

# Sustaining Multilateralism from the Bench

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*The surge in regional trade agreements (RTAs) in recent decades has generated growing friction between regionalism and multilateralism in international economic governance, resulting in serious institutional and legal challenges to the World Trade Organization (WTO). In this state of play and with the WTO's negotiating arm trapped in a persistent stalemate, several questions arise: (1) What role, if any, has the WTO dispute settlement system (DSS) played in responding to the challenges posed to the WTO multilateral trade regime by RTA proliferation? (2) How have these systemic challenges affected WTO jurisprudence? And (3) in which ways have these challenges shaped the judicial choices made by the WTO DSS in cases implicating substantive and jurisdictional questions located at the WTO-RTA interface? Based on a close analysis of WTO cases involving RTA-related issues and empirical evidence generated through interviews with WTO practitioners having firsthand knowledge of the DSS's work, this Article shows that the DSS has not remained indifferent to the challenges presented to WTO rules and institutions by increasing economic regionalization. Rather, in the series of RTA-related cases reaching its docket, the DSS has engaged in a determined and enduring quest for sustaining the multilateral trading system from the bench. This quest has evolved along two parallel and mutually reinforcing trajectories: the substantive and the jurisdictional. When woven together, these trajectories demonstrate how a steady body of DSS jurisprudence has emerged. This jurisprudence is animated by a judicial philosophy of seclusion from and ascendancy over regionalism and aimed at preserving the multilateral legal order in the face of the unabated surge in RTAs. This judicial philosophy, the Article concludes, nevertheless carries certain challenges of its own for the WTO and international economic law.*

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DOI: <https://doi.org/10.15779/Z38C824F7C>

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## INTRODUCTION

Since the 1990s, the world has experienced a significant and persistent surge in regional trade agreements (RTAs).<sup>1</sup> Not only has the number of RTAs “increased exponentially,” but their scope and content have also evolved.<sup>2</sup> These agreements “have become an indelible feature of the international trading landscape”<sup>3</sup> and a key element of trade policy for all Members of the World Trade

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1. Simon Lester, Bryan Mercurio & Lornad Bartels, *Introduction*, in 1 BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 1, 3-4 (Simon Lester, Bryan Mercurio & Lornad Bartels eds., 2nd ed. 2016).

2. *Id.* at 5; Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, in REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM 608 (Rohini Acharya ed., 2016).

3. Chase et al., *supra* note 2, at 608; Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95 (2016).

Organization (WTO),<sup>4</sup> developments stimulated in part by Members’ “frustration” over the lack of progress in multilateral negotiations and the inability to bring the WTO Doha Round of trade talks to a successful conclusion.<sup>5</sup> As a result of these events, a complex web of RTAs has emerged, which has consequently generated growing friction between regional trade arrangements and the multilateral trading system centered in the WTO.

The mounting tension between regionalism and multilateralism in international trade has, in turn, engendered serious concerns about the fragmentation of international economic law. This tension has also presented acute challenges to the WTO as an institution and a legal system at a time when its negotiating function has become ensnared in a long-standing stalemate.<sup>6</sup> In particular, the expanding network of RTAs that overlap with WTO trade disciplines and provide for their own dispute settlement mechanisms has presented risks to the credibility of WTO rules and the centrality of WTO governance in the international economic order.<sup>7</sup> The expansion of RTAs has likewise posed threats to the authority of the WTO dispute settlement system (DSS),<sup>8</sup> the adjudicative body designed to enforce WTO rules and to help achieve the multilateral objectives that those rules embody.<sup>9</sup>

Against this backdrop and the failed attempts of the WTO’s negotiating arm to overcome its impasse, several questions arise:

1. What role, if any, has the WTO DSS played in responding to the challenges RTA proliferation poses to the multilateral trade regime?
2. What effect have these systemic challenges had on WTO jurisprudence?  
And
3. How have these challenges shaped the DSS’s judicial and interpretative choices in cases implicating questions located at the intersection between the WTO and RTAs?

An in-depth, interview-based analysis of WTO cases involving RTA-related issues suggests that the DSS has not remained indifferent to the challenges posed to WTO rules and institutions by economic regionalization. Instead, in a series of RTA-related cases reaching its docket, the DSS, under the guidance of the WTO’s Appellate Body (AB), has engaged in a long and persistent quest to sustain the multilateral trading system from the bench. As this Article shows, that quest has evolved along two parallel, interrelated, and mutually reinforcing trajectories. The first is the substantive legal trajectory, which revolves around conflicts of

4. Rohini Acharya, *Regional Trade Agreements: Recent Developments*, in REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM 1 (Rohini Acharya ed., 2016).

5. *Id.* at 8; Lester et al., *supra* note 1, at 3.

6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part II.

9. Sivan Shlomo Agon, *Is Compliance the Name of the Effectiveness Game? Goal-Shifting and the Dynamics of Judicial Effectiveness at the WTO*, 15 WORLD TRADE REV. 671, 677–681 (2016).

obligations under the multilateral and regional trade systems. Along this trajectory, the DSS has continually worked to entrench the autonomy and preeminence of the WTO legal edifice while limiting the ability of Member States to derogate from their substantive WTO obligations through the formation of RTAs. Along the second, complementary jurisdictional trajectory, the DSS has steadily operated to uphold its own authority vis-à-vis regional dispute settlement fora, a step meant to preserve the DSS as an international adjudicative institution as well as to ensure its power to enforce compliance with the WTO's substantive legal rules.

These two trajectories followed by the DSS in RTA-related disputes, this Article argues, demonstrate an evolving judicial philosophy of seclusion from and ascendancy over regionalism,<sup>10</sup> a philosophy that results, as one WTO practitioner put it, in giving "greater strength to the multilateral system as opposed to regional . . . trade arrangements."<sup>11</sup> In other words, the WTO case law developed at the WTO-RTA nexus reflects a judicial philosophy of commitment to maintaining the multilateral trade regime and its underlying norms in a reality where the WTO's role as a vehicle for international trade regulation has been called into question while trade deals in regional fora multiply at an ever-increasing pace.

As this Article will show, this judicial philosophy, which lies at the heart of the DSS's quest to sustain multilateralism, is not asserted outright in RTA-related disputes but is, instead, often concealed behind a veil of textualism, thus appearing to adhere to the language of the WTO treaty. However, this thinly concealed judicial philosophy has driven a process of institutional evolution, adaptation, and struggle aimed at providing a measure of systemic and normative stability to the WTO regime in times of turbulence and change. Furthermore, this judicial philosophy, along its substantive and jurisdictional trajectories, has affected the legal and institutional interaction between the WTO and RTAs, thereby shaping the course of fragmentation in the international economic domain. Understanding this judicial philosophy, together with its ramifications for the WTO and the broader field of international economic law, is thus of great significance. This is particularly important because the friction between multilateralism and regionalism in international trade is not expected to disappear anytime soon. If anything, that friction will only grow as the surge in RTAs continues.<sup>12</sup>

With a view toward developing a fuller, more complex understanding of the DSS's quest in RTA-related disputes, the judicial philosophy steering it, and the interpretative strategies harnessed to its realization, this Article weaves together

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10. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 75 (2016) (suggesting that the AB has implemented a judicial policy of "clinical isolation" from regionalism).

11. Interview with private attorney, in Geneva (Apr. 23, 2012); see *infra* note 13 (explaining the anonymous interview process utilized).

12. See Acharya, *supra* note 4, at 5 (discussing the proliferation of RTAs).

legal and institutional analysis with unique empirical data generated through in-depth, semi-structured interviews with WTO practitioners who have firsthand knowledge of DSS's work and the disputes examined.<sup>13</sup> The interviewees included diverse actors in the world of WTO dispute settlement, such as WTO adjudicators, senior and midlevel staff members of the WTO Secretariat, WTO ambassadors, legal counsel in trade delegations, and lawyers at private law firms.

In order to glean multiple perspectives and develop a holistic account of the issues involved, I attempted to interview informants with different positions and opposing interests in the RTA-related cases investigated. Through these interviews, I sought to gain a more complete picture of the DSS's operation and decision-making in RTA-related disputes, as well as to obtain relevant information that is excluded from DSS rulings and other public records. In particular, the interviews with WTO insiders served as a valuable tool for eliciting participants' perceptions of the challenges faced by the DSS in RTA-related disputes, tracing the ways in which these challenges influenced the DSS's judicial choices, and exposing the underlying rationale and policy preferences these choices represent. While the analysis presented in this Article is a product of a continuous dialogue between the interviews, WTO rulings, the literature, and other pertinent sources, the interviews revealed otherwise unavailable information and perceptions and provided knowledge about WTO dispute settlement in action, as it is experienced in the real world.

Following this Introduction, the Article proceeds in five parts. Part I provides a short overview of the WTO and its dispute settlement system. Part II situates the discussion of RTA-related disputes in the broader context of the regionalizing international economic landscape. To this end, Part II begins with a review of the current state of RTA proliferation, the increasing friction it engenders between multilateralism and regionalism in international economic governance, and the systemic threats it poses to the multilateral trade regime centered around the WTO. Part II then recounts the main legal and institutional challenges raised before the WTO DSS when confronted with RTA-related disputes, while pointing to the DSS's ardent quest to sustain multilateralism that these challenges seem to have prompted. Parts III and IV proceed with an in-depth, interview-based analysis of this judicial quest as it unfolded in a series of RTA-related cases implicating substantive and jurisdictional questions located at the WTO-RTA

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13. These interviews form part of a broad series of interviews conducted by the author, primarily in Geneva, between March 2012 and April 2013. The present Article draws on nineteen of these interviews. Each interview lasted between one and one and a half hours. All participants but one permitted recording of the conversation. The interviews were conducted according to a semi-structured interview guide composed of open-ended questions that addressed the specific case(s) the interviewees were involved in and their experience with the work of the WTO DSS more generally. The semi-structured nature of the interviews permitted informants to convey their own narratives of the cases investigated and to share their knowledge of the DSS at length. At the same time, this format gave both the interviewees and the author the leeway needed to take the conversation down unexpected paths. For reasons of anonymity, the interviewees are cited throughout this work with generic titles such as "senior WTO official" or "EU official."

interface. Finally, Part V concludes with a discussion of the findings emerging from the study and an appraisal of their implications with a look to the future. Taking a broader perspective, this Part weaves together the substantive and jurisdictional threads of jurisprudence developed by the DSS in RTA-related disputes and discusses the fundamental judicial philosophy these threads reveal. On this basis, Part V assesses the systemic role played by the DSS in responding to the challenge of RTA proliferation. It further considers the ramifications of this role for the WTO and the future relationship of the multilateral and regional trade regimes in a rapidly changing global economic order.

## I.

### THE WTO AND ITS DISPUTE SETTLEMENT SYSTEM: A SHORT OVERVIEW

The WTO is a multilateral organization set up to supervise and liberalize international trade.<sup>14</sup> It was established in 1995 against the backdrop of the multilateral trading system as it had evolved during the fifty-year existence of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT).<sup>15</sup> The GATT provided the principal legal framework for the regulation of trade between nations from 1948 until the advent of the WTO,<sup>16</sup> operating for almost five decades as "the *de facto* international organization" for trade.<sup>17</sup> Under the GATT's auspices, the multilateral trading system "has been credited with considerable success in removing barriers to trade in goods" and with significantly promoting trade liberalization by sponsoring eight rounds of trade negotiations.<sup>18</sup>

The eighth and final round of multilateral trade negotiations under the GATT, known as the Uruguay Round, lasted from 1986 to 1994 and marked a pivotal turning point for the multilateral trading system.<sup>19</sup> It led to the creation of a formal institutional framework, in the form of the WTO, to oversee the multilateral trade regime, while also expanding the substantive scope of the regime by incorporating new areas within its regulatory reach.<sup>20</sup> Thus, whereas the GATT mainly dealt with trade in goods, the WTO and its agreements provide

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14. *Who We Are*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Dec. 19, 2019).

15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

16. For an excellent account of the origins and evolution of the GATT system, see ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 23-71 (2nd ed. 2008).

17. PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: LAW, TEXT, CASES AND MATERIALS* 76 (3rd ed. 2013).

18. JOOST PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE* 75 (3rd ed. 2016).

19. For an overview of the Uruguay Round, see LOWENFELD, *supra* note 16, 64-71.

20. Gilbert R. Winham, *The Evolution of the World Trading System – The Legal and Institutional Context*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 31, 37-38 (Daniel Bethlehem et al. eds., 2009).

for an extended set of rules dealing with trade in goods and services, as well as the protection of intellectual property rights.<sup>21</sup>

Pursuant to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement),<sup>22</sup> the WTO is entrusted with a broad mandate.<sup>23</sup> In line with this mandate, one of the organization's pivotal functions is to provide the WTO's 164 Members with a forum for negotiations over new trade rules and additional trade liberalization.<sup>24</sup> Another central function assigned to the WTO is to facilitate the implementation, administration, and operation of the WTO agreements,<sup>25</sup> which together form a rich and complex body of treaty text.

And so, at the heart of the WTO are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These agreements, commonly referred to as the "covered agreements,"<sup>26</sup> provide the legal ground rules for international trade. Alongside the GATT, which became an integral part of the covered agreements upon formation of the WTO,<sup>27</sup> other key components include the General Agreement on Trade in Services (GATS),<sup>28</sup> the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>29</sup> the Agreement on Technical Barriers to Trade (TBT),<sup>30</sup> and the Agreement on Subsidies and Countervailing Measures (SCM).<sup>31</sup>

Importantly, while the numerous agreements comprising WTO law are "lengthy and complex," several "fundamental principles run throughout all of these documents."<sup>32</sup> Perhaps most prominent among these principles are the two basic rules of nondiscrimination lying at the core of WTO law: (1) the most favored-nation (MFN) rule; and (2) the national treatment rule.<sup>33</sup> The MFN rule,

21. PAUWELYN et al., *supra* note 18, at 85.

22. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

23. For a thorough presentation of the WTO's mandate and the various functions entrusted to the organization, see VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 82–104.

24. See WTO Agreement, *supra* note 22, at art. II:2.

25. See *Id.* at art. III:1.

26. David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 398 (1998).

27. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

28. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

29. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

30. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

31. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

32. *Principles of the Trading System*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Nov. 21, 2019).

33. *Id.*

considered “a cornerstone of the multilateral trading system,”<sup>34</sup> prohibits a WTO Member from discriminating *between* its various WTO trading partners.<sup>35</sup> It follows from this rule that a WTO Member granting some form of favorable treatment to any given country is required to grant the same favorable treatment to all other WTO Members.<sup>36</sup> The national treatment obligation, for its part, prohibits a WTO Member from discriminating *against* foreigners; that is, it requires each WTO Member to treat foreign products and services no less favorably than it treats “like” products and services of domestic origin.<sup>37</sup>

The language of the various WTO agreements, however—even with respect to the basic nondiscrimination rules—often lacks a fixed meaning and details regarding what exactly amounts to a violation of WTO law.<sup>38</sup> This is also the case with respect to many other WTO provisions, including the policy exceptions enshrined in GATT Article XX and GATS Article XIV, which, subject to certain conditions, allow Members to derogate from WTO trade obligations for health, environmental, and other regulatory purposes.<sup>39</sup> And, as seen later in this Article, the same holds true for the exceptions regarding RTAs stipulated in WTO law, which are likewise formulated in a rather broad and open-ended manner.<sup>40</sup> These broadly drafted WTO norms and commitments, in turn, require WTO adjudicators to delineate the exact scope of WTO legal obligations and to articulate the specific requirements those obligations impose on WTO Members whenever a dispute arises.<sup>41</sup>

Central to the WTO regime, therefore, is its DSS, which has been explicitly assigned the goal of clarifying WTO rules in its constitutive instrument—the Dispute Settlement Understanding (DSU).<sup>42</sup> In addition, DSS’s objectives include: promoting the prompt and positive settlement of disputes, securing compliance with WTO rules, providing security and predictability to the multilateral trading system, maintaining the negotiated balance of rights and obligations between WTO Members, preventing unilateralism in Members’ trade relations, and sustaining the operation and legitimacy of the WTO regime.<sup>43</sup> In order to fulfil these objectives, the DSS was established as a two-tier adjudicating

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34. *Basic Purpose and Concepts*, WTO, [https://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s6p1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm) (last visited Nov. 21, 2019).

35. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 36.

36. *Id.*

37. *Id.*

38. Sivan Shlomo Agon & Eyal Benvenisti, *The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication*, 68 U. TORONTO L.J. 598, 606 (2018).

39. *Id.*

40. *See infra* Part II.

41. Shlomo Agon & Benvenisti, *supra* note 38.

42. *See* art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 Apr. 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

43. For a discussion of these DSS goals, *see* Shlomo Agon, *supra* note 9, at 677–81.



system, composed of ad-hoc panels and a permanent Appellate Body. Both tiers of adjudicators hold compulsory and exclusive jurisdiction over all disputes between Member States under the WTO agreements, and the reports they issue become binding quasi-automatically—that is, unless rejected by a consensus of all WTO Members.<sup>44</sup>

The WTO DSS, currently under considerable pressure,<sup>45</sup> “has attracted a large volume of business over the years,” steadily gaining prominence among international courts and tribunals.<sup>46</sup> Since its establishment in 1995, almost six hundred complaints have reached the DSS’s docket, covering a long list of subjects under the WTO agreements.<sup>47</sup> Hence, in contrast with the WTO’s negotiating function, which has exhibited little progress in producing new trade rules due to the failure to overcome the impasse in the Doha Round,<sup>48</sup> the WTO’s judicial function has managed to develop a rich body of jurisprudence in the numerous disputes that have come before it. These disputes, in turn, share many commonalities: “[A]ll involve competing trade-related interests, all are political in some sense (fought between states), and all have been addressed under the DSU, with reference to the WTO agreements.”<sup>49</sup> However, the various disputes filed with the DSS should not be viewed as a monolithic unit; these disputes often exhibit different features, which, consequently, present the system with “distinct legal, political, economic, and institutional challenges.”<sup>50</sup>

44. For a thorough presentation of the WTO DSS, see VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 156–311.

45. At the time of completing this Article, the DSS has become subject to substantial pressure resulting from the increasing number and complexity of cases filed with the system, and especially from the US’s continued blocking of new appointments to the AB. As a result of the US’s blockade on appointments, lasting from July 2017, as of December 2019, the AB has only one member, down from the full complement of seven members called for by the DSU. With only one member left in office, the AB can no longer meet the 3-member quorum required to hear new appeals, a development that threatens the future effectiveness and viability of the WTO DSS as a whole. See, e.g., Jennifer Anne Hillman, *A Reset of the World Trade Organization’s Appellate Body*, Council on Foreign Relations (2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> (last visited Feb. 22, 2020); Markus Wagner, *The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?*, in THE APPELLATE BODY OF THE WTO AND ITS REFORM 67 (Chang-fa Lo, Junji Nakagawa & Tsai-Fang Chen eds., 2020); Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT’L L. 6, 8 (2018); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT’L L. 37, 40–41 (2018).

46. Richard Stewart & Michelle Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT’L J. CONST. L. 556, 562 (2011).

47. See *Chronological List of Disputes Cases*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Feb. 21, 2020).

48. Baldwin, *supra* note 3, at 95, 106.

49. Shlomo Agon, *supra* note 9, at 681.

50. *Id.* at 681–82.

Thus, within the DSS's docket we find, among others, a growing number of cases known as "trade-and" disputes.<sup>51</sup> These disputes involve trade-restrictive national policies in areas such as health and environmental protection and incite the persistent friction between the WTO's trade liberalization mission and "non-trade" societal values.<sup>52</sup> The DSS's docket further includes several high-stakes, perennial conflicts between major economic powers that carry systemic implications for the disputants' economic relations and, more generally, for the stability of the cooperative WTO regime.<sup>53</sup> In a similar vein, the North-South divide has also entered the WTO dispute settlement arena, "placing the [WTO] judiciary in the uneasy position of having to apply law and technicalities to a tremendously charged social-political relationship, as it has in the other fields of tensions."<sup>54</sup>

Finally, Members have also called upon the DSS to adjudicate several cases involving the intricate tension between the multilateral and regional trading systems. This tension has intensified dramatically with the surge in RTAs over the last two decades.<sup>55</sup> As indicated in the Introduction, the latter category of cases, referred to here as "RTA-related" disputes, stands at the center of this Article. In what follows, I situate the discussion of RTA-related disputes and the systemic challenges such disputes pose to the DSS in a broader historical, institutional, and legal context. In so doing, I set the scene for an analysis of the quest to sustain multilateralism carried out by the DSS in this class of cases.

## II.

### MULTILATERAL ADJUDICATION IN A REGIONALIZING INTERNATIONAL ECONOMIC ORDER: CONTEXT, CHALLENGES, AND CONTENT

The proliferation of RTAs<sup>56</sup> is a salient feature of today's international economic landscape. However, such agreements are by no means a new phenomenon,<sup>57</sup> nor is their friction with the WTO, which has "dogged" the multilateral trading system "since its inception in the General Agreement on Tariffs and Trade (GATT) in 1947 and through its institutional transformation

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51. *Id.* at 681.

52. *Id.*

53. *Id.* at 681–82.

54. TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 28 (2004).

55. Shlomo Agon, *supra* note 9, at 681.

56. For the sake of clarity and consistency, I use the term Regional Trade Agreements (RTAs) in this Article to refer to both Free Trade Agreements (FTAs) and Customs Unions under GATT Article XXIV, as well as economic integration agreements under GATS Article V. Furthermore, the term "regional" as used herein does not carry any geographical connotations and includes agreements between parties that are geographically remote from one another.

57. *See* Lester et al., *supra* note 1, at 3.

into the WTO in 1995.”<sup>58</sup> At the core of this tension, as Lockhart and Mitchell have argued, is the fact that RTAs “entrench the very discrimination” that the multilateral trade rules “seek to eliminate.”<sup>59</sup> Thus, while RTAs vary widely in terms of geographic scope, number of State parties, and the trade-related issues subject to regulation, they all reduce trade barriers between the State parties, which seek closer economic integration beyond that of the multilateral trading system, and simultaneously maintain barriers with States outside the agreement.<sup>60</sup> Nonetheless, although such RTAs violate the fundamental tenet of nondiscrimination underlying the multilateral trading system as captured in the basic MFN rule, the WTO, like the GATT, has always allowed space for Members to grant one another more favorable treatment through RTAs—most notably, in Article XXIV of the GATT, subject to certain substantive and procedural conditions.<sup>61</sup>

Over the last two decades, however, the world has witnessed a sharp rise in the number of RTAs, unparalleled to that envisaged earlier.<sup>62</sup> Thus, “compared to the GATT years, when on average three RTAs were notified per year, since 1995, twenty-five RTAs, on average, have been notified per year.”<sup>63</sup> Accordingly, while the GATT saw a total of 124 notifications of RTAs between 1948 and 1994, more than three hundred RTAs were in force between WTO Members as of September 2019,<sup>64</sup> with dozens of other agreements notified to the WTO but not yet in force or currently under negotiation. At present, all WTO Members have reported participation in at least one RTA, and some are party to multiple agreements.<sup>65</sup>

In addition to the sharp increase in the number of RTAs, their regulatory coverage has also broadened over time, “moving from the reduction of tariffs to behind-the-border issues such as harmonization of standards, and further, to so-called ‘WTO-extra’ . . . issues such as competition and investment.”<sup>66</sup> Moreover, most, if not all, RTAs now contain provisions establishing dispute settlement

58. Robert Howse & Joanna Langille, *Spheres of Commerce: The WTO Legal System and Regional Trading Blocs – A Reconsideration*, 46 GA. J. INT’L & COMP. L. 649, 650 (2018).

59. Andrew D. Mitchel & Nicolas J.S. Lockhart, *Legal Requirements for PTAs Under the WTO*, in 1 BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 81 (Simon Lester, Bryan Mercurio & Lornad Bartels eds., 2nd ed. 2016).

60. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 651.

61. A corresponding provision is embedded in Article V of the GATS. Also of relevance is the “Enabling Clause,” which relaxed the requirements for customs unions and FTAs for developing countries in order to facilitate economic development. See *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Nov. 28, 1979), GATT B.I.S.D. (26th Supp. 1980) at 203.

62. Acharya, *supra* note 4, at 5.

63. *Id.*

64. *Regional Trade Agreements: Facts and Figures*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/regfac\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regfac_e.htm) (last visited April 8, 2020).

65. *Id.*

66. Chase et al., *supra* note 2, at 608.

procedures, which have likewise “increasingly shifted from politically-oriented procedures to more sophisticated, legalistic forms of dispute settlement.”<sup>67</sup>

The resulting “spaghetti bowl” of multilateral trade rules and regional trade arrangements,<sup>68</sup> each with its own dispute settlement mechanism, has inspired extensive debates over the fragmentation of international economic law and the challenges engendered by regime overlap. For example, there have been debates on conflicts of obligations under the WTO and RTA systems, jurisdictional competition between their dispute settlement fora, and forum shopping.<sup>69</sup> Most notably, the expansion of regionalism, which gained momentum with the failure to break the deadlock in the WTO Doha Round of trade negotiations,<sup>70</sup> has been accompanied by vigorous debate about the systemic effects of RTAs on the multilateral trade regime and, particularly, on the latter’s role in regulating international trade, an element that has become a major source of unease for the WTO.<sup>71</sup> As former WTO Director General Supachai Panitchpakdi noted in 2008, “the role of the WTO” in global economic governance is “being tested by the abundance of regional trade agreements” that continue to spread around the globe, resulting in international trade being increasingly governed by preferential arrangements among select groups of members instead of “under MFN conditions governed by the WTO.”<sup>72</sup> A decade later, in the face of the continuing regionalization of trade governance and the rise of so-called mega-regionals—RTAs of vast economic size and wide geographical spread<sup>73</sup>—Alan Winters went still further to warn that “absent a major and conscious change in the value placed

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67. *Id.* at 608–09.

68. The term was first used by Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Agreements*, in *THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS I* (Jagdish Bhagwati & Anne O. Kruger eds., 1995).

69. See, e.g., Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT’L ORG. 735 (2007); Karen Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13 (2009).

70. Lester et al., *supra* note 1, at 3; Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8 GLOBAL POL’Y 107 (2017).

71. See, e.g., Todd Allee & Manfred Elsig, *The Presence of the World Trade Organization Within Preferential Trade Agreements*, in *ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE?* 321 (Manfred Elsig, Bernard Hoekman & Joost Pauwelyn eds., 2017); Bown, *supra* note 70; WTO, *World Trade Report 2011—The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011) [hereinafter *World Trade Report 2011*], [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report11\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf).

72. Supachai Panitchpakdi, *The WTO, Global Governance and Development*, in *THE WTO AND GLOBAL GOVERNANCE: FUTURE DIRECTIONS* 195-96 (Gary P. Sampson ed., 2008). A WTO legal officer similarly stated that because of the proliferation of RTAs the “basic” principle underlying “the multilateral system, which is the most favored nation principle, starts becoming the exception rather than the rule.” Interview with WTO legal officer, in Geneva (Mar. 16, 2012).

73. These mega-regional trade agreements include, for example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement. For an overview, see Bown, *supra* note 70; Shuuro Urata, *Mega-FTAs and the WTO: Competing or Complementary?*, 30 INT’L ECON. J. 231 (2016).

by . . . countries on multilateralism, we are unlikely to bequeath an effective multilateral trade system to the next generation.”<sup>74</sup>

As the preceding discussion implies, the shift away from multilateralism in trade negotiations and the continuing surge in regional agreements that accord preferential treatment to some trading partners while excluding others pose threats to the attainment of those WTO objectives built on nondiscrimination. Moreover, the enduring proliferation in RTAs threatens the viability of the multilateral trading system and the WTO’s centrality in the international economic order.<sup>75</sup> In addition, the expanding network of increasingly complex RTAs—which overlap with WTO trade disciplines and often include their own dispute settlement mechanisms—risks undermining the legal coherence and predictability of the multilateral trade rules.<sup>76</sup> This convoluted web of RTAs likewise constitutes a source of normative and jurisdictional conflicts with the WTO legal system,<sup>77</sup> as seen in several disputes that have come before the DSS.<sup>78</sup> As RTAs multiply and mature, more of these disputes are expected to reach the DSS’s docket.

Such RTA-related disputes demand, in turn, that the WTO DSS address delicate questions that lie at the heart of the tense relationship between the multilateral and regional trade regimes. These questions pertain to the interaction between these separate but closely related normative international frameworks, the legal effects of RTA rules on WTO undertakings, and the competing jurisdictions of the judicial bodies established to enforce the distinct sets of international trade commitments. As a result, RTA-related disputes impinge in meaningful ways on the integrity of WTO rules, the realization of the multilateral

74. Alan L. Winters, *The WTO and Regional Trading Agreements: Is it All Over for Multilateralism?*, in *ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE?* 344, 346 (Manfred Elsig, Bernard Hoekman & Joost Pauwelyn eds., 2017).

75. See, e.g., Bown, *supra* note 70, at 107; Winters, *supra* note 74; Marc D. Froese, *Mapping the Scope of Dispute Settlement in Regional Trade Agreements: Implications for the Multilateral Governance of Trade*, 15 *WORLD TRADE REV.* 563, 564 (2016); Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 *CHI. J. INT’L L.* 597 (2011); Henry Gao & C. L. Lim, *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a “Common Good” for RTA Disputes*, 11 *J. INT’L ECON. L.* 899, 900 (2008).

76. See, e.g., WTO, *World Trade Report 2003—Trade and Development* (2003), [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report\\_2003\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf) (noting that the growing number of overlapping RTAs “risks undermining the transparency of trading rules” and that “ubiquitous and highly varied regional arrangements may . . . undermine the integrity and clarity of the multilateral trading system”).

77. See, e.g., Pamela Apaza Lanyi & Armin Steinbach, *Limiting Jurisdictional Fragmentation in International Trade Disputes*, 5 *J. INT’L DISP. SETTLEMENT* 372 (2014); Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1 *J. INT’L DISP. SETTLEMENT* 67 (2010).

78. For an overview of the various WTO disputes in which the existence of an RTA has been pleaded or argued in one way or another, see Armand C. M. de Mestral, *Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship*, 16 *J. INT’L ECON. L.* 777 (2013); see also Michelle Q. Zang, *When the Multilateral Meets the Regionals: Regional Trade Agreements at WTO Dispute Settlement*, 18 *WORLD TRADE REV.* 33 (2019).

trade liberalization objectives embodied in those rules, and the stature of the WTO as a vehicle for international trade regulation at a time when RTAs flourish against the backdrop of enduring stalemate in the WTO's legislative arm. Furthermore, as RTA-related cases often have a direct bearing on the very jurisdiction of the WTO DSS and its position vis-à-vis other international dispute settlement institutions, these disputes entail critical implications for the authority of the DSS itself and its ability to attain the goals set forth for it by WTO Members.

As demonstrated in the remainder of the Article, the DSS's awareness of the systemic consequences for WTO rules and institutions embedded in RTA-related disputes has, from the outset, guided this adjudicative mechanism in attuning its interpretative efforts and judicial arsenal accordingly. Thus, when called upon to decide cases that arise at the WTO-RTA nexus, the DSS, within its strategic judicial space, has deliberately and consistently opted for interpretive choices that may foster the multilateral trade system's security and predictability, entrench the primacy of the WTO and its norms, and sustain the DSS's own authority as a forum for the adjudication of international trade disputes. As one WTO official observed with respect to the line of jurisprudence developed by the DSS in RTA-related cases: "[I]f one were to read all of these cases, the overall assessment is that . . . [t]he case law would seem . . . to preserve the supremacy of . . . WTO law over other rules."<sup>79</sup> Going further, the same official added: "[O]ne of the values . . . [,] the normative value, that informs the case law of the Appellate Body and of panelists [in RTA-related cases] is preserving the WTO dispute settlement system and the WTO [regime] and its supremacy over regional trade agreements."<sup>80</sup>

As one may assume, however, this judicial philosophy, which lies at the core of the DSS's quest to sustain the multilateral trading system, is not asserted outright in RTA-related disputes. Instead, it is often shrouded in a veil of textualism, thus appearing to remain faithful to State consent. Yet this judicial policy, as I show below, is effectively captured not only in the evidence provided by WTO practitioners involved in the operation of the DSS and the RTA-related cases examined. It is also encapsulated in the specific judicial choices made and the legal interpretations developed in these cases, whereby WTO adjudicators have steadily worked along two parallel and mutually reinforcing trajectories to limit the ability of WTO Members to: (1) derogate from their substantive WTO obligations through the formation and operation of RTAs; and (2) contract out from the DSU through RTAs in a manner that would compromise the DSS's jurisdiction and thus its power to scrutinize RTA-related deviations from the WTO's substantive legal commitments.<sup>81</sup>

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79. Interview with WTO legal officer, in Geneva (July 11, 2012).

80. *Id.*

81. de Mestral, *supra* note 78; Joanna Langille, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482 (2011).

Hence, irrespective of the many pleas made over the years that the DSS would “consider the problems posed by the troubled relationships of RTAs and the WTO from a broad perspective of the unity of international trade law,” meaning that it would advance a more open policy toward RTA law and dispute settlement,<sup>82</sup> the DSS under the AB’s leadership has consciously approached the legal and institutional challenges emerging at the intersection of the WTO and RTAs through a narrow, WTO-centered prism. Contrary to its own declaration in its very first case that WTO agreements are “not to be read in clinical isolation from public international law,”<sup>83</sup> the AB has effectively embraced an “implicit judicial policy of ‘clinical isolation’ from regionalism”<sup>84</sup> in its quest to sustain the multilateral trading system from the bench.

In what follows, this Article addresses the key jurisprudential milestones established in this quest, while exploring the interpretative efforts they marked as the DSS exercised its role as a multilateral adjudicator in an increasingly regionalizing international economic order. In carrying out this investigation, I first consider the case law developed by the DSS at the WTO-RTA substantive legal nexus (Part III), where conflicts of obligations between the two legal frameworks arose and a range of legal defenses were invoked as parties sought to shield the otherwise WTO-inconsistent measures adopted within the context of their regional agreements. Thereafter, I proceed with a complementary analysis of the DSS jurisprudence that emerged at the jurisdictional WTO-RTA juncture (Part IV), where questions concerning the interaction between the DSS and the overlapping regional dispute settlement fora presented themselves. These questions implicate, among others, the very capacity of the DSS as an adjudicative institution to pronounce on international trade law and enforce compliance with the substantive legal norms underlying the multilateral trading system.

### III.

#### SUSTAINING MULTILATERALISM AT THE WTO-RTA SUBSTANTIVE LEGAL NEXUS

##### *A. Embarking on the RTA Challenge: Turkey-Textiles and the (Narrow) Reading of the Regional Trade Exception in GATT Article XXIV*

From the very beginning, the positioning of the WTO DSS as a multilateral dispute settlement mechanism in the evolving reality of RTA proliferation has

82. de Mestral, *supra* note 78, at 784; see also Julia Ya Qin, *Managing Conflicts Between Rulings of the World Trade Organization and Regional Trade Tribunals: Reflections on the Brazil-Tyres Case*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 601 (Pieter H. F. Bekker, Rudolf Dozler & Michael Waible eds., 2010); Lanyi & Steinbach, *supra* note 77.

83. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *U.S.—Gasoline*].

84. Howse, *supra* note 10, at 75.

presented panels and the AB with some of the most delicate legal and institutional issues surrounding the intersection of trade multilateralism and regionalism. This includes several questions related to the substantive legal interaction between WTO agreements and RTA law, particularly the question of conflicting obligations under the parallel normative frameworks and the legal defenses available to justify the WTO-inconsistent measures taken by Members within the framework of their regional trade arrangements. As this discussion will show, the AB, “[t]rue to its mission to bring greater order” to WTO law and the multilateral trading system, “took on the challenge posed by RTAs as soon as it was offered.”<sup>85</sup> This opportunity came in the early *Turkey-Textiles* case,<sup>86</sup> where the AB made its first “systematic effort” to address the legal relationship between RTAs and the WTO under the provision of GATT Article XXIV.<sup>87</sup>

As indicated previously, although RTAs deviate from the WTO’s fundamental MFN rule, WTO law permits Members to enter into RTAs if certain requirements are met.<sup>88</sup> These requirements are contained in Article XXIV of the GATT, Article V of the GATS, and the Enabling Clause, which are known as the “regional trade exceptions.”<sup>89</sup> Most prominent and debated among these regional trade exceptions is GATT Article XXIV,<sup>90</sup> which allows WTO Members to form RTAs—both free trade agreements (FTAs) and customs unions—under two main conditions stipulated in paragraphs (5) and (8). These conditions include: (1) the liberalization of substantially all trade between the parties to the RTA, and (2) the avoidance of greater trade restrictiveness against WTO Members who are not a party to the agreement.<sup>91</sup> In other words, the first condition under Article XXIV establishes a standard for the *internal trade* between the RTA’s constituent parties, requiring that they take significant steps to remove all barriers to trade between them. On the other hand, the second condition establishes a standard for the *external trade* of the RTA’s constituent parties with *third countries*, allowing the former to enter into an RTA so long as they do not impose higher barriers to trade on other WTO Members.<sup>92</sup> Ultimately, consistency with these conditions is what “allows WTO Members to deviate from the most-favored nation obligation that is a cornerstone of the multilateral trading system and to treat other parties to preferential agreements better than non-party WTO Members.”<sup>93</sup>

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85. de Mestral, *supra* note 78, at 790.

86. Appellate Body Report, *Turkey-Restriction on Imports of Textile and Clothing Products*, WT/DS34/AB/R (adopted Nov. 19, 1999) [hereinafter *Turkey-Textiles*].

87. Howse & Langille, *supra* note 58, at 661.

88. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 651.

89. *Id.* at 648-649.

90. See Howse & Langille, *supra* note 58, at 665.

91. Howse, *supra* note 10, at 35.

92. For a thorough discussion of these conditions, see VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 656-662.

93. Howse, *supra* note 10, at 35.



Alongside these substantive conditions, Article XXIV of the GATT also contains a procedural component stipulated in paragraph 7(a).<sup>94</sup> In line with this procedural element, parties that create an RTA must notify the GATT/WTO of the agreement established between them, with a view to allowing a multilateral review of the agreement and an evaluation of its fidelity to the substantive conditions articulated in Article XXIV.<sup>95</sup> As Mavroidis has noted when addressing this procedural requirement, the original intent of the GATT's drafters was to ensure that no RTA could "be consummated absent multilateral clearance."<sup>96</sup> To this end, during the GATT era, notified RTAs would be reviewed by an ad hoc working party, composed of State delegates, to determine whether the agreements complied with the substantive conditions set out in Article XXIV.<sup>97</sup> After the WTO's creation, in an attempt to bring greater discipline to the review of RTAs, the ad hoc working party system was replaced with a permanent political organ, the Committee on Regional Trade Agreements (CRTA),<sup>98</sup> which was entrusted with the power to examine RTAs and assess their consistency with the multilateral trade system's law and policy.<sup>99</sup>

Despite this mandate, since being formed in 1996, the CRTA has not provided a disciplined review process for the many RTAs subsequently notified to the WTO.<sup>100</sup> Continuing disagreements between Members over ambiguities in the language of GATT Article XXIV, together with the insufficient information submitted by RTA parties and the fact that determinations of WTO consistency were to be made by all WTO Members, including those whose RTAs were under examination,<sup>101</sup> quickly came to plague the CRTA, resulting in its failure to provide a meaningful ex ante review of RTAs.<sup>102</sup> At the same time, given that the CRTA was explicitly tasked with reviewing individual regional agreements notified to the WTO, doubts arose as to whether WTO adjudicative bodies could examine the compatibility of such agreements with the substantive requirements of GATT Article XXIV.<sup>103</sup> The AB clarified these doubts as well as other fundamental questions concerning the application of the regional exception embedded in Article XXIV in the *Turkey-Textiles* case.

In *Turkey-Textiles*, India brought a complaint regarding Turkish quotas imposed on imports of Indian textile and clothing products. India argued that these

94. Langille, *supra* note 81, at 1503.

95. *Id.*

96. 1 PETROS MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE* 292 (2016).

97. Langille, *supra* note 81, at 1503.

98. de Mestral, *supra* note 78, at 783.

99. World Trade Organization, Committee on Regional Trade Agreements, WT/L/127 (adopted Feb. 7, 1996).

100. de Mestral, *supra* note 78, at 783; *see also* World Trade Report 2011, *supra* note 71, at 185.

101. World Trade Report 2011, *supra* note 71, at 185.

102. Gao & Lim, *supra* note 75, at 899; Howse, *supra* note 10, at 35.

103. Gao & Lim, *supra* note 75, at 904.

import quotas were inconsistent with Turkey's obligations under WTO law, especially GATT Article XI concerning the prohibition on quantitative restrictions and GATT Article XIII regarding the nondiscriminatory administration of quantitative restrictions.<sup>104</sup> In response, Turkey asserted that the contested quantitative restrictions were introduced upon the formation of a customs union with the European Union (EU) and thus were justified under the exception for RTAs embodied in GATT Article XXIV.<sup>105</sup> According to Turkey, GATT Article XXIV "confers on WTO Members a right to enter into a customs union, and to derogate, under certain conditions, from their GATT obligations."<sup>106</sup>

As noted by Robert Howse, when the case arrived at the DSS, "[i]t was not especially controversial as a matter of judicial competence that the [WTO] dispute settlement organs could review the particular" trade restrictions introduced by Turkey and their link to the customs union with the EU.<sup>107</sup> However, the AB seized this early opportunity to clarify that the judicial competence of WTO adjudicators actually extends beyond examination of the appropriateness of the specific trade-restrictive measures at issue and includes "reviewing the overall consistency . . . of the customs union with the conditions in GATT Article XXIV."<sup>108</sup> Moreover, the AB not only made it clear in its ruling that all aspects of Article XXIV were justiciable, so that WTO panels could examine whether the substantive requirements for an RTA had been fulfilled, it essentially went further, suggesting that panels are "expected" to examine the overall compatibility of an RTA with the requirements of Article XXIV before considering a legal defense contending that a measure related to the formation of an RTA is justified under this provision.<sup>109</sup>

This AB ruling, which suggested that WTO judicial organs "might have the competence and even the responsibility in certain cases to determine" the consistency of an RTA with Article XXIV<sup>110</sup> while "overturning . . . the panel of first instance as well as the prior GATT practice" on this issue,<sup>111</sup> was criticized

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104. *Turkey-Textiles*, *supra* note 86, ¶ 3.

105. *Id.* ¶¶ 6–20.

106. *Id.* ¶ 10.

107. Howse, *supra* note 10, at 35.

108. *Id.*; Gao & Lim, *supra* note 75, at 904.

109. *Turkey-Textiles*, *supra* note 86, ¶¶ 59–60 (stating that "[w]e would expect a panel, when examining such a measure, to require a party to establish [*inter alia*, whether the customs union fully meets the relevant requirements of Article XXIV.]").

110. Howse & Langille, *supra* note 58, at 667.

111. Howse, *supra* note 10, at 35. Note that the first instance panel in *Turkey-Textiles* was uncertain about whether it could assess the compatibility of the RTA between Turkey and the EU with Article XXIV. Exercising judicial economy, the panel thus proceeded in its analysis, assuming *arguendo* that the EU-Turkey RTA is compatible with the requirements of Article XXIV while limiting its "examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue." See *Turkey-Textiles*, *supra* note 86, ¶ 60.

for upsetting the institutional balance between the WTO's political and judicial organs.<sup>112</sup> Nonetheless, no "major revolt" erupted against this declaration of expansive judicial authority and the legal clarification provided by the AB on the application of GATT Article XXIV.<sup>113</sup> As several commentators have noted, while the AB's decision in *Turkey-Textiles* may have intruded upon the authority of the WTO's political organs and the (ineffective) CRTA specifically,<sup>114</sup> it did so with the aim of reinforcing the multilateral trade disciplines and strengthening WTO oversight of the proliferating regional trade arrangements.<sup>115</sup> Thus, it was "consistent with the underlying substantive values" and objectives of the WTO community.<sup>116</sup>

However, the AB in *Turkey-Textiles* did not only take a "narrow view of the [regional] exception" in Article XXIV by "holding that it should be subject to strict judicial scrutiny, not merely diplomatic oversight, in the relevant WTO committee,"<sup>117</sup> the AB also interpreted the language of Article XXIV in a way that significantly limited Members' ability to use this clause as a shield for WTO-incompatible measures taken within the framework of RTAs. Thus, while the AB in *Turkey-Textiles* acknowledged that GATT Article XXIV may "justify the adoption" of an RTA-related measure "which is inconsistent with . . . GATT provisions, and may be invoked as a . . . 'defence' to a finding of inconsistency,"<sup>118</sup> the AB severely restricted the availability of this defense by introducing a condition that for such a measure to be justified, it must be *necessary* for the formation of the RTA.<sup>119</sup> Hence, according to the AB, a Member claiming the benefit of an Article XXIV defense must comply with two cumulative criteria. First, it must demonstrate that the measure at issue was introduced upon the formation of an RTA that fully meets the conditions of paragraphs (5) and (8) of Article XXIV. Second, it "must demonstrate that the formation" of the RTA "would be prevented if it were not allowed to introduce the measure at issue."<sup>120</sup> In reading this latter criterion into the language of Article XXIV, the AB

112. Gao & Lim, *supra* note 75, at 904. Forceful criticism was voiced in this respect by Frieder Roesler, a former director of the GATT legal secretariat. See Frieder Roesler, *The Institutional Balance between the Judicial and Political Organs of the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 325 (Marco Bronckers & Reinhard Quick eds., 2000).

113. Howse, *supra* note 10, at 36.

114. For subsequent developments in the WTO concerning the process of review of RTAs in light of the problems identified with the CRTA, including the adoption of the Transparency Mechanism for Regional Trade Agreements in 2006, see de Mestral, *supra* note 78, at 783–84; World Trade Report 2011, *supra* note 71, at 185.

115. Howse, *supra* note 10, at 36; Gao & Lim, *supra* note 75, at 904.

116. Howse, *supra* note 10, at 36.

117. *Id.* at 73.

118. *Turkey-Textiles*, *supra* note 86, ¶¶ 45, 58.

119. de Mestral, *supra* note 78, at 791 (noting that "the AB read into Article XXIV a condition that to be justified any measure must be 'necessary' for the formation" of the RTA); Langille, *supra* note 81, at 1508-1509.

120. *Turkey-Textiles*, *supra* note 86, ¶ 58.

effectively imposed a severe burden of justification on WTO Members in the form of the necessity test,<sup>121</sup> thus constraining their ability to derogate from WTO obligations through an RTA.<sup>122</sup>

It is important to highlight at this point that the strict and narrow interpretation of the regional trade exception followed by the AB in *Turkey-Textiles* differs quite significantly from the interpretative approach taken in other WTO disputes, most notably in “trade-and” disputes involving competing trade and nontrade interests. In the latter category of cases, the AB broadly and flexibly construed the policy exceptions enshrined in GATT Article XX (the “general exceptions clause”), in order to better accommodate values “external” to the WTO regime, such as health or environmental protection.<sup>123</sup> The message sent by the AB in the RTA-related case of *Turkey-Textiles* is therefore evident, as are its efforts to sustain the integrity of WTO rules and objectives and establish “the supremacy of the WTO over . . . regional bodies.”<sup>124</sup> In Langille’s words, the exception for RTAs in GATT Article XXIV “can only be employed in limited circumstances” according to the AB, whereas “WTO obligations can only be varied if a measure is necessary for an RTA to be formed.” Stated differently, “[c]reating a preferential arrangement cannot trump the goals of the WTO.”<sup>125</sup>

*B. Fending off Regionalism Under the General Exceptions in GATT  
Article XX: The Cases of Mexico-Soft Drinks and Brazil-Tyres*

Cases where Members tried to justify WTO-inconsistent measures adopted in connection with RTAs under the general exceptions provided in GATT Article XX reflect a similar approach to *Turkey-Textiles*, as well as a conscious attempt of WTO adjudicators to limit Members’ ability to derogate from their WTO obligations for RTA-related purposes. The first case that illustrates this approach is that of *Mexico-Soft Drinks*.<sup>126</sup>

*1. Mexico-Soft Drinks*

The *Mexico-Soft Drinks* case grew out of a broader dispute between the United States and Mexico concerning the market of sweeteners within the framework of the North American Free Trade Agreement (NAFTA).<sup>127</sup>

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121. MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 117 (4th ed. 2012).

122. Langille, *supra* note 81, at 1509.

123. Shlomo Agon & Benvenisti, *supra* note 38, at 635–37, 642.

124. Interview with WTO legal officer, in Geneva (July 7, 2012).

125. Langille, *supra* note 81, at 1509.

126. Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter *Mexico-Soft Drinks* AB Report].

127. *Id.* ¶ 10. On November 30, 2018, the NAFTA contracting parties—the United States,

According to Mexico, quantitative restrictions imposed by the United States on imports of cane sugar from Mexico contradicted a sugar-specific NAFTA annex in which the United States had committed to granting market access to Mexican sugar.<sup>128</sup> When seeking resolution of this dispute, Mexico initially invoked the NAFTA dispute settlement procedures, but the United States prevented the establishment of a NAFTA panel by blocking the selection of panelists.<sup>129</sup> In an attempt to induce the United States to comply with its NAFTA obligations and agree to the composition of a NAFTA panel, Mexico decided to retaliate against the United States by imposing an extra 20 percent tax on soft drinks using sweeteners other than cane sugar, an act favoring Mexico's domestic cane sugar producers.<sup>130</sup> In response, the United States launched dispute settlement proceedings at the WTO rather than under the NAFTA, arguing that Mexico's discriminatory tax measures were inconsistent with the national treatment obligation stipulated in GATT Article III.<sup>131</sup>

During the WTO proceedings, Mexico claimed that notwithstanding the violation of GATT Article III, its soft drinks tax could be justified under the exception in GATT Article XX(d), which permits WTO Members to impose measures that are "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [GATT]."<sup>132</sup> According to Mexico, its tax measures were "necessary to secure [the United States'] compliance" with its NAFTA commitments, "an international agreement that is a law not inconsistent with the provisions of the GATT 1994."<sup>133</sup>

Both the panel and the AB rejected Mexico's defense under GATT Article XX(d) and the proposed reading of the terms "laws and regulations" on which it was predicated.<sup>134</sup> While Mexico contended that these terms were "broad enough" to include "international agreements such as the NAFTA,"<sup>135</sup> the AB, like the panel, held that the terms "laws and regulations" in Article XX(d) narrowly "refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations

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Canada, and Mexico—signed a new trade deal, known as the United States-Mexico-Canada Agreement (USMCA). The agreement, which seeks to modernize and replace the 25-year-old NAFTA, will enter into force once ratified by its three signatories. Until then, NAFTA will remain in force. See Office of the United States Trade Representative, United States-Mexico-Canada Agreement (signed Nov. 30, 2018), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

128. Marceau & Wyatt, *supra* note 77, at 73.

129. Howse, *supra* note 10, at 74.

130. Marceau & Wyatt, *supra* note 77, at 73.

131. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 2.

132. *Id.* ¶¶ 58–59, 66.

133. Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, ¶ 8.162, WT/DS308/R (adopted Mar. 24, 2006) [hereinafter *Mexico-Soft Drinks* Panel Report].

134. *Id.* ¶¶ 8.198, 8.204; *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 68–80.

135. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 64.

of *another* WTO Member,” in this case, US commitments under NAFTA.<sup>136</sup> Hence, the AB concluded that Article XX(d) was not available as a justification for WTO-inconsistent measures seeking to secure compliance with a WTO Member’s obligations under an international agreement, such as the RTA under discussion.<sup>137</sup>

Notably, while the AB provided several reasons why “laws and regulations” in Article XX(d) refer to rules that form part of a domestic legal system and acknowledged that international obligations could be incorporated into domestic law and in some national legal systems with automaticity,<sup>138</sup> the AB “never explained why the terms [laws and regulations] themselves could not also encompass international obligations.”<sup>139</sup> In addition, although the AB provided some contextual and policy arguments in support of its decision to exclude international agreements from the purview of Article XX(d), the persuasiveness of those arguments has been doubted.<sup>140</sup>

For instance, one argument that the AB raised to support its narrow reading of Article XX(d) can be summarized as follows: if Article XX(d) were to cover international agreements, a WTO Member could invoke Article XX(d) to justify measures taken *unilaterally* to secure compliance with another Member’s obligations under the WTO agreements, in contradiction to the rules on countermeasures and unilateral actions detailed in Articles 22 and 23 of the DSU.<sup>141</sup> When elaborating on this argument, a WTO official involved in the case began his remarks by alluding to the United States’ past practice of “aggressive unilateralism” and the great attention consequently dedicated to the issue of unilateral measures during the drafting of the DSU in the Uruguay Round, which ultimately resulted in a prohibition on unilateral determinations and retaliatory measures in instances of alleged violations of WTO law.<sup>142</sup> This official went on to note that “a lot of what was in the . . . mind” of WTO adjudicators in *Mexico-Soft Drinks* was the threat of such “unilateral actions” and their potentially negative effect on the stability of the multilateral system and its dispute settlement mechanism.<sup>143</sup> The panel and the AB were both concerned that if they were to “decide[] differently, people could have read” Article XX(d) as suggesting that

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136. *Id.* ¶ 75 (emphasis original); *Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶¶ 8.191–8.197.

137. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 79.

138. *Id.* ¶¶ 69, 79, n. 148.

139. William J. Davey & André Sapir, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 *WORLD TRADE REV.* 5, 10 (2009).

140. *Id.* at 9–11.

141. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 77. Article 22 of the DSU regulates the application of countermeasures in cases of non-compliance within the WTO framework, whereas Article 23 prohibits unilateral actions, stating that WTO Members shall not make determinations of violations of WTO agreements except by recourse to the WTO DSS, in accordance with DSU rules.

142. Interview with WTO legal officer, in Geneva (Mar. 16, 2012).

143. *Id.*

States “affected by a [WTO] violation of another country, even if they have not . . . obtain[ed] a [DSS] finding [of violation], . . . still have the authority to impose . . . their own countermeasures” unilaterally.<sup>144</sup>

While this argument summarizes WTO adjudicators’ desire to secure the stability and predictability of the multilateral trading system by sending “a signal that . . . [Members] cannot take these unilateral measures,”<sup>145</sup> this justification is not entirely convincing. This is particularly so given the fact that the principle of effective treaty interpretation could preclude a Member’s attempt to use GATT Article XX(d) to circumvent its obligations under DSU Articles 22 and 23, which forbid unilateral trade measures and regulate the application of countermeasures within the WTO framework.<sup>146</sup>

Another argument the AB invoked when rejecting the reading of Article XX(d) as covering measures necessary to secure compliance with international agreements was that acceptance of Mexico’s position would imply that in order to resolve the case, WTO adjudicators would have to assess whether NAFTA, the regional agreement at issue, had been violated.<sup>147</sup> This, the AB contended, would make WTO panels and the AB “adjudicators of non-WTO disputes,” a function extraneous to their mandate under the DSU.<sup>148</sup> As Davey and Sapir have rightly noted, however, “this argument is not really accurate, as the WTO system would only be taking a view on the other agreement to the extent it was necessary to determine WTO rights and obligations; its view would not constitute adjudication of the dispute under the other agreement.”<sup>149</sup> The cogency of the AB’s argument is further undermined by the fact that, in other instances, the AB held that “it could make determinations about the legal requirements of other legal systems and whether they are met, where needed, in order to apply a WTO legal rule.”<sup>150</sup> This was the case, for example, with the Lomé Convention in *EC-Bananas*.<sup>151</sup> On the basis of this earlier case law, Howse has suggested that the AB in *Mexico-Soft Drinks* could have simply concluded that “the operative provision being applied was Article XX(d) of the GATT” and that a finding with respect to a NAFTA violation “was merely ancillary to determining” whether the Mexican measures were required to secure US compliance, thus making these measures consistent with the WTO covered agreements.<sup>152</sup>

144. *Id.*

145. *Id.*

146. Davey & Sapir, *supra* note 139, at 10.

147. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 78.

148. *Id.*

149. Davey & Sapir, *supra* note 139, at 10.

150. Howse, *supra* note 10, at 74.

151. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 25, 1997).

152. Howse, *supra* note 10, at 74.

The AB, like the panel, consciously chose not to pursue this route but to strictly construe GATT Article XX(d) as excluding international agreements, including RTAs, from its scope. This interpretative choice aptly discloses WTO judicial bodies' "implicit judicial policy of 'clinical isolation' from regionalism."<sup>153</sup> It also marks the adjudicators' deliberate attempt to control the negative impacts that RTA proliferation could have on the WTO legal system. Two messages were therefore made clear in the judicial endeavor undertaken by WTO adjudicators to sustain multilateralism in *Mexico-Soft Drinks*.

First, Article XX(d) was to be interpreted narrowly, meaning that WTO Members may not resort to this exception in order to justify WTO-inconsistent measures aimed at enforcing compliance with the international obligations adopted under the umbrella of regional trade arrangements. Clearly, this narrow interpretative approach is consistent with the strict mode of interpretation employed in *Turkey-Textiles* toward the regional trade exception embedded in GATT Article XXIV. At the same time, the narrow approach followed in *Mexico-Soft Drinks* with respect to the exception enshrined in Article XX(d) differs significantly from the broad interpretive stance taken by WTO adjudicators in "trade-and" disputes toward the exceptions found in Article XX(a), (b) and (g). In such "trade-and" cases, as I have described in detail elsewhere, WTO adjudicators exhibited much greater deference to the protected interests at stake (among them, health and environmental protection), as well as to the non-WTO international law sources of relevance to those interests.<sup>154</sup> When alluding to the noncoincidental variation between the judicial approach taken toward Article XX exceptions in "trade-and" disputes and the position taken in the RTA-related case of *Mexico-Soft Drinks*, a WTO official working on the case made a highly revealing comment:

[In *Mexico-Soft Drinks*,] Mexico was saying that . . . it could invoke [Article] XX(d) to enforce the NAFTA [i.e., a regional trade agreement] . . . [B]ut if someone were to suggest that they were applying a WTO-inconsistent measure to enforce an international environmental agreement, will they receive more deference than here? Maybe.<sup>155</sup>

This testimony tacitly demonstrates how the interpretative and judicial policy choices made by WTO adjudicators in *Mexico-Soft Drinks* were shaped by and harnessed to the DSS's efforts to uphold the WTO regime and bolster the stability and unity of its rules in the face of the threats posed by the expanding regional trading blocs. Indeed, a WTO panelist sitting on the bench in *Mexico-Soft Drinks* suggested as much when he explained the nondeferential approach WTO adjudicators took toward RTAs in this case:

One thing is to show deference [to other international agreements], but . . . I see it . . . the other way around. There are so many . . . free trade agreements that it is

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153. *Id.* at 75

154. Shlomo Agon & Benvenisti, *supra* note 38, at 635-637; Sivan Shlomo Agon, *Clearing the Smoke: The Legitimation of Judicial Power at the WTO*, 49 J. WORLD TRADE 539, 555-558 (2015).

155. Interview with WTO legal officer, in Geneva (Apr. 18, 2012).



very risky to take that road. . . . It is very dangerous [to show deference to these agreements]. . . . [I]t was [therefore] clear to the panel . . . that we had . . . to establish the limits very clearly.<sup>156</sup>

The second message conveyed by the *Mexico-Soft Drinks* ruling on GATT Article XX(d), particularly by WTO adjudicators' refusal to look into the relevant legal norms under NAFTA and their assertion that such an act would amount to adjudication of a "non-WTO dispute," is that "the WTO dispute settlement system was not available" for Members "to address gaps and ineffectiveness" in regional trade arrangements and their dispute settlement fora.<sup>157</sup> With respect to this position, a WTO legal officer participating in the case stated:

The truth is, at the end of the day, that Mexico had a valid complaint that the US is blocking [the operation of the] NAFTA [dispute settlement mechanism]. The question is, should . . . it be for the WTO, doomed for being in those situations, to fix their problem or should the WTO stay on the sidelines, like it did?<sup>158</sup>

This same interviewee added that the AB's ruling on GATT Article XX(d) reflected its "reluctance to get involved in what was a very messy regional dispute. . . . Not just the [dispute about trade in] sugar, but also this issue about . . . the blocking of the [selection] of panelists" by the United States, which prevented the establishment of a NAFTA panel to hear Mexico's claims and resulted in the latter's application of countermeasures.<sup>159</sup> There was some "concern" among WTO adjudicators at the time "that the WTO system would be put in a situation in which it would have to resolve regional controversies," a scenario that might undermine its own credibility.<sup>160</sup> The AB, determined to secure the autonomy, stability, and reliability of the WTO legal system, including its dispute settlement apparatus, sought to avoid any such occurrences.

## 2. *Brazil-Tyres*

The AB exhibited a similar attitude in *Brazil-Tyres*, another RTA-related dispute. In that case, the AB essentially held that Brazil had acted inconsistently with WTO rules by following a ruling handed down by a tribunal established in the framework of the Mercado Común del Sur (MERCOSUR), the RTA created

156. Interview with WTO panelist, in Geneva (July 24, 2012).

157. Howse, *supra* note 10, at 74.

158. Interview with WTO legal officer, in Geneva (Apr. 18, 2012). A state delegate drew a similar picture when alluding to the AB's decision to reject Mexico's claims in *Mexico-Soft Drinks* and to distance itself from the U.S.-Mexico skirmish under the NAFTA: "It was clear that it was an unfair situation, but. . . the WTO [DSS] can really just say nothing other than 'we never said the world is fair and we have our job to reinforce this [WTO Agreement], and we are sorry about what's happening [between the US and Mexico at the regional level].'" Interview with EU official, in Brussels (July 20, 2012).

159. Interview with WTO legal officer, in Geneva (Apr. 18, 2012).

160. *Id.*

between Brazil and several South American countries.<sup>161</sup> At issue in *Brazil-Tyres* was an import ban on retreaded tires, originally adopted by Brazil in 2000.<sup>162</sup> According to Brazil, the ban was introduced as part of its efforts to reduce the risks to human, animal, and plant life and health associated with waste tires, the accumulation of which increases the exposure to toxic emissions caused by tire combustion and facilitates the transmission of diseases by the mosquitos using tires as breeding grounds.<sup>163</sup> Brazil's 2000 ban had initially been challenged by Uruguay before a MERCOSUR arbitral tribunal in 2001.<sup>164</sup> Siding with Uruguay, the tribunal found that Brazil's import prohibition was a new restriction of commerce in violation of MERCOSUR law, which prohibited MERCOSUR member States from introducing new trade barriers of any kind between one another.<sup>165</sup> Following this ruling, Brazil adopted a revised regulation in 2004 that instituted an exemption to the import ban for retreaded tires originating in MERCOSUR member States ("the MERCOSUR exemption").<sup>166</sup>

This sequence of events led the EU—the primary exporter of retreaded tires to Brazil prior to the ban—to initiate legal proceedings against Brazil at the WTO.<sup>167</sup> The EU claimed that Brazil's import ban violated the prohibition on quantitative restrictions in GATT Article XI and that the MERCOSUR exemption was inconsistent with Brazil's nondiscrimination obligations under GATT Articles I (MFN) and XIII (nondiscriminatory administration of quantitative restrictions).<sup>168</sup> Brazil defended its position by invoking, *inter alia*, the exception in GATT Article XX(b), which offers immunity for trade-restrictive measures "necessary to protect human, animal or plant life or health."<sup>169</sup>

In addressing this defense, the AB, as in other environment and health-related cases, took a rather broad and deferential view of Brazil's regulatory measure at the first stage of the analysis of Article XX, where the AB examined whether the measure came under one of the exceptions listed in paragraphs (a) to (j) (in this case, the exception in paragraph (b)).<sup>170</sup> At this stage, and although retreaded tires "contribute[d] only indirectly to the health risks associated with the

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161. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil-Tyres* AB Report].

162. *Id.* ¶ 122.

163. *Id.* ¶ 134.

164. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 2.13, WT/DS332/R (adopted Dec. 3, 2007) [hereinafter *Brazil-Tyres* Panel Report].

165. *Id.*

166. *Id.* ¶¶ 2.14-2.15.

167. Qin, *supra* note 82, at 604–05.

168. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 2.

169. *Id.* ¶ 3.

170. Interview with AB member, in Jerusalem (June 6, 2012) (noting that the AB "has given a rather broad interpretation of . . . Article XX" and "in admitting an environmental exception" in this case).

accumulation of waste tyres,”<sup>171</sup> the AB ruled that Brazil’s ban on imports of retreaded tires was “necessary” to protect “human, animal and plant life and health,” thus upholding the panel’s finding that the ban was provisionally justified under Article XX(b).<sup>172</sup> However, the AB took a different course when it turned to the second stage of the analysis under the Article XX chapeau, focusing on the manner in which Brazil’s ban was applied. At this later stage, the AB parted company with the panel and reversed the latter’s (relatively RTA-friendly) decision on the MERCOSUR exemption.

And so, in a different spirit from that displayed by WTO judicial bodies in previous RTA-related disputes, the first-instance panel in *Brazil-Tyres* took a rather accommodating posture toward MERCOSUR, the RTA at issue, when examining the Brazilian import ban under the chapeau of Article XX. The chapeau requires WTO adjudicators to ensure that trade-restrictive measures found provisionally justified under one of the exceptions in paragraphs (a)-(j) of Article XX “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>173</sup> In *Brazil-Tyres*, the panel found that although the MERCOSUR exemption had resulted in discrimination in the application of the import ban against non-MERCOSUR countries, such discrimination was not “arbitrary” or “unjustifiable” within the meaning of the chapeau.<sup>174</sup> First, according to the panel, the discrimination was not “arbitrary” since the adoption of the MERCOSUR exemption was not “motivated by capricious or unpredictable reasons” but by Brazil’s legal obligation to comply with the MERCOSUR tribunal’s ruling.<sup>175</sup> In addition, the ruling was delivered in the context of a trade liberalizing agreement among MERCOSUR member countries, with such agreements expressly recognized in GATT Article XXIV.<sup>176</sup> Second, the panel held that the discrimination resulting from the MERCOSUR exemption was not “unjustifiable” because the volume of retreaded tires imported from MERCOSUR countries, at the time of the panel’s examination, had not been significant enough to undermine the import ban’s ability to fulfill its intended objectives.<sup>177</sup> As a result, the panel did not find a violation of the Article XX chapeau in this respect.<sup>178</sup>

171. Qin, *supra* note 82, at 622.

172. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 212; *Brazil-Tyres* Panel Report, *supra* note 164, ¶ 7.215.

173. Qin, *supra* note 82, at 606.

174. *Brazil-Tyres* Panel Report, *supra* note 164, ¶ 7.289.

175. *Id.* ¶¶ 7.272, 7.281.

176. *Id.* ¶¶ 7.273–7.274.

177. *Id.* ¶¶ 7.285–7.288.

178. Note, however, that at the end of the day the panel did find the Brazilian import ban to be applied in a manner that failed to meet the requirements of the chapeau of Article XX. This is due to the fact that despite the existence of the import ban, imports of used tires to Brazil were in effect

When asked to shed light on the rationale underlying the panel's uncommonly deferential approach toward MERCOSUR and the regional tribunal's ruling that prompted the adoption of the MERCOSUR exemption, one of the WTO panelists sitting on the bench in *Brazil-Tyres* made the following remarks. He noted that in this case, the panel was well aware of the fact that if the MERCOSUR exemption were to be found WTO-inconsistent, Brazil might find itself in a legal bind where it would not be able to comply with its obligations under the WTO without violating its obligations under MERCOSUR, pursuant to which the exemption had been adopted.<sup>179</sup> Consequently, the panel's view was that WTO adjudicators should not "interpret the WTO agreements . . . in a way that would put Members in conflict with their obligations under a regional trade agreement . . . if there is an alternative way of" interpreting the WTO agreements.<sup>180</sup> This panelist further stated that in cases where an alternative interpretation is not available and "a clear conflict" exists between WTO law and a Member's obligation under the respective RTA, then "all a WTO panel can do . . . is to apply WTO law."<sup>181</sup> Nevertheless, if the issues involved remain cloudy, that is,

[i]f the conflict [between the RTA and WTO law] is not clear, then there ought to be some recognition given to . . . the regional trade agreement . . . recognizing that . . . WTO law includes, in fact, regional trade agreements, as Article XXIV says, [and] that they are legitimate parts of the international trading system.<sup>182</sup>

Another WTO official involved in the *Brazil-Tyres* panel proceedings went on to explain that the panel's guiding "rationale" in the interpretative exercise followed in this case was to ensure that its decision would not impede Brazil's ability to comply with the decisions of both the WTO DSS and the MERCOSUR tribunal:<sup>183</sup>

[W]hat comes out of the panel report is really that they wanted to make sure that there would not be [a] contradiction [between the rulings of the two forums] . . . [thereby] putting Brazil in the situation that they don't know what to do . . . [and] are basically [forced to act] illegal[ly] . . . [with respect to the ruling of] one court . . . or the other.<sup>184</sup>

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allowed through court injunctions and in quite large quantities, what significantly undermined the ban's objectives. For this reason, the panel ultimately concluded that Brazil's ban was applied in a manner that constitutes unjustifiable discrimination and a disguised restriction to trade, and thus could not be justified under GATT Article XX. *Id.* ¶¶ 7.356–7.357.

179. Interview with WTO panelist, in Jerusalem (June 6, 2012).

180. *Id.* A WTO legal officer involved in the *Brazil-Tyres* proceedings followed suit, stating: "The panel's decision implies. . . that Brazil, as a member of MERCOSUR, has legal obligations, that it has to obey these obligations, and that the panel recognizes this state of events, and that it is allowed to take that into account." Interview with WTO legal officer, in Geneva (Mar. 19, 2012).

181. Interview with WTO panelist, in Jerusalem (June 6, 2012).

182. *Id.*

183. Interview with WTO official, in Geneva (Apr. 5, 2012).

184. *Id.*

However, this same official continued, the AB “did not seem to worry about” the potential conflict between Brazil’s obligations under MERCOSUR and the WTO.<sup>185</sup> Whereas “the panel was ready to be more flexible on the interpretation of the rules,” the AB was more concerned with “the legality of the [panel’s] findings”<sup>186</sup> that, as Brink has noted, “would have allowed WTO Members to circumvent the Article XX chapeau and discriminate in the application of their health and environment policies . . . simply on the grounds that they were doing so pursuant to an obligation in *another* international agreement.”<sup>187</sup>

Hence, unlike the panel, whose interpretation of the chapeau indicated a predisposition to avoid any head-on conflict with MERCOSUR’s legal prescriptions, the AB interpreted the chapeau “in a way that it knew would require Brazil to breach its treaty obligation under MERCOSUR.”<sup>188</sup> Thus, in rejecting the panel’s interpretation, the AB first noted that the “assessment whether discrimination is arbitrary or unjustifiable” within the meaning of the chapeau “should be made in the light of the objective of the measure” in question.<sup>189</sup> In this case, the AB stressed, the “discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal.”<sup>190</sup> This ruling, according to the AB, “was not an acceptable rationale” for the resulting discrimination because it bore no relationship to the legitimate environmental and health-related objectives pursued by the import ban; it even went against these objectives.<sup>191</sup> Accordingly, the AB concluded, the MERCOSUR exemption resulted in Brazil’s import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination,<sup>192</sup> in contrast to the requirements indicated in the Article XX chapeau. As a result, the ban could not be justified under Article XX as a whole.<sup>193</sup>

The AB’s decision, determining that the MERCOSUR tribunal’s ruling could not overcome the discipline of the Article XX chapeau and justify the discriminatory application of the import ban, “left Brazil in a legal quandary.”<sup>194</sup> “Brazil could not honor its treaty obligation under the WTO without breaching its obligation under MERCOSUR—and vice versa—unless it agreed to lift the import ban altogether, which was not an option given its declared environmental

185. *Id.*

186. *Id.*

187. Tegan Brink, *Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil-Tyres*, 44 J. WORLD TRADE 813, 816 (2010).

188. Qin, *supra* note 82, at 626.

189. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 227.

190. *Id.* ¶ 228.

191. *Id.*

192. *Id.*

193. *Id.* ¶ 252.

194. Qin, *supra* note 82, at 609.

objective.”<sup>195</sup> The AB, for its part, was well aware of the complex legal situation Brazil would face in the wake of the ruling. As one AB member then sitting on the bench stated: “The fact that there . . . [was] a [MERCOSUR] decision out there . . . meant that the [defending] country . . . [was] subject to two contradictory injunctions from two different treaties.”<sup>196</sup> In justifying the AB’s interpretative exercise, which contributed to this state of conflicting legal obligations at the regional and multilateral levels, that same AB member argued that:

[W]e had to apply our law. . . . The judge has . . . to exercise his jurisdiction according to the statute and the applicable law before him. He should, of course, not be half-blinkered, he should look right and left, but he cannot go against the law that governments [have agreed upon], [or go against] his [delegated] functions, simply because of something which is outside his jurisdiction.<sup>197</sup>

Others, however, have argued that the conflict between multilateral and regional obligations that Brazil faced following the AB’s ruling was “neither inherent nor inevitable.”<sup>198</sup> According to Qin, this conflict arose purely as a result of the interpretation under the Article XX chapeau adopted by the AB,<sup>199</sup> which “showed no interest in facilitating Brazil’s compliance with both sets of obligations and with the maintenance of the domestic regulatory scheme” that had already been found provisionally justifiable under Article XX(b).<sup>200</sup> Howse has further added in this regard:

Had the Appellate Body taken a positive view of the co-existence of regional fora with the WTO dispute settlement system, it could easily have found that Brazil’s discrimination in favour of MERCOSUR members was not unjustifiable—there is no definition of “unjustifiable” in Article XX and no textual basis for confining acceptable justifications to those that pertain to the main purpose of the general regulatory scheme itself.<sup>201</sup>

As seen above, the panel’s interpretation of the term “unjustifiable” in Article XX differed indeed from the AB’s interpretation.<sup>202</sup> Other interpretations of Article XX were also available, as Qin has demonstrated.<sup>203</sup> Nevertheless, the AB, despite its reputation for developing new and evolutionary interpretations and for integrating WTO agreements with other areas of international law,<sup>204</sup>

195. *Id.* A panelist involved in *Brazil-Tyres* similarly stressed that the AB’s ruling “effectively put Brazil in a position where it could not comply with the WTO obligations and its MERCOSUR obligations at the same time.” Interview with WTO panelist, in Jerusalem (June 6, 2012).

196. Interview with AB member, in Geneva (Apr. 19, 2012).

197. *Id.*

198. Qin, *supra* note 82, at 609.

199. *Id.* at 609–612.

200. Howse, *supra* note 10, at 74.

201. *Id.*

202. The alternative interpretation developed by the panel was discussed and rejected by the AB. See *Brazil-Tyres* AB Report, *supra* note 161, ¶ 229.

203. Qin, *supra* note 82, at 613–618.

204. *Id.* at 618.

consciously chose to reverse the panel's finding on the MERCOSUR exemption and refused to explore any interpretation that would avoid a conflict with the legal prescriptions under MERCOSUR. When alluding to this choice, a WTO official involved in *Brazil-Tyres* interestingly distinguished the AB's approach to RTAs from its attitude toward other international agreements:

[T]he AB has been consistently trying . . . to build a case law of its own. So . . . there is always a little bit of reluctance to look too much for what's going on elsewhere, especially when what's going on elsewhere is very similar to what is going on in the WTO . . . when it is related to trade. It's a different matter when they are looking at other [international] agreements, for instance, CITES [the Convention on International Trade in Endangered Species] [as examined] in the [*U.S.-Shrimp* case, where . . . they were looking [for] . . . an authority on environmental protection. There, I think, they are quite fine to do that . . . . [The AB's ruling in *Brazil-Tyres*, however,] was meant to . . . send a [different] message, that the law, the case law . . . to be considered is the case law here, [of the WTO,] and not the trade case law developed by another institution.<sup>205</sup>

Notably, this message did not come as a surprise to WTO practitioners, and neither did the AB's dismissal of the MERCOSUR tribunal's ruling. Rather, this attitude seemed a natural continuation of the AB's rulings in previous RTA-related cases. As a senior Brazilian official involved in *Brazil-Tyres* commented, "when the Appellate Body reversed [the panel's decision on the MERCOSUR exemption] . . . 'it was not a surprise.'" In fact, this official admitted, he "was surprised that the panel accepted [Brazil's] arguments," which relied on the MERCOSUR tribunal's decision.<sup>206</sup>

The picture emerging from this incident, in which the AB found that although Brazil was acting pursuant to its MERCOSUR obligations, Brazil was still required to meet the requirements of the GATT and, in particular, the chapeau of Article XX,<sup>207</sup> suggests that, in *Brazil-Tyres*, the AB followed the same judicial efforts marking its previous RTA-related jurisprudence. That is, the AB was working to preserve the autonomy of the WTO regime and to espouse the supremacy of WTO principles and rules over those of RTAs.<sup>208</sup> For this purpose, the AB further limited in its ruling the ability of Members' to contract out of their WTO obligations and discriminate against other WTO Members by means of an RTA.<sup>209</sup> As one WTO practitioner involved in the case stated, a comparison of the AB's ruling in *Brazil-Tyres* with its rulings in cases like *Mexico-Soft Drinks* strongly implies that "what . . . [the AB] is doing, intentionally or unintentionally,

205. Interview with WTO official, in Geneva (Apr. 5, 2012).

206. Interview with senior Brazilian official, in Geneva (July 5, 2012).

207. Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 CORNELL INT'L L. J. 193, 194–195 (2009).

208. Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*, TRADE L. & DEV. 230, 253 (2009); Qin, *supra* note 82, at 622.

209. Langille, *supra* note 81, at 1510.

is setting the supremacy of WTO law” vis-à-vis RTA law,<sup>210</sup> despite the lack of hierarchical relationships between the WTO and RTAs under international law.<sup>211</sup>

In responding to the criticism ultimately levelled at the AB’s ruling in *Brazil-Tyres*,<sup>212</sup> which urged WTO adjudicators “to get in dialogue between . . . courts” so as to avoid such incidents of conflicting obligations, one AB member went on to explain the regime maintenance rationale underlying this ruling in these words: “[I]f the WTO system were to take into account the MERCOSUR, the ASEAN, the African community” or the various other RTAs operating alongside the WTO, “the [WTO] system then . . . would be too easy to evade.”<sup>213</sup> Similarly, an EU official made the following comment as he situated the *Brazil-Tyres* ruling in the broader context of increasing regionalism and the threats it poses to the multilateral system of international trade:

[W]hat happened [in this case] is that the Appellate Body realized that in the future, there will be more regional integration . . . organizations, and that . . . you cannot . . . put in danger the WTO system just because . . . [those] regional integration organizations [are out there]. . . [I]t is WTO litigation, so in principle, the WTO Appellate Body should give preference to the GATT [Agreement].<sup>214</sup>

In concluding his observations, this same EU official stressed that “if a WTO decision can ignore or put aside a domestic measure, why . . . [is it] not entitled to do the same thing with a regional measure or a regional decision?”<sup>215</sup> As discussed below, this spirit of isolation from and ascendancy over regionalism, aimed at strengthening the multilateral trade system, remained prominent in the more recent dispute that arose at the WTO-RTA substantive legal interface: *Peru-Agricultural Products*.<sup>216</sup>

### *C. The Quest to Sustain Multilateralism Continues: Peru-Agricultural Products and the Interpretation or Modification of WTO Law by Means of an RTA*

In *Peru-Agricultural Products*, Guatemala filed a complaint against Peru’s Price Range System (PRS), a tariff regime that triggers additional duties on imports of selected agricultural products if their prices fall below a certain

210. Interview with WTO panelist, in Jerusalem (June 6, 2012); *see also* interview with EU official, in Brussels (July 20, 2012).

211. Qin, *supra* note 82, at 623.

212. For relevant criticism, *see, e.g.*, Lavranos, *supra* note 208; Qin, *supra* note 82.

213. Interview with former AB member, in Jerusalem (June 6, 2012).

214. Interview with EU official, in Brussels (July 20, 2012).

215. *Id.*

216. Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru-Agricultural Products AB Report*].



floor.<sup>217</sup> According to Guatemala, the PRS constituted a “variable import levy” incompatible with Article 4.2 of the WTO Agreement on Agriculture and “other duties or charges” in contradiction to Peru’s commitment under Article II of the GATT.<sup>218</sup> However, in an RTA signed by Peru and Guatemala in 2011, the two States agreed that “Peru may maintain its Price Range System”<sup>219</sup> (so that the PRS, claimed to be in violation of WTO law, was allegedly permissible under the RTA). In the RTA, the countries also agreed that “in the event of any inconsistency” between WTO agreements and the RTA, the latter “shall prevail.”<sup>220</sup> These RTA provisions were later invoked by Peru when defending the WTO violations associated with the PRS before the WTO DSS, thus raising fundamental questions concerning the substantive legal interaction between WTO and RTA rules, most notably the question of whether an RTA concluded between a subset of WTO Members can “influence or change the interpretation or application of WTO treaty provisions” as they apply between those specific Members.<sup>221</sup>

When deciding the case in 2015, the AB could have avoided delving into these intricate questions by simply following the panel’s finding that the RTA between Guatemala and Peru (ratified by Guatemala only) had not yet entered into force; hence, its provisions were not legally binding on the parties.<sup>222</sup> The AB, however, took a considerably different approach. After confirming the panel’s finding that Peru violated Article 4.2 of the Agreement on Agriculture and Article II of the GATT,<sup>223</sup> the AB began to tackle head on the issue of the relationship between the respective WTO provisions and the RTA, irrespective of the RTA’s status. In so doing, as explained in the preceding paragraphs, the AB refused to absolve the Peruvian PRS of the WTO violations identified based on any of the RTA-related defenses raised by Peru in a judicial exercise that significantly restricted the possible impact RTA rules could have on WTO obligations by means of either interpretation or modification.

The first defense Peru raised when attempting to exonerate itself of the WTO inconsistencies associated with its PRS was that, under customary rules of interpretation, the WTO provisions at issue should be interpreted in light of the provisions of the RTA between Peru and Guatemala.<sup>224</sup> More specifically, Peru

217. *Id.* ¶ 1.2.

218. *Id.* ¶ 1.4.

219. *Id.* n.92, n.105.

220. *Id.* ¶ 5.109, n.105.

221. Joost Pauwelyn, *Interplay Between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence*, 17 (2016), available at <https://ssrn.com/abstract=2731144>.

222. Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 7.526–7.528, 8.1.f, WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru-Agricultural Products* Panel Report].

223. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶¶ 5.61, 5.108.

224. *Id.* ¶ 5.91.

argued that the RTA concluded with Guatemala—which stipulated in paragraph 9 of Annex 2.3 that Peru may maintain the PRS—was pertinent to the interpretation of the WTO provisions applicable to the case as a “subsequent agreement between the parties,” and as other “relevant rules of international law applicable in the relations between the parties” within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties<sup>225</sup> (VCLT).<sup>226</sup>

The AB dismissed this defense.<sup>227</sup> First, the AB determined that any interpretation of WTO provisions in light of an RTA, either as a “subsequent agreement” or as other “relevant rules” applicable between the parties under VCLT Article 31(3), could not go against the explicit text of the WTO treaty, as was the case here, with WTO rules, as previously interpreted by the AB, explicitly prohibiting Peru’s PRS.<sup>228</sup> Second, the AB stated that according to its understanding of VCLT Article 31(1), the WTO treaty, as a multilateral treaty, was to be interpreted “as a whole,” in a manner establishing the “common intentions” of all WTO Members and “not just the intentions of some of the parties” such as Peru and Guatemala.<sup>229</sup> To find otherwise “would suggest that WTO provisions can be interpreted differently depending on the Members to which they apply and on the their rights and obligations under an FTA to which they are parties.”<sup>230</sup> Finally, the AB placed further limits on the interpretation of WTO provisions with reference to an RTA’s rules by stressing that in order to inform the WTO interpretative process, such “other rules” must be “*relevant*,” that is, “bearing specifically upon the interpretation” of the WTO provisions at issue.<sup>231</sup> Hence, rather than examining whether the RTA provisions were “rules applicable in the relations between the parties,” the AB chose to focus its examination on whether the provisions could be considered “relevant” to the interpretation of the WTO articles under discussion.<sup>232</sup> In this respect, the AB found that by stating that Peru “‘may maintain’ its PRS,” the RTA between Peru and Guatemala provided no “‘relevant’ interpretative guidance” to the construction of Article 4.2 of the Agreement on Agriculture or to the interpretation of GATT Article II.<sup>233</sup>

Following this line of reasoning, the AB rejected Peru’s first RTA-based defense. In so doing, the AB significantly raised the bar for an RTA to be available

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225. *Id.* ¶¶ 5.91, 5.98.

226. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT or Vienna Convention].

227. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.118.

228. *Id.* ¶¶ 5.93–5.94.

229. *Id.* ¶ 5.95.

230. *Id.* ¶ 5.106.

231. *Id.* ¶ 5.101.

232. James Mathis, *WTO Appellate Body, Peru—Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, 20 July 2015*, 43 LEGAL ISSUES ECON. INTEGRATION 97, 100 (2016).

233. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.103 (citation omitted).

for the purpose of interpreting WTO provisions<sup>234</sup> in what appears to be a clear attempt by the AB, in its heightened role as the guardian of the WTO legal system, to protect the coherence of the multilateral trade rules and prevent the fragmented application of those rules in times of RTA proliferation.

The AB exhibited a similarly exclusionary approach toward RTAs when it turned to address the second defense implicit in Peru's arguments, according to which the provisions of the RTA permitting it to maintain the WTO-inconsistent PRS modified the WTO provisions at issue *inter se*, that is, within the bilateral relations of Peru and Guatemala, in accordance with VCLT Article 41 on *inter se* treaty modifications.<sup>235</sup> Importantly, prior to addressing this defense, the AB concluded, based on its reading of several RTA provisions, that there was an "ambiguity" as to whether the RTA at all allowed Peru to maintain the WTO-inconsistent PRS.<sup>236</sup> This conclusion, in turn, could end the entire discussion. Nevertheless, the AB chose to continue its analysis, "assuming *arguendo*" that the RTA provisions allowed Peru to maintain the PRS.<sup>237</sup> In following this path, the AB seized the opportunity to declare that Peru could not modify its WTO commitments through the RTA and, more generally, that WTO Members' ability to contract out of their WTO obligations via RTAs was not governed by the general provisions of the VCLT, such as Article 41, but by the terms of WTO law itself.

And so, in rejecting Peru's second defense, the AB found that VCLT Article 41, which allows a subset of members to a multilateral treaty to modify the treaty *inter se* through a subsequent agreement, could not serve as a basis for two WTO Members to modify WTO rules via an RTA and to permit an otherwise WTO-inconsistent measure to hold between themselves. In the words of the AB, the WTO contains its own provisions for amendments, waivers, or exceptions for RTAs, "which prevail over the general provisions of the Vienna Convention."<sup>238</sup> As a result, the AB determined that "the proper routes" for assessing the lawfulness of RTA provisions departing from certain WTO rules "are the WTO provisions that permit the formation of regional trade agreements"—in this case, GATT Article XXIV, which Peru did not invoke.<sup>239</sup>

234. Mathis, *supra* note 232, at 101; Pauwelyn, *supra* note 221, at 20–21, 26.

235. Note that this defense was explicitly raised by Peru before the panel (*see Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.111). However, Peru focused its defense before the AB on the "interpretation" of WTO provisions, as discussed above. Yet, as the AB rightly observed, on appeal as well Peru implicitly argued that the RTA concluded with Guatemala had "modified" its obligations toward Guatemala (*Id.* ¶¶ 5.96-5.97). This defense as well was consequently addressed in the AB's ruling.

236. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶¶ 5.109–5.110.

237. *Id.* ¶ 5.111.

238. *Id.* ¶ 5.112.

239. *Id.* ¶ 5.113.

At this juncture, and although Peru did not raise Article XXIV as a defense for its WTO-inconsistent PRS,<sup>240</sup> the AB went further to reaffirm the strict two-prong test developed in *Turkey-Textiles*, according to which Article XXIV could justify a WTO-inconsistent measure provided that: (1) the measure at issue was introduced upon the formation of an RTA that fully meets the requirements of Article XXIV and (2) the formation of the RTA would be prevented if the introduction of the measure was not allowed.<sup>241</sup> In recounting this test, however, the AB did not address the different contexts of the two cases, namely, the fact that in *Turkey-Textiles*, “the test was applied to set the conditions for validating a measure that violated a *third party’s* right in the WTO,” whereas in *Peru-Agricultural Products*, the test was applied to a measure that violated WTO law “only between the *regional members* themselves.”<sup>242</sup> Instead, what the AB did on this occasion, when faced with a measure that was not only WTO-inconsistent but which raised hurdles to regional trade and placed the party to the RTA in a less favorable position as compared with other WTO Members, was to reinforce its strict reading of GATT Article XXIV. This the AB did by stressing that Article XXIV is aimed at “facilitating trade and closer integration” among RTA parties, and thus cannot be interpreted “as a broad defence” for measures in RTAs “that roll back on Members’ rights and obligations under the WTO covered agreements.”<sup>243</sup>

The above judicial move taken by the AB in *Peru-Agricultural Products* is remarkable. In effect, the AB suggested with this interpretative act that “WTO Members had contracted out of Article 41 of the Vienna Convention through the WTO’s own rules on amendments and exceptions,”<sup>244</sup> and “that, *even* where trade with *other* WTO Members is *unaffected*, any attempt by two or more Members to modify WTO obligations among themselves must pass through the relevant WTO legal architecture.”<sup>245</sup> As Howse and Langille have stated when pointing to the systemic goals lurking behind this judicial course of action:

This arguably goes beyond the obvious purpose of ensuring that . . . [RTAs] do not lead to more restrictive trade with third countries, or to ensuring that they in general result in freer trade, *to assuring the unity and integrity of the WTO as a legal system* . . . Here, the Appellate Body adopts an approach to *preserve the relative autonomy and universality of a multilateral regime under pressure from “spaghetti-bowl” fragmentation*.<sup>246</sup>

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240. *Id.* ¶ 5.114.

241. *Id.* ¶ 5.115.

242. Mathis, *supra* note 232, at 103-04 (emphasis original).

243. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.116.

244. Gregory Shaffer & Alan L. Winters, *FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law*, 16 WORLD TRADE REV. 303, 320 (2017).

245. Howse & Langille, *supra* note 58, at 678; *see also* Zang, *supra* note 78, at 53.

246. Howse & Langille, *supra* note 58, at 678 (emphasis added).

Along similar lines, the AB's controversial interpretative exercise,<sup>247</sup> as delineated above, was referred to by Pauwelyn as the AB's "defensive attempt to shelter the WTO treaty from outside (FTA) attack."<sup>248</sup> Arguably, since the WTO legal text does not explicitly prohibit *inter se* modifications, the AB could have opted for other interpretations that recognize Members' contractual freedom under the general provisions of the VCLT to amend and update the trade rules applying in their bilateral relations.<sup>249</sup> The AB in *Peru-Agricultural Products*, however, "did not leave any room" for the application of those provisions "in the WTO legal space with respect to RTAs."<sup>250</sup> Instead, the AB made it very clear that while the WTO legal order forms part of international law, it would be "misplaced to . . . interpret the question of derogability . . . of WTO law through the lens of the general rules" of the VCLT and to assume, in consequence, that WTO commitments "can seamlessly be amended bilaterally between two WTO members" via an RTA.<sup>251</sup> As Tietje and Lang have noted, any other interpretative approach would have gone "against the normative duty of the Appellate Body to protect the integrity and coherence of the WTO's legal system."<sup>252</sup>

Thus, *Peru-Agricultural Products* and the judicial efforts it encompasses fit perfectly with the RTA-related cases reviewed earlier, all which addressed questions that emerge at the substantive legal interface between WTO law and RTAs. Common to these and other RTA-related disputes (involving safeguard measures, among others)<sup>253</sup> is the DSS's attempt to reinforce the stature of the WTO vis-à-vis RTAs, to uphold its objectives and principles (most notably nondiscrimination), and to augment the stability of the multilateral trade rules at a time when regional agreements and negotiations thrive and the WTO politico-diplomatic process struggles to overcome its stagnation. In so doing, the DSS, led by the AB, has consistently worked to secure compliance with WTO obligations and to make deviations from those obligations more difficult—not least by limiting the scope of legal exceptions and defenses that may offer shelter to the WTO-inconsistent measures adopted by Members in the context of their RTA-related activities. The DSS has likewise displayed "no interest in treaty interpretations that could accommodate or facilitate harmonious co-existence with

247. For a critique of this interpretative move and its legal consequences, see Pauwelyn, *supra* note 221, at 21–24; Shaffer & Winters, *supra* note 244, at 320–21; Zang, *supra* note 78, at 52–55.

248. Pauwelyn, *supra* note 221, at 22.

249. Shaffer & Winters, *supra* note 244, at 322; Sherzod Shadikhodjaev, *The "Regionalism vs. Multilateralism" Issue in International Trade Law: Revisiting the Peru-Agricultural Products Case*, 16 CHINESE J. INT'L L. 109, 120 (2017).

250. Shadikhodjaev, *supra* note 249, at 120.

251. Christian Tietje & Andrej Lang, *Community Interests in World Trade Law*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 191, 207 (Eyal Benvenisti & Georg Nolte eds., 2018).

252. *Id.*

253. For a discussion of those cases, see de Mestral, *supra* note 78, at 791–94; Langille, *supra* note 81, at 1509–10.

regional regimes.”<sup>254</sup> Instead, it has maintained a strict separation between the multilateral and regional trading systems, despite the fact that the latter are explicitly recognized in WTO agreements.

Similar judicial efforts to those envisioned at the WTO-RTA substantive legal nexus, as we will now see, have been introduced at the complementary WTO-RTA jurisdictional intersection. At this intersection, panels, together with the AB, have sought to uphold the WTO DSS’s judicial authority and, thereby, the system’s ability to enforce WTO substantive legal commitments. With a view toward achieving these ends, panels and the AB have not only refused to either defer to or refer to RTA jurisprudence and proceedings; they have also significantly constrained the extent to which Members may contract out of the DSU via RTAs in ways that compromise the DSS’s jurisdiction and Members’ right to WTO adjudication.

#### IV. SUSTAINING MULTILATERALISM AT THE WTO-RTA JURISDICTIONAL NEXUS

Woven into the jurisprudence generated at the WTO-RTA substantive legal nexus is an interrelated strand of jurisprudence, dealing with the jurisdictional friction between the WTO and RTAs and the effects of regional dispute settlement mechanisms on the multilateral dispute settlement apparatus, the WTO DSS. At this jurisdictional juncture, the coexistence of the WTO DSS alongside multiple RTA dispute settlement fora raises various conundrums. Most prominent among them, perhaps, is the possibility that a dispute will be brought under both the WTO and RTA adjudicative mechanisms.<sup>255</sup> Since considerable overlap exists between the WTO agreements and RTAs—with the latter often referring to the WTO explicitly or incorporating substantial portions of WTO treaty language<sup>256</sup>—it follows that “a legally and/or factually identical dispute,” or some of its aspects, could be brought before either or both the multilateral and the regional dispute settlement venues.<sup>257</sup> The overlapping and competing jurisdictions of these adjudicative mechanisms may, in turn, lead to forum shopping, waste of resources, legal uncertainty, and conflicting decisions, which might ultimately intensify the fragmentation of international trade law.<sup>258</sup>

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254. Howse, *supra* note 10, at 75.

255. *World Trade Report 2011*, *supra* note 71, at 173; Howse & Langille, *supra* note 58, at 679.

256. For an overview, see Todd Allee, Manfred Elsig & Andrew Lugg, *The Ties Between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis*, 20 J. INT’L ECON. L. 333 (2017).

257. Howse & Langille, *supra* note 58, at 679; *see also World Trade Report 2011*, *supra* note 71, at 173.

258. Lanyi & Steinbach, *supra* note 77.

Awareness of this jurisdictional overlap and the possibility of parallel proceedings at the multilateral and regional levels has prompted State parties to incorporate into RTAs a number of approaches as to how these agreements regulate the relationship and potential jurisdictional conflicts between their own dispute settlement mechanism and that of the WTO.<sup>259</sup> The most common of these approaches takes the form of a forum exclusion clause (also known as a “fork-in-the-road” clause), which allows the party initiating the dispute to choose between the multilateral or the RTA forum; however, once that party has initiated the dispute in one forum, the other forum is no longer available to it.<sup>260</sup>

In the WTO, on the other hand, Article 23 of the DSU, entitled “Strengthening of the Multilateral System,” mandates that WTO Members shall have recourse to the rules and procedures of the DSU when seeking redress for a violation of the WTO covered agreements.<sup>261</sup> The AB elaborated that this provision “lays down a fundamental obligation of WTO Members” to settle disputes under the covered agreements in accordance with the DSU and “establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes.”<sup>262</sup> While DSU Article 23 does not explicitly state that the WTO DSS is hierarchically superior to RTA dispute settlement mechanisms,<sup>263</sup> neither Article 23 nor any other DSU provision sets out rules on how to resolve cases of jurisdictional overlap between the WTO and RTAs. Likewise, there are no rules as to whether the WTO DSS should relinquish its jurisdiction on certain occasions in order to overcome the emerging fragmentation issues between the multilateral and regional dispute settlement systems.<sup>264</sup> As one AB member described:

There is nothing . . . in the DSU which tells us that you have to take [regional dispute settlement fora] into consideration . . . . Not only that, but you have a clause of exclusiveness, that any dispute that falls within the [WTO] agreements should be exclusively decided within the system. That is not what States do, [however,] because all these cases of NAFTA—Softwood Lumber, Soft Drinks, etc. . . . are played like games of ping-pong between . . . NAFTA and [the WTO] . . . . So, in a way, that is the great danger of the free trade areas . . . . [T]hey are taking out the substance of the general system. And [in] the general system, we . . . have a rule of

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259. *World Trade Report 2011*, *supra* note 71, at 173.

260. *Id.*

261. *See* art. 23 of the DSU.

262. Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, ¶ 371, WT/DS320/AB/R (adopted Nov. 14, 2008) [hereinafter *U.S.–Continued Suspension*].

263. Howse & Langille, *supra* note 58, at 679.

264. Songling Yang, *The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause*, 23 MICH. ST. INT’L L. REV. 107, 110 (2014); *see also* Songling Yang, *The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs*, 11 CHINESE J. INT’L L. 281, 285–287 (2012).

exclusiveness.<sup>265</sup>

In this state of affairs, and despite the negative effects associated with the possible misuse of the overlapping dispute settlement mechanisms, in cases featuring aspects that “spill over” between a regional forum and the DSS, WTO adjudicators have shifted much of their efforts to asserting the autonomy, “if not a certain kind of supremacy. . . of the WTO dispute settlement system.”<sup>266</sup> Thus, seeking to avert potential interference with the integrity of WTO adjudication and rule enforcement against the spread of regional trade arrangements and dispute settlement fora, WTO panels, like the AB, have consistently manifested an unwillingness to engage in discourse with RTA adjudicative systems, defer to their judgments, or suspend proceedings pending the outcome of a related dispute.<sup>267</sup> Rather than pursuing such routes or otherwise applying comity toward international fora with overlapping jurisdictions on trade matters, WTO adjudicators, in all relevant RTA-related cases thus far, have chosen to give precedence to their own jurisdiction—that is, to their own power to look into claims, undertake legal analysis, and deliver a WTO judgment.<sup>268</sup> In so doing, they have established a distinctively high bar for RTA parties to reach before they can waive their right to WTO adjudication.

As one private attorney and former State delegate put it, the unequivocal “message” emerging from the WTO cases exhibiting jurisdictional linkage between the WTO and RTAs is that “[i]f there is concurrent jurisdiction, you [should] come here [to the WTO] . . . . Even though you may litigate [your case] . . . in a regional tribunal, you are welcome here anytime you want.” In fact, this informant added, WTO panels and the AB have sent an even stronger message: “Whenever the coin falls on our table, we’re gonna [sic] take it. And only in very extreme situations, we’re gonna [sic] drop the coin to a regional tribunal.”<sup>269</sup>

#### A. *Taking Up the WTO-RTA Jurisdictional Challenge: Argentina-Poultry and the Ensuing Cases*

The first dispute to raise the jurisdictional tension between the WTO and RTAs was *Argentina-Poultry*,<sup>270</sup> where the problem of sequential proceedings

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265. Interview with AB member, in Geneva (Apr. 19, 2012). This point was also stressed by other interviewees. See, e.g., interview with EU official, in Brussels (July 20, 2012).

266. Howse, *supra* note 10, at 73, 75.

267. *Id.* at 73-74; Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT’L L. 571, 576-579 (2008).

268. On this conceptualization of “jurisdiction,” see Andrew D. Mitchell, *The Legal Basis for Using Principles in WTO Disputes*, 10 J. INT’L ECON. L. 795, 821 (2007) (referring to jurisdiction as the power of WTO panels and the AB “to hear claims and proceedings, examine and determine the facts, interpret and apply the law, . . . and declare judgments” (citation omitted)).

269. Interview with former Mexican official, in Geneva (July 12, 2012).

270. Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (adopted May 19, 2003) [hereinafter *Argentina-Poultry*].



(and, consequently, conflicting decisions) with respect to the same measure at the regional and multilateral fora presented itself. In this case, Brazil brought a WTO complaint against certain Argentine antidumping duties that it had previously—and unsuccessfully—challenged before a MERCOSUR tribunal.<sup>271</sup> In light of the prior MERCOSUR proceedings, Argentina raised a preliminary objection asking the WTO panel to refrain from ruling on Brazil's claim. Argentina argued that Brazil had breached its obligation to act in "good faith" by initiating WTO dispute settlement proceedings against the same antidumping measure after losing the case at the regional level.<sup>272</sup> Argentina also invoked the principle of estoppel, arguing that Brazil, given its actions in MERCOSUR, should be precluded from challenging the same measure before the WTO DSS.<sup>273</sup> In response, Brazil argued that even if the measure challenged in both cases was the same, the dispute before the MERCOSUR tribunal was grounded on a different legal basis from the dispute before the WTO panel, and that in bringing the case to the WTO, Brazil was simply exercising its rights under the DSU.<sup>274</sup>

Siding with Brazil, the panel dismissed Argentina's preliminary objection in its entirety. As to good faith, the panel observed, citing previous AB jurisprudence, that two conditions must be satisfied to support a finding that a Member failed to act in good faith: first, there must be a violation of a substantive provision of the WTO agreements, and second, there must be something "more than [a] mere violation,"<sup>275</sup> (e.g., an "egregious breach").<sup>276</sup> However, because Argentina did not allege a violation of any substantive WTO obligation, there was no basis for concluding that Brazil violated the principle of good faith in initiating the present proceedings.<sup>277</sup>

Similarly, the panel denied Argentina's estoppel plea, noting that there was "no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR."<sup>278</sup> In this respect, the panel pointed, *inter alia*, to the fact that the MERCOSUR choice-of-forum provision to which Argentina referred in its arguments (noting that bringing the dispute to the RTA exhausted WTO options, and vice versa) was not yet in force.<sup>279</sup> The panel further reasoned that Brazil's choice not to pursue WTO proceedings after previous MERCOSUR

271. *Id.* ¶ 7.17.

272. *Id.* ¶¶ 7.17–7.18, 7.34.

273. *Id.* ¶¶ 7.18, 7.37.

274. *Id.* ¶¶ 7.22–7.24. Note that the dispute before the WTO DSS offered an assessment of Argentina's anti-dumping duties in light of rules under the WTO Agreement on Anti-Dumping that do not exist under MERCOSUR.

275. *Id.* ¶¶ 7.35–7.36.

276. Howse & Langille, *supra* note 58, at 681.

277. *Argentina-Poultry*, *supra* note 270, ¶ 7.36.

278. *Id.* ¶ 7.38.

279. *Id.*

rulings did not mean that Brazil implicitly waived its right to a judgment under the DSU in the present case.<sup>280</sup>

Hence, despite the binding effect of the MERCOSUR ruling on the parties, the WTO panel's "default reaction," as a former WTO official described it, was that "unless there . . . [was] a very clear legal basis, . . . [it] w[ould] not decline jurisdiction."<sup>281</sup> Having insisted on its jurisdiction, the panel then addressed Argentina's alternative argument in this case. Argentina contended that if Brazil were entitled to bring the case to the WTO, the panel should be "bound" by the earlier MERCOSUR tribunal's ruling on the measure at issue.<sup>282</sup> According to Argentina, the MERCOSUR ruling formed part of the normative framework to be applied by the panel pursuant to VCLT Article 31(3), which requires that other "relevant rules of international law applicable in the relations between the parties" be taken into account for the purpose of treaty interpretation.<sup>283</sup> The panel rejected this argument as well, explaining that in raising its claim, Argentina was not asking the panel to "interpret specific provisions of the WTO agreements in a particular way" but to actually "rule in a particular way"—something the panel believed it was not authorized to do.<sup>284</sup> Furthermore, in a rather critical tone, the panel concluded by stating that WTO panels "are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies."<sup>285</sup>

As Langille has noted, "[h]ere the panel asserted the hierarchy of WTO dispute settlement proceedings."<sup>286</sup> In its effort to entrench the authority of the WTO DSS vis-à-vis regional adjudicative mechanisms, the panel in *Argentina-Poultry* expressed disinterest in mutual accommodation of DSU and RTA proceedings and made it eminently clear that "if any rule was violated by refusal to take a decision of a MERCOSUR tribunal into account" in WTO proceedings, "it was that of MERCOSUR" and not the DSU.<sup>287</sup>

The panel ruling in *Argentina-Poultry* resonates with the decision rendered in the later *U.S.-Softwood Lumber* dispute between Canada and the United States.<sup>288</sup> In the latter case, the WTO panel again showed "no sense of . . . 'judicial comity'" to earlier Canada-United States binational panels under Chapter 19 of NAFTA, which dealt with essentially the same issues related to antidumping

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280. *Id.*

281. Interview with former WTO legal officer, in Geneva (July 16, 2012).

282. *Argentina-Poultry*, *supra* note 270, ¶¶ 7.17, 7.40.

283. *Id.* ¶¶ 7.18, 7.40.

284. *Id.* ¶ 7.41.

285. *Id.*

286. Langille, *supra* note 81, at 1512.

287. de Mestral, *supra* note 78, at 811.

288. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (adopted May 9, 2006) [*U.S.-Softwood Lumber* Panel Report].

and countervailing duties that the United States imposed on Canadian lumber.<sup>289</sup> While Canada sought to use the decisions of the NAFTA panels to support its WTO complaint, the WTO panel did “not make a single reference to the concurrent NAFTA Chapter 19 proceedings,”<sup>290</sup> and only agreed to include them in a footnote, in which the panel explained that Canada’s references to these decisions were inappropriate.<sup>291</sup>

The panel’s decision in *Argentina-Poultry* likewise closely corresponds to the spirit of the AB’s ruling in *Brazil-Tyres*. In this case, as shown earlier in the Article, the AB was unwilling to consider the MERCOSUR tribunal’s ruling in its interpretation of the GATT Article XX chapeau or to allow Brazil to premise its actions on this non-WTO legal decision. Rather than apply judicial comity toward the MERCOSUR tribunal, the AB chose to uphold its own authority to interpret and pass judgment on the relevant trade rules.<sup>292</sup> Alluding to the AB’s choice and its underlying goals, while situating *Brazil-Tyres* in the broader reality of RTA proliferation, a WTO practitioner involved in the case stated:

[D]eal[ing] with regional trade arrangements . . . is a fundamental issue facing the [WTO dispute settlement] system. And the reason that it hasn’t become more of an issue is that we don’t have a vibrant dispute settlement process operating under the . . . [regional trade] systems, but as soon as we have a vibrant [regional] dispute settlement process [the problem facing the WTO DSS will intensify] . . . . [So] the Appellate Body [in *Brazil-Tyres*] is looking ahead and . . . is setting the primacy [of the WTO DSS] so that they never have to deal with it when it happens.<sup>293</sup>

Elaborating further, this same interviewee stressed that the growing friction between RTAs and the WTO is “an unresolved issue that States . . . are not prepared to address . . . in the WTO.”<sup>294</sup> The AB, however, “does have to address” this friction whenever a dispute arises in the WTO-RTA context, and then it does so “in a hierarchic[al] way . . . [suggesting that] ‘the Appellate Body . . . is the boss.’”<sup>295</sup> Drawing a comparison between the AB and the International Court of Justice (ICJ), this interviewee added: “Look at the International Court of Justice when other dispute settlement systems were developing, the presidents started to cry out . . . ‘[W]e’re the premier, we’re the prior one’. . . . I think it’s the nature of a tribunal to assert its jurisdiction.”<sup>296</sup>

This position was all the more evident in the *Mexico-Soft Drinks* dispute, where both the panel and the AB affirmed their authority to decide a case even

289. Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA “Spaghetti Bowl” is Cooking*, 9 J. INT’L ECON. L. 197, 202 (2006); see also de Mestral, *supra* note 78, at 798.

290. Pauwelyn, *supra* note 289, at 202.

291. *U.S.-Softwood Lumber* Panel Report, *supra* note 288, n.12.

292. Langille, *supra* note 81, at 1511.

293. Interview with WTO panelist, in Jerusalem (June 6, 2012).

294. *Id.*

295. *Id.*

296. *Id.*

after an RTA's dispute settlement procedures had been invoked.<sup>297</sup> In this case, discussed earlier in the context of Mexico's GATT Article XX(d) defense, Mexico argued, as a preliminary matter, that the WTO panel should decline to exercise its jurisdiction to hear the present dispute. Mexico reasoned that the case was "inextricably linked to a broader dispute" over trade in sugar between the parties under NAFTA, where Mexico had already requested a panel, and which constituted the appropriate forum for resolving the larger United States-Mexico "sugar war."<sup>298</sup> Importantly, although NAFTA includes a fork-in-the-road provision stating that once dispute settlement procedures are initiated under the NAFTA or the WTO, that forum is to be used to the exclusion of the other, Mexico did not place this provision before the WTO panel, nor did it suggest that there were any other jurisdictional impediments to the panel hearing the case.<sup>299</sup> Instead, it accepted that the panel "had the authority to rule on the merits" of the United States' claims, but argued that the panel, as an international adjudicative body, possessed the "implied jurisdictional powers" to refrain from ruling in the circumstances of the present case.<sup>300</sup>

In a preliminary ruling, the panel rejected Mexico's request.<sup>301</sup> One of the panelists sitting on the bench elaborated on this rejection, while shedding light on the panel's resolve to exercise jurisdiction in this RTA-related dispute:

[W]e had to respond [to Mexico's request that the panel refrain from exercising jurisdiction] and we had to respond in a clear and sound way. But there was no hesitation . . . in the panel as to whether we had jurisdiction or not in this case. [The Mexicans] . . . were in breach of a WTO obligation. And . . . that is what we were examining. What was behind that is something that we've always tried to separate.<sup>302</sup>

Following this logic, and based on its reading of several DSU provisions, the panel ultimately found that "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."<sup>303</sup> The AB, in turn, upheld the panel's finding and the thrust of its legal reasoning. While recognizing that panels do have certain implied powers that are inherent in their adjudicative function, such as the power to determine whether they have jurisdiction in a given case and the scope of that jurisdiction,<sup>304</sup> the AB held that despite these powers, the text of the DSU *requires* panels to make a ruling on the merits of a dispute once jurisdiction has been validly established.<sup>305</sup> Hence, reluctant to use the inherent discretionary power of WTO adjudicators and cooperate with the

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297. Langille, *supra* note 81, at 1512.

298. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 40, 42, 54.

299. *Id.* ¶¶ 44, 54.

300. *Id.* ¶ 44.

301. *Id.* ¶ 4.

302. Interview with WTO panelist, in Geneva (July 24, 2012).

303. *Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.1.

304. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 45.

305. *Id.* ¶¶ 48-53.

regional dispute settlement forum, the AB in *Mexico Soft-Drinks* chose to follow a “strict textual” interpretation of the DSU.<sup>306</sup>

The AB’s textual reading of the treaty took the following path. First, the AB reasoned that a panel’s refusal to exercise jurisdiction in a case properly before it would breach its obligation under DSU Article 11 to “make an objective assessment of the matter before it.”<sup>307</sup> Turning to DSU Article 23, the AB then argued for the “entitlement” of Members to a WTO ruling, derived from WTO Members’ obligation to resort to the DSS when seeking to resolve a dispute under the WTO covered agreements.<sup>308</sup> According to the AB, as paraphrased by a private attorney, “[n]ot only do you [as a WTO Member] have an obligation to use the [WTO dispute settlement] system, but you are entitled to resolution under this system . . . . [Y]ou are entitled to that resolution as much as you are obliged to bring the problem to us.”<sup>309</sup> In light of this reading, the AB found that if a panel were to decline jurisdiction over a particular dispute, it would effectively “diminish the rights” of a WTO Member under the DSU,<sup>310</sup> an act explicitly prohibited in Articles 3.2 and 19.2 of the DSU.<sup>311</sup> As a result, the AB concluded by reiterating the panel’s statement that “a WTO panel ‘would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction’” in a case properly before it.<sup>312</sup>

Notably, this strict textual interpretation of the DSU differs significantly from the flexible and expansive interpretative approach to the DSU taken by the AB in other WTO disputes. For example, in *U.S.-Shrimp*, it was the AB that heavily criticized the panel’s interpretation of DSU Article 13 as “too literal” and “unnecessarily technical and formal,”<sup>313</sup> and which ultimately went beyond the DSU treaty text to allow *amicus curiae* submissions in WTO proceedings.<sup>314</sup> Likewise, in *U.S.-Continued Suspension*, the AB did not hesitate to broadly construe Article 21.5 of the DSU as allowing complainants *and defendants* to initiate WTO compliance proceedings, in contrast to the long-standing

306. Henckels, *supra* note 267, at 578.

307. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 50-51; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶¶ 7.6-7.8.

308. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 52; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.9.

309. Interview with private attorney, in Geneva (Apr. 23, 2012); *see also* interview with US official, in Geneva (July 17, 2012) (stating that according to the AB, “if somebody brings . . . [a dispute] to the WTO, they have the right to have it resolve here”).

310. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 53; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.9.

311. Both Article 3.2 and Article 19.2 of the DSU mandate that panel and AB rulings “cannot add to or diminish the rights and obligations provided in the covered agreements.”

312. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 53.

313. Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 107, WT/DS58/AB/R (adopted Nov. 6, 1998).

314. *Id.* ¶ 110.

understanding among WTO Members that only complainants may initiate such proceedings.<sup>315</sup>

Moreover, the interpretive methodology the AB followed in *Mexico-Soft Drinks*, which involved “rigidly sticking” to the text and “emphasizing what it perceived to be imperatives in the DSU,” contradicts the AB’s flexibility in other cases involving non-WTO law, institutions, and values, where the AB proved willing to consider linkages between the WTO and other parts of the international legal system, resort to teleological interpretations, and engage in complex normative trade-offs.<sup>316</sup> Thus, in “trade-and” cases such as *U.S.-Shrimp* and *U.S.-Clove Cigarettes*, which involved nontrade social values of environmental protection and public health, the AB went out of its way to interpret the relevant WTO provisions in light of the broad “object and purpose” of the WTO treaty, while introducing a balancing test into the analysis of the competing norms and values at stake.<sup>317</sup> In the RTA-related dispute of *Mexico-Soft Drinks*, however, the AB chose not to “test its interpretation of the text against an overall inquiry into the object and purpose of the DSU or the broader *telos* of state-state dispute settlement.”<sup>318</sup> Nor did the AB explicitly examine or weigh “the competing norms at issue: textualism and its role in maintaining the integrity of the WTO’s adjudicative [system] . . . *vis-à-vis* the desirability of flexible accommodation of unanticipated and exceptional circumstances as a means of maintaining the effective administration of justice.”<sup>319</sup> In *Mexico-Soft Drinks*, the AB, like the panel, simply prioritized the former interest over the latter.

But as one WTO official involved in the appellate proceedings in *Mexico-Soft Drinks* admitted when discussing the textual approach taken by WTO adjudicators: “Of course . . . you are never 100 percent textual, there will always be some of your policy preferences creeping in.”<sup>320</sup> Indeed, as I argue here, the textual approach followed in *Mexico-Soft Drinks* and the interpretative outcomes it yielded clearly attest to the policy preferences and objectives the panel and the AB pursued in this case—most notably, sustaining the operation, credibility, and authority of the WTO and its DSS as the central forum for resolving trade disputes between Member States.<sup>321</sup> Along these lines, another WTO official participating in the *Mexico-Soft Drinks* appellate proceedings openly stated that the main goal underlying the finding that a WTO panel does not have discretion to decline to rule in a case properly before it was:

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315. *U.S.-Continued Suspension*, *supra* note 262, ¶ 368.

316. Henckels, *supra* note 267, at 591.

317. Shlomo Agon, *supra* note 9, at 687-688.

318. Henckels, *supra* note 267, at 591.

319. *Id.*

320. Interview with former WTO official, in Geneva (July 16, 2012).

321. See, e.g., interview with former Mexican official, in Geneva (July 12, 2012) (alluding to the will of WTO adjudicators in *Mexico-Soft Drinks* “to keep [the WTO] working” and to maintain the DSS as “the main tribunal for addressing state versus state disputes”).

[To] maintain[] the effectiveness of the [WTO dispute settlement] system, sort of protecting the integrity of this system, because otherwise . . . if panels were to decline jurisdiction, then . . . any type of messy controversy . . . at the regional level would certainly paralyze this system. And . . . [there was] recognition that one of the reasons why this [dispute settlement] system [in the WTO] gets good reviews, generally, is that it works. It eventually . . . delivers a result and doesn't get paralyzed.<sup>322</sup>

Going further in elaborating on the issue of the integrity and credibility of the DSS, the same official stated:

[A]ny decision in which a panel says, "We can't decide this case because of x, y, or z" . . . may lead to a loss of credibility . . . [O]f course, there may be cases in which . . . a panel intervenes where it shouldn't intervene, and so there's a loss of credibility for a reason. But there's the risk on the other side as well. If a panel were quick to say, "Well . . . something is happening over there [at the regional level] and maybe we should wait" . . . that might hurt the credibility of the [WTO dispute settlement] system because . . . the system would not be doing what it was asked to do, which is to resolve disputes.<sup>323</sup>

Against this backdrop, this official concluded that the jurisdictional ruling in *Mexico-Soft Drinks* "was the safe result"; "the opposite result would have been potentially . . . more problematic, because you . . . open a door and you don't know what would . . . happen[]." <sup>324</sup>

Continuing along this path, another WTO legal officer who worked on the *Mexico-Soft Drinks* case commented that if the DSS were to find that a panel with validly established jurisdiction can nevertheless exercise "discretion" as to whether to take jurisdiction over a complaint of WTO violation, "this kind of [discretionary] power would be[come] so open-ended that it would be unpredictable when a panel would . . . actually exercise jurisdiction," which is contrary to the DSS's explicit aim of "providing security and predictability to the multilateral trading system."<sup>325</sup> The same official went on to emphasize that "any

322. Interview with WTO official, in Geneva (Apr. 18, 2012). Echoing a similar view, a former Mexican state delegate involved in *Mexico-Soft Drinks* noted the following when alluding to the goal guiding the AB's and the panel's insistence on the WTO DSS's jurisdiction in this case: "[If you] think about the politics of the WTO, you have three areas—administration of treaties, negotiation, and dispute settlement. Which one is working? Dispute settlement. Which one is having some problems? Negotiations.... So certainly, you don't want to erode the one [area in the WTO] that is working properly." Interview with former Mexican official, in Geneva (July 12, 2012).

323. Interview with WTO official, in Geneva (Apr. 18, 2012). A Brussels-based state official similarly noted that "[t]hrowing a case out is a pretty big thing to do for the Appellate Body" as it may adversely affect its integrity. "For the Appellate Body . . . it is a very big thing because you have a sovereign state who comes there with an international dispute, . . . and you are basically sending it home with nothing." Interview with EU official, in Brussels (July 20, 2012).

324. Interview with WTO official, in Geneva (Apr. 18, 2012).

325. Interview with former WTO legal officer, in Geneva (July 16, 2012). Note that China, a third party in *Mexico-Soft Drinks*, had raised a similar argument to which the AB referred twice in its decision. According to China: "[A] WTO panel does not have an implied power to refrain from performing its 'statutory function'.... [I]f a panel that is 'empowered and obligated' to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal

tribunal . . . faced with a trade-off like . . . [the one faced by the DSS in *Mexico-Soft Drinks*] would probably assert jurisdiction . . . . [T]hat is the nature of international tribunals, of any tribunal, you don't give up jurisdiction easily."<sup>326</sup> Offering an additional, related insight, a different WTO legal officer stressed: "If countries continue to bring disputes to this forum, that is what keeps this system going. The system lives only as long as States bring conflicts . . . . If States . . . [took] their trade disputes to competing adjudicating fora, that would affect the relevance of this system."<sup>327</sup>

These observations aptly reveal the judicial policy informing the interpretative stance of WTO adjudicators in *Mexico-Soft Drinks*. This judicial policy admits the risks posed to the DSS and its overarching WTO regime by RTA proliferation and recognizes that if the WTO is to remain a dominant actor in the international economic landscape, "it must provide the central means" of settling trade disputes between States.<sup>328</sup> With the surge in the number of RTAs notified to the WTO and the growing pace of negotiation of even larger regional agreements at a time when the WTO struggles to break its negotiation deadlock, the approach followed by the panel and the AB in *Mexico-Soft Drinks* appears geared toward maintaining the essential integrity of the WTO as an institution, as a body of trade rules, and as a core platform for settling international trade conflicts that all States can rely on.<sup>329</sup>

With a view toward achieving these ends, the result of the judicial endeavor carried out in *Mexico-Soft Drinks*, much like the result of the previous RTA-related disputes reviewed, is therefore "greater strength to the multilateral system as opposed to regional . . . trade arrangements" in a reality of economic regionalization.<sup>330</sup> That said, it should be noted here that "the panel and Appellate Body were . . . well aware of how big the . . . issues [in *Mexico-Soft Drinks*] were and took a fairly cautious approach in addressing them."<sup>331</sup> While the AB made clear that it did not accept Mexico's jurisdictional claim in this case, the AB, like the panel, concluded its discussion of the matter by stating that it was expressing "no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."<sup>332</sup>

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uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU." See *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 34, 43.

326. Interview with former WTO legal officer, in Geneva (July 16, 2012).

327. Interview with WTO legal officer, in Geneva (Mar. 19, 2012).

328. de Mestral, *supra* note 78, at 807.

329. *Id.*

330. Interview with private attorney, in Geneva (Apr. 23, 2012).

331. Interview with WTO legal officer, in Geneva (July 11, 2012).

332. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 54; see also *Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.10.



After making this statement, the AB briefly clarified that no such legal impediments existed in the present case, which was distinct from the case pursued by Mexico under NAFTA for several reasons. First, there was no overlap between the “subject matter and the respective positions of the parties” in the two cases. Second, no panel ruling had been rendered in the “broader” NAFTA dispute to which Mexico alluded. Third, there was no waiver of jurisdiction, which might ensue from the NAFTA’s forum exclusion clause (not “exercised” by Mexico in this case).<sup>333</sup> Having said that, the AB reiterated that it was not expressing “any view on whether a legal impediment to the exercise of a panel’s jurisdiction would exist in the event that features such as those mentioned above were present.”<sup>334</sup> The AB thus left open the question of whether, for example, a prior RTA ruling deciding the issues raised in the WTO case or, more interestingly, an RTA’s fork-in-the-road clause (such as the one not exercised by Mexico) or some other type of RTA provision conceived as a waiver of the right to initiate WTO proceedings, could constitute such a “legal impediment.”<sup>335</sup>

Although speaking informally, a former WTO legal officer involved in *Mexico-Soft Drinks* compensated for the AB’s silence by making several interesting observations in reference to the possibility that WTO adjudicators would actually relinquish jurisdiction based on a waiver or understanding agreed upon by Members within the framework of an RTA. Drawing a parallel to the *EC-Bananas* case,<sup>336</sup> where the AB found that a WTO Member may relinquish its right to have recourse to WTO dispute settlement by virtue of a mutually agreed upon solution in a specific dispute,<sup>337</sup> this interviewee stated that “the only situation in which the Appellate Body so far has accepted that jurisdiction would be forgone is . . . when a Member [explicitly] says, in the WTO, under a mutually agreed solution, ‘I’m giving up on my right to bring a case.’”<sup>338</sup> Yet, he stressed, “that is not the same situation you have under an RTA.” The one distinction identified as separating “the *Bananas* scenario” and an “RTA-type fork-in-the-road” scenario is grounded in the fact that

the [announcement] . . . of Members that they are giving up WTO jurisdiction” in the *Bananas* scenario [is confined] . . . to a *specific dispute*. . . . It is [a waiver of the right to resort to the DSU] in a particular case, where you know the complainant, you know the defendant, you know . . . the subject matter . . . and you renounce [your DSU rights] because you have settled [the case] . . . . It is different if you have a fork-in-the-road provision which was negotiated . . . fifteen years ago

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333. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 54 (citation omitted).

334. *Id.* (citation omitted).

335. Davey & Sapir, *supra* note 139, at 13; *see also* Howse & Langille, *supra* note 58, at 687.

336. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador/Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW2/ECU, WT/DS27/AB/RW/USA (adopted Dec. 22, 2008).

337. *Id.* ¶¶ 212, 217.

338. Interview with former WTO legal officer, in Geneva (July 16, 2012).

on generic terms in an RTA and now you have a dispute. I think it [would be] . . . harder for . . . the panel or the Appellate Body to say, “well, they renounced [their right] . . . fifteen years ago.”<sup>339</sup>

In light of this comparison, the same interviewee assessed that “it would have to be an extremely clear-cut situation where you, as the WTO panel, would be willing to renounce jurisdiction.”<sup>340</sup> As described below, this prognosis, including the legal analogy on which it was predicated, turned out to be quite close to the route ultimately taken by the AB in the later *Peru-Agricultural Products* case, where one of the questions left open in *Mexico-Soft Drinks* presented itself: “Can WTO Members relinquish their DSU right to WTO dispute settlement proceedings through a waiver or understanding concluded outside the context of a specific WTO dispute, namely, in the framework of an RTA?”<sup>341</sup>

*B. The Jurisdictional Quest’s Culmination: Peru-Agricultural Products and the High Threshold for Relinquishing DSU Rights via an RTA*

In *Peru-Agricultural Products*, discussed earlier, Peru raised a preliminary objection, arguing that by agreeing in the RTA to the maintenance of the Peruvian PRS, Guatemala had waived its right to challenge this measure within the framework of WTO dispute settlement.<sup>342</sup> For this reason, according to Peru, Guatemala “acted contrary to its good faith obligations under [DSU] Articles 3.7 and 3.10 when it initiated the present [WTO] proceedings.”<sup>343</sup> Peru thus requested that the WTO panel refrain from assessing Guatemala’s claims.<sup>344</sup> The panel, in response, avoided delving into the fundamental question of whether Guatemala had actually relinquished its right to bring a WTO complaint in the RTA. Instead, basing its analysis on the “technical” grounds that the respective RTA had not entered into force, the panel found no evidence for claiming that Guatemala had initiated the WTO proceedings in a manner contrary to its good faith obligations.<sup>345</sup>

339. *Id.* (emphasis added).

340. *Id.* The same view was shared by other interviewees. *See, e.g.*, interview with WTO ambassador, in Geneva (July 5, 2012); interview with EU official, in Brussels (July 20, 2012); interview with private attorney, in Geneva (Apr. 24, 2012).

341. Pauwelyn, *supra* note 221, at 17.

342. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.5.

343. *Id.* DSU Article 3.7, in the relevant section, states that “[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.” DSU Article 3.10 provides that “[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.”

344. *Peru-Agricultural Products* Panel Report, *supra* note 222, ¶ 7.50.

345. *Id.* ¶¶ 7.88, 7.96, 8.1.a. *See also Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.20.

While the AB upheld the panel's ultimate finding,<sup>346</sup> it took a different judicial course, demonstrating a greater willingness to consider the substance of Peru's jurisdictional claim "under the guise of a potential mutually agreed solution,"<sup>347</sup> encapsulated in the RTA provision in relation to the PRS.<sup>348</sup> In so doing, the AB, while paying little heed to the fact that the RTA was not actually in effect, seized the occasion to reaffirm the fundamental right of Members to initiate WTO legal proceedings and to stipulate the stringent conditions Members must meet in order to waive this right via an RTA.

The AB began its jurisdictional analysis in *Peru-Agricultural Products* by recalling its ruling in *EC-Bananas*, where the AB determined that a mutually agreed solution to a WTO dispute may contain a waiver by the parties of their right to have recourse to the DSU.<sup>349</sup> Restating its position in the *Bananas* case, the AB stressed that "the relinquishment of rights granted by the DSU cannot be lightly assumed" and that the parties "must clearly reveal" that they indeed "intended to relinquish their rights."<sup>350</sup> Following a substantive examination of the RTA between Peru and Guatemala, the AB concluded that Guatemala had "not clearly waived its right to have recourse" to WTO dispute settlement<sup>351</sup> and, in consequence, had not acted contrary to its good faith obligations under DSU Articles 3.7 and 3.10 when initiating these WTO proceedings.<sup>352</sup> To support this conclusion, the AB found that the RTA did not contain a clear statement relinquishing Guatemala's right to bring a case to the WTO DSS, but in fact provided in Article 15.3 that "[i]n the event of any dispute that may arise under this Treaty . . . or the *WTO Agreement*, the complaining Party may choose the forum for settling the dispute."<sup>353</sup> The AB also found support in one of its findings, mentioned earlier, that there was "ambiguity as to whether even the . . . [RTA] itself, regardless of its legal status," allowed Peru to maintain its PRS.<sup>354</sup> Finally, the AB reasoned that the RTA in question could not constitute a mutually agreed solution because it had been negotiated before the initiation of the present

346. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.28.

347. Stephanie Hartmann, *Recognizing the Limitations of WTO Dispute Settlement—The Peru-Price Band Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes*, 48 GEO. WASH. INT'L L. REV. 617, 646 (2016).

348. Referring in a footnote to Peru's appellant's submission, the AB indicated that: "Peru contends that the parties to the FTA had already reached a 'positive solution' within the meaning of Article 3.7 of the DSU when they agreed in the FTA that Peru may maintain its PRS." See *Peru-Agricultural Products* AB Report, *supra* note 216, n.103.

349. *Id.* ¶ 5.25.

350. *Id.*

351. *Id.* n. 109 and ¶ 5.28, where the AB stated: "Based on the foregoing discussion, we do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case."

352. *Id.* ¶ 5.28

353. *Id.* ¶ 5.27 (emphasis original).

354. *Id.* ¶ 5.26.

WTO dispute and, as noted earlier, was inconsistent with the WTO covered agreements.<sup>355</sup>

Of crucial importance for future RTA-related disputes,<sup>356</sup> however, is the AB's principled statement in *Peru-Agricultural Products* that it did "not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form *other than a waiver embodied in a mutually agreed solution.*"<sup>357</sup> The AB nonetheless enumerated several conditions that need to be met for it to recognize such a waiver.<sup>358</sup> First, "any such relinquishment must be made *clearly.*"<sup>359</sup> Second, the said relinquishment "should be ascertained . . . *in relation to, or within the context of, the rules and procedures of the DSU.*"<sup>360</sup> Third, such relinquishment of DSU rights may not go "beyond the settlement of *specific disputes.*"<sup>361</sup> It follows from the above that while WTO Members may waive their right to WTO adjudication in actions other than a mutually agreed solution under the DSU, parties to an RTA wishing to close the door to WTO dispute settlement on certain issues must strictly abide by the AB's explicit stipulations,<sup>362</sup> which, as Gregory Shaffer and Alan Winters note, "appear to go beyond the WTO textual requirements."<sup>363</sup>

These stipulations, in turn, require further clarification. However, it is rather clear that they significantly narrow the circumstances under which an RTA-based understanding to relinquish DSU rights can be effective in de facto thwarting a WTO panel's jurisdiction.<sup>364</sup> To begin with, these conditions seem to establish a high burden of proof, requiring demonstration of a Member's "clear" intent to waive its right to resort to the DSU.<sup>365</sup> In fact, Mathis has argued, the AB's interpretation is so strict that an RTA provision providing for a waiver of the right to invoke WTO dispute settlement must be "absolutely explicit, not subject to any reasonable argument over its interpretation," whereas any resulting contextual ambiguity will be resolved in favor of the complainant and the admission of the case.<sup>366</sup> Additionally, for the waiver of the right to initiate WTO legal proceedings to be valid, it must not only meet the textual clarity and explicitness

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355. *Id.*

356. Pauwelyn, *supra* note 221, at 19; Shaffer & Winters, *supra* note 244, at 318.

357. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.25 (emphasis added).

358. Shaffer & Winters, *supra* note 244, at 318.

359. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.25 (emphasis added).

360. *Id.* (emphasis added).

361. *Id.* n.106 (emphasis added). The AB noted that it did not "consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes."

362. Pauwelyn, *supra* note 221, at 20.

363. Shaffer & Winters, *supra* note 244, at 318.

364. See Howse & Langille, *supra* note 58, at 684; Hartmann, *supra* note 347, at 648; Gabrielle Marceau, *The Primacy of the WTO Dispute Settlement System*, 25 QUESTIONS INT'L L. 3, 7, 13 (2015).

365. Hartmann, *supra* note 347, at 648.

366. Mathis, *supra* note 232, at 104.

test, it must also apply to “specific disputes.”<sup>367</sup> While it is unclear what exactly the AB meant by “specific disputes,” this term could be understood as broadly referring to all those disputes falling under both the RTA and the WTO.<sup>368</sup> However, it could also refer to a specific subject or measure regulated in the RTA and subsequently litigated under the DSU.<sup>369</sup> Still, the term “specific disputes” could be read even more narrowly as referring to a particular WTO complaint;<sup>370</sup> that is, to a dispute “that has already arisen, thereby excluding undetermined future disputes.”<sup>371</sup> Should the latter be the case, this might suggest, for example, that even a clearly-stipulated, *ex ante* provision establishing the RTA dispute settlement procedures as the exclusive forum for the resolution of certain or all matters regulated under the RTA would not constitute a sufficient basis for a good faith claim to defeat a WTO panel’s jurisdiction. To this, one should add the near impossibility of rebutting the assumption that WTO Members engage in dispute settlement in good faith,<sup>372</sup> and, in the words of the AB, the “‘largely self-regulating’ nature of a Member’s decision to bring” a dispute to the WTO<sup>373</sup>— factors further lowering the odds of a responding Member successfully arguing that an RTA provision contracting out of the DSU constitutes evidence of bad faith, and thus the basis for a panel to decline jurisdiction.<sup>374</sup>

It should be noted at this point that on other occasions, however, when WTO Members have contracted out of the DSU *within* the WTO framework, the AB has exhibited a much more relaxed stance.<sup>375</sup> For example, in *U.S.-Continued Suspension*, the AB did not hesitate to allow the United States and the EU to open the hearings before it to the public through a bilateral agreement reached “inside the WTO,”<sup>376</sup> even though this agreement effectively contracted out of DSU Article 17.10, which prescribes confidential AB proceedings.<sup>377</sup> In contrast, in *Peru-Agricultural Products*, the AB expressed “major reservations about Peru and Guatemala bilaterally agreeing ‘outside the WTO’ (in an FTA) to ‘contract out’ of the DSU right to a panel;”<sup>378</sup> in fact, the AB seized this moment to place considerable limits on Members’ ability to reach such agreements in the future.

367. Shaffer & Winters, *supra* note 244, at 318.

368. Pauwelyn, *supra* note 221, n.68.

369. Shaffer & Winters, *supra* note 244, n.30.

370. *Id.*

371. Pauwelyn, *supra* note 221, n. 68.

372. Marceau, *supra* note 364, at 12; Hartmann, *supra* note 347, at 648.

373. See *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.18.

374. Marceau, *supra* note 364, at 13 (arguing that following the AB’ ruling in *Peru-Agricultural Products*, “[i]t seems difficult to conceive whether and how an RTA can possibly foreclose the use of the WTO DSM for the violation of WTO provisions, unless WTO Members decide to do so in the context of the DSU”); see also Hartmann, *supra* note 347, at 648.

375. Pauwelyn, *supra* note 221, at 29.

376. *U.S.-Continued Suspension*, *supra* note 262, Annex IV.

377. Pauwelyn, *supra* note 221, at 29.

378. *Id.*

In conclusion, the AB's latest ruling in *Peru-Agricultural Products* constitutes a direct continuation of the jurisdictional analysis employed by WTO judicial organs in previous RTA-related cases. This analysis seems to be driven by the goal of reinforcing the status of the DSS as the supreme judicial organ in the field of international trade,<sup>379</sup> yet with a view toward not only sustaining the DSS's authority as an international court, but also more systemically ensuring the functioning of the multilateral trade regime against the abundance of regional trade deals. The lesson emerging from *Peru-Agricultural Products* echoes and amplifies the lesson emerging from past cases along the WTO-RTA jurisdictional nexus. One WTO legal officer phrased this lesson quite succinctly:

[W]hat we can take from these past cases, is that panels . . . [will not] lightly reach the conclusion that because there is an RTA . . . that relates to the same subject matter, that would . . . , in and of itself, raise the question [of whether] . . . the WTO [jurisdiction is] applicable. No, there has to be the right set of facts and it is clearly . . . a very high standard that must be met. And in no case to date has that standard been met.<sup>380</sup>

## V.

### DISCUSSION AND CONCLUSIONS

A long-standing and increasing tension exists between regionalism and multilateralism in international economic governance, with systemic implications for the WTO as an institution and a legal system. The analysis throughout this Article demonstrates how the WTO DSS, in a series of RTA-related cases reaching its docket, has adjusted its judicial efforts so as to face the challenges and threats posed to WTO law and institutions by the ever-intensifying regionalization of international trade relations. In this line of cases, the DSS, "as guarantor of WTO law"<sup>381</sup> and following the AB's lead, has engaged in a determined quest for securing the integrity and functionality of the WTO legal order, espousing the supremacy of WTO rules and the multilateral trade objectives they embody, as well as fortifying the authority of the DSS itself.

This quest for sustaining multilateralism at the WTO-RTA nexus has unfolded along two parallel and mutually reinforcing trajectories: the substantive and the jurisdictional. The substantive legal trajectory revolves around conflicts of obligations under the multilateral and regional systems and the effects of RTAs on the substance of WTO rules. Along this trajectory, the DSS, under the AB's guidance, has continually operated to entrench the autonomy and preeminence of the WTO legal edifice, from which deviations through RTAs may be allowed only in limited circumstances and based on the conditions detailed in the WTO's own rules. Thus, in cases like *Turkey-Textiles* and *Peru-Agricultural Products*, the AB meaningfully narrowed the operative scope of the regional trade exception

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379. Howse & Langille, *supra* note 58, at 684-85.

380. Interview with WTO legal officer, in Geneva (July 11, 2012).

381. de Mestral, *supra* note 78, at 815.

enshrined in GATT Article XXIV, whereas in *Mexico-Soft Drinks* and *Brazil-Tyres*, it further constrained Members' ability to justify WTO-inconsistent measures adopted within the framework of RTAs under the general exceptions stipulated in GATT Article XX.

By doing so, the AB has worked to validate and strengthen WTO norms and their nondiscrimination underpinnings, with an eye toward preventing Members from undermining the WTO's multilateral trade liberalization project through the conclusion of RTAs. Moreover, in pursuing this agenda, the AB has not only limited the availability of WTO exceptions to serve as a shield for WTO-incompatible measures introduced in the context of regional arrangements; it has also restricted the possible impact RTA rules might have on the interpretation or application of WTO treaty provisions. Perhaps most significantly, the AB has refused to recognize Members' contractual freedom to modify, by means of an RTA, their WTO obligations as applied between themselves, while clarifying that any attempt by two or more Members to modify WTO rules is governed by the terms of WTO law itself, and not by the general provisions of the Vienna Convention, such as Article 41 on *inter se* treaty modification.

Hence, when operating along the substantive legal trajectory in RTA-related disputes, WTO adjudicators have repeatedly chosen not to facilitate greater coherence between WTO agreements and RTAs, in an effort to avoid further fragmentation of international economic law. Instead, they have often focused their efforts on deflecting RTAs' destabilizing effects on the WTO and its underlying norms, while maintaining a strict separation between the multilateral system and its neighboring regional trade regimes.

Along the complementary jurisdictional trajectory, in turn, the DSS has steadily worked to uphold its own authority vis-à-vis regional dispute settlement fora and to consolidate its power to review the WTO-compatibility of RTAs, elements vital for preserving the DSS as an adjudicative institution as well as for ensuring meaningful enforcement of WTO substantive legal norms. With a view toward achieving these ends, the DSS has not only asserted the authority to evaluate the conformity of RTAs to the requirements of GATT Article XXIV, but has also established a high bar in WTO jurisprudence before Members can waive their DSU rights and opt out of the DSS's jurisdiction by means of an RTA. Similarly, in their efforts to forestall potential interference with the integrity of WTO adjudication, WTO adjudicators, when exercising their judicial powers along the jurisdictional trajectory in RTA-related disputes, have repeatedly demonstrated their unwillingness to participate in a dialogue with RTA adjudicative systems, defer to their rulings, suspend proceedings pending the outcome of a related dispute, or otherwise apply comity toward international fora with overlapping jurisdictions on trade matters. In so doing, as one State official put it, WTO adjudicators have sent a clear message, according to which the WTO

DSS forms “the main tribunal for addressing State versus State disputes” in the field of international trade.<sup>382</sup>

As demonstrated throughout this Article, the quest to uphold multilateralism established along the substantive and jurisdictional trajectories delineated above, is reflected in the views and experience of WTO insiders. That same quest is also mirrored in the specific judicial choices and interpretative approaches followed by WTO adjudicators in the RTA-related cases examined. Together, these factors expose how, in the shadow of textualism, a steady body of jurisprudence has emerged, infused with a judicial philosophy of seclusion from and ascendancy over regionalism and aimed at fortifying the multilateral trade rules and institutions in the face of the unabated surge in RTAs. As the Article showed, at any juncture along the RTA-related cases reviewed, WTO judicial organs could have made other judicial choices. Still, choices have been made that reveal particular policy preferences, choices that significantly differ from the choices made by WTO adjudicators in other types of disputes.

Most notably, the strict, textual, and exclusionary stance taken by the WTO DSS toward RTAs, maintaining “‘clinical isolation’ from these other trade fora” and their respective dispute settlement systems,<sup>383</sup> seems to digress significantly from the integrationist and flexible approach taken by the AB toward general international law in “trade-and” disputes, which involve sensitive non-trade interests such as environmental protection or public health. As indicated early in this Article, in *U.S.-Gasoline*, the very first case to reach the AB’s docket, where a trade-restrictive regulation aimed at reducing air pollution was challenged, the AB openly stated that WTO rules should not be read “in clinical isolation from public international law.”<sup>384</sup> In later such “trade-and” cases, the DSS embraced a similarly accommodating stance by integrating into its jurisprudence “public international law concerns over the environment and public health through its interpretation of the open-ended language” of the WTO agreements.<sup>385</sup> Yet, while the DSS under the AB’s guidance has often looked to the outside in cases involving nontrade values, agreements, and stakeholders, which demonstrates the DSS’s interpretative flexibility and willingness to consider linkages between the WTO and other parts of the international legal system, it has shown little if any consideration and regard to the various RTAs operating alongside the WTO.<sup>386</sup>

This variation in the interpretative approaches taken in “trade-and” disputes as opposed to RTA-related cases, I argue, largely stems from the different challenges confronted and goals pursued by the DSS in the two types of cases. In disputes involving the delicate tension between trade and nontrade concerns, “the core force pushing the AB to embrace other international law was to legitimize

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382. Interview with Mexican official, in Geneva (July 12, 2012).

383. Howse, *supra* note 10, at 73.

384. *U.S.-Gasoline*, *supra* note 83, at 17.

385. Shaffer & Winters, *supra* note 244, at 324.

386. Shlomo Agon & Benvenisti, *supra* note 38, at 643.



itself<sup>387</sup> and the overarching WTO regime among expanding circles of national and global stakeholders.<sup>388</sup> In contrast, in RTA-related cases, the main force motivating WTO adjudicators to adopt a policy of judicial seclusion from and resistance to other international law was the “threat . . . to WTO multilateralism” represented by the “outside rules” set by RTAs. In other words, the DSS was motivated by “the fear” that RTA provisions would disturb the “uniformity of WTO rules” or that dispute settlement under RTAs would undermine WTO adjudication.<sup>389</sup>

The distinctive, non-accommodating judicial policy taken by the DSS toward RTAs therefore reveals the WTO adjudicators’ awareness of the systemic threats and challenges posed to the multilateral trade regime by RTA proliferation. Moreover, this judicial philosophy—as becomes clearer once its substantive and jurisdictional threads are woven together—exposes the adjudicators’ recognition of the role and responsibility of the DSS in sustaining WTO governance in the face of economic regionalization and an enduring stalemate in the multilateral negotiating process. In this sense, the two threads of jurisprudence developed by the DSS in RTA-related disputes narrate a tale of institutional struggle, evolution, and change, recasting the DSS as a guardian of the multilateral trade regime rather than a mere instrument for resolving episodic bilateral disputes at a time when the role and stature of the WTO in global economic governance has been seriously called into question.

However, the inward-looking, WTO-centered judicial philosophy followed by the DSS in RTA-related cases during the last two decades may nevertheless entail some challenges and risks of its own for the WTO and international economic law more broadly. As Shaffer and Winters have noted, given the difficulty of reaching a consensus among over 160 WTO Members, demonstrated most forcefully in the collapse of the Doha Round of multilateral trade negotiations, the odds that any political solution to the growing friction between trade multilateralism and regionalism will materialize through the WTO’s negotiating function are rather low.<sup>390</sup> In consequence, as regional trade deals proliferate and extend to mega-regionals such as CETA and CPTPP, the complex question of “how to address the sprawling world” of RTAs in WTO jurisprudence is expected to keep challenging the DSS, with the pressure on WTO adjudicators “to interpret WTO rules for today’s changed landscape” likely to increase.<sup>391</sup>

In this state of play, it has been argued that for the WTO and its DSS to stay relevant, the latter may have to fine tune its current approach along the WTO-RTA substantive legal nexus. More specifically, rather than fending off the application of RTA rules, the DSS may have to find ways to facilitate greater

387. Pauwelyn, *supra* note 221, at 31; *see also* Shlomo Agon, *supra* note 154.

388. Shlomo Agon, *supra* note 9, at 686-89.

389. Pauwelyn, *supra* note 221, at 31-32.

390. Shaffer & Winters, *supra* note 244, at 324.

391. *Id.*

coherence between WTO and RTA rules and contribute to the systemic integration of the closely related normative systems.<sup>392</sup> With a view to achieving these ends, Shaffer and Winters have suggested that one possible route for the DSS would be “to reverse course” and acknowledge parties’ contractual freedom to update, via an RTA, the trade rules that apply between themselves—that is, to allow room for *inter se* modifications of WTO rules in line with Article 41 of the Vienna Convention.<sup>393</sup> Against the continuing regionalization trends, Pauwelyn has gone further to stress that the opposite route taken by the AB in *Peru-Agricultural Products*, namely, that of “preventing *inter se* updates to the WTO treaty agreed to by sovereign states . . . not only risks being paternalistic . . . . It also risks putting the WTO ‘on ice’ and undermining (rather than strengthening) the centrality and relevance of the WTO in a rapidly changing world trade system.”<sup>394</sup>

In a similar vein, Pauwelyn has argued that adjustments to the DSS’s judicial approach should also be introduced along the WTO-RTA jurisdictional nexus. There, rather than “imposing a WTO supremacy from above or centralizing all disputes at the WTO” (considering that WTO judicial organs are already overburdened), “it may be wiser to let countries choose and have WTO and FTA dispute settlement supplement each other or at least ‘compete’ by persuasion, not by a priori hierarchies.”<sup>395</sup>

Here it should be noted that throughout the 25 years of the WTO’s existence, WTO Members have repeatedly chosen the WTO DSS as the forum in which to resolve disagreements with their RTA partners,<sup>396</sup> while bringing “very few disputes” to the parallel regional dispute settlement fora.<sup>397</sup> Accordingly, disputes between RTA partners represent 19 percent of all WTO disputes.<sup>398</sup> This also holds for disputes between trading partners to relatively older RTAs, such as NAFTA. As a former Mexican official remarked in this regard: “[A]ll the disputes between Mexico, the United States, and Canada . . . are brought here [to the WTO]. [E]veryone has to fly . . . thousands of kilometers to litigate the dispute here in Geneva rather than going to the Western Hemisphere.”<sup>399</sup>

This reality, as it has evolved over the past two decades or so, testifies in turn to the “continued attractiveness” of the WTO DSS over regional dispute settlement fora.<sup>400</sup> This attractiveness benefits, *inter alia*, from the support of the well-structured WTO Secretariat, the emergence of an extensive body of WTO

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392. *Id.* at 321, 324. For a similar argument see Pauwelyn, *supra* note 221, at 32.

393. Shaffer & Winters, *supra* note 244, at 322; Pauwelyn, *supra* note 221, at 32.

394. Pauwelyn, *supra* note 221, at 32 (citation omitted).

395. *Id.*

396. Chase et al., *supra* note 2, at 682.

397. Pauwelyn, *supra* note 221, at 32.

398. Chase et al., *supra* note 2, at 683.

399. Interview with former Mexican official, in Geneva (July 12, 2012).

400. Pauwelyn, *supra* note 221, at 32.

jurisprudence, and the establishment of the AB,<sup>401</sup> which has orchestrated the development of this extensive body of case law. Ironically, however, it is the AB, the judicial organ that has played a pivotal role in transforming the DSS into a leading actor among international courts<sup>402</sup> and whose jurisprudence has provided normative and institutional stability to the WTO at a time when its negotiating function has been stalled,<sup>403</sup> which now faces grave trials that threaten its future functioning and the effectiveness of the WTO DSS as a whole. Thus, while the DSS is currently in high demand, with cases continuing to reach its docket,<sup>404</sup> at the time of finalizing this Article, this adjudicative system is subject to unprecedented pressures. These pressures result not only from the increasing number and complexity of cases filed but especially from the United States' backlash against the DSS, observed in the continued blocking of new appointments to the AB, which the United States accuses of judicial "overreach."<sup>405</sup> As a result of the United States' prolonged blockade on appointment to the AB, as of December 2019, the AB no longer has the quorum necessary to hear new appeals,<sup>406</sup> a development that endangers the future functioning of the WTO DSS and the multilateral rules-based trading system.<sup>407</sup>

It is still unclear if and how the AB crisis will be resolved and what future course the WTO DSS will take in the wake of this predicament.<sup>408</sup> It nevertheless seems reasonable to conclude that whatever solution is found to this stalemate and the way the WTO DSS navigates this crisis will have systemic implications for

401. *Id.*

402. Stewart & Badin, *supra* note 46, at 562.

403. Howse, *supra* note 10, at 76; Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1095, 1103 (2016).

404. See *Chronological List of Disputes Cases*, *supra* note 47.

405. Shaffer, *supra* note 45, at 40-44, 47 (citation omitted); Hillman, *supra* note 45.

406. The AB is composed of seven members who decide cases in panels of three. As of October 1, 2018, only three AB members remained in office. On December 10, 2019, the terms of two of the three remaining AB members expired. As a result, as of December 11, 2019, the AB no longer has the minimum three members needed to hear new appeals. See *Members Urge Continued Engagement on Resolving Appellate Body Issues*, WTO, [https://www.wto.org/english/news\\_e/news19\\_e/dsb\\_18dec19\\_e.htm](https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm) (last visited Feb. 21, 2020).

407. See Hillman, *supra* note 45; Wagner, *supra* note 45; Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, EUI Working Paper 2019/95, at <http://diana-n.iue.it:8080/handle/1814/65244> (last visited Feb. 21, 2020).

408. For a discussion of the various initiatives, interim solutions, and reform proposals raised with a view to overcoming the current AB crisis, see, e.g., Hillman, *supra* note 45; Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297 (2019); Geraldo Vigidal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to WTO Dispute Settlement Crisis*, 20 J. WORLD INV. & TRADE 862 (2019); Bernard Hoekman & Petros Mavroidis, *Party Like It's 1995: Necessary But Not Sufficient to Resolve WTO Appellate Body Crisis* (2019), at <https://voxeu.org/article/party-it-s-1995-resolving-wto-appellate-body-crisis> (last visited Feb. 21, 2020); Laura von Daniels, Susanne Dröge & Alexandra Bögner, *Ways Out of the WTO's December Crisis: How to Prevent the Open Global Trade Order from Unravelling* (2019), at <https://www.swp-berlin.org/10.18449/2019C46/> (last visited Feb. 21, 2020).

the multilateral trade regime as well as for the future interaction of the WTO and RTAs at the substantive and jurisdictional nexus.