World Trade Review (2019), 18: 1, 33–61
 doi:10.1017/S1474745618000010 First published online 21 May 2018

When the Multilateral Meets the Regionals: Regional Trade Agreements at WTO Dispute Settlement

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Abstract: Interaction between regional trade agreements (RTAs) and the multilateral trading system established by the World Trade Organization (WTO) is an issue of significance but nevertheless remains unsettled. This article aims to explore the influence RTAs have generated had on the WTO system, with particular focus on the approach adopted by the adjudicators when dealing with irreconcilable RTA–WTO conflicts. During the development of 20 years' jurisprudence, WTO adjudicators offered responses to a number of critical questions. On the one hand, direct endorsement of RTA provisions with the effect of prevailing over the counterpart WTO rules appears to be very difficult, either through legal interpretation or application. On the other hand, unlike often being argued, a close review of WTO case law does not reveal a biased adjudicatory approach against regionalism, as compared to other sources of public international law. When dealing with RTA-related matters, the Appellate Body has been advocating an all-encompassing approach featured by the emphasis on the common intention during the interpretative exercise and the promotion for the WTO built-in mechanisms for valid modification. Such an approach is, to a certain extent, misleading in the RTA –WTO context and has led to certain ill-founded adjudicatory choice.

1. Introduction

Recent decades have witnessed a significant and continuing rise in regional trade agreements (RTAs), which have become an indelible feature of the international economic landscape. Not only have the number of RTAs in force and under negotiation increased dramatically, but also their content has evolved over time. Meanwhile, interaction between RTAs and the multilateral trading system established by the World Trade Organization (WTO) remains unsettled. Under today's multi-layered framework in economic governance, how RTAs interact

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I am very grateful for the critics and comments from the anonymous referees prior to the publication. All the mistakes remain mine.

with the multilateral trading system is an issue of significance, in that inter-regime interplay can facilitate the achievement of policy targets at each level, as well as the realization of collective advancement of economic cooperation; or on the contrary, it can degrade the 'formally' fragmented landscape with the risk of raising substantive conflicts and normative difficulties in the field of international economic law, or even the international legal system as a whole.[1]

Against this background, this article aims to explore the influence RTAs have had on the WTO system from the perspective of dispute settlement. It will look into the case law where RTA-related claims and defences were raised, with particular focus on the approach adopted by WTO adjudicators when dealing with irreconcilable RTA–WTO conflicts. To date, RTA–WTO debates have revolved mainly around three core questions. The first one concerns the preliminary issues in the adjudication process, e.g. jurisdiction of WTO panels and the exercise of it. Typical enquiries include under what circumstances and to what extent a WTO panel should defer to relevant RTA provisions on dispute settlement and make compromises in exercising its jurisdiction; and whether a WTO panel should dismiss a dispute for the reason that it has already been litigated at and decided by another RTA forum. The second question refers to the role of RTAs in the interpretative exercise of WTO adjudicators. As parties to the dispute have committed to obligations under both the WTO and the RTA, the question thus arises as to whether the latter will bear any interpretative value *vis-a-vis* WTO norms, particularly in light of the systemic interpretation principle[2] enshrined in Article 31(3) of the Vienna Convention on the Law of the Treaties (VCLT). Last but not least, in the case of obligation conflict, what approach does the WTO adjudicator employ and what solution does it offer? It is also questioned whether WTO

1 T. Cottier and P. Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence*, Cambridge: Cambridge University Press, 2011; T. Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict', *Indiana Journal of Global Legal Studies*, 16(2) (2009): 647–679; J. Hillman, 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should WTO Do', *Cornell International Law Journal*, 42 (2009): 193; G. Marceau, A. Izaguerri, and V. Lanovoy, 'WTO's Influence on other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation', *Journal of World Trade*, 47(3) (2013): 481–574; C. Claude, A. Yanovich, J.-A. Crawford, and P. Ugaz, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?', WTO Staff Working Paper, ERSD-2013-07, 10 June 2013; A.-C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, 22 (2009): 1.

2 It is argued that Article 31(3)(c) VCLT expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system. K. Matti, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (2014); C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *International and Comparative Law Quarterly*, 54 (2005): 279.

Members are permitted to modify their WTO obligations through an RTA concluded among themselves.

In line with the research questions raised above, this paper is arranged as follows. Section 2 looks into RTA-related preliminary objections at WTO dispute settlement. It starts with the categorization of preliminary objections under public international law and its application at the WTO; it then moves on to analysis of two specific objections which might involve the RTA. Section 3 examines the role of RTAs in interpreting WTO covered agreements. Discussion will explore whether there is any space for RTAs in the WTO interpretative 'tool box'. Section 4 focuses on the adjudicatory solution to the conflict of obligation between the RTA and the WTO. Critical analysis will be made towards the existing case law with a particular focus on the legal insufficiency and unsettled questions. Section 5 concludes with observations and recommendations.

2. RTA-related preliminary objections at WTO proceedings

2.1 Categorization of preliminary objections

In international adjudication, preliminary objection, which generally covers both matters of jurisdiction and admissibility, occurs when a party raises an allegedly unmet requirement for the existence or development of the adjudicatory process so as to impede or postpone a decision of merit.[3] Categorization of preliminary objections into jurisdiction and admissibility was developed originally by the Permanent Court of International Justice and the International Court of Justice (ICJ) and is now incorporated in the practice of several international tribunals. Article 79 of the ICJ Rules of Court provides that 'any objection by the respondent to *the jurisdiction of the Court* or to *the admissibility of the application*, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible' (emphasis added).[4] Similar rules are also found in Article 97 of Rules of the Tribunal of International Tribunal of the Law of the Sea.

In public international law, jurisdiction of international courts and tribunals is widely accepted as the channel through which a court or tribunal receives its power. It is based exclusively on the consent of all parties involved and addresses the question of whether the court or tribunal seized of a case can entertain that case and render a decision that is binding on the parties.[5] The other preliminary issue that is frequently found in close relationship with jurisdiction is the matter

3 L. E. Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections*, Cambridge: Cambridge University Press, 2014, p. 79.

4 Article 79 of the ICJ Rules of Court, www.icj-cij.org/en/rules.

5 *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, http://opil.ouplaw.com/home/EPIL.

https://doi.org/10.1017/S1474745618000010 Published online by Cambridge University Press

of admissibility. Despite the fact that objection to either jurisdiction or admissibility, if upheld, would bring the proceedings to an end and the adjudicator would not go on to consider the merits of the case, distinction between them ought to be made. Arguably, the dichotomy between jurisdiction and admissibility is embedded not only in the separation between the authority of the tribunal and the more general procedural relationship between parties; but also in the distinction between the scope of a tribunal's authority and the conditions governing the exercise of the specific action or process before the tribunal.[6]

At the WTO, preliminary objections have been common practice during the dispute settlement proceedings. Objections against the WTO panel's jurisdiction are primarily examined and solved on the basis of relevant DSU provisions. The often invoked rules include Articles 7, 11, and 23 DSU,[7] which establish the procedural and substantive guarantee of the panel's authority to make findings of WTO compliance or violation.[8]

The standard terms of reference under Article 7 DSU instruct the panel to 'examine' the claims before it and to 'make findings' with respect to consistency

6 J. Pauwelyn and L. E. Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions', *Cornell International Law Journal*, 42 (2009): 77–117. For detailed discussion on the distinction between jurisdiction and admissibility, see Salles, *Forum Shopping in International Adjudication*, pp. 163–168; Y. Shany, 'Jurisdiction and Admissibility', in R. Mackenzie *et al*., *Manual on International Courts and Tribunals: International Courts and Tribunals*, Oxford: Oxford University Press, 2010, p. 780; Northern Cameroons (*Cameroon* v. *United Kingdom*), Separate Opinion of Judge Fitzmaurice; *Oil Platforms (Zslamic Republic of Iran* v. *United States of America*), Judgment, I.C.J. Reports 2003.

7 Other DSU rules are also frequently involved in the jurisdiction discussion. For example, Articles 3.2 and 19.2 DSU often serve as complimentary interpretative tools in understanding the scope and nature of the panel's jurisdiction. In particular, both articles specify the point that recommendations and rulings made by the panel cannot add to or diminish the rights and obligations provided in the covered agreements; and Article 3.2 also stipulates the main aim of the dispute settlement system is to provide 'security and predictability to the multilateral trading system', 'to preserve the rights and obligations of Members under the covered agreements', and 'to clarify the existing provisions of those agreements'. According to Article 3.2 DSU, 'the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

8 For detailed discussion on the jurisdiction of WTO panel, please see L. Bartels 'Applicable Law in WTO Dispute Settlement Proceedings', *Journal of World Trade*, 35 (2001): 499; C. Henckels, 'Overcoming Jurisdictional Isolationism at WTO–FTA Nexus: A Potential Approach for WTO', *European Journal of International Law*, 19(3) (2008): 571–599; L. Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: WTO Appellate Body Beef Hormone Decision', *Georgetown Environmental Law Review*, 10 (1997): 915; G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', *Journal of World Trade*, 35 (2001): 1081; A. D. Mitchell and D. Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function', *Michigan Journal of International Law*, 31 (2009): 559; J. Pauwelyn, 'The Role of Public International Law in WTO: How Far Can We Go?', *American Journal of International Law*, 95 (3) (2001): 535–578; J. P. Trachtman, 'Domain of WTO Dispute Resolution', *Harvard International Law Journal*, 40(2) (1999): 333.

of the measures at issue. According to the Appellate Body, the use of the words 'shall address' in Article 7.2 DSU indicates that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.[9] Article 11 DSU further states that panels *should* make an objective assessment of the matter and the word 'should' is used 'to express a duty [or] obligation'.[10] It is thus difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.

The nature of the panel's jurisdictional power, i.e. exclusive or not, is another often debated matter. The Appellate Body is of the view that Article 23.1 DSU establishes the WTO dispute settlement system as the exclusive forum for the resolution of disputes over WTO covered agreements, requiring adherence to the rules of the DSU.[11] However, although Article 23 DSU prevents other adjudicators from settling WTO-related disputes, it cannot prohibit such adjudicator from exercising jurisdiction over the claim arising out of its own treaty provisions that run parallel to, or overlap with, WTO provisions.[12] In the RTA–WTO context, this means that the coexistence of the adjudicators founded under the RTAs and the WTO does not affect each other's jurisdiction, which is concerned primarily with the relationship between the tribunal being granted jurisdiction and the state parties, rather than the interaction among tribunals themselves. As shown in the case law analyzed below, RTA-related preliminary objections raised at WTO proceedings fall exclusively into the range of admissibility, leaving the panel's jurisdiction as laid out under Articles 7, 11, and 23 DSU untouched. However, WTO adjudicators have never accepted 'admissibility' as a legal concept, but instead addressed it as matters related to the 'exercise of jurisdiction'.

In *Mexico–Taxes on Soft Drinks*, the Appellate Body made several observations in relation to the panel's jurisdiction and the exercise of it. On the one hand, the Appellate Body was of the view that WTO panels have certain powers that are inherent in their adjudicative function, the so-called 'inherent adjudicative powers'.[13] It is confirmed that 'panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction'.[14] On the other hand, the Appellate Body nevertheless cautioned that the panel would seem not to be in a position to choose freely whether or not to exercise

9 Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (*Mexico–Taxes on Soft Drinks*), WT/DS308/AB, para. 48–49.

10 Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (*Canada–Aircraft*), WT/DS70/AB, para. 187; Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para. 51.

11 Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC–Hormones Dispute* (*Canada–Continued Suspension*), WT/DS321/AB, paras. 371–372.

12 K. Kwak and G. Marceau, 'Overlaps and Conflicts of Jurisdiction between WTO and RTAs', www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf, p.3.

13 Appellate Body Report, *Mexico–Taxes on Soft Drinks*, paras. 45–46.

14 Ibid., paras. 45.

https://doi.org/10.1017/S1474745618000010 Published online by Cambridge University Press

its jurisdiction. A decision by a panel to decline validly established jurisdiction would seem to 'diminish' the right of a complaining Member to seek the redress of a violation of obligations within the meaning of Article 23 DSU, and the right to bring a dispute pursuant to Article 3.3 of the DSU.[15] Last but not least, the Appellate Body acknowledged that there may be circumstances in which legal impediments could exist that would preclude a panel from exercising its jurisdiction.[16] Such acknowledgment presented the view that admissibility stands as exception to jurisdiction, defining the circumstances where the court should decline to exercise its jurisdiction.[17]

The following discussion will look into two types of RTA-related preliminary objections that might be raised at the WTO. The first one relates to the forum selection clause provided in the RTA and the second one refers to the scenario where a specific RTA provision is conceived as an agreed solution to certain disputes and/or a waiver of the right to recourse to DSU proceedings.

2.2 *Forum selection clause under the RTA*

The existence of parallel adjudication mechanisms between the WTO and RTAs is increasingly being dealt with through forum selection clauses.[18] The core idea is that once a party has opted to submit a dispute to a given forum, that choice is irreversible and the party is precluded from taking the dispute to another forum. Such clauses assume considerable latitude for strategic forum selection, but once the choice is made, they offer grounds for preliminary objections against parallel and serial litigation; the key objective is to avoid the multiplication of litigation.[19]

The forum selection clause of several RTAs makes express reference to the GATT/WTO. At the Southern Common Market (MERCOSUR), Article 1 of the Olivos Convention provides:

> Disputes falling within the scope of application of this Protocol, which may also be referred to the dispute settlement system of the World Trade Organization or other preferential trade systems that the MERCOSUR State Parties may have

15 As the Panel observed in *US–FSC*, 'a Member has the right to resort to WTO dispute settlement at any time … this fundamental right to resort to dispute settlement is a core element of WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right … rather there should be a clear and unambiguous basis in the relevant legal instrument for concluding that such a restriction exists.' Panel Report, *United States – Tax Treatment for 'Foreign Sales Corporations'* (*US–FSC*), WT/DS108/R, para, 7.17; Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para. 53.

16 Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para. 54.

17 The ICJ expressed a similar position in *Oil Platforms (Zslamic Republic of Iran* v. *United States of America)*, Judgment, I.C.J. Reports 2003, p. 177, para. 29.

18 It is even argued that international economic law offers an interesting laboratory for the use and development of tools in pursuit of coordination of international dispute settlement. L. Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', *European Journal of International Law*, 28(1) (2017): 13–72.

19 Salles, *Forum Shopping in International Adjudication*, p. 245.

> entered into, may be referred to one forum or the other, at the choice of the requesting party. Notwithstanding, the parties of the dispute may, by mutual agreement, decide the forum.
>
> Once a dispute settlement procedure has been initiated in accordance with the previous paragraph, neither party may apply to other dispute settlement systems established in other fora with respect to the same subject, as defined in Article 14 of this Protocol.[20]

Article 2005 of the North America Free Trade Agreement (NAFTA), which allows Member states to bring GATT complaints to WTO, nevertheless requires that 'before a Party initiates a dispute settlement proceeding in the GATT against another Party … that Party shall notify any third Party of its intention' and 'once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other'.

By contrast, the DSU does not contain any provision of this kind. Does the absence of such a clause suggest multilateral tolerance for repeated or parallel litigations? What is the role of RTA forum selection clauses at the WTO? How would they influence the dispute settlement proceedings? As discussed above, all these questions should be addressed at the preliminary stage, as opposed to the merits of the case, as questions in relation to the admissibility of specific cases and claims, as opposed to the jurisdictional power of the panel to entertain the dispute. However, to date, these questions have not been fully resolved. On the limited occasions when a forum selection clause might be involved, the disputing party did not make solid pleas based on it, mainly due to the specific facts of the case.

Argentina–Poultry Anti-dumping Duties was the first case where preliminary objection was raised in the RTA–WTO context. In that case, Brazil initiated WTO claims against definitive anti-dumping duties imposed by Argentina. Before the WTO dispute, Brazil had already challenged the same measure at the *ad hoc* tribunal of the MERCOSUR.[21] At the time of the MERCOSUR proceedings, the relevant agreement applicable then was the *Protocol of Brasilia*, which imposed no restrictions on Brazil's right to bring a subsequent WTO challenge in

20 Article 20.3 of Central American Free Trade Agreement sets out similar rules on the choice of forum. In particular, it is provided:

> 1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
>
> 2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.

21 Award of the MERCOSUR arbitral tribunal on the dispute between the Brazil (claimant) and Argentina (defendant), 'Application of Anti-dumping against the Export of Whole Poultry from Brazil', Resolution No. 574/2000.

respect of the same measure. It is only its successor the *Protocol of Olivos* that provides the forum selection clause. In *Argentina–Poultry Anti-dumping Duties*, Argentina did not invoke this clause under the *Protocol of Olivos*, but rather brought its claim under the principle of good faith. According to Argentina, Brazil was 'estopped' by the principle of good faith from initiating the case at the WTO due to the prior MERCOSUR proceedings on the same measure.

Three years later, another preliminary objection emerged in *Mexico–Taxes on Soft Drinks*. In this dispute between Mexico and the US, the RTA involved was the NAFTA. Mexico did not question that the WTO panel had jurisdiction to hear the US's claims but instead argued that these claims were linked to a broader dispute related to trade in sweeteners under the NAFTA.[22] In Mexico's opinion, under those circumstances, it would not be appropriate for the panel to issue findings on the merits of the US's claims until the parallel NAFTA proceedings had been completed;[23] and only such NAFTA panel would be in a position to 'address the dispute as a whole'.[24] Mexico did not raise any robust argument as regards the forum selection clause under Article 2005 NAFTA and expressly stated that the so-called 'exclusion clause' of Article 2005.6 had not been 'exercised'.[25]

Despite the missed opportunities for detailed elaboration, the Appellate Body suggested in an implicit manner that the forum selection clause might produce certain impact upon the exercise of the panel's jurisdiction.[26] In *Mexico–Taxes on Soft Drinks*, the Appellate Body looked into the preconditions for the operation of the NAFTA forum selection clause and found that they were not met. In particular, Article 2005 NAFTA requires the parallel WTO proceedings be concerned with the same matter and be based 'on grounds that are substantially equivalent to those available' under the NAFTA; but the Appellate Body pointed out that Mexico did not take issue with the panel's finding that 'neither the subject matter nor the respective positions of the parties are identical'. The Appellate Body also noted that Mexico stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claim it was pursuing under the NAFTA. Furthermore, it was undisputed that no NAFTA panel as yet had decided the 'broader dispute' to which Mexico had alluded; most important, Mexico had expressly stated that Article 2005.6 of the NAFTA had not been 'exercised'.[27] Therefore, the Appellate Body was 'mindful of the precise scope of Mexico's appeal' and thus restrained from expressing any view 'on whether a legal impediment to the

22 Panel Report, *Mexico–Taxes on Soft Drinks*, para. 7.11.
23 Ibid.
24 Ibid.
25 Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para. 54.
26 Ibid.
27 Ibid.

exercise of a panel's jurisdiction would exist *in the event that features such as those mentioned above were present*' (emphasis added).[28]

Where applicable in future disputes, an RTA forum selection clause could serve as part of the preliminary objection against the admissibility of relevant claims. The problem is such clause is not among the rules that are directly applicable at the WTO; and for it to be operational, the objection ought to be made in association with rules or principles that are within the reach of the panel. The most pertinent options are estoppel and principle of good faith. It can be argued that the forum selection clause presents the waiver made by the interested parties of their right to recourse to DSU proceedings; and the complaint, by launching the WTO dispute, violates estoppel and its obligation of good faith under Article 3.10 DSU. Essentially, the respondent advocates the preliminary objection for the lack of good faith as a procedural impediment that prevents the panel from exercising its jurisdiction.

A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency. The essence of estoppel is the element of conduct that causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice.[29] It is generally agreed that the party invoking estoppel 'must have been induced to undertake legally relevant action or abstain from it by relying in good faith upon clear and unambiguous representation by the other State'.[30]

So far, estoppel has never been applied by WTO adjudicators, who are of the view that 'it is far from clear that the estoppel principle applies in the context of WTO dispute settlement'.[31] In cases where the respondent argued that one or more claims was inadmissible on the basis of estoppel, WTO adjudicators have often proceeded an *arguendo* approach and reasoned that, assuming for the sake of argument that estoppel is applicable in WTO dispute settlement, one or more of the conditions for its application were not met by the facts of the case.[32] Arguably, what might assist or realize the application of estoppel at the WTO is

28 Ibid.

29 Bowett has described the essentials of estoppel to be: an unambiguous statement of fact, which is voluntary, unconditional, and authorized, and which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement. J. Crawford, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 420.

30 J. P. Muller and T. Cottier, in *Encyclopaedia of Public International Law*, Oxford Public International Law, http://opil.ouplaw.com/home/EPIL.

31 Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, paras. 310 and 312.

32 Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*, Cambridge: Cambridge University Press, p.3. Appellate Body Report, *EC–Export Subsidies on Sugar*, paras. 307, 310, 312; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC–Bananas III*) (Article 21.5–Ecuador II), *EC–Bananas III* (Article 21.5–US), WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, para. 228; Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (*Argentina–Poultry Anti-Dumping Duties*), WT/DS241/R, para. 7.38.

the principle of good faith. It is not only because estoppel is widely accepted as part, or one dimension of it;[33] more important, good faith is a legal principle that is explicitly incorporated in Article 3.10 DSU and thus directly applicable for dispute settlement. In *EC–Export Subsidies on Sugar*, the Appellate Body, after confirming Article 3.10 DSU on good faith covers the entire spectrum of dispute settlement, observed that 'even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU'.[34]

One critical step for preliminary objection based on estoppel and good faith is to establish the forum selection clause as a valid waiver of a Member's DSU right to recourse to the WTO dispute settlement. According to the Appellate Body, the relinquishment of rights granted by the DSU cannot be lightly assumed; the relevant language must, either explicitly or by necessary implication, reveal clearly that the parties intended to relinquish their rights.[35] Other conditions to be met for a valid waiver are further elaborated in *Peru–Agricultural Products*: a Member's compliance with its good faith obligations should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU; and such relinquishment of rights and obligations must be made with regard to the settlement of specific disputes.[36]

As a rule, a forum selection clause generally encloses two conditions for application, namely, the initiation of proceedings at one forum and the identity of the subject matter involved and/or the legal claim raised. This paper holds the position that once the stipulated conditions are found to be met, a statement to the effect of excluding recourse to WTO dispute settlement should be recognized only as an ambiguous relinquishment of the parties' DSU right. Although the forum selection clause is very differently composed from treaty to treaty, WTO adjudicators should apply consistent criteria across the board. Take the condition for identity as an example. While Article 1 of the Olivos Convention precludes parallel or repeated litigation that is concerned with *the same subject*, Article 2005 NAFTA provides exclusion of another forum when disputes are based *on grounds that are substantially equivalent*. In this regard, it is argued the assessment should focus on the identity of the disputed measure and the substantive equivalence of the rights and obligations involved. Any partial or incomplete assessment would lead to a biased understanding of the clause and infringe the right of the interested party. For example, the term 'same subject' under Article 1 of the Olivos Convention

33 Also see, Appellate Body Report, *EC–Export Subsidies on Sugar*, para 312; Appellate Body Report, *EC–Bananas III* (Article 21.5–Ecuador II), *EC–Bananas III* (Article 21.5–US), para. 227.

34 Appellate Body Report, *EC–Export Subsidies on Sugar*, para 312; Appellate Body Report, *EC–Bananas III* (Article 21.5–US), para. 227.

35 Appellate Body Report, *EC–Bananas III* (Article 21.5–Ecuador II), *EC–Bananas III* (Article 21.5–US), para. 217.

36 Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products* (*Peru–Agricultural Products*), WT/DS457/AB, para. 5.25 and footnote 106.

should be broadly interpreted to encompass not only the measure under dispute but also the legal claims raised against it. If a narrow interpretation is followed and 'the same subject' is interpreted as referring to only the disputed measure regardless of the related legal claims, Brazil would be prevented from initiating a WTO dispute in *Argentina–Poultry Anti-dumping Duties*. However, *Argentina–Poultry Anti-dumping Duties* offered substantial legality assessments in light of the anti-dumping rules that do not exist under the MERCOSUR. That is to say, if exclusive effect is granted, Brazil would be deprived of its right to recourse to the WTO dispute settlement for infringement of its trading rights that are not safeguarded at the regional level. This is clearly not the outcome intended under the forum selection clause.

Furthermore, the Appellate Body also placed the condition on specificity in establishing a valid waiver. It is required that such relinquishment of rights and obligations must be made with regard to the settlement of specific disputes.[37] Insofar as the forum selection clause is concerned, this condition should not be interpreted as requiring the express naming of, in the text of the clause, the disputed measure and product, or the title of proceedings initiated at another forum. While such specificity requirement reveals the concern of the Appellate Body that a general provision might risk being extended to matters for which parties were not intending to give up their DSU rights, this would not be the case under the forum selection clause since the common conditions imposed therein, i.e. the initiation of other proceedings and the identity of the dispute, have to a large extent guaranteed its precise and targeted application.

It is true that so far WTO adjudicators have not directly encountered an RTA forum selection clause, but future cases will definitely raise the opportunity. When it does arise, the adjudicator should not dismiss the operation of the clause simply because of lack of direct applicability as external source or endorse it without qualification as part of international law of relevance. The established tests for estoppel, good faith, and waiver of the DSU right can help to bridge such clause into the WTO while preserving the adjudicator's enduring adherence to the rules under the DSU.

2.3 RTA as mutually agreed solution and/or waiver of DSU right

In addition to a forum selection clause, preliminary objection might also be raised when the RTA includes provisions with respect to the settlement of a particular measure or specific dispute. In essence, such provisions are agreements reached among the signatories as regards certain WTO-inconsistent measures enforced by the RTA party or parties. In DSU terms, the question here is whether the agreement can qualify as the 'mutually agreed solution' within the meaning of Article 3.7

37 Appellate Body Report, *Peru–Agricultural Products*, footnote 106.

https://doi.org/10.1017/S1474745618000010 Published online by Cambridge University Press

DSU, or constitute the relinquishment of the right under Article 23 DSU to challenge the measure at the WTO.

In *Peru–Agricultural Products*, the measure under dispute was the additional duty imposed by Peru on imports of certain agricultural products. Such duty is determined and enforced by a mechanism known as the 'Price Range System' (PRS). In particular, Peru applies the PRS in addition to the tariffs that, pursuant to Article II:1 of the GATT, Peru has bound at 68% *ad valorem* for the relevant products. In April 2013, Guatemala filed a complaint at the WTO claiming that Peru by maintaining the PRS, violated its obligations under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT. This case has been widely discussed for its involvement of the bilateral free trade agreement (FTA) between Peru and Guatemala. The FTA was signed in December 2011 but at the time of the WTO proceedings, it had not yet entered into force due to the absence of ratification on the part of Peru. Insofar as the PRS is concerned, paragraph 9 of Annex 2.3 to the FTA states that 'Peru may maintain its Price Range System … with regard to the products subject to the application of the system marked with an asterisk in column 4 of Peru's Schedule as set out in this Annex'. The FTA also encloses specific articles dealing with its relationship with the WTO. For example, Article 1 stipulates that the Parties confirm their existing rights and obligations under the WTO and 'in the event of any inconsistency … this Treaty shall prevail to the extent of the inconsistency, unless otherwise provided in this Treaty'.

As part of the preliminary objections, Peru raised the counter-claim that Guatemala, by concluding the FTA, waived its right to challenge the measure at issue, and thus acted contrary to its good faith obligations under Articles 3.7 and 3.10 DSU when it initiated the present proceedings.[38] Peru's 'good faith' counter-claims essentially raised two questions: first, whether the FTA provision in relation to PRS can be considered a 'mutually agreed solution' within the meaning of Article 3.7 DSU; and if so, whether a 'mutually agreed solution' would lead to the 'relinquishment of a member's DSU right' to recourse to dispute settlement.[39] In fact, Peru might have made separate arguments, claiming the FTA provision qualifies not only as a mutually agreed solution but also the relinquishment of a Member's DSU right. Peru's argument instead mainly focuses on the former, taking the latter as the corollary associated to it: the achievement of a mutually agreed solution suggests the parties have agreed to forgo their rights under the DSU to bring the measure to the WTO DSM for resolution.

38 Appellate Body Report, *Peru–Agricultural Products*, para. 5.5.

39 According to the Appellate Body, 'while Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes'. Appellate Body Report, *Peru–Agricultural Products*, footnote 106.

Under the DSU, 'mutually agreed solution' is explicitly preferred as the ultimate resolution of a dispute compared to other alternatives, i.e. withdrawal of the contested measure, provision of compensation, and obligation suspension. The main difficulty of setting the RTA provision as a 'mutually agreed solution' lies in the timing and sequence of events. As the Appellate Body pointed out in *Peru–Agricultural Products*, the fact that Peru and Guatemala negotiated the FTA before the initiation of the present dispute renders it difficult for consideration under Article 3.7 DSU.[40] Even if the settlement for a specific measure or dispute is incorporated during the negotiation process, there remain further conditions to be met. For the Appellate Body, 'mutually agreed solution' must be 'consistent with the covered agreements' and 'should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU'.[41] It is apparently not the case for the FTA between Peru and Guatemala as the claimed solution of maintaining the PRS has been found in violation of the GATT and the Agreement on Agriculture.[42]

Without shedding light on the relationship between 'mutually agreed solution' and the relinquishment of the DSU right, the Appellate Body moved on to articulate the conditions for a valid waiver. As mentioned earlier, the Appellate Body took the position that 'the relinquishment of rights granted by the DSU cannot be lightly assumed' and 'the language … must clearly reveal that the parties intended to relinquish their rights', e.g. clearly stating that it would not take legal action with respect to a certain measure.[43] Despite its emphasis upon the linguistic and textual clarity, the Appellate Body did not impose rigid restrictions on the format of the relinquishment. The previous section has already explored the possibility of establishing relinquishment under the forum selection clause. In the case where parties to the RTA intend to set out a provision dedicated to the settlement of a specific measure or dispute with agreement to forgo their right to recourse to the DSM, what matters is the textual explicitness and scope specificity, i.e. clarity of the text that expresses the waiver of the right and that identifies the specific dispute upon which the waiver is made.[44] However, some authors have cautioned that the Appellate Body's interpretation is so strict that the provision providing for that waiver has to be clear and absolutely explicit, not subject to any reasonable argument over its interpretation. Any resulting contextual ambiguity will be resolved in favour of the complainant and the admission of the case.[45]

40 Ibid., para. 5.26.

41 Ibid., para. 5.25.

42 In fact, the Appellate Body was not even convinced that the FTA had disclosed the agreement as between disputing parties to allow Peru maintaining the PRS. Ibid., paras. 5.109–5.111.

43 Ibid., para. 5.25.

44 Ibid., footnote 106.

45 J. Mathis, 'WTO Appellate Body, Peru–Additional Duty on Imports of Certain Agriculture Products, WT/DS457/AB/R, 20 July 2015', *Legal Issues of Economic Integration*, 43(1) (2016): 97–105.

To sum up: for a successful objection against admissibility, parties to the RTA have to carefully prepare the relevant provisions from the initial stage of negotiation. A number of DSU provisions such as Article 3.7 on mutually agreed solution and Article 3.10 on good faith, together with the jurisprudence with regard to the relinquishment and waiver of right to recourse to the dispute settlement, are the major references to take into account. Essentially, the aim here is not to restrain or diminish the panel's jurisdiction *per se* but to establish, by means of the RTA, a valid legal impediment that might prevent the panel from exercising its jurisdiction. In any event, preliminary objection does not remove the unlawfulness of the measure. As shown below, a resolution that can 'fix' the WTO violation is reserved exclusively under the adjudicatory stages that deal with the merits of the case.

3. The role of RTAs in interpreting WTO covered agreements

In its very first report in *US–Gasoline*, the Appellate Body expressed a 'refreshing but cautious openness' towards public international law.[46] The Appellate Body confirmed that the 'general rule of interpretation' set out in Article 31 VCLT has attained its status as the 'customary rules of interpretation of public international law' within the meaning of Article 3(2) of the DSU, which directs the Appellate Body in seeking to clarify the provisions of WTO agreements.[47] The Appellate Body went even further by ruling that 'that direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law'.[48] Ever since then, denial of 'clinical isolation' has been widely recognized as the most important statement as regards the role of public international law in the WTO system, first and foremost, for the purpose of interpreting WTO agreements.

Later on, in *US–Shrimp*, the Appellate Body offered concrete instances where it used specific international instruments outside the WTO *acquis*. In search for the meaning of 'exhaustible natural resources' under Article XX(g) GATT, the Appellate Body was not convinced that this term is limited to only 'mineral' or 'non-living' natural resources, but instead considered it to embrace both living and non-living resources.[49] In its reasoning, the Appellate Body first made reference to the preamble of WTO Agreement that explicitly acknowledges 'the objective of sustainable development'. The Appellate Body noted that the generic term of

46 J. Pauwelyn, 'Interplay between WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' (10 February 2016), available at SSRN: http://ssrn.com/abstract=2731144 or http://dx.doi.org/10.2139/ssrn.2731144, p.7.

47 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US–Gasoline*), WT/DS2/AB, p.17.

48 Ibid., p.17.

49 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US–Shrimp*), WT/DS58/AB, paras. 128 and 130.

'natural resources' is not 'static' in its content or reference but is rather 'by definition, evolutionary'. The Appellate Body continued to consult a number of 'modern international conventions and declarations' that have recognized the same concept, i.e. the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.[50] It is worth noting that not all the instruments mentioned are ratified by the entire WTO membership.[51] One plausible explanation for their endorsement might be the scale of their membership and the multilateral nature of the agreements. For the Appellate Body, the cited international instruments demonstrate 'the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources'.[52]

In some cases, the Appellate Body also showed its willingness to involve bilateral agreements between the disputing parties to clarify the meaning of the WTO provisions. In *EC–Poultry*, where Brazil challenged the EC regime for the importation of certain poultry products, one of the most disputed issues is the relationship between, on the one hand, the Oilseeds Agreement, a bilateral agreement negotiated between Brazil and the EC as part of the resolution of the GATT dispute *EEC–Oilseeds*, and, on the other hand, Schedule LXXX of the EC tariff concession. In particular, the Oilseeds Agreement contained, *inter alia*, provisions for a duty-free global annual tariff-rate quota of 15,500 tonnes for frozen poultry meat, and those provisions were reflected in Schedule LXXX of the EC. While denying the Oilseeds Agreement as part of the legal basis of the dispute, the Appellate Body considered it part of the historical background of the EC concessions for frozen poultry meat and thus within the meaning of 'a supplementary means of interpretation of Schedule LXXX' pursuant to Article 32 VCLT.[53]

The above review of case law has disclosed one clear pattern of WTO adjudicators when dealing with non-WTO sources during their interpretative exercise. That is, there ought to be a normative bridging point that links the external source into the WTO system. As shown, recourse to the VCLT was based on Article 3.2 DSU; a number of international conventions and declarations were used to understand the term 'exhaustible natural resources' as a result of 'the objective of sustainable development' acknowledged in the preamble of the WTO Agreement; and the Oilseeds Agreement was taken into account through Article 32 VCLT. Following

50 The Appellate Body also made reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora to buttress its understanding on the exhaustibility of sea turtles. Ibid., paras. 130–132.

51 Ibid., footnotes 111 and 113.

52 Ibid., para. 131.

53 Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Poultry Products* (*EC–Poultry*), WT/DS69/AB para. 83.

this pattern, for a RTA to play a role in clarifying the meaning of the covered agreements, the critical step is to find a bridging point to connect the RTA concerned. The most invoked provision for this purpose is Articles 31(3) VCLT. In the case law, it has been argued that the RTA qualifies the 'relevant rules of international law applicable in the relations between the parties' under 31(3)(c) and/or 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' under 31(3)(a).[54] However, this paper holds the position that there is slim chance for the RTA to be included, by means of Article 31(3) VCLT, into the process of WTO interpretation; and even if it happens, the influence of the RTA involved would be rather limited.

One major hurdle under Article 31(3) VCLT for RTAs is the consistent emphasis of the Appellate Body that 'the purpose of treaty interpretation is to ascertain the *common intentions of the parties*'.[55] On a number of occasions, particularly in relation to the interpretation of Members' concession schedule, the Appellate Body has repeatedly confirmed the central role of 'common intentions' in its interpretative exercise and rejected to take into account a number of elements of unilateral nature, such as the prior practice and the subjective and unilaterally determined 'expectations' of only one of the parties.[56] Another related question refers to the understanding of the term 'the parties' under Article 31(3)(a) and (c) VCLT. It is questioned whether the 'relevant rules of international law' or 'subsequent agreement regarding the interpretation' needs to be ratified by the entire WTO membership or only a subset of it, e.g. parties to a specific dispute or parties to a RTA, is sufficient. The Appellate Body, while cautioning the use of international agreement to which not all WTO Members are party, is nevertheless aware of the fact that Article 31(3)(c) VCLT is considered an expression of the 'principle of systemic integration', which seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation.[57] In *EC and Certain*

54 Panel Report, *Argentina–Poultry Anti-Dumping Duties*, para. 7.41; Appellate Body Report, *Peru–Agricultural Products*, paras. 5.101–5.104.

55 Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (*EC–Computer Equipment*), WT/DS62/AB, para. 84; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (*EC–Chicken Cuts*), WT/DS269/AB, paras. 238–240; Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US–Anti-Dumping and Countervailing Duties (China)*), WT/DS379/AB, paras. 312–313; Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft* (*EC and Certain Member States–Large Civil Aircraft*), WT/DS316/AB, paras. 844–845; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China–Publications and Audiovisual Products*), WT/DS363/AB, para. 405.

56 Appellate Body Report, *EC–Computer Equipment*, para. 84; Appellate Body Report, *EC–Chicken Cuts*, paras. 238–240; Appellate Body Report, *EC and Certain Member States–Large Civil Aircraft*, paras. 844–845.

57 Appellate Body Report, *EC and Certain Member States–Large Civil Aircraft*, para. 845.

Member States–Large Civil Aircraft, the Appellate Body made the following observation:

> [I]n a multilateral context such as WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of WTO agreements, a delicate *balance* must be struck between, on the one hand, *taking due account of an individual WTO Member's international obligations* and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.[58] (emphasis added)

While it remains unclear how this balanced approach between individual international obligations and harmonious approach of interpretation would apply in the RTA–WTO context, the Appellate Body appears to raise the bar for a RTA to be available for the purpose of interpreting a WTO provision.[59] In *Peru–Agricultural Products*, the Appellate Body expressed its reservations as to whether provisions of a RTA can be used at all in establishing the common intention of WTO Members and was worried that WTO provisions could be interpreted differently, depending on the Members to which they apply and on their rights and obligations under the RTA to which they are parties.[60] On the one hand, it is undisputed that RTAs bear the inherent limit in reflecting the 'common intentions' at the WTO due to their varying range of membership. On the other hand, however, as shown in *US–Shrimp*, reflection of the 'common intentions' is not necessarily linked to rigid technical criteria, e.g. ratification by and across the entire WTO membership. The vital point seems to be demonstration of the 'acknowledgement by the international community'[61] of the instruments that are external to the WTO. Thus, would the rising mega-regionals, such as the Trans-Pacific Partnership or the Transatlantic Trade and Investment Partnership, or a provision that has been widely enclosed among contemporary RTAs, qualify the 'acknowledgement by the international community' and then be able to demonstrate the 'common intentions' of the WTO Members?

Even if the RTA is admitted to WTO interpretation by means of Article 31(3) VCLT, its influence would remain marginal. As the chapeau to Article 31(3) VCLT shows, the normative weight to be ascribed to the rules and agreements thereunder is merely to 'be taken into account', standing in stark contrast to the role of the determining elements envisaged in Article 31(1) VCLT, namely, the terms of the treaty, context, object, and purpose. In any event, the role of the RTAs in interpreting the WTO covered agreements should not be overestimated.

58 Ibid., para. 845.

59 Mathis, 'WTO Appellate Body, Peru–Additional Duty on Imports of Certain Agriculture Products, WT/DS457/AB/R, 20 July 2015'.

60 Appellate Body Report, *Peru–Agriculture Products*, para. 5.106.

61 Appellate Body Report, *US–Shrimp*, para. 131.

One premise for adjudicatory interpretation is there must be room, flexibility, or even ambiguity in the subject text for interpretation, but it is not very often the case in the RTA–WTO context. While sharing the same policy goals of economic integration, RTAs usually place upfront 'conflict' on the same regulatory subject with their counterpart WTO rules.[62] As shown in the coming discussion, clash of norms as such cannot be easily 'interpreted' away, since a permissible interpretative exercise would not lead to an outcome that appears to subvert the obvious meaning of the provisions as reflected in the text; and thus have to be settled through other adjudicatory techniques.

4. Conflicts of obligation between RTAs and WTO

To date, all WTO Members have at least one RTA in force with some Members being party to 20 or more RTAs. In the period 1948–1994, the GATT received 124 notifications of RTAs relating to trade in goods, and since the creation of the WTO in 1995, over 400 additional arrangements covering trade in goods or services have been notified. In contrast to such overwhelming prevalence, disputes over obligation conflict between RTAs and the WTO are comparatively rare. The reasons for such scarce recourse to litigation are manifold, ranging from the legal ambiguity and 'relaxed' enforcement of the relevant WTO rules,[63] to the so-called collective action problem[64] and the capacity and cost of the panel proceedings.[65] The WTO covered agreements do not provide any conflict clause dealing with incompatible obligation stemming from an RTA. When it happens, the adjudicators so far have settled, or attempted to settle, them under the exception clauses of Articles XX and XXIV GATT.

62 For example, while WTO accepts tariff as a legitimate border measure, most RTAs are built upon free circulation that prohibits any tariffs among the members.

63 M. W. Schiff and L. A. Winters, *Regional Integration and Development*, World Bank Publications, 2003, pp. 247–250; P. C. Mavroidis, 'Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today', *World Trade Review*, 10(3) (2011): 375–387.

64 P. C. Mavroides, 'If I Don't Do It, Somebody Else Will (or Won't)', *Journal of World Trade*, 40 (2006): 187–214.

65 Other explanations for the exceptionally few disputes might be the institutional establishment at WTO on RTA-related matters. As a rule, WTO members are bound to notify RTAs in which they participate. At the 10th Ministerial Conference in Nairobi in 2015, WTO members adopted a Ministerial declaration in which they agreed to work towards the transformation of the provisional RTA transparency mechanism into a permanent mechanism. Under the transparency mechanism, members participating in an RTA undertake a series of obligations from the negotiation until the end of the implementation period. Such obligations include early announcement, formal notification, submission of relevant data, as well as change reporting. Through such institutional establishment, WTO membership is assumingly well informed of RTA policies that deviate from the standard WTO commitments and is offered a number of occasions and opportunities to comment or even object before it becomes necessary to initiate a formal complaint at the dispute settlement. For more information, www.wto.org/english/tratop_e/region_e/region_e.htm See also, Mavroidis, 'Always Look at the Bright Side of Non-Delivery'.

https://doi.org/10.1017/S1474745618000010 Published online by Cambridge University Press

4.1 Regional exception clauses and WTO modification by means of the RTAs

Among all the RTAs in existence and those under negotiation, it is very common for them to include different rules to those of the WTO on the same subject matter. In most cases, the RTA makes more advanced progress for deeper economic integration. For example, the NAFTA extends national treatment and non-discrimination to the fields of government procurement as well as cross-border trade in services; and among its Member states, the European Union removed all the border charges decades ago and ironed out, to a large extent, the hurdles arising from diverse national standards. In theory, such policy discrepancy between the WTO and RTAs are safeguarded by various exception provisions, i.e. Article XXIV GATT, Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause, in that these clauses allow the adoption of measures that would otherwise be WTO-inconsistent, when they are in the pursuit of deeper economic integration among a selected group.[66]

Turkey–Textiles is the first case where regional trade exceptions under Article XXIV GATT were carefully discussed. In that case, India challenged Turkey's imposition of quantitative restrictions on imports of a broad range of textile and clothing products. Turkey claimed that these quantitative restrictions were adopted upon the formation of a customs union with the EC and thus were justified as exceptions under Article XXIV5(a). On appeal, the Appellate Body laid out the test for Article XXIV justification. In particular, in a case that involves the formation of a customs union, Article XXIV defence is available only when two conditions are fulfilled simultaneously:

> [F]irst, 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 measure at issue.[67]

The issue of conflicting obligations was raised again in *Peru–Agricultural Products*. One critical issue in that case was whether Peru and Guatemala could modify their WTO commitments by means of the FTA. The Appellate Body correctly pointed out that a reading of a number of FTA provisions together reveals that it is not clear whether Peru is allowed under the FTA to maintain the PRS. Although this finding alone could have ended the issue entirely, the Appellate Body opted to continue its analysis *arguendo* that the provisions of the FTA allowed Peru to

66 P. van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2016, p. 648.

67 Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS29/AB, para. 58.

maintain the PRS.[68] Therefore the situation faced by the Appellate Body was that while the FTA grants permission to maintain the PRS, the same measure is found to be in violation of Peru's WTO obligations. As for the rule applicable under this circumstance, the Appellate Body rejected the application of Article 41 VCLT on inter se treaty modification, as claimed by Peru, for the reason that 'the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention'.[69] The Appellate Body further suggested 'the proper routes' to assess whether a RTA provision may depart from certain WTO rules, but is nevertheless consistent with the covered agreements, are the provisions on regional trade exceptions.[70] Despite the fact that Peru did not invoke Article XXIV GATT in its defence, the Appellate Body went on to reiterate its findings in *Turkey–Textiles*, particularly the two cumulative conditions required to be met thereunder.

One distinct point of *Peru–Agricultural Products* is two WTO Members have agreed in the FTA between them, on a measure that is not only WTO-inconsistent but also placing the FTA party in a less favourable position as compared to other WTO Members. Instead of further liberalizing bilateral trade, the measure at issue potentially raised the obstacle to regional trade in the form of additional duties on a range of agricultural products. As regards this unusual aspect of the measure, the Appellate Body was of the view that such measure should not be exempted under Article XXIV GATT. It held that because Article XXIV(4) GATT qualifies a custom union or FTA as 'agreement of closer integration' and the purpose thereof is 'to facilitate trade' between the constituent parties, it cannot be interpreted 'as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements'.[71] As a conclusion, the Appellate Body dismissed Peru's defences based on the FTA and upheld the panel's finding on the PRS' violation under Article 4.2 of the Agreement on Agriculture and Article II:1(b) GATT.

In light of the significance of the issues under dispute, the rulings in *Peru–Agricultural Products* should have been complemented with more detailed reasoning and elaborations. The Appellate Body seemingly rejected the application of Article 41 VCLT for the reason of *lex specialis*. *Lex specialis* in international law, the principle that special law derogates from general law, is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts. It suggests that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the

68 Appellate Body Report, *Peru–Agricultural Products*, paras. 5.109–5.111.
69 Ibid., para. 5.112.
70 Ibid., para. 5.113.
71 Ibid., para. 5.116.

former.[72] According to the Appellate Body, since the WTO has established its own rules in relation to changes, such rules prevail over the general principle stipulated in the VCLT. However, this brief reasoning did not explain the reason why WTO provisions on *amendments*, *waivers,* and *exceptions* can replace the VCLT article on *inter se modification*. First, the mere fact that the VCLT has dealt with treaty amendments and inter se modification in two separate articles[73] suggests substantial distinction between them. While treaty amendments take effect across the entire membership, the inter se modification concerns certain parties only. Second, the Appellate Body invoked rules on waivers under Article IX WTO Agreement as one of the WTO-specific norms. On the one hand, Article IX(3) WTO Agreement lays out waiver of obligation as part of the decision-making authority of the Ministerial Conference in exceptional circumstances; on the other hand, however, inter se modification under Article 41 VCLT is founded upon negotiation and agreement among a selected group of parties. Last but not least, as shown in *Turkey–Textiles*, provisions embodied in Article XXIV GATT, Article V GATS, and the Enabling Clause, are exceptions that address the relationship between the RTA parties and other WTO Members, mainly in term of the most-favored-nation (MFN) treatment. By contrast, *Peru–Agricultural Products* demonstrated a different scenario where dispute arises as to the relationship between and within the RTA parties. Regardless of whether Article 41 VCLT should have been applied, this Article evidently deals with a different subject matter from the invoked WTO provisions on regional integration, amendments, and waivers. One possible reading of the Appellate Body's rulings is that any valid modification has to go through the WTO's built-in mechanisms; modification enclosed in or made on the basis of external agreement outside the WTO will not be recognized. Such a reading, if established, would in one brushstroke put the WTO treaty above all other treaties and equate an almost imperialistic proclamation of WTO supremacy in international law.[74]

72 ILC Report, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', http://legal.un.org/ilc/guide/1_9.shtml, para. 56. For detailed discussion, see also Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', *Nordic Journal of International Law*, 74(1) (2005): 27–66; M. Koskenniemi, 'Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes"', UN Doc. ILC (LVI)/SG/FIL/CRD 1 (2004); M. Akehurst, 'The Hierarchy of the Sources of International Law', *British Yearbook of International Law*, 47(1) (1976): 273–285; J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', *American Journal of International Law*, 96 (2002): 874; J. Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a universe of inter-connected islands', *Michigan Journal of International Law*, 25 (2003): 903; R. Howse and P. C. Mavroidis, 'Europe's Evolving Regulatory Strategy for GMOs – the Issue of Consistency with WTO Law: Of Kine and Brine', *Fordham International Law Journal*, 24 (2000): 317.

73 Articles 40 and 41 VCLT respectively deal with 'amendment of multilateral treaties' and 'agreement to modify multilateral treaties between certain of the parties only' under Part IV of 'Amendment and Modification of Treaties'.

74 J. Pauwelyn, 'Interplay between WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' (10 February 2016), pp. 21–22.

Furthermore, the reasoning in *Peru–Agricultural Products* seems to suggest that in the case of legal vacuum, i.e. non-existence of the relevant WTO provision, the Appellate Body would be willing to apply the rules and principles from public international law. That is to say, if the WTO does not contain any rules regarding the change of the treaty, Article 41 VCLT would be applicable. The gap-filling function of public international law is nothing new at the WTO except for the fact that panels and the Appellate Body have never openly admitted it.[75] If this is the case, declining the application of Article 41 VCLT would be an erroneous choice since WTO covered agreements do not envisage any general protocol for inter se modification. Some authors have proposed to permit an RTA defense under Article XXIV GATT insofar as the RTA concerned meets the core requirements thereunder, namely liberalizing 'substantially all trade' among RTA parties without raising trade restrictions against other WTO Members.[76] This proposal has the advantage of offering leeway for inter se modifications made in the form of RTAs, but its application will encounter a number of difficulties in light of the treaty interpretation. First, it considerably expands the scope of justifiable exceptions intended under Article XXIV GATT. In the words of the Appellate Body, Article XXIV GATT cannot be interpreted as 'a broad defence for measures in FTAs'[77]; and paragraph (5) therein explicitly sets out, or confines, the category of GATT violations that can be justified. On the one hand, the core requirements mentioned establish the criteria against which the RTA's overall compatibility with the WTO can be assessed. On the other hand, it is nevertheless another issue to use the RTA to justify WTO-inconsistent measures. That is to say, meeting the core requirements and being a WTO-compatible RTA cannot afford a comprehensive shelter for the entirety of the parties' RTA obligations, as against their WTO commitments. It is clearly not the intention of the WTO Members as reflected in the text of Article XXIV GATT. As mentioned, such a shelter ought to qualify the conditions under paragraph (5).

However, it is one thing for regional exception clauses not to offer broad exemptions for WTO inconsistency but quite another for such clauses to be the only way for valid inter se modification. Setting regional integration exceptions as the only option equals a refusal to recognize WTO Members' contractual freedom to update and modify the rights and obligations existing between them.[78] The fact that the WTO treaty can only be 'amended' by the consent of all WTO Members does not preclude that a limited number of WTO Members validly

75 L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', *Journal of World Trade*, 35 (2001): 499; J. Pauwelyn, 'The Role of Public International Law in WTO: How Far Can We Go?', *American Journal of International Law*, 95 (2001): 535–578; J. P. Trachtman, 'Domain of WTO Dispute Resolution', *Harvard International Law Journal*, 40 (1999): 333.

76 G. Shaffer, and L. Alan Winters, 'FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law', *World Trade Review*, 16(2) (2017): 303–326.

77 Appellate Body Report, *Peru–Agricultural Products*, para.5.116.

78 Shaffer and Winters, 'FTA Law in WTO Dispute Settlement', p.320.

conclude inter se 'modifications' to the WTO treaty; inter se 'modifications' must be tolerated as long as they do not affect the rights of other WTO Members.[79] However, the combined event of legal vacuum on inter se modification and non-application of Article 41 VCLT in fact put in place a judge-made law against the case where certain Members are willing to modify their WTO rights and obligations as between themselves alone. It is judge-made in the sense that although the possibility of such modification is not provided in the covered agreements, it is definitely not prohibited either. Insofar as the RTAs are concerned, such legal vacuum does not cause a problem if parties to the RTA plan for measures with better trade liberalizing effects. Nevertheless, problems will arise, as demonstrated in *Peru–Agricultural Products*, when the parties for whatever reason opt to make a step back from their WTO commitments and place, in the Appellate Body's words, a roll-back measure that raises hurdles to regional trade. The Appellate Body was correct to exclude the roll-back measure from the shelter under Article XXIV GATT, not only because such a measure fails to reflect the general theme of regional integration; more important, it clearly goes against the policy consideration underlying the exception clauses.[80] Even if such roll-back modification cannot be exempted as a regional integration exception, there ought to be certain protocol available that allows WTO Members to do so. It is clearly impossible to accept the view that the provisions of a multilateral treaty can never be modified and its obligations limited by particular agreements unless there is consent of all other contracting parties.[81]

4.2 Settling RTA–WTO conflicts under general exception clauses

In addition to regional exception clauses, disputing Members have also made recourse to the general exceptions under Article XX GATT to justify their RTA-related violations under the GATT. In *Mexico–Taxes on Soft Drinks*, Mexico sought for justification of its tax measures under Article XX(d) GATT, which offers shield for measures 'necessary to secure compliance with laws or regulations'. Mexico argued that the challenged measures were intended to secure compliance with the obligations of the US under the NAFTA.[82] Thus, the central issue here is whether Article XX(d) encompasses measures that aim to secure compliance with the RTA provisions.

The Appellate Body disagreed. It considered that 'laws or regulations' under Article XX(d) GATT refer to the rules that form part of the domestic legal order

79 J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Vol. 29, Cambridge: Cambridge University Press, 2003, pp. 315–316.

80 The same problem also arises under the proposal made by Shaffer and Winters, 'FTA Law in WTO Dispute Settlement', according to whom the roll-back measure could be defended under Article XXIV GATT insofar as RTA concerned meets the requirements thereunder and is thus WTO-compatible.

81 'The Chinn Case, 1935', *British Yearbook of International Law*, 16 (1935), p. 166.

82 Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para. 76.

and do not include the international obligations of another WTO Member.[83] The Appellate Body also took into account the fact that certain international rules may have direct effect within some Members' domestic legal systems without requiring implementing legislation; and, in such circumstances, these rules become part of the domestic law of that Member.[84] Even more interesting, the Appellate Body held the following:

> Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. As we noted earlier, this is not the function of panels and the Appellate Body as intended by the DSU.[85]

The Appellate Body's refusal to look into the relevant NAFTA norms was subject to pointed criticism. Some considered the US 'compliance' with the NAFTA a question simply subordinate to the legal rule under Article XX(d) GATT, which stands perfectly within the panel's jurisdiction.[86] It is also questioned when an assessment of a WTO claim with reference to a non-WTO treaty crosses the line from assessing a WTO claim in the context of applicable law beyond the WTO treaty to that of impermissible adjudication of a 'non-WTO dispute'.[87] The opponents make reference to a number of occasions where the Appellate Body has carried out such an assessment of the laws external to the WTO. For example, in *EC–Bananas III*, both the panel and the Appellate Body opted to examine the relevant parts of the Lomé Convention concluded between the EC and African, Caribbean, and Pacific countries in search of the accurate interpretation of the WTO provisions under dispute.[88] In *India–Patents (US)*, the Appellate Body considered also essential 'an examination of the relevant aspects of Indian municipal law' in determining whether India has complied with its WTO obligations.[89] The question then arises as to why the RTA was treated differently in *Mexico–Taxes on Soft Drinks*.

At this juncture, distinction ought to be made. In *EC–Bananas III*, the Appellate Body's examination of the Lomé Convention was based on a reference made to it and stipulated in the Lomé waiver, which is part of the WTO covered agreement. It is this reference that renders the Lomé Convention, to a certain extent, a GATT/

83 Ibid., paras. 69 and 75.

84 Ibid., para.148.

85 Ibid., para.78.

86 R. Howse, 'World Trade Organization 20 Years On: Global Governance by Judiciary', *European Journal of International Law*, 27 (2016): 9–77.

87 Pauwelyn, 'Interplay between WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' (10 February 2016), http://ssrn.com/abstract=2731144 or http://dx.doi.org/10.2139/ssrn.2731144, p.12.

88 Appellate Body Report, *EC–Bananas III*, para. 167.

89 Appellate Body Report, *India–Patents (US)*, paras. 65–66.

WTO issue. In the words of the panel and the Appellate Body, 'we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.'[90] In *India–Patents (US)*, the Appellate Body looked into India's municipal law that served as evidence of the facts and of state practice; the judicial exercise of examining it is not to interpret the law concerned but rather to determine whether the municipal law under dispute is in compliance with WTO laws.[91]

In contrast, *Mexico–Taxes on Soft Drinks* presents a different situation. First of all, there was no bridging element similar to the Lomé waiver in *EC–Bananas III*, setting up the normative links between the NAFTA and the WTO or making the NAFTA obligation a 'GATT/WTO issue'. Furthermore, different from the factual or evidential analysis in *India–Patents (US)*, examination of the NATFA provisions at issue would be essentially a process of legal enquiry. It not only involves the interpretation and application of the NAFTA rule, but also leads to a finding on the US's compliance with it; and, even more, in the case of non-compliance, application of Article XX GATT would further lead to the risk of adding the claimed NAFTA commitments to a Member's WTO obligations. This is exactly the type of adjudicative outcome envisaged but prohibited under Article 3.2 DSU; namely, adding to or diminishing the rights and obligations provided in the covered agreements. That is to say, in *Mexico–Taxes on Soft Drinks*, a ruling otherwise would not only have the effect of integrating the US's NAFTA commitments as part of its WTO obligations but also bear the consequence of converting the WTO adjudicators into the 'enforcement wing' of another international agreement.

Therefore, the Appellate Body made a plausible choice by not including NAFTA into its scrutiny under Article XX(d) GATT. However, what is worth noting is the Appellate Body did not completely close the door to RTAs under that article. As mentioned above, the Appellate Body noted the fact that in some WTO Members, certain international rules may have direct effect within their domestic legal systems and should thus be taken as part of the domestic law of that Member.[92] Therefore, a WTO violation might be justified, should the measure at dispute be necessary to secure compliance with the RTA that bears direct effect in the domestic legal system.

Another RTA-related defence under Article XX GATT was raised in *Brazil–Retreaded Tyres*, where the EC challenged the WTO-consistency of Brazil's import regime in retreaded tyres. In that case, Brazil imposed an import ban on retreaded tyres but with an exemption for imports from MERCOSUR countries (the MERCOSUR Exemption). The EC took issue with the MERCOSUR Exemption, contesting its resulting discriminatory treatment between

90 Appellate Body Report, *EC–Bananas III*, para. 167.
91 Appellate Body Report, *India–Patents (US)*, paras. 65–66.
92 Appellate Body Report, *Mexico–Taxes on Soft Drinks*, para.148.

MERCOSUR countries and other WTO Members. In fact, the original import ban did not have the MERCOSUR Exemption. It was later introduced by Brazil as a result of a ruling issued by the MERCOSUR arbitral tribunal, which found Brazil's restrictions on the importation of remoulded tyres in violation of its MERCOSUR obligation. Therefore, in *Brazil–Retreaded Tyres*, Brazil argued that because the MERCOSUR Exemption is based upon the decision of the MERCOSUR tribunal, it is thus justified under Article XX GATT, particularly under Article XX(b) GATT that offers immunity for domestic measures 'necessary to protect human, animal or plant life or health'.

During the appeal, the Appellate Body upheld the panel's finding that the import ban can be considered 'necessary' within the meaning of Article XX(b) and is thus provisionally justified under that provision. However, the MERCOSUR Exemption failed the 'chapeau test' that requires the measures at issue 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination … or a disguised restriction on international trade'.[93] According to the Appellate Body, 'the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree'.[94] The Appellate Body further observed that 'acts implementing a decision of a judicial or quasi-judicial body – such as the MERCOSUR arbitral tribunal – can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable".'[95]

In *Brazil–Retreaded Tyres*, the Appellate Body made no exception to its consistent approach towards Article XX GATT claims; that is, while applying a rather deferential standard of review in the so-called 'rationality review' under the provisional justification at the first tier, it adopted the rather strict scrutiny in the subsequent chapeau test focusing on the special features of the disputed policies, particularly in respect to the way in which the regulatory scheme is applied or operationalized in practice.[96] One matter of particular interest in *Brazil–Retreaded Tyres* is the fact that the conflict of obligation under dispute was between the WTO covered agreement, on the one hand, and the decision made by the RTA adjudicator, on the other. Generally speaking, this matter forms part of the enquiry on the relationship and interaction between the WTO DSM and other international courts and tribunals. But the fact that the external adjudicator

93 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (*Brazil–Retreaded Tyres*), WT/DS332/AB, para. 228.

94 Ibid., para. 228.

95 Ibid., para. 232.

96 R. Howse, 'The World Trade Organization 20 Years on: Global Governance by Judiciary', *European Journal of International Law*, 27 (2016): 9–77.

concerned is established under the RTA further raises the question as to whether the decision thereof might be treated differently. As shown in *Brazil–Retreaded Tyres*, the resulting outcome of the MERCOSUR tribunal's decision is the typical RTA–WTO dilemma between the regional integration process and the multilateral MFN commitment. When the same dilemma stems directly from the provisions of the RTA, the proper assessing routes offered by the Appellate Body are the WTO provisions on regional exceptions.[97] Would it be the same for the integration progress made on the basis of adjudicatory decisions? If not, given the Appellate Body's statement that 'acts implementing a decision of a judicial or quasi-judicial body … can hardly be characterized as a decision that is "capricious" or "random"', what would be the role and status of such decision at the WTO proceedings? On the one hand, following the interpretation of the Appellate Body, there seems to be not much space under the regional exceptions, Article XXIV GATT for example, to accommodate the judge-made integration of the region. On the other hand, however, it would be rather awkward for the multilateral adjudicator that has generated profound impact on regime maintenance and development to reject or refuse to acknowledge the same function made by its fellow adjudicators at the regional level. The WTO case law has not spoken on the above enquiries, which thus remain to be tested in the future.

5. Concluding remarks

To date, the RTA–WTO debates have evolved mainly around the irreconcilable conflicts between the two major constituents of global trade governance. During the development of 20 years' jurisprudence, WTO adjudicators offered responses to a number of critical questions and several observations and recommendations can thus be made to conclude this article.

For matters at the preliminary stage, the departure point is: RTA provisions on dispute settlement cannot affect the existence and scope of the panel's jurisdiction but they might affect the exercise of it. Such effect is in essence built on the waiver of RTA parties' right to recourse to the WTO DSM. The Appellate Body left certain flexibilities as regards the format of a valid waiver and in this regard, RTA parties have two options that are not exclusive to each other. The first one is to insert a forum selection clause in the RTA not only prohibiting repeated and parallel litigations but also expressly mentioning WTO DSM as one option available. So far, the Appellate Body has not encountered directly with the forum selection clause from the RTA. When it happens, this paper promotes an adapted but unified approach on the basis of estoppel and the principle of good faith. Essentially, WTO adjudicators, when testing such clause as a valid waiver of the DSU right, should focus on the identity of the disputed measure and the substantive equivalence of the rights

97 Appellate Body Report, *Peru–Agricultural Products*, para. 5.113.

https://doi.org/10.1017/S1474745618000010 Published online by Cambridge University Press

and obligations involved. The second option is to enclose a provision that articulates the agreement between the RTA parties to waive the same DSU rights with regard to a specific measure or dispute. However, such provision ought to be carefully composed to meet the Appellate Body's benchmark for textual explicitness and scope specificity.

Expectation for the weighty effect of allowing the RTA provision to prevail over the irreconcilable WTO rule is hard to achieve. WTO adjudicators have not yet granted such RTA priority through either legal interpretation or the general and regional exception clauses. In particular, there is slim chance for a RTA to qualify as 'relevant rules of international law' or 'subsequent agreement between the parties' under Article 31(3) VCLT due to its inherent weakness in reflecting the common intention of the WTO membership; and the Appellate Body's interpretation of exception clauses renders not much space for the RTAs to fit in.

Even if direct application of the RTA with the effect of setting aside the counterpart WTO rules appears to be difficult, it is nevertheless farfetched to argue that WTO adjudicators have employed a biased approach against regionalism, as compared to other sources of public international law. A close review of the case law has disclosed a high level of consistency in the adjudicatory practice of WTO panels and the Appellate Body. For example, there is always the need for a bridging point that links non-WTO law into the WTO proceedings, for the purpose of either legal application or interpretation; and WTO adjudicators have consistently placed ultimate priority on their adherence with the rights and obligations stipulated in the DSU. The fact that the RTAs, compared with other forms of international law, are less endorsed is mainly due to the particular facts of the case and/or the specificity of their membership coverage and relationship with the WTO.

However, the fact RTAs are not biasedly treated does not mean the jurisprudence has established perfect approaches in dealing with RTA-related matters. For example, declining the application of the VCLT article on inter se modification is not only an ill-founded choice; it also deprives Members' right to legitimately enclose policies and measures that push back their WTO commitments, either in a RTA or through other types of agreement. Furthermore, the panel and the Appellate Body could have offered more elaborations as regards, first, the role and influence RTA adjudicators have at the WTO; and, second, the way to deal with RTA adjudicatory decisions that are incompatible with WTO laws.

The rise of RTAs will remain one significant feature of the international economic landscape in the coming years. During their preparations for a RTA, participating states should pay close attention to the relevant provisions of the WTO agreements, together with the established case law. For example, granting direct effect to the RTA might activate the justification for violation under Article XX (d) GATT; enclosing forum selection clause and/or clause on the waiver of DSU right might prevent potential WTO disputes, provided such clauses are composed in line with the conditions set out in the jurisprudence. For many reasons, formal disputes over irreconcilable conflicts between the WTO and RTAs are relatively

rare; preparations as such would effectively keep under control the deterioration of systemic fragmentation and inter-regime conflicts of multi-layered economic governance.

On the side of the WTO, the Appellate Body has revealed the keenness for an all-encompassing approach in its adjudicatory practice, e.g. its constant emphasis on the reflection of the Members' 'common intention' when interpreting the covered agreements and promotion of the WTO's own mechanisms for amendment sweeping across the entire membership. This all-encompassing approach alone, however, is not sufficient to deal with the conflicts arising from or related to the RTAs and their adjudicatory organs. Although the Appellate Body has on several occasions shown willingness to take into account Members' commitments made at another forum, its application to RTAs is still to be tested in future cases.