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Article

2010

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Marceau, Gabrielle Zoe; Wyatt, Julian

How to cite

MARCEAU, Gabrielle Zoe, WYATT, Julian. Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO. In: Journal of international dispute settlement, 2010, vol. 1, n° 1, p. 67–95.
doi: 10.1093/jnlids/idp009

This publication URL: <https://archive-ouverte.unige.ch/unige:35611>

Publication DOI: [10.1093/jnlids/idp009](https://doi.org/10.1093/jnlids/idp009)

Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO

GABRIELLE MARCEAU AND JULIAN WYATT

The field of international trade law, often highlighted for its unity and the strength of its dispute settlement and remedies systems, is itself no stranger to the phenomenon of the so-called ‘proliferation’ of dispute settlement mechanisms. Regional trade agreements (RTAs) are increasingly prevalent and set up more and more solid and far-reaching dispute settlement systems, some of which are likely to come into direct contact with the multilateral system of the World Trade Organization (WTO). This article focuses on one particular type of such interaction between RTAs and the WTO: how should we address the issue of a trade countermeasure taken in the context of an RTA when such retaliatory action can be considered a breach of a WTO rule? A proper answer to this question requires an analysis of the flexibilities provided by the General Agreement on Tariffs and Trade and General Agreement on Trade in Services exception provisions allowing Members to maintain certain RTAs and of the nature of countermeasures often explicitly authorized by RTA dispute settlement mechanisms. The range of issues, relevant international law rules and potential solutions discussed are set to become only more pertinent both within the changing field of international trade law and, as international legal regimes become more robust and increasingly come into contact with one another, in contemporary international law in general.

1. Introduction

Many years ago, an article devoted to international trade would have been out of place in a journal on international dispute settlement. However, the revolution brought about by the Uruguay Round of 1986–1994 transformed trade law’s dispute settlement system from an archetype of unenforceable, politically dominated international dispute settlement to a legally rigorous, *de facto* compulsory, well-functioning and enforceable system which may have

Gabrielle Marceau is Counsellor in the Cabinet of the Director-General at the World Trade Organization and an Associate Professor in the Department of Public International Law, Faculty of Law, University of Geneva. E-mail: gabrielle.marceau@unige.ch. Julian Wyatt is a Teaching and Research Assistant and PhD Candidate in the Department of Public International Law, Faculty of Law, University of Geneva and a Barrister and Solicitor admitted to practice in the High Court of Australia and Supreme Court of Victoria. E-mail: julian.wyatt@unige.ch. The opinions expressed in this article are personal views of the authors which neither represent nor bind in any way the WTO or its Members. The authors are grateful to Joel Trachtman and the editors of this journal for their helpful comments on earlier versions of this article.

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even become, in some respects, the envy of the international law world. Indeed, very few international dispute settlement systems are obligatory, offer a two-tiered first instance and appellate review structure and the possibility of a more practical award in effect authorizing the successful party to take counterbalancing countermeasures. The World Trade Organization (WTO) version of trade dispute settlement has accordingly produced what is already a vast quantity of jurisprudence, with the Appellate Body in particular firmly establishing itself as the pre-eminent authority on legal questions regarding the interpretation and application of WTO agreements.

However, despite its prominence and new-found importance, WTO dispute settlement remains a creature of the Members of the WTO and is therefore not immune to one of the great challenges currently facing that particular multilateral system: the steady proliferation of regional trade agreements (RTAs). RTAs are all those agreements between subsets of States allowing them to depart from the WTO's fundamental most favoured nation clause in order to pursue a liberalization agenda which goes beyond that of the multilateral system. As pointed out by Bartels and Ortino, such agreements are now practically universal among WTO Members and increasingly economically significant for them.¹ While they retain the 'regional' moniker, these agreements now span the globe in what the economist Jagdish Bhagwati calls a 'spaghetti bowl' of overlapping agreements with a 'whole maze of trade barriers and duties that vary according to source'.² RTAs are not only increasingly numerous—some 450 have been notified to the WTO at the time of publication—but also increasingly wide in their scope, many more recent agreements venturing into not strictly trade-related areas such as labour, human rights, competition and investment. Of particular importance for the present paper is that RTAs are ever more likely to establish their own sophisticated enforcement regimes with dispute settlement mechanisms and provisions for countermeasures in response to breaches of their terms. As there are several overlaps between RTA and WTO rights and obligations, there is accordingly increasing potential for conflicts between the WTO and the RTA systems. This paper examines those issues, poses questions and suggests ways in which these overlaps could be handled.

A. The Debate So Far on WTO–RTA Overlaps: The Case of 'Double Breaches'

The majority of the literature written until this point in time that addresses the potential for jurisdictional overlap between the dispute settlement system

¹ Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Clarendon, Oxford 2006) 1.

² Jagdish Bhagwati, 'US Trade Policy: The Infatuation with Free Trade Agreements' in Jagdish Bhagwati and Anne Krueger (eds), *The Dangerous Drift to Preferential Trade Agreements* (AEI Press, Washington, DC 1995).

of the WTO and those established under RTAs, focuses on the most direct kind of overlap between dispute systems, namely where an RTA party challenges a given measure before an RTA dispute settlement body and then that same measure is challenged in the WTO dispute settlement mechanism. In the terms of Davey and Sapir, these situations involve a 'double breach' of both an RTA obligation and a WTO obligation such that both agreements' dispute settlement systems have jurisdiction over the exact same measure.³ This type of overlap reflects the situation faced in the famous *Mox Plant* dispute where the United Kingdom's planning and authorization of a nuclear fuel reprocessing plant on the Irish Sea was ultimately challenged in three different jurisdictions operating under three separate international regimes.⁴

That this 'double breach' type of jurisdictional overlap has been the focus of academic attention is understandable in light of the recent explosion of interest in the proliferation of international dispute settlement bodies in public international law in general and, indeed, the questions provoked by disputes such as the *Mox Plant* dispute.⁵

Taking their cue from fears of fragmentation of the international legal system, authors start from the premise that the double-handling of a dispute in parallel dispute settlement mechanisms for the enforcement of identical, or at least similar, RTA and WTO primary norms is highly problematic and therefore something which any dispute settlement body aware of this conflict should endeavour to avoid. Already in 2003, Marceau and Kwak had argued that WTO adjudicatory bodies cannot decline to hear a dispute brought before them even if all parties to the dispute had also signed an RTA priority clause in

³ William Davey and André Sapir, 'The *Soft Drinks* Case: The WTO and Regional Agreements' (2009) 8 WTR 5–23, at 23.

⁴ Ireland first made a request regarding the right to information under Art 9 of the OSPAR Convention before an arbitral tribunal under Art 32 of that Convention [see *Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, Final Award of 2 July 2003]. Ireland then instituted proceedings before an arbitral tribunal under Annex VII of the United Nations Convention on the Law of the Sea [see *MOX Plant (Ireland v United Kingdom)*, Request for Provisional Measures, ITLOS no 10, Order of 3 December 2001; and *MOX Plant (Ireland v United Kingdom)*, Order no 3 of 24 June 2003]. In addition to these proceedings, the European Commission then brought Ireland before the Court of Justice of the European Communities for an alleged violation of the exclusive competence (Art 292) of the EC Treaty (see Case C-459/2003 *Commission v Ireland* (ECJ 30 May 2006)).

⁵ The potential overlap between proliferating international jurisdictions has been a hot sub-topic of the wider fragmentation debate that has in many ways dominated international law discourse over the past 10–15 years. The debate generated conferences devoted to the topic such as the 1995 ASIL forum, 1997 EC International Law Forum and 1998 NYU/PICT symposium (for proceedings, see Laurence Boisson de Chazournes (ed), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (American Society of International Law, Washington, DC 1995); Malcolm Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, Oxford 1998); and (1999) 31 New York Univ J Int'l L Pol, respectively) and reactions from the International Court of Justice (ICJ) (see Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order' *Speech to the Sixth Committee of the UN General Assembly* (26 October 2000), press release available at <<http://www.icj-cij.org/presscom/files/9/3069.pdf>> accessed 26 September 2009 and even a dedicated study of the International Law Commission: Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) UN Doc GA A/CN.4/L.682.

favour of an RTA dispute settlement system,⁶ with a corollary debate emerging as to whether an RTA exclusive forum clause would be applicable, and, if so, how and to what extent. Then, in the wake of influential general international law work of authors like Yuval Shany in relation to notions such as judicial comity as a potential device to avoid jurisdictional conflict,⁷ some trade experts, including Pauwelyn, Mitchell, Gao and Lim, have recently conducted extensive searches for a means by which a principle of deference may be grounded in WTO law for such situations.

Pauwelyn and Salles, for example, explore domestic law analogies, evaluating the suitability of principles such as *res judicata*, *lis pendens* and *forum non conveniens*.⁸ Mitchell and Heaton, by contrast, focus primarily on the inherent jurisdiction of WTO tribunals and ask whether it extends to 'utility and comity' or to a form of estoppel which would preclude an already litigated claim from being brought again.⁹

Ultimately however, these contributions are forced to admit that serious doubts subsist as to whether such candidate principles can in fact operate in the WTO-RTA context to prevent the double exercise of jurisdiction.¹⁰ In many cases, the relevant principle, as defined by international law, is too narrow or otherwise ill-suited to the WTO-RTA context. *Res judicata*, for example, is frequently defined so narrowly that jurisdiction will only be refused where the cause of action (*causa petendi*) is the same in both instances of litigation. Since the precise cause of action differs even where the same measure is challenged for breach of an RTA provision and for breach of a WTO provision, *res judicata* will most likely not provide a solution to such situations, notably because of the different applicable law particularly regarding remedies and enforcement. In other cases, the relevant principle does not seem to have the necessary status of a general principle of international law which would potentially allow it to be used for the interpretation of WTO law pursuant to Article 3(2) of the WTO's Dispute Settlement Understanding (DSU) and potentially Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).¹¹ Equally, the concepts of inherent jurisdiction and

⁶ Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' (2003) 41 *Can Ybk Int'l L* 83; also in Ortino and Bartels (n 1) 465–524.

⁷ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, Oxford 2003).

⁸ Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 *Cornell Int'l LJ* 77, see in particular 102–13.

⁹ Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The need for a Principled Approach' *University of Melbourne Legal Studies Research Paper No. 416*, 32–46.

¹⁰ See also earlier on the same issue: Kwak and Marceau (n 6).

¹¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; 33 I.L.M. 1226 (1994); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980. Note that such non-WTO law would not be directly applicable and therefore could not itself lead to the prevention or suspension of WTO Panel proceedings. The applicable law at the WTO is limited to the WTO covered agreements, a *lex specialis*, and general international law is only relevant for the interpretation of that *lex specialis*.

compétence de la compétence are of uncertain legal status as operational rules, especially in WTO law, and arguably apply only as part of incidental jurisdiction, that is jurisdiction necessary to carry out the judicial function, not as a basis for refusing substantive jurisdiction.

It seems that the applicability of several of the potential options borrowed from domestic law or private international law were closed off by the WTO Appellate Body in the *Mexico – Soft Drinks* dispute. In that dispute, Mexico made a comity style argument before both the Panel and the Appellate Body, imploring them to refrain, on the basis of their inherent judicial function, from exercising substantive jurisdiction over what Mexico saw as a North American Free Trade Agreement (NAFTA) dispute. In rejecting such a course of action, both the Panel and the Appellate Body took the view that various provisions of the WTO's DSU, including its silence on panels' capacity to decline jurisdiction in favour of an RTA forum and the fundamentally compulsory nature of the WTO dispute mechanism, required the WTO adjudicatory bodies to exercise substantive jurisdiction over the dispute unless there was a legal impediment to stop them from doing so.¹²

One option to bring clarity and security regarding this type of overlap, and which was not necessarily closed-off by the *Mexico – Soft Drinks* Appellate Body, is the use of an 'exclusive forum clause' in favour of one system. Indeed, the Appellate Body noted explicitly that, in the dispute before it, NAFTA's exclusive forum clause had not been exercised.¹³ In addition to 'fork in the road provisions' such as NAFTA Article 2005(6), Gao and Lim identify non-exclusive forum selection clauses in various RTAs including the EFTA-Singapore FTA and Mercosur's Olivos Protocol which could also play such a role.¹⁴

This leaves open the question of whether a WTO panel would be entitled to decline jurisdiction if both parties to the dispute have agreed on a clause giving exclusive jurisdiction to the dispute settlement mechanism of an RTA. There is little WTO jurisprudence even indirectly relevant to the question of the applicability of non-WTO choice of forum clauses before WTO adjudicatory bodies and commentators' views on this issue appear to be diametrically opposed. Following on from Pauwelyn's previous work advocating a wide view of applicable law before WTO bodies which accommodates the vast bulk of general international law, Pauwelyn and Salles argue for introducing into WTO dispute settlement the jurisdiction and admissibility distinction well known at the ICJ, then claim that the latter concept of admissibility opens up the

¹² See: Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* ('*Mexico – Soft Drinks*, Panel report'), adopted 7 October 2005, WT/DS308/R as modified by the Appellate Body Report, paras 7.1–7.18; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* ('*Mexico – Soft Drinks*, Appellate Body report'), adopted 6 March 2006, WT/DS308/AB/R, paras 10 and 46–54.

¹³ *Mexico – Soft Drinks*, Appellate Body report, above n 12, para 54.

¹⁴ Henry Gao and CL Lim, 'Saving the WTO from The Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes' (2008) 11 JIEL 899–925.

possibility of reference to RTA forum choice clauses by WTO adjudicatory bodies.¹⁵ After a spirited defence of the more limited *status quo* regarding WTO applicable law against Pauwelyn's position, Gao and Lim conclude that RTA rules can only be applied under restricted circumstances and recognize the WTO's present limitations in referring to them by advocating, and even suggesting drafting for, amendments to the DSU that could help resolve such difficulties.¹⁶ Irrespective of one's position on this complex and ongoing debate regarding the applicability of non-WTO law at the WTO, one can expect long WTO disputes on the interpretation and applicability of such RTA exclusive forum clauses.

Clearly, finding a potential WTO legal basis to prevent WTO–RTA double litigation remains problematic and, as Gao and Lim's approach suggests, one of the only clear ways of rescuing WTO–RTA conflict of jurisdiction problems from the uncertainty of complex WTO debate on the applicability of non-WTO law, would be to amend or add to the relevant parts of the WTO structure. Perhaps, with a view to overcoming any applicability issues and enabling WTO panels to enforce such exclusive forum clauses, one could suggest the adoption of a General Council decision through which Members would explicitly allow RTA parties to give priority and even exclusivity to an RTA dispute settlement mechanism over the WTO DSU and DSU panels would be entitled to decline jurisdiction when they consider it appropriate. Parties would presumably disagree on the interpretation and applicability of such RTA forum clauses. In any case, it may be difficult in practice to obtain an appropriate amendment of the DSU, or a General Council interpretative decision, or a decision authorizing, for example, a WTO panel to refuse to exercise jurisdiction if, for instance, it is of the view that an RTA dispute settlement mechanism is more appropriate to handle the matter. With the WTO practice of consensus decision making, smaller developing WTO Members will most probably not support what in effect amounts to a transfer of some WTO jurisdiction to RTA dispute settlement bodies to the likely detriment of smaller states.

Improving RTA provisions, on the other hand, faces fewer obstacles. Specific RTA provisions could be adopted with a view to discouraging the parallel use of the WTO dispute settlement system. For example, the prospect of a directly enforceable penalty against any RTA party that launches a substantially similar dispute (defined appropriately) in the WTO could be introduced into RTAs. Such a penalty might even require the payment of damages equivalent to disgorging, say, 300% of any benefit gained at the WTO. This could be a means of reinforcing the primacy and exclusivity of the RTA system as well as a solution to the 'double breach' problem.

¹⁵ Pauwelyn and Salles (n 8) esp 98 and 118.

¹⁶ Gao and Lim (n 14) esp 22, 24 and 27.

The legal situation of RTA and WTO overlaps is broad and complex and calls for further reflexion and analytical work. As the previous discussion reveals, the bulk of academic work on the potential conflict between the WTO dispute settlement system and dispute settlement mechanisms of RTAs centres on one specific scenario: what happens when the same measure contested under an RTA mechanism is also contested before a WTO Panel, or vice versa? This article, however, focuses on a related but different issue which we will now discuss.

B. *A Different WTO–RTA Overlap: RTA Countermeasures that Violate WTO Rules*

Trade law is an area of international law offering a rare capacity for the enforcement of its provisions and decisions through countermeasures. Overlaps between trade systems can therefore lead to several conflicts. The present article focuses on a different and new dimension of the jurisdictional conflicts between the enforcement of RTA rights and obligations and the WTO system of rights and obligations: when a countermeasure from one system, an RTA system, is challenged as a measure in breach of another system's, here the WTO's, rules.

Given that countermeasures regularly and almost inherently involve the non-performance of legal obligations owed to the (originally) offending party, and that there is often considerable overlap between the substantive obligations contained in RTAs and those of the WTO covered agreements, an RTA countermeasure is not only certain to violate *a priori* the provisions of the RTA itself, but is also likely to violate the parallel WTO provisions.

Indeed, the fact situation of the *Mexico – Soft Drinks* dispute, even if not the WTO case itself, shows precisely how such a conflict may arise. In retaliation to a US sugar import regime that Mexico considered in breach of NAFTA annex 703(2)(A),¹⁷ Mexico imposed a 20% tax on all soft drinks produced with high fructose corn syrup, a product which Mexico imported predominantly from the United States. Clearly, what may have been permissible as a countermeasure under NAFTA (the United States blocked the formation of a NAFTA tribunal to hear Mexico's claim), was itself a breach of the WTO national treatment obligation.

Is it possible that trade-related countermeasures adopted pursuant to an RTA's enforcement regime, although *prima facie* inconsistent with WTO obligations, are justified on the basis that they are an inherent right of statehood and integral part of the rule of law imposed by the RTA system? Since Mexico cast its defence in terms of General Agreement on Tariffs and

¹⁷ See: North American Free Trade Agreement (adopted/opened for signature 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 ('NAFTA'), annex 703(2), section A. See also: *Mexico – Soft Drinks*, Panel Report, above n 12, part II.

Trade (GATT) Article XX(d) and did not specifically plead that its measure was justified as an RTA countermeasure under *general* international law on countermeasures that would be part of the WTO applicable law,¹⁸ neither the panel nor the Appellate Body in that case provided an answer to what Pieter-Jan Kuijper calls ‘the question that really mattered, namely whether the WTO system could accommodate the general international law of reprisals’.¹⁹

Kuijper’s analysis of this question approaches it from the direction of the degree to which the WTO system has truly opened itself up to general international law since the Appellate Body’s famous statement that the WTO agreements are ‘not to be read in clinical isolation from public international law’ in its very first report.²⁰

This again raises the complex issue of the applicability of non-WTO law, here RTA and general international law on countermeasures, before WTO adjudicatory bodies. It is not the purpose of this paper to plunge once more into this debate and into the issue of whether the WTO applicable law always includes all the provisions of general international law or whether WTO law is alternatively itself a sufficiently detailed *lex specialis* such that it is only affected by general international law insofar as its provisions must be interpreted coherently with it. Suffice it to say that the position that countermeasures taken in response to breaches anywhere else in the international legal system will automatically, and without reference to any relevant WTO law, be excused of WTO violations on the basis of a WTO applicable law wide enough to include general international law on countermeasures, is a very stringent imposition on the WTO legal system, probably contrary to the intention of the Members when they set it up.

In an attempt to provide a satisfying answer to the issue of the WTO compatibility of RTA trade countermeasures, one needs to address the issue of countermeasures (1) in customary international law as codified by the Rules on State Responsibility, (2) in WTO law and (3) in the law of RTAs. At the same time, one should not lose sight of the fact that particular provisions of the WTO agreements specifically permit the establishment and operation of certain RTAs. Is it possible that, in authorizing RTAs, WTO Members accepted that trade countermeasures may be used between the RTA parties in their RTA relations? Would this allow RTA parties to take trade countermeasures otherwise in violation of GATT/WTO rules? Can Article XXIV of the GATT/WTO be invoked as a full defence to justify RTA trade-countermeasures inconsistent with WTO market access rules? If so, how and to what extent?

¹⁸ *Mexico – Soft Drinks*, Panel Report, above n 12, see para 8.162.

¹⁹ Pieter-Jan Kuijper, ‘Does the World Trade Organization Prohibit Retorsions and Reprisals? Legitimate ‘Contracting Out’ or ‘Clinical Isolation’ Again?’ in Merit E Janow and others (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Juris Publishing, Huntington, NY 2008).

²⁰ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, adopted 29 April 1996, WTO Doc WT/DS2/AB/R, 16.

Given that many countermeasures capable of being taken under an RTA will involve a breach of WTO obligations, it becomes necessary to reflect further on the nature of the permission the WTO gives its Members to conclude RTAs and whether this permission entails that RTAs parties may use trade-countermeasures in their RTA relations. Can an RTA party condemned by the RTA system for having violated the RTA be permitted to nullify the effects of justifiable RTA countermeasures by invoking, for example, a most-favoured nation violation in the WTO?²¹ Would this not prevent the effective operation of any ambitious RTA where parties, like WTO members, may potentially wish to use trade countermeasures as a component of their enforcement regime?

There is no clear provision in the WTO stating whether RTAs parties can take a trade-countermeasure that would be inconsistent with WTO obligations. However, one must consider whether, based on the WTO provisions allowing for the establishment of effective RTAs, WTO Members are presumed to be entitled to adopt operational RTA dispute settlement systems coupled with enforceable trade countermeasures, and if so under what conditions?

Since we are dealing with this special type of measure adopted in the RTA context, namely countermeasures, we next discuss briefly the international law on countermeasures before focussing our analysis on the nature of the WTO exception in favour of RTAs, with a view to assessing whether its scope allows for trade countermeasures that would be *prima facie* inconsistent with WTO provisions.

2. Countermeasures in International and WTO Law

A. Countermeasures in General International Law as codified by the Rules on States Responsibility

Under general international law, unilateral determination of the existence of an internationally wrongful act is the default basis for the adoption of 'non-forcible' countermeasures.²² This is a right recognized by the customary Rules on State Responsibility (RSR) as codified by the International Law Commission's (ILC's) 2001 *Draft Articles on State Responsibility* ('SR Articles') subsequently adopted by the General Assembly.²³ These rules appear to

²¹ In the general case outlined above, after the WTO ruling against it, Mexico could refuse to drop its countermeasures at which point the United States could potentially adopt WTO-authorized countermeasures against Mexico under WTO law which Mexico could then potentially have ruled a violation by a NAFTA panel, enabling Mexico to then take further NAFTA-authorized countermeasures and so on, with the cycle potentially repeating itself until there were no Mexico-US trade obligations left to be suspended. While it is unlikely that two WTO Members and RTA Members would proceed in such a manner, if the WTO Panel were to refuse the wider RTA context of a dispute such a sequence of events, while improbable, could in fact occur.

²² See ILC, 'Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission Fifty-Third Session' (2001) UN Doc A/56/10, 20-143 ('State Responsibility Articles') (in particular Art 52).

²³ General Assembly Resolution A/RES/56/83 of 12 December 2001, Fifty-sixth session, Agenda item 162.

require States to exhaust all available dispute settlement mechanisms before resorting to (unilateral) countermeasures.²⁴

As the SR Articles reveal in relation to countermeasures at general international law, just because countermeasures are authorized in a given situation does not mean that there are no conditions and limitations on their use. For example, it has been accepted, at least since the time of US Secretary of State of Webster's famous letter in the 1837 *Caroline* incident, which 'necessity and proportionality' qualify all resort to measures taken in response to another States' action, be they taken in self-defence or for the purposes of coercion.²⁵ Conscious of the fact that countermeasures are liable to abuse, particularly where there are factual inequalities between States,²⁶ the SR Articles impose further conditions on the use of countermeasures including that they be directed solely against the responsible state and not against third parties [Articles 49(1) and 49(2)], temporary and reversible [Articles 49(2), 49(3) and 53] and not in violation of important norms of international law including the prohibition on the use of force, human rights and *jus cogens* norms [Article 50(1)].²⁷

Yet, the RSR remain residual, their provisions on *lex specialis* suggesting that States can deviate from the conditions they impose, with the rules continuing to apply for matters not covered by such *lex specialis* provisions.²⁸

B. The WTO's DSU Rules on Unilateral Countermeasures

Arguably the WTO's DSU does constitute (at least in part) a *lex specialis* provision for the administration of trade disputes and for the use of countermeasures relating to the WTO covered agreements. Although the terms of Article 23 of the DSU only require Members not to take unilaterally determined countermeasures in relation to the WTO covered agreements, this wording may also reflect the WTO membership's overall attitude against the taking of unilaterally determined trade countermeasures. Indeed, it would be somewhat odd if the WTO Members were to be lenient regarding unilateral trade measures where taken in the context of breaches of an RTA provision while maintaining its strict ban on trade unilateralism undertaken for the purposes of enforcing the provisions of the WTO covered agreements. A reading pursuant to which the WTO prohibits trade countermeasures based on unilateral determination, irrespective of the breach they are taken in response to, is therefore, we submit, at least plausible.

²⁴ State Responsibility Articles, above n 22, Art 52(3)(b).

²⁵ See eg *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7. See also SR Articles, above n 22, Arts 51 and 52.

²⁶ International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' (2001) II YBILC, Part Two ('State Responsibility Commentaries') 128.

²⁷ State Responsibility Commentaries, above n 26, 129.

²⁸ State Responsibility Articles, above n 22, Art 55.

One could also argue that the WTO system in general, including the various GATT rules likely to be breached by non-WTO countermeasures, themselves provide a *lex specialis* capable of displacing or restricting the applicability of state responsibility rules on countermeasures in the WTO context. Indeed, the ILC's commentaries to the SR Articles chapter on countermeasures specifically state that: 'a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation'.²⁹ Couldn't the GATT rules, violation of which can only be justified under a restrictive list of general exceptions or the restricted scope of countermeasures permitted under DSU Article 23, be sufficient to displace any other general international law reasons for non-compliance with them? After all, there is no reference to taking of countermeasures in response to non-WTO breaches in the general exceptions of GATT Articles XX and XXI which are usually read as an attempt to cover the field of bases upon which WTO violations may be excused. It would be strange if a trade-related measure taken to protect human life were subjected to the good faith test in the chapeau of Article XX, yet a measure portrayed as a trade countermeasure to a breach of a health provision in an RTA were not subjected to any WTO review. Such an argument has not yet garnered any jurisprudential or doctrinal support, but is supported by a pragmatic, common sense view of WTO dispute settlement, a view which may have been held by Mexico's representatives when they chose to focus their attention on the barely suitable general exception contained in Article XX(d) for measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement' in the *Soft Drinks* case. Such an approach clearly betrays the view that only matters listed in the GATT as exceptions (including, arguably, Article XXIV allowing for RTAs as discussed below) provided a defence to WTO violations and that a panel would not be able to entertain an argument that the measure be excused as a countermeasure taken in response to a breach of a non-WTO agreement.

C. RTA Rules on Unilateral Countermeasures

Do state responsibility rules allow for unilaterally determined countermeasures in the context of RTA relations? RTAs can include explicit *lex specialis* provisions on the matter which would displace the relevant general rules of state responsibility. The Association of Southeast Asian Nations (ASEAN) Protocol on Enhanced Dispute Settlement Mechanism, for example, limits the suspension of concessions to 'the event that the findings and recommendations of panel and Appellate Body reports adopted by the Senior Economic Officials are not implemented'.³⁰ However, where an RTA makes no express provision

²⁹ State Responsibility Commentaries, above n 26, Chapter II of Introduction to Part III, para 9, 129.

³⁰ ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Vientiane, 29 November 2004, Art 16.

limiting the adoption of unilaterally determined countermeasures, should it be read to permit them?

While there are no explicit provisions in the WTO on RTA countermeasures, are there WTO principles that are relevant for RTA-related countermeasures? As discussed further in Section 3, RTAs operate as an exception in the WTO system of rights and obligations. GATT Article XXIV and its GATS Article V equivalent for services authorize RTAs, but impose conditions to ensure that RTAs continue to operate within the 'WTO system' and respect its basic institutional principles. Arguably, one such general principle is the WTO prohibition on Members making a unilateral determination of a violation that can lead to the imposition of countermeasures as provided for in Article 23 of the DSU already discussed above. Articles 22 and 23 of the DSU explicitly prohibit the imposition of countermeasures that have not been authorized by the WTO membership, albeit through reverse consensus. In other words, although Article 23 of the DSU applies, strictly speaking, only to disputes relating to the WTO-covered agreements, and not to RTAs disputes, one could argue that the extraordinary nature of Article 23 and the importance of this unique prohibition against unilateral action relative to WTO trade, has permeated the entire multilateral trade system including its regional trade sub-systems. After all, RTAs that would be WTO consistent are those authorized by Article XXIV of GATT, which is itself a covered agreement. So it is not implausible that RTAs, as part of the WTO legal system, are also read to prohibit unilateral determinations. Moreover, given that many RTAs borrow heavily from the terms and structure of the DSU when outlining the secondary norms applicable to a breach of the RTA's terms, it is far from unforeseeable that the DSU's presumption against unilateral countermeasures could be read into the terms of many RTA's which, while not explicitly banning unilaterally determined countermeasures, adopt a WTO-style form that seems anathema to them. If this is indeed the case, then the WTO *lex specialis* against all forms of unilateral trade action, would have the effect of reversing any applicable general international law presumption that a State may unilaterally take countermeasures in the context of their RTA relations. This would mean that countermeasures, even RTA countermeasures, would need to be clearly authorized, both by the RTA itself and the WTO.

Such pre-authorization would arguably take place when an RTA providing implicitly or explicitly for the use of countermeasures, is accepted by the membership either upon its notification to the WTO or later on in the context of a dispute, a situation discussed further.

In sum, one could argue that the RSR can supplement RTA provisions on countermeasures, so long as the relevant RTA or, potentially, WTO rules do not exclude their application. This would be the case, for instance, where an RTA allows its parties, either expressly or impliedly, to take countermeasures, but says nothing about the form which they may take, residual general

international law conditions on the exercise of countermeasures becoming applicable for the RTA parties in respect of the form of the countermeasures they adopt.

Since the only RTA countermeasures that can come before the WTO are violations of trade-related obligations (including trade-related intellectual property rights), the conditions that they are temporary and reversible and that they do not breach important, predominantly use of force related norms, do not pose a problem. However, the issues of necessity and proportionality, combined with the condition that they be directed solely against the responsible state, do impose restrictions. While very few RTAs currently in existence expressly state to whom a countermeasure should be directed, they seem to take for granted that countermeasures can be applied only against the party at fault.

It should be noted that many, particularly contemporary RTAs describe in some detail the form which countermeasures may take and are therefore likely to displace, at least in part, the relevant general international law rules. In addition, the following passage from the ILC's commentaries to the State Responsibility Articles appear to suggest that where the text of the RTA requires that a specific dispute settlement regime be used, residual rules of general international law on countermeasures may well be excluded:

In common with other chapters of these Articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. **Likewise a regime for dispute resolution to which States must resort in the event of a dispute**, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.³¹ (emphasis added)

Furthermore, the commentaries interpret Article 50(2)(a), which simply states that a 'State taking countermeasures is not relieved from fulfilling its obligations [u]nder any dispute settlement procedure applicable between it and the responsible State' as saying that 'countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute [Article 50(2)(a)]'.³² This limits the possibility of unilaterally taking RTA countermeasures if the text of the RTA requires that a dispute settlement mechanism be used and/or that a specific process be followed before the imposition of countermeasures.

Accordingly, an RTA obligation to use a specific dispute settlement system may itself prevent the taking of countermeasures under that agreement without

³¹ State Responsibility Commentaries, above n 26, Chapter II of Introduction to Part III, para 9, 129 (original footnotes omitted).

³² State Responsibility Commentaries, above n 26, 327.

going through the RTA dispute settlement mechanism first. This approach would also appear to be coherent with the WTO DSU's Article 23 prohibiting the unilateral determination of a basis for the use of countermeasures, as discussed above.

Having concluded that WTO law and general international law rules on countermeasures may allow for the adoption of trade countermeasures in the context of an RTA, we now need to examine whether the WTO imposes conditions for RTAs to be WTO consistent and to what extent such conditions affect the right of RTA parties to take trade countermeasures inconsistent with WTO rules.

3. *WTO Law on RTAs: What Does GATT Article XXIV Allow for?*

A. *GATT Article XXIV and GATS Article V as 'Defences'*

The first key question which arises in this respect is whether GATT Article XXIV and, by analogy, its GATS Article V equivalent, are capable of operating as exceptions or, in other words, as defences which can be invoked by a WTO Member to justify a measure that would otherwise be in violation of its WTO obligations.

GATT Article XXIV is most commonly viewed as an exception to the most favoured nation rule contained in GATT Article I, allowing a subset of Members to liberalize trade between them without extending such liberalization to all other WTO Members.³³ However, this does not mean that the scope of the Article XXIV exception is restricted to *prima facie* breaches of Article I.³⁴

In its *Turkey – Textiles* report, the Appellate Body placed a new emphasis on Paragraph 5 of GATT Article XXIV³⁵ and confirmed the conditional 'right' of WTO Members to form RTAs. In particular, the Appellate Body focused on the words 'shall not prevent' as proof of the fact that 'Article XXIV may, under

³³ Indeed, in a key early text on GATT law, John Jackson characterised it as 'an exception to GATT obligations' in general [J Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, Indianapolis 1969) 576] and the GATT Panel presiding over the first major dispute in which Art XXIV was invoked as a defence, *EC – Bananas* of June 1993, also appeared to speak of a general exception or defence stating that 'Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement' (*EEC – Member States' Import Regime for Bananas*, 3 June 1993 (not adopted), GATT Doc. DS32/R). See also, Peter Hilpold 'Regional Integration according to Article XXIV: GATT – Between Law and Politics', in Armin von Bogdandy and Rüdiger Wolfrum (eds), (2003) 7 Max Planck Yrbk UN L 219–60; and Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, adopted 12 June 2007, WT/DS332/R, para 7.273.

³⁴ *EEC – Member States' Import Regime for Bananas*, 3 June 1993 (not adopted), GATT Doc. DS32/R.

³⁵ Para 5 of GATT Art XXIV reads as follows: 5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that: ...

certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency'.³⁶

What is the scope of this defence? The key part of the provision which establishes Article XXIV as a defence, speaks not merely of GATT Article I, but of 'the provisions of this Agreement' in general.³⁷ The Appellate Body insisted in *Turkey – Textiles* that 'Article XXIV of the GATT 1994... may be invoked as a defence to a claim of inconsistency with [Article XI of the GATT and Article 2(4) of the Agreement on Textiles and Clothing], provided that the conditions set forth in Article XXIV for the availability of this defence are met'.³⁸

The scope of the Article XXIV defence, if available for RTA countermeasures, would therefore be broad enough to excuse countermeasures that violate GATT provisions and possibly even other WTO provisions linked to GATT Article XXIV. What are those conditions and how is the WTO consistency of RTA being assessed in the WTO?

B. Political Hurdles in The Authorization of RTAs upon Their Notification

Pursuant to Paragraph 7 of GATT Article XXIV(7), the WTO must be notified of an RTA as soon as it is concluded. RTA parties should not put into force or maintain any such RTA unless they comply with the WTO Members' recommendations for making the RTA concerned WTO consistent. In practice however, because of the WTO's consensus decision making practice, no RTA has ever been explicitly approved as being WTO consistent because RTA parties will generally refuse to make any changes demanded by non-RTA Members to the notified RTA. The WTO jurisprudence has therefore developed a process whereby the WTO consistency of a specific RTA is addressed as a preliminary matter when an RTA measure is challenged and the RTA exception is invoked.

C. The First Condition: The RTA Must Be Fully Consistent with WTO Requirements

The leading jurisprudence we have on the scope of Article XXIV exception is the Appellate Body's *Turkey–Textiles* report which, of course, dealt with an RTA that had not been explicitly authorized by WTO Members upon its notification. Where an RTA is invoked as a defence to justify a trade restriction, the

³⁶ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, adopted 22 October 1999, WT/DS34/ABR ('*Turkey – Textiles*, Appellate Body Report') para 45.

³⁷ Note, however, that in subsequent paragraphs the Appellate Body in *Turkey – Textiles* speaks of 'certain GATT provisions'.

³⁸ *Turkey – Textiles*, Appellate Body Report, above n 38, footnote 13 to text in para 45.

Appellate Body set down the following requirements discerned from the text of Paragraph 5 of Article XXIV:

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the [challenged] measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.³⁹

This dictum clearly establishes the need to prove, when any claim is made to Article XXIV as a defence, that the RTA being invoked meets the WTO definitional requirements for such arrangements.

Complying with Article XXIV means complying with the principles of Article XXIV Paragraphs 5 and 8, read in light of Paragraph 4 which states the provision's overall purpose. As discussed in greater detail below, these provisions effectively require that, for an RTA to be WTO-compliant, it must not, *inter alia*, result in the raising of trade barriers *vis-à-vis* WTO Members not party to the RTA. Incidentally, this concern in favour of Members not party to the RTA seems to be parallel to the approach in Article 41 of the Vienna Convention which allows a subgroup of states to deviate from a multilateral treaty so long as, *inter alia*, the possibility of such modification is not prohibited by the treaty and that the modification does not affect the enjoyment by the other parties of their rights or the performance of their obligations.⁴⁰ In effect, this means that to meet the first hurdle, a Member seeking to invoke the right to take a countermeasure under the RTA must show that this right does not adversely affect third parties. Equally, any enforcement regime contained in an RTA and the remedies it permits, must be demonstrated to be in keeping with the requirements of Article XXIV before any measure taken under that regime can have any chance of being granted the benefit of the Article XXIV exception.

Going into depth on the specifics of each of the multitude of RTAs currently in existence to determine whether they meet the requirements of Subparagraphs 5 and 8 of GATT Article XXIV is an enormous task which falls well outside the ambit of this inquiry,⁴¹ but it should be noted in this context that this first stage at which a WTO member must demonstrate the WTO-compliance of the agreement relied upon may in many cases provide an insurmountable hurdle.

³⁹ *Turkey – Textiles*, Appellate Body Report, above n 38, para 58 (Appellate Body's emphasis)

⁴⁰ See: Vienna Convention on the Law of Treaties (opened for signature 23 May 1969 entered into force 27 January 1980) 1155 UNTS 331 ("VCLT") Art 41.

⁴¹ See, eg John Lockhart and Andrew Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and its Limits' in Andrew D Mitchell (ed) *Challenges and Prospects for the WTO* (Cameron, London 2005).

The jurisprudence of *Turkey – Textiles* suggests therefore that GATT Article XXIV operates as a general exception in relation to WTO-compliant RTAs, perhaps even in the same vein as GATT Articles XX and XXI, providing a justification for any violation of obligations either in the GATT itself or in any WTO covered agreement expressly linked to the GATT. However, GATT Article XXIV remains an ‘exception’, so the terms of the RTA exceptionally authorized must be respected. Indeed, by making an exception for regional trade regimes, the GATT Article XXIV and GATS Article V provisions cannot have been intended to afford deference to all measures connected to an RTA, even those in breach of such an RTA’s terms. A precondition for any WTO inconsistent measure to be excused under the RTA exception would therefore be that it was taken pursuant to and in conformity with the exceptionally authorized terms of the RTA.

D. The Second Condition: The Countermeasure Must Have Been Adopted in Conformity With The Terms of The Authorized RTA

Whether or not a countermeasure is taken in conformity with a given RTA will usually depend on a careful consideration of the overall structure and terms of that RTA and, where it is silent on relevant aspects, the residual rules of general international law in relation to countermeasures such as those discussed above.

A brief survey of the major RTAs notified to the WTO indicates that several older RTAs are silent on the use of countermeasures. By contrast, many more recent and more evolved RTAs authorize countermeasures in some situations, but do not state expressly whether or not they are authorized in other situations.

Broadly speaking, an RTA may: (i) be silent on countermeasures; (ii) regulate the use of countermeasures; or (iii) prohibit countermeasures.

(i) RTAs silent on countermeasures and dispute settlement

Where a countermeasure is taken under an RTA which says absolutely nothing about countermeasures or any form thereof and, further, neither provides for a dispute settlement system or any other way of dealing with the violation of its terms, such countermeasures would, *prima facie*, be possible on the basis of the RSR. Unless, the principle of DSU Article 23 prohibiting unilateral countermeasures were to be read as being included in all WTO consistent RTAs themselves authorized by a provision of a WTO covered agreement subject to Article 23 DSU disciplines, the RSR regarding countermeasures, which would apply in the absence of any RTA *lex specialis*, would seem to authorize unilateral necessary and proportional countermeasures taken in response to a breach of such an RTA.

(ii) RTAs that regulate countermeasures

Many RTAs set up a dispute settlement body for disputes relating to the interpretation and application of the RTA and expressly provide that trade

suspensions may be implemented where the opposing party does not implement the decision taken by such an RTA body. For example, NAFTA, Mercosur and ASEAN allow a party in possession of a ruling in its favour to suspend trade benefits of equivalent effect if the internal dispute settlement ruling has not been complied with within a relatively short period time, though in the latter case approval of the Senior Economic Officials Meeting (SEOM) is required before the countermeasures can actually be implemented.⁴² Equally, bilateral trade agreements such as the Australia–US free trade agreement on the EFTA–Chile free trade agreement also authorize the taking of countermeasures by a party which has obtained a ruling in its favour, but has not seen any evidence of compliance with it after a certain period of time.⁴³

Does an agreement structured in this way, by expressly authorizing countermeasures in one specific circumstance, impliedly prohibit them in all other circumstances?

An RTA of particular interest which takes this form is NAFTA, the relevant provisions of which read as follows:

Article 2004: Recourse to Dispute Settlement Procedures

[...]he dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

[...]

Article 1919: Non-Implementation-Suspension of Benefits

1. If in its final report a panel has determined that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex 2004 and the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 1818(1) within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.

One could argue that in a strict logical sense, the statement that if there exists an RTA ruling that has not been complied with, then countermeasures may be taken, does not equate to saying that countermeasures may only be taken *if and only if* there is a ruling that has not been complied with. In other words, these agreements state that the existence of a ruling that has not been complied with is a *sufficient*, but not *necessary* condition for the implementation of countermeasures.

⁴² NAFTA, above n 17, Art 2019 (30 days), Olivos Protocol for the Settlement of Disputes in Mercosur (opened for signature on 18 February 2002, entered into force on 10 February 2004) (2003) 42 ILM 1 ('Olivos Protocol') Arts 31 and 29 (a reasonable period of time for implementation specified or, by default, 30 days), ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Vientiane, 29 November 2004, Art 16 (60 days).

⁴³ See eg Australia–United States Free Trade Agreement (2004), Art 21(11) and Free Trade Agreement between the EFTA States and the Republic of Chile, Art 26.

Most authors, however, tend to consider that such an agreement, by expressly authorizing countermeasures in one specific circumstance, impliedly prohibits them in all other circumstances. Perez-Aznar, for example, interprets Article 2019 of NAFTA to mean that ‘countermeasures can only be taken if the [NAFTA] panel report is not implemented voluntarily’.⁴⁴ Moving away from a strict textual interpretation of the agreement’s terms and seeing them in the practical context of their drafting, such a conclusion is attractive as it is unlikely that the drafters would have expressly authorized countermeasures in only very limited circumstances if they had intended them to be permitted in all situations of breach anyway. Furthermore, the fact that many such RTAs attempt to mirror, to varying degrees and with varying levels of success, the WTO dispute settlement and enforcement systems, suggests that their drafters intended the WTO position on countermeasures to apply: namely that countermeasures may only be taken where they are expressly authorized.⁴⁵

From a WTO perspective, whether an RTA party taking the countermeasure has been authorized to do so by the combination of a dispute settlement body operating under the auspices of the RTA, express terms of the RTA itself and/or the RTA ruling, will essentially be a ‘factual’ determination. At the same time, a WTO party may in some cases, challenge the allegation made by the other party that the countermeasure is indeed adopted in conformity with the RTA process, particularly where no RTA body has made a decision regarding the legitimacy of that second party’s countermeasure. Such situations would require a WTO panel to examine the exact wording and operation of the RTA. Although WTO panels technically deal only with WTO disputes⁴⁶ and exclusively apply the WTO covered agreements, prior panels and the Appellate Body have examined non-WTO agreements explicitly linked to the WTO; very often as a factual matter relevant in the interpretation and application of WTO provisions. For instance in the famous *EC – Bananas* dispute, the WTO adjudicating bodies examined and interpreted the Lomé Convention to determine the exact scope of the EC waiver that exceptionally authorized the preferences of the Lomé Convention.⁴⁷ In the RTA context, the

⁴⁴ Facundo Perez-Aznar, ‘Countermeasures in the WTO Dispute Settlement System’ *Studies and Working Papers of the Graduate Institute of International Studies*, Geneva, 2005, 13 citing Gabrielle Marceau, ‘The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organisation’ in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International, The Hague 1999) 487–541.

⁴⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401; (1994) 33 ILM 1226 (‘DSU’), Art 23, Panel Report, *US – Certain EC Products*, adopted 17 July 2000, WT/DS165/R, paras 6.19–6.20 (upheld in Appellate Body Report, adopted 11 December 2000, WT/DS165/AB/R, para 111).

⁴⁶ *Mexico – Soft Drinks*, Appellate Body Report, above n 12.

⁴⁷ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 9 September 1997, WT/DS27/AB/R.

Canada – Autos panel, for example, displayed no reluctance in interpreting and applying Paragraph 1 of Annex 300-A.1 of NAFTA.⁴⁸

Our requirement that a WTO panel could only excuse measures taken in conformity with a WTO-authorized RTA implies that countermeasures taken in breach of an RTA should not benefit from the exceptions in GATT Article XXIV and GATS Article V. Just as a WTO Panel would likely accept as a “fact” the decision of an RTA dispute settlement body that RTA Party B’s measures *X* breached an RTA rule thereby entitling Party A to countermeasures on certain conditions, it would most likely equally accept an RTA body’s decision that Party B’s measures *X* did not breach an RTA rule and thus provide no basis for countermeasures whatsoever. This means that, if an RTA Party has obtained an unfavourable ruling from an RTA dispute settlement body, any countermeasures nonetheless taken will not be excused of any WTO violation they involve on the basis of the Article XXIV and Article V exceptions.

The situations where a party has sought and obtained a ruling from an RTA dispute settlement body are accordingly not so problematic for the purposes of this RTA conformity part of our analysis. However, if there is an RTA dispute settlement procedure available, but there is no actual ruling to support the countermeasure, the situation is considerably more difficult to determine. Where an RTA Party does not follow the process provided explicitly or implicitly in the RTA as a precondition to the adoption of countermeasures, it is likely that those measures would be deemed not to have been taken in conformity with the RTA and therefore not capable of justifying violations of WTO provisions. Indeed, where an agreement places a procedural limitation on the exercise of a right, a party not satisfying the procedural precondition and still exercising that right, cannot be seen to be acting pursuant to or in conformity with that agreement. Furthermore, requiring the exhaustion of the RTA dispute settlement mechanism before using countermeasures would be consistent with the WTO’s DSU prohibition of non-authorized countermeasures.

Where an RTA provides for a dispute settlement mechanism, but is silent on countermeasures, the situation is difficult and it depends on whether any weight is given to the WTO principle against non-authorized countermeasures in such an RTA. As noted above, there is general international law supporting the view that the existence of a dispute settlement system for an agreement may itself prevent the taking of countermeasures under that agreement without going through the RTA dispute settlement first. Such a view is not only remarked upon in the ILC’s commentaries to the SR Articles, but, as Pieter-Jan Kuijper explains, a general principle in other areas of law such as European law with the *Belgium-Luxembourg milk case* reasoning that ‘a complete and

⁴⁸ Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, adopted 11 February 2000, WT/DS142/R (*Canada – Autos*, Panel report), especially at para 268.

watertight system of compulsory dispute settlement system... ought not to be upset by the remedies available under general international law'.⁴⁹

However, as Kuijper notes, greater difficulty arises in relation to systems which are not subject to a watertight and compulsory dispute settlement system.⁵⁰ A particularly problematic scenario can be envisaged is for RTAs that have a dispute settlement system they either expressly or impliedly require to be used to confirm the existence of a breach before countermeasures are implemented. Imagine that Party A tries, in accordance with such an RTA, to get authorization to take countermeasures, but Party B succeeds in blocking this process. Will Party A still be deemed not in conformity with the RTA if it eventually adopts the countermeasures believing itself entitled to do so and in spite of the absence of the formally required, but substantively unattainable RTA body's authorization? Although this is precisely what occurred in the *Mexico – Soft Drinks* dispute, it is important to recall that in that dispute Mexico did not invoke Article XXIV as a defence, so that decision cannot be used for guidance on how to deal with such a situation if Article XXIV and/or Article V were invoked.

Seen from a legal perspective, this scenario does not differ from the one discussed just above in which we consider that access to the Articles XXIV and V defences would likely be refused on the basis that Party A had failed to observe the RTA's procedural pre-condition for the adoption of countermeasures. However, from a policy perspective some may argue that such an outcome would allow Party B to 'get away with' its RTA violations by simply refusing to go to RTA dispute settlement and then successfully countering any countermeasures taken by Party A at the WTO. This seems to point to the need to ensure that RTAs include a fully compulsory and automatic dispute settlement mechanism, because otherwise the RTA parties would be considered to have given away or suspended their right to use countermeasures under general international law even where they seem to provide for a system which authorizes such measures in some situations. Indeed, to the extent that an RTA conditions the use of countermeasures on the prior obtainment of an RTA ruling, but does not possess a fully compulsory dispute settlement system, its lack of compulsory jurisdiction could be exploited to completely undermine all countermeasures taken under that RTA and thus the enforcement of the RTA obligations themselves. However, as the *Mexico – Soft Drinks* report itself proves, a WTO Panel is required primarily to apply its own law and not to consider the overall 'fairness' of the outcome of its application of this law, particularly where such unfairness results from a weakness in an instrument largely separate from the WTO.

⁴⁹ Pieter-Jan Kuijper (n 19) 707 citing Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECJ *Recueil* 2729, point 9.

⁵⁰ *Ibid.*

Clearly then, if RTA parties would prefer the legal position to reflect what seems intuitively appropriate in such situations, the problem could easily be solved by reforming the RTA agreement either to make its dispute resolution system fully compulsory or, alternatively, by expressly stating that countermeasures may be taken even without the backing of a prior ruling from the relevant RTA dispute settlement body.

(iii) RTAs that prohibit the use of countermeasures (in certain circumstances)

Finally, some RTAs expressly prohibit the taking of countermeasures altogether.⁵¹ In this context countermeasures could not claim to have been adopted in conformity with an RTA and any supposed defence based on an RTA's provisions would therefore fail. If the RTA prohibits countermeasures unless they follow the explicit RTA process, then one could argue that WTO Members granted the right to use RTA countermeasures only pursuant to that specific process.

(iv) Conclusion: the countermeasures must be taken in conformity with the RTA

In sum, GATT Article XXIV and GATS Article V could not justify a countermeasure claimed to be an application of an RTA authorized by the WTO when this measure is not applied in conformity with the explicit and implicit terms of the RTA.

Once a WTO Panel has reached the conclusion that a specific RTA countermeasure was adopted in conformity with the terms of a WTO-authorized RTA, should it automatically grant such a measure the benefit of the regional integration defence or should it impose some kind of limits or control on the implementation of even these measures? On the one hand, potentially refusing the use of the defence for such measures runs the risk of effectively rendering worthless the enforcement of the rule of law of the RTA, but, on the other, it is perhaps appropriate that the WTO ultimately retains some control over which specific measures can and cannot be excused of the WTO violation they engender.

Ultimately, the answer to this question depends on whether GATT Article XXIV and GATS Article V provide an exception for all measures taken in conformity with a WTO compliant RTA, or instead require some sort of 'connection' between the measure claimed to be taken in conformity with the

⁵¹ For example, Art 10 of the EC Treaty, has been interpreted to prohibit any Member state from adopting 'on its own authority, corrective or protective measures designed to obviate any breach of another Member State of rules of Community law' (Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, European Court of Justice, 23 May 1996, para 20). See also: Art 10 EC Treaty. Note that, in the WTO, the EC Treaty is not itself a relevant example because all EC Members operate as if they are one WTO Member at the WTO, making the imposition of countermeasures between France and the UK, for example, an event that would never come before a WTO Panel.

RTA and the WTO. In addition, should there not be an additional form of WTO control over such a measure?

D. Third Condition: The Challenged Measure Must Have Been Essential to The Formation of The RTA

While, as noted above, GATT Article XXIV was always intended to operate as an exception to WTO prohibitions, it does not itself speak of what contested measures come within the scope of such an exception.

The *Turkey-Textiles* report set up conditions to be respected for a challenged measure to benefit from the application of Article XXIV: the Member invoking the benefit of Article XXIV must also demonstrate that the formation of that RTA union would be prevented if it were not allowed to introduce the measure at issue.

Turkey-Textiles' suggestion that the challenged measure must have been there upon the RTA formation calls for the question: what is the 'measure'? In the context of countermeasures, the specific measures, for example, the temporary implementation of a tariff on another RTA party's imports, are inherently taken after the formation of the regional trade area, so this dictum somewhat limited to its facts must surely be interpreted to be requiring that formation of the area would have been prevented if the explicit or implicit *right to take countermeasures* had not been allowed. If, as mentioned, it is the specific countermeasure that would be challenged in a DSU dispute, the test set up by *Turkey-Textiles* must therefore be read as focussing on both (i) the terms of the RTA upon its formation with regard to whether or not countermeasures in general may be used and (ii) the situation produced when the specific countermeasure is actually implemented.

(i) *The 'essentiality' of an RTA's terms on countermeasures upon its formation*
Access to an effective dispute settlement system and therefore the right to take countermeasures may be seen to be essential for the enforcement of the RTA rights and obligations and the respect of the rule of law. Indeed most recent RTAs contain sophisticated enforcement regimes and borrow heavily from the WTO system in which countermeasures play a key role.

Based on the *Turkey - Textiles* test, when a countermeasure is challenged before a WTO adjudicating body, the author of the countermeasure would, as noted above, first have to prove that its RTA is WTO consistent.⁵² Setting aside the issue of whether the RSR and those of the Article 41 of the Vienna Convention on the Law of Treaties are 'applicable law' at the WTO or relevant in the interpretation of Article XXIV, if the RTA provides for an abusive system of countermeasures that could obviously hurt non-RTA parties, through

⁵² Unless the RTA had already been approved by the membership upon its notification under para 7 of Art XXIV, an event which, for the reasons stated above, is extremely unlikely in practice.

trade-diversion for example, it will be difficult for the RTAs parties to explain how such an RTA (and its potential countermeasures) is consistent with Paragraphs 4 and 5 of GATT Article XXIV which essentially require that the formation of the RTA does not raise trade barriers *vis-à-vis* non-RTA parties or indeed with the parallel Article 41 of the Vienna Convention that prohibits *inter se* agreements that affect the rights of third parties and RSR.

Equally, if an RTA grants too wide a scope for the adoption of highly trade-restrictive countermeasures, it could potentially allow RTA action, albeit temporary, that does not fulfil Article XXIV's closer regional integration objective (namely in not covering substantially all the trade) and that falls foul of both WTO conditions for RTAs and potentially even some requirements of the RTA itself. For example, if an RTA allowed a countermeasure to raise a tariff from the RTA level of 0 % over and above a pre-integration tariff binding of 10% to say 20 percent as between the RTA parties concerned, it would seem to run counter to not only the GATT Article XXIV objective of facilitating trade between the parties relative to pre-integration, but potentially also the object and purpose of the RTA itself. Indeed, any countermeasure applied in an RTA constitutes a restrictive regulation of commerce and thus runs the risk of falling foul of the requirement in Paragraph 8 of Article XXIV that 'duties and other restrictive regulations of commerce... are eliminated with respect to substantially all the trade between the constituent territories of the [RTA] or at least with respect to substantially all the trade in products originating in such territories'.⁵³

The trade-restrictive effect of such RTA countermeasures regimes would be raised either upon the notification of the RTA or when an RTA measure is challenged before the DSB and may deal a fatal blow to any attempt to justify a WTO violation as a countermeasure taken under such an RTA authorized by GATT Article XXIV.

(ii) *The continuous control exercised by GATT Article XXIV(4), (5) and (8) over the application of the specific RTA countermeasures*

Certain other issues may only become apparent upon adoption of a specific RTA countermeasure.

Prima facie, RTA countermeasures, which are inherently taken against an RTA state, will not result in the creation of new trade barriers *vis-à-vis* WTO Members that are not party to that RTA. Indeed, where RTA countermeasures, such as a tariff on a good previously liberalized by the RTA, in fact roll back the liberalization between RTA partners, non-RTA Members of the WTO will, in the short term at least, most likely benefit from positive trade diversion while the countermeasures are in place. It would be somewhat ironic if a WTO

⁵³ General Agreement on Tariffs and Trade (adopted 30 October 1947), 55 UNTS 194; 61 Stat pt 5; TIAS No 1700 ('GATT 1947') Art XXIV(8)(a)(i).

Panel were, on behalf of those non-RTA Members, order that the counter-measures be retracted in such cases.

However, although any RTA countermeasure should be imposed only against the other RTA party, it is nonetheless possible that a 'abusive' countermeasure is taken pursuant to an RTA enforcement mechanism that, upon the notification of the RTA, appeared to be reasonable from a WTO perspective. In light of ever-changing preferences for goods and services and trade patterns, it is possible that a countermeasure introduced by an RTA party will have a different form from what appeared to have been possible when the RTA was initially notified to the WTO. For instance, such a countermeasure may directly or indirectly affect the WTO rights of Members not party to the RTA concerned, when such effects of intra-RTA countermeasures could not have been foreseen at the time when the regional trade are formed. For example, if a good A upon which trade is liberalized within an RTA allowing for countermeasures, suddenly becomes an important element in the production of a new high-tech product B, a subsequent RTA countermeasure raising tariffs on the importation of this good A within the RTA zone may have the effect of raising the price of the product B for non-RTA Members dependent, for their internal production of product B, on the importation of this good A from the RTA zone. How should such a situation be handled from a WTO perspective?

One could argue that such RTA countermeasures which unduly affect the trade interests of a third party are contrary to the overall purpose and specific terms of Articles XXIV and V. Paragraph 4 of GATT Article XXIV is particularly relevant in this respect. According to the Appellate Body in *Turkey – Textiles*, this paragraph which 'sets forth the overriding and pervasive purpose for Article XXIV' and must be used to interpret 'the conditions set forth in [the chapeau of Paragraph 5] for establishing the availability of a defence under Article XXIV'.⁵⁴

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Clearly, this paragraph sets out not only what Members consider the purpose of RTAs, but also a purpose they should not fulfil, namely raising barriers to trade with WTO Members not party to the RTA.⁵⁵

Given that these statements of Article XXIV's purpose influence, according to the Appellate Body, the interpretation of the conditions for establishing the

⁵⁴ *Turkey – Textiles*, Appellate Body Report, above n 38, para 57.

⁵⁵ See further: *Turkey – Textiles*, Appellate Body report, above n 38, and *Canada – Autos*, Panel report, above n 48, in relation to GATS Art V.

availability of the defence, it is more than conceivable that a WTO panel might refuse to grant the protection afforded by the Article XXIV defence to a measure which clearly goes against the stated purpose of an RTA by raising trade barriers against third parties, even where that measure was taken in conformity with a WTO-authorized RTA.⁵⁶ Indeed, in finding for India in the *Turkey – Textiles* dispute, the Appellate Body gave strong indications that it accepted that Member's argument that Article XXIV(5) cannot be interpreted to provide a justification for measures raising barriers to trade with other WTO Members.⁵⁷ Then, in relation to the GATS Article V exception, the panel in *Canada – Autos*, seemed to require that the actual measure at issue must serve in some way the objective of regional integration as understood by the WTO provisions if it is to have the benefit of the GATS Article V defence.⁵⁸

It accordingly seems safe to conclude that the fact that an RTA countermeasure does not have the effect of raising trade barriers *vis-à-vis* third parties to above their pre-integration levels, may operate as a further condition that must be met before an RTA countermeasure is excused of any WTO violation through the GATT Article XXIV and GATS Article V exceptions.

4. *Trade Countermeasures Taken in Response to Breaches of Non-trade Related RTA Rules*

Many modern RTAs include obligations that are not trade related, for example, rules requiring observance of minimum labour standards in relation to the production of exported goods. Arguably, any labour-related trade conditions imposed by an RTA, although potentially non-product conditions on market access, could themselves, at least where they do not affect the WTO rights of third-parties, be excused of any WTO incompatibility they engender under the exceptions in Articles XXIV and V. Of course, if non-trade related countermeasures are taken in response to an original breach of either a trade related or non-trade related rule, the countermeasure will not breach any terms of any WTO covered agreements, essentially covering only trade matters.

However, while many RTAs encourage countermeasures to be taken in the same area as that in which the original violation occurred, very few require it in all circumstances.⁵⁹ It is therefore quite possible that an RTA party may introduce trade suspensions as a countermeasure in response to an original

⁵⁶ This would mean that, if, for example, trade in the goods concerned was on a largely duty free basis or even subject to a 10 percent tariff before the RTA was introduced and is now, during the period of the countermeasure, subject to a 20% tariff, the countermeasure would not be afforded access to the Art XXIV defence. On the other hand, if, as is likely, the RTA has made great strides in progressive liberalization since its introduction such that the countermeasure period tariff rate is still well below that which applied between A and B before the RTA was signed, the countermeasures would still have the benefit of the regional integration defence.

⁵⁷ *Turkey – Textiles*, Appellate Body report, above n 38, para 22.

⁵⁸ *Canada – Autos*, Panel report, above n 48, see in particular para 10.271.

⁵⁹ See eg Olivos Protocol, above n 44.

breach of a non-trade related rule in the RTA, such as an RTA rule on labour conditions. Trade countermeasures can be more appealing than other types of countermeasure because they are easy to administer and may affect important players in the targeted country. Should countermeasures responding to non-trade related breaches be given the benefit of the regional integration exceptions at the WTO? Or, in other words, do GATT Article XXIV and GATS Article V authorize two or more WTO members to condition their trade relations to labour considerations?

From a policy perspective, on the one hand, one might question the appropriateness of the WTO, an institution which pursues trade liberalization, eschewing enforcement of its trade rules in favour of countermeasures pursuing compliance with objectives not directly related to trade liberalization, like labour standards. On the other hand, several provisions of the WTO agreements, like the TBT Agreement, allow for policies taken to achieve a broad range of non-trade related purposes, including the protection of health and the environment, security interests and potentially even labour standards themselves.⁶⁰

However, one might also argue that a trade countermeasure taken in response to a non-trade breach does not serve the purpose of facilitating the liberalization of trade between those RTA parties [see above in relation to Article XXIV(4)], because it instead serves another purpose, for example, ensuring that higher labour standards are maintained.

Which route should or could be taken in relation to this sub-issue is open to question. If an RTA party wants to take countermeasures against the violation of a non-trade related RTA rule, it will usually have the option of implementing countermeasures which themselves constitute non-trade suspensions. This would likely avoid all risk of WTO inconsistency, as countermeasures in the form of non-trade related suspensions are unlikely to be in violation of any rule in the WTO covered agreements, so would not come before the WTO.

5. Conclusion

When discussing overlaps and conflicts between the WTO and RTA regimes, there is considerable potential for a wide range of conflicts—not only direct conflicts where a measure challenged before an RTA dispute settlement body is subsequently challenged before a WTO dispute settlement body, or vice versa. Many overlaps can take place in the operation of the separate legal and commercial systems of RTAs on the one hand and the WTO on the other.

This article has attempted to clarify elements of the legal analytical framework that could be used to determine whether RTA trade

⁶⁰ Gabrielle Marceau 'A Guide to the World Trade Organization Law of Domestic Regulation of Goods and Trade and Labour: Rematching an Old Divorced Couple?' in D Bethlehem and others (eds) *The Oxford Handbook of International Trade Law* (OUP, Oxford 2009).

countermeasures that lead to trade restrictions can nonetheless be justified in the WTO system. However, the answer to this question is far from clear. Today's RTAs contain sophisticated enforcement mechanisms with specific rules on dispute settlement procedures and countermeasures. Yet it is not always clear whether the RTA parties that are also WTO Members wanted—or can be presumed to have wanted—RTA trade countermeasures to be able to violate WTO rules; and it is not clear whether WTO Members collectively wanted—or can be presumed to have wanted—RTA trade countermeasures to be able to violate the WTO's rules under the justification of GATT Article XXIV, and even if they did, for which ones and to what extent.

A three-part test is suggested for the assessment of the WTO compatibility of trade-related countermeasures taken under an RTA.

First, before assessing the WTO consistency of any specific measures adopted under an RTA, the WTO Member invoking the RTA basis for its measure must demonstrate that the RTA concerned is fully compatible with Article XXIV. This will require an evaluation of the RTA against the requirements of paragraphs 4, 5 and 8 of Article XXIV which, like Article 41 of the Vienna Convention on the Law of Treaties on *inter se* agreements, require that the WTO rights of third-parties are not adversely affected by the formation and operation of the RTA.

Second, given that Article XXIV of GATT and Article V of GATS only operate as exceptions in respect of regional trade agreements meeting certain explicit criteria, only those RTAs which have already been authorised by the WTO membership—upon their notification to the Committee on Regional Trade Agreements, or, alternatively, when eventually demonstrated in the context of a dispute to be compatible with the WTO requirements for regional trade agreements—will come within the scope of the Article XXIV exception. In addition, only countermeasures adopted in conformity with the terms of the RTA authorised by the WTO will come within the exception's scope. The second condition imposed by this second step in the test will therefore require an assessment of the language and structure of the RTA in relation to countermeasures and of the potentially applicable Rules on State Responsibility. It may also require a factual assessment of the countermeasure itself if the RTA only permits certain types of countermeasures or imposes specific criteria as to their nature and/or form (for instance that they do not exceed the level of trade affected by the original RTA violation).

Third, just because GATT Article XXIV and GATS Article V provide exceptions for actions taken in conformity with authorised RTAs does not necessarily mean that they grant *carte blanche* to all such actions irrespective of their consequences. In our view, the specific trade countermeasure challenged would also need to be assessed against the requirements of GATT Article XXIV and/or GATS Article V keeping in mind the overall purpose of those exception provisions, namely to encourage regional integration but not to the detriment of the rights of other WTO Members. If an ambiguity remains as to whether such RTA countermeasures could in fact lead to a violation of WTO obligations owed to non-RTA members, it would appear contrary to the spirit and principle of GATT Article XXIV and GATS Article V, that regional trade agreements do not affect the WTO rights of WTO Members not party to the RTA.

In sum the legal consequences of the overlaps between the operation of any RTA dispute settlement system and that of the WTO are far from clear. The normative evolution of RTAs and the WTO's jurisprudence on their consistency are not yet at the stage of maturity where we can make any more than highly speculative conclusions as to how best deal with a RTA trade countermeasure that breaches WTO rules. This complex area of regime interaction raises many legal policy questions and leaves the majority of them unresolved. It is hoped that this article will help drafters of future RTAs think about how their dispute settlement and enforcement systems might interact with the WTO's and will also assist thinking within the WTO structure on what kind of test should be developed in this regard and also on whether it is time for WTO Members to agree on a more systemic approach to RTA dispute settlement mechanisms and their operation within the WTO context.

On a more general level, we hope that this analysis highlights one particular type of problem that may arise as international legal regimes multiply, evolve and increasingly come into contact with one another. While compulsory dispute settlement mechanisms with regulated, authorized countermeasures remain, at this stage, the exception rather than the rule in the non-trade international law world, such a situation is unlikely to subsist. With luck, the path taken by international trade law in relation to conflicts between aspects of powerful systems can mark out an appropriate course for the development of 'stronger' dispute settlement and enforcement regimes in other areas of international law.

The field of international trade law, often highlighted for its unity and the strength of its dispute settlement and remedies systems, is itself no stranger to the phenomenon of the so-called 'proliferation' of dispute settlement mechanisms. RTAs are increasingly prevalent and set up more and more solid and far-reaching dispute settlement systems, some of which are likely to come into direct contact with the multilateral system of the WTO. This article focuses on one particular type of such interaction between RTAs and the WTO: how should we address the issue of a trade countermeasure taken in the context of an RTA when such retaliatory action can be considered a breach of a WTO market access rule? A proper answer to this question requires an analysis of the flexibilities provided by the GATT and GATS exception provisions allowing Members to maintain certain RTAs and also of the nature of countermeasures often explicitly authorized by RTA dispute settlement mechanisms. The range of issues, relevant international law rules and potential solutions discussed are set to become only more pertinent both within the changing field of international trade law and, as international legal regimes become more robust and increasingly come into contact with one another, in contemporary international law in general.