

**NEITHER CONSTITUTION NOR CONTRACT:
UNDERSTANDING THE WTO BY EXAMINING THE LEGAL LIMITS ON
CONTRACTING OUT THROUGH REGIONAL TRADE AGREEMENTS**

Submission to the Vance Writing Competition

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Submission Date: 22 May 2011

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INTRODUCTION

The World Trade Organization (WTO) is described by scholars of international law as the best example of “hard law” at the global level.² A “hard law” regime has formal legal rules and imposes formal penalties for non-compliance with legal obligations,³ unlike so-called “soft law regimes,” where informal persuasion and shaming are the mechanisms available to ensure compliance.⁴ Most international organizations are soft law systems; they have no ability to impose formal legal sanctions on countries which violate their rules. By contrast, the obligations that WTO member states undertake are formally legally binding and are enforced through the WTO’s dispute settlement procedure, where one country can take another country to ‘court’ for violating their WTO duties.⁵

Due to this hard law regime, unusual among international organizations, the WTO is often held aloft as a model for how legally binding obligations can be successfully imposed at the global level.⁶ It is a prime example used to respond to skeptics of international law, who contend that there can be no legally binding obligations internationally, because there is no

² See, e.g., JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 232 (2006) (describing WTO as a regime known for ‘hard’ treaty obligations).

³ The term ‘hard law’ may be unfamiliar to those who have not studied international law. But the concept should be easily grasped by those who have studied domestic law, since most domestic legal regimes are hard law regimes, which have a judiciary to apply the law, whose edicts are backed up by the threat of force or sanction.

⁴ For discussions of the difference between hard and soft regimes, see generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in JUDITH L. GOLDSTEIN, MILES KAHLER, ROBERT O. KEOHANE, AND ANNE-MARIE SLAUGHTER, LEGALIZATION AND WORLD POLITICS 37 (2001); Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499 (2006); Derek Jinks & Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004). The difference between hard and soft law is a central typology of international law, where there is significant compliance with legal regimes but where the legal regimes themselves are not organized the way they are domestically, with a centralized law maker and a court upholding the law through penalties against violators. The fact that hard law regimes, where there is a ‘court’ enforcing the law, are so rare is part of what makes the WTO an object of scholarly fascination.

⁵ ALVAREZ, *supra* note 2.

⁶ For example, the WTO is used as an example by neoliberals and regime theorists to demonstrate the success of international legalization and institutionalization. See, e.g., ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE (2001) (employing the WTO as an example of the success of international institutions and regimes). The fact that the WTO has a hard law compliance mechanism – a ‘court’ – is in large part why it is understood to be such an effective regime at the global level. WTO law is seen as both *binding* and *enforceable*, in the orthodox literature.

central authority to enforce the rules (unlike in the domestic context, where laws are enforced through police and judicial systems).⁷

Thus the most famous aspect of the WTO's legal regime is the degree to which it is binding.⁸ Yet an important ambiguity about the nature of WTO legal obligations remains: the extent to which WTO member states can preemptively "contract out" of their WTO legal obligations by making side-agreements with other member states to change the terms of their legal obligations. If countries can get around the WTO rules by making new sets of rules among themselves, the common wisdom that WTO rules are legally binding is challenged. While WTO law may still be 'hard' in nature, the character of the organization is greatly changed if parties can exit the system easily. If WTO obligations can be avoided with ease, the Organization's reputation for imposing binding legal obligations should be rethought.

Scholars debate the nature of WTO legal obligations. Some argue that the WTO is a "constitutional" regime, with obligations that cannot be derogated from through separate agreements.⁹ Others describe the WTO as a "contractual" regime, where individual member states are permitted make agreements with other states which alter the content of their WTO obligations.¹⁰ The debate between these two camps is unresolved.

Resolving this debate between a constitutional and a contractual understanding of the WTO has important consequences for the nature of the legal regime as a whole. If parties to the WTO can simply avoid their legal obligations by making side agreements with other parties, the much-heralded "hard law" system that the WTO is meant to impose looks significantly weaker.

⁷ For one example of such skepticism about international law, see ERIC POSNER AND JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law is not law at all, in the formal sense).

⁸ Indeed, there is an expansive literature which describes the 'hard law' features of the WTO legal regime. *See, e.g.*, K. W. Abbot & D. Snidal, *Hard and Soft Law in International Governance*, INT'L ORG 2000; JOHN J. KIRTON & MICHAEL J. TREBILCOCK, *HARD CHOICES, SOFT LAW* 348 (2004) ("The WTO ... is very largely based on hard law").

⁹ *See infra* Part II.A.

¹⁰ *See infra* Part II.B.

Since the WTO is famous among scholars and practitioners for its hard law regime,¹¹ the way the WTO is understood will be significantly affected if parties can simply get out of the rules through ‘private’¹² agreements.

This Note seeks to resolve this debate between the constitutional and contractual understandings of the WTO by describing the extent to which parties to the WTO are permitted to ‘contract out’ of their legal obligations. In the context of international trade law, side agreements which alter WTO obligations are called regional trade agreements (or “RTAs”). To determine the extent to which parties can vary their WTO obligations, I will explore the degree to which WTO members are permitted to form regional trade agreements. If the WTO places significant restrictions on the extent to which parties can contract out of their obligations, the constitutional understanding of the WTO seems most promising. However, if the WTO allows extensive contracting out of its legal regime through regional trade agreements, the contractual approach is more persuasive.

Thus this Note will answer two questions. First, what are the legal limits on contracting out of WTO obligations? Second, what do these limits tell us about how to understand the WTO as a legal regime?

To answer these questions, this Note will proceed in four parts. In Part I, I provide an introduction to the WTO as a legal regime governing international trade at the global, multilateral level. I then describe the parallel regime of regional trade agreements, which regulate trade bilaterally and regionally. In Part II, I outline the two conceptual models for understanding the WTO as a legal regime: a constitutional approach and a contractual approach. In Part III, I examine the extent to which WTO member states are legally permitted to contract

¹¹ See *supra* notes 6 and 8 and the accompanying text.

¹² I use the word ‘private’ cautiously. Of course, as a formal matter, agreements between governments (such as regional trade agreements) are not private agreements (in the sense of a contract between private individuals).

out of WTO obligations by making separate trade agreements with other states or groups of states; I look at the Vienna Convention on the Law of Treaties, WTO legal provisions on regional trade agreements, and WTO case law. This analysis reveals that states have a significant degree of freedom – in practice, they can contract out of most WTO obligations, which gives credence to the contractual understanding of the WTO. But there remains a “core” of obligations imposed by WTO law which member states cannot contract out of through RTAs. In Part IV, I answer the two questions posed by this piece. First, I summarize the legal limits imposed on contracting out of the WTO through RTAs. Second, I discuss how this analysis affects our understanding of the WTO as a legal regime.

I conclude that the WTO cannot be understood as purely a constitutional regime or a contractual regime: it contains elements of both theoretical models. This conclusion may challenge current concepts and provide directions for future research. It suggests that we can understand a legal regime by looking at the extent to which parties are permitted to contract out of it. And it suggests that the WTO may not be as strong as it looks. Despite its reputation as a hard law regime, the fact that parties have significant (albeit not absolute) ability to contract out of their WTO obligations preemptively places a significant limit on the strength of the regime.

This Note makes several important contributions to the literature. It articulates the debate between the contractual and constitutional understandings of the WTO. It conceptualizes regional trade agreements as ‘contracting out’ of the WTO. It suggests that there are some non-derogable obligations that the WTO has refused to cede to regional trade agreements. And it describes the WTO as possessing elements of both the constitutional and contractual accounts.¹³

¹³ These contributions are important because they help us to accurately categorize and describe the WTO legal regime. Understanding the WTO is important because it is arguably the most important international organization aside from the United Nations, in the popular and scholarly imagination. If the nature of its legal obligations is being misunderstood, it is important to correct that misimpression, since the WTO is often used as a yardstick for

PART I: A BRIEF INTRODUCTION TO THE WTO AND REGIONAL TRADE AGREEMENTS¹⁴

This Note will explore the legal relationship between the WTO and regional trade agreements, to better understand the nature of WTO legal obligations. This section will provide a brief introduction to the WTO as an international organization and a legal regime, and an overview of the proliferation of regional trade agreement, to better situate my analysis in the later Parts. I discuss the purpose, history, institutional structure, and basic legal obligations of the WTO, and define and describe the recent proliferation of regional trade agreements regulating trade at the bilateral and regional level.

The World Trade Organization is a multilateral, international organization that governs trade (the exchange of goods, services, and intellectual property) between nations.¹⁵ The WTO's self-identified purpose is three-fold.¹⁶ First, it is meant to encourage the progressive liberalization of international trade, and to remove protectionist barriers that states¹⁷ place on imports and exports, which distort trade flows and decrease overall prosperity.¹⁸ Second, the WTO is a negotiating forum. It facilitates so-called trade "rounds," where the 153 member states

evaluating the strength of other international organizations and legal regimes. ALVAREZ, *supra* note **Error! Bookmark not defined.** Further, given that the WTO has been both villanized and lauded as the ultimate flashpoint for debates over globalization, it is important to show that the WTO isn't as 'strong as it looks.' In these debates, it is commonly accepted that the WTO is an extremely powerful institution, with great coercive force. My Note suggests that this isn't the case, or at least that WTO legal power has been overstated, as parties have significant opportunity to modify WTO rules. My Note is also important because it tackles the emergent RTA legal regime. The RTA phenomenon is the most important development in global trade since the conclusion of the Uruguay Round, and work that sheds light on the legal relationship between the WTO and RTAs is of increasing value in the new world of global trade. Finally, the constitutional norms at the heart of the WTO that this Note exposes help us to see the WTO's self-understanding, which tells us about the nature of the institution – what it has consistently valued as the most important obligations that it asks of its members.

¹⁴ A note on the sources employed in this section: I deliberately use WTO sources in this Part, in order to present the most "orthodox" view of the Organization's mandate (what Joseph Weiler has called the view from the Kremlin). All of these statements could be (and have been) problematized. Nevertheless, I beg the reader's patience in presenting this very simplistic view of the WTO.

¹⁵ What is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Jan. 13, 2011).

¹⁶ What is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Jan. 13, 2011).

¹⁷ In keeping with international law and international relations literature, I use the term "state" to refer to countries.

¹⁸ There are some exceptions to this liberalizing agenda, for example for public health or economic development. For example, the infamous Article 20 of the GATT provides a series of exceptions. General Agreement on Tariffs and Trade, Oct. 30, 1947, Article 20 [hereinafter GATT].

which comprise the WTO meet and negotiate what are essentially treaties on trade liberalization.¹⁹ Third, the WTO seeks to provide clear rules on international trade,²⁰ and a means for settling disputes between members (the dispute settlement process).²¹

Understanding the WTO's current legal regime requires a brief examination of the history of the Organization. The World Trade Organization was not established as a formal international organization until 1995.²² It developed out of the General Agreement on Tariffs and Trade (GATT), a treaty adopted by 23 countries in 1947 and updated through subsequent trade rounds.²³ The GATT dealt with trade in goods and focused on reducing tariffs. During the 47 years when it was the primary agreement on international trade, the GATT grew in membership, covered an increasingly large percentage of global trade, and expanded beyond rules on tariffs.²⁴

The Uruguay Round of negotiations (1986-1994) expanded the scope of multilateral agreements governing trade and changed the institutional structure.²⁵ It resulted in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); trade in services and intellectual property are now

¹⁹ For a description of the various trade rounds, see *The GATT Years: From Havana to Marrakesh*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 13, 2011) and *The Uruguay Round*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 13, 2011).

²⁰ Principles of the trading system, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 13, 2011).

²¹ Who we are, http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Jan 13, 2011); A unique contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan 13, 2011).

²² See *What is the World Trade Organization?*, *supra* note 16. See also BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995; 2001) (describing the WTO's ability to resolve legal ambiguity).

²³ For excellent histories of the GATT's origins and subsequent development, see generally KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1993); RICHARD N. GARDNER, *STERLING DOLLAR DIPLOMACY: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (1969); HOEKMAN & KOSTECKI, *supra* note 14; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2002); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* (1969); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (1999).

²⁴ See generally *id.* (describing complex history of GATT's development). The special needs of developing countries were confronted most directly during the Tokyo Round of negotiations, which resulted in the "GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries," the so-called Enabling clause. For further discussion, see *infra* Part III.B.2.

²⁵ Perhaps the best history of the Uruguay Round can be found in HOEKMAN & KOSTECKI, *supra* note 22.

governed by multilateral agreements. It updated the GATT and produced the WTO, a formal, permanent institution to regulate international trade.

The move from the GATT to the WTO established a new institutional structure for governing global trade. Geneva became home to a permanent secretariat, and the dispute settlement procedure was made formally binding.²⁶ A member state which believes that another member is violating their WTO obligations can request that the WTO form a Panel to review the complaint. The Panel's decision can be appealed to the permanent Appellate Body, composed of neutral experts in trade law.²⁷ The Appellate Body's decisions are legally binding.²⁸

Although the agreements which comprise the WTO are detailed and complex,²⁹ there are two basic legal obligations which animate the entire regime. First, the WTO requires that all member states provide "most-favored-nation" (MFN) treatment to all other WTO members.³⁰ With some exceptions, WTO members cannot discriminate among their trading partners.³¹ Any concession made to one country (such as decreasing tariffs) must be granted to all others.³² Second, the WTO requires that member states treat foreign products the same as those which are domestically produced, once goods have entered a country – the "national treatment" requirement.³³ Both obligations are meant to reduce discrimination and combat protectionism.

²⁶ The Uruguay Round, *supra* note 19. See also HOEKMAN & KOSTECKI, *supra* note 22 (describing the process establishing the WTO).

²⁷ For a more detailed description of the complaint's process, see The panel process http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited Jan. 13, 2011); A unique contribution, *supra* note 21.

²⁸ And can be enforced through what are called countermeasures, where the complainant country can discriminate against the country which is in violation of WTO rules, to the extent that it is being harmed by the infringing country's actions. *Id.*, A unique contribution (providing overview of countermeasures process).

²⁹ The legal documents which form the WTO constitute the longest agreement in international law, at 25 000 pages. FEDERICO ORTINO & ERNST-ULRICH PETERSMANN, THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 (2004).

³⁰ Principles of the trading system, *supra* note 20.

³¹ For example, see GATT Article 20, which describes the exceptional circumstances such as health, environmental, or moral justifications which justify differentiating between trading partners.

³² It is codified in Article 1 of the GATT, Article 2 of the GATS, and Article 4 of TRIPS. *Id.*

³³ National treatment is codified in each of the main WTO agreements: Article 3 of GATT, Article 17 of GATS, and Article 3 of TRIPS. *Id.*

The GATT/WTO governs the global trading regime at the multilateral level. But there is a parallel regime regulating trade at the bilateral and regional level. Since the 1960s, pairs and groups of countries have negotiated independent agreements, outside of the auspices of the GATT/WTO, to regulate trade between them. Such agreements are generally referred to as “regional trade agreements,” or RTAs.³⁴ RTAs reduce trade barriers between the countries in the agreement, while maintaining barriers to other states outside the agreement.³⁵

RTAs vary widely in nature.³⁶ They range from bilateral agreements between two countries (such as the US-Australia free trade agreement) to regional trading blocs composed of ten or twenty members (such as the European Union).³⁷ RTAs can focus on a single issue, such as trade in goods, or cover an enormous range of issues; agreements like the North American Free Trade Agreement are almost as comprehensive as the WTO itself, covering trade in goods, services, intellectual property, and labour. RTAs can be limited to a particular geographic area (like the European Union) or be between countries on opposite sides of the globe (like the United States-Singapore free trade agreement). There are now almost 500 regional trade agreements world-wide, with more RTAs under negotiation.³⁸ Every WTO member (except Mongolia) is also a member of at least one RTA (and some are involved in as many as thirty).

RTA challenge the WTO regime because when parties form an RTA, they form new trade rules for the parties to the RTA which differ from those specified by the WTO. The parties

³⁴ While some scholars use other terms such as regional integration agreements, preferential agreements, or free trade agreements, I follow the WTO’s practice and use the term “RTA” throughout. Regional trade agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Jan. 14, 2011). *See also* JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT XX (2002).

³⁵ Indeed, RTAs are typically free trade area agreements, where the tariffs are reduced to zero on most or all trade between the countries which are in the RTA. An example of a free trade area is the NAFTA. RTAs also include customs unions, which are distinguished by the fact that the countries impose a common external tariff, so they all impose the same tariffs on the countries outside of the RTA. An example of a customs union is the European Union.

³⁶ Scope of RTAs, http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (last visited Jan. 14, 2011).

³⁷ For a complete list of RTAs, see Regional Trade Agreements Information System (RTA-IS), <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited Jan. 14, 2011).

³⁸ Facts and figures, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Jan. 14, 2011).

thus establish a new governance regime; they change the WTO rules and adopt a new regulatory regime as between the RTA parties. Rules governing trade are set at the multilateral level and the regional/bilateral level. The proliferation of RTAs means that the WTO is not the only game in town; there is an extensive network of agreements regulating trade below the multilateral level.

PART II: TWO CONCEPTUAL MODELS OF THE WTO

The above analysis outlined the basics of the multilateral regime governing trade (the WTO) and the parallel regime which exists at the bilateral and regional level (RTAs). This Note will explore what the legal relationship between these two regimes tells us about the nature of WTO legal obligations. In this Part, I situate my analysis in the current literature, examining two dominant conceptual models of the WTO.

Much of the literature on the WTO constitutes an attempt to understand the nature of the institution and its legal obligations.³⁹ Unlike the United Nations or its specialized agencies,⁴⁰ the WTO is seen as effectively imposing binding legal obligations which are enforced by a ‘judiciary.’⁴¹ This is remarkable, given what has been termed formal ‘anarchy’ at the global level (there is no pre-existing body politic, legislature, or executive, to create and enforce the rules).⁴² If the international system looks nothing like the domestic system, how do we describe the type of legal regime that we see in organizations like the WTO?

Scholars have mainly tried to understand the WTO’s legal obligations through analogies to domestic law. In this section, I will focus on two important paradigms which have arisen to try

³⁹ This attempt has taken many different forms. *See, e.g.*, Chios Carmody, *A Theory of WTO Law*, 11 J. INT’L ECO. L. 527 (2008) (discussing the need for a generalized theory of WTO law).

⁴⁰ This is, of course, a caricature. Some of what the UN and its specialized agencies do is legally binding (such as the decisions of the Security Council). But the WTO remains remarkable for a) the type of compliance pull that its rules offer and b) the fact that it has what has been called the “most powerful dispute settlement mechanism in international law.” SYLVIA OSTRY, *supra*.

⁴¹ I.e. what has been termed “hard law” obligations at the global level. *See supra* notes 2 - 5, 8.

⁴² For the most famous discussion of anarchy at the international level and the realist position on why legal governance is not possible at the international level, see KENNETH WALTZ, *MAN, THE STATE AND WAR* (1959).

and describe the WTO.⁴³ Certain scholars have argued that the WTO can best be understood as a ‘constitutional’ regime, in the sense of a public law system which has certain basic legal rights and obligations which are non-derogable. Others have suggested that the WTO is most like a ‘contractual’ regime: the Organization is just a series of bilateral deals between private negotiating parties, any of which can be varied by agreement between two or more of the parties.⁴⁴ I briefly outline each of the two paradigms, and argue that the two models differ on the extent to which they permit contracting out of the WTO system.

A. The Constitutional Model

On the domestic level, the term “constitution” usually refers to the fundamental law of a society, which is extremely difficult to vary or amend (it is *non-derogable*),⁴⁵ and which establishes the basic governmental structures and basic rights of individuals (safeguarded through judicial review).⁴⁶ A constitution is ‘public law,’ setting out the basic legal and political institutions and establishing the relationship between a people and its government.⁴⁷

Constitutional theories of the WTO take different forms, emphasizing different aspects of this domestic understanding of a constitution.⁴⁸ Scholars such as John Jackson emphasize the institutional/structural aspect of the constitutional analogy; he argues that the WTO is

⁴³ Note, though, that while these models purport to be descriptive, they have highly normative undertones and motivations.

⁴⁴ I concede that the distinction between the constitutional and contractual models is not absolute. For example, some scholars have argued that constitutions should be understood as contractual regimes. See, e.g., Barry Friedman & John A. Ferejohn, *Towards a Political Theory of Constitutional Default Rules*, 33 FLOR. STATE U. L. REV. 825 (2006) (discussing constitutional default rules as quasi-contractual in nature).

⁴⁵ For a discussion of how constitutions are meant to “tie us to the mast,” establishing obligations and commitments which are very difficult to alter, see STEPHEN HOLMES, *PASSION AND CONSTRAINT* (1995).

⁴⁶ Black’s Law Dictionary defines it as “[t]he fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.” BLACK’S LAW DICTIONARY (9th ed., 2009).

⁴⁷ *Id.* (defining public law as “[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself”).

⁴⁸ For a description of the various constitutional theories of the WTO, see Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EURO. J. INT’L L. 647 (2006).

‘constitutional’ in the sense that it ‘constitutes’ the architecture of the global trading system.⁴⁹

Other scholars argue that the WTO is like a domestic constitutional regime because of the existence of judicial review, which assures compliance with the regime’s basic law and norms.⁵⁰

But the most fully articulated constitutional theory of the WTO is offered by Ernst-Ulrich Petersmann.⁵¹ Unlike the institutional or judicial review theories discussed above, Petersmann focuses on the binding commitment aspect of the definition of a constitution. One can understand a constitution as binding a polity to certain vital and basic commitments, which are a higher form of law (superseding all others) that cannot be violated or easily varied.

Petersmann argues that the WTO is constitutional, in the sense of being a ‘higher’ form of law that cannot be varied or violated.⁵² The law of the WTO is ‘above politics.’ Governments are bound by WTO rules across time and across domestic institutions, so politics cannot enter the picture to determine trade policy. WTO law is therefore non-derogable; by its constitutional, binding nature, it should not be able to be varied, and should apply equally to all states.⁵³ WTO obligations are collective in nature; they are owed to the collectivity and are part of securing

⁴⁹ John Jackson, *The Perils of Globalization and the World Trading System*, 24 *FORDHAM INT’L L. J.* 371, 375 (2000). See generally J.H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1996); J.H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990); JOHN JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* (1969); John Jackson, *The WTO “Constitution” and Proposed Reform: Seven “Mantras” Revisited*, 4 *J. INT’L ECON. L.* 67 (2001).

⁵⁰ See, e.g. Deborah Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Law*, 12 *EURO. J. INT’L L.* 39, 42 (2001) (arguing that judicial review implies that the WTO is a constitutional regime). See also DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005) (ibid.).

⁵¹ Jeffrey L. Dunoff, *Why Constitutionalism Now?: Text, Context and the Historical Contingency of Ideas*, 1 *J. INT’L L. & INT’L REL.* 191, 194 (?) (describing different constitutional accounts); see also Robert Howse, *The WTO System: Law, Politics, and Legitimacy* 249 (2007) (ibid.).

⁵² ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* 42 (1997). See also Ernst-Ulrich Petersmann, *The WTO and RTAs as Competing Fora for Constitutional Reforms*, in LORAND BARTELS AND FEDERICO ORTINO 285-94 (eds. 2006) (explicitly contrasting ‘realist’, state-focused approaches to the WTO with human rights and constitutional approaches); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *NW. J. INT’L L. & BUS.* 398, 402, 406 (1996-1997). Indeed, Petersmann sees this approach as integrated with a comprehensive theory of justice. See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 *LOY. L.A. L. REV.* 407 (2003-2004).

⁵³ Petersmann, *The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms*, *supra* note 61.

fundamental freedoms for all, because trade law is about securing basic rights and liberties.⁵⁴

This establishes a vertical (or hierarchical) legal regime, with WTO obligations trumping other legal obligations. Therefore WTO obligations should be difficult to vary or opt out of.

To substantiate this understanding, Petersmann highlights certain aspects of the WTO's institutional structure that operate to create a binding constitutional structure.⁵⁵ First, Petersmann points to the fact that the WTO was a "single undertaking," incorporating an array of agreements into a single agreement,⁵⁶ making the institution less treaty-like and more constitutional.⁵⁷ Next, Petersmann points to the "[l]egal primacy of the WTO Agreement over other international trade agreements."⁵⁸ He cites Article XVI:3 of the WTO Agreement, which states that "in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail to the extent of the conflict."⁵⁹ These conflict of laws rules are of "constitutional significance" and establish a formal legal hierarchy ordering international law.⁶⁰ Most importantly, we should understand the WTO as constitutional in nature because of its capacity for judicial review and the dispute settlement system.⁶¹ This

⁵⁴ As Charmody has argued, WTO obligations are more appropriately regarded as collective in nature "because their principal object is the protection of collective expectations about the trade-related behaviour of governments..." Chios Carmody, *WTO Obligations as Collective*, 17 EJIL 419 (2006).

⁵⁵ Or, as Petersmann describes them, the "constitutional functions' for limiting discretionary trade policy powers of governments through worldwide long-term rules of a higher legal rank" PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM*, *supra* note 52, at 47.

⁵⁶ *Id.* at 48.

⁵⁷ *Id.* at 50.

⁵⁸ *Id.* at 51.

⁵⁹ *Id.* (quoting XVI:3).

⁶⁰ *Id.* at 52. Petersmann also reminds us that the WTO was designed to regulate RTAs as well, although he never examines the effectiveness of the provisions.

⁶¹ "By ensuring legally binding dispute settlement rulings and appellate review within short time-limits, the compulsory WTO dispute settlement system promotes rule of law more effectively than any other worldwide treaty system." Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19, 20 (2000). See also Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25 (1998); Ernst-Ulrich Petersmann, *Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law*, 30 LOY. L.A. INT'L & COMP. L. REV. 367 (2008). See also Ernst-Ulrich Petersmann, *The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms: Trade and Human Rights*, in LORAND BARTELS & FEDERICO ORTINO, *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 289-90 (2006) (adding to his constitutional account).

system assures that parties comply with their WTO duties and that they have a remedy when their ‘constitutional’ rights are violated.

At base, the ‘constitutional’ understanding of the WTO is meant to describe the regime as a series of commitments which place law over politics. Countries have bound themselves to rules and principles which are difficult to change, so that they are not tempted to change the rules to their advantage. These obligations should be non-derogable.

B. The Contractual Model

The contractual understanding of the WTO arose out of criticisms of the constitutional approach of Petersmann and others.⁶² Scholars such as Dunoff have questioned the empirical basis for describing the WTO as a constitution (noting the “non-existent” constitutional features of the Organization).⁶³ Howse has argued that, as a normative matter, understanding the WTO as a constitution makes the individual elements of the regime less easily contestable, less democratically entrenched, and less legitimate.⁶⁴

But what is a contract? Typically, a contract is understood as an agreement (or promise) between two or more private parties creating binding obligations.⁶⁵ Parties are permitted to agree to anything within the bounds of the law, and may set any terms they wish. They may also vary their obligations when they see fit by amending the contract.

These basic elements of a domestic law contract encapsulate the description of the WTO as a contractual regime. The strongest proponent of the contractual regime has been Joost Pauwelyn. He claims that the WTO is not a regime where obligations are owed to the collectivity and which cannot be varied or waived, in the way that we would think about a constitutional

⁶² Note, though, that the GATT was often conceived in a contractual fashion. See HOWSE, *supra* note x, at 248.

⁶³ Dunoff, *supra* note 51.

⁶⁴ HOWSE, *supra* note x, at 249.

⁶⁵ BLACK’S LAW DICTIONARY, *supra* note 46.

regime. The WTO is just a series of bilateral agreements between the parties. And any one of the obligations could be altered by a few of the parties without affecting the other countries who are part of the WTO. The WTO is not a higher form of law meant to bind governments over time, but a negotiating ground where parties can work out agreements regulating their relationships. While some treaties are collective because they are designed to protect the interests of the collectivity (like human rights treaties), other treaties are bilateral in nature because they, like the WTO, are meant to promote the individual self-interest of each country in the agreement.⁶⁶

Pauwelyn argues that WTO obligations are bilateral in nature for a variety of reasons. First, Pauwelyn argues that it is clear that WTO obligations are not *jus cogens* (obligations which are binding on all members of the international community and from which no derogation is permitted) or *ergo omnes* (obligations owed to all members of the international community) because WTO obligations are only owned by WTO members to other WTO member states.⁶⁷ This obvious observation has a clear consequence, according to Pauwelyn: it means that “later treaties will *prevail* over the WTO treaty between the parties to both treaties.”⁶⁸ Pauwelyn also argues that WTO obligations are also not independent, all-or-nothing treaties (such as disarmament or environmental treaties) where derogation by one party radically affects the ability of other parties to reach the goals set out in the treaty.⁶⁹ The WTO treaty is not a “treaty where each of the parties’ performance is effectively conditioned upon and requires the performance of each of the others.”⁷⁰

⁶⁶ Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EURO. J. INT’L L. 907, 908 (2003).

⁶⁷ *Id.* at 927.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (quoting ILC commentary). For example, performance of the WTO’s most-favoured nation (MFN) obligations applies ‘unconditionally,’ whether or not all WTO members perform it, and violation by one party does not allow or imply the suspension of WTO obligations for others. *Id.* at 928.

Pauwelyn also examines the object and purpose of WTO obligations to determine whether they are bilateral in nature. Trade, he claims, is about market access between countries. Breaches of WTO obligations which deny market access only affect the rights of parties to the breach;⁷¹ “not *all* breaches of WTO law *necessarily* affect the rights of *all other* WTO members.”⁷² Further, the interest in keeping the markets open can be ‘individualized’; “it is *not* a ‘collective interest’ in the sense of ‘a common interest, over and above any interests of the states concerned individually.’”⁷³ This is in sharp contrast with obligations in human rights treaties, for example.⁷⁴

The origin of WTO obligations also point in the bilateral direction for Pauwelyn; most WTO obligations are negotiated on a state-to-state, bilateral basis.⁷⁵ Further, WTO obligations are heterogeneous in an important way: not all WTO members have the same obligations imposed upon them; the process of reciprocal negotiation results in asymmetrical obligations.⁷⁶

Next, the enforcement mechanism in the WTO indicates the bilateral character of its obligations. WTO dispute settlement provides redress not for breach of obligations but instead “nullification of benefits *that accrue to a particular member.*”⁷⁷ Dispute settlement works in a purely bilateral fashion, with one member alleging a violation against another. Finally, even if a state is found to have breached a WTO obligation and they are recommended to bring their

⁷¹ *Id.* at 930.

⁷² *Id.* at 931. “Crucially, the objective of trade liberalization driving the WTO is *not* a genuine ‘collective interest’ in the sense that it transcends the sum total of individual state interests. It is therefore difficult to construe WTO obligations as truly collective obligations.” *Id.* at 932.

⁷³ *Id.* at 933, n.95 (quoting ILC Commentary).

⁷⁴ *Id.* at 933. “Unlike WTO obligations, human rights obligations do *not* constitute a promise to one or more other states *taken individually*, but a promise to the collectivity or common conscience of all states involved.” *Id.* at 933.

⁷⁵ *Id.* at 931.

⁷⁶ *Id.* at 931.

⁷⁷ *Id.* at 934-35.

actions into conformity “as against all members,” *only* the state that brought the complaint can impose countermeasures if the errant state does not change its behaviour.⁷⁸

Thus the contractual view of the WTO, as elucidated by Pauwelyn, views the agreements between the member states as nothing more than a series of bilateral contracts, any one of which could be varied by a sub-group of the WTO members who are in agreement.

PART III: LEGAL LIMITS ON CONTRACTING OUT OF WTO OBLIGATIONS

The constitutional and contractual understandings of the WTO outlined above were largely developed without reference to the actual legal relationship between the WTO and the burgeoning alternative legal regime governing international trade: the network of regional trade agreements at the bilateral and regional level. This explains why Petersmann and Pauwelyn could reach such different conclusions about the nature of WTO legal obligations: the two do not explore the relationship between the WTO regime and the RTA regime to see if parties are actually allowed to contract out of their WTO obligations.

This Part will rectify that lacuna in the current literature, determining what the legal relationship between the WTO and RTAs actually is, to better understand the nature of WTO legal obligations. I proceed by examining each of the sources of WTO law. I begin by looking at the Vienna Convention on the Law of Treaties, which is the starting point for interpreting any international treaty. Second, I look at WTO provisions on RTAs, both formally and in practice. Third, I examine WTO Panel and Appellate Body “precedent” on the legal limits on RTAs. I argue that while WTO legal provisions are generally quite permissive on contracting out, there are two core constitutional obligations which are imposed.

A. The Vienna Convention on the Law of Treaties

⁷⁸ *Id.* at 935.

The Vienna Convention on the Law of Treaties is necessary for analyzing obligations under the WTO because it provides the rules for interpreting international treaties, such as the WTO. It is an international “treaty on the law of treaties” which sets out an interpretive framework for international agreements.⁷⁹ It has also been held to cover the WTO Agreement by the WTO’s Appellate Body.⁸⁰ This section will explore the provisions of the Vienna Convention which relate to the WTO/RTA relationships, concluding that it imposes some minimal restraints on contracting out through RTAs.

The Vienna Convention contains several provisions related to contracting out of multilateral agreements. First, the Vienna Convention requires that parties be subject to the basic principle that agreements which are made must be obeyed, in Article 26.⁸¹ However, it is unclear whether this provision limits the ability of states to enter into subsequent agreements which change an initial treaty obligation since it says nothing about them, so it is ambiguous as to whether parties can derogate from their WTO obligations through RTAs.⁸²

Second, the Vienna Convention also contains a general admonition against affecting the rights of third parties. Article 34 states that “[a] treaty does not create either obligations or rights

⁷⁹ For an introduction to the Vienna Convention, see generally MALGOSIA FITZMAURICE, OLUFEMI ELIAS & PANOS MERKOURIS, *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON* (2010); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2009); RICHARD K. GARDINER, *TREATY INTERPRETATION* (2008). It has been signed and ratified by 111 states and is also recognized by non-signatories (such as the United States) as binding because it is a restatement of customary international law. See U.S. Department of State, Vienna Convention on the Law of Treaties, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 14, 2011).

⁸⁰ MAVROIDIS, BERMANN, & WU, *THE LAW OF THE WORLD TRADE ORGANIZATION* 929 (2010) (citing to the U.S.-Gasoline case, where the Appellate Body found that the VCLT could be used to interpret the WTO covered agreements).

⁸¹ Article 26 (“pacta sunt servanda”) states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁸² Scholars such as Cottier and Foltea argue that this should be interpreted to mean that the first treaty that parties enter into takes precedence and cannot be derogated from. Cottier and Foltea conclude that this means that WTO member states should not be able to enter into RTAs which change their WTO obligations. However, Cottier and Foltea concede that this is not necessarily how the *pacta sunt servanda* obligation should be interpreted, because other scholars interpret the obligation not as favoring an earlier treaty but rather making each treaty enforceable, even though they may post potentially incompatible obligations. Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and RTAs*, in BARTELS & ORTINO, *supra* note 52.

for a third State without its consent.”⁸³ But Article 34 doesn’t provide for a specific formula to determine when a treaty hurts third parties. RTAs clearly have effects on third parties,⁸⁴ but the Vienna Convention gives little guidance on how to weigh this factor in legal interpretation.

Third, the Vienna Convention provides a rule for the application of successive treaties relating to the same subject-matter.⁸⁵ Article 30(4) sets out the interpretive rule for a situation where there is a treaty later in time which doesn’t have all of the same members as the treaty which was earlier in time.⁸⁶ This applies to RTAs, because they are agreements later in time than the WTO but which are signed by only a few WTO members. The Convention holds that the members of the RTA should be governed by the RTA rules “only to the extent that [the WTO’s] provisions are compatible with those of the later treaty [in this case, the RTA].” So under Article 30(4)(a), WTO rules are supposed to yield to RTA rules, as between the parties to the RTA. Article 30 also states that between the members of an RTA and those WTO members who are *not* part of a given RTA, their relationship should be governed only by the WTO (Article

⁸³ VCLT art. 34, *supra* note 81.

⁸⁴ Countries which are members of the WTO (and which are thus bound to receive MFN and national treatment) are affected when a few WTO states form an RTA among themselves because the RTA states lower barriers vis-à-vis each other but not with respect to other WTO members.

⁸⁵ *Id.*, art. 30. The full text of Article 30 is as follows:

Article 30 (Application of successive treaties relating to the same subject-matter)

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty

⁸⁶ *Id.*

40(4)(b)).⁸⁷ Thus the Vienna Convention seems to allow a complete modification of the WTO as between members of a particular RTA.⁸⁸

Fourth, Vienna Convention Article 41 sets out a rule governing agreements which modify multilateral treaties between only certain parties to the multilateral agreement, which significantly curtails the implications of Article 30 outlined above.⁸⁹ This applies directly to RTAs because they are meant to modify the WTO (a multilateral agreement) between only a few of the WTO members. Article 41 holds that parties to a multilateral agreement can modify this agreement only if a) the modification is provided for by the multilateral treaty or b) if the modification isn't prohibited by the treaty, doesn't affect the rights of third parties, and doesn't relate to a provision "derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."⁹⁰ Article 41 thus requires an analysis of the WTO provisions on RTAs to determine whether the WTO allows contracting out through RTAs and whether contracting out through RTAs would affect the rights of third parties and would impair the effective execution of the WTO's object and purpose.

The relevant provisions of the Vienna Convention give some guidance on how the legal relationship between the WTO and RTAs should be interpreted. The Convention enshrines the general principles that agreements should be kept and the rights of third parties should not be

⁸⁷ *Id.*

⁸⁸ However, the rule in Article 30(4) is meant to apply "without prejudice" to Article 41, so Article 41 trumps.

⁸⁹ *Id.*, art 41. The full text of Article 41 is as follows:

Article 41 (Agreements to modify multilateral treaties between certain of the parties only)

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

⁹⁰ *Id.*

impaired. Article 30 suggests that parties are able to modify multilateral treaties through subsequent agreement, at least among the members of the subsequent agreement. But Article 41 places serious limits on such subsequent modifications. Parties can only contract out through RTAs if it is explicitly permitted by the WTO or if it isn't prohibited by the WTO, it doesn't affect the rights of third parties, and it doesn't affect a fundamental provision of the WTO.⁹¹

B. The WTO's Legal Provisions on Regional Trade Agreements

Legal provisions on RTAs are found in three of the major WTO agreements: the General Agreement on Tariffs and Trade (GATT), the Agreement on Differential and More Favourable Treatment, Reciprocity, and the Fuller Participation of Developing Countries (the so-called Enabling Clause), and the General Agreement on Trade in Services (GATS). This section will lay out the legal provisions on RTAs from each of these sources and will detail the implementation of these provisions in practice. I conclude that these legal provisions, which are meant to regulate RTAs ex ante, have largely become a 'dead letter' and have not effectively limited the extent to which WTO member states can contract out through RTAs, although they are still valid law 'on the books.'

1. GATT Article XXIV

The General Agreement on Tariffs and Trade was originally signed by 23 countries in 1947. The goal of the Americans leading the negotiations was to prevent the balkanization of the global trading system which had helped cause the Great Depression and paved the way for World War II; the Americans wanted the twin non-discrimination principles of most favoured nation (MFN) and national treatment to be at the heart of the new global trade regime.⁹² The

⁹¹ Thus a complete understanding of the Convention's rules (and Article 41 in particular) requires an analysis of the WTO provisions on RTAs, which the next section will provide.

⁹² JOHN BARTON, JUDITH GOLDSTEIN, TIMOTHY JOSLING, & RICHARD STEINBERG, *THE EVOLUTION OF THE TRADE REGIME* 29 (2006). See also Patricia Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the*

Europeans involved in the negotiations, however, wanted an exception to MFN, in order to develop regional integration mechanisms to help rebuild the continent and to prevent against future conflict.⁹³ The developing countries at the table wanted to maintain the colonial systems which allowed preferential trade between imperial powers and their (former) colonies.⁹⁴

These European and developing country demands resulted in Articles XXIV of the GATT, which was meant to carefully delineate the context in which such side agreements (what became known as regional trade agreements) could take place.⁹⁵ Article XXIV is the longest article in the GATT. It imposes several substantive conditions on RTAs. Each condition was meant to minimize the problematic effects of a violation of MFN through an RTA.⁹⁶

First, Article XXIV contains an “internal trade” requirement. RTAs must eliminate “substantially all” barriers to trade between the states that are part of the agreement.⁹⁷ An RTA cannot marginally reduce tariffs between members of the agreement. It must take significant steps to remove all barriers to trade between the contracting parties, for it to be permissible.⁹⁸

Interwar Period, in TILL GEIGER & DENNIS DENNEDY, REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT 31-32 (1996) (describing the American negotiating position); JEFFREY FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM 2 (1997); Gardner, *supra* note 23, at 4.

⁹³ J.S. Odell & B. Eichengreen, *The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership*, in ANNE KREUGER, THE WTO AS AN INTERNATIONAL ORGANIZATION 183 (1998).

⁹⁴ F.A. Haight, *Customs Unions and Free Trade Areas Under GATT: A Reappraisal*, 6 J. World Trade L. 393 (1972); MATHIS, *supra* note 25, at 37.

⁹⁵ As Dam writes, “the principal objective in the drafting of the customs union and free trade area provisions became to tie down, in the most precise legal language possible, the conditions that such regional groupings would have to fulfill in order to escape prohibition under the most-favoured nation clause as preferential arrangements...” DAM, *supra* note 23, at 45. Jackson concurs, indicating that the rationale behind the detailed provisions of Article XXIV was to stem abuse of the exception in ways that would contravene the MFN principle: “the fear of some countries that the regional exception could be abused to allow the introduction of detrimental preferences systems otherwise inconsistent with MFN was the motivating factor behind the elaborate draftsmanship that went into the other clauses of the regional exception.” JACKSON, *supra* note 15, at 600.

⁹⁶ Regional trade agreements, by their very nature, present an exception to MFN. Kerry Chase, *Multilateralism compromised: The mysterious Origins of GATT Article XXIV*, 5 WORLD TRADE REV. 1, 1 (2006).

⁹⁷ GATT, *supra* note 9, Article 20(8) (defining a proper RTA as “an area (or territory) where duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade between the constituent territories”).

⁹⁸ The purpose of this restriction was to minimize the economic effects of a violation of MFN. The economic logic was that if trade within the agreement (internal trade) was made virtually barrier-free, this would ‘create’ more trade in the world by opening up new markets, so parties outside of the agreement would not be worse off. As American

MFN is violated by RTAs, because countries would be free to treat their RTA partners differently from the rest of GATT members, but this was thought to dull the negative effects.

The second important substantive requirement imposed by Article XXIV is the so-called “external trade” requirement. Under Article XXIV:5, parties are permitted to form RTAs so long as they do not impose high barriers to trade upon other GATT parties. With respect to trade “external” to the RTA, the duties and other regulations maintained or imposed “shall not on the whole be high or more restrictive” than “prior to the agreement.”⁹⁹ This, too, was meant to guard against the discriminatory effect of RTAs and thus protect MFN. Parties to RTAs could trade with each other on more favorable terms, but they were not allowed to increase barriers to trade.

Article XXIV also contains a procedural element. Parties which create RTAs must notify the GATT/WTO that they have established an agreement.¹⁰⁰ During the GATT era, the RTA would be reviewed by an ad hoc Working Party, composed of other member states, to determine whether it complied with the Article XXIV requirements. After the WTO was created, additional oversight was imposed. The ad hoc Working Party review system was eventually phased out and replaced with a standing committee (the Committee on Regional Trade Agreements, or CRTA) with the power to examine proposed agreements (its effectiveness is questionable, however).

In sum, Article XXIV of the original GATT does permit WTO members to contract out of their WTO obligations, even MFN, to form regional trade agreements. But the Article was designed to a) minimize the potentially discriminatory and balkanizing effects of RTAs and b) to create a procedural mechanism for WTO oversight of RTAs. This suggests a core set of

economist Clair Wilcox, who chaired the International Trade Conference which resulted in the GATT, wrote: “[A] customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand . . . A customs union is conducive to the expansion of trade on a basis of multilateralism and non-discrimination; a preferential system is not.” CLAIR WILCOX, A CHARTER FOR WORLD TRADE 70-71 (1949).

⁹⁹ GATT, *supra* note 9, Article XXIV(5).

¹⁰⁰ *Id.*, Article XXIV(7)(a).

constitutional obligations imposed on RTAs, and a deep tension within the Organization: the GATT/WTO contemplates contracting out through RTAs and yet still attempts to assert some basic obligations.

2. The Enabling Clause

There are also provisions governing RTAs in the Enabling Clause, the major WTO document relating to the special needs of developing countries in the global trade regime.¹⁰¹ This Clause states that developing countries do not need to conform to GATT Article XXIV requirements as long as the RTAs are notified to the GATT (and now the WTO).

Despite the lack of Article XXIV requirements, however, the Enabling Clause does suggest that developing countries are not licensed to create RTAs on any terms they choose. Developing country RTAs must not create undue barriers for the trade of other countries and get in the way of MFN obligations.¹⁰² While this is somewhat contradictory, since all RTAs affect MFN, there is still a legal limit on the extent to which parties can contract out of GATT/WTO obligations through the Enabling Clause. Again, this suggests a core, constitutional set of WTO obligations, albeit not clearly defined.

3. GATS Article V

The General Agreement on Trade in Services is an extension of the GATT to trade in services, beyond the GATT's coverage of trade in goods. The GATS mirrors the GATT in logic and form, and its provisions on RTAs are very similar to the GATT's.

¹⁰¹ One of the major rounds of trade negotiations, the Tokyo Round of the 1970s, resulted in the "GATT Contracting Parties, Decision of November 28, 1979, on Differential and More Favourable Treatment, Reciprocity, and the Fuller Participation of Developing Countries," the so-called Enabling Clause. Differential and more favourable treatment reciprocity and fuller participation of developing countries, http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (last visited Jan. 14, 2011).

¹⁰² *Id.*

Article V of the GATS governs RTAs. The Article contains four main provisions, which mimic the internal and external trade requirements of GATT Article XXIV. First, RTAs that cover services must have substantial sectoral coverage.¹⁰³ Second, the agreement must abolish discrimination through the “elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures.”¹⁰⁴ Third, such agreements must not result in higher trade and investment barriers against third countries. Fourth, provisions are included for transparency and surveillance. As with RTAs which cover goods, parties to RTAs that cover services must notify their RTA to the WTO. Such RTAs are currently reviewed by the CRTA. In these four basic respects, GATS V is analogous to GATT XXIV.¹⁰⁵

The logic behind the GATS V provisions is similar to that of GATT XXIV. Parties are given leeway to contract out of their GATT/WTO obligations, including MFN, to form their own agreements. But the spirit of MFN should be maintained. States cannot create higher barriers to trade against non-RTA members; the RTA must reduce most internal barriers; and the WTO maintains a monitoring role in overseeing and approving RTAs.

4. Failed Implementation of these Provisions

¹⁰³ GATS, Article V(1)(a) (defined “in terms of number of sectors, volume of trade affected and modes of supply”). See also DAVID A. GANTZ: REGIONAL TRADE AGREEMENTS: LAW, POLICY, AND PRACTICE 37 (2009).

¹⁰⁴ GATS, Article V(1)(b).

¹⁰⁵ However, there are three differences between the two. First, lawyers such as Mavroidis have argued that the GATS V appears to set a looser standard than GATT XXIV. “Liberalization in the GATS context is not the same width and breadth as in the GATT context. It was probably considered politically untenable to request from WTO members aspiring to enter into PTAs covering trade in services to include sectors that they have not previously on an MFN basis.” HOEKMAN & MAVROIDIS, *supra* note 23, at 364. For example, the words ‘substantially all trade’ are replaced with ‘substantial sectoral coverage’, which is less stringent. The oversight given to the Council on Trade in Services (CTS) is less than that given to the CTG, as there is no provision in the GATS that renders RTAs invalid if they are not modified in accordance with Working Party recommendations. Second, GATS V makes no distinction between a CU and an FTA, unlike GATT XXIV. The Article is entitled ‘Economic Integration’ and addresses only one form of regional integration. Mavroidis argues that, “[f]rom the wording and spirit of Article V, one can deduce that regional integration in the context of GATS closely resembles a GATT FTA.” *Id.* Third, GATS V:3 gives developing countries involved in an RTA flexibility regarding the realization of the internal liberalization requirements and allows them to give more favourable treatment to firms that originate in parties to the agreement.

The above analysis of the legal provisions of the WTO makes clear that there are limits imposed on the extent to which parties are able to contract out through RTAs. The GATT, the Enabling Clause, and the GATS all impose requirements which try and minimize the discriminatory treatment that RTAs can cause, and each provides for oversight by the WTO. In practice, however, parties have not been stopped from contracting out of the WTO through these measures. The Working Party review process of the GATT era and the Committee on Regional Trade Agreements process of the WTO has failed to impose any meaningful ex ante review.

Parties have generally complied with the notification requirement – countries have been willing to report to the GATT/WTO that they are forming an RTA. But at the review stage the legal limits on RTAs have not been imposed. 124 RTAs were notified during the GATT era and for most of these an ad hoc Working Party was formed.¹⁰⁶ But no RTA was ever judged to be in violation of Article XXIV,¹⁰⁷ and only four Working Parties were ever able to agree that an RTA satisfied the requirements of XXIV.¹⁰⁸ All other Working Parties ended without any agreement. Enforcement of Article XXIV provisions through this mechanism was therefore non-existent.¹⁰⁹

¹⁰⁶ Roberto Fiorentino, Luis Verdeja, & Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements: 2006 Update*, WTO Discussion Papers, at 4 (2007).

¹⁰⁷ *Id.* at 22.

¹⁰⁸ *Id.*

¹⁰⁹ HOEKMAN & KOSTECKI, *supra* note 15, at 219 (first edition). As Hoekman and Kostecki write, “it is not much of an exaggeration to say that GATT rules [on RTAs] were largely a dead letter.” The Panels were ineffective for a number of reasons. First, the language of Article XXIV is vague, and several prominent lawyers argue that the primary reason disciplines could not be imposed was because the terms were inherently ambiguous. *See, e.g.*, MATHIS, *supra* note 34, at 57-68. Second, changing economic theory meant that the internal/external trade provisions were no longer considered the best way to maximize trade flows and prevent discrimination, so the provisions fell out of favour. JOSEPH VINER, *THE CUSTOMS UNION ISSUE 1950*. Third, the politics and the incentive structure of Working Parties also worked to make them ineffective. Consensus was required so agreement was difficult. And no country had an incentive to criticize the RTA of another, fearing retaliation when brought their own RTAs to a Working Party. Thus the Working Parties of the GATT era imposed no limits on contracting out of WTO obligations, and RTAs proliferated.

After the WTO was established, member states unsuccessfully attempted to fix this ineffective system for monitoring RTAs.¹¹⁰ Over 300 RTAs have been notified to the WTO,¹¹¹ but But the CRTA has never come to a consensus.¹¹² RTAs are also often notified after they have already been implemented, rendering any CRTA decision useless.¹¹³

In sum, “neither the GATT nor the WTO has effectively applied the approval or disapproval criteria” in GATT XXIV, the Enabling Clause, and GATS V through review by member states.¹¹⁴ While there are formal limits on contracting out through RTAs in the WTO’s legal documents, these limits have not be imposed through the ex ante review envisioned. Thus the limits to the formation of RTAs which are on the books, while still legally valid, are less valuable as a source of law because they have not been applied in practice.

C. WTO Panel and Appellate Body Precedent¹¹⁵

The source of WTO law which has been the most important in limiting contracting out of WTO obligations through RTAs has been the decisions of the WTO dispute settlement panels and the Appellate Body. These decisions provide precedents which define and shape the meaning of WTO law.¹¹⁶ This section provides an overview of the WTO dispute settlement process and

¹¹⁰ Review by a Working Party was made compulsory, and then the Working Party system was changed to review by the standing Committee on Regional Trade Agreements. WTO, “Marrakesh Agreement Establishing the World Trade Organization,” WTO Analytical Index,

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm; MATHIS, *supra* note 34, at 131.

¹¹¹ Fiorentino *et al*, *supra* note 106, at 4.

¹¹² Work of the Committee on Regional Trade Agreements (CRTA), http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Jan. 14, 2011).

¹¹³ HOEKMAN & MAVROIDIS, *supra* note 23, at 349; BARTELS & ORTINO, *supra* note 52, at 61; Sam Laird, *Regional Trade Agreements: Dangerous Liaisons?*, 22 WORLD ECO. 1192 (1999).

¹¹⁴ GANTZ, *supra* note 103, at 33 (2009). See also Petko D. Kantchevski, *The Differences between the Panel Procedures of the GATT and the WTO: The Role of the GATT and WTO Panels in Trade Dispute Settlement*, 3 INT’L L. & MGMT. REV. 79 (2006-2007) (describing the evolution of the dispute settlement regime).

¹¹⁵ A brief note on WTO case names: Panel and Appellate Body cases in the WTO are named after the respondent party and the issue at stake. So in “Turkey – Textiles,” the respondent country was Turkey and the substance of the dispute was over quantitative restrictions imposed on textiles imported from India.

¹¹⁶ Unlike a common law court, WTO precedents are not formally binding. But they are exceedingly persuasive authority and can essentially be treated like common law precedent.

discusses the two major areas in which the process has placed limits on contracting out. Finally, I discuss how WTO jurisprudence has *not* limited contracting out.

1. The WTO Dispute Settlement Process

Perhaps from the most radical aspect of the change from the GATT to the WTO was the move to a system of compulsory third-party adjudication and a two-instances system of adjudication.¹¹⁷ First, countries take their disputes to ad hoc Panels of neutral decision makers established by the WTO. Failing a resolution at the Panel stage, the parties can appeal to the Appellate Body which has the power of judicial review.¹¹⁸ Panels and the Appellate Body can order a member state to bring its measures into compliance.¹¹⁹ If one party feels that another has not complied with the order, they can take them to a compliance panel to have their actions adjudicated, which can result in the imposition of counter-measures.

2. Non-Discrimination

The WTO dispute settlement process places two types of limits on contracting out through RTAs. First, decision after decision has found that RTAs are not an excuse for failing to abide by WTO obligations in a non-discriminatory fashion. Second, panels and the Appellate Body have reiterated the importance of a right to dispute settlement in the WTO.

In Part I above, I noted that non-discrimination is at the heart of the GATT/WTO system. The original intent behind establishing global trade rules was to require countries to treat their trading partners equally (most favoured nation treatment, or MFN) and to treat the goods of other countries as favourably as domestically-produced goods, once they are in the country (national

¹¹⁷ HOEKMAN & MAVROIDIS, *supra* note 23, at 77.

¹¹⁸ *Id.*, at 78. The Appellate Body is a “permanent body composed of renowned experts ... seen as a definitive departure from a diplomacy oriented jurisprudence.”

¹¹⁹ *Id.*, at 81.

treatment). Regional trade agreements are a threat to the value of non-discrimination. They allow states to treat some trading partners differently from others, forming new rules for themselves.

As discussed above, this tension between Article XXIV of the GATT and the principle of non-discrimination was meant to be remedied by the system of country review of RTAs. This system, as noted above in Part III.B.4, was not effective. But the dispute settlement process has taken strides to assert the importance of the non-discrimination principle, vis-à-vis RTAs.

Various Panel and Appellate Body decisions have held that the fact that a country is part of an RTA does not automatically give them the right to discriminate between their RTA partners and other WTO member states. There are four different ways in which the dispute settlement process has imposed limits: (1) measures must be necessary for the formation of the RTA; (2) safeguard measures must be applied uniformly; (3) import restrictions must be applied uniformly; and (4) RTA membership doesn't justify discriminatory tariff treatment.

First, WTO jurisprudence has imposed a “necessity requirement” on recourse to justifying discrimination under Article XXIV. The leading case interpreting Article XXIV is *Turkey-Textiles*.¹²⁰ India contested a customs union agreement¹²¹ between Turkey and the European Union, arguing that quantitative restrictions¹²² applied by Turkey were inconsistent with the WTO covered agreements,¹²³ and were not justified by Article XXIV.¹²⁴ The Appellate Body agreed, holding that while Article XXIV can be considered a ‘defense’ to what would otherwise be a violation of WTO provisions, it can only be employed in limited circumstances.¹²⁵

For an RTA provision to be valid, it must be established under a valid RTA and must be

¹²⁰ Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products* (May 31, 1999) [hereinafter *Turkey-Textiles*].

¹²¹ Customs unions are regional trade agreements where custom duties are harmonized in the free trade area.

¹²² Quantitative restrictions are import quotas, where the importing country imposes a strict numerical limit on the number of goods it will import in a given time frame.

¹²³ Specifically, the Agreement on Textiles and Agriculture.

¹²⁴ *Id.*

¹²⁵ *Id.*

necessary to the formation of the RTA.¹²⁶ Thus WTO obligations can only be varied if a measure is necessary for an RTA to be formed. Creating a preferential arrangement cannot trump the goals of the WTO. This places a serious limit on contracting out through RTAs.¹²⁷

Second, several cases have held that safeguard measures must be applied uniformly. In *Argentina – Footwear*, Argentina had imposed safeguard measures¹²⁸ on all countries but the members of their major RTA, called “MERCOSUR.” The Appellate Body found that Argentina was obliged to apply safeguard measures to all countries. It reached this result without addressing Article XXIV (in fact, it reversed the Panel on the issue of Article XXIV, arguing that it did not apply in this instance); it used the Safeguards Agreement alone to reach the decision.¹²⁹ Yet, as one commentator has argued, “the implications for RTAs are significant. The rationale makes it more difficult for the RTA members to protect other members from safeguard measures...”¹³⁰ Thus the dispute settlement process... has limited the extent to which parties can form their own RTA-specific rules on safeguards (even though the decision was loathe to rule on the RTA issue). The decision implies that WTO rules on safeguards cannot be contracted out of through RTAs, even though that is not its explicit holding.

Third, import restrictions must also be applied uniformly, as evidenced by the *Brazil-Tyres* case. There, Brazil had imposed import restrictions on all countries other than their

¹²⁶ *Id.*, 58. Since Turkey could have used rules of origin to allow the EU to distinguish between Turkish and non-Turkish goods in its own imports, the quotas were not necessary. *Id.*, para. 61-63.

¹²⁷ As Gantz has argues, the case “set a high bar for the use of Article XXIV as a defense to measures which would otherwise be inconsistent with Article I or other GATT obligations. Not only must the member invoking the exception demonstrate that the RTA is legal under Article XXIV(8)(a) and (5)(a), which may be different ... but it must show that the measure was necessary to the formation of the RTA.” GANTZ, *supra* note 103, at 47. As Mathis puts it, the Panel found that Article XXIV is not a *lex specialis*; it is part and parcel of the WTO as a whole, and does not constitute a self-contained regime and thus must not alter WTO rights and duties. MATHIS, *supra* note 34, at 217.

¹²⁸ Safeguard measures are temporary restrictions placed on a particular product in order to protect a domestic industry from a flood of imports. Safeguard measures, http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm, last visited Apr. 15, 2011.

¹²⁹ GANTZ, *supra* note 103, at 51. It employed a similar technique in *US – Steel Safeguards*, avoiding the Article XXIV issue and relying on the Safeguards Agreement. *Id.*, at 51.

¹³⁰ *Id.*, at 52.

MERCOSUR counterparties, justifying it in part based on a MERCOSUR tribunal determination which required it to exempt other MERCOSUR members from the import restrictions. The Appellate Body found that the MERCUSOR decision did not justify the discriminatory behaviour, although it refused to rule on the Article XXIV issue. Instead, it found that Brazil was engaged in “arbitrary and unjustifiable discrimination under the chapeau of Article XX ...”¹³¹ This finding meant that the Article XXIV analysis was not necessary, according to the Appellate Body (the Panel ruling had found that the import restrictions were not justified under Article XXIV). But while the RTA issue did not prove dispositive as a technical, formal matter, the case is a strong suggestion that belonging to MERCOSUR did not he members of MERCUSOR were not permitted to modify their WTO obligations on import restrictions by contracting out through an RTA.

Fourth, WTO jurisprudence has held that being a member of an RTA does not allow one to grant discriminatory tariff treatment. In *Canada – Autos*, Japan and the EU challenged Canada’s practice of providing special tariff treatment to its North American Free Trade Agreement (NAFTA) partners and several other non-party states under the Canadian Motor Vehicles Tariff Order, arguing that it was in violation of, *inter alia*, GATT Article I.¹³² Canada employed Article XXIV as a defense but was unsuccessful, largely because the benefits were granted to more than just the US and Mexico (Canada’s NAFTA partners). This holding established that a member of an RTA cannot extend RTA benefits to non-parties on a

¹³¹ *Id.*, at 48

¹³² To see all documents related to the case (including the complaints), see Canada — Certain Measures Affecting the Automotive Industry, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds139_e.htm (last visited Jan. 14, 2011).

discriminatory basis.¹³³ Thus WTO jurisprudence has imposed limits on contracting out of WTO obligations, if non-discrimination is threatened.

3. Judicial Review

WTO jurisprudence has also limited the extent to which member states are permitted to contract out of RTAs if the right to judicial review in the WTO is compromised. RTAs often have procedures for judicial review over intra-RTA disputes. But the WTO has refused to hold that these decisions from within RTAs can estopp a WTO member from bringing a case in the WTO. The WTO has continually found that parties have a right to a WTO judgment. This is remarkable given the principle of comity, which holds that tribunals must respect the judgments of other international tribunals. This section will discuss four instances in which WTO jurisprudence has asserted that there is a right to judicial review.¹³⁴

First, in *Brazil-Tyres*, as discussed above, the Appellate Body did not permit Brazil to premise its actions on the previous MERCOSUR ruling. This constituted a rejection of comity;¹³⁵ the Appellate Body upheld its own capacity to make judgments on trade rules. Even if parties have agreed to use RTA dispute settlement, that doesn't necessarily mean that a ruling by such a process will be binding on the WTO.

¹³³ Panel Report, Canada — Certain Measures Affecting the Automotive Industry (Feb. 11, 2000), para.10.55-10.56.

¹³⁴ While this section does not address this example, there is also a current dispute in the WTO which demonstrates the importance of the right to judicial review. Mexico has brought a complaint about an American voluntary labelling scheme for dolphin safe tuna. The United States attempted to have the issue resolved by a NAFTA process and has continually argued that the dispute should be governed by NAFTA law rather than the WTO. The WTO has proceeded to form a panel to adjudicate the dispute (following a failure to negotiate) and thus it seems that the newest edition to the Tuna-Dolphin saga will provide another example of how the WTO insists on the right to a WTO dispute settlement process.

¹³⁵ Comity is the principle in international law whereby tribunals respect and uphold the decisions of other international tribunals.

Second, *Argentina – Poultry* reaches a similar conclusion. There, Brazil initiated proceedings with Argentina to contest anti-dumping measures taken by Argentina.¹³⁶ Brazil had previously unsuccessfully challenged the case in MERCOSUR proceedings, and Argentina relied on a MERCOSUR choice of forum provision (which specified that bringing the dispute in the RTA exhausted WTO options, and vice versa) that was not yet in force to argue that Brazil was estopped from bringing the claim.¹³⁷ The Panel declined to rule on whether the MERCOSUR judgment could estop the claim, instead finding that Brazil did not meet the conditions for consenting to estoppel.¹³⁸ The Panel was loathe to imply estoppel, holding that “the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the *DSU*.”¹³⁹ Further, the Panel noted scathingly that “We note that we are not even bound to follow rulings contained in adopted WTO panel report, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies.”¹⁴⁰ Here, we see the Panel asserting the hierarchy of WTO DSU proceeding.

Third, the estoppel issue also arose in the *EC – Sugar* case. While the Appellate Body declined to establish concretely whether a member could be estopped from bringing a claim to the WTO, it did note that no such claim has ever been successful and that there is no mention of estoppel in the DSU.¹⁴¹ It also denied an estoppel claim.¹⁴² This suggests that the AB is unlikely to accept an estoppel claim that prohibits parties from bringing claims to the WTO. Indeed, there

¹³⁶ Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (Apr. 22, 2003) [hereinafter *Argentina – poultry*].

¹³⁷ HENRIK HORN & PETROS C. MAVROIDIS, *THE WTO CASE LAW OF 2006-2007*, 11 (2008).

¹³⁸ *Argentina – poultry*, *supra* note 136, at 21.

¹³⁹ *Id.* at 22.

¹⁴⁰ *Id.* at 23.

¹⁴¹ Appellate Body Report, *European Communities – Export Subsidies on Sugar* (Oct. 28, 2005).

¹⁴² *Id.*

has been no case in which a WTO defendant has successfully relied on an RTA clause that prohibits the complainant to initiate proceedings under the WTO.¹⁴³

Fourth, in *Mexico – Soft Drinks*, the Appellate Body asserted its right to adjudicate disputes between parties while an RTA dispute settlement mechanism was being employed.¹⁴⁴ Mexico imposed taxes on soft drinks using corn syrup instead of cane sugar, and sought arbitration under NAFTA Chapter 20. The United States refused to cooperate and instead took the dispute to the WTO, where the AB exercised jurisdiction, stating that it had an obligation to decide the case.¹⁴⁵ Thus the WTO has recognized the right to judicial review by the WTO and has not adopted an estoppel principle for prior decisions made in RTA tribunals.¹⁴⁶

The above analysis of WTO case law reveals that the WTO ‘judiciary’ has imposed two core constitutional obligations through its case law. It has placed limits on the extent to which parties can justify discriminatory measures through RTAs and has also asserted that member states have a right to judicial review which cannot be waived by RTA.

PART IV: CONCEPTUALIZING THE WTO IN LIGHT OF LIMITS ON CONTRACTING OUT

This paper has provided an overview of the WTO as an institution and a legal regime, and the parallel regime at the bilateral and regional level.¹⁴⁷ I then discussed the two major competing theories for how to conceptualize the WTO as a legal regime: a constitutional approach and a contractual approach.¹⁴⁸ Next, to see which of these models was most descriptively accurate, I analyzed the law which governs the extent to which parties are allowed

¹⁴³ Tim Graewert, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1 CONTEMP. ASIA ARB. J. 287 (2008).

¹⁴⁴ Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages* (Mar. 6, 2006).

¹⁴⁵ GANTZ, *supra* note 103, at 53.

¹⁴⁶ For more discussion of conflicts between RTA and WTO dispute settlement, see Graewert, *supra* note 143.

¹⁴⁷ *See supra* Part I.

¹⁴⁸ *See supra* Part II.

to contract out of WTO obligations through regional trade agreements;¹⁴⁹ if contracting out was not permitted, the constitutional account seemed more accurate, and if contracting out was permitted, then the contractual account would be more apt. Having conducted this analysis, I am now able to answer the two questions that this paper posed. First, what are the legal limits on contracting out of WTO obligations? Second, what do these limits tell us about how to understand the WTO as a legal regime? This section will answer each of these questions in turn.

A. The Legal Limits on Contracting Out

Part III of this Note provided an overview of the law on the limits of contracting out of the WTO.¹⁵⁰ This section will analyze that data, to describe the limits on contracting. First, I will discuss the core legal obligations which are evident in each of the sources of WTO law, which are “constitutional” in nature: the WTO attempts to limit the extent to which parties can contract out of them. Second, I discuss the significant leeway that parties have to contract out of the WTO through RTAs, in spite of the core constitutional obligations evidenced in the law.

There are two major types of core obligations that all three sources of WTO law assert cannot be varied through contract. First, creating an RTA does not mean that a country can automatically discriminate against countries outside of the RTA; the rights of third parties are protected in various ways.¹⁵¹ Second, the WTO has continually asserted a right to review RTAs to ensure that they are WTO compliant.¹⁵²

The GATT/WTO has long been concerned with trying to eliminate discrimination in trade policy.¹⁵³ The MFN and national treatment obligations, at the heart of the system, are meant to ensure that countries do not use trade as a political weapon and that they effectively

¹⁴⁹ *See supra* Part III.

¹⁵⁰ *See supra* Part III.

¹⁵¹ *See supra* Part III.

¹⁵² *Id.*

¹⁵³ *See supra* Part I (discussing the history and purpose of the GATT/WTO).

liberalize their trade.¹⁵⁴ RTAs pose a deep challenge to this logic.¹⁵⁵ They create special trade rules and eliminate tariff barriers among certain parties, without giving those benefits to countries outside of the RTA. The law on RTAs has sought to mitigate this tension, by attempting to protect third parties from the discrimination that RTAs represent. This was most evident in the WTO dispute settlement precedent, which maintained that RTAs did not give countries a right to discriminate against third parties when imposing safeguards, etc.¹⁵⁶ This principle was also evident in the internal and external trade requirements of GATT Article XXIV, which were meant to mitigate against the exception to MFN that RTAs posed by reducing discrimination against third parties.¹⁵⁷ This strategy was imitated when the GATS and the Enabling Clause were established (to deal with trade in services and trade among developing countries, respectively).¹⁵⁸ We also saw this principle in the Vienna Convention on the Law of Treaties, which holds that treaties should be interpreted so as to not violate the rights of third parties and that subsequent agreements are only permitted to the extent that the rights of third parties are not violated.¹⁵⁹ Thus throughout the various sources of WTO law, the core constitutional obligation of mitigating discrimination against third parties is continually asserted.

The second significant limitation on contracting out through RTAs is the GATT/WTO's continued assertion that it still has right to review RTAs to decide whether WTO members are permitted to engage in such agreements and on what terms. As discussed above, a series of important WTO dispute settlement decisions continually asserted the right to WTO judicial review and refused to grant estoppel to RTA decisions.¹⁶⁰ The WTO has thus claimed that its

¹⁵⁴ *Id.*

¹⁵⁵ *See supra* Part III.B.1 (describing how RTAs violate MFN).

¹⁵⁶ *See supra* Part III.C.A.

¹⁵⁷ *See supra* Part III.B.

¹⁵⁸ *See supra* Part III.B.2 and 3.

¹⁵⁹ *See supra* Part III.A.

¹⁶⁰ *See supra* Part III.C.3.

dispute settlement processes are hierarchically superior to RTA processes. GATT Article XXIV also contained a similar assertion of the right of the GATT to review RTAs, through ad hoc Working Parties composed of other GATT member states.¹⁶¹ Finally, Vienna Convention Article 41 suggests when subsequent treaties between selected parties attempt to modify a multilateral agreement, the previously existent multilateral treaty has the ability to define the terms when such modification is possible,¹⁶² which also suggests that the WTO has the continuing ability to review RTAs and determine whether parties are permitted to contract out.

Thus there is a second core obligation which has been asserted throughout WTO law: that contracting out of the WTO is continually subject to WTO judicial or member review. These two obligations demonstrate that parties cannot fully contract out of the WTO. Therefore the contractual model of the WTO, which states that all WTO obligations should be able to be modified by parties acting at a bilateral or regional level, is flawed. There are core constitutional obligations in WTO law which to some extent cannot be varied.

But these core constitutional obligations which have been asserted in various sources of WTO law should not be overstated. There is still an extremely significant scope for contracting out of WTO obligations, which suggests that there is still truth to the contractual model of understanding the WTO. This section will summarize the evidence that RTAs are permitted on a legal basis and on a practical level.

RTAs are contemplated and accepted by WTO law. Article XXIV of the original GATT explicitly sanctioned their use, provided certain criteria be met, and GATS V and the Enabling Clause extend that right to other contexts.¹⁶³ Panel and the Appellate Body have taken a very limited approach in the cases discussed above. For example, they have left GATT Article XXIV

¹⁶¹ See *supra* Part III.B.1 and 4.

¹⁶² See *supra* Part III.A.

¹⁶³ See *supra* Part III.B.

virtually dormant. They have never found an RTA to be in violation of Article XXIV, and indeed have sought to avoid the issue; “[the AB’s] willingness to determine that a particular RTA is fundamentally inconsistent with GATT Article XXIV is as yet untested.”¹⁶⁴ The Vienna Convention also contemplates such a situation: Article 41 permits modifications to multilateral treaties through subsequent agreements, if the multilateral agreement permitted the modification.¹⁶⁵ While some legal limits are imposed, as discussed above, they have been confined to certain minor instances of discrimination against third parties and the right to judicial review in the GATT. All other modifications through RTAs seem possible.

RTAs are also permitted practically. The system of member-led review of the GATT era essentially failed to implement Article XXIV in a strict manner.¹⁶⁶ The facts that Article XXIV is largely moribund and the original review mechanism is ineffective necessitate the conclusion that extensive contracting out is tacitly accepted by the WTO regime. Even the much-heralded WTO dispute settlement system has done little to monitor RTAs. There is a huge range of issues where RTAs are permitted to set ‘policy,’¹⁶⁷ none of which have been challenged, such as intellectual property, rules of origin, sanitary and phytosanitary measures, etc. Only a tiny swath of the issues under RTAs have been adjudicated, and only the most basic principles of the WTO – non-discrimination and the right to dispute settlement – have been upheld. And since there are so many RTAs, and relatively few WTO cases, the vast majority of RTAs will never be challenged in WTO dispute settlement procedures. So any monitoring the process can do over contracting out through RTAs is inherently limited and piecemeal. It is also ex post – imposed

¹⁶⁴ *Id.*, at 56. All of the limits imposed on RTAs have not been done through a fully-fledged assessment of whether the RTA itself was compatible with the WTO. Rather, it was done by asserting the legal primacy of other WTO obligations over the particular RTA at issue on a piecemeal basis. So the precedent is narrowly drawn and circumscribed.

¹⁶⁵ *See supra* Part III.A.

¹⁶⁶ *See supra* Part III.B.4.

¹⁶⁷ *See supra* Part I.

after the RTAs are operational. So parties still have significant leeway to formulate their own rules governing trade because the scope of dispute settlement is so limited.

Thus, as a legal and practical matter, the limits on contracting out of the WTO through RTAs are minor indeed. This presents a serious challenge to the constitutional view and lends credence to the contractual interpretation of the organization's legal regime.

B. Understanding the WTO as a Legal Regime

The above analysis suggests that the WTO is a complicated legal entity. Through various legal sources, some limitations (largely relating to the non-discrimination principle and judicial review) have been placed on contracting out of the WTO through RTAs. But there is also an enormous scope for contracting out which continues unabated.

Having assessed what the legal limits on contracting out of the WTO are, this allows us to better understand the WTO as a legal regime. In this section, I conclude that both the contractual and constitutional models are flawed and that neither aptly describes the WTO's legal regime. Second, I discuss ways in which this conclusion challenges some current concepts.

The above analysis of the limits place on contracting out of the WTO through RTAs makes it clear that neither the constitutional nor the contractual account of the WTO is apt. There are both constitutional and contractual elements to the WTO. There are certain core obligations which WTO law has sought to assert as non-derogable, while permitting parties to contract out through RTAs on all other issues and as often as they would like. Parties are thus able to alter their WTO obligations on a bilateral or regional basis on most, but not all, issues. Both Petersmann and Pauwelyn, the theorists who developed the constitutional and contractual model, failed to contemplate the law on RTAs which describes the limits on contracting out, and thus both fail to describe the regime correctly. Thus the WTO is neither a purely constitutional regime

nor a purely contractual regime. There is space for party modification of multilateral obligations on most but not all issues. The WTO is a mixed system, incorporating elements of both models.

This new understanding of the WTO challenges some current concepts. First, the fact that the WTO is neither a purely constitutional nor a purely contractual regime may have important implications for legal theory. Legal regimes have generally been understood (by largely common law scholars) as either public regimes, where no contracting out of obligations is permissible (such as a domestic criminal law regime), or private regimes, where parties are generally free to set their own obligations (such as a domestic contractual regime).¹⁶⁸ This analysis supports the view that legal regimes can be much more complicated. They can contain elements of both ‘public’-style ‘constitutional’ regimes and ‘private’-style contractual regimes. And the nature of the legal regime is best understood by analyzing the extent to which parties are free to contract out of their obligations.

Second, this analysis raises questions about seeing the WTO as a hard law regime (bringing this Note back to where it began). The WTO is the paradigmatic hard law regime at the global level, as it has a much-touted dispute settlement system and “legally binding” obligations imposed on members.¹⁶⁹ Hard law regimes are notable for their ability to ensure compliance with legal obligations through coercive legal rules. Since the WTO is a famous hard law regime, it is assumed to have significant ability to make member states comply with its laws. But this Note implies that the fact that the WTO is a hard law regime may be less relevant, since parties have the power to contract out of their WTO obligations to a large extent. Those who point to the power of the WTO’s legal system may wish to reconsider their optimism.

¹⁶⁸ For other challenges to this traditional divide, see, e.g., MATTHIAS RUFFERT, *THE PUBLIC-PRIVATE LAW DIVIDE: POTENTIAL FOR TRANSFORMATION?* (2009); SUSAN B. BOYD, *CHALLENGING THE PUBLIC/PRIVATE DIVIDE* (1997).

¹⁶⁹ See *supra* notes 2 - 6.

CONCLUSION

This Note has sought to understand the nature of WTO legal obligations. The two most fully articulated theoretical models in the previous literature understood the WTO as either a fully constitutional regime (meaning that member states must abide by their WTO legal obligations, as they are made to the collectivity) or a contractual regime (meaning that parties could contract out of any of their WTO obligations, as the organization is simply composed of a series of bilateral promises, any of which could be altered by two or more states). To understand whether parties do have the power to contract out of the WTO, we must look at the extent to which they are able to form regional trade agreements, which are bilateral or regional agreements which alter trade rules from those established at the multilateral level. With this analysis complete, it is clear that neither the constitutional nor the contractual model is descriptively accurate. WTO law on RTAs has imposed two sets of core obligations on parties, namely some minor instances of non-discrimination and the WTO's right to review RTAs, but otherwise countries have been free to contract out through RTAs (and they have done so extensively).

I conclude that neither the constitutional nor the contractual understanding of the WTO is correct. The WTO is composed of both constitutional and contractual elements. This suggests a new way of thinking about the nature of legal regimes – by looking at the extent to which parties are allowed to act “privately” to alter their general obligations. It also challenges the notion that the WTO has an incredibly strong legal enforcement mechanism, since parties have significant leeway to contract out through regional trade agreements. Therefore, the shape of the WTO as a legal regime must be understood in conjunction with the parallel regime on regional trade agreements.