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International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice

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Abstract

Despite having considerable historical presence – traceable from 19th-century Germany – customs unions (CUs) have long been an understudied phenomenon in international law. This article aims to remedy this gap by critically reviewing the concept of customs union and identifying key issues in CU designs. The article problematizes what is understood by the concept of CU and what is entailed by the foremost definition of CUs found in Article XXIV of the General Agreement on Tariffs and Trade (GATT). It further investigates how recurrent design issues are resolved in practice by different CUs considering the inherent tension between the enactment of common rules and institutions and state sovereignty. We find variety in the historical, economic and legal conceptualizations of CUs, ambiguity and lacunas in Article XXIV of the GATT and diversity of CU designs along with a discernible concern for the impact of legal arrangements on state sovereignty.

1 Introduction

A customs union (CU), in broad terms, is an international arrangement whereby sovereign states agree to trade freely with each other while enacting common measures with respect to trade with non-members. From the perspective of economic integration, CUs are traditionally portrayed as being a step further than a free trade area but

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falling short of a common market.[1] Typically, CUs are formally established through an international agreement and within a more or less defined 'region'.

According to a database of the World Trade Organization (WTO) on regional trade agreements, 29 international treaties in force classify as CUs by virtue of having been notified to the organization either under Article XXIV of the 1994 General Agreement on Tariffs and Trade (GATT) or the so-called 'Enabling Clause'.[2] After consolidating this rudimentary list of agreements,[3] we can identify 16 CUs presently in force around the world.[4] Altogether, 118 countries are members of at least one CU, in addition to being, with a few exceptions, WTO Members. CUs are therefore not a marginal phenomenon, despite some observers considering them 'out of tune with today's trading climate' when contrasted with the popularity of free trade agreements (FTAs).[5]

Membership to a CU can have far-reaching consequences for the ability of states to conduct their international trade policy independently, including negotiations of FTAs with other states. Although recently popularized by proponents of the United Kingdom's (UK) departure from the European Union (EU) (commonly known as 'Brexit'), concerns about CUs constraining the 'independent trade policy' of states have been voiced in international adjudication as early as 1931.[6] The concept of a CU has been present in international law at least since the German Zollverein treaties in the 19th century.[7] As the capacity to enter into relations with other states is one of

1 B. Balassa, *The Theory of Economic Integration* (1961).

2 General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194; Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (Enabling Clause), Decision L/4903, 28 November 1979.

3 The World Trade Organization's (WTO) database on regional trade agreements records every state accession to a customs union (CU) as a separate entry.

4 Caribbean Community (CARICOM); Central American Common Market (CACM); Eurasian Economic Union (EAEU); European Union (EU); EU–Andorra CU; EU–San Marino CU; EU–Turkey CU (EUTCU); South African CU (SACU); Andean Community (CAN); Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Economic and Monetary Community of Central Africa (CEMAC); Economic Community of West African States (ECOWAS); Gulf Cooperation Council (GCC); Southern Common Market (MERCOSUR); and West African Economic and Monetary Union (WAEMU). The first eight have been notified to the WTO under Art. XXIV of the GATT, the latter eight under the Enabling Clause.

5 Fiorentino, Verdeja and Toqueboeuf, 'The Changing Landscape of Regional Trade Agreements: 2006 Update', WTO Discussion Paper 12 (2007), at 5. We use the term free trade agreement (FTA) to refer to agreements that abolish all tariffs and quantitative restrictions, while preferential trade agreements (PTAs) imply any reduction or partial removal of tariffs and quantitative restrictions on a bi- or multilateral basis. The usage of 'PTA' in this article therefore differs from WTO terminology where it designates preferential trade arrangements, meaning the granting of unilateral non-reciprocal preferences.

6 *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion, 1931 PCIJ Series A/B, Fascicule No. 41.

7 Henderson, 'The German Zollverein and the European Economic Community', 137 *Zeitschrift für die gesamte Staatswissenschaft* (1981) 491; Kindleberger, 'The Rise of Free Trade in Western Europe, 1820–1875', 35 *Journal of Economic History* (1975) 20.

the generally accepted criteria of statehood,[8] the creation and operation of CUs bears directly on questions of state sovereignty in international law.[9]

Although issues arising from CUs are neither theoretical nor trivial, there is a dearth of fundamental legal research on the concept. When analytical distinctions between a FTA, a CU and a common market became of critical policy importance during the Brexit negotiations, references to authoritative articles in law reviews were conspicuous by their absence. This was at least partially because, despite their wide presence and impact on state sovereignty, CUs have received scarce and, even then, only fragmentary attention from international law scholars, even as literature on FTAs and other forms of economic integration has burgeoned.[10]

Our present contribution seeks to remedy this lacuna in legal literature and form the basis for more informed policy discussions in the future. The article has a dual research objective: we revisit definitions of the concept of CU and show that there can be considerable variety in what passes off as a CU in name. We furthermore identify the key elements and gaps in WTO law as the most important international law governing the subject. In light of this analysis, we carry out comparative research of regional agreements establishing CUs with attention to the ways in which the relationship between the harmonized and independent aspects of trade policy of the member countries is formulated.

2 The Concept of a CU

Article XXIV of the GATT contains the most important contemporary legal definition of the concept of a CU in international law. It breaks down the concept into a number of technical elements that, at the same time, in terms of economic integration and impact on member countries' independence, go beyond and fall short of the leading definition found in economic literature. The GATT does not, however, embody the first international legal preoccupation with CUs and their impact on state sovereignty.

A Pre-GATT History

The history of CUs can be traced along two pathways: the consolidation of the British Commonwealth territories in, notably, Southern and East Africa, Australia and the Caribbean and the integration of German states that began in Prussia in 1818. The first CU in Southern Africa was established between the Cape of Good Hope and the Orange Free State in 1889 when the first common external tariff (CET) and a revenue-sharing arrangement for transhipped goods were agreed in the region. After the

[8] Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19, Art. 1(d).

[9] Under the traditional Westphalian conception of state sovereignty, which we use throughout this article, CUs are seen as sovereignty constraining. See, e.g., *Customs Régime between Germany and Austria*, *supra* note 6.

[10] Where legal research on CUs does exist, it tends to focus on a single international agreement, in particular, the EUTCU. The relative lack of legal research stands in contrast to the field of economics where CUs have received ample attention since J. Viner, *The Customs Union Issue* (1950).

establishment of the Union of South Africa, a new agreement was signed in 1910 between Bechuanaland, Basutoland, Swaziland and South Africa, which included a common tariff revenue pool and a revenue-sharing formula based on trade volumes. This CU has been in continuous existence ever since and is known today in an amended form as the Southern African Customs Union (SACU). Elsewhere in the British Commonwealth, the establishment of a CET and inter-colony free trade was an important driver behind Australian federation.[11] In the Caribbean, the creation of a CU was intensely debated in the preparation of the West Indies Federation, whose failure precipitated what is nowadays the Caribbean Community (CARICOM).

In Europe, it was the German Zollverein treaties that shaped the understanding of CUs. The foundational treaty of the German CU – the 1833 Zollvereinigungsvertrag – introduced free trade between members, a CET, harmonized tariff laws and redistributed net tariff revenues based on population size.[12] All decision-making in the CU was subject to unanimity of the participating states, and the treaties had to be renewed every 12 years.[13] The independence of members' trade policies was curtailed by the requirement of joint negotiation of preferential trade agreements (PTAs) with third countries.[14] Historians have shown that concerns about the impact of the CU on state sovereignty were high on the agenda throughout the century until they materialized during the German unification in 1871.[15]

In 1931, a proposed German–Austrian CU raised political concerns among a group of European states that requested an advisory opinion from the Permanent Court of International Justice (PCIJ) under Article 14 of the Covenant of the League of Nations.[16] The German–Austrian treaty at issue provided for the assimilation of tariffs and economic policies, 'thereby resulting in the establishment of a customs union regime'. The PCIJ was asked whether the CU was compatible with Article 88 of the Saint-Germain 1919 Treaty of Peace and Protocol no. I, signed in Geneva in 1922. Both of these instruments safeguarded Austria's independence, including in economic matters, after World War I.[17] The Court opined – by a narrow majority of

[11] The federation led to a 34 per cent increase in the average duty on imports, illustrating why the establishment of CUs later came within the scope of the GATT. See Lloyd, 'Customs Union and Fiscal Union in Australia at Federation', 91 *Economic Record* (2015) 155, at 160.

[12] See Zollvereinigungsvertrag 1833, 83 CTS 219, Arts 1, 4, 7, 22; see also Ploeckl, 'The Zollverein and the Sequence of a Customs Union', 55 *Australian Economic History Review* (2015) 277, at 278.

[13] Zollvereinigungsvertrag, *supra* note 12, Art. 41.

[14] Bazillion, 'Economic Integration and Political Sovereignty: Saxony and the *Zollverein*, 1834–1877', 25 *Canadian Journal of History* (1990) 189, at 200. In practice, Prussia was regarded as the legitimate spokesperson for the members of the CU by foreign states. Between 1839 and 1865, 28 preferential trade agreements were concluded with foreign states on behalf of the Zollverein. Schorkopf, 'Zollverein (German CU)', in *Max Planck Encyclopedia of Public International Law* (2015), para. 6, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e740.

[15] Bazillion, *supra* note 14.

[16] See Orde, 'The Origins of the German-Austrian Customs Union Affair of 1931', 13 *Central European History* (1980) 34; Newman, 'Britain and the German-Austrian Customs Union Proposal of 1931', 6 *European Studies Review* (1976) 449. Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919).

[17] Treaty of Peace, signed at Saint-Germain-En-Laye, 10 September 1919, Art. 88; Protocol no. I, signed in Geneva by Austria, France, Great Britain, Italy and Czechoslovakia, 4 October 1922, Art. 88.

eight to seven – that the CU was calculated to threaten Austria's economic independence and was therefore inconsistent with its obligations under Protocol no. I. This was the case because the CU granted exclusive advantages, required both parties to take each other's interest into account when negotiating commercial treaties and was not open to accession by other countries. The case, albeit specific and political,[18] serves as recognition of the far-reaching consequences of economic integration and the considerable commitments that formation of a CU entails as well as demonstrating wider international interest in the ramifications of concluding CUs before this became commonplace in the context of the GATT.

The PCIJ's advisory opinion listed four elements of a CU: (i) uniformity of customs law and customs tariff; (ii) unity of the customs frontiers and of the customs territory vis-à-vis third states; (iii) freedom from import and export duties in the exchange of goods between the partner states; and (iv) apportionment of the duties collected according to a fixed quota. These requirements are somewhat distinct from those found in the GATT, which was enacted 17 years later in 1948 and whose essentially unchanged rules continue to govern CUs at the global level today as part of the WTO.

B WTO Law: Structure and Design

Article XXIV of the GATT allows for regional integration exceptions; WTO Members can deviate from the most-favoured-nation (MFN) obligation in Article I of the GATT for the sake of forming a CU or a FTA. The right to form a CU, defined as 'the substitution of a single customs territory for two or more customs territories', is limited by internal and external substantive requirements.[19] As will be explained in this article, these requirements constitute demanding prerequisites, reflecting the negotiators' aim to make departure from the MFN principle difficult.[20] It should be noted that even though these constitute separate requirements, the challenge of complying with them is interlinked;[21] both the internal and external dimension of CUs entail specific legal issues.[22] Article XXIV has been described as 'deceptive' and reflecting 'broad dissent and conflict of opinion'.[23]

[18] The Court recognized the specificity of the case based on the unique obligations that had been undertaken by Austria in the 1922 Protocol. The contemporary commentary on this case also pointed out that other CUs would not have been prohibited. See Borchard, 'Editorial Comment: The CU Advisory Opinion', 25 *American Journal of International Law* (1931) 711, at 714–715.

[19] In interpreting the chapeau of Art. 88XXIV:5 of the GATT, the Appellate Body noted: '[W]e read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a CU.' See WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products – Report of the Appellate Body*, 22 October 1999, WT/DS34/AB/R, paras 45, 57, 60–61; see also Marceau and Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO?', 28 *Legal Issues of Economic Integration* (2001) 297, at 310.

[20] Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)', 40 *Journal of World Trade* (2006) 187, at 190.

[21] Marceau and Reiman, *supra* note 19, at 315.

[22] Many of the terms used in Art. XXIV of the GATT are ambiguous; see also Mavroidis, *supra* note 20, at 196.

[23] Dam, 'Regional Economic Arrangements and the GATT: The Legacy of a Misconception', 30 *University of Chicago Law Review* (1969) 615, at 619; Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics', 7 *Max Planck Yearbook of United Nations Law Online* (2003) 219, at 223.

1 *Internal and External Requirements of Article XXIV*

The first subparagraph of XXIV:8 of the GATT can be identified as an internal requirement, setting the standard for trade between the constituent members.[24] CU members are obliged to eliminate duties and 'other restrictive regulations of commerce' with respect to substantially all trade between them. Both the second subparagraph of Article XXIV:8 and the first subparagraph of Article XXIV:5 of the GATT are external requirements regulating CU members' trade policy towards third countries. Article XXIV:8(a)(ii) sets out that members of CUs must apply substantially the same duties and other regulations of commerce to their external trade. Article XXIV:5(a) cautions CU members that the duties and other regulations of commerce imposed at the institution of the CU and applying to third countries shall not, on the whole, be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable before the formation of the CU.

Several of these elements merit some elaboration due to the fact that their legal implications remain unexplained. First, the meaning of 'other (restrictive) regulations of commerce' has never been clarified, leading to uncertainty as to what trade barriers are encompassed in both internal and external requirements of paragraphs 5 and 8 of Article XXIV.[25] Even though repeatedly discussed among WTO Members, the question whether the term includes quantitative restrictions has so far remained unanswered.[26] The Appellate Body in *Turkey – Textiles* explicitly stated that it did not rule on the theoretical possibility of justifying quantitative restrictions under Article XXIV.[27] However, terms should not be interpreted in isolation from the other parts of the relevant paragraph.[28] The list of permitted measures immediately following the term 'regulations of commerce' should inform its meaning. Taking a closer look at the listed provisions, it becomes clear that some of them permit quantitative restrictions

[24] *Turkey – Textiles* (AB report), *supra* note 19, para. 48.

[25] No source could be found differentiating between 'other regulations of commerce' (para. 5(a)) and other 'restrictive regulations of commerce' (para. 8(a)). Due to their very similar wording, we submit that the same considerations as to the interpretation of these terms apply. Moreover, 'identical wording gives rise to a strong interpretative presumption that the two provision set out the same obligation or prohibition'. WTO, *United States – Continued Dumping and Subsidy Offset Act of 2000*, 16 January 2003, WT/DS217/AB/R, WT/DS234/AB/R, para. 268.

[26] As also noted by the GATT. *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil – Report of the Panel*, 19 June 1992, DS18/R, n. 34. Discussions on this topic can be found in GATT Report of the Working Party on the Accession of Iceland to EFTA and FINEFTA, Doc. L/3441, 18 September 1970, para. 10; GATT Agreements between the European Communities and Finland: Report of the Working Party, Doc. L/4064, 1 August 1974, para. 16; GATT Report of the Working Party on the Free-Trade Agreement between Canada and the United States, Doc. L/6927, 31 October 1991, para. 45.

[27] In that case, the Appellate Body limited itself to the consideration of whether the imposition of the quantitative restrictions was necessary for the formation of the CU. *Turkey – Textiles* (AB report), *supra* note 19, paras 61–65.

[28] WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, para. 37.

under certain circumstances.[29] It would therefore be nonsensical to interpret 'other restrictive regulations of commerce' as not including quantitative restrictions. WTO Members have challenged CU members that have introduced (discriminatory) quantitative restrictions in the context of adopting a common commercial policy.[30]

Second, 'substantially the same' does not require all duties and other regulations of commerce applied by members of a CU in their external trade to be completely identical.[31] However, members of a CU are required to apply a 'common external trade regime' relating to both duties and other regulations of commerce.[32] The assessment of such overlap encompasses both quantitative and qualitative elements.[33] The requirement boils down to the obligation to create a common commercial policy, yet some degree of flexibility is allowed.[34] The Appellate Body clarified that this flexibility is limited and that an approximation of 'sameness' is required.[35]

2 Levels of Regional Integration in Trade in Goods

Article XXIV of the GATT deals with both CUs and free trade areas. Several overlaps exist between both kinds of integration. Whereas CU members are required to eliminate internal trade barriers as well as establish a common commercial policy, free trade areas only eliminate internal trade barriers.[36] The GATT does not address features of more advanced forms of regional integration such as common markets.[37] This is not to say that WTO law has no role to play with respect to deeper integration projects; economic integration is typically layered, and there are at best a handful of 'pure' CUs in the world. Most CUs are enmeshed in more ambitious economic integration projects

[29] GATT, *supra* note 2, Art. XI (prohibition on quantitative restrictions), Art. XII (allowing quantitative restrictions to safeguard balance of payment) and Art. XIII (obligation of non-discriminatory administration of quantitative restrictions).

[30] Members called for Spain and the European Economic Community (EEC) to remove alleged GATT-inconsistent quantitative restrictions, based on the claim that Art. XXIV does not provide a waiver from the obligations contained in Arts XI and XIII of the GATT and does not allow for an acceding country to adopt the more restrictive trade regime of the CU. GATT Accession of Portugal and Spain to the European Communities: Report of the Working Party, Doc. L/6405, 5 October 1988, para. 39. This finding was echoed in *Turkey – Textiles* (AB report), *supra* note 19.

[31] *Turkey – Textiles* (AB report), *supra* note 19, para. 49.

[32] Ibid.

[33] See WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products – Report of the Panel*, 31 May 1999, WT/DS34/R, para. 9.148; *Turkey – Textiles* (AB report), *supra* note 19, para. 49. These elements are further elaborated on below.

[34] *Turkey – Textiles* (AB report), *supra* note 19, para. 49.

[35] It explicitly disagreed with the panel's finding that this requirement was met where 'constituent members have "comparable" trade regulations having similar effects with respect to third countries'. *Turkey – Textiles* (AB report), *supra* note 19, para. 50.

[36] Based on the wording used in Art. XXIV:8(a)(i) and 8(b) of the GATT, both stipulating that 'duties and other regulations of commerce are eliminated on substantially all the trade … in products originating in such territories'.

[37] Tevini, 'Article XXIV GATT, Understanding on the Interpretation of Article XXIV of the GATT 1994', in R. Wolfrum, P-T. Stoll and H.P. Hestermeyer (eds), *WTO: Trade in Goods*, vol. 5: *Max Planck Commentaries on World Trade Law* (2011) 625.

that set as their goal the creation of a common market or an economic and/or monetary union. While this can easily become a source of conceptual confusion, there is no doubt that WTO rules on CUs apply also to deeper forms of regional integration that include a CU. In this article, we proceed from the assumption that sustaining the traditional analytical distinction between FTAs, CUs and other forms of economic integration is desirable, even if, in most cases, the higher forms of integration subsume the lower (a CU is an 'upgrade' on an FTA – a common market – which additionally fosters factor integration on a CU and so forth).[38] As a result, we focus on those aspects that either constitute essential requirements of a CU according to Article XXIV of the GATT or are specific to CUs and issues associated therewith, as opposed to other forms of economic integration.

3 The Enabling Clause

The Enabling Clause applies to the formation of CUs among developing Members, allowing for 'regional or global arrangements … amongst less-developed contracting parties for the mutual reduction or elimination of tariffs'.[39] The main substantial requirement can be found in paragraph 3(a), which requires such arrangements to be designed to facilitate and promote trade and not to raise barriers or create undue difficulties for trade of other contracting parties.[40] The formation of a CU among developing countries is subject to considerably less stringent requirements than found in Article XXIV of the GATT, as is clear from Table 1.[41]

C Viner's Customs Union Theory

In economic literature, the early definition of a CU, promulgated by Jacob Viner, has largely persisted over the decades, as scholars in the field (including Viner) have been more concerned with the economic effects of a CU than with minutely redefining its conceptual elements. Viner saw CUs as 'one of a number of arrangements for reducing tariff barriers between political units while maintaining barriers against imports from outside regions'.[42] He defined a 'perfect CU' as meeting three conditions: '(1) the complete elimination of tariffs as between the member territories; (2) the establishment of a uniform tariff on imports outside the union; (3) apportionment of customs revenue between the members in accordance with an agreed formula'.[43] Since Viner's

[38] This is how economic integration is traditionally portrayed in economic theory. See Balassa, *supra* note 1. Reality is not so straightforward: the European Economic Area established by the Agreement on the European Economic Area, OJ 1994 L 1/3, constitutes in essence a common market but not a CU. Elsewhere, the FTA foundation of a CU can be shaky. See the discussion of the EUTCU later in this article.

[39] Enabling Clause, *supra* note 2, para. 2(c); The Enabling Clause is part of the 1994 GATT, *supra* note 2, para. 1(b)(iv).

[40] Enabling Clause, *supra* note 2, paras 3(b) and (c) contain two more requirements, but neither of them add substantive conditions.

[41] P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, 2017), at 688.

[42] Viner, *supra* note 10, at 4.

[43] *Ibid.*, at 5.

Table 1: Internal and External Requirements in Various Definitions

	Internal					External		
	Eliminate internal duties	**Eliminate other restrictive regulations of commerce**	**Apportion customs revenue (agreed formula)**	**Uniform external tariff**	**Uniform application of other regulations of commerce**	**Unity of customs and customs frontiers**	**Not raise trade barriers for third countries**	**Joint negotiation of future trade agreements**
Viner	✓	X	✓	✓	X	X	X	X
PCIJ	✓	X	✓	✓	"customs law"	✓	X	X
Article XXIV GATT	substantially	substantially	X	substantially	substantially	✓	✓	X
Enabling Clause	reduction sufficient	criteria prescribed by parties	X	X	X	X	✓	X
Zollverein 1931 AGCU	✓	only 1931 AGCU	✓	✓	"customs law"	✓	X	✓

analysis of the economics of CUs, economic literature has repeatedly pointed to the fact that regional integration both creates and diverts trade.[44] Viner also notes that, even though partial preferences allow for focusing on trade creation, in practice, selective preferences will often lead to trade diversion. This concern creates the rationale for mandating complete elimination of tariffs since full liberalization will at least also incorporate trade-creating preferences.[45]

D Conceptual Comparison

Table 1 shows the various conceptual elements present in different definitions of CUs. Even though the CU requirements, as found in Article XXIV of the GATT, quite clearly draw on historical definitions, Table 1 allows for the observation of some differences between the economic, historical and GATT definitions of a CU. First, compared to earlier definitions of CUs, WTO law explicitly allows for the less-than-complete elimination of tariffs as well as the less-than-uniform tariffs on imports into CUs, due to the 'substantially all trade' qualification on both the internal and external requirements. Second, Article XXIV requirements go further than historical and economic conceptualizations, as other regulations of commerce must be eliminated both internally and externally. Third, WTO law leaves the apportionment of customs revenue completely to states. Here as well, the approach taken by Article XXIV of the GATT focuses more on the third country perspective and is not concerned with the internal dynamics of the CU. Fourth, WTO law also does not explicitly address the issue of the relationship between CUs and (future) PTAs. Nor does it require CU members to negotiate PTAs jointly. The conclusion of PTAs after the formation of a CU is 'only' constrained (for WTO Members) by the comparatively vague requirement of Article XXIV:8(a)(ii) of the GATT to apply 'substantially the same duties and regulations of commerce'. WTO law therefore leaves a seemingly large margin of discretion to CU members to also define internally acceptable arrangements for the purposes of Article XXIV of the GATT with respect to PTAs.[46] The divergence between these CU definitions is symptomatic of the lack of willingness by states to relinquish their sovereignty for the sake of economic integration. Issues arising out of this dichotomy are not only reflected in the vague language of (differing) definitions but can also be observed in the structure of existing CUs.

[44] Mavroidis, *supra* note 20; M. Schiff and A. Winters, *Regional Integration and Development* (2003); A. Winters, 'Regionalism versus Multilateralism', World Bank Policy Research Working Paper 1687 (1996), available at http://documents.worldbank.org/curated/en/881921468739473983/Regionalism-versus-multilateralism; WTO, *World Trade Report 2003* (2003), available at www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf.

[45] Viner, supra note 10, at 51; J. Mathis, Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement (2002), at 114.

[46] Fiorentino, Verdeja and Toqueboeuf, *supra* note 5, n. 19.

3 Customs Union Designs and Issues in Comparative Perspective

Considering the definition of CUs as found in Article XXIV of the GATT, it becomes clear that the question of legality of CUs is surrounded by unresolved issues. Within the internal requirement, we are confronted with the ambiguous interpretation of what 'restrictive regulations of commerce' encompass. Are CU members required to eliminate quantitative restrictions on substantially all trade? Does this also include trade remedies? What constitutes the threshold for 'substantially all trade'? The external requirements raise even more questions as it remains unclear what is contained in the common external trade regime and how best to deal with past and future trade preferences, whether CU members are required to harmonize their quantitative restrictions and whether harmonized rules of origin are mandated.

In an attempt to explore these questions further, we turn to the actual design of CUs with one eye kept on the requirements of WTO law. We devote attention, in particular, to how CUs mediate specific issues arising from the tension between state sovereignty and the creation of a common external trade regime (commercial policy), which is a necessary component of a CU even if its precise scope may not be firmly established by Article XXIV of the GATT.

A Prior Trade Preferences and Essential Dilemmas in Safeguarding the Integrity of Customs Unions

CUs typically do not arise from a clean slate but, rather, from an environment where countries maintain a more or less complicated web of bilateral and regional trade preferences with several of their trading partners, in addition to having GATT commitments. The key problem with trade preferences granted prior to a CU agreement is that they undermine the economic integration rationale of the CU and compliance with Article XXIV of the GATT. Divergent preferences allow goods in the territory of a CU to be traded at rates not agreed upon jointly by all members, which has a host of potential consequences. The most obvious one is the free internal circulation of goods on which a preferential tariff has been applied instead of the CET. In keeping with the obligation to apply the same duties and other regulations of commerce on substantially all trade, the common characteristics of a CU should not be fragmented by prior PTAs. This can lead to trade deflection, as more trade in the affected goods can be channelled towards the preferential treatment, as well as having an impact on domestic industries and competitiveness inside the CU.[47]

The question therefore arises how such prior trade preferences should be treated by the CU members. Are prior trade preferences to be maintained, and will this lead to preferential access to the CU via one CU member or will trade preferences be either

[47] A difference-in-differences econometric analysis of the impact of the EU–Algeria FTA on Turkey (which does not have a FTA with Algeria) has proven the former point empirically. See Dincer, Tekin-Koru and Yaşar, 'Costs of a Missing FTA: The Case of Turkey and Algeria', 45(3) *Empirica* (2017) 489.

removed or extended to all CU members, thereby ensuring that the integrity of the CU is safeguarded?[48] This problem was to some extent anticipated by the GATT contracting parties as they included a carve-out in the obligation in Article XXIV:8(a)(ii) to apply the same duties to third counties. This carve-out is found in paragraph 9, which specifies that certain historical prior trade preferences (in Article I:2 of the GATT) are, in principle, not affected but can nonetheless be removed or amended on the basis of negotiations between the affected parties. However, such preferences should not be extended to the parties to the CU who were not original members to these preferential arrangements.[49]

The working party report on the accession of Portugal and Spain to the EU (then the European Economic Community) documented the disagreement on the application of trade preferences.[50] Some delegations noted that the preference that some parties would receive in their trade with Spain and Portugal due to their accession to the EU would 'result in a significant degree of trade diversion to the detriment of third countries'. The EU replied that Article XXIV of the GATT required the extension of preferential arrangements with third countries to Portugal and Spain and that this did 'not alter the fact that their markets were substantially opened as a result of accession'.

Prior PTAs are additionally protected under general international law on the ground of their anteriority. It is well established in general international law that prior treaty obligations shall, *ceteris paribus*, be given priority if they conflict with treaty obligations assumed later, provided that the later treaty was not concluded among the same contracting parties with the aim of replacing the old treaty.[51] Trade preferences awarded prior to the establishment of a CU should therefore legally take precedence over the commitment to a CET in case of conflict.

CU members have drawn up a number of legal solutions to the issues associated with prior trade preferences, but they all come at a cost. Most CU agreements explicitly recognize members' prior treaty obligations and allow these to be performed in derogation from the CU rules. The margin of manoeuvre afforded to CU members in this regard differs, however. For example, Article 102(1) of the Treaty on the Eurasian Economic Union (EAEU Treaty) permits members to not only honour their past obligations but also to continue granting preferences autonomously on the basis of treaties adopted before the entry into force of the CU agreement.[52] As is customary in most

[48] When we talk about the integrity of a CU, we refer to the fulfilment of the economic rationale – regional economic integration – through uniform external tariffs and preferential treatment and internal free movement of goods.

[49] GATT Committee on Treaty of Rome, Treaty Establishing the European Economic Community: Report Submitted by the Committee on the Rome Treaty to the Contracting Parties on 29 November 1957, Doc. L/778, 20 December 1957, Annex IV, para. 19.

[50] GATT, Accession of Portugal and Spain to the European Communities: Report of the Working Party, Doc. L/6405, 5 October 1988, para. 18.

[51] See Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 30(3); see also International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Supplement no. 10, Doc. A/56/10, November 2001, Art. 16.

[52] Treaty on the Eurasian Economic Union (EAEU Treaty) 2014, UNTS I:52764.

CUs, permissiveness towards prior trade preferences is counterbalanced by an obligation to harmonize existing trade agreements, although the EAEU Treaty spells out no concrete path to achieving this goal.[53] A stronger requirement to bring old agreements in line with the economic integration project can be found in Article 351 of the Treaty on the Functioning of the European Union (TFEU), which implores member states to 'take all appropriate steps' to eliminate inconsistencies and be mindful of the benefits of EU membership when applying prior treaties.[54]

As mentioned previously, any unilateral derogation from the CET is detrimental to the economic rationale of a CU, regardless of whether the derogation is necessitated by international law. In the absence of harmonization of prior trade preferences, CU members are forced to look inward to safeguard tariff revenues and the integrity of internal trade and competition. The most obvious way of remedying disruptions in the common external trade regime is by levying compensatory duties within the CU – as also proposed by Article XXIV:9 of the GATT – which equal the difference between a preferential external tariff applied by one member and the CET that is levied when (and if) the good is transhipped to another member of the CU.[55] This remedy, however, is incomplete, as not all imported goods are subsequently circulated within the CU.

Moreover, there are two additional negative implications of compensatory duties. First, a compensatory duty levied within the CU implies the existence of internal borders and customs checks. Indeed, it cannot be emphasized enough in this regard that the abolition of internal frontiers within the EU is the exception among CUs. Almost the same holds true for abolishing customs controls that rest on harmonized sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBTs) – only the EU and the Eurasian Economic Union (EAEU) have managed to do away with internal customs checks on borders between members, yet during its short existence, the latter union has already experienced the re-imposition of de facto customs checks in connection with Russian retaliatory sanctions on the EU and problems in Kazakh–Kyrgyz relations.[56] The second negative repercussion is that a compensatory duty levied within the CU on goods from outside the customs territory implies, in addition to borders and customs controls, the maintenance of rules of origin (ROOs) in order

[53] The second paragraph of the EAEU Treaty, *ibid.*, Art. 102(1), states that members 'shall unify all treaties that imply granting preferences'.

[54] The former requirement has been interpreted strictly and includes the obligation to denounce prior incompatible treaties. See Case C-84/98, *Commission of the European Communities v. Portuguese Republic* (EU:C:2000:358), para. 49. Treaty on the Functioning of the European Union (TFEU), OJ 2012 C 326/47.

[55] As an example, the Southern African Customs Union Agreement (SACU Agreement) 2002, as amended on 12 April 2013, available at www.sacu.int/docs/agreements/2017/SACU-Agreement.pdf, Art. 31(4) spells out this solution explicitly. A compensatory levy is also part of the EU–Turkey Customs Union (Decision no. 1/95 of the EC–Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Union, OJ 1996 L 35/1, Art. 16(3)) for a transitional period of five years during which Turkey was supposed to align its trade preferences with those of the EU. Full alignment has never been achieved, however.

[56] Belarus has become a conduit for the transhipment of EU goods banned in Russia, which has in response started to conduct sanitary and phyto-sanitary inspections near the border.

to determine the origin of goods circulating within the CU and whether they have received non-harmonized preferential treatment by any of the members.[57] ROOs are discussed further later in this article.

B PTAs and Common Commercial Policy

It is not only preferential treatment conferred in the past that is liable to disrupt the integrity of CUs. There are very few countries in the world that are not seeking to conclude PTAs, and the basic incentives to engage in such behaviour are present even after forming or joining a CU. However, if CU members wish to conclude PTAs without threatening the internal integrity of the CU, they need to devise an appropriate collective response, one that fits into an overall common commercial policy (CCP).[58]

In regard to the requirement of a CCP in Article XXIV:8(a)(ii) of the GATT, the WTO's Appellate Body concluded that the threshold of a 'high degree of "sameness"' is not met by having comparable trade regulations having similar effects.[59] It has been observed that this requirement has been arbitrarily filled in by CU members, which have resorted to deep economic integration when it suited them best.[60] Due to the difficulty of quantifying and aggregating 'other regulations of commerce', the Understanding on Article XXIV provides that the examination of individual measures, regulations, products covered and trade flows affected may be required.[61] This is an economic test, based on the extent of trade restrictiveness on the effect of trade policies before and after the formation of the CU.[62]

Various studies have shown that increased bargaining power in international (economic) negotiations, as a consequence of the CCP in CUs, is one of the possible gains of regional integration.[63] In their WTO discussion paper, Roberto Fiorentino, Luis Verdeja and Christelle Toqueboeuf note that, in principle, the requirements of a CU in Article XXIV do not allow CUs members to negotiate preferential agreements with

[57] The maintenance of rules of origin (ROOs) is envisaged within the EUTCU for textile products entering the EU from Turkey until Turkey applies 'substantially the same commercial policy' (citing Art. XXIV of the GATT as the original source of obligation) in the textile sector as the EU. See Decision 1/95, *supra* note 55, Art. 12(2) and (3).

[58] Common commercial policy (CCP) is not a term used in WTO law, but it can be conceptually linked to the wording of the external requirement ('the same duties and other regulations of commerce') in Art. XXIV:8(a)(ii) of the GATT.

[59] *Turkey – Textiles* (AB report), *supra* note 19, paras 49–50; see also *Turkey – Textiles* (Panel report), *supra* note 33, para. 9.151.

[60] WTO Committee on Regional Trade Agreements, Examination of the CU between the European Communities and Turkey – Note of the Meeting of 1 October 1997, Doc. WT/REG22/M/2, 4 December 1997, para. 12.

[61] See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade (Understanding on Article XXIV) 1994, 1867 UNTS 219, para. 2.

[62] *Turkey – Textiles* (Panel report), *supra* note 33, para. 9.120; *Turkey – Textiles* (AB report), *supra* note 19, para. 55; Van den Bossche and Zdouc, *supra* note 41, at 684.

[63] Kitamura, 'Economic Theory and the Economic Integration of Underdeveloped Regions', in M.S. Wionczek (ed.), *Latin American Economic Integrations* (1966) 42; Amr Sadek Hosny, 'Theories of Economic Integration: A Survey of Economic and Political Literature', 2 *International Journal of Economy, Management and Social Sciences* (2013) 146.

third parties on their own, as this would disrupt the functioning of the CU.[64] However, as for prior trade preferences, no legal basis can be inferred that would support the argument that Article XXIV requires joint negotiation of future PTAs.

Perhaps the most effective option – namely, to negotiate and conclude agreements as a single entity – is also the most inimical to traditional understanding of the notions of state sovereignty and independent trade policy. The EU is the most well-known example of a CU with a truly common commercial policy administered solely by the regional organization's institutions as a matter of exclusive competence.[65] The Council of the EU – the institution bringing together all EU member states – fixes the CET by a qualified majority vote on a proposal of the European Commission.[66] The chapter on the CCP is located elsewhere in the TFEU than the CET, but the policy is expressly linked to the establishment of a CU.[67] The EU is responsible for modifications of tariff rates, the conclusion of agreements relating to trade in goods and services, commercial aspects of intellectual property, foreign direct investment, export policy and trade remedies.[68] Although not all of these areas are of essential importance to the maintenance of a CU, the breadth of the CCP demonstrates the scope of the transfer of power to the EU.

The creation of a supranational CCP when trade agreements are negotiated by an institutional agent selected and overseen by the principals (the CU members) – in the language of principal–agent theories – is an effective way of managing the external trade regime of a CU and, thereby, also safeguarding its internal integrity. For most countries, however, the loss of sovereignty entailed by this supra-nationalization of trade policy is unacceptable; however, the EU has proven again to be an exception, although some other CU agreements also have the ambition to negotiate PTAs jointly. For example, Article 78(3)(a)(ii) of the Revised Treaty Establishing the Caribbean Community and Common Market (Revised Chaguaramas Treaty) requires CARICOM members to employ common negotiating strategies in the development of 'mutually beneficial trade agreements' with third countries.[69] While this provision does not bind CARICOM members to the joint negotiation of PTAs in all circumstances, it does form the bedrock of the current legal framework for recourse to the Office of Trade Negotiations.[70]

64 Fiorentino, Verdeja and Toqueboeuf, *supra* note 5, n. 19.

65 See TFEU, *supra* note 54, Art. 3(1)(e).

66 See *ibid.*, Art. 31. An example of a different CU where the CET is not set by unanimity is WAEMU (the rule is two-thirds majority). See Revised Treaty on the West African Economic and Monetary Union 2003, Art. 78, available at www.uemoa.int/en/system/files/fichier_article/traitreviseuemoa.pdf.

67 TFEU, *supra* note 54, Art. 206.

68 *Ibid.*, Art. 207(1).

69 Revised Treaty Establishing the Caribbean Community and Common Market (Revised Chaguaramas Treaty) 2001, 2259 UNTS 293, Art. 80(2). For another example, see EAEU Treaty, *supra* note 52, Art. 33(3).

70 The Office of Trade Negotiations is integrated into the CARICOM Secretariat. It harbours the relevant expertise on trade, and it can be called upon to lead negotiations with third countries on behalf of CARICOM, as part of a college of negotiators.

However, CARICOM as well as some other CUs does not entirely prohibit their members from concluding PTAs independently.[71] Unlike in the EU, CARICOM member states can negotiate agreements autonomously, provided that these are certified by the CARICOM Secretariat prior to their conclusion and, when involving tariff concessions, approved by the intergovernmental Council for Trade and Economic Development.[72] In the context of the EU's 'external' CUs, one can find both innovative solutions and seemingly intractable challenges, attention to which should notably be paid by decision-makers in the ongoing Brexit process. Article 7 of both of the CU agreements with Andorra and San Marino contain the obligation to align their laws and policies with the EU's for the purpose of the CUs. The countries get no reciprocal say in the formulation of the EU's external tariff or CCP. However, as stated in a declaration appended to the CU agreement with San Marino, the EU is willing to negotiate on behalf of San Marino with third countries with which it has a PTA so that products originating from San Marino receive the same treatment as those from the EU. And, indeed, this commitment has translated into practice that also comprises Andorra. The most recent illustration of this practice can be found in Annex 7 of the EU–Canada FTA (better known as CETA), which contains a joint declaration committing Canada to accept products originating from Andorra and San Marino that are covered by the respective CUs (not all goods fall under the CUs) as eligible for CETA treatment.[73]

While landlocked European micro-states might not be in a position to demand an equal partnership with the EU, the one-sided obligation on Turkey to track the EU's CCP has led to considerable criticism,[74] especially as the ever contested prospect of Turkey acceding to the EU has come to be seen as increasingly unrealistic.[75] Indeed, the expectation that forming a CU with the EU was merely a step towards membership is a crucial explanatory factor when it comes to Turkey's acceptance of the EU's external tariff, customs legislation, preferential treatment (both agreements and the generalized system of preferences) and more without having a seat at the table.[76] Not only do these provisions prescribe Turkey's alignment with EU laws and policies, but

[71] See, e.g., Protocol on the Establishment of the East African Customs Union (EAC CU Protocol) 2004, Art. 37(4), which also contains a consultation procedure for separate trade agreements. See also SACU Agreement, *supra* note 55, Art. 31(3), which prohibits members from negotiating, concluding and amending PTAs with third countries without the consent of the other SACU members.

[72] Revised Chaguaramas Treaty, *supra* note 69, Art. 80(3) and (4). In accordance with Art. 80(a) of the treaty, all CARICOM members are moreover under a general obligation to coordinate their trade policies.

[73] EU–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, entered into force provisionally 21 September 2017), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[74] See, e.g., Yilmaz, 'The EU–Turkey Customs Union Fifteen Years Later: Better, Yet Not the Best Alternative', 16 *South European Society and Politics* (2011) 235, at 246; Bülbül and Orhon, 'Beyond Turkey-EU CU: Predictions for Key Regulatory Issues in a Potential Turkey-U.S. FTA Following TTIP', 9 *Global Trade and Customs Journal* (2014) 444. For an excellent contemporary analysis, see Peers, 'Living in the Sin: Legal Integration under the EC-Turkey CU', 7 *European Journal of International Law* (1996) 411.

[75] In the meanwhile, the economic importance of the external trade regime that Turkey is forced to mimic under Decision 1/95 has also grown, strengthening the case for reform.

[76] Ç. Nas and Y. Özer, *Turkey and EU Integration: Achievements and Obstacles* (2017), ch 2. See Decision 1/95, *supra* note 55, Arts 12, 13, 14, 16.

Article 54 of Decision 1/95 also states that in areas of direct relevance to the CU, which include the CCP, 'Turkish legislation shall be harmonized as far as possible with Community legislation'. The EU was placed under an obligation to consult and continuously inform Turkey in such areas of relevance, but Turkey has repeatedly complained about a lack of execution in this regard.[77]

Moreover, there is a design issue in the CCP alignment clause. Bringing Turkey up to speed with the EU's external trade regime entails negotiating with the EU's trade partners worldwide. Due to significant economic differences, and, consequently, also to different trade interests, it is far from certain whether all third countries that are parties to a PTA with the EU have equal interest in concluding an agreement with Turkey, let alone on the same terms. As a result, there are a number of EU PTAs that have no equivalent in the Turkish external trade regime (see Table 2). While this divergence does not in itself preclude entirely the free circulation of imported goods within the CU, it does impede the internal efficiency of the CU (see the preceding subsection).[78]

Several remedies – short of EU membership – have been suggested to balance the asymmetry in the EU–Turkey CU (EUTCU) and to make alignment of CCP measures more effective. The EU, for example, could negotiate on behalf of Turkey and represent its interests in trade negotiations. However, in light of Turkey's size and the nature of its economy, EU trade strategy would require serious overhaul to incorporate Turkish interests. Conversely, Turkey would likely be concerned about agency slippage with the Commission misrepresenting Turkey's positions. A less onerous proposition in terms of sovereignty and principal–agent trust revolves around the idea of so-called 'Turkey clauses'.[79] Such clauses would bind the third country concerned in the course of negotiations with the EU to also conclude a mutually acceptable agreement with Turkey. To our mind, there is a sole example of a legally binding 'Turkey clause', and it does not guarantee any result: Article 15(2) of the EU–Albania Stabilisation and Association Agreement provides that 'Albania shall start negotiations with Turkey with a view to concluding … an Agreement. … These negotiations shall be opened as soon as possible'.[80] A legally softer alternative is more common and has been taken, for example, in the EU–Korea FTA negotiations, whereby the two parties appended to the agreement a joint declaration on Turkey in which the EU invited South Korea to enter into negotiations with Turkey and South Korea pledged to do so 'based on the result of a joint feasibility study'.[81] A similar FTA (with some differences, for example, in origin certification) to the EU–Korea

[77] See Decision 1/95, *supra* note 55, Arts 55, 56, 59, 60. Nas and Özer, *supra* note 76.

[78] See Decision 2006/646 of the EC-Turkey Customs Cooperation Committee of 26 September 2006 Laying Down Detailed Rules for the Application of Decision No 1/95 of the EC-Turkey Association Council, OJ 2006 L 265/18, Art. 17(1).

[79] Bülbül and Orhon, *supra* note 74, are sceptical of such a clause but, nonetheless, considered it a necessity in the context of an EU–US FTA.

[80] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ 2009 L 107/166.

[81] Free Trade Agreement between the European Union and Its Member States and the Republic of Korea, OJ 2011 L 127/6.

Table 2: Comparison of the EU's and Turkey's PTAs negotiated since 1990

	EU		Turkey	
Third country / bloc	**Start of negotiation**	**Entry into force**	**Start of negotiation**	**Entry into force**
ACP countries	1998	2003	-	-
Albania	2000	2009	2003	2009
Algeria	1995	2005	-	-
Bosnia and Herzegovina	2000	2008	2002	2003
Canada	2009	2017*	-	-
Central America	2008	2013*	-	-
Chile	2000	2003	2008	2011
Colombia	2009	2013*	2011	-
Croatia	2000	2005	2000	2003
Ecuador	2014	2017*	2011	-
EFTA	1990	1992	1990	1992
Egypt	1995	2004	1998	2007
Faroe Islands	1996	1997	2000	2017
GCC	1990	-	2005	-
Georgia	2012	2016	2007	2008
India	2007	-	-	-
Israel	1995	2000	1994	1997
Japan	2013	2018*	2014	-
Jordan	1995	2002	2005	2011
Kosovo	2013	2016	2012	-**
Lebanon	1995	2006	2003	-**
Macedonia	2000	2004	1998	2000
Malaysia	2010	-	2010	2015
Mauritius	2004	2012*	2009	2013
Mercosur	2010	-	2008	-
Mexico	1998	2000	2014	-
Moldova	2010	2016	2011	2016
Montenegro	2006	2010	2007	2010
Morocco	1995	2000	1999	2006
Palestine	1995	1997	1999	2005
Peru	2009	2013*	2013	-
Serbia	2005	2010	2007	2010
Singapore	2010	-	2014	2017
South Africa	1995	2004	-	-
South Korea	2007	2011	2010	2013
Syria	1995	-	2004	2007
Thailand	2013	-	2017	-
Tunisia	1995	1998	2002	2005
Ukraine	2007	2017	2007	-
US	2013	-	-	-
Vietnam	2012	-**	-	-

* not yet ratified but applied provisionally ** text agreed but not yet concluded

Source: This table was inspired by Bülbül and Orhon, 'Beyond Turkey-EU CU: Predictions for Key Regulatory Issues in a Potential Turkey–U.S. FTA Following TTIP', 9 *Global Trade and Customs Journal* (2014) 444.

FTA was subsequently signed between Turkey and South Korea – the agreement became effective on 1 May 2013.[82] Overall, however, there remain mismatches between the EU's and Turkey's PTAs, and this is without saying anything about the delay in the conclusion of the ones in place.

Finally, CUs notified under the Enabling Clause have equally not shied away from harbouring ambitions of concluding PTAs jointly.[83] One of the more cohesive Enabling Clause CUs – the East African Community (EAC) – has set out to 'co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade'.[84] The EAC has negotiated as a bloc of countries with the EU, the USA and China, but it has struggled to implement a joint negotiation mechanism as envisaged by Article 37(3)(b) of the Protocol on the Establishment of the East African Customs Union, which furthermore enables members to conclude agreements individually subject to a consultative procedure.[85] Article 2 of the Economic Agreement between the Gulf Cooperation Council (GCC) States, adopted by the GCC Supreme Council in 2001, was more ambitious by providing for collective negotiations and conclusion of agreements.[86] The GCC has since concluded trade agreements with European Free Trade Association and Singapore.[87] However, the very future of the GCC is in question at the moment as Qatar has been placed under sanctions in 2017 by the other members led by Saudi Arabia.

C ROOs

Article XXIV:8(a)(i) of the GATT specifies that CU members must liberalize 'substantially all' internal trade with respect to 'at least … products originating in such territories'. This does not prejudge whether internal free trade within the CU requires common ROOs. The text of Article XXIV also fails to clarify whether CU members have to coordinate or harmonize ROOs to determine non-originating products. Nor has it been agreed whether ROOs qualify as 'regulations of commerce', mandating their abolishment with respect to internal trade or not raising them with respect to external trade.[88] In light of

[82] Agreement on Trade in Goods between the Republic of Korea and the Republic of Turkey 2012.

[83] Although it should also be said that, for example, the European Free Trade Association (EFTA) also negotiates trade agreements with third countries jointly, but it is not a CU. See the revised Convention Establishing the European Free Trade Association 1960, 370 UNTS 3, Art. 43(1)(g).

[84] EAC CU Protocol, *supra* note 71, Art. 37(1).

[85] *Ibid.*, Art. 37(4).

[86] Economic Agreement between the Gulf Cooperation Council 2001.

[87] Note, however, that Bahrain derogated from the collective negotiation mechanism when it concluded an individual FTA with the USA (entered into force 11 January 2006).

[88] As noted by Canada in GATT, 'Report of the Working Party on the Free-Trade Agreement between Canada and the United States', 31 October 1991, L/6927, para. 37. ROOs are most often mentioned in the context of FTAs and their differing external tariff levels. See James, 'Rules of Origin and Rules of Preference and the World Trade Organization: The Challenge to Global Trade Liberalization', in P. Macrory, A. Appleton and M. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005), vol. 2, 274; WTO Committee on Regional Trade Agreements, Synopsis of 'Systemic' Issues Related to Regional Trade Agreements – Note by the Secretariat, Doc. WT/REG/W/37, 2 March 2000, para. 43.

such ambiguity, arguably all of the following ROO constructs are therefore compatible with Article XXIV.

The EU provides an example of dealing with ROOs unambiguously in both the internal and external dimension of CUs.[89] Once goods are cleared at one of the customs entry points, they are released for free circulation and must be treated equally to goods originating in the EU. All goods produced within the EU are not checked internally according to any ROOs because all inputs are either originating or must have first cleared external customs control, which consists of uniform rules on customs procedures, external ROOs, tariffs and preferential treatment, thereby ensuring the integrity of the CU. Such an arrangement of course greatly reduces the administrative burden on trade within the CU, so it is economically attractive for all regional integration organizations intent on facilitating internal trade. The same argument applies to the harmonization of ROOs for trade with non-members, which is, moreover, necessitated by the maintenance of a common external trade regime (the internal dimension is partially dependent on the external dimension). Illustratively, in the framework of the EUTCU, Turkey's grant of preferential treatment to goods imported from third countries is conditioned upon alignment with ROOs that are part of the EU's PTAs.[90]

On the contrary, due to gaps in the common external trade regime, ROOs concerning internal CU trade are maintained in the GATT-notified Central American Common Market (CACM)[91] and in CARICOM.[92] Furthermore, it is no surprise that CUs notified under the Enabling Clause, in light of their more porous trade arrangements, have also laid down ROOs governing internal trade.[93] A decision of the Council of the Southern Common Market (MERCOSUR) recognized the rationale explicitly: 'The existence of products exempt from the Mercosur Common External Tariff … necessitates the implementation of clear, predictable Rules of Origin to facilitate the flow of intra-zonal trade. … So as not to extend the differential treatment to third countries, the Mercosur Party States must adopt definite, clear rules of origin that will make it possible to determine certifiably the nationality of the products exchanged.'[94]

While the EU has indeed succeeded in removing regulatory obstacles relating to origin of internally traded goods, the EUTCU deserves closer inspection. Instead of ROOs, trade within the EU–Turkey CU takes place with the use of 'movement

[89] With some exceptions, the EAEU Treaty also abolishes ROOs internally and harmonizes them externally. See EAEU Treaty, *supra* note 52, Art. 37.

[90] Decision 1/95, *supra* note 55, Art. 16(2).

[91] Imperfect implementation of a string of regularly renewed commitments to a Central American CU make the abolishment of internal ROOs difficult. See M. Cas, A. Swiston and L. Barrot, 'Central America, Panama, and the Dominican Republic: Trade Integration and Economic Performance', IMF Working Paper no. 12/234 (2012), Annex II; see also Protocol to the General Treaty on Central American Economic Integration 1993, 1887 UNTS 401, Art. 5.

[92] See Revised Chaguaramas Treaty, *supra* note 69, Art. 84.

[93] See, e.g., EAC CU Protocol, *supra* note 71, Art. 14, and the EAC Customs Union Rules of Origin adopted thereunder.

[94] Decision of the Council of Common Market on Mercosur Origin System, Doc. MERCOSUR/CMC/DEC no. 06/94, December 1994.

certificates' – the so-called Admission Temporaire Roulette (ATR) certificates – and accompanying exporter declarations that testify to the originating status of the shipped goods. Although no specific local content requirements are present (as is customary for ROOs), the originating status of goods shipped from one constituent territory of the EUTCU to the other is subject to bureaucratic control, which is burdensome for the users of ATR certificates and, consequently, impedes internal EUTCU trade.[95]

D Variable Coverage of Customs Unions

In economic theory, the concept of a CU in its perfect form presumes that all trade in goods is covered by the CU framework. Under WTO law, the internal requirement concerns 'substantially all trade in goods', which comprises both a 'quantitative element' – how many codes of the Harmonized System (HS) are covered – and the intensity of trade ('qualitative element')[96] – to ensure that heavily traded goods are not left out.[97] The Appellate Body noted already in *Turkey – Textiles* that WTO Members could not agree on the interpretation of this term.[98] It was found not only that the requirement does not amount to an obligation to eliminate all trade barriers, but also that it does require the elimination of barriers to more than merely some trade.[99]

The measures that must be 'eliminated' are customs duties and the less precise 'other restrictive regulations of commerce'. There has been discussion on whether Article XXIV requires elimination to be reciprocal. Whereas WTO Members have contested the requirement of reciprocity in eliminating duties between parties to a CU, unadopted GATT panel reports have repeatedly held that the liberalization must be reciprocal.[100]

[95] European Commission, Impact Assessment Concerning an Agreement with Turkey on the Extension of the Scope of the Bilateral Preferential Trade Relationship and on the Modernisation of the Customs Union, Doc. SWD(2016) 475 final, 21 December 2016, at 62.

[96] GATT, Report of the Working Party on the European Free Trade Association, Doc. L/1235, 4 June 1960, para. 48; GATT, Article XXIV of the General Agreement – Note by the Secretariat, Doc. MTN.GNG/NG7/W/13, 11 August 1987, para. 13; see also the preamble to the Understanding on Article XXIV, *supra* note 61.

[97] J. Pauwelyn, A. Guzman and J. Hillman, *International Trade Law* (3rd edn, 2016), at 354.

[98] *Turkey – Textiles* (AB report), *supra* note 19, para. 48.

[99] *Ibid.* Members of the EFTA, however, contended that this does not require that barriers to trade be removed by all members of the CU, some latitude provided by the terms 'substantially all the trade'. GATT, Report of the Working Party on the European Free Trade Association, Doc. L/1235, 4 June 1960, paras 51, 54.

[100] In two GATT panel reports, the panels focused on the wording of Art. XXIV:8, which requires elimination of regulations of commerce on substantially all trade between the constituent territories. Moreover, the non-reciprocity principle in Art. XXXVI:8 does not apply to Art. XXIV. WTO, *EEC – Member States' Import Régimes for Bananas –Report of the Panel*, 3 June 1993, DS32/R, paras 364, 368, 371; WTO, *EEC – Import Régime for Bananas – Report of the Panel*, 11 February 1994, DS38/R, paras 159–162. Unadopted panel reports have no legal status in the GATT or WTO system, but they could present useful guidance. *Japan – Alcoholic Beverages II*, *supra* note 28, at 14–15.

The Enabling Clause explicitly rejects the requirement of reciprocity in the trade negotiations between developed and developing countries.[101]

The only CU that comes close to being 'perfect' in light of the scope of internal trade in both law and practice is the EU. All duties and regulations relating to internal trade in goods in the EU are subject to the (expansively interpreted) prohibitions of customs duties and charges that have equivalent effect and quantitative restrictions and measures that have equivalent effect.[102] The coverage of the adjacent EUTCU is already significantly different from the EU's own CU. The CU applies to all industrial goods but not to coal, steel and agricultural goods. Nevertheless, all coal and steel products and most agricultural and fishery goods are covered, respectively, by a standard FTA with ROO requirements and a PTA.[103] This patchwork of rules governing trade in goods between the EU and Turkey, however, is questionable in terms of compatibility with Article XXIV:8 of the GATT since neither the coal and steel industry nor the agricultural regime apply a CET.

Variable coverage and exemptions are typically associated with CUs notified under the Enabling Clause, which makes such arrangements compatible with WTO law. For example, MERCOSUR has traditionally excluded the important automotive sector from internal liberalization.[104] The shielding of sensitive industries, however, entails not only that the broader goal of regional liberalization is undermined but also that common institutions are empowered to a lesser extent, potentially endangering the success of the CU as a whole.[105] Even more commonplace is variation in the external tariff, which has a knock-on effect on internal trade. Although, in principle, the free movement of goods in the EAEU covers all goods, in practice, internal trade is significantly hampered by, among other things, the maintenance of widespread transitional exemptions from the CET.[106] Similar impediments following from misalignment in the

[101] Enabling Clause, *supra* note 2, para. 5; para. 6 goes even further, stating that developed members are to exercise utmost restraint in requesting concessions from least developed countries; similarly, see also para. 8 of the Enabling Clause. Therefore, if Art. XXIV:8 allowed for non-reciprocal regional liberalization between developed and developing countries, the drafting of the Enabling Clause would have been unnecessary. See *EEC – Import Régime for Bananas*, *supra* note 100, paras 160–162.

[102] See TFEU, *supra* note 54, Arts 30, 34, 35. Only very few goods are subject to special regimes partially derogating from the strict prohibitions of duties and quotas. For example, trade in military equipment (Art. 346(2)) and excisable goods (including alcoholic drinks, tobacco products and mineral oil).

[103] Agreement between the European Coal and Steel Community and the Republic of Turkey on Trade in Products Covered by the Treaty Establishing the European Coal and Steel Community, OJ 1996 L 227/3; Decision no 1/98 of the EC–Turkey Association Council of 25 February 1998 on the Trade Regime for Agricultural Products, OJ 1998 L 367/68.

[104] Fuders, 'Economic Freedoms in MERCOSUR', in M.T. Franca Filho, L. Lixinski and M.B. Olmos Giupponi (eds), *The Law of MERCOSUR* (2010) 87, at 91.

[105] Somewhat paradoxically, then, less delegation of powers to CU institutions can vitiate the legitimacy of whatever sovereignty was transferred, leading to the entire CU project failing or being significantly deficient. The Enabling Clause CUs, in particular, need to contend with this situation to varying degrees.

[106] Armenia applies exemptions on 800 tariff lines covering 40 per cent of non-EAEU imports, Kyrgyzstan on 200 lines representing 14 per cent of non-EAEU imports and Kazakhstan on 3,500 lines representing 49 per cent of non-EAEU imports. See R. Dragneva and K. Wolczuk, 'The Eurasian Economic Union: Deals, Rules and the Exercise of Power', Chatham House Research Paper (2017), at 22.

external tariff or preferential treatment have affected internal trade within, among others, the CACM, MERCOSUR, the EAC and the Common Market for Eastern and Southern Africa.[107]

E Other Issues: Non-Tariff Barriers, Trade Remedies and Customs Revenue

Other issues with respect to which CU designs diverge include the extent of liberalization of non-tariff barriers (NTBs) – in particular, SPS regulation and TBTs; trade remedies (applied both internally and externally);[108] and the apportionment of customs revenue. In regard to the first issue, due to the imprecise nature of the term 'other regulations of commerce' in Article XXIV of the GATT, it is not clear whether a CU requires the harmonization of NTBs, especially SPS measures and TBTs. What is clear, however, is that NTBs are hugely important for trade, possibly more so than customs duties.[109] Few CUs have managed to successfully harmonize NTBs, with the obvious exception of the EU, not least because the enforcement of common rules entails a cost for the sovereignty of CU members. NTBs therefore remain significant even in GATT-notified CUs such as the EUTCU and the EAEU.[110] Harmonization of TBTs and, in particular, SPS measures is moreover crucial if members wish to abolish customs controls or borders, as is apparent in the Brexit debate on Ireland. Nevertheless, under the prevailing, more minimalist, CU design, the harmonization of NTBs is perhaps desired by most CUs (for its positive impact on efficiency) but put in practice only by a few and sometimes selectively.[111]

Second, trade remedies are another hitherto undiscussed aspect that has some relevance for CUs. As with ROOs, there are distinct internal and external dimensions to this issue. Internally, the presence of trade remedies is not entirely unexpected, as CUs typically wish to regulate subsidies and dumping among members; safeguards are similarly part of CU agreements, and the ease with which they can be triggered is a potential indicator of the sovereign discretion available to members. It is easily

[107] COMESA is a CU with a particularly high divergence when it comes to members' compliance with the common external tariff. For example, Zimbabwe and Sudan aligned their external tariff only to the extent of 7.13 per cent and 18 per cent respectively in 2014. See COMESA Annual Report (2015), at 17, available at www.comesa.int/comesa-annual-reports/. Moreover, there are issues with the overlapping membership of Swaziland in both COMESA and the SACU (in addition to the SADC) and of Kenya, Uganda, Rwanda and Burundi in both COMESA and the EAC, which makes it impossible in principle for these members to comply with two different external tariff schedules. The same problem exists for eight countries in ECOWAS which are also members of the WAEMU.

[108] Trade remedies encompass anti-dumping, countervailing and safeguard measures.

[109] A recent United Nations Conference on Trade and Development report has underlined the importance of non-tariff barriers (NTBs) in MERCOSUR. See UNCTAD, Non-Tariff Measures in Mercosur: Deepening Regional Integration and Looking Beyond, Doc. UNCTAD/DITC/TAB/2016/1 (2017).

[110] Dragneva and Wolczuk, *supra* note 106, at 22.

[111] Removal or mitigation of NTBs has been identified as one of the major potential sources of welfare gains if the EUTCU were to be modernized. See European Commission, *supra* note 95, at 32.

conceivable that members to CUs would want to retain assurance for their sensitive import-competing sectors.[112]

Due to the imprecise nature of the term 'other restrictive regulations of commerce' in Article XXIV:8(a)(i) and the arguably exhaustive list of exceptions to the internal liberalization requirement,[113] it remains unclear whether the use of trade remedies between CU members must be abolished. Based on the aim of regional integration, it could be argued that 'other regulations of commerce' also encompass trade remedies.[114] Whereas some authors prefer the 'indicative list' interpretation,[115] thereby allowing for the maintenance of trade remedies within internal CU trade, others take the position that Article XXIV:8 requires trade remedies to be abolished internally.[116] If the list is exhaustive, it could imply that trade remedies are incompatible with the CU requirements of Article XXIV:8(a) of the GATT. In the absence of a consensus in WTO law, practice shows that most CU designs make trade remedies available to members. The EU, once again, represents an exception by having essentially replaced all trade remedies with a robust, supranational competition and state aid policy. The EU's CUs with Andorra and San Marino also do not provide for the possibility to have recourse to trade remedies.[117] On the contrary, the EUTCU contains a provision,[118] exercised on a number of occasions, allowing anti-dumping measures to be taken between the members.[119]

In addition, there is an external aspect to trade remedies in the context of CUs. If the GATT-mandated common external trade regime is the flipside of the measures eliminated internally, a question on which there is little guidance in any case, CU members might be required to apply trade remedies to the rest of the world jointly. It should not be surprising at this point that the EU applies trade remedies as one entity,[120] but so do the EAEU, the SACU and the GCC. In other CUs, members administer trade remedies individually, which can disrupt the common external trade regime and also impact on internal trade down the line.

[112] See also R. Teh, T. Prusa and M. Budetta, 'Trade Remedy Provisions in Regional Trade Agreements', WTO Staff Working Paper ERSD-2007-03 (2007), at 3–4.

[113] It is contested whether the list of exceptions, which does not include Art. VI (anti-dumping and anti-subsidy measures) and Art. XIX of the GATT (safeguards), is exhaustive. Based on the language used (or, rather, the lack of words such as 'including', 'for example', 'inter alia' or 'such as'), the list seems closed. However, the fact that the security exception in Art. XXI of the GATT is not included could rebut this.

[114] Even though abolishing trade remedies inside the CU leads to deeper integration, it does not have any effect on the CET. Teh, Prusa and Budetta, *supra* note 112, at 5, 28.

[115] M. Matsushita *et al.*, *The World Trade Organization: Law, Practice, and Policy* (3rd ed., 2015), at 521–522; Mavroidis, *supra* note 20, at 202.

[116] Gobbi Estrella and Horlick, 'Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free-Trade Areas Constituted between World Trade Organization Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey–Textiles* Ruling', 40 *Journal of World Trade* (2006) 909, at 913.

[117] Trade remedies should also be abolished in the EAEU; see EAEU Treaty, *supra* note 52, Art. 28(3).

[118] Decision 1/95, *supra* note 55, Art. 44.

[119] CARICOM also allows members to impose trade remedies against each other but under the auspices of a common procedure. See Revised Chaguaramas Treaty, *supra* note 69, Arts 125–133.

[120] Trade remedies are part of the EU's CCP.

Finally, some CUs take the opportunity presented by unified customs laws and tariffs to enact a mechanism for the distribution of collected duties. In the EU, duties, minus 20 per cent left to member states to cover operational costs, flow directly into the EU's budget as part of the EU's own resources. The SACU also operates a common revenue pool (since 1910) that comprises all customs, excise and additional duties collected in the CU.[121] While the question if and how customs revenue is distributed (and collected)[122] is crucial from an economic standpoint, and is reflected in the economic and historic definitions, it is at the fringes of analysis of international law under the prevailing austere CU conceptions. WTO law makes no provision for the establishment of a distributive or revenue-sharing mechanism.

F Overall Assessment

The preceding discussion has allowed us to go into deeper detail with respect to the various differences existing among CUs and, in particular, how they approach specific issues of CU designs. Table 3 provides an overview of some of the main elements of CUs notified under Article XXIV of the GATT. We exclude from the overview CUs notified under the Enabling Clause due to the more flexible requirements applying to members of such CUs in accordance with this clause.

One point that is worth highlighting in the wake of this comparative analysis is how CUs can be grasped conceptually despite a number of flaws distancing them from 'perfect' CUs, as envisaged by Viner and others (see Section 3.D). The way CUs operate in reality opens up the possibility of thinking about CUs not as a binary choice of existence but, rather, as a matter of degree. What is crucial is that both the internal and the external component of CUs are synchronized; the goods covered by the two components should be the same. Figure 1 illustrates schematically the necessary harmony in the relationship between the internal and external elements of any CU. Both the x and y axes can be measurable in HS classification codes, representing the internal and external coverage of the CU in terms of tariff lines. The manner in which the HS codes are ordered can be subject to the negotiation of the CU members; in other words, the members can determine the order of liberalization (for example, least sensitive goods first, most sensitive last). However, regardless of their order, the HS codes must correspond – they must be ordered in the same way both when it comes to the free movement of goods internally and the common external trade regime. The x = y line – a linear relationship between internal and external coverage – represents an optimal CU, with a perfect CU located in the top right corner of the box and a GATT-compliant one, depending on the interpretation of the term 'substantially all trade', starting slightly below on the x = y line. If internal and external coverage of the CU

[121] See SACU Agreement, *supra* note 55, Art. 32.

[122] There is considerable diversity when it comes to which member customs duties should accrue and how they should be collected. Duties can be allocated on the basis of a final destination principle or at the point of first entry. Similarly, the actual collection of duties can take place at the point of entry, final destination or final consumption. See Andriamananjara, 'Customs Unions', in J.-P. Chauffour and J.-C. Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (2011) 111, at 116–117.

Table 3: Overview of Main Elements of CUs Notified under Article XXIV of the GATT

		EU	EUTCU	EU-Andorra San Marino	EAEU	CARICOM	SACU	CACM
	Obligation to harmonize prior PTAs?	✓	✓	✓	✓	✓	✓	✓
PTAs	Future PTAs jointly negotiated?	✓	X	X	✓	✓	✓	✓
	Future separate PTAs possible?	X	X	X	X	✓	✓	✓
ROOs	Internally abolished?	✓	✓	✓	✓	X	✓	X
	Externally harmonized?	✓✓	✓	✓	✓	X	X	✓
CET	Agreed unanimously (U) or by majority (M) voting?	M	Unilaterally by EU	Unilaterally by EU	U	U	U	U
Trade remedies	Available internally?	X	✓	X	X	✓	✓	✓
	Applied jointly against third countries?	✓	X	✓	✓	X	✓	X
Common revenue pool	Is tariff revenue pooled and redistributed according to a formula?	✓	X	X	✓	X	✓	X

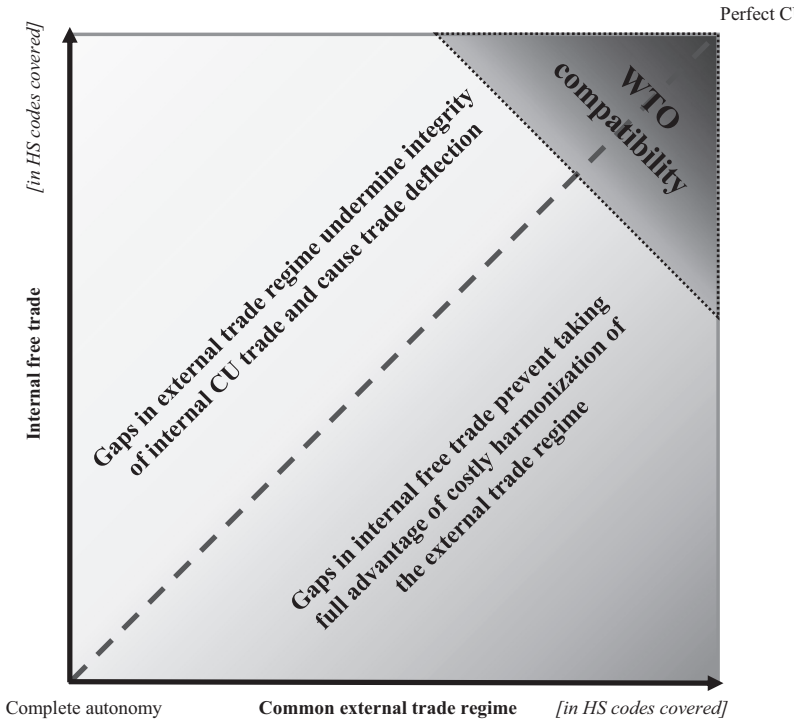

Figure 1: *Schematic Representation of a Non-Binary Conception of a CU*

are out of sync (above or below the x = y line), the CU is under-performing. This is something of which policy-makers should be aware. The flexibility provided by the concepts of Article XXIV can be criticized, but the reader should be mindful of the fact that this ambiguity originates in WTO members' desire to balance intrusion on sovereignty and the need for rules to protect third parties' welfare from adverse CU effects.

4 Conclusion and the Brexit Customs Debate

This analysis has lent itself to a number of general conclusions capable of also informing current and future policy debates, such as Brexit, CU designs (such as the proposed Australia–New Zealand CU) as well as academic discussions on the relationship of regional trade agreements and world trade law more generally. First, drawing on historical, economic and present-day international legal sources reveals that the elements encompassed by the concept of customs union vary. Second, the most elaborated and legally significant definition – Article XXIV of the GATT – is silent on certain conceptual elements, notably joint negotiation of PTAs and the apportionment of customs revenue, and offers little guidance and, therefore, a large margin of discretion on a number of important legal arrangements such as trade remedies and rules of origin. Nevertheless, the GATT conceptualization is the only one that is concerned with the external welfare effects (on non-members) of CU formation. Third, and in part as a

consequence of the conceptual variety and the ambiguity of the relevant WTO provisions, there is considerable diversity among CU designs in practice. Different CUs approach key design issues and tensions – from the negotiation of PTAs to regulating the origin of goods – in different ways. A common denominator across all conceptualizations and CUs is concern over state sovereignty, which affects how CUs are designed and how they operate. Such concerns typically lead to the formation of CUs that fall short of the idea of a 'perfect customs union', as theorized by Viner with the EU representing the exception rather than the rule in this regard. Moreover, state sovereignty affects not only the design but also the performance (sometimes as a function of flawed design) of CUs. Even absent a perfect CU, under-performance notably occurs when the relationship between the internal and external aspects of the CU is not synchronized.

Overall, in this environment of conceptual variety, legal ambiguity and design diversity, it is worth asking whether the economic rationale of the GATT is being respected. While CUs further regional trade liberalization, they might negatively impact the external welfare of non-members – the protection of which is a key objective of Article XXIV of the GATT. The ambiguity – and lack of enforcement – of Article XXIV arguably undercuts this objective, as attested to by the existence of a diverse array of sub-optimal CU designs. If the WTO membership wished to take the objective of Article XXIV more seriously, then they should jumpstart its enforcement. This could entail a stricter review of CUs in the Committee on Regional Trade Agreements and, in the most serious cases, initiating dispute settlement proceedings.

For the time being, it is paramount that integration projects bearing the name 'customs union' are analysed on their own merits and with attention to detail – blanket statements about CUs are likely to only be a source of confusion. The discussion of the future trade relationship between the EU and the UK after Brexit is a case in point in this regard. On numerous occasions, various actors have failed to distinguish the creation of 'a' customs union between the EU and UK from 'the' EU customs union of which the UK has been a part during its EU membership. This article has shown that this is a fundamental divide in the world of CUs; the EU's CU is the most integrated of all, which also means the most demanding sovereignty-wise. Having said that, a legal arrangement (regardless of whether it is called a customs 'union' or 'partnership'), short of a perfect CU can be envisaged in principle, given that in practice such sub-perfect CUs are the norm rather than the exception.

Nonetheless, there are potentially intractable challenges ahead for the future EU–UK customs relationship, despite the issue of the Irish land border instilling urgency into the negotiations and even if the more outlandish policy positions are cast outside this analysis. On the side of the UK, one of the key slogans of the Brexit campaign ('taking back control') has relied heavily on the UK's ability to conclude its own trade agreements after leaving the EU. On the side of the EU, the negotiators have insisted on the indivisibility of the four internal market freedoms (free movement of goods, services, capital and workers) and, therefore, the impossibility for the UK to 'cherry-pick' the freedoms it wants to sustain post-Brexit. These are essentially sovereignty-conscious red lines that would, if considered non-negotiable, prevent the conclusion of even the most minimal CU (running against the economic rationale of existing trade

benefits). The UK, on the one hand, no longer accepts the EU to conduct trade policy on its behalf, especially since it will lack the power it used to have as an EU member state. The EU, on the other hand, does not accept shared decision-making over its trade policy with a non-member, as attested to by the modalities of the EUTCU. As diverse as CUs around the world are, a jointly set CET is one of the absolute minimum requirements for the existence of any CU. Consequently, even the least sovereignty-constraining CU arrangement (exemplified, for instance, by CARICOM) would require both or one of the parties to relax their Brexit red lines. Should the UK attach a lesser 'sovereignty value' on regulatory alignment than on autonomous trade deal making, the European Economic Area model would be a more suitable alternative (provided that the UK could relax its position on migration, however). But this option lies beyond the vast domain of CUs.