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

Introduction

The recent decades have witnessed a significant and continuing rise of regional trade agreements (RTAs), which have become an indelible feature of the international economic landscape. It is not only reflected in the number of the RTAs in force and under negotiation, but also their content has also evolved overtime. To date, their regulatory coverage goes beyond the classic subjects of tariff reduction and standard harmonization and further encloses the so-called "WTO-extra" issues such as competition and investment.

Meanwhile, the interaction between RTAs and the multilateral trading system remains unsettled. It is nevertheless an issue of significant importance under nowadays’ multilayered global framework in economic governance. Inter-regime interplay can either facilitate the achievement of policy targets at each level, as well as the realization of collective advancement of economic integration and cooperation; or on the contrary, deteriorate the “formally” fragmented landscape with the risk of raising substantive conflicts and normative difficulties in the field of international economic law, or even the international legal system as a whole.¹

Against this background, this article deals with the role and influence the RTAs have in the WTO system and its dispute settlement mechanism (DSM). Up to date, the WTO – RTA debates have revolved mainly around three core questions. The first one concerns preliminary issues in the adjudication process, e.g. jurisdiction of WTO panels and their exercise of it. Typical

enquiries include under what circumstances and to what extent a WTO panel should compromise its jurisdiction and defer to a forum exclusion clause embodied in a RTA; and whether a WTO panel should dismiss a dispute for the reason that it has already been litigated at and decided by another RTA forum. The second question refers to the role of RTAs in the interpretative exercise of the WTO adjudicators. As the state party to a dispute may be committed to obligations under both the WTO and the RTA, question thus arises whether the latter bears any interpretative value vis-a-vis WTO norms, particularly in the light of the systemic interpretation principle\(^2\) enshrined in Article 31 (3) of the Vienna Convention on the Law of the Treaties (VCLT). Last but not least, in the case of conflict of norms, should the WTO or the RTA be prioritized? Moreover, it is also questioned whether states are permitted to modify their WTO obligations through the provisions of an RTA concluded among themselves.

This article is thus arranged as following. Part I looks into the standing of RTAs at the WTO from the perspective how RTAs are normatively distinct from other sources of public international law. The “point of departure” of our discussion is the impact RTAs have had in WTO jurisprudence particularly as regards the way in which WTO adjudicators have decided upon their involvement in a dispute, as compared to other sources of international law. Parts II – IV provide review and analysis of the WTO case law where the RTA and RTA-related matters are at the centre of the dispute and respectively address the three questions mentioned above. Part V concludes with remarks.

I. RTAs at the WTO

At the WTO, RTAs by definition belong to the “big family” of public international law and therefore, their standing in the WTO system is embedded in the broader topic of the interplay

\(^2\) Koskenniemi Matti, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the study group of the international law commission", (2014); C. McLachlan, "The Principle of Systemic Integration and Article 31(3) (c) of the Vienna Convention" (2005) 54 International and Comparative Law Quarterly 279.
between WTO and other international laws.\(^3\) However, from the WTO perspective, RTAs distinguish from other sources of international law in at least two accounts.\(^4\)

First of all, several WTO agreements explicitly establish the RTAs as exceptions to the obligations thereunder. The WTO, as an incomplete contract, offers a number of “exits” for its members.\(^5\) The most known example is the general and security exceptions.\(^6\) In addition, WTO law also provides exemptions for regional economic integration under Article XXIV GATT, the Enabling Clause of the GATT and Article V GATS, allowing WTO Members to adopt measures that would otherwise be WTO-inconsistent when they are in the pursuit of economic integration among a group of WTO Members.\(^7\) While in general WTO law recognizes the advantage of economic integration and trade liberalization at regional level, a balance must be struck between the interests of countries involved in regional integration and those that are excluded. On the one hand, regional trade exceptions set up the normative links that bridge the RTAs directly into the WTO system. On the other hand, as shown in the case law discussed later, such normative incorporation determines and confines the manner and extent RTAs influence and interact with the multilateral system, distinguishing the regional agreements from public international law in general.

Insofar as RTAs are concerned, the original intent of the GATT drafters was that the nature of the multilateral review would come close to that of a merger authority: no customs union or free trade agreements would be consummated absent of multilateral clearance.\(^8\) The notion of “institutional balance” prevailed the understanding of RTAs during the GATT era.\(^9\)

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\(^4\) It is not to argue that RTAs constitute a special source of public international law; rather, the point being made here is as a source of international law, RTAs are treated differently, or have gained different status, under the WTO system, as compared to other sources of international law.


\(^6\) Articles XX and XXI GATT and Articles XIV GATS


was widely held that review of RTAs was essentially a policy exercise or that the criteria under the exception clauses were too imprecise to be applied by the adjudicators and that their implementation was best left to negotiation between Contracting Parties.\textsuperscript{10} \par

That is to say, the assessment of RTAs and their consistency with the law and policy of the multilateral trading system was a function arguably confided to a committee of delegates.\textsuperscript{11} However, this scenario was changed in 1999 by the Appellate Body, who overturned the view of institutional balance from the prior GATT practice and found that judicial competence extended to reviewing the overall consistency of the RTAs with the conditions under the exception clauses.\textsuperscript{12}

The second factor that distinguishes RTAs from other international law is the normative similarities they share with the WTO regime in terms of both specific legal norms and general regulatory aims. This apparent trend of policy convergence and repetition is due to the ultimate objectives in economic integration and trade expansion pursued at both multilateral and regional level. There is thus substantive policy resemblance in areas such as tariff reduction, non-discrimination and restriction on obstacles to trade. Furthermore, they also share a number of public interest objectives that do not necessarily go hand-in-hand with trade liberalization ideal, e.g. environment protection, labour standards and public morals, striving to reach the balance between deeper economic integration and proportionate space for local regulation.

One corollary of such regime resemblance is that the same domestic measure that violates, for example, the non-discrimination principle can be contested at both the RTA and the WTO. As most RTAs have built up their own DSMs, the combination of, on the one hand, overlapped jurisdiction over the same or at least inextricably linked disputes and on the other hand, assimilated normative thresholds for judicial assessment, inserts a new dimension to the RTA – WTO debate, that is, the interaction between regional and multilateral trade adjudicators. In practice, RTA parties that are also members of the WTO often have different views regarding the most appropriate or the best forum for dispute resolution. Claims in relation to the jurisdiction


and the admissibility are often debated; and the WTO panels and the Appellate Body are facing substantial challenges arising from such preliminary matters.

II. Preliminary issues of dispute settlement at RTAs and the WTO

2.1 Overlapped and conflicting jurisdiction

Overlap or conflict of jurisdictions in dispute settlement can be defined as situations where the same dispute or related aspects of the same dispute could be brought to two distinct fora for resolution. At the WTO, the jurisdiction of the panel is stipulated in Article 1.1 and Article 7 of the DSU, which establish the procedural and substantive guarantee of the panel’s authority to make substantive findings of WTO compliance or violation.\(^\text{13}\)

Insofar as overlapped and conflicting jurisdiction is concerned, Article 23 DSU mandates exclusive jurisdiction in favor of the DSU. As the Appellate Body observed in US/Canada — Continued Suspension, Article 23.1 lays down the fundamental obligation of WTO Members to have recourse to the rules and procedures of the DSU when seeking redress of a violation of the covered agreements and establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU.\(^\text{14}\) On the one hand, Article 23 DSU prevents other jurisdictions from adjudicating disputes over the WTO covered agreements. On the other hand, however, it cannot prohibit RTA tribunals from

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exercising jurisdiction over the claims arising from their treaty provisions that run parallel to, or overlap with, the WTO provisions.\textsuperscript{15}

Jurisdiction discussion between the RTA and the WTO was first raised in Argentina – Poultry Anti-dumping Duties, where Brazil initiated the proceeding against the definitive anti-dumping duties imposed by Argentina on imports of poultry from Brazil. Before initiating the WTO dispute, Brazil had already challenged this measure at the ad hoc tribunal of the Southern Common Market (MERCOSUR)\textsuperscript{16} but lost the case. In other words, after the unsuccessful challenge at MERCOSUR, Brazil initiated the second attempt at the WTO DSM.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) does not enclose any provision on issues such as repeated litigation and forum shopping. Also, at the time of the MERCOSUR proceedings, the relevant MERCOSUR agreement applicable then was Protocol of Brasilia, which imposed no restrictions on Brazil’s right to bring subsequent WTO challenge in respect of the same measure. It is only its successor, namely Protocol of Olivos, that provides the “fork-in-the-road” clause, according to which once a party decides to bring a case under either the MERCOSUR or the WTO, that party may not bring a subsequent case on the same subject-matter in the other forum. In other words, in Argentina – Poultry Anti-dumping Duties there was no applicable rule at both WTO and MERCOSUR in relation to jurisdiction conflict. It is maybe for this reason that Argentina did not invoke the forum selection provision embodied in Protocol of Olivos but rather brought its claim under the principle of good faith. According to Argentina, Brazil was “estopped” by the principle of good faith from initiating the case at the WTO due to the prior MERCOSUR proceedings on the same measure.

The Panel agreed with Argentina that there are several essential elements of estoppel that must be fulfilled. However, the Panel found that it was not the case under this dispute. In particular, the Panel did not “consider that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not


\textsuperscript{16} Award of the MERCOSUR arbitral tribunal on the dispute between the Brazil (claimant) and Argentina (defendant), “Application of Anti-dumping against the Export of Whole Poultry from Brazil”, Resolution NO. 574/2000.
subsequently resort to WTO dispute settlement proceedings”. As regards the “fork-in-the-road” clause in the *Protocol of Olivos*, the Panel correctly considered it irrelevant since it was not yet in force and thus cannot apply in respect of disputes already decided in accordance with its predecessor.

Another issue that is worth noting in *Argentina – Poultry Anti-dumping Duties* is the different conclusions on the legality of the same measure reached at different fora: at the MERCOSUR, the tribunal upheld the disputed measure as no violation was found, while the WTO Panel blamed Argentina for violating a number of provisions of the WTO Anti-Dumping Agreement. Admittedly, it is mainly because of the different rules applied at each forum. Detailed analysis on Argentina’s obligations under the two regimes goes beyond the scope of this article but the fact that the same measure might end up with varying decisions on its lawfulness renders the choice of forum a critical element of the litigation strategy. In the case of forum exclusion provision, the claiming party has to carry out careful assessment before initiating the proceeding, particularly as regards the chance of success in the light of rules applied at each forum. In absence of such provision, the real problem is the defendant might have to deal with different or even opposite rulings from different adjudicators. This undesirable outcome not only raises difficulties for the domestic enforcement process, it might also enhance the so-called fragmentation problem of international law system, as well as issues associated to it, e.g. waste of resources, unnecessary procedures and contradictory development of international law.

2.2 The issue of admissibility I: exercise of the WTO jurisdiction

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Three years later, another jurisdiction-related conflict between the WTO and the RTA emerged in *Mexico – Taxes on Soft Drinks*. In this dispute between Mexico and the U.S., the RTA involved was the North American Free Trade Agreement (NAFTA). Mexico did not question the fact that the WTO Panel has jurisdiction to hear the U.S.’s claims but instead took issue with the jurisdiction on the basis that these “claims are linked to a broader dispute between the two countries related to trade in sweeteners under a regional treaty, the NAFTA”. In Mexico's opinion, under those circumstances, it would not be appropriate for the Panel to issue findings on the merits of the U.S.’s claims until a parallel NAFTA proceeding has been completed; and only such NAFTA panel would be in a position to "address the dispute as a whole". In other words, rather than questioning the existence and scope of the Panel’s jurisdiction, Mexico’s objection actually focused on the exercise of it. It was claimed that although the Panel had the authority to rule on the merits of the claims in this dispute, it also had the “implied power” to abstain from ruling on them and should have exercised this power under the circumstance of this dispute.

*Mexico – Taxes on Soft Drinks* raised a different issue from *Argentina – Poultry Anti-dumping Duties*, demonstrating the distinction between admissibility and jurisdiction that are both part of the universe of preliminary questions. Such questions, while leaving the merits of the case untouched, have the potential to prevent or postpone a judgement on the merit. The dichotomy between jurisdiction and admissibility is embedded not only in the separation between the authority of the tribunal and the more general procedural relationship between parties; but also in the distinction between the scope of a tribunal’s authority and the conditions governing the exercise of the specific action or process before the tribunal. To a certain extent, the issue of admissibility concerns the exercise of jurisdiction, as demonstrated in *Mexico – Taxes on Soft Drinks*, where the preliminary contention of Mexico was the Panel, due to the specific facts of the dispute, should decline to exercise its jurisdiction. While the panel’s jurisdiction is

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determined by Articles 1.1 and 7 of the DSU, the exercise of it might involve consideration of other elements that go beyond the WTO acquis. For example, assuming the MERCOSUR “fork-in-the-road” clause had already entered into force prior to the original arbitral proceedings, the Panel in Argentina – Poultry Anti-dumping Duties thus should have taken into account this MERCOSUR clause during its deliberation on the admissibility.

In Mexico – Taxes on Soft Drinks, the Appellate Body, without explicitly referring to the term “admissibility”, made several observations in relation to the exercise of panel’s jurisdiction. Using the words of the Appellate Body, WTO panels have certain powers that are inherent in their adjudicative function, the so-called “inherent adjudicative powers”.\(^{27}\) The Appellate Body shed light on four specific issues in this regard. First, it is confirmed, on the basis of “widely accepted rule” among international tribunals, that “panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction”.\(^{28}\) Second, the Appellate Body referred to its previous rulings and confirmed that the panel is endowed with “a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in particular case and that are not explicitly regulated”.\(^{29}\) For example, panels may exercise judicial economy, that is, refraining from ruling on certain claims, when such rulings are not necessary “to resolve the matter at issue in the dispute”.\(^{30}\) Furthermore, as the third related matter, the Appellate Body nevertheless cautioned that, from the existence of these inherent adjudicative powers, the panel would seem not to be in a position to choose freely whether or not to exercise its jurisdiction.\(^{31}\) A decision by a panel to decline validly established jurisdiction would seem to "diminish" the right of a complaining Member to seek the redress of a violation of obligations" within the meaning of Article 23 DSU, and the right to bring a dispute pursuant to Article 3.3 of the DSU.\(^{32}\) Last but not least, the Appellate Body acknowledged that there may be the circumstances in which legal impediments could exist that would preclude a

\(^{27}\) Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, paras. 45-46.

\(^{28}\) Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, paras. 45.

\(^{29}\) Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, paras. 45.

\(^{30}\) Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, paras. 45.

\(^{31}\) Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, paras. 53.

\(^{32}\) As the Panel observed in US – FSC, “a Member has the right to resort to WTO dispute settlement at any time...this fundamental right to resort to dispute settlement is a core element of the WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right...; rather there should be a clear and unambiguous basis in the relevant legal instrument for concluding that such a restriction exists”. Panel Report, US – FSC, WT/DS108/R, para, 7.17; Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, para. 53.
panel from exercising its jurisdiction. Unfortunately, the Appellate Body did not consider it necessary to offer further elaboration on the term “legal impediment” in the light of the facts of the dispute and the claims brought therein.

Argentina – Poultry Anti-dumping Duties and Mexico – Taxes on Soft Drinks, to a certain extent, explain and envisage the approach of the WTO adjudicators when dealing with preliminary claims stemming from the overlapped or conflicting jurisdiction of a RTA. The inherent adjudicative powers as confirmed by the Appellate Body means that the panel has the authority to decide preliminary questions and the alleged impact a RTA has upon the panel’s jurisdiction falls squarely into this enquiry. Where the RTA-related allegation arises, the panel would have to decide, before touching upon the merits of the dispute, the relevant issues in the light of legal and factual conditions specifically linked to the pending dispute.

As mentioned above, objections to admissibility are governed by principles and rules binding on the disputing parties but not necessarily incorporated in the clause granting the tribunal’s jurisdiction. In the meanwhile, the jurisdiction of the panel as stipulated in Articles 1.1 and 7 DSU is mainly left untouched insofar as compliance with WTO law is concerned: Article 23.1 DSU provides that a complaining member is obliged to bring any dispute arising under the WTO agreements to the WTO DSM. It thus ensures the exclusivity of the WTO vis-a-vis other international and regional fora in the sense that WTO compliance and/or violation can only be decided at Geneva. Therefore, while the “fork-in-the-road” clause of a RTA cannot take away or affect the existence of panel’s jurisdiction over disputes under the WTO law, such a clause might well affect the exercise of the panel’s jurisdiction. As shown in Mexico – Taxes on Soft Drinks, there remains the chance that “legal impediments” might arise and preclude a panel from ruling on the merits of the claims. In the case where the party made the choice of RTA mechanism under the “fork-in-the-road” clause, the disputed measure would then be inspected in the light of the RTA rules and the WTO law becomes irrelevant. What remains unclear, however, is under

33 Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, para. 54.
34 In Mexico – Taxes on Soft Drinks, Mexico does not take issue with the Panel’s finding that “neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA and the dispute before us.” Mexico also stated that it could not identify a legal basis that would allow it to raise the NAFTA market access claims in a WTO dispute settlement proceeding. It is furthermore undisputed that no NAFTA panel as yet has decided the “broad dispute” to which Mexico has alluded. Finally, Mexico has expressly stated that the so-called “exclusion clause” of Article 2005.6 of the NAFTA has not been exercised. Appellate Body Report, Mexico – Taxes on Soft Drinks, WT/DS308/AB, para. 54.
what circumstances legal impediments could exist and, when the existence of impediment is confirmed, to what extent it can affect the exercise of the panel’s jurisdiction. Arguably, it is seemingly safe to assume that such impediments would be established in *Argentina – Poultry Anti-dumping Duties* should the MERCOSUR “fork-in-the-road” clause be in force during the original arbitral proceedings.

Another occasion where legal impediment might prevent the exercise of panel’s jurisdiction is, by way of mutually accepted agreement, the disputing Member explicitly forgoes its right to initiate DSU proceedings. The agreement not to initiate a WTO dispute is often referred to as the “relinquishment of rights” to recourse to dispute settlement proceedings. As shown below, this issue was raised and analyzed in detail in *Peru – Agricultural Products*; and legal impediment of this type is strictly preconditioned by its textual explicitness and scope specificity. It is also suggested here that one such impediment might be when the exercise of jurisdiction by a WTO panel or the Appellate Body would violate or contribute to a violation of international law.\(^35\) This might occur, for example, if a panel or the Appellate Body, ignoring the indispensable third parties rule, made a legal determination that infringed the rights of states that had not consented to their jurisdiction.\(^36\) In any event, a decision by a panel to decline validly established jurisdiction should be a highly wary choice as it risks diminishing certain DSU rights of the complaining member.\(^37\) Such margin of discretion in the hands of the panel has to be exercised with great caution.

While being well discussed in international commercial law, the question of overlapped or conflicting jurisdiction in public international law remains unsolved in the sense that no relevant


\(^{37}\) As the Panel observed in *US – FSC*, “a Member has the right to resort to WTO dispute settlement at any time...this fundamental right to resort to dispute settlement is a core element of the WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right...; rather there should be a clear and unambiguous basis in the relevant legal instrument for concluding that such a restriction exists”. Panel Report, *US – FSC*, WT/DS108/R, para. 7.17; Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB, para. 53.
rules have been agreed upon.\textsuperscript{38} As shown in Argentina – Poultry Anti-dumping Duties, unsettled preliminary issues of dispute settlement might lead to the practice of repeated litigation with the possible ending of different adjudicative decisions over the legality of the same measure. Potential solution includes not only explicit treaty arrangement on forum selection; it is also plausible for the adjudicators to develop a clear-cut methodology on the relevant matters. Unfortunately, the WTO jurisprudence so far is not yet capable of offering elaborate guidelines in this regard.

2.3 The issue of admissibility II: RTA as mutually agreed solution and/or waiver of DSU right

In Peru – Agricultural Products, Peru imposed additional duties on imports of a number of agricultural products through its tariff regime, which is nevertheless specifically mentioned and recognized as an option legitimately available to Peru in the free trade agreement (FTA) concluded but not yet in force between Peru and Guatemala. However, for various reasons, Guatemala later on decided to bring Peru’s tariff regime to the WTO, challenging its compliance with the WTO Agreement on Agriculture, various provisions of the GATT 1994 and the Customs Valuation Agreement. Peru raised the counter-claim that Guatemala, by concluding the FTA, waived its right to challenge the measure at issue through the WTO DSM, and thus acted contrary to its good faith obligations under Articles 3.7 and 3.10 DSU when it initiated the present proceedings.\textsuperscript{39}

Peru’s “good faith” counter-claims essentially raised two questions: first, whether the FTA provisions can be considered a “mutually agreed solution” within the meaning of Article 3.7 DSU; and if so, whether a “mutually agreed solution” would lead to the “relinquishment of a

\textsuperscript{38} The issue of forum-shopping is well discussed in international commercial law, where principles, criteria and practices have developed (such as 	extit{forum non conveniens} or 	extit{lis pendens}) to deal with those issues so that one such adjudicating body would possibly decline or suspend jurisdiction in favour of another, more appropriate or simply preferred. Marceau Gabrielle Zoe. "Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO agreement and MEAs and other treaties", \textit{Journal of World Trade}, (2001) 35, 1081-1131, p.1108.

\textsuperscript{39} Appellate Body Report, Peru – Agricultural Products, WT/DS457/AB, para. 5.5.
member’s DSU right” to initiate dispute settlement proceedings. In fact, a similar issue has already been raised in *EC-Bananas III (21.5 II - Ecuador)* under Article 21.5 DSU compliance procedure. As for the issue whether a mutually agreed solution pursuant to Article 3.7 DSU may encompass an agreement to forego the right to initiate compliance proceedings, the Appellate Body was of the view that the mere agreement to a "solution" does not necessarily imply that parties waive their right to have recourse to the dispute settlement system and thus required “a clear indication in the agreement between the parties of a relinquishment of the right to have recourse to Article 21.5”.  

In *Peru – Agricultural Products*, Peru might have made separate arguments, claiming the FTA qualifies not only as mutually agreed solution under Article 3.7 DSU but also the relinquishment of a member’s right to initiate DSU proceedings. However, Peru’s argument instead mainly focuses on the former, taking the latter as the corollary associated to it: the achievement of mutually agreed solution suggests the parties have agreed to waive their rights under the DSU to bring the measure to the WTO DSM for resolution.

Under the DSU, “mutually agreed solution” is explicitly preferred as the ultimate resolution of a dispute compared to other alternatives, i.e. withdrawal of the contested measure, provision of compensation and obligation suspension. For the Appellate Body, “mutually agreed solution” must be “consistent with the covered agreements”, as required by Article 3.7 DSU, and “should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU”. It is apparently not the case for the FTA between Peru and Guatemala as the Appellate Body had already found Peru’s tariff regime inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, leaving aside the fact that Peru and Guatemala negotiated the FTA before the initiation of the present dispute.

Separate from “mutually agreed solution”, relinquishment of rights refers to the agreement of the Member to forego its right to initiate proceedings under the DSU. The Appellate Body took the position that "the relinquishment of rights granted by the DSU cannot be lightly assumed" and

40 According to the Appellate Body, “while Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes. Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB, footnote 106.


"the language...must clearly reveal that the parties intended to relinquish their rights", e.g. clearly stating that it would not take legal action with respect to a certain measure.\footnote{Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.25.} However, there is no rigid requirement as for the format of the relinquishment. While confirming the option of enclosing a waiver in a mutually agreed solution, the Appellate Body did not exclude the possibility of articulating the relinquishment in other forms.\footnote{Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.25.} What matters remains the clearness of the text that expresses the waiver of the right and that identifies the specific dispute upon which the waiver is made.\footnote{Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, footnote 106.}

In practical terms, the real question underlying the admissibility debate is whether, if so how, the WTO members can deal with potentially WTO-inconsistent measures by means of RTAs. One possible practice is in the RTA, some sort of compensation is offered for the member whose benefits are impaired; and in return, this member agreed not to challenge the potentially WTO-inconsistent measure. In DSU terms, the compensation provided for in the RTA might be addressed as the “mutually agreed solution” and the agreement not to initiate a WTO dispute as the “relinquishment of rights” to recourse to dispute settlement proceedings.

The main difficulty of setting the RTA provision as a “mutually agreed solution” is the timing and sequence of events. As the Appellate Body pointed out in \textit{Peru – Agricultural Products}, the fact that Peru and Guatemala negotiated the FTA before the initiation of the present dispute renders it difficult to be considered under Article 3.7 DSU.\footnote{Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.26.} Even if the resolution to a specific dispute is incorporated in the RTA negotiation, there remain further conditions to be met, including the WTO consistency and procedural compliance with the DSU.

It thus seems a more feasible option for the members to enclose a waiver of right in the RTA. The Appellate Body did not exclude the possibility of articulating relinquishment of right in the RTA. What matters is the textual explicitness and scope specificity. The waived right to seek redress of a WTO violation has to be clearly stipulated and addressed to the settlement of a specific dispute. However, waiving the right to WTO proceedings does not remove the unlawfulness of the measure; as shown later, resolution that can “fix” the WTO violation is
reserved exclusively under the exception clauses of the WTO agreements, e.g. Articles XX and XXIV GATT, the Enabling Clause of the GATT and Article V GATS.

III. The role of RTAs in interpreting WTO agreements

For the purpose of interpreting provisions of the WTO agreements, the Appellate Body has developed its approach essentially revolving around Articles 31 and 32 VCLT. Arguably, it is believed to be “an almost obsessive sticking to what the VCLT provides for” in that any element being involved in its interpretative exercise must meet the requirement and criteria stipulated therein.

3.1 The interpretation vs. application distinction

In Argentina – Poultry Anti-dumping Duties, Argentina argued that the ruling of the MERCOSUR tribunal that found no violation of Argentina’s measure under dispute is part of the normative framework to be applied by the Panel as a result of Article 31.3(c) of the VCLT. It is argued that the ruling constitutes the “relevant rules of international law applicable in the relations between the parties”. However, the Panel did not perceive this argument as an issue related to interpretation. The Panel observed that Argentina’s claim, rather than focusing on


48 According to the Appellate Body, “subsequent agreement between the parties” requires that the agreements regarding the interpretation of the treaty or the application of its provisions have to be "agreements bearing specifically upon the interpretation of a treaty". Appellate Body Reports, EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US), para. 390. In US – Clove Cigarettes, the Appellate Body found that it was not possible to discern a function of paragraph 5.2 of the 2001 Doha Ministerial Decision "other than to interpret the term 'reasonable interval' in the Agreement on Technical Barriers to Trade (TBT Agreement), and it was therefore considered to "bear specifically upon the interpretation" of that term. Appellate Body Report, US – Clove Cigarettes, para. 266. In US – Tuna II (Mexico), the Appellate Body found that a TBT Committee Decision could be considered as a "subsequent agreement" within the meaning of Article 31(3) (a) of the Vienna Convention. The Appellate Body considered that the extent to which the Decision would inform the interpretation and application of a term or provision of the TBT Agreement would depend on the degree to which it "bears specifically" on the interpretation and application of a term or provision "in a specific case". Appellate Body Report, US – Tuna II (Mexico), para. 372. For rules of international law to be "relevant" for purposes of interpretation, they must concern the same subject matter as the treaty terms being interpreted. Appellate Body Report, Peru – Agricultural Products, WT/DS457/AB, para.5.101; Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 308; Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 846.

**interpreting** specific WTO provisions, actually equaled to requesting the Panel to *apply* the relevant WTO provisions, in a particular way. The Panel therefore did not discuss further on the interpretation but rejected the request to apply the MERCOSUR ruling on the following ground: “there is no basis in Article 3.2 DSU, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We 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 non-WTO dispute settlement bodies”.\(^{50}\) The Panel thus made a preliminary yet interesting distinction between the interpretation and application of WTO law under the circumstances where the RTA is involved.

A similar issue once again emerged in *Peru – Agricultural Products*. Among a number of defences, Peru contended that its WTO obligations mentioned should be interpreted in the light of the provisions of the FTA as meaning permitting the tariff regime at dispute exclusively in the relations between Peru and Guatemala.\(^{51}\) According to Peru, the FTA should be considered as “subsequent agreement between the parties” and “relevant rules of international law” within in the meaning of Article 31 (3) VCLT. Along a similar line as the Panel in *Argentina – Poultry Anti-dumping Duties*, the Appellate Body considered the arguments of Peru are beyond the scope of an interpretative exercise as envisaged in Article 3.2 DSU and Article 31 VCLT. The Appellate Body was of the view that Peru was in essence arguing that, by virtue of the FTA, Peru and Guatemala modified between themselves their obligations under the relevant WTO agreements.\(^{52}\)

What has commonly emerged in *Argentina – Poultry Anti-dumping Duties* and *Peru – Agricultural Products* is the blurred line, and thus the need for distinction, between interpretation and application as regards the role of RTAs in settling WTO disputes. In theory, this distinction is evident and clear-cut: while interpretation highlights searching for the meaning of the provision under dispute, application points to the setting of the normative threshold against which legal compliance and violation should be assessed.\(^{53}\)

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\(^{51}\) Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB, paras. 5.93 and 5.95.

\(^{52}\) Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB, para. 5.96.

\(^{53}\) Similar distinction between interpretation and application was also made with regard to the function of other sources of international law in settling WTO disputes, e.g. the International Law Commission Articles on State
In the RTA – WTO context, interpretation amounts to looking for the meaning of the disputed WTO provision through the lens of the RTA. Interpretative exercise as such is subject to the clarity of the text being interpreted. There must be room, flexibility or even ambiguity in the treaty text for interpretation; and a permissible interpretative exercise would not lead to, in any event, an outcome that appears to subvert the obvious meaning of the provisions as reflected in the text. By contrast, legal application suggests the use of the RTA in a WTO dispute as part of the normative gauge, measuring the lawfulness of the domestic measure under scrutiny. To date, application of the RTA in WTO disputes has mainly taken the form of inter se defense, serving as exception to the member’s commitment. Thus, the purpose of RTA application is to assist the assessment of the measure’s WTO compliance, rather than to inspect whether the measure is RTA-consistent. Application as such does not lead to extended jurisdiction of the panel to assess the RTA-compliance of a domestic measure, which remains residing on disputes arising out of the WTO agreements. As the Appellate Body cautioned in *Mexico – Taxes on Soft Drinks*, the function of panels and the Appellate Body as intended by the DSU explicitly excluded them from becoming adjudicators of non-WTO disputes.  

Against the distinction between interpretation and application, the following discussion will look into the role of RTAs in interpreting provisions of WTO agreements, particularly in comparison with the involvement of public international law in the same context.

### 3.2 RTAs in the interpretative “tool box” of WTO agreements

The recent Appellate Body Report in *Peru – Agricultural Products* seems have closed the door to RTAs in interpreting WTO agreements. According to the Appellate Body,

> “with multilateral treaties such as the WTO covered agreements, the ‘general rule of interpretation’ in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the *common intention* of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the

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treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted.” (emphasis added) 55

The Appellate Body’s emphasis on “common intention” renders in deep doubt if there can be any involvement of the RTA in its interpretative exercise; and this strict approach stands in stark contrast with its openness towards public international law that has constitute a significant component in the interpretative “tool box”. 56 In its very first report in US – Gasoline, the Appellate Body expressed a “refreshing but cautious openness” towards public international law. 57 The Appellate Body confirmed the “general rule of interpretation” set out in Article 31 VCLT has attained its status as the "customary rules of interpretation of public international law" within the meaning of Article 3(2) of the DSU, which directs the Appellate Body in seeking to clarify the provisions of WTO agreements. 58 The Appellate Body went even further by ruling that “that direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law”. 59 The denial of “clinical isolation” has been widely recognized as the most important statement as regards the role of public international law in the WTO system, first and foremost, for the purpose of interpreting WTO agreements. Ever since then, a number of principle and concepts of general international law has been endorsed in the WTO case law, inter alia, the principle of good faith 60, proportionality in state responsibility 61 and principle of estoppel 62.

55 Appellate Body Report, Peru – Agricultural Products, WT/DS457/AB, para. 5.95.
Later on, in *US – Shrimp*, the Appellate Body offered concrete instances in its interpretative exercise where it used specific international instruments outside the WTO *acquis*. In search for the meaning of “exhaustible natural resources” under Article XX (g) GATT, the Appellate Body was not convinced that this term is limited to only “mineral” or “non-living” natural resources but instead considered it embrace both living and non-living resources.\(^{63}\) In its reasoning, the Appellate Body made reference to a number of “modern international conventions and declarations” that have recognized the same concept, i.e. the 1982 United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.\(^{64}\) It is worth noting that not all the instruments mentioned are ratified by the entire WTO membership, not even by the defendant to the dispute.\(^{65}\) One plausible explanation for their endorsement might be the scale of their membership and the multilateral nature of the agreements. For the Appellate Body, the cited international instruments demonstrate “the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources”.\(^{66}\)

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

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the EC concessions for frozen poultry meat and thus forms “a supplementary means of interpretation of Schedule LXXX” pursuant to Article 32 VCLT.67

In *EC and certain member States – Large Civil Aircraft*, the EC argued that the bilateral agreement between the EC and the U.S. ought to be treated as a “relevant rule of international law” under Article 31(3) (c) VCLT in interpreting relevant rules of the SCM Agreement. In that case, the Appellate Body, while suggesting “one must exercise caution in drawing from an international agreement to which not all WTO Members are party”, nevertheless took into account the "principle of systemic integration" that seeks to ensure that "international obligations are interpreted by reference to their normative environment" in a manner that gives "coherence and meaningfulness" to the process of legal interpretation. As a conclusion, the Appellate Body made the following observation:

> “in a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, *taking due account of an individual WTO Member's international obligations* and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.” (emphasis added)68

The above review of case law has shown the adjudicative openness towards various sources of public international law, i.e. principle and concepts of general international law, multilateral and bilateral agreements and international conventions. It thus raises substantial queries over the strict approach towards RTAs. Admittedly, RTAs bear the inherent limit in reflecting the “common intentions” of all the WTO members due to their varying range of membership; but, as shown in *US – Shrimp*, reflection of the “common intentions” is not necessarily linked to rigid technical criteria, e.g. ratification by and across the entire WTO membership. The vital point seems to be the demonstration of the “acknowledgement by the international community”69 by the laws and instruments that are external to the WTO acquis. Thus, would the mega-regional, e.g. the Trans-Pacific Partnership or the Transatlantic Trade and Investment Partnership, or a

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67 Appellate Body Reports, EC — Poultry, WT/DS69/AB, para. 83.
68 Appellate Body Report, EC and certain member States – Large Civil Aircraft, WT/DS316/AB, para. 845.
provision that has been widely enclosed in the majority of contemporary RTAs, qualify the “acknowledgement by the international community” and then be able to reflect the “common intentions” of the WTO members?

As for agreements with smaller scale of membership, even those bilateral in nature, the Appellate Body explicitly accepted the Oilseeds Agreement as the supplementary means for interpretation in EC – Poultry and advocated “due account of an individual WTO Member's international obligations” in EC and certain member States – Large Civil Aircraft. RTA commitment undoubtedly falls into “an individual WTO Member's international obligations” but it remains unknown how such commitment would be balanced against “a consistent and harmonious approach to the interpretation of WTO law among all WTO Members”. It is also unclear whether RTAs would be able to serve as supplementary means of interpretation within the meaning of Article 32 VCLT.

One plausible explanation for the strict approach towards RTAs might be that the substantial normative similarity between RTAs and the WTO has left little room for interpretation but rendered their interaction mainly in the form of settling the conflicts of obligations. As mentioned earlier, RTAs and the WTO share the same regulatory goals in economic integration and trade expansion, with the RTAs, in most cases, setting out protocols aiming at deeper economic cooperation but among selected group of WTO members. As a result, on the same regulatory subject, RTA provisions might place upfront “conflict” with their counterpart WTO rules. For example, while the WTO accepts tariff as a legitimate border measure, most RTAs are built upon free circulation that prohibits any tariffs among the members. Normative clash as such renders any interpretative activity impossible and as shown below, can only be solved through the WTO provisions on exceptions.

**IV. Conflicts of obligation between RTAs and the WTO**

When obligation conflict arises between the RTA and the WTO agreement, the defending party usually seeks justification under the exception clauses embodied in the latter. To date, both the regional trade exceptions under GATT Article XXIV and the general exceptions under Article

70 Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, WT/DS316/AB, para. 845.
XX have been invoked. These two exception clauses have applied to different types of conflicts in the RTA – WTO context and thus involve varying set of thresholds for a successful defence.

4.1 RTA-related claims under Article XXIV GATT

At the WTO, one significant distinction between RTAs and other sources of international law is the explicit acknowledgement of the former as exceptions to the members’ obligations, e.g. Article XXIV GATT. These exceptions allow the adoption of measures that would otherwise be WTO-inconsistent, when they are in the pursuit of deeper economic integration among a selected group. 71

Turkey – Textiles is the first case law on regional trade exceptions under Article XXIV GATT. In that case, India challenged Turkey’s imposition of quantitative restrictions on imports of a broad range of textile and clothing products. Turkey claimed that these quantitative restrictions were adopted upon the formation of a customs union with the EC and thus justified as exceptions under Article XXIV 5(a). On appeal, the Appellate Body laid out the test for Article XXIV justification. In particular, in the case that involves the formation of a customs union, Article XXIV defence is available only when two conditions are fulfilled simultaneously:

“first, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8 (a) and 5 (a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.” 72

Recourse to Article XXIV GATT was also raised in Peru – Agricultural Products, where the Appellate Body suggested “the proper routes” to assess whether a RTA provision may depart from certain WTO rules but is nevertheless consistent with the covered agreements are the

72 Appellate Body Report, Turkey – Textiles, WT/DS29/AB, para. 58.
provisions on regional trade exceptions.\textsuperscript{73} In its reasoning, the Appellate Body addressed the obligation conflict as “modification between the RTA parties of their obligations under the relevant WTO provisions”.\textsuperscript{74} As for the rule applicable under this circumstance, the Appellate Body excluded the applicability of Article 41 VCLT on inter se treaty modification: “the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention”.\textsuperscript{75}

At this juncture, the Appellate Body seems have applied the \textit{lex specialis} rule, which deals with situations where two rules of international law that are both valid and applicable deal with the same subject-matter differently.\textsuperscript{76} However, it is unclear how a VCLT article on \textit{inter se modification} is considered as dealing with the same subject-matter as WTO provisions on \textit{amendments}, \textit{waivers} and \textit{exceptions}. One possibility is that the Appellate Body considers all the legal acts with the effect of changing or suspending WTO rights and obligations as one single subject matter. However, the mere fact that VCLT has dealt with treaty amendments and inter se modification in two separate articles\textsuperscript{77} suggests substantial distinction between the two: while the former takes effect across the entire membership, the latter concerns certain parties only. Also, waivers under Article IX WTO Agreement are part of the decision making authority entitled to the Ministerial Conference and the General Council but inter se modification is required to be based upon negotiation and agreement among the parties involved. Insofar as RTAs are concerned, it is argued that Article XXIV GATT, as well as Article V GATS and the Enabling

\textsuperscript{73} Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.113.
\textsuperscript{74} Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.96.
\textsuperscript{75} Appellate Body Report, \textit{Peru – Agricultural Products}, WT/DS457/AB, para. 5.112.
\textsuperscript{77} Articles 40 and 41 VCLT respectively deal with “amendment of multilateral treaties” and “agreement to modify multilateral treaties between certain of the parties only” under Part IV of “Amendment and Modification of Treaties”. 
Clause, is exception that addresses the relation between RTA parties and the rights of other WTO members, mainly the MFN treatment, rather than the inter se relation amongst parties themselves.78

Otherwise, the Appellate Body might have simply considered Article 41 as one of the VCLT provisions that serve as the general rules compared to the specific WTO provisions.79 Another similar example then refers to Article 40 on amendments of multilateral agreement vis-à-vis Article X WTO Agreement dealing with the same topic. It nevertheless remains unclear which VCLT article should be considered as the general counterpart provision of the specific rules under Article XXIV GATT. As mentioned earlier, exception clauses like Article XXIV GATT cannot equate to inter se modification of treaty obligations.

Even if lex specialis applies and the specific WTO rules prevail, it does not necessarily lead to the non-applicability or exclusion of the general standard such as Article 41 VCLT. The relationship between the general standard and the specific rule may be conceived in two ways. One is the case where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of it. This case involves the simultaneous application of both the specific rule and the general standard with the former being considered as an application of the latter in a given circumstance. 80 The example of Article 40 VCLT and Article X WTO Agreement demonstrates such a scenario.

The other lex specialis case refers to where the two legal provisions are in no express hierarchical relationship but provide incompatible direction on how to deal with the same set of facts. In such case, lex specialis appears as a conflict-solution technique and the specific rule serves as a modification, overruling or a setting aside of the general standard.81 Once again, this does not seem to be the case for Article 41 VCLT and Article XXIV GATT not only because the

79 The its report, the Appellate Body used the following sentence: “we note that the WTO agreements contain specific provisions....which prevail over the general provisions of the Vienna Convention, such as Article 41.”
two articles deal with different sets of facts but also due to the absence of normative conflict between them.

Leaving aside the conditions and consequences of *lex specialis*, an alternative reading of the Appellate Body’s statement is that no modification of WTO agreements is permitted from outside. In other words, the members cannot make any change of their commitments through non-WTO agreements and any effective change has to go through the WTO build-in procedures, i.e. amendment, waiver or exception clauses. Arguably, such a reading would, in one brushstroke, put the WTO treaty above all other treaties and equate an almost imperialistic proclamation of WTO supremacy in international law. In any event, the question left unanswered is to what extent and in what manner members are able to deviate from their WTO obligation through regional trade exceptions. However, what appears clear from *Turkey – Textiles* and *Peru – Agricultural Products* is that the safety shield under Article XXIV is rather marginal in scope. It might be argued that the exception nature of Article XXIV naturally leads to narrow and restrictive interpretation. As the Appellate Body put it, Article XXIV cannot be considered a broad defence for measures in RTAs, and such defence is available only when all the provided conditions are fulfilled simultaneously.

**4.2 RTA-related claims under Article XX GATT**

In addition to the regional trade exceptions, RTA-related claims were also raised under the general exceptions of Article XX GATT. Different from the Article XXIV claims where obligation conflict arises directly between the provisions of the RTA and the WTO agreement, defence under Article XX usually stems from conflict between the member’s WTO obligation, and the obligations associated to or as a result of the enforcement of a RTA. In other words, the WTO-inconsistent measure subject to Article XX is not “introduced upon the formation of” a RTA; rather they are introduced for the reason that is RTA-related.

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In *Mexico – Taxes on Soft Drinks*, Mexico sought for justification of the measures at issue under Article XX (d), which offers shield for measures “necessary to secure compliance with laws or regulations”. Mexico argued that the challenged measures were intended to secure compliance with the obligations of the U.S. under the NAFTA. Thus, the central issue here is whether Article XX (d) encompasses WTO-inconsistent measures applied in order to secure compliance with another WTO member’s RTA obligation.

The Appellate Body disagreed. It considered that "laws or regulations” within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order and do not include the international obligations of another WTO member. The Appellate Body also took into account of the fact that certain international rules may have direct effect within some Members’ domestic legal systems without requiring implementing legislation; and in such circumstances, these rules become part of the domestic law of that Member.

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

The Appellate Body’s refusal to look into the relevant NAFTA norms is subject to pointed critics. In *Mexico – Taxes on Soft Drinks*, the legal rule was Article XX (d) and the issue of the U.S. “compliance” with the NAFTA was a question simply subordinate to whether Mexico’s measures were required to secure compliance. It is questioned when does an assessment of a WTO claim that is within the jurisdiction of a WTO panel with reference to a non-WTO treaty cross the line from assessing a WTO claim in the context of applicable law beyond the WTO

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treaty to that of impermissible adjudication of “non-WTO dispute”. Indeed, the Appellate Body has carried out such “assessment of a WTO claim in the context of applicable law beyond the WTO treaty” at many occasions. In *EC — Bananas III*, both the Panel and the Appellate Body opted to examine the relevant parts of the Lomé Convention concluded between the EC and African, Caribbean, and Pacific countries in search for the accurate interpretation of the WTO provisions under dispute. Moreover, as for the treatment of domestic laws, the Appellate Body considered essential “an examination of the relevant aspects of Indian municipal law” in determining whether India has complied with its WTO obligations. The question then arises as to why the RTA was treated differently in *Mexico – Taxes on Soft Drinks*.

At this juncture, distinction needs to be made. In *EC — Bananas III*, the Appellate Body’s examination of the Lomé Convention was made on the basis of a reference to it stipulated in the Lomé waiver, which is part of the covered agreement. It is thus this reference that renders the Lomé Convention, to a certain extent, a GATT/WTO issue. In the words of the Panel and the Appellate Body, “we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.” In *India – Patents (US)*, the Appellate Body looked into the municipal law of India that served as evidence of facts and of state practice; and the judicial exercise of examining it is not to interpret the law concerned but rather to determine whether the municipal law under dispute is in compliance with WTO laws.

However, in *Mexico – Taxes on Soft Drinks*, there was no bridging element similar to the Lomé waiver in *EC — Bananas III*, setting up the normative link between the NAFTA and the WTO or making the NAFTA obligation a “GATT/WTO issue”; and examination of the NATFA provisions would be essentially a process of legal enquiry, as opposed to the factual or evidential analysis in *India – Patents (US)*. It not only involves the interpretation and application of the NAFTA rule, but also leads to a finding as regards the U.S.’s compliance with it; and even more, in the case of non-compliance, application of Article XX GATT would further lead to the risk of

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adding the claimed NAFTA commitments to a member’s obligations under the covered agreements. This is exactly the type of adjudicative outcome that is envisaged but prohibited under Article 3.2 DSU. In other words, a ruling otherwise in *Mexico – Taxes on Soft Drinks* would not only integrate the U.S.’s NAFTA commitments as part of its WTO obligations but also bear the consequence of converting the WTO adjudicators into the “enforcement wing” of another international agreement.

On the one hand, the Appellate Body made a plausible choice by not including NAFTA into its scrutiny under Article XX (d), although the specificity of the facts and the complexity of the potential aftermath might deserve more elaborated discussions in the report. On the other hand, the Appellate Body did not completely close the door to RTAs under Article XX (d). As mentioned above, the Appellate Body noted the fact that in some WTO Members, certain international rules may have direct effect within their domestic legal systems and should thus be taken as part of the domestic law of that Member. Therefore, a WTO violation might be justified, should the measure at dispute be necessary to secure compliance with a RTA that bears direct effect in the domestic legal system. However, as required in Article XX (d), the RTA rules concerned cannot be inconsistent with the GATT provisions.

Another RTA-related defence under Article XX was raised in *Brazil – Retreaded Tyres*, where the EC challenged the WTO-consistency of Brazil’s import regime in retreaded tyres. In that case, Brazil imposed an import ban on retreaded tyres but with an exemption for imports from MERCOSUR countries (MERCOSUR Exemption). The EC took issue with the MERCOSUR Exemption, contesting its resulting discriminatory treatment between MERCOSUR countries and other WTO members. In fact, the original import ban did not have the MERCOSUR Exemption. It was later introduced by Brazil as a result of a ruling issued by the MERCOSUR arbitral tribunal, which found Brazil’s restrictions on the importation of remoulded tyres in violation of its MERCOSUR obligation. Therefore, in *Brazil – Retreaded Tyres*, Brazil argued that because the MERCOSUR Exemption is based upon the decision of the MERCOSUR tribunal, it is thus justified under Article XX, particularly under Article XX (b) that offers immunity for domestic measures “necessary to protect human, animal or plant life or health”.

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

The Article XX exceptions are by far the most invoked defence in the WTO case law. The classic two-tier test established by the Appellate Body in US — Gasoline entails the provisional justification by reason of characterization of the measure under one of the particular exceptions — paragraphs (a) to (j) — listed under Article XX, and a further appraisal of the same measure under the introductory clauses, namely, the chapeau test. Generally speaking, the Appellate Body, while applying a rather deferential standard of review in the so-called “rationality review” under the provisional justification at the first tier, adopts the rather strict scrutiny in the subsequent chapeau test focusing on the special features of the disputed policies, particularly in respect to the way in which the regulatory scheme is applied or operationalized in practice. This adjudicative methodology is clearly reflected in Brazil – Retreaded Tyres, rendering the chapeau test the “classic hurdle” for Article XX defence.

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96 Appellate Body Report, Brazil – Retreaded Tyres, WT/DS332/AB, para. 228.
97 Appellate Body Report, Brazil – Retreaded Tyres, WT/DS332/AB, para. 228.
4.3 Summary

The WTO agreements do not provide any conflict clause in relation to the incompatible obligations stemming from the RTAs. When conflict of obligation arises, resolution under the WTO falls into the domain of Article XX and Article XXIV GATT. Distinction between these two exception clauses is self-explanatory: while the former is generic in nature, the latter is RTA-specific. In the RTA – WTO context, they also distinguish from each other by the type of violation involved:\textsuperscript{101} Article XXIV is the only resolution for the so-called “absolute” or “irreconcilable” WTO violation that cannot be avoided through the techniques of treaty interpretation, while Article XX demonstrates the situation where the “alleged” violation might be solved by interpreting the WTO provision, Article XX in particular, in a way that will allow the member to maintain its measures that would otherwise violate its WTO obligations.

As mentioned earlier, irreconcilable obligations between the RTA and the WTO are the most common point of dispute. A successful defence under Article XXIV will have the weighty effect of allowing the RTA provision to prevail over the irreconcilable WTO rule. However, the text of Article XXIV, as well as the interpretation offered by the Appellate Body, has significantly confined such effect. As shown in \textit{Turkey – Textiles} and \textit{Peru – Agricultural Products}, not only Article XXIV is not a broad defence for measures in RTAs:\textsuperscript{102} in specific terms, the criteria thereunder have revolved closely around the “formation” of the RTA and the impact the disputed measure has upon it.\textsuperscript{103} Therefore, the regional trade exceptions are only able to secure the lawfulness of a very limited group of RTA commitments that are WTO-inconsistent.

\textsuperscript{101} Technically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. Not every such divergence constitutes a conflict; however, incompatibility of contents is an essential condition of conflict. \textit{Encyclopedia of Public International Law}, North-Holland 1984, p. 468. See also Wilfred Jenks, “The Conflict of Law-Making Treaties”, \textit{The British Yearbook of International Law}, 1953, p. 425. For, in such a case, it is possible for a State which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with each other, failing any evidence to the contrary. Sec also E.W Vierdag, “The Time of the ‘Conclusion’ of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions”, \textit{The British Yearbook of International Law}, 1988, p. 100; Sir Robert Jennings and Sir Arthur Watts (eds), \textit{Oppenheim's International Law}, Vol. I, Parts 2 to 4, 1992, p. 1280; Sir Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice”, \textit{The British Yearbook of International Law}, 1957, at p. 237.


\textsuperscript{103} Appellate Body Report, \textit{Turkey – Textiles}, WT/DS29/AB, para. 58.
Therefore, in search for the resolution for RTA-related WTO violations, the “proper routes” remain in the exception clauses embodied in different WTO agreements, depending on the type of the violation involved. However, as shown in the case law analyzed above, while varying sets of thresholds apply, neither the regional trade exception nor the general exceptions would make the justification for the conflicting RTA rules an easy case in front of the WTO adjudicators.

V. Concluding remarks

The opening part of this paper pointed out two normative distinctions between public international law and RTAs from the perspective of WTO law, namely, the acknowledgement of the RTAs as legitimate exceptions to the WTO and the substantial policy resemblance between the two regimes. A review of the 20-year jurisprudence of the WTO dispute settlement further verifies the differentiated standing of RTAs as compared to general international law. While the denial of “clinical isolation” by the Appellate Body has been often cited and widely recognized as the systemic openness of the WTO towards public international law, there is arguably an implicit judicial policy of “clinical isolation” from regionalism.\(^\text{104}\) Viewing from the case law discussed in this paper, there is little faith left in the RTAs’ involvement in interpreting WTO provisions as they are not able to reflect the “common intention” of the WTO membership; none of the RTA-related defences have passed through the judicial scrutiny under the exceptional clauses of Article XX and Article XXIV GATT; last but not least, the robust position taken with respect to the preliminary issues on jurisdiction and admissibility also suggests the perceived primacy by the WTO adjudicators over other regional fora under the RTAs.

However, all of these do not change or even affect the continuing rise of RTAs in the international economic landscape. RTA participating states should be well aware of the multilateral approach at the WTO towards regionalism as interplay among multi-leveled regimes revolving around the shared ideal of economic integration is imminent and unavoidable. The empirical ramifications of this study extend to various phases of the RTA’s lifespan, from negotiation, drafting to enforcement and adjudication. It is thus hoped that the upsurge of RTAs,

while yielding progressive advancement in regulatory policy and economic cooperation, manages the deterioration, to the minimum possible, of systemic fragmentation and inter-regime conflicts.