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CUSTOMS UNIONS IN INTERNATIONAL LAW: FROM CONCEPT TO PRACTICE

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Abstract

Relative to the study of free trade agreements, customs unions (CUs) have been neglected in international law scholarship, despite the fact that by no means do they constitute a recent phenomenon. The present article aims to fill this gap by conducting a scoping analysis of 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, flexibility and lacunas in Article XXIV GATT, and diversity of CU designs along with a discernible concern for the legal arrangements' impact on state sovereignty.

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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 a step further than a free trade area but 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') recording regional trade agreements, 29 international treaties in force classify as CUs by virtue of having been notified to the global trade body under either 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: 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 Customs Union ('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'), West African Economic and Monetary Union ('WAEMU'). The first eight have been notified to the WTO under Article XXIV GATT, the latter eight under the Enabling Clause.[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] Significantly, empirical economic analysis has shown that bilateral trade between members is intensified more by CUs than by FTAs.[6]

[1] B. Balassa, The Theory of Economic Integration (1961).
[2] Decision of 28 November 1979 (L/4903).
[3] The WTO database on regional trade agreements contains every state accession to a CU as a separate entry. Developments in 2017 have seen Panama accede to the Central American Common Market and Egypt to the Common Market for Eastern and Southern Africa.
[4] We discuss the significance of the notification distinction in the subsequent section.
[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 FTA to refer to agreements which abolish all tariffs and

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 UK's departure from the 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.[7] The concept of a CU has been present in international law at least since the German *Zollverein* treaties in the 19th century.[8] As the capacity to enter into relations with other states is one of the generally accepted criteria of statehood,[9] the creation and operation of CUs bears directly on questions of state sovereignty in international law. In this paper we refer to state sovereignty, for simplicity, in its traditional, Westphalian meaning, as for example legally codified in the 1970 Declaration on Principles of International Law,[10] and not to more recent and nuanced conceptions such as 'new' or 'relational' sovereignty.[11] Whereas in the latter prism subjugation to international regimes can be sovereignty-amplifying as countries benefit from pooled bargaining power, under the traditional, Westphalian conception CUs are seen as sovereignty-constraining.[12]

Although issues arising from CUs are neither theoretical nor trivial, there is a dearth of fundamental legal research on the concept. In Europe, CUs have in recent times become politically salient on at least three occasions. In 2013, the EU claimed that Armenia would not be able to simultaneously conclude a Deep and Comprehensive Free Trade Agreement (DCFTA) with the EU and enter the Eurasian Economic Union, at the time a newly

quantitative restrictions, while preferential trade agreements (PTAs) imply a reduction or partial removal of tariffs and quantitative restrictions.

[6] Jayjit Roy, 'Do Customs Union Members Engage in More Bilateral Trade than Free-Trade Agreement Members?' (2010) 18(4) Review of International Economics 663-681

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

[8] Henderson, 'The German Zollverein and the European Economic Community', 137 *Zeitschrift für die gesamte Staatswissenschaft* (1981) 491-507; Kindleberger, 'The Rise of Free Trade in Western Europe, 1820–1875' 35 *The Journal of Economic History* (1975) 20-55.

[9] Article 1(d) of Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19.

[10] 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, Resolution adopted by the General Assembly, 25th session, 24 October 1970.

[11] See A. Chayes and A. Chayes Handler, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Bok, Hoffmann, Lewis and Slaughter, 'In Memoriam: Abram Chayes' 114 *Harvard Law Review* (2001) 673, at 682–9; S. Hoffmann, *Janus and Minerva: Essays in the Theory and Practice of International Politics* (1987). See also Keohane, 'Ironies of Sovereignty: The European Union and the United States' 40 *Journal of Common Market Studies* (2002) 743-765; N. Walker (ed.), *Sovereignty in Transition* (2003).

[12] See, for example, *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion of September 5th, 1931, PCIJ, Series A/B, Fascicule No. 41.

reinvigorated customs territory comprising former Soviet republics. In 2014, the EU and Turkey have initiated scoping discussions regarding the modernization and extension of their CU established in 1996, partially in response to deficiencies in the design of the CU. Most recently, when analytical distinctions between an FTA, a CU and a common market became of critical policy importance during Brexit, 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.[13]

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: on the one hand, 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 a 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. Where relevant we draw on examples and issues that have already surfaced in the European context. We conclude with a summary of the main findings.

2. The Concept of Customs Union

Article XXIV GATT contains the most important contemporary legal definition of the concept of customs union in international law.[14] It breaks down the concept into a number of

[13] Where legal research on CUs does exist, it tends to focus on a single international agreement, in particular the EUTCU. See, for example, Peers, 'Living in the Sin: Legal Integration under the EC-Turkey CU' 7 *European Journal of International Law* (1996) 411; Pirim, 'The EU-Turkey Customs Union: From a Transitional to a Definitive Framework?' 42 *Legal Issues of Economic Integration* (2015) 31; Shadikhodjaev, 'Trade Integration in the CIS Region: A Thorny Path Towards a Customs Union' 12 *Journal of International Economic Law* (2009), 555. 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).

[14] Basic works on the interpretation of Article XXIV GATT include: L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006); Gantz, 'Regional Trade Agreements' in D. Bethlehem, D. McRae, R. Neufeld and I. Van Damme (eds) *The Oxford Handbook of International Trade Law* (2009) 237; Herzstein and Whitlock, 'Regulating Regional Trade Agreements – a Legal Analysis' in P.F.J. Macrory, A.E. Appleton and M.G. Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis – Volume II* (2005) 203; J.H. Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (2002); M. Matsushita *et al.*, *The World Trade Organization: Law, Practice, and Policy* (3rd ed., 2015); J. Pauwelyn, A. Guzman and J. Hillman, *International Trade Law* (3rd ed., 2016); P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (4th ed., 2017); Tevini,

technical elements which, in terms of economic integration and impact on member countries' independence, at the same time 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. Prior to the creation of the post-World War II international trading system, CUs played a role in a number of dominions of the British Commonwealth and in the economic and political integration of German-speaking lands. Significantly for the present article, in 1931 the Permanent Court of International Justice (PCIJ) was given the opportunity to issue an Advisory Opinion on the compatibility of a proposed German-Austrian CU in light of concerns of the international community about the CU's consequences for Austrian 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 which 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. Other territories could join the CU provided they had a 'civilised Government' which facilitated immediate expansion.[15] After the 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 (dominated by South Africa). This CU has been in continuous existence 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.[16] 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).

'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), 616.

[15] Hudson, 'Brief Chronology of Customs Agreements in Southern Africa, 1855-1979' 11 *Botswana Notes & Records* (1979) 89.

[16] The federation led to a 34% 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.

In Europe, it was the German *Zollverein* treaties which 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.[17] All decision-making in the CU was subject to unanimity of the participating states and the treaties had to be renewed every 12 years.[18] Nevertheless, Prussia wielded hegemonic power beyond the formal equality of the members which ultimately kept the CU together. Prussia could persuade or coerce other members to agree to its commercial policies, which included, particularly in the second half of the century, negotiations of preferential trade agreements (PTAs) with third countries, while the unanimity requirement curtailed the independence of members' trade policies.[19] 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.[20]

In 1931, a proposed German-Austrian CU raised political concerns among a group of European states which decided, through the Council of the League of Nations, to request an Advisory Opinion from the PCIJ under Article 14 of the Covenant of the League of Nations.[21] 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'.[22] 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 these instruments safeguarded Austria's independence, including in economic matters, after World War I.[23] The Court opined – by a narrow majority of 8 to 7 – that the CU was calculated to threaten Austria's

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

[18] Article 41 of the 1833 Zollvereinigungsvertrag.

[19] 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 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) at para. 6, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e740 (last visited on 28 June 2018).

[20] Bazillion, *supra* note 19.

[21] 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.

[22] Germany and Austria had not obtained the consent of the Council of the League of Nations, contrary to what is mandated in Article 88 of the Treaty of Peace between the Allied and Associated Powers and Austria together with the Protocol and Declarations annexed thereto signed at Saint-Germain-En-Laye, September 10, 1919.

[23] Article 88 of the Treaty of Saint-Germain, *supra* note 22 and Protocol No. I signed at Geneva by Austria, France, Great Britain, Italy and Czechoslovakia on 4 October 1922.

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,[24] 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 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, which clearly echo previous German experience with CUs, are somewhat distinct from those found in the GATT which was enacted 17 years later in 1948 and whose rules continue to govern CUs essentially unchanged at the global level today as part of the WTO.

B. WTO Law – Structure and Design

Article XXIV GATT allows for regional integration exceptions: WTO Members can deviate from the most-favoured nation obligation in Article I GATT for the sake of forming a CU or a free trade area. Case law has set out a two-tier test to determine the WTO consistency of measures related to the establishment of a CU: (i) whether the CU meets the requirements as set out in paragraphs 8(a) and 5(a) of Article XXIV GATT; and (ii) whether the measure is 'necessary' for the formation of the CU.[25]

The fifth paragraph of Article XXIV GATT, which provides for the possibility to form CUs if they do not raise barriers to trade with non-participating WTO Members, was interpreted by

[24] The Court recognized the specificity of the case based on the unique obligations that had been undertaken by Austria. The 1922 Protocol created obligations for Austria, also from an economic standpoint, not to alienate its independence. See 1931 PCIJ Advisory Opinion *supra* note 12, at 45 and 49. The contemporary commentary on this case also pointed out that other CUs would not have been prohibited. Borchard, 'Editorial Comment – The CU Advisory Opinion', 25 *American Journal of International Law* (1931) 711, at 714-715.

[25] WTO, Turkey – Restrictions on Imports of Textile and Clothing Products – Report of the Appellate Body, 22 October 1999, WT/DS34/AB/R, para. 58; WTO, Argentina – Safeguard Measures on Imports of Footwear – Report of the Appellate Body, 14 December 1999, WT/DS121/AB/R, para. 109; WTO, United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea – Panel Report, 29 October 2001, WT/DS202/AB/R, para. 7.147. The last requirement can be found in the chapeau of Article XXIV:5 GATT.

the Appellate Body (AB) in *Turkey – Textiles* as conferring the right on WTO Members to enter into CUs.[26] However, the right to form a CU, defined as 'the substitution of a single customs territory for two or more customs territories', is limited by substantive requirements, both internally and externally. As will be explained below, these constitute demanding prerequisites, reflecting the negotiators' aim to make departure from the MFN principle difficult.[27] It should be noted that even though these constitute separate requirements, the challenge of complying with them is interlinked;[28] both the internal and external dimension of CUs entail specific legal issues.[29] Article XXIV has been described as 'deceptive' and reflecting 'broad dissent and conflict of opinion'.[30]

1. Internal and External Requirements of Article XXIV

The first subparagraph of XXIV:8 GATT can be identified as an internal requirement.[31] CU members are obliged to eliminate duties[32] 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 GATT are external requirements regulating CUs' 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 trade with third countries. 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

[26] In interpreting the chapeau of Article XXIV:5 GATT, the AB noted 'we read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a CU'. The chapeau of the paragraph needs to be interpreted in light of the purpose set out in paragraph 4 (to facilitate trade between parties and not to raise barriers to third countries). See AB Report, *Turkey – Textiles*, *supra* note 25, 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, p. 310; For a more elaborate analysis of paragraph 4 see Rivas, 'Do Rules of Origin in Free Trade Agreements Comply with Article XXIV GATT?' in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 149, at 157-158.

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

[28] Marceau and Reiman, *supra* note 26, at 315.

[29] Many of the terms used in Article XXIV GATT are ambiguous. See also Mavroidis, *supra* note 27, at 196.

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

[31] Article XXIV:8(a)(i) sets the standard for internal trade between the constituent members of the CUs. AB Report, *Turkey – Textiles*, *supra* note 25, para. 48.

[32] Members disagree on whether the term 'duties' imposes an obligation to eliminate non-protective revenue duties on goods traded within the CU. Interestingly, the English and French versions of Article XXIV:8(a) differ: the English text refers to 'duties', whereas the French text refers to the more specific 'droits de douane'. GATT, 'Report of the Working Party on the Agreement of Association Between the European Economic Community and Malta', 1 March 1972, L/3665, at paras 14-17.

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.[33] Even though repeatedly discussed among WTO Members, the question whether the term includes quantitative restrictions has so far remained unanswered.[34] The Appellate Body (AB) in *Turkey – Textiles* explicitly stated that it did not rule on the theoretical possibility of justifying quantitative restrictions under Article XXIV.[35] However, terms should not be interpreted in isolation from the other parts of the relevant paragraph.[36] Considering the list of permitted measures (including both duties and other restrictive regulations of commerce) that follow immediately after the term 'regulations of commerce', it is argued that this list of exceptions should inform the meaning of that term. Taking a closer look at the listed provisions, it becomes clear that some of them (exclusively, not dealing with other 'regulations') permit quantitative restrictions under certain circumstances.[37] It would therefore be nonsensical to interpret 'other restrictive regulations of commerce' as not including quantitative restrictions.

[33] 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.

[34] As also noted by the GATT, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil – Panel Report*, 19 June 1992, DS18/R, fn. 34. Discussions on this topic can be found in GATT, 'Report of the Working Party on the Accession of Iceland to EFTA and FINEFTA', 18 September 1970, L/3441, at para. 10; GATT, 'Agreements between the European Communities and Finland – Report of the Working Party', 1 August 1974, L/4064, at para. 16; GATT, 'Report of the Working Party on the Free-Trade Agreement between Canada and the United States', 31 October 1991, L/6927, at para. 45. During the GATT years, divergent views were recorded on whether quantitative restrictions for balance of payment purposes could only be applied to non-members of the CU/FTA; GATT, 'Article XXIV of the General Agreement – Note by the Secretariat', 11 August 1987, MTN.GNG/NG7/W/13, at paras 12, 15 and 19. See also Marceau and Reiman, *supra* note 26, at 321.

[35] In that case, the AB did not rule on whether the EUTCU was consistent with the internal and external trade requirements in paragraphs 8(a) and 5(a) of Article XXIV. As the appeal was limited to the panel's finding on whether the imposition of the quantitative restrictions was necessary for the formation of the CU, the AB limited itself to this consideration. AB Report, *Turkey – Textiles*, *supra* note 25, paras 61-65.

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

[37] Article XI GATT (prohibition on quantitative restrictions), Article XII GATT (allowing quantitative restrictions to safeguard balance of payment) and Article XIII GATT (obligation of non-discriminatory administration of quantitative restrictions).

WTO Members have challenged CU members that have introduced (discriminatory) quantitative restrictions in the context of adopting a common commercial policy.[38]

Second, 'substantially the same' has been interpreted as not requiring all duties and other regulations of commerce applied by members of a CU in their external trade be completely identical.[39] However, members of a CU are 'required to apply 'common external trade regime' relating to both duties and other regulations of commerce'.[40] The assessment of such overlap encompasses both quantitative and qualitative elements.[41] The requirement boils down to the obligation to create a common commercial policy, yet some degree of flexibility is allowed.[42] The AB clarified that this flexibility is limited and that an approximation of 'sameness' is required.[43]

2. Levels of Regional Integration in Trade in Goods

Article XXIV GATT deals with two types of regional integration, namely CUs and free trade areas (FTAs). Several overlaps exist between both kinds of integration. Whereas CUs members are required to eliminate internal trade barriers as well as establish a common commercial policy, free trade areas only eliminate internal trade barriers.[44] Under Article XXIV:5 neither CUs nor free trade areas can raise the barriers to trade with third parties compared to the situation before the regional integration. It is because of this (partial) overlap in obligations that case law dealing with free trade areas can inform the interpretation of those same obligations applying to members of a CU.[45]

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[38] Members called for Spain and the EEC to remove alleged GATT-inconsistent quantitative restrictions, based on the claim that Article XXIV does not provide a waiver from the obligations contained in Articles XI and XIII 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', 5 October 1988, L/6405, at para. 39. This finding was echoed in *Turkey – Textiles* but in that case the AB limited itself to reviewing the necessity of the disputed quantitative restrictions for the formation of the EUTCU (and not the GATT-consistency of the EUTCU as a whole).

[39] AB Report, *Turkey – Textiles*, *supra* note 25, para. 49.

[40] Ibid.

[41] See WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products – Report of the panel*, 31 May 1999, WT/DS34/R, para 9.148 and AB Report, *Turkey Textiles*, *supra* note 25, para. 49. These elements are further elaborated on below.

[42] AB Report, *Turkey – Textiles*, *supra* note 25, para. 49.

[43] 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'. AB Report, *Turkey – Textiles*, *supra* note 25, para. 50.

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

[45] Case law on Article XXIV:8(b) is relevant for the interpretation of Article XXIV:8(a)(i), and vice versa. Van den Bossche and Zdouc, *supra* note 14, at 686.

The GATT does not address features of more advanced forms of regional integration such as common markets.[46] It has been hypothesised that this is because at the time of the drafting of Article XXIV, the drafters did not foresee forms of deeper integration that would ultimately be capable of challenging multilateral liberalization.[47] 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 which 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 also apply to deeper forms of regional integration which include a CU. In this paper, 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).[48] As a result, we focus on those aspects which either constitute essential requirements of a CU according to Article XXIV GATT or are specific to CUs and issues associated therewith, as opposed to other forms of economic integration. In this regard, we also note that the WTO framework concerning CUs only deals with trade in goods. Trade in services[49] and integration of factors of production (labour and capital) fall outside the scope of all established CU conceptualizations (see Table 1 below) and should for clarity be seen as features of 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'.[50] The main substantial requirement can be found in

[46] Tevini, *supra* note 14, at 625.
[47] Hilpold, *supra* note 30, at 226.
[48] Indeed, 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 Agreement on the European Economic Area [1994] OJ L1/3 constitutes in essence a common market but not a CU. Elsewhere, the FTA foundation of a CU can be shaky. See below the discussion of the EUTCU.
[49] Economic integration concerning trade in services is regulated within the WTO framework under Article V of the General Agreement on Trade in Services (GATS) which is analogous to Article XXIV GATT. Note that evaluation of compliance with Article V:1(b) GATS under paragraph 2 thereof can take into account the 'wider process of economic integration or trade liberalization among the countries concerned'. Such a criterion does not exist in Article XXIV GATT which focuses narrowly on trade in goods.
[50] Paragraph 2(c) Enabling Clause; The Enabling Clause is a part of the GATT 1994, see paragraph 1(b)(iv) GATT 1994.

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.[51] The formation of a CU among developing countries is subject to considerably less stringent requirements than found in Article XXIV GATT, as is clear from Table 3 below.[52]

4. Notification and review

Article XXIV:7 GATT requires WTO members to notify the WTO of their intention to form customs unions. The Transparency Mechanism for Regional Trade Agreements (RTA Transparency Mechanism) requires Members to notify their new RTAs no later than at the moment of its ratification and before preferential treatment is applied. Parties must indicate under which provisions of WTO Agreements they are notifying.[53] The Committee on Regional Trade Agreements (CRTA)[54] then reviews the compatibility of the proposed agreement with the constituent members' WTO obligations. Mavroidis interprets the notification requirement as reflecting that the burden of proof to show WTO consistency lies with the customs union's members.[55] The notification requirement does not entail a requirement of authorisation.[56]

Table 1: CUs notified under Article XXIV GATT

Customs Union	**Date of first notification**	**State Membership**
Caribbean Community ('CARICOM')	14 October 1974	Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat;

[51] Paragraphs 3(b) and (c) Enabling Clause contain two more requirements, but neither of them add substantive conditions.
[52] Van den Bossche and Zdouc, *supra* note 14, at 688.
[53] In the very recent *Brazil – Taxation* dispute, the panel found that paragraph 4(a) of the Enabling Clause does not permit notification of a measure adopted under a specific provision of the Enabling Clause to also serve notification under another provision, unless explicitly indicated in the notification. Brazil was unable to justify an internal tax reduction among MERCOSUR members as it did not properly notify under paragraph 4 of the Enabling Clause. Brazil did not notify any of the preferential arrangements under paragraph 2(b) and those that were notified under paragraph 2(c) did not sufficiently relate to the internal tax reductions. A dissenting opinion on this last point was recorded. See Panel Report, *Brazil - Taxation*, WT/DS472/R, WT/DS479/R (2017), paras. 7.1069-7.1131.
[54] The CRTA was established by the WTO General Council on 6 February 1996; WTO Decision of 6 February 1996, 'Committee on Regional Trade Agreements', WT/L/127, 7 February 1996; Decision-making is done by consensus; WTO Committee on Regional Trade Agreements, 'Rules of Procedure for the Committee on Regional Trade Agreements', Adopted by the Committee on Regional Trade Agreements on 2 July 1996, WT/REG/1, 14 August 1996.
[55] Petros Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)' in *Journal of World Trade* 2006, vol. 40, no. 1, 191
[56] Gabrielle Marceau and Cornelis Reiman, 'When and How is a Regional Trade Agreement Compatible with the WTO?' in *Legal Issues of Economic Integration* 2001, vol. 28, no. 3, p. 311.

		Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago
Central American Common Market ('CACM')	24 February 1961	Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; Panama
Eurasian Economic Union ('EAEU')	12 December 2014	Armenia; Belarus; Kazakhstan; Kyrgyz Republic; Russian Federation
European Union ('EU')	24 April 1957	EU28[57]
EU-Andorra CU	23 February 1998	EU28; Andorra
EU-San Marino CU	24 February 2010	EU28, San Marino
EU-Turkey CU ('EUTCU')	22 December 1995	EU28; Turkey
South African Customs Union ('SACU')	25 June 2007	Botswana; Lesotho; Namibia; South Africa; Swaziland

The notification requirement for preferences under the Enabling Clause can be found in paragraph 4(a), requiring a notification to the contracting parties and to 'furnish them with all the information they may deem appropriate relating to such action'.[58] The Transparency Mechanism for Preferential Trade Agreements does not apply to preferences under paragraph 2(c). Customs unions under the Enabling Clause must therefore be notified in accordance with the RTA Transparency Mechanism.[59] It leaves considerable leeway for developing Members to notify their customs union under the Enabling Clause, rather than Article XXIV GATT 1994, which has the consequence of bypassing the strict requirements of the latter.

Table 2: CUs notified under the Enabling Clause

Customs Union	**Date of first notification**	**State Membership**
Andean Community ('CAN')	1 October 1990	Bolivia; Colombia; Ecuador; Peru
Common Market for Eastern and Southern Africa ('COMESA')	4 May 1995	Burundi; Comoros; DR Congo; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libyan Arab Jamahiriya;

[57] Austria; Belgium; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovak Republic; Slovenia; Spain; Sweden; United Kingdom; Turkey.
[58] These notifications are made to the Committee on Trade and Development.
[59] WTO, 'Transparency Mechanism for Preferential Trade Agreements', General Council Decision of 14 December 2010, WT/L/806, 16 December 2010, para. 1 and footnote 1; See also WTO Committee on Trade and Development, 'Note on the Meeting of 4 December 2007', WT/COMTD/M/67, 31 January 2008, paras. 47-49.

		Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan; Swaziland; Uganda; Zambia; Zimbabwe
East African Community ('EAC')	9 October 2000	Burundi; Kenya; Rwanda; Tanzania; Uganda; South Sudan
Economic and Monetary Community of Central Africa ('CEMAC')	21 July 1999	Cameroon; Central African Republic; Chad; Congo; Equatorial Guinea; Gabon
Economic Community of West African States ('ECOWAS')	6 July 2005	Benin; Burkina Faso; Cabo Verde; Côte d'Ivoire; Ghana; Guinea; Guinea-Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; The Gambia; Togo
Gulf Cooperation Council ('GCC')[60]	3 October 2006	Bahrain, Kingdom of; Kuwait, the State of; Oman; Qatar; Saudi Arabia; United Arab Emirates
Southern Common Market ('MERCOSUR')	5 December 2006	Argentina; Brazil; Paraguay; Uruguay; Venezuela[61]
West African Economic and Monetary Union ('WAEMU')	27 October 1999	Benin; Burkina Faso; Côte d'Ivoire; Mali; Niger; Senegal; Togo; Guinea Bissau

Double notification has occurred, where Members often first notify to the Committee on Trade and Development before subsequently notifying to the RTA Committee.[62] An interesting example of an inverse change in notification can be found in the case of the Gulf Cooperation Council, originally done under Article XXIV and later changed to a notification under the Enabling Clause.[63]

[60] The GCC was originally notified under Article XXIV GATT.
[61] Venezuela's membership of MERCOSUR is currently suspended.
[62] This was for example done for the Memorandum of Understanding on Closer Relations between Bolivia and the Southern Common Market Agreement (MERCOSUR) and the Common Effective Preferential Tariffs (CEPT) scheme for the ASEAN Free Trade Area (AFTA); respectively WTO, 'Memorandum of Understanding on Closer Relations between Bolivia and MERCOSUR', Communication from the Republic of Bolivia, WT/COMTD/4, 1 September 1995; and WTO, 'ASEAN Preferential Trading Arrangements', Information submitted by the ASEAN Members, WT/COMTD/3, 11 August 1995.
[63] As explained in a communication from Saudi Arabia to the CRTD: *"Although the GCC Agreement was initially notified under GATT Article XXIV, upon further reflection the GCC decided that it would be more appropriate to notify it under the Enabling Clause, a provision that is designed to facilitate trade among developing countries. In*

The review by the CRTA should be critically appraised. Its inefficiency is based on the requirement of consensus, leading to an almost complete lack of decisions on the WTO consistency of RTAs. As noted in the Analytical Index, in the early years of the GATT the examination of agreements notified sometimes led to the adoption of a Declaration or Decision attesting to their GATT consistency.[64] However, this practice was quickly abandoned, with only a few exceptions occurring in the last few decades. The most noteworthy exception in the context of the present research is CARICOM.[65] Additionally, RTAs can also be reviewed by the Dispute Settlement Body (DSB).[66]

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'.[67] He defined a 'perfect CU' as meeting three conditions: '(i) the complete elimination of tariffs as

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other words, while the Agreement qualifies under both the general provision of Article XXIV and the specific provision of the Enabling Clause, the GCC members determined that it would be logical to change the notification to the more specific provision." WTO Committee on Trade and Development, 'Gulf Cooperation Council Customs Union – Saudi Arabia's Notification (WT/COMTD/N/25)' Communication from Saudi Arabia, WT/COMTD/66, 18 July 2008, p. 1-2. The original and changed notification can be found respectively under WT/REG222/N/1 and WT/COMTD/N/25.

[64] Analytical Index of the GATT, available at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art24_e.pdf, page 817. See also Petros Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)' in *Journal of World Trade* 2006, vol. 40, no. 1, 193 and 198.

[65] The conclusion of that Working Party report notes that the agreement does not raise barriers to trade with third countries, nor discriminates. *"It was understood that the Treaty establishing the Caribbean Community and Common Market would in no way be considered as affecting the legal rights of contracting parties under the General Agreement"*. See GATT, 'Report of the Working Party on the Caribbean Community and Common Market', L/4470, 2 February 1977, paras 13 and 14.

[66] See paragraph 12 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade; Appellate Body Report, *Turkey – Textiles*, para. 60. The panel had earlier found that whereas specific measures that are adopted at the formation of the customs union clearly fall within the ambit of the DSB, the overall assessment of a customs union should be undertaken by the CRTA; Panel Report, *Turkey – Textiles*, para. 9.53; Mavroidis additionally points out that this twofold opportunity of review might lead to different conclusions by both bodies. Petros Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)' in *Journal of World Trade* 2006, vol. 40, no. 1, 195-96. Interesting to note is the fact that the panel in *US – Line Pipe* found that the information submitted by the NAFTA parties was sufficient to make a prima facie case that NAFTA was WTO consistent, also considering the fact that the complainant (Korea) did not effectively refute this (Korea's rebuttal was hinged upon the lack of final decision by the CRTA). See Panel Report, *US – Line Pipe*, paras. 7.143-7.144. The AB overturned this decision on the basis that a finding on the relationship between Article 2.2 Safeguards Agreement and Article XXIV was not required, see Appellate Body Report, *US – Line Pipe*, para. 199; see also Gabrielle Marceau and Cornelis Reiman, 'When and How is a Regional Trade Agreement Compatible with the WTO?' in *Legal Issues of Economic Integration* 2001, vol. 28, no. 3, p. 312 and 320.

[67] Viner, *supra* note 13, at 4.

between the member territories; (ii) the establishment of a uniform tariff on imports outside the union; (iii) apportionment of customs revenue between the members in accordance with an agreed formula'.[68] Since Viner's analysis of the economics of CUs, economic literature has repeatedly pointed to the fact that regional integration both creates and diverts trade.[69] 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, as full liberalization will at least also incorporate trade creating preferences.[70] Consistent with his economic theory, Viner was pleased to see that under the post-war international trading system the formation of CUs represented the exception to the non-discrimination principle and not the norm.[71]

D. Conceptual Comparison

Table 3 below shows the various conceptual elements present in different definitions of CUs. Even though the CU requirements as found in Article XXIV GATT quite clearly draw on historical definitions, Table 3 allows observation of some differences between the economic, historical and GATT definitions of a CU.

[68] *Ibid.*, at 5.
[69] Mavroidis, *supra* note 27; M. Schiff and A. Winters, *Regional integration and development* (2003); Winters, *Regionalism versus multilateralism*, World Bank Policy Research Working Paper 1687 (1996), available at http://documents.worldbank.org/curated/en/881921468739473983/Regionalism-versus-multilateralism (last visited on 28 June 2018); WTO, *World Trade Report 2003* (2003), available at: https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf (last visited on 28 June 2018).
[70] Viner, *supra* note 13, at 51 and Mathis *supra* note 14, at 114.
[71] Viner, 'Conflicts of Principle in Drafting a Trade Charter' 25 *Foreign Affairs* (1947) 612, at 616.

Table 3: Internal and external requirements in various definitions

	Internal requirements			**External requirements**				
	Elimination internal duties	Elimination other restrictive regulations of commerce	Apportionment of customs revenue (agreed/fixed formula)	Uniform external tariff	Uniform application of other regulations of commerce	Unity of the customs frontiers and of the customs	Not raise barrier to trade for third countries	Joint negotiation of future preferential 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 suffices	‘in accordance with criteria or conditions prescribed by the contracting parties’	X	X	X	X	✓	X
Zollverein/1931 AG CU	✓	only in 1931 AG CU	✓	✓	✓ (‘customs law’)	✓	X	✓

First, compared to earlier definitions of CUs, WTO law explicitly allows both less than complete elimination of tariffs and less than uniform tariffs on imports into CU, due to the 'substantially all trade' qualification on both the internal and external requirements. Although the 'substantially all trade' requirement in Article XXIV GATT might accommodate practical issues and sovereign sensitivities, it is economically irrational from an external welfare perspective (that is, the welfare of non-parties to the regional integration), as it allows a degree of 'pick-and-choose' integration likely to result in trade diversion.[72] Even so, WTO law, consistent with its purpose to foster global trade, is the only conceptual source concerned with impact of CU formation on third countries.

Second, Article XXIV requirements go further than historical and economic conceptualizations, as other regulations of commerce must be eliminated both internally and externally. It should be noted, however, that based on external welfare, CUs that substantially eliminate internal barriers are generally the most trade distorting forms of regional integration.[73] From an economic perspective, it is therefore difficult – if not impossible – to reconcile the internal requirements with the obligation not to raise barriers to third parties. Already in 1963 Dam called for an innovative interpretation of the requirement 'not to create barriers to trade of third countries' as a trade creation standard.[74] This would go far beyond what was envisaged by the contracting parties when negotiating Article XXIV, but the suggestion aptly illustrates the juxtaposition of law and economics in this regard. Overall, it can be stated that the requirements found in Article XXIV only partially contribute to avoiding trade diversion in the process of regional integration, at least as far as static effects are concerned.[75] In order to eliminate (or decrease) the risk of trade diversion, qualitative internal liberalization would have to be limited[76] and external tariffs could not merely remain at the same level but should rather be reduced, so as to keep trade with non-CU members

[72] See *supra* note 53 and accompanying text.
[73] Mathis, *supra* note 14, at 103, 111 and 114.
[74] Dam, *supra* note 30, at 663.
[75] Whether dynamic effects, such as economies of scale achievable in the CU, mitigate or aggravate static effects on non-members has been contested but these are in any case beyond the scope of Article XXIV. See Kreinin, 'On the dynamic effects of a customs union', 71 *The Journal of Political Economy* (1964) 193.
[76] Mavroidis, *supra* note 27, at 210; the same can be said for the abolishment of trade remedies within the CU. See Teh, Prusa and Budetta, 'Trade remedy provisions in regional trade agreements' WTO Staff Working Paper ERSD-2007-03 (2007), at 6; A different position is taken by Dam, who clarifies that the elimination of quantitative restrictions among CU members will always lead to a more favourable allocation of the world's resources. Dam, *supra* note 30, at 629.

close to unchanged.[77] Requirements to this effect are not part of Article XXIV GATT, however.

Third, WTO law leaves the apportionment of customs revenue completely to states. Here as well, the approach taken by Article XXIV GATT focuses more on the third-country perspective and is not concerned with the internal dynamics of the CU.[78] GATT contracting parties avoided dealing with sovereignty-sensitive issues, limiting themselves to requiring substantive liberalization and avoiding detrimental impact on the rest of the world. [79]

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) 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 define internally acceptable arrangements for the purposes of Article XXIV GATT also with respect to PTAs.[80] In contrast, definitions of CUs found in the World Customs Organization (WCO) Revised Kyoto Convention and the Istanbul Convention refer to CUs as unions that have the competence to adopt own regulation and thereby have the competence to accede to the respective conventions.[81] This appears to imply that CUs, according to the WCO, must be organizations with international legal personality capable of binding their members as regards WCO-related areas, including accession to treaties. Historical sources also contain more express language in this regard. Article 24 of the 1833 *Zollvereinigungsvertrag* set out prerequisites for future trade preferences: constituent members of the CU were required to mutually agree to new preferential agreements. Additionally, Article IX of the 1931 Protocol establishing the Austro-German customs regime recognized that even though both governments in principle retained the right to conclude commercial treaties on their own behalf, they were required to ensure

[77] Mavroidis, *supra* note 27, at 190.
[78] Article XXIV thereby also does not try to redistribute the gains of economic integration, which could deter governments from giving up sovereignty in regional integration. Hansen, 'Regional integration: Reflections on a decade of theoretical efforts' 21 *World Politics* (1969) 242, at 257-263; Mathis *supra* note 14, at 110-111; Hosny, 'Theories of Economic Integration: A Survey of Economic and Political Literature' 2 *International Journal of Economy, Management and Social Sciences (*2013) 133, at 147.
[79] The prospect of less freedom in national economic policies deters governments from participating in regional integration. See Hirschman, *A bias for hope: Essays on development and Latin America* (1971), at 22.
[80] Fiorentino, Verdeja and Toqueboeuf, *supra* note 5, at fn. 19.
[81] Article 1(k) of the WCO International Convention on the Simplification and Harmonization of Customs Procedures, as Amended, June 1999 (Revised Kyoto Convention); Article 1(e) of the WCO Convention on Temporary Admission, 26 June 1990 (Istanbul Convention).

that the interests of the other party to the CU were not violated 'in contraction of the tenor and purpose of the CU treaty'. Negotiations were therefore, as far as possible, to be conducted jointly and ratification should have been simultaneous.[82]

3. Customs Union Designs and Issues in Comparative Perspective

Considering the definition of CUs as found in Article XXIV 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 CUs' 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, whether CUs' members are required to harmonize their quantitative restrictions and whether harmonized rules of origin are mandated. More generally, how to deal with trade preferences that pre-exist and future trade preferences remains an important, but unanswered question under WTO law. Allowing for PTAs negotiated by separate CU members can create significant trade deflection – a 'perfect' CU might therefore necessitate a transfer of negotiation competence for future PTAs from the state to the supranational level which is costly from the perspective of state sovereignty.

In an attempt to explore these questions further, we turn in the following analysis to the actual designs 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 GATT.

A. Preliminary Remarks

Although normally CUs are founded by an international treaty – that is a single document – the process of operationalizing a CU usually brings with it more legal complexity. Therefore, despite referring to the various CUs for brevity by their acronym, the CUs in reality tend to consist of a web of international legal instruments of both primary and secondary nature. We focus on the most important provisions in the legal frameworks of the CUs falling within the

[82] 1931 PCIJ Advisory Opinion *supra* note 12, at 50.

remit of the research objectives, fleshed out where appropriate with case law and secondary law.

The analysis is further complicated, not uniquely though, by differences existing between the 'law in books' and the 'law in action'. A number of the economic integration projects under review here have struggled with implementing the, often ambitious, international commitments undertaken by their constituent members. State sovereignty has self-evidently represented an obstacle to economic integration and with CUs impacting a range of state functions – from collection of customs duties to negotiation of trade agreements – member countries have more reasons to violate the principle of *pacta sunt servanda*. On more than one occasion this has resulted in successive treaties being adopted with the same objective of establishing a CU. Nevertheless, all existing CUs continue to have an impact in the real world more or less in line with the legal frameworks governing them. In our analysis, we concentrate primarily on the latter but refer to specific instances of how the international law of CUs performs in practice where relevant.

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

CUs typically do not arise from a clean slate but rather in 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 CUs and compliance with Article XXIV GATT. Divergent preferences allow goods into the territory of a CU 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 impact on domestic industries and competitiveness inside the CU.[83] Moreover, these issues are compounded by the reciprocal advantage from a prior PTA being enjoyed only by the derogating member.

[83] A difference-in-differences econometric analysis of the impact of the EU-Algeria FTA on Turkey (which does not have an FTA with Algeria) has proven the former point empirically. See Dincer, Tekin-Koru and Yaşar,

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 customs union via one CU member or will trade preferences be either removed or extended to all CU members, thereby ensuring that the integrity of the CU is safeguarded?[84]

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 prior trade preferences (in Article I:2 GATT) are in principle not affected but can nonetheless be removed or amended on the basis of negotiations between the affected parties.[85] However, such preferences should not be extended to the parties to the CU who were not original members to these preferential arrangements.[86] The preferences mentioned in Article I:2 (and Annexes A-E) all relate to historical preferences, of which some still exist, while others do not. Because of its express reference to Article I:2, paragraph 9 does not appear to apply to preferences granted in any other context (such as the Enabling Clause).

The working party report on the accession of Portugal and Spain to the EU (then EEC) documented the disagreement on the application of trade preferences.[87] Some delegations noted that the preference 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 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'. Unfortunately, the EU did not elaborate on this statement and we fail to understand the legal basis for the EU's interpretation of Article XXIV. The question of how to deal with pre-

'Costs of a missing FTA: the case of Turkey and Algeria' *Empirica* (2017) 1. The dynamic effects which include impact on competitiveness and investment are more difficult to determine empirically but are widely supported in theory. See Kreinin, *supra* note 75.

[84] 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.

[85] The ad note to Article XXIV:9 GATT clarifies that Article I GATT requires that products imported at preferential rates and later exported to another constituent member of the CU, will be subject to a duty when entering the latter member equal to the difference between the preferential rate and the duty it would have paid upon direct importation into that member.

[86] 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', 20 December 1957, L/778, Annex IV, at para. 19.

[87] GATT, 'Accession of Portugal and Spain to the European Communities – Report of the Working Party', 5 October 1988, L/6405, at para. 18.

existing preferences accorded by one or several constituent members of the CU, remains unanswered. A tense relationship can be observed between the principle of state sovereignty (to decide whether to extend preferences to specific countries) and the integrity of the CUs.

Prior PTAs are additionally protected under general international law on the ground of their anteriority. Without going into the debate about the subject-matter requirement in Article 30 of the Vienna Convention on the Law of Treaties (VCLT), it is well-established in general international law that prior treaty obligations shall, *ceteris paribus*, be given priority if conflicting 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.[88] 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 (hereinafter 'EAEU Treaty') permits members to not only honour their past obligations but to continue granting preferences autonomously on the basis of treaties adopted before the entry into force of the CU agreement. As is customary in many, but not all[89] 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.[90] 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

[88] See Article 30(3) and (4) United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 (VCLT). See also Article 16 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (Draft Articles on State Responsibility). The issue had already been discussed earlier by scholars, notably Wright, 'Conflicts Between International Law and Treaties', 11 *American Journal of International Law* (1917) 566, at 576; Aufricht, 'Supersession of Treaties in International Law', 37 Cornell Law Quarterly (1952) 655, at 656-657. For an overview of subsequent discussions see Orakhelashvili, 'Article 30' in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary*, Volume 1 (2011) 767.

[89] For example, Article 31(1) of the South African CU (SACU) Agreement only allows members to maintain prior trade preferences without requiring any action towards their, even progressive, harmonization. According to Article 31(3) of the same treaty, members are, however, explicitly prohibited from amending existing agreements without the consent of the other members.

[90] The second paragraph of Article 102(1) EAEU Treaty states that members 'shall unify all treaties that imply granting preferences'.

implores member states to 'take all appropriate steps' to eliminate inconsistencies and be mindful of the benefits of EU membership when applying prior treaties.[91] Harmonization of preferences can also be progressive, as in the EU-Turkey CU (EUTCU) which furthermore explicitly mentions that Turkey must align itself with both the EU's autonomous regimes and preferential agreements.[92]

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, which can be very difficult to achieve in practice despite CUs often containing compulsory language on this point, 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 GATT: the difference between a preferential external tariff applied by one member is levied when (and if) the good is transhipped to another member of the CU.[93] This remedy is, however, 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 which rests on harmonized sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBTs) – only the EU and the EAEU have managed to do away with internal customs checks on borders between members, yet the latter has already experienced during its short existence the re-imposition of de facto customs checks in connection with Russian retaliatory sanctions on the EU and problems in Kazakh-Kyrgyz

[91] 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* [2000] ECR I-05215 (ECLI:EU:C:2000:358), at para. 49.

[92] Article 16(1)(2) Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ C 11/2 (hereinafter 'Decision 1/95').

[93] As an example, Article 31(4) of the SACU Agreement spells out this solution explicitly. The difference between the normal and the preferential duty is paid into the Common Revenue Pool. A compensatory levy is also part of the EU-Turkey CU (Article 16(3) of Decision 1/95) 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.

relations.[94] 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 to determine the origin of goods circulating within the CU and whether they have received non-harmonized preferential treatment by any of the members.[95] ROOs are discussed further below.

C. Preferential Trade Agreements (PTAs) and Common Commercial Policy (CCP)

It is of course not only preferential treatment conferred in the past which is liable to disrupt CUs' integrity. There are very few countries in the world which 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).[96]

As regards the requirement of a CCP in Article XXIV:8(a)(ii), the WTO AB concluded that the threshold of a 'high degree of 'sameness'' is not met by having comparable trade regulations having similar effects.[97] It has been observed that this requirement has been arbitrarily filled in by CUs members, resorting to deep economic integration when it suited them best.[98] Due to the difficulty of quantifying and aggregating 'other regulations of commerce', the Article XXIV Understanding provides that examination of individual

[94] The EU has been imposing sanctions on Russia since its military interference in Ukraine and the annexing of Crimea in 2014. Russia retaliated by banning the import of certain EU goods (which?). A case brought by the EU is currently pending at the WTO. In the meanwhile, Belarus became a conduit for the transhipment of EU (agri?) goods into Russia, relying on the absence of customs controls between the two members of the EAEU. In order to enforce its import ban, Russia stationed veterinary and phytosanitary inspection just next to the Belarussian-Russian border, so as to keep up the appearance of compliance with the free movement rules of the EAEU Treaty. The Kazakh-Kyrgyz border clogged up in October 2017 after Kazakhstan tightened security and customs checks following the escalation of a long-standing row between both countries.

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

[96] 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 Article XXIV:8(a)(ii).

[97] AB Report, *Turkey – Textiles*, *supra* note 25, paras 49-50; see also Panel Report, *Turkey – Textiles*, *supra* note 41, para. 9.151.

[98] This remark was made by the United States in the assessment of the CU between the European Communities and Turkey. See WTO Committee on Regional Trade Agreements, 'Examination of the CU between the European Communities and Turkey – Note of the Meeting of 1 October 1997', 4 December 1997, WT/REG22/M/2, at para. 12.

measures, regulations, products covered and trade flows affected may be required.[99] This is an economic test, based on the extent of trade-restrictiveness of the *effect* of trade policies before and after formation of the CU.[100]

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.[101] In their WTO Discussion Paper, Fiorentino, Verdeja and Toqueboeuf note that the requirements of a CU in Article XXIV in principle do not allow CUs members to negotiate preferential agreements with third parties on their own, as this would disrupt the functioning of the CU.[102] 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.[103] The Council of the EU – the institution bringing together all EU member states – fixes the common external tariff by a qualified majority vote on a proposal of the European Commission.[104] The chapter on CCP is located elsewhere in the TFEU than the CET but the policy is expressly linked to the establishment of a CU.[105] The EU is responsible for modifications of tariff rates, conclusion of agreements relating to trade in goods and services, commercial aspects of intellectual property, foreign direct investment, export policy and trade remedies.[106] 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

[99] See paragraph 2 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
[100] Panel Report, *Turkey – Textiles*, *supra* note 41, para. 9.120; AB report, *Turkey – Textiles*, *supra* note 25, para. 55; Van den Bossche and Zdouc, *supra* note 14, at 684.
[101] Kitamura, 'Economic theory and the economic integration of underdeveloped regions' in M. S. Wionczek (ed.) *Latin American Economic Integrations* (1966) 42; Hosny, *supra* note 78, at 146.
[102] Fiorentino, Verdeja and Toqueboeuf, *supra* note 5, fn. 19.
[103] See Article 3(1)(e) TFEU. According to Article 2(1) TFEU, EU member states are only allowed to implement EU acts in areas of the EU's exclusive competence. The adoption of legally binding acts requires first empowerment by the EU, thus openly signalling the transfer of state competence to the EU.
[104] See Article 31 TFEU (voting majority applied in accordance with Article 16(3) TEU). An example of a different CU where the CET is not set by unanimity is WAEMU (the rule is two thirds majority). See Article 78 of the 2003 Revised Treaty.
[105] Article 206 TFEU.
[106] Article 207(1) TFEU.

power transfer to the EU. The procedures for realizing the CCP paint a similar picture of departure from Westphalian sovereignty. Both legislative measures and international agreements are adopted jointly by the European Parliament and the Council through a qualified majority vote in the Council (meaning that member states cannot veto the CCP on their own).[107] Furthermore, the European Commission recommends to the Council to open trade negotiations with third countries and, if granted, is subsequently in charge of representing the EU. Progress in the trade negotiations conducted by the Commission is regularly reported on both to the Trade Policy Committee, consisting of member states, and the European Parliament.[108]

The creation of a supranational CCP where 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 such supranationalization of trade policy is unacceptable; here the EU again proves an exception, although some other CU agreements also have the ambition to negotiate PTAs jointly. For example,[109] Article 78(3)(a)(ii) of the Revised Treaty Establishing the Caribbean Community and Common Market (hereinafter 'Revised Chaguaramas Treaty') requires CARICOM members to employ common negotiating strategies in the development of 'mutually beneficial trade agreements' with third countries.[110] While this provision does not bind CARICOM members to joint negotiation of PTAs in all circumstances, it forms the bedrock of the current legal framework for recourse to the Office of Trade Negotiations (OTN).[111] The basic governance of trade negotiations is not too dissimilar from the EU: the OTN harbours the relevant expertise on trade and it can be called upon to lead negotiations with third countries on behalf of CARICOM. It is held accountable to the members in the CARICOM Council for Trade and Economic Development which oversees the work of the OTN and makes decisions by unanimity. The OTN does not typically negotiate alone but

[107] Article 207(2) and (4) TFEU. Unanimity is required, however, when an international agreement concerns certain aspects of trade in services, commercial aspects of intellectual property, foreign direct investment, linguistic aspects of trade in cultural and audiovisual services, and trade in social, education and health services.
[108] Article 207(3) TFEU.
[109] For another example, see Article 33(3) EAEU Treaty.
[110] Article 80(2) of the Revised Chaguaramas Treaty reiterates the obligation: 'The Community shall pursue the negotiation of external trade and economic agreements on a joint basis in accordance with principles and mechanisms established by the Conference'.
[111] The OTN is integrated into the CARICOM Secretariat.

rather as part of a college of negotiators which can additionally comprise officials of CARICOM members and other actors according to needs.

However, CARICOM, as well as some other CUs,[112] do not entirely prohibit their members from concluding PTAs independently.[113] This is a clear departure from the supranational EU model where trade agreements are an exclusive prerogative of the Union, marking a significant difference in the degree of encroachment on state sovereignty. In CARICOM, member states can negotiate agreements autonomously but must ensure compatibility with CARICOM obligations and the agreements must be certified by the CARICOM Secretariat prior to their conclusion and, if involving tariff concessions, approved by the intergovernmental Council for Trade and Economic Development.[114] Somewhat closer to the EU model is the EAEU Treaty which makes the CCP de facto a matter for the Union. The common external tariff is set by the Eurasian Economic Commission which also deals with autonomous trade preferences and trade remedies.[115] The Commission is, however, more intergovernmental, including rotating chairmanship, than the European Commission and, in any case, the members draw up a list of 'sensitive goods' the regulation of which requires approval of heads of states meeting in the Supreme Eurasian Economic Council.[116] Similarly to the EU, trade agreements are a prerogative of the Union but member states can join their signature depending on which competences are implicated in the international agreement.[117] This is known as 'mixed agreements' in EU law.[118] Negotiation, signing and conclusion of

[112] See, for example, Article 37(4) of the Protocol on the establishment of the East African Customs Union which also contains a consultation procedure for separate trade agreements. See also Article 31(3) of the SACU Agreement which prohibits members from negotiating, concluding and amending PTAs with third countries without the consent of the other SACU members.

[113] Compliance with the CET is required at all times though, even if implementation is proving a challenge. When Guyana blatantly disrespected the CET on cement without having the required approval of COTED and was brought to the Caribbean Court of Justice on that account, the Court used the opportunity to emphasize that the CET is a 'fundamental pillar in the establishment of the Caribbean Single Market and Economy' and ordered Guyana to bring its applied tariff rates in line with the CET. See *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana* [2009] CCJ 5 (OJ), 20 August 2009, paras 5 and 45.

[114] Article 80(3) and (4) of the Revised Chaguaramas Treaty. According to Article 80(5) of the same, Belize enjoys a special regime allowing it to conclude agreements with neighbouring economic groupings, as long as any favourable treatment is also extended to CARICOM members. In accordance with Article 80(a) of the Treaty, all CARICOM members are moreover under a general obligation to coordinate their trade policies.

[115] Article 45(1) and 48(2) EAEU Treaty

[116] Article 45(2) EAEU Treaty. A special category of 'sensitive items' with high rates is also part of the tariff structure of, among others, the EAC. See Schedule 2 of East African Community Common External Tariff 2017, Annex 1 to the Protocol on the Establishment of the East African Community Customs Union.

[117] See Article 33(3) EAEU Treaty

[118] See, for example, Christophe Hillion, Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

international agreements are in the hands of the Supreme Council but it can delegate negotiating to the Commission.[119]

While the power balance within the EAEU is tilted towards its biggest, most powerful and prosperous member (Russia), the formal sovereignty of its member states is at the forefront of the integration project which is permeated by intergovernmentalism.[120] SACU is another CU where one member (South Africa) is by far the most dominant both economically and politically, which has impeded the implementation of common policies and institutions on trade negotiations and tariffs.[121] Such de facto lopsidedness is, however, accompanied by *de lege* imbalance between, on the one hand, the EU and, on the other, the parties to its three separate CU agreements: Turkey, Andorra and San Marino. In all three CUs the countries concerned are under an obligation to align themselves with the EU external trade regime without obtaining any decision-making powers to influence it.

In the context of the CCP of the EU's 'external' CU's one can find both innovative solutions and seemingly intractable challenges. Article 7 of both 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.[122] 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,[123] 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 which 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

[119] Article 7(2) and Article 12(15) EAEU Treaty

[120] See Article 3 EAEU Treaty which lists 'respect for the universally recognised principles of international law, including the principles of sovereign equality of the Member States and their territorial integrity' as the first 'basic principle of functioning of the Union'. The second and third principles similarly include 'specific features of political structures' and 'respect for national interests of the Parties'. As a sign of its strongly intergovernmental character, one of the main legal instruments of the EAEU Treaty framework are international treaties concluded between the members of the EAEU.

[121] Richard Gibb and Karen Treasure, 'SACU at centenary: theory and practice of democratising regionalism' (2011) 18(1) South African Journal of International Affairs 1-21; P. Draper and N. Khumalo, 'The Future of the Southern African Customs Union', Trade Negotiations Insights, 8, 6 (2009). South Africa accounts for the vast majority of total SACU GDP and trade.

[122] Article 7 of the EU-Andorra CU contains a more general obligation, while the same article of the EU-San Marino CU spells out more explicitly the various aspects on which alignment must take place.

[123] The declaration states: 'Where the scale of trade flows so warrants, the Community is prepared to negotiate on behalf of, and for, the Republic of San Marino with countries with which it has concluded preferential agreements for an appropriate form of recognition of equivalent treatment for products originating in San Marino and products originating in the Community'.

declaration committing Canada to accept products originating from Andorra and San Marino which are covered by the respective CUs (not all goods fall under the CUs) as eligible for the EU-Canada FTA treatment.

While landlocked European microstates 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,[124] especially as the ever contested prospect of Turkey acceding to the EU has come to be seen as increasingly unrealistic.[125] 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 GSP), and more without a seat at the table.[126] Not only do these provisions prescribe Turkish alignment with EU laws and policies, Article 54 of Decision 1/95 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.[127] The EU-Turkey CU is capped off with a clause prescribing a conforming interpretation with ECJ case law as regards substantively identical provisions in the CU Decision 1/95 and the EU Treaties. This can occasionally play to Turkey's trade interests, as the considerable openness of intra-EU trade should be transplanted into the EU-Turkey CU.[128]

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 different trade

[124] See, for example, 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.

[125] 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.

[126] Ç. Nas and Y. Özer, *Turkey and EU Integration: Achievements and Obstacles* (2017), Ch 2. See Articles 12, 13, 14 and 16 Decision 1/95. It should be added that Turkey was progressively adjusting itself with the EU external tariff already prior to the signing of Decision 1/95, in line with Article 17 of the Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force [1972] OJ L293/3. The objective to establish a CU is even older, dating back to Article 2(2) of the Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) [1973] OJ C113/2.

[127] See Articles 55, 56, 59 and 60 Decision 1/95. Nas and Özer, *supra* note 126.

[128] See, for example, the interpretation of Article 66 in *Istanbul Lojistik v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* [2017] ECLI:EU:C:2017:770.

interests, it is far from certain that all third countries which are parties to a PTA with the EU have equally interest to conclude an agreement with Turkey, let alone on the same terms. As a result, there are a number of EU PTAs which have no equivalent in the Turkish external trade regime (see Table 4 below). Such discrepancies impede internal CU trade between the EU and Turkey on account of the need to avoid transhipment of goods on which preferential treatment is not aligned through customs formalities, controls and surveillance mechanisms (see the dilemmas in safeguarding integrity of CUs in the preceding subsection).[129] 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.[130]

Several remedies – short of EU membership – have been suggested to balance the asymmetry in the EUTCU and to make alignment of CCP measures more effective. The EU could, for example, 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'.[131] 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 …'. Given that Albania is one of Turkey's foremost partners on the European continent, the presence of the clause is hardly a testimony of the general viability of this solution for the conundrum of aligning the CCP in the EUTCU.[132] A legally softer alternative has been taken, for example, in the EU-Korea FTA negotiations, whereby the two parties appended to the

[129] The economic costs of a missing FTA have been calculated, among others, in the case of Algeria with which only the EU signed an FTA. See Dincer, Tekin-Koru and Yaşar, *supra* note 83.
[130] See Article 17(1) of 2006/646/EC: Decision No 1/2006 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 [2006] OJ L265/18 (Decision 1/2006).
[131] Bülbül and Orhon, *supra* note 124, are sceptical of such a clause but nonetheless regarded it a necessity in the context of an EU-US FTA.
[132] Curiously, although negotiations on the Albania-Turkey FTA started after the signing of the EU-Albania Stabilisation and Association Agreement, the agreement with Turkey entered into force before the agreement with the EU.

agreement a joint declaration on Turkey in which the EU invited Korea to enter into negotiations with Turkey and Korea pledged to do so 'based on the result of a joint feasibility study'.[133] An FTA similar (with some differences for example in origin certification) to the EU-Korea FTA was subsequently signed between Turkey and South Korea – the agreement became effective on 1 May 2013. 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.

[133] A more lukewarm declaration can be found in the EU-Algeria Euro-Mediterranean Association Agreement wherein Algeria merely took note of the EU's plea to conclude a treaty with Turkey and pledged to 'consider this matter when the time comes'. So far, no FTA has been signed between Turkey and Algeria, at some economic cost to Turkey (see *supra* fn. 83).

Table 4: Comparison of the EU's and Turkey's PTAs negotiated since 1990 (based on Bülbül and Orhon 2014 and updated)

	EU		Turkey	
Third country/bloc	**Start of negotiations**	**Year of entry into force**	**Start of negotiations**	**Year of 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[134]	-[135]	-
Central America	2008	2013[136]	-	-
Chile	2000	2003	2008	2011
Colombia	2009	2013[137]	2011	-
Croatia	2000	2005	2000	2003
Ecuador	2014	2017[138]	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	-[139]	2014	-
Jordan	1995	2002	2005	2011
Kosovo	2013	2016	2012	-[140]
Lebanon	1995	2006	2003	-[141]
Macedonia	2000	2004	1998	2000
Malaysia	2010[142]	-	2010	2015
Mauritius	2004	2012[143]	2009	2013
Mercosur	2010[144]	-	2008	-

[134] Not yet ratified but applied provisionally since 2017.
[135] Exploratory talks were held in 2010.
[136] Not yet ratified but applied provisionally since 2013.
[137] Not yet ratified but applied provisionally since 2013.
[138] Not yet ratified but applied provisionally since 2017.
[139] Negotiations finalized in 2017 but FTA not yet concluded.
[140] Signed in 2013 but still subject to Kosovar ratification.
[141] Turkey signed an FTA with Lebanon in 2010 but the latter has still not ratified it.
[142] Negotiations put on hold in 2012.
[143] An interim EPA was signed between the EU and Mauritius, Madagascar, the Seychelles and Zimbabwe in 2009 and has been applied provisionally since 2012.
[144] Originally launched in 2000 but suspended in 2004 and again paused in 2012 before being revived in 2016.

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[145]	2013	-
Serbia	2005	2010	2007	2010
Singapore	2010	-	2014	2017
South Africa	1995	2004[146]	-	-
South Korea	2007	2011	2010	2013
Syria	1995	-	2004	2007
Thailand	2013	-[147]	2017	-
Tunisia	1995	1998	2002	2005
Ukraine	2007	2017	2007	-
US	2013	-	-	-
Vietnam	2012	-[148]	-	-

Finally, CUs notified under the Enabling Clause have equally not shied away from harbouring ambitions of concluding PTAs jointly.[149] One of the more cohesive Enabling Clause CUs, the East African Community (EAC), sets 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'.[150] The EAC has negotiated as a bloc of countries with the EU, US 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 CU which furthermore enables members to conclude agreements individually subject to a consultative procedure.[151] 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. The GCC has concluded since trade agreements with EFTA

[145] Not yet ratified but applied provisionally since 2013.
[146] Provisionally applied since 2000.
[147] Negotiations were interrupted due to a military coup in 2014.
[148] Agreement on text was reached in 2016 but the FTA has not yet been officially concluded.
[149] Although it should be also said that, for example, the European Free Trade Association (EFTA), too, negotiates trade agreements with third countries jointly but it is not a CU. See Article 43(1)(g) of the revised Convention establishing the European Free Trade Association, signed on 21 June 2001 (EFTA Convention).
[150] Article 37(1) of the Protocol on the establishment of the East African Customs Union (hereinafter 'EAC CU Protocol').
[151] *Ibid.*, Article 37(4).

and Singapore.[152] However, the very future of the GCC is at the moment in question as Qatar has been placed under sanctions in 2017 by the other members led by Saudi Arabia.[153]

D. Rules of Origin (ROOs)

Article XXIV:8(a)(i) 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.[154] In light of such flexibility, 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.[155] A high level of institutionalization of international cooperation within the EU allows members to safeguard the integrity of the CU – as far as origin of goods is concerned – solely at the external borders of the Union. 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.[156] 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

[152] Note, however, that Bahrain derogated from the collective negotiation mechanism when it concluded an individual FTA with the US (entered into force 11 January 2006).
[153] The dispute has been submitted to the WTO by Qatar. See WTO, Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights – Request for Consultations by Qatar, 4 August 2017, WT/DS528/1.
[154] 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. Rules of origin are most often mentioned in the context of FTAs and their differing external tariff levels; see Gantz *supra* note 14, at 243; James 'Rules of Origin and Rules of Preference and the World Trade Organization: The Challenge to Global Trade Liberalization' in P.F.J. Macrory, A.E. Appleton and M.G. Plummer, *supra* note 14, at 274; Matsushita *et al.*, *supra* note 14, at 524; WTO Committee on Regional Trade Agreements, 'Synopsis of "systemic" issues related to regional trade agreements – Note by the Secretariat', 2 March 2000, WT/REG/W/37, para. 43.
[155] With some exceptions, the EAEU Treaty also abolishes ROOs internally and harmonizes them externally. See Article 37 EAEU Treaty.
[156] EU law uses the term 'Union goods' to refer to both originating goods and imported goods released for free circulation following customs clearance. See Article 5(23) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L269/1.

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.[157]

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)[158] and CARICOM.[159] 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.[160] A decision of the MERCOSUR Council 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.'[161]

In GATT working party reports dealing with FTAs, the importance of rules of origin and their ramifications were extensively discussed. It has been stated that rules of origin are necessary in an FTA in order to prevent trade deflection and 'not to limit the scope of free trade nor create obstacles to third country exports'.[162] Nevertheless, it was also noted that ROOs in some instances can be so complex and cumbersome that they create barriers to trade

[157] Article 16(2) Decision 1/95.
[158] Imperfect implementation of a string of regularly renewed commitments to a Central American CU make the abolishment of internal ROOs difficult. See Cas, Swiston, and Barrot, 'Central America, Panama, and the Dominican Republic: Trade Integration and Economic Performance' IMF Working Paper No. 12/234 (2012), Annex II. See also Article 5 of Protocol to the General Treaty on Central American Economic Integration, signed 29 October 1993 (Guatemala Protocol).
[159] See Article 84 of the Revised Chaguaramas Treaty.
[160] See, for example, Article 14 EAC CU Protocol and the EAC Customs Union Rules of Origin adopted thereunder.
[161] Decisions of the Council of Common Market, MERCOSUR/CMC/DEC. Nº 06/94: Mercosur origin system.
[162] GATT, 'Agreement between the EFTA Countries and Spain, Report of the Working Party', 24 October 1980, L/5045, para. 28; Whereas 'bilateral cumulation' ('materials originating in one country can be considered as materials originating in the other partner country') is a feature of all PTAs, some include 'diagonal cumulation' (arrangement under which 'all participating countries agree bilaterally that in all PTAs concluded among themselves materials originating in one country can be considered to be materials originating in all the other countries.') as well; see World Trade Report 2011, *The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (WTO, 2011), p. 109. See also GATT, 'Report of the Working Party on the Free-Trade Agreement between Canada and the United States', 31 October 1991, L/6927, at paras 35 and 37.

detrimental to third country exporters, and that they can have the same effect as reverse preferences, leading to trade deflection.[163] The World Bank has pointed out in the context of the EUTCU that the situation is, however, different for CU trade, which does not require rules of origin thanks to a CCP.[164] Whereas FTAs concluded by the EU with third countries mandate observance of stringent ROOs, the EU itself, as well as the EU-Turkey CU, eschew ROOs from the internal trade regime.

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 certificates' – the so-called 'A.TR' ('Admission Temporaire Roulette') certificates – and accompanying exporter declarations which testify to the originating status of the shipped goods.[165] The A.TR certificate is issued by designated authorities in the exporting state (be it an EU member state or Turkey) and must ordinarily be presented to the customs authorities of the importing member of the CU at the time of importation.[166] The exporter is under the obligation to submit all appropriate documents proving the status of the goods if requested.[167] The issuing customs authorities are in charge of verifying, by 'taking any steps necessary', the status of the goods and the fulfilment of all requirements of the EUTCU. In doing so, the customs authorities can call for any evidence and conduct inspections of the exporter's accounts, as well as 'any other check considered appropriate'.[168] Thus, although no specific local content requirements are present

[163] See the references in footnote 46 of the Analytical Index of the GATT, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art24_gatt47.pdf (last visited on 28 June 2018), at page 802. See also GATT, 'Agreement between the European Economic Community and Tunisia – Report of the Working Party', 31 October 1977, L/4558, at para. 8; GATT, 'Agreement between the European Economic Community and Algeria – Report of the Working Party', 31 October 1977, L/4559, at para. 8; and GATT, 'Agreement between the European Economic Community and Morocco – Report of the Working Party', 31 October 1977, L/4560, at para. 8. See also the case for outlawing ROOs entirely due to their inefficiency: Mavroidis and Vermulst, 'The Case for Dropping Preferential Rules of Origin' 52 *Journal of World Trade* (2018) 1.

[164] Thereby also leading to fewer problems of trade deflection. See World Bank, *Evaluation of the EU-Turkey CU*, (2014) Report No. 85830-TR, at para. 43. The same position is taken in European Parliamentary Research Service, *CUs and FTAs – Debate with respect to EU neighbours*, November 2017 Briefing, at 10, available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608797/EPRS_BRI%282017%29608797_EN.pdf (last visited on 28 June 2018). The paper states that CUs without a CCP might require preferential rules of origin, whereas FTAs always will.

[165] Note that eligible goods under the EUTCU, as well as coal and steel goods, can additionally benefit from diagonal cumulation of origin available under the Regional Convention on pan-Euro-Mediterranean preferential rules of origin [2013] OJ L54/4.

[166] See Article 8 of Decision 1/2006. The A.TR certificate may exceptionally be submitted after importation subject to the requirements of Article 15 of Decision 1/2006.

[167] Simplified procedures are available for approved exporters. Articles 7(3) and 11 of Decision 1/2006. Simplified procedures are available for approved exporters.

[168] Article 7(4) of Decision 1/2006.

(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 A.TR certificates and, consequently, impedes internal EUTCU trade.[169]

Other examples of the regulatory burden on cross-border movement of goods within the EU-Turkey CU – when compared to the EU CU – are of the most mundane character but no less illustrative of the various impediments inherent in an imperfectly abrogated system of origin control. In two cases which reached the Gerechtshof in Amsterdam,[170] two travellers coming from Turkey to the Netherlands through the Schiphol Airport in Amsterdam used the green 'nothing to declare' passage to exit the terminal despite carrying jewellery. The travellers were stopped by customs personnel who noticed the undeclared goods and following a subsequent investigation, the travellers were asked to pay the EU tariff duty and VAT tax on the jewellery. After challenging the decisions in Dutch courts, the Gerechtshof in Amsterdam held on appeal that 'when using the green channel it is not possible to indicate that there are goods that meet the conditions for free movement between Turkey and the EU',[171] as a result of which the travellers, having additionally no A.TR certificate to prove the origin of goods,[172] incurred a tariff duty in line with Article 202 of the Community Customs Code. The levy was applicable simply by virtue of the fact that the good was undeclared in the proper way – the inspector did not doubt that factually it was of Turkish origin and that it was brought from Turkey under the free movement conditions of the CU.

E. 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'[173] – how

[169] European Commission, Impact Assessment accompanying Recommendation for a Council Decision authorising the opening of negotiations with Turkey on an Agreement on the extension of the scope of the bilateral preferential trade relationship and on the modernisation of the Customs Union, SWD(2016) 475 final, 21 December 2016, at 62.

[170] Kenmerk 12/01128, Judgment of 4 July 2013, ECLI:NL:GHAMS:2013:1837; and Kenmerk 12/01129, Judgment of 4 July 2013, ECLI:NL:GHAMS:2013:1836

[171] Translation by the authors from the Dutch.

[172] The travellers were eligible to use the simplified method of declaration of Article 20 of Decision No 1/2006 which exempts low value shipments on person from the A.TR certificate but having failed that, the A.TR certificate, representing the general rule and which the travellers understandably did not possess, became a mandatory requirement for the shipment of any goods seeking to take advantage of the CU treatment.

[173] Members expressed diverging opinions on what should be included in such quantitative assessment (only trade between EEC and associated overseas territories or also intra-European trade). GATT Committee on Treaty of Rome, 'Treaty Establishing the European Economic Community – Report Submitted by the Committee on the

many codes of the Harmonized System (HS) are covered – and the intensity of trade ('qualitative element')[174] – to ensure that heavily traded goods are not left out.[175] The AB noted already in *Turkey – Textiles* that WTO Members could not agree on the interpretation of this term.[176] It was found 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.[177]

The measures which must be 'eliminated' are customs duties and the less precise 'other restrictive regulations of commerce'.[178] 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,[179] GATT panels have repeatedly held that the liberalization must be reciprocal.[180] However, because the GATT Contracting Parties did not adopt these panel reports, they have only limited legal value.[181] The Enabling

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Rome Treaty to the Contracting Parties on 29 November 1957', 20 December 1957, L/778, Annex IV, at paras 28-38.

[174] GATT, 'Report of the Working Party on the European Free Trade Association', 4 June 1960, L/1235, at para. 48; and GATT, 'Article XXIV of the General Agreement – Note by the Secretariat', 11 August 1987, MTN.GNG/NG7/W/13, at para. 13. See also the preamble to the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

[175] Pauwelyn, Guzman and Hillman, *supra* note 14, at 354; In 1997, Australia tabled a proposal to only assess this requirement based on a quantitative assessment, with a fixed digit of 95% liberalization of all tariff lines. This proposal was never adopted. See WTO Committee on Regional Trade Agreements, 'Communication from Australia', 17 November 1997, WT/REG/W/18; Hilpold asserts that 'a range between 80 to 90 percent has found the broadest consensus'. Hilpold, *supra* note 30, at 233.

[176] AB Report, *Turkey – Textiles*, *supra* note 25, para. 48.

[177] *Ibid.*; Members of the European Free Trade Association (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', 4 June 1960, L/1235, at paras 51 and 54.

[178] See section 3.B on the discussion regarding the meaning of 'other regulations of commerce'.

[179] In 1966, the EEC opined that Article XXIV does not deal with the question of reciprocity: GATT, 'Report on the Working Party on EEC/Association of African and Malagasy States and of Non-European Territories', 3 June 1965, L/2441, at para. 14. The same position was taken by Australia in 1977: GATT, 'Report of the Working Party on the Australia/Papua New Guinea Trade and Commercial Relations Agreement', 14 October 1977, L/4571, at para. 7.

[180] In two (unadopted) GATT panel reports, the panels focused on the wording of Article XXIV:8 which requires elimination of regulations of commerce on substantially all trade *between* the constituent territories, thereby finding a requirement of reciprocity. GATT, *EEC – Member States' Import Régimes for Bananas –Report of the Panel*, 3 June 1993, DS32/R, paras 364, 368 and 371; GATT, *EEC – Import Régime for Bananas – Report of the Panel*, 11 February 1994, DS38/R, para. 159. Moreover, the non-reciprocity principle in Article XXXVI:8 does not apply to Article XXIV, based on the Article's wording, its drafting history, as well as the establishment of the Enabling Clause which would largely lose its relevance if Article XXIV:8 did not require reciprocity. If Article XXIV:8 allowed for non-reciprocal regional liberalization between developed and developing countries, the drafting of the Enabling Clause would have been unnecessary. See GATT Panel Report, *EEC – Import Régime for Bananas*, paras 160-162.

[181] Unadopted panel reports have no legal status in the GATT or WTO system, but they could present useful guidance. AB Report, *Japan – Alcoholic Beverages II*, *supra* note 36, p. 14-15. As this issue remains unresolved, we disagree with authors asserting that Article XXIV requires reciprocity, e.g. Tevini, *supra* note 14, at 636.

Clause explicitly rejects the requirement of reciprocity in the trade negotiations between developed and developing countries.[182] This is however of limited relevance to CUs under the Enabling Clause, as these can only be negotiated between developing countries.

The only CU which 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 prohibitions of customs duties and charges having equivalent effect and quantitative restrictions and measures having equivalent effect.[183] These prohibitions have been, moreover, interpreted expansively which has led to the creation of the freest international trade area in the world. Only very few goods are subject to special regimes partially derogating from the strict prohibitions of duties and quotas.[184]

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 coal, steel and agricultural goods. Nevertheless, all coal and steel products and most agricultural and fishery goods are covered by respectively, a standard FTA with ROO requirements and a PTA.[185] This patchwork of rules governing trade in goods between the EU and Turkey raises the question of compatibility with Article XXIV:8 GATT. On the one hand, WTO law is unlikely to be concerned by the precise nature of the legal arrangements creating a CU. Therefore, the criterion of the CU covering internally 'substantially all trade' might be satisfied even through a patchwork of agreements similar to the one present in EU-Turkey bilateral trade relations. However, the EU-Turkey framework appears more problematic in light of the other criteria of Article XXIV:8 GATT, namely the internal 'elimination' of duties and other restrictive regulations of commerce and the external application of the same duties and other regulations of commerce. The FTA treatment of coal and steel products might satisfy the internal requirement by having abolished both duties and quantitative restrictions (though not ROOs) but it does not include any external harmonization of tariffs or other regulations of commerce.

[182] Paragraph 5 of the Enabling Clause; Paragraph 6 goes even further, stating that developed Members are to exercise utmost restraint in requesting concessions from LDCs; similarly see also paragraph 8 of the Enabling Clause.
[183] See Article 30, 34 and 35 TFEU.
[184] Trade in military equipment forms one such special category pursuant to the exemption in Article 346(2) TFEU. Excise goods are another, whereby quantitative restrictions apply to goods intended for personal consumption and transported across member states' borders, in order to protect differential rates of excise duties to which additionally minimum requirements apply.
[185] 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 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 L 367/68.

The PTA on agriculture and fisheries is unlikely to meet even the internal CU requirement, in addition to leaving out certain products entirely. The consideration of the PTA and the FTA is necessary in relation to the EUTCU in light of the GATT obligation that a CU must cover 'substantially all trade'. It is very conceivable that the qualitative element in this obligation would not be met if coal, steel, agricultural and fisheries products were completely excluded. On the other hand, taking into account the preferential treatment accorded to these products under the FTA and PTA respectively casts doubt on the compatibility of the entire legal framework with the obligation to eliminate internally and apply externally the same duties and other regulations of commerce. In either scenario, the EUTCU's compliance with Article XXIV GATT is questionable.

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.[186] 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 Eurasian Economic Union covers all goods, in practice internal trade is significantly hampered by, among others, the maintenance of widespread transitional exemptions from the CET.[187] Similar impediments following from misalignment in the external tariff or preferential treatment have affected internal trade within, among others, the CACM, MERCOSUR, EAC and COMESA.[188]

F. Other Issues: Non-tariff Barriers, Trade Remedies, Single Customs Territory and Customs Revenue

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

[187] 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 3500 lines representing 49 per cent of non-EAEU imports. Moreover, some divergences between tariff regimes of EAEU members result from discrepancies between bound rates at the WTO prior to accession to the EAEU and EAEU tariffs. If such differences cannot be bridged through negotiations, WTO obligations must prevail, as confirmed in *Turkey – Textiles*. See Dragneva and Wolczuk, 'The Eurasian Economic Union: Deals, Rules and the Exercise of Power' (2017) Chatham House Research Paper, at 22; Movchan and Emerson, 'The Eurasian Economic Union's problematic CU' (2018) 3 DCFTAs, at 3.

[188] COMESA is a CU with a particularly high divergence when it comes to members' compliance with the CET. For example, Zimbabwe and Sudan aligned their external tariff only to the extent of 7,13% and 18% respectively in 2014. See COMESA Annual Report 2015, at 17, available at: http://www.comesa.int/comesa-annual-reports/ (last visited on 28 June 2018). Moreover, there are issues with the overlapping membership of Swaziland in both COMESA and SACU (in addition to SADC), and of Kenya, Uganda, Rwanda and Burundi in both COMESA and 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 WAEMU.

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);[189] the notion of a single customs territory; and the apportionment of customs revenue.

As regards the first, due to the imprecise nature of the term 'other regulations of commerce' in Article XXIV 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.[190] Few CUs have managed to successfully harmonize NTBs with the obvious exception of the EU, not least because 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 EAEU.[191] Harmonization of TBTs and in particular SPS measures is moreover crucial if members wish to abolish customs controls or borders. The question which regulations of commerce need to be harmonized for a borderless area to exist has become of immediate relevance in the context of Brexit, especially on the island of Ireland; an answer to it would not, however, settle the more conceptual question as to whether the harmonization of NTBs is the business of CUs or deeper levels of integration such as common markets. 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 few and sometimes selectively.[192]

Second, although they may be considered part of commercial policy, trade remedies are another hitherto undiscussed aspect having 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, the ease with which they can be triggered a potential indicator of the sovereign discretion available to members. It is

[189] Trade remedies encompass anti-dumping, countervailing and safeguard measures.
[190] A recent UNCTAD report has underlined the importance of NTBs in MERCOSUR. See UNCTAD, 'Non-Tariff Measures in Mercosur: Deepening Regional Integration and Looking Beyond', 2017 UNCTAD/DITC/TAB/2016/1.
[191] Dragneva and Wolczuk, *supra* note 187, at 22.
[192] 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 Repeat citation of European Commission, *supra* note 169, at 32.

easily conceivable that members to CUs want to retain assurance for their sensitive import-competing sectors.[193]

Due to the imprecise nature of the term 'other restrictive regulations of commerce' in XXIV:8(a)(i) and the arguably exhaustive list of exceptions to the internal liberalization requirement,[194] it remains unclear whether the use of trade remedies between CU members must be abolished.[195] Based on the aim of regional integration, it could be argued that 'other regulations of commerce' also encompass trade remedies.[196] Moreover, trade remedies are clearly not included in the listed exceptions. Whereas some authors prefer the 'indicative list' interpretation,[197] thereby allowing for the maintaining of trade remedies within internal CU trade, others take the position that Article XXIV:8 requires trade remedies to be abolished internally.[198] If the list is exhaustive it could imply that trade remedies are incompatible with the CU requirements of Article XXIV:8(a) GATT. If the opposite is true, trade remedies could be used within CUs. 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.[199] On the contrary, the EUTCU

[193] Teh, Prusa and Budetta also point to the political economy of protectionism as well as trade remedies being a pragmatic tool to deal with political demands for protection when negotiation regional integration. See Teh, Prusa and Budetta, *supra* note 76, at 3-4.

[194] Article XXIV:8(a)(i) allows members of a CU to maintain in their internal trade, where necessary, certain restrictive regulations of commerce which are permitted under Articles XI to XV and Article XX GATT. It does not include Article VI (anti-dumping and anti-subsidy measures) and Article XIX GATT (safeguards).

[195] It is heavily contested whether the list of exceptions 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, it has been argued that the fact that the security exception in Article XXI GATT is not included points to the fact that this is not a limitative list. See 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', 20 December 1957, L/778, Annex IV, at para. 26. A similar argument has been made regarding the imposition of safeguards under Article XIX GATT.

[196] 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 76, at 5 and 28.

[197] Matsushita *et al.*, *supra* note 14, at 521-522 and Mavroidis, *supra* note 27, at 202.

[198] 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, 913. The authors make their argument on the basis of a textual interpretation drawing on the VCLT and the AB ruling in *Turkey–Textiles*.

[199] Trade remedies should also be abolished in the Eurasian Economic Union; see Article 28(3) EAEU Treaty.

contains a provision,[200] exercised on a number of occasions, allowing anti-dumping measures being taken between the members.[201]

Within the context of the WTO, the most prominent example of the (mandated) maintenance of a restrictive regulation of commerce (safeguard measures) between members of a CU can be found in the *Argentina – Footwear* dispute. Argentina was required to impose its safeguard measures on imports from all sources and could therefore not exempt other MERCOSUR member states.[202] However, the AB avoided ruling on compatibility with Article XXIV as the safeguard measures were not enacted upon the formation of the CU.[203]

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,[204] but so does the EAEU, SACU and GCC.[205] In other CUs, members administer trade remedies individually which can disrupt the common external trade regime and down the line impact also internal trade.

A different challenge concerning compliance with the Article XXIV GATT requirement that a CU must constitute a single customs territory has surfaced in the context of one CU (the EU) forming another, different, CU with another country (Turkey). As not all relevant rules are centrally determined even in the most integrated CUs, individual members can create obstacles to trade with an 'external CU', thereby disrupting the unity of the latter customs territory. In the case of *Istanbul Lojistik*, a Turkish haulage company complained about a Hungarian tax on heavy goods vehicles applicable only to non-EU-registered vehicles which

[200] Article 44 Decision 1/95.
[201] CARICOM also allows members to impose trade remedies against each other but under the auspices of a common procedure. See Articles 125-133 of the Revised Chaguaramas Treaty.
[202] Safeguards have to be applied to all sources taken into account in determining the presence of serious injury. AB Report, *Argentina – Footwear*, *supra* note 25, para. 113. Similar findings on this 'parallelism' argument can be found in other cases: WTO, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities – Appellate Body Report*, 22 December 2000, WT/DS166/AB/R, paras 97-98; WTO, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea – Report of the Appellate Body*, 15 February 2002, WT/DS202/AB/R, para. 181.
[203] AB Report, *Argentina – Footwear*, *supra* note 25, para. 110. Similarly, the AB in *US - Line Pipe* avoided ruling on the question of whether Article XXIV of the GATT permits excepting other members of an FTA from a safeguard measure; AB Report, *US - Line Pipe*, *supra* note 202, para. 199.
[204] Trade remedies are part of EU CCP; they are adopted in accordance with the ordinary legislative procedure by the Council and the European Parliament on the proposal of the Commission.
[205] In the case of SACU, however, the administration of TDIs is in the hands of South Africa's International Trade Administration Commission in the continued absence of a common SACU institution, the Tariff Board.

the Hungarian government argued was levied to offset road maintenance and environmental costs.[206] The ECJ held that the tax constituted a charge having equivalent effect to a customs duty within the meaning of Article 4 of Decision 1/95 of the EU-Turkey Association Council, despite the fact that the tax related to the transporting vehicles and not the transported goods (as customs duties do). However, the Court arrived at this conclusion by applying Article 66 of Decision 1/95, which prescribes harmonious interpretation with internal EU law where provisions of EU Treaties and of Decision 1/95 are identical, and as a consequence the ECJ case law concerning Article 30 TFEU prohibiting customs duties and equivalent charges which has been interpreted expansively within the EU.[207] The case illustrates that the single customs territory requirement must in practice be additionally underpinned by rules on non-discriminatory freedom of transit within the CU. Many CUs provide for such rules but sometimes not without sovereign reservations which can be (mis)used to create internal trade barriers.[208]

Finally, some CUs take the opportunity presented by unified customs laws and tariffs to enact a mechanism for the distribution of the collected duties. In the EU, duties, minus 20% left to member states to cover operational costs, flow directly into the EU's budget as part of the EU's own resources. SACU also operates a common revenue pool (already since 1910) which comprises all customs, excise and additional duties collected in the CU.[209] This common revenue pool has long been linked to SACU development policy; more specifically, the formula used for the calculation of the distribution of customs revenue translates into a net transfer of funds from South Africa, which is by far the biggest contributor to the common revenue pool, to the less developed members of SACU (Botswana, Lesotho, Namibia and Swaziland).[210] While the question if and how customs revenue is distributed (and collected)[211]

[206] Case C-65/16, *Istanbul Lojistik v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság*, judgement of 19 October 2017, not yet reported (ECLI:EU:C:2017:770).

[207] para 38. Charges having an equivalent effect to a customs duty cannot in general be justified by reference to an overriding public policy objective, as opposed to quantitative restrictions on the free movement of goods prohibited under Article 34 TFEU and justifiable under Article 36 TFEU.

[208] See, for example, Article 24 SACU Agreement, which contains an explicit sovereign reservation and Article XV of the 1960 General Treaty on Central American Integration, which only permits a charge for customs services.

[209] See Article 32 of the SACU Agreement. The common revenue pool is, similarly to trade remedies, administered by South Africa in the absence of common institutions (the setting up of which is blocked by South Africa).

[210] See Article 34 of the SACU Agreement. See also Walters, 'Renegotiating Dependency: the Case of the Southern African Customs Union' 28 *Journal of Common Market Studies* (1989) 29.

[211] 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

is crucial from an economic standpoint and is reflected in the economic and historic definitions, under the prevailing austere CU conceptions it is at the fringes of analysis of international law. WTO law makes no provision for the establishment of a distributive or revenue-sharing mechanism.

G. Overall Assessment

The preceding part 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. The table below provides an overview of some of the main elements of CUs notified under Article XXIV 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 the Clause.

Table 5: Overview of main elements of CUs notified under Article XXIV GATT

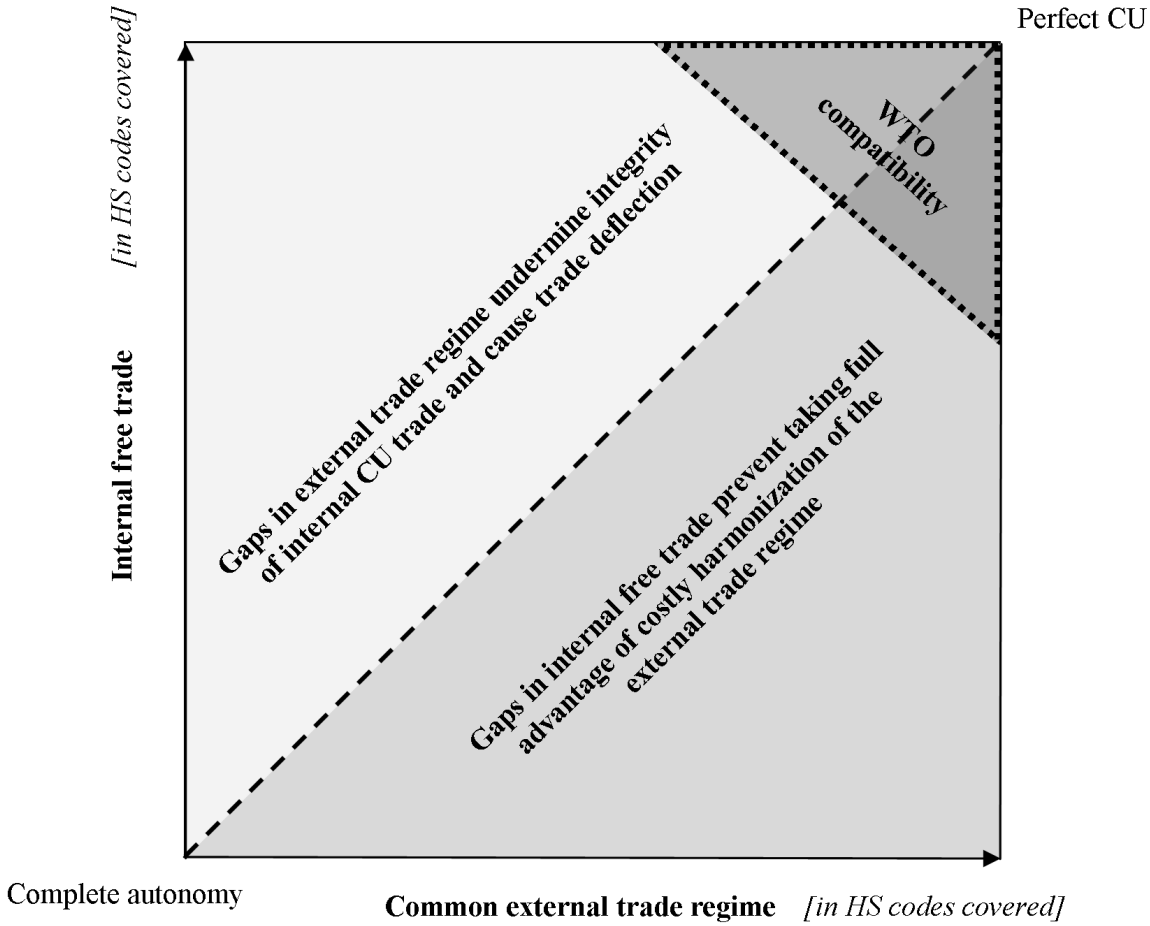
		EU	**EUTCU**	**EU-Andorra / San Marino**	**EAEU**	**CARICOM**	**SACU**	**CACM**
PTAs	Obligation to harmonize prior PTAs?	✓	✓	✓	✓	✓	✓	✓
	Future PTAs jointly negotiated?	✓	X	X	✓	✓	✓	✓
	Future separate PTAs possible?	X	X	X	X	✓	✓	✓
ROOs	Internally abolished?	✓	✓	✓	✓	X	✓	X
	Externally harmonized?	✓	✓	✓	✓	X	X	✓
CET	Agreed unanimously or by majority	Majority	Unilateral (EU)	Unilateral (EU)	Unanimous	Unanimous	Unanimous	Unanimous

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.

	voting?							
Trade remedies	Available internally?	X	✓	X	X	✓	✓	✓
	Applied jointly vis-à-vis third countries?	✓	X	✓	✓	X	✓	X
Common revenue pool	Is tariff revenue pooled and redistributed according to a formula?	✓	X	X	✓	X	✓	X

One point worth highlighting in the wake of the 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. The way CUs operate in reality opens up the possibility to think of CUs not as a binary choice of existence but 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 below illustrates schematically the necessary harmony in the relationship between the internal and external element 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 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 are out of sync (above or below the x=y line), the CU is underperforming.

Figure 1: Schematic representation of a non-binary conception of a CU



4. Conclusion

The preceding analysis lends 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 GATT – is silent on certain conceptual elements, notably joint negotiation of PTAs and 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 which is concerned by the external welfare effects (on non-members) of CU formation. Third, and in part as a consequence of the conceptual variety and the legal flexibility of WTO law, there is considerable diversity among CU designs in practice. Different CUs approach key design issues and tensions, from negotiation of PTAs to regulating 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 which 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, underperformance notably occurs when the relationship between the internal and external aspects of the CU is not synchronized.

We hope to have laid the legal foundations of future research on CUs. There is scope in English-language scholarship for deeper comparative work on, in particular, the understudied CUs in Africa and Latin America. Political scientists and international relations scholars might take more interest in the near-universal difficulties faced by most CUs in the setting up of core institutions and common rules such as common external trade policy. Similarly, a number of CUs, such as the EAEU, SACU or GCC are dominated by a regional hegemon – a comparison of the drivers of integration between these CUs and those with a more balanced membership might reveal the presence of different integration dynamics. Such studies could lead to a more comprehensive understanding of CUs which currently relies predominantly on economic research.