

## Preferential Trade Agreements and the World Trade Organization: Developments to the Dispute Settlement Understanding

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### Abstract

On 21 March 2016, at the 9<sup>th</sup> Annual Update on World Trade Organization (WTO) Dispute Settlement, former Chairman of the Special Session of the Dispute Settlement Body (DSB), Ambassador Ronald Saborío Soto, spoke on the Dispute Settlement Understanding (DSU) negotiations in light of recent dispute settlement experience. He expressed that changes to the DSU ought to promote the future efficiency and effectiveness of the WTO as a dispute settlement system. The proliferation of Preferential Trade Agreements (PTAs) has been a recurrent curiosity for the WTO, with provisions often competing and overlapping. Earlier work studying these interactions emphasises uncertainty in the application of non-WTO law, including PTAs, to WTO disputes and highlights the WTO's implicit claim to supremacy. The purpose of this article is to critically analyse the state-of-play of negotiations on improvements and clarifications of the DSU in addressing PTAs. It examines whether current DSU proposals meet the DSB's intended objectives and suggests solutions where problematic uncertainties remain. The article concludes that PTAs have not been sufficiently regarded by negotiators and that more express measures are required in the DSU to clarify such uncertainties and harmonise with PTAs in order to preserve the WTO's future legitimacy.

### I Introduction

The interactions between the non-discriminatory multilateral trading system under the World Trade Organization (WTO) and the discriminatory non-multilateral trading system under Preferential Trade Agreements (PTAs) has been the subject of a great many studies.<sup>1</sup> The 'spaghetti bowl' continues to deepen (as at 1 July 2016, 460 PTAs have been signed, of which 267 are currently in force); and mega-regional trade agreements such as the Trans-Pacific Partnership (TPP), Regional Comprehensive Economic Partnership (RCEP), and Transatlantic Trade and Investment Partnership (TTIP) are developing, despite the protectionist zeal of the Presidency of Donald Trump.<sup>2</sup> Inevitably, the increasing availability of forum choice and ever

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<sup>1</sup> James Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the International Trade Requirement* (Asser Press, 2002); Jagdish Bhagwati "U.S. Trade Policy: The Infatuation with Free Trade Areas" in Jagdish Bhagwati and Anne Krueger (eds) *The Dangerous Drift to Preferential Trade Agreements* (American Enterprise Institute for Public Policy Research, Washington, 1995) 1; Richard Baldwin "Preferential Trading Arrangements" in Amrita Narlikar, Martin Daunton and Robert M Stern (eds) *The Oxford Handbook on the World Trade Organization* (Oxford University Press, New York, 2012) 632; Wolfgang Alschner "Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?" (2015) 17 J Int'l Econ L 271.

<sup>2</sup> World Trade Organization "Regional Trade Agreements" (1 July 2016) <[www.wto.org](http://www.wto.org)>.

overlapping obligations under the various PTAs will cause conflict.<sup>3</sup> Yet, there is still not a satisfactory answer to explain either what approach dispute settlement bodies should take to PTAs in the presence of overlapping dispute proceedings or precisely what the applicable law to such conflicts should be. Despite a great deal of focus on the possible legal principles to remedy such conflicts, there has been little discussion as to potential approaches in the context of the aims of the WTO. In light of the recent negotiations for changes to the Dispute Settlement Understanding (DSU), further discussion on procedural and substantive conflicts with PTAs will benefit from the insights and intentions expressed by the WTO Members.<sup>4</sup>

This article, thus, seeks to review the existing commentary in light of these negotiations so as to re-establish which approaches are suitable to the amended DSU. It seeks to address the outcomes envisaged by the negotiations and propose changes consistent with these outcomes. This article begins at Section II with a brief overview of the purposed outcomes of negotiations and the WTO's tolerance for PTAs. It takes the position that the WTO seeks more political freedom and that an isolationist stance will undermine its future legitimacy and efficacy. Section III analyses the issues arising out of the WTO's position and its adjudicatory bodies' treatment of PTAs. It reveals that the use of public international law, including PTAs, is unsettled and identifies the gaps and inconsistencies to be addressed. The recent determinations from *Peru – Agricultural Products* pose strong ramifications to the former discussions.<sup>5</sup> Section IV addresses this case separately to account for its significant overlap in its reasoning across the various issues raised by this article and the evolving jurisprudence of the earlier cases. It goes on to critique the existing proposals to the DSU with particular reference to the current DSU draft and what additional proposals should be made.

## II Purpose of Negotiations

The Doha Ministerial Declaration established that changes be made to the DSU.<sup>6</sup> Interestingly DSU negotiations are not part of the single undertaking and so the Doha Ministerial Declaration offers the unique opportunity for the DSU to best reflect the consensual intentions of the WTO members without concession to other negotiated items.<sup>7</sup> The issue of uncertainty regarding WTO and PTA conflicts has been recognised and the subject of WTO discussion before.<sup>8</sup> However, the issue is conspicuously absent from DSU negotiations. Instead, negotiations have addressed other topics including guidance for panel interpretation, confidentiality,

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<sup>3</sup> For commentary, see for example Alschner, above n 1; Bernard Hoekman "Proposals for WTO Reform: A Synthesis and Assessment" in Amrita Narlikar, Martin Daunton and Robert M Stern (eds) *The Oxford Handbook on the World Trade Organization* (Oxford University Press, New York, 2012) 743; Gabrielle Marceau and Julian Wyatt "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO" (2012) 1(1) *JIDS* 67; Jennifer Hillman "Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO do?" (2009) 42 *Cornell Int'l L J* 193.

<sup>4</sup> *Report by the Chairman* TN/DS/25, 21 April 2011 (Special Session of the Dispute Settlement Body) [TN/DS/25]; *Report by the Chairman* TN/DS/26, 30 January 2015 (Special Session of the Dispute Settlement Body) [TN/DS/26]; *Report by the Chairman* TN/DS/27, 6 August 2015 (Special Session of the Dispute Settlement Body) [TN/DS/27]; Understanding on Rules and Procedures Governing the Settlement of Disputes 1869 UNTS 401 (opened for signature 15 April 1994, entered into force 1 January 1995) [DSU].

<sup>5</sup> *Peru – Additional Duty on Imports of Certain Agricultural Products* WT/DS457/AB/R, 20 July 2015 (Report of the Appellate Body).

<sup>6</sup> *Doha WTO Ministerial Declaration* WT/MIN(01)/DEC/1, 20 November 2001 at [30] [WT/MIN(01)/DEC/1].

<sup>7</sup> At [47].

<sup>8</sup> Peter Sutherland *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (World Trade Organization Report by the Consultative Board to the Director-General Supachai Panitchpakdi, 2004); World Trade Organization *World Trade Report 2011, The WTO and preferential trade agreements: From co-existence to coherence* (2011).

transparency and developing countries.<sup>9</sup> Indirectly, amendments under these topics will alter future approaches taken in response to PTAs. In particular, guidance for panel interpretation, which addresses the use of public international law in WTO disputes, stands out.<sup>10</sup> But, in the absence of express clarification through negotiations, amendments to the DSU may have both intended and unintended consequences to the prevailing issues.

DSU negotiations then represent an important opportunity and responsibility for Members to strengthen the institutional foundations of the WTO by fulfilling the Ministerial mandate to improve the clarity of the DSU.<sup>11</sup> Ambassador Ronald Saborío Soto saw them as coming under three general headings:<sup>12</sup> (i) technical fixes and procedural gaps, (ii) access to the system and effective recourse to dispute settlement; and, (iii) the balance between independent adjudicators and the role of Members. He suggests that these issues are complementary to each other and positive changes to one will have holistically positive effects on the others. These changes aim to ensure that WTO dispute settlement can continue to serve Members effectively and contribute to the security and predictability of the multilateral trading system in the future.<sup>13</sup> An important part of this article is to identify solutions that are agreeable, reflecting the intentions of the negotiating Members and workable in practice.<sup>14</sup> These solutions should reach a balanced convergence on a 'do no harm' basis, limited to 'improvements and clarifications' as necessary to meet the targets of efficiency, without trade-offs that some Members would consider detrimental to the functioning of the system.<sup>15</sup> Understanding these objectives will facilitate satisfactory changes to the DSU as well as aid adjudicatory bodies in their interpretation of the law, including PTAs.

There is significant commentary addressing the WTO's desire for further legal and political power and the balance between the judicial and legislative branches.<sup>16</sup> Conclusions show that it is increased political power that WTO Members currently call for.<sup>17</sup> Much of the criticism for the current DSU suggests that the judiciary has overstepped and that it has departed into a body of law making, subverting the democratic processes of the WTO.<sup>18</sup> The instability of ineffective law making has led panels and the Appellate Body to move beyond mere interpretation and engage in 'gap-filling'.<sup>19</sup> Indeed, as shown in the negotiations, guidance by political legislators to adjudicators over how they ought to be ruling to prevent judicial activism, moves to facilitate mutually agreed solutions outside of judicial proceedings, increased transparency and third party rights, all suggest a purpose to bolster the political power

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<sup>9</sup> See TN/DS/25; TN/DS/26; TN/DS/25.

<sup>10</sup> TN/DS/25 at A-27.

<sup>11</sup> WT/MIN(01)/DEC/1 at [30].

<sup>12</sup> Ronald Saborio Soto, Ambassador "WTO Dispute Settlement Body — Developments in 2015" (speech to Graduate Institute's Centre for Trade and Economic Integration, Geneva, 21 March 2016).

<sup>13</sup> TN/DS/27 at [1.6].

<sup>14</sup> TN/DS/27 at [2.1] and [2.4].

<sup>15</sup> Ronald Saborio Soto, above n 12; TN/DS/27 at [2.2].

<sup>16</sup> JHH Weiler "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35 *J World Trade* 191; Petros C Mavroidis "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11 *Eur J Int'l L* 763; Petros C Mavroidis "Dealing with PTAs in the WTO: Falling through the Cracks between 'Judicialization' and 'Legalization'" (2015) 14(1) *WTR* 107; Joost Pauwelyn "The Transformation of World Trade" (2005) 104(1) *Mich L Rev* 1.

<sup>17</sup> Pauwelyn "The Transformation of World Trade", above n 16.

<sup>18</sup> Clause E Barfield "Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization" (2001) 2(2) *Chicago Journal of International Law* 403; William J Davey "The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges" (2014) 17 *J Int'l Econ L* 679.

<sup>19</sup> This has been a key concern during negotiations, see for example TN/DS/26 at [258]-[266] and [316]-[318].

of the DSU.<sup>20</sup> More generally, the appetite for more political power is apparent in light of the stagnating Doha Round. Deepening regionalism and institutionalism has been undertaken by states in order to facilitate greater political flexibility. While the WTO is limited by consensus at a multilateral scale, PTAs release states from the burden of negotiating with numerous states, as well as providing a choice of whom they wish to negotiate. The latter has been a cause for concern that the WTO's position may be undermined by PTAs and new institutions allowing states 'efficient breach' by disregarding multilateral obligations in favour of others.<sup>21</sup> Political power enforced through PTAs is decentralised from the WTO and so fails to maintain the necessary checks that a multilateral regime sought to create in the first instance – namely, controlled liberalisation, protection and equal sovereignty for developed and developing countries alike. This is not to say that regionalism cannot be complementary to the multilateral regime, but this evolution will require the WTO to control and capture these benefits and not lead to a case of the tail wagging the dog. Moreover, in a complex and globalising world, different institutions and networks can provide necessary speed, flexibility and context-based decision making tailored to specific problems.<sup>22</sup> Given the mandate's requirements to be 'realistic' and 'workable', it would be a step too far to block the advancements made under PTAs.<sup>23</sup>

For the WTO to maintain its legitimacy and acceptance as a multilateral regime, Members need to believe that it properly respects their individual and collective concerns. The WTO must consider if its position in acting as a supreme law maker and preventing adjudicatory bodies from adequately addressing PTAs alters its legitimacy in international trade. The proliferation of PTAs partly reflects the stagnation of the multilateral regime and its inability to advance negotiations.<sup>24</sup> If the WTO cannot meet the needs of its Members and simultaneously blocks its external advancements, it will quickly lose its relevance. It is, therefore, not enough to merely look at the DSU in isolation. The WTO must clarify the judicial approach to PTAs and how PTAs are to be treated within the international trade environment more generally. Thus, it begs the question, where can flexibility in the DSU work in favour of PTAs and where should it be limited? This article submits that flexibility must be built into the system in regards to specialised issues or matters which pose minimal concern and detriment to the multilateral regime's membership as a whole. Surely PTAs were constructed in the first place to cover matters not properly addressed or reflected by the WTO. This flexibility then is limited by the underlying principles that the WTO was established to protect. Overlaps by PTAs merely seeking to introduce lesser standards to undermine multilateral obligations must surely be repugnant to the compliance WTO members consented to be bound to. What must be established then is; what are the WTO's essential minimum standards and when can adjudicatory bodies give effect to PTAs?

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<sup>20</sup> See generally TN/DS/27; TN/DS/26; TN/DS/25.

<sup>21</sup> Marc L Busch "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade" (2007) 61(4) Int'l Org 735; Rosendorff, B Peter "Stability and Rigidity: Politics and the Design of the WTO's Dispute Settlement Procedure" (2005) 99(3) Am Pol Sci Rev 389.

<sup>22</sup> Ikenberry, John and Anne-Marie Slaughter *Forging A World of Liberty Under Law: U.S. National Security in The 21st Century* (Final Report on the Princeton Project for National Security, September 2006).

<sup>23</sup> TN/DS/26 at [3.3]; TN/DS/27 at [2.4]; Joost Pauwelyn "Legal Avenues to "Multilateralizing Regionalism": Beyond article XXIV" (paper presented at the Conference on Multilateralising Regionalism, Geneva, Switzerland, 10-12 September 2007).

<sup>24</sup> Kent Jones *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* (Oxford University Press, New York, 2015) at 57.

### III Problems and Treatment of Preferential Trade Agreements in the World Trade Organization

This section focuses more deeply on the issues related to and arising from the current WTO regime and PTA proliferation. It seeks to analyse what standards panels and the Appellate Body have set to date in regards to PTAs, whether these appropriately reflect the level of compliance necessary for the WTO and how earlier commentary has sought to address these issues. It intends to uncover any gaps created or inconsistencies which remain unresolved that should be the focus of negotiations. Notwithstanding approaches to limit or control the formation of PTAs, this article seeks only to address measures through the DSU, outside of the single undertaking, targeting how PTAs may be used to resolve initiated disputes.<sup>25</sup>

#### A Key Issues

With a goal to foster the effectiveness and efficiency of the dispute settlement system, it is important to appreciate how changes to the DSU and in regards to PTAs will influence the entire regime. Such proposals must resolve weaknesses in the system while also not being incompatible with its other future objectives. Regard must be given to issues arising out of PTA-WTO conflicts as well as issues entirely internal to the WTO itself.

The first major issue with PTAs concerns jurisdictional conflict. Regional proliferation and new institutions grant complainants the opportunity to engage in forum shopping.<sup>26</sup> Of particular concern is that PTAs threaten to disrupt negotiated multilateral obligations, and as more power-based structures, give greater advantage particularly to larger political and economic powers at the expense of developing countries, whose WTO protections are undermined by external bodies with lesser standards. In order to manage this risk, the DSB may insist on compulsory jurisdiction to hear all matters related to the covered agreements, even when a similar issue has been heard by another body. This multiplication of procedures may create two problems. First, there is a doubling of resources where claims need to be heard twice; this is particularly disadvantageous to developing countries whose accessibility is limited by their constrained resources.<sup>27</sup> Secondly, there is the possibility that matters will be decided differently in the different forums and is detrimental to certainty.<sup>28</sup> The overlap of rights and obligations created by external PTAs brings question to how existing or subsequently concluded agreements alter the interpretation or application of WTO and non-WTO law. A concern is that giving effect to non-WTO law may alter the rights and obligations of covered agreements without the full consensus of WTO Members.<sup>29</sup> There remains apprehension that

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<sup>25</sup> For other examples; use of the enabling clause, Article XXIV of the GATT 1994, or use of the transparency mechanism. See Mavroidis “Dealing with PTAs” above n 16; Sherzod Shadikhodjaev “Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparency Mechanism for RTAs” (2011) 45(3) J World Trade 529; Armand CM de Mestral “Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship (2013) 16 J Int’l Econ L 777; General Agreement on Tariffs and Trade 1867 UNTS 187 (signed 15 April 1994, entered into force 1 January 1995).

<sup>26</sup> Busch, above n 21.

<sup>27</sup> Alschner, above n 1; Ernst-Ulrich Petersmann “Justice as Conflict Resolution: Proliferation, Fragmentation, And Decentralization of Dispute Settlement in International Trade” (2006) 27 University of Pennsylvania Journal of International Economic Law 273.

<sup>28</sup> Alschner, above n 1; Hillman, above n 3 at 202; Joost Pauwelyn and Luiz Eduardo Salles “Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions” (2009) 42 Cornell Int’l L J 77.

<sup>29</sup> Joost Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, New York, 2003); Julien Chaisse and Mitsuo Matsushita “Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism” (2013) 16(1) J Int’l Econ L 9.

the international trade environment and the two modes of agreements – by moving further away from each other – will undermine efficiency in trade. The WTO and PTAs must encourage participation in a constructive manner while also maintaining the necessary levels of compliance.

Internal to the WTO, there are some features that have pertinence when addressing how the roles of the WTO and PTAs should be distributed. First, the number of claims that the DSB faces is growing significantly.<sup>30</sup> Additional work for each case from DSU amendments such as strictly confidential information and third party rights will only further this burden. In its Annual Report for 2014, the Appellate Body noted that two thirds of cases end up appealed.<sup>31</sup> At the time of the report, if the WTO shut its doors to new claims, there would be enough work to keep the panels, Appellate Body and Secretariat staff busy for the next two years.<sup>32</sup> The number of appeals is not surprising; due to the limitations of negotiations at such a large scale, the WTO agreements and the DSU are often silent, whether unintendedly, to embody constructive ambiguity, or merely as a means to disagree and continue negotiations on the issue at a later date.<sup>33</sup> It leaves much to be desired for certainty; yet, adjudicators must still interpret and deal with them appropriately and bring a positive solution to a dispute.<sup>34</sup> Indeed, what drives the extensive use of the dispute settlement system is not so much the need to enforce unambiguous obligations under a certain WTO agreement but the existence of contractual silence on issues or ambiguous wording that creates different expectations as to the interpretation of the contract.<sup>35</sup> Silences require adjudicators to use their own judgement to make interpretations and, without proper guidance, encourages gap-filling.<sup>36</sup> The problem for the WTO is that reports are automatically adopted and so legislators have little control to act as a check on wrongful determinations. Furthermore, the slow progress of a consensus approach to amendments means that provisions are rarely updated. Without a dynamic approach to update interpretations and fill necessary gaps, the WTO agreements are unable to remain contemporary and will push states to negotiate their own extraneous agreements to cover such matters, distancing themselves from the multilateral regime. More direct to the issue of workload, the DSB must preserve its ability to effectively resolve disputes and avoid a backlog of claims to facilitate timeliness as well as not overstretch its staff to maintain quality in its work. It is worthwhile considering the selection and scope of claims it is to receive. There is little point to expending resources to hear claims that have already been or are better addressed by external forums. In this way, PTAs can help to relieve some of the strain of workload burdening the DSB. The WTO should consider whether some claims are better suited to external institutions that were specifically tailored to the requirements of its parties. Changes within the WTO and DSU ought to reflect the needs of its members to continue as an effective dispute settlement system.

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<sup>30</sup> TN/DS/27 at [3.61]; *Appellate Body Annual Report for 2014 WT/AB/24*, 3 July 2015.

<sup>31</sup> WT/AB/24, above n 30 at 6.

<sup>32</sup> At 6.

<sup>33</sup> Giovanni Maggi and Robert W Staiger “On the Role and Design of Dispute Settlement Procedures in International Trade Agreements” (June 2008) The National Bureau of Economic Research <[www.nber.org](http://www.nber.org)>.

<sup>34</sup> TN/DS/25 at A-28-A30; DSU, art3(4).

<sup>35</sup> Thomas Bernauer, Manfred Elsig and Joost Pauwelyn “Dispute Settlement Mechanism – Analysis and Problems” in *The Oxford Handbook on the World Trade Organization* (Oxford University Press, New York, 2012) 565.

<sup>36</sup> Mitsuo Matsushita “The Dispute Settlement Mechanism at the WTO: The Appellate Body – Assessment and Problems” in Amrita Narlikar, Martin Daunton and Robert M Stern (eds) *The Oxford Handbook on the World Trade Organization* (Oxford University Press, New York, 2012) 507.

## *B Current Approach to Preferential Trade Agreements under the Dispute Settlement Understanding*

The DSU does not establish a court of general jurisdiction.<sup>37</sup> The DSU mandate is quite clear in this respect; stating that the DSU applies only to the covered agreements listed in Appendix 1, preserving the rights and obligations under those covered agreements, as well as being the required terms of reference that a panel is to make such findings.<sup>38</sup> This position is seen as fundamental to preserve the intentions and consensus of the Membership. The Appellate Body in *Mexico – Soft Drinks* stated that there is no basis in the DSU for panels or the Appellate Body to adjudicate on non-WTO issues and so could not make a determination on whether the United States had breached its obligations under the North American Free Trade Agreement (NAFTA).<sup>39</sup> While these provisions are quite clear, the DSU – the result of wide and deep negotiation – is also plagued with areas of silence. The questions of what are the limits of the application and reference to non-WTO law remain areas of significant debate.<sup>40</sup> These issues are discussed below and reflect headings within the Consolidated Draft Legal Text under negotiation in the proposed Guidance for WTO Adjudicative Bodies:<sup>41</sup> (i) the use of public international law; and, (ii) the interpretive approach to use in WTO dispute settlement. The first heading addresses if other principles and sources of international law can be applied to disputes under the DSU and, if so, how they may be. It further analyses whether panels should give effect to the dispute mechanisms provisions of external regional agreements such as forum-choice clauses and whether WTO panels may apply limitations to jurisdiction or relief. The second heading looks to how WTO dispute bodies should interpret rights and obligations under the covered agreements in respect to existing PTAs, and whether such agreements vary how they are to be applied. It goes on to discuss how silences in the DSU have been interpreted and whether dispute bodies are properly abiding to their mandate of interpretation or if they are overstepping into the realm of law making and ‘gap-filling’.

### *1 The Use of Public International Law*

The WTO agreements, including the DSU, form part of the body of public international law. They, together with other legal sources such as treaties, general principles and customary law, make up the legal *acquis* for international law. It is fundamental to understand what the DSU’s place is in this *acquis* and, thus, how it interacts with the Members’ rights and obligations under other international law.<sup>42</sup> Harmonisation and a confluence of the different streams can align these rights and obligations to build certainty and facilitate efficacy in international trade.<sup>43</sup>

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<sup>37</sup> Joel P Trachtman “The Domain of WTO Dispute Resolution” (1999) 40 Harv Int’l LJ 333.

<sup>38</sup> DSU, articles 1, 3(2), 7, 11, 19(2) and 23.

<sup>39</sup> *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, 6 March 2006 (Report of the Appellate Body) at [56].

<sup>40</sup> Gabrielle Marceau “Fragmentation in International Law: The Relationship between WTO Law and General International Law – a Few Comments from a WTO Perspective” (2006) 17 Finnish Yearbook of International Law 5; Kyung Kwak and Gabrielle Marceau “Overlaps and Conflicts of Jurisdiction between the WTO and RTAs” (paper presented at World Trade Organization Conference on Regional Trade Agreements, April 2002); Pauwelyn *Conflict of Norms*, above n 29; Joost Pauwelyn “The Role of Public International Law in the WTO: How Far Can We Go?” (2001) 95 AJIL 535.

<sup>41</sup> TN/DS/25 at A-27.

<sup>42</sup> Pauwelyn “How Far Can We Go?”, above n 40.

<sup>43</sup> For some examples of proposed methods, see Mitsuo Matsushita “A View on Future Roles of The WTO: Should There Be More Soft Law in The WTO?” (2014) 17 J Int’l Econ L 701; Ernst-Ulrich Petersmann “Need for a New Philosophy of International Economic Law and Adjudication” (2014) 17 J Int’l Econ L 639; Alschner, above n 1; William J Davey and Andre Sapir “The *Soft Drinks* Case: The WTO and Regional Agreements” (2009) 8(1) WTR 5; Henry Gao and Chin Leng Lim “Saving the WTO from the Risk of Irrelevance: the WTO Dispute Settlement

However, despite calls for harmonisation, there is also support for fragmentation as far as the WTO retains its exclusive position.<sup>44</sup> Advocates for fragmentation argue that the covered agreements represent a consensus negotiated by the Membership and that external law undermines the will of the parties to the treaty.<sup>45</sup>

On the matter of jurisdictional overlap with outside agreements, WTO adjudicatory bodies have tended to uphold their jurisdiction to hear a claim.<sup>46</sup> Many PTAs contain ‘forum choice’ provisions on how to proceed with dispute resolution. The most common is to allow the complainant to choose to proceed either under the WTO or the PTA.<sup>47</sup> This type of situation arose in *Argentina – Poultry*, where Brazil initiated a dispute under the WTO after an unsuccessful claim under Mercosur (*Mercado Común del Sur*).<sup>48</sup> The panel stated that this choice did not amount to a waiver or preclude Brazil from invoking its WTO settlement rights under the DSU.<sup>49</sup> Unfortunately, the panel did not address the applicability of the apparent ‘forum exclusion’ as it was not yet in force at the time of the dispute.<sup>50</sup> Even if such forum exclusion provision was in force, panels still appear reluctant to give effect to them. The Appellate Body in *Mexico – Soft Drinks* took the position set in *Canada – Aircraft* that Article 11 of the DSU mandates a duty to make an objective assessment of the facts in order to assist the DSB by making recommendations and rulings on the covered agreements.<sup>51</sup> A denial of jurisdiction would infringe on a WTO Member’s right under Article 23 of the DSU, which provides that they *shall* have recourse to the rules and procedures of the DSU. Disallowing a validly established jurisdiction would be inconsistent with a panel’s requirement not to diminish the rights of a Member under Article 3(2) of the DSU.<sup>52</sup> The conclusion is that any claims properly brought under the covered agreements will receive compulsory jurisdiction and an automatic right to be heard, even in the face of prior or subsequent forum choice agreements or proceedings concluded by the parties.<sup>53</sup> In the face of overlap, the WTO will have jurisdiction over any WTO rules; only WTO+ rules outside of the scope of the covered agreements will lack the necessary requirements to establish jurisdiction for a panel. From a logical standpoint, this creates a self-enforcing mechanism where parties recognise that, in order to protect the finality of decisions and prevent the doubling of costs, complainants will naturally bring all WTO related claims under the DSU and restrict the use of WTO+ rules negotiated in their agreements to their external forum. For instance, in *US – Tuna II*, even though the United States requested Mexico to engage in consultations under NAFTA believing

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Mechanism as a ‘Common Good’ for RTA Disputes” (2008) 11 J Int’l Econ L 899; Joost Pauwelyn “Legal Avenues to “Multilateralizing Regionalism”: Beyond article XXIV” (paper presented at the Conference on Multilateralising Regionalism, Geneva, Switzerland, 10-12 September 2007); de Mestral, above n 25.

<sup>44</sup> Trachtman, above n 37; Sheela Rai “WTO Dispute Settlement System and Democracy” (2014) 13(2) J Int’l Trade L and Pol’y 185.

<sup>45</sup> Kwak, above n 40; Trachtman, above n 37.

<sup>46</sup> In particular, these questions of jurisdictional overlap relate to ‘choice of forum’ and ‘forum exclusion’. These respectively refer to what forum should have jurisdiction over a matter when there are competing alternatives, and the potential of barring additional proceedings when a matter has already been undertaken by another dispute resolution avenue.

<sup>47</sup> Hillman, above n 3.

<sup>48</sup> *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* WT/DS241/R, 19 May 2003 (Report of the Panel).

<sup>49</sup> At [7.38].

<sup>50</sup> At [7.38]. The Protocol of Olivos, provides that once a party brings a claim in either Mercosur or WTO dispute settlement, that party may not bring the same dispute to another forum.

<sup>51</sup> *Mexico – Soft Drinks* WT/DS308/AB/R, above n 39 at [51]; *Canada – Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R, 2 August 1999 (Report of the Appellate Body) at [187].

<sup>52</sup> *Mexico – Soft Drinks* WT/DS308/AB/R, above n 39 at [52]-[53]; DSU, arts 3(2) and 19(2).

<sup>53</sup> At [54]. While a panel cannot refuse jurisdiction, note that a claim must first be *validly established* (emphasis added). It is left open that there may be the possibility of legal impediments to jurisdiction.



this would be the most appropriate forum, it did not invoke its exclusive forum choice clause after Mexico had already established a WTO panel.<sup>54</sup> This may be a factor explaining why the issue of jurisdictional conflict does not arise as a matter for dispute as often as one might expect given the proliferation of PTAs. However, is such compliance to the WTO forum out of reluctance or desire? Surely, it would be wrong to suggest that states negotiated and continue to negotiate such forum choices and exclusions into their agreements if they did not intend to give effect to them or presume them to be binding. The argument goes that WTO adjudicatory bodies must maintain compulsory jurisdiction to hear claims as a check on the rule of power.<sup>55</sup> In light of the earlier identified issues, the WTO must realise that there are cases where it need not intervene with PTA jurisdiction and should rather shift some of the workload to external bodies. The DSB must adapt and shift the principles it seeks to enforce from one of compulsory jurisdiction in all cases, to one of assuming jurisdiction only when the situation calls for such protection.

Public international law is not limited to agreements concluded by states. Customary international law and general principles of law are a significant part of the legal *acquis*. Many commentators suggest that they can be applied to situations of jurisdictional conflict.<sup>56</sup> There is no doubt that, in some instances, other agreements outside the WTO's covered agreements can be relevant to examine.<sup>57</sup> Widely recognised principles of international law may be applicable in WTO dispute settlement and reasoning similar to *res judicata* and estoppel have been given effect before. The panel in *Korea – Procurement* noted that ‘the relationship of the WTO agreements to customary international law is broader than simply the rules to interpretation.’<sup>58</sup> Customary international law applies generally to the extent that parties do not ‘contract out’ or that it is not inconsistent with the WTO agreements. Nonetheless, commentators have demonstrated that the application of such principles appear too narrow in the face of jurisdictional overlap.<sup>59</sup> The provisions in the DSU and, particularly, Article 23 are taken to operate as a means of compulsory jurisdiction whereby a WTO adjudicating body always has authority, or even an obligation, to examine claims under the covered agreements.<sup>60</sup> While WTO panels do have competence to consider their own jurisdictional scope over claims

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<sup>54</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381R, 15 September 2011 (Report of the Panel).

<sup>55</sup> Yong-Shik Lee “Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation” (2011) 45(3) *J World Trade* 629.

<sup>56</sup> Kwak, above n 40; Hillman, above n 3; Joost Pauwelyn “Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions” (2004) 13(2) *Minn J Global Trade* 231.

<sup>57</sup> See generally David Palmeter and Petros C Mavroidis *Dispute Settlement in the World Trade Organisation: Practice and Procedure* (2nd ed, Cambridge University Press, Cambridge, 2004) at 17-84; *India – Measures Affecting the Automotive Sector* WT/DS146/R, WT/DS175/R, 5 April 2002 (Reports of the Panel); *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* WT/DS141/RW, 24 April 2003 (Report of the Panel); *United States – Anti-Dumping and Countervailing Duty Measures on Steel Plate from India* WT/DS206/R, 29 July 2002 (Report of the Panel) at [7.29]; *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* WT/DS132/AB/RW, 21 November 2001 (Report of the Appellate Body) at [50].

<sup>58</sup> *Korea – Measures Affecting Government Procurement* WT/DS163/R, 19 June 2000 (Report of the Panel) at [7.96].

<sup>59</sup> Gabrielle Marceau and Julian Wyatt “Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO” (2012) 1(1) *JIDS* 67.

<sup>60</sup> Kwak, above n 40.

before it with regards to its mandate and terms of reference, there appears to be no room to limit jurisdiction based on non-WTO law sources.<sup>61</sup>

While the DSU appears to affirm that WTO panels shall always have compulsory jurisdiction to hear a case, many commentators contend that the use of public international law; PTAs and other principles, may nevertheless be used as evidence in a dispute. Pauwelyn draws a distinction between ‘jurisdiction’ and the ‘applicable law’.<sup>62</sup> While the DSU mandates jurisdiction and finding violations under the covered agreements, it does not preclude adjudicatory bodies to make rulings based on the examination of outside law. Thus, WTO adjudicatory bodies should exercise a level of comity to consider and apply the reasoning of other tribunals to prevent inconsistent rulings and unnecessary re-litigation.<sup>63</sup> Furthermore, it may be that non-WTO law, though it cannot be the base of a claim under the DSU, may act as a justification or defence of a breach of a WTO obligation. In *Brazil – Retreaded Tyres*, the panel and Appellate Body considered Brazil’s argument that a binding dispute settlement decision under Mercosur was justification of an import ban of the same products from WTO Members.<sup>64</sup> The Appellate Body, though not finding so on the facts, did acknowledge that, in appropriate circumstances, the decision of a regional dispute tribunal may provide sufficient justification.<sup>65</sup> In fact, this circumstantial caveat surfaces in respect of many of the cited determinations. The Appellate Body has not entirely closed the book on the use of non-WTO law as either a bar on jurisdiction or its application.<sup>66</sup> However, the Appellate Body, exercising judicial economy, has not answered what these circumstances may be. In respect of these determinations, it is difficult to foresee what situation might be sufficient. It is likely such caveats on determinations are just to err on the side of caution.

There is an interesting implication from various decisions that where there is inconsistency with WTO rules – whether they be customary international law, general principles or obligations under PTAs – WTO rules prevail.<sup>67</sup> These determinations appear to raise WTO law as supreme over non-WTO law. This apparent hierarchy has been picked up by a number of commentators who believe that the WTO wrongly assumes this primacy and question the WTO’s place in international public law.<sup>68</sup> Formally, there is no hierarchy in international law.<sup>69</sup> However, the DSB’s rigour in upholding WTO law above non-WTO law is an implicit elevation, a ‘structural supremacy’ that sets a minimum standard that should bind all Members

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<sup>61</sup> *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS136/AB/R, 26 September 2000 (Report of the Appellate Body) at [52]; *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* WT/DS58/AB/RW, 21 November 2001 (Report of the Appellate Body) at [5.56]; de Mestral, above n 25.

<sup>62</sup> Pauwelyn “Multilateralizing Regionalism”, above n 43.

<sup>63</sup> Joost Pauwelyn “Adding Sweeteners to Softwood Lumber: The WTO—NAFTA ‘Spaghetti Bowl’ is Cooking” (2006) 9(1) *J Int’l Econ L* 197.

<sup>64</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/R, 12 June 2007 (Report of the Panel) at [7.283]

<sup>65</sup> *Brazil – Retreaded Tyres* WT/DS332/AB/R, above n 64 (Report of the Appellate Body) at [216]-[234].

<sup>66</sup> Bernauer, above n 35.

<sup>67</sup> *Korea – Procurement* WT/DS163/R, above n 58 at [7.96]; *Mexico – Soft Drinks* WT/DS308/AB/R, above n 39; *Argentina – Poultry* WT/DS241/R, above n 48 at [7.40]-[7.41]; Donald McRae “International Economic Law and Public International Law: The Past and The Future” (2014) 17 *J Int’l Econ L* 627.

<sup>68</sup> Pauwelyn “How Far Can We Go?”, above n 40; Pauwelyn “Multilateralizing Regionalism”, above n 43; Gregory Shaffer and Joel Trachtman “WTO Judicial Interpretation” in Amrita Narlikar, Martin Daunton and Robert M Stern (eds) *The Oxford Handbook on the World Trade Organization* (Oxford University Press, New York, 2012) 535; McRae, above n 67; de Mestral, above n 25.

<sup>69</sup> Pauwelyn “How Far Can We Go?”, above n 40.

and cannot be waived.<sup>70</sup> Supremacy, however, raises a separate issue. International law generally sets out a strong presumption against normative conflict and that different agreements are to be read consistently with each other.<sup>71</sup> WTO decisions show that their determinations were reached on the basis of inconsistency or conflict. Yet, former decisions have not expressly addressed on what principles this supremacy is based and how they qualify its position. An interesting point to mention is that Article XXIV of the GATT 1994 enables the creation of PTAs. The mere existence of PTA provisions presumes that they are valid and not incompatible.<sup>72</sup> In this regard, there is a jurisprudential issue that, although such agreements are provided for and valid, they are, at the same time, inconsistent and subordinate.

## 2 *The Interpretive Approach to Use in World Trade Organization Dispute Settlement*

While rights and obligations under non-WTO law have no direct applicability, its use may still play a vital role in providing for systemic integration. Article 3(2) of the DSU explicitly provides that adjudicators clarify the rights and obligations of the covered agreements in accordance with customary rules of interpretation of public international law. The first question, then, is when and in what circumstances an adjudicatory body may or shall regard these rules. Secondly, to what extent can these rules alter the meaning of the rights and obligations under the covered agreements to the parties to a dispute and to the WTO Membership as a whole. Question remains whether adjudicatory bodies are engaging in gap-filling (adding to or diminishing the rights and obligations provided in the covered agreements) and entering the role of law making, rather than correctly exercising their mandate to interpret agreements and respecting the consensus of the Membership.<sup>73</sup>

Panels and the Appellate Body recognised from the outset that under the customary rules of treaty interpretation, Articles 31 and 32 of the Vienna Convention, WTO law is ‘not to be read in clinical isolation from public international law’.<sup>74</sup> Of particular relevance to the overlap of WTO law and PTAs is Article 31(3)(c) of the Vienna Convention. It outlines that ‘any relevant rules of international law applicable in the relations between the parties’ ... ‘shall be taken into account’.<sup>75</sup> The International Law Commission (ILC) reported on the findings of a study group addressing the fragmentation of international law.<sup>76</sup> The study group concluded that this provision was essential to give effect to the principle of ‘systemic integration’ and necessary for determinations to be made consistently with the broader international legal environment.<sup>77</sup> However, *EC – Biotech* and subsequent cases have ruled that ‘applicable in relations between the parties’ means that Article 31(1)(c) only triggers when *all parties to the treaty* under

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<sup>70</sup> Shaffer, above n 68; Trachtman, above n 37.

<sup>71</sup> Martii Koskenniemi *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (International Law Commission, 58th Session, Geneva, 1 May to 9 June and 3 July to 11 August 2006, A/CN.4/L.682) at [37].

<sup>72</sup> Songling Yang “The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause” (2015) 23(1) *Mich St Int'l L Rev* 107.

<sup>73</sup> TN/DS/26 at [258]-[266] and [316]-[318].

<sup>74</sup> *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 20 May 1996 (Report of the Appellate Body).

<sup>75</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980), art 31(3)(c).

<sup>76</sup> Koskenniemi, above n 71.

<sup>77</sup> Campbell McLachlan “The Principle of System Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54(2) *ICLQ* 279.

interpretation are also parties to the extraneous treaty.<sup>78</sup> Therefore, PTAs, as concluded by a subset of the WTO's membership, cannot be addressed when interpreting the WTO agreements. Given the WTO's extensive membership, such a limitation emphasises the WTO's isolation and fragmentation of international law. The determination appears inconsistent given the widely approved approach in *US – Gasoline* that WTO law should not be read in 'clinical isolation'.<sup>79</sup> The approach taken in *EC – Biotech* is generally referred to as the 'restrictive' approach and gains its support on the primary basis that it protects non-parties to extraneous agreements from its legal consequences.<sup>80</sup> That is, it would be wrong that outside agreements could affect WTO members' rights and obligations without their consent. However, the meaning of 'taken into account' does not necessarily mean the extraneous provision must apply as the panel in *EC – Biotech* suggested in holding a restrictive view.<sup>81</sup> The ILC study argued that all Article 31(3)(c) requires is the incorporation into legal reasoning of a sense of coherence.<sup>82</sup> Meanwhile, Pauwelyn makes the distinction between interpretation and application. Interpretation is about the determination of content of a treaty and should have one uniform interpretation for WTO law; rather it is the application in the circumstances that depends on the parties.<sup>83</sup> The alternative 'broad' approach is that the term 'parties' refers only to those parties in the dispute and would allow a PTA to be taken into account when interpreting WTO rights and obligations.<sup>84</sup> The broad approach gained its support from a decision, *US – Shrimp*, where the panel took into account an extraneous treaty that neither the whole WTO nor all of the parties to the dispute were party to.<sup>85</sup> However, the panel in *EC – Biotech* noted that the panel, in that case, voluntarily drew upon extraneous rules rather than as a question of whether Article 31(3)(c) required it to.<sup>86</sup> Supporters of the broad approach believe that uniform interpretation is not possible.<sup>87</sup> In the international legal environment, obligations commonly diverge and may do so between parties even under the same agreement.<sup>88</sup> It is consensus to other agreements that should be equally respected and given effect. Ultimately, both interpretations result in some level of fragmentation. The restrictive approach isolates different interpretations to different agreements where not all parties are common, whereas the broad approach results in obligations under the same agreements being interpreted differently depending on the party. There is perhaps a third and overlooked alternative interpretation to Article 31(3)(c), however. McGrady suggests that 'the parties' refers to parties to the treaty under interpretation but the phrase 'applicable in relations between' refer to relations between the parties to the treaty generally.<sup>89</sup> It, therefore, does not mean that the extraneous treaty is binding over all parties, but rather concerns whether it is applicable and would not result in

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<sup>78</sup> *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, 21 November 2006 (Report of the Panel) at [7.68]–[7.70]; contrast *US – Gasoline* WT/DS2/AB/R, above n 74 at 17.

<sup>79</sup> Benn McGrady "Fragmentation of International Law or "Systemic Integration" of Regimes: *EC – Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties" (2008) 42(4) *J World Trade* 589; Gabrielle Marceau "WTO Dispute Settlement and Human Rights" (2002) 14(4) *Eur J Int'l L* 753.

<sup>80</sup> Pauwelyn *Conflict of Norms*, above n 29; McLachlan, above n 77; see also Margaret Young "The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case" (2007) 56(October) *ICLQ* 907.

<sup>81</sup> *EC - Biotech* WT/DS291/R, WT/DS292/R, WT/DS293/R, above n 78 at [7.69].

<sup>82</sup> Koskenniemi, above n 71 at [419].

<sup>83</sup> Pauwelyn *Conflict of Norms*, above n 29; Pauwelyn "Multilateralizing Regionalism", above n 43.

<sup>84</sup> McGrady, above n 79.

<sup>85</sup> *EC - Biotech* WT/DS291/R, WT/DS292/R, WT/DS293/R, above n 78 at [7.52].

<sup>86</sup> At [7.94].

<sup>87</sup> Duncan French "Treaty Interpretation and the Incorporation of Extraneous Legal Rules" (2006) 55(2) *ICLQ* 281.

<sup>88</sup> See also Koskenniemi, above n 71.

<sup>89</sup> McGrady, above n 79.

divergence and fragmentation.<sup>90</sup> It would make sense to apply the approach that results in the greatest consistency to respect both WTO and PTA obligations. We further build on this third interpretation in Section IV when discussing the interpretive approach to use in WTO dispute settlement. Indeed, while this type of approach has not been applied yet, there does at least appear to be acknowledgment by the Appellate Body that a restrictive approach is inappropriate. In *EC – Aircraft*, the Appellate Body suggested that ‘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’.<sup>91</sup>

Notwithstanding when WTO law may be sufficiently express, there are times when WTO law is silent or indeterminable. Could such ambiguities be filled by parties extraneous agreements or PTAs and given effect without adding or diminishing the rights and obligations of the covered agreements? The underlying clarification for adjudicators that must be made is when does interpretation become gap-filling. The distinction is often subtle. An example of the panel’s approach to silence can be seen in *US – Shrimp* which considered whether panels and the Appellate Body can accept *amicus* briefs from persons other than the disputing parties.<sup>92</sup> The DSU has no provisions covering this, but the Appellate Body ruled that Article 13 of the DSU empowered panels to ‘seek’ information from any sources including *amicus* briefs.<sup>93</sup> There is some criticism around this decision and later panels acknowledge that it should be cautious about not making law. Determining the rules is not the responsibility of adjudicatory bodies; only WTO members have the authority to amend the DSU or make such interpretations.<sup>94</sup> In defining the line between interpretation and gap-filling, Trachtman argues that there is a distinction between a context that calls for construction and a *lacuna*.<sup>95</sup> Construction is allowed where the intention of the parties is determinable, whereas a *lacuna* is a situation where the intent is not known.<sup>96</sup> If this approach is supported, then it is up to the WTO to better clarify the intention of such ambiguities so that it is not left to the discretion of panels to decide. A major drawback to this approach is how panels should address a situation of a genuine *lacuna*. Accordingly, if adjudicators adhere strictly to Article 3(2) of the DSU, then it would have no choice but to rule in default.<sup>97</sup> Such an approach again reflects the isolation WTO law seems to take. This position flies in the face of conventional theory which presumes there can be no *lacunae* in international law and that public international law fills such gaps.<sup>98</sup> It is necessary for the WTO to properly address how such silences should be addressed and whether it is preferable to allow adjudicators flexibility to develop them such as by reference to PTAs.

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<sup>90</sup> McGrady, above n 79.

<sup>91</sup> *European Communities – Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, 18 May 2011 (Report of the Appellate Body) at [845]; see also, *EC – Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, above n 78 at [7.72].

<sup>92</sup> *United States – Import prohibition of certain shrimp and shrimp products* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body).

<sup>93</sup> *US – Shrimp* WT/DS58/AB/R, above n 92 at [104]; Matsushita “The Dispute Settlement Mechanism”, above n 36.

<sup>94</sup> *United States – Import Measure on Certain Products from the European Communities* WT/DS165/AB/R, 11 December 2000 (Report of the Appellate Body) at [92].

<sup>95</sup> Trachtman, above n 37.

<sup>96</sup> At 339.

<sup>97</sup> At 336.

<sup>98</sup> Prosper Weil “‘The Court Cannot Conclude Definitively ...’ Non Liqueur Revisited” (1997) 36 Colum J Transnat’l L 109.at 110; Pauwelyn “How Far Can We Go?”, above n 40.

## IV Addressing the Issues

Negotiations should now focus on clarifying or rethinking its position in light of the main issues and inconsistencies identified in Section III. Current proposals have aimed to address procedural issues that have given rise to litigation.<sup>99</sup> However, the DSB should be careful not to simply confirm Appellate Body decisions to date given the cautious approach, use of judicial economy exercised and further evidence that they may actually be contrary to the intended objectives of the Membership. Where possible, it should also seek to provide answers to the questions that adjudicators have not yet addressed. Negotiations have recognised that multilateral clarification of such issues may enhance efficiency by avoiding unnecessary uncertainty and litigation of procedural issues.<sup>100</sup> While the current draft does not explicitly refer to the issue of PTAs, this article identifies ‘Additional Guidance for WTO Adjudicative Bodies’ within the draft DSU as particularly important. This section will focus on those amendments and follow the same order outlined in Section III. Regard is also given to the DSB’s general considerations to negotiations and the purposes identified in Section II.<sup>101</sup> As a preliminary matter, it will first address *Peru – Agricultural Products* and analyse how the previous issues have evolved, the extent they provide for further answers, as well as address commentary made by others on the dispute. We do not intend to resolve whether the Appellate Body was correct in its decisions, but attempt to find consistency and support to its logic for the purpose of understanding its position. Subsequently to this section, we consider whether its direction appropriately reflects the intentions of the WTO membership and should be expressed in the DSU amendments.<sup>102</sup>

### A *Peru – Agricultural Products*

Two important questions that the Appellate Body’s reasoning addressed were (i) whether a PTA be used in order remove a member’s right to a WTO panel, and (ii) whether WTO law can be modified or influenced by PTA provisions. The reasoning of the Appellate Body, if correct, appears to make grand claims about the structural supremacy for the WTO over other international law.

Despite staunch opposition to limit DSB jurisdiction, *Mexico – Soft Drinks* and *Peru – Agricultural Products*, accept that there may be ‘circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.’<sup>103</sup> Natens and Descheemaeker argue that a breach of good faith in Articles 3.7 and 3.10 of the DSU would prevent jurisdiction from being *validly established*.<sup>104</sup> The Appellate Body relied on *EC – Bananas III (Article 21.5)* and expressed that parties may waive their rights outside of mutually agreed solutions, but that a member cannot fail to act in good faith unless

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<sup>99</sup> TN/DS/27 at [2.5].

<sup>100</sup> At [2.5].

<sup>101</sup> TN/DS/25 at A-2, General considerations in negotiations: (a) limit any drafting changes to what is necessary to achieve the intended purpose and take into consideration the drafting guidelines suggested by several participants to ensure the greatest level of clarity possible (b) ensure that drafting consistency is maintained throughout the DSU (including internal consistency between unchanged existing DSU text and proposed new or amended text) (c) bear in mind the procedural coherence of the system (ensuring that intended clarifications or improvements are not an inadvertent source of further procedural complexities or uncertainties).

<sup>102</sup> We note that the *Peru – Agricultural Products* was settled subsequent to the negotiation materials relied on for this article and so Members did not have the benefit of addressing the Appellate Body’s reasoning.

<sup>103</sup> *Mexico – Soft Drinks* WT/DS/308/AB/R, above n 39 at [54]; *Peru – Agricultural Products* WT/DS457/AB/R, above n 5 at [5.25]–[5.28].

<sup>104</sup> Bregt Natens & Sidonie Descheemaeker “*Say It Loud, Say It Clear: Article 3.10 DSU’s Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction*” (2015) 49(5) JWT 873.

it had ‘clearly stated that it would not take legal action with respect to a certain measure’.<sup>105</sup> Without an intentional, clear and unambiguous statement, a member does not relinquish its rights to the WTO dispute settlement system.<sup>106</sup> Natens and Descheemaeker suggest that an exercised fork-in-the-road, forum exclusion provision would violate good faith if the party subsequently brings the case to the WTO. We concur that a lack of good faith could act as a legal impediment; however, remain sceptical of whether an exercised forum exclusion would amount to a clear statement. Good faith is ‘ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU’.<sup>107</sup> We believe that similar limitations exist as with an argument of *res judicata* and *lis pendens*. These principles fail to apply for the reason that a ‘legal claim’ under the WTO covered agreements is necessarily different from one arising out of the parties’ bilateral obligations. Note that footnote 106 of the Appellate Body decision maintains that waiver must not relinquish member’s rights and obligations under the DSU *beyond the settlement of specific disputes*.<sup>108</sup> This narrow reading could support that the WTO is concerned with specific legal claims rather than a broadly defined subject matter. An exercised forum exclusion would relate to the same ‘subject matter’, but would not strictly waive the ‘legal claim’ necessary to interfere with the procedural good faith granted under the DSU. This may give better insight to the apparent acceptance of understandings within the WTO context.<sup>109</sup> Notwithstanding the arguments of the WTO giving greater regard to its own jurisprudence, the ‘Understanding on Bananas’, because it was concluded in the WTO context, naturally related to a waiver of a WTO legal claim.<sup>110</sup> This may be the crucial aspect, but even then, there is no reason such waiver could not be made at a bilateral level if properly expressed. Pauwelyn outlines that a PTA to shut out a WTO dispute would need to (i) clearly stipulate so, (ii) make an explicit reference to the DSU, and (iii) limit the waiver to ‘specific disputes’.<sup>111</sup> To this end, we add that the nature of this waiver must properly address the legal claim of the dispute. It must further be noted that there is still no certainty as to how these arguments would be treated if tested in a non-WTO context such as through a PTA. As an alternate means of argument, Pauwelyn again draws the distinction between application and jurisdiction. He posits that consent provided by Article 20 of the ILC Articles on State Responsibility would offer a substantive means of defence and reduce the issues to a factual inquiry.<sup>112</sup> However, application of non-WTO law in a substantive manner still appears uncertain and it becomes a question of whether the WTO’s legal *acquis* allows or has endorsed it, or whether WTO law has set it aside as a hierarchal constraint.

The more astonishing judgments then perhaps come in regards to the Appellate Body’s treatment of non-WTO law and a near confirmation of its own supremacy. It ruled that the specific WTO provisions, and in particular Article XXIV of the GATT 1994 prevail over the

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<sup>105</sup> *EC – Bananas III (2nd Recourse to Article 21.5) WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA*, 26 November 2008 (Report of the Appellate Body) at [217] and [228].

<sup>106</sup> *Peru – Agricultural Products WT/DS457/AB/R*, above n 5 at [5.28].

<sup>107</sup> At [5.25].

<sup>108</sup> At [5.26].

<sup>109</sup> Others have suggested that a distinction based on context is arbitrary. See Joost Pauwelyn “Interplay Between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence” (10 February 2016) <papers.ssrn.com>; Akhil Raina “*The Day the Music Died*: The Curious Case of Peru – Agricultural Products” (2016) 11(2) *Global Trade and Customs Journal* 71.

<sup>110</sup> *Understanding on Bananas between the European Communities and the United States* signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1); *Understanding on Bananas between the European Communities and Ecuador* signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

<sup>111</sup> Pauwelyn “Interplay Between the WTO Treaty”, above n 109.

<sup>112</sup> Pauwelyn also argues that Article 45 of the ILC Articles on State Responsibility could be used to support a defence that Guatemala could no longer invoke responsibility to support a bar on proceedings.

general provisions of the Vienna Convention such as Article 41 on *inter se* modification.<sup>113</sup> This formulation may presume that WTO provisions are *lex specialis*. Many take offence to this finding and suggest that the Appellate Body improperly interpreted the WTO provisions, arguing that Article 41 and Article XXIV cover different situations.<sup>114</sup> However, *lex specialis* need not apply in such a traditional sense, and indeed, closed regimes like the WTO may be *sui generis* with regard to its treatment of general international law principles.<sup>115</sup> General law, of which Article 41 is part of, may be set aside merely on the basis that WTO law gives no textual basis to apply it.<sup>116</sup> Still, something must be said to address the expectation that international law is to be used to fill-gaps. Even if Article 41 has no textual applicability, unless it can be shown that the WTO agreements cover or sought to overrule its residual application, then there should be no restraint on its application.<sup>117</sup> Perhaps a stronger basis for WTO law prevailing here is that the WTO obligations in question are of a collective nature, affecting all WTO members simultaneously. Therefore, any sort of waiver or modification between a subset of parties would be impossible as it would violate the rights of all Members and be contrary to the Treaty's object and purpose.<sup>118</sup> There is debate whether WTO obligations are indeed by nature collective or bilateral.<sup>119</sup> Nevertheless, the Appellate Body's reasoning appears to set down the argument that it, at least, believes WTO obligations to be characterised as collective or interdependent. It characterises the only applicable forms of amendment and waiver to be through mechanisms that necessarily involve collective approval or protection.<sup>120</sup> In referencing Article XXIV, an MFN exception, it takes a narrow view, emphasising that it facilitates *closer* integration and not be exploited to roll back rights and obligations.<sup>121</sup> It is evidence it believes WTO obligations to be a collective goal to facilitate multilateral liberalisation and that any step back from WTO rules would be contrary to the context of the WTO's aims and Members' rights and obligations. Such interdependent obligations also appear evident from adjudicatory bodies' emphasis to make sure interpretation be uniform across the entire Membership.<sup>122</sup> If obligations were purely bilateral in nature, then it is our opinion divergent interpretations based on the parties to a dispute would not be problematic.

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<sup>113</sup> *Peru – Agricultural Products* WT/DS457/AB/R, above n 5 at [5.112].

<sup>114</sup> Article 41 applies to modify a provision between the parties to restrict WTO obligations, while Article XXIV is limited to cover further liberalisation and MFN obligations owed to third parties. Given the a presumption against normative conflicts in international law, for the Appellate Body to apply *lex specialis* suggests the provisions must cover the same matter and conflict. Pauwelyn “Interplay Between the WTO Treaty”, above n 109; Gregory Shaffer and L Alan Winters “FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate Body Wrong in Peru-Additional Duty (DS457)?” (EUI Working Paper RSCAS 2016/65, November 2016); see also Koskenniemi, above n 71 at [75].

<sup>115</sup> Koskenniemi, above n 71 at [85]—[97]; Carmody “WTO Obligations as Collective” (2006) 17(2) *Eur J Int Law* 419.

<sup>116</sup> Adjudicatory bodies must strictly adhere to the WTO or rule in default; see Trachtman, above n 37.

<sup>117</sup> Koskenniemi, above n 71 at [306].

<sup>118</sup> At [301]—[313].

<sup>119</sup> Chios Carmody “WTO Obligations as Collective” above n 115; Chios Carmody “A Theory of WTO Law” (2008) 11(3) *JIEL* 527; Joost Pauwelyn “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?” (2003) 14(5) *Eur J Int Law* 907.

<sup>120</sup> Article X of the WTO Agreement sets out detailed procedures “to amend the provisions of this Agreement or the Multilateral Trade Agreements”. Article IX of the WTO Agreement gives the Ministerial Conference and the General Council the exclusive authority to adopt interpretations of the WTO Multilateral Trade Agreements and to waive obligations imposed on Members under these agreements. Importantly, Article XXIV of the GATT 1994 and Article V of the GATS provide for regional trade exceptions.

<sup>121</sup> *Peru – Agricultural Products*, above n 5 at [5.116].

<sup>122</sup> That ‘parties’ mean all parties to the treaty under interpretation. Further that Article 31(3)(c) is meant to reflect ‘common intention’. *Peru – Agricultural Products*, above n 5 at [5.93]—[5.95] and [5.106]; see also *EC – Biotech* WT/DS291/R, WT/DS292/R, WT/DS293/R, above n 78; *EC – Aircraft* WT/DS316/AB/R, above n 91.



The question left standing is to what extent can non-WTO law, including PTAs, be used consistently within the WTO regime. An interesting aspect of the Appellate Body's decision is that it appeared to reason Article 41 would apply *but for* Article XXIV.<sup>123</sup> Therefore, if the previously stated structural supremacy is correct, then what basis did the Appellate Body have in analysing Article 41 in the first place? Bartels distinguishes that there is a difference between an application of non-WTO law to determine an issue necessary to apply WTO law and an application of non-WTO law to determine whether WTO law can be applied.<sup>124</sup> Here, it appears the Appellate Body has considered Article 41 only as to express that the WTO law in Article XXIV is applicable to all forms of modification. It articulated how existing WTO law applies *inter se* and to express why as a collective obligation, Article XXIV must be interpreted narrowly and consistently. The limit then of non-WTO law is it may be used so far as it does not modify the WTO provisions or their contextual object and purpose. Indeed, we have seen WTO adjudicatory bodies relying on non-WTO law for building its own procedures or as reasoning to endogenously develop interpretations within the WTO regime.<sup>125</sup> Putting these factors together, it would suggest that the application of non-WTO law is limited except perhaps in situations where the obligations can properly be interpreted as having a bilateral nature such as for procedural matters between disputing parties. Indeed, procedural waivers in regard to jurisdiction appear more palatable as it can be expressed through Articles 3.7 and 3.10 of the DSU. This outcome would put the WTO in a precariously powerful position over other international law. For the purposes of *Peru – Agricultural Products*, it seems to shut the book on any form of substantive waiver or modification outside of those incorporated within WTO Law such as Article XXIV. PTAs then, compared to other non-WTO law, actually receive benefit in the regime as they are expressly given reference by the GATT 1994 as a means of deviation. This would resolve to address the apparent jurisprudential subordination of PTAs earlier identified. With regards to the possibility then for WTO-minus rules to be formed, this would depend on how much slack Article XXIV provides.<sup>126</sup> We leave critique of the current approach to Article XXIV to others; but, the Appellate Body's ruling here suggests deviation will only exist to allow WTO+ rules unless they are 'necessary' to the PTA's formation.<sup>127</sup>

## B Guidance to Adjudicators

The intention of providing guidance on the use and interpretation of public international law is for the DSB to adopt such guidelines in a decision that would not have the legal status of treaty text.<sup>128</sup> Consideration was given to the following aspects: the relevance of non-WTO law and if the guidelines intend to modify or confirm existing practice; whether other interpretative approaches are implied outside those prescribed by Article 3(2) DSU and how constructive

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<sup>123</sup> Pauwelyn "Interplay Between the WTO Treaty" above n 109.

<sup>124</sup> Joel Trachtman "Peru – Agricultural Products: WTO versus RTAs (and other non-WTO international law)" International Economic Law and Policy Blog <worldtradelaw.typepad.com>; Lorand Bartels "Jurisdiction and Applicable Law in the WTO" (Working paper 2016/18 Fifth Biennial Global Conference, July 7-9 2016).

<sup>125</sup> TN/DS/26 at [593]: References to procedures of other tribunals are not an 'application' of public international law but rather involves the adjudicator logically drawing from the experience of other adjudicators to develop its own approach to procedural issues; Bartels, above n 124; *US – Shrimp* WT/DS58/AB/R, above n 92.

<sup>126</sup> TN/DS/26 at [596]: Interestingly, PTAs and the invocation of Article XXIV to justify WTO-consistency of measures is mentioned in passing during negotiations, but is not further dealt with.

<sup>127</sup> James Mathis "WTO Appellate Body, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015" (2016) 43(1) LIEI 97; Gregory Shaffer and L Alan Winters "FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate Body Wrong in *Peru-Additional Duty (DS457)*?" (EUI Working Paper RSCAS 2016/65, November 2016); Raina, above n 109; de Mestral, above n 25.

<sup>128</sup> TN/DS/25 at A-42.

ambiguity and gap-filling is distinguished from the legitimate application of customary international law.<sup>129</sup> Negotiations have leaned towards a ‘principles-based approach’ to provide guidance rather than on the basis of examples only.<sup>130</sup> While a principles-based approach is likely preferable when addressing international law generally, this article suggests that PTAs need specific acknowledgment to mirror their prominence in international trade.

### 1 *The Use of Public International Law*

Judicial treatment shows how the WTO and DSB have assumed a level of supremacy, preventing non-WTO law from applying to WTO rules. The draft readily identifies that the WTO agreements are part of public international law and that other public international law can play an important role in WTO dispute settlement.<sup>131</sup> Yet, this provides no certainty to what extent non-WTO law may be applied to a dispute. If one is to assume the WTO’s *de facto* supremacy, then only if reference to and applicability of non-WTO law is codified in its own text will it be effective without diminishing Member’s rights.<sup>132</sup> The concern for collective obligations suggests that flexibility may be appropriate in situations that other Members are not materially affected and have no legal claim. However, unease that outside institutions might threaten the purpose of facilitating multilateralism should be relaxed; this article submitting that blocking other institutions and law would in fact pose a greater threat to the multilateral regime.

In assessing jurisdiction, the ‘jurisdictional impediment’ approach cases allude to appears too strict. A number of commentators have suggested that the WTO incorporate its own forum choice into its text to give effect to a complainant’s choice.<sup>133</sup> Any amendment giving effect to forum choice then must be complemented by an exclusion clause in the DSU to prevent further claims solely on the same ‘subject matter’ and remove the difficult requirement of ‘legal claim’ needed in light of *Peru – Agricultural Products* and as a general principle approach. However, it is clear Members believe it would be inappropriate to allow all matters to be moved outside the WTO. The WTO should allow other forums to settle disputes only in situations that would not materially undermine compliance of essential principles. Assessing these situations is difficult and this article posits two mitigating approaches. The first would be to set a hard limit; where a developing country is involved, it would have the determining choice of which forum it may use. This will make sure that their protections are not undermined by any power-based PTAs that they get pulled into. In the case of two developing countries, there could be a presumption of the WTO unless agreed otherwise. The second approach would be to expand on a panel’s competence to rule on its own jurisdiction. Under this approach, the panel could analyse the risk of harm of external proceedings and then decide to either give effect and refer to an outside institution or insist on its jurisdiction. This approach would involve more work than the first but would give the WTO greater control over what disputes go through the system. For any option seeking to move claims away from the DSB, one must recognise that it is not simply the parties to the dispute which have an interest. The DSU, of course, maintains third party rights and is now further seeking to promote transparency and access.<sup>134</sup> Movement outside of the WTO will diminish these rights (though not strictly if forum choice is textually allowed) unless PTAs coordinate to offer the same rights. In this respect, the second alternative

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<sup>129</sup> TN/DS/25 at A-42.

<sup>130</sup> TN/DS/26 at 10 and [231].

<sup>131</sup> TN/DS/25 at A-27.

<sup>132</sup> Yang, above n 72.

<sup>133</sup> Yang, above n 72; Pauwelyn “Multilateralizing Regionalism”, above n 43.

<sup>134</sup> See generally TN/DS/25; TN/DS/26; TN/DS/27.

may provide a better solution to allow third parties to put their interest forward when analysing whether a panel should insist on jurisdiction, rather than leaving the choice up to the disputing parties. Thus, it would better allow for determination on whether the matter threatens collective obligations.

On the matter of the application of general principles of law, it was stated trying to codify generally uncontroversial notions may also introduce unwanted rigidity and ambiguity.<sup>135</sup> What is worth mentioning is that these principles as well as customary international law are always developing and while not applicable now, they may be in the future. In particular, there is increasing support for a looser application of *res judicata* that does not maintain the requirement for the same ‘legal claim’.<sup>136</sup> If this requirement eventually falls away, it may be harder for adjudicators to deny the effect of PTA jurisdiction provisions. However, since these remain uncodified, it will always be uncertain whether specific general principles have been set aside by the WTO’s implied supremacy. Similarly, there is uncertainty why or when other international law, such as PTAs, cannot be applied. There is a distinction between the jurisdiction of a panel, which is expressly limited to the covered agreements, and the applicable law that a panel may source to settle the dispute.<sup>137</sup> There is nothing in Articles 3(2) and 19(2) of the DSU that expressly suggest WTO covered agreements prevail over non-WTO law. The current draft appears to mirror this fact. In referencing Article 3(2), it only affirms its relation to Articles 31 to 33 of the Vienna Convention, which deal exclusively with interpretation and say nothing about the applicable law. Some Members have observed that in the current draft text, there is an apparent contradiction between the assertion that WTO law is part of public international law, which ‘should not be treated in isolation’, and subsequent guidance that suggests recourse to public international law is not seen favourably.<sup>138</sup> Juridical reasoning to date appears to suggest that application is limited to procedural matters and that substantive application would interfere with the collective obligations and standards the WTO established. We believe this adequately represents the WTO membership’s intention, as it would be pointless to multilateralise to allow states to simply and at will contract out of standards they consented to be bound. However, the current stance appears to go too far and we note two matters. Firstly, it is unlikely that the Membership intended to set aside all substantive non-WTO law such as certain provisions contained in the Vienna Convention and ILC Articles. If the WTO must retain its closed regime, then the DSU must more expressly state what rules do not conflict or at least provide a list of factors, which adjudicatory bodies must consider to assess whether there is in fact a conflict, such as its effect on WTO members and the collective purposes of WTO law. The currently implied setting aside offers no certainty within the system. Secondly, to give better effect to system integration of PTAs and non-WTO law, an alternate interpretation of Article 31(3)(c) may be enforced through issuing a new interpretive note. This is discussed more thoroughly in the next sub-section.

## 2 *The Interpretive Approach to Use in World Trade Organization Dispute Settlement*

The purpose of this proposal is stated to clarify the relationship between WTO dispute settlement and public international law, which is not clearly set out in the DSU, and provide guidance for what would be an appropriate role for public international law.<sup>139</sup> Problematically,

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<sup>135</sup> TN/DS/26 at [594].

<sup>136</sup> International Law Association *Interim Report: “Res judicata” and Arbitration* (International Commercial Arbitration, Berlin Conference, 2004).

<sup>137</sup> Pauwelyn *Conflict of Norms*, above n 29 at 460.

<sup>138</sup> TN/DS/26 at [326].

<sup>139</sup> TN/DS/26 at [320].

the current draft appears to follow earlier determinations which may be seen as contradictory.<sup>140</sup> One participant observed that there was no consistent rule that had been applied in addressing the extent to which arguments based on public international law are acceptable.<sup>141</sup> It was suggested that the structure of the text could be improved to clarify the elements of Article 31(3)(c).<sup>142</sup> The United States affirms the restrictive approach taken in *EC – Biotech* to ensure interpretation does not differ depending on the parties to the dispute and that Members would not see their obligations affected without their consent.<sup>143</sup> This appears to best reflect the collective nature of WTO law and ‘common intention’. However, the restrictive approach appears to go too far and it surely was not the common intention to deny any form of system integration with other sources of international law. Adjudicatory bodies have been hamstrung by this interpretation and it seems apparent in cases such as *EC – Aircraft* that they are looking for a lifeline to account for individual Member’s other international agreements.<sup>144</sup> We posit that an interpretation similar to McGrady’s proposal could satisfy both requirements for upholding WTO rights and obligations while also promoting system integration.<sup>145</sup> We build on this approach now and further note that such an argument could be raised and effective without express changes to the DSU. ‘Parties’ interpreted as ‘parties to the treaty’ seems a necessary prerequisite. However, ‘in relations between the parties’ could be interpreted more generally to mean either parties as a subset or as a matter contemplated or relevant to all parties to the treaty. Indeed, given that Article XXIV was expressed in *Peru – Agricultural Products* as a collective provision, not of purely bilateral *inter se* effect, expressly provided for in WTO law, then it would be difficult to deny that a PTA does not actually fit as a matter contemplated within the relations between the parties. ‘Applicable’ then relates to a matter of scope and how it could apply to the treaty under interpretation. The applicability of the PTA would be a high threshold set to not be detrimental towards other Members. In this regard, it would follow a similar test to Article 41 of the Vienna Convention. However, unlike *inter se* modification which is not permissible, nothing is limited with respect to interpretation. In fact, reading Article 3(2) of the DSU together with Article XXIV would suggest the Membership consented to this type of systemic integration. A further point is that ‘taken into account’, as the ILC suggests, merely refers to consideration and is not legally binding. Under this approach, a broader array of international law could be taken into account but its application would be limited to not alter the uniform interpretation of WTO law to the detriment of other Members. A simple application would exist when the meaning of a term in WTO law is not easily determinable, the availability of extraneous agreements could aid interpretation to better gauge its intent. More difficult is a situation like that in *Peru – Agricultural Products* where the WTO law was clear. It was argued that ‘shall maintain’ in light of the PTA should be interpreted as ‘may’.<sup>146</sup> Strictly, in this case, the effect of this interpretation would not have interfered with the rights and obligations of other Members. Notwithstanding all other potential considerations affecting applicability, a narrow interpretation, respecting that international law also presumes against conflict, would be to say that the WTO law be interpreted as ‘shall’ except with regard to this specific PTA. This prima facie may appear to run into the same problem that interpretation is different depending on the parties to a dispute. However, the basis is not on the disputing parties here. The interpretation still applies equally across all WTO members, but

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<sup>140</sup> *US – Gasoline* WT/DS2/AB/R, above n 74, *EC – Biotech* WT/DS291/R, WT/DS292/R, WT/DS293/R, above n 78; TN/DS/26 at [326].

<sup>141</sup> At [327].

<sup>142</sup> At [327].

<sup>143</sup> At [595].

<sup>144</sup> *EC – Aircraft* WT/DS316/AB/R, above n 91 at [845].

<sup>145</sup> McGrady, above n 79.

<sup>146</sup> Peru contended that article 4.2 of the Agreement on Agriculture should be read against paragraph 9 of Annex 2.3 to the PTA; *Peru – Agricultural Products*, above n 5 at [5.91].

here the PTA parties receive beneficial standing by reference to the PTA applicable to them. In this situation, the outcome is achieved by a PTA, consensually formed and consistent with the WTO, allowing the interpretation to be maintained rather than merely being altered because of the parties to the dispute. Such an approach would require a radical shift by adjudicators. But, conceptually it shows a way to give effect to greater systemic integration within the limits of WTO law. Worries for such an approach being exploited should be limited by the high threshold of applicability, its non-binding nature to apply and existing law preventing deviation merely to undermine an agreement.

The DSB proposal also seeks to provide guidance on how to deal with situations of ambiguity whether constructive or unintended.<sup>147</sup> Negotiations have emphasised that panels and the Appellate Body cannot derogate from Article 3(2) of the DSU and that any form of modification or gap-filling is prohibited.<sup>148</sup> Notwithstanding the limited potential to not adopt a report, it makes more sense that adjudicators be given guidance before a dispute so they can make correct determinations the first time.<sup>149</sup> Participants asked if, in cases of ambiguity, the proposal would require adjudicators to decline to make findings, thereby somehow subtracting from intended obligations and also whether it would be relevant for adjudicators to analyse the intent of constructive ambiguity.<sup>150</sup> Echoing Trachtman, the proponent submitted that it is not necessary to assess the intent *to include the ambiguity*; but where textual intent cannot be discerned after applying the Vienna Convention, adjudicators would have to decline.<sup>151</sup> However, the current DSU and WTO agreements are not clear enough for adjudicators to properly make this distinction.<sup>152</sup> Accepting the difficulty to clarify the intention behind every provision, a possible solution, though not explored in this article, is the potential for the DSB to comment, before appeal, on any points of appeal which might inappropriately lead to gap-filling. Still, question remains whether an adjudicator is bound to rule when confronted with silence.<sup>153</sup> In answering this article's concern about an inappropriate *lacuna* in international law, the DSB clarifies that the intention is not to have a situation of *non liquet* but to prevent the ambiguity serving as the basis of a successful claim or defence.<sup>154</sup> The difficulty appears to be in how such guidance and intent can be expressed. This article suggests that gap-filling is an issue that is created out of necessity when intent cannot be properly gauged. Indeed, the restrictive approach to Article 31(3)(c) limits the sources that adjudicators may take into account to do so. Opening up additional sources of public international law through the previously mentioned methods will allow adjudicators to more accurately interpret the rights and obligations of parties without resorting to unnecessary judgment calls that may fall into the area of law-making.

## V Conclusion

The proliferation of PTAs along with institutional proliferation has increased the complexity of legal and technical trade rules. Overlaps across agreements and institutions have fragmented rights and obligations and created impediments to an efficient dispute settlement system. It is not sufficient to merely lock out or turn a blind eye to the proliferation of PTAs now that they

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<sup>147</sup> TN/DS/26 at [227]–[228].

<sup>148</sup> At [256], [260], [316] and [512].

<sup>149</sup> At [257]–[260].

<sup>150</sup> At [232].

<sup>151</sup> At [233] and [513]–[516]; Trachtman, above n 37.

<sup>152</sup> TN/DS/26 at [258]–[266] and [316]–[318]; *US – Shrimp* WT/DS58/AB/R, above n 92.

<sup>153</sup> TN/DS/26 at [517].

<sup>154</sup> At [518]–[519].

are an established part of world trade. The WTO must acknowledge the changing trade environment to retain legitimacy as a body and preserve the effective functioning of the system as intended.<sup>155</sup> This article submitted that, in order to resolve the apparent inconsistencies, the WTO will need to loosen its self-proclaimed title to supremacy and respect other sources of public international law equally. The DSU should be amended with its own forum choice and exclusion provisions to give effect to PTA procedures where it would not significantly undermine the rights of the WTO membership. As a secondary mode of harmonisation, the DSB must take a broader approach to the use of public international law to respect Members' bilateral obligations. A new approach to interpretation, referencing extraneous law, will allow WTO law to remain dynamic and adapt to the changing requirements of international trade.

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<sup>155</sup> Ronald Saborio Soto, above n 12.