Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a ‘Common Good’ for RTA Disputes

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THE WTO DISPUTE SETTLEMENT MECHANISM AS A
‘COMMON GOOD’ FOR RTA DISPUTES

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Abstract:

Over the past few decades, Regional Trade Agreements (RTAs) have proliferated globally. Such proliferation of RTAs created a renewed sense of urgency for the WTO to take action in order to avoid the fate of being eclipsed into irrelevance. There are several options for coping with the challenge. Theoretically speaking, the best approach would be to heighten the level of ambition in global trade talks to reduce all trade barriers to zero so that the discriminatory effect created by RTAs could be reduced or even eliminated. In reality, such an approach would be impossible for well-known reasons. The next best option would be for the WTO to draft ‘best practices’ or model RTAs to minimize the effect of further fragmentation created by different breeds of RTAs. The problems with this approach are first the resource constraints of the WTO, second the

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bounded rationality of human beings, and third, whether a ‘one size fits all’ approach would work. Yet another option offered is to strengthen the WTO’s monitoring system of RTAs, with the 2006 rules on transparency being the most recent example. Unfortunately, as the Committee on Regional Trade Agreements (CRTA), the main enforcer of the monitoring rules in the WTO, has been plagued with ineffectiveness because of the consensus rule, heightened monitoring rules would not be of much help either.

In this article, we will discuss a fourth option, i.e., to use the WTO dispute settlement mechanism as a venue for resolving RTA disputes. The rationale underlying this initiative is that, by using the WTO dispute settlement system for RTA disputes, the Members will be able to develop a body of ‘common law’ on RTAs, which would then either form the basis of multilateral rules on RTAs or harmonize RTAs. This way, we can try to minimize the harmful effect of RTAs, and indeed turn RTAs from ‘stumbling blocks’ into ‘building blocks’ of the multilateral trading system.

INTRODUCTION

Over the past few decades, Regional Trade Agreements (RTAs) have mushroomed world-wide. The consensus in trade circles now is that ‘regionalism is here to stay’, ‘will not disappear’, and that ‘little can be done to prevent …[the]…spread of [RTAs]’. Such proliferation of RTAs has created a renewed sense of urgency for the WTO. The WTO must act to avoid the fate of being eclipsed into irrelevance. There are a number

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1 For the sake of consistency and clarity, we use the term ‘Regional Trade Agreements’ in this paper to refer to both free trade agreements (FTA) and customs unions (CU) under GATT Article XXIV, as well as economic integration agreements under GATS Article V. The word ‘regional’ carries no geographical connotations and agreements between parties which are geographically remote from each other (such as the United States and Singapore) are also included.
4 Warwick Report, above n 2, at 53.
5 The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to Director-General Supachai Panitchpakdi (Sutherland Report), 2004, para 103.
of options for the WTO today:

The first option sees the WTO as an RTA ‘terminator’. Theoretically speaking, the best approach would be to heighten the level of ambition in global trade talks to reduce all trade barriers to zero so that the discriminatory effect created by RTAs could be reduced or even eliminated. In reality, however, such an approach probably would never be adopted by countries for the following reasons. First, while an RTA, by reducing the tariffs of its members to zero at the regional level, increases the incentive for non-RTA members to urge WTO Members to reduce tariffs to zero at the WTO, it will also increase the incentive for the RTA members not to extend zero tariffs to non-RTA members for fear of erosion of their RTA preferences. As the decision whether to reduce tariffs is to be taken by RTA members, it is highly unlikely that they will choose to harm their own interests. Second, even if assuming, arguendo, that somehow the members to an RTA could overcome their fear of preference erosion and offer to non-RTA members in the WTO the same tariff concessions they can offer to their fellow members, it would be irrational to assume that they would be willing to offer more than what they are willing to give each other at the regional level. As several studies have shown, many RTAs have carved out certain sectors, with agriculture being the most well-known example, from the tariff reduction schedules. Thus, at least with regard to those sectors, the RTA has entrenched trade-protectionism and made it more difficult, rather than easier, for RTA members to agree to further reduce tariffs at the WTO. Third, while history is filled with examples of the ebb and flow of regional trade deals followed by major breakthroughs in multilateral trade negotiations, thus far it has not been possible for multilateral economic integration to reach the same level and depth of liberalization as regional economic integration. While the increased technical complexity of trade negotiations together with the increased number of participants is one explanation, a more plausible explanation is that regional integration is rarely about trade alone; instead,

7 Sutherland Report, above n 5, para 104.
8 See e.g., WTO, World Trade Report 2007, at 309-10, which quotes a WTO Secretariat study in 2002 and a study by the Inter-American Development Bank (IADB) in 2006.
most RTAs, if not all, are driven more about the need to trade small economic losses for major political and strategic gains.9 Offering zero tariffs to everyone at the WTO, however, would not score any political gains for most countries, as the WTO has become so large that it includes the friends and rivals of almost every country.

The second option sees the WTO as an RTA ‘confessor’.10 If we think of preferential treatment as a cardinal sin in the religion of free trade, the ‘terminator’ would wipe out those sins by eliminating the preferences. Under the second option, countries might seek, through ‘confession’, to alleviate their guilt even if they cannot wipe out their sins. According to this view, the WTO could, first, provide objective research to help better understand the impact of RTAs on non-Members; secondly, set up a negotiating forum for the coordination/standardization/harmonization of rules of origin11, and, thirdly, draft ‘best practices’ or model RTAs12 to minimize the effect of further fragmentation created by different breeds of RTAs. However, there are several reasons why this approach is not entirely satisfactory:

First, while the authors agree that the WTO would be the best institution to examine the pros and cons of different RTAs in the general sense, critical findings on particular RTAs would make the WTO (Secretariat) vulnerable to criticisms of infringing upon Member's rights to conclude RTAs under Article XXIV, and allegations of breaching the impartiality of the WTO and the Secretariat. Moreover, as it will be politically incorrect for the WTO to outsource such research to external researchers, the WTO most likely

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11 Baldwin, above n 3, at 1509-11.

would assign the work to its Trade Policies Review Division\(^\text{13}\) or the Economic Research and Statistics Division\(^\text{14}\). Even though these two are the largest divisions among all the functional divisions in the WTO\(^\text{15}\), their resources are still limited if we consider the task to be performed, i.e., examining the complex web of 400 RTAs\(^\text{16}\) which currently involve every WTO Member but one.

Second, using the WTO to harmonize rules of origin is also difficult to achieve. First of all, since many preferential rules of origin are intentionally designed as devices to deny non-RTA members preferences, it is doubtful whether WTO member countries would be willing to get rid of these carefully-crafted devices. Second, even if assuming such reluctance can be overcome in most sectors, it would still be nearly impossible to streamline rules of origin for some politically sensitive sectors.\(^\text{17}\) Third, even if the rules of origin can be harmonized in general, the application of such standardized rules of origin to particular products could still create problems. An example of this would be a product which is manufactured with a 20\% value-add in each of the five countries to an RTA, while the WTO adopts a uniform 30\% value-add rule of origin for all RTAs with no provision for cumulation rules.

Third, with regard to the role of the WTO as an authoritative source of ‘best practices’ for RTAs or a model RTA, the problems are that first, as each country brings its unique blessings and predicaments to the RTA negotiating table, a ‘one size fits all’

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\(^\text{13}\) In addition to its main task of supporting the Trade Policy Review Body, the Trade Policy Review Division also supports the work of the Committee on Regional Trade Agreements. See [http://www.wto.org/english/tratop_e/region_e/region_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (visited 18 September 2008).

\(^\text{14}\) The functions of the Economic Research and Statistics Division are to provide ‘economic analysis and research in support of the WTO’s operational activities, including monitoring and reporting on current economic news and developments’, as well as supporting ‘WTO Members and the Secretariat with quantitative information in relation to economic and trade policy issues’. See [http://www.wto.org/english/tratop_e/region_e/region_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (visited 18 September 2008).

\(^\text{15}\) The Economic Research and Statistics Division currently has 50 staff members, while the Trade Policy Review Division currently has about 39 staff members. See [http://www.wto.org/english/tratop_e/region_e/region_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (visited 18 September 2008).

\(^\text{16}\) According to the WTO Secretariat, there are close to 400 RTAs which are scheduled to be implemented by 2010 if we take into account RTAs which are in force but have not been notified, those signed but not yet in force, those currently being negotiated, and those in the proposal stage. See [http://www.wto.org/english/tratop_e/region_e/region_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (visited 18 September 2008).

\(^\text{17}\) Baldwin, above n 3, at 1511.
approach might not work. One possible solution to this is to draft ‘best practices’ or a model RTA in such a way that different options for a given rule are provided for potential RTAs to choose from. The danger, however, is that a country would simply choose the worst possible combinations resulting in a ‘Frankenstein’ RTA to defeat the very purpose of having such best practices in the first place.

Yet another option offered is to turn the WTO into an ‘inquisitor’ by strengthening the existing WTO monitoring system. The 2006 rules on transparency is a recent example of this. Unfortunately, because the Committee on Regional Trade Agreements (CRTA) is hamstrung by the consensus rule, merely having heightened monitoring rules would not be of much practical use here.

In this article, we discuss a fourth option, i.e., to make the WTO an ‘enforcer’ by using the WTO dispute settlement mechanism as a venue for resolving at least some disputes among RTA parties, and possibly even disputes between RTA and non-RTA WTO members. In a certain sense, this option complements rather than replaces the previous options. The rationale underlying this initiative is that, by using the WTO dispute settlement system for some RTA disputes, the Members will be able to develop, albeit gradually, incrementally and pragmatically, a body of ‘common law’ on RTAs. Such a body of common principles could form the basis of multilateral rules on RTAs or harmonize RTA rules. This could minimize the harmful effect of RTAs.

In order to use the WTO dispute settlement system as a ‘common good’ for RTAs, we have to answer three further questions:

First, can we use the WTO dispute settlement system to adjudicate at least some RTA disputes?

Second, which rules can the WTO apply in RTA disputes?

Third, how can we equip the WTO machinery to deal with RTA disputes?

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18 Warwick Report, above n 2, at 52.
In this article, we try to provide some preliminary thinking on these matters in the hope that our suggestions will trigger greater discussion about how the WTO could become more relevant given the current invasion of RTAs.

I. PANEL AND APPELLATE BODY JURISDICTION

Can the WTO dispute settlement system be used to address disputes arising from RTAs? Consider two scenarios. The first concerns the power of the WTO Dispute Settlement Body (DSB) to adjudicate disputes which involve general requirements imposed on the formation of RTAs under the relevant WTO agreements. These include\(^{19}\), for example, whether an RTA satisfies the ‘substantially all trade’ requirement in GATT Article XXIV.8.b or the ‘substantial sectoral coverage’ requirement under GATS Article V, whether an interim agreement exceeds the ‘reasonable length of time’ as provided for under GATT Article XXIV.5.c, whether particular trade policy instruments constitute ‘other restrictive regulations of commerce’ under GATT Article XXIV.8.a.i, whether or not ‘the duties and other regulation of commerce’ for non-Members are ‘higher or more restrictive’ than the pre-RTA level under GATT Article XXIV.5, or how to determine if particular products are ‘products originating in such territories [of RTA Members]’, etc. Most of these are pre-conditions that an RTA must satisfy before its Members could invoke GATT Article XXIV or GATS Article V to justify its deviation from the MFN obligation. As the CRTA was given an explicit mandate to examine individual regional agreements\(^{20}\), there used to be doubt about whether the WTO Panel and Appellate Body could conduct an examination themselves. In the Turkey-Textile case, however, the Appellate Body made it clear that the Panel does have the necessary jurisdiction to examine the consistency of an RTA with the requirements under GATT Article XXIV.\(^{21}\)

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\(^{19}\) For a summary of the legal issues involved in the interpretation of the relevant WTO provisions, see Synopsis of ‘Systemic’ Issues Related to Regional Trade Agreements: Note by the Secretariat, WT/REG/W/37, 2 March 2000. For an empirical rather than normative analysis of these issues, see World Trade Report 2007, above n 8, at 307-

\(^{20}\) WT/L/127.

\(^{21}\) See Lim, above n 12, at 434.
While the Appellate Body’s ruling on this issue has been subject to the criticism that it upsets the institutional balance between the WTO’s political and judicial organs, this is probably the only practical solution. Otherwise Article XXIV could be used to justify all kinds of violations of GATT obligations. Moreover, the Dispute Settlement Understanding (DSU) specifically mandates a panel to ‘address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute’ and make ‘an objective assessment of …the applicability of and conformity with the relevant covered agreements.’ It seems then that a panel could be in breach of its obligations under the DSU if it fails to address the consistency of an RTA with the requirements under GATT Article XXIV. After all, Article XXIV itself is a provision in the ‘covered agreements’. This is further confirmed by the Understanding on the Interpretation of Article XXIV of the GATT 1994. It provides that ‘any matters arising from the application of those provisions of Article XXIV’ shall be subject to the normal dispute settlement procedure under the DSU.

The second issue concerns the power of the WTO DSB to adjudicate disputes on substantive rules in individual RTAs. In order to fully discuss this question, we need to make a few observations at the outset.

First, according to a number of DSU articles, including Articles 1.1, 3.2, 7.1 and 11, the jurisdiction of WTO panels is facially limited to claims under the WTO covered agreements.

Second, while a panel is obliged to ‘address the relevant provisions in any covered agreements’...
agreement or agreements cited by the parties to the dispute\textsuperscript{26}, and make ‘an objective assessment of …the applicability of and conformity with the relevant covered agreements’\textsuperscript{27}, there is no obligation for a panel to address provisions that are not part of a ‘covered agreement’. On the other hand, just like a judicial organ or arbitral body, the panel has inherent jurisdictional powers. Pauwelyn characterized such powers as powers of ‘incidental or implied jurisdiction’, and he took this to mean the jurisdiction (1) ‘to interpret the submissions of the parties’ in order to ‘isolate the real issue in the case and to identify the object of the claim’; (2) to determine whether one has substantive jurisdiction to decide a matter (the principle of \textit{la compétence de la compétence}); (3) to decide whether one should refrain from exercising validly established substantive jurisdiction\textsuperscript{28}; and (4) to decide all matters linked to the exercise of substantive jurisdiction and inherent in the judicial function (such as claims under rules on the burden of proof, due process, and other general international law rules on the judicial settlement of disputes or state responsibility, including the power to order cessation, assurances of non-repetition, and reparations).\textsuperscript{29}

Thus, where a substantive rule is provided for under only the RTA but not under any WTO agreement, it can only provide the basis for a claim under the RTA but not the WTO. This also means that the WTO panel will apparently have no jurisdiction in such a case. One example would be an RTA which, for example, contains national treatment obligations for the legal services sector. If none of the RTA Members have scheduled such an obligation in their GATS schedule in the WTO, disputes arising from the RTA commitment can only be brought under the RTA’s dispute settlement system. Another example is where an RTA contains an investment chapter akin to NAFTA Chapter 11, and which provides for an investor-state dispute settlement mechanism. Such disputes typically cannot be brought before the WTO.\textsuperscript{30} Note that in the example given, the

\textsuperscript{26} DSU Article 7.1.
\textsuperscript{27} DSU Article 11.
\textsuperscript{28} Note that we disagree with this statement. See discussion below.
\textsuperscript{29} Pauwelyn, above n 26 (2001), at 555-56.
\textsuperscript{30} One more obvious exception may relate to services trade via mode-3 (commercial presence); see Lim, above n 12, at 434, 445-46, 454-55.
reason why the dispute cannot be brought before the WTO is because the substantive obligations do not arise from the WTO ‘covered agreements’, not because the RTA has its own dispute settlement mechanism or that the RTA mechanism is meant to be exclusive. We will return to this issue below.

The most problematic situation, however, is where both the RTA and the WTO contains overlapping substantive obligations, thus a claim is possible under either regime. This would be a situation of ‘true conflict’ or jurisdictional overlap. An example would be the national treatment obligation for goods, something which can be found under both the WTO and many RTAs. In such cases, as the obligation arises from the ‘covered agreements’ of the WTO, the WTO dispute settlement system clearly has jurisdiction over the claim. The more difficult question, however, is whether that jurisdiction should be exclusive. DSU Article 23 seems to suggest that this is the case, where it states that:31

‘When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.’

‘In such cases, Members shall…not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding…’

This view (i.e. of exclusive WTO jurisdiction) would be uncontroversial in the following kinds of cases:

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31 DSU Article 23 (emphasis added).
(1) Where the RTA does not include any dispute settlement provision, or

(2) Where an RTA provides applicable rules to resolve jurisdictional conflicts between the RTA and the WTO, and where such provisions explicitly make the WTO the forum of choice in case of conflict. This might be referred to as the ‘exclusive forum selection clause’ scenario. An example is the EC-Chile Interim Agreement, which provides in Article 189.4.(c) that:

‘Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.’

To sum up, the WTO definitely has exclusive jurisdiction in cases regarding the general requirements for RTAs in the relevant WTO agreements, but does not have jurisdiction in cases concerning substantive rules which are only provided for in the RTA. Beyond these two scenarios, we enter relatively uncharted waters.

II. WTO-RTA JURISDICTIONAL CONFLICTS

Short of simply saying that DSU Article 23.2.(a) means that WTO Members have no recourse but to submit to WTO dispute settlement whenever there is a question involving the violation of an obligation under a covered agreement of the WTO, the exclusivity of WTO jurisdiction may be called into question in situations involving the following:


33 Of course, critics might point out that it is difficult to say whether the negotiators considered that such a clause was required under WTO law, or that it was simply preferable. The phrase ‘unless the Parties otherwise agree’ may be interpreted to mean that the parties never considered this a WTO legal requirement.
(1) An exclusive forum selection clause, electing RTA dispute settlement: The most obvious example is where there exists an exclusive forum selection clause choosing the RTA as the exclusive forum for all disputes or a certain class of disputes.

(2) A non-exclusive forum selection clause: The RTA provides for an alternative dispute settlement system in addition to the one available under the WTO and gives the Members the choice to resort to either system even if the matter falls within the jurisdiction of the WTO. This method may be found, for example, in Article 56(2) of the EFTA-Singapore FTA. Another example is Article 1 of MERCOSUR’s Olivos Protocol.

(3) The Lis Aliibi Pendens Approach: Another model, which is tagged onto the EFTA-Singapore FTA and Olivos Protocol model above, requires the dispute to be brought exclusively within the RTA’s dispute settlement procedure where the dispute is first submitted under that procedure (i.e. as opposed to WTO dispute settlement). Under such a ‘lis pendens’ clause approach, it could also work the other way. A dispute brought before WTO dispute settlement could preclude the same dispute being brought under the RTA. In addition to the two examples above, the most famous example of this sort of forum selection clause is Article 2005.6 of the North American Free Trade Agreement (NAFTA), which states that:

‘Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.’

As we can see, that example also contains an exception to the rule. Another interesting

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34 EFTA-Singapore Free Trade Agreement, 26 June 2002.
feature is that unlike the post-WTO RTAs, NAFTA Article 2005.6 as with its predecessor rule, Article 1801 of the Canada-US FTA, is _lex priori_ and therefore may be said to be subject to the later rule in DSU Article 23.\(^{37}\) The same cannot be said of post-WTO RTAs.

(4) The _Res Judicata_ or Collateral Estoppel Approach: Another variant is to eschew the _lis alibi pendens_ approach in favour of a _res judicata_ or collateral estoppel approach. An example would be Article 26 of MERCOSUR’s Olivos Protocol. Notwithstanding the Olivos Protocol, Brazil still argued in the _Argentina-Poultry_ case that the _res judicata_ rule did not apply as it was bringing a fresh dispute on a different legal basis before WTO dispute settlement.\(^{39}\)

(5) The Comity Approach: Comity is a principle whereby a court declines to exercise jurisdiction over matters that would be more appropriately heard by another tribunal. In a recent article\(^ {40}\), Henckels argues that, following the examples set by other international tribunals such as the International Court of Justice (ICJ) and the arbitral tribunal under the United Nations Convention on the Law of the Sea, the WTO should use its ‘inherent power to apply comity’ and decline to exercise jurisdiction in appropriate cases of competing jurisdiction.\(^ {41}\) However, there are several problems with this approach, the most notable one being that there is no textual basis in the DSU for this.\(^ {42}\) Henckels argues, however, that ‘[t]he inherent power to find no jurisdiction _in limine litis_ or to decline to exercise jurisdiction arises notwithstanding the text of the DSU, unless these

\(^{38}\) We have not sought to distinguish clearly between these two concepts in the present paper. Put simply, in the case of collateral estoppel there does not have to be a litigation on the same claims for the doctrine to operate. See further _Hunt v. B.P. Exploration Co. (Libya) Ltd._, 492 F. Supp. 885 (1980) (United States District Court, Northern District of Texas). See further Adrian Briggs, _Conflict of Laws_ (Oxford: Oxford University Press, 2002) 132 ff on the (English) common law distinction between ‘recognition’ and ‘enforcement’ in private international law.
\(^{41}\) Ibid, at 584 ff.
\(^{42}\) Ibid, at 593-94.
inherent powers are specifically extinguished or modified in the text’. One difficulty with this approach is that if a panel were to apply comity and decline jurisdiction in a particular case, they may be accused of having breached their obligation under the DSU not to ‘add to or diminish the rights and obligations provided in the covered agreements’ and violated the rights of WTO Members to ‘have recourse to…the rules and procedures of [the DSU]’. Indeed, as Henckels concedes, this is how the WTO Panel and Appellate Body have approached the issue in Mexico – Soft Drinks and Argentina – Poultry, two cases where, according to Henckel’s theory, the WTO should have applied the comity principle. There seems to be a reluctance, at the very least, on the WTO’s side to press the comity argument too far.

(6) Further complexities arise where the RTA includes a provision not to invoke WTO dispute settlement system between the parties. This could mean that the dispute should be referred to the RTA tribunal, or that there is no dispute settlement system at all and all disputes shall be settled by consultations and negotiations among the parties. An example for the latter case is Article 19.5 of the Closer Economic Partnership Arrangement (CEPA) between Mainland China and Hong Kong, which provides that ‘any problems arising from the interpretation or implementation of the CEPA’ shall be resolved ‘through consultation in the spirit of friendship and cooperation’.

While these cases all differ from each other in some ways, the key legal issue involved in all of them is the same, i.e., whether a party can challenge the jurisdiction of the Panel in a case by resorting to non-WTO law and whether in turn the Panel can decline to exercise jurisdiction by appealing to non-WTO law.

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43 Ibid, at 594.
44 DSU Article 3.2.
45 DSU Article 23.1.
46 In Mexico – Soft Drinks, for example, the Appellate Body not only did not adopt the comity principle, but also explained in detail how the principle is inconsistent with several key DSU provisions, including Articles 3.2, 7.1, 7.2, 11, 19.2, and 23. See Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks), WT/DS308/AB/R, adopted 24 March 2006, paras 47-57.
The Appellate Body’s jurisprudence is equivocal at best on this point. Perhaps the most basic assumption is that RTAs form an exception to the WTO system. Based on this assumption, the impression created is that any overlap between RTA and WTO dispute settlement is the exception, not the rule. This is based on the view that RTAs are themselves the exception, at the very least to the MFN doctrine, under GATT Article XXIV and GATS Article V. Therefore, while the DSU includes GATT and GATS as covered agreements, RTAs emerged as ‘uncovered’ agreements and therefore fall into a dispute settlement vacuum. Whether this is true remains contestable. At present, controversy continues as to the extent to which GATT Article XXIV provides an exception to WTO obligations other than the MFN principle. The issue has arisen in relation to safeguards, for example.\textsuperscript{48} Similar arguments may also be offered in relation to RTA dispute settlement mechanisms.

Is the assumption that RTAs form an exception to the WTO system, in other words that they fall into a ‘black hole’, justified? The suggestion receives some support from the Appellate Body’s ruling in \textit{Mexico – Soft Drinks}, where the Appellate Body seems to have considered that NAFTA disputes are ‘non-WTO disputes’, and that it is not the function of panels and the Appellate Body to adjudicate upon such non-WTO disputes.\textsuperscript{49} Before \textit{Mexico – Soft Drinks}, the panel ruling in \textit{Argentina-Poultry} had, quite sensibly, suggested that a WTO panel may construe an RTA in relation to a provision therein governing the relationship between the RTA and WTO dispute settlement.\textsuperscript{50} The decision of the Appellate Body in \textit{Mexico – Soft Drinks}, however, seems to have cast some doubt on the panel’s decision in \textit{Argentina – Poultry}.

The Appellate Body in \textit{Mexico – Soft Drinks} also went on to suggest that an overlap with RTA regulation will not necessarily prevent WTO dispute settlement as panels and


\textsuperscript{49} Appellate Body Report, \textit{Mexico – Soft Drinks}, above n 47, paras 56, 78.

\textsuperscript{50} Panel Report, \textit{Argentina – Poultry}, above n 40, para 7.27. There, the Panel had gone on to interpret the Protocol of Brasilia, ruling that on its proper construction the Brasilia Protocol does not limit the right of the parties to bring WTO panel proceedings in relation to a measure which is already the subject of a dispute under that protocol.
the Appellate body do not have a discretion to decline to rule in cases brought before them barring any special circumstances. But the Appellate Body appears also to have confined itself specifically to ‘the case … before it’.\footnote{Appellate Body Report, \textit{Mexico – Soft Drinks}, above n 47, paras 54, 57.} One possible reading is that the Appellate Body would not rule on non-WTO disputes and would usually not decline jurisdiction because, absent ‘other circumstances’, it would not have the discretion to do so.\footnote{Ibid, para 54.} Exercising judicial economy, however, the Appellate Body did not further explain what might constitute such ‘special’ or ‘other’ circumstances.

Can \textit{Mexico – Soft Drinks} be read to suggest that in exceptional circumstances at least WTO panels or the Appellate Body may decline their own jurisdiction in favor of RTA dispute settlement? If so, might this also be taken to suggest that having separate RTA dispute settlement procedures is not \textit{per se} violative of DSU Article 23? Is a conflicting RTA provision a ground for invoking such exceptional circumstances – what the Appellate Body in \textit{Mexico – Soft Drinks} referred to blandly as ‘other circumstances’ in a highly couched ruling? Does \textit{Mexico – Soft Drinks} mean that RTA dispute settlement clauses could, in exceptional or special circumstances, \textit{prevail} over WTO dispute settlement?

Even if the answer to all of the questions above is ‘yes’, it would still be worthwhile to consider, or even to make, the WTO at least an \textit{optional} forum for the RTA parties for the reasons we suggest later in this paper. If the WTO were to serve such a function, the current DSU may however require amendment so that the jurisdiction of the WTO panel and Appellate Body would not be limited, at least in some cases, to ‘covered agreements’. This is especially important where no general rule of international law may be relied upon to resolve the problem by way of some interpretative or jurisdictional rule.

The largest question here would have to do with when the WTO should have the
jurisdictional authority to develop RTA rules. Should the WTO confine itself to resolving situations of conflict only, or should it play a larger role? We will return to this jurisdictional problem after dealing with the question of applicable law below.

III. APPLICABLE LAW

The problem here is related but not exactly the same as the first question. Can the WTO panel and Appellate Body apply the non-WTO rules in a WTO dispute? It is important to note the difference between the two sorts of question from the outset. Clearly, some questions, on the basis of the *Mexico – Soft Drinks* doctrine cannot fall to be adjudicated by WTO dispute settlement. But it begs the question of what rules panels and the Appellate Body can and cannot apply, or in an even further refinement, when it has jurisdiction over the parties to the dispute, and when such jurisdiction is precluded over certain subject-matter involving the rules to be applied. Here, we distinguish between ‘jurisdiction’ and ‘applicable law’ for the sake of simplicity. Put a little differently, a principal difference is that while the jurisdictional question is mainly concerned with the jurisdictional basis for a claim in a dispute, the question of applicable law is about what

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53 Part of the difficulty has to do with the highly undeveloped categories of jurisdiction *ratione personae*, jurisdiction *ratione materiae* and choice of law known elsewhere in both private and public international law thinking. It might be said that these categories do not apply to our present question because WTO jurisdiction *ratione personae* is given in the case of a WTO member. But this begs the question. Is that jurisdiction given in the case of WTO membership or in the case of WTO membership in the absence of a competing RTA rule? In the usual context in which that distinction operates, a sovereign may be immune *ratione personae* from the jurisdiction of a domestic court, whereas even if such immunity is defeated in exceptional situations, a domestic court may not have jurisdiction over the attachment or execution of the property of a foreign sovereign. See e.g., C.L. Lim, ‘Non-Recognition of Putative Foreign States (Taiwan) under Singapore’s State Immunity Act’ 11 Asian Yearbook of International Law 3 (2003-04), esp. 18 ff. Likewise, in private international law, the distinction, loosely speaking, between personal jurisdiction and prescriptive/legislative/subject-matter jurisdiction is generally well-known and established in common law countries even if the details may differ significantly from jurisdiction to jurisdiction – e.g. personal jurisdiction has a constitutional dimension in the United States, whereas the distinction between personal and subject-matter jurisdiction may not be so clear or may not even exist under a civilian system which may tailor jurisdictional questions to factors such as the place of the characteristic performance of the contract or the place of the commission of the tort thus emphasizing the connection with the claim as opposed to the defendant for example. See e.g., Ralph H. Folsom et al, *International Business Transactions: A Problem Oriented Coursebook*, 9th ed. (St. Paul Minnesota: Thomson/West, 2006), at 1192. These issues and their attendant complexities need not detain us. However, it has been suggested that similar notions of judicial comity should be applied where there are conflicts between international tribunals. See our discussion of the comity principle in this paper. See also the discussion of the MOX Plant dispute in Lim, above n 12, at 453.
arguments you may use to support your own claim, or to defend yourself against claims made by others. As the Appellate Body stated in EC – Hormones, even though ‘Panels are inhibited from addressing legal claims falling outside their terms of reference’, ‘nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration’. Thus, the inquiry on applicable law could be totally independent of the jurisdictional question.

While perhaps no WTO scholar would seriously disagree that the DSU limits the jurisdiction of the Panel to claims brought under WTO covered agreements, the real question is whether, in examining such claims, non-WTO norms could be brought into play. Generally speaking, non-WTO rules might be introduced in WTO dispute settlement process under three different circumstances.

The first is to use non-WTO rules, mostly general principles of law, to solve procedural issues which have not been clearly spelled out in WTO rules. Examples include the participation of private lawyers in Panel proceedings, the admissibility of amicus briefs in panel and Appellate Body proceedings, treatment of domestic law as questions of law or facts, etc. Even though neither the DSU nor the other WTO agreements has explicitly provided the power to apply these rules to the panel or Appellate Body, the issue has largely been uncontroversial because these are widely regarded as implied powers of a tribunal and it would have been very difficult for the

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56 For such resort to such “non-consensual” general principles in the public international law field, see O.A. Elias & C.L. Lim, “General Principles of Law, “Soft” Law and the Identification of International Law’, 28 Netherlands Yearbook of International Law 3 (1997), at 4-44.
57 Even though some WTO members argue that the admissibility of amicus briefs affect their substantive rights, there remains a strong body of opinion among members that the issue is mainly procedural in nature. See further, C.L. Lim, ‘The Amicus Brief Issue at the WTO’, 4 Chinese Journal of International Law 85 (2005), esp. 99, 105, 108, 109-10 for a survey of these differing opinions among the several delegations in Geneva.
58 Of course, one may argue that the statement in DSU Article 11 that the Panel shall ‘make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’ (emphasis added) implicitly grant such powers to panel, while the Appellate Body has been explicitly granted the powers to draft working procedures for appellate review by Article 17.9.
panels or the Appellate Body to carry out their job without such powers.\(^{59}\)

The second is to use rules of treaty interpretation to interpret certain provisions in the covered agreements. This relates mainly to the treaty interpretation rules under the Vienna Convention on the Law of Treaties (VCLT),\(^ {60}\) especially the rules under Articles 31 and 32. While there might be some uncertainty as to whether the panel and Appellate Body had such a power during the early days of the existence of the WTO, such doubt has since dissipated, especially since the Appellate Body made the resounding warning that WTO rules shall not be read ‘in clinical isolation’ from public international law in the US – \textit{Gasoline} case.\(^ {61}\) That pronouncement rests on the explicit reference to ‘customary rules of interpretation of public international law’ in the DSU as tools for clarifying WTO provisions.\(^ {62}\)

The third is to apply non-WTO rules as norms that create substantive, rather than procedural, rights and obligations. As we have discussed earlier, under the current WTO regime, non-WTO norms cannot be invoked as basis for staking out claims in a dispute; instead, their only possible substantive use would be as defense against claims of violation or justification for adopting measures which are inconsistent with WTO obligations. This is the hardest of the three scenarios, and it is also where the real controversy lies.

This third scenario can be analyzed at two levels: first, whether such non-WTO norms could be invoked by parties and applied by panels at all; second, even if they could be invoked despite running against WTO norms (which would typically be the case as otherwise the party invoking them would have relied on some WTO provision instead), whether they may prevail against WTO norms.\(^ {63}\)


\(^{63}\) Some of the issues discussed here were explored in a different context in Henry Gao, ‘The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle: An examination of the conflict between trade liberalization and domestic cultural policy with special regard to the recent dispute between the US and China on restrictions on certain cultural products’, 2 Asian Journal of WTO and International Health Law and Policy 313 (2007) at 333-36.
To some commentators, the answer to the first question is yes. Pauwelyn, for example, has urged that ‘the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements.’

He offers the following reasons:

First, WTO Panels and the Appellate Body have not limited themselves to the four corners of WTO covered agreements: they have referred to general principles of law and customary international law, such as the VCLT. In this sense, rules other than the WTO’s treaty rules can be applied in WTO proceedings.

A key assumption underlying Pauwelyn’s argument is that there is no legal basis in ‘the four corners of WTO covered agreements’ for the application of the VCLT. A closer examination of the Appellate Body’s famous statement in US-Gasoline reveals, however, that the reference to general principles of law and customary international law or even the VCLT by the Panel and the Appellate Body is made exactly pursuant to the mandate within ‘the four corners of WTO covered agreements’ as the Appellate Body clearly based its decision on the requirement under Article 3.2 of the DSU that the Panel and the Appellate Body shall ‘clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’

Moreover, the mere fact that panels and the Appellate Body have referred to rules of interpretation to help clarify the meaning of the substantive obligations in the covered agreements does not necessarily mean that they can refer to other non-WTO rules to change the substantive obligations under the WTO covered agreements.

Secondly, Pauwelyn notes that, among those ‘customary rules of interpretation of public international law’ referred to in DSU Article 3.2 lies Article 31.3 of the VCLT. It states that the treaty interpreter shall take into account not only the treaty itself—but also ‘any subsequent agreement between the parties regarding the interpretation of the treaty or

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64 Pauwelyn, above n 26 (2001), at 560. See also Pauwelyn, above n 26 (2003), at 460 ff.
65 Pauwelyn, above n 58, at 1001.
the application of its provisions. In this further sense, he argues that ‘non-WTO law’
can and should be applied in WTO cases.

Unfortunately, this is, again, a misreading. First of all, while Article 31 states that a

treaty shall be interpreted ‘in accordance with the ordinary meaning to be given to the terms

of the treaty’, the ‘subsequent agreement’ and ‘relevant rules of international law’ are

only to be ‘taken into account, together with the context’ (emphasis added). This means that,

while the terms of the treaty at issue shall be directly applied, the other relevant

agreements and rules shall only be used to supplement the interpretation based on the

context and may not be applied directly. Second, the scope of such agreements is not as

expansive as Pauwelyn may have suggested. Instead, only subsequent agreements which

are concluded ‘between the parties regarding the interpretation of the treaty or the application

of its provisions’ (emphasis added) could be used as a supplementary interpretive tool. It

means that the only agreements which can be invoked are those which are both made

between exactly the same parties to the original agreement and regarding the

interpretation of the treaty or the application of its provisions specifically. It is easy to

see that most RTAs would not satisfy either requirement, because first, RTAs are, by

definition, limited to a subset of WTO Members; and second, they are mainly concerned

with establishing obligations beyond those agreed in the WTO rather than the

interpretation or application of WTO obligations. For these reasons, RTA rules should

not be applicable in WTO disputes.

Third, according to Pauwelyn, the WTO agreement is a treaty and therefore is part of

public international law. Thus, ‘even without the explicit confirmation in DSU Article 3.2,

the WTO agreement cannot … be applied in isolation from other rules of international

law.’ To illustrate his point, Pauwelyn draws an analogy between contract law and

international law:

*Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of international law. Much the way private contracts do not need to list all the relevant legislative and administrative provisions of domestic law for them to be applicable to the contract, so treaties need not explicitly set out rules of general international law for them to be applicable to the treaty.*

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67 Pauwelyn, above n 58, at 1001.
69 Pauwelyn, above n 58, at 1001.
However, this argument is probably not as strong as it might at first appear. An initial objection may be dealt with swiftly. First, the basic assumption underlying Pauwelyn’s analogy has to do with the degree of similarity between domestic and international legal systems. The analogy is not altogether unproblematic. As Philip Allott puts it, the international legal system still lacks ‘most of the essential characteristics of their national legal systems’. Assuming however that such an analogy is sustainable in the present case, the real reason behind the parties’ decision to enter into private contracts is not because they want to incorporate general contract rules, but because they want to vary the default rules between them absent explicit provisions in each individual contract.

Thus, to say that general international law applies even when the WTO members have decided to establish some specific rights and obligations in the covered agreements ignores the purpose of WTO members in taking the trouble to negotiate WTO agreements in the first place. At the very least it begs the question of what general, background international rights and obligations the members have sought to vary, and which they have sought to leave intact. One example is the extent to which the WTO’s dispute settlement rules have been intended to replace the classic international law rule that self-help might be resorted to in the face of a breach of an international treaty obligation. The usual answer is that this is the whole point of the DSU. Yet what this paper tries to show is that the answer is not as simple as it seems. There may yet be further trade obligations undertaken outside the WTO which are subject to rules concerning their breach and the consequences of such breach which stand in uneasy relation to the WTO rules on dispute settlement. Third, even accepting that ‘treaties are automatically born into the system of international law’ just like private contracts, it

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72 What trade lawyers see as unilateral retaliation, international lawyers might view as lawful countermeasures instead and they would have a long line of international legal authorities which might also suggest that the power to modify the law of countermeasures is limited. See further, the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ, 25 September 1997, ICJ Reports 1997; Case Concerning the Air Services Agreement of 27 March 1946, US-France Arbitral Tribunal, 9 December 1978, RIAA Vol. XVIII.
does not necessarily follow that the WTO dispute settlement body must necessarily apply non-WTO norms in WTO disputes. Again the question here is related to jurisdiction: the WTO dispute settlement panel is not a tribunal of general jurisdiction; instead its jurisdiction is only limited to claims founded on WTO rules. Fourth, notwithstanding our previous analysis, even if we agree with Pauwelyn that WTO norms ‘are automatically born into the system of international law’ and that international law should simply be applied in WTO disputes without further qualification, it will not be of any help to the argument that RTA rules should be applied by panels and the Appellate Body in WTO disputes. The reason is simply that most RTAs did not even exist when the GATT or the WTO was established, thus it’s more accurate to state that the RTA rules are born into a system of WTO rules which in its relation with general international law is properly considered to be lex specialis.

Fourth, while Pauwelyn recognizes that Article 3.2 specifies that the WTO panel or the Appellate Body cannot ‘change’ the WTO treaty, he argues that this does not limit the extent to which WTO Members may conclude or have concluded other treaties that can influence their mutual WTO rights and obligations. Thus, Pauwelyn concludes:

As important as the distinction is between Panel jurisdiction (WTO claims only) and applicable law (potentially all international law), so too is the distinction between interpreting WTO rules (and the prohibition to add or detract from those rules in the process) and examining WTO claims in the context of other applicable international law (where the expression of state consent and conflict rules of international law must decide the outcome).

As Pauwelyn does not provide further illustration on this point in his article, it is not always clear what exactly he means by this. One logical interpretation of the argument seems to be this:

Even though the Panel and the Appellate Body have no power to change the rights and obligations of the Members, the Members themselves can always conclude other treaties (such as RTAs) to change their rights and obligations under the WTO. To give effect to these treaties, the panel and the Appellate Body shall have the power to apply them in WTO disputes as well. Otherwise, the power of Members to conclude other treaties would be diminished.

75 Pauwelyn, above n 58, at 1002-03.
76 Ibid, at 1003.
While Article 30.3 of the VCLT seems to confirm Pauwelyn’s argument by stating that ‘[w]hen all the parties to the earlier treaty are parties also to the later treaty …, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’, anyone who rushes to the conclusion that the VCLT is applicable here would fail to appreciate the crucial differences between the rights and obligations established under WTO agreements and those under the garden variety of multilateral treaties. First of all, for concessions on trade in goods, while most of the tariff negotiations today are formula based, the GATT/WTO regime has a long history of negotiating tariffs based on other approaches. Moreover, even today, not all negotiations on goods are based on formulae as there are special rules for tariff cuts by developing countries or sensitive products by certain countries. This is more so with trade in services, which has been dominated by a bilateral request-offer approach.\footnote{77} This means that, when two countries negotiate an RTA and cut all tariffs to zero, they are not only making concessions on the products which they themselves are most interested in, they are also extending concessions on products which do not interest the other party. Yet, through the operation of the MFN principle, it will affect the interests of a third country which has a keen export interest in such products. This is wholly different from the case of a treaty between three countries to solve their border disputes. Now suppose two of the three countries later on make another treaty to change a boundary on their mutual border but this does not affect the border of the third country, of course the second treaty would not have affected the interests of the third country. In contrast, because of the MFN rule, the multilateral, even the plurilateral, obligations of the WTO are not merely ‘bilateral obligations multiplied’.\footnote{78} They have a very far reaching effect.

Second, the legal effect of an RTA is only to create new rights and obligations for the Members under the RTA regime, rather than changing the rights and obligations under the ‘covered agreements’ of the WTO. The reason for this, as argued by Trachtman, is that since the WTO Agreement provides exclusive procedures to be followed in amending the obligations under the ‘covered agreements’, any amendment must follow

\footnote{77}{See Henry Gao, ‘Evaluating Alternative Approaches to GATS: Negotiations: Sectoral, Formulae and Other Alternatives’, in Pierre Sauvé, Marion Panizzon and Nicole Poli (eds), \textit{GATS and The Regulation of International Trade in Services} (Cambridge: Cambridge University Press, 2008), at 183-208.}

\footnote{78}{Even if strictly they are because the MFN rule is agreed between each WTO member with the other in what might be viewed as an accumulation of bilateral relationships. It is in this sense that the MFN rule has the magical effect of being a “tariff accelerator”.}
such prescribed procedures before it could change the content of the ‘covered agreements’ under the WTO.\textsuperscript{79} Of course, this does not mean that WTO Members cannot change their trade obligations outside of the WTO framework. However, even if such non-WTO rules are agreed between the parties, such modifications would not usually be applicable law in WTO dispute settlement.\textsuperscript{80}

This leads us to the third point, i.e., for those RTAs which either do not provide for formal dispute settlement, or which do provide a dispute settlement system which is however not compulsory, the very fact that members to such RTAs intentionally chose to shun the WTO dispute settlement system, or any dispute settlement system for that matter, probably means that they never intended to make such an agreement enforceable through the WTO dispute settlement system. If, however, the panel follows Pauwelyn’s advice and decides to drag a member into a formal WTO dispute settlement proceeding, that is clearly an infringement upon the sovereign rights of a member which never intended to be held to account in the WTO for breaches of its obligations under these non-WTO treaties.

Assuming, \textit{arguendo}, that the RTA rules could be invoked in WTO disputes, should such rules, to the extent that they are inconsistent with WTO norms, prevail over WTO rules? For many public international lawyers, the answer seems to be yes when one applies the two familiar rules for resolving treaty conflicts, i.e., \textit{lex posterior derogat priori} and \textit{lex specialis derogat generali}.\textsuperscript{81} The arguments are that, first, because the RTAs are concluded after the WTO agreements have been concluded, they are later rules and must prevail over prior rules; second, because the RTAs are special rules which are created on top of the general rules under the WTO agreements, the RTA rules must prevail as well. Again, however, the issues are not that simple. First of all, as we all know, the WTO rules are not carved in stone; instead, both the general rules for the WTO and the specific concessions of individual Members are periodically modified in successive rounds of trade negotiations. Thus, even if we agree that an RTA which was concluded in 2000 prevails over the WTO agreements concluded in 1994, should whatever results Members manage to reach in the Doha Round, say in 2010, also prevail over all RTAs among

\textsuperscript{79} Trachtman, above n 77, at 859.
\textsuperscript{80} Ibid.
\textsuperscript{81} See further, Michael Akehurst ‘The Hierarchy of Sources of International Law’, \textit{47 British Yearbook of International Law} 273 (1974-5).
WTO Members between 1994 and 2010? Second, even though most RTAs are concluded after the WTO came into being, there are some RTAs, such as NAFTA, which were concluded before the WTO agreements entered into force. If we agree that the *lex posterior* rule is applicable here, does it mean that these RTAs have been effectively rendered useless by the establishment of the WTO? At the very least, an attempt to resolve the issue by resorting to the *lex posteriori* rule would produce arbitrary solutions each time. It would amount to nothing more than checkerboard justice.  

Third, to the extent that the *lex posterior* and *lex specialis* rules are applicable, they can only be applied among laws which are of the same hierarchy. That is why the Marrakesh Agreement states in Article XVI.3 that ‘[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of [the Marrakesh] Agreement shall prevail to the extent of the conflict.’ Thus, to the extent that a WTO obligation may be said to be situated higher in the hierarchy of norms than RTA rules, it cannot be overruled simply because of an RTA obligation.

In sum, under the current WTO legal framework, RTA rules can be applied only under limited circumstances, just as there may be practical or doctrinal limits to what may be brought under WTO dispute settlement. New thinking is needed if we want the WTO dispute settlement system to apply the RTA rules and generate a body of ‘common law’ for RTAs – what we might tentatively call the ‘public international law of trade.’

In this regard, we think it would be worthwhile as a practical matter to make the WTO at least an *optional* forum for the RTA parties so that the WTO *could* contribute to the development of such a body of ‘common law’, and that in this way, under the stewardship of the Appellate Body, the law will in time work itself pure. But if the WTO were to serve such a function, the current DSU may require amendment so that the jurisdiction of the WTO panel and Appellate Body would not be limited, at least in some cases, to ‘covered agreements’. Alternatively, even if they would not be limited in all cases, amendment would provide much needed certainty and clarity. Coupled with the

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83 “[A]nd adapts itself to the needs of a new day”. The phrase is Lord Mansfield’s. Cited in Lon Fuller, *The Law in Quest of Itself* (Chicago: Foundation Press, 1940), at 140.
jurisdictional problem discussed earlier above, DSU Article 23.2.(a) may yet be taken to mean that WTO Members have no recourse but to submit to WTO dispute settlement where there is a question involving the violation of a WTO covered agreement obligation.

IV. ‘FARMING OUT’ THE WTO DISPUTE SETTLEMENT PROCEDURE FOR RTA DISPUTES: THE ‘BEST FORUM’ ARGUMENT

The idea that there are multiple options to the compulsory settlement of international disputes is hardly novel.

The traditional difficulty with subjecting diplomatic dispute over various subjects to compulsory dispute settlement was the principle of sovereign choice. Sovereigns choose how they would have their disputes resolved. But one option that had been revived from antiquity during the nineteenth century is international arbitration. The commission established under the 1794 Jay Treaty was one such example, and arbitration was given renewed impetus with the Alabama Claims (or ‘Geneva’) arbitration. The idea of compulsory jurisdiction may be traced to this but at present has been muddled with the idea of exclusive jurisdiction.

Exclusive compulsory dispute settlement is only a subset. That the WTO dispute settlement procedure may provide for the compulsory settlement of trade disputes today is nothing new. But does it mean that the WTO’s jurisdiction is exclusive? The option of electing WTO dispute settlement in some RTA provisions is only the latest manifestation of a far more established doctrine; namely, that of the free choice of means of settling sovereign disputes. Of course, the immediate retort to this is that DSU Article 23 is

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84 Opened for signature 19 November 1794, UK-US, 12 Bevans 13 (entered into force 24 June 1795).
85 John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been a Party (Washington: Government Printing Office, 1898), Vol. 1, 495-682.
86 See e.g. C.L. Lim, ‘The Uses of Pacific Settlement Techniques in Malaysia-Singapore Relations’, 6
meant to foreclose the doctrine of sovereign choice. Is that true?

Viewed carefully, the difficulty in the modern RTA context involves conflicts of jurisdiction, not a failure of compulsory dispute settlement. True, the problem is particularly acute in light of the widespread appreciation post-Uruguay Round that trade disputes would be semi-automatically submitted to WTO dispute settlement. In other words, the problem arises because RTAs threaten to undermine the WTO dispute settlement process. But we have seen that unless an uncompromising stance is taken in the name of WTO law, there is no clear prohibition of a future treaty prevailing over an earlier treaty, at least in terms of international law doctrine. The same applies in the case of a more specific treaty rule prevailing over a general rule.

It might be thought that the practical problem arises because arbitrators tasked with settling an RTA dispute might not recognize the WTO’s jurisdiction as prevailing over their own. This has some legal justification in arbitration law. The doctrine of kompetenz-kompetenz had been established for far longer than it has been in WTO jurisprudence. Arbitrators are liable to fail to comprehend why WTO dispute settlement should somehow constitute an exception to a well known arbitral doctrine. Put differently, if arbitrators can rely on the kompetenz-kompetenz doctrine against national courts, why would they be precluded from doing so against WTO dispute settlement?

One neat solution may be to channel the actual handling of WTO disputes to the WTO dispute settlement process itself. In cases where it is particularly unclear whether a WTO or RTA rule controls the dispute, the idea of having the choice of court process settled in advance of the choice of law issue seems particularly attractive. Practical wisdom might also suggest that if you put the issue before the right ‘forum’, the ‘right’

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87 A question arises concerning the extent to which an inter-party dispute in a modern FTA (as opposed, for example, to an investor-state dispute) may be said to result in an arbitral award, and more to the point is to be considered ‘arbitration’ in the first place. It might be argued that they are no more ‘arbitration’ than the WTO dispute settlement procedure.
choice of law would be more likely to follow. In other words, some RTA disputes might best be resolved by those persons who have some knowledge, familiarity or professional credibility in applying WTO rules. This would also ensure the harmonization of rules, particularly those rules dealing with WTO-RTA jurisdictional conflicts.

The fundamental problem here seems to be this. Had parties really wished to have all their trade disputes resolved at the WTO they would have said so. So the question should ideally be taken back to be resolved in Geneva’s multilateral setting. There are other advantages to a multilateral solution in Geneva. Aside from the obvious psychological advantage in favor of a multilateral solution, virtually all the active RTA-pursuing countries and all WTO members would be present. This allows the question of whether a WTO mandated solution should be preferred to be pursued but without sacrificing bilateral consultations between WTO members.

To help the WTO carry out this task, we suggest the following as a possible starting point for deeper reflection on the issues:

(1) The DSU should be amended to provide the possibility for RTA members to use the WTO dispute settlement system to resolve their RTA disputes. To provide the legal basis for this, Members to an RTA should insert the following clause on dispute settlement in their RTAs:

*We agree that we shall refer all relevant disputes under this agreement to the WTO dispute settlement body. The WTO dispute settlement body shall have the exclusive competence to decide whether a dispute constitutes a relevant dispute for the purposes of the present provision. A ruling on a relevant dispute by the WTO dispute settlement body shall be considered binding before any arbitral or other dispute settlement body or procedure established pursuant to the present Agreement.*

Correspondingly, Appendix 1 of the DSU could be amended to include the following:

(1) **Regional Trade Agreements**

The applicability of this Understanding to the Regional Trade Agreements of Members (‘the individual agreement’) shall be subject to the adoption of a decision by the parties to the individual agreement setting out the terms for the application of this Understanding to such agreements, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

(2) In order to facilitate the adjudication of RTA disputes by the panel or AB, any RTA which adopts the WTO dispute settlement system should also grant the panel and Appellate Body the powers to decide on the following two issues: First, whether the RTA fully complies with the requirements under GATT Article XXIV or GATS Article V. To the extent that an RTA cannot be justified, the Members will not be allowed to invoke the RTA as a defense against non-compliance of their relevant WTO obligations. Second, whether or not the RTA affects the interests of non-Members. To the extent that it does, such non-Member shall be given the opportunity to join in the dispute as well.

V. INSTITUTIONAL DESIGN

One last question has to do with what kind of institutional framework we might adopt for the adjudication of RTA disputes at the WTO. Should the normal rules for the constitution and operation of WTO panels be retained, or should we instead adopt the institutional framework under individual RTAs? In other words, should it be more akin to ad hoc arbitration or the kind of institutional arbitration which simply resorts to institutional arbitration rules for the convenience they might afford? What, in other words, should be the *lex arbitri*? In our view, to maintain the integrity of the WTO dispute settlement system, the current procedural rules and practices under the DSU should be adopted to the furthest extent possible, while providing the possibility for the panel to adopt different procedures. If so, a further clause should also be inserted into the RTA stating this. With regard to the specific procedural issues, our suggestions are as

90 *Ibid*, paras. 2.08-2.11. For the distinction between the arbitration rules and the *lex arbitri* (the law governing the arbitration), see *ibid*, paras.2.12-2.13.
follows:

(1) Parties to the dispute: Generally speaking, only parties to a specific dispute can be parties of a case. In cases involving substantive rules in the RTA which affect all members of the RTA, the other RTA members which are not parties to the dispute should have the right to join in the dispute settlement proceeding. Even in cases which involve only the substantive rights of the parties to the particular dispute, non-party members can join as third parties if the main parties to the dispute agree. In cases involving the substantive rights of non-RTA members, such non-RTA members should also have the right to join in the dispute settlement proceeding. Even in cases which involve only the substantive rights of RTA Members, non-RTA members can join as third parties if all the members of the RTA agree. Such an arrangement will ensure that the interests of all parties, RTA members and non-members alike, are adequately represented in such dispute settlement proceedings. This will not only ensure the highest degree of support among all parties who might have an interest in such cases, but also the highest degree of uniformity between different cases as well.

(2) Composition of the Panel: While we recognize that Panelists should have a sufficient understanding of the particular issues facing the members of an RTA, we also believe that, because RTAs are only tolerated in the multilateral trading system because they are perceived as ‘building blocks’ which contribute to the ultimate goal of global trade liberalization through the gradual expansion of regional economic integration, the idiosyncrasies in particular RTAs should not be used as an excuse to upset the carefully-negotiated balance of rights and obligations in the WTO as a whole. Therefore, of the three panelists to each panel, at least one should be someone who is not chosen by one of the RTA parties. This should be a person of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. The other two would be nominated respectively by the two principal parties to the dispute. In case of disagreement among the two panelists nominated by the RTA Members, the ruling of the third panelist shall prevail. Such
arrangement is intended to ensure not only that the panel has the necessary expertise to solve the dispute at hand, but also consistency with WTO jurisprudence would be maintained.

(3) Generally, the proceedings of the panel may be kept confidential and limited only to the disputing parties. If all the parties to the dispute agree, however, or if the RTA whose provisions are called into question provides expressly for public hearings, then the proceedings may be open to the general public. The reports of the Panel should however be generally made available to WTO Members so that such reports can gradually built up the ‘common law’ of RTA.

(4) The meetings of the panel may be held either in Geneva or at another mutually-agreed location, such as in the territory of an RTA member or in a third country. To the extent possible, both the WTO Secretariat and the secretariat for the RTA shall provide the necessary legal and administrative support to the panel.

(5) While the particular findings and recommendations of the panel in a particular dispute shall only be binding upon the parties to the dispute, the analysis by the panel on substantive rules in an RTA should ideally also apply to future cases between members of the same RTA, while the analysis by the panel of general WTO provisions shall also be of persuasive value for future disputes involving similar provisions between the members of other RTAs.

(6) If a party to a dispute is not satisfied with the ruling of the panel, it shall have a right to appeal the report to the Appellate Body.

(7) To avoid the diversion of resources from the current responsibilities and functions of WTO panels and the Appellate Body, the expenses for a case from an RTA should be funded by the RTA members involved in such dispute. Special and differential treatment could be provided to RTA Members which are developing countries.
VI. CONCLUSION

In this article, we have discussed the possibility of using the WTO dispute settlement system as a common good for RTA disputes. In answering this question, we have separated the doctrinal analysis from our recommendations for reform, i.e., what could be done to use the WTO dispute settlement system as a common good for RTA disputes under the WTO legal framework as it stands, versus how the current WTO legal framework should be changed to make it more useful. While we believe that it is desirable to use the WTO dispute settlement system to resolve RTA disputes, we also believe that there are significant uncertainties under the current WTO legal framework. Ideally, that framework should be amended. By confronting the conflict between the current WTO dispute settlement rules and RTA disputes in a direct manner, we have avoided the temptation to twist the current rules to achieve the result we want. In our view, such shortcuts create false hope for those who believe that the WTO dispute settlement system has a role to play in RTA disputes. It also threatens the integrity and legitimacy of the WTO dispute settlement system as a whole by trying to feed it with something which it cannot readily digest, resulting in congestion and possibly a great combustion of the WTO dispute settlement system.

While we recommend that a new treaty rule should be undertaken on a plurilateral basis, WTO members which might encounter difficulty in signing on to the new regime should nonetheless be allowed to bring their RTA conflicts to WTO dispute settlement by way of special agreement instead. This additional flexibility has in any case proven extremely useful in the context of disputes before the ICJ.91

91 For persuasive arguments in favor of the special agreement procedure in the context of the International Court of Justice, see e.g. Gary L. Scott & Craig L. Carr, ‘The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause’, 81 American Journal of International Law 57 (1987), generally.