

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

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This Note seeks to describe the legal system of the World Trade Organization (WTO) by analyzing the extent to which countries that are members of the WTO can contract out of WTO obligations. The current literature on the WTO provides two primary models through which we can understand the WTO's legal regime: a constitutional model and a contractual model. The constitutional model sees the WTO as a legal system that cannot be easily varied by individual WTO members because WTO commitments are made to all members. Alternatively, the contractual model describes WTO obligations as easily variable by subsets of members, since WTO commitments are made only on a bilateral (country-to-country) basis. This Note addresses that debate by looking at the ability of WTO members to contract out of WTO obligations through bilateral and regional trade agreements, whereby two or more members define the trade rules governing their relationship outside of the WTO legal regime. WTO law governing regional trade agreements reveals that, on the one hand, member states cannot contract out of all WTO obligations; certain core obligations cannot be varied. However, there remains significant scope for contracting out through regional trade agreements on most subjects. Therefore, both the constitutional and contractual models are insufficient and do not accurately describe the nature of WTO obligations.

INTRODUCTION

The World Trade Organization (WTO) is described by scholars of international law as the best example of “hard law” at the global level.¹ A hard law regime has formal legal rules and imposes formal

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¹ See, e.g., JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 232 (2005) (describing the WTO as a regime known for “hard” treaty obligations).

penalties for non-compliance with legal obligations,² unlike so-called “soft law” regimes, where informal persuasion and shaming are the mechanisms available to ensure compliance.³ Most international organizations are soft law systems; they have no ability to impose formal legal sanctions on countries that violate their rules. By contrast, the obligations that WTO member states undertake are formally legally binding and are enforced through the WTO’s dispute settlement procedure, in which one country can take another country to “court” for violating its WTO duties.⁴

Due to this hard law regime, unusual among international organizations, the WTO is often held up as a model for how legally binding obligations can be successfully imposed at the global level.⁵ It is a prime example used to respond to skeptics of international law, who contend that there can be no legally binding obligations at the international level because there is no central authority to enforce the rules (unlike in the domestic context, where laws are enforced through police and judicial systems).⁶

Thus, the most famous aspect of the WTO’s legal regime is the degree to which it is binding.⁷ Yet, an important ambiguity about the

² The term “hard-law” may be unfamiliar to those who have not studied international law, but the concept should be easily grasped since most domestic legal regimes are hard law regimes, which have a judiciary to apply the law and whose edicts are backed by the threat of force or sanction.

³ For discussions of the difference between hard and soft law regimes, see generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS* 37 (Judith L. Goldstein et al. eds., 2001), Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 687–98 (2004) and Anna D. Robilant, *Genealogies of Soft Law*, 54 *AM. J. COMP. L.* 499 (2006). The difference between hard and soft law is a central typology of international law, where there is significant compliance with legal regimes but where the legal regimes themselves are not organized the way they are domestically, with a centralized lawmaker and a court upholding the law through penalties against violators. The fact that hard law regimes, where there are “courts” enforcing the law, are so rare in international law settings is part of what makes the WTO an object of scholarly fascination.

⁴ See ALVAREZ, *supra* note 1, at 232 (describing “hard” WTO obligations and a “hard” dispute resolution mechanism).

⁵ For example, neoliberals and regime theorists cite the WTO as demonstrating the success of international legalization and institutionalization. *E.g.*, ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 261 (2001). The fact that the WTO has a hard law compliance mechanism—a “court”—is in large part why it is understood to be such an effective regime at the global level. WTO law is seen as both *binding* and *enforceable* in the orthodox literature. *E.g.*, Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations*, 9 *J. INT’L ECON. L.* 989, 989 (2006).

⁶ For one example of such skepticism about international law, see generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005), which argues that international law is based upon states acting in their own interest.

⁷ Indeed, there is an expansive literature that describes the hard law features of the WTO legal regime. *See, e.g.*, Nicholas Bayne, *Hard and Soft Law in International Institutions: Complements Not Alternatives*, in *HARD CHOICES, SOFT LAW* 348 (John J.

nature of WTO legal obligations remains: To what extent can WTO member states preemptively “contract out” of their WTO legal obligations by making side agreements with other member states that change the terms of their legal obligations? If countries can get around the WTO rules by making new sets of rules among themselves, the common wisdom that WTO rules are legally binding is challenged. While WTO law may still be “hard” in nature, the character of the organization is greatly changed if parties can exit the system easily. If countries can avoid their WTO obligations with ease, the WTO’s reputation for imposing binding legal obligations should be rethought.

There are two conceptual frameworks used to understand WTO obligations in the current academic literature. Some scholars argue that the WTO is a “constitutional” regime, with obligations that cannot be derogated from through separate agreements.⁸ Others describe the WTO as a “contractual” regime, in which individual member states are permitted to make agreements with other states that alter the content of their WTO obligations.⁹ The debate between these two camps is unresolved.

Resolving this debate between constitutional and contractual understandings of the WTO has important consequences for the nature of the legal regime as a whole. If parties to the WTO can simply avoid their legal obligations by making side agreements with other parties, the much-heralded hard law system looks significantly weaker. Since the WTO is famous among scholars and practitioners for its hard law regime,¹⁰ the way the WTO is understood will be significantly affected if parties can simply get out of the rules through “private”¹¹ agreements.

This Note informs the debate between the constitutional and contractual understandings of the WTO by describing the extent to which parties to the WTO are permitted to contract out of their legal obligations. In the context of international trade law, regional trade agreements (RTAs) are side agreements that alter WTO obligations. To

Kirton & Michael J. Trebilcock eds., 2004) (“The WTO . . . is also very largely based on hard law.”); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 427, 431, 436 (2000) (describing hard law features of the WTO, including judicial review).

⁸ See *infra* Part II.A (summarizing literature arguing that the WTO is a constitutional regime).

⁹ See *infra* Part II.B (summarizing literature arguing that the WTO is a contractual regime).

¹⁰ See *supra* notes 5 and 7 and accompanying text (describing the WTO as the paradigmatic hard law regime at the international level).

¹¹ I use the word “private” cautiously. As a formal matter, agreements between governments (such as regional trade agreements) are not private agreements in the sense of a contract between private individuals.

determine the extent to which parties can vary their WTO obligations, this Note explores the degree to which WTO members are permitted to form RTAs. If the WTO places significant restrictions on the extent to which parties can contract out of their obligations, the constitutional understanding of the WTO seems most promising. However, if the WTO allows extensive contracting out of its legal regime through RTAs, the contractual approach is more persuasive.

This Note answers two questions. First, what are the legal limits on contracting out of WTO obligations? Second, what do these limits tell us about how to understand the WTO as a legal regime? To answer these questions, this Note proceeds in four parts. Part I provides an introduction to the WTO as a legal regime governing international trade at the global, multilateral level. It then describes the parallel regime of RTAs, which regulate trade bilaterally and regionally. Part II outlines the two conceptual models for understanding the WTO as a legal regime: the constitutional approach and the contractual approach. Part III examines the Vienna Convention on the Law of Treaties, WTO legal provisions on RTAs, and WTO case law to determine the extent to which WTO member states are legally permitted to contract out of WTO obligations by making separate trade agreements with other states or groups of states. This analysis reveals that states have a significant degree of freedom: In practice, they can contract out of most WTO obligations. This freedom gives credence to the contractual understanding of the WTO. However, there remain “core” obligations imposed by WTO law that member states cannot contract out of through RTAs. Part IV offers answers to the two questions posed by this piece. First, it summarizes the legal limits imposed on contracting out of the WTO through RTAs. Second, it discusses how this analysis affects our understanding of the WTO as a legal regime.

This Note concludes that the WTO can be understood neither as a purely constitutional regime, nor as a purely contractual regime: It contains elements of both theoretical models. This conclusion challenges current views and provides directions for future research. It suggests that we can understand a legal regime by looking at the extent to which parties are permitted to contract out of it. It also suggests that the WTO may not be as strong as it appears. Despite its reputation as a hard law regime, the fact that parties have a significant (albeit not absolute) ability to contract out of their WTO obligations limits the strength of the regime.

This Note makes several contributions to the literature. It articulates the debate between the contractual and constitutional understandings of the WTO. It conceptualizes RTAs as a means of

contracting out of the WTO. It suggests that there are some non-derogable obligations that the WTO has refused to cede to RTAs. And it describes the WTO as exhibiting elements of both the constitutional and contractual accounts.¹²

I

A BRIEF INTRODUCTION TO THE WTO AND RTAs

This Part provides a brief introduction to the WTO as an international organization and a legal regime, as well as an overview of the proliferation of RTAs, to better situate the analysis contained in the rest of the Note. It discusses the purpose, history, institutional structure, and basic legal obligations of the WTO and describes the recent proliferation of regional trade agreements regulating trade at the bilateral and regional level.¹³

The WTO is a multilateral organization that governs trade between nations.¹⁴ Its self-identified purpose is threefold.¹⁵ First, it is meant to encourage the progressive liberalization of international

¹² These contributions help us to categorize and describe the WTO legal regime accurately. Understanding the WTO is important because it is arguably the most prominent international organization, aside from the United Nations, in the popular and scholarly imagination. If the nature of its legal obligations is misunderstood, it is important to correct that misimpression since the WTO is often used as a yardstick for evaluating the strength of other international organizations and legal regimes. Jose Alvarez has termed the perception that the WTO has the strongest legal regime in international law “penance-envy.” Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT’L & COMP. L. REV. 213, 226 (2002). Further, given that the WTO has been both villainized and lauded as the ultimate flashpoint for debates over globalization, it is important to show that the WTO is not as strong as it looks. In these debates, it is commonly accepted that the WTO is an extremely powerful institution with great coercive force. This Note suggests that this is not the case—or at least that WTO legal power has been overstated—because parties have significant opportunity to modify WTO rules. This Note is also important because it tackles the emergent RTA legal regime. The RTA phenomenon is the most important development in global trade since the conclusion of the Uruguay Round. It represents one of the most significant changes to the rules governing international trade since the WTO was established. Thus, work that sheds light on the legal relationship between the WTO and RTAs is of increasing value in the new world of global trade. Finally, the constitutional norms at the heart of the WTO that this Note exposes help us to see the WTO’s self-understanding, which tells us about the nature of the institution—what it has consistently valued as the most important obligations it asks of its members.

¹³ This Part deliberately relies on WTO sources in order to present the most “orthodox” view of the WTO’s mandate. All of these statements could be (and have been) problematized. Nevertheless, I beg the reader’s patience in presenting this very simplistic view of the WTO.

¹⁴ *What is the WTO?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Oct. 14, 2011). Trade is defined by the WTO as the exchange of goods, services, and intellectual property. *Id.*

¹⁵ *Id.*

trade and to remove protectionist barriers that states¹⁶ place on imports and exports, which distort trade flows and decrease overall prosperity.¹⁷ Second, the WTO is a negotiating forum. It facilitates so-called trade “rounds,” where the 153 member states that comprise the WTO meet and negotiate what are essentially treaties on trade liberalization.¹⁸ These agreements become binding on all WTO members and are agreed to by consensus.¹⁹ Third, the WTO seeks to provide clear rules on international trade, making international trade more transparent and predictable.²⁰ The WTO also provides a means for settling disputes over how the agreements should be interpreted and applied.²¹

Understanding the WTO’s current legal regime requires a brief examination of its history. The World Trade Organization was not established as a formal international organization until 1995.²² It developed out of the General Agreement on Tariffs and Trade (GATT), a treaty adopted by twenty-three countries in 1947 and updated through subsequent trade rounds.²³ The GATT dealt with

¹⁶ In keeping with international law and international relations literature, I use the term “state” to refer to countries.

¹⁷ There are some exceptions to this liberalizing agenda. For example, exceptions are made for public health and moral reasons. Also, the infamous Article 20 of the General Agreement on Tariffs and Trade (GATT) provides a series of exceptions. GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XX, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 455–56 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

¹⁸ For a description of the various trade rounds, see *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Oct. 14, 2011), and *The Uruguay Round*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Oct. 14, 2011).

¹⁹ All member states must agree for agreements to take effect. *Whose WTO Is It Anyway?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Oct. 14, 2011).

²⁰ *Principles of the Trading System*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 14, 2011).

²¹ *Who We Are*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Oct. 14, 2011) (describing the purpose of the WTO, including the goal of dispute settlement); *A Unique Contribution*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 14, 2011) (explaining the dispute settlement system in greater detail). For a more detailed description of the WTO dispute settlement system, see *infra* Part III.C.1.

²² See *What is the WTO?*, *supra* note 14; see also BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 37–40 (2001) [hereinafter HOEKMAN & KOSTECKI, WTO AND BEYOND] (describing the move from the GATT to the WTO).

²³ For excellent accounts of the history of the GATT’s origins and subsequent development, see generally KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1993), RICHARD N. GARDNER, STERLING DOLLAR DIPLOMACY: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER (1969), HOEKMAN

trade in goods and focused on reducing tariffs. During the forty-seven years in which it was the primary agreement on international trade, the GATT grew in membership, covered an increasingly large percentage of global trade, and expanded beyond rules on tariffs.²⁴

The Uruguay Round of negotiations (1986–1994) expanded the scope of multilateral agreements governing trade and changed the institutional structure.²⁵ It resulted in the General Agreement on Trade in Services (GATS)²⁶ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),²⁷ so services and intellectual property are now governed by multilateral agreements. It updated the GATT and produced the WTO, a formal, permanent institution to regulate international trade.²⁸ Evolving out of a complex history, the WTO is a compilation of a number of agreements (the so-called “covered agreements”).²⁹

The move from the GATT to the WTO established a new institutional structure to govern global trade. Geneva became home to a permanent secretariat, and the dispute settlement procedure was made formally binding.³⁰ A member state that believes that another member is violating its WTO obligations can request that the WTO form a panel to review the complaint. The Panel’s decision can be appealed to the permanent Appellate Body, composed of neutral experts in trade law.³¹ Panel and Appellate Body decisions are legally binding.³²

& KOSTECKI, *supra* note 22, JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1997), JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969), and MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (2005).

²⁴ See generally BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995) (describing the complex history of the GATT’s development).

²⁵ An excellent history of the Uruguay Round can be found in HOEKMAN & KOSTECKI, *WTO AND BEYOND*, *supra* note 22, 283–85.

²⁶ *Id.* at 237.

²⁷ *Id.* at 274.

²⁸ See *id.* at 37 (describing the creation of the WTO).

²⁹ For a description of covered agreements, see *Legal Basis for a Dispute*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s1p1_e.htm (last visited Sept. 18, 2011).

³⁰ *The Uruguay Round*, *supra* note 18.

³¹ For a more detailed description of the complaint process, see *The Panel Process*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm (last visited Oct. 14, 2011) and *A Unique Contribution*, *supra* note 21.

³² These decisions can be enforced through “countermeasures,” where the complainant country can discriminate against the country that is in violation of WTO rules to the extent that it is being harmed by the infringing country’s actions. *A Unique Contribution*, *supra* note 21 (providing an overview of the countermeasures process).

Although the agreements that comprise the WTO are detailed and complex,³³ there are two basic legal obligations which animate the entire regime. First, the WTO requires that all member states provide “most-favored-nation” (MFN) treatment to all other WTO members.³⁴ With some exceptions, WTO members cannot discriminate among their trading partners.³⁵ Any concession made to one country (such as decreasing tariffs) must be granted to all other countries. MFN treatment is meant to promote trade liberalization and to prevent trade discrimination and protectionism.³⁶ MFN treatment has been at the heart of the GATT/WTO regime since its inception.³⁷ Second, the WTO requires that member states treat foreign products after they enter the country in the same manner as those produced domestically. This requirement of “national treatment”³⁸ is meant also to reduce discrimination and combat protectionism.³⁹

The GATT/WTO governs the global trading regime at the multilateral level, but there is a parallel regime regulating trade at the bilateral and regional level. Since the 1960s, pairs and groups of countries have negotiated independent agreements, outside of the auspices of the GATT/WTO, to regulate trade among themselves. Such agreements are generally referred to as “regional trade agreements,” or RTAs.⁴⁰ RTAs reduce trade barriers between the countries party to

³³ The legal documents that form the WTO constitute the longest agreement in international law at more than 25,000 pages. FEDERICO ORTINO & ERNST-ULRICH PETERSMANN, *THE WTO DISPUTE SETTLEMENT SYSTEM 1995–2003*, at xviii (2004).

³⁴ *Principles of the Trading System*, *supra* note 20.

³⁵ See, for example, GATT Article XX, which describes exceptional health, environmental, or moral circumstances that justify differentiating between trading partners. GATT, *supra* note 17, art. XX.

³⁶ HOEKMAN & KOSTECKI, *WTO AND BEYOND*, *supra* note 22, at 29–30; *Principles of the Trading System*, *supra* note 20.

³⁷ Most Favored Nation (MFN) treatment is codified in Article I of the GATT, Article II of the GATS, and Article IV of TRIPS. GATT, *supra* note 17, art. I; General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. IV, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

³⁸ National treatment is codified in each of the main WTO agreements: Article III of GATT, Article XVII of GATS, and Article III of TRIPS. GATT, *supra* note 17, art. III; GATS, *supra* note 37, art. XVII; TRIPS, *supra* note 37, art. III.

³⁹ *Principles of the Trading System*, *supra* note 20.

⁴⁰ While some scholars use other terms such as “regional integration agreements,” “preferential agreements,” or “free trade agreements,” I follow the WTO’s practice and use the term “RTA” throughout. *Regional Trade Agreements*, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Oct. 14, 2011); see also JAMES H. MATHIS, *REGIONAL TRADE AGREEMENTS IN THE GATT / WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT*, at xx (2002) (adopting RTAs as preferred terminology).

the agreement, while maintaining barriers to other states outside the agreement.⁴¹

RTAs vary widely in nature.⁴² They range from bilateral agreements between two countries (such as the United States–Australia Free Trade Agreement) to regional trading blocs composed of ten or twenty members (such as the European Union).⁴³ RTAs can focus on a single issue, such as trade in goods, or cover an enormous range of issues (such as the North American Free Trade Agreement (NAFTA), which is almost as comprehensive as the WTO itself and covers trade in goods, services, intellectual property, and labor). RTAs can be limited to a particular geographic area (like the European Union) or be between countries on opposite sides of the globe (like the United States–Singapore Free Trade Agreement).⁴⁴ There are now almost 500 RTAs worldwide, with more under negotiation.⁴⁵ Every WTO member (except Mongolia) is also a member of at least one RTA (and some are involved in as many as thirty).⁴⁶

RTAs challenge the WTO regime because when parties form an RTA, they develop new trade rules for the parties to the RTA that differ from those specified by the WTO. The parties thus establish a new governance regime; they change the WTO rules and instead adopt a new regulatory regime between the parties to the RTA. Rules governing global trade are therefore being set at both the multilateral level and the regional or bilateral level. The proliferation of RTAs means that the WTO is not the only game in town; there is an extensive network of agreements regulating trade below the multilateral level.

⁴¹ Indeed, RTAs are typically free-trade area agreements, where tariffs are reduced to zero on most or all trade between the countries in the RTA. An example of a free-trade area is the North American Free Trade Agreement (NAFTA). RTAs also include customs unions, which are distinguished by the fact that the countries impose a common external tariff, so they all impose the same tariffs on the countries outside of the RTA. An example of a customs union is the European Union. Anne O. Krueger, *Free Trade Agreements Versus Customs Unions*, 54 J. DEV. ECON. 169, 172–74 (1997).

⁴² *Scope of RTAs*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (last visited Oct. 14, 2011).

⁴³ For a complete list of RTAs, see *Regional Trade Agreements Information System*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited Oct. 14, 2011).

⁴⁴ *Id.*

⁴⁵ *Facts and Figures*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Oct. 14, 2011).

⁴⁶ *Regional Trade Agreements Information System*, *supra* note 43 (click on “By country/territory” to view any country’s RTAs, if any).

II TWO CONCEPTUAL MODELS OF THE WTO

The above analysis outlined the basics of the multilateral regime governing trade (the WTO) and the parallel regime which exists at the bilateral and regional level (RTAs). Before looking at the legal relationship between these two regimes, it is useful to situate the analysis of WTO legal obligations in the current literature by examining two dominant conceptual models of the WTO and analyzing the debate between these two models.

Scholars have tried to understand the WTO's legal obligations primarily through analogies to domestic law. This Part focuses on two important models that have arisen to describe the WTO.⁴⁷ Certain scholars have argued that the WTO can best be understood as a "constitutional" regime, a public law system that has certain basic legal rights and obligations which are non-derogable. Others have suggested that the WTO is most like a "contractual" regime, a series of bilateral deals between private negotiating parties, any of which can be varied by agreement between two or more of the parties.⁴⁸ This Part outlines each of the two models and describes the arguments for each. It contrasts the two approaches, highlighting the crux of the debate between them, and argues that the two models differ in the extent to which they permit contracting out of the WTO system.

A. The Constitutional Model

On the domestic level, the term "constitution" usually refers to the fundamental law of a society that is extremely difficult to vary or amend (it is non-derogable),⁴⁹ and that establishes the basic governmental structures and basic rights of individuals (safeguarded through judicial review).⁵⁰ A constitution is "public law," setting out the basic

⁴⁷ Note, though, that while these models purport to be descriptive, they have highly normative undertones and motivations.

⁴⁸ I concede that the distinction between the constitutional and contractual models is not absolute. For example, some scholars have argued that constitutions should be understood as contractual regimes. See, e.g., Barry Friedman & John Ferejohn, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 838 (2006) (discussing constitutional default rules as quasi-contractual in nature).

⁴⁹ For a discussion of how constitutions establish obligations and commitments that are very difficult to alter, see generally STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* (1995).

⁵⁰ See BLACK'S LAW DICTIONARY 353 (9th ed. 2009) (defining "constitution" as "[t]he fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties").

legal and political institutions and establishing the relationship between a people and its government.⁵¹

Constitutional theories of the WTO take different forms, emphasizing different aspects of the typical understanding of a domestic constitution.⁵² Scholars such as John Jackson emphasize the institutional/structural aspect of the constitutional analogy. Jackson argues that the WTO is “constitutional” in the sense that it constitutes the architecture of the global trading system.⁵³ Other scholars argue that the WTO is like a domestic constitutional regime because of the existence of judicial review, which assures compliance with the regime’s basic law and norms.⁵⁴

But the most fully articulated constitutional theory of the WTO is offered by Ernst-Ulrich Petersmann.⁵⁵ Unlike institutional or judicial-review theories, Petersmann’s theory focuses on the binding commitment that is an essential part of a constitution. One can understand a constitution as binding a polity to certain vital and basic commitments, which are a higher form of law—superseding all others—that cannot be violated or easily varied.

Petersmann argues that we should understand the law of the WTO as constitutional in the sense of being a “higher” form of law that cannot be varied or violated.⁵⁶ In this sense, the law of the WTO

⁵¹ *Id.* at 1350–51 (defining “public law” as “[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself”).

⁵² For a description of the various constitutional theories of the WTO, see Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 *EURO. J. INT’L L.* 647, 650–56 (2006).

⁵³ John H. Jackson, *The Perils of Globalization and the World Trading System*, 24 *FORDHAM INT’L L.J.* 371, 375 (2000). See also, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998) (focusing on institutional and jurisprudential aspects of the WTO); JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990) (suggesting structural revisions to the GATT); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) (providing an analysis and overview of the GATT); John Jackson, *The WTO ‘Constitution’ and Proposed Reform: Seven ‘Mantras’ Revisited*, 4 *J. INT’L ECON. L.* 67 (2001) (discussing institutional developments and reform needed in the world trading system in light of recent constitutional questions).

⁵⁴ See, e.g., DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* 177 (2005) (arguing that judicial review implies that the WTO is a constitutional regime); DEBORAH Z. CASS, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 *EURO. J. INT’L L.*, 39, 42 (2001) (same).

⁵⁵ See Jeffrey L. Dunoff, *Why Constitutionalism Now?: Text, Context and the Historical Contingency of Ideas*, 1 *J. INT’L L. & INT’L REL.* 191, 194–96 (2005) (describing different constitutional accounts, including that of Professor Ernst-Ulrich Petersmann).

⁵⁶ ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* 47 (1997) [hereinafter PETERSMANN, *GATT/WTO*]; see also Ernst-Ulrich Petersmann, *The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms:*

is “above” politics. Governments are bound by WTO rules across time and across domestic institutions, so politics cannot enter the picture to determine trade policy. WTO law is therefore non-derogable; by its constitutional, binding nature, parties should not be able to vary their obligations under it, and it should apply equally to all states.⁵⁷ WTO obligations are collective in nature; they are owed to the collectivity and are necessary to secure freedom to trade for all.⁵⁸ This establishes a vertical (or hierarchical) legal regime, with WTO obligations trumping other legal obligations. Therefore WTO obligations under this model should be difficult or impossible to vary or opt out of.

To substantiate this understanding, Petersmann highlights certain aspects of the WTO’s institutional structure that operate to create a binding constitutional structure.⁵⁹ First, Petersmann points to the fact that the creation of the WTO was a “single undertaking,” incorporating an array of agreements into a single agreement,⁶⁰ making the institution less treaty-like and more constitutional.⁶¹ Next, Petersmann points to the “[l]egal primacy of the WTO Agreement over other international trade agreements.”⁶² He cites Article XVI(3) of the WTO Agreement, which states that “in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail to the extent of the conflict.”⁶³ These conflict-of-laws rules are

Trade and Human Rights, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 281, 285–93 (Lorand Bartels and Federico Ortino eds., 2006) [hereinafter Petersmann, *The WTO and Regional Trade Agreements*] (explicitly contrasting “realist” state-focused approaches to the WTO with human rights and constitutional approaches); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 Nw. J. INT’L L. & BUS. 398, 402, 406 (1996) (same). Indeed, Petersmann sees this approach as integrated with a comprehensive theory of justice—the WTO is meant to effectuate a particular vision of a just order. Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 423–28 (2003).

⁵⁷ PETERSMANN, GATT/WTO, *supra* note 56, at 47–57 (describing how the process of integrating the WTO agreements into a single legal framework changed the WTO to a constitutional, non-derogable regime).

⁵⁸ As Chios Carmody has argued, “WTO obligations are more appropriately regarded as collective because their principal object is the protection of collective expectations about the trade-related behaviour of governments.” Chios Carmody, *WTO Obligations as Collective*, 17 EUR. J. INT’L L. 419, 419 (2006).

⁵⁹ Or, as Petersmann describes them, the “‘constitutional functions’ for limiting discretionary trade policy powers of governments through worldwide long-term rules of a higher legal rank.” PETERSMANN, GATT/WTO, *supra* note 56, at 47.

⁶⁰ *Id.* at 48.

⁶¹ *Id.* at 44–46 (noting that the legal complexity of the WTO Agreement allows it to function as a “global integration agreement”).

⁶² *Id.* at 51.

⁶³ *Id.* (quoting Marrakesh Agreement Establishing the World Trade Organization art. XVI, ¶ 3, Apr. 15, 1994, 1867 U.N.T.S. 154).

of “constitutional significance” and establish a formal legal hierarchy ordering international law.⁶⁴ Most importantly, he argues that we should understand the WTO as constitutional in nature because of its capacity for judicial review and its dispute settlement system.⁶⁵ This system ensures that parties comply with their WTO duties and that they have a remedy when their “constitutional” rights are violated.

At base, the “constitutional” understanding of the WTO is meant to describe the regime as a series of commitments that place law over politics. Countries have bound themselves to rules and principles that are difficult to change so they are not tempted to alter the rules to their advantage. On this view, these obligations should be virtually non-derogable.

B. *The Contractual Model*

The contractual understanding of the WTO arose out of criticisms of the constitutional approach of Petersmann and others. Scholars such as Jeffrey Dunoff have questioned the empirical basis for describing the WTO as a constitutional system and noted its lack of constitutional features.⁶⁶ Robert Howse has argued that, as a normative matter, understanding the WTO as a constitution makes the individual elements of the regime less easily contestable, less democratically entrenched, and less legitimate.⁶⁷

But what is a contract? Typically, a contract is understood as an agreement or promise between two or more private parties creating binding obligations.⁶⁸ Parties are permitted to agree to anything within the bounds of the law, and may set any terms they wish. They

⁶⁴ *Id.* at 52. Petersmann also reminds us that the WTO was designed to regulate RTAs as well, although he never examines the effectiveness of those provisions. *Id.*

⁶⁵ “By ensuring legally binding dispute settlement rulings and appellate review within short time-limits, the compulsory WTO dispute settlement system promotes rule of law more effectively than any other worldwide treaty system.” Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT’L ECON. L. 19, 20 (2000); see also Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT’L ECON. L. 25, 33–48 (1998) (providing an overview of WTO dispute settlement and appellate review systems and discussing how they contribute to international law); Ernst-Ulrich Petersmann, *Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law*, 30 LOY. L.A. INT’L & COMP. L. REV. 367, 370–72 (2008) (discussing the WTO’s judicial review powers in the context of overlapping, constitutional consensus among member states); Petersmann, *The WTO and Regional Trade Agreements*, *supra* note 56, at 289–90 (describing different views of a “WTO constitution”).

⁶⁶ Dunoff, *supra* note 55, at 197.

⁶⁷ ROBERT HOWSE, *THE WTO SYSTEM: LAW, POLITICS & LEGITIMACY* 249 (2007).

⁶⁸ See BLACK’S LAW DICTIONARY, *supra* note 50, at 365 (defining contract as “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”).

may also vary their obligations when they see fit by amending the contract.

These basic elements of the domestic contract law regime encapsulate the description of the WTO as a contractual regime. The strongest proponent of the contractual regime has been Joost Pauwelyn. He claims that the WTO is not a regime where obligations are owed to the collectivity and cannot be varied or waived, as in a constitutional regime.⁶⁹ The WTO is merely a series of bilateral agreements between the parties, and any one of the obligations could be altered by a few of the parties without affecting the other states that are part of the WTO. The WTO is not a higher form of law meant to bind governments over time but a negotiating ground where parties can work out agreements regulating their relationships. While some treaties are collective because they are designed to protect the interests of the collectivity (like human rights treaties), other multilateral treaties (like the WTO) give rise to a bundle of bilateral obligations that are distinct and separate from one another.⁷⁰

Pauwelyn believes that WTO obligations are bilateral in nature for a variety of reasons. First, he argues that it is clear that WTO obligations are not *jus cogens* (obligations binding on all members of the international community and from which no derogation is permitted) or *ergo omnes* (obligations owed to all members of the international community, but which can be varied by bilateral agreement) because WTO obligations are only owed by WTO members to other WTO member states.⁷¹ The fact that WTO obligations are not *jus cogens* has a clear consequence, according to Pauwelyn: It means that “later treaties will *prevail* over the WTO treaty between the parties to both treaties.”⁷² Pauwelyn also argues that WTO obligations are not independent, all-or-nothing treaties (such as disarmament or environmental treaties) where derogation by one party radically affects the ability of other parties to reach the goals set out in the treaty.⁷³ The WTO treaty is not a “treaty where each [] parties’ performance is effectively conditioned upon and requires the performance of each of the others.”⁷⁴

⁶⁹ Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 *EURO. J. INT’L L.* 907, 937 (2003).

⁷⁰ *Id.* at 908.

⁷¹ *Id.* at 927–28.

⁷² *Id.* at 927.

⁷³ *See id.* at 913, 917 (describing the type of obligation in disarmament and environmental treaties).

⁷⁴ *Id.* at 927 (quoting Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, at 300, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Commentary]). For example, performance of the WTO’s MFN obligations

In addition, Pauwelyn examines the object and purpose of WTO obligations and determines that they are bilateral in nature. Trade, he claims, is about market access between countries. Breaches of WTO obligations that deny market access only affect the rights of parties to the breach;⁷⁵ “not *all* breaches of WTO law *necessarily* affect the rights of *all other* WTO members.”⁷⁶ Further, the interest in keeping the markets open can be “individualized”; “it is *not* a ‘collective interest’ in the sense of ‘a common interest, over and above any interests of the states concerned individually.’”⁷⁷ This is in sharp contrast with obligations in human rights treaties, for example.⁷⁸

According to Pauwelyn, the origin of WTO obligations is further evidence of their bilateral nature: Most WTO obligations are negotiated on a state-to-state, bilateral basis.⁷⁹ Further, WTO obligations are heterogeneous. Not all WTO members have the same obligations imposed upon them; the process of reciprocal negotiation results in asymmetrical obligations.⁸⁰ This further implies that obligations must be bilateral because they are not uniform but vary based on dyadic relationships.

Pauwelyn also claims that the WTO’s enforcement mechanism illustrates the bilateral character of its obligations. WTO dispute settlement provides redress not for breaches of obligations but instead “nullification of benefits *that accrue to a particular member.*”⁸¹ Dispute settlement works in a purely bilateral fashion, with one member alleging a violation against another. Finally, even if a state is found to have breached a WTO obligation, and the dispute settlement body recommends bringing the measure into conformity “as against all WTO members,” if the state does not comply in a reasonable amount of time, *only* the complainant state can suspend obligations to the defaulting state.⁸²

applies “unconditionally,” whether or not all WTO members perform it, and violation by one party does not allow or imply the suspension of WTO obligations for others. *Id.* at 928.

⁷⁵ *See id.* at 930 (describing the bilateral nature of trade).

⁷⁶ *Id.* at 931–32 (“Crucially, the objective of trade liberalization driving the WTO is *not* a genuine ‘collective interest’ in the sense that it transcends the sum total of individual state interests. It is therefore difficult to construe WTO obligations as truly collective obligations.”).

⁷⁷ *Id.* at 933 (quoting ILC Commentary, *supra* note 74, at 321).

⁷⁸ *See id.* at 933 (“Unlike WTO obligations, human rights obligations do *not* constitute a promise to one or more other states *taken individually*, but a promise to the collectivity or common conscience of all states involved.”).

⁷⁹ *See id.* at 931 (describing the bilateral nature of WTO negotiations).

⁸⁰ *Id.*

⁸¹ *Id.* at 934–35.

⁸² *Id.* at 935.

Thus the contractual view of the WTO, as elucidated by Pauwelyn, characterizes the agreements between the member states as nothing more than a series of bilateral contracts, any one of which could be varied by a subgroup of WTO members.

III LEGAL LIMITS ON CONTRACTING OUT OF WTO OBLIGATIONS

The constitutional and contractual understandings of the WTO outlined above were largely developed without reference to the actual legal relationship between the WTO and the burgeoning network of RTAs at the bilateral and regional level, which constitute an alternative legal regime. This oversight explains why Petersmann and Pauwelyn could reach such different conclusions about the nature of WTO legal obligations: Neither explores the relationship between the WTO regime and the RTA regimes to see if parties are actually allowed to contract out of their WTO obligations.

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

A. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties⁸³ is a necessary tool for analyzing obligations under the WTO because it provides the rules for interpreting international treaties, such as the WTO. It is an international “treaty on the law of treaties,” which sets out an interpretive framework for international agreements.⁸⁴ The WTO’s

⁸³ Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter VCLT].

⁸⁴ See generally RICHARD K. GARDINER, *TREATY INTERPRETATION* (2008) (describing Vienna Convention); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2009) (same). The Vienna Convention has been signed and ratified by 111 states and is also recognized by non-signatories (such as the United States) as binding because it is a restatement of customary international law. See

Appellate Body has held that it covers the WTO Agreement.⁸⁵ This Part will explore the provisions of the Vienna Convention that relate to the WTO/RTA relationships, concluding that the Vienna Convention imposes some minimal restraints on contracting out of WTO obligations through RTAs.

The Vienna Convention contains several provisions related to contracting out of multilateral agreements. First, Article 26 requires that parties be subject to the basic principle of *pacta sunt servanda* that agreements made must be obeyed.⁸⁶ It is unclear whether this provision limits the ability of states to enter into subsequent agreements that change an initial treaty obligation. The provision says nothing about such subsequent agreements, and, thus, does not address whether parties can derogate from their WTO obligations through RTAs.⁸⁷

Second, the Vienna Convention contains a general admonition against affecting the rights of third parties. Article 34 states that “[a] treaty does not create either obligations or rights for a third State without its consent.”⁸⁸ But Article 34 does not provide for a specific formula to determine *when* a treaty harms third parties. RTAs clearly have effects on third parties,⁸⁹ but the Vienna Convention gives little guidance on how to weigh this factor in legal interpretation.

Vienna Convention on the Law of Treaties, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 14, 2011) (stating that the U.S. government considers many provisions of the Vienna Convention to be customary international law).

⁸⁵ PETROS C. MAVROIDIS, GEORGE A. BERMAN & MARK WU, *THE LAW OF THE WORLD TRADE ORGANIZATION* 929 (2010) (citing Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 16–17, 23, WT/DS2/AB/R (Apr. 29, 1996), in which the WTO Appellate Body found that the Vienna Convention could be used to interpret WTO covered agreements).

⁸⁶ “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” VCLT, *supra* note 83, at 339.

⁸⁷ Thomas Cottier and Marina Foltea argue that Article 26 should be interpreted to mean that the first treaty that parties enter into takes precedence and cannot be derogated from due to requirements of subsequent treaties. Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 43, 53 (Lorand Bartels and Federico Ortino eds., 2006). Cottier and Foltea conclude that this means that WTO member states should not be able to enter into RTAs that change their WTO obligations. *Id.* However, Cottier and Foltea note that some scholars interpret the Article 26 obligation not as favoring an earlier treaty, but rather as making each treaty enforceable, even though they may contain potentially incompatible obligations. *Id.* at 53 n.31.

⁸⁸ VCLT, *supra* note 83, at 341.

⁸⁹ Member states are affected when some WTO states create a RTA among themselves because the RTA states will maintain lower barriers vis-à-vis each other but not with respect to other WTO members.

Third, the Vienna Convention provides a rule for the application of successive treaties relating to the same subject matter.⁹⁰ Article 30(4) sets out the interpretive rule for a situation where there is a later treaty that does not have all of the same members as an earlier treaty.⁹¹ This rule applies to RTAs because they are agreements created after the WTO, but are signed by only a few WTO members. The Convention thus holds that the members of the RTA should be governed by the RTA rules “only to the extent that [the WTO’s] provisions are compatible with those of the later treaty [in this case, the RTA].”⁹² As between the parties to the RTA, WTO rules are supposed to yield to RTA rules. As between members of an RTA and those WTO members who are *not* part of that RTA, the WTO continues to govern.⁹³ Thus, the Vienna Convention seems to allow for complete modification of the WTO as between members of a particular RTA.⁹⁴

Fourth, Article 41 sets out a rule governing agreements that modify multilateral treaties between only certain parties to the multilateral agreement. That rule significantly curtails the implications of

⁹⁰ VCLT, *supra* note 83, at 339. The full text of Article 30 is as follows:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) As between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Id.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ However, the rule in Article 30(4) applies “without prejudice” to Article 41, discussed *infra* notes 95–96 and accompanying text, so Article 41 trumps. VCLT, *supra* note 83, at 339.

Article 30 outlined above.⁹⁵ This applies directly to RTAs because they are meant to modify the WTO (a multilateral agreement) between only a few of the WTO members. Article 41 holds that parties to a multilateral agreement can modify the agreement only if a) the modification is provided for by the multilateral treaty or b) if the modification is not prohibited by the treaty, does not affect the rights of third parties, and does not relate to a provision “derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”⁹⁶ Article 41 thus requires an analysis of the WTO provisions on RTAs to determine whether the WTO allows contracting out through RTAs, and whether contracting out through RTAs would affect the rights of third parties or impair the effective execution of the WTO’s object and purpose as a whole.

The relevant provisions of the Vienna Convention thus give some guidance on how the legal relationship between the WTO and RTAs should be interpreted. The Convention enshrines the general principles that agreements should be kept, and that the rights of third parties should not be impaired. Article 30 suggests that parties are able to modify multilateral treaties through subsequent agreement, at least among the members of the subsequent agreement. But Article 41 places serious limits on such subsequent modifications. Parties can only contract out through RTAs if it is explicitly permitted by the WTO or if it is not prohibited by the WTO, it does not affect the rights of third parties, and it does not affect a fundamental provision of the WTO. Thus, a complete understanding of the Convention’s rules (and Article 41 in particular) requires an analysis of the WTO provisions on RTAs, which the next subpart will provide.

⁹⁵ VCLT, *supra* note 83, at 342. The full text of Article 41 is as follows:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) The possibility of such a modification is provided for by the treaty; or
 - (b) The modification in question is not prohibited by the treaty and:
 - (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Id.

⁹⁶ *Id.*

B. *The WTO's Legal Provisions on RTAs*

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

1. *GATT Article XXIV*

The GATT was originally signed by twenty-three countries in 1947.⁹⁷ The goal of the Americans leading the negotiations was to prevent the balkanization of the global trading system that had helped cause the Great Depression and paved the way for World War II.⁹⁸ The American delegation wanted the twin nondiscrimination principles of MFN and national treatment to be at the heart of the new global trade regime.⁹⁹ The Europeans involved in the negotiations, however, wanted an exception to MFN in order to develop regional integration mechanisms to help rebuild the continent and to prevent future conflict.¹⁰⁰ The developing countries at the table wanted to maintain the colonial systems which allowed preferential trade between imperial powers and their former colonies.¹⁰¹

These European and developing-country demands resulted in Article XXIV of the GATT (Article XXIV), which was meant to carefully delineate the context in which such side agreements (RTAs)

⁹⁷ *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited June 7, 2011).

⁹⁸ See JEFFREY FRANKEL, *REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM* 2-3 (1997) (describing the American perspective on pre-depression trade practices).

⁹⁹ See JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 31-33 (2006) (describing the American negotiating position); FRANKEL, *supra* note 98, at 3 (same).

¹⁰⁰ See John Odell & Barry Eichengreen, *The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 181, 193 (Anne O. Krueger ed., 1998) (describing the European negotiating position).

¹⁰¹ See MATHIS, *supra* note 40, at 37-39 (describing developing countries' negotiating position); F.A. Haight, *Customs Unions and Free-Trade Areas Under GATT: A Reappraisal*, 6 J. WORLD TRADE L. 391, 393-94 (1972) (same).

could take place.¹⁰² Article XXIV is the longest article in the GATT. It imposes several substantive conditions on RTAs. Each condition was meant to minimize the problematic effects of a violation of the MFN principle through an RTA.¹⁰³

First, Article XXIV contains an internal trade requirement. RTAs must eliminate “substantially all” barriers to trade between the states that are part of the agreement.¹⁰⁴ An RTA cannot marginally reduce tariffs between members of the agreement. It must take significant steps to remove all barriers to trade between the contracting parties for it to be permissible. RTAs violate MFN because countries would be free to treat their RTA partners differently from the rest of GATT members, but the removal of all trade barriers was thought to dull the negative effects.¹⁰⁵

The second important substantive requirement imposed by Article XXIV is the external trade requirement. Under Article XXIV:5, parties are permitted to form RTAs so long as they do not impose higher barriers to trade upon other GATT parties. With respect to trade external to the RTA, the duties and other regulations

¹⁰² As Kenneth Dam writes, “[T]he principal objective in the drafting of the customs union and free-trade area provisions became to tie down, in the most precise legal language possible, the conditions that such regional groupings would have to fulfill in order to escape prohibition under the most-favored-nation clause as preferential arrangements.” DAM, *supra* note 23, at 275. John Jackson concurs, indicating that the rationale behind the detailed provisions of Article XXIV was to stem abuse of the exception in ways that would contravene the MFN principle: “[T]he fear of some countries that the regional exception could be abused to allow the introduction of detrimental preference systems otherwise inconsistent with MFN was the motive power behind the elaborate draftsmanship that went into the other clauses of the regional exception.” JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 23, at 600.

¹⁰³ RTAs, by allowing countries within the RTA to receive preferential trading terms, present an exception to MFN. Kerry Chase, *Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV*, 5 *WORLD TRADE REV.* 1, 1 (2006).

¹⁰⁴ GATT, *supra* note 17, art. XXIV, ¶ 8 (defining an RTA as “a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories”).

¹⁰⁵ The purpose of this restriction was to minimize the negative economic effects of a violation of MFN. The economic logic was that if trade within the agreement (internal trade) were made virtually barrier-free, this would “create” more trade in the world by opening up new markets to the countries within the RTA, while ensuring parties outside of the agreement would not be worse off. As American economist Clair Wilcox, who chaired the International Trade Conference that resulted in the GATT, later wrote

A customs union creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. A preferential system, on the other hand, retains internal barriers, obstructs economy in production, and restrains the growth of income and demand. . . . A customs union is conducive to the expansion of trade on a basis of multilateralism and nondiscrimination; a preferential system is not.

CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 70–71 (1949).

maintained or imposed “shall not on the whole be higher or more restrictive” than “prior to the [agreement].”¹⁰⁶ This, too, was meant to guard against the discriminatory effect of RTAs and thus protect MFN. Parties to RTAs could trade with each other on more favorable terms, but they were not allowed to increase barriers to trade.

Article XXIV also contains a procedural element. Parties that create RTAs must notify the GATT/WTO that they have established an agreement.¹⁰⁷ During the GATT era, the RTA would be reviewed by an ad hoc working party, composed of other member states, to determine whether it complied with the Article XXIV requirements. After the WTO was created, additional oversight was imposed. The ad hoc working party review system was phased out and replaced with a standing committee (the Committee on Regional Trade Agreements, or CRTA) with the power to examine proposed agreements.¹⁰⁸ Its effectiveness is questionable, however.¹⁰⁹

In sum, Article XXIV of the original GATT does permit WTO members to contract out of their WTO obligations, including MFN, to form RTAs. But the Article was designed to (1) minimize the potentially discriminatory and balkanizing effects of RTAs and (2) create a procedural mechanism for WTO oversight of RTAs. This suggests a core set of constitutional obligations imposed on RTAs, and a deep tension within the WTO: The GATT/WTO contemplates contracting out through RTAs and yet still attempts to assert some basic obligations.

2. *The Enabling Clause*

There are also provisions governing RTAs in the Enabling Clause, the major WTO document relating to the special needs of developing countries in the global trade regime.¹¹⁰ This clause states

¹⁰⁶ GATT, *supra* note 17, art. XXIV, ¶ 5(a).

¹⁰⁷ *Id.* art. XXIV, ¶ 7(a).

¹⁰⁸ *Work of the Committee on Regional Trade Agreements (CRTA)*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Sept. 18, 2011).

¹⁰⁹ See *infra* notes 114–22 and accompanying text (describing the work of the CRTA and questioning its effectiveness).

¹¹⁰ One of the major rounds of trade negotiations, the Tokyo Round of the 1970s, resulted in the so-called “Enabling Clause.” *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) (allowing deferential treatment to developing countries); *Work on Special and Differential Provisions*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Sept. 18, 2011) (describing the Enabling Clause); *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Sept. 18, 2011) (describing the Tokyo Round).

that developing countries do not need to conform to Article XXIV requirements as long as the WTO is notified of RTAs.

Despite the lack of Article XXIV requirements, however, the Enabling Clause does suggest that developing countries are not licensed to create RTAs on any terms they choose. Developing-country RTAs must not create undue barriers for the trade of other countries that affect MFN obligations.¹¹¹ While this is somewhat contradictory, since all RTAs affect MFN, there is still a legal limit on the extent to which parties can contract out of GATT/WTO obligations through the Enabling Clause. Again, this suggests a core, constitutional set of WTO obligations, albeit ones that are not clearly defined.

3. *GATS Article V*

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

Article V of the GATS (GATS V) governs RTAs. The Article contains four main provisions, which mimic the internal and external trade requirements of Article XXIV of the GATT. First, RTAs that cover services must have substantial sectoral coverage.¹¹² Second, the agreement must abolish discrimination through the "(i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures."¹¹³ Third, such agreements must not result in higher trade and investment barriers against third countries. Fourth, provisions should be included for transparency and surveillance. As with RTAs that cover goods, parties to RTAs that cover services must notify the WTO. Such RTAs are currently reviewed by the CRTA. In these four basic respects, GATS V is analogous to GATT XXIV.¹¹⁴

¹¹¹ *Id.* ¶ 3(a).

¹¹² GATS, *supra* note 37, art. V n.1 (coverage understood "in terms of number of sectors, volume of trade affected and modes of supply"); see also DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY, AND PRACTICE 36–37 (2009) (describing the sectoral coverage requirement). The sectoral coverage requirement means that RTAs cannot be limited to certain sectors of the service economy but must apply more broadly. *Id.*

¹¹³ GATS, *supra* note 37, art. V.

¹¹⁴ There are three differences between the two. First, lawyers such as Petros Constantinou Mavroidis have argued that GATS V appears to set a looser standard than GATT XXIV: "Liberalization in the GATS context is not of the same width and breadth as in GATT. It was probably considered politically untenable to request, from WTO members aspiring to enter into [RTAs], to include sectors that they have not previously liberalized on an MFN-basis." Petros Constantinou Mavroidis, *Do Not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration Within the WTO*, in 2

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

4. Failed Implementation of These Provisions

The above analysis of the legal provisions of the WTO makes clear that there are limits on the extent to which parties are able to contract out of the WTO through RTAs. The GATT, the Enabling Clause, and the GATS all impose requirements that try to minimize the discriminatory treatment RTAs can cause, and each provides for oversight by the WTO. In practice, however, parties have found it easy to contract out of the WTO despite these measures. The working party review process of the GATT era and the CRTA process of the WTO have failed to impose any meaningful *ex ante* review.

Parties have generally complied with the notification requirement; countries have been willing to report to the GATT/WTO that they are forming an RTA. But at the review stage, the legal limits on RTAs have not been imposed. For most of the 124 RTAs that were formed during the GATT era,¹¹⁵ an *ad hoc* working party was formed.¹¹⁶ Of those, no RTA was ever judged to be in violation of GATT Article XXIV; the working parties “merely articulated issues raised . . . without arriving at any firm conclusions.”¹¹⁷ All other working parties ended without any agreement. Enforcement of GATT

HANDBOOK OF INTERNATIONAL TRADE 239, 261 (E. Kwan Choi & James C. Hartigan eds., 2004). For example, the words “substantially all the trade” are replaced with “substantial sectoral coverage,” which is less stringent. *Compare* GATT, *supra* note 17, art. XXIV, ¶ 8, with GATS, *supra* note 37, art. V, ¶ 1(a). The oversight given to the Council on Trade in Services (CTS) is less than that given to the Council on Trade in Goods (CTG), as there is no provision in the GATS that renders RTAs invalid if they are not modified in accordance with working party recommendations. Second, GATS V makes no distinction between a customs union and a free trade association, unlike GATT Article XXIV. *Compare* GATS, *supra* note 37, art. V, ¶ 7, with GATT, *supra* note 17, art. XXIV. Third, GATS V:3 gives developing countries involved in an RTA flexibility regarding the realization of the internal liberalization requirements and allows them to give more favorable treatment to firms that originate in parties to the agreement. GATS, *supra* note 37, art. V.

¹¹⁵ Roberto V. Fiorentino, Luis Verdeja & Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements: 2006 Update*, at 4 (World Trade Org. Discussion Papers No. 12, 2007).

¹¹⁶ Robert E. Herzstein & Joseph P. Whitlock, *Regulating Regional Trade Agreements—A Legal Analysis*, in 2 WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS 228 (Patrick F.J. Macrory et al. eds., 2005).

¹¹⁷ *Id.*

Article XXIV provisions through this mechanism was therefore nonexistent.¹¹⁸

After the WTO was established, member states unsuccessfully attempted to fix this ineffective system for monitoring RTAs.¹¹⁹ Over 300 RTAs have been notified to the WTO,¹²⁰ but the CRTA has never come to a consensus.¹²¹ Further, members often refrain from notifying their RTAs to the WTO or notify after they are already implemented, thereby “avoiding examination and discussion.”¹²²

In sum, “neither the GATT nor the WTO has effectively applied the approval or disapproval criteria” in GATT XXIV, the Enabling Clause, and GATS V through review by member states.¹²³ While there are formal limits on contracting out through RTAs in the WTO’s legal documents, these limits have not been imposed through the *ex ante* review envisioned. Thus the limits to the formation of RTAs on the books, while still legally valid, are less valuable as a source of law because they have not been applied in practice.

C. WTO Panel and Appellate Body Precedent

The most important source of WTO law that limits states’ ability to contract out of WTO obligations through RTAs has been the deci-

¹¹⁸ As Hoekman and Kostecki write, “It is not much of an exaggeration to say that GATT rules [on RTAs] were largely a dead letter.” HOEKMAN & KOSTECKI, *supra* note 22, at 353. The panels were ineffective for a number of reasons. First, the language of GATT Article XXIV is vague, and several prominent lawyers argue that the primary reason discipline could not be imposed was because the terms were inherently ambiguous. *See, e.g.*, MATHIS, *supra* note 40, at 68–71 (arguing that the GATT Article XXIV terms were too vague to be implemented effectively). Second, changing economic theory meant that the internal-external trade provisions were no longer considered the best way to maximize trade flows and prevent discrimination, so the provisions fell out of favor. *See, e.g.*, Jacob Viner, *The Customs Union Issue* 20 (1950) (arguing that RTAs have minimal economic effect). Third, the politics and the incentive structure of working parties made them ineffective. Consensus was required, so agreement was difficult. And no country had an incentive to criticize the RTA of another, fearing retaliation when bringing their own RTAs to a working party in the future. Thus the working parties of the GATT era imposed no limits on contracting out of WTO obligations, and RTAs proliferated.

¹¹⁹ Review by a working party was made compulsory, and then the working party system was changed to review by the standing CRTA. MATHIS, *supra* note 40, at 131.

¹²⁰ Fiorentino et al., *supra* note 116, at 4.

¹²¹ *Work of the Committee on Regional Trade Agreements (CRTA)*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited June 6, 2011).

¹²² Cottier & Foltea, *supra* note 87, at 61 (discussing deliberate avoidance of notification); Sam Laird, *Regional Trade Agreements: Dangerous Liaisons?*, 22 *WORLD ECON.* 1179, 1194 (1999) (describing posthoc notification).

¹²³ GANTZ, *supra* note 112, at 33. *See generally* Petko D. Kantchevski, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of the GATT and WTO Panels in Trade Dispute Settlement*, 3 *BYU INT’L L. & MGMT. REV.* 79 (2006) (describing the evolution of the dispute settlement regime).

sions of the WTO dispute settlement panels and Appellate Body. These decisions provide precedents that define and shape the meaning of WTO law.¹²⁴ This subpart provides an overview of the WTO dispute settlement process and discusses the two major areas in which the process has placed limits on contracting out. It also explains the ways that WTO jurisprudence has not limited contracting out of WTO member obligations through RTAs.

1. *The WTO Dispute Settlement Process*

Perhaps the most radical aspect of the change from the GATT to the WTO was the move to a system of compulsory third-party, two-instances system of adjudication.¹²⁵ First, countries take their disputes to ad hoc panels established by the WTO and composed of neutral decision makers. Either party can appeal the panel ruling to the Appellate Body, which has the power of judicial review.¹²⁶ Panels and the Appellate Body can order a member state to bring its measures into compliance.¹²⁷ If one party believes that another has not complied with the order, it can take the opposing party to a compliance panel adjudication, which can result in the imposition of countermeasures.¹²⁸

2. *Nondiscrimination*

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

Part I noted that nondiscrimination is at the heart of the GATT/WTO system. The original intent behind establishing global trade rules was to require countries to treat their trading partners equally

¹²⁴ Unlike a common law court, WTO precedents are not formally binding, but they are exceedingly persuasive authority and can essentially be treated like common law precedent. See generally Felix David, *The Role of Precedent in the WTO – New Horizons?* (Maastricht Faculty of Law, Working Paper No. 2009-12, 2009), available at <http://ssrn.com/abstract=1666169>.

¹²⁵ See BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* 77 (2007) (describing new dispute settlement procedures).

¹²⁶ *Id.* at 78. The Appellate Body is a “permanent body composed of renowned experts . . . seen as a definitive departure from a diplomacy oriented jurisprudence.” *Id.*

¹²⁷ *Id.* at 81.

¹²⁸ *Id.* A countermeasure is a measure taken against the infringing party that would normally violate WTO disciplines (for example, raising tariffs above MFN levels), but which is permitted against a country found to be in breach of the Agreement.

(MFN) and to treat the goods of other countries as favorably as domestically produced goods once they are in the country (national treatment). RTAs are a threat to the value of nondiscrimination. They allow states to treat some trading partners differently from others, forming new rules for themselves, possibly in derogation of WTO obligations.¹²⁹

As discussed above, this tension between GATT Article XXIV and the principle of nondiscrimination was meant to be remedied by the system of review of RTAs.¹³⁰ This system was not effective,¹³¹ but the dispute-settlement process has taken strides to assert the importance of the nondiscrimination principle, *vis-à-vis* RTAs.

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

First, WTO jurisprudence has imposed a “necessity requirement” before allowing discrimination under GATT Article XXIV. The leading case interpreting GATT Article XXIV is *Turkey—Textiles*.¹³² India contested a customs-union agreement¹³³ between Turkey and the European Union, arguing that quantitative restrictions¹³⁴ applied by Turkey were inconsistent with the WTO covered agreements¹³⁵ and were not justified by Article XXIV.¹³⁶ The Appellate Body agreed and held that while Article XXIV can be considered a “defense” to what would otherwise be a violation of WTO provisions,

¹²⁹ See *supra* Part I (describing RTAs).

¹³⁰ See *infra* Part III.B.1. (laying out legal provisions regarding RTAs).

¹³¹ See *infra* Part III.B.4 (describing the system’s failed implementation).

¹³² Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999) [hereinafter *Turkey—Textiles*]. A brief note on WTO case names: Panel and Appellate Body cases in the WTO are named after the respondent party and the issue at stake. So in *Turkey—Textiles*, the respondent state was Turkey and the substance of the dispute was over quantitative restrictions imposed on textiles imported from India.

¹³³ Customs unions are RTAs in which custom duties are harmonized in the free trade area. Krueger, *supra* note 41, at 174.

¹³⁴ Quantitative restrictions are import quotas, in which the importing country imposes a strict numerical limit on the number of goods it will import in a given time frame. See HOEKMAN & KOSTECKI, *supra* note 22 at 154–55 (describing the use of quantitative restrictions).

¹³⁵ Specifically, the Agreements on Textiles and Clothing. *Turkey—Textiles*, *supra* note 132, ¶ 9.3.

¹³⁶ *Id.* ¶ 9.67.

it can only be employed in limited circumstances.¹³⁷ For an RTA provision to be valid, it must be established under a valid RTA and must be *necessary* to the formation of the RTA.¹³⁸ Thus, WTO obligations can only be varied if a measure is necessary for an RTA to be formed. Creating a preferential arrangement cannot trump the goals of the WTO. This places a serious limit on contracting out through RTAs.¹³⁹

Second, several cases have held that safeguard measures must be applied uniformly. In *Argentina—Footwear*, Argentina had imposed safeguard measures on all countries but the members of their major RTA, called “MERCOSUR.”¹⁴⁰ The Appellate Body found that Argentina was obliged to apply safeguard measures to all countries.¹⁴¹ It reached this result without addressing Article XXIV; it used the Safeguards Agreement alone to reach the decision.¹⁴² Yet, as one commentator, David Gantz, has argued, “the implications for RTAs are significant. The rationale makes it more difficult for the RTA Members to protect other Members from safeguard measures”¹⁴³ Thus the dispute settlement process has limited the extent to which parties can form their own RTA-specific rules on safeguards (even though the Appellate Body was apparently loathe to rule on the RTA issue). The decision implies that parties cannot contract out of WTO

¹³⁷ *Id.* ¶ 9.83.

¹³⁸ *See id.* ¶ 9.116 (quoting Article XXIV:5(a) of the GATT, which allows necessary customs unions with some restrictions). Since Turkey could have used rules of origin to allow the EU to distinguish between Turkish and non-Turkish textiles in its own imports, the quotas were found to be unnecessary. *Id.* ¶ 9.190.

¹³⁹ David Gantz argues that *Turkey—Textiles*:

set a high bar for the use of [GATT] Article XXIV as a defense to measures that would otherwise be inconsistent with Article I or other GATT obligations. Not only must the Member invoking the exception demonstrate that the RTA is legal under Article XXIV(8)(a) and (5)(a), which may be difficult . . . but it must show that the measure was necessary to the formation of the RTA.

GANTZ, *supra* note 112, at 47. As James Mathis says, the panel found that GATT Article XXIV is not a *lex specialis*. It is part and parcel of the WTO as a whole, and does not constitute a self-contained regime; thus it must not alter WTO rights and duties. MATHIS, *supra* note 40, at 217.

¹⁴⁰ Panel Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 5.67, WT/DS121/R (June 25, 1999). Safeguard measures are temporary restrictions placed on a particular product in order to protect a domestic industry from a flood of imports. *Safeguard Measures*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited June 26, 2011).

¹⁴¹ In fact, it reversed the Panel on the issue of Article XXIV, arguing that it did not apply in this instance. Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 151(d), WT/DS121/AB/R (Dec. 14, 1999).

¹⁴² GANTZ, *supra* note 112, at 50. It employed a similar technique in *US—Steel Safeguards*, avoiding the Article XXIV issue and relying on the Safeguards Agreement. *Id.* at 51.

¹⁴³ *Id.* at 52.

rules on safeguards through RTAs, even though that is not its explicit holding.

Third, import restrictions must also be applied uniformly, as evidenced by the *Brazil—Tyres* case. There, Brazil had imposed import restrictions on all countries other than their MERCOSUR counterparties, justifying this measure in part by relying on a MERCOSUR tribunal determination which required Brazil to exempt other MERCOSUR members from import restrictions.¹⁴⁴ The Appellate Body found that the MERCOSUR decision did not justify the discriminatory behavior, although it refused to rule on the Article XXIV issue.¹⁴⁵ Instead, it found that Brazil was engaged in “arbitrary and unjustifiable discrimination under the chapeau of Article XX.”¹⁴⁶ This finding meant that the GATT Article XXIV analysis was not necessary, according to the Appellate Body, even though the panel ruling had found that the import restrictions were not justified under Article XXIV. But while the RTA issue did not prove dispositive as a technical, formal matter, the case strongly suggests that members of MERCOSUR were not permitted to modify their WTO obligations on import restrictions by contracting out through an RTA.

Fourth, WTO jurisprudence has held that membership in an RTA does not allow a member country to grant discriminatory tariff treatment. In *Canada—Autos*, Japan and the European Union challenged Canada’s practice of providing special tariff treatment to its North American Free Trade Agreement (NAFTA) partners and several other non-party states under the Canadian Motor Vehicles Tariff Order, arguing that it was in violation of, *inter alia*, GATT Article I.¹⁴⁷ Canada employed GATT Article XXIV as a defense but was unsuccessful, largely because the benefits were granted to more than just the United States and Mexico—Canada’s NAFTA partners.¹⁴⁸ This holding established that a member of an RTA cannot extend RTA benefits to non-parties on a discriminatory basis.¹⁴⁹ Thus, WTO jurisprudence has imposed limits on contracting out of WTO obligations if nondiscrimination is threatened.

¹⁴⁴ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreated Tyres*, ¶ 2, 65, WT/DS332/AB/R (Dec. 3, 2007).

¹⁴⁵ *Id.* ¶¶ 256, 258.

¹⁴⁶ GANTZ, *supra* note 112, at 48.

¹⁴⁷ Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶¶ 2.1–2.3, WT/DS139/R (Feb. 11, 2000).

¹⁴⁸ *Id.* ¶ 6.113.

¹⁴⁹ *Id.* ¶¶ 10.55–10.56.

3. Judicial Review

WTO jurisprudence has also limited the extent to which member states are permitted to contract out of WTO obligations through RTAs that compromise the right to judicial review in the WTO. RTAs often have procedures for judicial review over intra-RTA disputes. But the WTO has refused to hold that these decisions from within RTAs can estop a WTO member from bringing a case in the WTO. The WTO has continually found that parties have a right to a WTO judgment.¹⁵⁰ This is remarkable given the principle of comity, which holds that tribunals must respect the judgments of other international tribunals.¹⁵¹ This subpart will discuss four instances in which WTO jurisprudence has asserted that there is a right to judicial review.¹⁵²

First, in *Brazil—Tyres*, discussed above, the Appellate Body did not permit Brazil to premise its actions on the previous MERCOSUR ruling. This constituted a rejection of comity; the Appellate Body upheld its own capacity to make judgments on trade rules.¹⁵³ Even if parties have agreed to use RTA dispute settlement, that doesn't necessarily mean that a ruling by such a process will be binding on the WTO.

Second, *Argentina—Poultry* reached a similar conclusion. There, Brazil initiated proceedings against Argentinian anti-dumping measures.¹⁵⁴ Brazil had previously unsuccessfully brought the case in MERCOSUR proceedings, and Argentina relied on a MERCOSUR choice-of-forum provision (which specified that bringing the dispute in the RTA exhausted WTO options, and vice versa) that was not yet in force to argue that Brazil was estopped from bringing the claim.¹⁵⁵

¹⁵⁰ See *infra* notes 154–66 and accompanying text (arguing that the WTO has found that parties have a right to a WTO judgment).

¹⁵¹ See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 4–5 (1991) (discussing origins and notions of comity in domestic and international courts).

¹⁵² While this subpart does not address this example, there is also a current dispute in the WTO that demonstrates the importance of the right to judicial review. Mexico brought a complaint about an American voluntary labeling scheme for dolphin-safe tuna. The United States attempted to have the issue resolved by a NAFTA process and has continually argued that the dispute should be governed by NAFTA law rather than the WTO. The WTO has proceeded to form a panel to adjudicate the dispute (following a failure to negotiate), and thus, it seems that the newest edition to the dolphin-safe tuna saga will provide another example of how the WTO insists on the right to a WTO dispute settlement process. See generally *Mexico-US Tuna Dispute Moves to WTO*, BRIDGES TRADE BIORES (Int'l Centre for Trade and Sustainable Dev., Geneva, Switz.), Mar. 20, 2009, at 7, available at <http://ictsd.org/i/news/biores/43657/>.

¹⁵³ See *supra* notes 144–46 and accompanying text.

¹⁵⁴ Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003) [hereinafter *Argentina—Poultry*].

¹⁵⁵ *Id.* ¶¶ 7.37–7.38; see also William J. Davey & Andre Sapir, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 WORLD TRADE REV. 5, 11–12 (2009) (discussing

The panel declined to rule on whether the MERCOSUR judgment could estop the claim, instead finding that Brazil did not meet the conditions for consenting to estoppel.¹⁵⁶ The panel was loathe to imply estoppel and held that “the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the [Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)].”¹⁵⁷ Further, the Panel scathingly noted that “we are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies.”¹⁵⁸ Here, the panel asserted the hierarchy of WTO settlement proceedings.

Third, the estoppel issue also arose in the *EC—Sugar* case.¹⁵⁹ While the Appellate Body declined to establish concretely whether a member could be estopped from bringing a claim to the WTO, it did note that no such claim has ever been successful and that there is no mention of estoppel in the DSU.¹⁶⁰ It also denied an estoppel claim.¹⁶¹ This suggests that the Appellate Body is unlikely to accept an estoppel claim that prohibits parties from bringing claims to the WTO. Indeed, there has been no case in which a WTO defendant has successfully relied on an RTA clause that prohibits the complainant from initiating proceedings under the WTO.¹⁶²

Fourth, in *Mexico—Soft Drinks*, the Appellate Body asserted its right to adjudicate disputes between parties while an RTA dispute-settlement mechanism was being employed.¹⁶³ Mexico imposed taxes on soft drinks using corn syrup instead of cane sugar and sought arbitration under NAFTA Chapter 20.¹⁶⁴ The United States refused to cooperate and instead took the dispute to the WTO, where the Appellate Body exercised jurisdiction, stating that it had an obligation

Argentina—Poultry Panel decision that since the MERCOSUR provision was not yet in force, it was not an impediment to WTO Panel jurisdiction).

¹⁵⁶ *Argentina—Poultry*, *supra* note 154, ¶ 7.38.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* ¶ 7.41.

¹⁵⁹ Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS265/AB/R (Apr. 28, 2005).

¹⁶⁰ *Id.* ¶ 309.

¹⁶¹ *Id.* ¶ 313.

¹⁶² Tim Graewert, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1 CONTEMP. ASIA ARB. J. 287, 297 (2008).

¹⁶³ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 85, WT/DS308/AB/R (Mar. 6, 2006).

¹⁶⁴ Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 4.149, WT/DS308/R (Oct. 7, 2005).

to decide the case.¹⁶⁵ Thus, the WTO has recognized the right to judicial review by the WTO and has not adopted an estoppel principle for prior decisions made in RTA tribunals.¹⁶⁶

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

IV CONCEPTUALIZING THE WTO IN LIGHT OF LIMITS ON CONTRACTING OUT

Thus far, this Note has provided an overview of the WTO as an institution and a legal regime, and the parallel regime at the bilateral and regional level (namely, a large number of RTAs).¹⁶⁷ It then discussed how the two major competing theories conceptualize the WTO as a legal regime: a constitutional approach and a contractual approach.¹⁶⁸ Next, to see which of these models was the most descriptively accurate, this Note analyzed the law that governs the extent to which parties are allowed to contract out of WTO obligations through regional trade agreements;¹⁶⁹ if contracting out was not permitted, the constitutional account seemed more accurate, but if contracting out was permitted, then the contractual account would be more apt.

Having conducted this analysis, it is now possible to provide an answer to the two questions that this paper posed. First, what are the legal limits on contracting out of WTO obligations? Second, what do these limits tell us about how to understand the WTO as a legal regime? This Part will address each of these questions in turn. It will first discuss the legal limits on contracting out of the WTO based on the analysis of the law governing regional trade agreements discussed above. Second, it will discuss what this analysis tells us about the nature of the WTO as a legal regime.

There are two major types of core obligations that all three sources of WTO law assert cannot be varied through RTAs. First, creating an RTA does not mean that a country can automatically discriminate against countries outside of the RTA; rights of third parties are

¹⁶⁵ See GANTZ, *supra* note 112, at 53 (describing U.S. actions).

¹⁶⁶ For more discussion of conflicts between RTA and WTO dispute settlement, see Graewert, *supra* note 162.

¹⁶⁷ See *supra* Part I (providing an overview of WTO and RTA regimes).

¹⁶⁸ See *supra* Part II (outlining competing conceptual theories).

¹⁶⁹ See *supra* Part III (analyzing WTO law).

protected in various ways.¹⁷⁰ Second, the WTO has continually asserted a right to review RTAs to ensure that they are WTO compliant.¹⁷¹

The GATT/WTO has long been concerned with trying to eliminate discrimination in trade policy.¹⁷² The MFN and national treatment obligations, at the heart of the system, are meant to ensure that countries do not use trade as a political weapon and that they effectively liberalize trade.¹⁷³ RTAs pose a deep challenge to this logic.¹⁷⁴ They create special trade rules and eliminate tariff barriers among certain parties without giving those benefits to countries outside of the RTA. The law on RTAs has sought to mitigate this tension by attempting to protect third parties from the discrimination that RTAs represent. This was most evident in the WTO dispute settlement precedent, which maintained that RTAs did not give countries a right to discriminate against third parties when imposing safeguards, etc.¹⁷⁵ This principle was also evident in the internal and external trade requirements of GATT Article XXIV, which were meant to mitigate against the exception to MFN that RTAs posed by reducing discrimination against third parties.¹⁷⁶ This strategy was imitated when the GATS and the Enabling Clause were established (to deal with trade in services and trade among developing countries, respectively).¹⁷⁷ This principle is also apparent in the Vienna Convention, which holds that treaties should be interpreted so as to not violate the rights of third parties and that subsequent agreements are only permitted to the extent that the rights of third parties are not violated.¹⁷⁸ Throughout the various sources of WTO law, the core constitutional obligation to mitigate discrimination against third parties is continually asserted.

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

¹⁷⁰ See *supra* Part III (detailing various methods through which third party rights are protected).

¹⁷¹ See *supra* Part III.C.3 (arguing that the WTO has a protected right to judicial review).

¹⁷² See *supra* Part I (discussing the history and purpose of the GATT/WTO).

¹⁷³ See *supra* Part I (same).

¹⁷⁴ See *supra* Part III.B.1 (describing how RTAs violate MFN).

¹⁷⁵ See *supra* Part III.C.2 (explaining how the WTO has imposed limits on discrimination against third parties).

¹⁷⁶ See *supra* Part III.B.1–2 (describing the contents of GATT Article XXIV).

¹⁷⁷ See *supra* Part III.B.2–3 (discussing the GATS and the Enabling Clause).

¹⁷⁸ See *supra* Part III.A (analyzing the Vienna Convention).

right to WTO judicial review and refused to grant estoppel to RTA decisions.¹⁷⁹ The WTO has thus claimed that its dispute settlement processes are hierarchically superior to RTA processes. GATT Article XXIV also contains a similar assertion of the right of the GATT to review RTAs through ad hoc working parties composed of other GATT member states.¹⁸⁰ Finally, Article 41 of the Vienna Convention suggests that when subsequent treaties between selected parties attempt to modify a multilateral agreement, the prior multilateral treaty has the ability to define the terms of when such modification is possible.¹⁸¹ Article 41 of the Vienna Convention also suggests that the WTO has the continuing ability to review RTAs and determine whether parties are permitted to contract out.¹⁸²

These two obligations together demonstrate that parties cannot fully contract out of the WTO. Therefore, the contractual model of the WTO, which states that all WTO obligations should be able to be modified by parties acting at a bilateral or regional level, is flawed. There are core constitutional obligations in WTO law that, to some extent, cannot be varied. But these core constitutional obligations, which have been asserted in various sources of WTO law, should not be overstated. There is still a wide scope for contracting out of WTO obligations. That scope suggests that there is still truth to the contractual model of understanding the WTO.

RTAs are contemplated and accepted by WTO law. Article XXIV of the original 1947 GATT explicitly sanctioned their use, provided certain criteria were met, and GATS V and the Enabling Clause extended that right to other contexts.¹⁸³ Panels and the Appellate Body have taken a very limited approach in the cases discussed above. For example, they have left GATT Article XXIV virtually dormant. They have never found an RTA to be in violation of Article XXIV, and indeed, have sought to avoid the issue: “[The Appellate Body’s] willingness to determine that a particular RTA is fundamentally inconsistent with GATT Article XXIV is as yet untested.”¹⁸⁴ The

¹⁷⁹ See *supra* Part III.C.3 (discussing the right to judicial review in the WTO).

¹⁸⁰ See *supra* Part III.B.1 and 4 (describing RTA review mechanisms).

¹⁸¹ See *supra* notes 95–96 and accompanying text (discussing Article 41 of the Vienna Convention).

¹⁸² See *supra* Part III.B.1 and 4 (describing RTA review mechanisms).

¹⁸³ See *supra* Part III.B (describing the contents of GATT XXIV, GATS V, and the Enabling Clause).

¹⁸⁴ GANTZ, *supra* note 112, at 56. Limits imposed on RTAs have not been based on full-fledged assessments of whether the RTA itself was compatible with the WTO. Rather, they were imposed by asserting the legal primacy of other WTO obligations over the particular RTA at issue on a piecemeal basis. Therefore, the precedent is narrowly drawn and circumscribed.

Vienna Convention also contemplates such a situation: Article 41 permits modifications to multilateral treaties through subsequent agreements if the multilateral agreement permitted the modification.¹⁸⁵ While some legal limits are imposed, as discussed above, they have been confined to certain minor instances of discrimination against third parties and the right to judicial review in the GATT. All other modifications through RTAs seem possible.

RTAs are also permitted practically. The system of member-led review of the GATT era essentially failed to implement Article XXIV in a strict manner.¹⁸⁶ The fact that Article XXIV is largely moribund and that the original review mechanism is ineffective means that extensive contracting out is tacitly accepted by the WTO regime. Even the much-heralded WTO dispute settlement system has done little to monitor RTAs. There is a huge range of issues in which RTAs are permitted to set “policy,”¹⁸⁷ none of which have been challenged, such as intellectual property, rules of origin, and sanitary and phytosanitary measures. Only a tiny swath of the issues raised by RTAs have been adjudicated, and only the most basic principles of the WTO—nondiscrimination and the right to dispute settlement—have been upheld. And since there are so many RTAs and relatively few WTO cases, the vast majority of RTAs will never be challenged in WTO dispute settlement procedures. The WTO’s oversight over contracting out through RTAs is inherently limited and piecemeal. It is also *ex post* in that it is imposed after the RTAs are operational. Parties still have significant leeway to formulate their own rules governing trade because the scope of dispute settlement is so limited.

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

CONCLUSION

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

¹⁸⁵ See *supra* Part III.A (analyzing the Vienna Convention).

¹⁸⁶ See *supra* Part III.B.4 (describing the failure to implement the original system of review).

¹⁸⁷ See *supra* notes 42–44 and accompanying text (detailing the range of subjects that RTAs govern).

WTO are allows for better understanding of the WTO as a legal regime. This Note concludes that both the contractual and constitutional models are incomplete and that neither aptly describes the WTO's legal regime.

However, there are both constitutional and contractual elements to the WTO. There are certain core obligations that WTO law has sought to assert as non-derogable while permitting parties to contract out through RTAs on all other issues. Parties are thus able to alter their WTO obligations on a bilateral or regional basis on most, but not all, issues. Both Petersmann and Pauwelyn, the theorists who developed the constitutional and contractual models respectively, did not integrate the law on RTAs that defines the limits on contracting out into their models. Thus, both fail to describe the WTO regime correctly. The WTO is neither a purely constitutional regime nor a purely contractual regime, but incorporates elements of both models.

This new understanding of the WTO challenges some current concepts. First, the fact that the WTO is neither a purely constitutional nor a purely contractual regime has important implications for legal theory. Legal regimes have generally been understood by common law scholars as either public regimes, where contracting out of obligations is impermissible (such as a domestic criminal law regime), or private regimes, where parties are generally free to set their own obligations (such as a domestic contractual regime).¹⁸⁸ This analysis supports the view that legal regimes can be much more complicated. They can contain elements of both public-style constitutional regimes and private-style contractual regimes. The nature of a legal regime is best understood by analyzing the extent to which parties are free to contract out of their obligations.

Second, this analysis questions the WTO's reputation as a hard law regime. The WTO is the paradigmatic hard law regime at the global level, as it has a much-touted dispute settlement system with legally binding obligations imposed on members.¹⁸⁹ Hard law regimes are notable for their ability to ensure compliance with legal obligations through coercive legal rules. Since the WTO is widely considered to be a hard law regime, it is assumed to have significant ability to make member states comply with its laws. However, the fact that the WTO is a hard law regime may be less relevant, since parties have the

¹⁸⁸ For other challenges to this traditional divide, see generally *THE PUBLIC-PRIVATE LAW DIVIDE: POTENTIAL FOR TRANSFORMATION?* (Matthias Ruffert ed., 2009) and *CHALLENGING THE PUBLIC/PRIVATE DIVIDE* (Susan B. Boyd ed., 1997).

¹⁸⁹ See *supra* notes 1–5 and accompanying text (describing the WTO as a hard law regime).

power to contract out of their WTO obligations to a large extent. Those who point to the power of the WTO's legal system may wish to reconsider their optimism.