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Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO — What Should WTO Do?

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Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?†

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Introduction and Tribute to Yasuhei Taniguchi

It was a tremendous pleasure to participate in a symposium that honored one of the giants of the World Trade Organization's (WTO) Appellate Body—Professor Yasuhei Taniguchi. Professor Taniguchi served as a distinguished member of the Appellate Body from 2000 to 2007, during which time he served on the division for twenty-one appeals, many of them addressing landmark issues.[1] In tribute to him, this article focuses on an issue that was a key element in the last dispute on which Professor Taniguchi served as member of the Appellate Body. This dispute concerned Brazil's restrictions on imports of retreaded tires and raised important questions about the relationship between regional trade agreements and commitments to the WTO.[2]

The subject of this article—the relationship between the dispute settlement mechanisms of various free trade agreements, customs unions or regional trade agreements (RTAs) and the WTO's Dispute Settlement Understanding[3]—is one that has already seen considerable debate among scholars.[4] This debate is poised to become more relevant and more intense with the proliferation of free trade agreements and RTAs.

This article outlines the most common types of dispute settlement mechanisms contained in RTAs and the problems that can arise from the overlap or conflict between these RTA dispute settlement provisions and the Dispute Settlement Understanding of the WTO. This article also discusses the most recent case in which such a conflict arose—the Appellate Body's report in *Brazil Tyres*. In *Brazil Tyres*, the Appellate Body examined Brazil's ban on the importation of used and retreaded tires and the exemption from that ban that Brazil adopted to implement an adverse ruling from a decision of an RTA dispute settlement tribunal.[5] Brazil contended that the WTO panel was correct in finding that Brazil's exemption from the ban for certain retreaded tires was permissible because it was mandated by a Mercado Común del Sur (MERCOSUR) tribunal.[6] The Appellate Body reversed the panel, finding that taking action to comply with a MERCOSUR dispute settlement panel did not necessarily provide sufficient justification

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1. WTO, Dispute Settlement—Appellate Body Members: Biography, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm (last visited Sept. 13, 2009).

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

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

4. *See, e.g.*, Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007).

5. *See generally Brazil Tyres*, Appellate Body Report, *supra* note 2.

6. *Id.* ¶¶ 62-65. MERCOSUR is the Mercado Común del Sur (Southern Common Market), a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay, founded in 1991 by the Treaty of Asuncion, as amended and updated by the 1994 Treaty of Ouro Preto. *Id.* at Abbreviations Chart.

for Brazil's action.[7] Brazil was still required to meet the requirements of the General Agreement on Tariffs and Trade (GATT) and WTO covered agreements, particularly, in this case, the chapeau of Article XX.[8] This article concludes that there are a number of problems that can arise—or have already arisen—due to the overlap in dispute settlement processes between the WTO and RTAs, and WTO members should take immediate action under the Doha Round mandate to address these conflicts and clarify the legal relationship between RTA and WTO dispute settlement provisions.

I. Dispute Settlement Mechanisms in Regional Trade Agreements

There is no denying the explosive growth in the number of regional free trade, or preferential trade, agreements. The first forty-five years of the GATT[9] (the period between 1948 and the conclusion of the Uruguay Round in 1994) saw a total of 124 notifications to the GATT of RTAs.[10] In the fourteen years since its inception, the WTO has received notification of more than twice as many additional RTAs—a total of 380 RTAs as of July 2007.[11] If one considers the RTAs that are in force but not yet notified to the WTO, those signed but not yet in force, and those in the negotiating or proposed stage, there are likely to be more than 400 RTAs in force by 2010.[12] The vast majority (90%) of these are free trade agreements or partial scope agreements, while the remaining RTAs are customs union agreements.[13] Substantively, most of these agreements concern the same issues as various WTO agreements—touching on trade in goods and services, intellectual property, customs and valuation provisions, sanitary and phytosanitary provisions (SPS provisions), technical barriers to trade, agricultural issues, and the ubiquitous provisions for preferential tariff levels.

Virtually all of these free trade or partial scope agreements contain some form of dispute settlement mechanism. Although there are considerable differences in these provisions and the type of dispute resolution processes they establish, the various systems can generally be characterized as one of the following: 1) choice of forum agreements, with or without a further requirement granting exclusive jurisdiction to the forum chosen first; 2) exclusive jurisdiction agreements, which require all disputes arising under the RTA to be brought only under the RTA's dispute settlement mechanism; or 3) preference agreements, which specify a preferred forum that can be changed to an alternative forum only upon agreement among

7. *Id.* ¶¶ 232-233.

8. *See id.* ¶ 232.

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

10. WTO, Regional Trade Agreements—Facts and Figures: How Many Regional Trade Agreements Have Been Notified to the WTO?, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Sept. 13, 2009).

11. WTO, Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Sept. 13, 2009).

12. *Id.*

13. *Id.*

the parties.[14] Most of the RTAs notified to date are of the first type, providing for a choice of forum that allows the complaining party to choose whether to bring a claim under the dispute settlement mechanism of the RTA or under the WTO's Dispute Settlement Understanding (DSU). A significant number of these choice of forum provisions go on to require that once a dispute has been initiated in a given forum, the same dispute cannot be initiated in the other forum.[15]

II. WTO Dispute Settlement Understanding's Article 23 Versus WTO Member Rights Under GATT Article XXIV[16]

The existence and nature of the dispute settlement provisions in many RTAs may raise questions about their consistency with the WTO—particularly Article 23 of the WTO's dispute settlement provisions. Article 23 provides that: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."[17]

A number of scholars have argued that Article 23 should be read to mean that the DSU has "not only *compulsory* jurisdiction over matters aris-

14. Some agreements, most notably the North American Free Trade Agreement (NAFTA), provide a preference for only certain provisions of the agreement. *See generally* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Article 2005 of NAFTA includes a preference for NAFTA resolution of disputes involving environmental, SPS, or standards-related measures and further declares that if the complaining party has already started WTO procedures on these matters, the defendant can insist that the WTO complaint be withdrawn. *Id.* art. 2005, paras. 1-5. All other matters, except disputes involving final anti-dumping or countervailing determinations, are subject to a more traditional choice of forum clause in which the complaining party can choose whether to bring the case to the WTO dispute settlement system or a NAFTA panel; but once the forum is chosen, it is to be used to the exclusion of the other. *Id.* art. 2005.

15. A comprehensive chart outlining the dispute settlement mechanisms in most RTAs notified to the WTO can be found in the Annex to Kyung Kwak & Gabrielle Marceau, Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs (Apr. 26, 2002) (paper presented at World Trade Organization Conference on Regional Trade Agreements), *available at* http://www.wto.int/english/tratop_e/region_e/sem_april02_e/marceau.pdf.

16. The agreement creating the WTO included the General Agreement on Tariffs and Trade 1994 (GATT 1994), which is based on the original text of the GATT 1947. *See* Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 421 & n.9 (2001); *see also* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187. GATT 1994 includes Article XXIV of the GATT 1947, subject to the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. Cho, *supra*; *see also* Understanding on the Interpretation of Article XXIV of the General Agreement of Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of Uruguay Round, 33 I.L.M. 1161 (1994) [hereinafter Understanding on the Interpretation of Article XXIV].

17. DSU art. 23.1.

ing under the covered agreements, [but that] it also [has] *exclusive* jurisdiction over such matters."[18] In so doing, these scholars claim that Article 23 requires that if a WTO member seeks redress for violations of obligations under the covered agreements, it must use DSU procedures.[19] Consequently, once a request for a panel is made, the panel is automatically established and the rulings of that panel or of the Appellate Body are legally binding on the parties.[20]

If Article 23 does, in fact, provide compulsory *and* exclusive jurisdiction to resolve disputes involving the WTO covered agreements, one may ask whether RTAs with substantive provisions that are similar to the WTO but which have the effect of requiring resolution of a dispute by the RTA's dispute settlement process—either by compulsion or by being the first chosen exclusive forum—deprive parties of the right of access to the WTO's dispute settlement process. The flip-side of this issue is whether the WTO should be concerned by RTA members who initiate WTO dispute settlement proceedings in possible violation of their RTA obligations.[21]

To date, there has been little clarification of the exact legal relationship between the RTA dispute settlement systems and the DSU. Article XXIV of the GATT clearly acknowledges the existence of RTAs within the GATT/WTO system.[22] As such, WTO members are allowed to use RTA dispute settlement mechanisms to settle disputes under WTO-compatible RTAs. Yet, the growing overlap in the substantive obligations and multiple dispute settlement forums raise many questions about the nature of the legal relationship between these international agreements. Because Article 23 of the DSU provides that WTO violations can only be resolved through the

18. Debra P. Steger, *The Jurisdiction of the World Trade Organization*, 98 AM. SOC'Y INT'L L. PROC. 142, 143 (2004).

19. *See id.*

20. *See id.*

21. The issue has come to the fore in a number of cases in which RTA dispute settlement mechanisms have overlapped with WTO provisions. For example, as part of the so-called "sugar wars" between the United States and Mexico, Mexico filed a dispute under Chapter 20 of the NAFTA; but the United States did not agree on panelists. David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1073 (1999). Mexico then imposed a series of taxes on soft drinks that used a sweetener other than cane sugar, which the United States challenged under the WTO. *See* Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 2, WT/DS308/AB/R (Mar. 6, 2006). Mexico argued that the WTO panel should refuse to resolve the dispute in light of Mexico's efforts to initiate NAFTA Chapter 20 proceedings. *Id.* ¶ 3. The Appellate Body held that the panel could not decline to exercise jurisdiction and that the WTO had no basis to determine whether or not the United States had acted consistently with its NAFTA obligations. *Id.* ¶¶ 53, 56.

22. Article XXIV provides: "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area," and goes on to impose three conditions for such arrangements. GATT art. XXIV:5. The Appellate Body Report in *Turkey—Textiles* addressed the issue of demonstrating that the free trade agreement or customs union meets the conditions set forth in Article XXIV. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶¶ 60-63, WT/DS34/AB/R (Oct. 22, 1999).

WTO's dispute settlement mechanism, it is not clear that a WTO panel can decline jurisdiction because an RTA is a more convenient forum, has more specific rules, is already considering a case on the same claim, or has already adjudicated the matter.[23]

III. The *Brazil Tyres* Dispute

Some of these jurisdictional issues arose very directly in the most recent Appellate Body case that Professor Taniguchi helped to resolve—*Brazil Tyres*—involving a Brazilian ban on imported tires.[24] Because they are breeding grounds for mosquitoes, and because their disposal (particularly by burning) causes additional adverse effects, Brazil imposed an import ban on retreaded tires as part of its efforts to reduce the volume of tire waste and the "risks to human, animal, and plant life and health" associated with waste tires.[25] Uruguay challenged the import ban in MERCOSUR arbitral proceedings, claiming that the ban on imports of retreaded tires constituted a new restriction of commerce between the parties, "which was incompatible with Brazil's obligations under MERCOSUR."[26] The MERCOSUR arbitral tribunal found that Brazil's import ban was incompatible with MERCOSUR regulations.[27] Following the arbitral decision, Brazil enacted new provisions that exempted from the import ban certain retreaded tires (referred to as remolded tires) originating in MERCOSUR countries.[28]

The European Communities (EC) then filed a WTO challenge against both the import ban and the exemption.[29] The EC claimed that the Brazilian measures were inconsistent with, among other things, the GATT prohibition on quantitative restrictions (Article XI).[30] Brazil acknowledged that its import ban and associated fines were inconsistent with Article XI, but contended that its import ban was justified under Article XX(b) of the GATT as a measure necessary to protect human, animal or plant life or health.[31] Brazil also claimed that the fines associated with the import ban

23. *See* DSU art. 23. For example, the panel in *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil* stated that panels are not bound to follow the rulings of RTA panel proceedings, even if the proceedings involve the same measures. Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.41, WT/DS241/R (Apr. 22, 2003). There, a MERCOSUR panel had ruled in Argentina's favor. *Id.* In the subsequent WTO case brought by Brazil, Argentina claimed that the panel could not disregard the precedents set forth in the MERCOSUR proceedings. *Id.* The panel rejected those claims stating, "[T]here is no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way . . . . [W]e see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies." *Id.*

24. *See generally Brazil Tyres*, Appellate Body Report, *supra* note 2.

25. *Id.* ¶ 119.

26. *Id.* ¶ 122 n.163.

27. *Id.*

28. Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 2.14, WT/DS332/R (June 12, 2007) [hereinafter *Brazil Tyres*, Panel Report].

29. *Brazil Tyres*, Appellate Body Report, *supra* note 2, ¶ 2.

30. *Id.* ¶ 123; *see also* GATT art. XI.

31. *Brazil Tyres*, Panel Report, *supra* note 28, ¶ 4.9; *see also* GATT art. XX(b).

were justified under Article XX(d) as necessary to secure compliance with the import ban and its regulations.[32] The EC countered that Article XX permits such measures only if they meet the terms of the chapeau of Article XX, particularly the provision that measures cannot be applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[33] The EC claimed that to exempt imports only from MERCOSUR countries constituted arbitrary or unjustifiable discrimination between countries that are members of MERCOSUR and those that are not.[34]

First, the *Brazil Tyres* panel examined the terms "arbitrary" and "unjustifiable" and stated that, in the context of Article XX, these terms "suggest[ed], overall, the need to be able to 'defend' or convincingly explain the rationale for any discrimination in the application of the measure."[35] The panel noted that Brazil enacted the exemption only after a MERCOSUR dispute settlement tribunal found Brazil's restrictions on the importation of retreaded tires to constitute a new restriction on trade prohibited under MERCOSUR.[36] For the panel, the MERCOSUR exemption did "not seem to be motivated by capricious or unpredictable reasons. It was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."[37] The panel added that the discrimination was not "*a priori* unreasonable," because the discrimination arose in the context of an agreement that "inherently provide[d] for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."[38] The panel ruled in Brazil's favor after concluding that the MERCOSUR dispute settlement ruling provided a reasonable basis for enacting the MERCOSUR exemption, implying that any discrimination resulting from the exemption was not arbitrary.[39]

The EC then challenged various aspects of the panel report before the WTO Appellate Body, including the panel's finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination contrary to the chapeau of Article XX of the GATT 1994.[40] The EC contended that the panel erred in its definition of "arbitrary" as acts that are "capri-

32. *Brazil Tyres*, Panel Report, *supra* note 28, ¶ 4.425; *see also* GATT art. XX(d).

33. GATT art. XX; *see Brazil Tyres*, Appellate Body Report, *supra* note 2, ¶¶ 27, 31. The chapeau of Article XX of the GATT 1994 provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .

GATT art. XX.

34. *Brazil Tyres*, Panel Report, *supra* note 28, ¶ 4.448.

35. *Id.* ¶ 7.260.

36. *Id.* ¶ 7.271.

37. *Id.* ¶ 7.272.

38. *Id.* ¶ 7.273.

39. *Id.* ¶ 7.281.

40. *Brazil Tyres*, Appellate Body Report, *supra* note 2, ¶ 27.

cious," "unpredictable" or "random."[41] Furthermore, the EC argued that just because the exemption was in response to the MERCOSUR dispute settlement ruling did not mean that the exemption was consistent with Article XX.[42] The EC claimed that the objective of the measure at issue should be taken into account when determining whether the measure involves arbitrary or unjustifiable discrimination.[43] According to the EC, a measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable" in light of its objective.[44]

Conversely, Brazil claimed that the following considerations identified by the panel demonstrated that the MERCOSUR exemption did not amount to arbitrary discrimination:

> (i) Brazil introduced the exemption only after a dispute settlement tribunal established under MERCOSUR ruled that the ban violated Brazil's obligations under MERCOSUR; (ii) the MERCOSUR ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994; (iii) agreements of the type recognized by Article XXIV inherently provide for discrimination; (iv) Brazil had an obligation under international law to implement the ruling by the MERCOSUR tribunal; (v) Brazil applied the MERCOSUR ruling in the most narrow way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban; and (vi) it was not reasonable for Brazil to implement the MERCOSUR ruling with respect to imports from all sources, because doing so would have forced Brazil to abandon its policy objective and its chosen level of protection.[45]

As a result, Brazil claimed that the panel had correctly determined that these circumstances provided a rational basis for the MERCOSUR exemption.[46]

Although the Appellate Body agreed with the panel that Brazil's compliance with the MERCOSUR ruling could not be called capricious or random, its analysis did not end there.[47] The Appellate Body went on to state that discrimination can result from a rational decision or behavior and still be arbitrary or unjustifiable "because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective."[48] In this case, the parties agreed that the objective of the measure at issue was the protection of life and the decrease of health risks from mosquito-borne diseases and tire fires.[49] The Appellate Body thus found that the exemption's origins in a MERCOSUR ruling did not fully justify the discrimination caused by the exemption.[50] The Appellate Body noted that

41. *Id.* ¶ 29.
42. *Id.* ¶ 31.
43. *Id.* ¶ 220.
44. *Id.* (internal citation omitted).
45. *Id.* ¶ 65.
46. *Id.* ¶ 222.
47. *Id.* ¶ 232.
48. *Id.*
49. *See id.* ¶¶ 17, 56, 119.
50. *Id.* ¶ 228.

because the exemption permitted more tires to be imported into Brazil, "it [bore] no relationship to the legitimate objective pursued by the Import Ban that [fell] within the purview of Article XX(b), and even [went] against this objective."[51] The Appellate Body concluded that the MERCOSUR exemption resulted in the application of the import ban in a manner that constituted arbitrary or unjustifiable discrimination.[52]

One final paragraph in the Appellate Body's report merits further scrutiny. One of the EC's arguments was that Brazil should have defended its import ban in the MERCOSUR proceedings by invoking Article 50(d) of the Treaty of Montevideo,[53] which provides for an exception to MERCOSUR commitments similar to that provided in Article XX(b) of GATT 1994.[54] Brazil had not invoked this provision or made the claim in the MERCOSUR proceedings that the import ban was related to human health and safety.[55] The Appellate Body noted that it was not appropriate for it to second-guess Brazil's decision not to invoke the Treaty of Montevideo.[56] It went on to state:

> However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT . . . .[57]

The Appellate Body continued to address this issue of potential conflicts between the WTO and RTAs by adding the following footnote:

> In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.[58]

As such, the decisions of the panel—both those affirmed and those overturned by the Appellate Body in its final report—spawned a number of critical issues about the overlaps or conflicts in jurisdiction between RTAs and the WTO.

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51. *Id.*

52. *Id.*

53. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 [hereinafter Treaty of Montevideo].

54. *Brazil Tyres*, Appellate Body Report, *supra* note 2, ¶ 234 & n.443; *see* Treaty of Montevideo, *supra* note 53, art. 50(d).

55. *Brazil Tyres*, Appellate Body Report, *supra* note 2, ¶ 234.

56. *Id.*

57. *Id.* (internal citations omitted).

58. *Id.* ¶ 234 n.445.

IV. Issues Raised by Conflicts and Forum Choices

A. Jurisdiction of WTO over Non-WTO Law?

An immediate question arises from the overlap in the substantive areas covered by RTAs and the WTO: do WTO panels and the Appellate Body have the power to take non-WTO law (such as the text of an RTA or the decisions of RTA dispute settlement panels) into account, and should they exercise that power when resolving a WTO dispute? The rules and procedures of the DSU allow the Dispute Settlement Body (DSB) to resolve conflicts that involve the rights and obligations contained in the WTO covered agreements.[59] The decisions of the DSB are not to add to or diminish the rights and obligations of WTO members.[60] Furthermore, it is firmly established that WTO panels do not have the authority to enforce provisions of an RTA directly.[61] Nonetheless, there exists uncertainty as to whether RTA law can be, or should be, taken into account or treated differently than other non-WTO law—both because RTAs are explicitly recognized in Article XXIV of the GATT, and because the substantive law of RTAs generally mirrors or even replicates the language of the WTO covered agreements.

From the beginning, the Appellate Body has recognized that WTO law cannot exist wholly apart from public international law.[62] Some scholars have emphasized that in the instance of an RTA, the parties to the dispute have entered into an international agreement that exists concurrently with the WTO and expresses their rights and obligations.[63] As a result, these scholars have argued that the DSU does not necessarily add to or take away from those parties' rights and obligations if it takes into account the law of a given RTA in resolving a dispute.[64]

B. Duplicative Proceedings and/or Conflicting Rulings

A second immediate concern is the potential for duplicative proceedings at considerable expense to those states involved. For example, in the most recent dispute between Canada and the United States over trade in softwood lumber—involving countervailing duty and anti-dumping measures—Canada brought four separate WTO disputes, three NAFTA panel proceedings under Chapter 19 of the NAFTA, and a separate Chapter 11 NAFTA claim; an Extraordinary Challenge of the Chapter 19 decisions was also heard, and the industries on both sides of the border brought follow-up litigation in the U.S. courts.[65]

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59. DSU art. 3.2.
60. *Id.*
61. *See, e.g.*, *US–Margins of Preference* (Aug. 9, 1949), II GATT B.I.S.D. at 11 (1952).
62. *See* DSU art. 3.2.
63. *See* Steger, *supra* note 18, at 144 (commenting on the views of Joost Pauwelyn).
64. *See id.*
65. *See generally* Chi Carmody, *Softwood Lumber Dispute (2001-2006)*, 100 AM. J. INT'L L. 664 (2006). Chapter 19 of the NAFTA treaty governs disputes over final anti-dumping and countervailing duty determinations, while the general dispute settlement provisions of Chapter 20 govern other NAFTA disputes. *See* discussion *supra* note 14.

A panel of the WTO upheld the revised U.S. injury determination, while a NAFTA panel considering the same issue found that the injury determination was not supported by sufficient evidence—resulting in conflicting rulings.[66] Although the Appellate Body subsequently overturned the panel's conclusion,[67] the potential for contradictory rulings is evident. Both parties in a dispute can be expected to press the decision of one forum's panel onto the other panel when those decisions work in their favor.

In *Brazil Tyres*, the EC made a number of arguments about the claims Brazil raised or did not raise before the MERCOSUR tribunal. The EC argued that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.[68] The panel did not find this argument persuasive.[69] The panel considered that it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."[70]

C. Res Judicata?

Res judicata, the doctrine that a final judgment rendered by a competent court on the merits is conclusive and constitutes a bar to subsequent action on the same claim,[71] is woven into a number of RTAs. The inclusion of this principle raises the issue of whether a WTO dispute should be considered an appeal or relitigation of a claim that has already been adjudicated by an RTA panel. If so, one could argue that by agreeing to res judicata provisions, parties to an RTA either effectively strip the WTO of jurisdiction or risk violating the terms of the RTA if they bring a WTO case.

D. Good Faith

A question related to res judicata is whether it should be considered bad faith to bring a dispute before one forum, receive a final judgment, and then initiate a second proceeding before a second forum if dissatisfied with the first ruling. Article 3.10 of the DSU requires good faith,[72] but to date, violations of exclusive forum provisions have not been viewed as substantive violations of WTO law. Therefore, if a member brings a subsequent

66. *See* Jennifer Lan, *U.S. and Canadian Trade War over Softwood Lumber: The Continuing Dispute*, 13 LAW & BUS. REV. AM. 209, 214-16 (2007).

67. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 144-147, WT/DS264/AB/RW (Aug. 15, 2006).

68. *Brazil Tyres*, Panel Report, *supra* note 28, ¶ 7.275.

69. *Id.*

70. *Id.* ¶ 7.276. "In a similar case between Argentina and Uruguay, the tribunal also reached the conclusion that the restriction was unjustified, despite the invocation of the relevant exception by Argentina in those proceedings." *Id.* ¶ 7.276 n.1451.

71. RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 27 (1982).

72. *See* DSU art. 3.10.

WTO case after an RTA case, such actions have not been found to be violations of the WTO's good faith provision.

E. Preclusion of Defenses

Many RTAs contain more specific provisions that could be viewed as *lex specialis* provisions. An issue thus arises as to whether WTO members can raise provisions of an RTA as a defense in WTO cases.[73]

F. Impact on Third Parties

Because of the proliferation of RTAs and the degree of substantive overlap between RTAs and the WTO, the problem of third-party rights is growing. Article XXIV does not require that an RTA or its dispute settlement mechanism take into account the rights or opportunities of third parties to participate in the dispute settlement, while the WTO's DSU provisions *do* provide for third-party participation.[74] Many of the decisions of RTA tribunals could impact third parties. Therefore, these third parties may need to bring a separate dispute before the WTO to protect their interests if they are affected by proceedings before an RTA tribunal.

V. Can or Should the Overlaps or Conflicts Be Addressed? How?

Members of the WTO have recognized many problems created by the "spaghetti bowl" of overlapping trade agreements outside the WTO.[75] The Doha Declaration includes a negotiating mandate to clarify and improve "disciplines and procedures under the existing WTO provisions applying to regional trade agreements."[76] As such, WTO members could adopt any number of the approaches suggested by various scholars to address the problems of overlaps and conflicts with RTAs.[77] Each of these suggestions, however, raises its own significant problems. Particularly, these suggestions present questions of how far the WTO can or should go in taking account of the law, evidence, or decisions of any given subset of its members and what risks the WTO takes in giving up jurisdiction to decide basic questions of international trade law. Among the ideas suggested for possible resolution of conflicts are:

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73. *See, e.g.*, Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 254-255 (2004) (discussing arguments and conditions under which such defenses might be permitted).

74. *Compare* GATT art. XXIV, *and* Understanding on the Interpretation of Article XXIV, *supra* note 16, *with* DSU art. 10.

75. *See* PETER SUTHERLAND ET AL., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 19-20 (2004) (commenting on the erosion of the WTO principles occurring through the proliferation of RTAs).

76. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 29, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

77. For a discussion of many possible solutions, see Kwak & Marceau, *supra* note 15.

1. Permit/Require WTO Panels to Apply RTA Law as a Defense: WTO panels could be permitted, where appropriate, to recognize defenses available under an RTA. This could result in the same law being applied by panels of the WTO or an RTA.[78]
2. Forum Conveniens: Article 23 of the DSU could be amended to permit members to determine the most convenient forum for resolving a given dispute.[79]
3. Exhaustion of Remedies: Members could agree to require parties to either exhaust their RTA remedies before bringing a WTO dispute or to exhaust their WTO remedies before bringing an RTA dispute.[80]
4. Required Suspension of Other Forum Process: Members could negotiate rules to permit or require the suspension of proceedings in one forum while the other forum hears the matter.[81]
5. Article 13 of the DSU: Article 13 of the DSU, which permits panels to request information from parties or any other source, could be invoked to seek information, or evidence, or even rulings from an RTA tribunal.[82]
6. Res Judicata: Article 23 could be amended to permit a panel to decline jurisdiction if an RTA tribunal has already adjudicated the same matter.

Conclusion

Because Article 23 of the DSU gives the WTO authority to adjudicate all alleged violations of WTO obligations and gives WTO members the right to initiate WTO dispute settlement proceedings, it would be very difficult to ask a WTO member to take its dispute to another forum, even if it had agreed under an RTA to be subject to a parallel dispute settlement mechanism for parallel obligations. Because the WTO, through GATT Article XXIV, recognizes the right of members to enter into RTAs, an inherent tension exists between members' rights under Article XXIV and their RTAs, and their rights under the WTO's DSU. And because the number of RTAs is growing so substantially and affecting so many WTO members' rights, the best solution would be for WTO members to use the Doha negotiating mandate regarding RTAs to resolve the legal relationship between these agreements and the WTO, and to establish clear rules for addressing conflicts and overlaps between the dispute settlement mechanisms of the two. Possible ways of doing so have been noted in this article, and the decision of the Appellate Body in *Brazil Tyres* provides the most recent example of why such action by WTO members is both necessary and desirable.

78. *See* Pauwelyn, *supra* note 73, at 254-55.
79. *See* Kwak & Marceau, *supra* note 15, at 8.
80. *See id.* at 10.
81. *See id.* at 10-11.
82. *See id.* at 9.

Annex: Additional Sources of Information

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