

**THE LONDON SCHOOL OF ECONOMICS
AND POLITICAL SCIENCE**

**LAW AND LAWYERS IN THE MAKING OF REGIONAL
TRADE REGIMES: THE RISE AND FALL OF LEGAL
DOCTRINES ON THE INTERNATIONAL TRADE LAW
AND GOVERNANCE OF SOUTH-NORTH REGIONALISM**

RAFAEL LIMA SAKR

**A Thesis Submitted to the Law Department of the London
School of Economics for the Degree of Doctor of Philosophy,
London, October 2018**

DECLARATION

I certify that the thesis I have presented for examination for the PhD in Law Degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent.

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of 99,985 words.

I confirm that an earlier version of Chapter 3 is published in *Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law*. LSE Law, Society and Economy Working Papers 9/2018 (2018).

ACKNOWLEDGEMENTS

This thesis is thanks to a number of people who I would like to briefly acknowledge here.

First and foremost, my gratitude goes to my supervisors, Andrew Lang and Jan Kleinheisterkamp. In each of our meetings, they challenged me to think about my arguments and approaches, offered me invaluable guidance and support, and throughout the four years, provided much-needed encouragement. Special thanks go to Aaron Wu, Dagmar Myslinska, Martin Clark, Nicolás Perrone, and Micha Wiebusch with whom I have had enlightening conversations about the issues addressed herein. My work has also benefitted from the generous comments of Jorge Esquirol and Sabine Frerichs on parts of Chapter 5 and Helena Alviar on parts of Chapter 6.

This thesis would also have been impossible without the generous scholarship and support from the London School of Economics and Political Science. In particular, I would also like to thank the academic and administrative staff in the LSE Law Department. I would especially like to thank Susan Marks, Linda Mulcahy and Rachel Yarham for their assistance in organising and administering LSE's PhD programme in Law. My gratitude also goes to my upgrade readers, Chris Thomas and Jacco Bomhoff, for their comments on my upgrade materials, which were instrumental to my thesis. A special place in these acknowledgements goes to fellow students and friends at LSE. In particular, friendship and support of Aaron and Eloise-Marie Wu meant more to me than I can express. My many thanks also go to David Vitale, Irene Claeys, Jake Bronsther, Rebecca Sutton, Sarah Trotter, Velimir Živković, Ryan Stones, Aleksandra Bojovic, Alexander Damianos, Signe Larsen, and Callum Musto.

I have also been fortunate to learn much from people and events beyond LSE. Special thanks go to the organisers and participants of the Harvard Institute for Global Law and Policy's Workshops (Doha, 2015 and Bogotá, 2015) and the Biannual Conference (Cambridge, MA, 2015); the Sciences Po and Paris Ovest Nanterre La Défense University's Doctoral Weeks (Paris, 2015, 2016, 2017); the Society of International Economic Law's 6th Conference of the Postgraduate and Early Academics Network (Tilburg, 2016); the University of Birmingham's Conference on Post-Brexit

Britain in A World of Preferential Trade (Birmingham, 2017); the King's College London's Transnational Law Summer Institute (London, 2016).

A special mention here must also go to David Kennedy, Christine Desan, Sheila Jasanoff, and Alberto do Amaral Júnior, whose guidance and further support made this PhD possible.

Last but *certainly* not least, I would like to thank my family and my friends. In a profound way, this thesis would not come about without the love, dedication, and support of my parents, José Roberto and Silvia, my sister, Fernanda, and my grandmother, Maria. Nor would it come without the love and inspiration of my grandfather, Edvaldo. There are no words to express my gratitude.

London, September 2018

ABSTRACT

My research inquires into the role of law and lawyers in global governance, trade regionalism and economic development. The central question is why contemporary regional trade agreements (RTAs) between developed and developing countries (South-North) are typically described in international law literature as the expression of a relatively uniform model of legal arrangements – when significant political and economic factors suggest otherwise. Indeed, these RTAs are homogeneously characterised as inter-state agreements devised to promote trade liberalisation. This common-sense understanding assumes lightly that free trade is the primary policy of RTA-partners. It also ignores the relevance of their economic differences and the effects of these imbalances over policy preferences and bargaining power.

My doctoral thesis explains how South-North regional trade regimes came to be conceived as the expression of a single, dominant model. It focuses primarily on the work of lawyers in making and governing these RTAs. It is, accordingly, an important premise that legal thinking and practices play a pivotal role in envisaging, constructing, and managing RTA, and that this role is not well understood. It is through modes of legal governance – mainly legal doctrines and dispute settlement mechanisms – that trade policies and disputes are framed as legal issues, to which legal norms and ideas are applied, and solutions are devised. Specifically, legal doctrines on trade regionalism attempt to affect the disciplinary understanding by providing an ideal model for RTAs. Thus, legal doctrines are strategically employed to shape, at some fundamental level, the way RTAs are thought, constructed and governed under the World Trade Organisation.

My thesis accounts for the rise and fall of one of the legal doctrines on the international law of South-North RTAs. It postulates that three distinct legal doctrines were produced to structure decision-making over these RTAs between 1947 and 1985. It suggests that their influence achieved its zenith in the 1970s, but was followed by a sharp decline shortly afterwards. By the late-1980s they were marginalised by the emergence of a legal doctrine, which has dominated legal expertise ever since. This thesis argues, therefore, that this new legal doctrine has empowered lawyers to shape the existing South-North trade relations. Conversely, it has also operated as a disciplinary grip, arguably preventing lawyers from engaging in devising innovative solutions for present-day problems.

TABLE OF CONTENTS

DECLARATION	2
ABSTRACT	5
LIST OF ABBREVIATIONS.....	8
TABLES OF TREATIES AND OFFICIAL DOCUMENTS.....	10
TABLE OF CASES	13
INTRODUCTION	14
PART I - FROM HISTORY TO DOCTRINE: THE INTERNATIONAL LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES.....	23
Chapter 1. The History of the International Law and Governance of South-North Regional Trade Regimes.....	25
Introduction.....	25
A. The Making of the World Trading System: From Crises to the ‘Permanent Interim’ Agreement to the Institutionalisation of the GATT Regime	27
B. The <i>Proliferations</i> of Regional Trade Agreements: From Article XXIV to the GATT Governance of South-North Regionalism	31
C. Lessons from the History of the GATT Law and Governance of South-North Regionalism.....	41
Conclusion.....	45
Chapter 2. The Doctrine on the WTO Law and Governance of South-North Regional Trade Regimes.....	48
Introduction.....	48
A. The Concept of Regional Trade Agreements.....	49
B. The Past and Present of Regional Trade Agreements.....	51
C. The Non-Legal Assessment of RTAs	55
D. The Legal Assessment of RTAs	65
E. The Relationship between the WTO and RTAs.....	79
F. The WTO Law and Governance of South-North Regional Trade Regimes.....	82
Conclusion.....	86
PART II – FROM DOCTRINES TO HISTORY: EMPOWERMENT, LIMITATIONS, AND IMAGINATION	91
Chapter 3. Legal History in International Law and Governance of South-North Regional Trade Regimes.....	94
Introduction.....	94
A. The Traditional Approach to History of International Economic Law.....	95
B. The Limits of the History of the International Law and Governance of South-North Regional Trade Regimes	97
C. Towards an Alternative Approach to History of the International Economic Law	106
Conclusion.....	112

Chapter 4. Legal Doctrine in the International Law and Governance of South-North Regional Trade Regimes.....	115
Introduction.....	115
A. The Mainstream Approaches to Legal Doctrine and Doctrinal Analysis.....	116
B. The Limits of Legal Doctrines of International Economic Law.....	122
C. Towards a Socio-Legal Approach to Legal Doctrines of International Trade Law.....	136
Conclusion.....	163
PART III – BETWEEN HISTORY AND DOCTRINE: LAW AND LAWYERS IN THE MAKING OF SOUTH-NORTH REGIONAL TRADE REGIMES (1947-1985)	165
Chapter 5. International Law and Lawyers in the <i>Institutional</i> Making of South-North Trade Regimes	168
Introduction.....	168
A. One World Economy? The ‘-ism’ Governance of International Trade by Three Postwar Regimes for Multilateral Trade Cooperation: Liberal-welfarism, Socialism and Developmentalism.....	170
B. One Multilateral Trading System to Rule Them All? South-North Regional Trade Agreements as Battlefields between the Liberal-welfarist GATT and the Developmentalist UNCTAD.....	182
C. One International Law and Governance of South-North Regional Trade Agreements? From the Liberal-welfarism and Developmentalism Struggle to the Emergence of Four Institutional Models for Trade Governance.....	198
Conclusion.....	202
Chapter 6. International Law and Lawyers in the <i>Jurisprudential</i> Making of South-North Trade Regimes	205
Introduction.....	205
A. The Genesis of the Controversy over International Economic Law: In the beginning was international law, and international law was with international lawyers, and international law was international lawyers.....	209
B. The IEL Controversy in France: From the Disruptive Effects of Formalist Specialisation to Liberal-welfarist Programmes on International Law of South-North Trade Governance.....	211
C. The IEL Controversy in Africa: From the Converging Effects of Antiformalist Universalisation to the Developmentalist Programmes on International Law of South-North Trade Governance.....	214
D. International Law as Battleground: The Three Jurisprudential Visions of South-North Regional Trade Governance.....	218
Conclusion.....	241
Chapter 7. The Rise and Fall of International Trade Law Doctrines: The Legal Governance of the EU-Africa Regional Trade Regimes.....	244
Introduction.....	244
A. Legal Doctrines and the South-North Regional Trade Agreements.....	247
B. Law and Development Cooperation Doctrine: Legal Governance of the EU-Africa Trade Regime.....	249
Conclusion.....	293
CONCLUSION	298
APPENDIX.....	306
REFERENCES.....	308

LIST OF ABBREVIATIONS

- AAMS** Associated African and Malagasy States
- ACP** Africa, Caribbean, and the Pacific
- Association** Part IV of the Treaty of Rome
- Benelux** Belgium, the Netherlands, and Luxembourg
- CAP** Common Agricultural Policy (EU)
- CEP** common external policy
- CEPAL** Commission for Latin America (UN)
- CETA** Comprehensive Economic and Trade Agreement (EU-Canada)
- Comecon** Council for Mutual Economic Assistance
- CTD** Committee on Trade and Development (WTO)
- CRTA** Committee on Regional Trade Agreements (WTO)
- CU** customs union
- CUSFTA** Canada–US Free Trade Agreement
- DSU** Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
- EC** European Community
- ECOSOC** Economic and Social Council (UN)
- ECSC** European Coal and Steel Community (EU)
- EDF** European Development Fund
- EEC** European Economic Community (EU)
- EIB** European Investment Bank
- EPAs** Economic Partnership Agreements
- EU** European Union
- FTA** free trade agreement
- GATS** General Agreement on Trade in Services
- GATT** General Agreement on Tariffs and Trade
- GSP** Generalised System of Preferences
- IC** Implementing Convention on the Association of the Overseas Countries and Territories with the Community
- ICJ** International Court of Justice
- ICSID** International Centre for Trade and Sustainable Development
- IEL** international economic law
- IMF** International Monetary Fund

ISI import-substitution industrialisation
ITO International Trade Organisation
LDC least developed country
Lomé I Convention of Lomé of 1975
Lomé II Convention of Lomé of 1979
MFN most-favoured-nation clauses
NAFTA North American Free Trade Agreement
NIEO New International Economic Order
NIEO Declaration Declaration on the Establishment of a NIEO (UN)
NIEO Charter Charter of Economic Rights and Duties of States (UN)
OCT overseas countries and territories
OECD Organisation for Economic Co-operation and Development
OPEC Organisation of the Petroleum Exporting Countries
PTA preferential trade agreement
RTA regional trade agreement
SOE state-owned enterprise
Stabex Stabilisation of Export Earnings Scheme
Sysmin Stabilisation Scheme for Mineral Products
TPP Trans-Pacific Partnership Agreement
TTIP Trans-Atlantic Trade and Investment Agreement
UN United Nations
UNCITRAL UN Commission on International Trade Law
UNCTAD UN Conference on Trade and Development
UNIDO UN Industrial Development Organisation
VCLT Vienna Convention on the Law of Treaties
WIPO World Intellectual Property Organisation
WTO World Trade Organisation
Yaoundé I Convention of Association of 1963
Yaoundé II Convention of Association of 1969

TABLES OF TREATIES AND OFFICIAL DOCUMENTS

(i) GATT/WTO Treaties

Agreement establishing the World Trade Organization (15 April 1994, entry into force 1 January 1995) [WTO Agreement]

Agreement on Rules of Origin (15 April 1994, entry into force 1 January 1995) [RoO Agreement]

General Agreement on Tariffs and Trade (April 1947, entry into force 1 January 1948) [GATT]

Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994, entry into force 1 January 1995) [DSU]

(ii) Regional Trade Agreements Treaties

Convention of Association between European Economic Community and the African and Malagasy States associated with that Community (20 July 1963) [Yaoundé I]

Convention of Association between European Economic Community and the African and Malagasy States associated with that Community (29 July 1969) [Yaoundé II]

The Lomé Convention of Lomé (25 March 1975) [Lomé I]

The Second ACP-EEC Convention (31 October 1979) [Lomé II]

The Treaty of Rome (25 March 1957) [Treaty of Rome]

(iii) GATT/WTO Documents

GATT. *Australian treatment of products of Papua-New Guinea* (GATT Doc W.8/12, 7 October 1953) [Australia-Papua-New Guinea Waiver].

GATT. *ACP-EEC Convention of Lomé. Questions and Replies*. (GATT Doc L/4325, 7 July 1976) [Lomé I Q&R].

GATT. *Decision concerning a waiver for the continued application by Italy of Special Customs Treatment to certain Products of Libya* (GATT Doc CP.6/54, 25 October 1951) [Italy-Libya Waiver].

GATT. *Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries* (GATT Doc L/4903, BISD 26S/203, 28 November 1979) [Enabling Clause].

GATT. *Decision on the Generalized System of Preferences* (GATT Doc L/3545, 25 Jun. 1971) [GSP Decision].

GATT. *Report of the Working Party on Convention of Association between European Economic Community and the African and Malagasy States* (GATT Doc L/3465, 20 November 1970) [Yaoundé II Report].

GATT. *Report of the Working Party on EEC/Association of African and Malagasy States and of Non-European Territories* (GATT Doc L/2441, 3 June 1965) [Yaoundé I Report].

GATT. *Report of the Working Party on the ACP-EEC Convention of Lomé*. (GATT Doc L/4369, 5 July 1976) [Lomé I Report].

GATT. *Report of the Working Party on the European Free Trade Association* (GATT Doc L/1235, 4 June 1960) [EFTA—WP Report].

GATT. *Report of the Working Party on the Second ACP-EEC Convention of Lomé*. (GATT Doc L/5292, 5 March 1982) [Lomé II Report].

GATT. *Summary Record of the Thirteenth Meeting, Third Session of the Contracting Parties* (GATT Doc CP.3/SR.13, 18 May 1949) [Summary Record of the Thirteenth Meeting]

WTO. *Decision on Transparency Mechanism for Preferential Trade Arrangements*. General Council (WTO Doc WT/L/806, 16 December 2010) [Transparency Decision].

WTO. *Decision to Establish the Committee on Regional Trade Agreements*. General Council (WTO Doc WT/L/127, 1996) [CRTA Decision].

WTO. *Submission on Regional Trade Agreements by the ACP Group of States* (WTO Doc TN/RL/W/155, 2004) [ACP—RTA Submission].

WTO. *Submission on Regional Trade Agreements by the European Communities*. (WTO Doc TN/RL/W/179, 2005) [EU—RTA Submission].

(iv) EU Documents

European Commission. *Association des Etats d’Outre-Mer à la Communauté. Considérations sur le futur régime d’association* (COM Document (61) 110, 12 July 1961) [EU, 1961].

European Commission. *Commission Memorandum on a Community Policy for Development Cooperation* (Summary. SEC (71) 2700 final, 27 July 1971. Bulletin of the European Communities, Supplement 5/71) [EU, 1971].

European Commission. *The Community's development policy*. Memorandum (Information Memo P-51/82, September 1982) [EU, 1982].

European Commission. *Les relations entre la Communauté et les pays du bassin Méditerranéen. Communication de la Commission au Conseil = Relations between the Community and the countries of the Mediterranean basin*. Communication from the Commission to the Council (SEC (72) 3111 final, 27 September 1972) [EU, 1972].

European Commission. *The Community and the Mediterranean countries: guidelines for economic cooperation*. Communication by the Commission to the Council. (COM (85) 517 final, 26 September 1985) [EU, 1985].

(v) UN Documents

UN. *Resolution 1995 (XIX). Establishment of the United Nations Conference on Trade and Development as an organ of the General Assembly*. UN General Assembly Nineteenth Session (30 December 1964) [UN Resolution 1995 (XIX)].

UN. *Resolution 3201 (S-VI). Declaration on the Establishment of a New International Economic Order*. UN General Assembly (UN Doc A/RES/3201, 1 May 1974) [NIEO Declaration].

UN. *Resolution 3281 (XXIX). Charter of Economic Rights and Duties of States*. UN General Assembly (UN Doc A/RES/3281, 12 December 1974) [NIEO Charter].

UNCTAD. *Proceedings of the United Nations Conference on Trade and Development* (Vol. I, United Nations, 1964) [UNCTAD Proceedings 1964-I].

UNCTAD. *Proceedings of the United Nations Conference on Trade and Development* (Vol. II, United Nations, 1964). [UNCTAD Proceedings 1964-II].

UNCTAD. *Proceedings of the United Nations Conference on Trade and Development* (Vol. V, United Nations, 1964) [UNCTAD Proceedings 1964-V].

UNCTAD. *Proceedings of the United Nations Conference on Trade and Development, Second Session, New Delhi, 1 February-29 March 1968* (Vol. I, United Nations, 1968) [UNCTAD Proceedings 1968-I].

UNCTAD. *Resolution 21(II). Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries* (UNCTAD, 1964-I, Vol. I, United Nations, 1964) [UNCTAD Resolution 21(II)].

(vi) Official documents of other international organizations

Comecon. *Comprehensive Program for the Further Intensification and Improvement of Collaboration and the Development of Socialist Economic Integration of COMECON Member Nations* Soviet and Eastern European Foreign Trade (Vol. 7, pp. 187–305, 1971) [Comecon, 1971].

TABLE OF CASES

GATT. *EEC – Import Regime of Bananas*, Report of the Panel (not adopted, GATT Doc DS38/R, 1994) [EEC—Bananas II Panel Report].

GATT. *EC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, Report of the Panel (not adopted, GATT Doc L/5776, 1985) [EC—Citrus Panel Report].

WTO. *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body (Doc WT/DS121/AB/R, 1999) [Argentina—Footwear AB Report].

WTO. *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body (Doc WT/DS248/AB/R, 2003) [US—Steel Safeguards AB Report].

WTO. *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (Doc. WT/DS2/AB/R, 1996) [US—Gasoline AB Report].

WTO. *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body (Doc. WT/DS34/AB/R, 1999) [Turkey—Textiles AB Report].

WTO. *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Panel (Doc. WT/DS34/R, 1999) [Turkey—Textiles Panel Report].

WTO. *Canada – Certain Measures Affecting the Automotive Industry*. Report of the Panel (Doc. WT/DS139/R, 2000) [Canada—Autos].

WTO. *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Panel (Doc. WT/DS202/R, 2001) [US—Line Pipe Panel Report].

WTO. *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Panel (Doc. WT/DS332/R, 2007) [Brazil—Retreaded Tyres].

INTRODUCTION

This thesis engages with a conversation that has been largely forgotten, and yet very present even in the newspapers since the turn of the millennium or even further back to the rise of ‘neoliberalism’ in the 1980s. We often read about international actors, national governments, political parties, businesses, and social movements discussing the virtues and vices of regional trade agreements (RTAs). The context, actors and opinions may differ – developed or developing countries, producers or consumers, exporters or importers, conservatives or liberals, experts or activists – but the description is similar: all regional trade agreements, regardless of the partners, are international instruments for promoting trade liberalisation. Some RTA defenders argue that the liberalisation of trade fosters economic development by increasing economic efficiency and market access. Yet, others claim that RTAs contribute to consolidating a (neoliberal) rule of law for world trade. By contrast, the opponents contend that RTAs prevent economic development by destroying domestic business while shipping jobs overseas. Others assert that RTAs restrict the domestic space for social and environmental regulation and development policies. But, what if, these viewpoints share, as a starting point, a particular understanding of what RTAs are for, and how they work? This thesis is about that shared understanding – what it is, how it is constructed and maintained, and how it frames our debates about the shape the trade agreements ought, and ought not, to have in the 21st century.

From its inception to 2016, the world trading system has never been free from controversies. Neither the World Trade Organisation (WTO) nor the constellation of RTAs (including the North American Free Trade Agreement, the Comprehensive Economic and Trade Agreement between the EU and Canada, the Trans-Pacific Partnership Agreement, and the Trans-Atlantic Trade and Investment Agreement) has ever gathered strong support among the general public. However, the opposition has tended to be dispersed, enabling politicians, policymakers, experts, and domestic and transnational business sectors, to conclude a series of trade agreements since the end of World War II. Looking back, countries have been in a continuous state of multilateral and regional negotiations.

The difference today is that the political-technocratic consensus around the advantages of international trade has been weakened by politicians and populist movements. They have seized the opportunity for gaining political support by blaming economic globalisation and immigration for the losses impinged on the majority of citizens by the Great Recession triggered by the 2008 global financial crisis. This opposition to

trade agreements only became a reality for the political and expert establishment in 2016 with the shocking outcomes of the Brexit referendum, Wallonia's threat to reject the CETA referenda and the US presidential election. Since then, North America and Europe have been in turmoil. The three symbolic pillars of the world trade regime's success are under siege: the European Union (EU), North American Free Trade Agreement (NAFTA), and WTO.

Are we – international lawyers¹ – responsible for Brexit or Donald Trump's victory? Lawyers might only wish they have the kind of power necessary to determine the outcome of referenda or elections. Yet, even if lawyers have not been the cause of those stunning results, we would bear part of the responsibility for having legitimised and validated the shared understanding of international trade by grounding on its stories and ideas legal arguments about the WTO and RTAs.

The origins of our current challenges seem to begin back in the 1970s-1980s. In this period of global economic stagnation and political turbulence, an ideational programme for world trade emerged. It was founded on a persuasive set of political and economic theories about the relationship between the state and economy, which promised to promote growth in a faltering world economy. This rising blueprint rejected various ideas and policies associated with 'liberal-welfarism', the programme that dominated the political and expert communities since the postwar period.² The core ideas of the new programme were first introduced in Chile in the mid-1970s. They were, then, adopted over the 1980s in the Ronald Reagan's United States and the Margaret Thatcher's United Kingdom, and in the rest of Latin America through the support of the International Monetary Fund (IMF) and World Bank. From the early-1990s leading up to the 2008 financial crisis, this body of norms, theories, and practices, became a dominant programme that was applied (unevenly and partially) around the world.

The programme proposed – at the most fundamental level – to reimagine society as a marketplace. It proclaimed that markets, not governments, held the key to prosperity and freedom.³ It turned away from a concept of politics as a shared language for formulating, mobilising, and realising the collective goals of a political society, towards a concept of

¹ For the sake of clarity, the terms "lawyers" or "legal experts" are used interchangeably. They both mean intellectuals and practitioners who work in the field of international law. These professionals are legal experts who tend to think of themselves as practitioners (*e.g.* attorneys, policy makers, diplomats, judges, prosecutors, activists) or intellectuals (*e.g.* academics, thinkers, scholars, jurists). Each of them has her/his political and moral orientation that disappears inside of legal expertise and reappears vested into a specialised vocabulary and style in the intense debates about international law and governance.

² Jouannet, 2012: 249-253; Ruggie, 1982: 393.

³ Plant, 2010: 6.

politics as a shared idiom for enabling individuals' pursuit of self-interests.⁴ This process of redefining the meanings of 'society', 'politics', 'governments' and 'markets', has drawn inspiration primarily from neoclassical economics, which nurtured a strong normative preference for 'free' and 'fair' markets. The ascendance of a 'market faith' led the programme to embrace free trade and competitive markets, combined with strong private rights, as the ultimate form of wealth creation. The role of the state was to be limited to sustain the institutional and normative conditions necessary for enabling the development of well-functioning markets. Over time, this way of thinking penetrated deeply in minds and hearts around the world. As a result, without realising or deciding, societies "drifted from having a market economy to being a market society."⁵ This programme has been named 'Washington Consensus', 'market fundamentalism', or 'neoliberalism', depending on the perspective.

The ideational, political and economic transformations driven by neoliberalism had profound impacts on international trade law. The contemporary world trading system was originally centred on the General Agreement on Tariffs and Trade of 1947 (GATT), a postwar offspring of the liberal-welfarist programme. At present-day it is presided over by the WTO, a product of the radical reconceptualisation of the GATT regime by neoliberalism in the 1980s-1990s.

Yet, the first laboratory for neoliberal thought in international trade agreements was not the GATT but regional trade agreements. The Canada-US Free Trade Agreement of 1988 (CUSFTA) and the NAFTA of 1992 were the earlier experiments to take the institutional form of the neoliberal programme at the international level. They came to be imaginatively associated with a neoliberal model of concrete RTAs. The combination of these programmatic developments with the collapse of the socialist bloc, the debt crisis in the Third World, and the push towards economic globalisation opened an opportunity for a 'neoliberal regionalism'. For instance, the waves of 'new regionalism' in the late-1980s and of 'bilateral' and 'mega-regionals' in the late-2000s produced roughly 250 RTAs modelled on the neoliberal archetype.

In this context, neoliberalism was progressively entrenched in the field of international economic law. Initially, lawyers came to be engaged by the demands, reforms, questions, challenges, and struggles associated with the rise of the neoliberal programme,

⁴ Lang, 2011: 1-2.

⁵ "The difference is this: A market economy is a tool—a valuable and effective tool—for organizing productive activity. A market society is a way of life in which market values seep into every aspect of human endeavor. It's a place where social relations are made over in the image of the market" (Sandel, 2012: 23).

and sought to bring their expertise to bear on them. Later, they began to gradually embrace neoliberal thought and weave it into legal ideas and practices. My thesis advances one general and two specific arguments about the profound impact that global political and intellectual struggles around neoliberalism have had on the international trade law and governance of regional trade regimes between developed and developing countries (South-North) (and vice versa).

The first general argument is about lawyers' sizeable share of responsibility for the normalisation of a particular ideal of South-North regionalism within the IEL field while accepting (consciously or otherwise) the disappearance of alternative concepts and models from the contemporary legal debates. The second argument is about legal histories lawyers tell to make sense of and engage with these RTAs. The third argument is about legal doctrines that lawyers produce, which combine history lessons with norms, ideas, and practices, to produce and enact (relatively) stable and coherent frameworks for decision-making in and about those RTAs. These arguments, briefly summarised in the following paragraphs, are partial responses to the question of the share of lawyers' responsibility in the current state of international trade affairs.

International Trade Law of South-North Regionalism as Legal History

The initial argument I make is about the three widespread and influential lessons about the relationship between multilateralism and regionalism learned from history. Chapter 1 describes these teachings by retelling the widely accepted accounts of the evolutions of the world trading system and RTAs from the early-20th century onwards. The conventional narratives reveal that the interaction between multilateralism and regionalism has been sometimes tense, sometimes harmonious, due to the normative preference for the latter formed in the postwar period.

The first lesson is that the ideational mission of the GATT was to promote multilateral trade liberalisation while preventing the destructive effects of protectionism and ensuring RTAs were devised to foster rather than hamper free trade and economic integration. The second is that the GATT's institutional defects were partially responsible for exposing the multilateral regime to recurring waves of regionalism. The third is that the unsatisfactory jurisprudential solutions to normative ambiguities and policy contradictions weakening the authority of GATT law were partially responsible for disempowering the control of the world trade regime over regionalism.

According to the traditional history, those problems have been greatly mitigated through the profound reforms carried out in and over international trade law throughout the 1980s and 1990s. Institutionally, the reconstitution of the GATT as the WTO, combined with the piecemeal improvement of its disciplines on regionalism, has, if not contained the proliferation of RTAs, at least directed them to contribute to multilateral liberalisation or, perhaps, economic globalisation. Jurisprudentially, new approaches have assisted lawyers in increasing the influence of WTO law over decision-making in and over RTAs through legalisation and judicialisation of trade disputes. Ideationally, RTAs have been re-conceptualised as second-best servants for constructing a global free and fair market, as a response to the long deadlock in multilateral negotiations preventing the world trade regime from realising its mission.

In Chapter 3, I make the broader claim that the importance of these stories has been to contribute to validating and legitimising a narrow view of South-North RTAs, on which lawyers have built their projects and ideas, and reworked their expertise. These conventional narratives have been articulated to frame needs, preoccupations, and challenges associated with regionalism in a particular way that has substantially constrained the range of potential options and solutions imaginable within the domain of international trade law. This suggests that history-telling bears a great deal of responsibility for shaping lawyers' understanding of and response to the recent events that rapidly drifted away from the rise of 'mega-regionals' and towards Brexit and Trumpism.

My response to the traditional history is to rethink 'what' histories international lawyers tell, and 'how' they historicise international trade law. Chapter 3 examines the techniques undertaken by lawyers to portray institutional and jurisprudential stories. It describes and identifies the shortcomings of (what I call) the 'traditional approach to legal history'. To avoid some of these weaknesses, I propose an alternative devised to assist us to re-engage with lawyers' past and present expertise and choices. I resituate the international trade law of South-North regionalism within a wider temporal trajectory and spatial context, with the purpose of remembering the 'rest' of international trade law that was forgotten by inside disciplinary struggles, and outside political-economic conflicts underscoring the 'invention', 'maturation', and 'defence' of legal doctrines.

Chapters 5 and 6 apply my 'alternative approach' to retelling partially the history of the interaction between multilateralism and regionalism. Although historicising the trajectory of South-North regionalism all the way back to the late-19th century may well be best, the task cannot be undertaken within the limits of this work. Instead, I offer two very brief, and not exhaustive, overlapping historical accounts of international law and lawyers

in the making and management of South-North RTAs under the GATT. My purpose is to reveal what kind of institutional and jurisprudential stories can be told when historical narratives are not instrumentalised in support of a legal doctrine. These accounts also intend to show that the traditional history is neither a mere objective and neutral description of the past, nor an incontestable set of lessons that can only entail a single legal doctrine with universal application. Rather, they reveal that stories are built on facts and ideas that are less clear and determinate than the conventional narratives suggest. Finally, they aim to assist us in rethinking the received wisdom of the three history lessons set out above, which underlie contemporary lawyers' thinking and practices of South-North regionalism.

International Trade Law of South-North Regionalism as Legal Doctrine

The second argument is about the contemporary dominance of a particular legal doctrine⁶ on the international trade law of South-North regionalism. Chapter 2 describes and analyses in detail what I call 'the WTO law of regional trade agreements' as found in academic and policy literature and official documents. This comprehensive account provides evidence to support my claim that there exists a specific legal doctrine that holds a dominant position within the IEL field and exerts a significant authority in legal and policy debates about South-North RTAs, and how WTO law should address them.

This legal doctrine – I argue – is (like the traditional history) structured on three domains of legal thinking and practices. Ideationally, it embraces a programme of market-led growth and integration. Institutionally, it focuses on the WTO as a governance model for institutions and rules. Jurisprudentially, it centralises WTO law, while also privileging functionalist ideas about the role of the law, and the range of legal techniques which are available. The combination of these constitutive features underlies the doctrinal framework for South-North regionalism.

The origins of this legal doctrine go back to the formation of neoliberal thinking. Since the late-1980s, this doctrine has not only marginalised its competitors within the IEL field but also gained great currency in global trade governance. Once it became dominant, legal expertise has narrowed its focus on making the doctrine more coherent, technical, and accurate. It also has empowered lawyers' influence in and over the world trading system.

⁶ In this thesis, the term 'legal doctrine' refers not only to legal norms or their interpretation. As I shall discuss in Chapter 4, *legal doctrine* is conceived as a coherent and stable framework of positive and non-positive norms and legal knowledge and techniques, which serves as a legitimate and authoritative mode of legal governance.

However, the narrow specialisation has constrained the range of lessons and norms, ideas and methods regarded as valid and legitimate. A concrete effect has been to consolidate a view of South-North RTAs as the expression of a relatively uniform model of legal arrangements devised to promote trade liberalisation. This common-sense understanding not only assumes that free trade is the primary policy of RTA-partners but also considers irrelevant both their economic differences and the impact of these imbalances on policy preferences and bargaining power. As a consequence, I contend that this legal doctrine has played a pivotal role in constraining lawyers' ability to think ingeniously about solutions to the present-day problems concerning the relationship between international law and governance, trade regionalism, and economic development.

To be clear, the problem to which I seek to draw attention is not the increasing complexity of recent RTAs' scope, scale, norms, and relationship with the WTO. This is well known within the IEL field. Rather, the broader claim I seek to make through these observations is that we do not yet have a satisfactory analysis of the precise ways in which legal doctrines affect the participation of law and lawyers in the making and interpretation of South-North RTAs (and vice versa). Thus, I offer, in Chapter 4, a 'socio-legal approach' to account for what I believe is the critical function of legal doctrines in international trade law and governance. Applied to South-North regionalism, this alternative approach focuses specifically on the constitutive features of legal doctrines and how they shape, at some fundamental level, the way RTAs are thought, constructed and governed.

Since this doctrinal dimension is currently under-appreciated, I undertake an exploratory inquiry of the past and present of legal doctrines on the international trade law of South-North RTAs. Grounded in my findings, Chapter 7 hypothesises that three distinct legal doctrines were produced to structure decision-making in and over South-North RTAs between 1947 and 1985. It speculates that their influence achieved its zenith in the 1970s, but was followed by a sharp decline shortly afterwards. By the late-1980s, they were marginalised by the rise of today's dominant legal doctrine.

To partially demonstrate my hypothesis, I examine the rise and fall of one of those three legal doctrines. My account shows how lawyers engaged international law in the creation and operation of regional trade agreements between the European Union and the newly independent African states from 1947 to 1985. I claim, therefore, that the Yaoundé and Lomé Conventions were negotiated, designed, and interpreted based partially on a doctrinal framework, which was distinct from legal doctrines underlying other South-North RTAs.

In conclusion, I bring the discussion back to the contemporary world of neoliberal regionalism in order to revisit the question with which this thesis began. Until 2016, we – international lawyers – were all living in a different moment. It was a time in which our mindset was framed around the quest for finding ways out of the Great Recession. The strategy appeared to be almost consensual. To make national economies grow again, it was necessary to promote trade liberalisation even further. Given the deadlock of the Doha Round of multilateral negotiations, the WTO became perceived as too ineffective and dysfunctional by developed countries, which were interested in pushing towards a free trade agenda. As in the late-1980s, the solution was to turn to regionalism. The consequence was the rise of bilateral and mega-regional negotiations. Acronyms, such as ‘TTP’, ‘TTIP’, and ‘CETA’, and sophisticated terms-of-art, such as ‘21st-regionalism’ and ‘shallow and deep integration’, became part of the prevailing legal imagination. However, this global marketplace of regional and multilateral trade deals had its foundational assumptions deeply destabilised by Brexit and President Trump’s trade policies.

So, are we, lawyers, somehow responsible for the outcomes leading up to Brexit and ‘Trumpism’? Considering our active role in sustaining a homogeneous understanding of the world trading system and also in managing its core multilateral and regional regimes, my general argument is that lawyers must take a sizeable share of the blame for the (re)production of economic imbalances and political grievances that paved the way for the 2016 attacks to the (neoliberal) international economic order. Part of this responsibility is associated with lawyers’ largely uncritical acceptance of the gradual dedifferentiation – undertaken by the current doctrine – of South-North and North-North RTAs. The consequence has been that lawyers have largely stopped debating South-North regionalism as its own particular governance challenge and legal form, and, as a result, we have allowed one model of RTA to dominate almost unchallenged.

The purpose of this thesis is to help to change this state of things, and to do so by reinvigorating the debate about the international trade law and governance of South-North regionalism that used to be – and, I argue, should still be – at the core of the IEL field. My analysis offers reflections on the specific role that legal histories and doctrines of international trade law plays in global trade governance (generally), and in the conduct and regulation of South-North regionalism (particularly). It calls attention to the importance of understanding the connection between the construction and application of history lessons and doctrinal frameworks and the range of norms, ideas, and practices that may empower or

constrain lawyers' imaginative interaction with the world trading system and RTAs. More concretely, I argue that lawyers should reflect on the potential relationship between the dominant doctrine examined in Chapter 2 and our apparent failure in contributing to adequate solutions or alternatives to deal with the contemporary challenges.

For international lawyers interested in re-imagining South-North regionalism, or more broadly for those interested in the project of re-imagining the world trading system as a response to its current crisis of legitimacy, my central argument is that we should re-engage in (re)writing our histories and (re)working our doctrines as a way to (re)open space for contesting and rethinking the ideational, institutional, and jurisprudential dimensions of South-North RTAs. Indeed, the IEL field should expand its disciplinary boundaries and rethink its prevailing common-sense so as to reconsider the consensus on the way the WTO law and governance of regionalism are currently thought and practised. My call is, therefore, to open ourselves up to the possibility (or perhaps the necessity) of developing an enhanced awareness of the diversity – diversity of programmes and facts, diversity of ideas and practices, and the diversity of norms and regimes – produced around the world. It is through this diversity of (past and present) ways of thinking and practising international trade law that the relationship between global governance, South-North regionalism, and economic development can actually be re-imagined.

PART I - FROM HISTORY TO DOCTRINE: THE INTERNATIONAL LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES

Debates about world trade within international economics, international political economy, international relations and international economic law (IEL) are frequently animated by the idea of a multilateral tradition that might be in conflict with a regional tradition. The history of postwar multilateralism is often remembered as a battle against regionalism and militant economic discrimination and protectionism, in which non-discrimination and free trade are equated with liberal governments, market economies, cosmopolitanism and a more peaceful world through commercial sociability. This dominant view of multilateralism looks to history in order to root a contemporary set of rules, institutions and doctrines in the past, to provide an authoritative and legitimate lineage that gives them meaning as part of an unfolding story of institutional and jurisprudential progress, and to narrate the triumph of this way of understanding the world trading system.

The traditional history often begins with ambitious attempts to rebuild a liberal international economic order after World War II. Despite the failure to bring the International Trade Organisation into force, world trade has been, according to this story, continuously and linearly moving towards the institutionalisation and universalisation of a multilateral regime centred on the principles of free trade, non-discrimination, and reciprocity. This gradual advance has been hampered in certain moments by resurgences of regionalism. Nonetheless, the establishment of the World Trade Organisation symbolises the almost unanimous commitment to free trade multilateralism and the legitimate authority of this new institution to oversee and govern regionalism. In this context, international law has been deeply implicated in managing the world trading system and constructing the (still incomplete) global free market.

The aim of Part I is to account for shared understandings that exist within the IEL field about the role of international law and lawyers in making and interpreting regional trade agreements (RTA) between developed and developing countries (South-North). It is a central assumption that legal thinking and practices play a pivotal part in applying international law to RTA. The IEL field has over decades developed a particular kind of legal expertise which empowers lawyers' influence in and over the world trading system. Two legal techniques – the telling of histories and the development of doctrines – are

central to understanding the ways lawyers seek to shape the international law of regional trade agreements. Consequently, two specific goals orient my investigation. The first aim is to retell the traditional history of regionalism as an entry-point to explore the legal rules, ideas, and practices underlying and governing their conceptualisation, formation, and development. I intend to show that the consensual understanding of the past provides the grounds for legal doctrines. The second purpose is to describe the contemporary legal doctrine on the international trade law of regionalism so as to unveil its often-neglected function in negotiating, managing, and solving disputes over RTAs. It seeks to demonstrate that this legal doctrine is dominant within the IEL field, without there being a significant alternative.

The history and doctrine of the international law and governance of trade regionalism offered in Part I intend to replicate the same style of history-telling and doctrinal analysis found in mainstream literature, and reflect on it. The first step that is routinely carried out by the majority of lawyers is to place a legal norm or regime into a historical frame. Hence, Chapter 1 tells the traditional history of regional trade agreements in the context of the world trading system. It provides an instance of conventional narratives of the formation and application of the WTO law of RTAs. It draws attention to the challenges underlying the origins and interpretation of the rules on South-North RTAs enshrined in Article XXIV of the General Agreement on Tariffs and Trade (GATT). The central purpose is to highlight how the prevailing understanding of the present-day WTO law of South-North regionalism has been constructed, sustained, and reproduced due in part to history-telling.

The second step is to undertake a doctrinal analysis of a legal norm or regime in light of the present-day context. Chapter 2 provides, then, the contours of the contemporary legal doctrine on the international trade law and governance of regionalism. It describes how history lessons are employed to identify and select out of a constellation of norms, ideas, and facts, the elements that are regarded as valid and legitimate for applying and developing such doctrinal framework. Furthermore, it shows the existence of a present-day consensus over that unique doctrine. Finally, it foregrounds the current problems underlying the interpretations and application of the WTO disciplines on South-North regional trade regimes, which challenge, in turn, the dominant doctrine.

CHAPTER 1. THE HISTORY OF THE INTERNATIONAL LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES

Introduction

At the present-day, it is not difficult to demonstrate the existence of a disciplinary consensus over the history of the international trade law and governance of South-North regional trade regimes. This Chapter retells (what I shall call) the ‘traditional history’ of regionalism as conventionally found in mainstream literature. My specific purpose is to examine the facts regarded as historical events or landmarks, and also reflect on the ways the history is told and understood by contemporary lawyers.

Part of the work involves showing that jurisprudential and institutional stories are interwoven in a ‘grand’ narrative about the inevitability and desirability of a global free and fair market underpinned by the world trading system. It, also, consists of showing that this traditional style of history-telling makes it harder rather than easier to understand how history lessons that are relevant to the contemporary relationships between the multilateral system and regional regimes, free trade and economic development, and WTO law and RTAs are produced and taken away by lawyers. Finally, it describes the particular way those stories have been told that accounts for the historical evolution, and justify the legitimate position, of the dominant doctrine on the international trade law of RTAs. This Chapter paves, therefore, the way to explore the effects of the interaction between history and doctrine on the international trade law and governance of South-North regionalism.

Before delving into the past, the traditional literature often provides the basic legal vocabulary for making sense of world trade affairs and their relation to international trade law. Two contested concepts – international trade law and regional trade agreements – require an *ex ante* clarification due to their central significance for conventional narratives.

The concept of *international trade law* is habitually defined in two different ways. There is a more general meaning that derives from the abstract notion of international economic law. For instance, John Jackson conceptualises it as the subject, or branch, of IEL

that establishes rules for international trade.⁷ This definition has been rarely employed and so has very weak traction in the field. Rather, the disciplinary consensus identifies international trade law essentially with WTO law. Although Jackson acknowledges that international trade law is *centrally* served by the GATT/WTO legal system, most lawyers tend to equate both terms straightforwardly.⁸

Similarly, the definitions of *regional trade agreements* are frequently constructed as specialised variations of the concept of international treaty. For Bartels, RTAs are “treaties providing for the liberalization of trade in goods and services.”⁹ A narrower definition, by contrast, equates RTAs with (non-multilateral) trading arrangements as defined in GATT Article XXIV. In this sense, Bartels explains that “[t]he term [RTAs] is used by the [GATT/WTO] to refer to free trade areas, customs unions, ‘economic integration agreements’ liberalizing trade in services, and ‘preferential trade agreements’ between developing countries.” Since the late 1990s, RTAs have received other more specific definitions, such as ‘regional trading blocs’, ‘free trade agreements’ (FTAs), ‘customs unions’ (CUs) and ‘preferential trade agreements’ (PTA), or even divided in between ‘bilateral’, ‘regional’, and ‘plurilateral’ trading arrangements. Surprisingly, the continuous dispute over naming RTAs seems not to impact substantively how the history of South-North RTAs is told. The choice of any of those terms, instead, seems to indicate the intellectual and political affiliations of the author.

My choice to employ the term ‘RTA’ rests on the following reasons. As discussed in Chapter 2.A, ‘FTA’ and ‘CU’ are long-established terms in the IEL field. Since they were formalised by GATT/WTO law to refer to two specific legal institutions, they have significantly lost explanatory power. Conversely, ‘PTA’ is a recent term that describes ‘trade agreements’ concluded to exchange trade preferences among partners, entailing, in turn, discriminatory effects over third countries. It was coined primarily to suggest the departure from the ‘normalcy’ in trade relations, which is assumed to be the interactions carried out by WTO members according to the principle of non-discrimination enshrined in WTO law.

Finally, ‘RTA’ is a term with a long history in mainstream literature. Although it was used to describe postwar arrangements devised for ‘regional’ economic integration, the term has been employed by lawyers to indicate ‘trade arrangements’ that are either ‘non-global’

⁷ Jackson, 1997: 25; 2009: 31-32. *See also* Loibl (2003: 689) and Herdegen (2016: 8-9).

⁸ *Compare* Jackson (1997: 25) *with* Loibl (2003: 700), Bethlehem (2009: 1-2), Sebastian (2010: 330), Trebilcock *et al* (2012: 24-25), Fabri (2012: 365-367), Trebilcock (2015: 10-11) and Herdegen (2016: 8-9).

⁹ Bartels, 2013. *See also* Herdegen (2016: 319).

or ‘non-multilateral’. Despite potential misunderstandings, the term RTA is also chosen because trade agreements do not need to (and have not historically) serve primarily as instruments to exchange discriminatory trade preferences. Thus, it leaves the ‘whats’ and ‘hows’ of a trade agreement open to being negotiated by its partners rather than assumed *ex ante* as the term PTA suggests.

This subtle controversy over naming (non-universal/international/multilateral) trade regimes seems to be experienced by lawyers as either historically and empirically irrelevant or doctrinally and theoretically marginal. Most of them often use the above terms interchangeably to refer to what appears to be the same legal phenomenon. If this controversy is not a controversy, why has mainstream literature been unable to reach a consensus on the terminology? Why does it repeatedly justify using one of the terms discussed above?

I argue that there is something about the act of *naming*¹⁰ that appears to entail a kind of expert effect that brings a ‘concept’ (or a noun) into ‘being’, with a sense of materiality, authority and legitimacy that risk putting in the shade disputes over projects and issues, norms and actors, ideas and techniques, process and agency. This means to say that the terms ‘RTA’, ‘PTA’, ‘FTA’, and ‘CU’ are not ahistorical, apolitical or value-neutral. Instead, their normative and descriptive dimensions reflect value-laden projects underpinned by political decisions and intellectual attitudes that are historically and contextually situated. Thus, behind the apparent neutrality in the usage of terms are choices on the relevance of sets of values, theories, methods, questions, and preoccupations, that frame legal thinking and practice in decisive ways.

A. The Making of the World Trading System: From Crises to the ‘Permanent Interim’ Agreement to the Institutionalisation of the GATT Regime

According to the conventional narratives,¹¹ from World War I to the 2016 Brexit vote, the formation and evolution of the world trading system tend to be chronicled in four phases. The first phase retells the collapse of the liberal international economic order due to the

¹⁰ This argument is inspired by Marks (2005).

¹¹ This brief summary is mainly built on the following narratives that are generally accepted as accurate accounts of the history of the world trading system: Hudec (1990), Jackson (1997, 2009), Irwin *et al* (2008), Lowenfeld (2008), Winham (2009), Fabri (2012), Trebilcock *et al* (2012), Matsushita *et al* (2015), Trebilcock (2015), Herdegen (2016), Van den Bossche and Zdouc (2017).

destructive effects entailed by the political and economic crises leading up to World War II. The second period narrates the reconstruction of the world trading system, accounting from the defective birth to the continuous institutionalisation of the GATT. The third moment describes the establishment of the WTO. The fourth phase accounts for both the institutionalisation of the WTO and the developments from the Doha Declaration until the current challenges involving regionalism.¹²

The common starting-point of traditional literature is with the traumatic events of the interwar period. Until World War I, international trade was led by Great Britain and governed by the so-called *liberal* international economic order. This regime was centred on classical international law, generally, and on its principle of freedom of commerce, specifically.¹³ However, the outbreak of World War I massively disrupted the international trading system of liberalising bilateral arrangements tied by most-favoured-nation clauses (MFN). The peace was not enough to repair the fractions in such liberal order, which recovered slowly during the 1920s. Most countries only gradually dismantled their war-time economic controls, while tariff levels continued higher than before 1914. Moreover, the 1919 Versailles Treaty contributed to produce long-term, deleterious impacts on Germany's economy, pushing it to adopt a predatory economic strategy.

The liberal trading system was already severely cracked when the Great Depression began in the late-1920s.¹⁴ The trade policies of the 1930s would become eventually known as *beggar-thy-neighbour* for aiming to insulate national economies from the global downturn by raising barriers and adopting extreme forms of discriminatory and protectionist measures. This included exchange rate devaluations and all sorts of trade controls. This infamous strategy sought to subsidise domestic producers at the expense of, while externalising internal costs to, export suppliers. Consequently, the MFN clause fell into disuse forcing countries to conclude bilateral arrangements.

When the United States, which emerged from the First World War as the largest trading nation, enacted the Smoot-Hawley Tariff Act in 1930 (the most notorious beggar-thy-neighbour policy), it quickly provoked comparable retaliatory reactions by its major trading partners.¹⁵ All these predatory policies not only exacerbated the effects of the Great Depression but also led the international trading system to an institutional paralysis. By the mid-1930s, President Roosevelt managed to pass the Reciprocal Trade Agreements Act,

¹² See section 2.B.

¹³ Irwin *et al*, 2008: 5-12; Lowenfeld, 2008: 21-23; Winham, 2009: 9-13; Jackson, 2009: 31-33; Sebastian, 2010: 333-336; WTO, 2011: 50, 94; Trebilcock *et al*, 2012: 23-24; Herdegen, 2016: 14-15.

¹⁴ See *supra* note 13.

¹⁵ Trebilcock *et al*, 2012: 23.

authorising the US administration to negotiate new trade agreements. This swing back to free trade came too late, however. The outbreak of World War II is regarded as having cemented the end of the liberal trading system.

The combination of the Franco-German revanchism, generalised trade wars, and the Great Depression, with an ineffective liberal order and marginal international law, served as traumatic lessons for what was supposed to become a new regime for governing the international economy.¹⁶ Since World War II, these teachings became common-sense within the community of trade experts. They were widely used for choosing economic policies and designing legal norms and regimes to lay the foundations for a new international economic order.

When it had become reasonably clear that war would be shortly over, the idea of ‘order’ was already present in the minds of Anglo-American officials and diplomats in charge of negotiating an original blueprint for postwar monetary, financial and trade policies and institutions.¹⁷ The US-UK diplomacy paved the way for concluding the Bretton Woods Agreement in 1944, which devised a plan to establish specialised international organisations under the future United Nations for reconstructing and governing the world economy.¹⁸ Following the war, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (later the “World Bank”) were duly established. However, the International Trade Organisation (ITO) failed in coming into existence, largely because of the United States’ refusal in 1947 to ratify its Charter. The US claimed that the ITO would excessively constrain its economic sovereignty.

Alternatively, the General Agreement on Tariffs and Trade, an interim agreement, negotiated in 1947 among 23 major trading countries, as a prelude to the ITO, became, “through the magic of practice,” the permanent institutional architecture for the multilateral trading system until the establishment of the World Trade Organisation in 1995.¹⁹ The history of the GATT is thus intertwined with that of the ITO Charter. While the ITO would be the specialised trade organisation, the GATT would be a provisional multilateral agreement to reduce tariffs of manufactured goods, through a process of negotiated trade concessions based on the principles of reciprocity and non-discrimination.²⁰

¹⁶ Jackson, 2007: 3-4; 2009: 31-34; Lowenfeld, 2008: 21-26; Winham, 2009: 14; Trebilcock *et al*, 2012: 24-25; Herdegen, 2016: 195-197.

¹⁷ *See supra* note 16.

¹⁸ Trebilcock *et al*, 2012: 24-25.

¹⁹ Fabri, 2012: 365-366.

²⁰ Jackson, 2007: 4; 2009: 34-37; Lowenfeld, 2008: 46-60; Winham, 2009: 14-18; Trebilcock *et al*, 2012: 24-25; Herdegen, 2016: 195-197.

When the ITO Charter failed to come into force, the GATT was used to fill the vacuum without explicit legal authority. Since negotiators believed it was to be incorporated by the ITO, the GATT agreement “never came fully into force, but was implemented in part by the ‘Protocol of Provisional Application’”²¹ The consequence was a permanent state of uncertainty about its *legal* character. This led lawyers to embrace a pragmatic attitude towards the implementation and operation of GATT ‘law’. Until the 1980s, the GATT rules were perceived more as diplomatic guidelines rather than legal obligations.²² The settlement of trade disputes relied mainly on diplomatic techniques, instead of formal procedures.

Nevertheless, between 1947 and 1994, the GATT not only evolved institutionally but also had its mandate and membership expanded.²³ Eight multilateral rounds of trade negotiations were concluded under the GATT. The first six rounds (from the 1947 Geneva Conference to the 1963-1967 Kennedy Round) focused predominantly on tariff reductions. The 1973-1979 Tokyo Round sought, in addition to tariffs, to negotiate policy and institutional reforms to non-tariff areas.

The 1986-1994 Uruguay Round was a turning point in the history of international trade law. It was the last and most complex multilateral negotiation under the GATT.²⁴ It reached a set of trade agreements entailing a profound transformation in the world trading system. The establishment of the WTO was one of its central achievements followed closely by the unprecedented expansion of regulatory competence. Moreover, the creation of the Dispute Settlement Body (DSB) symbolised the passage from a power-oriented to a rule-oriented system, through the adoption of ‘juridical’ procedures for dispute settlement.

Ever since the WTO came into force, the world trading system has been subject to a multitude of factors, including the dramatic enlargement of its membership, the implementation of the new regulatory domains, and the diplomatic push toward the extension of its substantive competence over uncovered areas of trade and non-trade affairs.²⁵ Particularly, this new phase of operationalisation and expansion of the WTO governance has entailed a greater focus on domestic policy and regulatory divergences as potential distortions of international trade. The consequence has been to determine the degree to which the WTO may excessively constrain domestic sovereignty.

²¹ Jackson, 2009: 31.

²² Jackson, 2009: 31, 45-46.

²³ Jackson, 2007: 4; 2009: 34-37; Lowenfeld, 2008: 46-60; Winham, 2009: 14-18; Trebilcock *et al*, 2012: 24-25; Herdegen, 2016: 195-197.

²⁴ Jackson, 2009: 37-39; Lowenfeld, 2008: 60-67; Winham, 2009: 19-24; Trebilcock *et al*, 2012: 25-26; Herdegen, 2016: 197-199.

²⁵ Jackson, 2009: 39-41; Winham, 2009: 24-28; Trebilcock *et al*, 2012: 802-808; Herdegen, 2016: 199-200.

The Doha Ministerial Declaration of 2001 launched a new round of negotiations for furthering the development of the WTO system. This first WTO round (or the ninth WTO/GATT) has proved to be extraordinarily laboured. As of this writing, the Doha Round is commonly acknowledged as having failed to live up to its comprehensive agenda. To fill the gap partially, the WTO Ministerial Conferences (MC) have only sought to approve packages of measures in support of developing countries.²⁶

B. The Proliferations of Regional Trade Agreements: From Article XXIV to the GATT Governance of South-North Regionalism

The conventional history²⁷ of regionalism can be summarised as ‘a chronicle of proliferations’.²⁸ This narrative about ‘surges in’ RTA activity has been repeated at different moments in history. Before World War II, the ‘spread’ of RTAs was recounted as a remnant beggar-thy-neighbour strategy employed in the 1930s trade wars. In the GATT era, the ‘increasing number’ of RTAs was habitually described as a continuous threat to free trade multilateralism. From the WTO until the mega-blocs negotiations, the ‘explosion’ of RTAs has been historicised as the “termites” in the world trading system.²⁹ Only in the last decade, part of literature has shifted towards a more accommodative narrative, which neither condemns regionalism entirely nor portrays it as the WTO’s nemesis. The focus of this section is on the part of literature concerning particularly with South-North RTAs.

Just like the multilateral trading system, the history of regionalism finds its roots in the post-World War I period when the liberal order was quickly deteriorating.³⁰ The world trading system of MFN-linked bilateral arrangements was being replaced by preferential agreements devised to create advantageous relations between trading partners while discriminating third countries. The British Commonwealth was the most notorious system

²⁶ In the 2005 Hong Kong MC, a package of measures was approved to support the least developed countries. The 2013 Bali MC succeeded in agreeing on the Agreement on Trade Facilitation, while the 2015 Nairobi MC adopted a declaration on the gradual elimination of export subsidies in the agricultural sector (Herdegen, 2016: 199-200).

²⁷ This brief summary is mainly built on the following narratives that are generally accepted as accurate accounts of the history of the North-South regional trade regimes under the GATT/WTO system: Hudec (1990), Bhagwati (1991, 1993, 2005, 2008) Jackson (1997, 2009), Bartels and Ortino (2006), Irwin *et al* (2008), Gantz (2009), Lester and Mercurio (2009), Bartels (2010), Fabri (2012), Trebilcock *et al* (2012), Matsushita *et al* (2015), Anuradha (2016), Van den Bossche and Zdouc (2017), Griller *et al* (2017).

²⁸ Bhagwati, 2005; Bartels and Ortino, 2006: 1-3; Lester and Mercurio, 2009: 3-5; Gantz, 2009: 238-241; Bartels, 2013; Trebilcock *et al*, 2012: 83-84; Anuradha, 2016: 413-414; Griller *et al*, 2017: 3-5.

²⁹ See *supra* note 28.

³⁰ Irwin *et al*, 2008: 5-12; Winham, 2009: 12-13; Lester and Mercurio, 2009: 3; Trebilcock *et al*, 2012: 24-25, 83-86.

of imperial preferences. It was established in 1932 between the United Kingdom and its dominions (principally Australia, Canada, New Zealand, and South Africa) with the aim of exchanging preferential tariffs to the detriment of third countries' producers. This beggar-thy-neighbour strategy spread out during the 1930s trade wars contributing decisively to fuel the economic crisis that was already underway.³¹ These circumstances combined with the political turmoil led up to the Second World War and the collapse of the liberal trading system.

By the end of the war, Anglo-American policymakers turned their minds to alternatives to replace the liberal trade regime.³² However, it became soon clear that the role of RTAs in the future world trading system gave rise to a fundamental controversy between the US multilateralist attitude and the UK imperialist position. The establishment of Articles I (MFN) and XXIV (RTA) in the GATT is traditionally accounted as expressing the Anglo-American compromise on how to reconcile regionalism with multilateralism. This institutional arrangement envisaged assigning to the GATT legal authority to govern the formation and operation of RTAs.

Recent research shows that the history of Article XXIV cannot be simply narrowed to the British interest in preserving its imperial system of preferences. Instead, its negotiation and design must be considered as intertwined with today's overlooked Articles I:2 (Imperial Systems of Preferences) and XXV:5 (General Waiver).³³ These three provisions were devised to strike a balance between a utopian aspiration for a non-discriminatory multilateralism and a concrete reality of preferential regionalism. It was consensual that non-discrimination was to be achieved by multilateralising the MFN through the GATT. To deal with existing and future preferential arrangements, three exceptions to Article I:1 were included: a provision ensuring the continuation of existing 'imperial systems of preferences' (Article I:2); a provision disciplining a waiver procedure for new 'preferential arrangements' (Article XXV:5); and a provision regulating the new 'regional trade agreements' (Article XXIV).

³¹ Alongside the British Commonwealth, other imperial systems of preferences were established by major trading nations, including France, the Nazi Germany, and Japan (Irwin *et al*, 2008: 6-7).

³² Irwin *et al*, 2008: 5-12; Trebilcock *et al*, 2012: 24-25, 83-86; Matsushita *et al*, 2015: 508-509. *See also supra* notes 16-18, and accompanying text.

³³ *See supra* note 32.

1. The Article-I:2 Grandfather Discipline on South-North Imperial Trade

Before the GATT, a number of preferential trade agreements were in operation, most prominently the imperial systems between European powers and their colonies, dominions and protectorates.³⁴ These imperial regimes, especially the British Commonwealth, the French Union, and the Benelux³⁵ Customs Unions, set forth protectionist and discriminatory measures to prevent colonies from trading with third countries. Although their dismantlement was one of the US priorities for the postwar trading system, developed countries settled their disagreements by grandfathering the most significant imperial systems from the core rules of the GATT, with the assumption that in due time they would either disappear or lose their function. Article I:2 carved out an exception for a list of pre-GATT preferential trade arrangements, which would be subject to the Article-I:4 prohibition on any increase of preferential margins. Hence, Article I:2 accorded a ‘special and differential treatment’ to imperial powers that were parties to GATT and desired to safeguard their South-North imperial trade preferences.

2. The Article-XXV:5 Waiver Discipline on South-North Preferential Trade

Another relevant discipline is established under Article XXV:5. This provision sets forth a waiver power ensuring that new preferential schemes could be created if a two-thirds majority of (then) ‘contracting-parties’ (and now ‘WTO members’) agreed on them. It enables contracting-parties acting jointly to suspend GATT obligations. Its institutional story goes back to the Suggested Charter³⁶, which provided a limited version of the waiver clause.³⁷ During the ITO and GATT negotiations, the power for waiving was extended to cover all obligations. If conditions were met, Article XXV:5 could exempt any preferential agreement.

Since 1947, the waiver power has been invoked on some important occasions to authorise ‘special and differential treatment’ between developed and developing countries, or between empires and colonies.³⁸ The practice of granting waivers for preferential

³⁴ Yusuf, 1982: 7; Trebilcock *et al*, 2012: 56, 80.

³⁵ Benelux stands for Belgium, the Netherlands, and Luxembourg.

³⁶ Feichtner, 2011: 58-59.

³⁷ The “Suggested Charter” was the US proposal that served as the basis for the negotiation of an international trade organisation (Irwin *et al*, 2008: 104).

³⁸ Yusuf, 1982: 47-50.

arrangements can be distinguished in three phases: the early years of the GATT; and the periods before and after the adoption of the Generalised System of Preferences (GSP).

The first application of Article XXV:5 took place in 1948 to authorise the United States to offer preferential treatment to Pacific islands formerly under Japanese trusteeship. Afterwards, Italy and Australia requested a waiver to its former colony, Libya, and its trustee territory of Papua-New Guinea (respectively). All these waivers were justified on the basis that trade preferences support the economic development of recipients.³⁹ This led the UK to propose in 1951 a GATT amendment creating a general waiver for imperial countries to establish preferential arrangements for promoting the economic development of their colonies. Although the reform proposal was rejected in 1955, European countries were continuously waived to accord preferences in support of their remaining or former colonies.⁴⁰

With decolonisation, developing countries increasingly demanded non-reciprocal preferences as a matter of international solidarity, historical justice, or development policy.⁴¹ Unable to secure their interests under the GATT, developing countries gathered around the United Nations Conference on Trade and Development (UNCTAD) to pressure developed countries for changes. The GSP was created under the UNCTAD in 1968 and accorded a waiver by the GATT to operate in 1971. Even after the introduction of the GSP, contracting-parties (and later WTO members) have continued to request individual waivers for preferential arrangements that do not comply with the rules of such GSP waiver since they benefit only selected developing countries.⁴² Thus, Article XXV:5 is used to authorise the formation of South-North trade arrangements under GATT/WTO law insulated from the discipline of Article XXIV.

3. The Article XXIV Discipline on South-North Regional Trade

The ‘fierce’ US opposition to RTAs was not only tamed by the grandfather clause and the general waiver but mainly by the acceptance of the exception enshrined in Article XXIV. Given the powerful US position during the negotiations, the inclusion of Article XXIV to

³⁹ Yusuf, 1982: 47-50; Feichtner, 2011: 97-99.

⁴⁰ Yusuf, 1982: 49.

⁴¹ See *infra* note 64, and accompanying text.

⁴² Feichtner, 2011: 110-114.

the GATT has repeatedly caused perplexity in the IEL field.⁴³ The reason for this confusion lies in the apparent inconsistency between the accounts of Article XXIV's origin and justification and the analyses of GATT's preparatory work. Mainstream literature tends to explain Article XXIV as the consensual compromise by which the United States accommodated the British interests in imperial systems, developing countries' demands for flexibility, and the European integration project. However, this understanding seems not to find support in the archival record. The British imperialism was already secured under Article I:2, while the exception for customs unions was already accepted by all countries negotiating the ITO Charter. Besides, the plans for European integration were only revealed after the Havana Conference.

Looking back, recent scholarship suggests that Article XXIV was a compromise constructed in two steps, each of them accommodating interests of distinct groupings: the early drafts of the GATT made reference to an exclusive exception for customs unions, while only after the Havana Conference free trade agreements were added to Article XXIV. The central arguments for accepting the inclusion of CUs were practical and theoretical.⁴⁴ Pragmatically, the CU-exception was intended to accommodate the factual existence of two groups of countries that were already CU-partners: the Syrian–Lebanese CU and the Benelux. Theoretically, CUs were understood not as preferential arrangements, but rather as mechanisms for achieving economic or political integration. Conceived as a matter of border and sovereignty rather than trade preference, the CU-exception was proposed in the first drafts of the ITO Charter and the GATT, and was never opposed by the negotiating countries, including the United States.

Conversely, the addition of FTAs to Article XXIV has been regarded as the outcome of a more obscure bargain.⁴⁵ The FTAs-exception only appeared after the 1947 Havana Conference. The justifications for such amendment remain contentious. It seems that a formal proposal was presented by Syria and Lebanon and several other Latin American countries, with the support of France and other developing countries, grounded in the view that FTAs were a better-suited instrument to promote economic integration among the latter. A different narrative suggests that the US accepted the FTAs-exception not to strike a compromise with European or developing countries. Rather, the US needed to carve out a loophole for an FTA it had secretly negotiated with Canada. It was, hence, in the form of Article XXIV that the GATT was invested with the legal authority to govern

⁴³ Hafez, 2003: 881-884; Chase, 2006: 1-3; Irwin *et al*, 2008: 121-122, 167-168, 186; Trebilcock *et al*, 2012: 84-86; Matsushita *et al*, 2016: 508-509.

⁴⁴ See *supra* note 43.

⁴⁵ See *supra* note 43.

regionalism. Specifically, Article XXIV sets forth the legal rules for constituting and operating RTAs.⁴⁶

4. Two *Waves* of Regionalism under the GATT

The establishment of Article XXIV did not prevent the ‘proliferation’ of regional trade regimes. Whereas very few RTAs were formed in the 1950s, two major ‘surges’ took place in the 1960s-1970s and from the mid-1980s onwards.⁴⁷ The European Union⁴⁸ was at the centre of both episodes, while Latin America joined the race in the 1960s, and North America and Asia only in the 1980s. At the creation of the WTO in 1995, 124 RTAs had been notified to the GATT, of which roughly 70 came into force, and about 50 were active.

(a) The First Wave of Regionalism (1950-1985)

The ‘first wave’ of regionalism (r)evolved around Europe. In the context of rising East-West tension, Article XXIV was initially used by the United States to design the Marshall Plan and the Canada-US FTA.⁴⁹ The European Recovery Program (the so-called “Marshall Plan”) was devised for assisting the European economic reconstruction from the devastation of World War II. It played an important role in sponsoring the European integration projects. Consequently, Western European countries led to the formation of RTAs, first, among themselves and, later, with their former and existing colonies. Hence, the first wave was driven by the Marshall Plan and governed by Article XXIV.

European regionalism started with the European Coal and Steel Community (ECSC) in 1951⁵⁰, which was followed by the European Economic Community (EEC) in 1957⁵¹.⁵² This encouraged the formation of the competing European Free Trade Association

⁴⁶ See section 2.D.

⁴⁷ Mansfield and Milner, 1999: 600; Damro, 2006: 26-27; Hoekman and Kostecki, 2009: 476-478; Carpenter, 2009: 17-22; WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26-27, 85-86.

⁴⁸ The terms ‘EEC’ or ‘EC’ are only used when emphasising the historical dimension (pre-Maastricht era) or the legal basis.

⁴⁹ Gilpin, 2000: 58; Chase, 2006: 21-25; Carpenter, 2009: 17-18; 167-168; WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26.

⁵⁰ The ECSC was established by the Treaty of Paris between France, West Germany, Italy, and the Benelux.

⁵¹ The EEC was established by the Treaty of Rome between France, West Germany, Italy, and the Benelux.

⁵² Carpenter, 2009: 18-19; Trebilcock *et al*, 2012: 26-27, 86; WTO, 2011: 51-54.

(EFTA) in 1960⁵³. Under Article XXIV, European countries concluded RTAs with other European countries not partners to EEC or EFTA and with their former or existing colonies. Outside Europe, groups of developing countries in Africa, Caribbean, Central and South America rushed to create their own RTAs inspired by the European integration projects. The Latin American Free Trade Association (LAFTA) of 1960⁵⁴ and the Association of Southeast Asian Nations (ASEAN) of 1967⁵⁵ were important examples of non-European regionalism.

Throughout this period, the GATT's multilateral negotiations, membership enlargement, and policy and legal disputes moved in tandem with the expansion and deepening of (predominantly European) regionalism.⁵⁶ The proliferation of RTAs led other GATT contracting-parties to pressure (mainly) European countries for lowering MFN tariffs across the board so as to mitigate the effects of trade preferences. The 1960-1961 Dillon Round was launched in part because of the establishment of the EEC, whereas the Kennedy Round was triggered by the intensification of European integration, and the Tokyo Round by the EEC's first enlargement.

Running in parallel to these multilateral rounds, intense disputes concerning the consistency of RTAs with GATT law arose.⁵⁷ The debates focused mainly on the compatibility of the EEC, EFTA, LAFTA, and the EEC's association agreements with Article XXIV. These RTAs were accused of having several inconsistencies that ranged from tariff issues to the lack of a clear commitment to full trade liberalisation as well as infant industry exceptions.⁵⁸ However, the GATT did not have at the time a permanent mechanism for reviewing RTAs notified under Article XXIV. Instead, RTAs were assessed by working parties that did not hold the authority to adopt definitive (binding) reports. Concretely, these controversies were mostly settled, waived, hidden, or disregarded as part of multilateral and bilateral negotiations and consultations, which led the GATT and its contracting-parties to develop a policy of a high tolerance for a wide diversity of RTAs.⁵⁹ The legal debates about Article XXIV seemed to have enabled contracting-parties to

⁵³ The EFTA was established by the Stockholm Convention between Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom.

⁵⁴ The LAFTA was established by the Treaty of Montevideo between Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay.

⁵⁵ The ASEAN was established by the Bangkok Declaration between Indonesia, Malaysia, the Philippines, Singapore, and Thailand.

⁵⁶ Gilpin, 2000: 342; WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26-27; Coppolaro, 2013: 22-32.

⁵⁷ Jackson, 1969: 621-623; Trebilcock *et al*, 2012: 26-27; WTO, 2011: 184-186.

⁵⁸ See *supra* note 57.

⁵⁹ See *supra* note 57.

exercise some degree of influence over the development of RTAs in a way that mitigated their adverse effect on non-RTA-partners.⁶⁰

Against this historical background, the GATT law and governance of South-North regionalism experienced significant developments. The most important transformation was driven by the developing countries' reaction to the GATT regime. Initially, only 11 of 23 signatories to the GATT were developing countries. Nonetheless, from the negotiations for the Suggested Charter to the ITO Charter to the GATT agreement, they raised concerns regarding the fact that rules assumed formal equality despite the evident material inequality between developing and developed parties.⁶¹ Their main criticism was that the GATT's 'one-size-fits-all' disciplines required contracting-parties to negotiate and accord non-discriminatory and reciprocal trade concessions, irrespective of their development level. They understood developing economies could not compete for export markets on an MFN-equal basis with developed economies, and so they demanded special treatment.

The acceptance of development as an issue in the GATT took place only in the late-1950s when the Haberler Report was circulated⁶². The Report found unequivocal evidence that the problem of developing countries' exports was chiefly associated with protectionist measures for agricultural and manufactured goods in many developed markets. The conclusion was that the protectionism of developed economies was the major factor adversely impairing the growth of developing economies. Consequently, the bulk of its recommendations consisted of demanding developed states to dismantle or reduce their protectionist policies combined with some sort of foreign aid and liquidity mechanism. Although its policy proposals were not adopted, the Haberler Report became the reference for debating development issues in the upcoming multilateral rounds.

The non-implementation of the Haberler Report reinforced the idea of the GATT as a rich men's club.⁶³ This encouraged developing countries to reorganise themselves around the United Nations, first, and then the UNCTAD, with the aim of addressing what they understood to be their distinctive economic needs. During the Kennedy Round, contracting-parties agreed to negotiate a new chapter on trade and development. In 1965, Part IV was added to the GATT establishing three provisions, which were regarded as non-binding legal obligations. These new rules introduced the special and differential treatment (SDT) into

⁶⁰ Jackson, 1969: 621.

⁶¹ Irwin *et al*, 2008: 125-132; Trebilcock *et al*, 2012: 24-25, 608-610; Matsushita *et al*, 2015: 695-700.

⁶² The Report on *Trends in International Trade* (the so-called "Haberler Report") was issued in 1958. The Austrian Gottfried Haberler was appointed chairman and the Brazilian Roberto da Oliveira Campos, the British James Meade, and the Dutch Jan Tinbergen were chosen by the GATT contracting-parties to integrate the panel to report on trends in international trade, in particular the development question.

⁶³ Trebilcock *et al*, 2012: 24-25; Matsushita *et al*, 2015: 695-700.

GATT law, which in practice exempted developing countries from any obligation of reciprocity concerning trade concessions while urging developed countries to offer them unilateral market access.

However, both Part IV and the trade concessions of Kennedy Round produced disappointing results for developing countries.⁶⁴ The frustration led them to return to the UNCTAD to pursue their interests. In 1968, the UNCTAD established the Generalised System of Preference, a framework for developed countries to offer preferential trade arrangements on a non-reciprocal basis to developing countries. Since the GSP would violate Articles I:1 and XXIV, contracting-parties agreed in 1971 to grant a 10-year collective waiver. This was succeeded in 1979 by the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the so-called “Enabling Clause”), a permanent waiver authorising the constitution of two new special arrangements. One possibility is the creation by developed countries of their own GSP schemes, through which tariff preferences are unilaterally granted to developing countries. Another possibility is the formation of South-South arrangements, which authorise the exchange of preferences between developing countries.

The consequence of the first wave of European-centric regionalism was that roughly 85% of the South-North RTAs had at least one European state as a partner.⁶⁵ Moreover, most of the RTAs concluded among developing countries (South-South) and inspired by the European model collapsed or drifted into dormancy by the end of the 1970s. By 1980, roughly 60% of RTAs in force was South-North, 20% between developed countries (North-North) and 20% South-South.⁶⁶

(b) The Second Wave of Regionalism (1980-1995)

The ‘second wave’ of regionalism began in the 1980s and extended until the mid-1990s.⁶⁷ It started taking off with the EU’s Single European Act of 1986 setting forth a plan to create its single market and its reluctance to join the Uruguay Round. These decisions triggered a response of the United States in the form the Canada-US FTA (CUSFTA) of 1988, which was expanded in 1992 to include Mexico, resulting in the North American Free Trade Agreement (NAFTA). These watershed RTAs symbolised the US departure from its strong

⁶⁴ Trebilcock *et al*, 2012: 24-25; Matsushita *et al*, 2015: 695-700; Gammage, 2017: 52-54.

⁶⁵ Trebilcock *et al*, 2012: 26-27, 86; WTO, 2011: 51-54.

⁶⁶ Dam, 1963: 661-663; Jackson, 1969: 586-591; WTO, 2011: 183-184.

⁶⁷ Mansfield and Milner, 1999: 600; Damro, 2006: 26-27; Hoekman and Kostecki, 2009: 476-478; Carpenter, 2009: 17-22; WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26-27, 86.

commitment to multilateralism.⁶⁸ The EU responded back with the 1993 Treaty of Maastricht establishing the European Union, and with a series of RTAs with the former socialist countries in Central and Eastern Europe, and with developing countries in North Africa and the Middle East.

The EU and the US were not alone in pushing towards trade regionalism, since other regional trading blocs (re-)emerged among developing countries.⁶⁹ In South America, the Southern Common Market (Mercosur) was created in 1991, inspired by the European integration, for constituting – but never achieved – a customs union among Argentina, Brazil, Paraguay and Uruguay.⁷⁰ In Africa, different initiatives sought to revive existing RTAs or create new ones in the early 1990s, such as the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), and the Common Market for Eastern and Southern Africa (COMESA). Finally, the African Economic Community (AEC)⁷¹ was created in 1991 to establish an economic and monetary union among African countries. In Asia, the ASEAN established an FTA in 1992.

Even before the beginning of the Uruguay Round, regionalism had already become a topic of greater concern.⁷² In 1985, the Leutwiler Report was published concluding that the rules of Article XXIV had been seriously “distorted and abused” making them irrelevant to resolve disputes.⁷³ To prevent further erosion of the multilateral trading system, it recommended that “GATT rules on customs unions and free trade-areas should be examined, redefined so as to avoid ambiguity, and more strictly applied, so that this legal cover is available only to countries that genuinely use it to establish full free trade among themselves.”⁷⁴ During the Uruguay Round, a group of countries that included Australia, India, Japan, New Zealand, and South Korea presented proposals to strengthen Article XXIV. However, they encountered strong opposition, mainly from the European Union. Despite their ultimate rejection, the proposals succeeded in pushing contracting-parties towards the adoption of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade in 1994 (Article XXIV Understanding).

⁶⁸ See *supra* note 67.

⁶⁹ WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26-27, 86. For African RTAs, see *generally* Gathii (2011a).

⁷⁰ The Mercosur was established by the Treaty of Asunción.

⁷¹ The AEC was established by the Abuja Treaty.

⁷² Croome, 1995: 98-100, 219-220.

⁷³ The Report on *Trade Policies for a Better Future – Proposals for Action* (the so-called “Leutwiler Report”) was issued in 1985. The Swiss Fritz Leutwiler was appointed chairman and the Brazilian Mario Simonsen, the Indonesian Sumitro Djojohadikusomo, the Indian Indraprasad Patel, the American William Bradley, the Sweden Pehr Gyllenhammar, and the French Guy Ladreit de Lacharnère were chosen by the Director-General Arthur Dunkel of the GATT to integrate the panel to report on the problems facing the international trading system.

⁷⁴ Leutwiler Report, 1985.

The second wave lost its energy due to the conclusion of the Uruguay Round.⁷⁵ The establishment of the WTO is commonly understood as a multilateral reaction against regionalism. By the mid-1990s, out of roughly 70 RTAs in force, 35% were South-North, 15% North-North, and 50% South-South.

C. Lessons from the History of the GATT Law and Governance of South-North Regionalism

Within the field of international economic law, past and present are connected by the continuous teaching of and learning from legal history. As explained in Chapter 3, these lessons are used to organise and shape legal knowledge and techniques, which ultimately affect lawmaking and interpretation. Present-day lawyers draw lessons from the traditional history of the GATT law and governance of South-North regionalism in order to make sense of contemporary behaviour, preferences and policies of WTO members, frame them as legal issues or disputes, and offer arguments and solutions through law. However, these teachings are neither homogenously nor clearly articulated in mainstream literature. For my analysis only, I consolidate those around three takeaways.

The first and foremost lesson from the traditional history is about the (aspirational) virtue of GATT law in dealing with the tension between multilateralism and regionalism. It teaches that the extensive use of preferences as a beggar-thy-neighbour strategy contributed significantly to fuel trade wars in the 1930s. In the post-World War II, the US sought to prevent those mistakes from repeating by banning all forms of discriminatory and protectionist arrangements through the establishment of an international trade organisation. The ITO regime was envisioned as a superior and fairer alternative for organising world trade around non-discriminatory and reciprocal principles rather than the previous international system of preferential and imperial trading. Throughout negotiations, Article XXIV was included in the ‘interim’ GATT agreement, with the narrow scope of accommodating specific interests in some form of regionalism. This provision was intended to set forth an exception for contracting-parties to depart from those general principles in order to conclude RTAs. The (ideal) purpose of the rules of Article XXIV was to limit contracting-parties’ discretion by requiring that only RTAs devised to complement the multilateral trading system would be valid and legitimate under GATT law.

⁷⁵ WTO, 2011: 51-54; Trebilcock *et al*, 2012: 26-27, 86; Dür *et al*, 2014.

By contrast, the second lesson emphasises the effects on Article XXIV of contracting-parties' institutional practice. The thrust of the story is that Article XXIV was softened rather than strengthened over time due to the political and economic influence of contracting-parties with market power.⁷⁶ The controversy over the legal character of the GATT is remembered as having prevented its rules from being regarded as fully binding. This conventional narrative reinforces the idea of the GATT as a diplomatic rather than a juridical regime, and so unable to prevent Article XXIV from bending towards stronger economies. On the other hand, it corroborates with the view of Article XXIV as a defective legal norm. These institutional and normative shortcomings are told as resulting from GATT's 'original sin', a diplomatic attempt to strike a balance between the general principle of non-discrimination and the narrow exception to regionalism. Therefore, the multilateral trading system is historicised as having been constantly challenged by 'waves' of regionalism that were authorised through the progressive relaxation of Article XXIV caused by external forces and internal ambiguity.

The third important takeaway concerns the secondary or marginal role played by international law and lawyers in the GATT governance of regionalism. To mitigate the relevance of the 'legal defects' of Article XXIV, the traditional history tells that during the negotiations on the ITO and GATT there were two competing views of what should be the function of law and legal expertise.⁷⁷ On the one hand, there were advocates of an international economic order build upon a 'deeper' and 'harder' institutional architecture than that existing until World War II. They argued that the Havana Charter should set forth international law rules establishing legally binding rights and obligations, which would be enforceable through a formal procedure, and justiciable in the International Court of Justice. This view was openly championed by the United States.

On the other hand, there were defenders of an institutional architecture less centred on law and more on diplomacy and policymaking.⁷⁸ They reasoned that the ITO should be legally ambiguous to accommodate not only the divergent preferences and policies of contracting-parties, but also the political discretion and technical complexity involved in economic decision-making. Consequently, a dispute settlement should be governed by economic experts and pragmatic diplomats committed to achieving compromises rather than complying with legalistic procedures and formal requirements. In this sense, the

⁷⁶ Hudec, 1970: 619; 1990: 7, 22-26, 289; Jackson, 1969: 187, 755; 2009: 31; Fabri, 2012: 354-356, 365-367.

⁷⁷ See *supra* note 76. See also Lang (2011: 199-202).

⁷⁸ See *supra* note 76. See also Lang (2011: 199-202).

United Kingdom promoted a conception of international law as an instrument for attaining policy goals rather than a body of positive norms on state conduct.

These opposing views of the appropriate role of international law have been in play in the GATT/WTO regime since its origins.⁷⁹ Although their individual influence varied over time, the diplomatic view prevailed in the drafting of the GATT and over the initial rounds of multilateral negotiations. The conventional narratives account that the softness of the GATT and the ambiguous language of Article XXIV were not only a pragmatic compromise reached by the contracting-parties, but also reflected a dominant understanding at the time of international law as a purposive instrument for policymaking. More specifically, the GATT regime is historically portrayed as a power-oriented system that was operated mostly by non-legal experts, who were either second-tier diplomats, governmental officials and politicians, or other non-legal trade specialists.⁸⁰ In contrast to ‘high’ political issues arising out of the Cold War, economic affairs were regarded as of ‘low’ political priority and dominated by more ‘technical’, and few ‘juridical’, matters. The combination of doubts about the GATT’s ‘legal nature’ and the epistemic dominance of policy-oriented disciplines over trade matters led the interpretative practice of Article XXIV to be governed by economics and political science thinking and techniques.

With the professional and intellectual dominance of policy-oriented expertise, only a few lawyers feature in the conventional narratives as having actually participated in decision-making in or over the GATT or RTAs.⁸¹ Conversely, most of them are remembered for their academic commitment to IEL theory and (excessively) formalist approach to GATT law. Gradually, this jurisprudential view lost authority inside and outside the IEL field until being almost forgotten in the 1970s.

According to traditional history, it was only in the 1980s legal expertise began to be reconstructed as a discipline for solving trade conflicts through policy-oriented interpretation and instrumentalist application of GATT law, thanks to the efforts of a more pragmatically-driven, rather than academically-oriented, lawyers.⁸² Specifically, their strategy was to stress the need for interdisciplinary collaboration with policy-oriented expertise, with the aim of reconceiving GATT law as a formal instrument for choosing regulatory policy to achieve economic and technical objectives. This turn-to-functionalism is described as an empowering undertaking, through which international lawyers

⁷⁹ Lang, 2011: 199-202.

⁸⁰ D.W. Kennedy, 1994a: 61; Reich, 1997: 775-776; Weiler, 2001: 194-197; Howse, 2002: 98-99; Charnovitz, 2014: 616-624.

⁸¹ See *supra* note 80.

⁸² See *supra* note 80. See also Lang (2011: 240-244).

(re)claimed their protagonist position in global trade governance. They participated intensively in the institutionalisation process culminating in the establishment of the WTO and the adoption of the Article XXIV Understanding, and later in the attempts to strengthen Article XXIV through the DSB's case law.⁸³

Nowadays, the majority of lawyers is committed to some strand of functionalism.⁸⁴ They understand international trade law as an instrument to produce predictability and certainty by ensuring the compliance of members' preferences and measures with WTO law through the DSB.⁸⁵ In practice, they balance conflicting policies, frame legal issues and craft (functionalist) arguments about the role of Article XXIV taking into consideration the nature of the relationship between multilateralism and regionalism. Grounded in functionalism, Article XXIV has been reconceived as a legal mechanism for governing, more or less effectively, RTAs rather than eliminate them. Thus, the traditional history teaches that the valid and legitimate ways of interpreting Article XXIV range in-between two stylised poles: regionalism and multilateralism.

Supporters of multilateralism argue that Article XXIV establishes too vague or weak rules to discipline RTAs. These shortcomings are understood to be inherent to Article XXIV. In other words, the fundamental inconsistency between discriminatory and non-discriminatory approaches to trade was entrenched into the GATT rather than solved. This is the historical reason for Article XXIV has been unable to prevent the constant resurgences of regionalism in the 1960s, 1970s, and mid-1980s. Particularly, the 'chronicle of proliferations' is told as a legal tragedy in which the efforts to fix Article XXIV have been resisted by powerful contracting-parties despite the progressive institutionalisation of the GATT. In this sense, the multilateralism-versus-regionalism debate fuels the fears of a return to discriminatory and protectionist measures, bearing the potential of eventually leading to trade wars and the collapse of the WTO. Regional trade regimes are, therefore, imagined as either ontologically or functionally incompatible with the WTO. This understanding frames the preoccupation with and critique of the current 'third wave' of regionalism.⁸⁶ Although some pro-multilateralism lawyers remain inflexible in condemning regionalism, others with a more pragmatic attitude have advocated for reforms to strengthen the WTO's control over RTAs.

By contrast, supporters of regionalism reason that Article XXIV-consistent RTAs are validly created under WTO law. More importantly, they claim that these RTAs have

⁸³ See section 2.D.5.

⁸⁴ Lang, 2011: 343-353.

⁸⁵ Lang, 2011: 199-202.

⁸⁶ See section 2.B.

never represented a threat to the GATT/WTO for two reasons. First, the GATT provides not only the exception under Article XXIV but also a variety of other exceptions that authorise members to adopt policies and measures that would be inconsistent with WTO law otherwise. Second, RTAs have become neither like imperial systems of preferences nor like discriminatory bilateral arrangements. Rather, they are constituted as legitimate mechanisms for economic integration and trade liberalisation. Some pro-regionalism lawyers assert that the growing prominence of RTAs reflects the gradual demise of multilateralism. Others argue that history is clear in showing that regionalism and multilateralism are in essence complementary and need to be governed accordingly.

Conclusion

I want to conclude by reflecting on the traditional history and its central lessons. This Chapter shows that for over sixty years the championing of multilateralism and the defence of regionalism have been closely related to projects for the institutionalisation, juridification, and management of world trade through international law. It specifically demonstrates the existence within the IEL field of a strong consensus on the history of the international trade law and governance of South-North regionalism.

Boiled down to its essence, the traditional history of GATT Article XXIV is simply chronicled as a series of progressive moments that tie political and economic crises to institutional responses and legal justifications. It can be synthesised as follows: from the extensive use of preferential and imperial arrangements as a beggar-thy-neighbour strategy employed in the 1930s trade wars; to the diplomatic attempt of the US to ban all forms of preferential and imperial systems; to the US-led effort to construct a multilateral trading system by accepting to include Article XXIV, a narrow and rigid exception to general principles; and, to the threat to the multilateral trade liberalisation by the progressive relaxation of Article XXIV interpretation and the increase of (temporary and permanent) exceptions to accommodate contracting-parties' interests and needs. From 1947 to 1995, these 'threats' took the form of two waves of regionalism. These two surges were formally authorised by Articles XXV:5 and (mainly) XXIV and the Enabling Clause, despite the understanding of RTAs as incompatible with the non-discriminatory and reciprocal spirit of the GATT. This history is, therefore, a chronicle of the tragedy of Article XXIV for failing over and over again in preventing the proliferations of RTAs due to its policy contradiction, institutional defects, and normative ambiguity.

This summary draws attention to the critical effects of conventional narratives: it highlights certain events and understandings that are at the heart of the traditional history, while ‘hiding’ or ‘marginalising’ the others. It also obfuscates the effects of this traditional style of telling history on the IEL field. To shed light on the operation of conventional narratives, I propose to differentiate their descriptive and prescriptive dimensions and highlight their normative preference for particular ideational, institutional, and jurisprudential ideas and practices.

Conventional narratives like the above function not only as a description of the past but also as prescriptive teachings for framing present-day thinking and practice of international trade law. Drawing from the traditional history, lessons describe what seem to be sometimes tense, sometimes harmonious interactions between two interwoven patterns of norms, institutions, ideas and practices that can be roughly associated with either multilateralism or regionalism. This juxtaposition is expressed in opposing terms:

Multilateralism	Regionalism
multilateral trading system	‘regional-preferential-bilateral’ trade regimes
non-discrimination	discrimination
reciprocity	non-reciprocity
free trade	protectionism (or economic development)
GATT/WTO	RTAs
global governance institutions	sovereign states’ discretion
formalist jurisprudence	functionalist jurisprudence

The above binaries have significant importance for framing our understanding of, and assigning meaning to, the present-day WTO law of South-North regionalism. More concretely, three lessons (discussed in this Chapter) attribute a normative value not only to the past but also to a pole of each binary. The consequence is to prescribe ideational, institutional, and jurisprudential views of and practices for governing present-day decision-making over the interaction between multilateralism and regionalism.

The first teaching asserts the *ideational* mission of the GATT/WTO in promoting multilateral trade liberalisation while constraining and directing regionalism to complement

multilateralism. It reminds that Article XXIV authorises members to depart from general principles only to conclude RTAs that are formally and purposefully consistent with GATT/WTO law. The second takeaway contends that the *institutional* defects of Article XXIV are partially responsible for exposing the GATT/WTO to periodic waves of regionalism. It retells that the shortcomings and improvements of Article XXIV result from a continuous process of deepening institutionalisation through the multilateral rounds of negotiations.

The third lesson holds that the unsatisfactory *jurisprudential* solutions to normative ambiguities and policy contradictions weakening the authority of Article XXIV are partially responsible for disempowering the GATT/WTO's control over regionalism. It accounts that the marginal part played by law and lawyers in the GATT/WTO governance of RTAs caused by the dominance of Article XXIV's interpretative practice by policy-oriented experts due to the formalist jurisprudence's disappointing solutions. This began to change in the 1980s with the turn-to-functionalism in the IEL field and followed up with the Article XXIV's increasing legalisation and juridification as part of lawyers' efforts to take over the domain of international trade law and governance.

This Chapter provides, therefore, an account of 'the traditional history' and calls attention to its often-disregarded effects on international trade law and governance of multilateralism and regionalism. As suggested above, history lessons play a pivotal role as vehicles for transmitting a conversation that international lawyers have been involved in among themselves and with diplomats, policymakers, trade experts about the past, present and future place of regional trade regimes in relation to the world trading system. They not only encapsulate the descriptive and prescriptive dimensions of conventional narratives but also shape the understandings and meanings of WTO law and RTAs. The function of this traditional approach to history-telling is, therefore, to strengthen the connection between the past to present so as to reinforce the authority and legitimacy of the contemporary legal doctrine on the WTO law and governance of South-North regionalism.

CHAPTER 2. THE DOCTRINE ON THE WTO LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES

Introduction

This Chapter provides a comprehensive account of the legal doctrine on the WTO law and governance of regional trade regimes between developed and developing countries. It demonstrates the existence of a legal doctrine that is currently dominant within the field of international economic law and influential in and over the world trading system. It examines mainstream academic and policy literature and official documents to show that the contemporary legal doctrine is grounded in the traditional history of how GATT/WTO law is interpreted and applied to conclude and operate South-North RTAs. The conventional narratives (described in Chapter 1) carry with them, sometimes explicitly, sometimes implicitly, competing views of the relationship between multilateralism and regionalism, which arise from continuous debates about the history, practices and theories of RTAs. Specifically, the history lessons have transmitted a series of disciplinary understandings, meanings, concerns and preoccupations about the proper role of South-North RTAs within the world trading system.

The majority of international lawyers have traditionally positioned themselves either as supporters of free trade multilateralism or supporters of preferential trade regionalism; although recently some of them have sought to work out a certain compromise. The defence of each position – I argue – is undertaken through the competent use of a dominant legal doctrine, and this doctrine equally shapes the range of available positions on regionalism within the IEL field. As discussed in Chapter 4, my thesis adopts a narrow and specific understanding of the term ‘legal doctrine’. It is conceived as a coherent and stable framework of positive and non-positive norms and legal knowledge and techniques, which is devised to serve as a legitimate and authoritative mode of legal governance. Doctrinal analysis is regarded as an expert technique that is routinely carried out to make sense of states’ preferences, actions and policies, to interpret and apply international trade law, and to craft and interpret RTAs. It enables lawyers to argue persuasively with one another about the credibility or correctness of legal arguments and the consistency of RTAs with WTO law. It also empowers them to interact with non-legal trade specialists and policy-makers to

negotiate and manage RTAs. Thus, the dominant legal doctrine vests lawyers with legitimate authority to participate in a continuous conversation about the *nature* and *functions* of South-North regional trade regimes and their relations to international trade law and governance.

Within the IEL field, legal doctrines are expressed in different discursive forms. They are traditionally embodied in scholarly (*e.g.* treatise, books, and articles), policy (*e.g.* expert reports, reform proposals, and preparatory work) or official (*e.g.* interpretative understandings and case law) texts. As discussed below, the legal doctrine on WTO law and governance of South-North regionalism has been articulated in academic works (majority) and policy reports (minority), which have been applied, rejected or transformed by official decisions reached by the WTO's members and Dispute Settlement Body.

The purpose of this Chapter is, therefore, to describe the dominant legal doctrine as it is found in mainstream literature. The doctrinal text generally begins by discussing the distinct concepts of trade agreements (section A). The second step is to account for the historical evolution and recent developments of regionalism under the multilateral trading system (section B). This is followed by a non-legal assessment of RTAs (section C). It then examines RTAs according to WTO law (section D). Section E explores the contemporary forms of interaction between multilateralism and regionalism. Lastly, it analyses the particularities of the WTO law and governance of South-North regionalism (section F). In conclusion, I argue that present-day South-North regional trade regimes have come to be negotiated, constructed and managed as variations of a single archetypical model that is conceptualised and practised according to, and within the limits of, this prevailing legal doctrine.

A. The Concept of Regional Trade Agreements

The initial question that international lawyers seek to address concerns the nature, and appropriate naming, of the different 'trade agreements' between countries.⁸⁷ In the WTO vernacular, 'trade agreements' are roughly understood as international treaties concluded between (at least) one WTO member and one or more countries, through which advantages and concessions are reciprocally exchanged on a non-MFN basis, aiming at advancing trade liberalisation and economic integration among themselves. Of the range of proposed terms,

⁸⁷ Hafez, 2003: 884-887; Chase, 2006: 17-18; Trebilcock *et al*, 2012: 85-86; Matsushita *et al*, 2016: 507.

four have been more commonly used to ‘name’ them: *free trade agreements*, *customs unions*, *regional trade agreements* and *preferential trade agreements*.

The advantage of employing the terms ‘free trade agreements’ and ‘customs unions’ are twofold.⁸⁸ Over the last two centuries, FTA and CU have been widely used to describe trade agreements and also to name them. Due to their historical acceptance and formal usage, these terms were enshrined (first) in the GATT and (later) in the WTO agreements. The formalisation of FTA and CU as legal institutions under WTO law has empowered them with normative authority. Conversely, it has also narrowed their descriptive power to the definitions established in GATT Article XXIV. The effect of formalising FTA and CU is to grant them prescriptive power at the cost of reducing their capacity to describe institutional arrangements that do not meet their formal requirements. For instance, the term FTA excludes necessarily CUs and other trade arrangements. Thus, the concepts FTA and CU are currently employed to refer solely to two specific phenomena: the ‘legal agreements’ that are notified to the WTO and are ideally crafted according to, and aspire to comply with, Article XXIV. Recent developments, concerning the shift of review authority from the Multilateral Review Mechanism towards the DSB⁸⁹, seem to entail the assumption that trade agreements under the rubric of FTA and CU are *prima facie* consistent with WTO law. Consequently, to refer to the whole universe of WTO-consistent trade agreements, which might fall or not under Article XXIV, lawyers had to coin other terms.

Regional trade agreements and *preferential trade agreements* were coined as general categories to encompass (almost) ‘any’ trade arrangement. Although some lawyers may use these terms interchangeably, each of them has a particular normative valence. Despite their differences, the terms PTAs and RTAs encompass FTAs and CUs, unless a carve-out is clearly stated. Some lawyers, who habitually employ the term ‘PTA’, conceive (consciously or not) ‘trade agreements’ as bilateral and plurilateral treaties devised to promote discriminatory trade under WTO law.⁹⁰ Since these agreements create preferences among their partners, they impinge in turn discriminatory effects over the other WTO members. Hence, the term PTA is perceived by its users as providing a more accurate description of the trade relations undertaken under these exceptional regimes, as well as between PTA-partners and non-partners.

⁸⁸ Lester and Mercurio, 2009: 4-5; Gantz, 2009: 238; Gathii, 2011a: 86-87; Mathis, 2011: 31-33; Köbele, 2011: para 1-2; Kaufmann, 2014: para 1-6; Matsushita *et al*, 2015: 507-508; Lo, 2016: 475, 479-481.

⁸⁹ See section 2.D.5.

⁹⁰ Sutherland Report, 2004: 19; Warwick Commission, 2007: 45; Lester and Mercurio, 2009: 4-5; Horn *et al*, 2009: 3-4; WTO, 2011: 44; Trebilcock *et al*, 2012: 83; Matsushita *et al*, 2015: 507-508; Anuradha, 2016: 411-412.

Other lawyers, who often use the term ‘RTA’, understand (consciously or not) ‘trade arrangements’ as ‘non-global’, or ‘non-multilateral’, treaties consistent with WTO law.⁹¹ Trade agreements may be concluded among WTO members that neither need to be close to each other, nor need to include all countries from that geographical area. Thus, the adjective “regional” is almost a misnomer inherited from the postwar ideas on economic integration, which was employed to describe arrangements between trading partners that shared physical proximity. Despite potential misunderstandings, the term RTA is regarded as displaying two advantages. Historically, it has been widely used in mainstream literature. Also, it is arguably more accurate because trade arrangements do not necessarily serve to exchange discriminatory trade preferences.

B. The Past and Present of Regional Trade Agreements

History is central for the formation, application and legitimation of the contemporary legal doctrine on the international trade law and governance of South-North regionalism. It builds a bridge between the past and present of the GATT/WTO law of RTAs, with the purpose of making sense of facts and assigning meaning to official texts. Historical narratives are told by international lawyers to identify and solve problems arising from, interpret the provisions of, and entrench normative missions into, WTO rules and institutions. As explored in Chapter 1, the history of GATT law of regionalism is mainly and foremost a chronicle of the sometimes tense, and sometimes complementary, interaction between multilateralism and regionalism. The disciplinary consensus tends to end the ‘past’ of the international trade law of regionalism in 1994 with the conclusion of the Uruguay Round. Thus, the events following the establishment of the World Trade Organisation are commonly perceived as part of the present developments and so regarded as potential issues of global trade governance.

In 1995, most lawyers, policymakers, and trade specialists believed that once the WTO came into force, RTAs would be gradually marginalised or would, at least, lose their relevance. This prediction never eventuated, however. The RTA activity accelerated dramatically following the failure of negotiations at the 1999 Seattle Ministerial

⁹¹ Bartels and Ortino, 2006: 1-2; Gantz, 2009: 238; Lester and Mercurio, 2009: 4-5; Bartels, 2013: para 1-5; 4-5; Gathii, 2011a: 1, 86-87; Van den Bossche and Zdouc, 2017: 671-672.

Conference.⁹² In the immediate aftermath, the major economies launched multiple regional negotiations. The number of RTAs in force grew from roughly 70 in 1994 to 455 by 2017. All WTO members are currently partners to at least one RTA.

Moreover, FTAs are by far the dominant type of RTA. Their scope and membership have expanded unprecedentedly.⁹³ Not only has geography lost its centrality for concluding RTAs, but also the main focus of their policy mandate has shifted away from preferential reductions in manufactured goods tariffs and towards non-tariff regulation in non-goods subject-matters, such as trade in service, intellectual property, investment flows and others. The result is a new ‘wave’ of trade regionalism, which is perceived as holding unique features.

First, RTAs are increasingly concluded between developing countries.⁹⁴ 60% of RTAs in force are South-South, while roughly 30% are South-North, and just 10% are North-North. Nonetheless, European countries were still leading in the absolute numbers of RTAs in 2010. The EU participated in the largest number of RTAs (30), while the EFTA members concluded between 20 and 22. Asian countries, which were latecomers in this process, showed increasing RTA activity. Singapore participated in 19 RTAs, India (12) and China (10). Latin America also contributed to trade regionalism: Chile concluded 26 RTAs, Mexico (21), and Brazil (13). Other developing countries, such as Egypt (18) and Turkey (17), were not too far. Even the United States became more active, entering into 9 RTAs since 2000.

The second distinct feature is the rise in the number of cross-regional RTAs.⁹⁵ As of 2010, not only roughly 50% of RTAs in force were cross-regional, but the majority of RTAs that were in negotiation or signed were also cross-regional. This evidences that geographical location is not a fundamental determinant for concluding ‘regional’ trade agreements.

⁹² Sutherland Report, 2004: 19; Bartels and Ortino, 2006: 1-2; Do and Watson, 2006: 8-9; Damro, 2006: 23-26; Warwick Commission, 2007: 45-46; Hoekman and Kostecki, 2009: 474-476; Gantz, 2009: 238-239; Horn *et al*, 2009: 3-4; Lester and Mercurio, 2009: 3-4; WTO, 2011: 54-57; Davey, 2011: 235-237; Köbele, 2011: para 3-4; Trebilcock *et al*, 2012: 86-88; Bartels, 2013: para 6-8; Van den Bossche and Zdouc, 2017: 673-679; Kaufmann, 2014: para 22; Matsushita *et al*, 2015: 24-25; Anuradha, 2016: 412; Griller *et al*, 2017: 3-5; WTO, 2018d: 110.

⁹³ See *supra* note 92.

⁹⁴ WTO, 2011: 54-57; Trebilcock *et al*, 2012: 86.

⁹⁵ Bartels and Ortino, 2006: 1-2; Fiorentino *et al*, 2009: 38-40; Lester and Mercurio, 2009: 4; WTO, 2011: 58-60; Trebilcock *et al*, 2012: 86; Bartels, 2013: para 6.

Bilateralism rather than plurilateralism has become dominant.⁹⁶ By 2010, bilateral RTAs accounted for roughly 60% of RTA activity. There was also a pattern linking bilateralism and cross-regionalism. Whereas cross-regional trade regimes tended to be constituted by bilateral agreements, plurilateral arrangements were much more used within a particular region. Consequently, the doubling of cross-regional RTAs over the 2010s coincided with strong growth in the number of bilateral arrangements. Nonetheless, since 2010 there have been negotiations on cross-regional RTAs involving a larger number of countries. The CETA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), TTIP, the Regional Comprehensive Economic Partnership Agreement (RCEP) and the Trade in Services Agreement (TiSA) have been called ‘mega-regionals’ for envisaging plurilateral partnerships to further deep integration between countries or regions with a major share of world trade.

Fourth, RTAs covering trade in goods are still the majority, but the tendency is moving towards to including trade in service.⁹⁷ Although about 60% of RTAs in force concern only trade in manufactured goods and only 30% address goods and services, the number of RTAs covering both has more than doubled in the 2010s.

The increasing move from ‘shallow integration’ towards ‘deep integration’ is the fifth trend.⁹⁸ It involves shifting the focus from tariff reductions to the adoption of rules on ‘behind-the-border’ domestic policy, such as intellectual property rights, capital investment, competition, public procurement, trade facilitation, and environment and labour standards. This tendency has not aimed at eliminating discriminatory treatment, but rather embedding these subject-matters into the preferential regulatory regimes established by the RTAs. The consequence has been an increase in the complexity of regionalism.

The above features of contemporary RTA practice are widely accepted in mainstream literature. They are justified by combining empirical facts and historical causes. Although there are many different arguments for states to enter into RTAs, only three of them are widely perceived as explaining the third wave of trade regionalism.⁹⁹ None of them, however, has succeeded in forming a widespread consensus.

⁹⁶ Do and Watson, 2006: 8-9; Warwick Commission, 2007: 46-47; Fiorentino *et al*, 2007: 8-9; Lester and Mercurio, 2009: 4; WTO, 2011: 60-61; Trebilcock *et al*, 2012: 86; Anuradha, 2016: 412-414; Griller *et al*, 2017: 3-6.

⁹⁷ Horn *et al*, 2009: 3; WTO, 2011: 53, 62-63; Trebilcock *et al*, 2012: 86.

⁹⁸ Warwick Commission, 2007: 47; Horn *et al*, 2009: 3; Lester and Mercurio, 2009: 4; WTO, 2011: 53, 110-111; Köbele, 2011: para 4; Trebilcock *et al*, 2012: 86-87; Bartels, 2013: para 7-8; Lo, 2016: 479-481-484.

⁹⁹ Damro, 2006: 27-28.

The most common rationale asserts that the surge in RTA activity lies in the interest of WTO members in seeking improved market access through the exchange of tariff concessions.¹⁰⁰ However, this broadly accepted justification has been contested on the ground that almost 71% of the world merchandise imports are subject to either zero or very low MFN tariffs.¹⁰¹ Only 4% of world trade in goods seem to be eligible for a margin of preference exceeding 10%, while 15% are regarded as “sensitive”, and so they will not be reduced through RTAs. In addition, tariff preferences have been eroded over time as the partners conclude other RTAs.

Another common argument suggests that the increase in RTA numbers is a functional response to the challenges faced by countries in pursuing their preferences at the multilateral or even domestic level.¹⁰² This rationale reflects the frustration of WTO members in their attempts at furthering trade liberalisation through the multilateral negotiations. The deadlock of the Doha Round results from four structural issues: the large number of members, the increasing difficulties of monitoring new and subtle forms of protectionism, the decline of the US as the economic hegemon willing and capable of safeguarding the world trading system, and institutional and policy differences between the major trading nations. Hence, RTAs create the opportunity to agree on specific rules and policies not (yet or adequately) covered by the WTO, notably nontrade or behind-the-border areas, or to go beyond what is politically feasible at the multilateral level.

A similar logic rests on the strategy undertaken by countries of shifting lawmaking initiatives from either domestic or the multilateral systems to regional venues. This tactic allows them to pursue their interests and lock in policies that are politically too costly to adopt or maintain at the domestic level.¹⁰³ They aim to minimise the price for reducing the market-distorting policies enjoyed by politically organised domestic groups, which do not enjoy comparative advantage and survive from protectionism.

In both cases, RTAs are intended to serve as sites for policy development, where countries can organise themselves into clusters aiming to maximise their respective preferences.¹⁰⁴ Hence, RTAs offer the opportunity to move negotiations on trade

¹⁰⁰ Do and Watson, 2006: 9; Hoekman and Kostecki, 2009: 479; WTO, 2011: 68, 73, 124-127; Gathii, 2011a: 67; Trebilcock *et al*, 2012: 87-89; Anuradha, 2016: 414.

¹⁰¹ WTO, 2011: 68.

¹⁰² Matsushita, 2004: 497-499; Cottier and Foltea, 2006: 72-73; Do and Watson, 2006: 21-22; Damro, 2006: 27-38; Trachtman, 2007: 160; Helfer, 2009: 7-9; Hoekman and Kostecki, 2009: 479-481; Gathii, 2011a: 69-73; Davey, 2011: 236-237; Trebilcock *et al*, 2012: 87-89; Anuradha, 2016: 414; Lo, 2016: 479-483; Griller *et al*, 2017: 4, 8-9.

¹⁰³ Ravenhill, 2008: 123; Hoekman and Kostecki, 2009: 37, 480; WTO, 2011: 94-95; Winters, 2011: 13-15.

¹⁰⁴ *See supra* note 103.

liberalisation to a distinct level where transaction costs and information asymmetries might be either reduced or more easily dealt with, and bargaining power might be aggregated to negotiate with more powerful partners. They also function as mechanisms for signalling the partners' credible and long-term commitment to the specific set of policies and rules enshrined in the RTAs.

A third, and more recent, argument reasons that WTO members may negotiate RTAs aiming to meet the institutional, regulatory, and governance demands posed by international production networks.¹⁰⁵ The success of production networks rests on reducing the costs associated with the lack of sufficient infrastructure, harmonious regulatory standards, and sophisticated institutional apparatus. There is evidence suggesting that the formation of RTAs is likely to operate as a catalyst of international production networks and that these networks, once constituted and operational, will increase the demand for deeper integration through RTAs. Thus, countries aspiring to join global production networks have incentives to conclude RTAs.

C. The Non-Legal Assessment of RTAs

From early days of the GATT until today, the legal doctrine continues to frame the general debate in terms of a tension between multilateralism and regionalism.¹⁰⁶ To assess the benefits and costs of RTAs, lawyers tend not to resort to approaches and methods that are regarded as traditional within the IEL field. Rather, they import concepts, ideas, and techniques from other disciplines, notably economics and other policy-oriented sciences. This section examines the non-legal arguments and methods that have gained greater and greater influence in legal expertise.

Since the previous section has discussed the current rationales that may induce WTO members to negotiate RTAs, the following analysis broadly addresses two critical questions. It begins by asking how those non-legal disciplines respond to the general question as to whether RTAs have a detrimental impact on trade and welfare of their partners and non-partners, and how these (non-)partners react. An equally relevant issue is

¹⁰⁵ WTO, 2011: 111-113; Gathii, 2011a: 67-69; Trebilcock *et al*, 2012: 87-89; Griller *et al*, 2017: 4-5.

¹⁰⁶ See generally Viner (1950), Bhagwati and Panagariya (1996b), Sutherland Report (2004), Do and Watson (2006), Damro (2006), Trachtman (2007), Bhagwati (2008), Gantz (2009), Hoekman and Kostecki (2009), Reich (2010), WTO (2011), Trebilcock *et al* (2012), Matsushita *et al* (2015); Van den Bossche and Zdouc (2017).

whether RTAs are beneficial or not in terms of systemic effect for the international economy, sovereign countries, and peoples' lives. Thus, I will explore how legal expertise describes the ways non-legal disciplines address the general debate on multilateralism-versus-regionalism.

Before delving into the details, it is important to highlight that the general attitude within the IEL field is to present itself as neutral and apolitical. Few lawyers commit explicitly to a specific view. The majority argues that the theories, methods, and findings provided by non-legal literature are still inconclusive. Therefore, to avoid criticism, their preferred strategy is to offer a list of potential arguments in favour and against regionalism. It is possible, however, to foreground three key features entrenched into this tactic.

On the one hand, non-legal arguments are understood as expressions of states' preferences. The premise is that RTAs are institutional instruments for furthering partners' trade policy and preference. On the other hand, non-legal arguments are often critical of the waves of regionalism. The assumption is that postwar international trade law was devised to prevent the proliferation of RTAs. However, the normative conflict between multilateralism and regionalism was embedded into GATT Article XXIV, rendering WTO law indeterminate and so ineffective.

These non-legal understandings of how international trade law relates to states, the WTO and RTAs seem to contradict each other. The former position seems to embrace a functionalist approach, denying the WTO and RTAs any independent normative authority. By contrast, the latter attitude appears to adopt a formalist understanding of the WTO and RTAs as (quasi-)autonomous bodies of positive norms. In this sense, Article XXIV is ineffective not because it lacks binding force, but because its flawed disciplines bear an inherent normative ambiguity. As I shall discuss below, the legal doctrine creates strategies for hiding or suspending this contradiction. Either it overemphasises one side (functionalism or formalism) or creates some distance from the controversy by assuming a sceptical position.

The last strategy undertaken by lawyers is to present the non-legal arguments as if they were options listed in a menu. This lack of historical contextualisation hides not only the intellectual developments in non-legal thinking and practice but also overlooks how these changes have shaped or not the legal doctrine. Baldwin suggests that the history of economic thinking on regionalism can be divided into two phases.¹⁰⁷ The first economic debate on "trade creation versus trade diversion" was developed in the 1940s-1950s as a

¹⁰⁷ See generally Baldwin (2008, 2011, 2012).

response to the first wave of regionalism.¹⁰⁸ From 1960 to the late-1980s, this theoretical framework concentrated the attention of economists on a single matter as to whether countries should join or not RTAs.

The second wave of regionalism not only increased the complexity of world trade but also called the attention to the potential systemic effects of RTAs over the brand new World Trade Organisation.¹⁰⁹ The consequence was that from the late-1980s the economic paradigm changed to answer questions as to whether RTAs strengthen or weaken the multilateral trading system. The third wave of regionalism is still underway, but it seems to have pushed the economic thinking further into questions related to shallow and deep integration.¹¹⁰ Economists have worked particularly to incorporate the insights from international production networks into the reflections on regionalism. Finally, it is important to highlight that the debates on the non-economic goals of RTAs had historically preceded the economic ones, and have remained relevant up-to-date. However, for reasons I shall discuss later, they have been less influential in the IEL expertise.

1. The Traditional Debate on the Static Effects of RTAs: *Trade Creation versus Trade Diversion*

This and the next two debates share an underlying preoccupation.¹¹¹ In the ideal world, the WTO would be successful in bringing about full free trade, ‘unleashing’ the law of comparative advantage that allows consumers and producers exchange goods and services as easily across national boundaries as within countries. However, although trade barriers have substantially declined since 1947, the WTO has not managed to achieve a perfect global free and fair market, given the different interests and preferences of its members. Against this backdrop, economists have asked themselves, if complete free trade were the ideal, any movement in that direction would be presumably beneficial. More specifically, if RTAs are largely free trade instruments and if free trade is beneficial, are RTAs therefore not beneficial almost by definition? This theory of the second best is at the core of the following issues.

¹⁰⁸ Baldwin, 2008: section 2.

¹⁰⁹ Ibid: section 3.

¹¹⁰ Baldwin, 2008: sections 4-6; 2012: 646-650; WTO, 2011: 109-114.

¹¹¹ Do and Watson, 2006: 10-11.

The best-known controversy is whether the ‘static’ effects of the formation of RTAs lead primarily to ‘trade creation’ or ‘trade diversion’.¹¹² This classic debate hinges on whether the reduction or removal of trade barriers through RTAs shifts the production to a lower-cost country (trade creation) or higher-cost country (trade diversion), based solely on the production costs. Since the seminal work of Jacob Viner in 1950, economic models have been developed and reviewed, yet conclusions on the impact of RTAs on non-partners are still ambiguous, demonstrating the possibility for both welfare-enhancing and welfare-reducing RTAs.¹¹³ Similarly, empirical studies have produced conflicting results, depending on the methods used and the available data. Therefore, the legal doctrine often points out that it is not possible to determine whether the predominant effect of RTAs is one of trade creation or trade diversion.¹¹⁴

2. More Recent Debates on the Static Effects of RTAs: the *Spaghetti Bowl Phenomenon*

The second question concerns whether the ‘static’ effects of the RTAs proliferation cause the formation of distinct rules and tariff schedules in global trade governance, which in turn impose substantial transaction costs on importers and exporters that, ultimately, inhibit trade.¹¹⁵ First identified by Jagdish Bhagwati, this phenomenon was named the “spaghetti bowl” for arguably increasing complexity and divergence in international regulation, which culminate in reducing producers’ potential gains from free trade. Conversely, some economists have argued that the transaction costs imposed by RTAs might not deter trade, since identifying the applicable tariff rates is not burdensome, while producers always have the choice to export under WTO rules. Hence, the spaghetti bowl cannot diminish welfare beyond the overall regulation established by the WTO. Nonetheless, the grossly incomplete and inaccurate information has limited empirical studies on this matter leaving the issue unsolved.

¹¹² Viner, 1950; Bhagwati, 2008: 50-60; Hoekman and Kostecki, 2009: 483, 493-496; WTO, 2011: 100-104.

¹¹³ For a review of the traditional debate (or “small think regionalism”), see generally Baldwin (2008; 2012) and Winters (2011).

¹¹⁴ Do and Watson, 2006: 11-17; Trachtman, 2007: 157-159; Gantz, 2009: 243; Trebilcock *et al*, 2012: 89-91; Matsushita *et al*, 2015: 509-511; Trebilcock, 2015: 49.

¹¹⁵ Sutherland Report, 2004: 19-20, 22, 26-27; Do and Watson, 2006: 17-20; Trachtman, 2007: 157-159; Bhagwati, 2008: 61-71; Gantz, 2009: 243-244; WTO, 2011: 83-84, 108-109; Trebilcock *et al*, 2012: 91-92; Trebilcock, 2015: 50.

3. The Systemic Debate on the Dynamic Effects of RTAs: *Building Blocs* versus *Stumbling Blocs*

The third problem focuses on how the ‘dynamic’ effects of the formation of RTAs impact the future course of multilateral trade liberalisation.¹¹⁶ As ‘building blocs’, RTAs are regarded as instruments for furthering trade liberalisation by establishing incentives that lead countries to oppose protectionism and attain the WTO goals. As ‘stumbling blocs’, RTAs are conceived as instruments that divert trade and clash with the WTO goals. The “dynamic time-path question” suggests that RTA proliferation could affect the trajectory of multilateral liberalisation in two ways, by expanding RTA memberships and by accelerating or decelerating the pace of multilateral trade negotiations (MTN).

Regarding the first process, economics provides two opposing claims.¹¹⁷ Grounded in domino theory and excluding MTN, the pro-RTA argument speculates that the formation of an RTA creates incentives for non-partners to seek membership. Over time, the incentives to join grow as the membership expands. This domino effect causes an RTA to move from a regional towards a global regime. Conversely, the competing argument suggests that, in some circumstances, existing RTA-partners have few incentives to allow new countries to join. Based on Cournot-oligopoly models, RTA-partners are expected to attain a welfare peak before reaching the universal membership, at which point they will have incentives to block further expansions.

Conventional economics has not found solutions for the second process concerning the interaction between RTA formation and MTN.¹¹⁸ Instead, alternative theories and approaches have offered compelling responses suggesting that RTA surges are likely to hamper multilateral liberalisation. From a negotiation theory viewpoint, the possibility of concluding an RTA if MTN fail is likely to increase a country’s negotiating position in the WTO round. However, the ‘regional option’ is also likely to narrow the bargaining zone to the potential RTA partners, impacting negatively the prospect for multilateral liberalisation.

¹¹⁶ Bhagwati and Panagariya, 1996b: 22-29; Sutherland Report, 2004: 22-23; Damro, 2006: 24, 39-41; Trachtman, 2007: 159; Gantz, 2009: 244-246; Hoekman and Kostecki, 2009: 482-483, 498-502; Trebilcock *et al*, 2012: 93-95; Matsushita *et al*, 2015: 509-511; Trebilcock, 2015: 50-51. For a review of the recent debate (or “big think regionalism”), see generally Baldwin (2008; 2012) and Winters (2011).

¹¹⁷ Hoekman and Kostecki, 2009: 482-483, 499-500; Trebilcock *et al*, 2012: 93-95.

¹¹⁸ Damro, 2006: 34-35; Gantz, 2009: 244-245; Hoekman and Kostecki, 2009: 500-502; Trebilcock *et al*, 2012: 93-95.

The political economy literature offers two views. From an international perspective, RTAs are likely to hinder multilateral liberalisation for two reasons.¹¹⁹ Where WTO members enjoy existing or potential regional market access, they are likely to face weaker incentives to pursue liberalisation through MTN. Likewise, where WTO members are highly dependent on regional market access, they are likely to have stronger incentives to resist to MTN to maintain their preferential margin. Nonetheless, the contrary argument suggests that a process of competitive liberalisation could result from a widespread trade regionalism.

From a domestic political economy standpoint, the main argument is that frequent engagement in regional negotiations reduces the prospect for multilateral liberalisation since RTA-making causes internal trade anxiety and fatigue.¹²⁰ Grounded in the bicycle theory, the opposing argument asserts that it is imperative to sustain momentum towards trade liberalisation by either multilateral or regional routes. The aim is to make producers understand that any preferential margin will be short-lived due to continuous avenues of liberalisation. Thus, RTAs might assist politicians temporarily to satisfy domestic producers when faced with resistance to pursuing an agenda of multilateral liberalisation. Furthermore, RTAs could contribute to governments by ‘locking-in’ free trade policies at the domestic level. They may operate as stronger mechanisms making future protectionist measures politically undesirable and economically costly.

Taking into consideration the above political economy approaches to the dynamic path question, some empirical studies support the claim that RTAs operate as ‘stumbling blocs’, while others as ‘building blocs’.¹²¹ Notwithstanding, the legal doctrine once again asserts that the question is still unsolved and so in need for further theoretical and empirical research.

4. The Systemic Debate on the Relationship between Economic Integration and RTAs: *Shallow Integration* and *Deep Integration*

¹¹⁹ Damro, 2006: 38-42; Trachtman, 2007: 159; Gantz, 2009: 245-246; Hoekman and Kostecki, 2009: 500-502; Trebilcock *et al*, 2012: 93-95.

¹²⁰ Damro, 2006: 36-38; Gantz, 2009: 241-242; Hoekman and Kostecki, 2009: 480, 496-497; Trebilcock *et al*, 2012: 93-95.

¹²¹ Damro, 2006: 36-38; Gantz, 2009: 241-242; Hoekman and Kostecki, 2009: 480, 496-497; WTO, 2011: 166-168; Trebilcock *et al*, 2012: 93-95.

The fourth and the most recent issue is concerned with the implications of ‘deep-integration’ RTAs for the world trading system.¹²² Over the last three decades, regional trade agreements have gradually shifted their focus from the reduction of tariffs and border measures toward the adoption of regulations on ‘behind-the-border’ domestic policy. RTAs that mostly deal with border measures are conceived as promoters of ‘shallow’ integration, while the ones dealing with rules on domestic policies are regarded as vehicles of ‘deep’ integration. Different from the above debates on the effects of ‘shallow-integration’ RTAs on trade flows, the issues arising from the expansion of ‘deep-integration’ regionalism have two distinct, but interrelated, dimensions: the policy coverage and the institutional depth of RTAs.

Furthermore, the deep-integration RTAs have been examined from two different angles.¹²³ The first approach has found out that deep integration increases the difficulty of determining whether RTAs promote trade-creation or trade-diversion. Combining welfare economics with international production networks, the pro-regionalism argument asserts that deep-integration RTAs serve to maintain trade and improve welfare once countries gain the possibility of exporting and importing not only final goods but also components along the supply chain. An RTA might be welfare-reducing for a partner that was unable to compete with other partners’ final products; however, if the latter partner managed to trade in parts and components along a production network, then the effects of RTAs could become welfare-improving. However, the reverse reasoning could also be true. Since the possibility of trading components used in the production of final products affects the calculation of trade creation and trade diversion, the welfare implication is still deemed to be unsettled.

The second approach focuses on the potential implications of the constitution of supranational public goods under deep-integration RTAs.¹²⁴ These agreements may serve as supranational platforms for policy and regulatory harmonisation and institution creation. Such measures may be welfare increasing for (some stronger) RTA-partners, but they may also entail adverse effects over (weaker) partners and third countries. From an intra-RTA perspective, developing-country partners may be under pressure to adopt trade or non-trade rules and policies that are detrimental to their interests. From an extra-RTA viewpoint, deep-integration RTAs may be beneficial to the world trading system since they may adopt rules and policies that go beyond and deeper than WTO law. Also, they can serve as

¹²² Trachtman, 2007: 160; Hoekman and Kostecki, 2009: 502-508; WTO, 2011: 9-10, 109-114; Trebilcock *et al.*, 2012: 95-97; Trebilcock, 2015: 51, 95.

¹²³ See *supra* note 122.

¹²⁴ Gantz, 2009: 242; Hoekman and Kostecki, 2009: 502-508; WTO, 2011: 113-114, 182; Trebilcock *et al.*, 2012: 95-97.

laboratories for future WTO disciplines. However, this new regulation may also result in both discrimination, which would hinder trade liberalisation, and path dependencies, creating advantage for those states whose interests are crystallised in deep-integration RTAs. Since the debate over shallow and deep integration addresses new frontiers in economic integration via RTAs, the issues underlying it are still unsettled.

5. The Debate on the Non-Economic Goals of RTAs: *Narrow Mandate* versus *Broad Mandate*

It is not only economic objectives that are pursued through RTAs.¹²⁵ Rather, RTAs can also pursue goals that do not fall strictly under foreign economic policy. Historically, a broad range of objectives, policies, rules and institutions have been qualified as non-economic. They are as diverse as peace and security, labour and environment, and development aid.¹²⁶ The fifth problem focuses, therefore, on the use of RTAs for non-economic objectives.

The pro-argument asserts that RTAs might serve as a medium to pursue peace, security and stability in a region, by increasing political, economic or cultural ties and confidence among partners. The most successful example has been the European Union, while other non-European initiatives (*e.g.* ASEAN in Asia, SADC in Africa and Mercosur in Latin America) have also set forth non-economic objectives in their constitutive agreements. Recently, developed countries have demanded in their negotiations with developing countries that non-economic goals be included in RTAs. For instance, the NAFTA has established environmental and labour standards.

Nevertheless, the use of RTAs to govern non-economic objectives have proved historically to be dangerous.¹²⁷ The interwar period teaches that such political regionalism might lead up to destructive antagonism, trade wars and armed conflicts. Thus, the contrary argument claims that a strong commitment to multilateralism is the best solution to avoid RTAs to generate non-economic conflicts.

¹²⁵ Sutherland Report, 2004: 23; Damro, 2006: 30-34; Gantz, 2009: 241-242; Hoekman and Kostecki, 2009: 480-481; Reich, 2010: 278-279; Trebilcock *et al*, 2012: 97-98; Trebilcock, 2015: 51.

¹²⁶ I do acknowledge the differences between non-economic policies and goals are important; however, the mainstream literature commonly qualifies all of them under the same 'non-economic' rubric.

¹²⁷ Damro, 2006: 30-34; Trebilcock, 2015: 51.

6. The Contradiction Underlying Non-Legal Arguments

The five non-legal topics summarise how legal doctrine foregrounds certain issues in the debates over RTAs, and how it positions different views of these issues in relation to one another. Of course, they are not intended to be an exhaustive list of questions and answers discussed in mainstream literature, but they aim to represent the sort of problems, theories, and methods that have attracted the attention of the majority of lawyers. The above summary reveals that recent scholarly works do not reach definitive responses to the posed issues.

My analysis of this rich, but inconclusive, set of non-legal arguments seems to highlight the contradiction of their assumptions. This interdisciplinary scholarship purports to reconcile its ‘scientific’ commitment to describing and explaining the formation and operation of RTAs on the grounds of state preference with its ‘normative’ pledge to sustain the world trading system devised to facilitate the development of a global market to function as a critical driver for prosperity and welfare.

Mainstream literature aspires to find in non-legal arguments a firmer and less subjective basis for lawmaking and interpretation. The strategy is to integrate policy-oriented sciences into legal expertise with the purpose of offering a scientific framework of analysis to determine why and how states conclude RTAs, or when RTAs are more likely to be advantageous or harmful to their partners. These questions are put forward not as an intellectual puzzle but from the perspective of WTO members, with stakes to improve or reduce domestic and/or international welfare as a result of decisions on whether to conclude RTAs. This turn to policy-oriented reasoning comes with a firm commitment to formalist assumptions, including to rational analysis and methodological individualism that are expected to provide useful ways for understanding the actual or potential consequences of the WTO law and governance and the proliferation of RTAs.

However, re-imagining the WTO and RTAs as institutional instruments for pursuing individual economic interests entails a number of problems that were raised above. The most important for the legal debates that I shall examine below derives from the attempts of combining positive (*i.e.* scientific-neutral-apolitical) descriptions with

normative individualism and intentionalism¹²⁸ of WTO members. This trend in non-legal reasoning correlates the issues of “effectiveness”, “efficiency” and “compliance” of WTO law and governance with the third wave of regionalism, which is regarded as reflecting a new economic pattern of (actual or presumed) preferences and behaviours of welfare-maximiser WTO members. This understanding directs the argumentation for or against the creation and design of RTA or reforms to, or interpretation of, the WTO disciplines.

Moreover, mainstream literature is committed to the world trading system. Policy-oriented sciences are deployed to ensure that the proliferation of RTAs does not jeopardise the normative project for a global market. The scientific framework is used to determine whether, when and how RTAs are detrimental or complementary to the development of a global free and fair marketplace under the WTO. As the legal order devised to regulate the creation and operation of RTAs, WTO law is entrusted with the authority to prevent the third wave of regionalism from reducing general welfare or constraining the formation of a global market. This conception of the WTO and RTAs also raise a number of issues that were discussed above. The central aspect for the legal debates is the efforts to associate scientific descriptions with normative functionalism of the WTO. Likewise, problems of “effectiveness,” “efficiency” and “compliance” of WTO law and governance are linked to the third wave of regionalism.

However, the recent surge in RTA-activity is not understood as a manifestation of state preference. Instead, it is interpreted as a behavioural deviation threatening the world trading system, since its systemic effects are not only welfare-reducing but also erosive of the fundamental purpose of developing a global market. This trend in non-legal reasoning tends to argue for or against RTA grounded in the normative ideal of constituting a global marketplace through WTO law.

As shall be more evident below, these contradictory claims, unsettled debates and provisional conclusions in non-legal assessments of RTA play a central role in framing lawyers’ understanding and interaction with regionalism through legal expertise. Their gaps and shortcomings open the possibility for lawyers to strategically rework them as legal arguments to be used against or in favour of RTAs. In this sense, non-legal topics are translated into legal issues, to which WTO law is applied, with the purpose of providing solutions in the form of legal arguments or decisions. Thus, the continuous interplay

¹²⁸ Individualism refers to the notion that an IEL rule or institution reflects state behaviour, will and interest. Intentionalism refers to the idea that the meaning of an IEL rule or institutions derives from the (actual or presumed) intent of state.

between legal and non-legal disciplines through the production of knowledge and practical applications has shaped the WTO law doctrine on South-North regionalism.

D. The Legal Assessment of RTAs

The above non-legal analyses are mostly interested in understanding the political-economy and welfare implications of RTAs. They tend to remove, or abstract as much as possible the impact of, international trade law from their consideration. Conversely, the IEL field shifts the legal assessment to the other extreme by focusing primarily (and almost exclusively) on GATT Article XXIV for RTAs concerning trade in goods, and secondarily on GATS Article V for RTAs involving trade in service, and on the Enabling Clause for South-South RTAs.¹²⁹

The consensual understanding is that Article XXIV expresses the attempt of the drafters to strike a balance between two contradictory projects for governing world trade: free trade multilateralism and preferential regionalism.¹³⁰ The compromise was embedded into Article XXIV:4 providing that “the desirability of increasing freedom of trade by the development, through [RTAs], of closer integration between the economies of the countries parties to such agreements,” on the one hand; and “the purpose of a [RTA] should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories,” on the other hand.

As examined in detail below, this normative ambiguity has been governed by the rules of Article XXIV. From 1947 up to date, the continuous practice has progressively institutionalised Article XXIV as a legal regime for balancing formal and substantive considerations concerning the relationship between the WTO and RTAs. Nonetheless, Article XXIV has been widely regarded as weak and ineffective.¹³¹ The consequence is that most of the legal questions related to it have remained unresolved. The remaining of this section describes and analyses the dominant understandings of and around the teleological, substantive and procedural aspects of the WTO law of regionalism.

¹²⁹ See generally Jackson (1969), Mathis (2006), Estrella and Horlick (2006), Gantz (2009), Bartels (2013), Trebilcock *et al* (2012), Matsushita *et al* (2015), Trebilcock (2015), Van den Bossche and Zdouc (2017).

¹³⁰ See generally Gantz, 2009: 247-253; Trebilcock *et al*, 2012: 99-121; Bartels, 2013: 13-14; Matsushita *et al*, 2015: 513-514; Trebilcock, 2015: 45.

¹³¹ Hafez, 2003: 879-919; Gantz, 2009: 247-248; Trebilcock *et al*, 2012: 99-100; Bartels, 2013: 15; Matsushita *et al*, 2015: 513-514; Trebilcock, 2015: 52; Van den Bossche and Zdouc, 2017: 680.

1. The Legal Purpose of RTAs

One of the most long-standing debates concerns whether Article XXIV imposes an overall legal purpose to RTAs, and their place within the world trading system. The controversy lies in whether Article XXIV:4 disciplines *ex ante* the legal purpose of RTAs. Indeed, paragraph 4 could be understood as either prescribing a test for the legality of RTAs, or providing guidance for interpreting Article XXIV, or even setting forth a supplementary provision intended to fill gaps in Article XXIV.¹³²

Although the Article XXIV Understanding had failed in resolving the ambiguity, the WTO Dispute Settlement Body settled the controversy in *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey–Textiles)*. The Appellate Body (AB) found that Article XXIV:4 does not set forth an operative test for assessing the purpose of RTAs.¹³³ Nonetheless, its decision held that the entire text of Article XXIV must be interpreted in light of the purposive language of paragraph 4. Therefore, the substantive and procedural requirements enshrined in Article XXIV:5-9 should be regarded as rules devised to facilitate trade between the constituent partners and not to raise barriers to the trade between third countries and such partners.

Furthermore, it is commonly accepted that Article XXIV was devised to authorise the establishment of RTAs under the GATT regime.¹³⁴ The wording of Article XXIV:4 seems to leave no doubt that it creates an exception to the MFN obligation enshrined in GATT Article I:1. With the establishment of the WTO, the question of whether Article XXIV sets forth an exception to other provisions as well was raised. In *Turkey–Textiles*, the AB responded in the affirmative holding that “Article XXIV may justify a measure which is inconsistent with certain other GATT provisions.”¹³⁵ The consequence is that Article XXIV assumes that RTAs are inherently compatible with free trade multilateralism and that they perform a legitimate function within the world trading system.

¹³² Hafez, 2003: 884-885, 890-891; Gantz, 2009: 248-249; Trebilcock *et al*, 2012: 101-102; Trebilcock, 2015: 46.

¹³³ WTO, *Turkey–Textiles* AB Report: para 57

¹³⁴ Matsushita *et al*, 2015: 513-514.

¹³⁵ *Turkey–Textiles* AB Report: para 58.

2. The Partners to RTAs

Article XXIV disciplines RTAs concluded among WTO members. Two assumptions underlie this rule. First, Article XXIV is not applicable to RTAs between a WTO member and a non-member. To conclude an RTA with a non-member, a WTO member must obtain an Article-XXIV:10 waiver. However, the practice changed GATT/WTO law requiring WTO members also to notify RTAs with non-members according to the Article XXIV procedures.¹³⁶

The second premise rests on the principles of formal sovereign equality and reciprocity enshrined in Article XXIV:5. Article XXIV does not distinguish RTA partners according to economic development.¹³⁷ Unless the partners declare to be all developing countries and invoke the Enabling Clause, Article XXIV should apply to their RTA. The joint effect of these regimes is to establish an institutional division of authority based on legal identity ascribed to members under WTO law. Article XXIV governs North-North and South-North RTAs, while the Enabling Clause regulates South-South RTAs. Article 7 of the Enabling Clause establishes a continuous process of ‘reclassification’ by which a WTO member may ‘graduate’ from the ‘special and differentiated’ condition once it reaches a certain level of development. The consequence of the graduation is to subject the now ‘developed’ member to the disciplines of Article XXIV. The disputes about the relationship between Article XXIV and the Enabling Clause have never been directly raised by or before the DSB, nor extensively discussed in mainstream literature.

3. Substantive Conditions

(a) Internal Conditions

The core rules disciplining the internal conditions for the formation and operation of WTO-consistent RTAs are enshrined in Article XXIV:8.¹³⁸ They determine the nature and degree

¹³⁶ Bartels, 2013: para 16; Trebilcock, 2015: 46-47.

¹³⁷ Hafez, 2003: 900-903; Trebilcock *et al*, 2012: 81-82; Matsushita *et al*, 2015: 700-708; Gammage, 2017: 53-54.

¹³⁸ Gantz, 2009: 249; Trebilcock *et al*, 2012: 102-103; Bartels, 2013: para 19-22; Van den Bossche and Zdouc, 2017: 680-684.

of trade liberalisation required of FTAs and CUs. Unsurprisingly, the text of paragraph 8 is very ambiguous raising controversies over a number of relevant terms and definitions.

Under Article XXIV:8, an FTA is “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 in products originating in such territories.” A CU adopts similar definition and goes a step further requiring its partners to establish a common external tariff, which shall apply “substantially the same duties and other regulations of commerce” to non-partners.

“Duties and other restrictive regulations of commerce”

One unsettled aspect of Article XXIV:8 concerns the expression “duties and other restrictive regulations of commerce.” The question is whether the term “duty” refers to bound or applied rates of duty. The WTO agreement and case law are silent. Yet, the Article XXIV Understanding, reaffirmed by the AB’s decision in *Turkey—Textiles*, determines that the term “duty” in Article XXIV:5 must be interpreted as applied rather than bounded rates of duty.¹³⁹ Although neither of them addresses Article XXIV:8, it is likely that similar interpretation applies to it.¹⁴⁰

Even vaguer is the expression “other restrictive regulations of commerce” (ORRC). Under Article XXIV:8(a)(i) and 8(b), ORRC must also be eliminated on substantially all the trade. Again, the WTO agreement and case law have not addressed this definition directly. Instead, the Panel in *Turkey—Textiles* interprets the term “other regulation of commerce” (ORC) under Article XXIV:5 and 8(a)(ii), in reference to the external requirement, to mean “any regulation having an impact on trade.”¹⁴¹ In contrast to “duties,” this interpretation is very unlikely to be applied to internal conditions, since such an expansive understanding of ORRC, combined with “substantially all the trade” requirement, would ultimately command all RTAs to implement what is regarded as an internal single market regime.¹⁴² To avoid this excessive intervention, ORRC has been reconceived as a subset of ORC, with the term “restrictive” serving to limit its effects. Thus, the current debate aims to determine whether the meaning of ORRC encompasses either border measures between the parties only, or some internal measures that discriminate against the goods of CU-partners, or all regulatory measures.

¹³⁹ *Turkey—Textiles* AB Report: para 53, 58.

¹⁴⁰ Trebilcock *et al.*, 2012: 102-103; Bartels, 2013: para 21, 24; Matsushita *et al.*, 2015: 520-521; Trebilcock, 2015: 46-47; Van den Bossche and Zdouc, 2017: 683.

¹⁴¹ WTO, *Turkey—Textiles* Panel Report: para 9.120.

¹⁴² Trebilcock *et al.*, 2012: 103-104; Bartels, 2013: para 21; Matsushita *et al.*, 2015: 521-522.

“*Substantially all the trade*” (SAT)

Under Article XXIV:8, the term “substantially all the trade,” on which barriers between the parties must be eliminated, is very controversial.¹⁴³ Indeed, the AB acknowledged in *Turkey—Textiles* that WTO members had never reached a consensus on its meaning.¹⁴⁴ There are two outstanding questions concerning its interpretation. One is whether this definition should be understood in pure quantitative (focusing only on the volume of trade liberalised among the partners) or also qualitatively (concerning which specific sectors are covered under an RTA) terms. This issue was settled in *Turkey—Textile*, which finds that the meaning of “substantially” in Article XXIV:8(a) refers to quantitative and qualitative components.¹⁴⁵

The other question is of what degree of liberalisation, quantitatively or qualitatively, is required to satisfy Article-XXIV:8 requirement. This issue has remained unresolved, however. *Turkey—Textile* holds “that [the term] ‘substantially all the trade’ is not the same as *all* the trade, and also [it] is something considerably more than merely *some* of the trade.”¹⁴⁶ Although this decision confers WTO members with some flexibility to impose restrictive measures consistent with WTO law, it is regarded as having ultimately failed in providing clear limits.¹⁴⁷

With regard to the application of the qualitative element, a controversial issue arises concerning the segments of trade that must be covered by an RTA to satisfy the SAT test.¹⁴⁸ In 1960, the consistency of the Stockholm Convention with the GATT was assessed by a working party, holding that the SAT test requires that no relevant sector of trade can be left out of an RTA.¹⁴⁹ Despite the importance of such ambiguity, no substantial progress was achieved under the GATT. The Article XXIV Understanding acknowledges that the expansion of world trade is diminished “if any major sector of trade is excluded.” Although the dominant view is that the qualitative component of “substantially all the trade” demands that no important segment be excluded from internal liberalisation of an RTA, neither WTO case law nor practice has validated such understanding. Rather, the long-standing history of

¹⁴³ Hudec and Southwick, 1999: 61; Hafez, 2003: 891-894; Gantz, 2009: 249; Trebilcock *et al*, 2012: 104-105; Bartels, 2013: para 17-18; Matsushita *et al*, 2015: 519-520; Van den Bossche and Zdouc, 2017: 681-682, 687.

¹⁴⁴ *Turkey—Textiles* AB Report: para 48.

¹⁴⁵ *Turkey—Textiles* AB Report: para 49.

¹⁴⁶ *Turkey—Textiles* AB Report: para 48.

¹⁴⁷ Gantz, 2009: 249; Trebilcock *et al*, 2012: 104-105; Bartels, 2013: para 17-18; Matsushita *et al*, 2015: 519-520.

¹⁴⁸ See *supra* note 147.

¹⁴⁹ GATT, EFTA—WP Report: para 48.

regionalism under the GATT/WTO regime shows that RTAs tend to exclude partially or entirely major economic sectors, notably trade in agriculture, which would likely be found in violation of Article XXIV:8(a)(b). Partially for this reason, some WTO members have proposed, without reaching a consensus, a stricter qualitative test for SAT, which should prevent major economic segments be excluded from liberalisation. Nonetheless, a General Council's decision implicitly suggests that the qualitative requirement does not require liberalisation of all trade involved.¹⁵⁰

Regarding the quantitative component, the issue concerns the volume of trade that must be liberalised by an RTA to meet the SAT standard.¹⁵¹ Neither WTO case law nor the Article XXIV Understanding addresses the problem. Yet, a broad understanding, but not a consensus, has been formed around the range of 80-90%. The quantitative element has recently become subject to an intense dispute. Specifically, the EU and ACP countries debated the issue throughout the negotiations leading up to the Economic Partnership Agreement (EPA). The controversy was over the EU's insistence, contrary to the claims of the ACP countries¹⁵², that a minimum degree of 80% of liberalisation must be achieved by the RTA-partners to ensure WTO compliance.

Therefore, after more than fifty years of negotiations and practice¹⁵³, WTO members have failed to agree on a workable definition for SAT. The literature points out that the interpretative disputes might have arisen from the lack of clear policy objectives embodied in the term SAT.¹⁵⁴ Economically, a comprehensive RTA is not necessarily more beneficial than a partial RTA for world trade.¹⁵⁵ If an RTA is trade-diverting, demanding it to be more comprehensive may diminish global welfare. From a political economy perspective, the comprehensiveness requirement aims to increase the costs and difficulties to create RTAs.¹⁵⁶ By containing the proliferation of RTAs, the WTO would reduce the possibility of a return to the interwar world of discriminatory and preferential agreements. Another argument is that the comprehensiveness requirement prevents countries from concluding RTAs covering only their competitive sectors, while shielding their politically sensitive segments from liberalisation.¹⁵⁷ Thus, the political economy arguments tend to

¹⁵⁰ WTO, Transparency Decision.

¹⁵¹ Trebilcock *et al*, 2012: 105-106; Bartels, 2013: para 17-18; Matsushita *et al*, 2015: 519-520.

¹⁵² R. Lang, 2006: 12-13.

¹⁵³ WTO, 2018a: 824-825, footnote 162.

¹⁵⁴ Trebilcock *et al*, 2012: 105-106.

¹⁵⁵ Viner, 1950: 49-50.

¹⁵⁶ Bhagwati 1991: 66.

¹⁵⁷ Hudec, 1993: 155; Grossman and Helpman, 1995: 13.

support the comprehensiveness requirement on the ground of it leads to the reduction of trade diversion while enhancing global welfare.¹⁵⁸

(b) External Conditions

The external requirement disciplining the relationship of RTAs to non-partner WTO members is under Article XXIV:5 and 8(a)(ii).¹⁵⁹ Whereas adverse effects on trade with third countries is an almost inevitable consequence of RTAs, this does not mean that CUs and FTAs need to increase or impose new barriers to trade with non-partner WTO members.

Paragraph 5 of Article XXIV prescribes that the “duties and other regulations of commerce” imposed on non-partners after the creation of an RTA should not be “higher or more restrictive” than before. In practice, the formation of an FTA does not require any change in the external trade policies of its partners, so FTA-partners are entitled to set up unilaterally their foreign commercial policy. Still, Article XXIV:5(b) precludes individual trade instruments from becoming more restrictive after the formation of an FTA. By contrast, the establishment of a CU requires some degree of harmonisation of a common external policy (CEP). For this reason, Article XXIV:8(a)(ii) requires CUs to apply “substantially the same duties and other regulations of commerce” to non-partners.

“The provisions of this Agreement shall not prevent [...] the formation of a customs union or of a free-trade area”

Article XXIV:5 asserts that GATT provisions shall not prevent the formation of a CU.¹⁶⁰ While the AB in *Turkey–Textiles* held that Article XXIV can justify certain WTO violations, it interpreted Article XXIV:4 and 5 as imposing a test of necessity, aiming to assess whether inconsistent measures would make impossible the formation of a CU.¹⁶¹ This two-prong test requires CU-partners claiming the benefit to demonstrate that (i) the inconsistent measure is introduced upon the formation of a CU in full compliance with Articles XXIV:8(a) and 5(a), and (ii) the formation of the CU would be prevented if it were not allowed to introduce the measure at issue.

¹⁵⁸ Trebilcock *et al*, 2012: 106.

¹⁵⁹ Jackson, 1969: 621; Hafez, 2003: 889-890, 894-897; Gantz, 2009: 248-249; Bartels, 2013: para 24; Trebilcock *et al*, 2012: 106-107; Matsushita *et al*, 2015: 523-524; Van den Bossche and Zdouc, 2017: 682-688.

¹⁶⁰ Hafez, 2003: 894-897; Trebilcock *et al*, 2012: 113-117; Trebilcock, 2015: 48.

¹⁶¹ *Turkey–Textiles* AB Report: para 57-61.

“Duties and other regulations of commerce”

As examined above¹⁶², the term “duties” in Article XXIV:5 refers to applied, rather than bound, rates of duty. Also discussed above, the wording “other regulations of commerce” has important ambiguities, which were addressed in *Turkey–Textiles*. The Panel held that the meaning of ORC encompasses “any regulation having an impact on trade,” but noted that, given “the dynamic nature of [RTAs]”, it is an “evolving concept.”¹⁶³ Thus, in contrast to Article XXIV:8 that refers to “other *restrictive* regulations,” Article XXIV:5(b) contains no exhaustive list of regulations of commerce.

“Higher or more restrictive”

Article XXIV:5 precludes RTA-partners to apply duties and ORCs that are “higher or more restrictive” than those applied before the creation of an RTA. It regulates FTAs and CUs slightly different as to reflect their unique characteristics.

Article XXIV:5(a) specifies that “the duties and other regulations of commerce imposed at the institution of [a CU] [...] shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations” applicable before its formation. This wording reflects the special quality of CUs, which requires the adoption of a CEP through a process of adjustment in the constituent CU-partners’ policies.¹⁶⁴ Considering that the CEP results from the harmonisation of existing unilateral tariffs of CU-partners, the formation of a CU is likely to impose greater trade barriers for third parties with respect to one of the constituent partners, while it is expected other third parties benefit from lower barriers. Through the terms “on the whole” and “general incidence,” Article XXIV:5(a) grants some flexibility to the formation of CUs by accepting particular trade barriers may increase as far as the overall effect of the CEP does not increase the constraints on trade with third parties.

Although Article XXIV:5(a) provides no assessment test for determining whether duties and ORCs increase “on the whole” after the creation of a CU, paragraph 3 of the Article XXIV Understand prescribes an ‘economic test’ to assess the consistency of CUs with Article XXIV. In *Turkey—Textiles*¹⁶⁵, both the Panel and AB endorsed the economic

¹⁶² See *supra* notes 139-142, and accompanying text.

¹⁶³ *Turkey–Textiles* Panel Report: para9.120.

¹⁶⁴ Hafez, 2003: 894-897; Trebilcock *et al*, 2012: 108-110; Matsushita *et al*, 2015: 525-526; Van den Bossche and Zdouc, 2017: 684.

¹⁶⁵ *Turkey–Textiles* Panel Report: para 9.121-9.122; *Turkey–Textiles* AB Report: para 55.

test to compare the extent of trade restriction before and after the formation of a CU; however, its application remained underspecified. The DSB provided no adequate answer as to how to evaluate individual ORCs and how to determine whether their overall effect would cause the violation of Article XXIV:5(a).

The rule on external trade barriers for FTAs is provided under Article XXIV:5(b).¹⁶⁶ The key difference from the discipline on CU is that the term “on whole” is lacking and the wording “the general incidence of the duties and regulations of commerce” is replaced by “the corresponding duties and regulations of commerce.” These divergences express the distinct institutional design of CUs and FTAs. While CUs require a CEP, FTAs do not. The consequence is that rather than the overall ‘economic test’, a measure-by-measure approach to the external requirement applies to an FTA under Article XXIV:5(b) to determine whether the “duties and other regulations of commerce” imposed on third parties by each constituent partner are not higher or more restrictive after the formation of the FTA than before.

“Substantially the same”

Article XXIV:8(a)(ii) requires CU-partners to apply “substantially the same duties and other regulations of commerce” to third parties.¹⁶⁷ Although the Article XXIV Understanding does not address the meaning of this requirement, the DSB clarifies it in *Turkey—Textiles* in two ways.¹⁶⁸ First, “substantially the same” bears both a qualitative and quantitative component. Second, this term grants constituent CU-partners some flexibility in implementing a CEP, since it allows them to adopt quantitative restrictions under a special transition regime.

(c) Rules of Origin (RoO)

RoO are key institutions devised to implement FTAs and CUs.¹⁶⁹ If goods and services were entirely exchanged on the MFN basis, it would not be necessary to determine their origin. However, WTO law allows its importing members to apply distinct RoO, which entail different treatment to products depending on the territory from where they were

¹⁶⁶ Hafez, 2003: 896-897; Trebilcock *et al*, 2012: 108-110; Van den Bossche and Zdouc, 2017: 686; *Turkey—Textiles* Panel Report: para 9.125.

¹⁶⁷ Hafez, 2003: 893-894; Trebilcock *et al*, 2012: 110-111.

¹⁶⁸ *Turkey—Textiles* Panel Report: para 9.148 and 9.151; *Turkey—Textiles* AB Report: para 49-50.

¹⁶⁹ Hafez, 2003: 887-888; Trebilcock *et al*, 2012: 103-104; Bartels, 2013: 27-31; Matsushita *et al*, 2015: 524.

produced or substantially transformed. Although the WTO Agreement on Rules of Origin¹⁷⁰ establishes various RoO for certain situations in which the MFN treatment is suspended, it does not regulate them under RTAs, leaving entirely up to the partners' discretion.

The purpose of RoO is to distinguish between products originating in the territory of a partner, and so entitled to the advantages provided under the RTA, and products originating in the territory of a non-partner.¹⁷¹ In FTAs, RoO are central to ensure the integrity of the RTA, which could be undermined by a problem known as 'trade reflection'. That is the process in which a non-partner exporter routes its products through the market of an FTA-partner with lower external tariff in order to take advantage of the tariff differential. Hence, RoO are established to prevent trade reflection by requiring products to qualify for tariff-free trade. This is achieved by imposing minimum levels of domestic content or substantial transformation in order to a good be designed as originating within a partner's territory rather than only passing through it. In CUs, RoO perform a special function of assisting the partners to maintain a CEP that is "substantially the same" but not identical. In *Turkey—Textile*, Turkey was authorised to adopt a different external policy on textiles import from the EU; however, this solution was only possible because the products at dispute did not constitute a substantial amount of trade for the purpose of Article XXIV:8(a)(i)-(ii).¹⁷²

A relevant, but unsolved, question concerns the protectionist use of RoO in RTAs.¹⁷³ Origin designation rules could be employed to exclude from preferential treatment under RTAs products that use non-partners' inputs. The issue is, thus, whether RoO may be used to determine the amount of trade that must be liberalised under Article XXIV:8. If RoO were regarded ORRC, then they could be subject to the Article XXIV:8 requirement of eliminating restrictive regulation of commerce with respect to "substantially all trade." The result would be to assess whether RoO restrict too large fraction of trade. Similarly, it raises the issue of whether RoO could be qualified as ORC under Article XXIV:5. If so, the formation of RTA could not lead to the adoption of RoO that would be "higher or more restrictive" than those previously applied. Another issue is related to the potential protectionist effects on non-partners' exports entailed by the changes to existing RoO under RTAs. If more restrictive RoO under RTAs were adopted, they could be regarded as an ORC, and so in violation of Article XXIV:5.¹⁷⁴

¹⁷⁰ RoO Agreement.

¹⁷¹ Hafez, 2003: 887-888; Bartels, 2013: 27-29; Matsushita *et al*, 2015: 524.

¹⁷² *Turkey—Textiles* AB Report: para 62.

¹⁷³ Trebilcock *et al*, 2012: 103-104, 107-108; Bartels, 2013: 29-31.

¹⁷⁴ See *supra* note 173.

4. Interim Agreements

Article XXIV also disciplines interim agreements leading to completed RTAs within a “reasonable length of time.”¹⁷⁵ The purpose of interim agreements is to grant to constituent partners reasonable time to adjust from unilateral trade policies to full implementation of an FTA or CU. During this period, they might fall short of the standards and requirements established under Article XXIV. Although Article XXIV:5(c) does not define “reasonable length of time,” paragraph 3 of the Article XXIV Understanding clarifies that it “should exceed 10 years only in exceptional cases.” In practice, there is no consensus on the meaning of “exceptional cases,” and so this maximum period is regularly exceeded, in some cases by up to 20 years.¹⁷⁶

5. Procedural Conditions

The procedural requirements provided in Article XXIV and their respective implementation have proven challenging.¹⁷⁷ Three key aspects are examined in this section: notification, ‘multilateral’ review by the Committee on Regional Trade Agreements and ‘judicial’ review by the Dispute Settlement Body.

(a) Notification

Under Article XXIV:7, WTO members deciding to conclude an RTA have to notify the WTO of their intention to do so.¹⁷⁸ Specifically, notification must be submitted to the CRTA if an RTA is North-North and South-North, and between a WTO member and a non-WTO member. The text of Article XXIV:5 sets forth that only a WTO member is entitled to constitute WTO-consistent RTAs. Consequently, unless justified under XXIV:10, RTAs with non-WTO members would entail that any advantage granted would have to be automatically and unconditionally extended to all WTO members. However, Matsushita *et*

¹⁷⁵ Hafez, 2003: 886-887; Trebilcock *et al*, 2012: 111-113; Bartels, 2013: 32.

¹⁷⁶ *See supra* note 175.

¹⁷⁷ Hafez, 2003: 902-904; Gantz, 2009: 251-252; Bartels, 2013: 32; Matsushita *et al*, 2015: 513-514.

¹⁷⁸ Gantz, 2009: 252; Trebilcock *et al*, 2012: 100; Matsushita *et al*, 2015: 513-518; Van den Bossche and Zdouc, 2017: 692.

al. explain that trade practice has evolved to ensure that the notification by any WTO member to an RTA prevents the operation of MFN clause.

Furthermore, there is a controversy over the formation of a dual-notification regime. South-South RTAs must be notified under the Enabling Clause to the Committee on Trade and Development (CTD) and so not to the CRTA. Nonetheless, the Mercosur notification was also submitted to the CRTA under Article XXIV. Some developing countries challenged this practice of dual notification, which remains an unresolved issue.¹⁷⁹

The text of Article XXIV:7(a) suggests that the constituent partners to an RTA should notify the WTO as early as possible and, in any case, immediately following its ratification.¹⁸⁰ Nonetheless, due to the lack of retroactive remedies in WTO law, the practice is that notifications can take place after the entry in force of the RTA. This understanding was later institutionalised by a decision of the General Council.¹⁸¹ Yet, the WTO noted in 2016 that 72 RTAs, which were in force, had never been notified.¹⁸²

(b) Multilateral Review Mechanism

The multilateral review mechanism operates under Article XXIV:7.¹⁸³ Since 1947, it has undergone considerable transformations. Article XXIV:7 grants WTO members authority to make recommendations on notified RTAs. Before the WTO, *ad hoc* working parties were established to examine the consistency of notified-RTAs with GATT law and then to report to the GATT Council.¹⁸⁴ Each RTA “should be considered on its own merits. The case under consideration could not create a precedent.”¹⁸⁵ The Council was expected to adopt the report; however, history proved that the multilateral review mechanism did not fulfil its mandate.¹⁸⁶ Starting with the notification of the South Africa-Southern Rhodesia Customs Union in 1949, crystallised in the examination of the Treaty of Rome, and reproduced by over fifty working parties, the diplomatic consensus reached by the contracting-parties was that a unanimous conclusion or endorsement that a specific RTA met the Article XXIV:7

¹⁷⁹ See *supra* note 178.

¹⁸⁰ See *supra* note 178.

¹⁸¹ Transparency Decision: para 3.

¹⁸² Van den Bossche and Zdouc, 2017: 693.

¹⁸³ Hafez, 2003: 902-904; Gantz, 2009: 252-253; Bartels, 2013: 33-34; Matsushita *et al*, 2015: 515-518; Van den Bossche and Zdouc, 2017: 682-683, 693-694.

¹⁸⁴ WTO, 1995: 10.

¹⁸⁵ GATT, Summary Record of the Thirteenth Meeting: 6-7.

¹⁸⁶ Hafez, 2003: 902-904; Gantz, 2009: 252-253; Hoekman and Kostecki, 2009: 484-485; Bartels, 2013: 33-34; Matsushita *et al*, 2015: 515-518.

requirement was almost impossible.¹⁸⁷ Indeed, only six decisions found RTAs consistent with GATT law, and none was held inconsistent.¹⁸⁸ Despite the apparent ineffectiveness, the multilateral review mechanism was in fact used by GATT contracting-parties, which were non-partners to the notified RTA under examination, to express their concerns and negotiate changes.¹⁸⁹

In 1994, the Article XXIV Understanding reformed the multilateral review mechanism aiming to increase the effectiveness of the Council for Trade in Goods in examining the notified-RTAs. To improve the review proceedings, the WTO General Council established the CRTA in 1996, a permanent mechanism mandated to produce a report and recommendations on notified RTAs.¹⁹⁰ However, the CRTA proved once again to be unsatisfactory. Between 1995 and 2007, it did manage to complete the factual examination of a total of 66 RTAs, of which 45 in the area of trade in goods and 21 in trade in services.¹⁹¹ However, no report has ever been agreed upon for subsequent transmission to the Council for Trade in Goods. This was partly due to continuing disagreements over the ambiguities of Article XXIV, lack of information provided by the RTA-partners, and the fact that a report can only be approved by positive consensus by all WTO members, including the RTA-partners that are likely to refuse any changes.

A further effort took place in 2006, resulting in the establishment of the new Transparency Mechanism.¹⁹² The Transparency Decision set forth new procedural obligations. It also shifted the central authority from the CRTA to the WTO Secretariat.¹⁹³ It mandated the Secretariat to elaborate the factual presentation based primarily, but not exclusively, on information provided by the RTA-partners. The CRTA serves now only to hold a single meeting at which notified-RTAs are considered. The Transparency Mechanism has not increased the effectiveness of the multilateral review mechanism but rather turned it into a mere exercise in transparency. Thus, the purpose of the Transparency Decision was to increase the amount of information about RTAs, while introducing an institutional reform that in practice shifted the burden of assessing the consistency of notified-RTAs to the DSB.

¹⁸⁷ Hafez, 2003: 902-904; Hoekman and Kostecki, 2009: 484-485.

¹⁸⁸ WTO, 2018a: 817.

¹⁸⁹ Jackson, 1969: 621.

¹⁹⁰ WTO, CRTA Decision.

¹⁹¹ Gantz, 2009: 252-253; Hoekman and Kostecki, 2009: 489-490; WTO, 2011: 185; Bartels, 2013: 33-34; Matsushita *et al*, 2015: 515-518; WTO, 2018c: 14.

¹⁹² Transparency Decision, 2006: para 18.

¹⁹³ Gantz, 2009: 252-253; Bartels, 2013: 33-34; Matsushita *et al*, 2015: 515-518; Van den Bossche and Zdouc, 2017: 682-683, 693-694; Gammage, 2017: 54-55.

(c) Dispute Settlement Mechanism

Considering the failure of the multilateral review mechanism, the Dispute Settlement Body is left as the only procedure empowered to determine the consistency of RTAs with WTO law.¹⁹⁴ The DSB is the (quasi-)judicial review mechanism of the WTO with authority to adopt binding decisions. Thus, it can be required by a WTO member to resolve disputes concerning the consistency of notified-RTAs with WTO law. Nonetheless, relatively few cases have so far been brought before the DSB.¹⁹⁵

Up-to-date, some important issues have been decided by the DSB. The first was the questions concerning the authority of the DSB over disputes involving Article XXIV. Until the adoption of the Article XXIV Understanding, there was a debate over whether the GATT dispute settlement had jurisdiction over such matters. Although GATT panels faltered (or perhaps prevaricated) on the issue¹⁹⁶, paragraph 12 of the Article XXIV Understanding provides that dispute settlement proceedings may be used for “any matters arising from the application of those provisions of Article XXIV relating to [RTA]”. This understanding was directly reaffirmed by the Appellate Body in *Turkey—Textiles*¹⁹⁷, and indirectly in several other cases.¹⁹⁸

Moreover, the second issue concerned the conditions under which Article XXIV could be invoked as a defence to adopt WTO-inconsistent measures when members are constituting an RTA.¹⁹⁹ In *Turkey—Textiles*, the AB held that the burden of establishing that the challenged RTA meets the requirements of Article XXIV falls on the respondent WTO member, since it invokes the exception as a defence to justify a discriminatory measure. Finally, the DSB was also called to decide on controversies over the meaning of central terms of Article XXIV: 4²⁰⁰, 5²⁰¹ and 8 (a)(i)²⁰².

Nonetheless, five reasons seem to explain the overall lack of interest of WTO members in challenging the consistency of RTAs.²⁰³ First, the initial steps of the European integration projects clearly violated GATT law. Also, the US-Canada Auto Pact would have also been held inconsistent with Article XXIV. In addition to these historical reasons, mainstream

¹⁹⁴ See generally Matsushita *et al*, 2015: chapter 4, and also *supra* note 24.

¹⁹⁵ Hafez, 2003: 906-907; Gantz, 2009: 256; Bartels, 2013: 35; Matsushita *et al*, 2015: 527-534.

¹⁹⁶ *EC—Citrus* Panel Report: para 4.15; *EEC—Bananas II* Panel Report: para 158-159.

¹⁹⁷ *Turkey—Textiles* AB Report: para 360 and 369.

¹⁹⁸ See *Argentina—Footwear* AB Report and *US—Steel Safeguards* AB Report.

¹⁹⁹ *Turkey—Textiles* AB Report: para 59.

²⁰⁰ See section 2.D.1.

²⁰¹ See *supra* notes 159-166, and accompanying text.

²⁰² See *supra* notes 143-158, and accompanying text.

²⁰³ Gantz, 2009: 256; Matsushita *et al*, 2015: 527-534.

literature has suggested three pervasive rationales. WTO members are unwilling to enforce Article XXIV, because they are all partners to at least one RTA. Moreover, the strategy of sustaining legal uncertainty may serve the objectives of WTO members that intend to use RTAs in case of not achieving their goals through MTN. Finally, the institutional design of DSB seems inadequate to govern this sort of conflicts.²⁰⁴

E. The Relationship between the WTO and RTAs

The challenge involved in managing the relationship between multilateralism and regionalism through international trade law and governance is nothing new. In the early days of the world trading system, the interaction between the GATT and RTAs was mostly about tariff reductions.²⁰⁵ Multilateral liberalisation was seen as superior to, but not necessarily contradictory with, regional opening. In the first wave of regionalism, the GATT sought to ensure coherence and stability, understood as accepting that regional and multilateral regimes could complement each other while imposing disciplines to minimise the negative effects that RTAs could entail. In the second wave of regionalism, issues of coherence and stability were brought back to the forefront but this time the controversies were over the systemic effects of RTAs.²⁰⁶ The GATT/WTO and RTAs were perceived as either mutually-complementary or contingently-incompatible. In the latter cases, the GATT/WTO was assumed as the superior system with which RTAs were required to ensure their consistency. The policy blueprint was to strengthen the WTO disciplines aiming to increase their influence over the development and mitigate the discriminatory and market-distorting effects of RTAs. Despite the potential tension, the WTO accommodated the expansion of regionalism by avoiding direct diplomatic or judicial confrontation between its members.

The third wave of regionalism made RTAs increasingly important to WTO law and governance.²⁰⁷ It held significant differences with the previous surges. Quantitatively, the number of RTAs had more than sextupled between 1995 and 2017, reaching 455 RTAs in force. Qualitatively, part of them intensified the central features of the second wave, while the other part aimed to widen and deepen the coverage of both policy areas and products.

²⁰⁴ Trebilcock *et al.*, 2012: 135; Matsushita *et al.*, 2015: 533-534.

²⁰⁵ See section 1.B.4.

²⁰⁶ See section 1.B.4.

²⁰⁷ See section 2.B. See also WTO, 2018d: 110.

Until 2016, the consensus over the idea that the WTO should ensure coherence and stability through its disciplines seemed to be rapidly eroding. Although it is premature to envisage what kind of long-term effect Brexit and Trump's foreign trade policy will have on multilateralism and regionalism, it is already clear that in the short-term South-North RTAs will be at the centre stage, with the NAFTA renegotiation and the British and American turn to bilateralism. As of today, regionalism has posed two particularly relevant challenges.

1. Coherence and Conflicts in the International Trade Law and Governance of Regionalism

The first challenge concerns the effort to maintain coherence and stability of international trade law and governance in the context of the third wave of regionalism.²⁰⁸ The focus of RTAs is perceived as shifting from tariff preferences and diplomatic reciprocity towards domestic (trade and non-trade) barriers and juridification. This has led to regulatory and jurisdictional overlaps between the WTO and RTAs. Different from the past surges, the recent RTAs have not only incorporated and expanded on WTO trade rules but also established dispute settlement mechanisms. The potential consequence is the fragmentation of the normative order and jurisdictional authority of international trade law.

Regional negotiations on behind-the-border policies or reforms for deep integration are regarded as a threat to the regulatory coherence and stability of international trade law and governance.²⁰⁹ These new RTAs are motivated by production sharing, cross-border service expansion, intellectual property protection and investment attraction. For these reasons, they are likely to be concluded between developed and developing countries under the leadership of only a few countries with economic power. Given their specificity, these trade policies are arguably not suitable subjects of MTS or even multilateralisation. To avoid fragmentation, four solutions have been widely debated within the IEL field: (i) accelerating multilateral liberalisation²¹⁰, (ii) fixing the deficiencies of the WTO disciplines on RTAs²¹¹, (iii) adopting a soft law approach as a complementary strategy to WTO law²¹², and (iv) multilateralising regionalism²¹³. These proposals aim essentially at ensuring that RTAs contribute to the WTO.

²⁰⁸ Gantz, 2009: 260; WTO, 2011: 187-190; Trebilcock *et al*, 2012: 121-134; Bartels, 2013: para 56.

²⁰⁹ WTO, 2011: 187-190.

²¹⁰ *See generally* Sutherland Report (2004).

²¹¹ *See generally* Davey (2011).

²¹² *See generally* Shaffer and Pollack (2010) and Low (2008).

²¹³ *See generally* Baldwin (2006), Baldwin and Thornton (2008) and Baldwin *et al* (2009), Low (2011).

Nonetheless, the recent trend in regionalism is likely to challenge the authority of international trade law and governance on two fronts. Where the WTO and RTAs adopt conflicting policies and rules, there is the possibility of a single act of a WTO-member partner to be held in breach of an obligation by either the multilateral or a regional dispute settlement mechanism. Where WTO and RTAs adopt similar policies and rules, there is a chance of ‘double breach’ by a single act of a WTO-member partner. In this scenario, a complaining partner may be able to engage in forum shopping by choosing whether to bring the trade dispute to either the RTA or WTO dispute settlement mechanism, or perhaps to both. The WTO case law on this matter is extremely limited, leaving the issue unsettled.

2. Coherence and Conflicts in the WTO Law and Governance of Regionalism

The second challenge relates to the suitability of the WTO law for governing contemporary regionalism.²¹⁴ The large surge in RTA activity in the last decade has increased the pressure over the WTO disciplines. Three main issues concerning, particularly, Article XXIV have attracted the most attention. First, some Article XXIV rules have been widely regarded as normatively ‘contradictory’, institutionally ‘ill-defined’ and authoritatively ‘inefficient’.²¹⁵ For instance, the controversies have mainly focused on the interpretation of paragraphs 5 (external conditions), 8 (international conditions) and 7 (procedural condition) of Article XXIV.

Second, the core principles of non-discrimination and reciprocity underpinning Article XXIV have been losing effectiveness, since its disciplines (which are largely reproduced in GATS Article V) “were designed for simpler agreements than those currently in existence and being negotiated.”²¹⁶ In contrast to preferential tariffs on trade in goods, the policies and measures established in the ‘twenty-first century’ RTAs are devised to reduce the costs of doing business by promoting deep integration, implementing mutual recognition policies, regulating domestic trade and non-trade matters, and governing special and differential treatment between developed and developing countries.²¹⁷ They are complex and might be held inconsistent with Article XXIV for producing discriminatory or protectionist effects.

²¹⁴ Hafez, 2003: 914-917; Gantz, 2009: 260; WTO, 2011: 187-190; Trebilcock *et al*, 2012: 121-134; Bartels, 2013: para 54-56.

²¹⁵ See section 2.D.

²¹⁶ Hafez, 2003: 915; Bartels, 2013: para 55.

²¹⁷ See *supra* note 216.

Finally, although Article XXIV may have shaped RTAs negotiations, it has been rarely used to discipline RTAs through the DSB.²¹⁸ Indeed, Article XXIV has only been invoked, although never successfully, four times in WTO disputes²¹⁹. The consistency of RTAs with Article XXIV has never been assessed by the Appellate Body and only once by a panel²²⁰. The compliance problem exists because the WTO rules are weak. This weakness is caused partly by their institutional design and normative ambiguity and partly by the political unwillingness of WTO members with economic power to follow them. They are not so vague or defective as to make compliance impossible. Besides, only a few cases were brought before the WTO.²²¹

F. The WTO Law and Governance of South-North Regional Trade Regimes

The previous sections described the prevailing understanding within the IEL field of the international trade law and governance of regionalism. They also discussed the most critical issues, ambiguities, and divergences, underscoring and surrounding the specific debates under that common-sense framework. The purpose of this section is to identify the widely accepted and the most controversial features and preoccupations that sustain the dominant view of the law applicable to South-North RTAs. The conclusion is that South-North RTA must comply integrally with the requirements of GATT Article XXIV and GATS Article V to be considered as valid and legitimate under WTO law. This implies that legal expertise largely disregards the development stage, economic imbalances, or the share of world trade of partners as relevant to the ideational, formal, and substantive considerations underlying the formation and operation of RTAs.

The controversies over the WTO law of South-North regionalism that are discussed below are marginal. They represent the efforts of some developing countries, international lawyers, non-legal experts and policymakers to broaden the common-sense around and surrounding WTO law by trying to reintroducing the question of development. Their strategy is to reform the way in which Article XXIV has been interpreted and applied.

²¹⁸ Hafez, 2003: 914-917; Gantz, 2009: 260; WTO, 2011: 187-190; Trebilcock *et al*, 2012: 121-134; Bartels, 2013: para 54-56; Van den Bossche and Zdouc, 2017: 671-672.

²¹⁹ *Turkey—Textiles* (1999); *Canada—Autos* (2000); *US—Line Pipe* (2001); and *Brazil—Retreaded Tyres* (2007).

²²⁰ US—Line Pipe Panel Report: para 7.144.

²²¹ See section 2.D.5(c).

Specifically, they seek to incorporate the notion of special and differential treatment into the processes of making, interpreting and governing South-North RTAs. So far, they have not succeeded in influencing decision-making in and over the WTO and RTAs. Although many proposals have been offered, six of them seem to have succeeded to at least some small degree in reframing the debate.

1. The Membership to South-North RTAs

The first question concerns the existence of special rules disciplining the formation of South-North RTAs. The current interpretation of Article XXIV:5 and 10 acknowledges that any WTO member can conclude RTAs with another country on the basis of formal sovereign equality and reciprocity.²²² This implies that their stage of economic development is not legally relevant. The only exception is the Enabling Clause, which can be invoked by developing countries to conclude an RTA among themselves on the mutual reduction of tariffs and non-tariff measures. Under the Enabling Clause, South-South RTAs may be created with no need to eliminate duties nor liberalise “substantially all trade” within a “reasonable length of time.” Consequently, the minimum requirements for South-South RTAs are less restraining than those under Article XXIV. Thus, except for South-South RTAs under the Enabling Clause, the qualification of RTAs as either North-North or North-South entails no legal consequence.

Nonetheless, there have been disputes over the full application of Article XXIV to South-North RTAs for not taking into consideration Part IV of the GATT. Whereas Article XXIV requires RTAs to *reciprocally* eliminate all duties and restrictive regulations on “substantially all the trade” between their partners within “reasonable length of time,” Article XXXVI:8 sets out that “[developed partners must] not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of [developing partners].” This implies that there is a legal difference between South-North and North-North RTAs on the basis of countries’ material conditions. WTO law practice, however, overlooks the application of that provision entirely.

²²² See section 2.D.2.

2. Non-Reciprocity

Another important issue is whether the principle of non-reciprocity between developed and developing countries under Part IV applies to Article XXIV.²²³ In *EEC–Bananas II*, the GATT Panel held that Article XXXVI:8 does not constitute an exception to Article XXIV:8(b).²²⁴ The consequence is that non-reciprocal South-North RTAs are *prima facie* inconsistent with WTO law. Although the adoption of this report was blocked by the EU, and the reasoning challenged by the ACP countries (claiming that the provisions of XXIV and XXXVI had to be considered in conjunction with one another), the holding in *EEC–Bananas II* has become conventional wisdom in WTO practice.

3. Minimum Degree of Liberalisation

This question concerns whether Article XXIV imposes a minimum degree of liberalisation regardless of the developmental stages of the partners.²²⁵ Under Article XXIV:8, a WTO-consistent RTA must eliminate all barriers on “substantially all the trade” between partners. As discussed above,²²⁶ WTO practice, jurisprudence and case law have never reached a consensus on a quantitative definition for “substantially all the trade.” This interpretative uncertainty tends to be perceived as more acute by developing countries. While proposals ranged from 51% to 99% and earlier RTAs liberalised between 70-80%, present-day common-sense is that Article XXIV:8 requires around 80-90%. Developing countries have resisted this understanding, claiming it deprives them of the necessary ‘policy space’ for development policies. Nonetheless, unless WTO members or the DSB decides otherwise, the broader consensus is that South-North RTAs are required to liberalise at least 80% of trade.

²²³ Bartels, 2007: 735, fn 150; WTO, 2018a: 826-827.

²²⁴ *EEC–Bananas II* Panel Report: para 160-162.

²²⁵ Hilpold, 2003: 235; Trebilcock *et al*, 2012: 105-106; Bartels, 2013: para 17; Matsushita *et al*, 2015: 519-520.

²²⁶ *See supra* notes 143-158, and accompanying text.

4. Asymmetrical Liberalisation

The fourth unsettled issue is whether Article XXIV allows trade to be liberalised on an asymmetrical basis taking into consideration the different level of development between the partners.²²⁷ Although *EEC–Bananas II* held that non-reciprocal RTAs are inconsistent with WTO law, it does not mean that asymmetrical liberalisation is entirely prohibited by Article XXIV:8.

By reading Article XXIV:8 in light of Article XXXVI:8, the “substantially all the trade” criterion in respect of duties might be interpreted as not preventing a South-North RTA to establish a partially asymmetrical elimination of trade barriers taking into account development needs.²²⁸ This means that a South-North RTA could establish that its partners would split the liberalisation covering 80% of an existing trade so as to that 90% of trade restrictions would be eliminated by the developed partner while a developing partner, 70%. Alternatively, developing countries would be allowed to systematically exclude a larger share of their trade from tariff elimination, if they justify it is necessary for achieving their development goals.

Moreover, if Article XXIV:8 is read side-by-side with Article XXXVI:8, the “substantially all the trade” criterion in respect of “other restrictive regulations of commerce” might be understood as allowing a South-North RTA to authorise developing partners to apply safeguards and non-tariff measures on other RTA-partners aiming to preserve their necessary policy space for development purposes.²²⁹ Furthermore, to protect the development dimension of North-South RTAs, developing partners could not be allowed to impose these trade restrictions upon other developing partners.

Not surprisingly, asymmetrical liberalisation has not found wide support in WTO practice, jurisprudence, or case law. In contrast to the dominant understanding, Bartels argues that Article XXIV authorises some degree of asymmetry similar to GATS Article V, which specifically “allows for ‘asymmetry’ in regional integration agreements between developed and developing countries.”²³⁰

²²⁷ Bartels, 2007: 754; 2013: para 19.

²²⁸ Onguglo and Ito, 2005: para 8, 30; R. Lang, 2006: 11-14; Bartels, 2007: 754; 2013: para 19.

²²⁹ Onguglo and Ito, 2005: para 9; R. Lang, 2006: 16-18.

²³⁰ Bartels, 2007: 735, fn 150; Onguglo and Ito, 2005: para 24, 26 28, 30.

5. Transition Period

A less contentious, but not irrelevant, issue relates to the transition period enjoyed by partners to an interim agreement leading to a South-North RTA. Paragraph 3 of the Article XXIV Understanding clarifies the language “reasonable length of time” in Article XXIV:5(c) by stating that this transition period “should exceed 10 years only in exceptional cases.”²³¹ Since there is no definition for “exceptional cases,” developed countries advocate that this special and differential treatment should “only be applied to a very limited number of products under RTAs, should not unreasonably postpone the end of the transition periods, and should be used only for prolonged phase-in of commitments by developing and especially least-developed countries, not by developed countries.”²³² By contrast, developing countries claim that “exceptional circumstances” should allow them to enjoy a transition period longer taking into consideration their trade, development, and financial needs.²³³ However, this SDT interpretation of “exceptional cases” is not commonly accepted by WTO practice, jurisprudence and case law.

Conclusion

This Chapter started off by anticipating the discussion in Chapter 4 on the role of lawyers and legal expertise, generally, and of legal doctrines, particularly, in global governance, trade regionalism, and economic development. It was necessary to state clearly and beforehand the premise, which will be further justified, that legal doctrines perform a pivotal function in structuring the way international lawyers think and practice international trade law. It then offered an analysis of mainstream literature and official documents to evidence not only the existence, authority, and legitimacy of a specific legal doctrine on the WTO law and governance of South-North regionalism but also its dominant position inside the IEL field and influence over the world trading system.

The investigation of legal doctrine closely followed the mainstream argumentative practice of the IEL field. The presentation, organisation and analysis of WTO disciplines replicated the structure, content, and style of academic, policy, and official texts. Specifically, this Chapter showed how history teachings play a fundamental function in

²³¹ Onguglo and Ito, 2005: para 10, 32-34; R. Lang, 2006: 18-19.

²³² EU—RTA Submission: para 11-12.

²³³ ACP—RTA Submission: 4. Onguglo and Ito, 2005: para 10, 31-34.

validating and legitimising norms, concepts, theories, and methods that constitute the legal doctrine. In this sense, I argue that the process of translating history into doctrine is central to understand how lawyers give meaning to WTO law as a way to exert authority over South-North RTAs. Thus, the past and present understandings of and controversies over the WTO law of regionalism were examined to reveal their contribution to the formation and application of the prevailing doctrinal framework.

I want to conclude by stressing the constitutive features of the dominant legal doctrine. Grounded in the comprehensive analysis in this Chapter, I argue that the fundamental purpose of the contemporary legal doctrine is to address the three challenges foregrounded by the history lessons: the ideational mission of the GATT/WTO in promoting multilateral liberalisation and directing regionalism; the institutional defects of GATT/WTO rules that allow surges in regionalism; and the lack of jurisprudential solutions to normative ambiguities and policy contradictions weakening GATT/WTO law. The doctrinal responses to them have brought into being a stable and coherent model that seems to govern the thinking and practice of the WTO law of South-North regionalism undertaken.

The first challenge concerns the ideational dimension of GATT/WTO law of regionalism. Its primary focus is on the ways to understand the relationship between multilateralism and regionalism. The legal doctrine deals with this preoccupation by reinterpreting the WTO mandate to govern RTAs according to its own embedded ideational programme. Although the doctrinal framework seems to provide an ahistorical ‘menu’ of economic and non-economic theories for supporting or prohibiting regionalism, history returns to explain that the continuous changes in regionalism thinking are closely associated with the underlying material, institutional, and intellectual transformations occurring at the same time. Thus, the ideational programme that is entrenched in the legal doctrine began to emerge in the 1980s as part of the ascension of neoclassical economics and the second wave of regionalism.

Neoclassical economics was the heart of an ideational revolution leading to a profound redefinition of the meanings of ‘market’, ‘state’, ‘international economy’, and ‘politics’.²³⁴ Firstly, the market was reconceived from a tool for organising domestic economies to a model for governing society. This market fundamentalist vision replaced politics with competitive markets as the most efficient and fairer mechanisms for maximising societal welfare. The role of the state in society was then minimised to create

²³⁴ Jenkins, 1992: 151-164; Plant, 2010: 6; Lang, 2011: 1-2, 5-7; Sandel, 2012: 23; Orford, 2016: 709-710, 732-733. *See also supra* notes 3-5, and accompanying text.

the institutional conditions for sustaining well-functioning markets. This included the protection of private rights and exceptional measures to intervene in market failures. Finally, international economy was reconceptualised as a global market whose production and welfare potential are to be realised through ‘deep’, ‘broad’ and ‘fair’ economic integration.

The second wave of regionalism operated as a concrete laboratory for neoclassical ideas.²³⁵ The concept of multilateral and regional trade regimes as ‘political communities’ was replaced with the notion of ‘marketplaces’. The GATT/WTO and RTAs were reimagined as normative and institutional fora where states bargain and exchange trade concessions. Their function is to facilitate the deepening and expansion of international economic integration by protecting traders from states’ market-distorting interventions and illegitimate and unfair behaviour. This requires expanding the reach of multilateral and regional rules to discipline ‘behind-the-border’ policies and regulations. This includes not only clearly trade-related (*e.g.* services, investments, intellectual property and competition) but also not-clearly trade-related (*e.g.* labour, environment, safety and sanitary) areas. The ultimate purpose of regionalism is to contribute to the GATT/WTO’s effort of constituting a global market, the key driver for wealth creation worldwide. Over time, these set of neoclassical ideas and practices evolved into a comprehensive programme called neoliberalism.

The second challenge refers to the failures of the institutional architecture of the GATT in controlling the proliferation of RTAs. The GATT operated as an international institution devised to ensure a stable and relatively open international economy, and above all a continuous process of multilateral liberalisation. This also meant to help to create the conditions necessary for the development of the welfare state domestically and regimes for economic integration regionally. This changed in the 1980s with a profound transformation in the US credo about the relationship between regionalism and multilateralism. The reimagination of their respective model of governance took concrete form in the NAFTA and WTO.

Normatively, the model was devised to protect traders and promote the development of a global marketplace.²³⁶ This was meant to be achieved by setting up international rules intervening deeply in the ‘behind-the-border’ policies and regulations of states. Modelled on the ‘Washington Consensus’ blueprint, these legal disciplines covered a broad range of matters including goods and agriculture, regulatory standards and non-tariff

²³⁵ See *supra* note 234.

²³⁶ Gathii, 2011b: 424-425; Lang, 2011: 1-2, 5-7.

barriers, government procurement, services, investment, intellectual property rights, and competition policy. Structurally, the model reconceived governance institutions and practices through the introduction of the rule of law, which carried with it the values of “neutrality, predictability, certainty, generality, and objectivity.”²³⁷ To ensure the enforcement of legal disciplines, rule-oriented dispute settlement mechanisms were also established. This mode of legal governance was devised to apply substantive and procedural rules, in concert with technical knowledge (*e.g.* economic and scientific expertise) to solve trade controversies over (mainly) the legality and legitimacy of state intervention.

Currently, the WTO is regarded as the model for designing governance institutions and rules of the majority of South-North RTAs. The debates about “deep integration and shallow integration” and “narrow mandate and broad mandate” assume the WTO as the institutional benchmark. There are three clear examples. The policy coverage found in RTAs is classified into two groups called ‘WTO+’ and ‘WTO-X’. The provisions that fall under the mandate of the WTO are called WTO+ (*e.g.* manufacturing goods, agricultural goods, and GATS services), whereas WTO-X relates to provisions that are outside the current mandate of the WTO (*e.g.* competition policy, anti-corruption, labour regulation).²³⁸ Moreover, the intensity of integration reflected in RTAs is qualified along the deep-shallow axis (WTO → FTA → FTA+ → CU → Common Market → Monetary Union → Fiscal Union).²³⁹ Likewise, FTAs tend to be modelled on the GATT, the FTA+ on the WTO and so on. The last evidence is provided by a recent empirical study that employs a textual analysis to show that almost all RTAs refer explicitly to the WTO (most doing so on average 25 times), and implicitly to the language of WTO (which is widely copied into the RTAs).²⁴⁰

Lastly, there is the challenge posed by unsatisfactory jurisprudential responses to normative ambiguities and policy contradictions of GATT/WTO law. Until the 1980s, the making and interpretation of the GATT law of South-North regionalism were dominated by diplomatic practice and economic thinking. The reason was the inability of lawyers to provide adequate solutions to the GATT’s problems with governing RTAs. Specifically, the formalist jurisprudence was self-constrained to identify the legal rights and obligations under Article XXIV, stress its textual ambiguities, and determine the abstract compliance of concrete RTAs with its legal rules. The turn-to-functionalism in the IEL field equipped lawyers with theories and methods open to integrating policy-oriented expertise in legal

²³⁷ Lang, 2011: 6.

²³⁸ WTO, 2011: 128-131.

²³⁹ WTO, 2011: 109-111.

²⁴⁰ Allee *et al*, 2017: 333-334.

thinking and practice. The notion of Article XXIV as a (quasi-)autonomous legal norm to be enforced was replaced with the view of it as a formal instrument for determining the policies, rules, and arguments that would contribute to the development of a global market under the WTO. More broadly, lawyers employed the functionalist approach to arguing for legalisation and juridification of the world trading system as a way to protect free and fair trade from protectionism and discrimination.

The rise of functionalism profoundly affected the international trade law of South-North regionalism. Grounded in economic and non-economic rationales, international trade law is roughly equated to GATT/WTO law, while South-North RTAs are not different from (North-North) FTAs and CUs. These two definitions mean that economic and development inequalities are regarded as jurisprudentially irrelevant for regulating South-North RTAs. Article XXIV is understood as authorising members to depart from the general principles of WTO law only if the RTAs are constructed formally and purposefully consistent with the WTO mission. This has led the interpretation of Article XXIV:4 and the practice of members to converge towards a consensual view that juxtaposes the function of the WTO and RTAs; that is, to serve as institutional mechanisms for the formation of a global free market.

Furthermore, those economic and non-economic rationales have supported the interpretative practice that reinforces the authority of the substantive requirements of Article XXIV:5 and 8 while disregarding the application of Part IV. Consequently, norms and institutions established in South-North RTAs embed the principles of reciprocity and non-discrimination but not the principles of special and differential treatment. For instance, the MFN and the national treatment clauses are understood as mandatory, while provisions setting out a degree of liberalisation below 80%, non-reciprocity in trade liberalisation, or asymmetrical liberalisation tend to be avoided *ex ante* for being either illegitimate or likely to be held inconsistent by the DSB.

In synthesis, the dominant legal doctrine on the WTO law and governance of South-North regional trade regimes embraces neoliberal programme of market-led growth, the WTO as an institutional model of governance, and functionalist approach to lawmaking and interpretation. As a result, the legal doctrine dissolves the difference between North-North and South-North RTAs.

PART II – FROM DOCTRINES TO HISTORY: EMPOWERMENT, LIMITATIONS, AND IMAGINATION

The legal history and doctrine of international trade law and governance of South-North regionalism described in Part I are regarded today as neither novel nor controversial. Except for my own reflections and conclusions, they represent the conventional vernacular of facts, concepts, theories, methods, and arguments, that is widely accepted, complemented, and repeated by mainstream literature. The notion of a shared vocabulary does not mean that contemporary international lawyers have reached one agreement to solve each legal issue arising out of transactions or disputes taking place in the world economy. My claim is more modest. I believe that the way in which legal history and doctrine are thought and practised has served to govern the range of possibilities for conceiving of and engaging with South-North regionalism through international trade law. History lessons are applied to constitute the doctrinal framework, whereas the legal doctrine is used to structure lawmaking and interpretation of South-North RTAs. Both are produced and validated within the IEL field, which in turn lends its authority and legitimacy to their influence over global trade governance. Thus, to inquire into legal history and doctrine, the first step is to understand their relationship to the IEL field.

Ever since its (contemporary) origins in the 1940s, the field of international economic law has undertaken a variety of disciplinary strategies to differentiate itself as an autonomous field. Part of the process was to cultivate a distinct expertise for thinking and reasoning about certain norms and behaviours.²⁴¹ Building on international law traditions, the IEL field developed its own varieties of an especially ‘legal’ technique called *doctrinal analysis*, which consists of an ‘objective’ and ‘impartial’ description and examination of rules and processes against a normative or sociological criterion.

One of the central consequences of this long-standing tradition is to separate ‘doctrine’ from ‘history’ and (also) ‘theory’ of IEL. Although this distinction does not automatically undermine the authority or legitimacy of legal expertise, it contains a potential for causing distortions.²⁴² Specifically, it has led most lawyers to maintain a certain distance between what they ‘think’ and ‘say’ about global governance, trade regionalism, and economic development, and what they ‘claim’ to be IEL. To preserve the field, they position themselves between two approaches: doctrines have either a narrow

²⁴¹ Koskenniemi, 2005: 1-2; Aspremont, 2017: 20-22, 33-35.

²⁴² Koskenniemi, 2005: 1-2.

scope focusing exclusively on the normative dimension of the international economy or a broad scope seeking to ‘appropriate’ of and ‘speak’ about theories and histories of IEL. In either case, lawyers routinely undertake a ‘doctrinal’ analysis, which consists of applying a certain framework (contingently validated and legitimised within the IEL expertise) to understand, evaluate, and argue about legal norms (narrow scope) and other norms, facts, and hypotheses (broad scope).

In the case of doctrinal analysis of IEL divorced from reflections about its ideational, institutional, and jurisprudential features, or about its economic, political and sociological contexts or consequences, the outcomes are often experienced as disappointing. They are frequently attacked for excessive formalism, and so accused of being either ‘empirically irrelevant’ for securing the compliance of state behaviour and policies with legal rules, or ‘authoritatively controversial’ due to normative indeterminacy.²⁴³ In an attempt to overcome these limitations, some lawyers turn doctrinal analysis to facts to produce outcomes that are not only ‘valid’ and ‘legitimate’ but also ‘effective’ and ‘determinate’. Histories, empirical data, and theories are instrumentalised to serve the purpose of a particular legal doctrine. The result is also unsatisfactory, since disputes about history lessons, empirical findings, and theoretical postulates reproduce, instead of resolving, the problems of indeterminacy and compliance.²⁴⁴ In spite of the perils of marginalising or instrumentalising history and theory, doctrinal analysis remains a constitutive part of the IEL field. Therefore, legal doctrine is acknowledged as a specifically ‘legal’ (or perhaps ‘juridical’) mode of governing the making and interpretation of international trade law.

Part II provides a critique of the most important underpinnings of the legal history (as told in Chapter 1) and doctrine (as described in Chapter 2) of the international trade law of South-North regionalism. By juxtaposing doctrine and history, it is possible to foreground and examine how these apparently independent outcomes of legal activity interact with one another within legal expertise. Therefore, it is an essential premise of the following Chapters that legal history and doctrine play a particularly pivotal role in making and interpreting WTO law and RTAs and that this function is not well understood. With this in mind, Chapter 3 examines the central features of history-telling in mainstream literature and how it relates to legal doctrines. In Chapter 4, the nature and functions of legal doctrines of international trade law are analysed in detail.

²⁴³ Koskenniemi, 2005: 1-4.

²⁴⁴ Ibid.

My conclusion suggests that the lack of alternatives to resolve the contemporary challenges to the international trade law and governance of South-North regionalism rests not only on the disagreement among politicians, policymakers and trade negotiators, and on the political and economic forces. It also lies in the disciplinary constraints imposed on lawyers' imagination by the prevailing ideas and practices in legal expertise. I argue that the dominance of a legal doctrine within the IEL field empowers lawyers' influence in and over the world trading system; however, it also constrains their ability to think ingeniously about solutions to the problems concerning WTO law and governance, trade regionalism, and economic development.

CHAPTER 3. LEGAL HISTORY IN INTERNATIONAL LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES

Introduction

A significant part of this thesis is dedicated to the history of the international trade law and governance of South-North regionalism. Chapters 1, 5 and 6 account for their jurisprudential and institutional stories in two distinct periods of time and spaces. This Chapter is different from those others. It does not provide a historical narrative but rather reflects on the legal style of telling history. It aims at examining the way international lawyers approach the past in order to reconstruct, in the present, the temporal evolution or decline of legal rules, regimes, ideas, and practices situated in specific contexts. History-telling is, thus, conceived as a disciplinary mode of governance of meanings across time. Finally, the Chapter will analyse the relationship of history with doctrines (in particular), and with legal expertise (generally).

To better understand the interaction between history and doctrine, two questions are central. First, what have we – international lawyers – learned from the historical accounts of international trade law and governance of South-North regional trade regimes? Recall I argued in Chapter 1 that the conventional narratives provide three history lessons, in which the normative consensus underlying the contemporary IEL field lies. They assert that the purpose of Article XXIV is to contribute to furthering trade liberalisation by providing a choice between regionalism and multilateralism. These two tracks must, nonetheless, be managed to achieve a global free market progressively. To do so, countries agreed to reinvent the world trading system as a rule-oriented regime operated by legal expertise. This means that WTO law was chosen as the primary mode of legitimate and authoritative governance over policy decisions and disputes concerning multilateralism and regionalism. Finally, lawyers were acknowledged as the experts equipped with formal-technical knowledge (generally) and legal doctrine (particularly) developed to interpret Article XXIV and balance its application to structure the decision-making in and over RTAs.

This leads to the second question: how does history relate to doctrine in the IEL field? It is common-sense that international lawyers use *history-telling* as a way of

governing the movement of meanings across time. Mainstream literature often offers narratives both to manage and support a wide variety of norms, theories and methods that constitute legal expertise. As analysed above, these accounts may take the form of institutional histories of the formation and development of rules and regimes that nowadays underscore the world trading system. Likewise, they may contribute to the understanding and diffusion of current ideas or techniques by reciting their jurisprudential evolution. By connecting past and present, history lessons produce and validate legal doctrines, which in turn affect lawmaking and interpretation. Moreover, these teachings are continuously reasserted as a strategy to sustain the authority and legitimacy of legal doctrines in the global trade governance. This suggests that the way in which lawyers tell their own history plays a vital role in shaping (directly) legal doctrines and asserting (indirectly) their influence in and over the WTO and South-North RTAs.

The purpose of this Chapter is to analyse in detail (what I call) *the traditional approach to history-telling* aiming to reveal its core assumptions, bias, and limitations. Section A outlines the traditional approach to historicising IEL and its limitations. This follows a discussion in section B of the ways conventional narratives are used to empower a variety of projects, norms, knowledge, and techniques by connecting their past to the present. Not surprisingly, history lessons shape legal doctrines affecting, ultimately, lawyers' imaginary of the WTO law and governance of South-North regionalism. Building on this analysis, section C reflects on the possibility of adopting an alternative approach to history-telling. I conclude by claiming that the conventional narratives have contributed to constitute and sustain the dominant legal doctrine, and suggesting how we might go about rethinking the historical justifications and doctrinal limitations that constrain lawyers' ability to answer innovatively to the contemporary challenges.

A. The Traditional Approach to History of International Economic Law

The description of the legal histories of the world trading system in section 1.A and of the South-North regional trade regimes in section 1.B suggest the operation of the traditional approach, a characteristic style of history-telling that widely dominates legal expertise. Chapter 1 illustrates how history lessons are drawn from a 'grand narrative' that merges institutional and jurisprudential stories about the origins and development of international

trade law and governance, while Chapter 2 exemplifies the way in which these teachings are habitually translated into legal doctrines. Together they show how the traditional approach has been used to combine institutional and jurisprudential stories with the purpose of drawing a line dividing whom and what are parts of the IEL field. This prevailing style of history-telling is, particularly, used to determine what/who matters or not to the field's past, and also to control what lessons should be taken into consideration today to produce and apply legal doctrines.

Against this backdrop, I suggest that the majority of international lawyers have successfully employed conventional narratives to construct and sustain the legal doctrine on the WTO law and governance of South-North regionalism. Within the IEL field, the traditional approach is used as a disciplinary technique of governing the legitimacy and validity of knowledge, actors, and norms. It is employed to draw a temporal timeline dividing past and present for international trade law. For instance, legal rules *not* understood as being part of the (re-)foundation of the world trading system around the WTO are mainly regarded as belonging to the past. Consequently, they do not or should not inform today's practices and ideas that constitute legal doctrines.

Moreover, the traditional approach entails a spatial effect, separating which elements fit in and out international trade law. For instance, legal rules historically related to the WTO are often acknowledged as part of the doctrine on the international trade law of regionalism, while the ones identified with environmental, social, labour and development issues tend to fall outside, regardless of their trade relevance. Similarly, arguments associated historically with functionalist jurisprudence are habitually received without ideological suspicion or intellectual scepticism, whereas the ones associated with formalism, post-colonialism, legal feminism, and human rights are frequently marginalised.

Furthermore, the disciplinary consensus produced through the traditional approach around today's legal doctrine entails important external consequences. By using the conventional narratives to assert the authority of the dominant doctrine, lawyers intend to claim exclusive authority over the interpretative practice of WTO law and also to legitimise their participation in decision-making over RTAs. This, in turn, affects their interaction with non-legal experts and other international economic regimes. The purpose of using the traditional approach is, I argue, to empower the legal doctrine with legitimate authority to be used to make sense of and legal arguments about the WTO and RTAs to politicians, diplomats, and experts, including themselves. This suggests that it operates less like a mean to reflect upon how past acts and choices led up to the present. Instead, it works backwardly by selecting and mobilising historical events to legitimise and validate the consensus around

the linear connection between the origins, development, and present-day legal doctrine. Hence, lessons that are ‘discovered’ in history tend to reflect commitments to intellectual traditions, normative programmes and professional groups.

My analysis in this Chapter indicates that the majority of international lawyers has continuously applied the traditional approach to sustaining the prevailing legal doctrine on the WTO law of South-North regionalism. I argue that their limitations in addressing the current challenges to world trading system have a great deal to do with how historical narratives have been used to lend authority to the dominant doctrine. Furthermore, I explore what an analysis of histories and doctrines can tell us today about the repertoire of ideas, practices, rules and institutions that was relegated to the dustbin of past due to disciplinary consensus. I am specifically interested in uncovering and criticising the strategies undertaken to entail constraining and path-dependency effects so as to assist in broadening the horizons of possibility to propose alternatives to rethink the relationship between international trade law and regional trade regimes.

B. The Limits of the History of the International Law and Governance of South-North Regional Trade Regimes

In legal expertise, history-telling and doctrine-making tend to be assumed as independent disciplinary techniques. However, the traditional approach – I argue – instrumentalises history to craft doctrines. It subordinates the past to the present in order to determine as to whether a rule, idea or method is either a present-day outcome of the progressive development of (and so belonging to), an old (and non-applicable) relic of, or just non-part of international trade law. I suggest, therefore, that one possibility to rethink the international trade law and governance of South-North regionalism is through the understanding and critique of how the traditional approach has structured the interaction between history and doctrine.

There are numerous possibilities to approach the IEL history.²⁴⁵ Martti Koskenniemi explains that “international law histories of late 20th century have usually

²⁴⁵ See generally Anghie (2005), Craven (2007, 2016), Pahuja (2011), Fassbender and Peters (2012), Crawford and Koskenniemi (2012), Koskenniemi (2012a, 2012b, 2012c), Simpson (2012), Jouannet (2012), Mégret (2012) and Eslava (2015) for approaches to international law history; and specifically Thomas (1995 and 2011), Lang (2006, 2011, 2014), Thomas and Trachtman (2009), Gathii (2011a and 2011b), Pahuja (2011), Alessandrini (2011), Jouannet (2012), Fabri (2012), Perry-Kessaris (2013),

combined accounts of the development of the States system with brief excursions into a well-defined circle of canonical texts.”²⁴⁶ This also seems to capture how IEL has been historicised since the contemporary literature often combines stories of the institutional development of state practice with brief doctrinal analysis of official documents and policy-scholarly texts. For instance, Chapter 1 provides an account of the traditional history of the international trade law and governance of regionalism. It reveals how conventional narratives merge a linear account of crises and institutional responses involving the GATT/WTO regime with rather simple progress in jurisprudence from formalism to functionalism, in order to tell a ‘David and Goliath’ story of Article XXIV and its attempts to control the waves of regionalism.

Moreover, the traditional approach tends, consciously or otherwise, to instrumentalise GATT/WTO history in order to justify and legitimise legal doctrines by claiming they are the natural or logical consequence of a neutral and universal set of history lessons. The peril is to blur the line drawn to differentiate historical reconstructions from normative projects. The effect of this style of history-telling is to emphasise aspects of history that support legal doctrines’ underlying policy-ideational-intellectual commitment as factual determinants while leaving others necessarily (and perhaps strategically) in the forgotten realm of the past. For instance, Chapter 1 accounts for a conventional narrative that has been consistently employed to support the dominant legal doctrine on the WTO of regionalism (as described in Chapter 2).

1. The Institutional Story of the International Trade Law and Governance of Regionalism

The first type of storyline – found enmeshed in conventional narratives²⁴⁷ – chronicles the progressive institutionalisation of world trade. Specifically, it historicises the evolution of multilateralism and regionalism as institutional practices of constituent states in *pari passu* with the continuous expansion of global economic interdependence and regional integration. The turn-to-institutions in inter-state trade relations teaches that the foundation

Craven (2015), Eslava (2015), Orford (2015 and 2016) and Gammage (2016 and 2017) for approaches to IEL history.

²⁴⁶ Koskenniemi, 2012b: 960-961.

²⁴⁷ See generally Chapter 1.

of the contemporary world trading system undergoing from 1944 to 1994 was realised in two gradual stages. The initial stage is presented as precursory serving to set up the institutional and normative architecture underscoring the multilateral trade regime. The GATT is portrayed as the central, but weak guardian of a multilateral system of non-discriminatory and reciprocal trade in a world of protectionist measures and discriminatory regionalism created by preference-maximising, but economically unequal, states. However, GATT rules are accounted as mostly defective or incomplete, while their application was highly dependent on economic interests and material conditions of contracting-parties. Due to external political pressure and internal normative contradictions, the GATT did not impose an effective discipline on RTAs. Rather, those factors ensured that the flawed Articles I:2, XXV:5 and XXIV would constrain the authority and legitimacy of the GATT to control the formation and operation of systems of imperial, preferential and regional trading.

Article XXIV is commonly accounted as the cornerstone of the GATT law of regionalism. Institutional stories chronicle that powerful contracting-parties used their influence to take advantage of its ill-designed rules so as to progressively subvert its original function: from a *specific exception* (mainly) devised to make possible the economic integration of Europe towards a *wide loophole* used to circumvent the general prohibition to benefit from trade preferences. The conventional history suggests that the flawed institutionalisation is the cause for the prevalence of a diplomatic and technical character, rather than legal or juridical, of the GATT, which in turn provided the conditions for the first wave of regionalism.

The 1970s was described as a turbulent moment marked by the return of discriminatory and protectionist policies and arrangements. On the one hand, the introduction of pro-development reforms to the GATT aimed at softening, even more, its disciplines on regionalism. Part IV and the Enabling Clause served either to exempt developing countries from fully complying with Article XXIV (due to the principle of non-reciprocity) or to exclude GSP schemes entirely from the authority of Article XXIV. On the other hand, the rise of New Protectionism consisted of a strategy undertaken by the developed world to use domestic measures to exert pressure over developing contracting-parties to make them accept the introduction of sectorial waivers to Article XXIV. By the end of its initial stage, the GATT is regarded as the impotent or ineffective gatekeeper of multilateralism. While the first wave of regionalism is described as reflecting the individual interests of contracting-parties, which were indifferent to the negative externalities wielded by the RTAs, the GATT is in contrast perceived as a collective enterprise evolving from the

ashes of World War II towards an institutionalised community of interdependent economies through non-discriminatory and reciprocal liberalisation.

The situation began to change in the 1980s with several initiatives to deep the institutionalisation of the world trading system. This second stage is the efforts of contracting-parties under the Uruguay Round to advance the institutional reforms devised to expand trade liberalisation and increase the constraints over state discretion by moving incrementally the GATT towards a more rule-oriented system. This included the idea that regional trade agreements would be progressively eliminated through a rigid and formalist application or improvement of Article XXIV. However, controversies among the leading developed contracting-parties prevented the multilateral negotiations from reaching a common agreement. The deadlock of the Uruguay Round encouraged them to look for alternatives. Ironically, they found it in the form of regionalism. The consequence was that, instead of tightening the loopholes of Article XXIV, the contracting-parties widened them even more, triggering the second wave of regionalism.

The establishment of the World Trade Organisation in 1994 led the second stage of institutionalisation to an end. It is accounted as an effective response to contain the second spread of regional trade agreements. Nevertheless, the adoption of the Article XXIV Understanding is narrated as a futile attempt of multilateralist contracting-parties to prevent another wave of regionalism. Since powerful developed economies, notably the US and EU, engaged in a competitive liberalisation from the late-1990s onwards, the Article XXIV Understanding turned out to be an institutional fiasco. The number of RTAs in force under the WTO increased from roughly 70 in 1990 to 455 by 2017.

This institutional story tends to overemphasise political or economic forces as structural drivers of the WTO regime while downplaying the role of moral, social or legal norms. While the 1940s is remembered as the constitutive moment in which states committed to the contemporary world trading system, the late-1980s is narrated as the moment when WTO law began to be used more extensively to govern inter-state trade affairs. Between 1947 and 1995, two waves of regionalism challenged the world trading system, triggering institutional reactions that culminated in the WTO. Therefore, this storyline of conventional narratives organises history lessons underscoring the consensual imaginary of present-day international trade law and governance as resulting from the gradual institutionalisation of the GATT/WTO from politics to diplomacy to law. Similarly, Article XXIV is chronicled as evolving progressively from a political compromise to a set of diplomatic guidance for debating solutions to controversies over trade preferences and

then to (contemporary) legal rules for balancing multilateral and regional policies and practices of WTO members.

2. The Jurisprudential Story of the GATT/WTO Law and Governance of Regionalism

The second type of storyline – found entangled in conventional narratives²⁴⁸ – accounts for the advancement in the jurisprudence of the GATT/WTO law of regionalism. It often reduces WTO law to the succession of jurisprudential writings that provide a vernacular of facts, concepts, theories and methods to make sense of the prevailing institutional interactions and state behaviour within the world trading system. The conventional narratives tend to emphasise how questions about the GATT/WTO law and governance of regionalism were framed, evaluated and answered through doctrinal analyses of Articles I:2, XXV:5 and XXIV, the Enabling Clause, and (more recently) GATS Article V. Chapters 1 and 2 show that the almost exclusive focus of traditional accounts lies in jurisprudential debates as to the legality and legitimacy of RTAs. They stress how evidence was offered to prove or disprove the formal and functional consistency of South-North RTAs with GATT/WTO law through the primary examination of Article XXIV.

Since 1947, lawyers have provided interpretations to Article XXIV. This characteristic exercise is historicised as having been influenced by formalist and functionalist approaches developed in response to normative gaps, institutional reforms, and intellectual transformations, and also to the attempts of political and economic interference in the world trading system. Specifically, the formal uncertainty and functional ambiguities of Article XXIV are historicised as reflecting one of the most controversial of the GATT's 'birth defects'. On the one hand, this institutional deficiency has been blamed for generating uncertainty as to the 'real' purpose of Article XXIV. The entrenchment of the compromise between multilateralism and regionalism has led to divergent interpretations as to how the GATT should govern their relationship. On the other hand, the institutional shortcomings have been accused of formalising the vague rules of Article XXIV, which have validated the abusive use of exceptions to create CUs and FTAs.

To minimise the relevance of questions about the nature and function of Article XXIV while highlighting the need to constrain state discretion over RTA-formation by promoting the enforceability of its disciplines, the jurisprudential story often foregrounds

²⁴⁸ See generally Chapter 1.

the evolution from a formalist to a functionalist approach. The conventional narratives chronicle that in the early years only a few lawyers participated in the governance of the GATT or RTAs. Most of them are remembered for their academic attitude and intellectual commitment to formalism and the foundation of international economic law as a disciplinary field. The 1940s generation was led by Georg Schwarzenberger to focus on formal and legalist dimensions of the GATT, leaving outside issues of policy and governance. The consequence was that they limited themselves to discuss the legal status of GATT and its implication to Article XXIV and RTAs. This formalist-oriented mindset is understood as responsible for letting international lawyers enclose themselves in excessive academicism for decades, while other fields of international economic policymaking occupied the central position in global trade governance.

This view is further reinforced by stories suggesting that legal expertise bore no significant relevance throughout the GATT era. The combination of doubts about the GATT's legal character and the rise of the epistemic authority of policy-oriented disciplines on trade matters led GATT 'law' to be perceived as more 'technical' or 'diplomatic' than 'juridical'. The consequence was that the ascendancy of rival fields over a domain historically associated with international law. The traditional history portrays, therefore, the interpretative practice of Article XXIV and the making of RTAs as activities undertaken by diplomats, officials and non-legal trade experts specialising in GATT law. Conversely, lawyers were perceived as assuming instrumental roles in formalising policy choices or neutral academic positions devoted to developing a conclusive, general and ahistorical *legal* solution for the conflict between multilateralism and regionalism.

Side-lined for three decades, the IEL field is considered to have been reborn to global economic governance only in the 1980s thanks to the determination of more pragmatically-driven, rather than academically-oriented, lawyers. The 1980s generation was led by John Jackson to rethink legal expertise as a way of reclaiming their participation in international trade law. The conventional account chronicles how they gradually shifted the mindset towards functionalist, realist and pragmatic attitudes and mentality. They were less interested in debates over the legal nature of the GATT and more preoccupied with its functions, effectiveness, and the application of its rules to solve problems of world trade. This turn-to-functionalism is perceived as having empowered lawyers to participate in the institutionalisation process leading up to the creation of the WTO, the adoption of the Article XXIV Understanding, and the move from a power-oriented to a rule-oriented system, which later underpinned their efforts to strengthen Article XXIV through litigation before the DSB.

3. The Modernist and Anglocentric Limits of the Conventional ‘Grand’ Narratives

The institutional and jurisprudential storylines are often united through the commitment of the traditional approach to a view of history as a single and universal phenomenon. Lawyers often try to merge these stories by assuming that both are somehow intertwined teleologically and progress linearly.²⁴⁹ The purpose of converging them into one common trajectory seems to be an attempt to scientifically capture the single, universal reason driving the history of international trade law and governance of South-North regionalism. This grand narrative is remembered as a conflict against the proliferation of RTAs, which is associated with autocracy, discrimination, and protectionism, as well as against formalism and academicism. By contrast, the GATT is accounted for as a ‘legitimate’ and ‘fair’ system centred on free trade cooperation, non-discrimination, and reciprocity, as well as functionalism and pragmatic attitude. At the core, international trade law is narrated as a universally accepted mode of institutionalised, expert governance of world trade that aspires to impose formal and effective constraints upon sovereign discretion over trade policies, while promoting a more peaceful world and economic welfare through interdependence.

Mainstream literature aims to validate and legitimise its underlying programmes through conventional narratives that vindicate the naturalness, necessity or superiority of GATT/WTO law. The traditional approach is employed to root the rules, ideas and practices of WTO law in history lessons, so as to ascribe them meaning as part of an unfolding story of institutional and jurisprudential progress that serves to support the dominant programme.²⁵⁰ For instance, the institutional story about the ITO failure and the formation and development of GATT/WTO governance of South-North regionalism under Article XXIV is strategically tied up to the jurisprudential story about the evolution from formalist questions about the existence and legality of the GATT to the issues of formal and functional defects of Article XXIV followed by the functionalist interpretation and application of its disciplines to govern the making and operation of South-North RTAs. The ultimate aim is to instrumentalise history to lend authority to the contemporary legal doctrine. Therefore, the dangerous consequence of combining these storylines through the traditional approach is to produce a teleological view of the history of GATT/WTO law of South-North RTAs as a *single* and *universal* phenomenon.

²⁴⁹ Koskenniemi, 2013: 220-221.

²⁵⁰ Orford, 2016: 701-702.

Recently, a new trend in literature has extensively criticised the traditional approach for its shortcomings.²⁵¹ For the aim of my discussion here, I highlight two critiques of mainstream literature's commitments to *modernism* and *Anglocentrism* that seem to bear great explanatory power. It will become soon clear that the combination of these two assumptions shapes the interaction between legal history and doctrine in a particular way that has the effects of imposing disciplinary limitations over legal expertise and of impacting adversely international trade law.

The critique of modernism calls attention to the argumentative structure embedded in the traditional approach. The initial step to history-telling is to define international trade law. This definition is habitually constructed upon two moves. It first assumes *international trade law* can be 'objectively' isolated from other social phenomena, such as morality, politics, and economics, as well as from domestic and international law, in order to provide a definitive, abstract 'concept'. This definition is often a specialised variation of the notion of international economic law as a universal and neutral set of positive norms and authoritative processes that are 'legitimately' produced and can be 'objectively' interpreted.

These premises produce blind spots that often lead the traditional approach to overlook how political and intellectual struggles shape GATT/WTO law. This implies that, to produce a universal history, conventional narratives frequently fail to take into consideration the impact of socio-economic contexts on the making and interpretation of international trade law, while obscuring disciplinary bias and marginalising alternative ideas and practices within the IEL field.²⁵² Therefore, embedded into the traditional approach, the modernist commitment to teleology requires the adoption, preceded or not by theoretical justification, of a universal concept of international trade law as the condition *sine qua non* to begin the process of uncovering its history. This restricts, in turn, legal history to the jurisprudential and institutional stories that often support the dominant programmes underpinning the concept chosen *ex ante*.

Chapters 1 and 2 illustrate the perils of modernism. Two shortcomings are particularly important. First, the traditional literature narrows the notion of international trade law to GATT/WTO law, accompanied or not by methodological reasons. The consequence is to impose a disciplinary demarcation that disregards any rule or institution existing from 1947 to 1995 that falls outside that concept. Second, to reinforce this conceptualisation, the conventional narratives seem to function as an apologetic conduit

²⁵¹ See *supra* note 245.

²⁵² D.W. Kennedy, 1999: 12.

providing authoritative justifications for using the contemporary legal doctrine to apply Article XXIV in the making and interpretation of South-North RTAs.

The second critique is concerned with the overwhelming Anglocentrism embedded into conventional accounts.²⁵³ From physical places to intellectual debates to global policy-making, GATT/WTO law is frequently experienced in present-day mindset as an Anglo-American phenomenon. Locations such as Bretton Woods, New York, and Washington in the United States, London and Torquay in the United Kingdom are central to the historiography, where international lawyers have been found, in some way, even today. Of course, other key places such as Geneva, Paris, Annecy, Brussels, Tokyo, and Havana, have also been historically important; however, the traditional approach portrays them as islands of Anglocentrism elsewhere.

It feels discouragingly difficult and sometimes impossible to engage with international trade law without delving into Anglo-American history, referring to ideas and practices about multilateralism and regionalism as imagined in the US and UK, or even communicating in the English language. This suggests the existence of an affinity between lawyers' disciplinary preference and their acceptance of an Anglocentrism. The IEL field is, hence, experienced as dominated by Anglocentric-inspired norms and knowledge.

This Anglocentrism leads one to wonder what kind of history it would be possible without resuming it to the role of the US (mainly), the UK (secondarily) and Western Europe and Japan in the construction and maintenance of the world trading system? The overwhelming majority of the contemporary narratives, following either institutional or jurisprudential storyline, seem to drive back to what and how British and Americans have done and written.

Institutionally, the literature tends to equate international trade law to GATT/WTO law by either foregrounding their ancestors in the 19th-century, liberal economic system led by Great Britain, or emphasising their origins in the Anglo-American negotiations that resulted in the Atlantic Charter. It often retells the debate between the American Cordell Hull and Harry Dexter White, and the British John Maynard Keynes about free-trade multilateralism and imperialist regionalism.

Jurisprudentially, mainstream literature emphasises unequally ideas and practices produced by Anglo-American (trained) lawyers.²⁵⁴ In the 1940s, the 'father of IEL', Georg

²⁵³ Likewise, *see* Anghie (2005), Gathii (2008) and Koskenniemi (2012a, 2012b, 2012c and 2013) for Eurocentrism in international law, and *see* Carvalho (2011), Pahuja (2011) and Orford (2015 and 2016) for Eurocentrism/Anglocentrism in IEL.

²⁵⁴ D.W. Kennedy, 1994a: 61; Charnovitz, 2014: 616-624.

Schwarzenberger (1908–1991), was a German-British professor of the University of London. In the 1980s, the ‘great champion of IEL’, John Jackson (1932-2015), was an American-born practitioner turned into a professor of the Georgetown University who on different occasions served the Office of the US Trade Representative. Therefore, the traditional approach makes a quite impossible task to offer a credible history of international trade law and governance of South-North regional trade agreements without adopting an Anglocentric viewpoint.

C. Towards an Alternative Approach to History of the International Economic Law

In an attempt to address some of the shortcomings of the traditional approach, I provide below the contours of an alternative grounded in four strategies. The purpose is to rethink the history of international trade law and governance of South-North regionalism through this proposed alternative.

1. Widening History Boundaries

I purport to place the origins and development of international trade law within a broader historical trajectory. The goal is to widen the scope to analyse how IEL was ‘founded’ in relation to the ‘rest’ of international law and also to the ‘other’ policymaking domains and institutionalised regimes of trade governance existing between 1944 and 1994. This consists of retelling institutional and jurisprudential stories in a more comprehensive frame. Hence, the aim is to prevent the failures of conventional narratives from constraining today’s legal expertise in two important ways.

Firstly, the consensus on the GATT/WTO as the unique, or perhaps ultimate, institutional and normative experiments of international trade governance since 1944, is challenged. Specifically, the conventional portrait of the GATT/WTO as the single multilateral trade regime to emerge from the postwar period is confronted. Secondly, the traditional perspective that confines the history of international trade law of regionalism to an antagonistic debate between free-trade multilateralism versus preferential regionalism is rejected.

Chapters 1 and 2 evidence that present-day legal doctrine on international trade law and governance of South-North regionalism is grounded in (almost singularly) institutional and jurisprudential stories of GATT Article XXIV. How the history of Article XXIV is narrated already does a great deal of work in setting up the history lessons that are taken away about the necessity, inevitability, and desirability of the WTO disciplines on South-North regionalism. In this sense, history should be understood as doctrine.²⁵⁵ The doctrinal rework would consist of providing alternative accounts in which international trade law is juxtaposed to the ‘rest’ of international economic law, whereas the GATT/WTO and the regional trade regimes are resituated in relation to the ‘other competing’ international regimes for trade cooperation. The aim would be to rescue legal questions, projects, concepts, ideas and practices related to regional trade regimes that were historically marginalised for having been regarded as falling outside WTO law and IEL expertise.

Part III retells the history of the GATT law of South-North regionalism within the wider frame of postwar international economic law and governance, which were characterised by normative heterogeneity, institutional experimentalism, and jurisprudential innovation. The institutional story looks different from the conventional narratives if, instead of focusing exclusively on the GATT, it accounts for the role of GATT (as the embodiment of a normative and institutional model) in the battle against the UNCTAD and the Council for Mutual Economic Assistance (Comecon) for global trade governance. Likewise, conventional stories of IEL jurisprudence single out an innovative body of legal knowledge produced since the 1940s. Not only has the traditional history led legal expertise to relegate a rich repertoire of norms and ideas to the dustbin of the past, but also has crystallised a disciplinary boundary that prevents recent preoccupations, rules, and theories from growing or entering international trade law.²⁵⁶ For instance, it has marginalised relevant questions related to social justice and economic development by justifying historically that redistributive policies, environmental and labour concerns, and humans rights considerations fall outside the IEL field (generally) and WTO law (specifically).

2. Endogenising History

I suggest that we suspend our habit, nurtured by an intellectual compromise and a professional common-sense, of imagining international trade law as a *special* body of

²⁵⁵ Likewise, *see* Orford (2016: 703).

²⁵⁶ Likewise, *see* Howse (2017: 188).

positive rules and processes, which can be empirically identified and scientifically analysed. International trade law can be conceived not as a result of a unilateral process of normative, jurisprudential or institutional specialisation or fragmentation, which is possible to be ‘discovered’ and ‘apprehended’ by lawyers, regardless their historical context, through the identification of a distinguishable group of universal norms and regimes holding a natural or logical speciality. Instead, I propose to approach international trade law as (part of) the creation and advancement of the IEL field, which have been undertaken by contextualised groups of lawyers since the 1940s.²⁵⁷

This thesis aims to explore the consequences from understanding that the ‘origins’ and ‘progress’ of international trade law were intertwined with the ‘invention’, ‘maturation’, and ‘defence’ of the IEL expertise. In this sense, international trade law is *neither* equated to GATT/WTO law *nor* only regarded as bodies of positive rules and process, but *also* a way of legal thinking and practising it. It involves the production and transmission of knowledge among lawyers so that ideas and methods are routinely embedded in legal expertise ceasing to be politically or intellectually contested.²⁵⁸ Particularly, I will reveal how mainstream consensus on the IEL field’s history and doctrines reflects, emblematically, the continuous labour of lawyers to encapsulate a specific set of political decisions, intellectual commitments, and normative positions into conventional narratives that sustain the contemporary legal doctrine on the international trade law of South-North regionalism.

Moreover, I will show that lessons from the traditional history smooth the process of decision-making and consensus-building within the IEL field.²⁵⁹ They are employed to ‘construct’ international trade law having more or less influence depending on contingent factors related to the authority and legitimacy of their proponents and reasoning. This suggests that jurisprudential and institutional stories are neither neutral nor apolitical. Rather, they are produced by lawyers pursuing, personal or collective, projects, who are located in different jurisdictions, educated according to distinct legal traditions, and committed to divergent political groups and ideational mindsets. The consequence of this view is to contest the IEL field’s traditional claim to the universalism and perpetuity of WTO law (as the formalisation of the ‘single’ and ‘global’ international trade law) since it cannot be sustained empirically but only aspired intellectually.

²⁵⁷ This approach is inspired by D.W. Kennedy (2005 and 2016), Lang and Scott (2009), Koskenniemi (2011), and Roberts (2017).

²⁵⁸ D.W. Kennedy, 2002: 408-414; Roberts, 2017: 1-6.

²⁵⁹ Santos, 2002: 178-179; Roberts, 2017: 8-9.

Therefore, Chapter 6 will combine an analysis of the IEL field's intellectual history with an investigation of the performance of its members as designers, managers and interpreters of international trade law. My specific purpose is to show how intra-disciplinary struggles and outside political-economic conflicts shaped the construction of history lessons that contributed to constituting competing legal doctrines on the GATT law of South-North regionalism between 1947 and 1980.

3. Breaking up with Modernism: History as Temporal Contestation of Doctrines

I will depart from the modernist commitment to a progressive, linear and universal style of history that often instrumentalises institutional or jurisprudential stories to reassert a consensus on international trade law so as to support particular programmes.²⁶⁰ This means to resist to our impulse born out of the traditional approach to constructing narratives of WTO norms and practices by working backwards in order to 'uncover' a single lineage from the GATT that justifies the natural or logical teleology we want to see hidden in history. To do so, I suggest recalibrating three main elements of history-telling about GATT/WTO law: frame, scope and scale.

Following the shift from *positive norms* to *differentiated expertise*, the focus is not on retelling how legal rules and regimes have continuously and progressively evolved into their contemporary manifestations. Rather, I aim to foreground how legal norms and knowledge are produced by contextualised groups of lawyers who pursue their projects through practice. This does not mean to impose a dogmatic separation between past and present aiming to completely sterilise history from critical engagements. I suggest emphasising, instead of erasing, intellectual and political conflicts that historically produced compromises, ruptures, or transformations within the normative, institutional, and jurisprudential dimensions of international trade law. This new approach enables us to understand better how conventional narratives have constrained legal imagination by continually retelling the lessons that ultimately reinforce the disciplinary consensus on today's legal doctrine on South-North regionalism. Part III highlights not only the conditions of possibility that (did and do) frame decision-making in and over legal doctrines on the international trade law of South-North regionalism but also empower a critical engagement with lawyers' past and present expertise and choices.

²⁶⁰ This strategy is inspired by Koskenniemi (2012b and 2013).

4. Departing from Anglocentrism: History as Spatial Contestation of Doctrines

This strategy consists of breaking up with Anglocentrism.²⁶¹ If IEL is understood as a transnational field that aggregates lawyers from and working in multiple jurisdictions, historical narratives shall also be conceived as produced in sites located outside the Anglo-American world. This move entails two consequences. It is necessary to take into consideration that international trade law has been thought and practised in distinct contexts. Nonetheless, the validity and legitimacy of norms, ideas, and techniques hinge on the dynamic interplay between different legal communities within legal expertise. This disciplinary interaction is affected by the unequal distribution of authority and resources. Consequently, it is important to be aware of the effects of certain ‘spatial’ differences over the production of histories, as well as of the extent to which particular associations of some lessons with some doctrinal frameworks have come to dominate understandings of what counts or not as (part of) international trade law in a way that can make them appear neutral and universal.

I propose, instead of equating the history of international trade law with Anglo-American stories of GATT/WTO law, to foreground the variety of historical narratives chronicled according to different approaches, each produced by the interplay of contextualised groups of lawyers (within and across jurisdictions) facing political and intellectual communalities, dissimilarities and conflicts. Thus, the interaction between histories and doctrines would be different if lessons produced by lawyers situated in distinct states and regions and often associated with different communities were to be accepted as part of the IEL field rather than obfuscated by Anglocentrism.

Chapter 1 makes us think of Anglo-American stories as the universal history of international trade law of South-North regionalism. By contrast, Part III leads us to rethink how international trade law was thought and practised in non-Anglo-American contexts, as well as on the conditions that led GATT/WTO law to be employed as legal expertise to support trade interactions with Anglo-Americans. Furthermore, it shall become evident that the formation and development of the international trade law of South-North RTAs were undertaken in sites located outside the Anglo-American world. Indeed, the European Paris, Brussels, Geneva, Athens and Istanbul, the Mediterranean Tunis, Rabat, and Cairo, as well

²⁶¹ This strategy is inspired by Anghie (2005), Gathii (2008), Carvalho (2011), Pahuja (2011), Koskenniemi (2012a, 2012b, 2012c and 2013), and Orford (2015 and 2016).

as the African Yaoundé and Lomé were among the most relevant places where lawyers negotiated and drafted mainly in French the South-North RTAs between the European Union and its former colonies or neighbouring countries between 1947 and 1985. Thus, I intend to historicise international trade law taking into consideration how history teachings were dispersedly produced not only to shape legal expertise but also to justify and legitimise legal doctrines to be used in making or interpreting RTAs in locations outside the Anglo-American world.

5. An Alternative to the History of International Law and Governance of South-North Regional Trade Regimes

All in all, my alternative approach has three aspirations. It intends to offer a way to rethink legal history as a window to unveil how different groups of lawyers have participated in the foundation and development of international trade law. It aims to assist us in understanding how jurisprudential and institutional stories have been produced to govern the formation of doctrines. It seeks to highlight how conventional narratives have connected ‘certain’ past to ‘certain’ present in order to establish and sustain relations of difference, dominance, and disruption inside and outside the IEL field. Thus, this new style of history-telling purports to reveal how lessons have been mobilised to support legal doctrines on GATT/WTO law and governance of South-North regionalism in ways that have affected lawyers’ understanding of and engagement with international trade law.

It also intends to improve our understanding of how international trade law has been employed to control the formation of ideational, institutional, and jurisprudential programmes operating within the international economic order. It aims to foreground the continuous involvement of lawyers in the naturalisation and essentialisation of WTO/GATT law as (the core) international trade law. Specifically, it seeks to unveil how lawyers labour to embody this project into legal rules, institutions and doctrines on regionalism, through lawmaking and interpretation. With this new approach in mind, Chapter 7 provides one case study of how legal doctrines were reworked through practice in order to reflect, shape, and sustain ideational, institutional and jurisprudential programmes. Some of these doctrinal frameworks were successfully incorporated, while the ‘rest’ was ‘forgotten’, into legal expertise, which underscores present-day international trade law of South-North regionalism.

It finally intends to contribute to contemporary debates on international trade law by *rethinking the history of the present*. Understanding history as part of today's practice involves revealing how the work of embedding ideational, institutional and jurisprudential programmes into international trade law through lessons has shaped the IEL field's identity, mission and influence over the world trading system. Present-day challenges arising out of economic globalisation, political nationalism, and trade populism, seem to put a real threat not only to the WTO but also to South-North regional trade regimes that were once celebrated and have recently become controversial, such as the European Union, NAFTA, TPP, and the Economic Partnership Agreements (EPAs). In providing a new way of understanding the interaction between history and doctrines, an alternative approach aims at penetrating into the IEL field to illuminate how historical narratives and doctrinal analysis constitute the conditions of possibility that enable and constrain lawyers to engage WTO law in producing imaginative solutions to current problems.

Conclusion

I opened this Chapter by suggesting that the interaction between history and doctrines is key to understanding the participation of international lawyers in the construction of international trade law and governance of South-North regionalism. Throughout the sections, I showed that legal doctrines result from the interplay between intellectual debates meaningfully grounded in history lessons and political disputes arising from collective and individual pursuits of authority and legitimacy. In this context, the function of the traditional style of history-telling is two-fold. It narrates the past as teachings to support ideational, jurisprudential, and institutional projects for governing world trade. It chronicles the past as lessons to frame and argue about trade problems through international trade law. This means that the traditional approach has great responsibility for producing and sustaining legal doctrines. Therefore, I claim that the conventional narratives are implicated in the imposition by the present-day legal doctrine of limitations on legal imagination, which prevents lawyers from offering inventive solutions to contemporary issues.

If my analysis is correct, the IEL field should seek to relax the disciplinary frontiers of international trade law in order to produce alternative ways to reform and transform South-North RTAs. This would partially include welcoming inventive projects, norms, ideas, and techniques from legal and non-legal experts located outside Anglo-American, orthodox sites. Since these 'innovations' could be found out not only in present-day but also

in the past, the IEL field should rethink its own history in order to recover the sense it once had that international trade law was characterised by normative heterogeneity, institutional experimentalism and jurisprudential innovation. I hope that the proposed alternative approach will assist in broadening the boundaries of legal history so as to lessen the disciplinary constraints while empowering lawyers to re-imagine the international trade law of South-North regionalism in response to current problems. I want to conclude by highlighting my core arguments.

The IEL field is directly implicated in the production and transmission of legal histories and doctrines. Specifically, history-telling functions as an expert mode of governance of meanings across time. It is employed to control the range of choices of who and what matters or not for 'today's' international trade law and governance of regionalism. Studying legal history as a practice of disciplinary differentiation, domination, and disruption is thus studying the conditions of possibility sustained by the IEL field for lawyers to engage in alternative (past or present) ways to transform the South-North RTAs.

As evidenced by Chapters 1 and 2, the link between conventional narratives and doctrinal frameworks is constructed and justified through views of world trade's *telos*. This approach enables legal reasoning to work backwards in order to 'discover' lessons accounting for a single lineage that validates and legitimises the natural or logical teleology embedded into legal norms, regimes and doctrines governing international trade relations. As demonstrated further in Chapters 5 and 6, the alternative approach can be used to uncover the effects entailed by the imposition by the traditional style of disciplinary demarcation between international trade law and 'the others'. The definition of the 'others' has been contingently reworked relying upon the efforts to delineate spatial and temporal dedifferentiation.

Moreover, I argued that modernism and Anglocentrism embedded in the traditional style often constrain rather than empower lawyers to rework today's legal doctrine on the international trade law of South-North regionalism, in order to provide new and alternative responses to current issues. To avoid those shortcomings, I proposed to resituate the foundation and development of the international trade law of the South-North regionalism within a wider temporal trajectory and spatial context. The aim is to cause history-telling to take into consideration the 'rest' of international law and trade policy existing between 1945 and 1985. More specifically, I argue that the history of international trade law of the South-North regionalism should be retold *not* as single, universal, and neutral accounts of past events, but rather as contingent and partial stories carrying out ideational, institutional, and jurisprudential projects.

The alternative style of history-telling has the potential to uncover the normative and material roots of modernism and Anglocentrism that are entrenched in mainstream literature. Normatively, the Anglo-American view of international trade law as an instrument for realising a specific (initially, liberal-welfarist and, now, neoliberalist) programme has been tied up with the modernist idea of universal and linear evolution. The result has been the production of history lessons to legitimise the contemporary legal doctrine by demonstrating that its origins and development go back to past events that are central for neoliberalism and Anglo-American diplomacy. Materially, the dominance of modernism and Anglocentrism has a great deal to do with the political and economic power of the United States and the United Kingdom in shaping international trade law and governance since the postwar period. The alternative approach I offered can assist us to produce a better map of the prevailing doctrinal framework that structures decision-making in the WTO and the South-North RTAs, and so critically engage in a dialogue with lawyers' past and present expertise and choices.

CHAPTER 4. LEGAL DOCTRINE IN THE INTERNATIONAL LAW AND GOVERNANCE OF SOUTH-NORTH REGIONAL TRADE REGIMES

Introduction

Most of this thesis is devoted to expose and examine the role of legal doctrines in the making of South-North regional trade regimes. I started Chapter 2 by defining legal doctrines as loosely as possible without departing radically from how most international lawyers think about them. I did this by conceptualising legal doctrine as a coherent and stable framework of positive and non-positive norms and legal techniques that serves as a mode of legal governance. The concept was left slightly ambiguous and open-ended to allow a detailed study of mainstream scholarly and policy literature and official texts. This Chapter inquires into the nature and functions of legal doctrines of international economic law by addressing two central questions.

What do we – international lawyers – know about the role of legal doctrines of international economic law? Section A describes the prevailing understandings of legal doctrines aiming to highlight their commonalities and differences. It shows that all approaches share similar assumptions, which, in turn, constitute a characteristic way of thinking and reasoning about legal doctrines – I call this distinctive style of legal doctrine the *mainstream approach*. Section B explores the singularities and limits of the mainstream approach to legal doctrines of international economic law. Based on these findings, I argue that one of the main reasons for our collective legal knowledge being ill-equipped to perceive the nature and functions of legal doctrines is the dominance of the mainstream approach in the IEL field. In section C, the Chapter makes a case for adopting a *socio-legal approach* with the aim of (re-)conceiving legal doctrines as an expert mode of governing legal decision-making. My argument is that the socio-legal approach is a useful analytic to enhance our understanding of how legal doctrines empower and constrain lawyers' authority to make legal arguments about choices concerning the legality, legitimacy, effectiveness, and fairness of WTO law and RTAs. It also assists us to be aware of the costs of sustaining such authority based on the continuous and uncritical use of legal doctrines.

That leads to the second question: what are the constitutive features of a legal doctrine of international trade law and governance, and which effects do they entail? Section C conceptualises legal doctrines as coherent and stable frameworks of projects and histories, facts and norms, and ideas and methods. This moves our attention away from legal doctrines as descriptions and evaluations of positive norms or authoritative processes as well as from validity as their central preoccupation. Instead, the focus should be placed on the constitutive features of legal doctrines and how the relationship with one another is crafted so as to lend meaning to norms and regimes of international trade law. The aim is to foreground the use of legal doctrines as a way of governing the movement and authority of meanings across space.

In conclusion, I consider the application of the socio-legal approach to examining and reflecting on the specific role of legal doctrines of international trade law in the context of South-North regionalism. My aim is to use it to better understand the connection between the disciplinary construction and application of doctrinal frameworks and the range of possibilities that may empower or constrain lawyers' imaginative interaction with the WTO and RTAs.

A. The Mainstream Approaches to Legal Doctrine and Doctrinal Analysis

Although any lawyer educated according to a Western legal tradition has some idea of what 'legal doctrine' and 'doctrinal analysis' are about, these terms are more difficult to define than the first impression would suggest. Terms such as 'black letter law', 'doctrinalism', and 'dogmatism' are also used to denote (the outcome of) a 'scientific' approach to 'the law'. For this reason, I begin by examining the polysemous meaning of the term *legal doctrine* and slightly less controversial meanings of *doctrinal analysis*. Since the particular relevant variations in their understandings seem to be somehow related to 'grand Western legal traditions' rather than strict national or jurisprudential boundaries, I start by outlining the main differences in their meanings associated with the conventional division of legal expertise in civil and common law.

1. The Common and Civil Law Approaches

In the common law tradition, *legal doctrine* is usually equated to positive law, while *doctrinal analysis* is often defined as a methodology that ‘replicates’ judicial decision-making in order to describe and evaluate the ‘correctness’ of ‘legal doctrines’.²⁶² The terms *doctrine* and *precedent* are interchangeably used to mean “the law, at least as it comes from courts. Judicial opinions create the rules or standards that comprise legal doctrine.”²⁶³ The language of legal doctrine represents the law, and so it sets the normative terms for future resolution of disputes. Thus, the nature of legal doctrine is consensually understood as “the currency of the law.”²⁶⁴

The common law approach consists of examining the content of a legal opinion to assess the validity of its reasoning, or to explore its implications for future cases.²⁶⁵

Doctrinal analysis is regarded as a ‘scientific’ process to provide ‘apolitical’ and ‘value-neutral’ descriptions and explanations of judicial decisions. The specific functions of the explanatory activity are to evaluate and criticise the existing legal doctrine, by showing the courts the error in their legal reasoning, and so provoking change in or new legal doctrine. This is only possible because the relationship between doctrinal analysis and legal doctrine is premised on the idea of “reasoned response to reasoned argument.”²⁶⁶ In other words, doctrinal work is structured ‘as if’ it were judicial decision-making with the aim of generating a ‘correct’ outcome holding equal validity and legitimacy (but not authority) to legal doctrine. If the law is assumed to be comprised of objective legal norms, the identity of lawyers should not determine the decision itself but only its formal authority.

Legal doctrine in the civil law tradition is generally understood as ‘non-positive’ law arguments produced by lawyers through ‘doctrinal analysis’, a ‘scientific’ methodology that loosely ‘mirrors’ legal decision-making in order to describe and assess the ‘correctness’ of ‘positive’ lawmaking, judicial decision, and legal interpretation.²⁶⁷ In contrast to the common law tradition, legal doctrine is not regarded as a precedent that creates legal rules and standards. Rather, it is a coherent and persuasive argument in the form of professional, non-judicial writings, such as commentaries and textbooks. The language of legal doctrine is how the law is communicated and reasons about the validity or legitimacy of ‘concrete’

²⁶² For an introduction to the common law approach, see Redish (1985) and Tiller and Cross (2006).

²⁶³ Tiller and Cross, 2006: 517-518.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Shapiro, 1987: 737.

²⁶⁷ For an introduction to the civil law approach, see Peczenik (2001), Pattaro (2005), Lepsius (2014), and Smits (2015).

legal rules, decisions, and claims. However, in no way, it ‘binds’ individuals, ‘prohibits’ or ‘authorises’ conducts, ‘modifies’ the legal state of things, or ‘threatens’ with state force. The nature of legal doctrine is commonly conceived as ‘a systematic and analytical exposition’ of the law.

The civil law approach to legal doctrine consists of describing the existing legal rules and arguments in order to evaluate their correctness or explore their implications for future developments of positive law.²⁶⁸ Doctrinal analysis is regarded as a ‘scientific’ process performed by lawyers to provide ‘objective’ and ‘value-neutral’ descriptions of and explanations about the law.²⁶⁹ The descriptive function aims to provide some kind of rationalisation of the law as a coherent, stable, and intelligible system. The explanatory functions seek to offer justifications to the existing legal rules, judgments, and claims, by demonstrating error or correctness in their legal reasoning with the aim of validating, reforming or overriding them. This is only possible because doctrinal analysis is premised on the pursuit of a knowledge of (the not clear-cut notion of) ‘what the law is’ (*de lege lata*) rather than the promotion of ‘what the law should be’ (*de lege ferenda*).²⁷⁰ This disciplinary commitment to knowledge-production, which may lead to a change of the law, links legal academia and legal practice. Thus, doctrinal work is structured ‘as if’ it were legal decision-making with the aim of reaching a ‘correct’ outcome with equivalent validity and legitimacy (but not authority) to judicial and legislative decisions. Thus, if the law is assumed to be comprised of objective legal norms, the identity of lawyers should not determine the outcome of doctrinal analysis but only its formal authority.

2. The International Economic Law Approach

Legal doctrine plays a central role in international law, perhaps more than in other fields of law.²⁷¹ Similar to the civil law tradition, it is understood as ‘non-positive law’ arguments produced through ‘doctrinal analysis’. Yet, there is one aspect that approximates its meaning to the common law view: while common law regards legal doctrine as ‘positive law’ in the form of judicial decisions, international law may acknowledge a concrete legal doctrine “as subsidiary means for the determination of rules of [international] law” under Article 38(1)(d) of the Statute of the International Court of Justice (ICJ). Consequently,

²⁶⁸ Peczenik, 2001: 75; Pattaro, 2005: 1-2; Smits, 2015: note 15.

²⁶⁹ Peczenik, 2001: 78-82; Pattaro, 2005: 1-6; Lepsius, 2014: 694-697; Smits, 2015: 4-6, 8-12.

²⁷⁰ See *supra* note 269.

²⁷¹ For an introduction to the international law approach, see Koskeniemi (2005, 2007d, 2007e), Peters (2017), Orford (2017), and Wood (2017).

legal doctrine may serve as ‘evidence’ of positive international law.²⁷² Although there is no exact equivalent to Article 38(1)(d) in the WTO agreements, legal doctrines have been brought into WTO law by the DSB through Articles 3.2 and 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).²⁷³

More specifically, *legal doctrines* are defined as a coherent and credible argument about international economic law, which may take many forms of legal (non-judicial) writings, including treatises, textbooks, journal articles, and reports. Their language of legal doctrine is regarded as a universal medium which speaks about IEL, and reasons the validity or legitimacy of its ‘concrete’ legal rules, decisions, and claims.²⁷⁴ Even if they were acknowledged as a subsidiary source, legal doctrines would be a vehicle for, but never, legal norms that express a sense of imperativeness over the conscience of IEL subjects. Therefore, the nature of legal doctrines is commonly conceived as ‘teachings’, and so it does not entail ‘binding’ effects on international actors or ‘threaten’ with coercion and force.

The mainstream approach to doctrinal analysis shares the core assumptions that underpin its civil and common counterparties. *Doctrinal analysis* is conceived of as a ‘scientific’ method for describing and evaluating existing legal rules, interpretations and judgments.²⁷⁵ It often begins with an overview of IEL as it stands today by mapping and organising the ‘legal’ vocabulary applicable to the concrete matter at stake. Then, it rationalises IEL as a coherent and stable legal system, which governs the valid and legitimate forms of relationship between norms, decisions and outcomes.²⁷⁶ This argumentative process is fundamentally shaped by a consensual set of underlying assumptions about the goal of legal doctrine, the authority of styles of legal reasoning, and the types of materials to be included in the system. Although distinguishing doctrinal work from other legal activities may be challenging, the core premise is that the former is a disciplinary mode of governance that controls the production of knowledge of ‘what IEL is’ rather than ‘what IEL was or should be’. Particularly, it is acknowledged as an ‘objective’, ‘impartial’, and ‘disinterested’ technique for knowledge production rather than political or moral opinion, sociological or historical description.

²⁷² Koskenniemi, 2007d: para 1; Carvalho, 2011: 32-33; Wood, 2017: para 1-4.

²⁷³ Palmeter and Mavroidis, 1998: 399, 407-408.

²⁷⁴ Carvalho, 2011: 32-33.

²⁷⁵ Koskenniemi, 2007d: para 1; 2007e: para 1; Peters, 2017: 151-152; Orford, 2017: 108-109.

²⁷⁶ See *supra* note 275.

It is the disciplinary commitment to scientific knowledge-production that has oriented legal scholarship towards practice.²⁷⁷ The perceived authority of legal doctrines is based on their objective claims to universality. Historically, they have been relied upon for resolving international legal disputes. Alike the domestic approaches, doctrinal tasks are thought and practised ‘as if’ they were a legal decision-making process for attaining a ‘correct’ outcome with equivalent validity and legitimacy (but not authority) to treaty-making and judicial decisions. If IEL can be scientifically ascertained and evaluated, the identity of lawyers should not determine the outcome. Thus, ‘practice-oriented’ legal doctrines may affect IEL by changing (indirectly) how concrete legal rules are understood and interpreted or providing (directly) authoritative teachings that are formally acknowledged as subsidiary formal sources.

By comparing the three traditions, it is possible to highlight their central features. The fundamental disagreement stems from the meaning of ‘legal doctrine’. This term, for common lawyers, refers to positive law in the form of judicial decisions, while, for civil lawyers, it connotes non-positive law arguments. International lawyers side with their civil law peers conceiving legal doctrine as non-positive IEL arguments; nevertheless, they acknowledge the possibility of those arguments be qualified as “teachings” under the ICJ Statute or DSU. Although understanding these differences is relevant to evaluate the formal authority of ‘legal doctrine’, it does not affect the ‘outcome’ of doctrinal analysis, which, in all traditions, means a non-positive law argument.

Turning to the shared views, the first one is regarding the nature of doctrinal analysis as ‘science of law’. Although the underlying premises vary, the notion of science of law is deeply grounded in the core tenets of modernism: objectivism, (moral and political) neutrality, universalism, and verifiability. This means that ‘the law’ is universally defined as comprised of the ‘present’ and ‘applicable’ (and so neither the ‘past’ nor ‘future’) body of legal rules arising out of concrete social processes. Second, this aggregate of legal norms is, in turn, assumed to be a universal phenomenon able to be objectively and impartially described and evaluated. Consequently, there is a common-sense understanding of what distinguishes doctrinal analysis from any other form of legal inquiry. The third shared feature is the rationalisation of the law.²⁷⁸ Despite methodological variations, law is rationalised as a ‘legal system’. This makes doctrinal analysis not a mere recording of existing case and statutory law but rather a combining descriptive and evaluative task aimed at determining out of social norms which ones are positive law and organising them into a

²⁷⁷ See *supra* note 275. See also Wood (2017: para 1-4).

²⁷⁸ Smits, 2015: 5-7.

coherent and stable system of legal rules and institutions. Finally, doctrinal analysis is committed to an internal perspective.²⁷⁹ This means that, although the inquiry may contain other considerations, its core consists of the identification, interpretation, and systematisation of existing law. This internal view is what makes law an autonomous discipline.

Those core features provide, therefore, the basic contours of what lawyers tend to imagine doctrinal analysis as science of the existing law, which is rationalised as an abstract legal system, in order to serve as the criterion against which concrete legal rules and claims, and judicial decisions are assessed to determine their validity and legitimacy. This understanding allows the law to be conceived as an objective reality that can be evaluated as a scientific subject, and as a self-contained system that provides the normative and sociological boundaries for an objective and value-free inquiry. Doctrinal analysis provides the vocabulary through which lawyers communicate to one another, in order to address concrete issues, craft arguments, suggest solutions, and reach decisions on their own terms. This strong orientation towards legal practice lends to doctrinal work legitimacy to reinforce the imaginary of the law ‘as if’ it were a legal system.

It is fair to say that any Western-trained lawyer recognises these consensual features of the mainstream approaches. The vast majority of them are instilled with the doctrinal mindset when attending law schools, and so are able to acknowledge it as a distinctive mode of thinking and practising the law.²⁸⁰ Not rare it is implicitly transmitted as ‘the’ legal approach or method: to students, it is a way to learn to “think like a lawyer”; to scholars, it is described as the “nerve centre” of legal science or the “mother’s milk to academic lawyers.”²⁸¹ It is difficult to imagine the existence of ‘the law’ without doctrinal analysis. If IEL is about norms for governing economic relations, legal doctrine communicates which of them are ‘positive norms’, how they relate to one another and also to social contexts. However, the widespread consensus on the centrality (or, perhaps, supremacy) of doctrinal work does not suggest that lawyers are aware of its exact nature and functions. While law students are habitually taught how to undertake doctrinal analysis dissociated from any reflection on its theoretical or methodological assumptions, legal academics have woefully understudied its role and effects.

²⁷⁹ Ibid.

²⁸⁰ Ibid. at 3-4, 7-10.

²⁸¹ Ibid. at 1-2.

B. The Limits of Legal Doctrines of International Economic Law

The disciplinary common-sense tells that the IEL field has never reached a consensus on ‘a general theory’ or ‘a single method’. Nor is it clear that these are necessary or desired.²⁸² Instead of convergence, legal expertise seems to promote intellectual eclecticism. As a result, there are numerous possibilities to approach the international trade law and governance of South-North regionalism. Each of these ‘approaches’ offers a unique combination of philosophical, normative, historical, theoretical, and methodological tendencies. Although the assumption is that the choice of approach falls to each international lawyer, the reality is that the decision is profoundly conditioned by *both* the (objective) social and material relations *and* (subjective) intellectual, political, and disciplinary commitments, sustaining the IEL field and global trade governance (and the relationship between them). As the previous section implies, however, doctrinal analysis is traditionally conceived as a *primus inter pares* technique within the IEL profession.

Despite the disciplinary preference, the way doctrinal analysis should be carried out is not consensual either. It depends on which specific features are chosen to determine the legitimate mission of legal doctrines, the authority of methods of legal reasoning, and the validity of materials to be included in the ‘legal system’. For the specific purpose of this thesis, the overall function of (what I have called so far) *the mainstream approach* is to legitimise and validate doctrines of IEL (generally) and trade law (in particular). This is achieved by governing their production within the IEL field, and by ensuring their influence over an exclusive domain of lawmaking and interpretation. By controlling foundational questions underpinning international trade law, doctrinal work seeks to dictate how preoccupations about and challenges to the WTO law and governance are to be framed and addressed. I suggest, therefore, that one possibility to rethink the international trade law and governance of South-North regionalism is through the understanding and critique of how the mainstream approach produces, legitimises, and applies legal doctrines.

Contemporary, mainstream jurisprudence offers two broad strands of possibilities to undertake doctrinal analysis.²⁸³ Formalist and functionalist approaches have been applied to produce distinct legal doctrines for interpreting WTO law and making RTAs. While formalism focuses primarily on ‘rules’ and ‘legal sources’ seeking to create reliable concepts of ‘validity’ and ‘binding force’, functionalism emphasises ‘processes’ and ‘objectives’ in order to conceive ‘legitimacy’ of rules and link international trade law to its

²⁸² Perry-Kessaris, 2013: 3.

²⁸³ See *supra* note 271.

social context. These jurisprudential views reflect how international trade law is historicised, thought, and practised today by the majority of international lawyers. The effort to realise the jurisprudential project of constructing a ‘universal’ international trade law and governance in the form of the GATT/WTO has been led by the dynamic interaction between formalist and functionalist perspectives since World War II. While section 1.B.4 accounts briefly for their past, the next sections examine their present, core features.

A common trait of mainstream jurisprudence is to ground their doctrines of international trade law in theories about the nature and functions of GATT/WTO law in the world trading system. These theories have posed three particularly important sets of questions.²⁸⁴ A first set is drawn from the recognition of the heterogeneity of international actors, their full range of preferences or policies, and the differences in their political and economic backgrounds. Is international trade law between such actors possible? Might there be common norms and regimes governing, or an overarching political economy programme uniting, all or perhaps some of them? Are multilateral and regional trade regimes ‘public or private interests communities’?

A second set of questions emerges from the assumption that those actors are independent of each other and entitled to pursue their interests and objectives autonomously. How can any international trade law institution or rule be really ‘binding’ on such actors and what might their ‘binding force’ mean? What is the justification for multilateral and regional trade agreements to coerce autonomous actors? A third set probes into those actors and their relationship with one another. Who are the relevant actors in the first place, and how can international trade law assist them in attaining their preference or goal? Finally, what to do if their interests and objectives are different – as they often are?

As I shall discuss below, these three sets of questions deal, respectively, with the ‘universality’ of international trade law, its ‘binding force’, and its ‘relation’ with the surrounding political and social environment. Formalism and functionalism have been the most influential jurisprudential strands supporting doctrinal answers to those questions since the postwar. Indeed, they have assembled and empowered sets of stories, norms, theories, and methods to be used in constructing legal doctrines of international trade law. These jurisprudential views tend, consciously or otherwise, to overemphasise specific issues and instrumentalise ideas, facts, and rules, in order to justify and legitimise legal doctrines’ constitutive features. Conversely, they often downplay the importance of other concerns and marginalise other history lessons, theoretical and methodological options, and social norms due to their ‘subjective’, ‘political’, ‘value-laden’, or ‘ideological’ character.

²⁸⁴ These questions are inspired by Koskenniemi (2007d: para 2).

The most of the questions raised above are contemporarily overlooked, to the extent that since the late-1980s the IEL field has dramatically shifted its attention away from theories and methods of international trade law and towards legal doctrines of GATT/WTO law.²⁸⁵ This change was caused partly by the formal-technical turn, and partly by the emerging managerial attitude. Together they narrowed the focus of legal expertise, privileging doctrinal analysis of WTO law or concerns about its effectiveness over transcendental reflections about the universality of WTO law and about the nature and functions of IEL in organising the relationship between world trade and ‘non-trade’ issues (*e.g.* development, inequality and environment).

1. The Formalist View of Legal Doctrine of International Trade Law

The formalist approach to doctrines of (contemporary) international trade law was initially developed by a generation of lawyers working in the post-World War II period.²⁸⁶ They shared an anti-idealist attitude and a realist concern with elaborating the conditions of international coexistence in a world economy divided into ideological regimes of trade cooperation. The German-American Ernst Feilchenfeld (1898–1956), the British Leslie C. Green (1920-2011) and David Hughes Parry (1893-1973), and the Hungarian-American Stephen A. Silard, alongside Georg Schwarzenberger, engaged in an intellectual task of identifying and justifying an emerging province of international law. By employing a formalist-inspired jurisprudence, they advocated for the existence of this new branch – which they came to name ‘international economic law’ – and the application of its distinct features to the regulation of inter-state trade affairs. Their core mission was, therefore, to demonstrate that the universal, objective and neutral character of IEL made it a suitable instrument to promote the institutionalisation of multilateral trade governance.

As the leading figure, Schwarzenberger produced seminal literature over three decades.²⁸⁷ His definition for IEL is distinctively grounded in Austin’s concept of law as rules consented by sovereign nations coexisting in a Hobbesian (political) society. IEL is understood as a specialised province of public international law constituted of a sufficiently coherent, self-contained corpus of positive norms created by self-interested states.²⁸⁸ In turn, international trade law is defined as a sub-branch of IEL.

²⁸⁵ Koskeniemi, 2007d: para 4; Lang, 2011: 241-246.

²⁸⁶ For an introduction to the formalist approach, *see* D.W. Kennedy (1994a) and Charnovitz (2014).

²⁸⁷ D.W. Kennedy, 1994a: 61; Charnovitz, 2014: 616-617.

²⁸⁸ Schwarzenberger, 1948: 405-406; 1966: 7-8.

The doctrinal work for Schwarzenberger consists of employing an “inductive approach” to providing evidence of the formal authority of international trade law.²⁸⁹ The question about sources is used to scientifically determine what counts as law (*lege lata*) and what counts as moral or political opinions (*de lege ferenda*). To determine the valid sources of law, the inductive method seems to merge a ‘teleological’ with a ‘conceptualist’ style of reasoning.²⁹⁰ The first step is to use sociological and historical analyses to account for the power politics of sovereigns as the determinant of international trade law. This aims to show that legal rules emerge from verifiable hard facts of power politics and not utopian morality.²⁹¹ After determining the existence of law, the doctrinal task is to undertake a normative analysis. Specifically, sociological or historical methods are supplementary to the normative examination. This approach allows, therefore, to ‘scientifically’ reason about the separation of international trade law from trade politics, since the former is conceived as an ‘objective’ legal norm distinct from the latter that is ‘subjective’, but verifiable, political opinion.

From a lawmaking viewpoint, international trade law would consist solely of special norms that are legally binding, and they must be established by objective criteria. Schwarzenberger aims to create verifiable or falsifiable hypotheses to determine whether law exists by focusing on the regular functioning of the “law-creating processes”.²⁹² The making of international trade law is carried in by states, and not by deductions from general principles. This implies that law is based on consent, which, unlike morality, has an objective character that can be tested. Particularly, “the emphasis of International [Trade] Law is on treaties.”²⁹³ By employing a teleological style of reasoning²⁹⁴, Schwarzenberger argues that the ultimate test is to verify the capacity of international trade law to sustain a *de facto* world trading system. Thus, the current purpose of legal doctrine is to distinguish, scientifically, WTO law (essentially objective and so binding) from trade policies and politics (inherently subjective and so non-binding).

From an interpretation standpoint, the formalist approach provides a conceptualist style of inductive/deductive reasoning²⁹⁵. The doctrinal work starts by analytically distinguishing legal from political-moral disputes, and also acknowledging that many

²⁸⁹ Schwarzenberger, 1966: 12-17; Schwarzenberger and Brown, 1976: 17-20. *See also* Koskenniemi (2005: 189-191).

²⁹⁰ *See infra* notes 351-354, and accompanying text.

²⁹¹ Schwarzenberger, 1971: 1; 1976: 9-10.

²⁹² Schwarzenberger and Brown, 1976: 17.

²⁹³ *Ibid.* at 12.

²⁹⁴ *See infra* notes 351-354, and accompanying text.

²⁹⁵ *See infra* notes 351-354, and accompanying text.

disputes contain elements of both.²⁹⁶ It purports to objectively analyse and systematise legal norms, as defined in Article 38 of the ICJ Statute, in order to inductively determine the fundamental principles of international trade law. Put differently, the WTO principles are determined by examining the valid rules as defined in Articles 3.2 and 7 of the DSU. This formalist method of inductive reasoning provides the ‘correct’ approach because it is able to scientifically determine the degrees of objectivity of each legal rule by analysing “law-determining agencies” (e.g. courts, lawyers, states).²⁹⁷ This means that legal interpretation can be more or less objective, depending on the skill and technical qualification of each agency.

The formalist view suggests that the authority of doctrines of international trade law is based on two premises. Methodologically, they must be capable of determining the validity and legitimacy of rules through scientific methods. For instance, to demonstrate the normative status of WTO law, some lawyers (like Schwarzenberger) focus primarily on questions about the validity and legal sources (internal explanations), while others emphasise questions about legitimacy and substantive justice (external explanations). Theoretically, the authority of legal doctrines is grounded in their scientific capacity to demonstrate that norms are valid and legitimate, and so maintain their objective distance from subjective policies and opinions. The Schwarzenberger’s type of formalist doctrine seeks to show that WTO rules, which are initially based on state consent, can *a posteriori* direct the behaviour of WTO members irrespective of their interests (internal explanations). The other formalist variant aims to demonstrate that those WTO norms are grounded in an ‘international economic constitution’ (external explanations).

Thus, the authority of formalist doctrines lies in their contingent autonomy, since they are produced out of scientific examinations of the relatively clear and determinate content of WTO law and RTAs, and not just instrumentalise what states, or other powerful actors, do or intend. Indeed, there is a strong assumption that, once the rule of WTO law or RTAs is ‘correctly’ determined, its meaning and effects are readily identifiable. This relative determinacy of WTO law is a premise on which formalist analysis rests.

²⁹⁶ Schwarzenberger, 1955: 196-197; 1971: 3-5, 8; Koskenniemi, 2005: 192-193.

²⁹⁷ Schwarzenberger and Brown, 1976: 21-28.

2. The Functionalist View of Legal Doctrine of International Trade Law

The functionalist approach to doctrines of (contemporary) international trade law emerged in the 1980s with a group of lawyers enmeshed in a moment of radical transformations.²⁹⁸ This generation was mainly marked by the rise of neoliberalism, the end of the Cold War, the conversion of the GATT into the WTO, and the second wave of regionalism. These events renewed the possibility of reimagining a world economy ruled by (a universal) international law. The Dutch Pieter VerLoren van Themaat (1916-2004), in his treatise *The Changing Structure of International Economic Law* of 1981, proposed a revision of the Schwarzenberger's definition of IEL in light of the new contexts. His effort was followed by the German Norbert Horn and Ernst-Ulrich Petersmann, the Austrian Ignaz Seidl-Hohenveldern (1918-2001), and the American John Jackson and Robert Hudec (1934-2003).

Over time, John Jackson became known as “the greatest champion” of IEL for his extensive contributions.²⁹⁹ Jackson's classical work was an entry on the term *international economic law* in the *Encyclopaedia of Public International Law* of 1985.³⁰⁰ This definition was later employed in his masterpiece of 1989, *The World Trading System*, whereby IEL is not precisely characterised. Rather, a functionalist method is offered to identifying IEL rules and institutions, while avoiding the rigid demarcation between financial, monetary and trade law, and between international and domestic law. In contrast to the Schwarzenberger's (very narrow and detailed) definition, Jackson conceives IEL as “a very broad inventory of subjects: embracing the law of economic transactions, government regulation of economic matters, and related legal relations including litigation and international institutions for economic relations. Indeed, it is plausible to suggest that ninety per cent of international law work is in reality international economic law in some form or another.”³⁰¹ In this sense, international trade law is purposefully defined as a branch of IEL, whereas GATT/WTO law is conceptualised as the centrally organised system of trade law norms.

From a lawmaking viewpoint, Jackson argues that ‘practical’ needs of lawyers drive the choice of legal materials and techniques.³⁰² The doctrinal task consists of making use of

²⁹⁸ For an introduction to the functionalist approach, see D.W. Kennedy (1994a) and Charnovitz (2014).

²⁹⁹ Charnovitz, 2014: 620. See also Kennedy (1994a, 1995), Howse (1999), Thompson (2016), Broude (2016), Hufbauer (2016), Steger (2016), Horlick (2016), and Davey (2016).

³⁰⁰ Charnovitz, 2014: 620; Jackson, 1997: 25.

³⁰¹ Jackson, 1996: 18; 1997: 25.

³⁰² Ibid.

a “functional[ist] approach” to analysing policy objectives of establishing international trade law norms.³⁰³ A broad variety of scientific methods from distinct disciplines (*e.g.* economics and international relations) can be employed to objectively test whether a proposition is legally authoritative by evaluating empirical evidence and conclusions arising from both the economic forces shaping policy preferences and the common values and needs of the international society.³⁰⁴ This dual aspect of IEL – concrete politics/abstract normativity – is reconciled by imagining international trade law as a set of legal instruments for policy-making, which express, or must comply with, the consensual, interdependent values embedded in the constitutional economic legal order.³⁰⁵ Although the distinction between law and politics seems to collapse, Jackson removes subjective discretion, abstract formality, and political bias in doctrinal practice by conceiving that authoritative sources of law can be scientifically determined based on the verification of actual, effective, and imperative will of the majority of international economic actors, rather than on the preference of an individual state, or on the lawyers’ interest.

Concerning interpretation, Jackson’s functionalism adopts a policy style of conflicting considerations.³⁰⁶ Doctrinal analysis is carried out by a process of “balancing competing policy goals in contexts where each has considerable merit.”³⁰⁷ Rules, values, and functions can be weighted with effectiveness, the rule of law, and constitutional provisions, in order to produce an authoritative response.³⁰⁸ Lawyers’ work is to objectively identify within this vast universe of possibilities the international trade law norms that are not only internal to the legal order but also part of the social norms shared by the relevant community of international economic actors.³⁰⁹ This objectivity is attained by adopting multi-disciplinary methods and pragmatic attitude, while rejecting legal norms based on exclusive moral or political preferences of individual actors.³¹⁰ Once acknowledged their validity and legitimacy, these legal rules can enter into decision-making, and may determine the balance when weighting between competing norms and techniques, states’ values and preferences, and the needs for international cooperation.³¹¹ Jackson conceives his functionalist style as the ‘right’ approach to interpreting international trade law because it is able to scientifically determine among conflicting norms the one with legal character. Therefore, legal doctrines use multi-disciplinary methods to test whether such a norm

³⁰³ Jackson, 1997: 25-28; 2006: 37.

³⁰⁴ Jackson, 1996: 18-26; 2006: 46-47.

³⁰⁵ Jackson, 2006: 37; 2007: 6.

³⁰⁶ See *infra* notes 351-354, and accompanying text.

³⁰⁷ Jackson, 1997: 25-28; 2006: 145-151.

³⁰⁸ Jackson, 2006: 222-227 (constitutional thinking), 227-230 (rule of law thinking).

³⁰⁹ Jackson, Jackson, 2005: 6; 2007: 6-7; 2008: 451.

³¹⁰ Jackson, 1996: 19-20; 2006: 6, 46, 158, 205-206.

³¹¹ Jackson, 2005: 6; 2011: 189-191.

reflects both the changing conditions of international economic relations and the particular purposes of the global economic constitution.

Functionalism suggests that the authority of legal doctrines of international trade law is based on two premises. Methodologically, the validity and legitimacy of legal norms are determined through a scientific analysis of lawmaking and interpretation. Some lawyers seek to evidence the concreteness of WTO law by showing its function in a globally interdependent economy (external explanation). Others aim to demonstrate that the WTO law's empirical force rests on the material power of its members (internal explanation). While the former examines WTO rules as reflections of international economic relations, the latter analyses those norms as elements of policy-making processes of aggregating WTO members' preference. The functionalist methodology consists of approaching WTO law as an institutional instrument for the realisation of collective policymaking, values embedded in the constitutional order, or economic forces.

Theoretically, legal doctrines are depended on their scientific ability to evidence the responsiveness of international trade law to the realities of the world economy. Three main strategies are employed to examine the processes and objectives of WTO law.³¹² Some doctrines investigate the expanding scope of WTO disciplines to take account of either development promoted by economic globalisation or policy preferences of members with economic power. Others aim to widen the focus of doctrinal analysis to examine the growth and diversification of non-state economic actors in decision-making within and about WTO law. Finally, another strand studies questions about 'effectiveness' and 'efficiency' of legal rules leading up to reimagining WTO law as a managerial instrument for global trade governance.

The authority of functionalist doctrines rests on their 'valid' descriptions of institutional processes of decision-making in WTO law. Since they are constructed as objective and neutral recordings, legal doctrines have no normative authority over lawmaking and interpretation of WTO norms. Instead, their persuasiveness is restricted to inform and examine whether the relatively clear and determinate content of WTO rules or RTAs 'reflects' either state interest and values or political and economic forces. This relative determinacy of meanings, functions, and consequences of international trade law is a strong presumption underlying doctrinal analysis.

³¹² Lang and Scott, 2009: 610-611; Lang, 2011: 343-353.

3. The Limits of Mainstream Legal Doctrine of International Trade Law

Despite their differences, formalism and functionalism are often united within the IEL field by the shared understanding of legal doctrine as the universal science of international trade law. The mainstream approach assumes that legal doctrine is the product of (some kind of) scientific analysis. This implies that the historical, theoretical, and methodological contrasts between functionalism and formalism are experienced as mere ‘scientific variations’, ‘jurisprudential eclecticism’, ‘plurality of rationalities’, or just ‘multiplicity of methods’, all with a claim to be ‘the’ legal (doctrinal) approach. At the core, international trade law is imagined – I argue – as a universally accepted mode of institutionalised governance of international trade that is managed by legal and non-legal experts with the purpose of imposing formal and effective constraints upon sovereign discretion over policies and measures, while promoting a more peaceful world and economic welfare through interdependence.

The mainstream commitment to the notion of the science of international trade law aims to validate and legitimise its underlying programme that asserts the naturalness, necessity, or superiority of legal doctrines as a mode of legal decision-making over the world trading system. The promise of the mainstream approach is to empower lawyers to influence lawmaking and interpretation in WTO and RTAs by asserting the centrality of WTO law, the objectivity and neutrality of doctrinal analysis, and the authority of legal doctrine.³¹³ The first commitment of the mainstream approach is to defend the legitimate authority of international trade law over global governance by demonstrating the centrality and universality of the WTO as *both* a legal system for regulating state policies and behaviours, and as an institutional space for state interaction. The second commitment is to create and apply rules of and arguments about WTO law by carrying out doctrinal analysis. Finally, the mainstream commitment to presenting the IEL field as the only legitimate and authoritative voice capable of defending the science of international trade law against its inside ‘rebels’ and outside ‘detractors’.³¹⁴

The mainstream approach is applied to determine which norms and ideas count as (constituent of) international trade law, so as to ascribe them meaning as part of legal doctrines of WTO law that serve to support certain programme. For instance, as examined in section 2.F, the dominant legal doctrine has reached a relative consensus on the full

³¹³ This argument is inspired by Trubek and Esser (1989) and Schachter (1977) and draws from Lang and Scott (2009) and Lang (2011: chapter 8, 2014).

³¹⁴ Jackson, 2006: 227-230; Schachter, 1977: 223-226.

application of GATT Article XXIV to South-North RTAs, regardless of Article XXXVI:8 provides otherwise. Put differently, mainstream literature asserts that the majority of doctrinal analyses have found that Article XXIV is validly and legitimately applicable to govern South-North regionalism, while Article XXXVI:8 is not. This means that WTO law serves as instrument to assign authority to the contemporary legal doctrine. Thus, by conceiving doctrinal analysis as ‘scientific process’, the mainstream approach has sustained a consensus around the existing legal doctrine on GATT/WTO law of South-North RTAs as a *single, logical* and *universal* phenomenon.

As already introduced in Chapter 3, a new trend in literature has extensively criticised the mainstream approach for its philosophical limitations.³¹⁵ For the aim of my thesis, I highlight two critiques of mainstream literature’s (consciously or otherwise) commitments to *modernism* and *Anglocentrism* that seem to bear great explanatory power. It will become soon clear that the combination of these two features produces legal doctrines in a specific way that empowers and constrains the IEL field, impacting, in turn, the international trade law and governance of South-North regionalism.

(a) The Modernist Critique of Mainstream Legal Doctrines

The critique of modernism brings to the fore the argumentative structure embedded in the mainstream approach. A doctrinal analysis begins with a definition to *international trade law*, which is routinely presented upon five steps. It, first, assumes that international trade law is an immanent, unified, and distinct phenomenon that regulates all forms of trade norms. Second, international lawyers can scientifically isolate international trade law from other sociological and normative phenomena, to the extent that it bears the qualities of ‘objectivity’ and ‘universality’. Conversely, morality, politics, and economics are perceived as ‘subjective’, while domestic laws are regarded as local and international laws as holding distinctive substantive and procedural features. Third, lawmaking is at the same time unique and universal, which means that social norms are converted into legal norms only if they are subject to a ‘transcendental’ procedure discovered as capable of entailing authority to them. Fourth, after being recognised as international trade law, legal norms are regarded ‘as if’ they were a non-subjectivist resolution of value struggle and social conflict, and able to be rationalised as a part of a coherent and stable legal system. The result of this analytical work is a (relatively) conclusive and abstract *concept* of international trade law, which is

³¹⁵ See *supra* note 245.

often a specialised variation of the notion of *international economic law* as a universal, objective, and neutral body of legal rules and institutions that are created out of an immanent and authoritative process or source, and are validly justified and legitimately recognised by IEL subjects, who in turn accept to have their universal freedom (sovereignty) governed by those legal norms and regimes. The final step is to assert that WTO law is the only, or the most relevant, body of positive international trade law, which is *legitimately* and *validly* produced and can be *scientifically* interpreted.

These ontological and epistemological assumptions produce shortcomings and blind spots that often lead the mainstream approach to overlook how intra-expertise political and intellectual disputes impact legal doctrines on the international trade law and governance of South-North regionalism. This implies that, to produce a universal legal doctrine, mainstream literature often fails to take seriously into account *both* the ‘objective’ relations and the ‘subjective’ dimensions that are responsible for carrying out doctrinal analyses, which in turn structure and direct lawmaking and interpretation of rules and institutions of international trade law.³¹⁶ Put differently, the mainstream approach operates to empower the influence of international lawyers over decision-making in and over multilateral and regional trade regimes, while obscuring disciplinary bias and marginalising alternative ideas and practices within the IEL expertise. Therefore, the mainstream commitment to modernism requires the adoption, preceded or not by theoretical or historical reasons, of a universal concept of international trade law as the condition *sine qua non* to carry out doctrinal analysis. This restricts, in turn, legal doctrines of international trade law to the formalist and functionalist views that often support the programmes underpinning the concept chosen *ex ante*.

Chapters 1 and 2 illustrate the dangers resulting from the modernist style of approaching legal doctrine. Two shortcomings are particularly important. First, mainstream literature narrows the notion of international trade law to GATT/WTO law, accompanied or not by theoretical or historical justifications. The consequence is to impose a disciplinary boundary that disregards any (past or present) concept, theory, method, history, as well as rule, institution, or doctrine that is regarded as ‘unfitted’ into such narrow concept. Second, to reinforce this philosophical framing, the mainstream approach often works as an apologetic instrument for crafting valid and legitimate arguments about the application of GATT/WTO law (generally) and Article XXIV (in particular) to govern the making and interpretation of South-North regional trade agreements.

³¹⁶ D.W. Kennedy, 1999: 12; Lang, 2011: 172-173.

(b) The Anglocentric Critique of Mainstream Legal Doctrines

The second critique calls attention to the overwhelming Anglocentrism surrounding and embedded into the mainstream approach.³¹⁷ From geographical places to doctrinal debates to multiple sites of global trade governance, GATT/WTO law is frequently experienced within the IEL field as an Anglo-American phenomenon. Institutional settings such as the IMF, the World Bank, the Inter-American Development Bank, the Office of the US Trade Representative, and the Georgetown University, in the United States, as well as the European Bank for Reconstruction and Development, the British Foreign and Commonwealth Office and Department for International Trade, the London Court of International Arbitration, and the University of London in the United Kingdom, have been central to the formation and consolidation of legal doctrines on international trade law of South-North regionalism. Of course, the GATT/WTO, UNCTAD, WIPO, ICTSD, and the Graduate Institute in Geneva, the OECD in Paris, and the EU Trade Commission in Brussels have also played a key role; nonetheless, mainstream literature often represents these places as islands, or perhaps containers, of Anglocentrism elsewhere.

In fact, it feels overwhelmingly challenging and sometimes even impossible to engage with international trade law without delving into projects, theories, methods, histories, and doctrines about multilateralism and regionalism as conceptualised, promoted, and applied by the United States and the United Kingdom, or communicating in the English language. This suggests closeness between international lawyers' thinking and practice and their acceptance of an Anglocentrism. Thus, legal doctrines are often experienced as dominated by the Anglocentric vocabulary of concepts, ideas, and practices.

The Anglocentrism causes one to consider what kind of legal doctrine on international trade law of South-North regionalism would it be possible without resuming it to either the role of the US (mainly), the UK and EU (secondarily), and Japan in global and regional trade governance, or to the vernacular of legal rules, institutions, knowledge, and techniques developed and implemented in Anglocentric-inspired regimes for multilateral and regional trade law- and policy-making. The overwhelming majority of the contemporary doctrinal arguments and analyses, following either the formalist or functionalist view, seem to overemphasise what and how American and British, and to some extent 'Western' (trained) lawyers have done and written.³¹⁸

³¹⁷ Likewise, Anghie (2005), Gathii (2008) and Koskenniemi (2012a, 2012b, 2012c and 2013) show how Eurocentrism shapes international law, while Carvalho (2011), Pahuja (2011), and Orford (2015 and 2016) demonstrate the effects of Eurocentrism/Anglocentrism over international economic law.

³¹⁸ D.W. Kennedy, 1994a: 61; Charnovitz, 2014: 616-624.

For formalists, doctrinal analysis of international trade law has been ‘created’ by the 1940s generation led by Schwarzenberger. Despite its decline and almost disappearance in the 1970s, formalism was recently recovered mainly by the mainstream (European) literature in the form of international economic cosmopolitanism. For functionalists, doctrinal analysis was pragmatically ‘re-created’ by the 1980s generation. Today, functionalism is not only dominant within the IEL expertise but is also very influential in WTO law and governance as a result of its prominent role in fostering the formalisation and technicalisation of the multilateral trade regime. Therefore, mainstream literature seems to make a quite unbearable task to craft a persuasive and authoritative legal doctrine on the international trade law and governance of South-North regional trade agreement without adopting an Anglocentric perspective.

(c) The Modernist and Anglocentric Limits of Mainstream Legal Doctrines

I have argued so far that since 1947 the mainstream approach has limited how we conceive, historicise, theorise, craft, and apply legal doctrines of international trade law. Now, it is important that I be clear what I mean when I suggest the practical and intellectual impossibility to escape from its modernist and Anglocentric limits. Part of this has to do with the (objective) socioeconomic relations which structure the IEL field independently of lawyers’ mindset; and part with their (subjective) professional identities and intellectual habits, as well as the relationship between them. Put differently, what matters for the present argument is simply that the characteristic ways of conceiving and applying legal doctrines in the IEL field have an important (broader) effect on the choices that are made in the creation, elaboration, application, and interpretation of the international trade law and governance of South-North regionalism. More concretely, the rise of (what some have called) the ‘managerial mindset’ in the United States and United Kingdom in the 1980s, which spread out to the rest of world from the 1990s onwards, is a very important aspect of the reproduction, naturalisation, and legitimation of modernism and Anglocentrism that go on in and around the WTO regime.³¹⁹

The managerial mentality was involved in the formation and legitimation of the negotiation positions of the US and UK during the Uruguay Round, and so they have a significant influence over the change in the character of the GATT/WTO that led to the

³¹⁹ D.W. Kennedy, 2005: 4-6; Lang and Scott, 2009: 610-611; Lang, 2011: 252-254.

formalisation and technicalisation of its legal system.³²⁰ On the one hand, the formalisation empowered the IEL expertise (generally) and legal doctrines (specifically), to the extent that they were chosen as the valid and legitimate techniques to ensure, through the new dispute settlement body, an objective and neutral enforcement of WTO rules and trade concessions. This consolidated, in turn, a redistribution of authority and resources from the diplomatic community to the legal profession. On the other hand, the technicalisation was deepened as part of the strategy to use objectivity and neutrality of WTO law to constrain Members' discretion over trade matters. Specifically, policy sciences, notably neoclassical economics, were combined or translated in different ways into the IEL expertise so as to constitute a mode of legal governance, which marginalised trade diplomacy within the WTO governance.

The Anglo-American style of trade managerialism has entailed transformations in the WTO regime and the IEL field. The colonisation of the WTO governance by managerial governmentality reveals a tendency towards the dominance of characteristic modes of legal governance, which can be described as institutionalised processes of administering and balancing trade problems through formal-technical reasoning and objective and neutral solutions.³²¹ This trend was reflected in the empowerment of legal doctrines and the WTO Dispute Settlement Body, and in the attempted depoliticisation of lawmaking and interpretation. In this world of Anglo-American managerialism, trade decision-making shifted from diplomatic conflicts settled down through politics towards disputes solved by legal rules and a modernist style of legal governance.

Running in parallel, the infiltration of managerial mindset into the field of international economic law in the 1980s entailed pervasive effects. This began with the effort to combine formalisation and (policy-science) technicalisation by reworking legal knowledge and techniques. Specifically, the mainstream approach to legal doctrine was reformed through the lens of functionalism, in order to conceive international trade law as an instrument for trade policy. This move allowed international lawyers to sometimes borrow directly from policy disciplines, and sometimes try to appropriate ideas and techniques of other expert domains by translating them into legal expertise. The effects of managerialism went on in and around the IEL field causing a progressive change of its professional identity. Reflecting the influence of the Anglo-American legal community, lawyers reimaged themselves as 'legal experts'³²², participating in the reconstruction and administration of the world trading system. They rethought world trade as increasingly covered in international

³²⁰ Lang, 2011: 252-254.

³²¹ Ibid.

³²² Lang and Scott, 2009: 611.

law, and so increasingly governed by legal experts.³²³ Yet, IEL expertise was not the only technocratic domain in global trade governance. It had to compete among other professional fields to become the prevalent and most influential expert mode of governance in the WTO regime.

C. Towards a Socio-Legal Approach to Legal Doctrines of International Trade Law

In an attempt to address or avoid some of the predispositions, limitations and blind spots inherent to the mainstream approach to legal doctrines of international trade law, I provide below the contours of a socio-legal approach grounded in four strategies. The ultimate purpose is to rethink the legal doctrine of international trade law and governance of South-North regionalism through the novel lens offered by the proposed alternative.

1. Redrawing Doctrinal Boundaries: From Doctrine to History

The first strategy purports to redraw the doctrinal boundaries of international law of economy (generally) and trade (in particular). The task is less about widening the scope but more about refocusing the doctrinal analysis. The aim is to understand the ways in which norms, regimes, histories, projects, ideas, and practices have been ‘discovered’ or ‘determined’ as belonging to international economic law and governance, while the ‘rest’ as ‘found’ not to. Part of this effort consists of retelling institutional and jurisprudential stories as proposed in section 3.C.1, in light of a more comprehensive historical frame. The other part is to historicise decision-making inside and outside the IEL field so as to bring into the fore the contingent justifications and choices for inclusion and exclusion of the main constitutive features of legal doctrines. Thus, the purpose is not only to prevent the uncritical application of the mainstream approach to legal doctrines, but also to understand their constraining and empowering effects on the IEL expertise and global economic governance.

To avoid overlooking the dynamics of differentiation, dominance, and marginalisation, I suggest moving beyond the narrow concern of mainstream literature on legal doctrines with either positive norms (formalism) or authoritative processes

³²³ D.W. Kennedy, 2005: 1.

(functionalism). Instead, I propose to refocus our attention to legal doctrines on understanding their constitutive features. These structural elements are found (implicitly or explicitly) entangled in each doctrinal framework. Nonetheless, they can be intellectually organised in three domains of projects, norms, histories, ideas and practices. This means that the separation is merely heuristic, since each domain shapes and, at the same time, is shaped by the others. By unravelling these intertwined domains, I seek to understand their individual influences over the formation, validation, legitimation, and application of legal doctrines of international trade law. In turn, this analytical task will illuminate what is at stake when international lawyers uncritically apply the dominant legal doctrine to affect decision-making of South-North regional trade agreements within WTO governance.

The domain of (what I call) *ideational programmes of international political economy* aims to shed light on the abstract options and concrete choices made by international lawyers concerning with the meaning and *telos* of global governance, trade regionalism, and economic development that are embedded into legal doctrines. It seeks to emphasise the contextual interaction between normative, theoretical, and methodological ideas as well as the social and material conditions that frames the contingent range of possibilities for imagining legitimate goals and valid forms of ordering international trade. The choice of those goals and forms entails a disciplinary commitment to specific understandings of what should be achieved through trade; how international trade law and governance should be used to attain it; how economic, political, and normative outcomes and processes should be described and evaluated; who has the authority to decide about the distribution of benefits, burdens, and consequences.

More concretely, I propose to foreground and challenge the ideational programme of international political economy embedded into the dominant legal doctrine on the WTO law of South-North regionalism. On the one hand, this doctrine conceives South-North regional trade regimes as institutional instruments for the development of a free and fair market among partners through reciprocal bargaining of trade concessions and policies. On the other hand, it assumes that the WTO is the guardian of the world trading system, the ultimate mechanism for regulating international trade. The consequences are that mainstream literature not only narrows the ideational debate to the dichotomy between (utopian, non-discriminatory) multilateralism and (apologetic, preferential) regionalism, but also naturalises it within the IEL field. Thus, lawyers routinely experience WTO law as either an ‘institutional instrument’ or a ‘body of legal norms and processes’ devised for constituting a global free and fair marketplace through the purposeful balancing of multilateralism and regionalism.

The other dimension relates to the pattern of institutional ideas and practices involved in international trade law and governance. This opens the possibility to examine the existing institutions of multilateral and regional trade regimes in order to identify the repertoire of (more or less credible) design choices³²⁴ and (more or less acceptable) social and economic constraints³²⁵ faced by international lawyers. In this sense, concrete arrangements and abstract models are analysed so as to unveil the set of institutional alternatives available throughout the decision-making of inclusion and exclusion leading up to present-day WTO and RTAs. Specifically, I suggest that the dominant legal doctrine idealises the WTO as a universal institution, from which a model for South-North regional trade regimes is rationalised. As the doctrinal referent for designing RTAs, the WTO lends credibility to ideas and techniques that draw from it, while alternative norms, theories, and methods that depart from or contest it are marginalised.

For instance, the debate about “narrow mandate and broad mandate” assumes the WTO as the institutional benchmark for classifying policy coverage of RTAs into two groups called WTO+ and WTO-X. The RTA provisions that fall under the mandate of the WTO are qualified as WTO+ (*e.g.* manufacturing goods, agricultural goods, and GATS services), whereas WTO-X relates to provisions that fall outside the mandate of the WTO (*e.g.* competition policy, anti-corruption, and labour regulation).³²⁶ Therefore, the study of (what I call) *institutional visions of international trade governance* opens the possibility to cast doubt on the consensus around the WTO as a natural, necessary, or superior regime for institutionalised management of inter-state trade.

The last domain is composed of (what I call) *jurisprudential views of international trade norms and processes*. It focuses on the vocabulary of concepts, norms, stories, projects, theories, and methods, that constitutes legal doctrines of international trade law. Specifically, it emphasises the political and intellectual processes of selecting-discounting, negotiating, and formalising rules, ideas, and practices as South-North regional trade agreements. I assert that the policies, provisions, and institutions established in these RTAs are highly similar to the ones under the WTO agreements. This is partly because of the constitutive, substantive, procedural, and informative effects of GATT Article XXIV on RTA-making. Partly also because international lawyers employ the same IEL expertise developed for the WTO to conceive, debate, craft, and manage RTAs. And part, finally, because RTAs must be notified, and eventually assessed or challenged before the WTO’s CRTA and DSB on the grounds of WTO law. Hence, by questioning the jurisprudential

³²⁴ For example: membership, scope, centralization, formalisation, control, and flexibility.

³²⁵ For instance: efficiency, equity, distribution, and uncertainty.

³²⁶ WTO, 2011: 128-131.

consensus, it is possible to broaden the horizons of possibility to rethink the legal doctrine on the WTO law and governance of South-North regionalism in distinct terms from the mainstream, mindset dichotomies between regulatory and jurisdictional coherences and conflicts, power-oriented and rule-oriented regimes, diplomatic and juridical ethos, and, finally, between functionalist and formalist thinking and reasoning.

Chapters 1 and 2 demonstrate that present-day legal doctrine on the WTO law and governance of South-North regional trade regimes is described, analysed, and justified by a constitutive vernacular of norms, concepts, stories, theories, methods, and arguments. The way this vocabulary is ‘spoken’ and ‘practised’ by international lawyers when negotiating, designing, and implementing RTA does a great deal of work in embedding into them the ideational programme, institutional vision, and jurisprudential view that are dominant in both, the IEL field and WTO governance. How South-North RTAs are thought, made, and interpreted through the lens of Article XXIV imposes from the outset the centrality, necessity, and persuasiveness of the WTO as an authoritative blueprint for economic development; as a legitimate model for institutionalised governance of free and fair marketplaces; and as a credible system of legal rules and principles. In this respect, that legal doctrine should be understood as a shared framework of positive and non-positive norms and processes, which serves as an expert medium of communication about the WTO law and governance of South-North regionalism. It is through such a coherent and stable framework that RTAs are thought, communicated, and practised. Put differently, if international trade law is about legal norms or processes for regulating trade policies and behaviour, legal doctrines select and articulate the ‘whats’, ‘hows’, and ‘whys’ concerning these norms or processes.³²⁷

Any attempt to reimagine South-North regional trade agreements through international trade law would require the reworking of its background legal doctrine. This disciplinary endeavour would begin by according primacy to (present or past) norms, regimes, knowledge, and practices that are excluded from the dominant legal doctrine for not fitting within its framework. This might lead to the reconceptualisation and repositioning of international trade law with regard to the ‘rest’ of international economic law. Also, the hierarchical relationship between the WTO and regional trade regimes might be contested and levelled in light of lessons from and experiences of ‘other competing’ international regimes for trade cooperation. These efforts would open the possibility to recover and accommodate a broader or distinct range of questions, projects, stories, concepts, ideas and techniques related to RTAs that are marginalised for falling outside WTO law and the IEL

³²⁷ Smits, 2015: 8-10.

expertise. In Chapter 7, I propose a case study that examines the GATT law of South-North regionalism through my proposed notion of legal doctrines. This alternative conception allows a more comprehensive understanding of postwar international trade law and governance, which were characterised by normative heterogeneity, institutional experimentalism and jurisprudential innovation. My ultimate aspiration is, therefore, to offer new avenues for rethinking South-North regionalism so as to enable the formation of alternatives to present-day legal doctrine.

2. Endogenising Legal Doctrine: a Contestation of the Centrality of International Trade Law

Drawing from the argumentation offered in section 3.C.2 for endogenising history³²⁸, I propose to approach the rise, decline and fall of legal doctrines on international trade law and governance of South-North regional trade regimes as (part of) the formation and development of the field of international economic law and as (part of) the (re)construction and transformations of global governance and world trade.

As examined in section 4.A.2, mainstream scholarship has approached legal doctrines from two distinct angles. On the one hand, lawyers committed to functionalism conceive legal doctrines as instrumental expressions of either state consent and interest or political and economic forces.³²⁹ Legal doctrines are understood as valid descriptions and analyses of institutional processes of decision-making in international trade law. For instance, legal doctrines on the WTO law and governance of South-North RTAs are perceived by functionalist lawyers as normatively irrelevant, to the extent that they either serve to inform the substantive and procedural rules of Article XXIV (at best) or bear no significant meaning (at worse), since the ill-designed Article XXIV deprives them of any authority. Thus, their persuasiveness is restricted to the communication and examination of the relatively clear and determinate contents, meanings, functions, and consequences of Article XXIV in light of GATT/WTO members' preferences, international constitution of economic order, or global economic interdependence.

On the other hand, lawyers pledging to formalism understand legal doctrines as possessing a relative normative autonomy.³³⁰ While certain legal doctrines may be

³²⁸ This approach is in debt to the work of D.W. Kennedy (2005 and 2016), Lang and Scott (2009), Koskenniemi (2011) and Roberts (2017).

³²⁹ See section 4.B.1.

³³⁰ See section 4.B.2.

acknowledged as “teachings of the most highly qualified publicists,” or even embodied into “judicial decisions,” pursuant to Articles 3.2 and 7 of the DSU, and so enjoying binding force derived from formal sources; the persuasiveness of the vast majority rests on their contingent autonomy, which results from valid descriptions produced through the scientific examination of relatively clear and determinate content of WTO law and RTAs. Some formalist lawyers adopt a narrow understanding of legal doctrines, which limits the scope of doctrinal analysis to the text of the WTO and regional trade agreements, whereas others include the examination of additional sources ranging from WTO case law only to the (disputed) list of subsidiary sources provided in DSU Article 3.2. Once the rule of WTO law or RTAs is ‘correctly’ determined through doctrinal analysis, its meaning and effects are assumed to be readily identifiable. This relative determinacy of international trade law rules and institutions is a premise on which doctrinal analysis rests.

I propose to depart from the mainstream approach to legal doctrines so as to replace it with a socio-legal approach that opposes a purely functionalist and a purely formalist view. On the one hand, the socio-legal view shares with functionalism the understanding of legal doctrines as instrumental manifestations of state consent or political-economic forces. On the other hand, it sides with formalism on the relative autonomy of legal doctrines, although on different grounds. As shall be clear as this and next sections progress, legal doctrines are not regarded as independent by their transcendental nature or theoretical presupposition of the IEL field, states, or a wider social-economic context. Instead, the autonomous validity and legitimacy of legal doctrines are asserted and sustained through specific forms of mutually constitutive interactions between the IEL expertise and the other domains of global trade governance. The socio-legal approach opens, therefore, the possibility to rethink legal doctrines of international trade law. While the next section re-examines the conditions for their construction and application, this section focuses on their role inside and outside of the field of international economic law.

I start by moving away from mainstream understanding that defines legal doctrines as valid and legitimate (non-positive) arguments about objective law resulting from some sort of scientific analysis carried out by apolitical and impartial lawyers in a de-contextualised, ‘laboratorial’ place. As examined above, mainstream literature generally acknowledges the existence and relative importance of the IEL field and the doctrinal work of lawyers in the making and interpretation of international trade law. However, I shall argue that the way their concrete functions and interactions are theoretically and methodologically conceived leads the mainstream views to intentionally bracket the

influence of the IEL expertise (generally) and legal doctrines (in particular) over legal decision-making in global trade governance.

To understand how that conventional understand is (re)produced, my strategy is to examine the premises and effects of the centrality of international trade law, one of the core commitments underpinning the mainstream approach.³³¹ Conventional literature asserts that international trade law is a *central* institution for governing world trade.³³² This legal fiction is built on an idea of international trade law as a special body of universal, superior, and objective norms or processes applicable to all legal subjects regardless of their (subjective) will, formal particularity, or socioeconomic inequality. In other words, the centrality of international trade law lies in ‘demonstrating’ its *universality*, *supremacy*, and *objectivity* vis-à-vis the ‘rest’ of law or ‘other’ forms of global trade ordering.

Universality is the idea of a world governed by a *single* legal corpus. There are distinct justifications for a universal international trade law, which can express formalist and functionalist theories as well as institutional and jurisprudential stories.³³³ For instance, formalist doctrines make use of normative criteria of validity (*e.g.* Schwarzenberger’s power politics or moral preferences) to justify the dominance of international trade law, whereas functionalist doctrines reason its ascendancy over the other legal domains grounded on sociological criteria of validity (*e.g.* effective applicability or Jackson’s factual acceptance of international economic constitution).³³⁴

Distinctively, supremacy conceives a world governed by a normative plurality in which the legal system is the *ultimate* authority. By imagining global trade governance as ruled by competing forms of decision-making expertise or by fragmenting normative orders, the idea of superiority is employed to ‘find’ a single and universal hierarchy of ‘authoritativeness’ so as to place international trade law at its top and the other domains of trade policy- and norm-making downward the ladder. This hierarchisation is often described as either static degrees of ‘formalisation’ or a continuum process of ‘institutionalisation’ from (subjective and non-binding) social norms to (objective but non-binding) ‘soft’ law, and then to (objective and binding) ‘hard’ law.³³⁵

³³¹ See sections 4.A.2 for the shared mainstream assumptions, and sections 4.B.1 and 4.B.2 for their respective formalist and functionalist variations. See also Picciotto (2005: 479-481).

³³² This argument is inspired by the work of Trubek and Esser (1989: 7-8), Koskenniemi (2005: 513-515) and Pahuja (2011: 26-30).

³³³ For history-based justification of universalism, see section 3.B.3, while for theory-based reasoning, see section 4.A.2.

³³⁴ Koskenniemi, 2005: 513-515; Roberts, 2017: 8-9, 21-22.

³³⁵ See generally Trubek, Cottrell, and Nance (2006), and Shaffer and Pollack (2010, 2013).

Objectivity paints a world as a complex social phenomenon governed by multiple regimes and polycentric sites intertwined with a global normative pluralism, all with varying degrees of authority and institutionalisation. What makes a specific body of norms international trade law is a *special* quality that allows it to be objectively ‘identified’, ‘categorised’, ‘systematised’, or ‘analysed’ regardless of one’s moral belief, political preference, or intellectual commitment. The core of the objectivity claim consists of understanding international trade law as ‘law’ because its rules and institutions arise as social processes of decision-making.³³⁶ Although there are jurisprudential variations in their explanations for what that ‘social processes’ is³³⁷, formalism and functionalism commonly agree that concreteness and normativity are necessary and sufficient conditions for international trade law’s objectivity.³³⁸

These three assumptions provide the justification of the centrality of international law in global trade ordering.³³⁹ The validity of the centrality claim depends on segregating (objective) legal norms from (subjective) political, moral and expert opinions, which also includes excluding the influence of the IEL field (generally) and legal doctrines (in particular). This ideal is operationalised in the form of two legal fictions. On the one hand, the values enshrined in legal rules and institutions are conceived ‘as if’ they are coherent and/or unproblematic. On the other hand, the law is regarded ‘as if’ it drives itself legal decision-making towards the realisation of its own natural or logical truth or teleology.³⁴⁰ Thus, the mainstream approach brackets, or even denies entirely, the influence of legal doctrines over the production or interpretation of international trade law (generally) and the GATT/WTO law of South-North regionalism (in particular).³⁴¹

Grounded in the move from *positive norms* to *differentiated expertise*³⁴², I suggest approaching international trade law as (part of) a transnational field, and legal doctrine as an *expert mode of legal governance*. In this sense, international trade law is *neither* equated to GATT/WTO law *nor* a special body of positive rules and institutions. Rather, it is regarded as a way of thinking, reasoning, and applying these norms, regimes, or techniques. Similarly, legal doctrines are *neither* ‘functionalist recordings’ *nor* ‘formalist descriptions’. Instead, they are regarded as stable and coherent frameworks for legal decision-making over particular areas or issues of international trade. Part of their collective work is to build

³³⁶ Koskenniemi, 2005: 513-515.

³³⁷ See sections 4.B.1 and 4.B.2.

³³⁸ Koskenniemi, 2005: 513-515.

³³⁹ Ibid.; Trubek and Esser, 1989: 7-8.

³⁴⁰ D. Kennedy, 2014: 114-115.

³⁴¹ See sections 4.B.1 and 4.B.2.

³⁴² See section 3.C.2.

consensus around international trade law as objective, universal, and superior body of legal norms and institutions, in order to employ the authority generated through this process to determine its position in relation to the ‘rest’ of the domain of law and to ‘other’ areas of international trade policy-making.

If international trade law is understood as a transnational field, legal doctrines are conceived as produced and applied in distinct contexts based on a valid vocabulary of projects, history lessons, theories, methods, rules and institutions, in order to achieve legitimate purposes. Amongst their functions, some strategic uses of legal doctrines to deal with worldwide issues have become part of the disciplinary common-sense. My particular emphasis is on their use as another technique for controlling the expansion and contraction of international trade law’s boundaries. They are tactically employed to constitute and structure the continuous process of decision-making and consensus-building that undergirds the political and intellectual dynamics of differentiation, dominance and disruption both inside and outside the IEL field.³⁴³ By ‘finding’, ‘describing’, and ‘systematising’ what counts or not as (part of) international trade law in a way that constructs and reinforces its centrality in the world trading system, legal doctrines contribute significantly to the IEL field’s control of its boundaries by giving concrete application to the centrality claim.

More concretely, international trade law is different from other social norms because of its norms and processes hold three special features. The claim to *objectivity* asserts that there is a qualitative difference between the (objective) law and (subjective) opinions, policies, and measures of international trade. The objective criterion operates as a disciplinary tactic for legitimising and validating the normative frontiers drawn by the IEL expertise. This is followed by the claim to the *supremacy* of the rule of international trade law. This premise is grounded in the ‘finding’ that social processes produce two qualitatively distinct norms, objective (superior) or subjective (inferior). The objectivity criterion determines whether a certain norm is ‘legal’ by examining concrete processes of lawmaking and interpretation. Law is then ‘acknowledged’ as a singular corpus of legal norms. The *superiority* criterion lends to legal doctrines not only the authority to exercise control over which sources and procedures produce (objective and superior) legal norms, but also to determine how they relate to other (inferior) forms of (subjective) social orderings. Finally, the claim to *universality* serves to differentiate international trade law from other realms of law itself. The role of legal doctrines is to instrumentalise history lessons, theories, and methods so as to choose and justify out of the broad range of social norms the rules and regimes holding those special features required to be (part of)

³⁴³ See *supra* note 258, and accompanying text.

international trade law, and so holding the exclusive authority to regulate the international trading system. In this sense, doctrinal frameworks are used to draw the international trade law's frontiers inside and outside the domain of law and policy.

My understanding is that the commitment to centrality entails powerful effects on international trade law. Its assumptions are enabled by legal doctrines to exert control over disciplinary boundaries at three different dimensions. Each of them involves constructions of dichotomous categories and fictions, and their use to determine and justify 'what is' and 'what is not' international trade law: universality versus particularity, singularity versus plurality, superiority versus inferiority, and objectivity versus subjectivity. More concretely, the legal doctrine on the WTO law of South-North regionalism reformulates these dichotomies as, for instances, (universal) WTO versus (particular) RTAs, (singular) multilateralism versus (plural) regionalism, (superior) WTO rules versus (inferior) RTA-rules, and (objective) WTO law versus (subjective) WTO members' policies and measures, including RTAs. In this sense, legal doctrines are implicated (directly) in enabling the use of legal assumptions, categories and fictions to support the IEL field's borders, and (indirectly) in shaping the relations of differentiation, dominance, and disruption within the law, and between law and other domains of international trade.

Part of the persuasiveness of the centrality commitment is due to the use of legal doctrines to erase the IEL field's own influence.³⁴⁴ Specifically, the mainstream approach seeks to make legal assumptions, categories and fictions appear natural, necessary, or transcendental, while bracketing the role of legal doctrines in their construction and operation. This erasure is in large measure achieved by the disciplinary effort to validate and legitimise a consensus around the WTO as an objective, superior, and universal law for governing international trade. Particularly, the claim to be 'international trade law' is employed by legal doctrines to separate the IEL field from others, while denying their own work as part of boundary-drawing and consensus-building. Thus, I argue that part of the legal doctrines' authority resides in 'bracketing' and 'denying' their role in legal decision-making with the aim of 'immunising' their outcomes against disconfirmation and critiques.

³⁴⁴ This argument is inspired by Pahuja's use of the Derrida's idea of 'cutting' (2011: 26-27).

3. Breaking up with Modernism: a Contestation of the Science of International Trade Law

My strategy is to depart from the modernist commitment to objective, impartial, and universal ideals of doctrinal analysis, to the extent that it often leads to the instrumentalisation of histories and projects, theories and methods, norms and regimes to support particular programmes for international trade law and governance. This means to resist to our professional and intellectual habit to conceive legal doctrines as outcomes of ‘objective’ and ‘impartial’ examinations of the validity or legitimacy of GATT/WTO rules, judgements, and arguments. To do so, I suggest rethinking the commitment of the mainstream approach to the modernist science of international trade law.

Modernism is the most influential and long-lasting philosophical paradigm³⁴⁵ in present-day IEL expertise. Since World War II, it has provided the normative, theoretical and methodological tenets that shape our understanding of how international trade law is made and interpreted within global economic governance. As discussed below, its central assumptions underpin specific common-sense ideas of the nature and functions of doctrinal analysis. Most legal and non-legal professionals as well as laypersons, regardless of intellectual or political allegiance, perceive international trade law as portrayed by modernism. I begin by calling attention to the second commitment of the mainstream approach that is to the view of legal decision-making as an outcome of doctrinal analysis carried out by international lawyers. This will be followed by an examination of the modernist conception of doctrinal analysis. In conclusion, I will propose an alternative way to conceive doctrinal work.

Inspired by modernism, international trade law is (understood as) created, interpreted, transformed, and repealed through neutral and objective descriptions and evaluations (which I have called doctrinal analysis) undertaken by impartial and rational lawyers. This mainstream understanding of doctrinal analysis underpinning lawmaking and legal interpretation produces two complementary fictions (legal objectivity and impartiality).³⁴⁶ As examined in the previous section, international trade law is conceived as

³⁴⁵ Thomas Kuhn explains that *philosophical paradigms* are the strong, general consensus achieved within an expert community around theoretical, ethic, ontological, epistemic, epistemological and methodological assumptions and techniques (2012).

³⁴⁶ Picciotto, 2005: 479-481. For the mainstream understandings of doctrinal analysis, *see supra* notes 289-297 (Schwarzenberger’s formalist view) and 302-311 (Jackson’s functionalist views), and accompanying texts.

an objective (or transcendental) reality that can be discovered, apprehended, and translated into a doctrinal language. To do so, lawyers are portrayed as rational experts in law who are both independent of the object of analysis and essentially, or at least sufficiently, unconstrained by political, moral or intellectual influences. The result is an imaginary that canvasses lawmaking and interpretation as no more than ‘objective’ routines through which ‘the’ international trade law is found by apolitical and rational lawyers. Put differently, doctrinal analysis is understood as science of international trade law, whose ultimate purpose is to reveal its governing truth (*e.g.* historical, economic or technological development, rule of law, constitutional values, collective or individual will, economic function, efficiency).³⁴⁷

Despite that mainstream consensus around the general idea of doctrinal analysis, its specific features vary according to jurisprudential views. Formalism conceives doctrinal work as a ‘scientific’ methodology for providing ‘valid descriptions’ of ‘social processes’ underlying the production of international trade law. This involves identifying the ‘social facts’ (*e.g.* rules, institutions, and conducts); determining their legality or lawfulness against a body of positive (*e.g.* GATT/WTO or RTA) law; and, rationalising them as a legal system, and assessing ‘correctness’ of international trade law. Functionalism defines doctrinal labour as a ‘scientific’ methodology for providing ‘valid descriptions’ of ‘social processes’ underlying the authoritative decision-making in global trade governance. This includes identifying the ‘social facts’ (*e.g.* norms, regimes, policies, measures, and behaviour); assessing them by an anterior criterion of authority, effectiveness, common values and needs, and economic functions; rationalising them as part of a legal system; and, evaluating policy- and rule-based alternatives to achieve legitimate objectives.³⁴⁸ The mainstream approach acknowledges, therefore, that the authority of legal doctrines rests on the combination of an accurate description of those ‘social processes’, a scientific evaluation of legal norms or processes against a pre-determined criterion, a valid rationalisation of the legal corpus, and a persuasive argumentation leading up to an objective and neutral conclusion.

The participation of international lawyers in global trade decision-making is perceived as realised through the IEL expertise (generally) and doctrinal analysis (in particular). The mainstream approach asserts that the authority of the IEL field is often exerted in lawmaking and legal interpretation through doctrinal analysis. Its influence is, in turn, conditioned by the modernist commitment to objective methodologies, political

³⁴⁷ D. Kennedy, 2014: 114-115.

³⁴⁸ Koskenniemi, 2005: 220-221.

impartiality, and moral and intellectual neutrality. The particular way these scientific features are embedded into and employed through doctrinal work is dependent on the prevailing jurisprudential view. The application of doctrinal analysis to lawmaking has been viewed with some scepticism by the majority of mainstream literature. The central reason is the uneasy effort to conciliate the (value-laden and political) process of creating new law with objectivity and impartiality.³⁴⁹ To legitimise their ‘legislative’ role, international lawyers are imagined as apolitical professionals equipped with an (almost) exclusive expertise that entitles them to analyse objectively norms, policies, values, interests, and facts against a valid and legitimate criterion, based on which ‘legal’ rules and institutions are produced out of authoritative sources or processes. A norm or regime is acknowledged as ‘legal’ if it arises from an objective reality named as ‘source’ or ‘process’.

The doctrinal work in international trade lawmaking begins by ‘discovering’ and ‘examining’ social facts in order to determine which of them is a source or process of legal authority that exists independent of lawyers’ moral, political or intellectual preferences.³⁵⁰ The next step is to objectively ‘describe’ and ‘analyse’ the legal phenomenon without influencing it or being influenced by it. However, mainstream literature has never reached a consensus on which facts count as ‘objective reality’ in global trade governance. This means that the ‘descriptive’ task of international lawyers does not flow automatically from ‘the facts’ but rather rests on choosing a (functionalist- or formalist-inspired) concept to assist in their identification. For instance, international trade law can be objectively found in Schwarzenberger’s formal notion of law as rules consented by sovereigns or Jackson’s functionalist idea of law as rules of an international economic constitution. Consequently, the participation of lawyers in international trade lawmaking is somehow shaped by the need to make anterior jurisprudential choices, which structure, in turn, their doctrinal analysis.

In contrast to lawmaking, legal interpretation does not raise as much suspicion in mainstream literature. There is a broad consensus on the virtues of using doctrinal analysis to scientifically identify and apply international trade law. To ensure the neutrality and objectivity in legal interpretation while uncovering hidden moral or political bias, the mainstream approach is employed to examine the validity and legitimacy of the relationship among legal rules and institutions and the application of these norms to concrete facts. Since the end of the 19th century, legal expertise has produced three ‘scientific’ styles of legal interpretation that have been adapted into a broad portfolio of ‘legal methods’ by an

³⁴⁹ Schachter, 1977: 219-226.

³⁵⁰ Penner and Melissaris, 2012: 240-249; Koskenniemi, 2005: 220-221; Douzinas and Warrington, 1991: 74-75.

eclectic variety of jurisprudential projects: the conceptualist style of inductive/deductive reasoning, the teleological style of purposive reasoning, and the policy style of conflicting considerations reasoning.³⁵¹

These styles are singularly or jointly employed to interpret international trade law, in order to apply abstract rules to particular facts, find the correct rule applicable between ambiguous norms, fill a gap or solve antinomies, and introduce new principles or policies into considerations.³⁵² For instance, Schwarzenberger's inductive method seems to be a hybrid of teleological and conceptualist styles of reasoning about international trade law, whereas Jackson's functionalist method appears to adopt a policy style of conflicting considerations.³⁵³ Thus, despite their particular differences, international lawyers believe (or at least pretend to) that is possible through doctrinal analysis to reach a value-free and objective outcome by correctly identifying the valid and legitimate source/process from which international trade law drives itself the legal interpretation towards the realisation of its own truth.³⁵⁴

The mainstream commitment to the science of international trade law has been criticised in recent literature. For the purpose of this study, I propose to rethink doctrinal analysis through the critiques to the modernist science of law. In the remainder of this section, I take aim at objectivity and impartiality in doctrinal analysis, while the next section focuses on universalism. In so far, I have shown that the consensus within the IEL field is that the superior authority and legitimacy of legal expertise (generally) and legal doctrines (specifically) in the context of global trade decision-making reside in their modernist commitment to a scientific process of lawmaking and legal interpretation. The scientific ideal conceives doctrinal analysis as capable of immunising legal thinking, reasoning, and practice against subjectivity, discretion, and unpredictability associated with moral beliefs, intellectual preferences, professional interests, and political pressures. Two legal fictions support this conventional understanding of legal doctrine: objectivity and impartiality.

³⁵¹ See generally D. Kennedy (2014).

³⁵² Ibid. at 92-98.

³⁵³ See *supra* notes 291-297 (for Schwarzenberger's inductive method) and 307-311 (for Jackson's functionalist method), and accompanying text.

³⁵⁴ D. Kennedy, 2014: 114-115.

(a) Objectivism in Doctrinal Analysis

As examined above, the mainstream approach assumes that doctrinal analysis is equipped with scientific methods capable of uncovering the objective reality that structures the process of legal decision-making in the world trading system. This presupposes that the world trading system as a self-evident reality that can be externally approached in order to be observed, described, and evaluated independently of the mindset of lawyers living in that social context.³⁵⁵ As intuitive as this objectivist explanation appears to be at first glance, it has serious inadequacies. The problem is that the reality that constitutes the world trading system does not appear automatically. Instead, it requires lawyers to find and choose *ex ante* doctrinal frameworks in order to approach it. For instance, to answer the conventional question ‘what are the legal norms governing the world trade system?’, Schwarzenberger and Jackson offer distinct doctrinal solutions. While Schwarzenberger proposes to approach the world trading system through the doctrinal lens of legal sources, Jackson suggests approaching it by undertaking a doctrinal analysis of values and needs shared by international society.

However, the choice of doctrinal reference cannot be assessed against an anterior criterion offered by a specific doctrinal framework, because accepting such standard will already assume that a decision is made.³⁵⁶ The impossibility to determine prior to the doctrinal analysis itself what constitutes the relevant reality demonstrates the lack of consensus on the ‘true nature’ of the world trading system. If there is no agreement on what counts as ‘transcendental realities’, the legal fiction that it is possible to produce objective descriptions, against which the correctness of legal doctrines can be verified, lacks validity and so persuasiveness. Consequently, the choice of doctrinal frameworks results from the international lawyers’ contingent discretion. Their decision cannot be made based on an ‘objective reality’ but only by comparing among jurisprudential views and legal doctrines accepted within the IEL field.

This philosophical inconsistency of modernism affects the mainstream approach in multiple ways. Two explanatory failings are particularly relevant for changing our shared understanding of lawyers’ role in making and interpreting international trade law. As examined above, the first step of doctrinal work is to objectively identify the ‘social reality’ in order to produce a valid description. Since there is no disciplinary consensus on what

³⁵⁵ Bourdieu, 1990: 124; Wacquant, 1992: 7-8; Lang, 2011: 172-173.

³⁵⁶ Koskenniemi, 2005: 220-223; Lang, 2011: 172-173.

count as ‘objective reality’, a choice of doctrinal frameworks becomes a condition *sine qua non* for carrying out the descriptive task. “Here lies the indeterminate character of modernism.”³⁵⁷ Lawyers can select out of a range of legal doctrines offered by the IEL expertise. This decision is obviously not unconstrained, but often limited to mainstream doctrines grounded in functionalism and formalism, each of them claiming to provide a framework to find and describe the ‘objective reality’ in order to determine the ‘correct’ response or solution to an international trade law question.

To avoid challenges to its claim to objectivity, the mainstream approach hides the indeterminacy by adopting two combined strategies.³⁵⁸ On the one hand, it builds styles of legal reasoning using descriptive language. On the other hand, it denies the agency of lawyers by suppressing or minimising any form of theoretical and methodological disagreements from legal doctrines, or even treating such disputes as intellectually suspicious or irrelevant to doctrinal analysis.

The second shortcoming concerns the assumption of that the relative determinacy of international trade law and governance flows from objective reality.³⁵⁹ Functionalism roughly equates ‘objective reality’ to the ‘facts’ of the world trading system, while formalism broadly defines ‘objective reality’ as its ‘norms’. Despite their ontological differences, both views presuppose that a relatively clear and identifiable meaning and consequence can be drawn from either facts or norms. However, this assumption fails to take into consideration the indeterminacy arising from the lack of consensual definition of ‘objective reality’ as well as from the ambiguity inherent to concrete ‘facts’ or ‘norms’. Whereas the former cause of indeterminacy rests (as discussed above) on the anterior choice of doctrinal framework, the latter resides in the lack of clarity and precision of behaviour and rules. This implies that the meanings of facts or norms cannot be apprehended in their pure form. Rather, lawyers need to use doctrinal and other techniques to ‘make sense of’ facts and norms.

The functionalist attempt to produce an accurate description of international trade law through pure observation of the ‘transcendental facts’ of the world trading system fails, because ‘objective facts’ must be found out of the amorphous mass of things and events, described, and explained through language.³⁶⁰ Since language does not automatically reflect trade affairs, these social phenomena must be identified and portrayed as ‘facts’ through the application of particular concepts and categories provided *ex ante* by legal doctrines. In this

³⁵⁷ Koskenniemi, 2005: 222.

³⁵⁸ Ibid.

³⁵⁹ Ibid. at 220-223, 513-519.

³⁶⁰ Ibid. at 519-527; Lang, 2011: 164-169.

sense, ‘objective facts’ are not self-evident but constructed as they are perceived through doctrinal analysis.

For instance, Article XXIV:8(a)(i) and 8(b) require countries concluding an RTA to eliminate “other restrictive regulations of commerce” on substantially all the trade. The way to characterise a particular government measure as “ORRC” is not self-evident, and obviously involve doctrinal analysis to determine whether the notion of ORRC refers only to border measures between the parties, or to some internal measures that discriminate against the goods of CU-partners, or all regulatory measures.³⁶¹ Thus, the indeterminacy arises out of the use of an ambiguous vocabulary to determine in the form of a descriptive language what counts as ‘objective facts’ of world trade.

Not surprisingly, formalism enjoys no better result in its efforts to render an accurate description of international trade law through a pure examination of norms.³⁶² The rules of the WTO and regional agreements produced out of negotiations or case law are treated as expressing a relatively clear and identifiable content and effects. However, the official documents contain ambiguities, which may entail their meaning and impact very indeterminate. To deal with this problem, doctrinal analysis is employed to determine the true meaning of an ‘objective norm’ by referring to its external reality. Since ‘facts’ (as examined above) are constructed by language and so indeterminate, the extra-conceptual reference takes the form of a transcendental source, from which the ‘objective meaning’ of a norm can be found through customary methods of interpretation.³⁶³ Yet, ‘objective meaning’ is neither self-evident nor found in transcendental places. Rather, it is produced through doctrinal analysis. Thus, indeterminacy arises from the reliance in the ambiguous content and effects of ‘texts’, ‘contexts’, and ‘purposes’ to determine in terms of a descriptive language what counts as ‘objective meaning’ of norms of international trade law.

To preserve the fictional validity of legal objectivity, the mainstream approach hides the above sources of indeterminacy through the adoption of two combined strategies. On the one hand, the commitment to the science of international trade law is realised by building styles of legal reasoning using descriptive language.³⁶⁴ However, the effort to conceal indeterminacy by founding the validity of doctrinal analysis on ‘description’ causes legal doctrines to be assessed in terms of its empirical or normative nature. This creates tension in lawyers’ mindset since any attempt to conduct a (empirical) cognitive inquiry

³⁶¹ See *supra* notes 141-142, and accompanying text.

³⁶² Koskenniemi, 2005: 527-532; Lang, 2011: 169-171.

³⁶³ US—Gasoline AB Report: para 16–17.

³⁶⁴ Koskenniemi, 2005: 222; Pattaro, 2005: 5-6.

into ‘the law’ ends up facing indeterminacy in every step, demanding them, in turn, to engage in (normative) interpretations, evaluations, and justifications.

On the other hand, such commitment denies the agency of lawyers in choosing doctrinal frameworks by concealing or dismissing any disagreements.³⁶⁵ The common-sense in the IEL expertise is that lawyers’ theoretical, methodological or historical premises are regarded as practically inconsequential to doctrinal analysis. Indeed, there is an implicit understanding that the problems of theory, method and history are non-legal problems, and so sociological and normative issues of global governance, trade regionalism, and economic development can be best dealt with through doctrinal thinking and reasoning. Thus, the effect of these two strategies is to conceal indeterminacy by ‘erasing’ international lawyers’ interpretation and choice so as to make facts and norms appear objective, natural, transcendental or self-evident.

(b) Impartiality in Doctrinal Analysis

Juxtaposed with objectivity, impartiality is the other legal fiction underpinning doctrinal analysis. The mainstream approach portrays lawyers as rational and impartial experts in international trade law, who are separate from the political domains of diplomacy and policymaking and from the moral realms of international justice and ethics. These provinces are regarded as suspects for their subjectivity, discretion, and unpredictability. Put differently, impartiality serves to immunise legal thinking and practice against moral beliefs, intellectual preferences, professional interests, and political pressures. This disciplinary commitment is deeply embedded into the IEL field’s mission and identity, which gains expression, for example, into the visible separation of ‘legal doctrine’ from ‘policy’, of legal offices from foreign affairs and trade ministries, of legal from diplomatic ethos³⁶⁶, of rule-oriented from power-oriented regimes³⁶⁷, and, ultimately, of law from politics and morality. Thus, by embracing neutrality and rationality, international lawyers claim to be able to carry out doctrinal analysis in the context of multilateral and regional trade regimes without having to involve themselves in choices about political, policy, moral or intellectual preferences.

The commitment to impartiality has led formalism and functionalism to produce two almost antagonistic views of doctrinal analysis being carried out by either quasi-

³⁶⁵ Koskenniemi, 2005: 1-4.

³⁶⁶ See Weiler (2001).

³⁶⁷ Jackson, 2009: 37-39.

autonomous or quasi-mechanical lawyers (respectively).³⁶⁸ As quasi-autonomous, lawyers engage objectively with international trade law without influencing, or being influenced by, it or any other external factor. The outcome of doctrinal analysis is portrayed by formalism as if it is driven by the law itself. As quasi-automata, lawyers serve as perfect conduits for external forces to intervene in international trade law. The outcome of doctrinal examination is canvassed by functionalism as if it reflects impersonal forces, over which lawyers have no influence.

These contradictory fictions produce strategically two significant effects on the IEL expertise. On the one hand, they hide the relevance of material struggles and ideational disputes within the IEL field to determine which concepts, histories, theories, and methods are regarded as valid and legitimate to be part of doctrinal practice. On the other hand, by assuming an instrumental rationality, they obfuscate the effects of moral values, political views, intellectual understandings, and professional allegiances on lawyers' individual and collective decisions taken throughout concrete doctrinal work. Therefore, the mainstream approach brackets material and ideational conditions for the production and performance of doctrinal analysis under the understanding that they distort the disciplinary commitment to the neutral and apolitical treatment of international trade law.

However, as suggested above, doctrinal analysis *does* presuppose choices of concepts, histories, theories, and methods, which require 'subjective' and 'arbitrary' decisions according to political, policy, moral and intellectual preferences and affiliations. By trying to bracket lawyers' agency and erase the background debates about ideational and material conditions, the mainstream approach does fail to acknowledge the existence of interpretative acts underpinning doctrinal work. Put it simply, it is throughout doctrinal labour that trade policy and law choices are conceived, framed, and mobilised in support of ideational projects, institutional visions, and jurisprudential views. The mainstream literature's lack of adequate explanation of rational actions in doctrinal analysis has, therefore, produced the caricatures of lawyers as (neutral, impartial, apolitical, value-free) automata or autonomous.³⁶⁹

³⁶⁸ This argument is inspired by Granovetter (1985: 483-487), Callon (1998b: 252-253), Picciotto (2005: 479-481) and Lang (2011: 173-175).

³⁶⁹ Lang, 2011 173-174; Koskenniemi, 2012: 12-13; Picciotto, 2005: 480.

(c) Breaking up with the Modernist Scientificism of International Trade Law

As shown above, mainstream literature has produced a consensus on the nature of doctrinal analyses as the modernist science of international trade law. It is through these scientific processes that legal rules and institutions can (aspire to) be *readily* identified, *accurately* described, *precisely* designed, *unambiguously* interpreted, and *clearly* applied, by impartial and rational lawyers irrespective of their moral and political preferences or professional and intellectual allegiances within the IEL field. The overall purpose of modernist science is to attain a valid description of how lawmaking and legal interpretation are undertaken by international lawyers.

By suggesting that lawmaking and legal interpretation are routinely portrayed as *objective and impartial* forms of legal decision-making carried out by (quasi-)mechanical or (quasi-)independent lawyers, I do not imply that these fictions (*i.e.* legal objectivity and impartiality) are homogeneously produced or uniformly accepted by all mainstream strands of IEL jurisprudence. Naturally, I do acknowledge that my representation of the mainstream approach to doctrinal analysis offers only a high abstraction of its most common features, which, as any simplification, loses the nuances and details of each specific view.

To break up with the modernist commitment, I propose to adopt a distinct philosophical paradigm, *interpretivism*.³⁷⁰ This means that the differences between modernism and interpretivism lie not at the theoretical or methodological level but rather at the philosophical level. For this reason, I will provide some brief ground-clearing before outlining an alternative view of doctrinal analysis.

The first key difference between those two philosophical traditions concerns the idea of truth. Interpretivism conceives that international trade law and governance are not important because they are ‘objective realities’, but rather because they have ‘social meanings’.³⁷¹ This leads to the rejection of any explanation of law and governance grounded in an absolute, transcendental foundation. Instead of conceiving them as universal and natural entities, law and governance are regarded as social constructions. Consequently, ‘facts’ and ‘norms’ cannot be found true or false, only arguments about them can. The focus of doctrinal analysis shifts, therefore, away from determining the descriptive validity of

³⁷⁰ The concept of interpretivism is borrowed from Porta and Keating (2008b: 24-25), Sale *et al* (2002: 45), and Bevir and Rhodes (2002: 131).

³⁷¹ Different interpretivist strands define ‘meanings’ in distinct ways: expressions of beliefs, ideas, discourses, consciousness or systems of signs and norms (Porta and Keating, 2008b: 24-25; Sale *et al*, 2002: 45; Bevir and Rhodes, 2002: 131).

transcendental sources/processes of law and towards the construction, interpretation, and challenge of doctrinal frameworks.

Second, the knowledge of a legal phenomenon is not an objective description to be impartially evaluated against a discoverable reality.³⁷² Rather, it is a partial way of reconstructing factual and normative realities from distinct perspectives. In other words, it is not possible to access ‘social realities’ independent of lawyers’ mind. Two important consequences flow from this interpretivist understanding. On the one hand, there is no external, objective referent against which to test claims to validity or legitimacy of rules and institutions of international trade law. Instead, meanings of facts and norms are socially constructed by strategic reference to definitions, projects, histories, and theories widely accepted by the IEL field. On the other hand, the idea of lawyers as impartial actors is replaced with the notion of *meaning actors*, in order to emphasise the importance of understanding and interpreting objective and subjective meanings that motivate their contextualised actions. The consequence is to abandon the modernist claims to objectivity and impartiality. This does not mean, nonetheless, that lawyers are unconstrained actors who are entitled to freely engage in interpretative processes aiming to craft or interpret abstract legal rules, and link them to concrete decisions or actions.

The modernist distinction between legal ideas and actions, which assumes changes in behaviour as responses to external causal factors or internal pure volition, is revised. The third key difference is concerned with the interpretivist focus on meanings that essentially shape and constrain legal ideas and actions, and how they are produced, disseminated, received and contested. This move does not imply a complete rejection of external or internal explanations. While material realities might also be explained by ‘causation’, ideal factors fall into the category of ‘reasons for actions’, which accounts for the justification for the causal elements.³⁷³ In this sense, lawyers’ actions are understood as legal thinking and practices, which are carried out based on a variety of doctrinal frameworks of response to an array of changing situations and unsettled disputes. The way doctrinal analysis structures lawmaking and legal interpretation is by enabling a specific range of possibilities for addressing certain issues or solving particular controversies, and not others.³⁷⁴

However, as I suggested above, the mainstream approach makes those potential choices enabled by doctrinal analysis either disappear from the sight of or feel irrelevant for the majority of lawyers, because they are experienced as natural or self-evident. In other

³⁷² Porta and Keating, 2008: 24-25; Trubek and Esser, 1989: 17-19.

³⁷³ Trubek and Esser, 1989: 17-19; Ruggie, 1998: 869.

³⁷⁴ See, for instance, section 2.F.

words, legal doctrines are not free or really open to being chosen. As I shall discuss in the next section, these decisions are constrained by material and ideational conditions of possibility co-produced by the IEL field and global trade governance. The consequence is that legal practitioners and intellectuals do not feel they have agency or discretion over doctrinal frameworks. Indeed, this ‘taken for granted’ attitude is an *effect of power* caused strategically by the mainstream approach, in order to make a specific form of doctrinal analysis appear natural, self-evident, and authoritative.³⁷⁵ Thus, the fourth move is to highlight these effects so as to enable the contestation of dominant legal doctrines and the understanding of how alternatives might be proposed.

The fifth insight is to understand international trade law and lawyers as partly constituted by, and partly constitutive of, the IEL field. Yet, neither lawyers nor law are regarded as determinate products of legal expertise, to the extent that the IEL field is also subject to transformations caused by (internal and external) political and intellectual conflicts. Specifically, law and lawyers are interactively connected through doctrinal analysis, so that objective and subjective meanings are mutually created within the context of lawmaking and legal interpretation.

This brief excursion into interpretivism provides the building blocs to suggest an alternative understanding of the nature of doctrinal analysis. I propose to move away from the modernist scientificism of law and towards a socio-constructivist idea of argumentation framework. Wayne Sandholtz and Alec Stone Sweet define *argumentation frameworks* as “[m]odes of governance [...] for constructing rules and for applying them to concrete situations.”³⁷⁶ They are conceived as cognitive, evaluative, and discursive structures that organise how normative claims are made through the mediation between macro-abstraction and micro-particularities. Given changing circumstances, they serve both to create and evolve rules and institutions, and to prevent and solve disputes.

Building on the work of Sandholtz and Stone Sweet, I suggest rethinking legal doctrines as argumentation frameworks for governing cognitive, evaluative, and discursive processes through which lawyers engage in legal decision-making in the world trading system. In this sense, lawmaking and legal interpretation are reconceived as legal thinking and practice empowered and limited by *doctrinal frameworks*. Legal doctrines are, in turn, produced, transformed and legitimised through continuous processes of interaction within

³⁷⁵ Lang, 2011: 173-174. ‘Naturalisation’ is an effect of power whereby existing legal practices and knowledge come to be experienced as self-evident, as if they were natural phenomena belonging to a world ‘out there’. In this sense, legal doctrines make norms and facts, projects and histories, theories and methods that are contested may be treated as ‘predetermined’, ‘given’, or ‘beyond question’.

³⁷⁶ Sandholtz and Stone Sweet, 2004: 245-247.

the IEL expertise, and between the IEL field and global trade governance. They are constructed through the selection and combination of projects and histories, concepts and norms, theories and methods, with the purpose of assuring normative coherence and persuasive power to international trade law and governance. Thus, lawyers not only produce and benefit from legal doctrines, but also defend them against other competing alternatives by asserting their legitimacy and authority.

I will use the concept of doctrinal framework to capture the way in which legal meanings are produced not from either objective facts or norms, but rather from contextualised legal practices and arguments inside the IEL field and outside global economic governance. This understanding of legal doctrines does not subscribe to radical indeterminacy, to the extent that the valid and legitimate range of meanings is constrained by internal and external disciplinary mechanisms (*i.e.* the IEL expertise and multilateral and regional trade regimes, respectively). Therefore, the idea of doctrinal framework represents an innovative way of inquiring into how doctrinal analysis structures lawyers' engagement in legal decision-making.

4. Departing from Anglocentrism: a Contestation of the IEL Field as the Guardian of International Trade Law

This strategy consists of breaking up with the Anglocentricism embedded into the mainstream approach to legal doctrine.³⁷⁷ As anticipated in section 3.C.4, international economic law can be reconceived as a transnational field that aggregates lawyers from and working in numerous jurisdictions. This suggests that not only international trade law is thought and practised in distinct contexts, but also legal doctrines are produced in sites located inside and outside the Anglo-American world. However, the validity, legitimacy, and influence of legal doctrines are subject to political and disciplinary dynamics underlying and between distinct legal communities within the IEL expertise. Thus, I argue that the examination of legal doctrines of international trade law without taking into consideration the role of the IEL expertise is severely undermined, while conceptualising the IEL field as a neutral and homogenous profession would overlook the impact of its internal dynamics on legal doctrines.

³⁷⁷ This strategy is based on the writings of Anghie (2005), Gathii (2008) and Koskenniemi (2012a, 2012b, 2012c and 2013) and the works of Carvalho (2011), Pahuja (2011) and Orford (2015 and 2016), all of which provide historical or analytical accounts of how Eurocentrism and Anglocentrism have shaped international law and international trade law (respectively).

Two important consequences derive from this understanding. It is possible to disaggregate ‘the IEL field’ (*i.e.* the unit of analysis) so as to examine the continuous processes of intellectual and professional differentiation, domination, and disruption, involving these legal communities. Specifically, it opens the opportunity to explore how the unequal distribution of authority and resources constitutes and reproduces a ‘transnational division of legal labour’. This ‘global legal chain’ is understood in recent literature as a transnational network of legal experts and their shared legal knowledge,³⁷⁸ according to which certain places have (‘naturally’ or ‘historically’) ‘specialised’ in the production and export of legal ideas and techniques (generally) and legal doctrines (in particular), while others in their import and consumption. Not surprisingly, these relations within the IEL field tend to be structured as a centre-periphery by having, at the core, the Anglocentric hubs, which are surrounded by other sites located in Northern-developed countries, while legal communities in Southern-developing countries are at the margin. As a result, intra-expertise production of legal doctrines is deeply conditioned by the ‘geographical’ position of their proponents and advocates.

The other consequence is to draw the enquiry towards the effects on legal doctrines of the mainstream commitment to presenting the field as the guardian of international economic law. The project of empowering international trade law by aggregating lawyers located across jurisdictions under a unified professional front tends to render an opaque picture of the IEL field. Indeed, this raises important questions: who is speaking on behalf of the IEL expertise? With which authority and legitimacy? Granted by whom? Who does (or should) have the authority and competence to determine the field’s positions concerning international trade law and governance (generally) and legal doctrines (in particular)? The historical and doctrinal analyses in Part I suggest that the mainstream approach has overlooked these questions in order to build a consensus around the IEL field as the unique, legitimate and authoritative protector of international trade law. The result, however, is to reinforce and naturalise the intra-expertise patterns of production, specialisation, subjugation, and marginalisation.

My argument does not intend to suggest that mainstream literature conceives the IEL expertise as single-minded or one-voiced. Rather, I argue that the existing disciplinary common-sense is that worldwide international lawyers acknowledge themselves as members of the same field, regardless of local differences. This general understanding does a great deal of work to naturalise not only the ‘transnational division of labour’ but also to legitimise the leadership of groups of lawyers in dominant positions. In this sense, the

³⁷⁸ D.W. Kennedy, 2005: 4-6; Lang and Scott, 2009: 610-611.

influence of Anglo-American legal communities is regarded as playing a disproportional role in the rise, decline, and fall of legal doctrines in multilateral and regional trade governances. Thus, the claim to guardianship serves as a disciplinary technique for mainstream literature to either bracket the 'internal differences' or deflect its causes to external, political-economic forces beyond the profession's control, with the purpose of building authority for the IEL field's prominent 'founders', 'champions' and 'leaders' over legal doctrines.

Against this backdrop, I propose to move away from the mainstream approach. Instead of equating legal doctrine of international trade law with the Anglo-American doctrine of the WTO law, the purpose is to bring to the fore the variety of doctrinal frameworks produced according to different approaches by contextualised groups of international lawyers (within and across jurisdictions) facing political and intellectual communalities, dissimilarities and conflicts. Thus, the creation, validation, legitimation, application, and contestation of legal doctrines of international trade law would be different if approaches elaborated by lawyers situated in distinct states and regions and often associated with different communities were to be accepted as part of the IEL expertise rather than obfuscated by Anglocentrism.

Chapter 2 makes us to think of the dominant doctrine born out of Anglo-American settings, functionalist jurisprudence and managerial mindset as the universal doctrinal framework for international trade law and governance of South-North regionalism: since the ITO/GATT negotiations, the debates have been framed around the formal possibility and policy desirability of accommodating discriminatory RTAs under a non-discriminatory regime for multilateral trade. With the creation of the GATT, the controversies took the form of legal disputes about the content, meanings, and effects of the (defective, ambiguous, or flexible) rules of Article XXIV. Since then these issues have been rephrased in a variety of ways depending on which policy expertise the IEL field was 'allied' at a particular time.

For instance, questions asked about the formal, substantive, or even teleological, consistency of RTAs with GATT/WTO law, as well as about their legitimate and effective function as complementary instruments for promoting global free and fair trade, were widely examined and addressed through the use of the mainstream approach. From the postwar negotiations until the present-day, two main positions have caused polarisation of the majority of international lawyers as *either* supporters of free trade multilateralism *or* supporters of preferential trade regionalism. Therefore, the legal doctrine is understood as a mode of legal-technical governance through which lawyers argue with one another to

determine the credibility or correctness of legal arguments and decisions concerning the validity and consistency of South-North RTAs with WTO law; interact also with other trade experts and policy-makers to negotiate, design, and operate WTO-consistent South-North RTAs; and participate in the continuous conversation about the nature and functions of multilateralism and regionalism and their relations to international law and global governance, free and fair trade and economic development, discrimination and non-discrimination, as well as reciprocity and non-reciprocity.

By contrast, Part III purports to open our horizons by examining a period in the history prior to the rise and domination of the contemporary legal doctrine. My aim is to show that, between 1947 and 1980, there were doctrinal alternatives to be used in conceptualising, making, and operating regional trade regimes between developing and developed countries distinct from the existing legal doctrine. Specifically, I will account for the rise, decline, and fall of these legal doctrines in a context characterised by normative heterogeneity, institutional experimentalism and jurisprudential innovation. This will involve examining the disputes over the authority and legitimacy of projects and histories, rules and institutions, theories and methods (produced in sites located inside and outside the Anglo-American world) in the formation, validation, legitimation, contestation and application of those legal doctrines. As it will be clear, the European Paris, Brussels, Geneva, Moscow and Belgrade, the Mediterranean Tunis, Rabat, and Cairo, as well as the African Yaoundé and Lomé were among the most significant locations where international lawyers were found not only crafting legal doctrines but also applying them in the negotiation and operation of the South-North RTAs between the European Union and its former colonies. Therefore, legal doctrines will be historicised and examined taking into consideration how groups of lawyers participated not only in their construction, but also in their use in making and interpreting multilateral and regional regimes for trade cooperation under the GATT law between 1947 and 1980.

5. An Alternative to the Legal Doctrine of International Law and Governance of South-North Regional Trade Regimes

The general purpose of offering an alternative approach is to call attention to the aims and methods through which lawyers produce and apply legal doctrines of international economic law. Despite the long tradition of construing and challenging them, we – international lawyers – are not sufficient aware of their nature and function inside the IEL

field and outside global governance. There is little doubt that doctrinal analysis is an expert way of thinking and reasoning about international trade law, but both its proponents and critics seem too little interested in understanding its foundations and operations. Therefore, this Chapter has intended to shed some light on what the legal doctrines of international trade law is really about.

Bearing that in mind, my alternative approach has three specific ambitions. The first one is to use legal doctrines as an entry-point to foreground the political and intellectual dynamics of groups of international lawyers in making and interpreting the international trade law and governance of South-North RTAs. It seeks to explain why and how legal projects, history, knowledge and techniques are experienced as crafted in polycentric places, but subjected to validation and legitimation by only a small circle of settings acknowledged as authoritative within the IEL field. In this sense, it helps us to unveil the reasons for the mainstream strands of functionalism and formalism have become prevalent in the IEL expertise and have, in turn, governed the way doctrinal analysis is carried out.

On the one hand, it aspires to explain, by examining the relationship between these mainstream views and the transnational division of legal labour, the choice of ‘certain’ (and not ‘other’) constitutive features of doctrinal frameworks. On the other hand, it aims to investigate the ways legal doctrines have contributed to establishing and sustaining relations of difference, dominance, and disruption within the IEL field and between it and other expert fields. Thus, this new approach purports to reveal how legal doctrines have been strategically produced, validated, and legitimised in ways that have affected lawyers’ understanding of and engagement with the international trade law and governance of South-North regionalism.

The second goal is to improve our understanding of the role of international economic law in governing the production, implementation, and challenge of political economy, institutional, and jurisprudential programmes operating within the international economic order. The alternative approach seeks to highlight the ways legal doctrines are applied in continuous and routinised processes of lawmaking and interpretation to entrench particular programmes into the international trade law and governance of South-North regionalism. Doctrinal analysis assists in the universalisation, naturalisation, and essentialisation of those distinct projects by embedding them into the meaning of rules and institutions. More concretely, Part III examines how legal doctrines were continuously reworked between 1947 and 1980 in order to sustain particular programmes through the making and interpretation of multilateral and regional trade regimes. Furthermore, Part I examines the history and constitutive features of the legal doctrine that provide the

underlying vocabulary of meanings and the boundaries around what today we call international trade law and governance of South-North regional trade agreements.

The third aspiration is to contribute to debates on contemporary issues of international economic law by *rethinking legal doctrine*. Understanding the role of legal doctrine in international trade law and governance requires breaking up with cognitive gridlocks imposed by the mainstream approach. The doctrinal work has served to universalise, naturalise, and essentialise political economy, institutional, and jurisprudential programmes by embedding them into international trade law. This involves the combination of four expert moves: define legal doctrine as a valid description; use a descriptive and explanatory style of legal reasoning to sustain claims to objectivity and impartiality so as to conceal the normative elements behind the façade of ‘science of law’; defend GATT/WTO law as a special body of universal, superior, and objective norms or processes applicable to all legal subjects regardless of their (subjective) will, formal particularity, or social inequality; and assert the IEL field as the only legitimate guardian of, and ultimate authority over, the domain of international trade law and governance.

To bring the embedding process up to the surface, I suggest reconceiving legal doctrines as coherent and stable frameworks of legal meanings, whereas their function is rethought as a mode of legal governance. Within the IEL expertise, they assist in ascertaining or rejecting the validity and legitimacy of legal projects, histories, norms, ideas and practices. In global trade governance, they structure the making and interpretation of the international trade law and governance of South-North regional trade agreements.

Conclusion

The socio-legal approach is an alternative to what I perceive as the shortcomings and gaps of the consensual understanding of the nature and functions of legal doctrines in mainstream literature. More specifically, the mainstream approach is inadequately equipped to apprehend, assess and criticise legal doctrines of the international trade law and governance of South-North regionalism. The consequence of its weaknesses is to prevent international lawyers from acknowledging and dealing with the existence and effects of a dominant legal doctrine in present-day world trading system.

Nowadays, it is common-sense to argue that the World Trade Organisation is somehow losing its effectiveness or perhaps heading towards a critical moment. The

reasons lie partially in doubts about the limits of the WTO regime itself, and partially in fears about the capacity of WTO law to provide solutions to current problems. Challenges arising out of (what has been called) ‘economic globalisation and inequality’, ‘political nationalism’, ‘trade populism and protectionism’, ‘divergent models of economic development’, ‘dysfunctional multilateralism’, and ‘unfair regionalism’, seem to put a real threat to the WTO (generally) and South-North regional trade regimes (in particular). Celebrated by the vast majority of policymakers and experts for promoting free and fair trade liberalisation and economic development since the 1990s, the RTAs between developed and developing countries, such as the NAFTA, TPP³⁷⁹, and EPAs, have recently become controversial. In providing a new way of understanding the role of legal doctrines in the making and interpretation of these RTAs, the socio-legal approach aims at illuminating how they have constituted and shaped the conditions of possibility that enable and constrain the ways lawyers think and practice international trade law in their engagement with the contemporary challenges to the world trading system.³⁸⁰

If the reflections in this Chapter were correct, the IEL field should open up to alternative ways of conceiving and transforming the WTO and RTAs. This would partially involve welcoming innovative rules and ideas from legal and non-legal experts critical to mainstream mindset and situated inside as much as outside Anglo-American settings. Since these ‘alternatives’ could be (re-)discovered in the present and past stock of legal norms, knowledge and techniques, lawyers should rethink their approach to legal doctrines in order to recover the sense it once had that international trade law was constituted by normative heterogeneity, institutional experimentalism and jurisprudential innovation. My aspiration is that the proposed socio-legal approach will help us in breaking up with the imaginative grip imposed by the dominant legal doctrine, while empowering lawyers to rethink the international trade law and governance of South-North RTAs in the face of the contemporary challenges. The alternative approach will be applied in the next chapters with a view to advance the understanding of the nature and functions of legal doctrines in decision-making in and over multilateral and regional trade regimes.

³⁷⁹ Goodman, 2018.

³⁸⁰ Likewise, *see* Howse (2017: 188).

PART III – BETWEEN HISTORY AND DOCTRINE: LAW AND LAWYERS IN THE MAKING OF SOUTH-NORTH REGIONAL TRADE REGIMES (1947-1985)

The purpose of Part III is to foreground the particular roles of legal history and doctrines in the formation and evolution of the international trade law and governance of regional trade agreements between developed and developing countries (South-North) from 1947 until 1985. On the one hand, I aim to go beyond mainstream literature that often reduces international trade law and governance in that historical period to both the progressive trade liberalisation and institutionalisation of the GATT through multilateral rounds of negotiations *and* the GATT's power-oriented system of dispute settlement, which developed a unique style of diplomatic jurisprudence to solve trade disputes. On the other hand, I seek to depart from the conventional understanding of the international law of regionalism as the tragedy of GATT Article XXIV that allowed contracting-parties to conclude RTAs by circumventing its weak disciplines.

An alternative to these accounts is to examine how legal doctrines were implicated in the 'invention' not only of international trade law but also of South-North regional trade agreements. Legal doctrines have been produced as shared frameworks of concepts and norms, theories and methods, projects and histories serving as media through which international trade law is thought, practised and communicated. They frame interests and conflicts as legal issues and articulate legal rules and institutions into a set of valid and legitimate claims and solutions. For the questions of what regional trade agreements are or what functions they may perform, legal answers were crafted through doctrinal frameworks. In this sense, legal doctrines 'created' South-North RTAs as legal phenomena. My purpose is to historicise and examine the participation of legal doctrines in the making of South-North regional trade regimes between 1947 and 1985. While Chapters 5 and 6 narrate how legal doctrines shaped institutional and jurisprudential thinking and practice underlying those RTAs, Chapter 7 delves into those doctrines to reveal which and how their features were chosen and combined into their constitutive frameworks.

In Chapters 1 and 3, the traditional history was retold to account for the significant participation of South-North regional trade regimes in the evolution of the world trading system. Indeed, the progress of the GATT is historically portrayed as in a dialectical relation to the waves of regionalism. The uneasy coexistence between multilateralism and

regionalism took the form of a continuous movement through which the ascension of the latter caused the downfall of the former, and vice-versa. The conventional narratives merge the jurisprudential development with the institutional evolution of GATT law (generally) and its rules on regional trade agreements (in particular). Their aim is to provide history lessons to assist us to understand the origins, development, and rationales behind the present-day world trading system.

However, the current way these teachings have been produced and transmitted has adversely affected the field of international economic law. They have minimised the importance of historical discontinuities caused by political and intellectual conflicts, ideational and policy disagreements, normative ambiguities, and doctrinal divergences. Instead, they highlight past events that reinforce the disciplinary understanding of institutional and jurisprudential progress towards the realisation of world trade's *telos* in the form of WTO law and governance. Although simplifications are widely acknowledged for their relative degree of imprecision, the issue at stake is that the traditional style of history-telling has reduced the ambivalence of historical accounts by obscuring intellectual bias, factual gaps, and unfortunate outcomes of core decisions made about regional trade agreements that might threaten or undermine the legitimacy or authority of the GATT/WTO regime.

In Chapters 5 and 6, I will approach the history of international trade law of South-North RTAs from an angle distinct from that which characterises mainstream literature. Neither is the GATT accepted *ex ante* as the natural, necessary, or unique institutional and normative regime with universal authority to apply a superior body of legal rules and institutions to govern trade affairs, regional agreements, and economic development; nor are formalism and functionalism received as the only schools of international law that produced relevant jurisprudential projects for international economic law. To move beyond these tendencies, my overall strategy is to focus on the role of legal doctrines in conceiving, constructing, operating, interpreting, and opposing the international trade law and governance of South-North trade. To do so, I will offer two very brief, and not exhaustive, overlapping historical accounts of international law and lawyers in the making and management of regional trade regimes between developed and developing countries under the GATT.

The general purpose of these historical reconstructions is to reveal what kind of institutional and jurisprudential stories of the international trade law of South-North RTAs can be told if contemporary lawyers do not instrumentalise them to support the dominant legal doctrine. The two accounts intend to show that the traditional history is neither a mere

objective and neutral account, nor a suspect teleology, or a frozen set of lessons that can only sustain a universally applicable legal doctrine. I will argue that these storylines are rather built on ideas and facts that are less clear and determinate than the conventional narratives suggest. In reality, the selection and understanding of historical events are neither self-evident nor neutral. They result from lawyers' choices and interpretations, which are conditioned (consciously or unconsciously) by the IEL field. Although the relative indeterminacy of the past allows those storylines to accommodate competing narratives about the origins and development of international trade law and South-North RTAs, only a subset of them – the ones incorporated into legal doctrines – is regarded as sufficiently meaningful to affect legal thinking and practice. Thus, Chapters 5 and 6 provide two historical backdrops to illuminate the way history teachings are selected and embedded into legal doctrines, with the aim of enabling lawyers to conceive, pursue, and express state and non-state preferences, and also coordinate those interests and solve disputes concerning past and present challenges to global governance, trade regionalism, and economic development.

In Chapter 7, I analyse the role of international law and lawyers in the making and interpretation of South-North RTAs through the socio-legal notion of doctrinal framework. As discussed in Chapter 4, legal doctrines are expert techniques devised for using international law to influence decision-making in and over multilateral and regional trading systems. They are constituted of a relatively coherent and stable framework of positive and non-positive norms, ideas and practices, that serves as a mode of legal governance. Taking into consideration the historical accounts provided in Chapters 5 and 6 and my analysis of primary and secondary sources, my central hypothesis is that three legal doctrines were routinely applied to interpret and apply GATT law and make and manage South-North RTAs from 1947 to 1985. Chapter 7 aims to test, partially, this postulate by providing a full account of the legal doctrine underlying the regional trade regimes between the European Union and the newly independent African states. I conclude by arguing that the Yaoundé and Lomé Conventions were negotiated and interpreted grounded in a (significant part) doctrinal framework, which I shall call the Law and Development Cooperation Doctrine.

In conclusion, Part III seeks to address two central questions. First, how were jurisprudential and institutional stories employed to empower and constrain international lawyers in their construction and application of legal doctrines devised to provide a legal mode of international trade governance for regional trade relations between developed and developing countries? The second question purports to recall the debate proposed in Chapter 4: how might the analysis of legal doctrines contribute to expanding the imaginative boundaries of the contemporary field of international economic law?

CHAPTER 5. INTERNATIONAL LAW AND LAWYERS IN THE *INSTITUTIONAL* MAKING OF SOUTH-NORTH TRADE REGIMES

Introduction

The history provided in this Chapter focuses, particularly, on the institutional story of the GATT law of South-North regional trade agreements. This unorthodox account does not (and should not) begin by reinforcing today's disciplinary consensus around the conventional narratives that support the myth of universality and continuity of the GATT as the single, necessary, or ultimate governance regime for international trade cooperation. Recall that one of the key shortcomings of the *traditional approach* (as examined in Chapter 3) was to take the contemporary world trading system as its starting point and works backwardly to reconstruct the history of international trade law as a gradual evolution towards the maturity of our present rules and institutions, such as the World Trade Organisation and European Union.³⁸¹ Often, the conventional accounts purposefully select state and institutional practices that tend to overshadow the increasing fragmentation of international economic relations into three distinct regimes for multilateral trade cooperation in the aftermath of World War II. This disciplinary strategy is strengthened by a conceptual triple-move.

First, the traditional style of history-telling equates international trade law to GATT law. The second move is to reinterpret the abstract category of *multilateral regime for trade cooperation* as the description of the GATT. Finally, the general definition of *regional trade agreements* universalises the two specific archetypes of RTAs enshrined in Article XXIV: free trade agreement and customs union. The consequence is that contemporary international law, global governance, and regional regimes are conventionally narrated as having their legitimate origins and valid sources found in the General Agreement on Tariffs and Trade of 1947. The powerful effects of such reductionism are to consolidate the legitimacy and authority of the dominant legal doctrine on the WTO law of South-North regionalism, while rejecting or marginalising historical accounts of competing, institutional experiments and state practices.

³⁸¹ See sections 3.A. and 3.C.3.

My purpose is to emphasise, instead of erasing, the ideational disputes and diplomatic battles that historically produced, maintained, and opposed to the construction and development of institutional regimes of multilateral and regional trade governances. I highlight not only compromises but also ruptures and transformations underlying the construction of international trade law rules and institutions. Consequently, my starting point cannot be the apparent moment of consensus achieved by Anglo-American lawyers around the establishment and evolution of the GATT and the subsequent spread out of regional trade agreements. Rather, I begin when lawyers were living in a time of normative and doctrinal inflexion concerning the possibilities of engaging international law in the postwar efforts to (re)build universal, multilateral, or regional regimes for governing trade affairs.

According to mainstream literature in the postwar period, the allied leaders (the United States, the United Kingdom *and* the Union of Soviet Socialist Republics – USSR) kicked off the negotiations for establishing an institutional architecture for a new international economic order in the early 1940s.³⁸² The general plan consisted of preventing the traumatic events that fuelled the outburst of World War II by building a global economic order centred on international law. Grounded heavily in the Anglo-American blueprint³⁸³, the project envisaged three interlinked specialised organisations: one devised to deal with monetary matters; another designed to govern financial flows; and, finally, a third institution for regulating transnational trade. Although these specialised organisations would function independently of one another, they all would be subject to the future universal political organisation, the United Nations. The combination of institutional linkage and hierarchical subordination aimed at mutually reinforcing the support for the new global regime under the UN. Hence, the ally leaders hoped that this embryonic plan for a postwar international economic order would be perceived as beneficial enough to attract most, or perhaps all, sovereign countries.

However, the Anglo-American blueprint failed to come into being. The ally leaders agreed that the first step for the plan's realisation depended on ensuring strong participation and commitment of most countries to the future international economic law and organisations.³⁸⁴ With this strategy in mind, the Bretton Woods Conference of 1944 was organised to negotiate the creation of two out of the three specialised institutions. The

³⁸² Carreau *et al.*, 1980: 78-83; Nguyen *et al.*, 1999: 895-900, 907, 926-927, 939-941; Bennouma, 1983: 68-71, 212-213; El-Naggar, 1969: 256-260; Brabant, 1990: 34-35.

³⁸³ See also section 1.A.

³⁸⁴ Carreau *et al.*, 1980: 78-83; Nguyen *et al.*, 1999: 895-900, 907, 926-927, 939-941; Bennouma, 1983: 212-213; El-Naggar, 1969: 256-260; Brabant, 1990: 34-35.

proposal for establishing the International Monetary Fund and the World Bank aimed at setting out the institutional and normative regimes to deal with monetary and financial matters, respectively. The Bretton Woods negotiations were initially perceived as successful since the IMF and World Bank were duly created with the support of all ally leaders. This early optimism did not last long though. The project deeply suffered from diplomatic manoeuvres, economic interests, political tensions, and ideational conflicts, which reflected, or perhaps contributed to, the beginning of the Cold War and decolonisation.

The following sections narrate how these disputes prevented the general agreement on a ‘universal’ economic order institutionalised and regulated by a single and coherent body of international law norms and regimes. Instead, they led up to the fragmentation of international trade governance into three regimes for multilateral trade cooperation. Therefore, the history of the GATT law and governance of South-North RTAs starts not with a progressive account from the 1930s trade wars to Anglo-American negotiations to the political failure of ITO to the GATT to the waves of regionalism and so on. Rather, it begins with the foundational moment of dissensus marked by the disagreements of the Soviet Union and the socialist bloc, followed up the Third-World divergences, with the Anglo-American blueprint for a universal regime for governing international trade.

A. One World Economy? The ‘-ism’ Governance of International Trade by Three Postwar Regimes for Multilateral Trade Cooperation: Liberal-welfarism, Socialism and Developmentalism

1. From the Liberal-welfarist Programme to the GATT Regime

In the postwar period, international lawyers were predominantly concentrated in developed countries, notably in Western Europe. The two World Wars forced the profession to reassess the core commitments underscoring its identity and mission. One of the most chastened assumptions was the notion of (European) public international law as a universal phenomenon.³⁸⁵ Consequently, legal doctrines produced after 1945 were not only less Western-centric but also had to acknowledge the institutional and normative diversity of the

³⁸⁵ Koskenniemi, 2007d: para 10.

period. Their core purpose was to elaborate the conditions of international cooperation in a fragmented world economic order.

These legal doctrines recognised that the Anglo-American proposal was a political and economic compromise reached by developed countries about how to govern their trading relations after the end of World War II.³⁸⁶ These countries aimed at departing from a *liberal regime of trade coexistence*, constructed on the idea of balance of power between sovereign countries underpinned by a classical notion of international law.³⁸⁷ They often rejected inter-state governance of free trade organised under a set of liberal ideas and legal institutions that produced a legitimate space for countries make choices on trade and economic matters disregarding the potential spillover effects on other states. The principle of freedom of commerce was regarded as the quintessential representation of the liberal trading system since it provided legal ground for states to freely and inconsequently choose between different economic programmes, trade policies and relations with other nations. Mercantilist, protectionist and free trade policies and measures were perceived as not more than lawful and legitimate expressions of sovereign economic freedom.³⁸⁸

This liberal regime of trade coexistence was, nevertheless, blamed by postwar lawyers for not having prevented state actions, which were perceived as responsible for interrupting the gradual restoration of the world economy after the shocks of World War I and the Great Depression.³⁸⁹ They understood that the failure of classical international law and liberal governance in imposing some constraints upon state discretion was responsible for allowing the disastrous rise of national protectionism, on the one hand, and international predatory competition, on the other hand. These trade policies, together with economic downturns and political events, were conceived as the primary causes leading up to the collapse of the liberal trading system. Thus, legal doctrines consistently defended that a new international trade regime was needed to safeguard universal peace and global economy from the perils of the interwar period.

The Anglo-American proposal for a postwar international regime for trade cooperation was expected to strike a compromise between the liberal aspiration for a universal system of non-discriminatory and reciprocal trade relations, on the one hand, and the welfarist call for national intervention on economic and social spaces, on the other

³⁸⁶ See generally Carreau *et al* (1980: 26-27, 78-83, 256-258), Nguyen *et al* (1999), Bennouma (1983), and El-Naggar (1969).

³⁸⁷ Carreau *et al*, 1980: 78-83, 257-258; Nguyen *et al*, 1999: 946-948; Bennouma, 1983: 212-213; El-Naggar, 1969: 256-260.

³⁸⁸ Jouannet, 2012: 158.

³⁸⁹ Carreau *et al*, 1980: 67-78, 257-258; Nguyen *et al*, 1999: 906-908, 946-948.

hand.³⁹⁰ The role of international law was imagined as the legitimate and authoritative instrument to ensure stability to interdependent economic relations. More specifically, international law rules and institutions were needed to be reconceived to structure and operate an international legal order where states could coordinate their trade policies multilaterally, while preserving domestic space for economic and social policies. In other words, the postwar international trade law and governance should be able to accommodate these two goals without triggering a race to discriminatory behaviours and protectionist measures, which were regarded as responsible for producing mutually destructive consequences in the interwar period.³⁹¹ This ideational project purporting to compromise free trade at the international level and socioeconomic interventionism at domestic level received different labels, but hereinafter is called *liberal-welfarism*.³⁹² Contemporarily, this programme has been understood as possessing a *constitutional* character, to the extent it is claimed to have made possible the establishment of a new economic order. Thus, the liberal-welfarist programme set up the political-economy parameters for imagining a new international trade law and organisation.³⁹³

The Anglo-American Suggested Charter for an International Trade Organisation embedded liberal-welfarism.³⁹⁴ However, in contrast to traditional narratives, the proposal was only partially successful. It failed not only in getting the approval of the US Senate (as acknowledged by traditional accounts) but also in gathering the consent of the majority of countries. Indeed, developed countries were its primary supporters, actively contributing to the negotiations of the ITO as well as to the conclusion and operation of the GATT. Nevertheless, their diplomatic support was directly conditioned to the legitimacy of the US leadership and the benefits obtained under the Marshall Plan. Socialist and developing countries, despite their initial backing, held ambiguous attitudes towards the liberal-welfarist programme. The majority of them either ratified the constitutive agreements only to ignore them later or rejected them entirely. This suggests, therefore, that, to understand

³⁹⁰ The ideational project underscoring the GATT law and governance has been differently described and granted a wide variety of labels since 1947. French lawyers have named it *neo-liberalism* (Carreau *et al*, 1980; Nguyen *et al*, 1999), while Ruggie (1982) has labelled it *liberalism*. The aim of this thesis is not to investigate the genealogy of these labels; nonetheless, I choose to adopt Emmanuelle Jouannet's *liberal-welfarism* (2012: 249-253) to represent the Anglo-American project for postwar international economic order. Although I am aware of potential anachronistic effects that the use of such term might entail, its explanatory power in highlighting the two core tenets embedded into the project (liberalism and welfarism) compensates for my departure from the historical terminology. Similar scholarly license has also been undertaken by other contemporary international lawyers, *see generally* Dunoff (1998, 1999), Gathii (2001), Howse (2002), and Lang (2006).

³⁹¹ Ruggie, 1982: 393.

³⁹² *See generally* Jouannet (2012: chapter 22).

³⁹³ Ruggie, 1982: 393.

³⁹⁴ Carreau *et al*, 1980: 26-27, 78-83, 257-258.

the institutional development of postwar international law and governance of trade relations, it is necessary to juxtapose the liberal-welfarist story to historical narratives underscoring the competing projects – socialism and developmentalism – that succeeded in giving birth to alternative regimes for multilateral trade cooperation.

2. From the Socialist Programme to the Comecon Regime

It is not surprising that international lawyers in, or supporting, the socialist bloc constructed different legal doctrines aimed at historicising, conceptualising, and influencing the formation and consolidation of postwar international economic order.³⁹⁵ They tended to focus primarily on the active role of the Soviet Union in shaping global economic governance and institutions. Their emphasis was on the Soviet diplomatic efforts to create an institutional regime at the international level for the development of a socialist division of labour. However, these attempts were hampered, or perhaps sabotaged, by its Western ‘allies’.

The historical narratives underpinning those legal doctrines often began with the invitation for the USSR to participate in the Anglo-American negotiations for a project to structure the postwar governance of international economy.³⁹⁶ The Soviet Union not only attended the Bretton Woods Conference and signed the Articles of Agreement in 1944, but also contributed continuously until the first meeting of the IMF Board of Governors in 1946. However, it refused to ratify the Bretton Woods Agreement. The majority of socialist countries did participate in the foundation of IMF, but not in the World Bank. Yet, by mid-1960s most of them either ignored or withdrew from the Bretton Woods system.³⁹⁷

More importantly, those historical accounts highlight that the USSR and other socialist countries did give initial support to the Anglo-American Suggested Charter.³⁹⁸ Nonetheless, the Soviets attended neither the meetings of the Preparatory Committee (London in 1946, New York and Geneva in 1947) nor the Havana Conference in 1947.³⁹⁹ Despite their absence, other socialist countries, including Czechoslovakia, Poland and Yugoslavia, engaged in the deliberations on the ITO Charter and the GATT. Yet, only Czechoslovakia and Yugoslavia signed the ITO Charter, and only the former signed and

³⁹⁵ See generally Ustor (1971).

³⁹⁶ Brabant, 1990: 43-44; Ikenberry, 1993: 197-198.

³⁹⁷ Brabant, 1990: 41-44.

³⁹⁸ Ibid.

³⁹⁹ Ibid; Schiavone, 1981: 3.

ratified the GATT. Under the shadow of the Cold War, legal doctrines expressed the socialist position, which claimed that the ITO was a strategic instrument devised by the United States to influence economically and politically trading relations in the emerging socialist world.⁴⁰⁰ Moreover, the ITO regime based on non-discrimination and reciprocity would entail two adverse effects. It would make more burdensome the transformation of Eastern European countries into centrally-planned economies. It would also reinforce, instead of preventing, the imperialist domination of Western countries over trade relations among socialist countries. Thus, the ITO was accused of reproducing and legitimising a world divide between powerful, rich countries and dependent, poor countries.⁴⁰¹

In response to the conclusion of the GATT in 1947, the Council for Mutual Economic Assistance was founded in 1949, with the purpose of establishing an international regime for economic assistance and development of the world socialist system. Since it is not the scope of this study to go at length into legal doctrines produced in the context of the Comecon, I offer here only a very brief account of their core features.

Since after World War II, the Eastern European countries were engaged not only in reconstructing their devastated economies but also in a deeply transformative process of adapting them to planned development.⁴⁰² From 1945 until 1949, they organised their economic relations by concluding a number of bilateral treaties of friendship, cooperation and mutual assistance. The Comecon was established in this context to perform two general functions. As a defensive organisation, it aimed to protect their members against discrimination and economic abuse perpetrated by the Western states. As an assistance institution, its central purpose was to promote mutual technical support and economic cooperation among fully equal socialist countries. These functions reflected a balanced compromise between the two core goals of the *socialist programme*⁴⁰³: the *comradely* aspiration for a multilateral regime devised to achieve formal and substantive equality among states through the implementation of “the international socialist division of labour in the interest of building socialism and communism in their countries,”⁴⁰⁴ on the one hand; and, the *voluntary* desire to protect national sovereignty as the mean for avoiding foreign interference in the state control of centrally planned domestic economies, on the other hand.

⁴⁰⁰ Kostecki, 1979: 3-4.

⁴⁰¹ Ibid.

⁴⁰² Ustor, 1971: 183-185. Schiavone, 1981: 11.

⁴⁰³ Ustor, 1971: 275.

⁴⁰⁴ Ibid.

The development of Comecon law and governance sought to realise such socialist programme.⁴⁰⁵ More precisely, the notion of “assistance” enshrined in the mandate of the Council for Mutual Economic *Assistance* was born in the idea that socialism was a superior and richer model of governing cooperation than liberal-welfarism.⁴⁰⁶ This was supposedly manifested into the principle of mutual assistance, which was conceptualised as a legal right to receive support from other socialist countries. To prevent interference in domestic affairs, the principle of mutual assistance was counterweighted with the principle of sovereignty. These two legal principles should govern state behaviour and institutional practices under the Comecon regime.⁴⁰⁷

At the international level, the Comecon ought to ‘assist’ its members in freeing themselves from economic dependence on the capitalist system through the socialist style of economic integration. This consisted of safeguarding the planned development of national economies, the acceleration of economic and technological progress, the higher levels of industrialisation, and the gradual equalisation of economic developments.⁴⁰⁸ At the domestic level, the Comecon should ‘assist’ its members to implement and consolidate the socialist economic system through nationalisations, economic planning and monopolist control of production. Under the Comecon, socialist countries coordinated their reciprocal trade, through bilateral agreements, according to their long-term plans for the progress of national economies. Additionally, their common trade policies sought to introduce a wide variety of innovative, non-liberal-welfarist rules and mechanisms, such as the Sofia principles⁴⁰⁹ and multilateral commissions of experts.

Somehow similar to the GATT, the origin of the institutional architecture of the Comecon was also unorthodox. The Charter of the Comecon was adopted only in 1959, more than 10 years after its foundation.⁴¹⁰ This means that during the initial years Comecon members relied heavily on state and customary practices rather than treaty for their normative and institutional guidance. Since then, the socialist regime evolved gradually

⁴⁰⁵ Ibid. at 183-189.

⁴⁰⁶ Schiavone, 1981: 3.

⁴⁰⁷ Ustor, 1971: 183-189.

⁴⁰⁸ Ibid.

⁴⁰⁹ The Sofia principle was a completely new, unprecedented technique to coordinate economic policy, since it operates in opposition to the secretiveness and competition of Western economies and the GATT. The Sofia principle unlocked to Socialist countries the storehouse of their scientific and technical knowledge. This assisted all the Comecon members, particularly the less developed among them, to “raise their general technological level, to make considerable economies, introduce advanced industrial technology and master the manufacturing of new types of goods in the shortest possible time” (Ustor, 1971: 184).

⁴¹⁰ Ustor, 1971: 184-189.

towards a more diversified and open form of cooperation, but still within the boundaries circumscribed by the balance between sovereignty and equality.

The next step was the approval of key amendments to the Charter of the the Comecon in the 1962 Moscow Conference.⁴¹¹ Normatively, the Basic Principles of International Socialist Division of Labour were adopted aiming to set forth the main goals and methods of economic cooperation between member countries. Institutionally, the Charter was also amended to remove the membership to European states only. The amendment to Article 2:2 transformed the socialist regime from its initial defensive, inward-looking, regional vocation into a multilateral regime for trade cooperation, open to contributing to the world economy.⁴¹²

In 1971, the Comecon adopted the “Comprehensive Programme” that aimed to organise the collective efforts of its members to further deepening the international socialist division of labour through joint actions towards greater economic integration. In contrast to other international organisations, socialist governance and law were neither conceived nor constructed upon supranational organs reproducing the competences of liberal state and bestowed with authority to intervene in the affairs of sovereign states.⁴¹³ Instead, they set up a complex institutional machinery to govern economic and technical relations among socialist countries, firmly grounded on equality and sovereign principles.⁴¹⁴

The multilateral trading system constituted and operated under the Comecon was centred on the interests and needs of socialist states.⁴¹⁵ While their national economies were organised around the notions of central planning and state ownership of the means of production, consumption, investment and reserve, their foreign trade was carried out by state-owned enterprises (SOE). Comecon members manifested their preferences in economic plans, which in turn were reflected in trade policies. To secure imported goods necessary to fulfil their economic goals, long-term trade agreements were concluded between Comecon members. These bilateral arrangements provided what goods would be imported or exported. However, the actual exchange of goods was undertaken by authorised SOEs through private law transactions.⁴¹⁶ Hence, while (public international) treaties set forth the details of goods exchange, (private law) contracts had to be entered into between domestic legal entities to the implementation of foreign trade.

⁴¹¹ Ibid.

⁴¹² Ibid. at 275-276.

⁴¹³ Ibid. at 189, 277; Kuznetsov, 1971: 88-90.

⁴¹⁴ Ustor, 1971: 189, 194-195, 277.

⁴¹⁵ Ibid. at 263-264, 274.

⁴¹⁶ Ibid.

The operation of the Comecon did not preclude socialist countries from trading with non-socialist countries and later changing their view of the ITO.⁴¹⁷ Further on, some of them came to reposition their trade policies towards the GATT, and, eventually, some acceded to it. As a bloc, socialist countries were committed to the Comecon and used the United Nations as the neutral forum to debate general trade matters. Individually, some of them began to enter into closer contact with Western countries, and the liberal-welfarist regime.⁴¹⁸ From the late-1950s on, Czechoslovakia (an original member of the GATT) and Cuba (acceded in 1948) were progressively joined by other socialist countries. First, Yugoslavia and Poland became associate members in 1959 and received full membership in 1966 and 1967, respectively. This made Poland the first Comecon member to become a GATT contracting-party. In 1971, the Comprehensive Programme acknowledged the economic and technical value of maintaining relations with capitalist developed and developing countries.⁴¹⁹ This led Romania and Hungary to accede to the GATT in the early-1970s. The accession of Comecon members seemed to indicate that GATT law and governance had to become even more flexible and resilient during this period to accommodate not only trade relations between liberal-welfarist and socialist countries but also to accept the participation of centrally-planned economies.⁴²⁰

3. From the Developmentalist Programme to the UNCTAD Regime

In the Third World, international lawyers also sought to craft legal doctrines to historicise, analyse, and influence the (re)construction of the postwar international economic order. Similar to socialist states, they accounted that the initial attitude of developing countries was to participate and support the Anglo-American project. Throughout World War II, they engaged extensively in deliberations for establishing the liberal-welfarist economic regime. They contributed significantly with pro-development ideas, policies and rules to the preparatory work that paved the way to the 1944 Bretton Woods Conference and the 1947 Havana Conference.⁴²¹ Leading developing countries sought to strike a more equal balance between liberal free trade at the international level and welfarist policies at the domestic level by proposing some amendments to the draft ITO Charter. Indeed, different from

⁴¹⁷ Kostecki, 1979: 5-11.

⁴¹⁸ Ibid.; Grzybowski, 1980: 547-551.

⁴¹⁹ Comecon, 1971.

⁴²⁰ See generally Grzybowski (1980).

⁴²¹ El-Naggar, 1969: 256-258; Yusuf, 1982: 11-14; Bennouma, 1983: 212-213; Helleiner, 2014: 2-3; Toye, 2014: 2-3.

Bretton Woods, Third-World countries were more vocal and influential in Havana. This diplomatic effort resulted in some concessions, including the inclusion of new chapters on economic development and commodities trade. However, throughout both negotiations, the United States moved to withdraw progressively its support from rules and institutions on development matters.

The adoption of the Bretton Woods Agreement, the US refusal in ratifying the ITO Charter, and the durability of the 'interim' GATT were sources of considerable criticism by developing countries.⁴²² Although their support to the ITO varied, the idea of having an international regime for trade cooperation was central to their economic development plans. By contrast, the GATT in their eyes was irrelevant at best, and a threat at worse. It not only disregarded developmental issues, focusing only on lowering trade barriers to trade in industrial goods, but also rejected any attempt to have pro-development rules introduced. When finally the GATT turned to development in the form of the 1958 Haberler Report, developed contracting-parties decided not to implement the expert recommendations. Moreover, when in the 1960s and 1970s Third-World countries succeeded in increasing their exports in agricultural and manufactured goods, GATT provisions were turned against them by First-World countries.

Not surprisingly, these strategies were perceived as imperialist attempts to use the IMF, World Bank and GATT to marginalise and subjugate developing countries.⁴²³ The consequence was twofold. On the one hand, the liberal-welfarist governance was formally or practically rejected by the Third World. On the other hand, the political dissatisfaction and ideational suspicion of the too strong bias of the GATT towards free trade caused developing countries to experience a lack of institutional representativeness coupled with their factual irrelevance in policy- and rule-making. This context led to the formation of a vacuum, which would be progressively filled up by developing countries' move to the United Nations, where they began to organise themselves around what would become a multilateral regime for economic cooperation, development promotion and protection against neo-imperialism.⁴²⁴

Lagging behind socialism and liberal-welfarism, the origin of what is called *developmentalism* finds its roots in the different way of thinking about the world economy developed in the 1950s under the United Nations Commission for Latin America

⁴²² See *supra* note 421.

⁴²³ See *supra* note 421.

⁴²⁴ Bielshowsky and Macedo e Silva, 2016: 292-293.

(CEPAL).⁴²⁵ Taking into consideration his policymaker experience in trying to manage the disastrous consequences for Argentina of the 1930s Great Depression and trade war, the economist Raúl Prebisch offered the initial ideas and techniques that would be at the core of developmentalist programme: the Prebisch-Singer thesis on a secular decline in the terms of trade; the view that GATT law and governance were systemically biased against developing countries for their failure in recognising the distinct economic dynamics of central and peripheral countries and in providing adequate institutional solutions; and the trade policies that aimed at promoting regional integration of developing countries and trade preferences for their manufactured exports.⁴²⁶

These development-centric ideas found fertile soil in developing countries constrained by the dynamics of Cold War and decolonisation. From the 1955 Bandung Conference to the 1961 Belgrade Conference to the 1962 Cairo Conference, Latin American and Asian countries, which had experienced great disappointment after the Havana Conference, joined the increasing number of Asian-African postcolonial countries in building an interregional solidarity and furthering developmentalism. Specifically, they aimed at converting those initial theories and observations into proposals for trade and development policies, rules and institutions. By 1962 the First- and Second-World countries could not ignore or postpone Third-World claims for reshaping international trade law and governance.⁴²⁷ In December 1962, the UN General Assembly passed Resolution 1785(XVII) calling for the United Nations Conference on Trade and Development in 1964.

The UNCTAD was firstly convened as a conference in March 1964, but was rapidly transformed by UN General Assembly into a new organisation by December 1964. Its main purpose was to “formulate principles and policies on international trade and related problems of development.”⁴²⁸ Its institutional arrangement was devised to assist Southern economies to establish a development-centric international trade law and governance. During its first ten years and so, the basic policy agenda presented in 1964 was expanded, refined and turned into a pro-development programme. Grounded on a lineage of international trade theories and observations starting with Prebisch’s work, the idea at the core of the project was that economic development is “activity-specific,” and so a country is defined by its production and import-export activity.⁴²⁹ This means that growth of

⁴²⁵ For an overview of the developmentalist programme, *see generally* El-Naggar (1969), Bedjaoui (1979), Bennouma (1983), Abi-Saab (1984), Elias (1992), Cypher and Dietz (2009), Toye (2014), and Bielshowsky and Macedo e Silva (2016).

⁴²⁶ El-Naggar, 1969: 258-260; Bennouma, 1983: 158-163; Toye, 2014: 4-14.

⁴²⁷ *See supra* note 426.

⁴²⁸ Article II(3)(b) of the UN Resolution 1995 (XIX).

⁴²⁹ Bielshowsky and Macedo e Silva, 2016: 292-293.

peripheral developing countries, which specialise in producing and exporting agricultural goods and raw material, tends to be slow and fragile due to the structural bias of global markets. On the one hand, their primary good exports are more exposed to price and demand fluctuations. On the other hand, their economic growth is more likely to suffer from a trade gap created by a qualitative difference in income elasticity between goods exported from and imported to developing economies.⁴³⁰

Drawn from those theories and observations, the core vision that informed UNCTAD consisted of two basic tenets. Since developing and developed economies were substantially different, their trade needs were also different. To promote convergence in welfare standards between countries, it was necessary to foster economic diversification of developing economies through some degree of industrialisation and international economic integration.⁴³¹ Consequently, the UNCTAD shared with the GATT the view that international trade can benefit all countries. However, it diverged from the liberal-welfarist notion that free trade at the international level and socioeconomic welfare at the domestic level would achieve that goal. Instead, the UNCTAD defended that, in a context of a demand-led economy, a structurally biased trading system, and a politically polarized world, for countries fully benefited from the international division of labour, it was condition *sine qua non* to establish a new set of global and regional democratic institutions. This institutional programme would have authority to implement adequate demand management and policies, which would take into consideration countries' diverse stages of economic development.⁴³²

Building on this programme, an international regime for trade cooperation between developed and developing countries was imagined to strike a compromise between two goals: the aspiration for fairer, though (inter-)dependent, international economic integration through a multilateral system of preferential trading; and the desire for economic emancipation through import-substitution-industrialisation policies and state intervention.⁴³³ The role of international economic law was to serve as legitimate instruments to promote economic development, reduce inequalities and vulnerabilities, and guarantee policy space at the domestic level and equal participation in decision-making processes at the international level. To do so, legal rules and institutions had to be reformed, whereas legal ideas and practices reconceived.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.; El-Naggar, 1969: 287.

⁴³³ Bedjaoui, 1979: 188-189, 250-253; Bennouma, 1983: 8-9; Abi-Saab, 1984: 102-104; Elias, 1992: 39-40, 208-209; Toye, 2014: 22, 25; Bielshowsky and Macedo e Silva, 2016: 293-294; Cypher and Dietz, 2009: chapter 6.

The overall strategy of the emerging legal doctrines in the Third World was to contest the dominant liberal-welfarist international economic law and governance while assisting, through continuous reforms or revolution, the construction of a new international economic order. The UNCTAD's Generalised System of Preferences was devised to achieve the foreign trade objectives by constituting a venue for negotiations and policy, while the Declaration for the Establishment of a New International Economic Order (NIEO Declaration), along with its Programme of Action and Charter of Economic Rights and Duties of States (NIEO Charter), were conceived as the central pillars of a comprehensive plan for bringing a new international economic order into existence. These normative and institutional proposals reflected the efforts of lawyers to entrench developmentalism into international economic law. The ultimate aspiration was to accommodate the two pro-development goals (preferential cooperation and emancipatory development) without increasing dependency or falling into isolationism. Therefore, this compromise between trade preference at the international level and development interventionism at the domestic level was at the heart of the developmentalist programme.

In contrast to the conventional narratives, socialist and Third-World countries played a very active (now strategically forgotten) role in both the deliberations that led up to the formation of the liberal-welfarist GATT and the construction of alternative regimes for multilateral trade cooperation, the socialist Comecon and developmentalist UNCTAD.⁴³⁴ Under the shadow of the Cold War and decolonisation, these multilateral trading systems were conceptualised, implemented, and managed according to their distinct political economy missions, institutional arrangements, legal norms and state behaviour. Although the dynamics of East-West and North-South politics might have increased tensions pushing them to aspire to trade isolationism, the reality was that these multilateral trade regimes were neither politically nor economically self-contained. Instead, they coexisted simultaneously and sometimes overlapped one another within specific domains. These institutional encounters were experienced differently hinging on the contingent circumstances. From harsh clashes to compromising small differences, they increased or reduced political or economic frictions, depending on states' policies and behaviour as well as regimes' institutional adaptability and normative resilience. Furthermore, unforeseeable and highly complex processes of structural transformation (including political, economic, technological, social and cultural) converged to shape and defy each of these multilateral

⁴³⁴ Helleiner, 2014: 2-3; Brabant, 1990: 43-44.

trading systems. Contrary to conventional wisdom⁴³⁵, this reveals that lawyers living in the period experienced the postwar as a rich period of ideational, normative and institutional experimentalism, which was materialised in the fragmentation of the international economic order into three multilateral regimes for trade cooperation centred around competing projects: liberal-welfarism, socialism and developmentalism.

B. One Multilateral Trading System to Rule Them All? South-North Regional Trade Agreements as Battlefields between the Liberal-welfarist GATT and the Developmentalist UNCTAD

The previous section shows that international lawyers produced legal histories as a way to engage in the construction and operation of the postwar international economic order. These historical narratives were used to create legal doctrines in order to justify and legitimise the distinct projects for re-organising and managing trade relations among countries.

Specifically, lessons were extracted from institutional stories in order to defend the superiority or necessity of a specific multilateral trading system. Despite all their differences, these legal histories and doctrines shared an understanding that the period was not characterised by an ideational consensus, institutional homogeneity, and normative harmonisation around one correct model of governing world trade. Rather, ‘global trade governance’ was experienced as a fragmented order, under which three, juxtaposed, regimes for multilateral trade cooperation competed for supremacy: the liberal-welfarist GATT, the socialist Comecon, and the developmentalist UNCTAD.

Running in parallel, the postwar period also witnessed the formation and development of legal histories and doctrines on the international trade law of regionalism. They were used to structure the creation and management of bilateral, preferential and regional agreements devised to regulate trade affairs of distinct groupings of countries. In the beginning, the majority of these international treaties were experimental and did not follow a particular institutional design or policy formula. Out of the constellation of trade agreements, some were concluded by GATT contracting-parties, and so attracted the jurisdiction of the GATT. This section aims to account for the institutional stories about regional trade agreements between developed and developing countries (South-North) in the context of the postwar fragmentation of international trade law and governance.

⁴³⁵ For the conventional narratives on the history of international economic order, *see generally* Lowenfeld (2008), Qureshi and Ziegler (2011), Loibl (2014), and Charnovitz (2014).

Specifically, it focuses on how South-North RTAs were conceived, designed, operated and contested under GATT Article XXIV, while framed, shaped and challenged in the course of confrontations and *détentes* between liberal-welfarism and developmentalism.

1. The GATT Law and Governance of South-North Regionalism

The institutional story begins by acknowledging the existence of not one but two rival projects for regulating South-North regional trade agreements: the dominant liberal-welfarism and the challenger developmentalism. Historically, liberal-welfarism was the first programme to be conceived and implemented. As discussed above, its roots go back to the 1940s when the US and UK negotiated the ideational, normative, and institutional architecture for reorganising the postwar world trade. The outcome of such diplomatic effort was the compromise reached by the Western developed countries around liberal-welfarism.⁴³⁶ Its teleological mission was to prevent the interwar economic disaster and trade wars through the establishment of a less discriminatory, and more reciprocal regime for multilateral trade cooperation under an international organisation. This programme was primarily embodied in the Suggested Charter, and then embedded into the ITO Charter and finally into the GATT.

In this context, one of the main controversies between the United States and the United Kingdom was concerning with their views of South-North regional trade agreements. While American diplomacy pushed towards a multilateral system of non-discriminatory trade, the British negotiators resisted the pressure to dismantle its imperial system of trade preferences.⁴³⁷ Despite their divergent positions, a diplomatic agreement was reached that free trade was to be gradually achieved through the adoption of a multilateral version of most-favoured-nation clause at the heart of the future liberal-welfarist trading system, while regional preferences, progressively phased out. Concretely, Article I established the MFN clause in the GATT, whereas Articles I:2 (Imperial Systems of Preference), XXV:5 (General Waiver) and XXIV (RTA) created the exceptions. These GATT disciplines were devised to operate together to accommodate (the American) free trade multilateralism and (the British) preferential regionalism. In this context, the liberal-welfarist programme envisaged assigning to the GATT the legal authority to govern the formation and operation of South-North RTAs.

⁴³⁶ Jouannet, 2012: 249-253; Ruggie, 1982: 393-398.

⁴³⁷ See *supra* note 32, and accompanying text.

Prior to the GATT, a number of South-North trade arrangements were in operation. The vast majority was established as colonial regimes between European empires and their colonies.⁴³⁸ The British Commonwealth, the French Union, and the Benelux Customs Unions were the most important of those imperial systems. They employed discriminatory and protectionist policies and measures to hinder the growth of trading flow between their colonies and third countries. Despite their dismantlement was a key priority of the United State's project postwar for multilateral trade cooperation, the imperial preference question was settled by excepting the most significant of those imperial systems from the core rules of the GATT. Behind that compromise, there was an American ideal that in due time those imperial systems would either disappear or lose their function.⁴³⁹ Article I:2 was the formalisation of that understanding, to the extent that it grandfathered a list of pre-GATT preferential arrangements, which would, otherwise, be subject to the prohibition on any increase of preferential margins under Article I:4. The effect of Article I:2 was, therefore, to grant a 'special and differential treatment' to GATT contracting-parties who were imperial powers and conditioned their support on excepting their South-North preferential regimes from the general principles of non-discrimination and reciprocity.

While Article I:2 grandfathered existing preferential arrangements, Article XXV:5 established a waiver power ensuring that new preferential schemes could be created if a two-thirds majority of contracting-parties agreed with them.⁴⁴⁰ This 'waiver provision' enabled countries to act jointly to suspend GATT obligations. During the ITO/GATT negotiations, the power for waiving was progressively broadened to cover all obligations.⁴⁴¹ In practice, Article XXV:5 provided justification for new preferential agreements outside the Article XXIV discipline.

From 1947 until 1985, the waiver power was exercised to grant 'special and differential treatment' to South-North preferential arrangements.⁴⁴² The first application of Article XXV:5 took place already in 1948 to allow the United States to accord trade preferences to Pacific islands formerly under Japanese trusteeship. In 1951, Italy was authorised to grant trade preferences to its former colony, Libya.⁴⁴³ In 1953, Australia was granted a waiver to depart from the general provisions in order to accord preferential

⁴³⁸ Yusuf, 1982: 7; Trebilcock *et al.*, 2012: 24-25, 83-86.

⁴³⁹ See *supra* note 438, and accompanying text.

⁴⁴⁰ Yusuf, 1982: 47-50. See *supra* notes 34-36, and accompanying text.

⁴⁴¹ Feichtner, 2012: 58-59.

⁴⁴² Yusuf, 1982: 47-50. See *supra* notes 34-36, and accompanying text.

⁴⁴³ GATT, Italy-Libya Waiver.

treatment to its trustee territory of Papua-New Guinea.⁴⁴⁴ All these waivers were authorised on the argument that preferential trade was beneficial to the recipients' economic growth.⁴⁴⁵

This 'benign' view of trade preferences encouraged the United Kingdom to propose as early as 1951 an amendment to the GATT creating a general waiver for imperial countries to establish new preferential arrangements with their colonies to promote the economic development of the latter. The reform proposal was rejected in 1955 by the contracting-parties; nonetheless, European countries were continuously granted waivers to support the economic development of their colonies or newly independent countries.⁴⁴⁶ Thus, Article XXV:5 was widely used to authorise the formation of South-North preferential arrangements insulated from the discipline of Article XXIV.

Looking back, what has been described as an American 'ardent' opposition to RTAs was not only tamed only by Articles I:2 and XXV:5, but mainly by the acceptance of the exception enshrined in Article XXIV. Taking into consideration the powerful US position during the ITO/GATT negotiations, the adoption of Article XXIV has often caused confusion and bewilderment.⁴⁴⁷ This partly explains the reason for historical narratives of its origins have always been controversial. Another explanation has been the inconclusiveness that has arisen out of GATT's preparatory work.⁴⁴⁸ Against the conventional wisdom of present-day literature, historical accounts have often not accepted the British imperialism as the determinant factor for the inclusion of Article XXIV since its core interest was already secured under Article I:2. Instead, it seems Article XXIV was constructed in two steps, each of them accommodating interests of distinct groupings: the early drafts of GATT referred to an exclusive exception for customs unions, while only after the Havana Conference the free trade areas were added to Article XXIV.

Concerning customs unions, the central arguments for accepting their inclusion were practical and theoretical.⁴⁴⁹ From a pragmatic viewpoint, the CU exception aimed to provide a solution for countries participating in the negotiations who were already members to customs unions, the Syrian–Lebanese customs union and the Benelux (formed by Belgium, the Netherlands, and Luxembourg). From a theoretical standpoint, customs unions were not conceived of as preferential or protectionist arrangements. Rather, they were

⁴⁴⁴ GATT, Australia-Papua-New Guinea Waiver.

⁴⁴⁵ Yusuf, 1982: 47-50.

⁴⁴⁶ From 1955 to 1960, waivers were granted to the UK (with regard to its dependent territories), France (regarding Morocco) and Italy (concerning Somalia) to conclude preferential arrangements with the aim of promoting economic development (Yusuf, 1982: 49).

⁴⁴⁷ See generally Acheson (1969) and Chase (2006), Gantz (2009), Trebilcock *et al* (2012) and Matsushita *et al* (2016).

⁴⁴⁸ Trebilcock *et al*, 2012: 84-86.

⁴⁴⁹ Jackson, 1969: 575-580. See also Matsushita *et al*, 2016: 508-509; Trebilcock *et al*, 2012: 84-86.

regarded as institutional arrangements employed to promote economic or political integration. This historical narrative underlines the widely accepted explanation connecting the establishment of Article XXIV to the process of European integration. However, this common understanding has been recently challenged by the lack of archival evidence to back-up its historical-causal connection.⁴⁵⁰

Furthermore, the inclusion of free trade areas in Article XXIV was even more opaque. While the CUs-exception had already been included in the Atlantic Charter, the FTAs-exception only appeared in draft proposals after the Havana Conference of 1947.⁴⁵¹ The reasons for the acceptance of such amendment are also contentious. Part of mainstream literature tells that a formal amendment was presented by Syria and Lebanon, with the support from France and other developing countries, on the grounds that FTAs would be a better-suited mechanism than CUs to foster economic integration among the latter. A minority view postulates that the US acceptance of the FTA-exception served not to strike a compromise with the United Kingdom, France, Syria, Lebanon or developing countries. Instead, the motivation of the United States was to create a valid exception for an FTA it had secretly negotiated with Canada.

It was hence in the form of Article XXIV that contracting-parties transferred to the GATT the legal authority over regional trade agreements. Article XXIV set forth the legal conditions for the formation, implementation, and operation of RTAs. In the GATT vernacular, RTAs were abstractly understood as treaties entered between at least one contracting-party and one or more countries, through which trade concessions were reciprocally exchanged, aiming at advancing trade liberalisation and economic integration among themselves.⁴⁵² Concretely, Article XXIV established a distinction between three forms of RTAs: free trade areas, customs unions, and interim agreements. For an FTA to be consistent with GATT law, its partners had to liberalise trade between themselves, while for a CU to be GATT-consistent its partners were additionally required to agree on a common external tariff. Both FTAs and CUs were thus perceived as forms of promoting economic integration and trade liberalisation.⁴⁵³ Finally, interim agreements consisted of a temporary trade agreement leading to either FTAs or CUs.

Taking Article XXIV into consideration, the United States designed the Marshall Plan, a liberal-welfarist proposal for assisting the European economic reconstruction from

⁴⁵⁰ Compare Trebilcock *et al* (2012) and Gantz (2009) with Matsushita *et al* (2016), Acheson (1969) and Chase (2006).

⁴⁵¹ Jackson, 1969: 575-580. See also Matsushita *et al*, 2016: 508-509; Trebilcock *et al*, 2012: 84-86.

⁴⁵² Matsushita *et al*, 2016: 507.

⁴⁵³ Ibid.

the devastation of World War II.⁴⁵⁴ The Marshall Plan played an important role in sponsoring the trade and economic integration projects in Europe. The 1957 Treaty of Rome establishing the European Economic Community and the 1959 Treaty on the European Free Trade Association were made possible by the combination of both the Marshall Plan's economic support and the GATT's Article XXIV exception. However, the EU and EFTA were not single instances, since a wave of regionalism followed their creation. Whereas very few RTAs were established in the 1950s, there was a significant surge in numbers in the 1960s and 1970s.⁴⁵⁵ Of the many regional trade agreements signed and notified to the GATT under Article XXIV, 28 were between developed and developing countries.⁴⁵⁶ This represented roughly 60% of all notified RTAs in the late 1970s.⁴⁵⁷

The European Union was the most important trading economy interested in concluding South-North RTAs. It figured as the Northern partner in 23 of those RTAs, while Finland entered into 4 and Australia, 1. As I shall analyse below, from the outset of the European integration projects to 1985, developing countries, especially former European colonies, were present in the EU policies for foreign trade and development aid. Given the economic and political differences among developing countries and changes in the interests of European countries over time, it seems that three institutional models of regional governance were developed and implemented to regulate the economic relations of the European Union with Third-World countries. Each model had distinct goals and levels of complexity depending mainly on the identity assigned by the EU to developing partners. Moreover, the South-North RTAs concluded between either Finland or Australia with a developing country appear to have been closely shaped on one of the European models for trade cooperation.

Throughout this period, regionalism became one of the most controversial issues within the GATT governance.⁴⁵⁸ The supporters of multilateralism argued that Article XXIV established too vague or insufficient rules to discipline the formation of RTAs. Such legal ambiguities were understood to be responsible for not preventing the resurgence of 'preferential' trade agreements in the 1960s and 1970s, increasing fears of a return to discriminatory and protectionist measures, which had the potential of eventually conducting countries to trade wars. By contrast, the supporters of preferential regionalism reasoned that

⁴⁵⁴ Ibid.; Gilpin, 2000: 58.

⁴⁵⁵ Mansfield and Milner, 1999: 600.

⁴⁵⁶ Dür *et al*, 2014.

⁴⁵⁷ WTO, 2011: 55.

⁴⁵⁸ Gilpin, 2000: 79.

Article-XXIV consistent RTAs were created under a valid and legitimate exception to GATT law.

More importantly, they claimed that these trade agreements did not represent a threat to the GATT regime for two reasons.⁴⁵⁹ First, the GATT agreement contained not only Article XXIV but also a variety of other exceptions that enabled its contracting-parties to adopt a wide range of trade policies and arrangements in a manner consistent with GATT law. Second, RTAs were not like imperial systems of preferences. Rather, they were useful mechanisms to promote economic integration and trade liberalisation under the liberal-welfarist programme. For instance, not only the EU found its genesis in the Marshall Plan and Article XXIV, but also the majority of South-North RTAs served only to formalise ‘special’ economic and political ties existing between European countries and their former colonies whose economies were almost insignificant for world trade. Under liberal-welfarism two competing views of the institutional story emerged to influence the interpretation of Article XXIV and shape the design of South-North RTAs. As I shall discuss further, the GATT and EU models offered different institutional possibilities for striking a balance between multilateralism and regionalism.

2. The UNCTAD Law and Governance of South-North Regionalism

Before delving into those two liberal-welfarist perspectives (GATT and EU), it is important to retell how critical visions of GATT Article XXIV were inspired by developmentalism. The controversies as to multilateralism-versus-regionalism were dominant among GATT developed partners. While at the superficial level, these debates reflected the conflict between the general rules of non-discriminatory trade enshrined in Article I:1 and the particular exception for discriminatory economic integration under Article XXIV; at the core level, the root of their disagreements went down to the normative tension of the GATT between liberalism and welfarism. These liberal-welfarist perspectives of the interplay between Article I:1 and XXIV were regarded as widely accepted within legal expertise. They tended, however, to obfuscate two significant features of fundamental impact on developing countries. Either under the GATT or an RTA, partners were subject to two legal principles: formal equality of treatment and conventional reciprocity.⁴⁶⁰

⁴⁵⁹ Ibid.

⁴⁶⁰ Yusuf, 1982: 3-10.

Formal equality of treatment was similarly expressed in Articles I:1 and XXIV. This entailed that any trade concession granted by a partner would automatically and non-discriminatorily be extended to the other parties to specific agreements provided exceptions apply. If the external operation of ‘Article I:1’ multilateral regime and ‘Article XXIV’ regional regimes might cause mutual discrimination, their internal activities were carried out on the basis of formal equality of treatment.

The equivalent can be found as to conventional reciprocity. GATT preamble and Articles I:1 and XXVIIIbis provided that contracting-parties commit themselves to negotiate non-discriminatory concessions on reciprocal and mutually advantageous basis towards to the substantial reduction of trade barriers. The basic assumption under the GATT regime was that partners were not obliged to grant advantages unilaterally, but they were indeed expected to accord and receive concessions. Article XXIV regimes also operated under the assumption of reciprocity with a significant difference: partners were not free to choose not to exchange trade concessions.⁴⁶¹ Under Article XXIV:8, RTA-partners were legally required to reciprocally exchange advantages that would eliminate barriers to “substantially all the trade.” Therefore, formal equality and conventional reciprocity were perceived by developed countries as core principles necessary for the construction and function of both the GATT regime and regional trade regimes.

Contrariwise, developing countries from the ITO negotiations through the GATT governance contested the application of the principles of equality and reciprocity to all countries alike. They persistently argued, with very little success, that an international regime for trade cooperation could not be founded on the principles of formal equality and conventional reciprocity. These legal principles, they claimed, would blind the trading system to the profound material inequality between Southern and Northern countries, and so the need to grant differential treatment to the former. More concretely, GATT law ensured, mainly through the combined operation of Articles I (MFN), XXIV (RTAs), XXV (general waiver), and XXVIIIbis (tariff negotiations), the economic and political dominance of developed countries in both multilateral and regional negotiations. GATT rules concentrated the bargaining on manufactured goods of interest to developed countries, in detriment of developing countries’ key exports.⁴⁶² These GATT disciplines on bargaining processes constrained developing countries’ space for negotiating. On the one hand, they could not engage in concessions exchanges on an equal basis, because tariff and non-tariff measures were widely employed by them to implement pro-development policies and to

⁴⁶¹ Ibid.

⁴⁶² UNCTAD Proceedings 1964-V: 467-468.

increase revenues. On the other hand, developed countries could refuse to negotiate on any product, notably the ones vital for developing economies.

Developing countries experienced similar perverse dynamics throughout RTAs negotiations under Article XXIV. Either developed countries concluded RTAs among themselves producing discriminatory effects against developing countries, or Northern economies used their dominant position to dictate the terms of RTAs to Southern economies.⁴⁶³ The EU and EFTA exemplified the first tendency, in which the consequence of intra-trade barriers increased the difficulties of developing countries in expanding their exports of agricultural or manufactured goods to European markets; whereas the Yaoundé Conventions⁴⁶⁴ and Association Agreements with the Maghreb countries represented the second tendency, under which developing countries were demanded to offer reverse trade concessions to developed countries. Thus, the principles of reciprocity and non-discrimination enshrined in the GATT agreement not only reinforced the already powerful bargaining position of developed countries but also constrained the range of possible concepts, ideas, rules and institutions available to constitute 'pro-development' RTAs. For these reasons, since its creation in 1947 developing countries sought to reform GATT law.

The continuous denials of developed countries to take into consideration developing countries' demands caused Southern economies to conclude that the GATT regime was heavily biased in favour of Northern economies and so responsible for hampering their efforts to use international trade as means to promote economic development.⁴⁶⁵ GATT rules were deemed to be obstacles rather than promoters of developing countries' participation in world trade, since they supported a mutually advantageous liberalisation of trade in manufactured goods while authorising the relatively high tariffs on agricultural goods and escalating tariff rates applied to export products that were vital to developing countries. More specifically, developed economies tended to shield their agricultural production with high tariffs, on the one hand; and, discourage the imports of manufactured goods from developing countries by increasing the duties with the degree of processing, which entailed a double effect: protection against manufactured goods and incentive to importing primary commodities from Southern economies. Thus, after struggling for two decades, developing countries decided to embrace and realise the developmentalist programme by challenging the GATT regime through the construction of the UNCTAD as an alternative regime for multilateral trade cooperation. As we shall discuss, this alternative

⁴⁶³ El-Naggar, 1969: 286-287; Yusuf, 1982: 3-10, 18-21.

⁴⁶⁴ The Yaoundé Conventions were RTAs concluded between the EU and the African developing countries in 1963 and again in 1969. For specific details, *see* Chapter 7.

⁴⁶⁵ UNCTAD Proceedings 1964-V: 467-468; El-Naggar, 1969: 276-277; Yusuf, 1982: 15-21.

programme shifts the focus of the GATT governance of South-North RTAs from a multilateralism-versus-regionalism controversy to a debate on strengths and weaknesses of either preferential dependency or economic emancipation.

The developmentalist plan offered by the UNCTAD aimed at reforming international trade law and governance in three fronts: international commodity agreements, South-North arrangements on preferential access for developing countries' manufactured goods, and South-South preferential agreements.⁴⁶⁶ Due to the limited scope of this study, the following analysis focuses only on the interaction between the UNCTAD and GATT concerning South-North RTAs under Article XXIV.

To deal with the challenges highlighted above, the UNCTAD sought to reshape entirely the governance of South-North trade relations through the introduction of a new set of legal concepts, rules, and institutions. The purpose was to establish a pro-development system of trade in order to stimulate manufacturing exports of developing countries by granting them preferential treatment. It was expected that this system of preferences would reduce their high initial costs. By lowering initial costs and opening up larger markets on a temporary and preferential basis, weak industries in Southern economies would have the opportunity to develop and compete internationally.

Similar to other protectionist measures employed by developed countries in the past to self-industrialise, preferential access would work as a justifiable instrument for protecting infant exporting industries in developing countries. Also, preferences would level the playing field by softening the real effects of the non-discriminatory principle. Indeed, preferential reductions would enable developing countries to come closer to material equality of treatment. Thus, a multilateral regime of preferential treatment would symbolise the international acceptance of the necessity for asymmetry in the regulation and governance of trade relations between Southern and Northern economies, on the one hand; and the recognition that law reform was required to introduce 'differential and special' rules aiming at achieving material equalisation, on the other hand.

At the 1964 Geneva Conference, the UNCTAD Secretariat presented its first proposal to reform international trade law and governance.⁴⁶⁷ Several suggestions and reservations were offered to the establishment of a multilateral system of trade preference.⁴⁶⁸ Three distinct positions were advocated by Northern economies. The United States presented the strongest reservations to the proposal. The US defended the GATT

⁴⁶⁶ Yusuf, 1982: 18-21; El-Naggar, 1969: 286-288. *See also* UNCTAD Proceedings 1964-II.

⁴⁶⁷ *See generally* UNCTAD Proceedings 1964-II and Yusuf (1982: 21-23).

⁴⁶⁸ *See supra* note 467.

regime by claiming that any departure from its core rules, notably Article I:1, should be entirely justified and rigorously scrutinised, while arguing that the multilateral rounds of negotiations would cause any preferential margin to be of little relevance. The UK, supported by Germany and the Netherlands, defended a single preferential scheme applied to all developing countries by all developed countries. By contrast, the French-Belgian position was to internationalise the Association regime already in operation under the Treaty of Rome to regulate trade relations between the EU and its former African colonies. It would consist of a selective regime of preferences constituted around a committee where exporting and importing countries would negotiate preferences bilaterally on a reciprocal basis.

The Southern economies did not share a single view either, despite their joint negotiating position. Developing countries who already benefited from preferences were not willing to forgo them unless given new advantages. This was mainly the case of African countries associated with the Yaoundé Convention⁴⁶⁹. Also, the least developed countries argued for introducing a further distinction based on the different levels of development with the purpose of narrowing the control over the allocation of trade concessions. Despite great effort, developed and developing countries could not reach an agreement on the institutional design for the multilateral system of preferences, except for the General Principle Eight acknowledging the need for preferential treatment.⁴⁷⁰

From the 1964 Geneva Conference to the 1968 New Delhi Conference, the political power gathered around the UNCTAD increased. This opportunity led developing countries to push forward the developmentist-inspired reform of international trade law and governance.⁴⁷¹ Initially, developed countries sought to weaken the pressure of the UNCTAD by shifting the negotiations back to the GATT. They introduced the 'Part IV amendment' to the GATT agreement in 1964. Although it did not discipline trade preferences, Part IV acknowledged the structural differentiation between developed and developing countries, and so created an exception in favour of the latter for the non-application of the principle of reciprocity. In 1965, developed countries set up a special group to study preferential treatment for developing countries under the Organisation for Economic Co-operation and Development (OECD). It concluded that trade preferences could stimulate developing countries' exports of manufactured goods. These efforts were seen as important but not enough, and so developing countries continued demanding a

⁴⁶⁹ For specific details, *see* Chapter 7.

⁴⁷⁰ UNCTAD Proceedings 1964-I: 20.

⁴⁷¹ *See generally* UNCTAD Proceedings 1968-I and Yusuf (1982: 21-23, Chapter V).

permanent solution. By 1967 developed countries were ‘convinced’ to accept the principle of preferential treatment, but required further specification. This came in the 1968 Conference when Resolution 21(II) setting forth the basis for the Generalised System of Preferences (GSP) was passed by unanimous approval. It recognised the need for establishing “a mutually acceptable system of generalised non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries.”⁴⁷²

Developing countries believed that UNCTAD Resolution 21(II) represented a critical watershed decision reached by unanimity. It provided the general normative and ideational contours for the Generalised System of Preferences. Normatively, the GSP should rest on three pillars: (a) preferences should be generalised to all developing countries, on the basis of (b) non-reciprocity, and (c) non-discrimination. Ideationally, the aim of preferential treatment was to (i) increase export earning, (ii) promote industrialisation, and (iii) accelerate the economic growth of developing countries.

However, the implementation of Resolution 2(II) was surrounded by enormous challenges. The United States, together with Nordic countries, Switzerland and Japan, defended the establishment of a common scheme by all major developed countries and the elimination of special and reverse preferences; whereas Western European countries rejected the single system approach and defended a system of individual schemes that aspired towards harmonisation.⁴⁷³ The UNCTAD received all developed countries’ unilateral submissions, organised trade negotiations, and finally published the “Agreed Conclusions,” which consisted of a resolution adopted by its Trade and Development Board, expressing the consent given by all states to the establishment of the Generalised System of Preference.

The formation of the developmentalist regime had direct influence over the GATT law and governance of South-North RTAs. As we shall discuss below, the GSP represented an institutional alternative to the three schemes in operation under the GATT to regulate trade arrangements between developed and developing countries. The first incursion into the GATT was through the need to reform its rules and institutions to make room for GSP schemes.⁴⁷⁴ The GATT Secretariat prepared a technical note suggesting three possible ways of incorporating GSP preferences into the GATT regime: (a) waivers to general rules of GATT law, (b) an amendment to the GATT agreement, or (c) a unanimous declaration by the contracting-parties authorising such preferences. The Secretariat recommended the

⁴⁷² UNCTAD Resolution 21(II), preamble: 38.

⁴⁷³ Yusuf, 1982: 83-87.

⁴⁷⁴ Ibid. at 87-90.

adoption of the latter since the other two faced substantive and procedural limitations. Nevertheless, the contracting-parties decided to accord a temporary waiver to the GSP schemes.

The decision on granting a waiver was made not without careful consideration.⁴⁷⁵ It strategically avoided crystalising the developmentalist inroad into the GATT, which would have happened if an amendment were approved. Further, the temporary waiver made no reference to either Part IV, Article XXV:5, or any other rule of GATT law. This again served to contain the ‘infection’ of developmentalism for a limited period of time. This situation partially changed with the Tokyo Round, when developing countries pushed through the negotiations for a permanent legal status of GSP schemes.⁴⁷⁶ At the end of the Round, developing countries’ position seemed to have prevailed, leading contracting-parties to approve by consensus the Enabling Clause, which created under the GATT a permanent mechanism for GSP schemes. This approval came at a high price, nonetheless: the Enabling Clause was constructed as an exception to Article I:1, under which any preference under the GSP did not constitute a legally binding trade concession under Article II⁴⁷⁷ (Schedules of Concessions). This left the possibility for developed countries to withdraw in whole or in part any of trade preferences granted in accordance with the GSP.

The Enabling Clause represented a major ideational advance, institutional innovation and normative breakthrough for developmentalism. It not only operated a permanent insertion of developmentalist concepts, ideas and practices into the liberal-welfarist regime for trade cooperation but also forced a reorganisation of the three mechanisms for regulating trade arrangements between developed and developing countries under the GATT. With the Enabling Clause, Articles I:2 and XXV:5 lost their function of providing procedural and substantive rules for according wavers to preferential arrangements between developed and developing countries.⁴⁷⁸ Nonetheless, the Enabling Clause seemed to have entailed two (unexpected or unintended) effects. It assisted the former European empires by replacing uncertain or too limited legal provisions with a permanent legal instrument devised to establish preferential arrangements with developing countries. It also established legal rules authorising developed countries to unilaterally accord, modify and withdraw such preferences under the GSP.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid. at 90-93.

⁴⁷⁷ Pursuant to Article II:7, the schedules of concessions are integral part of the GATT and so legally binding upon contracting-parties.

⁴⁷⁸ Yusuf, 1982: 90-93.

By contrast, the relationship between the GSP and Article XXIV was regarded as more complex. The UNCTAD's General Principle Eight set out the normative basis for the GSP on two principles: non-reciprocity between developed and developing countries and non-discrimination among developing countries.⁴⁷⁹ The implementation of these two principles into the GSP revealed to be politically difficult since affected powerful interests protected under Article XXIV.

The non-discriminatory aspect of Principle Eight provided that GSP schemes should not discriminate among developing countries, whereas the existing preferential arrangements should be "abolished *pari passu* with the effective application of international measures providing at least equivalent advantages to the developing countries concerned."⁴⁸⁰ In other words, "preferential arrangements of a discriminatory nature between developed and developing countries" should be gradually phased out and replaced with the GSP schemes guaranteeing at least equivalent advantages.⁴⁸¹ The normative effect was to introduce the principle of non-discrimination among developing countries into GATT law of South-North RTAs, in order to prevent the use of the so-called *vertical preference*.⁴⁸² More concretely, it commanded not only the elimination of preferential arrangements under Articles I:2 and XXV:5 but also the South-North RTAs under Article XXIV.⁴⁸³ This view was pushed forward by certain developed countries, along with developing countries not benefited from Article XXIV preferences,⁴⁸⁴ which insisted that the abolition of Article XXIV preferences be a pre-condition for the inclusion of Southern economies as recipients under the GSP. However, after prolonged negotiations, the preference-free condition to access the GSP was dropped. The political abandonment of the principle of non-discrimination represented, therefore, the victory of Article XXIV over the GSP.

The non-reciprocity aspect of Principle Eight set forth that "developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries."⁴⁸⁵ This legal

⁴⁷⁹ Ibid. at 83-87, 112-113; El-Naggar, 1969: 275.

⁴⁸⁰ UNCTAD Proceedings 1964-I: 10-11.

⁴⁸¹ Ibid. at 121-122.

⁴⁸² Vertical preferences referred to the preferential arrangements under GATT Article XXIV between 'some' developed countries and 'some' developing countries. This type of South-North RTAs was seen as potentially accruing *discriminatory* effects on third developing countries (El-Naggar, 1969: 275).

⁴⁸³ Yusuf, 1982: 83-87, 112-113; El-Naggar, 1969: 275.

⁴⁸⁴ See *supra* note 483.

⁴⁸⁵ UNCTAD Proceedings 1964-I: 10-11.

norm clashed directly with the so-called *reverse preferences*.⁴⁸⁶ Again, certain developed countries declared that developing countries granting and benefiting from Article XXIV reverse preferences should not have access to the GSP.⁴⁸⁷ Conversely, developing countries argued that there was a large number of them benefiting from reserve preferences and so they would be excluded from the GSP in contrary to the all-inclusive objective of Principle Eight. The result of this controversy was twofold. Normatively, Article XXIV prevailed, since the GSP did not require the elimination of reverse preferences to consider a developing country eligible for benefits. Nonetheless, the introduction of the GSP seemed to be a determinant factor for the gradual elimination of reverse preferences in South-North RTAs.

At the end of the 1972 Santiago Conference, the Generalised System of Preference was institutionally established under the UNCTAD Special Committee on Preferences. By 1980, sixteen GSP schemes were in operation involving 25 donor countries (19 First-World countries and 6 Second-World countries).⁴⁸⁸ Until this point in time, the results from unilateral granting of non-reciprocal preferences to developing countries were meagre at best, and disappointing at worse. Almost all preference-giving countries only accorded preferential access to developing countries' manufactured goods, and so excluding by large their main exporting products, such as agriculture and textiles. Concerning raw materials, GSP schemes did not actually apply since these products were often admitted free of duty. Moreover, GSP schemes contained a number of provisions to safeguard developed markets from undue disruption potentially caused by products designed as "sensitive," notably textiles, leather and petroleum-based products. Finally, the effectiveness of GSP schemes was limited by the erosion of GSP preferences caused by MFN tariff reductions taking place within the Tokyo Round.⁴⁸⁹ All of these factors contributed to reducing the universe of developing countries' exports benefiting from the GSP. It was estimated that no much more than 13.4% of these products were covered under GSP schemes. Developing countries interpreted these weak outcomes as a reaction of developed countries to open their markets through either GSP schemes or MFN concessions within the Tokyo Round.

In light of the above, the creation of the Generalised System of Preference under UNCTAD was perceived by the Third World as the most profound transformation of legal rules and institutions underlying international trade law and governance since the end of

⁴⁸⁶ Reverse preferences referred to trade concessions *reciprocally* and mutually exchanged between some developed countries and some developing countries under Article XXIV (El-Naggar, 1969: 276).

⁴⁸⁷ Yusuf, 1982: 113-114; El-Naggar, 1969: 276.

⁴⁸⁸ Yusuf, 1982: 119, 149-160.

⁴⁸⁹ Ibid. at 158-160.

World War II.⁴⁹⁰ It was never considered a panacea for solving all their problems of economic development, to the extent that its shortcomings and limitations resulted from the weak compromise reached by developed and developing countries. Nonetheless, it represented a series of ideas, practices, policies and norms designed exclusively for attaining the interests of developing countries to promote industrialisation and accelerate their economic growth led by exports. More importantly, it constituted an institutional alternative to the Article XXIV mechanism under the GATT.

The Generalised System of Preferences symbolised, in this sense, the possibility of replacing the GATT regime of South-North RTAs, which were employed to reproduce historical and political ties between European imperial powers and their former colonies, with the UNCTAD regime of GSP schemes grounded on special and differential treatment, reflecting differences in the level of economic development, which was expressed in the form of trade preferences.⁴⁹¹ Indeed, Abdulqawi Yusuf argued that the GSP was viewed “as a significant step in the overall struggle for restructuring economic relations among States.”⁴⁹² In other words, it offered an opportunity to move away from the liberal-welfarist law and governance of South-North RTAs based on the principles of equality of treatment (vertical preferences) and conventional reciprocity (reverse preferences); and towards a developmentalist law and governance of GSP schemes centred on non-reciprocity between developed and developing countries and non-discrimination among developing countries.

As I shall discuss in the next section, two distinct institutional views arose out of the developmentalism to shape the interpretation of GATT Article XXIV and the making of South-North RTAs. Whereas the GATT-centric and European-centric understandings provided for distinct approaches to dealing with the tension between GATT multilateralism and RTA regionalism, the UN-centric and UNCTAD-centric visions offered alternative possibilities for governing South-North regional trade agreements by reframing the liberal-welfarist contradiction as between preferential cooperation and emancipatory development.

⁴⁹⁰ Ibid. at 115,166-167.

⁴⁹¹ El-Naggar, 1963: 289.

⁴⁹² Yusuf, 1982: 166.

C. One International Law and Governance of South-North Regional Trade Agreements? From the Liberal-welfarism and Developmentalism Struggle to the Emergence of Four Institutional Models for Trade Governance

From the clashes and *détentes* between the liberal-welfarist GATT and the developmentalist UNCTAD, four institutional models for trade governance emerged from the legal histories and doctrines on the international law and governance of South-North regional trade agreements. Regardless of their doctrinal angle, some events were shared in every account: political and economic factors that contributed to economic turmoil and trade wars of the 1930s leading up to the outburst of the Second World War, followed closely by the formation of a new international political order under the United Nations, which was in turn shaped by the Cold War and decolonisation. After accounting for these facts, the legal histories then shifted to the international economic governance by focusing, with varying degrees of relevance, on the establishment of the GATT and UNCTAD at the multilateral level, and the creation of the EU and EFTA, as well as South-North RTAs and GSP schemes at the regional level. The relative importance of each event and its respective lessons for the GATT law and governance of South-North RTAs under Article XXIV hinged on the way the institutional story was retold by legal doctrines created and applied in different settings.

Two visions of how the transformations carried out by the formation and implementation of the liberal-welfarist GATT regime caused developed countries, mostly European, to change their interactions with developing countries, mainly post-colonial states located in Africa, Caribbean, Pacific and Mediterranean. Some emphasised the stories and lessons about the efforts of the United States to persuade and direct the European empires to make their imperial systems of preferences progressively compliant with GATT law. Others stressed the developmental aspects of the imperial system and the need to adapt them to accommodate the European integration projects. Both focused on how to transform South-North preferential arrangements under Articles 1:2 and XXV:5 into either South-North RTAs under Article XXIV or trade concessions under Article II. Not surprisingly, these two views were dominant in the Global North. They were linked by their shared commitment to liberal-welfarism and often reframed as part of the multilateralism-versus-regionalism controversy. The legal doctrines supporting these visions highlighted a particular set of relevant events for the First-World countries, while tended to ignore or

overlook other facts and lessons related to the socioeconomic transformations driving the process of decolonisation and development in the Third World.

By contrast, the legal histories produced in the Global South gave birth to two competing visions of how political independence and international trade relations should be reconciled. Some viewed decolonisation and interdependence as moments of the restoration of political sovereignty and economic glory for Third-World countries. Others understood the same events as moments of political subjugation and new forms of economic exploitation. These two institutional visions underscored the developmentalist programme for establishing a new regime for multilateral trade cooperation between Northern and Southern countries. Therefore, grounded on the story of institutional practices examined in the previous sections, I argue that from 1947 to 1985 different patterns of legal doctrines gave rise to four institutional models of governance for structuring and managing South-North RTAs under GATT law.

The *GATT model* of trade governance emerged from legal doctrines that emphasised the historical tension between multilateralism and regionalism embedded into GATT Article XXIV. The institutional stories began by retelling how protectionist and discriminatory measures contributed to the outbreak of World War II.⁴⁹³ Throughout the interwar period, European empires created systems of preferences with their former colonies, dominions and protectorates. These trade regimes involved the imposition of higher duties on non-member goods and lower duties on member goods. The GATT negotiations had these imperial systems as one of the most contentious issues. The United States led by Secretary Cordell Hull was pushing the postwar policy agenda towards a complete dismantling of such discriminatory schemes, while the United Kingdom represented by John M. Keynes defended its maintenance.⁴⁹⁴ This understanding of institutional story calls attention to how the GATT was established to promote free trade against the discriminatory practices of former European empires. Consequently, the *telos* of Article XXIV was to impose constraints on the formation and operation of regional trade agreements, with the purpose of attaining their complete elimination. In this context, the South-North RTAs were mostly perceived not as mechanisms to foster economic prosperity, but rather as preferential trading systems, serving to perpetuate imperialist policies under a different label, which were tolerated only for political reasons. Thus, to

⁴⁹³ For this GATT-centric vision, see generally Carreau *et al* (1980) and Flory (1968). Also, see *supra* notes 436-459, and accompanying text.

⁴⁹⁴ Carreau *et al*, 1980: 80; Flory, 1968: 17; Irwin *et al*, 2008: 12. See also *supra* notes 436-459, and accompanying text.

aspire to be not only formally but also teleological consistent with Article XXIV, RTAs should reproduce the GATT model at the regional level.

The *European model* was grounded on a particular thread of legal doctrines that placed the European integration projects at the centred and then focused on the relationship of the EU and EFTA with developing countries in light of their mandates and members' foreign strategies.⁴⁹⁵ The European model of trade governance was chiefly influenced by interests and policies of France, Belgium, and the UK. The Association regime established under Part IV of the Treaty of Rome transposed the French-Belgium colonial arrangements to the European Union.⁴⁹⁶ After decolonisation, these preferential arrangements under the Association regime served as models for designing RTAs between the European Union and the newly independent states. The French-Belgium models were later reformed by the UK accession. Despite their particular differences, the EU sought to govern its trade with developing countries by creating an institutional hierarchy among Southern economies through regional arrangements.

To circumvent the GATT rules of non-discrimination (Article I:1) and of the prohibition on expanding imperial systems of preference (Article I:2), the European Union made use of RTAs as an open frame to accommodate its trade and development practices under GATT Article XXIV. The outcome was two-fold. On the one hand, the post-decolonisation RTAs between the EU and the newly sovereign states served to regulate trade relations while providing development assistance. On the other hand, EU-South RTAs did not seem to be experienced by the European Union as preferential trade instruments under the GATT regime. Instead, they were conceived as economic integration mechanism under EU law and governance.⁴⁹⁷ Thus, the understanding of South-North RTAs as welfarist mechanisms for development, which were almost part of the EU's 'internal' affairs, led the European-centric view to be favourable to regionalism. Whereas the GATT model was often associated with pro-multilateralism, the European model tended to align with pro-regionalism arguments.

These two liberal-welfarist narratives were not perceived as compelling in the Global South. Two alternative models of trade governance were constructed drawing from legal doctrines and histories that accounted for institutional practices associated with developmentalism. The UN-centric and UNCTAD-centric views were better succeeded in

⁴⁹⁵ For this European-centric vision, *see generally* Luchaire (1975), Gautron (1987), and Vignes (1988). *See also supra* notes 43-459, and accompanying text.

⁴⁹⁶ Broberg, 2013: 676.

⁴⁹⁷ Feuer, 1993: 88.

penetrating and influencing legal reform proposals, trade policies and behaviour of developing countries, notably the ones emerging from decolonisation processes.

The *UN model* was built in legal doctrines that focused on institutional stories about international socioeconomic processes of transformation leading up to both decolonisation and economic integration of Third-World countries under the auspice of the United Nations.⁴⁹⁸ The independence of colonies, dominions and protectorates was historically accounted for as the single most important event, to the extent that it opened the opportunity not only to defend the sovereignty of the colonised peoples but also to reassert their dignity, identity and self-determination. Neither the GATT nor the European Union, but rather the United Nations was regarded as the institutional model that would allow the rehabilitation of post-colonial states. Under the UN Charter, newly independent countries were to be equated to the Western states, dispelling the colonial images of their backwardness and primitiveness. Indeed, they supported the formation of new (or strengthening of old) majoritarian UN specialised agencies, such as the UN Economic and Social Council (ECOSOC), the UN Commission on International Trade Law (UNCITRAL), the UN Industrial Development Organisation (UNIDO), and the UNCTAD, which could assist developing countries to realise their key goals: the promotion of their domestic economic and social development, and their re-assimilation to their righteous place in the international community. Regional trade agreements and GSP schemes were understood as institutional mechanisms to help developing countries not only to foster economic growth but also to reclaim their legitimate participation in international trade law and governance. To be perceived as sovereign states, developing countries embracing the UN-centric view tended to support the principles of non-discrimination and reciprocity, and consequently the concession of vertical and reverse preferences contained in South-North RTAs. Hence, GATT Article XXIV was understood as the legal disciplines applicable to regional trade regimes between (sovereign) developed countries and (sovereign) developing countries which often shared historical and cultural ties; whereas GSP schemes were regarded as legal regimes open to all Third-World states.

Alternatively, the *UNCTAD model* of trade governance arose from legal doctrines stressing institutional stories that cast doubts on the celebratory view of decolonisation, economic interdependence, and harmonious trade.⁴⁹⁹ The political independence was accounted for a moment of treachery; since the visible colonial regimes under the liberal

⁴⁹⁸ For this UN-centric vision, see generally Elias (1992). See also *supra* notes 481-492, and accompanying text.

⁴⁹⁹ For this UNCTAD-centric vision, see generally El-Naggar (1969), Abi-Saab (1962, 1984), Bedjaoui (1979), and Bennouma (1983). See also *supra* notes 481-492, and accompanying text.

trading system was replaced with a less visible international system of neo-imperialist exploitation in the form of the GATT. The UN General Assembly was initially envisaged as the institutional locus to strive for legal transformation that would protect developing countries' economic sovereignty and self-determination from attempts of developed countries to assert neo-colonial controls. Once First-World countries contested the legality and legitimacy of the United Nations, while Second-World countries stood up only for their interests, developing countries sought to establish the UNCTAD as the symbol of the Third-World aspiration for a developmentalist regime for multilateral trade cooperation. While the GSP was regarded as a legitimate alternative, the UNCTAD-centric understanding condemned the South-North RTAs under the GATT by claiming they were institutional mechanisms to exchange vertical and reserve preferences. In other words, these Article-XXIV RTAs reinforced institutionally the principles of discrimination among developing countries and reciprocity between developed and developing countries in direct contradiction to the General Principle Eight of UNCTAD law. Thus, South-North RTAs should be phased out and replaced by GSP schemes.

Conclusion

This chapter opens with an invitation to revisit the history of the postwar multilateral and regional trade regimes through the lens of an alternative approach. This involved avoiding the disciplinary bias and intellectual shortcomings that have produced and universalised the 'grand narrative' provided in the contemporary mainstream literature. Specifically, I sought to foreground the role of international law and lawyers in the *institutional practices* that constituted, governed, and challenged the GATT and South-North regional trade agreements between 1947 and 1985. The analysis of official and archival documentation, canonical writings, and jurisprudential works reveals that this chapter of the institutional story of the GATT governance of South-North regionalism was characterised by a high intensity of ideational conflicts, political and intellectual struggles, jurisprudential transformations, and normative fragmentation. Thus, this period cannot, and should not, be remembered (as suggested in today's legal historiography) as a mere formative era of progressive trade liberalisation and continuous institutionalisation of the GATT regime. With this in mind, this chapter conveys two core arguments.

The clashes and *détentes* between the liberal-welfarist GATT and the developmentalist UNCTAD influenced the production of a number of innovative and eclectic legal doctrines. Four (relatively coherent) institutional models for regional trade governance emerged out of that moment of doctrinal creativity and experimentation. Since they were modelled on the institutional architecture and practice of concrete international organisations, I have named the models after their respective source of inspiration: the GATT, the European Union, the United Nations, and the UNCTAD. My first argument is that, in the postwar period, four (and not only one) institutional models were part of legal imaginary, and so regarded as valid and legitimate options to design and manage South-North regional trade regimes.

Less noticed but equally important, the historical narratives underpinning the four institutional visions did a great deal of work in assigning authority to and building disciplinary consensus around their models of trade governance. My second argument is that these accounts were characterised by their diversity, contestability and rivalry. This might sound counter-intuitive for most contemporary lawyers trained in the Global North. The reason for the lack of familiarity with these competing narratives seems to result from the bias and blind spots created by the traditional style of legal history. As discussed in Chapter 3, this mainstream approach tends to combine an overemphasis in state and non-state practices in the Anglo-American world with a narrow definition of international trade law. The consequences over time have been to overlook or rule out concepts and facts, history lessons and ideas, regimes and norms found in the rival legal doctrines underpinning the UN and UNCTAD models; while containing or reframing the minority understanding (EU model).

It seems that any attempt to re-appreciate, or construct new models based on, those institutional visions of regional trade governance by retelling legal history would be more disruptive for today's legal doctrine *and* the IEL field than when they were produced originally. The main reason for this destructive impact is, at the time these competing models arose, there was no strong consensus around a specific thread of historical narratives that underscored the overwhelming majority of legal doctrines. Consequently, it is not unexpected that the relative influence of each institutional vision was contingent depending on the context in which it emerged and was applied. The degree of relevance of each model of trade governance shall become even more evident in Chapter 7, where I analyse the negotiation, construction, and operation of the 28 South-North regional trade agreements under the GATT regime.

In conclusion, postwar lawyers were called to participate in the institutional making of the multilateral and regional trade regimes through international law. They employed legal doctrines to influence decision-making in and over the South-North regional trade agreements while defending or challenging the institutional models that prevailed in a particular setting. Hence, what seems to be more surprising nowadays is the realisation that, despite its European origins and Anglo-American appropriation, international trade law and governance were subject to highly disputed controversies from 1947 to 1985. This chapter provided the institutional story of how state behaviours, post-traumatic events, and the process of institutionalisation of the GATT and South-North regional trade regimes were understood and translated into history lessons. The next chapter shifts the focuses towards the *jurisprudential story*, in order to chronicle how canonical writings and official documents were crafted and interpreted by lawyers to offer legal doctrines to deal with and solve the foundational controversies over international trade law rules and institutions.

CHAPTER 6. INTERNATIONAL LAW AND LAWYERS IN THE *JURISPRUDENTIAL* MAKING OF SOUTH-NORTH TRADE REGIMES

Introduction

The history of the international trade law and governance of South-North regionalism has been traditionally articulated along two different, but complementary, storylines. The previous chapter examined the distinct narratives produced by postwar lawyers to make sense of and engage with the new institutional practices and projects underlying the rival regimes for multilateral and regional trade cooperation between 1947 and 1985. It focused particularly on the institutional patterns underlying the liberal-welfarist and developmentalist trade governances, which were accounted of as history lessons. Grounded partially in these teachings, legal doctrines were crafted to influence the formation and evolution of the GATT and the South-North regional trade agreements. Four institutional visions emerged from the wide range of legal histories and doctrines produced through the period. Each of them was centred on a model for regional trade governance based on the following international organisations with trade vocation: GATT, European Union, United Nations, and UNCTAD.

This chapter takes a different pathway. Instead of focusing on state behaviour, institutional practices and regimes, and socio-economic events, its purpose is to provide the history of international law in the jurisprudential making of South-North regional trade regimes from a perspective different from mainstream literature. The alternative approach proposed in Chapter 3 is employed to historicise the formation and development of legal ideas and techniques underlying the postwar international trade law and governance. Specifically, I aim to demonstrate that distinct narratives, which aspired to, but not necessarily achieve, a certain degree of coherence, were constructed to validate and legitimise jurisprudential programmes. Not only history lessons but also jurisprudential projects were influenced by the surrounding ideational conflicts, institutional and normative fragmentation, and professional and intellectual struggles. Grounded in these stories and teachings, a variety of legal doctrines were produced and employed to craft arguments

about, and offer solutions for, foundational controversies over the GATT law and governance of South-North regionalism. The result was the emergence of three jurisprudential visions of GATT Article XXIV and the South-North RTAs.

Following the same steps of institutional story, an alternative account of GATT jurisprudence between 1947 and 1985 requires departing from today's conventional narratives that often narrow the intellectual history to canonical writings that provide a vernacular of facts, concepts, theories and methods to make sense of the prevailing institutional interactions and state behaviour under the world trading system. Recall that mainstream literature often stresses how ontological and epistemological issues on the GATT law and governance of South-North regionalism were framed, evaluated, and answered through doctrinal analyses of Articles I:2, XXV:5 and XXIV and the Enabling Clause. Chapters 1 and 2 demonstrate that the almost exclusive focus of traditional accounts rests on jurisprudential debates as to the legality and legitimacy of regionalism under the GATT/WTO regime. They underscore the way evidence was offered to prove or disprove the formal consistency of South-North RTAs with GATT law through the examination of the disciplines in Article XXIV. This interpretative practice of GATT law is narrated as overwhelmingly influenced by formalism, which was developed by few (Anglo-American) lawyers engaged in the construction and implementation of the postwar international trading system.

As examined in Chapter 3, the traditional history tells that in the first decades of the GATT the field of international economic law was progressively disregarded within international trade governance, because lawyers were unable to provide an effective *legal* solution to the unhindered use of Article XXIV. The 'too soft' discipline imposed by Article XXIV on RTAs-making was explained as resulting from GATT's 'birth defect'. The opacity and ambiguity of GATT rules (generally) and Article XXIV (in particular) were understood as the main reason for the 'abusive' resort by contracting-parties to the exception for creating CUs and FTAs. To constrain state discretion, the 1940s generation applied their doctrinal analysis to determine both the formal validity of the rules of Article XXIV themselves and the compliance of RTAs with them. For leaving aside issues of policy and governance, this conceptual style of doctrinal analysis was criticised for rendering ineffective solutions to tame the 'misuse' of GATT law. The consequence was a gradual displacement of legal expertise as a mode of international trade governance in favour of less abstract and legalist and more policy-oriented and technical forms of expertise. This was manifested through the substitution of international lawyers for economists, diplomats and officials as experts in decision-making under the GATT.

In light of the above, I argue that the (contemporary) mainstream literature portrays the history of international trade law and governance of regionalism as a jurisprudential tragedy with powerful and long-lasting effects over the IEL field's identity and mission. Ideationally, the conventional narratives tell that the central problem faced by postwar lawyers was the conflict between multilateralism and regionalism. Institutionally, the present and past ineffectiveness of Article XXIV is deterministically attributed to the GATT's 'original sins'. Jurisprudentially, those accounts acknowledge the failure of formalism in applying GATT rules to discipline RTAs in a way that was politically and economically sound and effective. Hence, legal expertise had no significant role in decision-making in and over the GATT law and governance until at least the 1980s.

The effects of the traditional history are to reinforce the legitimacy and authority of the current mainstream jurisprudence of the international trade law of South-North regionalism. This is achieved by narrowing the jurisprudential story to the contributions of Anglo-American lawyers and blaming formalism for letting legal expertise to be powerlessly trapped in itself. The legal doctrine of Article XXIV is narrated as overly committed to abstract formalities rather than to policy issues concerning the factual proliferations of South-North RTAs. Likewise, lawyers are historically painted as the tragic heroes, who were unable to develop a general, ahistorical, conclusive solution for managing the conflict between multilateralism and regionalism. Consequently, the IEL field was 'forced' to defer the authority to policy-oriented experts.

To avoid telling a jurisprudential story as a tragedy starring Anglo-American lawyers and focusing solely on Article XXIV, this chapter accounts for the stories produced between 1947 and 1985 to understand and give meaning to the international trade law and governance of South-North regionalism. It intends to emphasise, instead of overlooking, the intellectual and political conflicts that generated, supported and challenged legal doctrines employed to negotiate, design, and operate South-North RTAs under the GATT. Making use of the alternative approach introduced in Chapter 3, the following jurisprudential story does not move backward to tell how Article XXIV was created and had its rules been progressively interpreted with the purpose of refining their application to constrain state discretion on RTA-making. Instead, it consists of historicising how Article XXIV was conceived and interpreted in the context of profound transformations undergoing inside and outside the field of international law. It narrates the efforts of international lawyers to engage with the (re)construction of the postwar international economic order (generally), and also to manage its fragmentation in multilateral and regional regimes for trade governance (in particular).

Moreover, GATT law is neither equated to international trade law nor narrated as a special body of positive rules and institutions, or as technocratic, policy-oriented expertise resistant to formal thinking and legalistic practice. Rather, it is accounted as part of the struggled for legitimacy and authority over legal decision-making within and over multilateral and regional regimes for trade cooperation. Jurisprudentially, this conflict was manifested as foundational questions and crucial preoccupations about the making and interpretation of new concepts, rules and institutions concerning GATT law and South-North RTAs.

My alternative history begins when lawyers were living in a period of professional and intellectual disarray mainly caused by the challenges posed to international law by the diplomatic efforts to construct, operate, and challenge new universal, multilateral or regional regimes for trade cooperation in the aftermath of World War II. It was in this complex and tense background that the trade dimension of international law gained currency into legal expertise as part of controversies about international economic law. The jurisprudential debates shaped and were influenced by the attempts to establish 'the' postwar international economic order. Throughout these processes of making of and resisting to multilateral and regional regimes for trade cooperation, legal doctrines were constructed to empower lawyers to craft, manage and reason about legal rules and institutions of international trade affairs. They also imposed limits to the legal imagination by drawing the boundaries of what constituted valid and legitimate idea and technique as well as by determining what is (part of) international trade law.

As I shall discuss in detail below, the jurisprudential controversy over the autonomy of the field of international economic law serves as an entry-point to capture the intellectual and political struggles underlying the formation and development of the GATT and South-North regional trade regimes. Although this debate was sometimes foregrounded and sometimes hidden within legal expertise, I will show that a lawyer's view on the matter affected, consciously or otherwise, the construction and application of legal doctrines on the GATT law (generally) and on the South-North RTAs (in particular). Put differently, this theoretical, and perhaps overly abstract, question veiled a core battlefield where opposing ideational programmes and rival jurisprudential projects were argued and then clashed against one another, with the purpose of producing meanings with authoritative and legitimate effects over the international trade law and governance of South-North regionalism.

A. The Genesis of the Controversy over International Economic Law: In the beginning was international law, and international law was with international lawyers, and international law was international lawyers...

In the aftermath of World War II, the founding fathers of the emerging field of international economic law were the heirs of European legal traditions. The first lawyers interested in thinking about international regulation of economic affairs were German jurists who sought to extend to international law the same sort of jurisprudential debates about disciplinary demarcation, which was common among their domestic law peers. The foreground issue animating such dispute was to whether legal rules governing economic life should be studied as a new discipline due to its specialised subject-matter, or should be categorised and examined according to the traditional public-private and international-domestic law conceptualisation. Although these controversies might sound overly formalist or excessively detached from reality, they were not mere abstract speculations by legal academics locked up in their Ivory Towers. Instead, they were the embryonic manifestations of jurisprudential projects for global economic governance proposed by groups of lawyers, which were subject to disciplinary mechanisms for consensus-building within legal expertise. The emergence of two rival strands led up to a core set of legal questions, ideas and techniques that would shape the field of international economic law and governance for the next decades.

Georg Schwarzenberger was a Jewish born in Germany who found refuge in 1934 in the United Kingdom. As a professor at the University of London, he published as early as 1942 his first piece in international economic law.⁵⁰⁰ Yet, it was his masterpiece of 1948, *The Province and Standards of International Economic Law*, that provides the still influential conceptualisation of the discipline.⁵⁰¹ His formalist view emphasised the role of international law subjects in the process of lawmaking, while reinforced the centrality of legal sources for legal interpretation.⁵⁰² At the outset, the central controversy was framed as to whether IEL is procedurally limited to the public aspect of international law that regulates inter-state economic relations or whether it also extends to domestic, or even transnational, law dealing with private business transactions.⁵⁰³ In summary, Schwarzenberger's jurisprudential project purported to empower international economic

⁵⁰⁰ Schwarzenberger, 1942: 21.

⁵⁰¹ Schwarzenberger, 1948: 405-406. For the influence of Schwarzenberger over the contemporary IEL field, see sections 3.B.2 and 4.B.1.

⁵⁰² Schwarzenberger and Brown, 1976: 3; Schwarzenberger, 1948: 405-406; 1966: 8.

⁵⁰³ See *supra* note 502.

law by narrowing it to the formal rules and institutions created and employed only by sovereign states to regulate their economic interactions. Over the years, his pioneering and magisterial project sought to influence the construction and management of the postwar international economic order by advocating the existence of IEL as a specialised branch of international law.⁵⁰⁴

In contrast to Schwarzenberger's formalism, Georg Erler (1905-1981), a Nazi-German law professor, developed an alternative project in his outstanding and also influential work *Grundprobleme des Internationalen Wirtschaftsrechts* of 1956.⁵⁰⁵ He argues that international economic law should not be limited only to public rules of international law, but should rather cover the bodies of law having a regulatory effect on cross-border economic transactions. A functionalist approach was employed to determine whether a rule or institution is valid and legitimate by assessing evidence of its force in constituting and shaping the 'factual' structure regulating international economic relations.⁵⁰⁶

Erler's move challenged the central role of 'normative' structure as the distinctive benchmark for a specialist branch of international laws. In other words, legal rules and institutions governing international economy were deemed to be created and shaped by an interconnected web of (state and non-state) actors and (private, transnational and public) sources of international law. His weak antiformalist perspective underscored the 'object' of international law in the law-creating process, while blurred the traditional distinctions between hard law and soft law, and between public and private, constraining legal interpretation. As a result, the central polemic was reframed as to how to maintain the unity of the discipline, given the difficulties to practically and intellectually control whether a certain rule is legal or non-legal or whether all the legal rules are normatively equal regardless their origin or content. Hence, Erler's jurisprudential project consisted of strengthening the role of international economic law as the expert technique for governing world economy by expanding its material reach in order to regulate almost any economic affair having a tenuous international connection.

By the 1950s, these two jurisprudential projects sowed the seeds that led to the formation of Schwarzenberger's *Formalist School* and Erler's *Functionalist School*. As I shall discuss below, their jurisprudential debate spread out across Europe, causing international legal practitioners and intellectuals to choose sides or reject the controversy

⁵⁰⁴ See *supra* note 502.

⁵⁰⁵ See generally Erler (1956).

⁵⁰⁶ Tietje *et al*, 2006: 21-22; Verloren Van Themaat, 1981: 9-11.

entirely. More importantly, this conflict shaped the emerging IEL field by framing in what was regarded as ‘acceptable’ concepts and histories, norms and regimes, ideas and practices while outflowing the rest as ‘unsuitable’. Over time, it has also influenced international lawyers’ legal doctrines of international trade law and governance and impacted ultimately their conceptualisations of and interactions with the GATT law of South-North regional trade agreements.⁵⁰⁷

Despite their particular differences, the Formalist and Functionalist Schools seem to embrace the same transcendental premise, namely the sufficient uniqueness of international economic law. Building on the claim that IEL’s distinctive common features are self-evident, their lawyers sought to establish disciplinary boundaries, separating the IEL field from the others, and also to increase its authority over international economic governance. Inside legal expertise, this involved undertaking concrete steps to assert the existence of the IEL field by rewriting its history and reshaping its professional identity and mission, while reorganising its disciplinary commitments, characteristic vocabulary, and differentiated styles of reasoning. Outside, the task consisted of promoting IEL norms, regimes, and doctrines as techniques of legal governance to be strategically deployed by lawyers to make and manage international economic affairs.

B. The IEL Controversy in France: From the Disruptive Effects of Formalist Specialisation to Liberal-welfarist Programmes on International Law of South-North Trade Governance

Before proceeding, it is important to explain why the French history of international law is particularly relevant for the analysis of South-North regional trade agreements (generally) and EU-South RTAs (in particular). As shall become clear in Chapter 7, France and its lawyers were the most interested and influential in shaping the RTAs concluded between the EU and developing countries in Africa and the Mediterranean.⁵⁰⁸ The main reasons for the French protagonist position are the following. The majority of the original African and Mediterranean states participating in RTAs were former French colonies. France, alongside with Belgium, was the primary advocate of establishing EU policies towards those

⁵⁰⁷ The German debate, or the formalist-functionalist controversy, came to shape the IEL field in the decades following up the publications of Schwarzenberger and Erler’s masterpieces. For instance, *see* its impact on the works of Carreau, Flory, Juillard and Rochère in the 1960s and 1970s (1968, 1980), Verloren Van Themaat in 1980s (1981: 9-11), and Ortino and Ortino in 2000s (2008).

⁵⁰⁸ Jean-Claude Gautron, a French emeritus professor of international law, has reached a similar conclusion (1987). *See also* Bartels (2007) and Broberg (2013).

developing countries. France had built ‘special relations’ with them, which ranged from strong historical and cultural ties to considerable economic interests. As a consequence, the international law arrangements between the EU and the newly independent African and Mediterranean countries were initially modelled on the French law of overseas countries and territories, underlying the French Union and the French Community. Hence, considering the prominent role of France, I will use French lawyers as an entry-point to investigate the role of legal thinking and practice in the making of EU-South RTAs.

The penetration of the jurisprudential controversy over international economic law in France led to a sophisticated debate among its most prestigious international lawyers, resulting in a deep disciplinary turmoil.⁵⁰⁹ It began with Paul Reuter’s (1911-1990) introduction of the formalist-functionalist quarrel over the IEL autonomy into the French international law community as early as 1952. The IEL controversy rapidly spread out, impacting the major French schools of international law adversely. Indeed, legal practitioners and intellectuals were called to support or reject the claim for the autonomy of international economic law. Their choice often indicated their allegiances to one of the two primary French schools of international law, the *Voluntarist* and *Sociological Schools*. Although both Schools had pledged their commitment to legal neo-positivism, the question about IEL pushed them towards two opposing directions.⁵¹⁰ Whereas voluntarist lawyers rejected the IEL project by conceptually arguing that there were not enough distinctive empirical features to support a claim for disciplinary independence, their sociological peers defended the IEL project by employing interdisciplinary approaches to demonstrate empirically that the IEL’s unique characteristics justified its autonomy.

The ramification of voluntarist and sociological positions was pervasive across the French legal community, profoundly affecting how lawyers conceived the international trade law and governance of South-North regional trade agreements.⁵¹¹ From a voluntarist viewpoint, international trade law was a sub-speciality of IEL devised to regulate trade affairs among First-World countries. Under liberal-welfarism, the GATT was regarded as the multilateral regime for trade cooperation among advanced capitalist-market economies, while the European Union was conceived of as a regional regime for economic integration of developed countries. Distinctively, international development law was conceptualised as *another* sub-speciality of IEL developed to discipline trade matters between First- and

⁵⁰⁹ Following the publication of Reuter’s *Le Droit économique international* course in 1952, French lawyers tended to engage, directly or indirectly, with the controversy about the existence of IEL as an autonomous field.

⁵¹⁰ See generally Jouannet (2006, 2009).

⁵¹¹ Nguyen *et al*, 1999: 895-900, 946-947. See also Weil (1972), Lacharrière (1967: 704-706), Tietje *et al* (2006: 21-22).

Third-World countries.⁵¹² Under developmentalism, the UNCTAD was understood as the multilateral regime for trade cooperation between developed and developing countries, whilst South-North RTAs, such as Lomé Conventions and EU-Mediterranean Cooperation Agreements, were regional arrangements for First-World states assist Third-World states to promote economic development.⁵¹³ Thus, voluntarist lawyers defended the notion of duality in international economic law, through which two IEL bodies of concepts, histories, norms, regimes, ideas, and techniques were constructed and applied to govern two different kinds of trade interactions: North-North and North-South. More specifically, since South-North RTAs were deemed to be subject only to international development law, GATT Article XXIV should not apply to them. Instead, those trade agreements were constituted and regulated by the special and differential regime under GATT Part IV.

Building on the idea of international economic law as autonomy expertise, the Sociological School reached very different understandings of international trade law and governance of South-North RTAs.⁵¹⁴ Conceived as a branch of IEL, international trade law was imagined as a body of concepts, histories, rules, institutions, theories, and methods applicable to all trade affairs. The GATT was conceptualised both as an international organisation with universal vocation devised to preside over cross-border trade transactions and as a liberal-welfarist code to regulate trade relationships according to the ‘laws of the economy’.⁵¹⁵ The European Union and the European Free Trade Association were understood as valid and legitimate exceptions to GATT’s core principles since their aim was to promote economic integration among regional trading partners.

Conversely, sociological lawyers were very suspicious and resistant to accept any other institutional regime for multilateral trade cooperation.⁵¹⁶ The rival multilateral trading systems were seen not only as ‘political’ programmes for the establishment of anti-GATT regimes but mainly as ideological attempts to implement artificial divisions of labour disassociated from the reality of international economic order. This perspective led the Sociological School to reject the institutional and universal character of the UNCTAD and the status of NIEO Declaration and Charter as formal, hard law. At the regional level, South-North regional trade agreements were deemed to be ‘impure’ forms of regional economic integration. This meant that the Yaoundé and Lomé Conventions as well as the constellation of EU-Mediterranean Association, Trade and Cooperation Agreements, were

⁵¹² Nguyen *et al.*, 1999: 895-900, 906-914. *See also* Virally (1965), Feuer (1993: 88-89).

⁵¹³ Nguyen *et al.*, 1999: 895-900, 906-910. *See also* Lacharrière (1964, 1967), Feuer (1993: 88-89).

⁵¹⁴ Carreau *et al.*, 1980: 11-15, 86-87. *See also* Carreau, Flory and Rochère (1968).

⁵¹⁵ Carreau *et al.*, 1980: 11-15, 36-37.

⁵¹⁶ *Ibid.* at 11-15, 36-37, 84-93.

not perceived as GATT Article XXIX mechanisms for economic integration. Rather, they were understood as legal instruments for establishing ‘special’ or ‘exceptional’ regimes to promote preferential trade between developed and developing countries.⁵¹⁷

There were two main implications of the French projects to regional trade agreements between developed and developing countries.⁵¹⁸ At the theoretical level, voluntarist and sociological visions appeared not to be directly contradictory: while the latter understood South-North regional trade agreements as exceptional regimes only justified by political compromises, which ultimately posed a threat to GATT law, the former conceived those trade agreements as special and differential regimes operating under the GATT governance. Despite their differences, both schools of international law shared the normative assumption that the GATT law and governance of South-North RTAs were not truly part of international trade law, but rather the legal instances of some sort of special, provisory regime grounded on exceptional rules and institutions, and justified by either political concessions (sociological vision) or economic inequality or underdevelopment (voluntarist vision). While sociological lawyers conceived these exceptional regimes as governed by the politically-sensitive province of international development law (in contrast to the economically-oriented domain of international economic law), the voluntarists understood them as distinct arrangements of international development law (which coexisted side-by-side with international trade law under IEL).

C. The IEL Controversy in Africa: From the Converging Effects of Antiformalist Universalisation to the Developmentalist Programmes on International Law of South-North Trade Governance

The introduction of the IEL controversy into Africa seems to have provoked a converging, rather than divisive, effect over legal communities. The formalist-functionalist debate on the autonomy of international economic law did not find fertile soil to flourish in the post-colonial context of African schools of international law. This does not mean that African lawyers were not interested in legal norms and regimes regulating the global economy. Nothing could be further from the truth. Very early after independence, European colonisation of Africa was understood as a two-prong approach.⁵¹⁹ The colonial strategy

⁵¹⁷ Ibid. at 308-309, 343-347, 361-363.

⁵¹⁸ For specific details, *see* Chapter 7.

⁵¹⁹ Gathii, 2008: 318-319; Anghie and Chimni, 2003: 79-82.

combined imperial manoeuvres to acquire political sovereignty over non-European territories with a mercantilist policy of economic subjugation and exploitation, which employed international law as a legitimising and authoritative mechanism. As a result, a consensus was early reached on the centrality of international economic matters to African countries, as well as on the desire to use international law and governance to manage and deal with them.

The formation and consolidation of legal communities in Africa took place from the 1950s until the end of 1970s.⁵²⁰ Lawyers were called to express their support to one of the jurisprudential projects for governing the international economy by joining one of the emerging African schools of international law. While a minority defended a radical breakup with the existing international economic order, the majority pledged their alliance to one of the reformist projects undertaken by the African *Contributionist* and *Critical Schools*. Each jurisprudential programme was grounded in a particular body of legal concepts, histories, rules, institutions, ideas and methods. The primary strategy of those leading schools consisted of employing *identity* (contributionism) and *structural* (critical) approaches, respectively, to engage international law in reclaiming and reconstructing the international economic order according to the needs and aspirations of the newly independent African states.

The contributionist and critical projects produced pervasive consequences across African legal communities, deeply affecting how international trade law and governance of South-North regional trade agreements were thought and practised. Contributionists conceived international trade governance as a fragmented domain under the modern regime for peace and security inaugurated in the postwar era.⁵²¹ The United Nations was understood as the legitimate authority presiding over international life (generally) and trade matters (in particular). Subject to the UN Charter, the GATT regime was perceived as the embodiment of the liberal-welfarist programme for multilateral trade cooperation, which was created by First-World countries according to their own values and operated for their own interests.⁵²² By contrast, the UNCTAD regime reflected the developmentalist programme for trade cooperation constructed with the participation of developed and developing countries for the purpose of reforming international trade law rules and institutions. As a consequence, the UNCTAD was regarded as the embryonic institution for ‘the’ future world trade and development organisation.

⁵²⁰ Gathii, 2008: 318-319; Anghie and Chimni, 2003: 79-82.

⁵²¹ Elias, 1974, 1992: chapter 1. *See also* Gathii (2008: 318-321; 2012: 408-409).

⁵²² Elias, 1992: 25-28, 198-200, 203-208, 378-381.

Contributionist lawyers understood international trade law as a speciality of IEL, which in turn was regarded as a branch of modern international law.⁵²³ GATT law was experienced as serving only the First World's preferences, and so its legal norms tended to suffer from neo-imperialist or Anglocentric biases. Their rehabilitation would require a legal reform to adopt concepts, rules, and institutions already enshrined in the NIEO Declaration and Charter, as well as in other UN and UNCTAD resolutions.⁵²⁴ This reformist project implicitly challenged the European view that narrowed and equated the notion of international trade law to GATT law, while openly praised the UNCTAD law and NIEO Declaration and Charter as authoritative outcomes of legitimate, inter-civilizational lawmaking processes.

Moreover, the emphasis on reclaiming IEL caused the contributionist project to disregard regimes and norms not involved in the Third World realities.⁵²⁵ More concretely, the EU and Comecon were overlooked as governance models for trade cooperation, because developing countries were not members. Interestingly, South-North RTAs, such as the Yaoundé and Lomé Conventions and EU-Mediterranean Cooperation Agreements, seemed to be of no great concern either. These regimes were, by contrast, regarded as valid and legitimate since developing countries did participate in their negotiation processes, and their official documents were compatible with the UN Charter. Thus, contributionist lawyers appeared to defend a reformist project for the construction of a 'modern' international trade law, which consisted of building a new international organisation and a universal set of fairer legal rules and institutions through the equal participation of developed and developing countries in their making. The ultimate purpose was to assist Third-World states to pursue their fully and egalitarian integration into a modern international economic order.

The Critical School embraced the same normative commitments of denouncing and reforming classical international economic law and governance for their colonial complicity or origins.⁵²⁶ Likewise to the contributionist understanding, international trade law was regarded as a special domain of international (economic) law.⁵²⁷ Further, it rejected the reductionist notions promoted by European schools that equated it with either classical or liberal-welfarist international trade law.⁵²⁸ These First-World concepts were deemed to be behind the international law rules and institutions responsible for reproducing inequality and exploitation of the Third World, which in turn prevented these countries from

⁵²³ Elias, 1992: 25-28.

⁵²⁴ Elias, 1992: 198-200, 203-208, 378-381.

⁵²⁵ Ibid.

⁵²⁶ See generally Umozurike (1979) Bedjaoui (1979), Benchikh (1983), and Bennouna (1983).

⁵²⁷ Bennouna, 1983: 10-19.

⁵²⁸ Bedjaoui, 1979: 36, 207-209; Bennouna, 1983: 213-214.

overcoming underdevelopment. Not surprisingly, the GATT was conceived of as a politically oligarchical and economically conservative regime for liberal-welfarist trade cooperation created by and for the benefit of developed countries. Similarly, the Comecon and European Union were understood as rival regional regimes for economic integration, equally designed on the same idea of governing trade matters within an economically and politically homogenous group of socialist or capitalist (both developed) countries, respectively.⁵²⁹ Since all the previous models assumed a certain degree of homogeneity among their members that led them to the adoption of the principle of formal equality, none of them was deemed to be applicable to the Third World, whose main feature was exactly its structural inequality caused by underdevelopment.

Contrariwise, the UNCTAD was perceived by critical lawyers as the possible compromise achieved by developing and developed countries to jointly engage in correcting the severe deficiencies contained in norms and regimes of the international economic order.⁵³⁰ Indeed, the UNCTAD served as the institutional forum to negotiate the introduction of developmentalist policies, such as the GSP schemes and the differential and special treatment, into international trade law and governance. The aim of these policies was to compensate Third-World countries for the weakness of their economic structures aggravated by the deterioration of the terms of trade. Despite the importance of these reforms, the Critical School defended that the ultimate attempt to replace neo-imperialism by developmentalism would consist of adopting the NIEO Declaration and Charter, while the institutional transformation would require the merger of the GATT and the UNCTAD into a truly international trade organisation. In this context, South-North regional trade agreements, such as Lomé Conventions and EU-Mediterranean Cooperation Agreements, were perceived as special systems of trade preference, a regional version of the Generalised System of Preference, devised to assist the gradual replacement of the (neo-colonial) liberal-welfarist by a developmentalist regime for multilateral trade cooperation.⁵³¹

The Contributionist and Critical Schools shared some common visions of the GATT law and governance of South-North regional trade agreements, but also important differences. Both were committed to some version of developmentalism while rejecting the liberal-welfarist programme partially for not expressing an inter-civilizational compromise (contributionism) or entirely for embodying an imperialist system of economic exploration (critical). Doctrinally, they also overlooked the controversy over the autonomy of

⁵²⁹ Bennouna, 1983: 315-316.

⁵³⁰ Bedjaoui, 1979: 36, 207-208; Bennouna, 1983: 8-13, 212-222.

⁵³¹ Bennouna, 1983: 222-229.

international economic law, since both defended the unity of international law. Despite grounding their positions on different accounts of history, critical and contributionist lawyers offered comparable legal doctrines advocating the need for replacing the GATT law and governance by the UNCTAD or a new institutional regime.

Those two African schools also disagree on central matters. Whereas the Contributionist School argued that the negotiations leading up to the GATT lacked the effective and equal participation of developing countries, the Critical School claimed that the GATT constituted a neo-colonial mechanism devised to maintain Third-World countries underdeveloped through their economic exploitation and trade dependence on First-World states. Finally, the Contributionist School did not engage with South-North RTAs, while the Critical School produced a sophisticated legal doctrine. For critical lawyers, the South-North regional trade agreements were special systems of trade preference, which were constituted not pursuant to GATT law but under UNCTAD law since their purpose was to regulate trade affairs between developed and developing countries. Hence, like the GSP schemes under the UNCTAD, South-North RTAs were not regarded as subject to GATT law.

D. International Law as Battleground: The Three Jurisprudential Visions of South-North Regional Trade Governance

The previous sections chronicled the profound and multidimensional transformations that caused international law and governance to be recreated in the aftermath of World War II. These structural changes were critical in reshaping legal norms and regimes devised to regulate inter-state economic affairs. They were also significant in pushing the field of international law to review its body of knowledge and techniques and reorganise its intellectual and political affiliations. The demand for ideational, normative, and institutional renovations served as a call for jurisprudential renewal. Part of the process of reforming legal expertise (generally) and legal doctrines (in particular) required lawyers to rethink the past events and history lessons in light of a new age of international economic governance. Inside the field, legal practitioners and thinkers strove for legitimacy and authority to define which concepts, stories, rules, institutions, ideas and practices were regarded as part of international trade law and governance. The other part consisted of participating in a professional struggle to determine which form of expertise was legitimate and authoritative to be applied in and over the postwar international economic order. Outside the field,

lawyers sought to position themselves as experts capable of making sense of and managing both the reality of world trade and the emerging ideational programmes for governing it through the use of international law.

The specific disputes over ‘the’ international law and governance of South-North regional trade agreements was enmeshed in the profound and pervasive process of disciplinary renovation. The task of renewing legal knowledge and techniques involved rewriting jurisprudential narratives with the purpose of transforming the field’s identity and mission, reorganising its intellectual and political commitments, and reviewing its characteristic vocabulary and differentiated styles of reasoning. This enterprise appears to have destabilised core aspects of disciplinary consensus causing a disruptive effect over legal expertise. More concretely, two central disputes arose out of that overhaul.⁵³² On the one hand, the collapse of the liberal international economic order was followed up by the rise of postwar regimes of international economic governance. These alternative ways to organise inter-state economic relations called for a rethinking of contemporary legal rules and institutions. On the other hand, the final decay of the ‘classical’ notion of international law and the consolidation of the ‘social’ notion of legal thinking and practice as dominant in legal expertise pushed to the reconstruction of the legal vocabulary of projects, concepts, histories, ideas and methods.⁵³³

From the outburst of the First World War until the end of the Second World War, the progressive disruption led to an expert dissensus opening to the possibility of normative, institutional, and doctrinal alternatives. These new rules, institutions and doctrines were produced by groups of international lawyers through the combination of the emerging (ideational, institutional, and jurisprudential) programmes for regulating international economy with the social vernacular of legal knowledge and technique. As I shall explain in this section, three jurisprudential visions of international trade law and governance South-North regional trade regimes were built up from, and so partially reflected, those innovations carried out by the schools of international law.

⁵³² D. Kennedy, 2006b: 37-59; D.W. Kennedy, 2006: 102-106.

⁵³³ D. Kennedy, 2006b: 37-59; D.W. Kennedy, 2006: 102-106.

1. The External Contenders to the Centrality of International Law in the Making of the Postwar International Economic Order

Against this backdrop, the postwar jurisprudential projects had to resist assaults coming from inside and outside the field of international law. From outside, the jurisprudential programmes were confronted by rival disciplines, which were trying to assert their own intellectual and political influence over international economic order, notably economics and political science. The reality was that the non-legal experts who acted either as diplomats, governmental officials, policymakers, politicians or academics sought to employ their own body of knowledge and techniques to construct and operate international governance of inter-state economic affairs.⁵³⁴ In the battle of disciplines, the British John M. Keynes (1883-1946) and William Arthur Lewis (1915-1991), the American Walt W. Rostow (1916-2003) and Quincy Wright (1890-1970), the Canadian Jacob Viner (1892-1970), the German-American Albert O. Hirschman (1915-2012) and Hans Morgenthau (1904-1980), the Estonian Ragnar Nurkse (1907-1959), and the Argentinian Raúl Prebisch (1901-1986) stood up for having provided projects, histories, theories, methods, and doctrines, which, with a variety of degrees, were chosen to (re)construct the postwar governance regimes of international economy. The United Nations, GATT, IMF, World Bank and UNCTAD are acknowledged as having been inspired, with varying degrees of influence, by their seminal works.⁵³⁵ In this context, the disciplinary debates over regional trade regimes flourished mainly in the policy-oriented domains.

In a very brief summary, economics moved as early as the 1950s to organise a sub-speciality focused on what it named *economic integration*. The pioneering study of Jacob Viner on the welfare consequences of customs unions aimed at challenging the conventional wisdom of the economics profession grounded in David Ricardo's theory of comparative advantage.⁵³⁶ The classical view conceived RTAs as beneficial to their partners and non-partners alike, to the extent that they produced similar economic gains to the multilateral trading system. In his classical work, Viner not only contested this optimistic assumption but also offered a static theory of the effects of CUs' common external policy on non-partners, which later was extended to all kinds of RTAs. The central question was refined as: would a country benefit from joining a regional trade arrangement? For Viner,

⁵³⁴ See generally D.W. Kennedy (1994a), Weiler (2001), Howse (2002), and Charnovitz (2014).

⁵³⁵ Okano-Heijmans, 2011: 10, Cypher and Dietz, 2009: 73-103, Meier, 2005: 15-40.

⁵³⁶ See generally Viner (1950), Tovias (1994), Bhagwati and Panagariya (1996), Gilpin (2009: chapter 13).

RTAs, as distinct regimes from the GATT, could harm both an RTA-partner and the world welfare.⁵³⁷ The formation of the EU in 1957 and EFTA in 1960 gave a more direct policy dimension to the economics of regional integration, leading to important theoretical insights. Therefore, from the 1940s to 1970s, ‘the best and brightest’ in the field joined the project of the making of economics powerful expertise to justify or challenge the co-existence of the GATT and regional trade regimes.⁵³⁸

Distinct from economics, political scientists produced a broader set of questions, concepts, history lessons, theories and methods, to study regional economic integration. They tended to fix their attention on the problems arising from the relationship between the institutional solutions to economic regionalism and the non-economic challenges posed by wars and international political instability.⁵³⁹ The starting point was to rethink the traditional doctrines on sovereignty and nationalism so as to undermine the exclusiveness of sovereign states while strengthening the political integration perspectives. From the early postwar period on, the political science projects for governance of regional trade regimes were influenced by five theories: federalism, functionalism, neofunctionalism, neoinstitutionalism, intergovernmentalism, and realism.⁵⁴⁰

Those political science theories shared some basic assumptions and one central argument.⁵⁴¹ First, economic regionalism was understood as a voluntary and comprehensive phenomenon that emerged in Western European integration projects in the late 1940s and subsequently spread out. Consequently, those theories suffered from a profound Eurocentrism. Second, economic integration was deemed to be either a process through which economic decision-making is handed to a new supra-national entity dependent on distinct, progressive steps; or, a stage whereby sovereign states transfer parts or all of their economic power over to a supra-national body. Third, states were assumed to be the main drivers of economic integration. Fourth, the primary focus was on the processes of formal

⁵³⁷ For details of Viner’s static theory of regional trade agreements, *see* section 2.C.1.

⁵³⁸ From the 1950s to the end of 1970s, classical studies on the economics of RTAs were produced by, among other, the Canadian Richard Lipsey, Harry Johnson (1923-1977) and Robert Mundell, the Australian Kelvin Lancaster (1924-1999), the Austrian Gottfried Haberler (1900-1995), the British James Meade (1907-1995), the Dutch Jan Tinbergen (1903-1994), the Swedish Gunnar Myrdal (1898-1987), the Hungarian Béla Balassa (1928-1991), and the Indian-American Jagdish Bhagwati (Bhagwati and Panagariya, 1996: 82-83; Baldwin, 2008: 5-12, 2012: 633-634; Gilpin, 2009: 346-358; Briceño Ruiz, 2017).

⁵³⁹ Gilpin, 2009: 348-347.

⁵⁴⁰ From the 1950s to the end of 1970s, four distinct projects for economic integration were developed by, among other, the Italian Altiero Spinelli (1907-1986) and Ernesto Rossi (1987-1967), the German-American Ernst Haas (1924-2003), the Romanian-British David Mitrany (1888-1975), the Czech Karl Deutsch (1912-1992), the French-American Stanley Hoffmann (1928-2015), and the American Robert O. Keohane and Joseph Nye (Gilpin, 2009: 346-347; Söderbaum, 2016: 20-26).

⁵⁴¹ Gilpin, 2009: 346-347; Mansfield and Milner, 1997: 5-6; Söderbaum, 2016: 20-26.

institution-building at the regional level. Grounded in this theoretical background, political scientists often concluded that economic integration led by states through institutionalised regimes increased the welfare of trading partners and so the willingness to jointly solve international problems. Therefore, political science projects tended to apologetically perceive regional trade regimes as a benevolent phenomenon of economic integration.

2. *To Be, or Not to Be, That Is the Question of International Economic Law: a Professional and Intellectual Controversy over the Field of International Law*

From inside the field of international law, the jurisprudential projects on international economic law were widely challenged on distinct grounds: from ontological controversies about the existence of international economic law to epistemological debates about the identification of IEL norms and regimes, to methodological issues of lawmaking and interpretation, to normative arguments about the general purpose of institutional regimes or specific goals of legal rules, and to ideational claims to IEL functions and effects. More specifically, the clashes between jurisprudential projects took place at the moment of framing and answering key questions about the international law and governance of South-North regional trade regimes: is there an autonomous field of international economic law to deal with above issues? Who has the authority and legitimacy to determine which projects, concepts, histories, ideas, practices, rules, institutions, and doctrines are part of the international law of economy? How is (or should be) an inter-state trade governed by international law? Should trading partners be legally differentiated due to their economic inequality, development stage, or bargaining power? Is there a need for a special regime to regulate trade between developed and developing countries? Which legal norms, regimes, and doctrines apply to the international law and governance of South-North regionalism?

The above set of queries might be initially viewed as foregrounding too abstract and theoretical debates about international economic law (generally) and the international law and governance of South-North RTAs (specifically). However, these controversies veiled a very concrete conflict for authority and resources inside and outside the field of international law. The disciplinary renewal affected, and perhaps concealed, the political struggle to reshape the professional hierarchy of the legal community. After the Second World War, the dominance of European lawyers over the field was progressively weakened not only by their American and Soviet peers recently empowered by the military victory but also by the legal practitioners and intellectuals from the Third World who were in pursuit of

authority and legitimacy in a postcolonial world. The four decades following the Bretton Woods Conference of 1944 were marked by the moment where IEL norms and regimes were still in the making, which opened the opportunity for lawyers to seek to exercise influence over their formative and interpretative processes.

As it became soon clear, they sought to secure formal positions of authority not only in academia but also at foreign affairs ministries, domestic and international courts and organisations for economic affairs. In this process, legal doctrines were constructed to assert authority over bodies of rules and institutions employed to govern international economic transactions. Not surprisingly, there was intellectual and political resistance coming from different fronts in a variety of forms and arguments. Therefore, the effective reception, selection, adaption and rejection of legal doctrines were dependent not only on their own constitutive features and technical merits but also on the distinct historical contexts where they were brought into being.

From the ashes of World War II, the field of international law experienced a quick ascendancy. Lawyers tended to imagine themselves as being part of a transnational legal community, which was constituted by a consensual agreement on a set of historical facts, professional ethos, disciplinary vernacular, and differentiated styles of thinking and reasoning. They believed that legal expertise empowered them with legitimate and authoritative knowledge and techniques to participate in the reconstruction and management of the international economic order.⁵⁴² They perceived themselves as a profession committed to using their legal doctrines to the betterment of humanity through the realisation of the liberal-welfarist programme for global governance of economic interdependency. Specifically, this consisted of using international law in the making and interpretation of multilateral and regional regimes for trade cooperation.

However, this European imaginary began to fade quickly after the Bretton Woods Conference. The rival ideational programmes that promised a fairer and more just world economy were received, rejected or contested by lawyers and then merged with legal ideas and techniques into the jurisprudential projects for governing international economic affairs.⁵⁴³ This imaginative process led them to push the transformation of legal norms, regimes and doctrines, as well as ideas and practices towards distinct directions. In fact, from 1947 to 1985 the legal community witnessed the rise and fall of a wide variety of schools of international law, some of them sought to use their jurisprudential projects to produce and renovate legal doctrines so as to be applied in the reconstruction of

⁵⁴² Carreau *et al*, 1980: 14, 27-29, 35-40; Nguyen *et al*, 1999: 895-900, 946-947.

⁵⁴³ See section 5.A.

international economic law and governance. The combination of legal innovation and disputes over authority generated, or gave more emphasis to, ambivalent positions and contradictory responses within the field of international law. Consequently, the legal profession, which was generally dominated by a hierarchical organisation, conservative attitudes and path-dependence thinking (that tended to narrow the range and moderate the volatility of disciplinary experimentation and political initiatives) contributed, consciously or otherwise, to wide the horizons of possibility for the emergence, dissemination and reception of novel legal norms, institutions and doctrines.

More concretely, the IEL controversy over the autonomy of international economic law symbolises a core battlefield for authority and resources in and over the international economic order.⁵⁴⁴ This debate provided a frame where projects, history lessons, and ideas clashed and disputes over norms, regimes, and doctrines were decided. On the one hand, it communicated the fundamental differences between these theories, practices, rules, institutions, and doctrines. On the other hand, it expressed the conflicts arising from political positions and intellectual allegiances. Sections 6.B and 6.C demonstrate the ways in which the French and African schools of international law sought to shape international economic law and governance by influencing legal decision-making.⁵⁴⁵ This took the form of disciplinary struggles to embed their jurisprudential projects into legal doctrines that would, in turn, be employed to craft and interpret IEL rules and institutions.

In France, the schools of international law pledged their allegiance to legal neo-positivism; nonetheless, they diverged on the issue of the autonomy of international economic law.⁵⁴⁶ The Sociological School advocated that structural changes of legal norms and regimes caused IEL to become an autonomous domain. The sociological strategy was to increase its influence by forcing a disciplinary rupture on the grounds of the specialisation of IEL. This maneuverer was frontally opposed by the Voluntarist School, which not only rejected the specialisation argument but also claimed IEL was nothing more than a sub-domain of public international law. The voluntarist position was implicitly supported by the African schools, which denied any process of disciplinary dedifferentiation. Despite their rejection of legal positivism, the Contributionist and Critical Schools shared the view of international economic law as a sub-province of (modern) international law.⁵⁴⁷

⁵⁴⁴ See section 6.A.

⁵⁴⁵ See sections 6.B and 6.C.

⁵⁴⁶ Jouannet, 2006: 309; Nguyen *et al*, 1999: 895-896; Carreau, Flory and Rochère, 1968: 554; Carreau *et al*, 1980: 3-15, 27-28. See also Weil, 1972; Tietje *et al*, 2006: 21-22.

⁵⁴⁷ Elias, 1992: 39; Bedjaoui, 1979: 104-105, 113-114; Bennouna, 1983: 17-18.

This disciplinary controversy yielded powerful effects over international law and governance of international economy. As I shall examine right below but also return to this debate later on, it is not difficult to imagine the far-reaching and profound consequences that would have entailed over the field of international law if the sociological view had prevailed at that time. First and foremost, the sociological project would have caused a rupture of the ideal of legal community leading up to a deep disciplinary crisis. Remember that the field was already under great pressure due to the shift of authority and resources away from the European centres and towards the new hegemons (the US and USSR) and the newly independent countries in Asia and Africa. These historical events were gradually reshaping the transnational division of legal labour while deteriorating the Eurocentric identity and mission of the field. The claim to IEL independence would increase the stress over the legal community, to the extent that it expressed the aspiration to create not only a theoretical and doctrinal demarcation but also a new field constituted by a distinct identity and mission.

Second, the potential impact of the sociological project was highly indeterminate, since it might have caused authority and resources to be redistributed in large-scale entailing adverse effects over international economic law. Intra-field, legal expertise (generally) and doctrines (in particular) would have been scrutinised to determine whether they fit into a much narrower terrain of IEL. Sociological lawyers would have enjoyed the authority and legitimacy to select which legal doctrines met their definition of IEL, while all other schools would have had to adapt their projects, concepts, ideas and practices to a sociological view of IEL. Extra-discipline, the sociological programme might have led IEL expertise to be even more marginalised by other disciplines or accepted and empowered to control legal decision-making in international economic governance.

In the latter case, it would have not only reduced the universe of legal norms and regimes qualified as IEL but also constrained the range of legal doctrines regarded as authoritative and legitimate. More specifically, the sociological claim was grounded on a particular variation of the liberal-welfarist notion of international economic law. If any legal rule, institution or doctrine had fallen outside the specific variation of such ideational programme, it would have been excluded from the IEL domain and subjected to the 'other' provinces of (public or private) international law. Conversely, if it had met the definition, it would have been governed by an autonomous field whose narrow, and likely more coherent, set of ideas and practices were inspired by one perspective of liberal-welfarism and determined by a smaller group of influential, mostly European, lawyers. Hence, lawyers who did not share the sociological project previously would have been required to accept a

new vocabulary of concepts, histories, theories, methods, norms and institutions in order to construct valid and legitimate legal doctrines.

The above counterfactual scenario might seem to be at first sight unnecessary or speculative. Despite the sociological attempts, the legal community never embraced its programme. The consequence was that from 1947 until 1985 the field of international economic law was *not* brought into being. This means that lawyers conceived, made and interpreted IEL norms and institutions through international law expertise and its legal doctrines. The relevance of the above hypothesis is to point out that where the Sociological School failed in the 1960s and 1970s, the Anglo-American functionalism succeeded in the 1980s and 1990s. The purpose of the functionalist project was also to break up IEL from public international law. Sections 1.C and 3.B.2 briefly tell the jurisprudential story of the disciplinary schism leading up to the formation of the field of international economic law in the 1980s.

All in all, the IEL controversy and the rejection of the sociological project generated a disciplinary inflexion allowing the schools of international law to foster and advocate their own jurisprudential projects within a much wider disciplinary boundary. These programmes were used to strengthen the field's identity and mission as well as to shape legal knowledge and techniques. Part of expert work was to embed them into legal doctrines to be employed to (re)construct, operate and challenge international law and governance of trade affairs. After the establishment of the GATT, lawyers tried to build a consensus around common expertise for governing inter-state trade relations through international law.

However, this effort was not successful since jurisprudential projects, produced by schools of international law located in different settings, did not share enough fundamental commonalities. For instance, they disagreed on how to produce and what would constitute a fairer and more just world trading system. Their visions of how to regulate regional trade regimes also diverged substantially.⁵⁴⁸ Furthermore, each school of international law aimed at introducing changes in legal expertise and proposing very distinct, sometimes even radically disruptive, legal doctrines to reshape IEL norms and regimes. The result was a fertile period of experimentalism within the field of international law, which interacted with the fragmentation of the international trade governance into three multilateral regimes for trade cooperation.⁵⁴⁹

⁵⁴⁸ Compare section 6.B. with section 6.C.

⁵⁴⁹ See section 6.A.

3. The Game of Telling Histories of International Law of South-North Trade Governance

The previous section's brief historical account and analysis of the (actual and potential) impact of the IEL controversy on the field of international law provide the entry-point to historicise the disciplinary battles fought by French and African schools over international trade law. It also offers a way to examine in more details how jurisprudential projects were constructed and strategically used by schools of international law in their pursuit to shape legal expertise and influence, in turn, international economic law. As I shall examine below, once the core controversy over the identity and mission of the field of international law was contingently tamed, the jurisprudential disputes spread out across other battlefields. In the pursuit for realising their jurisprudential projects, international lawyers engaged in the reconstruction of legal histories, theories, and doctrines of international trade law and governance.

The African and French schools seemed to accept the importance of certain historical landmarks as responsible for the formation and consolidation of postwar international economic law. They shared the understanding of which some traumatic events contributed decisively to the failure of the liberal trading system and also to the outburst of World War II.⁵⁵⁰ The basic history teaching was the need to constrain sovereign discretion from freely adopting protectionist and discriminatory policies and engaging in competitive predatory behaviour at the international level. To ensure international peace and security, the United Nations was established as part of the postwar consensus on the progressive institutionalisation of inter-state relations. This shared agreement also provided the creation of UN specialised agencies be necessary to assist with the reconstruction of national economies and prevent international economic factors from threatening the new UN regime. Thus, worldwide lawyers embraced a common view that the best solution to govern world trade was through international law and organisations.

The similarities as to jurisprudential storyline stopped at this point. The schools of international law diverged significantly in their interpretation of key events. These divergent understandings of the past led to conflicting lessons, which, in turn, affected jurisprudential projects. As I will demonstrate, contradictory history teachings were

⁵⁵⁰ Carreau *et al*, 1980: 78-83, 257-258; Nguyen *et al*, 1999: 946-948; Bennouma, 1983: 212-213; El-Naggar, 1969: 256-260; Elias, 1992: 39-40. *See also* Jouannet (2012: 158).

embodied into legal doctrines entailing a divisive effect over postwar diplomatic deliberations, trade policies and institutional outcomes.

The French schools shared a linear, progressive story of institutional and normative evolution. For them, the liberal trading system – which had been a successful private-ordering regime – collapsed during the interwar period due to its lack of adequate legal protections. To solve this problem, it should be replaced by a public-institutional (and so not contractual) regime for international trade. Grounded in these lessons, French lawyers conceived the establishment of a UN specialised agency as the ideal mechanism for restoring international trade flows and regulating them according to a body of international law rules and institutions.⁵⁵¹ However, with the failure of the ITO Charter, the GATT became progressively acknowledged as the embodiment of postwar international trade law and governance. Particularly, GATT law represented the formalisation of a delicate balance between the two extremes of the liberal-welfarist programme. Hence, the French jurisprudential projects were committed to (some variety of) liberal-welfarism, whereas rejecting socialism and developmentalism, either for not being universally applicable to all countries (voluntarist vision)⁵⁵², or for being political-constructs divorced from economic order (sociological vision)⁵⁵³.

Despite that common understanding, the institutional and ideational transformations carried out by inter-state affairs led the French schools to diverge in their jurisprudential visions.⁵⁵⁴ While the Sociological School conceived international trade law as a ‘branch’ of IEL, and so only subject to IEL self-contained discipline⁵⁵⁵, the Voluntarist School defined international trade law as a ‘sub-speciality’ of IEL, and so subject to the entire province of public international law⁵⁵⁶. Moreover, the Sociological School claimed that GATT law was the only institutional regime and normative order scientifically devised to govern world trade through international law due to its economically-neutral character.⁵⁵⁷ By contrast, the Voluntarist School argued that all competing systems of international trade were the outcome of political decisions of states and, hence, the socialist and developmentalist regimes for multilateral trade cooperation were equally and validly governed by international law despite their lack of universal vocation.⁵⁵⁸

⁵⁵¹ Nguyen *et al*, 1999: 946-947; Lacharrière, 1967: 704-706; Carreau *et al*, 1980: 14-29, 35-40, 86-87.

⁵⁵² Nguyen *et al*, 1999: 946-947; Lacharrière, 1967: 704-706.

⁵⁵³ Carreau *et al*, 1980: 36-37, 84-87.

⁵⁵⁴ Compare Nguyen *et al* (1999: 906-910, 946-947) and Lacharrière (1967: 704-706) with Carreau *et al* (1980: 11-15, 86-87).

⁵⁵⁵ Carreau *et al*, 1980: 11-15, 86-87.

⁵⁵⁶ Nguyen *et al*, 1999: 895-900.

⁵⁵⁷ Carreau *et al*, 1980: 15-21, 36-37.

⁵⁵⁸ Nguyen *et al*, 1999: 906-910, 946-947; Lacharrière, 1967: 704-706.

The African schools neither shared the history lessons with the French schools nor agreed on their conclusions about postwar international trade law and governance. The Contributionist School offered a historical narrative of the linear evolution of international trade law. This gradual evolution was drastically interrupted by a single anomalous event: the colonial system of exploitation imposed upon non-European territories and communities in Africa.⁵⁵⁹ The Critical School did not support such progressive view, espousing, instead, a historically determinist notion of international trade law as the superstructure reflection of economic basis.⁵⁶⁰ Despite these differences, the African schools reached a similar conclusion. In direct contrast to the Western imagination, the liberal trading system was not regarded as a virtuous international trade regime. African lawyers did not agree it was enough to fix it through institutionalisation and legal improvements in order to constrain state discretion over trade policies while liberalising transnational trade flows. Rather, the liberal trade regime was understood as the enemy to be defeated. Its ideational commitment, normative order, and institutional arrangements were perceived as devised to perpetuate the same mechanisms of economic exploitation and political dominance of the Third World by the First World that were in force before the World Wars. In other words, slave trade and colonialism were regarded as regimes constituted and regulated by international trade law and operated under the liberal trading system.

Since the liberal-welfarist GATT was widely acknowledged as the augmented heir of the liberal trading system, both African schools rejected it as a legitimate regime for governing trade affairs with developing countries. The Contributionist School partially refused the liberal-welfarist programme for not embracing an inter-civilizational agenda. This would require GATT to be open for reform to ensure effective and equal participation of developing countries in the making and interpretation of international trade law.⁵⁶¹ The Critical School denied any support to the GATT since liberal-welfarism was seen as an ideational programme grounded in a neo-imperialist strategy for supporting the economic exploitation of Third-World countries.⁵⁶²

Both African schools reached an implicit agreement on developmentalism as the legitimate programme to foster the values and interests of developing countries. Each of them committed to some strand of developmentalism.⁵⁶³ The UNCTAD was widely

⁵⁵⁹ Elias, 1974: 5-6, Chapters 1-3. *See also* Gathii (2008: 318-321, 325-326, 336-337).

⁵⁶⁰ Bedjaoui, 1979: 66, 98-99, 104-105; Gutto, 1987: 275, Umozurike, 1979:x, 9-10, 85, 108; 1993: 12-13, Gathii, 2008: 338-340.

⁵⁶¹ Elias, 1992: 25-28.

⁵⁶² Bedjaoui, 1979: 36, 207-209; Bennouna, 1983: 213-214.

⁵⁶³ *Compare* Elias (1992: 25-28, 39, 198-200, 202-211, 378-381) *with* Bedjaoui (1979: 36, 207-208) and Bennouna (1983: 212-216, 222-229).

accepted as the institutional alternative brought into being by the Third World with the purpose of establishing a new model of governance for international trade. The developmentalist regime for multilateral trade cooperation was regarded by them as a progressive mechanism devised to prevent and counterweight neo-imperialist policies and arrangements, on the one hand, and to fairly regulate international trade affairs, on the other hand. More specifically, UNCTAD law was understood as a body of international trade law rules and institutions created to implement the developmentalist programme in the form of GSP schemes, special and differential policies and the New International Economic Order.

The conflicting narratives about the jurisprudential storyline were tactically used to prevent any school from building a consensus around history lessons that would give authority or legitimacy to a particular programme for global trade governance. The controversies over the jurisprudential story caused deep transformations not only to styles of history-telling but also to the meanings of history teachings and, to some extent, to the field's identity and mission. The traditional approach to legal history was dominant in France and disputed in Africa, where Critical lawyers rejected it. Despite its relative preponderance, the traditional style did not assure that history lessons were similarly extracted or understood. The ideational and jurisprudential rivalries infused great divergence into legal expertise. The consequence was that, from the 1940s until the 1980s, rival programmes and divergent historical accounts were produced and entrenched into legal doctrines, with the aim of (re)conceptualising and (re)constructing international trade law and governance.

4. *Bricolaging Liberal-welfarism and Developmentalism into International Law of South-North Trade Governance*

The most influential ideational programmes for international trade governance in the First and Third World were gradually embedded into international trade law. The receptions of liberal-welfarism and, later, developmentalism by international lawyers were not frictionless or unilateral. The efforts to 'renew' legal expertise encountered a challenging task of introducing these postwar projects while handling both the declining collection of Eurocentric programmes and the increasing fragmentation of disciplinary authority across state borders. It was not enough to convince legal practitioners and intellectual of the merits of liberal-welfarism and developmentalism. To effectively shape legal mindset, these ideational programmes had to be introduced by merging them with jurisprudential projects.

Therefore, in the decades following the Bretton Woods Conference of 1944, the liberal-welfarist and developmentalist programmes impinged structural changes on international trade law and governance. They displaced liberalism from the heart of legal expertise, without, however, building a consensus on a single ideational programme. They also supported the emergence of a new generation of jurisprudential projects, which reformed or rejected the existing interwar programmes. This process of ideational and jurisprudential *bricolage* was deeply affected by political alliances and intellectual commitments undertaken both inside and outside the field of international law. The result was a period in which international trade law and governance faced intense normative, theoretical and doctrinal reform, renovation and experimentation.

By the end of the 1940s, not only the liberal programme but also ‘classical’ jurisprudential projects were in steady decline in Europe and elsewhere. Prominent blueprints, such as Hans Kelsen’s legal formalism, Hersch Lauterpacht’s natural law, and Georges Scelle’s sociologism, were either marginalised or reviewed under the pressure of emerging ideational and jurisprudential projects.⁵⁶⁴ In the continuous process of building disciplinary consensus, the field of international law narrowed and organised the ambivalences and contradictions generated by liberal-welfarism and developmentalism. Each school of international law was called to employ legal expertise to resist to or merge these ideational programmes with their jurisprudential projects. This involved reworking their goals and preoccupations, concepts and histories, knowledge and techniques. Therefore, the reception of liberal-welfarism and developmentalism in France and Africa varied significantly, and so their influence over jurisprudential programmes (generally) and their respective legal doctrines (in particular).

If liberal-welfarism and developmentalism constituted the ends of an axis, the French and African schools would be situated in different places. The Critical and Sociological Schools would be found themselves at the opposing extremes.⁵⁶⁵ Closer to the liberal-welfarist end, the sociological lawyers argued that the GATT was the institutional expression of a natural world trade order, and so it should be protected and improved to produce global welfare. By contrast, the Critical School, which was closer to the developmentalist end, defended that the GATT as the epiphenomenal reflection of a historically-determined international economic system devised to support the economic exploitation of developing countries, and so it should be dismantled and replaced by the

⁵⁶⁴ Koskenniemi, 2012c: 54-56; Jouannet, 2009: 95-99.

⁵⁶⁵ *Compare* Carreau *et al* (1980: 15-21, 36-37) *with* Umozurike (1979: 9-14) and Bedjaoui (1979: 109-114).

UNCTAD. Around the centre, the (liberal-welfarist leaning) Voluntarist School and the (developmentalist leaning) Contributionist School took more moderate positions that espoused forms of mutual coexistence between distinct international trading systems.⁵⁶⁶ Both accepted that the GATT and the UNCTAD were created and regulated by public international law to express the consent of states according to their own ideational preferences.

Those profound disagreements on the nature and purpose of the multilateral trading systems produced disruptive effects that impacted the field of international law. The ideational rivalries and jurisprudential radicalisation became real threats to the profession itself. They were, nonetheless, moderated and constrained by legal expertise. Disciplinary mechanisms and a relatively stable vocabulary of legal concepts, ideas and, practices enabled the expression of the goals, similarities, and differences of each programme, but also constrained the range of possibilities for creating, transforming, and contesting legal rules, institutions, and doctrines. The consequence was to make their coexistence governable within the boundaries of international trade law.

The strategy to manage these conflicting programmes under international trade law was to translate their, more or less, contradictory goals into legal doctrines. More specifically, their programmatic objectives were reconceptualised as ‘mandates’ or ‘principles’ attributed to or ‘functions’ of legal norms or regimes. This doctrinal rationalisation involved two main steps.

The first move was to deal with the inherent contradictions of each ideational programme. As examined above⁵⁶⁷, liberal-welfarism was built upon a compromise between the liberal aspiration for a multilateral system for non-discriminatory and reciprocal trade relations and the welfarist call for national intervention in economic and social spaces. Distinctively, developmentalism was constructed on a compromise between the aspiration for a fairer and more just multilateral system for preferential trade (inter-)dependence, and the desire for economic emancipation through state intervention. Hence, liberal-welfarism and developmentalism posed a great challenge to the debate about the *raison d'être* of each regime for multilateral trade cooperation, the GATT and UNCTAD.

The field of international law was very skilful in dealing with the internal contradictions of those ideational programmes. Lawyers used the century-surviving contradiction of international law to craft legal doctrines capable of accommodating

⁵⁶⁶ Compare Nguyen *et al* (1999: 946-947) and Lacharrière (1967: 704-706) with Elias, 1992: 25-28, 198-200, 203-208, 378-381.

⁵⁶⁷ See section 5.A.1.

conflicting purposes of the ideational blueprints. Legal vocabulary and reasoning made use of the individualist and communitarian character of international law to tactically translate those contradictory ideational goals into the disciplinary issue ‘what is the nature and purpose of international trade law and governance?’. Different from an open-ended ideational question, a legal issue could be addressed through doctrinal analysis.

Since legal expertise has never reached a consensus on whether the ultimate source of authority of international trade law rests on ‘state consent’ and ‘international society’, lawyers used these jurisprudential ambiguities to reconstruct the ideational goals through legal doctrines. Liberal-welfarism was reimagined as GATT law centred on the tension between a ‘communitarian ideal of non-discriminatory and reciprocal free trade’ *and* ‘a sovereign ideal of domestic socioeconomic intervention’. Conversely, developmentalism was rethought as UNCTAD law centred on the tension between a ‘communitarian ideal of fairer and more just (inter-)dependent trade’ and a ‘sovereign ideal of emancipatory socioeconomic intervention’.

The management of these tensions inherent to the GATT and UNCTAD demanded continuous doctrinal work to craft, interpret and apply their legal rules and institutions in accordance with those two sets of contradictory (legal) mandates or functions. Indeed, the schools of international law aimed precisely to control the processes of creating, validating, and legitimising legal doctrines.

Jurisprudential projects were conceived as a strategy to empower a preferable set of legal concepts, histories, ideas, methods, norms and regimes by arguing it was the outcome of rigorous, scientific analysis. For instance, the Sociological and Contributionist Schools emphasised the communitarian aspect of their programmes by advocating for the importance of either ‘liberal, non-discrimination’ rules or ‘dependent, preferential integration’ rules, respectively.⁵⁶⁸ By contrast, the voluntarist and critical lawyers highlighted the individualist facet of their programmes throughout the defence of either ‘welfarist, socioeconomic intervention’ rules or ‘emancipatory, socioeconomic intervention’ rules, respectively.⁵⁶⁹

The second move undertaken by international lawyers was to deal with the existence of two antithetic, and mutually exclusive, ideational programmes embodied into the rivals, GATT and UNCTAD. To avoid the clash between these two multilateral trade regimes with universalising aspiration, the matters of direct conflict were rationalised, with

⁵⁶⁸ Compare Carreau *et al* (1980: 15-21, 36-37) with Elias (1992: 25-28, 185-186).

⁵⁶⁹ Compare Nguyen *et al* (1999: 905-906, 946-947), Weil (1972: 23-26), and Lacharrière (1967: 704-706) with Umozurike (1979:x), Bedjaoui (1979: 36, 207-208), and Bennouna (1983: 8-13, 212-222).

varying degrees of nuance, by doctrinal analysis as a set of legal issues, which could be mitigated or resolved through international trade law. Each jurisprudential project crafted legal doctrines on distinct models for governing world trade under an international economic order marked by institutional and normative fragmentation. The French and African schools agreed that any international regime for trade cooperation had to find the source of its formal authority and legitimacy in the United Nations. Nonetheless, the specific ways they conceived and handled the interplay between rival multilateral trading systems were contingent on their legal doctrines.

The Sociological School conceived Article 3 of the UN Charter as the legal foundation of the international legal economic order. It seemed to admit “*la nouvelle division internationale du travail*,” and the existence of three regimes.⁵⁷⁰ Yet, this fragmentation was seen as transitory, since only the GATT, as the heir of the liberal trading system held a universal character due to its economic nature, while the UNCTAD was a politically-contingent regime. Consequently, the conflict between GATT and UNCTAD law was only apparent, to the extent that GATT law was the formalisation of international trade law, whereas UNCTAD law was international development ‘law’, which was ‘political’ rather than ‘scientific’ in nature and so it was not part of international economic law.

The Critical School provided a distinct legal doctrine.⁵⁷¹ The UN Charter was conceived not only as having a constitutional character but also as embodying the postwar communitarian principles of justice and social progress. Conversely, the GATT symbolised the institutionalised and enhanced version of the liberal trading system, which was developed to reproduce the exploitation of the Third World. The UNCTAD was created as a developmentalist trading system to rival the liberal-welfarist regime. The consequence was a world trade order fragmented into multilateral trade regimes under the presidency of the United Nations. GATT and UNCTAD laws were both regarded as international (trade) law, each crafted to regulate trade affairs between states with distinct status and qualities. The two regimes were inherently contradictory; however, they could coexist provisionally, through special provisions such as the GATT Enabling Clause and the UNCTAD GSP schemes, until one of them be dismantled by economic forces. Critical lawyers argued, thus, that the normative and institutional fragmentation was an exceptional phenomenon that

⁵⁷⁰ Carreau *et al*, 1980: 26-27, 81.

⁵⁷¹ Bedjaoui, 1979: 36, 207-213; Bennouna, 1983: 8-13, 213-214.

could be anticipatively fixed by merging the GATT with the UNCTAD into a new international trade organisation.⁵⁷²

By emphasising the role of state consent as the central source of international trade law, the voluntarist and contributionist Schools shared an understanding in which partial trading systems could coexist simultaneously so far they were consistent with the UN Charter.⁵⁷³ Indeed, UN law and governance functioned to ensure political and economic coexistence not only between countries but also between (rival trade) regimes. The main differences between these jurisprudential projects were regarded with their views on the ultimate goal and nature of international trade law. For voluntarist lawyers, the GATT and UNCTAD transposed into international economic law a factual duality reflecting countries' distinct trade preferences and levels of economic development.⁵⁷⁴ The GATT was regarded as a multilateral trading system created by international trade law to regulate transactions among developed countries, whereas the UNCTAD was a trading system established under international development law to discipline trade relations between developed and developing countries. By contrast, the Contributionist School sought to promote effective and equal participation of developing countries by arguing that the universal quality of any norm or regime of international (economic) law was only achieved through an inter-civilizational process of lawmaking.⁵⁷⁵ In other words, GATT and UNCTAD laws were both regarded as non-universal international trade laws. Hence, the contributionist proposal consisted of replacing both of them with a world trade and development organisation.

The debate concerning the 'nature' and 'functions' of GATT and UNCTAD laws produced profound consequences in legal expertise. It seemed to be uncontroversial that GATT law was (part of) international trade law; however, there was no agreement on the extension of its jurisdiction. Distinctively, UNCTAD law was deemed to be (part of) international economic law by all but the Sociological School.⁵⁷⁶ Nonetheless, the Voluntarist School distinguished it as international development law from international trade law⁵⁷⁷, while the African schools conceived it as international trade law.

Those legal controversies and doctrines were not merely intellectual exercises. Rather, they were the manifestation of a deep and pervasive struggle for authority and resources inside and outside the field of international law. By claiming that UNCTAD law

⁵⁷² Bedjaoui, 1979: 59, 206-207, 256-257.

⁵⁷³ Compare Nguyen *et al* (1999: 946-947) with Elias (1992: 25-28, 198-200, 203-208, 378-381).

⁵⁷⁴ Nguyen *et al*, 1999: 895-900; Feuer, 1993: 88-89; Weil, 1972: 23-26; Lacharrière, 1967: 704-706.

⁵⁷⁵ Elias, 1992: 25-28, 185-186.

⁵⁷⁶ Carreau *et al*, 1980: 11-15, 86-87.

⁵⁷⁷ Nguyen *et al*, 1999: 895-900; Feuer, 1993: 88-89; Weil, 1972: 23-26.

was not international trade law, the French schools sought to exclude developed countries from the jurisdiction of developmentalist-inspired legal norms and regimes by ‘naming’ them as a distinct ‘branch’ of international (economic) law only applicable to developing countries. Moreover, their legitimacy and validity were also constrained by tactically imposing legal qualifications upon them. For instance, UNCTAD rules and institutions were regarded as ‘economically unsound’ and ‘politically opportunistic’ (sociologism), or ‘temporary’ instruments to assist developing countries to ‘catch-up’ with developed countries (voluntarism).⁵⁷⁸ Hence, the French schools argued that the ‘natural’ (sociologism) or ‘normal’ (voluntarism) international trade law was established under the GATT due to its universal and permanent qualities.

The African schools also played the doctrinal game of ‘naming in’ and ‘framing out’. They counter-argued their French peers by claiming that, since GATT law was created by and for First-World countries, its norms either resulted from an illegitimate and unequal lawmaking process (contributionism) or constituted an authoritarian and conservative mechanism of economic exploitation of Third World economies (critical).⁵⁷⁹ The GATT was conceived as being either a specific body of international trade law rules and institutions applicable only to its contracting-parties, or ‘the’ law of international trade, in which case it lacked universality and permanency. Conversely, UNCTAD law was effectively and equally negotiated, constructed, and implemented by both developing and developed countries, with the purpose of establishing a fairer and more just world trading system. The limitation of its mandate was due to the refusal of developed countries to regulate trade affairs between themselves through UNCTAD law. Hence, the African schools argued that both GATT and UNCTAD laws were equally part of a universal body of international (trade) law, although only the former is universally applicable.

Looking back, it seems that to engage with international trade law was to implicate oneself in contested ‘grand visions’ about how to govern world trade. From the 1940s onwards, the continuous efforts to merge ideational programmes with jurisprudential projects through the production, validation and legitimation of legal histories, theories and doctrines caused deeply transformation in the field of international law. The above analysis suggests that embedding liberal-welfarism and developmentalism into international trade law and governance was a complex endeavour that required considerable political and intellectual investments from international lawyers. This task was partly related to the

⁵⁷⁸ Compare Carreau *et al* (1980: 15-21, 36-37) with Nguyen *et al* (1999: 906-910) and Feuer (1993: 88-89).

⁵⁷⁹ Compare Elias (1974: 58-59, 1992: 25-28, 39-40, 198-200) with Bedjaoui (1979: 36, 207-213) and Bennouna (1983: 8-13, 213-214).

formation of ‘formalist’, ‘voluntarist’, ‘sociologist’, ‘contributionist’, ‘critical’ or other jurisprudential projects that aimed to (re)construct, reform, maintain or manage the postwar world trading system through international law. The other part concerned the international division of legal labour. These new jurisprudential blueprints were produced in Western Europe and also in other First-World countries and the Third World. However, their validation and legitimation were subject to an unequal distribution of authority and resources within legal expertise, which affected their credibility and persuasiveness in global trade governance. As I will show in Chapter 7, the influence of each legal doctrine over decision-making in multilateral and regional regimes for trade cooperation was dependent on both social and material conditions and the work of lawyers inside and outside the field.

5. The Jurisprudential Visions of the International Law of South-North Regional Trade Governance

Against this backdrop, international lawyers were called to turn their attention and apply their legal expertise to the law and governance of regional trade relations between developed and developing countries. Regardless of their differences, they sought to expand their jurisprudential projects to frame in South-North trade affairs. This involved developing and using concepts, histories, ideas, and methods to make of ‘regional’ governance of South-North trade a subject-matter of ‘international’ law. In this sense, legal doctrines already applied to international trading systems were adapted to regional trade regimes with minor alterations. This suggests that the above debates over the existence of IEL, the nature of international trade law and governance, and the role and functions of the GATT and the UNCTAD, were, consciously or unconsciously, incorporated into the ways of thinking and practising ‘the’ international law of South-North regional trade governance. The choice or rejection of each feature of doctrinal frameworks was made by schools of international law and justified on their jurisprudential projects. This intra-disciplinary process produced specific legal doctrines to understand, conceive, and argue about regional trade regimes between developed and developing countries. If these doctrinal frameworks were accepted as authoritative and legitimate in global trade governance, then they could be used in the making and interpretation of South-North regional trade agreements. This section focuses on the construction of the three jurisprudential visions that were at the heart

of the legal doctrines on the international law and governance of South-North regionalism between 1947 and 1985.

The French and African schools did not produce coherent or homogenous literature on the topic. In the four decades following the 1944 Bretton Woods Conference, their jurisprudential visions could be described as highly experimental and inconsistent, since lawyers tried to conceive South-North regional trade regimes in light of their preferred ideational and jurisprudential projects. It seems that all schools agreed that regional trade agreements were international law treaties pursuant to Article 38 of the ICJ Statute. However, they mostly diverged on all the other matters.

For instance, voluntarist lawyers understand South-North trade relations as commercial transactions between capitalist economies in different stages of economic development.⁵⁸⁰ Two parallel and equal in dignity models of trade governance coexisted at the time. On the one hand, the liberal-welfarist model inspired the creation of the GATT at the multilateral level and the EU and EFTA at the regional level. These regimes were constituted and regulated by international trade law with the aim of promoting the economic integration among their members. On the other hand, the developmentalist model was used to construct the UNCTAD at the multilateral level and GSP schemes and South-North RTAs at the regional level. Specifically, South-North regional trade agreements were created and governed by international development law, with the purpose of assisting developing countries to ‘catch-up’ with developed economies.

Grounded in the voluntarist project, what I call a *reformist vision* of the international trade law of South-North regional governance emerged.⁵⁸¹ It was founded on the idea that South-North RTAs were legal regimes devised for promoting the economic development of developing countries and not economic integration among (equal) developed countries (as the EU and EFTA). The implication was that GATT law was found not suitable to govern South-North RTAs, since Article XXIV was devised to regulate regimes for economic integration. For this reason, voluntarist lawyers welcomed the introduction of Part IV as an important step towards adapting the GATT to the needs, interests, and values of the Third World. The consequence was to regard South-North RTAs as subjects not to the rigid and formalist ‘rules’ of international trade law embodied in Article XXIV but rather to the flexible and purposeful ‘standards’ of international development law under Part IV. Put differently, South-North RTAs and Part IV were understood as international development law regimes and norms (respectively) consistent

⁵⁸⁰ Nguyen *et al.*, 1999: 906-910; Feuer, 1993: 88-89.

⁵⁸¹ Nguyen *et al.*, 1999: 906-910.

with the welfare aspect of the GATT regime. However, the voluntarist assumptions underlying the reformist vision entailed two apparently unintended consequences. First, they reaffirmed the notions of temporality, speciality and hierarchy into international economic law, to the extent that the South-North regional trade regimes were defined as ‘temporary’ mechanisms created by a ‘special’ body of ‘non-universal’ (and so inferior) IEL rules and institutions to help countries overcome their underdevelopment. Second, their aim to realise developmentalist policies through GATT law seemed to be disfigured by the attempt to reconcile them with the dominant liberal-welfarist policies for economic development.

The Sociological School developed a distinct understanding of South-North regional trade regimes. They were conceived as international treaties devised to establish and regulate trade preferences between states.⁵⁸² Two key implications followed from this conceptualisation. First, South-North RTAs were constituted and governed by international trade law rather than international development law. The consequence was that, in contrast to the GSP and other schemes under the UNCTAD, they were fully subject to the disciplines of GATT Article XXIV. Second, South-North RTAs were regarded as neither mechanisms for economic integration nor instruments to implement developmentalist policies or any rule or institution of the NIEO Declaration or Charter. Instead, they were preferential trading systems under liberal-welfarist governance. Specifically, they were understood as legal instruments that expressed not a communitarian desire to promote economic interdependence or integration. Rather, they reflected the selfish interests of states that tactically resorted to GATT exceptions to profit from preferential arrangements, which, despite their legal validity, were contrary to the core principle of non-discrimination. Thus, the sociological project nurtured an *apologetic vision* of the GATT as the guardian of a natural economic order, under which South-North RTAs should be rigorously controlled by Article XXIV, and ideally phased out.

While the French schools mutually agreed on to subject the South-North regional trade agreements to GATT law on different grounds, their African peers ignored the GATT disciplines altogether. In fact, the Contributionist School was silent on the role of international law in the making and governance of South-North regional trade regimes. Nevertheless, it is reasonable to infer from the contributionist literature that these RTAs would only be regarded as valid and legitimate if they met two conditions: they had to be

⁵⁸² Carreau *et al*, 1980: 84-85, 308-309, 343-347, 361-363, 621.

constituted and regulated by international (trade) law, and result from equal and fair negotiations between developed and developing countries.⁵⁸³

Distinctively, the Critical School engaged extensively with South-North regional trade regimes.⁵⁸⁴ They were initially conceived of as legal arrangements created by international (trade) law for the aim of perpetuating the exploitation of developing countries by the First World. However, the rise of the Third World caused their transformation into ‘special regimes’ of trade preference (in contrast to the Generalised System of Preference) capable of promoting contradictory goals depending on the contingent outcome of trade negotiations. Indeed, multilateral and regional renegotiations tried to shift the authority over these special regimes from the GATT to UNCTAD. The consequence was that South-North RTAs became hybrid instruments that combined legal rules and institutions devised to promote two sets of inconsistent objectives.

Inspired by developmentalism, part of the policies of South-North RTAs aimed to promote cooperative (inter)dependency and emancipatory development. Inspired by liberal-welfarism, the other part sought to advance free trade and socioeconomic policies. Put differently, both the provisions of South-North RTAs and the norms of international law applicable to them reflected the sometimes harmonious, and sometimes conflictive, interactions between liberal-welfarism and developmentalism (generally) and between different jurisprudential projects (in particular). Taking this amalgam of ideational and jurisprudential blueprints, critical lawyers advocated a *utopian vision* that defended the continuous reconstruction of South-North regional trade regimes in order to shift their core function from liberal-welfarist instruments of economic exploitation and dependency to developmentalist mechanisms of economic development and emancipation.

In light of the above, some conclusions can be reached. First, the schools of international law produced three jurisprudential visions of the international law and governance of South-North regional trade regimes with varying degrees of sophistication. Second, these distinct perspectives were reasonably consistent with the above-examined jurisprudential projects with some minor changes. Third, they all seem to agree that South-North regional trade agreements were constituted and regulated by ‘some kind of’ international law, despite the lack of consensus on the specific ‘field’ or ‘branch’. Fourth, they also reveal that both these RTAs were highly contested ideational, institutional and normative regimes. In this sense, I argue that it would be misleading to use the term ‘legal concepts’ to refer to the jurisprudential attempts to define South-North regional trade

⁵⁸³ See section 6.C, notably notes 521-524 and accompanying text.

⁵⁸⁴ Bennouna, 1983: 8-13, 222-229; Bedjaoui, 1979: 36, 207-208.

regimes, to the extent that they would imply that their definitions held a much higher level of homogeneity and technical refinement. I prefer, instead, to employ the less value-laden term ‘jurisprudential visions’ to the outcome of French and African efforts to conceptualise South-North RTAs.

Furthermore, the widespread disagreement across the schools seems to have slowed the formation of a disciplinary consensus around legal doctrines on the international law and governance of South-North regional trade regimes. In Chapter 7, I will suggest that three legal doctrines reached a sufficient level of authority and legitimacy inside and outside the field of international law to be used in the making and interpretation of South-North regional trade agreements. Their continuous struggles for supremacy produced two consequences. On the one hand, the lack of agreement on the constitute features inhibited the development of more sophisticated legal doctrines. On the other hand, the disputes prevented legal doctrines from entailing effects of power, such as naturalisation and reification, over legal expertise. I believe that these were the causes that allowed lawyers to engage in attempts to (re)conceptualise, (re)imagine, and (re)construct the international trade law and governance of South-North regionalism. Therefore, from 1947 to 1985 the field of international law witnessed the rise and consolidation of at least three jurisprudential visions, each of them offering a distinct understanding of the relationship between GATT law and the South-North regional trade agreements.

Conclusion

I started off this chapter by returning to my critique of the traditional style of telling the jurisprudential history of the international trade law of South-North regional trade regimes. Drawing from the analysis in section 3.B, I argue that (contemporary) conventional narratives tend to strategically obfuscate or forget jurisprudential projects that played a prominent role in the past, but might pose a challenge to the dominance of present-day legal doctrine. The implication of these accounts of the jurisprudential storyline has been to single out or marginalise projects on the grounds of they are old (and non-applicable) relic of or non-part of WTO law. Put differently, any history lesson, jurisprudential programme or vision that might cast doubt on, or suggest a reconstruction or reinterpretation, of the legal doctrine on the WTO law and governance of South-North regionalism, is often regarded as outdated, invalid, illegitimate, or distrustful to the present-day field of

international economic law. This chapter breaks up this disciplinary grip by retelling the jurisprudential story through the official documents and canonical writings produced in the aftermath of World War II. Specifically, it intends to recover the histories, projects, ideas, and techniques used by lawyers in the (re)reconstruction of the postwar jurisprudence of international trade law.

As examined in Chapter 1, the jurisprudential story provided in (current) mainstream literature accounts only for the Anglo-American schools of international law. It suggests that other fields of expertise dominated multilateral and regional domains of trade governance until the 1980s due to the vices of formalism and the virtues of functionalism. As the traditional history unfolds, functionalist lawyers are praised as the heroes who reworked legal expertise (generally) and the legal doctrine on the GATT law of RTAs (in particular) in order to reclaim the authority and legitimacy of international law in global trade governance. By looking backwards, the debates between Anglo-American strands of formalism and functionalism are regarded as the drivers for today's jurisprudential projects. This justifies not only the almost exclusive focus on the Anglo-American contribution to the jurisprudence of the international trade law and governance of South-North regional trade agreements, but also the lack of reference to other jurisprudential programmes in current mainstream literature. The traditional history entails, therefore, a powerful effect over the contemporary field of international economic law, which not only reinforces the dominant legal doctrine but also imposes a grip over legal imagination by preventing the (now heterodox) past from challenging or contributing to contemporary debates.

The richness and variety of jurisprudential stories, projects, and visions examined in this chapter are often received by the contemporary field of international economic law with surprise. The suggestion that international trade law and governance, as well as multilateral and regional regimes for trade cooperation were highly disputed legal concepts in the aftermath of World War II is suspicious to most lawyers who were trained to accept their European origins and Anglo-American reformation. This chapter demonstrates that the orthodox frame of how international trade law is (or should be) thought and practised today is very distinct from the context of jurisprudential competition and innovation that prevailed between 1947 and 1985. The postwar dissensus prevented disciplinary effects from limiting legal imagination. In practice, lawyers were enlisted in the formation of, and also in the infighting between, schools of international law with the view of supporting or contesting the autonomous existence of international economic law. This controversy eventually failed in bringing the new IEL field into being. Nonetheless, it did succeed in inaugurating a long period of jurisprudential renovation of international trade law.

Against this backdrop, legal communities located in different national jurisdictions and institutional settings were involved in the process of jurisprudential reconstructions. Four relevant projects for international trade law came out of France and Africa. Voluntarism and sociologism were creations of French lawyers who sought to reconcile specific strands of legal neo-positivism with the liberal-welfarist programme, bearing in mind the constraints of the Cold War. Distinctively, the contributionist and critical projects were developed by the schools of international law that emerged in the post-colonial countries of Africa. Their aim was to rethink the European-centric jurisprudence of international (trade) law in light of developmentalism and decolonisation.

Grounded in these jurisprudential programmes, lawyers selected (or rejected) events and actors, rules and institutions, theories and methods to be combined into divergent historical narratives, from which teachings were extracted. These conflicting lessons were then merged into a wide variety of competing legal doctrines of international trade law. Out of this moment of creative destruction, three visions emerged from the French and African jurisprudence holding significant legitimacy and authority. The *reformist*, *apologetic* and *utopian* visions provided three ways to historicise and conceive South-North regional trade regimes as legal phenomena, and how they relate to international law (generally) and to the GATT and the UNCTAD (in particular). Their ultimate purpose was to influence decision-making in and over the GATT law and governance of South-North regionalism.

Notwithstanding, it is important to reaffirm that I am not claiming that every project, vision, or doctrine produced in France and Africa from 1947 until 1985 managed to obtain legitimacy and authority inside and outside the field of international law. My claim is much more modest. I argue that only three jurisprudential visions were successfully developed, disseminated and gathered validity and acceptance. The degree of relevance of each vision shall become even more evident in the next Chapter, in which I analyse how they were employed in the formation and application of legal doctrines on the GATT law and governance of South-North regional trade regimes.

CHAPTER 7. THE RISE AND FALL OF INTERNATIONAL TRADE LAW DOCTRINES: THE LEGAL GOVERNANCE OF THE EU-AFRICA REGIONAL TRADE REGIMES

Introduction

This chapter analyses the rise and fall of one legal doctrine on the international law and governance of regional trade regimes between developed and developing countries. Specifically, it shows how lawyers engaged international law in the creation and operation of regional trade agreements between the European Union and the newly independent African states from 1947 to 1985. I conclude by arguing that the Yaoundé and Lomé Conventions were negotiated, designed, and interpreted based partially on a doctrinal framework, which was distinct from legal doctrines underlying other RTAs.

In the aftermath of World War II, lawyers were under intellectual and political pressure to reinvent international law in order to respond to the new demands and challenges posed by the (re)construction of the international economic order. Part of their task was to rethink legal rules and institutions and apply them to support the initial effort to institutionalise international trade governance. The failure to secure a general agreement on a universal body of positive norms was followed up by the rapid fragmentation of world trade in regimes for multilateral and regional cooperation. Chapter 5 provides an account of the participation of lawyers in that attempt to re-make the institutional architecture of the international trading system. Drawing from these and other international experiments, four (relatively coherent) institutional models of governance were developed through the negotiations and management of regional trade agreements.

The other part of lawyers' endeavour was to reimagine legal expertise, with the aim of reforming or creating a new vernacular of concepts, histories, ideas, and techniques to deal with the wide variety of changes and needs arising mainly from the establishment and management of rival multilateral trading systems. Chapter 6 historicises the impact of the ideational and political polarisation of South-North trade relations between the liberal-welfarist GATT and the developmentalist UNCTAD on the process of jurisprudential

renovation. Due to the chiefly importance of French and African lawyers in the making of South-North RTAs, it accounts for their most relevant jurisprudential projects. Three (relatively coherent) visions emerged, providing a *reformist*, *apologetic* and *utopian* way to conceive of and engage with South-North regional trade regimes as international law phenomena.

In light of the above historical accounts, I intend to approach the participation of international law and lawyers in the making and interpretation of South-North regional trade regimes through the socio-legal notion of legal doctrine. As discussed in Chapter 4, legal doctrines are conceived of as expert techniques devised for using international law to influence decision-making in and over multilateral and regional trading systems. They are conceived as coherent and stable frameworks of positive and non-positive norms and concepts, projects and histories, visions and models, ideas and methods, that serve as a mode of legal governance. They are used to frame interests and conflicts as legal issues, and articulate legal rules and institutions into a set of valid and legitimate claims about, and solutions to, critical questions concerning the legal governance of South-North regionalism. For example, they provide answers to questions about the origins, nature and functions of South-North RTAs, and how they are, and should be, constituted and regulated and for which ends. In this sense, legal doctrines *create* South-North RTAs as legal phenomena under international law.

The purpose of this chapter is to describe and examine the constitutive features and account for the formation and participation of one particular legal doctrine that historically played a critical role in the formation and management of South-North regional trade regimes. Based on the combination of the historical analysis of Chapter 5 and Chapter 6 and an exploratory investigation of primary and secondary sources, I have identified what seem to be three distinct legal doctrines that were successful in gathering authority and legitimacy to govern lawmaking and interpretation of South-North RTAs between 1947 and 1985. Taking into consideration their aspirational goals and legal mandates, I have provisionally named them *Law and Integration Doctrine*, *Law and Trade Cooperation Doctrine*, and *Law and Development Cooperation Doctrine*.

At the most general level, my central hypothesis is that the period between 1947 and 1985 opened a window for legal re-imagination aimed at building a new international trading system. Against conventional wisdom that portrays the decades following the establishment of the GATT as ‘lost’ for international law, I claim that this period did not suffer from any professional ‘apathy’, intellectual ‘lethargy’, or legal ‘underdevelopment’. Rather, this epoch was marked by ‘energetic’ and ‘rich’ normative and institutional

experiments. International law shaped and was shaped by the fragmentation of world trade order driven by profound disagreements on its forms of governance and ultimate purposes. From the Anglo-American proposal for a liberal-welfarist trading system under the International Trade Organisation, the four decades following World War II witnessed the establishment of the GATT, Comecon, and UNCTAD to support the liberal-welfarist, socialist, and developmentalist regimes for multilateral trade cooperation (respectively), and the formation of a constellation of plurilateral, regional, and bilateral trade agreements. Despite their differences, all these arrangements were brought into being by and administered through international law. To understand the participation of lawyers in this experimental moment of international trade law and governance, I suggest approaching the construction and management of that complex environment characterised by multilevel and overlapping trade regimes, and also in solving disputes over their normative and institutional architecture by focusing on the role of legal doctrines as modes of legal governance.

My point is perhaps best captured by the continuous interactions between legal practitioners and thinkers from different jurisdictions engaged in persuading, bargaining, or imposing legal rules and institutions into South-North regional trade regimes that reflect their countries' trade policies and preferences. This means that the field of international law was at the centre stage of political and intellectual battles for the core set of ideational, institutional, and jurisprudential features that would serve to govern legal decision-making in and over regional trade. Put differently, the account of disciplinary struggles for shaping a doctrinal framework is relevant, because the constitutive elements of a legal doctrine are ultimately articulated to influence the making and legal interpretation of the South-North regional trade agreements.

This understanding leads us to conceive RTAs between developed and developing countries not as a singular, or uniform, legal phenomenon expressing a series of institutional and jurisprudential events marching gradually towards perfection. Instead, it helps us to think of South-North RTAs as resulting historically from heterogeneous beginnings, and divergent paths that continuously intersected, overlapped and were reconfigured through doctrinal conflicts. The awareness of the greater and richer plurality of concepts and norms, ideas and practices embedded into the 1947-1985 RTAs compel us to question the relationship between their constitutive features and how legal doctrines were produced and employed to them. Indeed, this postulate calls for an examination of the encounters and practices of Northern and Southern lawyers (generally), and of their French and African peers (in particular), as a step to foreground the reasons for the success of

some, but not other, legal doctrines in gathering authority and legitimacy. This analysis suggests that the existence of competing legal doctrines and processes of differentiation, domination, and disruption inside and outside legal expertise were implicated in the differences and variation among South-North RTAs. This politics of legal doctrines empowered and constrained lawyers' ability and imagination in constructing and managing South-North RTAs.

The implication of my hypothesis is three-fold. Legal doctrines are understood as particular expert modes of international trade law and governance. As such, they enable and direct divergent legal avenues for trade regimes between developed and developing countries. Further, legal doctrines reveal that South-North RTAs are not naturally biased against developing countries. Rather, the controversies over RTAs are subject to continuous interactions – negotiations, persuasions, or dominations – to which lawyers strategically employ legal doctrines to give legitimacy and authority to their arguments or instruments. This means that not only Southern and Northern lawyers struggle to shape trade agreements through lawmaking and interpretation, but also that there is a limit to the effects of legal doctrines vis-à-vis other expert modes of governance and the political and economic conditions.

Therefore, my general proposition is that those three legal doctrines were the winners of political and intellectual disputes inside the field of international law and outside the GATT governance of South-North regionalism. This chapter aims to test, partially, this postulate by providing a full account of the Law and Development Cooperation Doctrine, the doctrinal framework underlying the EU-Africa regional trade regimes.

A. Legal Doctrines and the South-North Regional Trade Agreements

For the purpose of this chapter, I examined the 28 South-North regional trade agreements concluded and notified to the GATT between 1947 and 1985.⁵⁸⁵ My general purpose was to understand the role of international law and lawyers in the making and interpretation of these South-North RTAs. My study focused on the interplay of the three dimensions underlying international trade law: (a) legally binding texts, (b) doctrinal arguments and practices of international lawyers, and (c) the politics of the GATT governance. Specifically, I sought to determine whether, and to what extent, particular legal doctrines

⁵⁸⁵ See Appendix.

shaped, and were moulded, throughout the negotiations, management, and contestation of those RTAs.

The examination of all South-North RTAs revealed the existence of particular patterns. First, the European Union was the most active GATT-developed, contracting-party engaged in negotiating and concluding RTAs with developing countries. The EU was a partner to 23 out of the 28 South-North RTAs, while Finland and Australia figured as the developed-party in 4 and 1 RTAs, respectively. Second, from 1947 to 1985 the EU was in its formative and consolidating years, yet it managed to aggregate substantive economic and political resources. Third, the RTAs concluded between the EU and very distinct developing countries were relatively heterogeneous. Nonetheless, some of them shared similar characteristics, which allowed me to classify these RTAs according to three different 'archetypes'. Conversely, the other 5 non-EU-South RTAs held features that closely resembled one of the EU-South groups, and so received the same classification. Hence, I tentatively labelled each archetypical group as: economic integration RTAs, trade cooperation RTAs, and development cooperation RTAs.

Drawing from my preliminary analysis, my hypothesis is that each of those different archetypes of EU-South RTAs was grounded in one distinct legal doctrine. These legal doctrines were constructed by lawyers throughout their practical and intellectual experiences in negotiating, drafting, and, interpreting those RTAs. They operated as modes of legal governance, to the extent that they structured how each party could pursue its interests through legitimate and authoritative arguments of international trade law. Each of these suggested legal doctrines was characterised by a distinguished combination of constitutive features that can be apprehended and understood through their ideational, institutional, and jurisprudential dimensions. Therefore, I have named the three legal doctrines as Law and Economic Integration Doctrine, Law and Trade Cooperation Doctrine, and Law and Development Cooperation Doctrine. These terms were coined to reflect their 'legal nature' and 'archetype'.

In the following sections, I provide evidence to prove partially my hypothesis. I carry out an in-depth analysis of primary and secondary sources related to the South-North RTAs that can be hypothetically classified as instances of the same archetype. Specifically, I inquire into the Yaoundé Conventions and the Lomé Conventions I and II, in order to demonstrate the existence and operation of the Law and Development Cooperation Doctrine. My examination is organised in two stages. First, I examine the history and texts of those EU-Africa RTAs. Second, I describe the legal doctrine underlying these RTAs.

A number of caveats are necessary. The focus of my study is on the construction and application of legal doctrines to produce, manage and contest regional trade regimes between developed and developing countries within the context of GATT. This goal entails two direct implications. First, the role of international law and lawyers are foregrounded, and hence treating other aspects less comprehensively. Second, the analysis does not address (i) RTAs concluded among contracting-parties but not submitted to the GATT, (ii) RTAs that fall outside of the GATT mandate, such as commodities and textiles agreements, and (iii) RTAs whose parties are either exclusively developed countries (North-North RTAs) or solely developing countries (South-South RTAs). The circumscribed scope of this chapter does not preclude the possibility, however, that its discussions and arguments have relevance outside the immediate context.

Moreover, I am aware that choosing to provide an in-depth analysis of representatives of only one of the three legal doctrines, which I claim to have existed and operated as legal modes of trade governance, has evident limitations. The most relevant consequence is to limit not only my findings' generalisation but also to leave part of my claim to the existence of three legal doctrines incomplete. Nonetheless, the need to narrow the examination to the EU-African South RTAs and their underlying Law and Development Cooperation Doctrine is due to material, technical, and time constraints. These research design and approach are also open to additional criticisms. The analysis of relations between the EU and the African bloc may be regarded as not giving sufficient recognition to each individual Sub-Saharan countries, such as Nigeria or Cameroon. However, this lack of individual level of analysis is the necessary and unavoidable price to be paid for providing a broader perspective of legal doctrines operating in EU-Africa RTAs.

Finally, this chapter is not intended to be normative, insofar as this implies any argument for or against any South-North RTAs, their archetypes, or legal doctrines. My aim is to provide an account and critique of, rather than advocate for, one legal doctrine underlying South-North regional trade agreements concluded between 1947 and 1985.

B. Law and Development Cooperation Doctrine: Legal Governance of the EU-Africa Trade Regime

The postwar period caused profound transformations to the relationship between developed and developing countries. This chapter examines the evolution of economic affairs between Western European and African countries under the liberal-welfarist trade governance

centred on the GATT. It inquires into the establishment and management of a regional regime of trade cooperation between the European Union and a group of post-colonial African states through international law. Specifically, it analyses the way lawyers were involved in the formation, operation, and contestation of EU-Africa RTAs.

My argument is that the role of legal expertise (generally) and a legal doctrine (particularly) in the making and interpretation of EU-Africa RTAs has been overlooked by contemporary literature. This section aims to fill that gap by showing that a particular legal doctrine was deeply implicated in the re-invention of regional trade between a 'post-imperial' Europe and a 'newly independent' Africa. This legal doctrine was developed through the 'dual-work' of lawyers. On the one hand, they participated in the production of a doctrinal framework to understand and argue about the international trade law and governance of regional trade regime between the EU and African countries inside the field of international economic law. On the other hand, they engaged in the doctrinal practice involved in the negotiation, craft, and interpretation of EU-Africa regional trade agreements. More concretely, the Conventions of Yaoundé and Lomé were landmark international law treaties, to the extent that they were the legal expression of a distinct archetype of regional regimes for South-North trade governance, which was significantly conceived and operated by the Law and Development Cooperation Doctrine.

As explained in Chapter 4, legal doctrines are composed of constitutive features, each of them is articulated to hold a specific relation with the others, so as to lend particular meanings to norms and regimes of international trade law. The core elements are deeply entangled in doctrinal frameworks; nonetheless, they can be intellectually organised in three domains: ideational, institutional, and jurisprudential. By disentangling these spheres, this section seeks to reveal how each domain continuously interacted as part of the Law and Development Cooperation Doctrine with the Yaoundé and Lomé regimes.

To better explain those reciprocal relations, I will address three central questions. Firstly, what were the ideational programmes of political economy (generally) and their regional projects for economic development (particularly) on which the EU-Africa regional trade regimes were inspired by? Secondly, what were the institutional programmes that provided valid and legitimate models of trade governance for constituting the EU-Africa trade regionalism? Thirdly, which concepts and histories, theories and methods, norms and institutions were regarded as legally valid and legitimate to be part of the jurisprudential vocabulary underscoring the international trade law of the EU-Africa RTAs? Thus, the purpose is to understand the existing range of possibilities offered by the Law and Development Cooperation Doctrines, and to compare it to the choices made and

justifications presented in the course of the construction and interpretation of the Yaoundé and Lomé Conventions.

In the remainder of this section, I analyse the Yaoundé and Lomé Conventions with the aim of explaining how they relate to the Law and Development Cooperation Doctrine. It is not a simple task to inquire into the role of international law and lawyers in the politically sensitive, economically complex, and legally revolutionary processes of transformation that the relationship between Europe and Africa underwent from the outburst of World War II onwards. The core of these changes related to the need of both regions to reinvent themselves. While European imperial powers had to reconstruct themselves as liberal-welfarist states under the leadership of the United States' Marshall Plan and the GATT, African colonies had to reborn as newly independent countries in a world dominated by the East-West and the South-North divides. Thus, the challenge is to unveil how these historical transformations were perceived by and often required reactions from the field of international law. My strategy is to start off by providing a brief account of the evolvement of the EU-Africa trade regionalism between 1947 and 1985. This involves historicising the formation, replacement, and development of regional trade arrangements underlying the legal governance of EU-Africa trade affairs.

1. A Brief History of Legal Governance of the EU-Africa Trade Regime: From Colonialism to Union to Preference to Association and Back Again

The origins of EU-Africa 'trade' relations have been a controversial topic. Some scholars claim that their roots go back to the late 1950s until the early 1970s, while others trace them even further back to the colonial legacy of the 19th century, or perhaps the 15th century.⁵⁸⁶ The purpose of this section is to examine the role of legal doctrines in the formation and development of EU-Africa regional trade regimes under the GATT between 1947 and 1985. For this reason, the starting point of my analysis lies in the landmark events leading up to World War II.

⁵⁸⁶ Montana, 2003: 71-72.

(a) The French Empire, Union, and Community (1884-1960)

In the Berlin Conference of 1884-1885, Africa was partitioned into British, French, German, Belgium, and Portuguese colonies.⁵⁸⁷ During this era, the pattern of trade between European empires and their African, and also Caribbean and Pacific, colonies became characterised by the imperial ruling. This integrated Euro-African-Caribbean-Pacific system was constituted by international law rules and institutions, which provided that goods from the imperial metropole were admitted in the colonies, while colonial goods were exported to the former duty-free. After the Second World War, the imperial systems came progressively to an end due to the weakening position of European empires and the increasing pressures of the Cold War superpowers, the anti-colonial United States and the anti-imperial Soviet Union.

Against this background, France was unwilling to denounce its former colonies, except for Indochina, Algeria, Tunisia, and Morocco. In 1946, the French Empire was recast as the French Union⁵⁸⁸, a legal regime authorised under GATT Article 1:2 exemption. It was devised to allow colonies to move towards self-government while retaining connections with France.⁵⁸⁹ In 1958, the French Union became the French Community⁵⁹⁰, under which colonies were authorised to establish internal self-government, but still subject to some control in matters related to trade policy and defence. From the creation of the French Union to the end of French Community, the economic importance of colonies for France was in decline. Nonetheless, it was politically inconceivable for France to ‘abandon’ its colonies since they both were regarded as forming a single cultural unity.

(b) The Treaty of Rome (1957-1963)

The French imperial system began to change rapidly in the 1950s and 1960s due to the foundation of the European Economic Community and the decolonisation process led by the United Nations. Throughout the negotiations leading up to the establishment of the EEC, France tried to convince its new European partners that, by broadening the scope of association to include some of their colonies, the future EU would benefit from trading with

⁵⁸⁷ Ibid.; Lister, 1988: 18.

⁵⁸⁸ Milward, 2005: 80-84; Lister, 1997: 61-62.

⁵⁸⁹ Lynch, 1997: 166; Montana, 2003: 71-72.

⁵⁹⁰ Lister, 1988: 6-9; 1997: 61-62; Milward, 2005: 80-84; Garavini, 2012: 48.

colonial markets.⁵⁹¹ Less appealing, France also tried to sell them the idea of a single cultural unity.

These arguments were met with a certain degree of scepticism.⁵⁹² While market access to colonies was less advantageous than proposed, since some colonies were in any case required under international treaties to trade on a non-discriminatory basis, it also appeared that French interests would continue to be protected by existing marketing arrangements. In addition, the costs seemed to be significant. Not only the EU members would have to abandon their traditional and cheaper sources of tropical products, but they would also be required to provide financial aid to support the colonies. Not surprisingly, only Belgium supported the French proposal, whereas West Germany and the Netherlands were vigorously opposed, and Luxemburg and Italy were no more than indifferent.

Despite these oppositions, France managed to secure the acceptance of its proposed association based less on the persuasiveness of its arguments and more on its negotiating strategy.⁵⁹³ Indeed, the French proposal, supported by Belgium, was suddenly and unexpectedly introduced at the very last minute of negotiations on the EEC. More importantly, France presented it as a condition for its participation in the EEC. Given this deal-breaking position, the other European partners had little choice but to agree. A few months later, the Treaty of Rome of 1957 was signed providing the establishment of the EEC *and* a special trade regime with its members' colonies.

The core goal of the Treaty of Rome was to set forth the foundations of the European common market between France, West Germany, Italy, and the three Benelux countries, which was protected by an external customs union. Article 3(k) assigned the EU one of its core activities: "the association of the overseas countries and territories, in order to increase trade and to promote joint economic and social development." Part IV constituted a *permanent* regime for governing trade between the EU members and their colonies (the "Association").⁵⁹⁴ It was structured around general rules⁵⁹⁵, while the more sensitive obligations were established in an Implementing Convention on the Association of the Overseas Countries and Territories with the Community (IC) limited to five years'

⁵⁹¹ Barnes, 1967: 25.

⁵⁹² Wells, 1965: 157; Twitchett, 1978: 10.

⁵⁹³ Twitchett, 1978: 7-9; Milward, 2005: 82-83; Broberg, 2013: 676.

⁵⁹⁴ The term *association* was used by French politicians to describe their African programme as a dynamic interchange between the developed metropole and underdeveloped 'associated' colonies. The Association that would provide a legal regimes for more rapid economic and social development. Since in the early years France's influence over the EU trade and development policy was all-pervasive, the term was embedded into Part IV of the Treaty of Rome (Milward, 2005: 82-83)

⁵⁹⁵ Part IV comprises Articles 131-136 of the Treaty of Rome.

duration. Under Article 131, the “associated status” could be accorded to overseas countries and territories (“OCT”) that had “special relations with” EU members.

The purpose of the Association was to “promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.”⁵⁹⁶ The Association regime consisted of a kind of a system of market access between the EU and the individual OCTs.⁵⁹⁷ This preferential trade arrangement was complemented by the European Development Fund (EDF), a mechanism for providing financial aid to OCTs. Not surprisingly, the ideational project for trade affairs and the institutional model for regional governance incorporated into Part IV were modelled directly on France’s colonial strategy of maintaining the colonies dependent on the metropole.⁵⁹⁸ Nonetheless, the Association was vested as a free trade area similar to the EEC itself and in compliance with GATT Article XXIV.

The origins of the EU’s ‘trade and development policy’ rest, therefore, on the French proposal and Part IV of the Treaty of Rome. It provided an ‘open door’ approach to selected colonies, and later newly independent countries, in Africa, Caribe, and the Pacific.⁵⁹⁹ This served as an open frame to accommodate colonial practices into the European integration project, while Part IV was the legal regime governing trade flows with the 18 ‘associated’ African OCTs. All in all, the establishment of the EU triggered the formation of a new pattern of trade relations with its members’ colonies and later developing countries.

(c) The Yaoundé Conventions (1964-1975)

The Association operated until being replaced by the Yaoundé Convention of 1964 (“Yaoundé I”).⁶⁰⁰ The events leading to the conclusion of the Yaoundé Convention promoted a structural transformation in the EU-Africa relationship. The period from 1960

⁵⁹⁶ Article 131 of the Treaty of Rome.

⁵⁹⁷ Annex IV to the Treaty of Rome provided the list of OCTs: French West Africa (eight territories: Senegal, French Sudan (now Mali), French Guinea (now Guinea), Ivory Coast, Dahomey (now Benin), Mauritania, Niger and Upper Volta (now Burkina Faso)); French Equatorial Africa (four territories: Middle Congo, Ubangui-Sari, Chad and Gabon); French Togoland; Belgian dependent territories (two territories: Belgian Congo, Rwanda-Burundi); Italian territory (Somaliland); Netherlands dependent territory (New Guinea); other French dependencies (St Pierre and Miquelon, the Comoros Archipelago, Madagascar and dependencies, French Somaliland, New Caledonia and dependencies, French settlements in Oceania, Southern and Antarctic Territories).

⁵⁹⁸ Lister, 1988: 20; Montana, 2003: 71-73.

⁵⁹⁹ *See supra* note 598.

⁶⁰⁰ Lister, 1997: 61-62; Montana, 2003: 74-75; Milward, 2005: 80-84.

to 1973 became known as the era of decolonisation. Starting off with French Guinea's independence from France in 1958, most colonies followed the pathway in the early 1960s. The decolonisation challenged the basis of the EU's trade and development policy, to the extent that the newly independent African countries would reject the European system of (neo-)colonial preferences.

Decolonisation sparked demands for a redefinition of the legal regime of economic governance between the EU and the former African colonies.⁶⁰¹ As a consequence, the Convention of Association of 1963 between the European Economic Community and the Associated African and Malagasy States ("AAMS")⁶⁰² was a new, comprehensive treaty between sovereign states of Europe and Africa devised to regulate trade and development cooperation for a period of five years. The recognition of the newly independent African countries as sovereign states by the EU and of their mutual colonial heritage formed the cornerstone of Yaoundé I.⁶⁰³ Put differently, the Association was devised to govern regional trade between the EU and non-sovereign OCTs, whereas the Yaoundé Convention was negotiated between formally equal and sovereign partners.⁶⁰⁴

The Yaoundé regime was centred on a series of FTAs between the EU and each AAMS. Since the European and African partners were equal, their relationship had to be based on reciprocity with regard to the exchange of preferential trade access as well as the institutional arrangement.⁶⁰⁵ This meant that AAMS were no longer limited to make demands through their metropole, but they could rather engage in deliberations directly with the EU. To ensure political equality, Yaoundé I established an institutional regime comprised of an association council, an association committee, a parliamentary conference, and a court of arbitration.

As far as trade was concerned, Yaoundé I replicated the main subject-matters of Part IV. The AAMS continued to be accorded preferential access. Except for the products protected by the newly established Common Agricultural Policy (CAP), the AAMS partners were granted immediate duty-free access on their products.⁶⁰⁶ Since Yaoundé I was based on reciprocity, the AAMS continued to reduce their tariffs and open quotas for EU products

⁶⁰¹ Broberg, 2013: 677.

⁶⁰² The AAMS were Burundi (formerly part of Rwanda-Burundi), Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Congo (Brazzaville), Dahomey (now Benin), Gabon, Ivory Coast, Madagascar, Mali (formerly part of French Sudan), Mauritania (formerly part of French Sudan), Niger, Rwanda, Senegal, Somalia, Togo, Upper Volta (now Burkina Faso).

⁶⁰³ Broberg, 2013: 677.

⁶⁰⁴ Montana, 2003: 76-77.

⁶⁰⁵ Montana, 2003: 76-77; Bartels, 2007: 722-723; Broberg, 2013: 677.

⁶⁰⁶ Articles 2(1) and 5(1) of Yaoundé I.

while abolishing all quantitative restrictions within four years.⁶⁰⁷ This discipline on trade cooperation continued to be combined with the EDF's financial aid.

Before the expiry of Yaoundé I, the EU and the AAMS agreed to renew the Yaoundé Convention in 1969 for an additional 5-year term ("Yaoundé II"). Some not significant modifications were introduced to Yaoundé II. Yet, its conclusion was considered in the North-South relations as a force of stability for the AAMS in what was regarded as an unsettled period. Indeed, the five-year term of Yaoundé I was marked by broad political and economic changes. Part of this was due to the rise of the Third World and the attempt to challenge its dependence on the First or Second World.⁶⁰⁸ The other part was the AAMS's rejection of East-West confrontation in favour of a South-North agenda for economic cooperation. They sought to echo the NIEO's claim for more formal and material equality. This led them to demand a declaration that the Yaoundé regime was not a system of (neo-)colonial domination but a free trade area among sovereign states. Finally, the EU began to conclude special arrangements with other developing countries lowering or abolishing duties on a range of tropical products.⁶⁰⁹ This proliferation of RTAs not only increased the complexity of EU-Africa regionalism but also reduced the priority given to the AAMS in the EU's trade and development policy.⁶¹⁰ It was under these circumstances that the extension of the Yaoundé Convention was concluded in 1969.⁶¹¹

(d) The Lomé Conventions I and II (1975-1985)

The Convention of Association between the European Economic Community and the African, Caribbean and the Pacific countries, signed in Lomé on 28 February 1975 ("Lomé I"), is an emblematic legal document for representing an effort to establish a new Euro-African *entente*.

⁶⁰⁷ Article 5(1) of Yaoundé I.

⁶⁰⁸ Cosgrove, 1978: 38, 145; Montana, 2003: 76-77.

⁶⁰⁹ Holland, 2002: 29. The proliferation of EU-South RTAs covered a wide range of developing countries: (i) The Arusha and Lagos Conventions; (ii) The RTAs with the Northern Mediterranean Cyprus, Malta, and Turkey, and (iii) RTAs with Algeria, Morocco, Egypt, Lebanon, Jordan, Tunisia, and Syria. In addition, the EU concluded some special arrangements with developing countries in Asia, Latin America, Central America, and the Middle East (Montana, 2003: 79-80).

⁶¹⁰ Ravenhill, 1985: 56, 61.

⁶¹¹ For an account of the Yaoundé II negotiation, see Zartman (1970), Cosgrove (1978), and Ravenhill, (1985).

By the early 1970s, the Yaoundé regime came under harsh criticism.⁶¹² Some accused it of promoting neo-colonialism and divisiveness among the newly independent countries in Africa. Others claimed that the Yaoundé model failed in promoting economic integration or development since the trade declined steadily between the EU and Africa in the period between 1958 and 1974. Moreover, a number of global transformations were undergoing. The most important of all being the Arab-Israeli war, which led to the use of oil as an economic weapon and the formation of the Organisation of the Petroleum Exporting Countries (OPEC) as a major commodity cartel. The success of the OPEC fuelled the imagination of the end of the First World economic superiority, and created the fears that a similar strategy could be undertaken by other commodities producers. Hence, it was because of these disappointments, and a general disillusionment of developing countries with the international trade system, that the idea of Yaoundé III was rejected. Instead, a new model of governing South-North regionalism had to be conceived.

There was another reason for rethinking the Yaoundé regime. The accession of the United Kingdom to the EU in 1973 had the effect of bringing the developing countries associated with the British Commonwealth under the EU's trade and development policy.⁶¹³ Pursuant to Protocol 22 (annexed to the UK's Treaty of Accession), 20 Commonwealth states were offered the opportunity to negotiate a long-term agreement with the EU. Three options presented themselves: the enlargement of Yaoundé; the conclusion of bilateral trade agreements; or the collective agreement on a new plurilateral agreement. The first two options were contemplated, but ultimately rejected. Despite their diversity and division, the former colonies forged a consensus on a new group of developing countries located in Africa, Caribbean, and the Pacific (ACP)⁶¹⁴ willing to negotiate a new model for EU-Africa regional trade governance.

Against this background, the Lomé I was concluded and came into force in 1976 for a period of 5 years, linking the 9 EU-member states with 46 ACP countries.⁶¹⁵ The most distinctive feature of the Lomé regime was a commitment to an equal partnership between Europe and the ACP. The preamble committed the partners "to establish, on the basis of complete equality between partners, close and continuing cooperation in a spirit of

⁶¹² Holland, 2002: 32-32; Montana, 2003: 81-85.

⁶¹³ See *supra* note 612.

⁶¹⁴ The Georgetown Agreement of 1975 formally established the group of African, Caribbean and Pacific countries, which allowed the newly constituted bloc to forge a stronger bargaining position and act through a single spokesperson throughout the Lomé Conventions era.

⁶¹⁵ The ACP was comprised of the original 18 AAMS and Mauritius, 6 other African states, and 21 developing countries of the British Commonwealth (12 were African, 6 Caribbean and 3 the Pacific). However, during the five-year Term of Lomé I the developing-country membership quickly rose to 53 (Holland, 2002: 34).

international solidarity,” and to “seek a more just and more balanced economic order.” This declaration was a response to the criticism that the Yaoundé Conventions had perpetuated dependency rather than promoted development. It was also a reflection of the mutual willingness to create a new model for South-North regional trade governance, which aspired to contribute to a more balanced and just international economic order.

The Lomé regime aimed at reflecting the idea of partnership in the trade relationship, its legal rights and obligations, and institutional arrangement.⁶¹⁶ At the institutional level, Lomé I sought to merge the Yaoundé architecture with the commitment to partnership: the ACP-EC council of ministers, the committee of ambassadors, and the joint consultative assembly. Since the Yaoundé’s court of arbitration had never been convened and given the preference for diplomatic rather than legal modes of dispute resolution, Lomé I did not provide a judicial arbitration procedure. At the policy level, the major objective of Lomé I was to promote EU-ACP trade, agricultural and industrial development, provide financial aid and support for regional cooperation. To avoid the shortcomings of the Yaoundé Conventions, Lomé I was based on non-reciprocal trade, which meant that the ACP were now required to treat the imports from the EU on a most-favoured-nation basis. It also established the Stabilisation of Export Earnings Scheme (Stabex), a system for the stabilisation of export earnings from agricultural commodities.

The first five-year term of the Lomé regime was generally regarded as successful for its commitment to equal partnership, while seeking to eschew any form of neo-colonialism. This model was based on two pillars: the ACP was not required to offer trade preference to the EU (non-reciprocity principle) nor was prohibited from trading with other countries (non-discrimination principle).⁶¹⁷ Also, Lomé I was acknowledged for its mandate to promote economic integration of developing countries in the global market, its range of development assistance programmes, and its lack of political conditionality on the ACP. However, there was a gap between Lomé I’s expectations and its actual reality. The most notable criticism of the Lomé regime was on its marginal impact on the trade balance. Not only the ACP did not increase its trade with the EU market but also appeared to have increased its dependency on raw materials as an export base in exchange for importing the EU’s industrial goods. Even the pro-development Stabex was criticised for rewarding failure rather than success.

Signed in 1979 for an additional period of five years, Lomé II introduced only two relevant developments: policies and rules in favour of the least developed countries (LDC),

⁶¹⁶ Holland, 2002: 34-36; Montana, 2003: 84-85.

⁶¹⁷ Holland, 2002: 39-40.

and the Stabilisation Scheme for Mineral Products (Sysmin). In contrast to Lomé I, Lomé II was regarded as not fully satisfactory to either the EU or the ACP.⁶¹⁸ While Lomé I was perceived as part of a new pathway towards a new international economic order, Lomé II was experienced as the end of that path. The Lomé Conventions became the target for the frustration of both blocs with their poor economic outcomes, even if the major cause was a global recession triggered by a combination of the successive oil crises, a decline in the relevance and importance over commodities, and the economic slowdown in Europe from 1975 onwards. Specifically, the ACP exports to EU failed to increase despite the preferential treatment, while exports from non-Lomé developing countries persistently grew in relative terms. By contrast, some in the EU blamed the impact of manufactured imports from developing countries as an important factor for causing the 1979 recession. Nonetheless, the shared hope of a South-North partnership of equals was gradually eroded as international financial institutions took over the leading role in managing and funding development affairs in Africa.

Despite its shortcomings, the Lomé regime has been regarded as a landmark for South-North regional trade agreements. It reflected a significant improvement of the terms of the relationship of the newly independent African countries with the European Union.⁶¹⁹ From the Association to Yaoundé and then to Lomé II, the African states demanded and received more and more favourable conditions from the European Union, while the EU received less and less from the ACP. This suggests that the ACP obtained the greater advantages – aid, preferences, supports, and guarantees – precisely because of its weaknesses and needs.

Notwithstanding, this sophisticated regional regime for governing South-North trade and development cooperation should not be confused with closer *political* ties or *economic* betterment for either bloc. Indeed, putting aside the legal aspects, the economic and political consequences of Lomé I and II were unexpected at best and disappointed at worse. The enlargement of the two groups (EU and ACP) and their reorganisation as continental blocs was perceived as a decline of the “special relationship” between individual partners.⁶²⁰ The plurilateralisation and segregation fostered by the Lomé regime diluted postcolonial ties and contributed to strengthening the regional-continental identities. Indeed, the ACP bloc, created as a legal fiction during Lomé negotiations, was turned into a

⁶¹⁸ Ibid.; Montana, 2003: 85-86.

⁶¹⁹ Zartman, 1976: 332-334.

⁶²⁰ Ibid.

relatively stable political group. The implication was the increase of ACP's leverage to bargain with the EU.

Moreover, the economic outcome of the Lomé regime was regarded as disappointing.⁶²¹ The ACP did enjoy a trade surplus with the EU, but this was also the position under the Association and Yaoundé Conventions. The ACP exports to the EU increased in absolute values but declined significantly in market share relative to other developing countries and developed countries. The Lomé Conventions also failed in fostering the industrial development of ACP countries. More surprisingly, the pattern of EU-Africa trade seemed to have remained mostly unchanged throughout the operation of the Association, Yaoundé and Lomé Conventions. From 1945 to 1985, the ACP-EU trade was characterised by “an acute imbalance, both among products exported and among the ACP exporting countries [...] this structure has changed very little and largely retains the features of the colonial period [...] The rule of free trade is meaningless for countries which, at the present stage, because of their production structures, have practically nothing to export to the [EU] rather than primary commodities].”⁶²² This means that, after forty years, ACP countries remained mainly dependent on exporting agricultural products and raw materials in exchange for European industrial goods. For these reasons, the Lomé Conventions were accused of having yielded perverse effects over their economies.

All in all, the Lomé Conventions were understood as a clearly superior model of EU-Africa regional trade governance to its predecessor, the Yaoundé.⁶²³ They symbolised a watershed in South-North postcolonial relations. Not only reciprocity was removed, but also the (neo-)colonial project for European-African trade was rejected. The purpose was to replace dependency by equality and stability as the pillars of the EU-ACP trade governance. Obviously, not every demand of either side could be met. Yet, Lomé I and II were historically important for consolidating a novel and unique archetype of South-North regional trade agreement. As examined in the next section, the EU-Africa regime for regional trade resulted partly from the operation of the Law and Development Cooperation Doctrine, which was built on a distinguishing combination of an ideational blueprint for development cooperation, an institutional project for inter-regional governance, and a jurisprudential programme for regulating trade and development affairs.

⁶²¹ Holland, 2002: 39-40; Sissoko *et al*, 1998: 11-19; Milward, 2005: 104

⁶²² Focke Report, 1980: 14.

⁶²³ Holland, 2002: 40; Montana, 2003: 86.

2. The Legal Governance of the EU-Africa Regional Trade Regimes: The Law and Development Cooperation Doctrine

The previous section provides a historical introduction to the legal governance of the EU-Africa regionalism. The purpose now is to describe and analyse the legal doctrine that exerted a dominant influence over (legal) decision-making in and over the Yaoundé Conventions and the Lomé Conventions I and II. I argue that the Law and Development Cooperation Doctrine was applied to govern how institutions were designed, regimes managed, rules interpreted, arguments made, with the aim of shaping, or solving disputes arising from, the EU-Africa regimes for regional trade. It provided a doctrinal framework of possibilities to make sense of and employ international law to manage these South-North RTAs. The period between 1947 and 1985 witnessed the long rise and sharp decline of the Law and Development Cooperation Doctrine, reaching the pinnacle of its authority and legitimacy in 1975 when Lomé I was signed. The next sections open, disentangle, and examine its ideational, institutional, and jurisprudential dimensions. This case study intends to serve ultimately as evidence to support my general hypothesis.

(a) Ideational Dimension: Development Cooperation as the Political Economy Programme for EU-Africa Trade Regionalism

The construction of legal doctrines of international trade law rests partially on the commitment to an ideational programme of international political economy for ordering trade relations towards a determined purpose. Section 5.A argues that three rival ideational projects for governing world trade were very influential from 1947 to 1985. Recall that liberal-welfarism, developmentalism, and socialism provided the political economy blueprints for constituting and managing the GATT, UNCTAD, and Comecon, respectively. The latter two shaped the mindsets and practices of officials, diplomats, policymakers, lawyers, and other policy-oriented experts involved in the conceptualisation, negotiations, constructions and operation of South-North regional trade agreements.

On the one hand, liberal-welfarism aimed to shape the postwar understanding of regional trade agreements between developed and developing countries.⁶²⁴ Its core goals rested on a compromise between the liberal aspiration for universal trading on the basis of

⁶²⁴ See section 5.B.1.

non-discriminatory and reciprocal relations and the welfarist purpose of securing domestic economic and social development through state intervention. The idea of South-North regional trade regimes has always fitted uneasily under liberal-welfarism since it was associated with the interwar trade discrimination and European imperialism. Part of liberal-welfarist supporters understood that universal free trade was the fairer and the most efficient mechanism for economic development. Since they were against any form of discriminatory, colonial or protectionist measures, RTAs should be proscribed. Others argued that RTAs were not intrinsically against liberal-welfarism. Rather, they could serve as a complementary form to universal free trade, to the extent that there should be legal rules determining that the RTAs must promote economic integration and trade liberalisation.

On the other hand, developmentalism emerged as a contestation to liberal-welfarism.⁶²⁵ Its core aspiration was to accommodate two goals: promotion of preferential cooperation at the international level, and state interventionism for fostering emancipatory development at the domestic level. The notion of South-North regional trade regimes was a central part of the developmentalist programme, since its purpose was to subvert the continuous use of RTAs as imperial systems of preferences in the past and as neo-colonial systems vested as free trade areas in the present. To do so, South-North RTAs were reconceived as pro-development systems premised on special and differential treatment, which was expressed in the form of trade preferences, non-reciprocity between developed and developing countries, and non-discrimination among developing countries.

The ideational programme embedded into the Law and Development Cooperation Doctrines resulted from an unbalanced compromise between liberal-welfarism and developmentalism. The efforts to combine their blueprints entailed a wide range of projects and histories, concepts and norms, theories and methods. Some features of those programmes were found to have similarities while others were fundamentally contradictory. Lawyers' work consisted of mapping, organising, selecting, and justifying the choice of particular ideational features to constitute the legal doctrine. Although these two programmes were very influential at the time, each of them developed one specific project devised for fostering economic development specifically. These blueprints rationalised abstract ideas in concrete policies, including proposals for promoting development through trade regionalism. The underlying political economy of the EU-Africa RTAs resulted from a unique (and unbalanced) combination of these projects inspired by liberal-welfarism and developmentalism.

⁶²⁵ See section 5.B.2.

The emergence of the Law and Development Cooperation Doctrine coincided with the birth of two political economy projects offered to address ‘the problem of development’.⁶²⁶ Both began to be produced from the closing years of World War II when global economic governance of the developing world was being reimagined as the United States intensified its attacks against European colonial systems. After a period of intellectual maturation and policy delineation, these ideational blueprints for economic development had acquired sufficient contours, validity, and legitimacy to be named *modernisation* and *structuralism*.

From the outset, modernisation was at the core of the EU’s policy debates about trade and development for African colonies and then sovereign countries.⁶²⁷ From the 1950s to the 1980s, these ideas and techniques were criticised and modified by new findings and theories from inside and outside modernisation, which in turn were reflected back into the EU policies. By contrast, structuralism was initially rejected by the European Union. However, after decolonisation, the newly independent African countries embraced structuralist theories and proposals and used them to continually criticise and demand changes.⁶²⁸ The tension between modernisation and structuralism deeply shaped the Yaoundé and Lomé Conventions. Therefore, the ideational project for development cooperation embedded into the Law and Development Cooperation Doctrine drawn, with varying degrees of authority, from the unbalanced amalgamation of both modernisation and structuralism.

The origins of modernisation were deeply rooted in liberal-welfarism.⁶²⁹ It was conceived under the political movement favouring decolonisation, and rejecting socialism, that was reflected in the US President Harry Truman’s “Point Four Aid” in 1949.⁶³⁰ Indeed, the Point Four has been regarded as the opening act for reimagining the liberal-welfarist world from a *development* viewpoint.⁶³¹ In the decades following World War II, modernisation quickly became the orthodoxy in Western developed countries.

Institutionally, modernisation drew inspiration from successful domestic and international policies and arrangements. Intellectually, the new sub-disciplines of neoclassical development economics and politics were placed at its heart. A new generation of Western thinkers was engaged in adapting Keynesian-inspired economics and liberal

⁶²⁶ See generally Cypher and Dietz (2009: chapter 3) and Doidge and Holland (2014).

⁶²⁷ Doidge and Holland, 2014: 60-65.

⁶²⁸ Ibid.

⁶²⁹ This brief account of modernisation summarizes the mainstream story that is shared by the majority of political and economic development experts. For alternative views, see Cowen and Shenton (1996) and Cooper and Packard (1997).

⁶³⁰ Cypher and Dietz, 2009: 98-102; Latham, 2000: 13-17.

⁶³¹ Rist, 2008: 78.

political institutions to resolve the dualist-sector challenge of developing countries through capitalist-growth, industrialisation.⁶³² The breakthrough of this group as to rationalise the non-Western-and-non-socialist poor regions of the world as suffering from the problem of ‘underdevelopment’.⁶³³ This ‘problem’ could be solved by an objective and neutral application of policy-oriented social sciences. For instance, policies and techniques were devised to assist those regions to overcome the challenges of rural underemployment and late industrialisation through public investment, planning and intervention.

The solution to help developing countries to become a Western industrial economy was to employ domestic and international instruments to mimic the historical path taken by developed countries.⁶³⁴ Modernisation policies focused directly on the state, which was placed at the centre stage at both domestic and international arenas, and indirectly on the managerial role of political and official elites. The state was assumed to have the perfect position to use policy-oriented expertise to guide the transition of its economy from traditional to modern.⁶³⁵ Domestically, state intervention was the primary mechanism to maintain order and stability as the pre-conditions for fostering endogenous economic growth. Internationally, the state was the main intermediary between the national socioeconomic needs and the liberal-welfarist package of trade and economic opportunities and financial aid offered by the benign Western developed countries.

The structuralist project began in the early 1950s as a critique of modernisation.⁶³⁶ A group of Latin American economists employed structuralist analysis to challenge neoclassical development economics and politics. They sought to explain the reasons for the declining returns of commodities trade, and for the specialisation in these products failed in entailing economic growth, diversification and industrialisation, and, more importantly, development, as otherwise assumed by modernisation. Grounded in the new sub-discipline of structuralist economics, and later on institutionalist and dependency theories, the main hypothesis of structuralism was that underdevelopment was not a stage of the development path on which countries were stuck or held back by deficiencies imposed by colonisation or caused by civilizational backwardness. Instead, underdevelopment was

⁶³² The post-1945 generation of liberal-welfarist experts was composed by the economists Albert Hirschman, Kurt Mandelbaum, Paul Rosenstein-Rodan, W. Arthur Lewis, Ragnar Nurske, and Walt Whitman Rostow as well as the political scientists Robert Packenham and Irene Gendzier. For a discussion of liberal-welfarist theories of economic development, *see generally* Cypher and Dietz (2009: chapter 5). For a discussion of the history of liberal-welfarist development ideas and practices, *see generally* Hodge (2015; 2016).

⁶³³ Rist, 2008: 73.

⁶³⁴ *Ibid.*

⁶³⁵ Gilman, 2007: 4, 16-17; Doidge and Holland, 2014: 60-65; Hodge, 2015: 433-434.

⁶³⁶ For a discussion of heterodox theories of economic development, *see* Cypher and Dietz (2009: Chapter 6).

the political-economic outcome of a global capitalist system constructed to exploit peripheral commodities economies through their subjugation to core industrial economies. The difference in the terms of trade was evidence of the structural bias of the world trading system, which served exclusively to benefit the ‘core’ by sustaining its continuous economic progress while perpetuating the underdevelopment at the ‘periphery’. The modernisation goal to replicate the Western-style path of development in the Global South was hence impossible.

The solution offered by structuralism was to transform the state into the central promoter of development.⁶³⁷ Domestically, the state should implement import-substitution industrialisation (ISI) and export-led growth policies. Internationally, it should protect its economic development by either decoupling from the global mechanisms of capitalist exploitation or at least resisting to them through legal reforms aiming to ensure a more just and fair international economic order.

In the context of the legal governance of EU-Africa trade regionalism, a political economy programme for development cooperation was constructed through the clashes and compromises between modernisation and structuralism. Put differently, the ideational dimension of the Law and Development Cooperation Doctrine was stabilised and organised around five constitutive features drawn from a modernisation-structuralist framework.

First, the world of colonies and empires was gradually (and forcefully) replaced by a world-view of interdependent sovereign countries. The old and new developing countries were reconceived as ‘underdeveloped economies’⁶³⁸, constrained by internal ‘primitive-backwards’ practices or external ‘colonialist’ or ‘capitalist’ exploitation, whereas developed countries were repositioned from imperial powers to stewards for a prosperous world economy.⁶³⁹ Third, each country was regarded as aspiring to achieve self-sustaining economic growth by either ‘naturally travelling’ or ‘intentionally striving’ for the development path, with, direct or indirect, assistance or intervention of the state in the economy. Fourth, the state was conceived of as the central actor to promote development by adopting national, regional, or international measures and policies. Finally, development was understood mainly as an economic problem that could be scientifically analysed and technically solved through policies, rules and institutions.

Although it might seem counterintuitive given the prevailing position of the GATT and UNCTAD, the United Nations was regarded as the starting point for the

⁶³⁷ Ibid.

⁶³⁸ Rist, 2008: 79.

⁶³⁹ Hodge, 2016 130-132.

institutionalisation of the political economy project for regional development cooperation. In the aftermath of World War II, the UN had been established to preside over all areas of international affairs, including peace and security, economic, decolonisation, and development matters.⁶⁴⁰ The UN General Assembly functioned as a permanent forum for mediating the different, or perhaps rival, initiatives at the multilateral and regional levels. It was under the UN that the core ideational features of the programme for development cooperation were openly debated in light of the disputes between the (overlapping) multilateral trading systems, the GATT and the UNCTAD.

The GATT primarily shaped the EU's trade interactions with Africa by severely constraining the imperial systems of trade preference and then imposing limits upon regional trade agreements.⁶⁴¹ After decolonisation, many African countries were encouraged to join the GATT. However, most of their exporting products (agriculture and textiles) fell outside its mandate. More importantly, Article XXIV not only disciplined the formation of RTAs, but its rules also presupposed the legitimacy and validity of regional trade governance institutions modelled on the GATT. From an ideational perspective, the often-neglected work of the GATT regime was to infuse liberal-welfarism into RTAs through its legal requirements. This does not mean that the European Union was less influential. As discussed previously, the core features of the EU-Africa trade regime were initially drawn directly from the Treaty of Rome and indirectly from the French colonial regimes. More concretely, the Yaoundé Convention was modelled on the liberal-welfarist GATT and on the French neo-imperialist Part IV of the Treaty of Rome.

Despite that initial conflict, the political economy project for development cooperation was gradually refined and expanded until it became dominant. Part of its success was due to the prevailing position of modernisation in the First World. The other part was related to its resilience in accommodating the hasty ascension of structuralism. The influence of the UNCTAD over Africa spread out quickly in the post-independence. It shaped the EU-Africa trade regionalism by advocating for the establishment of the Generalized System of Preferences and, later, the NIEO. GSP was imagined as a non-discriminatory regime of non-reciprocal trade concessions. Indeed, the GSP schemes symbolised the structuralist-inspired alternative model for the modernisation-inspired Article-XXIV RTAs.

Between 1947 and 1985, the influence of liberal-welfarism and developmentalism over the EU-Africa regional trade regime varied. In the 1950s, the modernisation rationale

⁶⁴⁰ Carreau *et al*, 1980: 15-21, 36-37; Nguyen *et al*, 1999: 946-947; Elias, 1992: 25-28, 39-40.

⁶⁴¹ GATT Articles I:1 and 2, and XXIV. For details, *see* sections 1.B. and 2.D.

had penetrated in the GATT and EU. It affected the establishment and early years of the EU's trade and development policy. However, the influence of the French imperial project was dominant. More specifically, the Association was built on France's imperial programme with a modernisation façade. It was conceived as a regional regime to assist the overseas countries and territories to catch up with (European) civilisation by supporting their efforts to 'modernise' and 'industrialise'.⁶⁴² Assuming that supplying capital would be sufficient, or perhaps the main goal, to finance industrialisation and promote continuing growth, Part IV of the Treaty of Rome deployed the two core modernisation mechanisms at the regional level: free trade and financial aid.⁶⁴³ On the liberal front, a GATT-style free trade area was established to enable overseas countries and territories to generate foreign exchange by exporting commodities for which they were found to enjoy a competitive advantage. On the welfarist front, the EDF, a Bretton-Wood-inspired fund, was designed to channel funds to OCTs' public investments.

Only a few years following the implementation of the Association, the EU's trade and development policy was challenged by decolonisation demands, structuralist critiques and new developments in modernisation.⁶⁴⁴ These attacks to the Association also penetrated into liberal-welfarism. The EU was required to defend and review its policies and practices towards OCTs. Indeed, the Yaoundé negotiations provided an opportunity to reconsider the ideational project underlying the EU-Africa trade regionalism. Although the institutional outcome had been disappointing for merely reincorporating the Association as an international law treaty, the Yaoundé Conventions signalled a shift in the ideational balance towards modernisation by introducing minor changes that sought to respond to the intellectual debate on development and the political reality of decolonisation.

Throughout the 1960s, the political and intellectual circumstances led to the wide acceptance of structuralism and its coexistence and amalgamation with modernisation. The ideational project for development cooperation came progressively to incorporate the core tenets from both programmes, allowing international lawyers to craft regional trade regimes by making use of a wider doctrinal framework of theories, methods, and policies. The EU's Memorandum on a Community Policy for Development Co-operation of 1971 ("1971 Memorandum") that preceded the Lomé negotiations reflected this broader ideational consensus. Nonetheless, modernisation and structuralism did not have the same weight. The 1971 Memorandum shows that modernist theories became dominant in the EU's trade and

⁶⁴² EU, 1961: 3.

⁶⁴³ Ferrandi, 1962: 26-27; Sissoko *et al*, 1998: 10.

⁶⁴⁴ Doidge and Holland, 2014: 62-63.

development policy, while some structuralist ideas were incorporated and French imperial policies, marginalised.⁶⁴⁵

The Lomé Convention of 1975 was the embodiment of the political economy project of regional trade and development cooperation. It was constructed to accommodate rules and standards, policies and mechanisms, grounded directly in modernisation and structuralism, and indirectly in liberal-welfarism and developmentalism. At the regional level, Lomé I accepted the benefits of free trade (modernisation), but moderated by non-reciprocal and preferential access and supported by the Stabex and Sysmin (structuralism). This implies that it embraced neither modernisation nor structuralism in full. Instead, it reached a compromise by departing from market-access reciprocity (modernisation), and from general non-discriminatory treatment for all developing countries (structuralism). At the domestic level, the Lomé regime envisaged an active state responsible for implementing not only welfarist measures (modernisation) but also import-substitution-industrialisation (structuralism) and export-led-growth policies (modernisation/structuralism). Such state interventionism was conceived to be supported by EDF's funds and technical assistance (modernisation) with no 'political' conditions attached (structuralism).

(b) Institutional Dimension: the Governance Model of EU-Africa Trade Regionalism

In section 5.C, I argue that from the encounter between liberal-welfarism and developmentalism four visions of institutional models for South-North trade governance emerged in the postwar period. These visions were grounded in institutional stories about the four more influential international regimes with mandates over trade affairs: the United Nations, the GATT, the UNCTAD, and the European Union. The relative importance of each institutional model for the formation, reconstruction, and management of the EU-Africa regional trade agreements depended on how, and also by whom, these history lessons were articulated as legal arguments.

Two visions resulted from the efforts of Western developed countries in reading history in light of liberal-welfarism with the aim of crafting a postwar institutional model of

⁶⁴⁵ The 1971 Memorandum made explicit use of modernisation and structuralist policy vocabulary (Doidge and Holland, 2014: 64). For instance, it states that economic development was dependent on "economic take-off," a direct reference to Rostow's theory of the five stages of growth (EU, 1971: 18). By contrast, it also commits the EU to make "its own contribution to the establishment of a more just international order," reproducing the NIEO's central claim (EU, 1971: 8).

trade governance. The main preoccupation for liberal-welfarist supporters was to prevent the discriminatory and protectionist measures that caused the collapse of the liberal trading system. The use of international law to establish an international organisation to govern trade affairs was a shared objective. Despite their overall consensus on a universal legal regime for world trade, there were disagreements on what role, if any, regional trade agreements should play in the postwar international economy. The consequence was the formation of two visions of regionalism, which, in turn, entailed distinct institutional models of trade governance.

The GATT-centric vision conceived regional trade regimes between Europe and Africa as (imperialist) systems of trade preference that posed a threat to the multilateral trading system under the GATT. However, since EU-Africa RTAs were to be tolerated for political reasons, they should be formally constituted as either free trade areas or customs unions in strict accordance with Article XXIV, and modelled on the GATT itself. Thus, to be formally and teleological consistent with Article XXIV, the Yaoundé and Lomé Conventions should replicate the institutional model of GATT governance.

Alternatively, the European-centric vision understood regional trade regimes between European countries and (colonial or postcolonial) Africa as multi-dimensional phenomena that reflected not only trade preferences and economic interests but also development commitments and historical and cultural ties. For this reason, EU-Africa RTAs were never regarded as mere FTAs under Article XXIV. Instead, they were conceived as economic integration mechanisms for development, which were an intrinsic part of the EU integration project. This means that (what later would become known as) the EU's 'trade and development policy' was envisaged as instrumental and complementary to the formation of the European internal market. Specifically, the Yaoundé Conventions were regarded as designed on the Treaty of Rome and French Community, while the Lomé Conventions I and II on the EU and British Commonwealth. Hence, the institutional model for the EU-Africa regional trade regime should ultimately be the European Union itself but adapted to account for the unequal stage of development between the two blocs.

These two liberal-welfarist visions shared a similar understanding of the history of international trade law and governance of South-North regionalism. They diverged, however, as to the legitimate use of South-North RTAs under the GATT regime. Whereas the GATT vision favoured multilateralism and a narrow GATT-FTA model of governance, the European vision defended regionalism and an EU-integration model. By contrast, developmentalism inspired two distinct models for institutional governance of South-North regional trade regimes. Although they agreed with liberal-welfarism on the significance of

the interwar events, their interpretation of them was profoundly different. The liberal trading system was not perceived as a benign model of governance to be replicated. Rather, it held responsible for making imperialism possible. Consequently, it could not serve as a model for either international or regional governance of trade affairs. The primary lessons to be taken into consideration to assist in the reinvention of trade regimes between newly independent African states and the European Union were related to decolonisation, political independence of colonies, and economic interdependence. By rethinking the past from a developmentalist viewpoint, two visions of history and governance of EU-Africa trade relations emerged.

The UN-centric vision conceptualised regional trade regimes between Europe and Africa as international trading systems between (sovereign) developed countries and (sovereign) developing countries which often shared historical and cultural ties. These regimes were only possible because of decolonisation of the African peoples. Their main functions were as much economic as symbolic. Their aims were to foster economic growth, to reclaim African states' participation in world trade, and to dispel the colonial images of their backwardness and primitiveness. Hence, neither the GATT nor the European Union, but rather the United Nations was regarded as the institutional model of governance that should assist post-colonial African states in reasserting their equality to the Western developed countries.

Decolonisation was also the landmark moment for the UNCTAD vision rethink regional trade regimes between the European Union and post-independence countries in Africa. However, it was understood as a moment of betrayal rather than victory, since it only changed a visible for an invisible international system of imperial exploitation under the GATT governance. The creation of UNCTAD purported to promote and implement an institutional model of South-North governance based on a non-discriminatory and non-reciprocal system of international trade under the Generalised System of Preferences. Thus, the GATT FTAs and CUs (generally) and the Yaoundé and Lomé Conventions (in particular) were regarded as contradictory to the GSP schemes, since they violated the General Principle Eight of UNCTAD law for being based on principles of discrimination and reciprocity.

Those four models of institutional governance and their respective institutional stories were, with different degrees of persuasiveness, regarded as legitimate and valid part of the Law and Development Cooperation Doctrine. This doctrinal framework was broader and more resilient to accommodate the diversity and contestability entailed by the four visions. Lawyers could use this legal doctrine to make a credible argument about the virtues

and vices of governance bodies of a particular EU-Africa RTA by drawing from either one of those institutional models.

The acceptance of a wider variety of governance models as legitimate and authoritative did not entail that they were all created equal or enjoyed the same influence. In fact, aspects of one or other vision prevailed over time ruling out the rival model or history lesson. Put differently, I suggest that the dispute between institutional models for South-North RTAs would entail a more disruptive effect over contemporary legal doctrine than in the past since there was no strong consensus around a specific vision. Consequently, it is not unexpected to affirm that the relative influence of each model or story was contingent depending on the context in which it was invoked. Enmeshed in European, African, Caribbean and Pacific settings, lawyers were called to apply their Law and Development Cooperation Doctrine in decision-making underlying the negotiations, constructions and operations of the EU-Africa RTAs. What seems to be more surprising nowadays is the realisation that, despite its European origins, the history lessons and institutional models of regional trade governance were subject to highly disputed controversies. In the remainder of this section, I will examine the Yaoundé and Lomé Conventions against the four visions, with the purpose of showing their relative influence.

(i) The Yaoundé Governance of EU-AAMS Trade Regionalism

The two Yaoundé Conventions were comprehensive international law treaties. The negotiations leading up to Yaoundé I were the opening act for the use of the Law and Development Cooperation Doctrine. This legal doctrine provided the range of possible models to craft the governance institutions of the first regional trade regime between formally and politically equal and economically and developmentally unequal African and Western European countries.

The core aspects of the Yaoundé regime were not a novelty at the time since the Conventions served to ‘reincorporate’ Part IV of the Treaty of Rome as an international law treaty between sovereign states of Europe and Africa. Part IV established the Association for fulfilling the EU core goal of increasing trade and promoting economic and social development for the overseas countries and territories with “special relations” with EU members. It has been perceived as the legal instrument through which European

colonialism was ‘dressed up’ in liberal-welfarist apparel in order to be accepted and incorporated into the EU integration project.⁶⁴⁶

The Association governance of the EU-OCT trade cooperation reproduced the GATT-style system of market access centred on reciprocity and non-discrimination, which was also adopted by the EU members to gradually achieve, over a period of 12 years, internal free trade within the European Union.⁶⁴⁷ The Association was complemented by the EU’s common external tariff, which increased the protection for the OCT exports by imposing high tariffs on the similar products imported from other suppliers.⁶⁴⁸ As far as investment was concerned, the IC set forth liberal rules on free and mutual establishment rights.⁶⁴⁹ Finally, the Association was completed by the European Development Fund, an exclusive Bretton-Woods-style funding mechanism designed to provide development aid to OCTs.

The Association operated only for few years as envisaged since the majority of OCTs gained their political independence. Not surprisingly, it was criticised by the three institutional visions that contributed to its construction and implementation. GATT- and UN-inspired voices accused Part IV of perpetuating the existing colonial-metropole relationship under an FTA façade, while the supporters of the European visions argued that its purpose was to establish an institutional mechanism to preserve historical-political ties between the partners rather than promote an EU-style of economic integration.⁶⁵⁰ The first test of the Association came with the negotiations for a successor arrangement. Despite the critiques, Yaoundé I was the internationalisation of Part IV, to the extent that largely transposed the Association regime to govern the trade and development cooperation between the EU members and the newly independent African countries.

The preamble of Yaoundé I indicated that the two liberal-welfarist visions exerted a dominant influence, while the UN view only residual. It provided that the contracting-

⁶⁴⁶ See Ravenhill (1985: 47-48), Holland (2002: 25-27), Bartels (2007: 717-722), and Broberg (2013: 676).

⁶⁴⁷ Under Part IV, EU members committed to extend the benefits of the internal process of trade liberalization within the EU to the OCTs, which included gradual reduction, and eventual elimination, of customs duties and quantitative restrictions, with the exception of sensitive products. On the other side, OCTs agreed to reduce duties and open up quotas for EU products, following a transitional schedule; nevertheless, OCTs were still allowed to impose both quantitative restrictions on non-quota imports and customs duties to foster industrialisation and produce revenue for their budget (See IC Articles 9 and 14; Treaty of Rome Articles 13, 14, 32, 33, and 133).

⁶⁴⁸ Bartels, 2007: 721.

⁶⁴⁹ IC Article 8.

⁶⁵⁰ Ravenhill, 1985: 52-53; Holland, 2002: 27.

parties must observe “the principles of the United Nations Charter”⁶⁵¹ (UN vision) and the “Treaty of Rome”⁶⁵² (EU vision) in their pursuit of trade and development cooperation to achieve “the economic, social and cultural progress of their countries.”⁶⁵³

Five distinct and original features were introduced to the Yaoundé regime. First, Yaoundé I can be described as a legal instrument for ‘regime transposition’. The Association was built on Part IV of the Treaty of Rome and ICs between the European Union and EU members’ colonies. These ‘legal agreements’ challenged the classical notion of the centrality of state sovereignty as the (sole) subject of international law. Hence, Yaoundé I can be reasonably understood as ‘reconstructing’ Part IV and ICs as ‘international law treaty’ to reflect the change in the legal status of the post-colonial African states.

Moreover, GATT- and European-centric narratives portrayed the shift from “associated OCTs” to “associated states” as a ‘natural’, ‘logic’, or perhaps ‘strategic’, consequence of either a global event enmeshed into the dynamics of the Cold War, GATT negotiations and the US-EU foreign policies, or a European event that resulted from a diplomatic compromise between French-Belgium neo-imperialist ambitions and the European integration project. For these liberal-welfarist visions, decolonisation was generally regarded as a mere exchange of formal titles (from OCTs to AAMS), since African countries remained economically dependent on exports to the EU market.⁶⁵⁴ Nonetheless, from a UN viewpoint, the independence of African colonies was the single most important event of the 20th century. Indeed, the rejection of the project for the French Community by the former OCTs in favour of political sovereignty, self-determination, and nationalism, was celebrated as a watershed event, regardless of its economic implications.⁶⁵⁵ Thus, the transformation of the Association into Yaoundé I was perceived not merely as a game of appearances for the new African countries, but the acknowledgement by the former coloniser of their new status as ‘subjects’ of international law. This, in turn, empowered them to conclude ‘international treaties’.

Second, the Yaoundé Conventions constituted a uniquely complex regime of regional trade. Its legal governance was built on the French imperial practice reshaped by

⁶⁵¹ “WISHING to demonstrate their common desire for co-operation on the basis of complete equality and friendly relations, observing the principles of the United Nations Charter” (Yaoundé I, Preamble).

⁶⁵² “HAVING REGARD TO the Treaty establishing the European Economic Community, REAFFIRMING accordingly their desire to maintain their Association, [...] RESOLVED to develop economic relations between the Associated States and the Community” (Yaoundé I, Preamble).

⁶⁵³ Article 3(k) of the Treaty of Rome.

⁶⁵⁴ See Milward (2005: 80-82, 85-86) and Lister (1997: 61-62).

⁶⁵⁵ Milward, 2005: 80-84; Lister, 1997: 61-62. See also *supra* note 590.

the GATT and European models, and slightly chastened by the UN-centric view. The consequence was that the managerial premise of the EU-AAMS trade regionalism shifted from ‘assimilation’ to ‘interdependence’ and ‘development’.⁶⁵⁶ The notion of empire as a process of gradual integration of colonised peoples into the European civilisation was intrinsically embedded into the French Community, which served as the model for the Association. The ideational appeal of this French concept was weakened during the negotiations to the Yaoundé Conventions, through which it was marginalised in favour of the notion of an interdependent economy in which Europe was the midwife or steward of the ‘less developed’ countries or societies. To become an advanced European country, post-colonial AAMS should follow the EU’s trade and development policies, which mainly consisted of preferential trade and investment liberalisation combined with financial aid.

Third, the form and substance of the Yaoundé Conventions also changed. Formally, Yaoundé I was divided into four core titles⁶⁵⁷, each of them combining provisions crafted in the form of rule or standard⁶⁵⁸. Substantially, it integrated under the same regime distinct economic disciplines ranging from trade, services, and investment to development aid and technical assistance. Despite some degree of variation, its formal structure followed closely a specific normative pattern: liberal-free-trade norms tended to be constructed as rules, while welfarist-development-aid norms were often crafted as standards. Specifically, the titles on ‘trade cooperation’, ‘right of establishment and services’ and ‘institutions’ were mainly constituted of rule-based provisions. For instance, the provisions on trade cooperation were (directly) based on Part IV of the Treaty of Rome and (indirectly) modelled on the ‘rules’ of the GATT. The other example is of the development provisions that were designed on the ‘standards’ of the Bretton Woods Agreement, since they set forth vague rights and obligations that required on-going decision-making.

The fourth novel feature was that the Yaoundé Conventions constituted a regional system of preferential market access rules containing exceptions devised to soften their

⁶⁵⁶ Milward, 2005: 83-84.

⁶⁵⁷ Yaoundé I was comprised of four core and one miscellaneous titles: I – Trade (Articles 1-14); II – Financial and Technical Co-operation (Articles 15-28); III – Right of Establishment, Services, Payments and Capital (Articles 29-38); IV – Institutions of the Association (Articles 39-53); and V – General and Final Provisions (Articles 54-64).

⁶⁵⁸ Duncan Kennedy argues that norms can be formally designed as either rules or standards. While rules deemed to be rigid and objective, and aim to increase certainty, standards are regarded as flexible and subjective, and aspire to realise substantive objectives. Rules tend to be associated with legal norms directing free trade, whereas standards are often used as legal norms for welfarist policies. Rules are generally criticised for supporting a mechanical decision-making process that leads to over- or under-inclusiveness, whereas standards are attacked for defending a biased decision-making that is subject to arbitrariness (1976: 1687-1688, 1695-1696; 1997: 151).

application. Modelled on the Treaty of Rome and the GATT, the Title I on Trade⁶⁵⁹ sought to implement a preferential trade arrangement between formally equal state partners with the purpose of promoting a reciprocal, non-discriminatory, and gradual reduction of customs duties and quantitative restrictions.⁶⁶⁰ The provisions on trade were structured as rule-based norms, aiming at imposing clear obligations and rights. Standard-based provisions were also added to give some flexibility to the application of these liberal-free-trade rules. For example, Article 6 provided that the right to impose either quantitative restrictions on non-quota imports or customs duties to protect infant industry. Another departure from the Association was that the AAMS were not required to liberalise trade among themselves. To be consistent with GATT law, the Yaoundé Conventions were structured not as a single FTA but rather as a bundle of interconnected FTAs.⁶⁶¹ The normative architecture of the Yaoundé regime suggests that the EU and AAMS accepted the key tenets of liberal-welfarism (generally) and modernisation (in particular). At the regional level, they were not only expected to treat one another on a non-discriminatory basis but also they were regarded as formally equal and thus willing and able to reciprocally exchange trade concessions.⁶⁶² At the domestic level, partners were authorised to legislate on social and economic matters, limited only to not impose discriminatory treatment between them.⁶⁶³

By contrast, the provisions on development cooperation did not set forth clear and self-executing rights and obligations to the parties. Instead, the disciplines on financial aid and technical assistance and training were designed as open policy, which required affirmative interactions and continuous decision-making to be realised. The European Development Fund and the European Investment Bank (EIB) symbolised the differences between the formal design of provisions on trade cooperation and provisions on development aid, to the extent that the access to their financial resources was subject to the EU's sole discretion. The implications were two-fold. On the one hand, only one-third of the EDF's fund was successfully claimed by the AAMS and disbursed by the EU. On the other hand, the bulk of the EDF's resources was channelled to infrastructure projects, excluding or undersupplying all other areas, notably the industrial sector.⁶⁶⁴

⁶⁵⁹ Articles 1-14 of Yaoundé I.

⁶⁶⁰ Pursuant to Articles 2 and 11, all products from African countries received a measure of preferential treatment, except for the products covered by the newly established EU Common Agriculture Policy. There were also preferential measures providing progressive liberalization of products originating in EU countries (Article 2).

⁶⁶¹ Article 8 and 9 Yaoundé I. *See also* Bartels (2007: 723-724).

⁶⁶² Holland, 2002: 29.

⁶⁶³ Bartels, 2007: 724-725.

⁶⁶⁴ Holland, 2002: 29; Zartman, 1970: 28.

Fifth, a complex institutional and bureaucratic machinery composed of four main bodies was established to manage the Yaoundé regime. The “association council”, assisted by the “association committee”, contained one representative of each partner, and met annually to make binding decisions based on a joint agreement. The “parliamentary conference” had an advisory function, while the “court of arbitration” was the adjudicatory mechanism for resolving disputes over the Yaoundé Conventions. Despite their sophistication, these governance bodies were perceived as not very relevant for decision-making. Whereas the trade and investment provisions were mostly self-executing ‘rules’, the development and financial assistance provisions were ‘standards’ and so demanded case-by-case deliberation. Nonetheless, such decisions were not under the mandate of those governance institutions rather they were subject to the EU’s discretion only. Finally, these bodies were perceived as designed not to make relevant political decisions. Instead, their function seems to have been only symbolic serving to “bolster the self-respect and confidence of the African members.”⁶⁶⁵

(ii) The Lomé Governance of EU-ACP Trade Regionalism

After a decade of the legal governance of EU-AAMS trade regionalism, the Yaoundé regime was to be phased out. In 1973, the European Union and the ACP launched the negotiations on a new institutional model. The criticism of the Yaoundé Conventions was, with varying degrees of influence, taken into consideration by both sides. Also, the negotiations were affected by the rising of the Third World and its rejection of the East-West confrontation and attempt to reverse its economic dependency on developed countries.⁶⁶⁶ This movement was magnified by its call for a new international economic order, and dramatised by the OPEC’s policies in the late 1970s, which affected the growing First-World dependence on commodities while triggering a run for securing raw materials supplies. In this turbulent context, the EU enjoyed a less dominant position and so it was ‘more willing’ to meet the ACP’s demands. Consequently, the first Lomé Convention was signed in 1975. This political and economic conditions changed radically in the 1979 negotiations on the extension of the Lomé Convention.⁶⁶⁷ The result was unsatisfactory on both sides, causing Lomé II to be perceived as resting on the same principles, yet as being less inventive and far-reaching than of its predecessor.

⁶⁶⁵ Feld, 1965: 243.

⁶⁶⁶ Montana, 2003: 76.

⁶⁶⁷ See *supra* note 618, and accompanying text.

The Lomé Convention I reflects the zenith of the influence exerted by the Law and Development Cooperation Doctrine as a distinct legal mode for governing the economic affairs between North and South. Despite the attempts of the European Union to label the agreement a “new model,” I argue that Lomé I should be more accurately understood as a continuation or development of, rather than a rupture with, the institutional model embedded into the Yaoundé governance.

It is certainly not an exaggeration to assert that Lomé I was the most complex international law treaty on matters related to trade and development cooperation concluded between a bloc of developed countries (the EU) and a bloc of developing countries (the ACP). In contrast to 1964, the four institutional visions born out of liberal-welfarism and developmentalism had their main assumptions, arguments and models been tested, refined, and perfected through theoretical debates and practical experience by 1975. Despite their differences, they all converged in acknowledging that from the Association and Yaoundé Conventions to Lomé I, a new model of South-North regional trade governance emerged.

From a European viewpoint, the first Lomé Convention was essentially the embodiment of the renewed European Union’s trade and development policy.⁶⁶⁸ This fresh strategy mainly expressed the possible compromise between the French ‘organic’ approach and the British ‘interdependent’ approach to regulate their economic relations with former colonies. From a GATT perspective, the Lomé Convention was conceived as a trade agreement that set forth a ‘free trade area’ that fell uneasily under two exceptions to the most-favoured-nation treatment: Article XXIV and Part IV. Although resisted by a minority of GATT contracting-parties, Lomé I was regarded as the first “special and differential” RTA under Part IV of the GATT devised to grant non-reciprocal trade preferences to developing countries. Hence, international lawyers associated with both liberal-welfarist visions interpreted the Lomé Convention as expressing a new institutional model.

Distinctively, the supporters of developmentalism also perceived Lomé I as an attempt to create a “new model.” The aspiration was that this novel form of trade governance would pave the way to transform the South-North relations in accordance with the objectives of the NIEO Declaration.⁶⁶⁹ This shared consensus did not mean that the UN

⁶⁶⁸ Holland, 2002: 32; Milward 2005: 88-90.

⁶⁶⁹ “ANXIOUS to establish, on the basis of complete equality between partners, close and continuing co-operation, in a spirit of international solidarity;
RESOLVED to intensify their efforts together for the economic development and social progress of the ACP States [...]
DESIROUS of safeguarding the interests of the ACP States whose economies depend to a considerable extent on the exportation of commodities;

and UNCTAD approaches ceased to have differences, but rather they agreed on the existence of a new model underlying Lomé I. From a UN-centric standpoint, the first Lomé Convention represented an evolution in the strategy for interdependent development undertaken by developing countries.⁶⁷⁰ The Lomé model symbolised a conceptual shift from a ‘reciprocal’ towards a ‘non-reciprocal’ system of trade preference favouring developing countries. This change is grounded on the understanding that a regional trade regime of ‘politically equal’ and ‘economically unequal’ states should adopt institutional mechanisms to promote the economic development of the ACP and their gradual economic interdependence with other developed countries.

The UNCTAD vision that was emerging when Yaoundé I was signed had not only been perfected over the previous decade but also had its influence increased along with the success of the UNCTAD Conferences I (1964), II (1968) and III (1972). In contrast to the UN view, the UNCTAD defenders argued that Lomé I might be a new model, but it still served to perpetuate (neo-)imperial patterns of EU-ACP trade relations.⁶⁷¹ Despite the apparent move towards a non-reciprocal trade system and recognition of the ACPs as politically equal and economically unequal, the EU’s trade and development policy sought to subject former colonies to its own interests by weakening their bargaining powers through the segmentation of the ACP from the Third World.

The effort to reimagine the legal governance of EU-ACP trade and development cooperation according to a new paradigm was materialised in the Lomé Convention. The preamble of Lomé I stated clearly that its purpose was “to establish a new model for relations between developed and developing States, compatible with the aspirations of the international community towards a more just and more balanced economic order.” This “new model” combined innovative with conventional features. In contrast to the Yaoundé Conventions, Lomé I reflected a more balanced compromise between liberal-welfarist and developmentalist visions. Their relative weight could be found in the details of Lomé I’s institutional design. However, despite the attempts to build a new model, the Lomé Convention – I argue – was a sophisticated South-North regional trade agreement but still thought, crafted, and operated through the Law and Development Cooperation Doctrine.

ANXIOUS to promote the industrial development of the ACP States by wider co-operation between these States and the Member States of the Community;” (Lomé I, Preamble).

⁶⁷⁰ Ravenhill, 1985: 28; Montana, 2003: 68-70; Zartman, 1976: 326-327.

⁶⁷¹ Nkrumah, 1964; Lister, 1988: 18; Montana, 2003: 68-70; Zartman, 1976: 326.

Seven innovative features of the Lomé Convention deserve special attention. First, the Lomé regime embraced, as Yaoundé did, the political economy project for development cooperation, but struck a more equitable compromise between its modernisation and structuralist policies and ideas. It was primarily modelled on the same liberal-welfarist models of legal governance but relaxed by developmentalist reforms. This suggests that, despite the rise of the Third World, the European Union held enough bargaining power to impose its ‘trade and development policy’. The main transformation inflicted by the UNCTAD vision was the abandonment of the reciprocity principle and the revision of trade rules. This represented the final departure from the French imperial strategy of claiming that reciprocity was a condition *sine qua non* for cooperative relations among equally sovereign countries.⁶⁷² Thus, GATT-inspired rules on trade cooperation were reformed in light of the UNCTAD-inspired principle of non-reciprocity.⁶⁷³

Second, the most original invention was the new institutional design conceived to bring into existence a non-reciprocal regime for regional trade favouring the ACP countries. This involved merging the GATT’s legal institution of ‘free trade area’ with the UNCTAD’s legal institution of ‘generalised system of preferences’. The result was the formation of a bundled-up preferential arrangement of 46 ‘non-reciprocal free trade zones’ between individual ACP countries and the European Union under the Lomé governance. The consequence was two-fold. ACP products were granted full duty-free and quota-free access to the EU market, except for the products under the EU Common Agricultural Policy, which represented less than 1% of ACP exports to EU.⁶⁷⁴ Moreover, ACP countries were not required or obliged to offer reciprocal market access to EU products, unless to comply with most-favoured-nation treatment. These obligations were subject to safeguard provisions, which authorised EU members to take measures in case of ACP products cause serious disturbances in any sector of their economy.⁶⁷⁵

Third, the form and substance of Lomé had several original traits. The scope of the EU-ACP economic relations expanded to include new policy areas. The broader mandate covered not only cooperation on trade, services, and investments as well as financial and technical assistance (as under the Yaoundé Conventions), but also cooperation on export

⁶⁷² Holland, 2002: 34; Bartels, 2007: 724; Milward, 2005: 97.

⁶⁷³ See Articles 2-3, 7 of Lomé I.

⁶⁷⁴ Zartman, 1976: 332.

⁶⁷⁵ Article 10 of Lomé I.

earnings from commodities and industrial promotion. Lomé I was formally organised in six core titles⁶⁷⁶, each one combining rule- and standard-based provisions.

Similar to the Yaoundé Conventions, the formal structure of Lomé I and II followed closely a specific normative pattern: liberal-free-trade norms tended to be crafted as ‘rules’, while welfarist-development-aid norms were often designed as ‘standards’. More specifically, the provisions on ‘trade cooperation’, ‘services’, ‘investment’, and ‘institutions’ were mainly rule-based and modelled on the GATT and the EU. Conversely, the provisions on financial, development, and industrial assistance were mostly standard-based and shaped on the Bretton Woods institutions. In addition, some of the novelties in trade and development cooperation introduced by the Lomé Convention were shaped on the UNCTAD vision. Interestingly, the UNCTAD-inspired provisions followed the same pattern of form and substance: the articles on the Stabex and industrial and technical cooperation were predominantly standard-based, while provisions on trade were primarily rule-based.⁶⁷⁷

Fourth, an original notion of membership was introduced by the Lomé Convention devised to widen the eligibility criteria beyond former European colonies in Africa. Two factors drove to a sharp increase in the number of developing partners yielding important consequences. On the one hand, the first enlargement of the European Union in 1973 impacted meaningfully the EU’s trade and development policy, notably the extension of the ‘association status’ to the former British colonies in Africa, Caribbean, and Pacific.⁶⁷⁸ On the other hand, the Dutch and German request for ending the ‘organic’, ‘associative’ character of Yaoundé regime, and the UNCTAD demand for a non-discriminatory preference regime for all developing countries, were partially met.⁶⁷⁹ Under the Lomé regime, developing countries, which were not former European colonies but yet met the criteria established in Part IV of the Treaty of Rome, could apply for membership.⁶⁸⁰

The practical effects were evident. Geographically, the membership expanded from Europe and Africa to the Caribbean and Pacific. The accession of the UK, Ireland and Denmark to the EU increased from 6 to 9 the number of European partners. Yet, the number

⁶⁷⁶ Lomé I was comprised of six core and one miscellaneous titles: I – Trade (Articles 1-15); II – Export Earnings from Commodities (Articles 16-25); III – Industrial Cooperation (Articles 26-39); IV – Financial and Technical Cooperation (Articles 40-61); V – Provisions relating to Establishment, Services, Payments and Capital Movement (Articles 62-68); VI – Institutions (Articles 69-83); and VII – General and Final Provisions (Articles 84-94).

⁶⁷⁷ Compare Articles 2-3, 7 (on Trade) with Articles 26-39 (on industrial cooperation) of Lomé I.

⁶⁷⁸ The Protocol No 22 of the UK’s Treaty of Accession accorded to 20 Commonwealth states the opportunity to negotiate a long-term agreement with the European Union.

⁶⁷⁹ Zartman, 1970: 28-30; Montana, 2003: 79-80.

⁶⁸⁰ Articles 88-90 of Lomé I.

of developing countries skyrocketed: from the original 18 Yaoundé states and Mauritius to 46 partners, which added the 21 British Commonwealth countries (12 African, 6 Caribbean, and 3 Pacific) and 6 other African countries. During the five-year term of Lomé I, the number of ACP members quickly rose to 53. Moreover, the number of states classified as Least Development Countries raised steadily from 24 in Lomé I to 35 in Lomé II. This increasing importance of LDCs led to renewed emphasis on financial and development policies designed to provide them assistance.⁶⁸¹ Hence, the Lomé regime became a trans-continental regime for governing economic interactions between developed and developing countries organised in two bargaining blocs according to their development stage.

The fifth novelty was that the concessions of special treatments to certain ACP products as provided in specific commodities protocols under the Lomé Conventions. Specifically, Lomé I set forth preferential schemes for sugar, bananas, and rum to access the EU market. The Protocol 6 on Bananas granted preferential treatment to ACP imports, which consisted of duty-free entry to the EU up to specific quota. Under Protocol 3 on Sugar, the EU accepted to purchase a fixed quantity of ACP's sugar at attractive prices aligned to the EU's internal market prices. Finally, Protocol 7 on Rum provided for reduced duties.

The establishment of the Stabex – a regional scheme for compensatory financing – was the sixth innovation. Title II of Lomé I regulated the mechanism for stabilisation of the ACP countries' export earnings from commodities. Constructed with standard-based norms, the Stabex was an intricate institutional scheme managed by the EU on a continuous process of decision-making. This means that the European Union had discretion over the resources expenditure. The Stabex was designed to remedy the harmful effects of production shortfalls or price fluctuations of certain commodities on which the ACP countries were heavily dependent. Its aim was thereby to enable the ACP to achieve the stability, profitability, and sustained growth of their economies. In practice, the Stabex did not operate as envisaged. The global recession and the long-term decline in commodity prices prevented the ACP from repaying the loans taken to cover short-term falls in earnings.⁶⁸² The result was that the request for Stabex compensation exceeded the allocated budget. Further, the resources were not equally distributed among the ACP. For instance, the Stabex directed more than one-third of available funds to groundnut production, while just three partners (Senegal, Sudan and Mauritania) received 38.1% of the available

⁶⁸¹ Holland, 2002 37-38.

⁶⁸² Bartels, 2007: 738.

support.⁶⁸³ Despite the criticism, the Stabex not only was renewed by Lomé II of 1979 but also served the model for the Sysmin, a ‘special financing facility’ devised to protect ACP countries heavily dependent on mining exports to the EU market from loss of production or price collapses.

Seventh, the governance structure of the Lomé regime replicated the Yaoundé design except for the court of arbitration, which had never been used.⁶⁸⁴ This implies, nevertheless, a shift in the emphasis from an adjudicatory mode of dispute resolution centred on arbitration (*triadic*) to an argumentative mode centred on mediation and conciliation (*dyadic*).⁶⁸⁵ Drawing from the Treaty of Rome, three principal bodies were established to support the Lomé governance: the ACP–EU ‘council of ministers’, the ‘committee of ambassadors’, and the ‘joint consultative assembly’. The Assembly was composed of an equal number of ACP and EU representatives, and its decisions were consultative and non-binding. Nevertheless, the Assembly soon became the most energetic and active governance body having been responsible for proposing recommendations and resolutions to the Council.⁶⁸⁶ The Assembly was used by the ACP countries to vocalise their criticisms of Lomé I’s standard-based provisions, which were dependent on the EU’s discretion. Specifically, the burdensome procedures and delays related to the disbursement of funds were vigorously debated contributing to promote reforms.

Against this backdrop, the EU-African trade governance changed substantially from the establishment of the Association until the termination of Lomé II. The transformations involving its model of governance were conceived, debated, and carried out within a particular doctrinal framework of institutional and policy alternatives. For instance, the Law and Development Cooperation Doctrine empowered lawyers to conceptualise and argue about the Lomé Conventions from four distinct institutional angles. Thus, the Lomé experiment could be described as a regional regime for trade governance that reflected either the consolidation of a neo-colonial system (UNCTAD vision), the institutionalisation of economic (inter-)dependency (UN vision), the formation of an interdependent regime for trade and development (EU vision), or the constitution of a special and differential free trade area (GATT vision).

⁶⁸³ Holland, 2002: 36-38.

⁶⁸⁴ Compare “Title VI” of Lomé I with “Title IV” of Yaoundé I.

⁶⁸⁵ Drawing from Sandholtz and Stone Sweet, there are two modes of legal governance: dyadic and triadic. The former employs legal doctrines to make valid and legitimate argumentations within a not formally hierarchical or centralised setting. Under the dyadic mode, the parties involved in the negotiations or disputes reach their own agreements or solutions through argumentation and persuasion. Conversely, triadic system sets forth an institutionalised hierarchy, in which a third party finds a solution to a controversy (2004: 245-247).

⁶⁸⁶ Holland, 2002: 35.

(c) Jurisprudential Dimension: International Law of EU-Africa Trade Regionalism

From 1947 to 1985, the field of international law was passing through a period of intense normative, theoretical and doctrinal reform, renovation and experimentation. These processes were partially endogenous, led by an innovative attitude of lawyers towards international trade law, and partially exogenous, caused by ideational, political and economic transformations exemplified by the establishment of the GATT, Comecon, and UNCTAD at the multilateral level. In the context of EU-Africa regionalism, four jurisprudential projects for international trade law and governance gained relevance. Considering the constraints imposed by the Cold War, voluntarism and sociologism were approaches to international (trade) law developed by French lawyers aiming to reconcile specific trends in legal neo-positivism with the liberal-welfarist GATT law. Taking decolonisation seriously, contributionist and critical approaches were produced by post-colonial African lawyers with the purpose of criticising the Western-centric international law of the world trading system while advocating for the developmentalist UNCTAD law. Out of this moment of creative destruction, I argue in Chapter 6 that three visions emerged, each of them offering a distinct understanding of the relationship between GATT law and EU-Africa regional trade agreements.

Inspired by French voluntarism, the reformist vision conceived South-North regional trade agreements as international law treaties, through which ‘temporary’ regimes were created by a ‘special’ body of ‘non-universal’ (and so inferior) IEL rules and institutions to help developing countries overcome their underdevelopment. For this reason, the EU-Africa RTAs were regarded as not subject to GATT Article XXIV since its rigid and formalist rules of international trade law were designed to regulate RTAs devised for economic integration among (equal) developed countries (*e.g.* the EU and EFTA). Conversely, the introduction of Part IV was understood as an important step, to the extent that its flexible and purposeful standards of international development law were crafted to respond to the needs, interests, and values of the Third World.

Grounded in French sociologism, the apologetic vision conceptualised South-North regional trade agreements as international treaties devised to establish and regulate trade preferences between states. This means that the EU-Africa RTAs were understood as preferential trading systems that expressed state economic preference, rather than

mechanisms for economic integration or instruments for developmentalist policies. The consequence was that they were regarded as constituted and governed by the disciplines of GATT Article XXIV rather than any other rule or institution of international development law. Moreover, RTAs (generally) and the EU-Africa RTAs (in particular) were contrary to the core principle of non-discrimination, and so they should be rigorously controlled by Article XXIV and ideally phased out.

The utopian vision was based on the African critical project. It accused the GATT (generally) and South-North RTAs (particularly) of using international law to perpetuate the exploitation of developing countries by the First World. With the emergence of the Third World and the creation of the UNCTAD, South-North RTAs were reimagined as ‘special regimes’ of trade preference (in contrast to the GSP) capable of fostering cooperative (inter)dependency and emancipatory development. Thus, EU-Africa RTAs should be continuously reworked in order to shift their core function from liberal-welfarist instruments for economic exploitation to developmentalist mechanisms for economic development.

Those three jurisprudential visions were tactically used to negotiate, craft, and interpret EU-Africa regional trade agreements. They were also used to assign meaning to the GATT text in the process of arguing about the validity and legitimacy of Part IV of the Treaty of Rome, ICs, the Yaoundé Conventions and the Lomé Conventions I and II. The persuasiveness of legal arguments grounded in these jurisprudential views was not equal. Rather, their authority varied over time and place depending on contextual factors. The purpose of this section is to show their relative significance in the constitution and application of the Law and Development Cooperation Doctrine to the GATT law and governance of EU-Africa regional trade regimes.

(i) The GATT Law of the Yaoundé Regime

While the politics of decolonisation and the Cold War were important drivers for structural change, growing pressures from two fronts shaped the EU-Africa regional trade regimes and their outcomes. At the multilateral level, the GATT and UNCTAD were the main fora where controversies over the EU-Africa RTAs were articulated and solutions proposed through legal argumentation grounded, with varying degrees of relevance, in the jurisprudential visions.

Between 1964 and 1975, the GATT provided an institutional space where debates about the Yaoundé Conventions were reasoned through law. Not surprisingly, they were a central topic during and after the 1963–1967 Kennedy Round.⁶⁸⁷ Contracting-parties not allowed or not interested in acceding to the Yaoundé regime were entitled to protect their interests by challenging its consistency with GATT law. The United States accused it of perpetuating preferential treatment that distorted international trade flows, while GATT-developing parties claimed that their products were unfairly discriminated and prevented from accessing the EU market. Indeed, the Yaoundé Conventions were perceived as the symbol of the European Union’s greater commitment to trade preferences and discrimination rather than to liberal-welfarism.

During this period, the main ‘legal’ strategy was to contest the validity or legitimacy of an RTA through the GATT’s multilateral review mechanism under Article XXIV:7.⁶⁸⁸ This involved a process in which working parties examined whether FTAs and CUs met the requirements under Article XXIV.⁶⁸⁹ The analysis lay in two core obligations: RTAs must not raise barriers to trade with third countries (Article XXIV:5) and must eliminate all restrictive regulations of commerce on substantially all the trade between them (Article XXIV:8). When the Yaoundé Conventions were notified to the GATT, the European Union argued that both RTAs met the Article XXIV criteria.⁶⁹⁰

Developing parties to GATT, but not to the Yaoundé Conventions, sought to resist to the EU-Africa preferential trade regimes by using GATT law.⁶⁹¹ They contested the EU claim by making six legal objections to the compliance of the Yaoundé Conventions with Article XXIV, each of them can be roughly associated with one or more jurisprudential visions. The first criticism was on their illegitimate function of extending the historical system of preferences under GATT Article I:2 (shared by all jurisprudential visions).⁶⁹²

The second complaint focused on the unclear and unstable legal arrangement underlying the Yaoundé regime (apologetic vision).⁶⁹³ It cast doubt on the “legal identity” of Yaoundé Conventions as an FTA under Article XXIV. The claim was that they were a bundle of FTAs under a common institutional architecture named ‘Yaoundé Convention’. This amalgamation of FTAs not only lacked express authorisation under Article XXIV but

⁶⁸⁷ See Kock, 1969: 129; Milward, 2005: 88-89; Bartels, 2007: 728-729; Coppolaro, 2013: 175-176; La Barca, 2016: 20-21.

⁶⁸⁸ For details, *see* section 2.D.5.

⁶⁸⁹ For details, *see* section 2.D.

⁶⁹⁰ *See generally* Yaoundé I Report and Yaoundé II Report.

⁶⁹¹ Yaoundé I Report: para 20-29; Yaoundé II Report.

⁶⁹² Yaoundé II Report: para 5.

⁶⁹³ Yaoundé I Report: para 4, 13, 19, 23-24; Yaoundé II Report: para 4.

also encouraged the rapid proliferation of RTAs, resulting in the practical disappearance of the non-discrimination principle. This would ultimately violate the general requirement of Article XXIV:4 providing that FTAs were conceived to create new trade and not to divert it. Additionally, the absence of a plan for eliminating trade barriers between the partners raised doubts on whether the Yaoundé Conventions were an FTA on its formation or an interim agreement. All in all, the normative and institutional design of the Yaoundé Conventions would turn almost impossible to undertake an analysis of their compatibility with Article XXIV.

The third objection concerns the limited duration of each RTA to a fixed-term of five years.⁶⁹⁴ Two opposite claims were made by contracting-parties to challenge the temporality of the Yaoundé Conventions. One position defended that “an extensive or indefinite period” was an “implicit requirement” in Article XXIV, since the aim of RTAs is to promote economic integration (apologetic vision). Conversely, another contracting-party asserted that the Yaoundé Conventions could not be permanent since the “historical or other” reasons for their conclusion were transitory in nature (reformist vision).

Fourth, there was a controversial objection against the authorisation for AAMS to increase duties for development needs.⁶⁹⁵ Some contracting-parties claimed that the use of such safeguard measures would be inconsistent with Article XXIV:8(b), which requires the elimination of duties on “substantially all the trade” (apologetic vision). Additionally, they stressed that the expression “substantially all the trade” should not be interpreted in purely statistical terms, and so the authorisation under an FTA for the application of duties or other restrictions for ‘any protective purpose’ could not be justified under Article XXIV:8(b). Others argued that the resort to those measures by developing countries was not only likely but also economically justified on the basis of their need for revenues and efforts to promote development and industrialisation (reformist vision). This implied that such safeguards would not violate Article XXIV:8(b).

The fifth challenge was a direct attack on the principle of reciprocity (reformist vision). Some members of the working party claimed that South-North FTAs should not require reciprocal concessions from developing countries, which would be unable to accord free entry to substantially all products of a developed country.⁶⁹⁶ As a result, the requirement of Article XXIV should be interpreted in light of the new Part IV in order to prevent developing countries from according advantages under FTAs.

⁶⁹⁴ Compare Yaoundé I Report: para 5-6 with Yaoundé II Report: para 15-16.

⁶⁹⁵ Yaoundé I Report: para 7, 30; Yaoundé II Report: para 11-12, 20.

⁶⁹⁶ Yaoundé I Report: para 14, 25-27; Yaoundé II Report: para 7, 12, 22.

The last and most disruptive objection sought to put in question the suitability of Article XXIV, specifically, and GATT law, generally, to regulate FTAs and CUs between developed and developing countries (utopian vision). In the Yaoundé I Report, some contracting-parties only challenged the application of Article XXIV on the grounds that its disciplines were not devised for governing South-North RTAs.⁶⁹⁷ Further, it was one member of the working party examining Yaoundé II that first argued that GATT law was inappropriate to deal with EU-AAMS trade relations. Instead, they should be governed by the (newly agreed) GSP under the UNCTAD.⁶⁹⁸

The second front was the developmentalist assault to EU-AAMS regional trade regime undertaken under the UNCTAD. In this setting, developed countries, generally, and the European Union, in particular, were accused based on a utopian vision of benefiting from the structural exploitation of the Third World. The UNCTAD I Conference of 1964 found that developed economies had an unfair advantage over developing economies because the demand and price of commodities tended to decline relative to the demand and price of manufactured goods over the long term.⁶⁹⁹ The implication was two-fold. The deterioration of the terms of trade was understood to go against commodities exporters. This structural unbalance, also, shifted the bargaining power towards developed countries, leaving developing countries with little to offer in trade negotiations. This controversy was firstly translated into (non-binding) legal terms through the agreement on the General Principle Eight of the UNCTAD. This Principle stated that developed countries should grant general non-reciprocal trade concessions to developing countries. In 1968, the UNCTAD Conference II turned such Principle into the mutual agreement on the establishment of the GSP.⁷⁰⁰

Furthermore, the General Principle Eight and other recommendations put forward by UNCTAD led to the “Part IV: Trade and Development” amendment to the GATT in 1966, and to the adoption of the Enabling Clause in 1971 (temporary waiver) and 1979 (permanent waiver). During the years that elapsed between the first (1964) and the second (1968) sessions of the UNCTAD, the Yaoundé I (1964) was concluded and the negotiations for Yaoundé II (1969) were on the way. The Yaoundé regime was attacked by developing countries for being the nemesis to the GSP for three central reasons (utopian view).⁷⁰¹ They were constituted and regulated by GATT law. They legitimised a GATT-inspired

⁶⁹⁷ Yaoundé I Report: para 14, 25-26, 30.

⁶⁹⁸ Yaoundé II Report: para 7.

⁶⁹⁹ UNCTAD Proceedings 1964-I: 4-11.

⁷⁰⁰ UNCTAD Proceedings 1968-I.

⁷⁰¹ Milward, 2005: 86; Bartels, 2007: 724-729.

mechanism of reciprocal exchange of trade concessions. Finally, their rules of membership imposed discrimination between AAMS and other developing countries.

The European Union and AAMS articulated a legal response to the GATT-UNCTAD criticisms in two ways. On the one hand, the EU-AAMS countered the GATT attack by arguing that the Yaoundé provisions did not violate Article XXIV.⁷⁰² They asserted that the Yaoundé Conventions constituted FTAs for the purpose of Article XXIV (apologetic vision). Its disciplines required neither the implementation of an institutional model of governance nor the evidence of FTAs were creating, rather than diverting, trade.⁷⁰³ Regarding the issue of temporality, there was not a requirement to conclude only permanent FTAs. In fact, almost all RTAs notified to the GATT shared a provisory character.

Three more substantive counter-arguments were put forward by the EU-AAMS. The controversy over the consistency of safeguard measures to promote development with GATT law was addressed by the EU on two grounds (apologetic vision).⁷⁰⁴ Since all RTAs set forth safeguard clauses, their compatibility could only be assessed according to their use *post facto* and *not ex ante*. Also, the EU rejected the objection against the existence of safeguard measures by arguing that such view was grounded on “an out-of-date philosophy of economic development.” Moreover, the claim to the inconsistency of FTAs providing reciprocal exchanges between developed and developing countries was rejected based on the inexistence of such limitation in Article XXIV and the fact that the Yaoundé Conventions resulted from their partners’ trade interests and formal consent.⁷⁰⁵ Finally, the EU-AAMS refuted the objection to the application of Article XXIV to South-North RTAs by arguing that “[t]here was no reason to believe that the authors of Article XXIV had overlooked the possibility of free-trade areas between countries at different stages of development.”⁷⁰⁶ They claimed further that Article XXIV:5 provided that the GATT rules should not prevent the formation of RTAs, including the new Part IV.

On the other hand, the EU sought to contain the UNCTAD assault by trying to revert the debate back to a liberal-welfarist framework. More specifically, the EU offered the so-called Brasseur Plan, which proposed to create a system of managed markets devised to protect developed countries from adverse effects while supporting developing countries’

⁷⁰² Yaoundé I Report: 30-32; Yaoundé II Report; Kock, 1969: 129; Bartels, 2007: 729; Steffek, 2006: 85-89.

⁷⁰³ Yaoundé I Report: para 4-6, 14, 30-33; Yaoundé II Report: para 16.

⁷⁰⁴ Yaoundé I Report: para 7, 30; Yaoundé II Report: para 12, 29-30.

⁷⁰⁵ Yaoundé I Report: para 30-31; Yaoundé II Report: para 21.

⁷⁰⁶ Yaoundé I Report: para 14, 30; Yaoundé II Report: para 21, 23.

uncompetitive exports through selective preferences negotiated with each beneficiary according to its development stage (reformist vision).⁷⁰⁷

The responses to the GATT and UNCTAD objections were somehow not accepted. As typical under the GATT, the legal issue of whether the Yaoundé Conventions were FTAs consistent with Article XXIV did not reach an agreement within working parties nor was resolved by the dispute settlement mechanism.⁷⁰⁸ Rather, the ‘legal’ decision was ‘suspended’ by diplomatic compromises that diverged the conflict from working parties to the Kennedy Round.⁷⁰⁹ Moreover, the Brasseur Plan was rejected within the UNCTAD on the grounds of that it would not only increase the discretion of developed countries over developing countries but would also fragment their bargaining positions.

(ii) The GATT Law of the Lomé Regime

The 1970s witnessed profound transformations in the EU-Africa regionalism. The continuous economic disappointment of AAMS with the Yaoundé regime and of developing countries with the GATT (generally) and the Kennedy Round (in particular) led them to increase the pressure over the First World to reform the world trading system. Under the UNCTAD, they managed to secure the approval of the GSP in 1968. This was followed by the ‘acknowledgement’ of the GSP by GATT law through the 1971 Decision and later ‘incorporated’ through the 1979 Enabling Clause.⁷¹⁰ In 1973, the EU’s first enlargement impacted its trade and development policy meaningfully. Finally, developing countries’ long campaign to reform international economic law and governance succeeded in approving the NIEO Declaration and Charter under the United Nations in 1974.

Against this background, the negotiations on a successor to the Yaoundé regime began in 1973. By 1975, the European Union and the ACP agreed to establish a “new model” of South-North regional governance under Lomé I. In contrast to the Yaoundé Conventions, Lomé I and II were received with great enthusiasm by GATT contracting-parties.⁷¹¹ Most of them welcome the new provisions related to trade and development cooperation. The EU and ACP explained that the Lomé regime aspired to be a new model devised to promote economic cooperation and contribute towards a new or more equitable

⁷⁰⁷ Yusuf, 1982: 21; Bartels, 2007: 731; Steffek, 2006: 85-89; Coppolaro, 2013: 175-176.

⁷⁰⁸ See *supra* note 707.

⁷⁰⁹ See *supra* note 707.

⁷¹⁰ UNCTAD Resolution 21(II); GATT, GSP Decision.

⁷¹¹ See *generally* Lomé I Report and Lomé II Report.

international economic order. Notwithstanding, some members of the working party raised significant legal objections against the Lomé regime.

The most celebrated innovation of the Lomé Conventions was the abandonment of reverse preference and the adoption of the principle of non-reciprocity.⁷¹² In contrast to the Yaoundé Reports, the EU and ACP argued that Part IV should be applied in conjunction with Article XXIV to exempt developing countries from the obligation of extending concessions reciprocally (reformist vision).⁷¹³ Consequently, only the EU was required under Article XXIV:8(b) to eliminate duties and other restrictions concerning substantially all trade with ACP. The majority of the working party's members agreed with the EU-ACP interpretation of Article XXIV vis-à-vis Part IV.⁷¹⁴

The second clear novelty expressed in the Reports was the change in attitudes of most contracting-parties towards the UNCTAD and NIEO. It was noticeable that UNCTAD law had penetrated into the GATT governance and began to be employed to make legal arguments. Two consequences followed from this. The influence of UNCTAD law incentivised contracting-parties to expand the GATT mandate, in order to engage with trade and non-trade provisions of Lomé I and II. The EU-ACP invited the members of the working party to undertake a comprehensive and teleological analysis of the totality of rules and objectives under the Lomé Conventions.⁷¹⁵ For instance, the EU argued that their goal was to “contribute towards the creation of a more just and balanced world economic order” (reformist vision).⁷¹⁶ Distinctively, the ACP stated that their objective was to “build a stronger and more self-assured economies and step in the evolution towards a new international economic order” (utopian vision).⁷¹⁷ The majority of the working party supported the aspiration for a novel or renewed international economic order embedded into the Lomé Conventions (utopian and reformist visions).⁷¹⁸

Moreover, the working party's members increased their reference to UNCTAD norms and institutions. For instance, the EU asserted that the Lomé Conventions were not its only form to cooperate with developing countries.⁷¹⁹ It, additionally, implemented a

⁷¹² Lomé I Report: 26; Lomé II Report: 17.

⁷¹³ Lomé I Report: 4-5, 13; Lomé II Report: 4.

⁷¹⁴ Lomé I Report: 8, 12, 24, 26; Lomé II Report: 6, 24.

⁷¹⁵ Lomé I Report: 4-6; Lomé II Report: 4. In spite of having advocated for a comprehensive and teleological approach, the EU-ACP moved strategically back to the narrow and formalist analysis of GATT law when development measures under Lomé II were challenged by contracting-parties (Lomé II Report: 18, 22).

⁷¹⁶ Lomé I Report: 3; Lomé II Report: 5.

⁷¹⁷ Lomé I Report: 5. Interestingly, the position of the ACP shifted in Lomé II closer to the reformist argumentation adopted by the EU (Lomé II Report: 6).

⁷¹⁸ Lomé I Report: 6; Lomé II Report: 10.

⁷¹⁹ Lomé I Report: 3, 15, 19; Lomé II Report: 5, 12.

‘GSP scheme’, and participated in ‘international commodity agreements’ and other pro-development initiatives (utopian vision). The ACP asserted that the Lomé regime covered various aspects of development cooperation, such as agricultural, industrial and technical cooperation.⁷²⁰ Other members of the working party also referred to UNCTAD-inspired policies and measures, including the Stabex, Sysmin and industrial cooperation.⁷²¹

Nonetheless, legal objections were presented by the members of the working party. The most important opposition to the Lomé Conventions was concerned with its discriminatory effects over non-ACP developing countries. Contracting-parties argued that, to move towards a more just and balanced economic order, the Lomé Conventions should be implemented in a manner not to harm other developing countries (reformist vision).⁷²² Particularly, the Stabex could entail adverse effect on trade to the detriment of non-ACP developing countries. Others claimed that the best alternative for the EU’s trade and development policy would be to dismantle its web of RTAs while according preferential treatment to all developing countries on a non-reciprocal and non-discriminatory basis through the progressive implementation of the GSP (utopian vision). In the Lomé II Report, the ACP provided evidence that the Lomé regime was not harming the interests of third developing countries.⁷²³

One contracting-party criticised the Lomé regime for fearing the increase of preferential treatment, which would, in turn, erode the GATT rules and prevent the progress of multilateral and non-discriminatory liberalisation (apologetic visions).⁷²⁴ Other members challenged the majoritarian understanding of the consistency of the Lomé Conventions with GATT law based on the combination of Part IV and Article XXIV.⁷²⁵

All in all, Lomé I symbolised the heyday of the Law and Development Cooperation Doctrine. The legal arguments that were put forward by the EU, ACP, and other members of working parties were articulated within a shared doctrinal framework. This suggests that the Law and Development Cooperation Doctrine was perceived as an authoritative and legitimate mode of deal with trade interests and controversies over EU-Africa regionalism through international law. Obviously, the Yaoundé and Lomé Reports provide no more than partial evidence of the fluid influence of the three jurisprudential visions over the ways

⁷²⁰ Lomé II Report: 6.

⁷²¹ Lomé I Report: 7, 18; Lomé II Report: 22.

⁷²² Lomé I Report: 6-7, 18, 25; Lomé II Report: 8, 10-11, 16.

⁷²³ Lomé I Report: 6-7, 18, 25; Lomé II Report: 6, 15.

⁷²⁴ Lomé I Report: 7; Lomé II Report: 7.

⁷²⁵ Lomé II Report: 9, 11.

lawyers argue about South-North RTAs and interpret GATT law. Nonetheless, some general conclusions can be inferred from the above analysis.

From 1947 to 1985, the notion of “South-North regional trade agreement” played a central role in defining the normative possibilities and borders of GATT law. It worked as a ‘description’ and a ‘norm’. On the one hand, it characterised the essential properties that an entity must possess to be qualified as an FTA or CU. On the other hand, it involved a set of rules and institutions, rights and obligations, which were understood to constitute the normative basis of South-North regionalism. However, lawyers were challenged by how the relations between the descriptive and prescriptive aspects of South-North RTAs could (or should) be understood in light of a world trade fragmented into multilateral and regional trading systems.

Most lawyers started out by retelling history to extract from its lessons a description of South-North regional trade regimes with the aim of distinguishing them from the preferential and imperial arrangements of the past, which were regarded as illegitimate and illegal in the postwar international economic order. However, difficulties emerged when they sought to explain which facts and norms counted to ascertain the boundaries of legality and legitimacy. By relying on their jurisprudential projects, lawyers produced three distinct visions of South-North RTAs. As suggested above, the echoes of each one of them can be found, with varying degrees of influence, in the arguments put forward by the members of working parties assessing the compatibility of the EU-Africa RTAs with GATT law.

More concretely, apologetic-inspired arguments generally asserted that Article XXIV was the ultimate test for determining the validity and legitimacy of EU-Africa RTAs. They contended that the disciplines of Article XXIV were devised to prevent the proliferation of preferential and imperial trade agreements, which were poisonous to the natural evolution of world trade. The apologetic arguments about the Yaoundé and Lomé Conventions tended to advocate for the strict application of Article XXIV, while calling attention for the threat posed by the proliferations of RTAs to the GATT regime and multilateral trade negotiations.

Distinctively, reformist-inspired arguments did often acknowledge the virtues of Article XXIV, but also stressed its normative limits vis-à-vis developing countries’ needs. It reasoned that Article XXIV reflected the developed countries’ postwar understanding of the benefits of European projects for economic integration, which were not necessarily suitable for promoting economic development of newly independent African countries. The reformist arguments emphasised that the rules of Article XXIV were somehow inadequate

to govern about the Yaoundé and Lomé Conventions. Consequently, they should be applied in conjunction with Part IV, which was introduced to allow GATT law to be reinterpreted in light of developing countries' interests.

By contrast, utopian-inspired arguments frequently attacked the rules of Article XXIV claiming they were simply not applicable to South-North RTAs. Implicitly, they assumed that the existing GATT rules were devised to realise developed countries' policies and interests, including the reproduction of systems of exploitation of the Third World. As a result, they advocated for replacing GATT law with UNCTAD law as the normative basis to examine the Yaoundé and Lomé Conventions. Some of them even questioned the legality and legitimacy of the EU-Africa RTAs on the grounds that the GSP was a proper mechanism to govern South-North trade relations.

The point is that the distinct patterns of legal argumentation about EU-Africa regional trade regimes seemed to be explained by the unequal degree of influence of the three jurisprudential visions. Each line of reasoning claimed to be valid and legitimate since they resulted from an apolitical and objective analysis of the facts and norms related to South-North trade regionalism. Therefore, I contend that the combination of (normative and factual) indeterminacy and the general authority often entrusted to international law empowered contracting-parties to use GATT law to defend their positions, reach agreements, or solve controversies over the Yaoundé and Lomé Conventions. Put differently, the Law and Development Cooperation Doctrine not only allowed officials, diplomats, and lawyers to debate trade matters by translating them into 'apolitical' and 'objective' legal issues, but also offered doctrinal solutions to deal with them through GATT law. For instance, the political and economic struggle about reverse preferences was rationalised as a legal problem involving the principle of reciprocity (generally) and GATT's Article XXIV:8 and Part IV and the UNCTAD's GSP (in particular).

Conclusion

I would like to conclude by reflecting on how the above-analysis contributes, directly, to supporting (even if partially) my central hypothesis stated in this chapter and, indirectly, to the overall argument of this thesis. My account suggests that the Law and Development Cooperation Doctrine was, in significant part, a mode of legal governance that structured and guided decision-making in and over EU-Africa regional trade regimes. I also describe it

as a doctrinal framework that served to empower and constrain the legal imagination, which was both reflected in, and sustained by, the making and interpretation of the international trade law of the EU-Africa regionalism.

Moreover, I infer from my analysis of the 28 South-North RTAs that the Law and Development Cooperation Doctrine was neither the only nor the dominant legal doctrine in the period. Rather, I postulate that the other 24 RTAs, which could be functionally classified as for either ‘economic integration’ or ‘trade cooperation’, were governed by two other legal doctrines. If this were true, then it would be reasonable to hypothesise that not only more than one legal doctrine could exist at the same time, but also their emergence was associated with the lawyers’ efforts to provide valid and legitimate responses to the profound transformations that world trade was undergoing.

This reflection opens avenues to further inquiries that are relevant to our current debates about the future of the world trading system. It, first, allows us to question the substantive and formal limits imposed on the making and interpretation of South-North regional trade agreements by the text of, and the official decisions on, Article XXIV and GATT/WTO law. This calls our attention to the empowering and constraining effects entailed by legal doctrines on the ways of thinking and practising the GATT/WTO law of South-North regional trade regimes. Accordingly, the attention shifts again to the central question about the disciplinary grip imposed by the present-day, dominant legal doctrine on legal imagination, which prevents lawyers to rethink the international trade law and governance of South-North regionalism in the face of contemporary challenges.

To assist us in breaking up the imaginative constraints, this chapter examines the Law and Development Cooperation Doctrine, with the aim of showing that the contemporary legal doctrine is neither the only alternative nor the necessary outcome of a jurisprudential and institutional evolution towards doctrinal perfection of the GATT/WTO law of South-North RTAs. As explained in Chapter 4, a legal doctrine results from a dynamic interplay of particular constitutive features that are entangled in legal practices and arguments but can be intellectually separated in three domains: ideational, institutional, and jurisprudential. With particular regard to the EU-Africa trade regimes, each of these domains must address the following questions: what are the ideational, institutional, and jurisprudential programmes for EU-Africa trade governance? How were these projects combined into a doctrinal framework? How was this legal doctrine validated and legitimised inside and outside the field of international law? What changes did it entail on lawyers’ mindsets and practices? What were its impacts on the rules and institutions of both the GATT and EU-Africa trade regimes? Therefore, a full account of the Law and

Development Cooperation Doctrine necessarily includes an analysis of its constitutive features, political and intellectual origins, and impacts on norms and regimes of international trade law and governance.

My analysis of legal doctrines focuses on their ideational, institutional, jurisprudential dimensions. The ideational dimension of the Law and Development Cooperation Doctrine refers to the political economy programme for EU-Africa regionalism that emerged from the unbalanced compromise between modernisation and structuralism. The political economy programme was characterised by the attempt to accommodate a wide range of modernisation and structuralist theories, methods, and policies into an ideational framework that aspired to enlist regional agreements in the task of fostering economic development. This resulted in a relatively coherent vernacular that was employed to conceive, negotiate, and manage the general goals, specific policies, and concrete instruments of the EU-Africa trade regimes. Hence, the ultimate purpose of EU-Africa regionalism was to promote ‘economic development’.

As regards the institutional dimension, four visions were found entrenched in the Law and Development Cooperation Doctrine. The EU-Africa RTAs could be validly understood as regional regimes for trade governance that reflected either the formation of a special and differential free trade area (GATT vision), the implementation of a trade and development mechanism (EU vision), the consolidation of a neo-imperialist system (UNCTAD vision), or the institutionalisation of economic (inter-)dependency (UN vision). These models were employed, with varying degrees of influence, to make credible arguments about the virtues and vices of governance bodies, the advantages and disadvantages of the institutional design of policy mechanisms, or the benefits and shortcomings of the form and content of rules and standards. Thus, the lack of a strong consensus around one vision led the EU-Africa trade regimes to be characterised by an experimental institutionalism.

The jurisprudential dimension relates, finally, to ideas about and practices of the nature and functions of the international trade law of EU-Africa regionalism. Three particular visions, which emerged from French and African schools of international law, were embedded into the Law and Development Cooperation Doctrine. Grounded in French voluntarism, the reformist vision conceptualised the EU-Africa RTAs as ‘temporary’ special regimes, pursuant to Article XXIV and Part IV of GATT, devised for assisting African countries to overcome their underdevelopment. Drawn from French sociology, the apologetic vision conceived the EU-Africa RTAs as preferential trade agreements, which would be a violation of the non-discrimination principle under GATT law if it were

not for the political exception provided in Article XXIV. Inspired by the African critical jurisprudence, the utopian vision understood the EU-Africa RTAs as legal mechanisms of exploitation of developing countries, which, nonetheless, could be reconstructed as ‘special regimes’ of trade preference through UNCTAD law in order to promote cooperative (inter)dependency and emancipatory development.

The above jurisprudential visions were employed by international lawyers to make and interpret the Yaoundé and Lomé Conventions and to assign meaning to the text of the GATT in the process of arguing about their validity and legitimacy. For instance, apologetic claims often asserted that Article XXIV was the ultimate test for assessing any RTA regardless of the difference in development levels among its partners. Reformist arguments frequently reasoned that Article XXIV provided a valid and legitimate form of assessment of RTAs among developed countries; however its application to the EU-Africa RTAs had to be balanced by the principle of special and differential treatment introduced by Part IV. Conversely, utopian arguments habitually rejected the application of Article XXIV to the EU-Africa RTAs claiming that its application to any South-North RTA was illegitimate and invalid for aiming to reproduce systems of exploitation of the Third World. As a result, the Conventions of Yaoundé and Lomé should either be governed by UNCTAD law or replaced immediately by GSP schemes.

The history lessons of international (trade) law tell us that a number of South-North regional trade agreements entered in force over almost four decades following the signing of the GATT. In this context, international law and lawyers undertook a central role in their formation and development of South-North (generally) and EU-Africa (in particular) regional trade regimes. By reflecting on the hypothesis and findings put forward by this chapter, I contend that the making and interpretation of each trade agreement underpinning the EU-Africa regimes were, in substantial part, governed by the Law and Development Cooperation Doctrine. Between 1964 and 1985, the Law and Development Cooperation Doctrine was historically important for providing a framework (distinct from the other legal doctrines) that contributed significantly to bring into being a new archetype of South-North RTAs, which produced long-term effects over the economic relations between Europe and Africa.

The protracted rise of the Law and Development Cooperation Doctrine reached its zenith in 1975 with the conclusion of the Lomé Convention. Lomé I symbolised the contingent accommodation of its constitutive features at a relatively equal level of authority and legitimacy. The following decade was characterised as one of falling hopes in the Lomé regime, which was accompanied by profound transformations: the exhaustion of the Cold

War, the liberalisation and reforms of the Tokyo Round, the new protectionism fostered by the United States, the second expansion of the European Union, the economic slowdown and debts crisis in the Third World, as well as the rise of neoliberalism in the GATT, of Anglo-American functionalism in legal expertise, and of neoclassical thinking in economics and political science. The combined effects of these external and internal factors caused the legal doctrine to experience a sharp decline of its influence. When Lomé III entered into force in 1986, the Law and Development Cooperation Doctrine had already been displaced as the mode of legal governance in the EU-Africa trade regime.

CONCLUSION

Trade agreements are dead. Long live trade agreements. As of this writing, regional trade agreements are under siege. They have never been the darlings of the general public but not the public enemy number 1 either. This situation has changed dramatically, as they have been made scapegoats, along with immigration, for the demise of the middle and working classes in the developed world. Far from being innocent instruments for trade cooperation among states, contemporary RTAs are, indeed, deeply implicated in the edification of contemporary global economic governance that has failed in delivering on the neoliberal promises of prosperity and welfare. They have contributed to spreading the ideational programme of global market-led growth, constituting regional marketplaces for trade policies bargain, and implementing variations of the institutional and normative blueprint for limiting domestic regulation and constraining policy space. However, they are not causes but the outcomes of a series of past and present choices made by politicians, officials, policymakers, experts, and ultimately voters. My point is the crisis of trade regionalism is part of the crisis of the American-European faith in ‘market societies’.

Those contemporary attacks on RTAs undergone by leading American and European politicians reflect the decline of a consensus on the benefits of (global and regional) markets. They are not irrational but supported by real grievances of many working families that have suffered, on the one hand, from economic policies, such as fiscal austerity and the dismantle of welfare state, adopted in response to the Great Recession and, on the other hand, from the impact of low-cost imports from and job losses to third countries. These families came to realise that globalisation lifted many but not all boats: financiers and bankers are richer, while middle and working classes, poorer. As a reaction, not only the ‘typical’ South-North RTAs, such as the NAFTA and TPP, but also the venerable European Union have come to be associated with their demise. Indeed, today’s public rhetoric blames existing RTAs for harming domestic economies since their provisions limit economic sovereignty instead of constraining unfair trade and immigration.

It is surprising, however, that the solutions proposed recently by the British and American governments are not quite to get rid of RTAs. The US trade policy seems to embrace a more ‘divide and conquer’ tactic than a non-RTA dogma. It has challenged RTAs where the US economic power is (arguably) diluted, such as in the TPP and NAFTA while proposing to conclude or modernise bilateral agreements with other countries. In the

UK, the Global Britain plan follows a similar strategy: Brexit combined with bilateral agreements with trade partners, including one with the EU itself. In other words, the same politicians seem to be playing a game of (hegemonic or imperialist?) utopias while still tied up to the shared understanding of the ‘need for’ RTAs. This would make one wonder whether the central question lies in RTAs or elsewhere.

The argument I want to make is that the current public and, to a great extent, legal discourses about RTAs seem to be once again missing the opportunity to engage with the two core debates that inspired this thesis. The broader debate is about the role of markets in society: do we want a global market economy or a global market society? The specific debate is about the role of RTAs in meaningfully contributing to a global market by sustaining and governing trade between developed and developing countries. Framing this differently, should South-North RTAs be solely conceived as institutional marketplaces where states bargain for trade concessions that would ultimately contribute to the realisation of a global free and fair market? Alternatively, can they be re-imagined as institutional domains where developed and developed countries may jointly discover paths to foster economic development?

The central contribution my thesis seeks to make is to bring those debates to the fore and engage with them through the lens of international law. I aimed to demonstrate the participation, and also responsibility, of law and lawyers in the constitution and governance of a global market society by producing and managing South-North regionalism. More specifically, I sought to highlight how histories and doctrines are continuously devised by lawyers to use international law in the making and interpretation of South-North regional trade agreements. I want to conclude by outlining my specific arguments developed in the previous chapters, and reflecting on the avenues for further inquiries and debates they open.

Challenging Plato’s Rulers: Breaking-up with the Traditional History of the International Trade Law of South-North Regionalism

“Those who tell the stories rule society,” asserted Plato.⁷²⁶ Part of his *The Republic* was dedicated to teaching the Greek leaders through history-telling. The great philosopher acknowledged that stories were key to shape identity, ideas, and actions: “Our first business

⁷²⁶ 1955: 115.

is to supervise the production of stories, and chose only those we think suitable, and reject the rest.”⁷²⁷

My first argument is ‘Platonic’ in a sense it is about the importance of history lessons and history-telling for the international trade law and governance of South-North regionalism. My analysis showed that conventional accounts chronicle the evolution of the world trading system and RTAs from the early-20th century onwards. The creation of the GATT in 1947 and its re-constitution as the WTO in 1995 are told to symbolise the shared preference for multilateralism, while the waves of regionalism are portrayed as the inescapable reality that has relentlessly challenged, and so denied the realisation of, that ideal. This grand narrative explains that their interaction has swung over time between hostility and complementarity, depending on the contingent interpretation of the effects of regionalism on the world trading system.

As far as the traditional history goes, I argue that the important lessons ‘identified’ by mainstream literature can be broadly summarised as follows. The ideational mission of the GATT/WTO is to foster multilateral trade liberalisation while preventing protectionism and directing RTAs to serve as complementary instruments for a global market. The institutional defects inherent to the GATT have been partially responsible for the surges in regionalism and for failing to ensure that all RTAs contribute to international economic integration. The formalist jurisprudence played a significant part in crafting inadequate solutions to normative ambiguities and policy contradictions underlying GATT law, which in turn weakened the GATT’s authority over regionalism.

Those lessons are articulated by the traditional style of history-telling to be received as valid or ‘taken-for-granted’ descriptions of the GATT governance of regionalism. Their purpose is to ‘guide’ legal thinking and practice. The narrative by which they identify problems frames legal imagination around a set of choices defined as valid and legitimate. Institutionally, the solution would then be to introduce reforms to the WTO not to prevent but to reinforce the direction of regionalism towards international economic integration. Jurisprudentially, functionalism would be the answer for as a more ‘suitable’ approach to interpreting WTO law as a process for decision-making over RTAs, through which economic, political, and legal rationales are balanced and managed to find adequate solutions. Ideationally, the response would be to redefine and enlist RTAs as a second-best co-producer of a global market.

⁷²⁷ Ibid.

The analysis I carried out demonstrated that the powerful effects of these lessons and solutions are to validate and legitimise the dominance of the existing legal doctrine on the WTO law of South-North RTAs. These institutional and jurisprudential stories have been retold to frame necessities, concerns, and issues associated with regionalism in a particular way that has significantly constrained the range of potential norms, ideas, and techniques to be considered in thinking and applying international trade law to our contemporary problems. My claim is, therefore, that the traditional style of history-telling bears a great deal of responsibility for preventing lawyers who share the above understanding from responding imaginatively to present-day challenges.

My response to the conventional narratives is two-fold. Methodologically, I sought to rethink ‘what’ and ‘how’ lawyers historicise international trade law by identifying the shortcomings of the ‘traditional approach to legal history’ and proposing an alternative to assist lawyers to re-engage with their past and present expertise and choices. Substantially, I resituated the international trade law of South-North regionalism within a wider temporal trajectory and spatial context, in order to rescue the ‘rest’ of international trade law that has been ‘forgotten’ due to political and intellectual struggles.

I applied my ‘alternative approach’ to partially retell the history of the interaction between multilateralism and regionalism. Although providing the trajectory of South-North regionalism since the late-19th century would have been ideal, such a comprehensive study would not have fit within the limits of this thesis. Nonetheless, I offered two very brief, and not exhaustive, overlapping stories of international law and lawyers in the making and management of South-North RTAs under the GATT. From their narratives, I argue that a different set of lessons can be learned about the ideational, institutional, and jurisprudential ideas and practices involved in the international trade law of South-North RTAs. As importantly, I showed that the traditional history is neither an objective and apolitical description, nor a suspect teleology, or a frozen set of teachings, which could only support a universally applicable legal doctrine. Therefore, my findings aim to challenge the lessons that underlie present-day legal expertise of South-North regionalism.

Unchaining from Keynes’s Zombie Slave-Masters: Thinking against the Dominant Doctrine on the International Trade Law of South-North Regionalism

In *The General Theory of Employment, Interest and Money*, John M. Keynes concluded his masterpiece by warning us that some ideas and practices are long-lived, often surviving

their creators and taking new and different forms. Some of them endure while others are forgotten. But even when they have been proved wrong or dangerous, ideas and practices may be very hard to kill. Indeed, they are like zombies that keep on trying to slave our imagination. Keynes wrote, wisely, that:

the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.⁷²⁸

My second argument is, in this sense, ‘Keynesian’ with respect to the dominance of the contemporary legal doctrine on the international trade law of South-North regionalism. Grounded in my detailed examination of academic, policy and official texts, I demonstrated that present-day doctrine is constituted of three domains of legal thinking and practices. Ideationally, it embraces a neoliberal programme of market-led growth and integration. Institutionally, the WTO serves as a governance model. Jurisprudentially, WTO law is regarded as central while functionalist ideas and techniques enjoy preponderant authority. The combination of these features underlies the single doctrinal framework for conceiving and managing South-North RTAs.

From the late-1980s onwards, the dominant legal doctrine has not only marginalised its competitors in legal expertise but also gathered authority in and over the WTO and South-North RTAs. It has been gradually perfected to ensure its internal validity and external legitimacy. However, its higher level of specialisation narrowed the range of available lessons and norms, ideas and methods. One of the most critical consequences was to associate all RTAs with a relatively uniform model, which conceives RTA as legal arrangements devised primarily to promote trade liberalisation, irrespective of partners’ economic or development differences and imbalances on policy preferences and bargaining power. I argue, therefore, that the legal doctrine plays a pivotal role in constraining lawyers’ ability to think imaginatively about options and solutions to present-day problems

⁷²⁸ 2018: 383-384.

concerning the relationship between international law and governance, trade regionalism, and economic development.

My response to this disciplinary consensus is to provide an enhanced understanding of how legal doctrines affect the participation of law and lawyers in the making and interpretation of South-North RTAs (and vice versa). I propose a 'socio-legal approach' to account for what is the critical function of legal doctrines in international trade law and governance. Applied to South-North regionalism, my focus is to foreground the connection between the constitutive features of legal doctrines, and their effects over the way RTAs are thought, constructed and governed. Specifically, I used that proposed socio-legal analytic to investigate past legal doctrines on the international trade law of South-North RTAs so as to be possible to compare to the present one.

Grounded in my findings, my hypothesis is that three distinct legal doctrines were produced to structure decision-making in and over South-North RTAs between 1947 and 1985. Each of them is characterised by a distinguished combination of constitutive features that can be apprehended and understood through their ideational, institutional, and jurisprudential dimensions. I have named them as (a) Law and Economic Integration Doctrine, (b) Law and Trade Cooperation Doctrine, and (c) Law and Development Cooperation Doctrine. These terms were coined to reflect the 'legal nature' and 'archetype' (or model) of South-North RTAs. Finally, I suggest that their influence achieved its zenith in the 1970s, but was followed by a sharp decline shortly afterwards. By the late-1980s, they were marginalised by the rise of today's dominant legal doctrine.

To partially prove my hypothesis, I examined the rise and fall of the Law and Development Cooperation Doctrine. My account showed how lawyers engaged international law in the creation and operation of RTAs between the European Union and the newly independent African states from 1947 to 1985. I claim, therefore, that the Yaoundé and Lomé Conventions were negotiated, designed, and interpreted based partially on a distinct doctrinal framework. Finally, I conclude that further research would be necessary to demonstrate or falsify my hypothetical explanation that two other distinct legal doctrines governed the rest of South-North RTAs in the period.

Appropriating Bourdieu's Martial Art: the Practice of Re-Imagining the International Trade Law of South-North Regionalism

My attempts to re-engage legal history and doctrine bring me back to the question with which this thesis began. Are we – lawyers – somehow responsible for the outcomes leading up to Brexit and Trumpism? Following the line of thinking of this thesis, lawyers were decisively implicated in sustaining and managing the multilateral and regional regimes underlying the world trading system. As a result, lawyers must take their sizeable share of blame for the production of economic imbalances and political grievances that paved the way for the 2016 attacks to the (neoliberal) international economic order. As I have demonstrated, part of the responsibility is associated with their uncritical acceptance of the ideational dedifferentiation – embedded in today's doctrine – between South-North and North-North RTAs. The consequence was that lawyers stopped debating South-North regionalism, allowing one view of RTA to dominate legal expertise.

The overall goal of this thesis is to transform that the existing state of mind and practice by restoring the debate about the international trade law and governance of South-North regionalism to the premier position within the IEL field. Pierre Bourdieu said once that “sociology is a combat sport, a means of self-defence. Basically, you use it to defend yourself, without having the right to use it for unfair attacks.” If sociology is ‘a’ martial art, law is ‘the’ martial art *par excellence*. It is through legal expertise that social norms become law, and it is through legal history and doctrine that law becomes an (martial) art of imaginative and argumentative practices. Thus, international trade law could (or should) be reconsidered as a means of debating whether we prefer a ‘global market society’ or a ‘global society with a market economy’. More specifically, whether the international trade law of South-North regionalism should, as a self-defence technique against the contemporary rise of isolationism and nativism, be rethought as a way for assisting *both* developing *and* developed countries to cooperatively discover avenues to economic development.

For international lawyers engaged in re-imagining South-North regionalism, or more broadly for those committed to the project of re-rethinking the world trading system as a response to its crisis of legitimacy, my central argument is that we should practice the art of writing histories of the forgotten choices and crafting doctrines that foreground the relevant questions of economic development, social justice, and redistribution. This is a way to re-open space in public and legal debates for contesting and re-imagining South-

North regional trade regimes. By destabilising the consensus on today's legal doctrine and offering a discussion of the Law and Economic Development Doctrine, my purpose is to re-open space for debating and rethinking the ideational, institutional, and jurisprudential dimensions of South-North RTAs.

My hope is, therefore, that this thesis contributes to broadening our horizons to the possibility (or perhaps the necessity) to develop a great awareness of the diversity of past and present programmes and facts, ideas and practices, norms and regimes produced around the world, through which the relationship between international law, global governance, and South-North regionalism can be reimagined to foster economic development.

APPENDIX

Year	Short Name	Full Name
1963	EC-Turkey Association Agreement (Ankara Agreement)	Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963
1963	Yaoundé I	Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed in Yaoundé on 20 July 1963
1969	EC-Morocco Association Agreement	Agreement establishing an Association between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 31 March 1969
1969	EC-Tunisia Association Agreement	Agreement establishing an Association between the European Economic Community and the Republic of Tunisia, signed in Tunis on 28 March 1969
1969	Yaoundé II	Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed in Yaoundé on 29 July 1969
1970	EC-Israel Agreement	Agreement between the European Economic Community and the State of Israel, signed on 29 June 1970 in Luxembourg
1970	EC-Malta Agreement	Agreement between the European Economic Community and Malta, signed on 29 June 1970 in Luxembourg
1970	EC-Turkey Additional Protocol	Additional Protocol to Association between the European Economic Community and Turkey signed in Brussels on 23 November 1970,
1972	EC-Cyprus Association Agreement	Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, signed on 19 December 1972
1972	EC-Egypt Agreement	Agreement between the European Economic Community and the Arab Republic of Egypt, signed in Brussels on 18 December 1972
1972	EC-Lebanon Agreement	Agreement between the European Economic Community and the Lebanese Republic, signed on 22 January 1972
1973	EC-Turkey Supplementary Protocol	Supplementary Protocol to Association between the European Economic Community and Turkey, signed in Ankara on 30 June 1973
1974	Finland-Bulgaria Agreement	Agreement between the Republic of Finland and the People's Republic of Bulgaria on the reciprocal removal of obstacles to trade, signed in 1974
1974	Finland-Czechoslovakia Agreement	Agreement between the Republic of Finland and the Czechoslovak Socialist Republic on the reciprocal removal of obstacles to trade, signed in 1974
1974	Finland-Hungary Agreement	Agreement between the Republic of Finland and the Hungarian People's Republic on the reciprocal removal of obstacles to trade, signed in 1974
1975	EC-Israel Agreement	Agreement between the European Economic Community and the State of Israel, signed on 29 June 1970
1975	Lomé I	Convention of Association between the European

		Economic Community and the African, Caribbean and the Pacific countries, signed in Lomé on 28 February 1975
1976	EC-Algeria Cooperation Agreement	Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Rabat on 27 April 1976
1976	Australia-Papua New Guinea Agreement	Agreement on trade and commercial relations between the government of Australia and the government of Papua New Guinea, signed in 1976
1976	EC-Morocco Cooperation Agreement	Cooperation Agreement between the European Economic Community and the Republic of Tunisia, signed in Tunis on 25 April 1976
1976	EC-Tunisia Cooperation Agreement	Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, signed in Rabat on 27 April 1976
1976	Finland-Poland Agreement	Agreement between the Republic of Finland and the Polish People's Republic on the reciprocal removal of obstacles to trade, signed on 29 September 1976
1977	EC-Egypt Cooperation Agreement	Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt, signed in Brussels on 18 January 1977
1977	EC-Jordan Cooperation Agreement	Cooperation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan, signed in Brussels on 18 January 1977
1977	EC-Lebanon Cooperation Agreement	Cooperation Agreement between the European Economic Community and the Lebanese Republic, signed in Brussels on 3 May 1977
1977	EC-Syria Cooperation Agreement	Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, signed in Brussels on 18 January 1977
1979	Lomé II	Convention of Association between the European Economic Community and the African, Caribbean and the Pacific countries, signed in Lomé on 31 October 1979
1980	EC-Yugoslavia Interim Agreement	Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and trade cooperation, signed in Belgrade on 2 April 1980

REFERENCES

1. Bibliography

Abbott, Kenneth W. 1985. The Trading Nation's Dilemma: The Functions of the Law of International Trade. *Harvard Int'l L. J.* **26**, pp.501-532.

Abbott, Kenneth W. 1989. Modern International Relations Theory: A Prospectus for International Lawyers. *Yale J. Int'l L.* **14**, pp.335-411.

Abbott, Kenneth. 1992a. GATT as a Public Institution: the Uruguay Round and beyond. *Brooklyn Journal of International Law.* **18**, pp. 31-85.

Abbott, Kenneth. 1992b. The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice. *Columbia Business Law Review.* **1**, pp.111-309.

Abbott, Kenneth W. and Duncan Snidal. 2013. Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art.* Cambridge University Press.

Abi-Saab, Georges. 1962. The Newly Independent States and the Rules of International Law: An Outline. *Howard Law Journal.* **8**, pp.95-121.

Abi-Saab, Georges. 1984. Progressive development of the principles and norms of international law relating to the new international economic order. *United Nations General Assembly, Report of the Secretary-General A/39/504/Add.1, 23 October 1984.*

Abi-Saab, Georges. 1987. Cours general de droit international public. *Recueil des Cours.* **207**, pp.9-463.

Abi-Saab, Georges. 2013. *Speech Professor Georges Abi-Saab.* (Online). (Accessed 27 June 2013). Available from:
<http://www.denhaag.nl/the-hague-prize/winners-2013/Speech-professor-Georges-Abi-Saab.htm>

Abi-Saab, Georges. 2016. The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines? *Third World Quarterly.* **37**, 1957-971.

Acheson, Dean. 1969. *Present at the Creation: My Years in the State Department.* W. W. Norton.

Adler, Emanuel. 2005. *Communitarian International Relations: The Epistemic Foundations of International Relations.* Routledge.

Allee, Todd L. 2004. Legal Incentives and Domestic Rewards: The Selection of Trade Disputes for GATT/WTO Dispute Resolution. *Unpublished Paper.* (Online). (22 September 2018) Available from:
<http://libertyparkusafd.org/lp/Hamilton/legal%20challenges%5CLegal%20Incentives%20and%20Domestic%20Rewards%20--%20Selection%20of%20Trade%20Disputes.pdf>

Allee, Todd, Manfred Elsig, and Andrew Lugg. 2017. The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis. *Journal of International Economic Law.* **20**, pp. 333-63.

Amaral Jr., Alberto. 2006. *A solução de controvérsias na OMC e a aplicação do direito internacional public.* Atlas.

- Amaral Jr., Alberto. 2008. *Introdução ao direito internacional público*. Atlas.
- Anghie, Antony. 2005. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press.
- Anghie, A. and B.S. Chimni. 2003. Third World Approaches to International Law and Individual Responsibility in Internal Conflicts. *Chinese Journal of Int'l L.* **2**, pp.77-103.
- Anuradha, R.V. 2016. Rise of the Plurilaterals: Threat or Opportunity for Multilateral Trade Governance. In: Julien Chaisse and Tsai-yu Lin (eds.). *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford University Press.
- Aral, Berdal. 2005. An Inquiry into the Turkish School of International Law. *European Journal of International Law.* **16**, pp. 769-785.
- Aspremont, Jean D. 2017. The Professionalisation of International Law. In: Jean D' Aspremont *et al* (eds.). *International Law as a Profession*. Cambridge University Press.
- Aspremont, Jean D., Tarcisio Gazzini, André Nollkaemper, and W. G. Werner. 2017. *International Law as a Profession*. Cambridge University Press.
- Azevêdo, Roberto. 2014. *Azevêdo says success of WTO dispute settlement brings urgent challenges*. (Online). (Accessed 26 September 2014). Available from: https://www.wto.org/english/news_e/spra_e/spra32_e.htm
- Bagwell, Kyle and Petros Mavroidis (eds.) 2011. *Preferential Trade Agreements: A Law and Economics Analysis*. Cambridge University Press.
- Baldwin, Richard. 1995. A domino theory of regionalism. In: Richard Baldwin, P. Haarapanta and J. Kiander (eds.), *Expanding Membership of the EU*. Cambridge University Press.
- Baldwin, Richard. 2006. Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade. *The World Economy.* **29**, pp.1451-1518.
- Baldwin, Richard. 2008. Big-Think Regionalism: a Critical Survey. *NBER Working Paper 14056*. (Online). (Accessed June 2008). Available from: <http://www.nber.org/papers/w14056>
- Baldwin, Richard. 2011. 21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules. *WTO Economic Research and Statistics Division, Working Paper ERSD-2011-08*. (Online). (Accessed April 2011). Available from: http://www.wto.org/english/res_e/reser_e/ersd201108_e.pdf
- Baldwin, Richard. 2012. Preferential Trading Arrangements. In: Amrita Narlikar, Martin Daunton, Robert Stern and Robert Mitchell (eds.). *The Oxford Handbook on the World Trade Organization*. Oxford University Press.
- Baldwin, Richard, Simon Evenett and Patrick Low. 2009. Beyond tariffs: multilateralizing non-tariff RTA commitments. In: Richard Baldwin and Patrick Low (eds.). *Multilateralizing Regionalism*. Cambridge University Press.
- Baldwin, Richard and Philip Thornton. 2008. *Multilateralising Regionalism. Ideas for a WTO Action Plan on Regionalism*. CEPR.
- Baldwin, Robert. 1971. *Non-tariff Distortions of International Trade*. Brookings Institution.

- Baldwin, Robert and Richard Clark. 1987. Game-Modeling Multilateral Trade Negotiations. *Journal of Policy Modeling*. **9**, pp.257–284.
- Barenberg, Mark. 2004. The Impact of the Free Trade Area of the Americas on Democratic Governance. In: Antoni Esteveordal *et al.* (eds.). *The FTAA and Beyond: Prospects for Integration in the Americas*. Harvard University Press.
- Barnes, William. 1967. *Europe and the Developing World: Association under Part IV of the Treaty of Rome*.
- Bartels, Lorand. 2007. The Trade and Development Policy of the European Union. *European Journal of International Law*. **18**, pp.715-756.
- Bartels, Lorand. 2013. Regional Trade Agreements. In: Rüdiger Wolfrum *et al.* (eds.) *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Bartels, Lorand, Sacha Silva, Hadil Hijazi, Hannes Schloemann & Thomas Cottier. 2013. *Re-Thinking Reciprocity: A New Framework for WTO Disciplines on North-South Regional Trade Agreements*. NCCR Working Paper No 2013/20, May 2013.
- Bartels, Lorand and Federico Ortino. 2006. Introduction. In: Bartels, L. and Ortino, F. (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Barton, John H., Judith L. Goldstein, Timothy E. Josling, Richard H. Steinberg. 2006. *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*. Princeton University Press.
- Beattie, Alan. 2005. Bilateral trade agreements 'betraying' WTO ideals. *Financial Times*. 18 January 2005.
- Bedjaoui, Mohamed. 1976. Non-Alignement et Droit International. *Recueil des Cours*. 151, pp.428-438.
- Bedjaoui, Mohamed. 1979. *Towards a New International Economic Order*. Holmes & Meier Publishers.
- Bedjaoui, Mohamed. 1987. Some unorthodox reflections on the "right to development. In: Francis Snyder and Peter Slinn (ed). *International Law of Development: Comparative Perspectives*. Professional Books.
- Behr, Timo and Teija Tiilikainen. 2015. *Northern Europe and the making of the EU's Mediterranean and Middle East Policies: normative leaders or passive bystanders?* Ashgate Publishing Limited.
- Benchikh, Madjid. 1983. *Droit International du Sous-Développement: Nouvel Ordre dans la Dépendance*. Berger-Levrault.
- Beneyto, José María and David W. Kennedy. (ed.) 2013. *New Approaches to International Law: The European and American Experiences*. Asser Press.
- Bennouna, Mohamed. 1983. *Droit International du Développement: Tiers Monde et Interpellation du Droit International*. Berger-Levrault.
- Berger, Maurits. 2008. Islamic views on International Law. In: P. Meerts (Ed.) *Culture and International Law*. Cambridge University Press.
- Bergsten, Fred. 1997. Open Regionalism. *World Economy*. **20**, pp. 545–565.

- Berkowitz, Dan, Katharina Pistor and Jean-François Richard. 2003. Economic Development, Legality, and the Transplant Effect. *Eur. Econ. Rev.* **47**, pp.165.
- Bethlehem, Daniel, Donald McRae, Rodney Neufeld and Isabelle Van Damme. 2009. Introduction. In: Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.). *The Oxford Handbook of International Trade Law*. Oxford University Press.
- Bevir, Mark and R.A.W. Rhodes. 2002. Interpretive Theory. In: David Marsh and Gerry Stoker (eds.), *Theory and Methods in Political Science*. Palgrave Macmillan.
- Bhagwati, Jagdish. 1988. *Protectionism*. Cambridge MA, MIT Press.
- Bhagwati, Jagdish. 1991. *The World Trading System at Risk*. Princeton University Press.
- Bhagwati, Jagdish. 1993. Regionalism and Multilateralism: An Overview. In: Jaime de Melo and Arvind Panagariya (ed.). *New Dimensions in Regional Integration*. Cambridge University Press.
- Bhagwati, Jagdish. 2005. *In defense of globalization*. Oxford University Press.
- Bhagwati, Jagdish. 2008. *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*. Oxford University Press.
- Bhagwati, Jagdish and Arvind Panagariya. 1996a. The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends. *The American Economic Review*. **86**, pp. 82-87
- Bhagwati, Jagdish and Arvind Panagariya. 1996b. Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes? *Discussion Paper Series No. 9596-04, 1996*. (Online) (Accessed 22 September 2018) Available from: http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9596_004.pdf
- Bhagwati, Jagdish, Pravin Krishna, and Arvind Panagariya. 1999. *Trading Blocs: Alternative Approaches to Analyzing Preferential Trade Agreements*. MIT Press.
- Bhagwati, Jagdish N. and T. N. Srinivasan. 1980. Revenue Seeking: A Generalization of the Theory of Tariffs. *J. Pol. Econ.* **88**, pp.1069-1087.
- Bhagwati, Jagdish and T. N. Srinivasan. 1982. Comment, Revenue Seeking: A Generalization of the Theory of Tariffs - a Correction. *J. Pol. Econ.* **90**, 188-190.
- Bicchi, Federica. 2009. Euro-Mediterranean relations in historical perspective. In: *Foundation for European Progressive Studies and Fondazione Italianieuropei (ed.). The Euro-Mediterranean Dialogue: Prospects for an Area of Prosperity and Security*. Solaris.
- Bicchi, Federica 2015. Chapter 5 - The European Origins of Euro- Mediterranean Practices. In: Adler, Emanuel *et al* (ed.). *The Convergence of Civilizations: Constructing a Mediterranean Region*. University of Toronto Press.
- Bielshowsky, Ricardo and Antonio Carlos Macedo e Silva 2016. The UNCTAD system of political economy. In: Erik Reinert, Jayati Ghosh and Rainer Kattel (ed.). *Handbook of Alternative Theories of Economic Development*. Edward Elgar.
- Black, Julia. 2013. *Seeing, Knowing, and Regulating Financial Markets: Moving the Cognitive Framework from the Economic to the Social*. LSE Law, Society and Economy Working Papers 24/2013.
- Blackhurst, Richard. 2005. The future of the WTO: some comments on the Sutherland Report. *World Trade Review*. **4**, pp.379-389.

- Blagojevic, Borislav. 1968. Quelques Caractéristiques Du Droit économique International Actuel. *Revue Internationale De Droit Comparé*. **20**, pp.273-285.
- Bogdandy, Armin von and Markus Wagner. 2005. The ‘Sutherland Report’ on WTO reform – a critical appraisal. *World Trade Review*. **4**, pp. 439-447.
- Börzel, Tanja A. 2016. Theorizing Regionalism: Cooperation, Integration, and Governance. In: Tanja A. Börzel and Thomas Risse (ed.). *The Oxford Handbook of Comparative Regionalism*. Oxford University Press.
- Bossche, Peter Van den. 2005. Debating the Future of the World Trade Organization: Divergent Views on the 2005 Sutherland Report. *J. Int. Economic Law*. **8**, pp.759.
- Bossche, Peter Van den and Iveta Alexovicová. 2005. Effective Global Economic Governance by the World Trade Organization. *J. Int. Economic Law*. **8**, pp.667-690.
- Bossche, Peter Van den, and Werner Zdouc. 2013. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Cambridge University Press.
- Bourdieu, Pierre. 1990. *In Other Words: Essays Towards a Reflexive Sociology*. Polity.
- Bourquin, Maurice. 1931. Règles générales du droit de la paix. *Recueil des Cours*. **35**, pp. 5-232.
- Brabant, Jozef M. Van. 1990. *The Planned Economies and International Economic Organizations*. Cambridge University Press.
- Briceño Ruiz, José. 2017. Raúl Prebisch and the theory of regional economic integration. In: Margulis, Matias (ed.). *The Global Political Economy of Raúl Prebisch*. Routledge.
- Broberg, Morten. 2013. From colonial power to human rights promoter: on the legal regulation of the European Union's relations with the developing countries. *Cambridge Review of International Affairs*. **26**, pp.675-687.
- Broude, Tomer. 2016. *A Field of his Own: John Jackson and the Consolidation of International Economic Law as a Scholarly Domain*. *J. Int'l Econ. L.* **19**, pp. 329–331.
- Brunnée, Jutta and Stephen J. Toope. 2000. International Law and Constructivism: Elements of an Interactional Theory of International Law. *Colum. J. Transnat'l L.* **39**, pp.19-74
- Brunnée, Jutta and Stephen J. Toope. 2013. Constructivism and International Law. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Bryman, Alan. 1984. The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology. *The British Journal of Sociology*. **35**, 75-92.
- Busch, Marc L., and Eric Reinhardt. 2003. Developing Countries and GATT/WTO Dispute Settlement. *Journal of World Trade*. **37**, 719–35
- Callon, Michel. 1998a. Introduction: the embeddedness of markets in economics. *The Sociological Review*. **46**, pp.1-57.
- Callon, Michel. 1998b. An essay on framing and overflowing: economic externalities revisited by sociology. *The Sociological Review*. **46**, pp.244-269.
- Carpenter, Theresa. 2009. A Historical Perspective on Regionalism. In: Richard Baldwin and Patrick Low (eds.). *Multilateralizing Regionalism*. Cambridge University Press.

- Carreau, Dominique, Thiébaud Flory, Dutheil de la Rochère Jacqueline. 1968. Chronique de Droit international économique. *Annuaire français de droit international*. **14**, pp.554-605.
- Carreau, Dominique, Thiébaud Flory, Dutheil de la Rochère Jacqueline. 1969. Chronique de Droit international économique. *Annuaire français de droit international*. **15**, pp.615-663.
- Carreau, Dominique, Thiébaud Flory, Patrick Juillar. 1978. Chronique de Droit international économique. *Annuaire français de droit international*. **24**, 605-659.
- Carreau, Dominique, Thiébaud Flory, Patrick Juillard. 1980. *Droit International Économique*. Paris: Librairie Générale De Droit Et De Jurisprudence.
- Carvalho, Evandro Menezes De. 2011. *Semiotics of International Law: Trade and Translation*. Springer.
- Chaisse, Julien, and Mitsuo Matsushita. 2013. Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism. *J. Int'l. Econ. L.* **16**, pp.9-36.
- Charnovitz, Steve. 2005. A Close Look at a Few Points. *J. Int'l. Econ. L.* **8**, 311-319.
- Charnovitz, Steve. 2014. The Field of International Economic Law. *J. Int'l. Econ. L.* **17**, pp. 607-626.
- Chase, Kerry. 2006. Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV. *World Trade Review*. **5**, pp.1-30
- Chaumont, Charles.1970. Cours general de droit international public. *Recueil des Cours* **129**, pp.335-527.
- Chenal, Alain. 2009. The Mediterranean, sea of all conflicts or place of all encounters? In: *Foundation for European Progressive Studies and Fondazione Italianeuropei (ed.). The Euro-Mediterranean Dialogue: Prospects for an Area of Prosperity and Security*. Solaris.
- Cho, Sungjoon. 2005. A quest for WTO's legitimacy. *World Trade Review*. **4**, pp.391-399.
- Cooper, Frederick and Randall Packard. 1997. Introduction. In: Frederick Cooper and Randall Packard (ed.). *International Development and the Social Sciences: Essays on the History and Politics of Knowledge*. University of California Press.
- Coppolaro, Lucia. 2013. *The making of a world trading power: the European Economic Community (EEC) in the GATT Kennedy Round Negotiations (1963-67)*. Ashgate Publishing Limited.
- Cosgrove, Carol. 1972. The EEC and its Yaoundé Associates: A Model for Development. *International Relations*. **4**, pp. 142-155.
- Cosgrove Twitchett, Carol. 1978. *Europe and Africa: From Association to Partnership*. Farnborough. Saxon House.
- Cottier, Thomas. 2005. The Erosion of Non-Discrimination: Stern Warning without True Remedies. *J. Int. Economic Law*. **8**, pp.595-601.
- Cottier, Thomas and Marina Foltea. 2006. Constitutional Functions of the WTO and Regional Trade Agreements. In: Lorand Bartels and Federico Ortino (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Cowen, Michael and Robert W Shenton. 1996. *Doctrines of Development*. Routledge.

- Craven, Matthew. 2007. Introduction: International Law and its Histories. In: Craven, Matthew C. R., Malgosa Fitzmaurice, Maria Vogiatzi (eds.). *Time, History and International Law*. M. Nijhoff, pp.1-25.
- Craven, Matthew. 2015. Between Law and History: the Berlin Conference of 1884-85 and the Logic of Free Trade. *London Review of International Law*. **3**(1), pp 31-59.
- Craven, Matthew. 2016. Theorising the Turn to History in International Law. In: Orford, Anne and Florian Hoffman (ed.). *The Oxford Handbook of the Theory of International Law*. Oxford University Press.
- Crawford, James and Martti Koskenniemi (ed.). 2012. *The Cambridge Companion to International Law*. Cambridge University Press.
- Crawford, Jo-Ann and Roberto Fiorentino. 2005. The changing landscape of regional trade agreements. *World Trade Organization*, Discussion Paper No.8.
- Curzon, Gerard and Victoria Curzon. 1976. The Management of Trade Relations in the GATT. In: Andrew Shonfield (ed.), *International Economic Relations of the Western World, 1959–1971*, Volume 1. Politics and Trade. Oxford University Press.
- Croome, John. 1995. *Reshaping the World Trading System: A History of the Uruguay Round*. World Trade Organization.
- Cypher, James and James Dietz. 2009. *The Process of Economic Development*. Routledge.
- Dahi, Omar S. and Firat Demir. 2013. Preferential trade agreements and manufactured goods exports: does it matter whom you PTA with? *Applied Economics*. **45**, pp. 4754-4772.
- Dal Ri Jr., Arno. 2003. O Direito Internacional Econômico em Expansão: Desafios e Dilemas no Curso da História. In: Arno Dal Ri Jr. and Odete Maria de Oliveira (ed.). *Direito internacional econômico em expansão: desafios e dilemas*. Unijuí.
- Dam, Kenneth. 1970. *The GATT; Law and International Economic Organization*. University of Chicago Press.
- Damro, Chad. 2006. The Political Economy of Regional Trade Agreements. In: Lorand Bartels and Federico Ortino (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Davey, William. 2005. The Sutherland Report on Dispute Settlement: A Comment. *J. Int. Economic L.* **8**, pp.321-328.
- Davey, William. 2006. Dispute Settlement in the WTO and RTAs: A Comment. In: Lorand Bartels and Federico Ortino (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Davey, William. 2011. A model article XXIV: are there realistic possibilities to improve it?. In: Kyle W. Bagwell, Petros C. Mavroidis (ed.). *Preferential Trade Agreements*. Cambridge University Press.
- Davey, William. 2016. John Jackson and the Rule of Law. *J. Int'l Econ. L.* **19**, pp.333-334.
- Davis, Kevin E. and Michael Trebilcock. 2008. *The Relationship between Law and Development: Optimists Versus Skeptics*. New York University Law and Economics Working Papers 133, 2008.
- De Búrca, Gráinne, Robert O. Keohane and Charles Sabel. 2013. New Modes of Pluralist Global Governance. *N.Y.U. J. Int'l L. & Pol.* **45**.

- Delimatsis, Panagiotis. 2011. The Fragmentation of International Trade Law. *Journal of World Trade*. **45**, pp. 87-116.
- Deutsch, Karl Wolfgang, Sidney Burrell, Robert Kann, Maurice Jr. Lee; Martin Lichterman, R. E. Lindgren, F. L. Lorwenheim, and R. W. Van Wagenen. 1957. *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*. Princeton University Press.
- Do, Viet and William Watson. 2006. Economic Analysis of Regional Trade Agreements. In: Lorand Bartels and Federico Ortino (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Jaime de Melo and Arvind Panagariya (ed.) 1993. *New Dimensions in Regional Integration*. Cambridge University Press.
- Derrida, Jacques. 2007. Structure, sign, and play in the discourse of the human sciences. In: Richard Mackey and Eugenio Donato (ed.). *The structuralist controversy: The languages of criticism and the sciences of man*. Baltimore: Johns Hopkins University Press.
- Diebold, William. 1952. *The End of the I.T.O.* Princeton University, Department of Economics and Sociology, International Finance Section.
- Doidge, Mathew and Martin Holland. 2014. A Chronology of European Union Development Policy: Theory and Change. *Korea Review of International Studies*. **17**, pp.59-80.
- Douzinis, Costas. 2014. A Short History of the British Critical Legal Conference or, the Responsibility of the Critic. *Law Critique*. **25**, pp.187–198.
- Douzinis, Costas and Ronnie Warrington. 1991. *Postmodern Jurisprudence: the Law of Text in the Texts of Law*. Routledge.
- Doyle, Michael. 2009. Chapter 4 - The UN Charter – A Global Constitution? In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Ruling the World: Constitutionalism, International Law, and Global Governance*. Cambridge University Press.
- Dunoff, Jeffrey L. 1998. Rethinking International Trade. *University of Pennsylvania Journal of International Economic Law*. **19**, pp. 347-389
- Dunoff, Jeffrey L. 1999. The Death of the Trade Regime. *European Journal of International Law*. **10**, pp. 733-762.
- Dunoff, Jeffrey L. and Joel P. Trachtman. 1999. Economic Analysis of International Law. *Yale Journal of International Law*. **24**, pp.1-54.
- Dunoff, Jeffrey L. and Mark A. Pollack. 2013a. International Law and International Relations: Introducing an Interdisciplinary Dialogue. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Dunoff, Jeffrey L. and Mark A. Pollack. 2013b. Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Dür, Andreas, Leonardo Baccini, and Manfred Elsig. 2014. The Design of International Trade Agreements: Introducing a New Database. *Review of International Organizations*. **9**, pp.353-375.

- Edwards, Harry. 1992. The Growing Disjunction between Legal Education and the Legal Profession. *Michigan Law Review*. **91**, pp. 34–2286.
- Eicher, Theo S. and Christian Henn. 2011. In Search of WTO Trade Effects: Preferential Trade Agreements Promote Trade Strongly, but Unevenly. *J. of Int'l Economics*. **83**, pp.137-153.
- El-Agraa, Ali Mohammed. 1994. *The Economics of the European Community*. Harvester Wheatsheaf.
- El-Naggar, Said. 1969. The United Nations Conference on Trade and Development: background, aims and policies. *Recueil des Cours*. **128**, pp. 241-345
- Elias, Taslim. 1974. *Africa and the Development of International Law*. Martinus Nijhoff Publishers.
- Elias, Taslim. 1989. *The United Nations Charter and the World Court*. Nigerian Institute of Advanced Legal Studies.
- Elias, Taslim. 1992. *New Horizons in International Law*. Martinus Nijhoff Publishers.
- Eliason, Antonia. 2015. The Trade Facilitation Agreement: A New Hope for the World Trade Organization. *World Trade Review*. **1**, pp. 1-28.
- Elsig, Manfred and Mark A. Pollack. 2014. Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization. *Eur. J. of Int'l Relations*. **20**, pp.391-415.
- Erler, Georg. 1956. *Grundprobleme Des Internationalen Wirtschaftsrechts*. Schwartz.
- Estrella, Angela Gobbi and Gary Horlick. 2006. Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's Turkey—Textiles Ruling. In: *Lorand Bartels and Federico Ortino (eds.). Regional Trade Agreements and the WTO Legal System*. Oxford University Press.
- Fabri, Hélène Ruiz. 2012. Chapter 16 - Regulating trade, investment and money. In: James Crawford and Martti Koskenniemi (ed.). *The Cambridge Companion to International Law*. Cambridge University Press.
- Fadel, Mohammad. 2009. International Law, Regional Developments: Islam. In: Rüdiger Wolfrum *et al.* (eds.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Fairclough, Norman. 1992. *Discourse and Social Change*. Polity Press.
- Fairclough, Norman. 2003. *Analysing Discourse—Textual Analysis for Social Research*. Routledge.
- Faria, José Eduardo. 2002. *O direito na economia globalizada*. Malheiros.
- Fassbender, Bardo and Anne Peters (ed.). 2012. *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press.
- Feichtner, Isabel. 2011. *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*. Cambridge University Press.
- Feld, Werner. 1965. The Association Agreements of the European Communities: A Comparative Analysis. *International Organization*. **19**, pp. 223–249.
- Fieldhouse, D. K. 1986. The Economics of French Empire. *The Journal of African History*. **27**, pp. 169–172 .

- Flory, Maurice. 1987. A North-South Legal Dialogue: the International Law of Development. In: Francis Snyder and Peter Slinn (ed). *International Law of Development: Comparative Perspectives*. Professional Books.
- Flory, Thiébaud. 1968. *Le G.A.T.T.: droit international et commerce mondial*. Librairie générale de droit et de jurisprudence.
- Focke Report. 1980. *From Lomé I to Lomé II; Texts of the Report of the Resolution Adopted on 26 September 1980 by the ACP-EEC Consultative Assembly*. Luxembourg: European Parliament, 1980.
- Footer, Mary. 2005. *An Institutional and Normative Analysis of the World Trade Organization*. Nijhoff.
- Ferrandi, Jacques. 1962. *EEC action in the Associated Countries*. Address delivered to the African and Malagasy Economic Conference, Marseilles, 1962.
- Feuer, Guy. 1993. *Le Droit International Du Développement: Une Création De La Pensée Francophone*. In: Etat Des Savoirs Sur Le Développement.
- Fiorentino, Roberto, Luis Verdeja and Christelle Toqueboeuf. 2007. *The Changing Landscape of Regional Trade Agreements: 2006 Update*. World Trade Organization, Discussion Paper No. 12.
- Fiorentino, Roberto, Jo-Ann Crawford and Christelle Toqueboeuf. 2009. The landscape of regional trade agreements and WTO surveillance. In: Richard Baldwin and Patrick Low (eds.). *Multilateralizing Regionalism*. Cambridge University Press.
- Foucault, Michel. 1979. *Discipline and Punish: The Birth of the Prison*. Penguin.
- Friedmann, Wolfgang. 1964. *The Changing Structure of International Law*. Stevens.
- Friedmann, Wolfgang. 1971. The Reality of International Law—A Reappraisal. *Columbia Journal of Transnational Law*. **10**, pp. 46
- Gammage, Clair. 2016. Overcoming the Development Deficit of Article XXIV: Promoting Equality through North-South RTAs. *Law and Development Review*. **9**, pp. 69-93.
- Gammage, Clair. 2017. *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement*. Cheltenham, UK: Edward Elgar Publishing Limited.
- Gantz, David. 2009. Regional Trade Agreements. In: Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.). *The Oxford Handbook of International Trade Law*. Oxford University Press.
- Garavini, Giuliano. 2012. *After Empires: European Integration, Decolonization, and the Challenge from the Global South 1957-1986*. Oxford University Press.
- Gathii, James. 2001. Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis. *Widener L. Symp. J.* **7**, pp.137–227.
- Gathii, James. 2008. A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias. *Leiden J. Int'l L.* **21**, pp.317-349.
- Gathii, James. 2011a. *African Regional Trade Agreements as Legal Regimes*. Cambridge University Press.
- Gathii, James. 2011b. The Neoliberal Turn in Regional Trade Agreements. *Washington Law Review*. **86**, pp.421–474.

- Gathii, James. 2012. *Africa*. In: Bardo Fassbender and Anne Peters (ed.). *The Oxford Handbook of the History of International Law*. Oxford University Press.
- Gautron, Jean-Claude. 1987. The French contribution to the international law of development: a study of sources. In: Francis Snyder and Peter Slinn (ed). *International Law of Development: Comparative Perspectives*. Professional Books.
- Giddens, Anthony. 1984. *The Constitution of Society: Outline of the Theory of Structuration*. Polity.
- Gilligan, Michael. 1997. *Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy*. University of Michigan Press.
- Gilman, Nils. 2007. *Mandarins of the future: modernization theory in Cold War America*. Johns Hopkins University Press.
- Gilpin, Robert. 2009. *Global political economy understanding the international economic order*. Princeton University Press.
- Gilpin, Robert and Jean M. Gilpin. 2000. *The Challenge of Global Capitalism: the World Economy in the 21st Century*. Princeton University Press.
- Goffman, Erving. 1975. *Frame Analysis*. Penguin.
- Goldschmidt, Arthur, and Lawrence Davidson. 2010. *Concise History of the Middle East*. Westview Press.
- Goodman, Matthew P. 2018. From TPP to CPTPP. Critical Questions. *The Center for Strategic and International Studies*. (Online) (Accessed 8 March 2018) Available from: <https://www.csis.org/analysis/tpp-cptpp>.
- Granovetter, Mark. 1985. Economic Action and Social Structure: The Problem of Embeddedness. *American Journal of Sociology*. **91**, pp.481-510.
- Griller, Stefan, Walter Obwexer and Erich Vranes. 2017. Mega-Regional Trade Agreements: New Orientations for EU External Relations?. In: Stefan Griller, Walter Obwexer and Erich Vranes (eds.) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*. Oxford University Press.
- Grilli, Enzo R. 1993. *The European Community and the Developing Countries*. Cambridge University Press.
- Grossman, Gene and Elhanan Helpman. 1994. Protection for Sale. *American Economic Review*. **84**, pp. 833–50.
- Grossman, Gene and Elhanan Helpman. 1995. The Politics of Free Trade Agreements. *American Economic Review*. **85**, pp. 667–90.
- Gruhn, Isebill. 1976. The Lomé Convention: inching towards interdependence. *International Organization*. **30**, pp. 241-262.
- Grzybowski, Kazimierz. 1980. Socialist Countries in GATT. *The American Journal of Comparative Law*. **28**, pp. 539-554.
- Gutto, Shadrack. 1987. Responsibility of States and Transnational Corporations for Violation of Human Rights in the Third World in the Context of the New International Economic Order. In: Frederick E. Snyder and Surakiart Sathirathai (eds.). *Third World Attitudes toward International Law*. Springer.

- Guzmán, Andrew and Alan Sykes (eds.) 2007. *Research Handbook in International Economic Law*. Edward Elgar.
- Guzmán, Andrew and Timothy Meyer. 2010. International Soft Law. *Journal of Legal Analysis*. **2**, pp.171–225.
- Haberler, Gottfried, Roberto da Oliveira Campos, James Meade, and Jan Tinbergen. 1958. *Trends in International Trade: report by a panel of experts*. Sales No. GATT/1958-3, October 1958.
- Hausmann, Ricardo and Dani Rodrik. 2002. *Economic Development as Self-Discovery*. John F. Kennedy School of Government, Harvard University, Faculty Research Working Papers Series, RWP02-023, March 2002.
- Hayter, Teresa. 1966. *French Aid*. Overseas Development Institute.
- Helfer, Laurence. 2004. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. *Yale J. Int'l L.* **29**, pp.1-83
- Helfer, Laurence. 2013. Flexibility in International Agreements. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Helleiner, Eric. 2014. *Forgotten Foundations of Bretton Woods: International Development and the Making of the Postwar Order*. Cornell University Press.
- Heller, Thomas. 1984. Structuralism and Critique. *Stanford Law Review*. **36**, pp. 127–198.
- Henig, Stanley. 1971. The Mediterranean policy of the European community. *Government and Opposition*. **6**, pp. 502-519.
- Hilpold, Peter. 2003. Regional Integration According to Article XXIV GATT — Between Law and Politics. *Max Planck Yearbook of United Nations Law Online*. **7**, pp.219–260.
- Hodge, Joseph Morgan. 2015. Writing the History of Development (Part 1: The First Wave). *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*. **6**, pp.429-463.
- Hodge, Joseph Morgan. 2016. Writing the History of Development (Part 2: Longer, Deeper, Wider). *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*. **7**, pp. 125-174.
- Hoekman, Bernard. 2005a. Expanding WTO membership and heterogeneous interests. *World Trade Review*. **4**, pp. 401-408.
- Hoekman, Bernard. 2005b. Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment. *Journal of International Economic Law*. **8**, pp.405–424.
- Hoekman, Bernard and Michel Kostecki. 2009. *The Political Economy of the World Trading System*. Oxford University Press.
- Hoekman, Bernard and Petros Mavroidis. 2007. *The World Trade Organization: Law, economics, and politics*. Routledge.
- Hoekman, Bernard and L. Alan Winters. 2009. Multilateralizing Preferential Trade Agreements: A Developing Country Perspective. In: Richard Baldwin and Patrick Low (eds.). *Multilateralizing Regionalism*. Cambridge University Press.

- Holland, Martin. 2002. *The European Union and the Third World*. Palgrave.
- Horlick, Gary. 2016. John Jackson as a Resource for Scholars and Others. *J. Int'l Econ. L.* **19**, pp. 401–402.
- Horn, Henrik, and Joseph H. H. Weiler. 2005. European Communities – Trade Description of Sardines: Textualism and Its Discontent. In: Henrik Horn and Petros C. Mavroidis (org.). *The WTO Case Law of 2002: The American Law Institute Reporters' Studies*. Cambridge University Press.
- Horn, Henrik, Petros Mavroidis and André Sapir. 2009. *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*. Bruegel Blueprint Series.
- Hufbauer, Gary Clyde. 2016. Worthy of a Nobel: An Appreciation of John H. Jackson, *J. Int'l Econ. L.* **19**, pp.353–354.
- Robert Howse. 1999. The House that Jackson Built: Restructuring the GATT System. *Michigan J. Int'l L.* **20**, pp. 107-119.
- Howse, Robert. 2002. From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime. *The American Journal of International Law.* **96**, pp. 94-117
- Howse, Robert. 2014. The Breakthrough in WTO Talks and the Trade Facilitation Agreement (TFA)-Far from Meaningless. *Opinio Juris*. (Online) (Accessed 20 November 2014) Available from: <http://opiniojuris.org/2014/11/20/breakthrough-wto-talks-trade-facilitation-agreement-tfa-far-meaningless/>
- Robert Howse. 2017. Economics for Progressive International Lawyers: a Review Essay. *London Review of International Law.* **5**, pp. 187-196.
- Hudec, Robert. 1970. The GATT Legal System: A Diplomat's Jurisprudence. *J. of World Trade L.* **4**, pp.615.
- Hudec, Robert. 1990. *The GATT Legal System and World Trade Diplomacy*.
- Hudec, Robert. 1993. Comment on: "GATT's influence on regional arrangements". In: Jaime de Melo and Arvind Panagariya (ed.). *New Dimensions in Regional Integration*. Cambridge University Press.
- Hudec, Robert. 1999. The New WTO Dispute Settlement Procedure: An Overview of the First Three Years. *Minnesota Journal of Global Trade.* **8**, pp. 1–50.
- Hudec, Robert and James Southwick. 1999. Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly. In: Rodríguez Mendoza, Patrick Low and Barbara Kotschwar (eds.). *Trade rules in the making: challenges in regional and multilateral negotiations*. Brookings Institution Press.
- Hufbauer, Gary. 2005. Inconsistency Between Diagnosis and Treatment. *J. Int. Economic Law.* **8**, pp. 291.
- Hurrell, Andrew. 2012. International Law 1989-2010: A Performance Appraisal. In: James Crawford and Sarah Nouwen (eds.). *Select Proceedings of the European Society of International Law*. Vol. III, Hart Publishing.
- Ikeda, Ryo. 2006. *French policy towards Tunisia and Morocco: The international dimensions of decolonisation, 1950-1956*. PhD thesis, London School of Economics and Political Science.

- Ikenberry, G. John. 1993. The Political Origins of Bretton Woods. In: Michael D. Bordo and Barry Eichengreen (eds.). *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform*. University of Chicago Press.
- Irwin, Douglas A., Petros C. Mavroidis, Alan O. Sykes. 2008. *The Genesis of the GATT*. Cambridge University Press.
- Jackson, John H. 1969. *World Trade and the Law of the GATT*. Bobbs-Merrill.
- Jackson, John H. 1978. The Crumbling Institutions of the Liberal Trade System. *J. World Trade L.* **12**, pp. 99.
- Jackson, John H. 1996. Reflections on International Economic Law. *U. Pa. J. Int'l Econ. L.* **17**, pp. 17-28
- Jackson, John H. 1997. *The World Trading System: Law and Policy of International Economic Relations*. MIT Press.
- Jackson, John H. 2005. Part I: The state of international economic law – 2005. *J. Int'l Econ. L.* **8**, pp. 3-15
- Jackson, John H. 2006. *Sovereignty, the WTO, and Changing Fundamentals of International Law*. Cambridge: Cambridge University Press.
- Jackson, John H. 2007. International Economic Law: Complexities and Puzzles. *J. Int'l Econ. L.* **10**, pp. 3-12.
- Jackson, John H. 2008. The Case of the World Trade Organization. *Int'l Aff.* **84**, pp.437-454.
- Jackson, John H. 2009. The Evolution of the World Trading System – The Legal and Institutional Context. In: Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.). *The Oxford Handbook of International Trade Law*. Oxford University Press.
- Jackson, John H. 2011. Modern Approaches to Treaty Interpretation. In: Inge Govaere, Reinhard Quick and Marco Bronckers (eds.), *Trade and Competition Law in the EU and Beyond*. Edward Elgar.
- Jasanoff, Sheila. 2006. *States of Knowledge: the Co-Production of Science and the Social Order*. Routledge.
- Jenkins, Rhys. 1992. *Theoretical Perspective*. In: Tom Hewitt, Hazel Johnson and Dave Weld (eds.), *Industrialization and Development*.
- Jessup, Philip C. 1956. *Transnational Law*. Yale University Press.
- Jessup, Philip C. 1960. International Litigation as a Friendly Act. *Columbia Law Review.* **60**, pp.24.
- Johnson, H. 1953. Optimum tariffs and retaliation. *Review of Economic Studies.* **21**, pp. 142-153 .
- Johnstone, Ian. 2011. *The Power of Deliberation: International Law, Politics, and Organization*. New York: Oxford University Press.
- Johnstone, Ian. 2013. Lawmaking by International Organizations: Perspectives from IL/IR Theory. In: Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Jouannet, Emmanuelle. 2006. French and American Perspectives on International Law: Legal Cultures and International Law. *Me. L. Rev.* **58**, pp. 292.

- Jouannet, Emmanuelle. 2009. A Century of French International Law Scholarship. *Me. L. Rev.* **61**, pp. 83-131.
- Jouannet, Emmanuelle. 2012. *The Liberal-welfarist Law of Nations: A History of International Law*. Cambridge University Press.
- Katzenstein, Peter J., Robert O. Keohane, and Stephen D. Krasner. 1998. International Organization and the Study of World Politics. *International Organization*. **52**, pp. 645–685.
- Kaufmann, Christine. 2014. Customs Unions. In: Rüdiger Wolfrum *et al.* (eds.). *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Kennedy, David W. 1986. Critical Theory, Structuralism, and Contemporary Legal Scholarship. *New England Law Review*. **21**, pp. 209–289.
- Kennedy, David W. 1987. The Move to Institutions. *Cardozo L. Rev.* **8**, pp. 841–988.
- Kennedy, David W. 1988. A New Stream of International Law Scholarship. *Wisconsin Int'l L.J.* **7**, pp. 1-49
- Kennedy, David W. 1994a. The International Style in Postwar Law and Policy. *Utah L. Rev.* **1**, pp. 7-103.
- Kennedy, David W. 1994b. A New World Order: Yesterday, Today, and Tomorrow. *Transnational Law and Contemporary problems*. **4**, pp. 330-375.
- Kennedy, David W. 1999. The Disciplines of International Law and Policy. *Leiden J. Int'l L.* **12**, pp. 9-133.
- Kennedy, David W. 2002. The Twentieth Century Discipline of International Law in the United States. In: Austin Sarat *et al.* (ed.). *Looking Back at Law's Century*. Cornell University Press.
- Kennedy, David W. 2005. Challenging Expert Rule: The Politics of Global Governance. *Sydney J. of Int'l L.* **27**, pp. 3-12.
- Kennedy, David W. 2006. The 'Rule of Law,' Political Choices and Development Common Sense. In: David Trubek and Alvaro Santos (eds.). *The New Law and Economic Development: A Critical Appraisal*. Cambridge University Press.
- Kennedy, David. 2016. *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*. Princeton University Press.
- Kennedy, Duncan 1976. Form and Substance in Private Law Adjudication. *Harvard L. Rev.* **89**, pp.1685.
- Kennedy, Duncan 1986. Freedom and Constraint in Adjudication: A Critical Phenomenology. *Journal of Legal Education*. **36**, pp.518–562.
- Kennedy, Duncan. 1994. A Semiotics of Legal Argument, Reprinted. In: *3 Collected Courses of the Academy of European Law*. Kluwer Academic Publishers, Book 2, pp. 309-365.
- Kennedy, Duncan. 1997. *A Critique of Adjudication (Fin de Siècle)*. Harvard University Press.
- Kennedy, Duncan. 2001. A Semiotics of Critique. *Cardozo Law Review*. **22**, pp.1147–1189
- Kennedy, Duncan. 2006a. *The Rise and Fall of Classical Legal Thought 1850–1940*. Beard Books.

- Kennedy, Duncan. 2006b. Three globalizations of law and legal thought 1850–2000. In: Alvaro Santos and David Trubek (ed.). *The New Law and Economic Development: A Critical Appraisal*. Cambridge University Press.
- Kennedy, Duncan. 2014. The Hermeneutic of Suspicion in Contemporary American Legal Thought. *Law and Critique*. **25**, 91–139.
- Kennedy, Duncan and Karl E. Klare. 1984. A Bibliography of Critical Legal Studies. *Yale L.J.* . **94**, pp.461.
- Keohane, Robert. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton University Press.
- Keohane, Robert, Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization*. **54**, pp.457–88.
- Keynes, John Maynard. 2018. *The General Theory of Employment, Interest, and Money*. Palgrave Macmillan.
- Kingsbury, Benedict, Nico Krisch and Richard Stewart. 2005. The Emergence of Global Administrative Law. *Law & Contemporary Problems*. **68**, pp.15-61
- Kingsbury, Benedict. 2009. The Concept of “Law” in Global Administrative Law. *Eur. J. Int’l L.* **20**, pp. 23-57.
- Kirgis, Frederic L. Jr. 1970. Developments in the Law and Institutions of International Economic Relations--International Economic Development: The Emergent Issues. *Am. J. Int’l L.* **64**, pp. 106, 138.
- Kirton, John J. and Michael J. Trebilcock. 2004. Introduction: Hard Choices and Soft Law in Sustainable Global Governance.” In: John J. Kirton and Michael J. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance*. Ashgate.
- Klabbers, Jan. 1998. The Undesirability of Soft Law. *Nordic Journal of International Law* . **67**, pp.381–91
- Köbele, Michael. 2011. Free Trade Areas. In: Rüdiger Wolfrum *et al.* (eds.). *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Kock, Karin. 1969. *International Trade Policy and the GATT 1947–1967*. Almqvist & Wiksell.
- Koremenos, Barbara. 2013. Institutionalism and International Law. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Koremenos, Barbara, Charles Lipson, and Duncan Snidal. 2001. The Rational Design of International Institutions. *International Organization*. **55**, pp. 761–799.
- Koskenniemi, Martti. 1998. Repetition as Reform: Georges Abi-Saab Cours Général de droit international public. *European Journal of International Law*. **9**, pp. 405-411.
- Koskenniemi, Martti. 1999. Letter to the Editors of the Symposium. *American Journal of International Law*. **93**, pp. 351-361.
- Koskenniemi, Martti. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press.

- Koskenniemi, Martti. 2005. *From Apology to Utopia the Structure of International Legal Argument : Reissue with a New Epilogue*. Cambridge University Press.
- Koskenniemi, Martti. 2007a. *The Fate of Public International Law*. 70 *Modern L. R.* 1-30.
- Koskenniemi, Martti. 2007b. Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalisation. *Theoretical Inquiries in Law*. **8**, pp. 9-36.
- Koskenniemi, Martti. 2007c. Constitutionalism, Managerialism and the Ethos of Legal Education. *European J. Legal Studies*. **4**, pp. 1-17.
- Koskenniemi, Martti. 2007d. International Legal Theory and Doctrine. In: Rüdiger Wolfrum *et al.* (eds.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Koskenniemi, Martti. 2007e. Methodology of International Law. In: Rüdiger Wolfrum *et al.* (eds.). *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Koskenniemi, Martti. 2011. Between Commitment and Cynicism: Outline for a Theory of International Law as Practice. In: *The Politics of international law*. Hart Publishing.
- Koskenniemi, Martti. 2012a. Law, Teleology and International Relations: An Essay in Counterdisciplinarity. *International Relations*. **26**, pp. 3-34.
- Koskenniemi, Martti. 2012b. A History of International Law Histories. In: Bardo Fassbender and Anne Peters (ed.). *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press.
- Koskenniemi, Martti. 2012c. Chapter 2 - International law in the world of ideas. In: James Crawford and Martti Koskenniemi (ed.). *The Cambridge Companion to International Law*. Cambridge University Press.
- Koskenniemi, Martti. 2013. Histories of International Law: Significance and Problems for a Critical View. *Temple Intl. & Comp. L.J.* **27**, pp. 215-240.
- Kostecki, Michel. 1979. *East-West Trade and the GATT System*. Macmillan for the Trade Policy Research Centre.
- Kratochwil. 2008. Constructivism: what it is (not) and how it matters. In: Donatella Della Porta and Michael Keating. *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*. Cambridge University Press.
- Krisch, Nico and Benedict Kingsbury. 2006. Introduction: Global Governance and Global Administrative Law in the International Legal Order. *Eur. J. Int'l L.* **17**, pp. 1-13.
- Krugman, Paul. 1991a. Is Bilateralism Bad? In: Elhanan Helpman and Assaf Razin (ed.). *International Trade and Trade Policy*. Cambridge: MIT Press.
- Krugman, Paul. 1991b. The Move toward Free Trade Zones. *Economic Review. Federal Reserve Bank of Kansas City*. **76**, pp. 5-25.
- Krugman, Paul. 1993. Regionalism versus multilateralism: Analytic notes. In: Jaime de Melo and Arvind Panagariya (eds.). *New Dimensions in Regional Integration*. Cambridge University Press.
- Krugman, Paul and Maurice Obstfeld. 2003. *International Economics: Theory and Policy*. Addison Wesley.
- Kuhn, Thomas S. 2012. *The Structure of Scientific Revolutions*. Chicago: University of Chicago Press.

- Kuznetsov, Valerii I. 1976. *Economic Integration: Two Approaches*. Progress.
- Hafez, Zakir. 2003. Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs. *North Dakota L. Rev.* **79**, pp. 879-919.
- Hilf, Meinhard. 2001. Power, Rules and Principles – Which orientation for WTO/GATT Law? *Journal of International Economic Law.* **4**, pp. 111-130.
- La Barca, Giuseppe. 2013. *International Trade in the 1970s: the US, the EC and the Growing Pressure of Protectionism*. Bloomsbury Academic.
- La Barca, Giuseppe. 2016. *The US, the EC and World Trade: From the Kennedy Round to the Start of the Uruguay Round*. Bloomsbury Academic.
- Lacharrière, Guy Ladreit de. 1964. *Commerce extérieur et sous-développement*. PUF.
- Lacharrière, Guy Ladreit de. 1967. Aspects récents du classement d'un pays comme moins développé. *Annuaire français de droit international.* **13**, pp.703-716.
- Lafer, Celso. 1977. *Da Reciprocidade no Direito Internacional Econômico – O convênio do Café de 1976* (Unpublished habilitation dissertation). University of Sao Paulo.
- Lafer, Celso. 1998. *A OMC e a regulação do comércio internacional: uma visão brasileira*. Forense.
- Lamy, Pascal. 2007. Proliferation of regional trade agreements “breeding concern.” *Speech delivered at the Conference on “Multilateralizing Regionalism*. (Online) (Accessed 10 September 2007)
Available from:
https://www.wto.org/english/news_e/sppl_e/sppl67_e.htm
- Lang, Andrew. 2006. Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime. *Journal of International Economic Law.* **9**, pp. 81–116.
- Lang, Andrew. 2011. *World Trade Law after Neoliberalism: Reimagining the Global Economic Order*. Oxford University Press.
- Lang, Andrew. 2014. Governing ‘As If’: Global Subsidies Regulation and the Benchmark Problem. *Current Legal Problems.* **67**, pp. 135–168.
- Lang, Andrew and Joanne Scott. 2009. The Hidden World of WTO Governance. *Eur. J. Int. Law.* **20**, pp.575-614.
- Lang, Rémi. 2006. *Renegotiating GATT Article XXIV: A Priority for African Countries Engaged in North–South Trade Agreements*, 33 African Trade Policy Centre.
- Langenhoven, Luk van and Brigid Gavin. 2003. Trade in a world of regions. In: Gary P. Sampson and Stephen Woolcock (eds.), *Regionalism, Multilateralism and Economic Integration: the Recent Experience*. United Nations University Press.
- Latham, Michael. 2000. *Modernization as Ideology: American Social Science and “Nation Building” in the Kennedy Era*. University of North Carolina Press.
- Lawrence, Robert. 1996. *Regionalism, Multilateralism, and Deeper Integration*. Brookings.
- Lenin, Vladimir I. 1965. *Collected Works*. Vol. 30, Progress Publishers.

- Lepsius, Oliver. 2014. The Quest for Middle-Range Theories in German Public Law. *International Journal of Constitutional Law*. **12**, pp. 692–709.
- Lester, Simon and Bryan Mercurio. 2009. Introduction. In: Simon Lester and Bryan Mercurio (eds.). *Bilateral and Regional Trade Agreements: Commentary and Analysis*. Cambridge University Press.
- Leutwiler, Fritz, Bill Bradley, Pehr Gyllenhammar, Guy Ladreit de Lacharrière, I.G. Patel, Mario Henrique Simonsen, and Sumito Djojohadikusumo. 1985. Trade policies for a better future: the Leutwiler Report. In: Arthur Dunkel. *Trade Policies for a Better Future: The Leutwiler Report, the GATT, and the Uruguay Round*. M. Nijhoff.
- Lim, Chin L. 2008. Neither Sheep nor Peacocks: T. O. Elias and Post-colonial International Law. *Leiden Journal of International Law*. **21**, pp. 295-315.
- Lister, Marjorie. 1988. *The European Economic Community and the Developing World: The Role of the Lomé Convention*. Avebury.
- Lister, Marjorie. 1997. *The European Union and the South relations with developing countries*. Routledge.
- Lo, Chang-fa. 2016. Bridging Global and Regional Governance of International Trade. In: Julien Chaisse, and Caiyu Lin (eds.). *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford University Press.
- Loibl, Gerhard. 2003. International Economic Law. In: Malcolm Evans (ed.). *International Law*. Oxford University Press.
- Lombardi, Clark Benner. 2006. *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharia into Egyptian Constitutional Law*. Brill.
- Low, Patrick. 2008. Regionalism: challenges for the WTO. *Paper presented at the Asian Development Bank Institute/Graduate Institute of Geneva conference on Multilateralizing Asian Regionalism, Tokyo*. (Online) (Accessed 18-19 September 2018) Available from: <http://www.adbi.org/conf-seminar-papers/2008/10/07/2729.low.regionalism.wto.challenges/>
- Lowenfeld, Andreas F. 2008. *International Economic Law*. Oxford University Press.
- Luchaire, François. 1975. Les associations à la Communauté économique européenne. *Recueil Des Cours*. **144**, pp. 241–308.
- Lynch, Frances M. B. 1997. *France and the international economy: from Vichy to the Treaty of Rome*. Routledge.
- Machlup, Fritz. 1977. *A History of Thought on Economic Integration*. Columbia University Press.
- Mansfield, Edward D. and Helen V. Milner. 1997. *The Political Economy of Regionalism*. Columbia UP.
- Mansfield, Edward D. and Helen V. Milner. 1999. The New Wave of Regionalism. *International Organization*. **53**, pp. 602.
- Mathis, James. 2002. *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement*. TMC Asser.
- Mathis, James. 2006. Regional Trade Agreements and Domestic Regulation: What Reach for ‘Other Restrictive Regulations of Commerce’?. In: Lorand Bartels and Federico Ortino (eds.). *Regional Trade Agreements and the WTO Legal System*. Oxford University Press.

- Marks, Susan. 2005. Naming Global Administrative Law. *NYU Int'l L. and Politics*. **37**, pp.995-1002.
- Mathis, James. 2011. The “legalization” of GATT Article XXIV – Can Foes Become Friends? In: Kyle Bagwell and Petros Mavroidis (ed.). *Preferential Trade Agreements: A Law and Economics Analysis*. Cambridge University Press.
- Matsushita, Mitsuo. 2004. Legal Aspects of Free Trade Agreements in the Context of Article XXIV of the GATT. In: Mitsuo Matsushita and Dukgeun Ahn (eds.). *WTO and East Asia: New Perspectives*. Cameron May.
- Matsushita, Mitsuo. 2005. The Sutherland Report and its Discussion of Dispute Settlement Reforms. *J. Int. Economic Law*. **8**, pp. 623-629.
- Matsushita, Mitsuo and Dukgeun Ahn (eds.) 2004. *WTO and East Asia: New Perspectives*. Cameron May.
- Matsushita, Mitsuo, Thomas Schoenbaum, Petros Mavroidis, and Michael Hahn. 2016. *The World Trade Organization: Law, Practice, and Policy*. Oxford International Law Library.
- Matsuyama, K. 1990. Perfect Equilibria in a Trade Liberalization Game. *American Economic Review*. **80**, pp. 480-492.
- Mazzucato, Mariana. 2011. *The Entrepreneurial State*. Demos.
- McCrudden, Christopher. 2006. Legal Research and the Social Sciences. *Law Quarterly Review*. **122**, pp. 632-650.
- McDougal, Myres. 1953. International Law, Power and Policy: A Contemporary Conception. *Recueil des Cours*. **82**, pp.133–259.
- McDougal, Myres, Harold Lasswell, and W. Michael Reisman. 1967. The World Constitutive Process of Authoritative Decision. *Faculty Scholarship Series, Paper 675*. (Online) (Accessed 22 September 2018) Available from: http://digitalcommons.law.yale.edu/fss_papers/675
- McRae, Donald. 2005. Developing Countries and 'The Future of the WTO'. *J. Int. Economic Law*. **8**, pp. 603-610.
- Meagher, Niall. 2005. So far, so good: but what next? The Sutherland Report and WTO dispute settlement. *World Trade Review*. **4**, pp. 409-417.
- Mégret, Frédéric. 2012. Chapter 3 - International law as law. In: James Crawford and Martti Koskenniemi (ed.). *The Cambridge Companion to International Law*. Cambridge University Press.
- Meier, Gerald M. 2005. *Biography of a Subject: An Evolution of Development Economics*. Oxford University Press.
- Messerlin, Patrick A. 2005. Three Variations on ‘The Future of the WTO’. *J. Int. Economic Law*. **8**, pp. 299-309.
- Merry, Sally Engle. 2009. Measuring the World: Indicators, Human Rights, and Global Governance. *Proceedings of the Annual Meeting*. American Society of International Law **103**, pp.239-243 (March 25-28, 2009).
- Michalopoulos, Constantine. 2000. *Trade and Development in the GATT and WTO: the Role of Special and Differential Treatment for Developing Countries*. World Bank Policy, Research Working Paper 2388, 2000.

- Milward, Alan. 2005. *Politics and Economics in the History of the European Union*. Routledge.
- Möllers, Christoph. 2015. Ten years of global administrative law. *Int'l J. Constitutional L.* **13**, pp. 469-472
- Montana, Ismael Musah. 2003. The Lomé Convention from Inception to the Dynamics of the Post-Cold War, 1957-1990s. *African and Asian Studies.* **2**, pp.63–97.
- Moravcsik, Andrew. 2013. Liberal Theories of International Law. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Murray, Tracy. 1977. *Trade Preferences for Developing Countries*. Wiley.
- Mutua, Makau, and Antony Anghie. 2000. What Is TWAIL? *Proceedings of the Annual Meeting, American Society of International Law.* **94**, pp.31-40
- Narlikar, Amrita, Martin Daunton, Robert Stern and Robert Mitchell (ed.) 2012. *The Oxford Handbook on the World Trade Organization*. Oxford University Press.
- Nasser, Rabih Ali. 2002. *A OMC e os países em desenvolvimento*. Aduaneiras.
- Neff, Stephen. 2014. A short history of international law. In: Malcolm Evans (ed.). *International Law*. Oxford University Press.
- Nespor, Jan. 2006. Morphologies of Inquiry: The Uses and Spaces of Paradigm Proliferation. *Int'l J. Qualitative Studies in Education.* **19**, pp. 115-128.
- Nguyen Quoc, Dinh, Patrick Daillier and Alain Pellet. 1999. *Direito Internacional Público*. Fundação Calouste Gulbenkian.
- Nkrumah, Kwame. 1964. *Neo-Colonialism: The Last Stage of Imperialism*. Thomas Nelson & Sons.
- Odell, John, and Barry Eichengreen. 1998. The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership. In: Anne O. Krueger (ed.). *The WTO as an International Organization*. University of Chicago Press.
- Okano-Heijmans, Maaïke. 2011. Conceptualizing Economic Diplomacy: The Crossroads of International Relations, Economics, IPE and Diplomatic Studies. *The Hague Journal of Diplomacy.* **6**, pp.7-36.
- Onguglo, Bonapas and Taisuke Ito. 2005. In defence of the ACP submission on special and differential treatment in GATT Article XXIV. *Discussion Paper No. 67*. (Online) (Accessed 22 September 2018) Available from: <http://ecdpm.org/wp-content/uploads/2013/11/DP-67-Defence-ACP-Submission-Special-Differential-Treatment-GATT-2005.pdf>.
- Onuf, Nicholas. 1985. Do Rules Say What They Do? From Ordinary Language to International Law. *Harvard. Int'l L.J.* **26**, 385-410.
- Onuf, Nicholas. 1989. *World of Our Making: Rules and Rule in Social Theory and International Relations*. University of South Carolina Press.
- Orakhelashvili, Alexander. 2014. Scelle, Schmitt, Kelsen, Lauterpacht, and the Continuing Relevance of Their Inter-War Debate on Normativity. *Nordic Journal of International Law.* **83**, pp.1-39.

- Orford, Anne. 2013. On International Legal Method. *London Rev. of Int'l L.* **1**, pp.166-97.
- Orford, Anne. 2016. Theorizing Free Trade. In: Anne Orford, Florian Hoffmann and Martin Clark (ed.). *The Oxford Handbook of the Theory of International Law*. Oxford University Press.
- Orford, Anne. 2017. Scientific Reason and the Discipline of International Law. In: Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (ed.). *International Law as a Profession*. Cambridge University Press.
- Ortino, Federico. 2006. Treaty Interpretation and the WTO Appellate Body Report in US Gambling: A Critique. *Journal of International Economic Law*. **9**, pp.117-148
- Ortino, Federico and Matteo Ortino. 2008. Law of the Global Economy: In Need of a New Methodological Approach? In: Colin Picker, Isabella Bunn, and Douglas W. Arner (ed.). *International Economic Law: The State and Future of the Discipline*. Hart Pub.
- Pahuja, Sundhya. 2011. *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge University Press.
- Palmeter, David. 1989. Book Review, The Capture of the Antidumping Law. *Yale J. Int'l L.* **14**, pp.182.
- Palmeter, David, and Petros Mavroidis. 1998. The WTO Legal System: Sources of Law. *American Journal of International Law*. **92**, pp. 398-413.
- Pasca, Roberto. 1978. Mediterranean Agricultural Trade Problems and the Effects of the EC Policies. *European Review of Agricultural Economics*. **5**, pp.221–254.
- Pattaro, Enrico. 2005. Legal Doctrine and Legal Theory. In: Corrado Roversi (eds) *A Treatise of Legal Philosophy and General Jurisprudence, Vol. 1: The Law and the Right: A Reappraisal of the Reality That Ought to Be*. Springer.
- Pauwelyn, Joost. 2005a. The Sutherland Report: a Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO. *J. Int. Economic Law*. **8**, pp.329–346.
- Pauwelyn, Joost. 2005b. The Transformation of World Trade. *Michigan L. Rev.* **104**, pp.1-65.
- Peczenik, Aleksander. 2001. A Theory of Legal Doctrine. *Ratio Juris*. **14**, pp. 75–105.
- Penner, James E. and Emmanuel Melissaris. 2012. *McCoubrey & White's Textbook on Jurisprudence*. Oxford Univeristy Press.
- Perry-Kessaris, Amanda. 2013. What Does it Mean to Take a Socio-Legal Approach to International Economic Law? In: Amanda Perry-Kessaris (ed.). *Socio-legal Approaches to International Economic Law: Text, Context, Subtext*. Routledge.
- Peters, Anne. 2017. International Legal Scholarship Under Challenge. In: Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (ed.). *International Law as a Profession*. Cambridge University Press.
- Petersmann, Ernst-Ulrich. 1997. *The GATT/WTO Dispute Settlement System: International Law, International Organization and Dispute Settlement*. Kluwer Law International.
- Petersmann, Ernst-Ulrich. 2005. Addressing Institutional Challenges to the WTO in the New Millennium: A Longer-Term Perspective. *J. Int. Economic Law*. **8**, pp. 647-665.
- Picciotto, Sol. 2005. The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance. *Governance*. **18**, pp. 477–503.

- Picciotto, Sol. 2006. Regulatory Networks and Global Governance. *W. G. Hart Legal Workshop*. (Online) (Accessed 22 September 2018) Available from: http://eprints.lancs.ac.uk/232/1/Reg_Networks_&_Glob_Gov.pdf.
- Pierros, Philippos, Jacob Meunier and Stan Abrams. 1999. *Bridges and Barriers: The European Union's Mediterranean Policy, 1961-1998*. Ashgate.
- Plant, Raymond. 2010. *The Neo-liberal State*. Oxford University Press.
- Plato. 1955. *The Republic* (translated and with an Introduction by H. D. P. Lee). Penguin Books.
- Pomfret, Richard. 1981. The Impact of EEC Enlargement on Non-Member Mediterranean Countries' Exports to the EEC. *The Economic Journal*. **91**, pp. 726-729.
- Pomfret, Richard. 1982. Protectionism and Preferences in the European Community's Mediterranean Policy. *The World Today*. 38, pp.60-65.
- Pomfret, Richard. 1986. *Mediterranean Policy of the European Community: a Study of Discrimination in Trade*. St. Martin's Press.
- Porta, Donatella Della, and Michael Keating. 2008a. Chapter 1, Introduction. In: Donatella Della Porta and Michael Keating. *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*. Cambridge University Press.
- Porta, Donatella Della, and Michael Keating. 2008b. Chapter 2, How Many Approaches in the Social Sciences? An Epistemological Introduction. In: Donatella Della Porta and Michael Keating. *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*. Cambridge University Press.
- Posner, Richard. 1987. The Decline of Law as an Autonomous Discipline: 1962-1987. *Harvard Law Review*. **100**, pp.761-780.
- Qureshi, Asif H. and Andreas R. Ziegler. 2011. *International Economic Law*. Sweet & Maxwell/Thomson Reuters.
- Raustiala, Kal. 2002. The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law. *Virginia J. Int'l L.* **43**, pp.1.
- Raustiala, Kal. 2005. Form and Substance in International Agreements. *American Journal of International Law*. **99**, pp. 581-610.
- Ravenhill, John. 1985. *Collective Clientelism: the Lomé Conventions and North-South Relations*. Columbia University Press.
- Redish, Martin. 1985. The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine. *Columbia L. Rev.* **85**, pp.1378.
- Reich, Arie. 1997. From diplomacy to law: The juridicization of international trade relations. *Northwestern Journal of International Law & Business*. **17**, pp. 775-849.
- Reich, Arie. 2010. Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity. *University of Toronto L.J.* **60**, pp. 263-287.
- Reinert, Erik. 1994. Catching-up from Way behind: A Third World Perspective on First World History. In: Jan Fagerberg, Bart Verspagen and Nick von Tunzelmann (eds.). *The Dynamics of Technology, Trade and Growth*. Edward Elgar Publishing.

- Reinert, Erik, Jayati Ghosh and Rainer Kattel. 2016. *Handbook of Alternative Theories of Economic Development*. Edward Elgar.
- Reinicke, Wolfgang and Jan Martin Witte. 2000. Interdependence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords." In: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford University Press.
- Reus-Smit, Christian. 2004. *The Politics of International Law*. Cambridge: Cambridge University Press.
- Reuter, Paul. 1952. *Le Droit Économique International*. Paris: Institut des hautes études internationales.
- Roberts, Anthea. 2017. *Is International Law International?* Oxford University Press.
- Roberts, Anthea. 2018. The Parochialism of Western Cosmopolitanism in a Competitive World Order. *EJIL: Talk!* (Online) (Accessed 7 February 2018) Available from: <https://www.ejiltalk.org/the-parochialism-of-western-cosmopolitanism-in-an-emerging-competitive-world-order/>
- Beattie, Alan. 2005. *Bilateral trade agreements 'betraying' WTO ideals*, Financial Times, 18 Jan. 2005, at 10.
- Rodrik, Dani. 2004. *Industrial policy for the twenty-first century*. (Online) (Accessed 22 September 2018) Available from: <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/UNIDOSep.pdf>
- Rodrik, Dani. 2007. *One economics, many recipes: globalization, institutions, and economic growth*. Princeton University Press.
- Rodrik, Dani. 2010. Diagnostics before Prescription. *Journal of Economic Perspectives*. **24**, pp.33-44.
- Rodrik, Dani. 2011. *The Globalization Paradox: Democracy and the Future of the World Economy*. W. W. Norton & Company.
- Roessler, Frieder. 2000. The Institutional Balance between the Judicial and the Political Organs of the WTO. In: Marco Bronckers and Reinhard Quick (eds.). *New Directions in International Economic Law: Essays in Honour of John H. Jackson*. Kluwer Law International.
- Ruggie, John G. 1982. International Regimes, Transactions, and Change: Embedded Liberalism and the Post-war Economic Order. *International Organization*. **36**, pp.379.
- Ruggie, John G. 1998. What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge. *International Organization*. **52**, pp. 855–885.
- Sale, Joanna E. M., Lynne H. Lohfeld, and Kevin Brazil. 2002. Revisiting the Quantitative-Qualitative Debate: Implications for Mixed-Methods Research. *Quality and Quantity*. **36**, pp. 43–53.
- Sampson, Gary P. 2005. The future of the WTO in world economic affairs. *World Trade Review*. **4**, pp. 419-428.
- Sandel, Michael. 2012. *What Money Can't Buy: The Moral Limits of Markets*. Penguin.
- Sandholtz, Wayne and Alec Stone Sweet. 2004. Law, Politics, and International Governance. In: Christian Reus-Smit (ed.). *The Politics of International Law*. Cambridge University Press.

- Santos, Boaventura de Sousa. 2002. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. Butterworths.
- Sartori, Giovanni. 1994. *A Formal Model of Legal Argumentation*, 7 *Ratio Juris* 2.
- Saussure, Ferdinand. 1959. *Course in General Linguistics*. New York: Philosophical Library.
- Scelle, Georges. 1932. *Précis de droit des gens – Principes et systématique*. Vol. I, Paris.
- Schachter, Oscar. 1977. The Invisible College of International Lawyers. *Northwestern Univ. L. Rev.* **72**, pp.217–226.
- Schachter, Oscar. 1982. International Law in Theory and Practice: General Course in Public International Law. *Recueil des Cours*. **178**, pp. 9–396.
- Schiavone, Giuseppe. 1981. *The Institutions of Comecon*. Macmillan.
- Schott, Jeffrey. 1989. *Free Trade Areas and U.S. Trade Policy*. Institute For International Economics.
- Schott, Jeffrey. 2004. Reviving the Doha Round. *Peterson Institute for International Economics, Speeches and Papers*. (Online) (Accessed 22 September 2018) Available from: <http://www.iie.com/publications/papers/print.cfm?ResearchId=207&doc=pub>
- Schwarzenberger, Georg. 1942. The Development of International Economic and Financial Law by the Permanent Court of International Justice. *Juridical Review*. **54**, pp.21.
- Schwarzenberger, Georg. 1948. The Province and Standards of International Economic Law. *The International Law Quarterly*. **2**, pp. 402-420.
- Schwarzenberger, Georg. 1955. The fundamental principles of international law. *Recueil des Cours*. **87**, pp. 195-383.
- Schwarzenberger, Georg. 1966. The principles and standards of international economic. *Recueil des Cours*. **117**, pp. 1-96.
- Schwarzenberger, Georg. 1971. *International Law and Order*. Stevens & Sons.
- Schwarzenberger, Georg, and E. D. Brown. 1976. *A Manual of International Law*. 6th Ed., Professional Books.
- Sebastian, Thomas. 2010. World Trade and International Law. In: Basak Cali (ed). *International Law for International Relations*. Oxford University Press.
- Seidl-Hohenveldern, Ignaz. 1999. *International Economic Law*. Kluwer Law International.
- Shaffer, Gregory. 2005. The role of the Director-General and Secretariat: Chapter IX of the Sutherland Report. *World Trade Review*. **4**, pp. 429-438.
- Shaffer, Gregory and Mark Pollack. 2010. Hard vs. soft law: alternatives, complements and antagonists in international governance. *Minnesota Law Review*. **94**, pp. 706-799.
- Shaffer, Gregory and Mark Pollack. 2013. Hard and Soft Law. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Shalakany, Amr. 2001. Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamize. *Islamic Law and Society*. **8**, pp. 201–44.

- Shalakany, Amr. 2006. 'I Heard It All Before': Egyptian Tales of Law and Development. *Third World Quarterly*. **27**, pp. 833-853.
- Shapin, Steven and Simon Schaffer. 2011. *Leviathan and the Air-pump: Hobbes, Boyle, and the Experimental Life*. Princeton University Press.
- Shaw, Malcolm. 2008. *International Law*. Cambridge University Press.
- Shapiro, David L. 1987. In Defense of Judicial Candor. *Harvard L. Rev.* **100**, pp. 731
- Shen, Simon and Wilson Chan. 2018. *A comparative study of the Belt and Road Initiative and the Marshall plan*. 32 Palgrave Communications. (Online) (Accessed 27 March 2018) Available from: <https://www.nature.com/articles/s41599-018-0077-9>.
- Simpson, Gerry. 2012. Chapter 1 - International law in diplomatic history. In: James Crawford and Martti Koskenniemi (ed.). *The Cambridge Companion to International Law*. Cambridge University Press.
- Sinclair, Adriana. 2010. *International Relations Theory and International Law: A Critical Approach*. Cambridge University Press.
- Sissoko, Macki M., Louis O. Osuji, and William I. Cheng. 1998. Impacts of the Yaounde and Lome conventions on EC-ACP trade. *The African Economic & Business Review*. **1**, pp. 6-24.
- Slaughter, Anne-Marie. 1997. The Real New World Order. *Foreign Affairs*. **76**, pp.183-197
- Slaughter, Anne-Marie. 2003. Global Government Networks. Global Information Agencies, and Disaggregated Democracy. *Michigan J. Int'l L.* **24**, pp.1041.
- Smits, Jan M. 2015. What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research. *Maastricht European Private Law Institute Working Paper No. 2015/06*. (Online) (Accessed June 2018) Available from: <https://ssrn.com/abstract=2644088> or <http://dx.doi.org/10.2139/ssrn.2644088>
- Söderbaum, Fredrick. 2016. Old, New, and Comparative Regionalism: The History and Scholarly Development of the Field. In: Tanja A. Börzel and Thomas Risse (ed.). *The Oxford Handbook of Comparative Regionalism*. Oxford University Press.
- Staiger, R. W. and G. Tabellini. 1987. Discretionary trade policy and excessive protection. *American Economic Review*. **77**, pp. 823-837.
- Steinberg, Richard H. 2004. Judicial Law-Making at the WTO: Discursive, Constitutional, and Political Constraints. *American Journal of International Law*. **85**, pp. 613–45.
- Steinberg, Richard H. 2009. The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott. *Eur. J. Int. Law*. **20**, pp. 1063–1071.
- Steinberg, Richard H. 2013. Wanted – Dead or Alive: Realism in International Law. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Steiner, Henry J., and Detlev F. Vagts. 1968. *Transnational Legal Problems: Materials and Text*. Foundation Press.
- Steffek, Jens. 2006. *Embedded Liberalism and Its Critics: Justifying Global Governance in the American Century*. Palgrave Macmillan.

- Steger, Debra P. 2009. The Future of the WTO: The Case for Institutional Reform. *J. Int. Economic Law*. **12**, pp. 803-833.
- Steger, Debra. 2016. John H. Jackson—WTO Institution Builder. *J. Int'l Econ. L.* **19**, pp.339–341.
- Summers, Lawrence. 1991. Regionalism and the World Trading System. *Economic Review*. **76**, pp. 295–302.
- Sutherland, Peter, Jagdish Bhagwati, Kwasi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer & Thierry de Montbrial. 2004. The Future of the WTO: Addressing Institutional Challenges in the New Millennium. *Report by the Consultative Board to the Director-General Supachai Panitchpakdi*. WTO.
- Swan, Alan C. and John F. Murphy. 1991. *Cases and materials on the regulation of international business and economic relations*. M. Bender.
- Szawlowski, Richard. 1976. *The system of the international organizations of the communist countries*. Sijthoff.
- Tamanaha, Brian. 1995. The lessons of law-and-development studies. *Am. J. Int'l L.* **89**, pp.470.
- Tan, Celine. 2018. Beyond the 'Moments' of Law and Development. Law and Development Scholarship in a Globalized Economy. *Völkerrechtsblog* (Online). (Accessed 20 September 2018). Available from: <https://voelkerrechtsblog.org/beyond-the-moments-of-law-and-development/>
- Taylor, Robert. 1980. *Implications for the Southern Mediterranean countries of the second enlargement of the European Community* (Europe Information: Development, June 1980, X/225/80).
- Terris, Daniel, Cesare Romano, and Leigh Swigart. 2007. *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*. University Press of New England.
- Tiller, Emerson and Frank Cross. 2006. What is Legal Doctrine? *Northwestern University Law Review*. **100**, pp. 517–534.
- The Economist Editorial. 2005. *Free trade's best friend*, The Economist, 22 Jan. 2005, at 71.
- The Warwick Commission. 2007. *The Multilateral Trade Regime: Which Way Forward?* The University of Warwick.
- The Washington Post Editorial. 2005. *Open Trade*, The Washington Post, 3 Feb. 2005, at A26.
- Thomas, Chantal. 1995. Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development. *Harvard Law Review*. **108**, pp. 1715–2059.
- Thomas, Chantal. 2011. Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism. *Cornell Law Review*. **96**(4), pp. 967-1024.
- Thomas, Chantal and Joel P. Trachtman. 2009. *Developing Countries in the WTO Legal System*. Oxford University Press.
- Thompson, Robert B. 2016. John Jackson's Legacy: Defining a Field. *J. Int'l Econ. L.* **19**, pp.317–322 .
- Tietje, Christian, Alan Brouder, Karsten Nowrot. 2006. *Philip C. Jessup's Transnational Law Revisited - On the Occasion of the 50th Anniversary of its Publication*. Institut für Wirtschaftsrecht, 50 Heft, 02-2006.

- Tovias, Alfred. 1977. *Tariff Preferences in Mediterranean Diplomacy*. Macmillan for the Trade Policy Research Centre.
- Tovias, Alfred. 1994. A Survey of the Theory of Economic Integration. In: Michelmann, Hans J., and Soldatos, Panayotis (ed.). *European Integration: Theories and Approaches*. University Press of America.
- Toye, John. 2014. *UNCTAD at 50: A Short History*. United Nations.
- Trachtman, Joel. 2005. The Missing Link: Coherence and Poverty at the WTO. *J. Int. Economic Law*, **8**, pp. 611-622.
- Trachtman, Joel. 2007. International Trade: Regionalism. In: Andrew Guzmán and Alan Sykes (eds.). *Research Handbook in International Economic Law*. Edward Elgar.
- Trebilcock, Michael J. 2015. *Advanced Introduction to International Trade Law*.
- Trebilcock, Michael J., Robert Howse and Antonia Eliason. 2012. *The Regulation of International Trade*. Routledge.
- Truyol y Serra, Antonio. 1951. *Doctrines contemporaines du droit des gens*. A. Pedoné.
- Trubek, David and Alvaro Santos (eds.) 2006a. *The New Law and Economic Development: A Critical Appraisal*. Cambridge University Press.
- Trubek, David and Alvaro Santos. 2006b. Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice. In: David Trubek and Alvaro Santos (eds.). *The New Law and Economic Development: A Critical Appraisal*. Cambridge University Press.
- Trubek, David and John Esser. 1989. 'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box? *Law & Social Inquiry*, **14**, pp. 3-52.
- Trubek, David, Patrick Cottrell, and Mark Nance. 2006. 'Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity." In Gráinne de Búrca and Joanne Scott (eds.), *Law and New Governance in the EU and the US*. Hart.
- Tumlir, Jan. 1979. The New Protectionism, Cartels, and the International Order. In: Ryan Amacher, Gottfried Haberler and Thomas Willett. *Challenges to a Liberal International Order*. Washington: American Enterprise Institute for Public Policy Research.
- Umozurike, U. Oji. 1979. *International Law and Colonialism in Africa*. Nwamife Publishers.
- Umozurike, U. Oji. 1993. *Introduction to International Law*. Spectrum Law Publishing.
- United Nations Conference on Trade and Development Secretariat. 2006. *UNCTAD: a Brief Historical Overview (2006, UNCTAD/GDS/2006/1)* (Online) (Accessed 22 September 2018) Available from: http://www.unctad.org/en/docs/gds20061_en.pdf
- Unger, Roberto Mangabeira. 1986. *The Critical Legal Studies Movement*. Harvard University Press.
- Unger, Roberto Mangabeira. 1996. *What Should Legal Analysis Become?* Verso.
- Unger, Roberto Mangabeira. 2000. *Free Trade Reimagined: The World Division of Labor and the Method of Economics*. Princeton University Press.

- Ustor, Endre. 1969. *First Report of the Special Rapporteur*. II Yearbook of the International Law (U.N. Doc. A/CN.4/213, 1969).
- Ustor, Endre. 1971. Decision-making in the Council for Mutual Economic Assistance. *Recueil des Cours*. **134**, 163-295.
- Van Damme, Isabelle. 2010. Treaty Interpretation by the WTO Appellate Body. *European Journal of International Law*. **21**, pp. 605-48.
- Venables, A. J. 1987. Trade and trade policy with differentiated products: a Chamberlinian-Ricardian model. *Economic Journal*. **97**, pp. 700-717.
- Verloren Van Themaat, Pieter. 1981. *The Changing Structure of International Economic Law: A Contribution of Legal History, of Comparative Law and of General Legal Theory to the Debate on a New International Economic Order*. Martinus Nijhoff ; T.M.C. Asser Institute.
- Vignes, Daniel. 1988. Communautés Européennes et Pays en Développement. *Recueil des Cours*. **210**, pp. 225-400
- Viner, Jacob. 1950. *The Customs Union Issue*. Carnegie Endowment for International Peace.
- Virally, Michel. 1965. Vers un droit international du développement. *Annuaire français de droit international*. **11**, pp.3-12.
- Von Stein, Jana. 2013. The Engines of Compliance. In: Jeffrey L. Dunoff and Mark A. Pollack (ed.). *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art*. Cambridge University Press.
- Xenakis, Dimitris and Dimitris Chrysochoou. 2001. *The emerging Euro-Mediterranean system*. Manchester University Press.
- Yusuf, Abdulqawi. 1982. *Legal Aspects of Trade-Preferences for Developing States: a Study in the Influence of Development Needs on the Evolution of International Law*. M. Nijhoff.
- Wacquant, Loic. 1992. Toward a Social Praxeology: The Structure and Logic of Bourdieu's Sociology. In: Pierre Bourdieu and Loic Wacquant (ed.). *An Invitation to Reflexive Sociology*. Cambridge.
- Wells, Sidney. 1965. The EEC and Trade with Developing Countries. *Journal of Common Market Studies*. **4**, pp. 150-167.
- Weil, Prosper. 1972. Le droit international économique: mythe ou réalité? In: *Société française pour le droit international. Aspects du droit international économique: Élaboration, contrôle, sanction*. Paris: Pédone.
- Weil, Prosper. 1983. Towards Relative Normativity in International Law? *Am. J. Int'l L.* **77**, pp. 413-442.
- Weiler, Joseph H.H. 2001. The Rule of Lawyers and the Ethos of Diplomats. *Journal of World Trade*. **35**, pp. 191-207.
- Wilkinson, Rorden. 2001. The WTO in Crisis. Exploring the Dimensions of Institutional Inertia. *Journal of World Trade*. **35**, pp. 397-419.
- Williamson, John. 1990. What Washington Means by Policy Reform. In: John Williamson (ed.). *Latin American Adjustment: How Much Has Happened?* Peterson Institute for International Economics.

- Williamson, John. 2002. Did the Washington Consensus Fail? *Outline of Speech at the Center for Strategic and International Studies* (6 November 2002) (Online) (Accessed 22 September 2018) Available from:
<http://www.iie.com/publications/papers/paper.cfm?ResearchID=488>
- Williamson, John. 2004. A Short History of the Washington Consensus. *Peterson Institute for International Economics*. (Online) (Accessed 22 September 2018) Available from:
<http://www.iie.com/publications/papers/williamson0904-2.pdf>
- Winham, Gilbert. 1986. *International Trade and the Tokyo Round Negotiations*. Princeton University Press.
- Winham, Gilbert. 2009. The Evolution of the World Trading System – The Economic and Policy Context. In: Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.). *The Oxford Handbook of International Trade Law*. Oxford University Press.
- Winters, L. Alan A. 2011. Preferential Trading Agreements: Friend or Foe? In: Kyle Bagwell and Petros Mavroidis (eds.). *Preferential Trade Agreements: A Law and Economics Analysis*. Cambridge University Press.
- Wolfe, Robert. 2005. Decision-Making and Transparency in the ‘Medieval’ WTO: Does the Sutherland Report have the Right Prescription? *J. Int. Economic Law*. **8**, pp. 631-645.
- Wood, Michael. 2017. Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute). In: Rüdiger Wolfrum *et al.* (eds.). *Max Planck Encyclopedia of Public International Law*. Oxford University Press.
- Zang, Dongsheng. 2009. Divided by Common Language: ‘Capture’ Theories in GATT/WTO and the Communicative Impasse. *Hastings Int'l & Comp. L. Rev.* **32**, pp.423-475.
- Zartman, William. 1970. The EEC’s New Deal with Africa: What the Africans Wanted, What the Europeans Offered, the Meaning of the New Yaoundé Convention. *Africa Report*. **15**, pp. 28-31.
- Zartman, William. 1976. Europe and Africa: Decolonization or Dependency. *Foreign Affairs*. **54**, pp. 325-343.
- Zeiler, Thomas W. 1999. *Free Trade, Free World: The Advent of GATT*. The University of North Carolina Press.

2. Reports, Bulletin, Informative

(i) European Union

European Commission. 1976. 1 *Bulletin of the European Communities*.

European Commission. 1982. *The European Community and the Arab world* (Europe Information: Development DE 38, June 1982).

European Commission. 1984. *The Mediterranean Policy*. In: Europe-South Dialogue.

(ii) GATT/WTO

WTO. 1995. *Regionalism and the World Trading System*. WTO Publications.

WTO. 2003. *World Trade Report 2003: Trade and Development*. WTO Publications.

WTO. 2011. *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence*. WTO Publications.

WTO. 2013. *World Trade Report 2013: Factors shaping the future of world trade*. WTO Publications.

WTO. 2014. *World Trade Report 2014: Trade and Development: recent trends and the role of the WTO*. WTO Publications.

WTO. 2018a. *WTO Analytical Index of the GATT*. WTO Publications.

WTO. 2018b. *WTO Analytical Index (Jurisprudence)*. WTO Publications.

WTO. 2018c. *WTO Analytical Index (Practice)*. WTO Publications.

WTO. 2018d. *Annual Report 2018*. WTO Publications.