

# 1. Interpretation of GATS and the selected EU RTAs

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Before one can commence the analysis of constraints on regulatory autonomy resulting from obligations applicable to the EU in GATS and the services chapters of EU RTAs, it is imperative to explain how these treaties are to be interpreted. In the case of GATS, case law has developed its take on the rules of treaty interpretation extensively. In the case of EU RTAs, despite the dispute settlement mechanisms provided, no disputes have been brought to this day.<sup>1</sup> Although there is some guidance in the text of each of the selected agreements, it is submitted that a presumption of WTO consistent interpretation applies to all agreements. Because the objectives of an agreement shed light on the interpretation of its provisions, these are addressed in this chapter as well.

## 1. THE MULTILATERAL LEVEL

### 1.1 Treaty Interpretation in the WTO

To understand many unresolved questions of GATS law, one needs an understanding of how panels and the Appellate Body (AB) have so far interpreted GATS. As treaty interpretation in the WTO has been addressed expertly elsewhere,<sup>2</sup> it suffices here to briefly introduce the applicable rules. Article 3.2 of the Dispute Settlement Understanding (DSU) contains the mandate for the dispute settlement system to clarify the existing provisions of the WTO agreements in accordance with customary rules of public international law. In practice, WTO dispute

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<sup>1</sup> See Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?* (World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-07, 2013) 10–11 and 54–55.

<sup>2</sup> Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009).

settlement bodies apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>3</sup> (VCLT).<sup>4</sup> By applying Article 31.1 VCLT, the panels and AB interpret treaty provisions ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. The ordinary meaning of a term should determine the common intentions of the parties,<sup>5</sup> and all the terms of a treaty must be given meaning.<sup>6</sup> The treaty interpretation techniques of Article 31 VCLT are ‘ultimately a holistic exercise that should not be mechanically subdivided into rigid components’.<sup>7</sup> To confirm the interpretation resulting from an application of Article 31 VCLT, or if the cited approach leaves the meaning of a provision ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 VCLT allows recourse to supplementary means of interpretation, including the preparatory works – i.e. the negotiating history, to which little importance has been given<sup>8</sup> – of the treaty and the circumstances of its conclusion.

In addition to treaty interpretation rules, it is important to note that the AB has ‘opted for a strong de facto rule of precedent’.<sup>9</sup> As the AB stated itself:

the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring ‘security and predictability’ [...] implies that, absent cogent reasons,

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<sup>3</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

<sup>4</sup> Their customary nature is confirmed in respectively *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, AB report adopted 20 May 1996 15–16 and *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, AB report adopted 1 November 1996 122–123.

<sup>5</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R, AB report adopted 16 January 1998 para. 45.

<sup>6</sup> *US – Gasoline (AB)* 21.

<sup>7</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products* WT/DS363/AB/R, AB report adopted 19 January 2010 para. 176; *Japan – Alcoholic Beverages II (AB)* 104.

<sup>8</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 192–193.

<sup>9</sup> Joost Pauwelyn, ‘Minority Rules: Precedent and Participation Before the WTO Appellate Body’ in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Judicial Authority in International Economic Law* (forthcoming) 3; Anne Scully-Hill and Hans Mahncke, ‘The Emergence of the Doctrine of *Stare Decisis* in the World Trade Organization Dispute Settlement System’ (2009) 36 *Legal Issues of Economic Integration* 133.

an adjudicatory body will resolve the same legal question in the same way in a subsequent case.<sup>10</sup>

On a vertical level, ‘following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same’.<sup>11</sup>

## 1.2 The Objectives of GATS

The preamble of an agreement reflects the intentions of the negotiators, and therefore provides context to the obligations in an agreement and sheds light on its object and purpose.<sup>12</sup> The AB stated that the preamble adds ‘colour, texture and shading’ to the interpretation of an agreement.<sup>13</sup> Moreover, the preamble contains the objectives of an agreement, which constitute its *telos* and ‘serve as a lighthouse for our appreciation of its provisions and case law’.<sup>14</sup> The objectives of GATS are reflected in the key elements of its preamble and shape the tension between regulatory autonomy and trade liberalisation.<sup>15</sup> The second recital of the GATS preamble states that the overarching objectives of the agreement are the expansion of trade in services under conditions of transparency, and progressive liberalisation to promote economic growth among all WTO Members. The objective of progressive liberalisation is complemented in the third recital by the words ‘while giving due respect to national policy objectives’. The latter is supported by the fourth recital, in which regulatory autonomy is emphasised. It talks of ‘[r]ecognizing the right of

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<sup>10</sup> *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R, AB report adopted 20 May 2008 para. 160.

<sup>11</sup> *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* WT/DS268/AB/R, AB report adopted 17 December 2004 para. 188.

<sup>12</sup> Article 31.2 VCLT and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, AB report adopted 6 November 1998 para. 155.

<sup>13</sup> *Ibid.* As concerns GATS, see *US – Gambling (AB)* paras 188–189.

<sup>14</sup> Michael Ming Du, ‘Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization’ (2007) 6 *Chinese Journal of International Law* 269, 273.

<sup>15</sup> Andrew Lang, ‘The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry’ (2004) 7 *Journal of International Economic Law* 801, 804.

Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives’.

The AB has pointed out that there are several objectives listed in the preamble of GATS, but did not express a view on their relationship.<sup>16</sup> In its reading of the preamble of the Agreement on Technical Barriers to Trade (TBT Agreement), the objective of trade liberalisation and a right to regulate were however compared to the balance set out by the national treatment obligation and the general exceptions provision in the General Agreement on Tariffs and Trade (GATT) 1994.<sup>17</sup> This comparison does reflect a relational understanding. This is confirmed by the finding of the Panel in *China – Publications and Audiovisual Products* that the second recital of GATS contains the ‘general object and purpose’, while the aspect of securing a balance between rights and obligations must be interpreted ‘in light of this general object and purpose’.<sup>18</sup> Similarly, the Panel in *US – Gambling* noted that ‘Members’ regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services’.<sup>19</sup> This indicates that progressive liberalisation and transparency, as conditions for the expansion of trade in services, are considered the foremost objectives of GATS. Of course, liberalisation must nonetheless ‘secure an overall balance of rights and obligations’<sup>20</sup> and the right to regulate should not be underrated. The Panel in *US – Gambling* noted that ‘it is clear that *WTO Members do have the right to regulate*’ and ‘[w]e have not decided that *WTO Members do not have a right to regulate*’.<sup>21</sup> In *China – Publications and Audiovisual Products*, the Panel noted that ‘China has the undoubted right to regulate trade in services under the GATS’.<sup>22</sup> The Panel in *Argentina – Financial Services* stressed the

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<sup>16</sup> *US – Gambling (AB)* footnote 271; *China – Publications and Audiovisual Products (AB)* para. 392.

<sup>17</sup> *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R, AB report adopted 24 April 2012 paras 94–96.

<sup>18</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products* WT/DS363/R, Panel report adopted 19 January 2010 paras 7.1219 and 7.1348.

<sup>19</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, Panel report adopted 20 April 2005 para. 6.316, and recalled by the AB in *US – Gambling (AB)* footnote 271.

<sup>20</sup> *US – Gambling (Panel)* para. 6.317.

<sup>21</sup> *Ibid* paras 5.17 and 7.4 (emphasis original).

<sup>22</sup> *China – Publications and Audiovisual Products (Panel)* para. 7.1139. Also see *China – Measures Affecting Electronic Payment Services* WT/DS413/R, Panel report adopted 31 August 2012 para. 7.569; *United States – Measures*

preamble's right to regulate in conjunction with Article XIX GATS, which refers to respect for national policy objectives.<sup>23</sup> However, panels and the AB have stressed that the limit of regulatory autonomy lies where it impairs the rights of other Members under GATS.<sup>24</sup>

The discussion above highlights that the objectives of GATS can be interpreted as giving substantial regard to national regulatory autonomy on the one hand, or that they can be interpreted under a wholly opposite market liberalisation approach on the other hand.<sup>25</sup> It should be recognised that GATS, as part of a regulatory framework on international trade, is based on the point of view that trade liberalisation is beneficial. The structure of the agreement indeed reflects this approach. However, from its preamble onwards, the tension between regulatory autonomy and trade liberalisation is recognised,<sup>26</sup> and the (limited) use of the preamble in GATS case law indicates that panels and the AB recognise this tension, too. This, in its turn, points towards the nature of GATS as an elaborate political compromise that is 'no monument of clarity'.<sup>27</sup>

## 2. THE PREFERENTIAL LEVEL

### 2.1 Treaty Interpretation in RTAs

#### 2.1.1 Rules and guidance for the interpretation of RTAs

The interpretation of RTA provisions is crucial to understand how RTAs limit regulatory autonomy. Being aware of the lack of interpretational

*Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/ARB, Decision by the Arbitrator circulated 21 December 2007 para. 3.45.

<sup>23</sup> See e.g. *Argentina – Measures Relating to Trade in Goods and Services* WT/DS453/R, Panel report not yet adopted paras 7.422–7.423.

<sup>24</sup> *US – Gambling (Panel)* para. 6.316, recalled by the AB in *US – Gambling (AB)* footnote 271; *China – Electronic Payment Services (Panel)* para. 7.1139.

<sup>25</sup> M Krajewski, *National Regulation and Trade Liberalization in Services* (Kluwer Law International 2003) 57.

<sup>26</sup> This reflects the fear of developing countries during the negotiation of GATS that the agreement would grant effective control over their services markets to foreign powers. Marchetti and Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)' (2011) 22 *European Journal of International Law* 689, 698.

<sup>27</sup> Juan A Marchetti and Petros C Mavroidis, 'From Reluctant Participant to Key Player: EU and the Negotiation of the GATS' in Inge Govaere, Reinhard Quick and Marco Bronckers (eds), *Trade and Competition Law in the EU and Beyond* (Edward Elgar Publishing 2011) 95.

guidance from case law, concerning both the interpretational rules of RTAs and the substantive content of their provisions, one must resort to an interpretation based on the text of the agreement and the available interpretational tools. As noted in the Introduction, the EU's RTAs contain three types of interpretational provisions, and one of each type is selected as a case study in this book. The three types of interpretational provisions prescribe interpretations: (i) based on customary rules of interpretation only; (ii) based on customary rules of interpretation for provisions not identical to a WTO provision but consistent with relevant WTO interpretations for identical provisions; and (iii) taking into account relevant WTO interpretations. These rules create four scenarios:

- a. An identical obligation is interpreted 'in consistency with' WTO case law.
- b. An obligation, whether identical or non-identical, is interpreted by 'taking into account' WTO case law.
- c. A non-identical obligation is interpreted in accordance with customary rules of interpretation.
- d. An identical obligation is interpreted in accordance with customary rules of interpretation.

At first sight, from a. to d., the risk of interpretational variance seems to augment. However, WTO treaty interpretation is based on customary rules of interpretation, and while there is leeway within these rules for adopting a different approach to the one taken in WTO dispute settlement practice, how far could an RTA arbitration panel that is called upon to interpret an RTA deviate from WTO treaty interpretations in situations b., c. or d.? A director at the Directorate General for Trade of the European Commission noted, in his personal capacity, that 'the substantive law of free trade agreements is very largely influenced – and, indeed, dependent upon – WTO law'.<sup>28</sup> Indeed, it is my view that, absent a good reason not to, the provisions in the EU RTAs' services chapters should be interpreted in conformity with WTO case law regardless of which of the three abovementioned types of interpretational provision applies.

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<sup>28</sup> Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 399.

### 2.1.2 The presumption of WTO consistent interpretation

Because of the combination of the three main reasons set out below, it is argued that there is a rebuttable presumption that RTA provisions must be interpreted in consistency with WTO case law interpretations.<sup>29</sup> This presumption improves the predictability and coherence of international trade law, and is therefore ‘highly desirable’.<sup>30</sup> RTA arbitration panels should apply ‘*de facto stare decisis*’, i.e. precedents are followed for ‘extra- and quasi-legal reasons, including custom and habit’ and their high persuasiveness, but not because RTA arbitration panels are legally required to do so.<sup>31</sup> Such a ‘de facto precedent, like a de jure one, creates a presumption that it is to be followed unless a very good reason for a departure exists’.<sup>32</sup> Hence, it is my view that although RTA arbitration panels are not always allowed to and do not always have to expressly draw upon WTO case law, a *de facto* identical interpretation should be achieved in most cases, i.e. except when the presumption is rebutted. The main proponent of *de facto stare decisis* summarises this approach as follows:

in a *de facto stare decisis* regime, a prior holding is like a cane that the adjudicator is only in theory – specifically, legal theory – free to use or toss,

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<sup>29</sup> The presumption of WTO consistent interpretation also applies to RTAs between the EU and non-WTO Members, as the reasons below do not cease to apply in such a case.

<sup>30</sup> Garcia Berbero, ‘Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?’ 400, who makes this claim regarding bilateral provisions that are largely independent from WTO obligations. Concerning areas of overlap between WTO and RTA obligations or where an RTA obligation reproduces the WTO obligation without referring to it, he notes ‘it is difficult to see how a bilateral panel could properly apply the provisions of the FTA without also referring to WTO law’.

<sup>31</sup> See Marc L Busch, ‘Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade’ (2007) 61 *International Organization* 735, 740; David M Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd edn, Cambridge University Press 2004) 56; Locknie Hsu, ‘Applicability of WTO Law in Regional Trade Agreements: Identifying the Links’ in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 526–527 and 551–552.

<sup>32</sup> Raj Bhala, ‘The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)’ (1999) 9 *Journal of Transnational Law & Policy* 1, 3.

but in fact always uses whenever the opportunity arises, or in the rare cases when it chooses to toss the cane, it takes great care in explaining why.<sup>33</sup>

The first and second main reasons are supporting affirmations vis-à-vis the third, perhaps most convincing, reason for a WTO consistent interpretation.

*2.1.2.1 'Supremacy' of the WTO agreements* The first reason to interpret RTA provisions in consistency with WTO case law is based on the alleged 'supremacy' of the WTO agreements vis-à-vis RTAs. The argument is based on Article 41 VCLT, which at least 'reflects customary law',<sup>34</sup> and relates to the relationship between the WTO Agreements on RTAs from the perspective of public international law. Article 41.1 VCLT addresses the situation in which two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty between them as individual parties. Such modification is prohibited if: (i) the multilateral treaty prohibits modification; (ii) if the modifying treaty affects the rights and obligations of third parties; and (iii) if the modifying treaty derogates from a provision, where such derogation is incompatible with the effective execution of the object and purpose of the multilateral treaty in its entirety.

Article 41.1 (a) VCLT reflects the situation where a multilateral treaty provides for the possibility of a modification of the multilateral treaty between two parties alone. According to several authors, the WTO rules on the formation of RTAs, contained in Articles XXIV GATT 1994 and V GATS are thus to be considered superior to RTA rules on the basis of Article 41.1 (a) VCLT, as the formation of the RTA is only in accordance with Article 41.1 (a) VCLT if it respects the rules set out in these provisions.<sup>35</sup> This creates a 'constitutional and hierarchical relationship

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<sup>33</sup> Raj Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' (1999) 14 *American University International Law Review* 845, 939–940.

<sup>34</sup> Kerstin Odendahl, 'Article 41' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 723. Pauwelyn considers Article 41.1 VCLT to be customary international law: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 305.

<sup>35</sup> James Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (TMC Asser Press 2002) 271–285; Thomas Cottier and Marina Foltea, 'Constitutional Functions of the WTO and RTAs' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 56–57.

between WTO rules and RTAs'.<sup>36</sup> This may have been visible in *Turkey – Textiles*, as the AB may have hinted at the fact that RTAs are a mere exception to multilateralism, rather than an alternative.<sup>37</sup> Even if 'supremacy' is too strong a term, the link between Article V GATS and the RTA does create a hierarchy between both agreements.

Similarly, it may be argued that Article V GATS does not provide for the *possibility* of modification,<sup>38</sup> but merely does *not prohibit* such modification. Consequently subparagraph (b) of Article 41.1 VCLT is applicable. This reflects the situation where a modification is neither expressly prohibited (in which case a modification cannot be allowed under the rules of the VCLT), nor expressly allowed (in which case Article 41.1 (a) VCLT would apply). In support of such argument, it can be put forth that Article V GATS is an exception,<sup>39</sup> and therefore not a provision explicitly allowing the modification of GATS between RTA parties (even if in effect this is what an RTA does). In order for a modification to be in accordance with Article 41.1 (b) VCLT, the modifying agreement, *in casu* the RTA, should fulfil the two conditions contained in that provision.<sup>40</sup> Failure to fulfil these obligations would imply a violation of Article 41.1 VCLT. Either condition thus is a 'ground of illegality',<sup>41</sup> as modifications that do not fulfil a condition are illegal modifications of the multilateral agreement. The first condition requires that the rights of the other Members are not prejudiced by the RTA. That could appear to be the case as, in principle, the RTA remains *res inter alios* for those Members.<sup>42</sup> Nonetheless, the rights of third parties may in certain situations be affected by interpretations of provisions in an RTA.<sup>43</sup>

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<sup>36</sup> Cottier and Foltea, 'Constitutional Functions of the WTO and RTAs' 57.

<sup>37</sup> Peter Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics' (2003) 7 Max Planck Yearbook of United Nations Law Online 219, 246.

<sup>38</sup> The examples given of such clauses in Odendahl, 'Article 41' 723–724 differ from Article V GATS: e.g. '[n]othing in the present Convention shall preclude States from concluding international agreements *confirming or supplementing or extending or amplifying* the provisions thereof' (emphasis added).

<sup>39</sup> Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization* 664.

<sup>40</sup> The notification requirement of Article 41.2 VCLT would be fulfilled by the notification of the RTA to the WTO.

<sup>41</sup> Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 305.

<sup>42</sup> Odendahl, 'Article 41' 725.

<sup>43</sup> Compare to Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 308–310, giving

The second condition of Article 41.1 (b) VCLT is more interesting: it requires that the derogation from a certain multilateral provision in the modifying agreement is not incompatible with the effective execution of the object and purpose of GATS as a whole. The Panel in *China – Publications and Audiovisual Products* referred to the expansion of trade in services under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries as the ‘general object and purpose’ of GATS.<sup>44</sup> A case can be made that RTAs may generally be incompatible with this object and purpose.<sup>45</sup> For example, RTAs (and especially GATS– provisions) do not promote the interests of all WTO Members nor do they contribute to progressive rounds of multilateral services liberalisation. However, this is not the question at hand, which is whether *interpretations* that are not consistent with GATS case law, and thus derogate from a GATS provision, are incompatible with the effective execution of the object and purpose of GATS. Article 41.1 (b) (ii) VCLT requires that the modification does not relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the multilateral treaty as a whole. Where an RTA provision is drafted using WTO law concepts, the RTA itself could well be consistent with Article 41.1 VCLT. It seems, even if not required by Article 41.1 VCLT, that the *interpretation* of such a modifying agreement should adhere to the same guidelines as its creation. Indeed, it may be argued that the establishment of a multilateral framework for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation could be hampered by inconsistent interpretations between RTAs and GATS, if not frustrated entirely. First, RTAs do not increase transparency of the regulation of trade in services, as this book will demonstrate. Second, there are clear GATS– provisions in the services chapters of

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*inter alia* the example of a multilateral environmental agreement that is modified by a subsequent bilateral agreement in which, between the parties to the latter, an emission reduction target is lowered vis-à-vis the multilateral agreement.

<sup>44</sup> *China – Publications and Audiovisual Products (Panel)* paras 7.1219 and 7.1348.

<sup>45</sup> Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 317–318, who envisages situations outside of adherence to the conditions in Articles XXIV GATT 1994 and V GATS that may violate Article 41 VCLT.

RTAs,<sup>46</sup> which indicates that RTAs do not necessarily lead to progressive liberalisation. Third, trade diversion effects may indicate that there is no expansion of trade in services resulting from RTAs. The link with ‘a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole’ can be made because any specific provision from which the RTA deviates has such potential, possibly through linking back to the preamble. Indeed, in many cases, derogation from *any* GATS provision could be said to frustrate the abovementioned object and purpose of the agreement.<sup>47</sup> To avoid such problems (and although it is acknowledged that this reasoning is not sufficient to support the presumption by itself), it is submitted that the interpretation of an RTA should be in conformity with that of the hierarchically supreme agreement,<sup>48</sup> i.e. the multilateral WTO covered agreements.

*2.1.2.2 Systemic integration* The second reason for interpreting provisions of RTAs in consistency with WTO case law relates to the principle of systemic integration. Article 31.3 (c) VCLT requires RTA arbitration panels to take into account, together with the context of the terms of the treaty and the treaty’s object and purpose, ‘any relevant rules of international law applicable in the relations between the parties’. According to the International Law Commission (ILC)’s report on the fragmentation of international law, this rule expresses the principle of ‘systemic integration’.<sup>49</sup> The ILC notes that ‘all that article 31 (3) (c) requires [is] the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness’.<sup>50</sup> The AB endorsed this interpretation in the context of

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<sup>46</sup> See e.g. Rudolf Adlung and Sébastien Miroudot, ‘Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements’ (2012) 46 *Journal of World Trade* 1045.

<sup>47</sup> See, for similar thinking, Rudolf Adlung, ‘The Trade in Services Agreement (TISA) and its Compatibility with GATS: An Assessment Based on Current Evidence’ 14 *World Trade Review* 617, 623.

<sup>48</sup> It is supreme for the same reasons expressed vis-à-vis Article 41.1 (a) VCLT.

<sup>49</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (A/CN.4/L.682, Report of the Study Group of the International Law Commission, 2006) para. 413.

<sup>50</sup> *Ibid.* para. 419.

applying non-WTO law to interpret WTO law.<sup>51</sup> The limit to this approach is that interpretation by way of Article 31.3 (c) VCLT must reflect the common intention of the parties to the treaty that is being interpreted.<sup>52</sup> If the WTO agreements are applicable in the relations between the parties, i.e. all parties are WTO Members, and the rule concerns the same subject matter,<sup>53</sup> RTA arbitration panels should take into account these WTO rules and, hence, their interpretation by WTO dispute settlement bodies. The arbitration panels are only obliged to do so in specific situations according to some of the treaty interpretation provisions in the selected EU RTAs, but should take into account the normative environment of international trade law. It has even been argued that RTA tribunals are ‘essentially always required to interpret [R]TA obligations in the light of the relevant WTO law’.<sup>54</sup> I agree with this view. Ignoring WTO case law would run counter to the principle of systemic integration. Similarly, it may be said that WTO case law provides context in the sense of Article 31 VCLT.<sup>55</sup> According to Article 38.1 (d) *juncto* 59 of the Statute of the International Court of Justice, judicial decisions are not binding precedents, but may nonetheless constitute ‘subsidiary means for the determination of rules of law’.

*2.1.2.3 Pragmatic reasons* Finally, and most convincingly, the third reason for a presumption of WTO consistent interpretation is a pragmatic preference for multilateral dispute settlement organs in the context of the fragmentation of international trade law. The presumption could be considered ‘a hub-and-spoke model’ that ‘would be particularly effective in countering fragmentation in the international trade regime’.<sup>56</sup> In comparison to the body of case law from any other international tribunal, the WTO’s body of case law is very substantial and well developed. The

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<sup>51</sup> *European Communities – Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, AB report adopted 1 June 2011 para. 845.

<sup>52</sup> *Peru – Additional Duty on Imports of Certain Agricultural Products* WT/DS457/AB/R, AB report adopted 31 July 2015 para. 5.95.

<sup>53</sup> The subject matter of the rules must be the same: see *ibid* and the case law cited there.

<sup>54</sup> Adrian M Johnston and Michael J Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ (2013) 12 *World Trade Review* 621, 638. The authors correctly note that this does not work the other way, nor between RTAs dispute settlement organs.

<sup>55</sup> Hsu, ‘Applicability of WTO Law in Regional Trade Agreements: Identifying the Links’ 527; also see 523–540.

<sup>56</sup> Johnston and Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ 641.

consequence of this is the *de facto* hierarchy of the WTO dispute settlement over RTA dispute settlement.<sup>57</sup> It therefore has ‘procedural superiority’ over RTA dispute settlement.<sup>58</sup> It may be that multilateral dispute settlement is ‘intrinsically superior to RTA dispute settlement’ and is perceived to be more legitimate because of, among other factors, the neutrality of panellists and its rules-based approach.<sup>59</sup> When interpreting provisions which are related to – not just identical to – WTO law, or find their foundation therein, there would be little sense for an *ad hoc* EU RTA arbitration panel to go against a WTO case law interpretation, unless there is a clear indication that the parties intended to diverge from the meaning of the WTO provision. For example, in most RTAs there are references to national treatment or MFN obligations, which induce the scope of cross-treaty interpretation.<sup>60</sup> If an RTA has a *telos* similar to that of the WTO, the RTA’s dispute settlement mechanism ‘will be inspired by the GATT/WTO case law when interpreting’ the RTA.<sup>61</sup> Similarly, an analysis of the ordinary meaning of the words in the RTA could lead to the taking into account of WTO case law.<sup>62</sup> Of course, the RTA panel should not apply WTO law, but it should use relevant WTO (case) law to interpret an RTA provision if the conditions of Article 31.3 (c) VCLT are fulfilled.<sup>63</sup> These conditions are that relevant rules of international law applicable in the relations between the parties shall be taken into account when interpreting a provision. In practice, due to the quasi-universal

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<sup>57</sup> Erik Voeten, ‘Borrowing and Nonborrowing among International Courts’ (2010) 39 *Journal of Legal Studies* 547, 566; Johnston and Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ 639.

<sup>58</sup> Delimatsis, ‘The Fragmentation of International Trade Law’ 115.

<sup>59</sup> William J Davey, ‘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 2006) 354–357; William J Davey and André Sapir, ‘The *Soft Drinks* Case: The WTO and Regional Agreements’ (2009) 8 *World Trade Review* 5, 22.

<sup>60</sup> Johnston and Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ 639.

<sup>61</sup> Panagiotis Delimatsis, ‘The Fragmentation of International Trade Law’ (2011) 45 *Journal of World Trade* 87, 109.

<sup>62</sup> Johnston and Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ 637, argue that this may also apply to other RTAs.

<sup>63</sup> In WTO case law, the panels and AB cannot ‘determine rights and obligations outside the covered Agreements’. *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, AB report adopted 24 March 2006 para. 56.

membership to the WTO, the rule will only need to be 'relevant', as it will very often be applicable in the relations between the RTA parties. Consequentially, the relevant rules of WTO law and their interpretation should reflect on the interpretation of the RTA provision, leading to a WTO consistent interpretation.<sup>64</sup>

Moreover, only in very specific cases can a WTO panel decline to exercise their procedurally validly established jurisdiction.<sup>65</sup> Otherwise, according to Article 23 DSU, the jurisdiction of the WTO dispute settlement system is exclusive and compulsory as concerns the covered agreements. Hence, in 'twin' cases concerning the same parties and subject matter, a Member may bring a case before the WTO if it is dissatisfied by the outcome at the level of RTA dispute settlement; for example, if there is an overlap between WTO and North American Free Trade Agreement (NAFTA) provisions and the latter's dispute settlement mechanism adjudicated on issues that could have been brought before a WTO panel. The problem is aggravated in the context of 'double' RTAs, where the relationship between parties is not only governed by WTO rules and an RTA, but potentially also a mega-regional or a plurilateral agreement such as the Trade in Services Agreement (TiSA).<sup>66</sup> The risk of fragmentation and turf wars resulting from such a situation provides no benefit to any of the parties involved.<sup>67</sup> Only in cases where the dispute is based on a WTO+ or WTO-X provision, or in cases where a panel could decline to exercise its jurisdiction, would this risk be avoided.

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<sup>64</sup> This is very much in line with the case law from the Court of Justice of the European Union on the principle of consistent interpretation of secondary EU law with rules of international law. See e.g. Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52.

<sup>65</sup> *European Communities – Export Subsidies on Sugar* WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB report adopted 19 May 2005 para. 312. See, extensively, Bregt Natens and Sidonie Descheemaeker, 'Say it Loud, Say it Clear – Article 3.10 DSU's Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction' 49 *Journal of World Trade* 871.

<sup>66</sup> Joost Pauwelyn and Wolfgang Alschner, 'Forget About the WTO: The Network of Relations between Preferential Trade Agreements (PTAs) and "Double PTAs"' in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press 2015).

<sup>67</sup> See e.g. the EU-Chile 'Swordfish' and EU-Faroe Islands 'Herring' disputes where claims were filed both at the WTO and the International Tribunal for the Law of the Sea. The case was settled.

*2.1.2.4 Evidence supporting the presumption* There is evidence of the presumption of a WTO consistent interpretation in RTA dispute settlement practice. First, such evidence is found in NAFTA Chapter 20 dispute settlement, one of the few examples of active bilateral dispute settlement (outside of investment). The interpretation of NAFTA Chapter 20 by the Arbitral panel makes substantial reference to WTO case law. To date, three reports have been issued, each relying on GATT 1947 and WTO case law. The NAFTA Arbitral Panel in the *Certain U.S.-Origin Agricultural Products* case does so only in passing, noting that exceptions to trade liberalisation obligations should be ‘viewed with caution’, as is ‘well accepted in the interpretation of the GATT [1947]’.<sup>68</sup> The Panel also hinted at the importance of AB case law, by referring to the AB’s acceptance of and reliance on Articles 31 and 32 VCLT as customary rules of interpretation.<sup>69</sup> Consequently, when the Panel was asked to interpret a NAFTA provision ‘substantively identical’ to a WTO obligation in *Broom Corn Brooms*, WTO case law was referred to.<sup>70</sup> In establishing likeness of products, GATT 1947 and WTO case law was used extensively.<sup>71</sup> Additionally, in its *Cross-Border Trucking Services* report, the NAFTA Arbitral Panel’s analysis started by explaining that its approach ‘is fully consistent with the practice of the WTO Appellate Body’.<sup>72</sup> In its interpretation of the national treatment obligation under NAFTA, the Arbitral Panel explicitly relied on a GATT Panel Report.<sup>73</sup> WTO case law on Article XX GATT 1994 was also heavily relied upon by the Panel.<sup>74</sup> Hence, in all three cases of Chapter 20 dispute settlement, WTO/GATT 1947 case law was cited.<sup>75</sup> Nonetheless, it should be noted that the point of view taken here is not shared unanimously in legal scholarship. For example, one author notes that ‘[i]n short, one can speak meaningfully about separate bodies of de facto stare decisis at the WTO

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<sup>68</sup> CDA-95-2008-01 NAFTA Chapter 20 Arbitral Panel, Final Report 2 December 1996 in the matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products para. 122 and footnote 109.

<sup>69</sup> Ibid footnote 107.

<sup>70</sup> USA-97-2008-01 NAFTA Chapter 20 Arbitral Panel, Final Report 30 January 1998 in the matter of US Safeguard Action Taken on Broom Corn Brooms from Mexico paras 50 and 53.

<sup>71</sup> Ibid paras 66–68.

<sup>72</sup> USA-MEX-98-2008-01 NAFTA Chapter 20 Arbitral Panel, Final Report 6 February 2001 in the matter of Cross-Border Trucking Services para. 214.

<sup>73</sup> Ibid para. 251.

<sup>74</sup> Ibid paras 262–270.

<sup>75</sup> Johnston and Trebilcock, ‘Fragmentation in International Trade Law: Insights from the Global Investment Regime’ 636–637.

and NAFTA' and notes that the references to WTO law are merely of 'suggestive' value, *ad hoc* and controversial.<sup>76</sup> Other authors, and I concur with their reading of the case law, have specifically criticised this reading, describing that it is an 'unfair' analysis.<sup>77</sup> In my opinion, the explicit referral to WTO case law is to be understood as giving *de facto* precedential value to the interpretations of WTO panels and the AB.

Outside of NAFTA, a recent dispute between Costa Rica and El Salvador was settled through the dispute settlement mechanism of the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA).<sup>78</sup> The dispute settlement organ, called 'Grupo Arbitral' made explicit reference to WTO law in several instances. Regarding the request for establishment of a Grupo Arbitral, it takes into account the relevant law of the WTO, with explicit reference to a recent AB Report.<sup>79</sup> Costa Rica advanced an argument on the basis of AB case law as well, although it was not considered by the Grupo Arbitral.<sup>80</sup> In a preliminary procedural ruling in, at the time of writing, the only other CAFTA case, addressing Guatemala's obligation to enforce its domestic labour laws, the Arbitral Panel noted that it was 'mindful of the practice of panels in WTO dispute settlement', also because both parties referred to WTO case law – and went on to consider WTO case law.<sup>81</sup> These instances constitute further evidence that RTA parties may also be inclined to apply interpretations of WTO law to RTAs.

Second, when interpreting provisions in bilateral investment treaties (BITs) which are similar to WTO disciplines, panels in investment dispute settlement have also drawn upon WTO case law.<sup>82</sup> For example, the NAFTA Chapter 11 Arbitral Panel in *S.D. Myers Inc. v Canada* held

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<sup>76</sup> Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' 742.

<sup>77</sup> Johnston and Trebilcock, 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' 636.

<sup>78</sup> CAFTA/ARB/2014/CR-ES, Tratamiento Arancelario a Bienes Originarios de Costa Rica (Informe Final del Grupo Arbitral), 18 November 2014.

<sup>79</sup> Ibid para. 4.41 at footnote 37.

<sup>80</sup> Ibid at footnote 60.

<sup>81</sup> CAFTA/ARB/2014/CR-ES, Guatemala – Issues Relating to the Obligations Under Article 1621(a), Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling, 20 November 2014 para. 54; Guatemala, *Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR – Initial written submission of Guatemala (2 February)* (2015) paras 63–64 and 66.

<sup>82</sup> Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 549.

that a State must choose the least trade restrictive alternative reasonably available, which respects the State's chosen level of protection. The Panel stated that this approach is 'consistent with the language and the case law arising out of the WTO family of agreements',<sup>83</sup> as found in the necessity analysis of Article XIV GATS. Subsequently, it referred to GATT 1994 case law on 'likeness' in interpreting the term 'like circumstances'.<sup>84</sup> The Arbitral Panel also relied on WTO case law in affirming that NAFTA obligations are to be considered cumulative and complementary.<sup>85</sup> In *Pope & Talbot Inc. v Canada*, the Arbitral Panel referred to the AB's text-based interpretational approach.<sup>86</sup> Outside of NAFTA investment arbitration, a similar reference to interpretative practice in WTO case law can be found in the *ADF Group Inc. v United States of America* arbitral award.<sup>87</sup> The Arbitral Panel in *Continental Casualty Company v Argentine Republic* relied on WTO case law regarding the necessity test found in Article XX GATT 1994.<sup>88</sup>

These examples illustrate the NAFTA Chapter 11 Arbitral Panel's statement in *Methanex Corporation v United States of America* that:

the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.<sup>89</sup>

Similarly, in *AES Corporation v The Argentine Republic*, without reference to WTO law, the NAFTA Chapter 11 Arbitral Panel noted that while there is no formal rule of precedent, and 'a different solution for resolving the same problem' may be adopted by each tribunal, once an arbitral tribunal has set a point of law, such 'precedents may also be rightly considered, at least as a matter of comparison and, if so

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<sup>83</sup> *S.D. Myers Inc. v Canada* NAFTA Chapter 11 Arbitration Partial Award, 13 November 2000 para. 221.

<sup>84</sup> *Ibid* paras 244–246.

<sup>85</sup> *Ibid* paras 291–294.

<sup>86</sup> *Pope & Talbot Inc. v Canada* NAFTA Chapter 11 Arbitration Award on the Merits of Phase 2, 10 April 2001 footnote 68.

<sup>87</sup> *ADF Group Inc v United States of America* ICSID Case No ARB(AF)/00/1, Award, 9 January 2003 footnote 152.

<sup>88</sup> *Continental Casualty Company v Argentine Republic* ICSID Case No ARB/03/09, Award, 5 September 2008 paras 192–195.

<sup>89</sup> *Methanex Corporation v United States of America* NAFTA Chapter 11 Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 para. 6.

considered by the Tribunal, of inspiration'.<sup>90</sup> Finally, the Arbitral Panel in *Pope & Talbot Inc. v Canada* expressed the similar view that there are 'very strong reasons for interpreting the language of Article 1105 [NAFTA] consistently with the language in BITs', referring particularly to the aim, context, object and purpose of NAFTA.<sup>91</sup> This cross-treaty interpretational practice is not a legal requirement, but it appears to be practice in the interpretation of BITs, and could be expected in RTA case law, if such case law were to emerge.<sup>92</sup> Hence, the presumption of WTO consistent interpretation thus appears to be a practical reality.

*2.1.2.5 Rebutting the presumption* As noted, the 'presumption' of interpreting EU RTA provisions consistently with WTO case law is rebuttable. Of course, the RTA interpreter is not stringently bound by WTO interpretations. The RTA is a separate treaty; its interpretation should not blindly or slavishly follow WTO case law.<sup>93</sup> Following the application of relevant rules of interpretation, if the outcome is that RTA provisions should be interpreted contrary to WTO case law, the interpreter should follow this course. Immediately, two situations come to mind. First, the context, object and purpose of the agreements may differ, which may lead to a difference in interpretation – as is the case for the national treatment obligations of Article 2.1 TBT Agreement and III:4 GATT 1994.<sup>94</sup> Second, there may be an indication that the use of a different term indicates a different interpretation from a WTO term. However, if there is no such indication, or it is insufficient, preference should be given to an interpretation which conforms to WTO (case) law. This analysis needs to be made on a case-by-case basis, taking into account all relevant factors. Such an analysis could be based on Article 31.4 VCLT type exceptions to the general principle of interpretation in accordance with the ordinary meaning of the text of a treaty.<sup>95</sup> This provision states that a special (as opposed to ordinary) meaning shall be

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<sup>90</sup> *AES Corporation v The Argentine Republic* ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005 paras 30–31.

<sup>91</sup> *Pope & Talbot Inc. v Canada* paras 115–116.

<sup>92</sup> Johnston and Trebilcock, 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' 629.

<sup>93</sup> Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 541.

<sup>94</sup> See e.g. *US – Clove Cigarettes (AB)* para. 181.

<sup>95</sup> Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 568.

given to a term if such a meaning can be established as the parties' intention. Here, a 'special meaning' would be a meaning contrary to WTO law.

If the presumption is rebutted, the question arises as to whether there should be coherence between the non-WTO consistent interpretation given to provisions in different RTAs. It is submitted that this is not the case if the treaty interpretation mechanisms do not support such a finding. For example, as addressed below, one of the objectives of the EU-Georgia DCFTA is the integration of the Georgian economy into the EU internal market. By contrast, the EU-Colombia & Peru RTA appears to be concerned with achieving a GATS-type balance between trade liberalisation and other concerns. Thus, it would seem defensible that treaty provisions in these agreements should be interpreted differently.

## **2.2 The Objectives of the Selected EU RTAs**

Considering the broader political scope of the RTAs, it is no surprise that the objectives of the EU-Colombia & Peru (EU-C&P) and the EU-Georgia DCFTA are much wider than those of GATS. The objectives of the EU-Singapore agreement are however limited to trade. The following overview is limited to trade-related objectives.

The objectives of the EU-C&P and EU-Singapore RTAs, listed in their preambles, are the promotion of comprehensive economic development with the objective of reducing poverty and creating new employment opportunities and improved working conditions, as well as raising living standards in the parties' territories by liberalising and expanding trade and investment between their territories. The parties desire to establish clear rules governing their trade and to provide a predictable legal framework for their trade and investment relations. Moreover, the EU, Colombia and Peru, and Singapore stress that they build on their respective rights and obligations under the WTO Agreement. The EU-Singapore RTA lists trade and investment liberalisation and facilitation as its sole objective under Article 1.2, 'Objectives'. This differs from the more detailed EU-Colombia & Peru RTA list of objectives, which lists 11 oriented objectives, all of an economic nature, in Article 4. Concerning services specifically, Article 4 (c) EU-C&P notes that the progressive liberalisation of trade in services, in conformity with Article V GATS, is an objective of the agreement. Articles 107.1 EU-C&P and 8.1 (1) EU-Singapore RTA, again, reaffirm WTO commitments and note that the objective of the chapter on trade in services is the progressive liberalisation of such trade. The objectives of the EU-Georgia DCFTA, listed in Article 1, in so far as they are relevant here, note that Georgia's

economic potential should be developed through approximation with EU law. Georgia's sustained and comprehensive regulatory approximation, in compliance with the rights and obligations arising from WTO membership, will gradually integrate the Georgian economy into the EU internal market. As concerns services, and according to Article 76.1, the objective of the agreement is again the progressive reciprocal liberalisation of trade in services. Article 220 EU-Georgia, part of the chapter on transparency, recognises the impact that the regulatory environment may have on trade and investment and therefore obliges the parties to provide a predictable regulatory environment for economic operators.

As under GATS, regulatory autonomy is confirmed in the preamble of the EU-Colombia & Peru RTA by an affirmation of the 'rights to use, to the greatest extent, the flexibilities provided for in the multilateral framework for the protection of public interest'. Note the reference to the multilateral framework, not the RTA. Article 107.5 of the RTA adds that each party retains the right to exercise its powers and to regulate and introduce new regulations in order to meet legitimate public policy objectives. In the EU-Singapore RTA and EU-Georgia DCFTA, it is merely noted in Articles 8.1 (3) and 76.4 respectively that each party 'retains the right to regulate and to introduce new regulations to meet legitimate policy objectives in a manner consistent' with the provisions in the chapter.

Three aspects of these objectives stand out. First, all three RTAs (although it is less prominent in the EU-Georgia DCFTA) mention the desire to create a predictable legal framework. When interpreting an RTA in accordance with this objective, preference may be given to the presumption of WTO consistent interpretation. Moreover, the constraints on regulatory autonomy resulting from these RTAs should be in accordance with the principle of predictability. Second, the EU-Colombia & Peru and EU-Singapore RTAs confirm that these agreements build on the parties' rights and obligations under the WTO. This statement could also be seen as supportive of a WTO consistent interpretation of the agreement, as differing interpretations of key provisions could have the effect of modifying or eroding WTO rights and obligations. Third, in comparison to the objectives of GATS, the balance between trade liberalisation and regulatory autonomy differs between the agreements. The EU-Colombia & Peru RTA can be said to echo the GATS balance. In the case of the EU-Singapore RTA, strengthened by this agreement's sole listed objective of trade liberalisation and facilitation, the balance appears to tip towards trade liberalisation. In cases where the presumption of WTO consistent interpretation would be rebutted, this difference should be taken into account. Similarly, the EU-Georgia DCFTA features less explicit reference to

regulatory autonomy, which can be explained by the agreement's focus on integration of the Georgian economy into the EU internal market, rather than 'simply' facilitating and liberalising trade. The need for regulatory autonomy would necessarily be diminished by this objective of approximation: as Georgia is supposed to comply with EU rules, EU regulators are unlikely to face substantial regulatory autonomy constraints. The differences in these objectives, and the existence of broader objectives in two RTAs, are only to play a limited role. In most cases, they do not appear to be a sufficient reason to alter an interpretation based on the presumption of WTO consistent interpretation.