs had been notified to the GATT or the WTO, with 180 of these still in force. Only Mongolia belonged to no RIA.

Table 1: Number of Regional Trade Agreements 1948-2002



Source: WTO Secretariat

The great majority of these RIAs are free trade areas (FTAs), rather than customs unions (CUs). A FTA provides zero tariffs among its members, but each member maintains its own tariff schedule for application to the products of other states, whereas a CU is a free trade area with a common external tariff. Among the best known regional RIAs are the European Communities (EC),[1] the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations Free Trade Area (AFTA) and the 2004 Central American Free Trade Area (CAFTA).

Regionalism presents many faces to the international economic law system. Regional integration creates international economic law subsystems.[2] These subsystems are rather diverse in structure and scope. These subsystems have a complex economic relationship with the multilateral system, represented by the WTO: they may both undermine and support multilateral economic integration.

Regionalism, as applied to third countries, is broadly inconsistent with the principle of most favored nation trade: the principle of non-discrimination among trading partners. This is because it applies a different tariff on goods depending on their origin. Therefore, vis-à-vis the global setting (as opposed to internally), regionalism will often be inconsistent with the operation of comparative advantage, since it applies tariffs to goods sourced outside the RIA, but not to goods sourced within the RIA.

On the other hand, regional arrangements generally reduce internal barriers to trade and therefore are consistent with comparative advantage internally. The comparison between internal trade creation, and diversion of external trade, initially analyzed by Jacob Viner, has been a central, but disputed, part of the analysis of the static welfare effects of regionalism. Regional arrangements may also have dynamic effects by inducing economic restructuring that paves the way for deeper multilateral integration, or serving as comparative laboratories to develop institutional tools for deeper multilateral integration. Furthermore, regionalism may implicate any or all of the "four freedoms:" trade in goods, trade in services, free movement of investment and free movement of labor.

Regional subsystems also have a complex legal relationship with the multilateral system. Regionalism is regulated under WTO law. The relationship between regional agreements and WTO law is important both in the application of the law of the regional agreements and in the application of the law of the WTO.

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[1] The EC includes the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community. "EC" thus refers to the relevant entity for regional economic integration. The European Union consists of three pillars: the EC plus the two intergovernmental pillars of the Common Foreign and Security Policy and Justice and Home Affairs.

[2] It is important to note that they are not "subsystems" in terms necessarily of priority or supremacy, but merely in terms of numbers of participants. *But see* Tiny 2005 for an analysis in terms of priority or supremacy.

This chapter provides an introduction to several critical issues of international economic law raised by regionalism. After providing a taxonomy of regionalism in part 2, this chapter briefly describes the economic and political relationship between regionalism and multilateralism in part 3.

Part 4 reviews the GATT and WTO regulation of regionalism in light of the economic and political relationship between regionalism and multilateralism. At the most basic level, Article XXIV of GATT provides an exception from GATT disciplines, notably but not limited to the Article I MFN requirement, with respect to RIAs that meet specific conditions. These conditions include most importantly an "internal" requirement that participants eliminate restrictive regulations of commerce with respect to substantially all the trade. A CU must apply a common external tariff: it must apply substantially the same duties and other regulations of commerce to imports. Finally, for both a FTA and a CU, duties and other regulations of commerce imposed after formation may not on the whole be higher or more restrictive than prior to formation.

Part 5 examines the emerging issue of choice of law and choice of forum in international economic law disputes in the context of overlapping rules of international economic integration. Part 6 concludes.

2. Varieties of Regionalism in Trade: From the EU to NAFTA

There is a wide variety of regional economic integration. In point of fact, some of it is not regional at all, such as the U.S.-Singapore Free Trade Agreement. Therefore, the more accurate term for the subject of this chapter would be "sub-multilateral integration" or "preferential trade agreement." However, since much sub-multilateral integration has traditionally been regionally-based, and since these terms are conventional in the literature, we refer to regional integration inclusively.

This part reviews some traditional categories, but also recognizes some of the newer variations that have developed among regional integration agreements. These variations include the manner by which non-tariff barriers are addressed, the treatment of services and investment, and the institutional structure of the RIA. Indeed regional integration defies simple categorization, as the topics addressed vary by the circumstances of the parties.

a. Traditional Categories

Since its founding in 1957, the EC has been the leading example and the "gold standard" of regionalism. Not only has it established in large measure the "four freedoms",[3] but it has also developed a high level of policy coordination, international relations coordination, and redistribution. Furthermore, the EC has developed a complex federal legal system, covering a broad spectrum of subject areas and dealing in a highly

[3] Free movement of goods, services, labor and capital.

sophisticated way with issues of legal relations between the RIA governance and the member states. There are many examples of circumstances in which other regional and multilateral integration bodies have learned lessons from, or emulated, the EC. Of course, customs unions can be precursors of states, as in the formation of Germany and Italy.

Balassa (1962) developed a system of categorizing regional integration.[4] We begin with a FTA, in which tariffs and quotas are abolished for imports from within the area, but each member maintains its own external trade barriers. The next step is to a CU, which in addition to establishing a FTA, establishes a common external tariff. A common market includes additional removal of barriers to movement of factors of production, and may include further coordination of external commercial policy. An economic union includes some degree of harmonization of economic policy. Total economic integration includes unification of monetary, fiscal, social and counter-cyclical policies, plus a supranational authority that can bind member states.

Thus, the EC may be understood as an example of a common market with some features of total economic integration, while NAFTA is essentially a FTA with a few additional features. These additional features include coverage of investment, intellectual property and services. However, as the multilateral system since 1994 has included intellectual property and services, the additionality offered by NAFTA is largely in the area of the intra-regional zero tariff treatment, plus investment. More recent FTAs have provided greater additionality, with more intense coverage of intellectual property and services than may be found in the multilateral system: so-called "WTO plus."

The Balassan stages are not necessarily expected to be followed in order, and there is no compelling reason to expect a FTA to "evolve" into a CU or toward total economic integration (see Evenett 2004). But each type of regionalism requires additional legal rules and institutions internally, and raises additional legal issues externally.

b. Regulatory Non-Tariff Barriers

The decline of tariff barriers has lent greater importance to non-tariff barriers. Non-tariff barriers take varying forms. In this chapter, we address two types: (i) regulation that may impede market entry, and (ii) trade policy measures such as safeguards, anti-dumping and anti-subsidies measures.

Regulation may impede entry through either *de jure* or *de facto* discrimination. However, it may also impede entry in other ways deemed undesirable, as when the costs in lost welfare from trade exceed the regulatory benefits. RIAs may address regulatory non-tariff barriers through either negative integration or positive integration. Negative integration involves judicially-applied disciplines such as national treatment, most-favored nation treatment, proportionality or other tests that may be applied to find illegal

[4] For an updated analytical structure, *see* Pelkmans (1997).

a domestic regulatory measure. Positive integration entails centralized legislative power to establish new regulation at the RIA level. There is an important relationship between negative integration and positive integration. Positive integration capacity makes negative integration less necessary. Positive integration may reduce the potential deregulatory bias that may arise with negative integration.

c. Trade Policy Non-Tariff Barriers

Safeguards mechanisms, anti-dumping measures and anti-subsidies measures (collectively, "trade policy measures") may serve as non-tariff barriers to trade (this definition is commonly accepted even though these measures may be implemented using additional tariffs). RIAs may take varying approaches to trade policy measures. For example, trade policy measures are not normally permitted among states of the EC (although certain subsidies are illegal under EC law). Another example is NAFTA, which provides special requirements for safeguards measures, and provides special international judicial review for anti-dumping and anti-subsidies countervailing duty measures. Within the Australia-New Zealand Closer Economic Relations Agreement, anti-dumping duties are generally prohibited, countervailing duties are sharply limited, and safeguard measures are generally prohibited.

d. Services

RIAs may or may not extend beyond goods. However, most major RIAs include a services dimension (Mattoo and Fink 2002). To the extent that they address services, they may follow a variety of approaches. For example, the EC addresses trade in services through prohibition of discrimination and certain other more explicit types of barriers, and a program of essential harmonization and mutual recognition to address less explicit barriers. These categories correspond to the negative integration and positive integration categories established above. NAFTA contains extensive provisions liberalizing North American trade in services. The U.S. and Mexico have had a dispute regarding trade in cross-border trucking services.

e. Investment

More recent RIAs, especially those of the U.S., often cover investment, by including provisions that are similar in nature to a bilateral investment treaty within the text of the RIA. NAFTA is an important example. These provisions generally cover the standard of treatment of foreign investment, including prohibitions on expropriation and violation of the international law minimum standard. In addition, these provisions often cover market access for investment. One of the most contentious components of these investment chapters, although it is similar to the provisions found in typical bilateral investment treaties, is the provision of private rights of action to investors in connection with violations. These private rights of action relate to investment arbitration, often provided at the International Center for the Settlement of Investment Disputes (ICSID). One of the loudest complaints of anti-globalization protesters has targeted the facility for

private rights of action for private investors under these RIAs. In the recent Australia-U.S. FTA, these types of private rights of action in arbitration were not included.

f. Institutional Structure

Finally, RIAs have varying institutional structures. Here, the EC, as suggested above, is the gold standard, to such an extent that it may be in a different category altogether from other RIAs. Indeed, the EC is somewhat comparable to a federal system such as that of the U.S., Australia or Switzerland, insofar as it combines centralized authority with local autonomy. Other RIAs lack the capacity for majority voting and the strong secretariat that the EC possesses. Furthermore, while other RIAs have dispute resolution mechanisms or even courts, none have become constitutional courts with the broad power and prestige that the European Court of Justice possesses.

g. Patterns of Regionalism

The U.S. and the EC have programmatic approaches to regionalism, and may be viewed as hubs of various arrangements. The EC has entered into customs union agreements and free trade area agreements with individual countries, and is in discussions for an association agreement with Mercosur. The U.S. has entered into a number of free trade area agreements with other countries, in cases where those other countries do not necessarily have free trade area arrangements with one another. The EC also uses regional agreements as a development tool.

3. Regionalism and Multilateralism

Economists have devoted much research to the question of whether regional arrangements for free trade areas or customs unions are welfare-enhancing or welfare-reducing. This chapter does not seek to provide a review of this literature, but merely to introduce some of the salient concepts (for reviews, *see* Panagariya 2000; Kowalczyk 1999; Baldwin & Venables 1995).

The modern economic study of regionalism began with the seminal work of Jacob Viner (1950), comparing the trade creating (welfare-enhancing) effects with the trade diverting (welfare-reducing) effects of regional integration. In the years since 1950, economists have critiqued and extended the static Vinerian analysis in a number of ways.

Economists have also importantly added to Viner's "static" analysis by consideration of what Bhagwati has called the "dynamic" time-path issue (Bhagwati 1993). This dynamic question includes the question of the relationship between the growth of regional trade integration and the growth of multilateral trade integration: whether regional integration agreements are building blocks or stumbling blocks on the path to global economic integration (Bhagwati 1991). (This question was already being asked in Dam 1963.)

a. Static Analysis: Trade Creation, Trade Diversion and Spaghetti Bowls

Static welfare analysis of RIAs considers changes in volumes of trade subject to domestically captured rents (such as tariffs) and rents that are not captured domestically (such as quota rents), as well as terms of trade effects (Baldwin and Venables 1995). Quota rents result from the scarcity of imported goods that arises from quotas, giving the exporter the power to price them at a higher level than if quotas did not create artificial scarcity. Quota rents accrue to the exporter, and so are not captured domestically. On the other hand, tariffs accrue directly to the importing government, and so they are domestically captured.

The changes in volumes of trade subject to domestically captured rents are considered under the well-known concepts of trade creation and trade diversion. Trade creation occurs when the reduction of internal barriers leads private persons to import from a supplier that is a lower cost producer than domestic producers. Trade diversion occurs when the reduction of internal barriers, while leaving in place external barriers, leads private persons to import from an RIA producer rather than a lower cost non-RIA producer.

For example, before the formation of NAFTA, a Brazilian manufacturer of a particular textile product may have been able to price its goods more competitively for the U.S. market than a particular Mexican manufacturer. Under pre-NAFTA MFN tariffs, the Brazilian manufacturer would be able to gain more market share: greater trade volumes compared to the Mexican manufacturer. After the formation of NAFTA, the tariff on the Brazilian textiles remained in place, while the tariff on the Mexican textiles was reduced to zero. To the extent that this results in the Mexican manufacturer becoming able to sell in the U.S. market at a price lower than that offered by the Brazilian manufacturer, trade diversion takes place. (Importantly, this very phenomenon results in a dynamic effect: the Brazilian manufacturer may lobby its government to enter into a FTA with the U.S.)

On the other hand, assume that before the formation of NAFTA, a U.S. manufacturer of furniture was able to compete effectively with a more efficient Mexican manufacturer, because of the protective barrier provided by U.S. MFN tariffs on imported furniture. Upon the formation of NAFTA, this protective barrier was removed, and the Mexican manufacturer became able to take market share from the U.S. manufacturer. This is trade creation. (For a more formal illustration of trade diversion and trade creation, *see* Panagariya 2000, 290-93.) The fundamental theorem of welfare economics holds that trade creation enhances welfare.

One way of understanding RIAs is to examine whether the welfare reduction resulting from trade diversion is greater or less than the welfare enhancements resulting from trade creation. This kind of test, though, is difficult enough to apply *ex post*, and seems impossible to apply reliably *ex ante*. It also leaves out consideration of rents that are not captured domestically, and terms of trade effects. Moreover, once we drop the unrealistic assumption of zero elasticity of demand, even a wholly trade-diverting RIA may lead to an increase in welfare (Lipsey 1957, Panagariya 2000). Bhagwati (1971)

shows that in order to eliminate the possibility of trade diversion, it is necessary to assume that *both* the elasticity of demand for imports is zero, *and* the elasticity of supply for exports is zero.

Rents that are not captured domestically often arise from non-tariff barriers (Baldwin and Venables 1995). Baldwin and Venables point out that if all barriers were of this type, then a state gains from any RIA that reduces its average tariff-equivalent trade barriers. The extent of trade creation and trade diversion are irrelevant in this case.

If countries in the RIA have sufficient market power, then welfare may also be affected by terms of trade changes both in the internal trade of an RIA member and in its external trade. Baldwin and Venables conclude that where the RIA is small (meaning that there are no terms of trade effects) and there is perfect competition, an RIA that does not raise external barriers would have no effect on external welfare. Would countries raise external trade barriers? Art. XXIV of GATT specifically prohibits this, as discussed in more detail below. The threat of retaliation might also induce states not to raise external barriers. While in a two-country single-play model, a small country's threat to retaliate might be insufficient, repetition or the ability to receive compensation might induce large RIAs not to raise barriers (Kowalczyk 2000; Konishi, Kowalczyk and Sjostrom 2003).

Panagariya (2000) describes a Kemp-Wan-Vanek-Ohyama theorem whereby two countries may enter into a customs union while setting a common external tariff that maintains imports into the customs union at pre-union levels. This would keep the welfare of third states constant, and allow intra-union free trade to increase the welfare of member states. Even under these circumstances, the welfare of member states would not necessarily be increased. A similar result can be achieved for FTAs (Panagariya and Krishna 1997).

Bhagwati has criticized the proliferation of RIAs in terms of transaction costs. He has used the term "spaghetti bowls" to refer to the varying tariff structures that exporters encounter, and even more substantively, the varying rules of origin that exporters encounter and customs officials apply (Bhagwati 1996).

b. Dynamic Analysis: Building Blocks and Stumbling Blocks

Another approach to RIAs is to evaluate them in terms of their dynamic effects. Several parameters may be evaluated. First, is there a pro-competitive effect of integration? Second, does RIA liberalization spur growth through investment? Third, does regional liberalization result in a reduction of political power of protected industries, or of the value of multilateral protection to protected industries, and therefore a reduction of political demand for protection? Lastly, does bureaucratic experience with regional integration pave the way for multilateral integration? On the other hand, does path dependence result in reduced possibilities for multilateral integration, after states engage in regional integration?

Pro-competitive effects may arise from the creation of a larger market within the RIA. The European Community's single market program in the 1980s and early 1990s was motivated by a desire to establish a breeding ground for "world class" competitors that could match US and Japanese firms. Pro-competitive effects may be substantial, leading to significant increases in firm scale (Baldwin & Venables 1995).

Growth may arise from integration where firms increase investment in order to capture increasing returns. One important issue here is investment diversion. For example, did the creation of NAFTA cause a shift in investment from the U.S. to Mexico? In fact, the inclusion of Chapter 11 in NAFTA may be seen as an attempt to accentuate this effect by providing market access and protection for U.S. and Canadian investors in Mexico.

Another source of dynamic effects is in political economy. To the extent that regional integration reduces the rents from protectionism that a firm is able to reap, the firm will have less incentive to seek protection, and fewer resources to do so. This may open the way to further integration on the multilateral front.

c. Laboratories of Multilateralism and Path Dependence

RIA disciplines may serve as an example or a pathfinder for future multilateral disciplines: as laboratories of integration[5] and sources of intellectual capital. On the other hand, especially in the area of regulatory non-tariff barriers, there are questions about the extent to which RIA disciplines might result in circumstances where the RIA proceeds along a path that makes multilateral integration more difficult (Bhagwati 1993, p. 22), or that may pre-determine the path of multilateral integration (Mattli 2000): path dependence. Thus, the RIA may take advantage of "first mover" advantages, and use its prior action to impose outcomes on other states.[6] More importantly, regional integration creates advantageous positions, including those enjoyed by new investors in RIA members, with its own demand for continued preference.

d. The Regional "Card" and the Demand for Integration

In addition, states sometimes appear to engage in regional integration as an alternative to multilateral integration. This may occur simply as a BATNMA: a "best alternative to a negotiated multilateral agreement." In this sense, states would be

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[5] For an elaboration, *see* Cho 2001.

[6] For an example, *see* the Consultation Document Prepared by the European Commission's Directorate General for Enterprise on the Review of the New Approach, 13 December 2001, available at http://europa.eu.int/comm/enterprise/consultations/new_approach_rev/documents/consultation_doc.pdf, at 6 ("A more consistent implementation of the New Approach within the European Community will help the Community to encourage international alignment with its regulatory framework. . . . strengthening the Community's negotiating position with third parties").

expected to examine their alternatives to proposed multilateral integration arrangements. States may strategically cultivate RIAs in order to enhance their BATNMA, and therefore their leverage in multilateral negotiations. It appears that the setback in WTO Doha Development Agenda negotiations in the 2003 Cancun ministerial conference precipitated negotiations on a number of RIAs. Finally, all states, but especially developing states, have finite capacity to negotiate international economic integration agreements. Therefore, work on RIAs reduces the ability to engage in multilateral integration.

4. WTO Regulation of Regionalism

RIAs are generally inconsistent with the basic most favored nation (MFN) principle in WTO law: the principle that each member state treat all WTO member states equally. This principle is expressed in Art. I of GATT as to goods in the following terms: any liberalization granted by any member state to any product originating in any other country must be accorded to the like product originating in all other contracting parties. Similar provisions are included in the General Agreement on Trade in Services (GATS) and in other WTO agreements.

Therefore, in order for an RIA—either a FTA or a CU—to comply with WTO law, an exception is necessary in order to permit differential tariffs as between member states and non-member states, among other things. Art. XXIV of GATT provides such an exception, subject to the satisfaction of specified conditions.

Art. XXIV was proposed for addition to the original GATT by U.S. negotiators, in anticipation that the U.S. would enter into a FTA with Canada (Chase 2005). Interestingly, the Havana Charter, which would have provided for the broader International Trade Organization, but was never ratified, only provided an exception for customs unions, not for free trade areas (Chase 2005). Earlier customs unions had quickly led to full political integration. The original GATT, which was intended merely to hold in place certain tariff concessions until states could ratify the Havana Charter, added an exception for FTAs in order to facilitate the proposed, but frustrated, treaty with Canada.

There is wide agreement among economists that the conditions specified by Art. XXIV are not congruent with economic theory. There is less agreement on a replacement. For example, in analyzing Article XXIV, Bhagwati suggests that

> A different, and my preferred, approach is not to pretend to find rules of thumb to exclude CUs and FTAs "likely" to be trade-diversionary, but rather to examine the different ways in which trade diversion could arise and then to establish disciplines that would minimise its incidence. (Bhagwati 1993, p. 16)

Bhagwati suggests that Article XXIV:5 operates in this spirit, by seeking to ensure that external barriers are not increased at the formation of an RIA, although "it is evident to trade economists that *maintaining* external tariffs unchanged is, in any event, not the

same as eliminating trade diversion." (Bhagwati 1993, p. 16) Therefore, Bhagwati recommends rules that would require a reduction in external tariffs. McMillan recommends simply asking the question whether the agreement results in less trade between member countries and outside countries—he would in effect require some reduction in external barriers in order to counter the trade diversionary effects of internal integration (McMillan 1993, p. 306). It is useful to consider whether Article XXIV accommodates a test that would meet the requirements of welfare economics (Mathis 2002, p. 108).

This part first reviews the basic structure and operation of Art. XXIV and the Understanding on the Interpretation of Article XXIV. Core issues include the question of how customs unions are to establish common external tariffs. This part examines the ambiguity regarding the treatment of product standards under Art. XXIV. It examines the ambiguity regarding the treatment of safeguards, dumping and subsidies measures under Art. XXIV. It examines the amenability of disputes regarding the interpretation or application of Art. XXIV to WTO dispute settlement. It also describes the facility for RIAs among developing countries under the Enabling Clause.

a. Article XXIV of GATT and the Understanding on Interpretation of Article XXIV

Article XXIV:5 provides a conditional, and limited, exception from GATT requirements. It states that the GATT shall not prevent, as between the territories of contracting parties, the formation of a CU or of a FTA, or an interim agreement necessary for the formation of a CU or FTA, provided that external duties and other regulations of commerce are not "on the whole . . . higher or more restrictive" than the general incidence prior to formation. This is known as the "external" requirement.

In addition, the availability of the Article XXIV exception depends on the existence of a customs union or free trade area, or an interim agreement. However, the definitions of "customs union" and "free trade area" are also restrictive, and impose an "internal" requirement. The internal requirement, contained in Art. XXIV:8, requires that "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all" trade. Finally, the definition of "customs union" contains an additional external requirement, requiring that "substantially the same duties and other regulations of commerce are applied by each of the members . . ." to external trade.

The internal and external requirements include a number of difficult interpretative issues. This Chapter can only highlight a few of them. With respect to the internal requirement, first, what are "other restrictive regulations of commerce", and is the enumeration of exceptions in the parenthetical quoted above exhaustive or not?[7] Second, what is "substantially all" trade? The public policy question behind both these doctrinal questions is what restrictions are permitted between RIA partners—in effect, it asks what

[7] For a useful review of the history of this provision, *see* Mathis (2002).

level of integration will be set as a hurdle for permission to depart from the MFN obligation and other obligations of GATT. Third, for an interim agreement, how long an interim is permitted, and how gradual may be the phasing-in of integration? For the external requirement, interpretative issues include the question of the meaning of "other regulations of commerce" and how to calculate whether duties and other regulations of commerce are "on the whole higher or more restrictive." Here, there are important questions of economic policy and analysis. There are also questions about requirements to compensate third states for any raised tariffs or other restrictions.

i. The Uruguay Round Understanding

The 1994 Understanding on the Interpretation of Article XXIV (the "Understanding") provides some clarifications, as well as some additional requirements with respect to RIAs.

The Understanding provides some specification with respect to the method of calculation of whether the general incidence of duties and other regulations of commerce has been raised in the formation of a customs union under Article XXIV:5. This issue has long been the subject of dispute, with the interpretative questions focusing on the method of averaging and the scope for offsetting increases in duties by reductions, and the determination of a prior reference period. The Understanding states that assessment shall be made on a tariff line basis. Thus, normally, a reduction in one tariff line will not balance an increase in another tariff line. Formation of a customs union usually involves some averaging, with each state raising some duties, while reducing others. If reduction on the same tariff line is not sufficient to provide the necessary compensatory adjustment, the Understanding provides that the customs union must offer compensation, which may take the form of reductions of duties on other tariff lines. The member states having negotiating rights in the binding being modified or withdrawn are required to take that compensation into account. However, where negotiations on compensation are unsuccessful, the customs union is free to modify or withdraw the concessions, and affected member states are then free to withdraw substantially equivalent concessions in accordance with Article XXVIII of GATT.

The Understanding specifies that applied rates, rather than bound rates, shall be used for calculation purposes. The Understanding also provides some specification of what is meant by a "reasonable length of time" during which an interim agreement must be completed. Generally, this period should exceed 10 years only in exceptional cases.

Finally, the Understanding provides for procedures for notification, negotiation and review of proposed RIAs. A WTO Committee on Regional Trade Agreements was established in 1996. The CRTA considers the systemic implications of RIAs for the multilateral trading system and the relationship between them. More specifically, it examines RIAs in goods notified to the WTO. This examination ensures the transparency of RIAs and allows other member states to evaluate and discuss the proposed RIA's consistency with WTO law. The proposed parties to the RIA provide information that forms the basis for the evaluation and discussion. Consultations are conducted toward

the formulation of a CRTA report, but no reports have achieved consensus and been issued since 1995. The WTO Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of relevant provisions of Article XXIV.

ii. The Role of Article XXIV: The Turkey—Textiles Jurisprudence

In the Turkey–Restrictions on Imports of Textile and Clothing Products decision,[8] the Appellate Body examined the relationship between Article XXIV and other provisions of GATT. In particular, the question arose whether Article XXIV applies to provide an exception only to the MFN principle, or whether it provides an exception to other requirements of GATT.

The case concerned the final phase of the creation of a CU between Turkey and the EC. As of 1 January 1996, Turkey harmonized its tariffs, and its textiles and clothing quantitative restrictions, with those of the EC. India claimed that the imposition of these quantitative restrictions on textiles and clothing violated GATT Articles XI and XIII, as well as Article 2.4 of the Agreement on Textiles and Clothing, and was not justified by Article XXIV.

The Appellate Body found that the words "shall not prevent" (with reference to the formation of a customs union or a free trade area) in the *chapeau* of Article XXIV:5 are critical to a determination of the scope of the exception under Article XXIV.

The panel had found that Article XXIV does not provide an exception from the rules against quantitative restrictions contained in Articles XI and XIII of GATT 1994.[9] The Appellate Body determined that the panel did not fully analyze the chapeau of Article XXIV:5, and proceeded to do so.

The Appellate Body emphasized the words "shall not prevent" and held that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[10] "It follows necessarily that the text of the chapeau of paragraph 5 of Article XXIV cannot be interpreted without reference to the definition of a 'customs union'."

As noted above, with respect to customs unions, Article XXIV:8(a)(i) sets the internal requirement to eliminate duties and other restrictive regulations with respect to substantially all trade. Article XXIV:8(a)(ii) sets the external requirement for a

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[8] WT/DS34/AB/R, adopted 19 November 1999 [Turkey-Textiles Appellate Body Report].

[9] Turkey Textiles-Panel Report, *supra* note , paras. 9.188 and 9.189.

[10] Turkey Textiles-Appellate Body Report, *supra* note , para. 46.

"common external trade regime."[11] In addition, Article XXIV:5(a) imposes an additional external requirement to the effect that duties and other regulations of commerce "shall not on the whole be higher or more restrictive than the general incidence" prior to formation.

The Appellate Body found that Article XXIV:4, and the preamble of the Understanding, provide an important part of the context for interpretation of the chapeau of Article XXIV:5, to the effect that a balance must be struck between the positive internal effects of customs unions, and any negative trade effects on third parties: this is an economic test.[12]

The Appellate Body held that the state using the Article XXIV defense has a burden of proof as to whether the requirements of Article XXIV:5 and 8 are met, and that the measure for which the defense is sought is *necessary* to the customs union: that compliance would prevent the formation of the customs union.[13] The panel failed to examine compliance with Article XXIV:5 and 8.[14]

With respect to the necessity criterion, Turkey asserted that if it had not imposed the quantitative restrictions at issue here, the EC would have "exclud[ed] these products from free trade within the Turkey/EC customs union."[15] The EC would have done so to prevent trade diversion: to prevent these products from flowing into the EC through Turkey, and thereby avoiding the application of the EC's quantitative restrictions. These goods accounted for 40 per cent of Turkey's trade with the EC, thus raising concerns that, if they were excluded, Turkey's regional arrangement with the EC would not satisfy the "substantially all trade" criterion.

However, the Appellate Body agreed with the panel that there existed less trade restrictive alternatives, including the use of rules of origin to distinguish between Turkish and third country textiles.[16] This would have addressed the problem of trade diversion, and obviated the need to exclude the textiles and clothing sector from the EC-Turkish customs union. However, the Appellate Body did not address the fact that such rules of origin would require administration, and would prevent the formation of the kind of

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[11] Turkey-Textiles Appellate Body Report, *supra* note , para. 49.

[12] Turkey-Textiles Appellate Body Report, *supra* note , paras. 55-57, *citing* Panel Report, para. 9.120.

[13] Turkey-Textiles Appellate Body Report, *supra* note , para. 58.

[14] The panel expressed that it is arguable that it did not have jurisdiction to consider such compliance, but the Appellate Body noted in this respect its opinion in India--Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, to the effect that a panel has jurisdiction to examine matters that are also committed to political evaluation. WT/DS90/AB/R, adopted 22 September 1999, paras. 80 – 109.

[15] Turkey's appellant's submission, para. 56.

[16] Turkey-Textiles Appellate Body Report, *supra* note , para. 62-63.

customs union that the EC and Turkey wished: one that would not require border controls on goods, consistent with the principle of "free circulation."[17]

Under the Appellate Body's approach, the EC and Turkey are not entitled under Article XXIV to an exception necessary for features that go beyond those required by the definition of "customs union" in Article XXIV itself. That is, states forming an RIA are not permitted to exceed the minimum standards set forth in Article XXIV if to do so would entail violation of another provision of GATT.

The Appellate Body concluded that Turkey failed to satisfy its burden of proof that formation of a customs union between the EC and Turkey would have been prevented if Turkey were not allowed to adopt the quantitative restrictions at issue.

b. Treatment of Product Standards

The requirements of Article XXIV of GATT and the Understanding with respect to RIA regulation of national product standards, technical regulations, and sanitary or phytosanitary measures (collectively, "standards") are somewhat unclear, in large measure due to the imprecision of the definitions of "other restrictive regulations of commerce" in Article XXIV:8, and "other regulations of commerce" in Article XXIV:5 and 8. Under the analysis of *Turkey-Textiles* provided above, the following difficulty arises: harmonization or rules of mutual recognition that might otherwise violate GATT are only permitted to the extent that they are required under Article XXIV.

However, Article XXIV:8 does not appear to require harmonization or mutual recognition arrangements. To the extent that RIAs engage in harmonization, their harmonized standards measures must conform to the requirements of WTO law, namely the GATT, the TBT Agreement and the SPS Agreement. The regulation of RIA rules of mutual recognition, under the MFN obligation of Article I:1 of GATT, and under Article XXIV, is unclear, and rules of mutual recognition may present some opportunities for RIA protectionism. It would be useful to clarify the meaning of "other restrictive regulations of commerce" in Article XXIV:8, and "other regulations of commerce" in Article XXIV:5 and 8 in order to clarify what Article XXIV requires and what it prohibits.

The core question raised in this area has to do with the treatment of recognition arrangements (see Bartels 2005). Do recognition arrangements violate the MFN obligation of Article I:1 of GATT? Should RIAs be permitted to maintain exclusive

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[17] Turkey-Textiles Panel Report, para. 4.3, quoting a response to written questions by the EC as follows: "The use of rules of origin benefiting only Turkish exports would have been an exception to the principle of free circulation within the customs union and would have required the maintenance of customs and border checks within the customs union designed to ensure that Turkey would not become a transit point of goods in circumvention of the Community's quota system arising from Turkey's adoption of the Community's rates of tariffs, etc."

recognition arrangements, effectively discriminating against similarly-situated third states and "like" third state products? Or should they be required, as under Article VII of the GATS, to practice what might be termed "open recognition" (Trachtman 2003)? Open recognition would establish RIA *conditions* for recognition, but permit third states to meet those conditions. Although the legal requirements are not clear, open recognition may be required under Article I:1 and XXIV of GATT. It would be useful to clarify these requirements. It would also be useful to clarify whether Article XXIV may serve as an exception to the requirements of the TBT Agreement or the SPS Agreement. The specific text of Article XXIV states only that it provides an exception to obligations in the GATT itself.

c. Treatment of Safeguards Measures

Another important, and contentious, issue is whether a state member of an RIA may, may not, or must apply safeguards measures to other members of the RIA. Here, a central question under WTO law is whether these trade policy measures are "other restrictive regulations of commerce" within the meaning of Article XXIV:8. This issue was discussed in the Uruguay Round negotiations, but was not resolved. The Agreement on Safeguards provides in footnote 1 that "nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994." Under the Turkey-Textiles line of reasoning, if a member of an RIA is prohibited by Article XXIV from applying safeguard measures to other RIA members, then Article XXIV would serve as a defense to any requirement elsewhere in GATT to apply safeguard measures on an MFN basis. If it is not prohibited to apply safeguard measures to other RIA members, then it may well be required to do so.

One way of understanding this issue is in the context of a conflict between an RIA treaty that prohibits application of safeguards measures to other RIA members, and WTO requirements of MFN application of safeguards measures. This issue is addressed more fully in part 5, below.

So far, the Appellate Body has not spoken directly to this issue, although it has held that the scope of countries included in a safeguards investigation may not exceed the scope of countries included in the safeguard measure. This concept of "parallelism" was applied in several Appellate Body decisions,[18] and provides that imports included in the determinations of serious injury made under Articles 2.1 and 4.2 of the Safeguards

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[18] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R, adopted 10 December 2003.

Agreement should correspond to the imports included in the application of the resulting measure under Article 2.2.

For example, in *Line Pipe Safeguards*, the Appellate Body, reversing the Panel, agreed with Korea that including imports from Canada and Mexico in the domestic investigation, but excluding these imports from the application of the safeguard measure without a reasoned and adequate explanation, violated Articles 2 and 4 of the Safeguards Agreement. The Appellate Body found that the U.S. administrative agency's report, while distinguishing between NAFTA and non-NAFTA imports, did not establish explicitly "that increased imports from non-NAFTA sources by themselves caused serious injury or threat of serious injury."[19]

Under these circumstances, the Appellate Body noted that it did not have to rule on the contentious issue of whether Article XXIV could serve as an exception here to the obligation to provide MFN treatment in the application of safeguard measures under Article 2.2 of the Agreement on Safeguards. (Recall that Article XXIV is nominally only an exception to the obligations under GATT itself.) According to the Appellate Body, this question becomes relevant only in two possible circumstances. The first is when the investigation by the competent authority does not consider the imports that are exempted from the safeguard measure. The second is when the imports that are exempted from the safeguard measure are considered in the determination of serious injury, and the competent authority has also established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of the safeguard measure. Neither of these two circumstances pertained in that case.

d. Dispute Settlement and the Committee on Regional Trade Agreements

For a variety of reasons, RIAs were rarely challenged through dispute settlement during the GATT period.[20] First, there were a number of ambiguities in the legal requirements. Second, the working party process by which RIAs were reviewed was generally indeterminate: no RIAs were disapproved and only a handful were approved. Third, the dispute settlement process required consensus to begin and to reach a legal conclusion; given the other uncertainties, and the contention by the EC that RIA legality was not amenable to GATT dispute settlement, it was difficult to bring a case.

As noted above, Article 12 of the Understanding specifically authorizes dispute settlement with respect to any matters arising from the application of Article XXIV to RIAs. On the issue of the jurisdiction of panels to consider member state actions under Article XXIV, in *Turkey-Textiles*, the Appellate Body, following its decision in *India--Quantitative Restrictions* (in a different context), asserted the authority of panels to examine these issues. Although in *Turkey-Textiles* the panel expressed doubt regarding the ability of a panel to evaluate compliance of an RIA with Article XXIV, the Appellate

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[19] Appellate Body Report, *Line Pipe Safeguards*, para. 196.

[20] The exception is the first two Bananas cases, which were unadopted.

Body found not only that a panel may make this determination, but that a panel must do so in order to evaluate the availability of a defense under Article XXIV.

It should be emphasized that there seems to be no protection for pre-existing RIAs from scrutiny in dispute settlement. Thus, it would be possible for any existing RIA to be challenged under Article XXIV. *Turkey-Textiles* suggests that RIAs are potentially subject to rather strict scrutiny. This scrutiny may put increased pressure on revision of Article XXIV, or on greater deference to a political process of approval.

Under GATT, no working party ever disapproved an RIA, and only a few RIAs were approved. At the 1996 Singapore Ministerial, member states established the Committee on Regional Trade Agreements (CRTA) to review RIAs.

e. The Enabling Clause

The 1979 Enabling Clause[21], which became a part of WTO law pursuant to Annex 1A of the WTO Charter,[22] provides exceptions from the MFN obligation of Article I of GATT in two ways. First, it allows contracting parties to offer non-reciprocal preferential treatment to imports from developing countries. The Enabling Clause also permits the establishment of RIAs among less-developed contracting parties.

The prerequisites for RIAs established under the Enabling Clause vary considerably from those detailed in GATT Article XXIV. The Enabling Clause does not

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[21] Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L4903. The relevant portions provide as follows:

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

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

. . .

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

. . .

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

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

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

[22] *See* Appellate Body Report, *EC—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted April 20, 2004.

impose the internal requirement of eliminating barriers from "substantially all trade". Moreover, its formulation of the external requirement is weaker, contemplating only that RIAs "Not…constitute an impediment to tariff reduction or elimination on a MFN basis."

The WTO Secretariat opined in 1995 that "the Enabling Clause does not contain references to Article XXIV, an omission which has left unclear whether the Enabling Clause applies in situations where that Article does not, or affects the terms of the application of that Article, or represents, for developing countries, a complete alternative to the Article." (WTO 1995.) This ambiguity has not been clarified in dispute settlement.[23]

f. Rules of Origin

FTAs do not include common external tariffs. Therefore, there might be incentives for exporters to export through the FTA member that maintains the lowest tariff and then transfer the goods to higher tariff members. CUs, such as the EC, often maintain regimes of "free circulation," meaning that once a good enters the CU it may be transferred freely to any other member of the CU. In order to prevent transshipment to evade differential tariffs—"trade deflection"—FTAs cannot maintain regimes of free circulation, and must establish rules of origin to distinguish between goods that originate within the FTA and goods that do not.

These rules of origin may be designed with trade, and investment, policy in mind. That is, a rule of origin that requires a certain value added or certain processes to take place within the FTA determines the minimum investment by a foreign investor in the FTA, provided that the foreign investor wishes to take advantage of FTA tariff-free treatment. Complex rules of origin may also be an important source of transaction costs burdening trade.

While the WTO has plans to work toward harmonizing MFN rules of origin, there are presently no plans to harmonize or otherwise discipline through rules RIA rules of origin. RIA rules of origin may be designed to focus on substantial transformation, change in tariff classification, value added, or particular processes performed. There is some debate as to whether Article XXIV of GATT disciplines rules of origin, either as "other regulations of commerce" under Article XXIV:5 or as "other restrictive regulations of commerce" under Article XXIV:8. Rules of origin could be disciplined under the Art. XXIV:8 requirement of elimination of restrictive regulations of commerce with respect to "substantially all trade" by considering whether rules of origin restrict too large a fraction of trade. (WTO 1998; see also McQueen 1982, arguing that rules of origin that are more restrictive than necessary to counter trade deflection are internally discriminatory; and Mathis 2002).

g. Regionalism in GATS

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[23] The Appellate Body has addressed the Enabling Clause in the context of the generalized system of preferences in *EC—Tariff Preferences*.

First, it is critical to note that Article XXIV of GATT only textually provides an exception from the requirements of GATT, not from the requirements of other WTO agreements. Thus, it is necessary that GATS contain its own provisions dealing with RIAs, to the extent that an RIA would violate particular provisions of GATS. Here, for example, GATS Article II contains an MFN rule. Article V of GATS plays a role in GATS parallel to that of Article XXIV of GATT, but differs in important respects.

First, instead of requiring RIAs to eliminate barriers with respect to "substantially all trade", Article V of GATS establishes the cognate concept of "substantial sectoral coverage." This is to be "understood in terms of number of sectors, volume of trade affected and modes of supply" and no mode of supply (cross-border, movement of service consumer, commercial presence, and movement of service supplier) may be *a priori* excluded. Further, within the covered sectors, substantially all discrimination must be eliminated.

Second, again paralleling Article XXIV of GATT, Article V provides that the overall level of barriers to third countries may not be raised by the formation of the RIA.

Finally, Article VII of GATS permits "open" recognition arrangements, as discussed above. These arrangements are required to be open to member states that are able to meet the requirements for recognition. The relationship between Articles V and VII is somewhat uncertain. Yet there is some concern that states may provide de facto preferences through recognition or other arrangements regarding technical regulations, licensing and qualification requirements in services (Mattoo and Fink 2002).

5. Choice of Law and Choice of Forum Problems

One of the most difficult sets of technical legal problems raised by RIAs is the relationship among different sources of international law, and the application of these different sources in dispute settlement (Kwak and Marceau 2004; Pauwelyn 2004B). In the international legal system, these are questions of choice of law and of choice of forum.

There are several types of substantive problem. First, what happens where RIA law requires action that WTO law forbids, or vice-versa? Second, what happens where RIA law permits action that WTO law forbids, or vice-versa? Third, may WTO law be applied in RIA dispute settlement, either as the basis for a claim or as a defense. Fourth, may RIA law be applied in WTO dispute settlement, either as the basis for a claim or a defense? Fifth, may a claimant bring identical, or similar, claims in more than one forum at a time, and does a doctrine of res judicata or collateral estoppel apply to prevent repeated litigation of the same claims and of the same issues? Finally, how do these divergent sources of law influence one another in terms of interpretation? This chapter cannot respond definitively to these questions, but we attempt to outline some of the issues. Many of these issues will seem familiar to those who have studied federal or

other divided legal systems, where there are multiple sources of law and multiple tribunals with varying scopes of jurisdiction.

In fact, in the international legal system generally, "[t]his is not a unique situation as States are often bound by multiple treaties and the dispute settlement systems of those treaties operate in a parallel manner." (Kwak and Marceau 2003) Many have remarked on the proliferation of international tribunals, not to mention diverse sources of law (Charney 1998).

In some cases, treaty provisions in the WTO or in an RIA will specifically address these issues. For example, as a matter of choice of forum, Article 23 of the DSU would seem to provide for exclusive jurisdiction in the WTO for claims arising from WTO law. Of course, some actions may give rise to claims arising from both WTO law and RIA law; Article 23 does not specifically address this possibility. Furthermore, in cases arising under both NAFTA and the GATT, Article 2005 of NAFTA allows the complainant to select the forum, except in certain cases involving environmental, standards or SPS matters. Other RIA agreements specify that similar choices shall be exclusive. (Kwak and Marceau 2003)

However, as a matter of choice of law, there are substantial questions as to whether a WTO panel would apply the provisions of RIA agreements specifying exclusive jurisdiction in order to "oust" the WTO Dispute Settlement Body of jurisdiction. WTO panels are mandated to apply directly only WTO law. Therefore, they could not apply RIA law to bar a claim by a WTO member state. Furthermore, Article 23 of the DSU claims exclusive jurisdiction for the WTO over WTO law claims.

So it may be that WTO law would require what an RIA prohibits, or vice versa. This certainly seems possible in the Article XXIV context, where an RIA requires integration in a form that violates Article XXIV. This type of conflict would have a certain outcome within WTO or RIA dispute settlement, respectively, which may differ from the outcome that would obtain at general international law.

That is, at general international law, all law is applicable, and conflict may often be settled in accordance with a "last-in-time" rule. However, even if, for example, the RIA were the last in time, the state relying on it would be responsible for any violations of WTO law under the rules of state responsibility, pursuant to Article 30(5) of the Vienna Convention on the Law of Treaties. It would also generally be responsible within the WTO legal system. The panel in *Turkey-Textiles* stated that "a bilateral agreement between two Members . . . does not alter the legal nature of the measures at issue or the applicability of the relevant GATT/WTO provisions."[24]

In the recent dispute between Mexico and the United States with respect to high fructose corn sugar, Mexico argued to the WTO panel that the panel should decline to

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[24] Panel Report, Turkey—Restrictions on Imports of Textiles and Clothing Products, WT/DS34/R, adopted as modified on appeal, 19 November 1999, Para. 9.178

exercise its jurisdiction in favor of arbitration under NAFTA, in order to address both Mexico's claims regarding market access in the U.S. for Mexican cane sugar under NAFTA and the United States' claims, brought in the WTO, with respect to Mexico's tax measures. This was similar to a *forum non conveniens* claim in private litigation (see Pauwelyn 2004B). Mexico did not argue that NAFTA prohibited the U.S. bringing the relevant litigation to the WTO. However, the panel found that, under the DSU, it had "no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[25]

The panel related the choice of forum issue to the choice of law: "any findings made by this Panel, as well as its conclusions and recommendations in the present case, only relate to Mexico's rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law."[26]

6. Conclusion

While in 1947, Article XXIV may not have been very important, and while at that time, the rise of FTAs could not be anticipated, Article XXIV has taken on great importance. One of the most important questions in international economic policy today is the relationship between regional integration and multilateral integration. For better or worse, Article XXIV (and its cognates in services and elsewhere) provides the framework for articulation of this relationship.

Article XXIV of GATT presents a facially compelling case to seek to align international trade law with the dictates of welfare economics. It would be useful to redesign or reinterpret Article XXIV so as to increase global welfare: permitting only those RIAs that result in an increase in global welfare. However, there are two potential obstacles. First, it is not clear that the goal of governments is to increase global welfare. Second, it is not clear that an Article XXIV rule oriented more directly to global welfare would be possible or administrable.

Article XXIV is not well developed, and contains many uncertainties, perhaps reflecting in part the ambivalence in states' attitudes towards RIAs. This ambivalence, for example, makes it difficult to know how Article XXIV will deal with safeguards and with certain SPS or TBT measures in RIAs.

Yet, RIAs may serve as laboratories of institutional development, assisting our understanding of the potential institutional solutions to international economic integration problems. The question of whether RIAs may indeed serve as building blocks toward greater integration is still open.

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[25] Panel Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, 7 October 2005, para. 7.1.

[26] *Id.* at para. 7.15.

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