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A BALANCING ACT: USING WTO DISPUTE SETTLEMENT TO RESOLVE REGIONAL TRADE AGREEMENT DISPUTES

FELICITY HAMMOND*

This note outlines a proposal for creating and maintaining a strong and balanced international trade law framework. The author argues that the institutional balance between the judicial and legislative arms of the international trade law system has been tipped. In the World Trade Organization (WTO), as the rule-making body remains in a decade-long deadlock, the specter of judicial activism is raised as the WTO dispute settlement system (WTO DSS) attempts to adequately address the evolving needs of its Members. In contrast, although most Bilateral and Regional Trade Agreements (RTAs) include dispute resolution mechanisms, it appears the parties are largely continuing to rely on the WTO DSS to provide a judicial check. In order to address these issues and restore equilibrium, this note proposes that disputes under RTAs are referred to the WTO DSS for resolution. If implemented, this proposal would provide the WTO DSS with an expanded mandate to consider emerging issues in international trade law, and provide RTAs with access to a robust judicial mechanism to resolve disputes. This proposal encourages increased engagement and interaction between the two systems and in doing so, creates a path for de facto convergence in trade law jurisprudence. The key strengths of both systems—a robust judicial mechanism provided by the WTO and a dynamic source of international trade law provided by the ever-expanding network of RTAs—are aligned.

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I. INTRODUCTION

The institutional balance between the judicial and legislative arms of the international trade law system has been tipped. In the World Trade Organization (WTO), the failure to break the impasse in the Doha Round has left its 'legislative' body practically inert. This has saddled the WTO dispute settlement system (WTO DSS) - the comparatively active 'judicial arm' of the WTO, with the burden of potentially having to stretch its mandate to ensure that the existing rules meet the evolving needs of WTO Members. Meanwhile, reciprocal trade agreements between two or more trading partners (Regional Trade Agreements or RTAs) have become the vehicle through which trading powers are pursuing their trade liberalisation goals.¹ Although legislative action in the international trade law

¹ As on Jan. 15, 2012, 511 notifications of RTAs (counting goods and services separately) had been received by the GATT/WTO. Of these, 319 were in force, *see* WORLD

sphere has moved to the negotiation of RTAs, judicial review under RTAs has been comparatively inactive. Most RTAs incorporate dispute settlement provisions, however, RTA parties have relatively rarely invoked them, apparently choosing instead to use the WTO DSS to resolve issues that may also fall within the scope of their RTA.²

Against this background, the author outlines a proposal for the restoration of the institutional balance in the international trade law system. Specifically, the author proposes that disputes that arise under RTAs are referred to the WTO DSS for resolution. The WTO DSS would provide an established dispute resolution institution, including access to a standing Appellate Body experienced in international trade law.³ However, the rules to be applied to resolve the dispute would be those of the relevant RTA—there would be no explicit merging or hierarchical application of RTA or WTO rules in the event of overlap. In order to implement this proposal, the WTO Dispute Settlement Understanding (DSU),⁴ would need to be amended. Parties would also need to structure dispute resolution mechanisms in their RTAs to provide for disputes to be resolved by the WTO DSS.

The proposal would provide equilibrium in the international trade law system by injecting the WTO with the power to resolve disputes implicating international trade related issues and rules that extend beyond the current, static WTO mandate. At the same time, it would provide a robust judicial avenue, including appellate

TRADE ORGANIZATION, *Regional trade agreements*, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Apr. 16, 2012) [hereinafter WTO on RTAs].

² David Morgan, *Dispute Settlement Under PTAs, Political or Legal?*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 241, 257 (Ross P. Buckley et al. eds., 2008) [hereinafter Morgan]. See also WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2011, THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 176 (2011) [hereinafter WORLD TRADE REPORT].

³ Henry Gao and C. L. Lim have also proposed that that one way to ‘save the WTO from the risk of irrelevance’ due to the proliferation of RTAs is for RTA disputes to be resolved by the WTO DSS. See Henry Gao & C. L. Lim, *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a ‘Common Good’ for RTA Disputes*, 11 J. INT’L ECON. L. 899, 899 (2008) [hereinafter Gao & Lim]. Colin B. Picker also includes referral to the WTO DSS as one element of a broader proposal to deal with what he perceives as the threat to the WTO posed by RTAs. See Colin B. Picker, *Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT’L ECON. L. 267 (2005) [hereinafter Picker].

⁴ Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

review, for the resolution of disputes under RTAs. Importantly, the WTO and the network of RTAs would no longer operate as silos. The proposal draws on the relative strengths of both systems and increases the level of interaction between them. Through the sharing of a dispute resolution institution, and the introduction of both “horizontal” and “vertical” consistency, the path is set for incremental de facto convergence in trade law jurisprudence.

This note is structured as follows: Part I will set out the problem of ‘imbalance’ in the international trade law system; Part II will outline in detail the proposal for addressing this imbalance through the referral of disputes under RTAs to the WTO DSS; and Part III will analyse this proposal and discuss the ways in which it will restore equilibrium and increase the interaction between the two regimes. The proposal positions the WTO and RTAs not as competing forces, but as complementary systems that can be productively used to reinforce each other.

II. IMBALANCE IN THE INTERNATIONAL TRADE LAW SYSTEM

A. *Imbalance in the WTO*

The WTO institutional structure can broadly be divided into a legislative branch and a judicial branch.⁵ At the peak of the legislative branch is the General Council—the highest rule and decision-making body. The General Council, through the Trade Negotiations Committee, is currently engaged in negotiating updated rules and improved market access through the Doha Development Round. The ‘Doha Round’ is to be negotiated as a “single undertaking” where “nothing is agreed until everything is agreed”.⁶ Having been initiated in 2001, more than a decade of negotiations has passed, and the Doha Round has failed to reach

⁵ Frieder Roessler, noted in 2000 that, “[t]he framers of the WTO Agreement carefully negotiated a more complex institutional structure under which separate judicial and political bodies are empowered to take binding decisions that confirm, define or alter the rights and obligations of Members.” See Frieder Roessler, *The Institutional Balance Between the Judicial and Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, ESSAYS IN HONOUR OF JOHN H. JACKSON* 325 (Marco Bronckers & Reinhard Quick eds., 2000) [hereinafter Roessler]. See also Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in *INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS* 219, 219 (Laurence Boisson de Chazournes et al. eds., 2002), available at <http://www.worldtradelaw.net/articles/charnovitzjudicial.pdf>; Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 *INT’L & COMP. L. Q.* 861 (2004) [hereinafter Bartels].

⁶ See World Trade Organization, *The Doha Round*, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Apr. 16, 2012).

a successful conclusion. As a result, the current rules governing WTO Members have become increasingly outmoded in two principal ways. First, ambiguous, non-binding and occasionally conflicting text in the WTO Agreement⁷ mean that in many areas, the goals of WTO Members cannot be achieved in the most efficient and effective way. For example, questions have been raised over how to give content to “special and differential treatment” obligations as regards developing country Members in the text.⁸ Another ambiguity in the text that has resulted in a series of disputes being brought before the WTO DSS is whether Members can legally use ‘zeroing’ as a methodology for calculating antidumping duties against foreign products.⁹ Secondly, the WTO Agreement does not cover a number of trade-related areas that are of increasing concern for WTO Members. For example, there are only limited disciplines relating to foreign investment,¹⁰ and there are no detailed substantive provisions in relation to labour standards¹¹ and the

⁷ The Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] sets out the rules governing the WTO Members. The WTO Agreement is an umbrella agreement that includes a number of other agreements on Annexed are the agreements on goods, services, intellectual property, dispute settlement, the trade policy review mechanism and plurilateral agreements as annexes.

⁸ The Special Session of the Committee on Trade and Development was established by the Trade Negotiations Committee in February 2002 to fulfill the Doha Declaration mandate to review all special and differential treatment provisions “with a view to strengthening them and making them more precise, effective and operational.” See Article 44, World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). For a discussion of some of the issues regarding special and differential treatment provisions, see Manuela Tortora, *Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet* (Draft, Jan. 2003), available at http://www.acp-eu-trade.org/library/files/Tortora-Manuela_EN_012003_UNCTAD_SDT-and-Development-Issues-in-the-Multilateral-Trade-Negotiations-The-Skeleton-in-the-Closet.pdf.

⁹ For a discussion of the controversy surrounding zeroing, see Daniel J. Ikenson, *Zeroing In: Antidumping's Flawed Methodology under Fire*, 11 CATO INSTITUTE FREE TRADE BULLETIN (2004), available at <http://www.cato.org/publications/free-trade-bulletin/zeroing-antidumpings-flawed-methodology-under-fire>.

¹⁰ The Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 sets out some rules that apply to the domestic regulations applicable to foreign investors but is limited to disciplining certain measures such as local content requirements. Also the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, regulates the supply of services by a foreign company setting up operations in a host country.

¹¹ See World Trade Organization, *Labour standards: consensus, coherence and controversy*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited, Apr. 16, 2012).

environment.¹²

In contrast, the WTO DSS has continued to function in an active and relatively efficient manner. The WTO DSS provides an independent and rule-based formal dispute settlement mechanism. Any dispute arising under the WTO Agreement must be resolved in accordance with the DSU.¹³ Under the DSU, in the event of a dispute, the parties must engage in compulsory consultations before the complainant Member can request the Dispute Settlement Body (consisting of all WTO Members) to establish an ad hoc panel to hear the dispute.¹⁴ Either party can make an appeal to the standing Appellate Body.¹⁵ If the respondent Member does not comply with recommendations made in the final adopted report within the required reasonable period of time, and if negotiations to agree on compensation have failed, the complainant Member may request authorisation to impose retaliatory measures by suspending concessions or obligations (for example, by raising tariffs on certain imports).¹⁶ As of October 31, 2012, the WTO DSB had adopted 177 dispute settlement reports, and in most cases Members have implemented recommendations made against them in these reports.¹⁷ As noted by David Jacyk, the WTO DSS has “been used frequently and with great success”.¹⁸

¹² See World Trade Organization, *The environment: a specific concern*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (last visited Apr. 16, 2012).

¹³ DSU art. 23.1 provides:

[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of the benefits under the covered agreements . . . they shall have recourse to, and abide by the rules and procedures of this Understanding.” DSU art. 1.1 further provides: “The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.” The covered agreements include the WTO Agreement and the multilateral and plurilateral agreements annexed to it (see DSU, Appendix 1).

¹⁴ DSU art. 4.3 and art. 6.

¹⁵ DSU art. 17.1 and art. 17.4.

¹⁶ DSU arts. 20, 21 and 22.

¹⁷ See World Trade Organization, *Dispute Settlement Body, Annual report (2012) - Overview of the state of play of WTO disputes – Addendum*, WT/DSB/58/Add.1, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes.

¹⁸ David Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past,*

The relative success of the WTO DSS is not guaranteed. The juxtaposition in terms of activity between the legislative and judicial branches of the WTO means the WTO DSS is burdened with the task of interpreting and applying the existing rules in a way that meets the evolving needs of WTO Members. In doing so, the WTO DSS runs the risk of stepping over the boundary of its legitimate mandate. As noted by Lorand Bartels, “[p]olitical stalemate and an active dispute settlement system is truly a recipe for judicial activism.”¹⁹ Richard H. Steinberg et al. suggest that the WTO DSS has engaged in “gap filling”, described as “judicial law-making on a question for which there is no legal text directly on point” and “ambiguity clarification”, “judicial law-making on a question for which there is legal text but that text needs clarification”.²⁰ Judicial activism by the WTO DSS has been described as “an imperfect substitute for liberalisation through legislative action.”²¹ The WTO DSS faces a legitimacy dilemma no matter which way it turns: facing one direction, and choosing to be cautious by strictly interpreting the existing text, it risks failing to address the needs of its constituent Members, facing the other direction, it risks extending beyond its legitimate mandate as defined by its constituent Members. As C. Johan Westberg highlights, the WTO DSS is in a “more precarious position the longer it needs to shoulder the burdens of lacking political progress”.²² The imbalance between the legislative and judicial branches of the WTO system has been acknowledged by a number of scholars.²³ Less

Present and Future, 11 AUSTL. INT’L L. J. 235, 236 (2008) [hereinafter Jacyk]. See also, Bruce Wilson, *Compliance by WTO Members With Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397 (2007).

¹⁹ Bartels, *supra* note 5 at 866. Richard H. Steinberg and Judith L. Goldstein have noted, “[a]s the prospects for broad legislative rule-making have declined, judicial lawmaking has become more common, especially through interpretation of unclear rules and the filling of gaps in WTO agreements.” See Richard H. Steinberg & Judith L. Goldstein, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics* 3 UCLA Sch. of Law, Law-Econ Research Paper No. 14 (2007) [hereinafter Steinberg & Goldstein].

²⁰ *Politics in the GATT/WTO System: Legislative and Judicial Processes*, in THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO 61, 75 (John H. Barton et al. eds., 2008). See also, Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 248 (2004).

²¹ Steinberg & Goldstein, *supra* note 19, at 4.

²² See C. Johan Westberg, *The WTO DSM – The Dangerous Link of Doha stalemate and Environmental Pressure*, Trade and Environment Nexus (Jan. 5, 2012), <http://www.tradeandenvironmentnexus.com/the-wto-dsm-the-dangerous-link-of-doha-stalemate-and-environmental-pressure> [hereinafter Westberg].

²³ See e.g., Debra P. Steger, *Why Institutional Reform is Necessary*, in REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 1, 4 (Debra P. Steger ed., 2009): “The efficiency of the dispute settlement system contrasted with the inefficiency of the decision-making and rule-making system has created an imbalance in the institutional structures of the WTO.” See also Westberg, *id.*; Debra P. Steger & Natalia

recognized is the fact that the same problem, in reverse, is emerging in the expanding web of RTAs.²⁴

B. *Imbalance in RTAs*

With the Doha Round stalling, the legislative action in the international trade sphere has shifted to the negotiation of RTAs. Over 300 RTAs were in force as of January 2012. Moreover, of all WTO Members, only Mongolia has not entered into an RTA.²⁵ RTAs have provided a comparatively efficient means by which Members can pursue their liberalisation goals through the negotiation of both reduced trade barriers and also improved rules. The contents of RTAs can generally be characterised into provisions that either reflect existing WTO rules, such as bans on quantitative restrictions or incorporate and build on existing WTO rules, such as improved intellectual property protections; or include new areas not covered by WTO rules, such as provisions relating to investment, labour and the environment. Provisions in the last two categories have been characterised as “WTO-plus” and “WTO-X” respectively.²⁶

As most RTAs incorporate some form of dispute settlement mechanism,²⁷ a “web” of bilateral trade dispute resolution mechanisms has resulted.²⁸ While there are differences in the dispute resolution mechanisms, most RTAs provide for one of the three general dispute settlement mechanisms: diplomatic settlement; referral

Shpilkovskaya, *Internal Management of the WTO: Room for Improvement*, in REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 129, 130 (Debra P. Steger ed., 2009); Marco C. E. J. Bronckers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO*, 2 J. INT'L ECON. L. 547 (1999).

²⁴ See REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 6 (Debra P. Steger ed., 2009), which highlights this point. See also, Morgan, *supra* note 2, at 3, where he states “[i]t is only recently that dispute settlement mechanisms in RTAs [other than NAFTA] have been the focus of attention.”

²⁵ See WTO on RTAs, *supra* note 1. According to the World Trade Report, starting from the 1950s the number of active PTAs increased more or less continuously to about 70 in 1990. Following this time the number of PTAs proliferated with approximately 300 PTAs in force in 2010. See WORLD TRADE REPORT, *supra* note 2, at 6. Mongolia is currently in negotiations with Japan for an economic partnership agreement. See Ministry of Foreign Affairs of Japan, *Japan-Mongolia Economic Partnership Agreement (EPA)* <http://www.mofa.go.jp/policy/economy/fta/mongolia.html>.

²⁶ WORLD TRADE REPORT, *supra* note 2, at 128.

²⁷ Amelia Porges, *Dispute Settlement*, in PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 467, 467 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011) [hereinafter Porges].

²⁸ See Peter Drahos, *Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution*, 41 J. WORLD TRADE 191, 192 (2007) [hereinafter Drahos].

to standing tribunals; or ad hoc arbitration.²⁹ Most RTAs provide negotiation as a first step in the resolution of disputes and ad hoc arbitration is the most popular choice of mechanism.³⁰ Only in rare cases do dispute resolution mechanisms provide for referral to standing judicial bodies³¹, and most do not incorporate an avenue for appeal.³² Interestingly, in some RTAs, parties have chosen to provide for differing dispute resolution mechanisms depending on the nature of the provision. For example, under the North American Agreement on Environmental Cooperation (“NAAEC”), the environmental side agreement to North American Free Trade Agreement (“NAFTA”), a separate dispute resolution mechanism with unique procedures and remedies was created.³³

Despite carefully negotiated provisions, “relatively few” disputes have been resolved under the dispute settlement mechanisms of RTAs.³⁴ According to a 2011 World Bank report surveying RTAs, there have been only 25 known decisions of RTA dispute settlement panels relating to 16 disputes.³⁵ One explanation is that RTAs are relatively new and so there has been less time for disputes to arise.³⁶ A second explanation is that parties are resolving disputes under RTAs via diplomatic means.³⁷ Thirdly, RTA parties may simply prefer to bring disputes under the WTO DSS. It appears that RTA parties are continuing to have “frequent recourse” to the WTO DSS to resolve disputes, even if same set of facts or measures may also constitute a breach of the provisions of an RTA between the parties.³⁸ This

²⁹ Porges, *supra* note 27, at 467.

³⁰ *Id.* at 468, 471. See also WORLD TRADE REPORT, *supra* note 2, at 172.

³¹ Examples include the Andean Tribunal of Justice, the Caribbean Court of Justice and the ECOWAS Community Court of Justice. See generally, Porges, *supra* note 27, at 471-73.

³² Some examples include the European Court of Justice [“ECJ”] for the EU customs union and the Tribunal Permanente de Revisions, created under Mercosur’s Protocol of Olivos. Under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, panel decisions may be appealed to an appellate body to be formed by the ASEAN Economic Community Council. However, this Appellate Body has not been formed. The 2004 Protocol has almost never been invoked because the decision to refer the dispute to a panel requires consensus among all ASEAN members including both the complainant and respondent parties. See generally, Porges, *supra* note 27, at 481.

³³ North American Agreement on Environmental Cooperation, part V, 32 I.L.M. 1480 (1993).

³⁴ Porges, *supra* note 27, at 492.

³⁵ *Id.*

³⁶ Porges, *id.*, suggests that parties postpone implementation of ‘difficult’ sectors meaning disputes about these sectors will also be postponed.

³⁷ *Id.*

³⁸ According to the World Trade Report, on average, about 30 per cent of WTO disputes are between members that are party to the same PTA, see WORLD TRADE REPORT,

indicates that there is still a demand for some form of judicial dispute resolution, but RTA mechanisms are currently not adequately addressing this demand. As RTAs continue to proliferate and mature, it is unlikely that parties can continue to turn to the WTO DSS, which currently exists outside the RTA framework, as a proxy judicial check. Disputes will inevitably arise under the WTO-plus and WTO-X provisions, which are currently beyond the reach of the WTO DSS. In addition, if parties did begin to bring disputes with more regularity under the RTA dispute settlement mechanisms, this would raise the risk of fragmentation. Ad hoc, discrete dispute settlement panels may interpret substantively similar or identical provisions in different RTAs in different ways. Further, if RTA parties continue to bring certain disputes to the WTO DSS, leaving RTA dispute settlement panels to resolve disputes under WTO-plus and WTO-X provisions, this may create an additional schism. The lack of adequate and strong dispute resolution provisions in RTAs indicates that as in the WTO, there is a fundamental imbalance between the judicial and legislative arms.

C. Existing Proposals for Reform

Various solutions have been proposed to address this issue of imbalance. The first set of approaches focuses on constraining the judicial arm of the WTO in order to curb judicial activism.³⁹ One way to achieve this is to return to non-binding dispute settlement to resolve more controversial or 'political' issues. For example, Lorand Bartels suggests that WTO dispute resolution bodies be granted the power to reject cases that would interfere with the powers of the political organs and to suspend cases to allow for determination in a political forum.⁴⁰ However, to the extent the adoption of these approaches manages to create the required balance, it would only be temporary: the pressure placed on the institution as a result of its failure to keep pace with its Members would continue to build. In the WTO context, the focus should not be on "watering down"⁴¹ the power of the

supra note 2, at 176.

³⁹ See Roessler, *supra* note 5, at 387. Roessler states "[j]ust as modern states, the WTO must ensure that its judicial organs exercise their powers with due regard to the jurisdiction assigned to the other parts of its institutional structure."

⁴⁰ Bartels, *supra* note 5, at 894-95. Bartels acknowledges that "[t]hese solutions are perhaps not optimal, but for so long as WTO Members continue their practice of voting by consensus on every issue, they may provide a useful safety valve in a system in which the allocation of powers between the political quasi-judicial organs has become seriously unbalanced." Claude Barfield has also proposed a number of reforms including a system of resolution of certain disputes by political negotiation, see CLAUDE. E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 112-13 (2001).

⁴¹ Thomas Cottier, *A Two-Tier Approach to WTO Decision-Making*, in *REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY* 43, 51 (Debra P.

judicial arm. Instead, it is suggested that the solution lies in providing a new mandate and source of rules for the judicial arm to interpret.

A second set of approaches focuses on strengthening the rule-making power of the WTO's existing legislative arm, for example, through reforms to its decision-making and negotiation processes.⁴² Although further consideration of ways to bolster the WTO's decision-making processes is advocated, fundamental changes to the mode of negotiations and decision-making processes of the WTO may be practically difficult to achieve, at least in the near future. Further, suggested approaches are limited in that they do not address the issue of imbalance in RTAs. A third set of approaches attempts to build on the dynamism of RTAs as a way to reconcile perceived tensions between RTAs and the WTO system. "Multilateralising regionalism" has been promoted as a general approach under which RTA-related initiatives are aligned and consolidated over time into the WTO framework.⁴³ Joost Pauwelyn has suggested that the WTO DSS may be "one of the main engines" for multilateralising regionalism.⁴⁴ Colin Picker has suggested that the WTO DSS be used to resolve RTA disputes, and where WTO and RTA rules overlap, "the WTO Rules shall be supreme."⁴⁵ The key problem with this hierarchical approach is that it pits RTAs as a threat to the WTO system that must be curtailed. In contrast, it is suggested that the proliferation of RTAs is something that is irreversible and so the focus should be on constructive solutions to draw on, rather than repress, the dynamism of RTAs. As noted by Pauwelyn, "[r]ather than lament their inconsistency with WTO principles . . . it may be more fruitful to think of how the web of WTO and co-existing regional agreements can be untangled so as to give maximum effect to both."⁴⁶ Pauwelyn proposes an approach based on "interaction and dialogue" where the integration of regional developments into WTO activities is achieved by, for example, keeping the jurisdiction of the WTO DSS limited to determining violation claims under the relevant treaty, but "allowing WTO dispute settlement panels to interpret and

Steger ed., 2009).

⁴² For example, in noting that "the proper balance should be achieved through an enhanced political process rather than watering down dispute settlement", Thomas Cottier has proposed a "two-tier" approach with the separation of negotiations over rule-making from tariff concessions and the division of rules into different categories. The two-tier approach is combined with different modes of decision-making depending on the category of rules. *See id.* *See also*, Marco C. E. J. Bronckers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO*, 2 J. INT'L ECON. L. 547 (1999).

⁴³ WORLD TRADE REPORT, *supra* note 2, at 54.

⁴⁴ Joost Pauwelyn, *Legal avenues to 'multilateralising regionalism': beyond article XXIV*, in MULTILATERALIZING REGIONALISM CHALLENGES FOR THE GLOBAL TRADING SYSTEM 368, 393 (Richard Baldwin & Patrick Low eds., 2009) [hereinafter Pauwelyn].

⁴⁵ Picker, *supra* note 3, at 268.

⁴⁶ Pauwelyn, *supra* note 44.

apply WTO rules with reference to regional arrangements agreed to by both parties”.⁴⁷ Under this approach, the two dispute resolution mechanisms remain separate at an institutional level. Although treating the two sources of law as parallel rather than hierarchical is appropriate, the ability of a “dialogue” approach to achieve convergence is limited. Building on the ‘multilateralising regionalism’ approaches, an alternative approach will be set out that capitalises on the key strengths of both the WTO and RTAs in order to achieve the necessary balance in the international trade law system.

III. RESTORING THE BALANCE: A PROPOSAL

It is suggested that equilibrium and integration in the international trade law system can be achieved by positioning the WTO as an institution to resolve disputes arising under both the WTO Agreement and RTAs. From a legal perspective, similar to the ‘dialogue approach’, the two sets of rules will continue to run in parallel, at least at a formal level, with neither set of rules explicitly overriding the other. From a procedural perspective, to the extent possible, the provisions of the DSU would govern the conduct of the dispute under the RTA. In order to save the WTO from being “eclipsed into irrelevance” by RTAs, Gao and Lim have similarly proposed positioning the WTO as an “enforcer” by using the WTO dispute settlement mechanism as a venue for resolving some disputes between RTA parties.⁴⁸ Gao and Lim suggest their proposal is a “possible starting point for deeper reflection”.⁴⁹ In order to contribute to this discussion, the key features of such a system and how it would function will now be outlined in detail.

A. Jurisdiction under the WTO

As noted, the DSU limits the jurisdiction of the WTO DSS to the settlement of disputes under the WTO Agreement.⁵⁰ Therefore, in order to implement this proposal, the DSU would need to be amended such that it governs the resolution of disputes arising under RTAs (including RTAs that include non-WTO Members as parties) as well that are referred to it by an RTA party. The WTO DSS would also have the power to determine whether the dispute was properly referred to it under the terms of the RTA.

Under Article X.8 of the WTO Agreement, the DSU may only be amended upon approval of a proposal to do so by consensus of all WTO Members (acting through the Ministerial Conference). It cannot be denied that any attempt to

⁴⁷ *Id.* at 326.

⁴⁸ Gao & Lim, *supra* note 3, at 899.

⁴⁹ *Id.* at 922.

⁵⁰ *See* WTO Agreement, *supra* note 7.

amend the DSU is likely to meet resistance. Only one attempt has been made to amend the WTO Agreement, and this proposed amendment does not yet formally apply as the required threshold of acceptance by two-thirds of the Membership for that particular type of amendment has not yet been met.⁵¹ Further, given the state of the Doha Round, Members may not have the appetite to accept an ad hoc amendment. In relation to his proposal, Picker acknowledged, “the likelihood of the adoption of a formal amendment, this one in particular, to the WTO is unlikely”.⁵² However, there are some indications that Members may consider this proposal a viable option to deal with the problem of imbalance and the general interaction between RTAs and the WTO. First, as almost all WTO Members have entered into an RTA, the Membership clearly has an interest in introducing reforms that aim to maintain the stability and effectiveness of both systems. Secondly, the issue of the interaction between RTAs and the WTO has proved to be one area in which WTO Members have been willing to act. In 2006, as part of the Doha Round Negotiations on Rules, the General Council agreed to adopt a new transparency mechanism for regional trade agreements on a provisional basis.⁵³ WTO Director-General Pascal Lamy highlighted that this decision, “reflects a growing level of concern regarding the consequences of a continuing regionalisation of trade relations”.⁵⁴ Despite the myriad of other issues on the Doha Round negotiating table, the fact that Members were willing to make a move on this particular issue indicates that they may be at least open to consider related proposals. As time goes on, and as pressure increases, the impetus for this kind of amendment may increase.

One possible question that may be raised as a consequence of a WTO dispute settlement body agreeing to hear a dispute under an RTA is whether it will be construed as tacitly accepting that the relevant RTA meets the applicable ‘exception’ for free trade areas and customs unions under Article XXIV of the General Agreement for Tariffs and Trade (GATT) or ‘agreements liberalising trade in services’ under Article V of the General Agreement on Trade in Services (GATS).⁵⁵ Although it is unlikely that agreeing to resolve an RTA dispute would be

⁵¹ On December, 6 2005, WTO Members approved an amendment to the TRIPS agreement, making permanent a decision on patents and public health originally adopted in 2003. The deadline to accept this amendment has been extended on a number of occasions and is currently December 31, 2013. See World Trade Organization, *Members accepting amendment of the TRIPS Agreement*, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last visited, Apr. 23, 2012).

⁵² Picker, *supra* note 3 at 318.

⁵³ See, General Council, *Transparency Mechanism for Regional Trade Agreements*, WT/L/671 (Dec. 18, 2006).

⁵⁴ Pascal Lamy, *Foreward*, in *MULTILATERALISING REGIONALISM: CHANGES FOR THE GLOBAL TRADING SYSTEM* i, xiii (Richard Baldwin & Patrick Low, eds., 2009).

⁵⁵ Article XXIV of the General Agreement on Tariffs and Trade, Apr. 15, 1994,

construed in this way, particularly if the WTO DSS has an express mandate to accept the dispute, if it is considered necessary, the DSU could be amended to include an express provision, for the avoidance of doubt, that a panel or the Appellate Body in accepting a dispute under the RTA is not expressly or implicitly ruling on the whether the RTA meets the relevant requirements under GATT 1994 or GATS. Gao and Lim have suggested that in addition to making it clear that the WTO DSS is authorised hear disputes under RTAs, the RTA parties should also grant the dispute settlement bodies the power to decide whether the RTA fully complies with the requirements under these 'exceptions'.⁵⁶ Although the RTA parties are free to include such a provision, this proposal does not include it as a prerequisite to the WTO DSS hearing a dispute referred to it. If a WTO Member has doubts about whether the relevant RTA meets the required thresholds, that Member would still be free to invoke its existing right to challenge it under the WTO rules, or alternatively, trigger scrutiny by the Committee on Regional Trade Agreements which has been established with the purpose of monitoring RTAs.

B. Jurisdiction under RTAs

In order to implement this proposal, when concluding all future RTAs, state parties will need to include a provision that provides that all disputes arising under the RTA are to be referred to the WTO DSS for resolution in accordance with the rules set out in the DSU. Parties can specify in the RTA any variations to the DSU procedure that they wish to apply in relation to their particular RTA. For example, parties may wish to maintain their own procedures and time frames with respect to the initial consultation phase. Where necessary, RTA parties may also maintain the flexibility to carve out certain provisions of the RTA from referral to the WTO DSS, for example, disputes under investment or labour standards provisions could continue to be resolved by a separate mechanism. However, such variations should

Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994], provides: "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." Similarly, Article V of the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS] provides "this Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement." Although these provisions have been subject only to limited judicial scrutiny, they have generally been treated as a green light for Members to enter into preferential trade agreements that meet certain threshold requirements that would otherwise likely breach the obligation of non-discrimination as between Members under the 'most-favoured nation' provisions under the GATT 1994 and the GATS.

⁵⁶ Gao & Lim, *supra* note 3, at 923.

generally be kept to a minimum, and to the extent possible, the key provisions regarding the panel and Appellate Body procedures, compliance and retaliation should apply as provided for in the DSU.

The proposed dispute settlement provision should be included in RTAs currently under negotiation as well as in ‘model’ RTAs relied on by larger trading partners such as the United States and European Union as a basis for the negotiation of future RTAs. In addition, given that over 300 RTAs have already been concluded amongst key trading nations, to have full force, parties to existing RTAs should consider amending the dispute resolution provisions to refer disputes to the WTO DSS where possible. As noted by Picker, for his proposal to “come close to achieving its goals”, it must also apply to “extant agreements”.⁵⁷ Admittedly, given the understandable reluctance of parties to re-enter negotiations for concluded RTAs, particularly for certain complex RTAs with relatively entrenched dispute settlement mechanisms such as the European Union and NAFTA, this is clearly a more difficult proposition than inclusion in new RTAs. Hopefully, however, if this approach is adopted in new RTAs, parties to existing RTAs will be more willing to sign on.

C. Choice of Forum

One key issue that has arisen in the context of overlapping WTO and RTA provisions is the possibility of parallel proceedings. In some circumstances, a state may technically be able to bring a dispute both to the WTO DSS and to the existing RTA dispute settlement mechanism to resolve a claim for a breach of an obligation that is substantively equivalent under both sets of agreements. The most common approach taken by RTA parties to manage this risk is to include a choice of forum clause in their RTA. The more common form of choice of forum clause is a ‘fork in the road’ provision under which an RTA party may choose to take the dispute either to the WTO DSS under the WTO Agreement or to the RTA dispute settlement mechanism under the RTA rules. Once a party has commenced proceedings under one system, it is barred from pursuing its claim in the alternative system.⁵⁸ An alternative approach is an ‘exclusive’ forum clause under which the RTA designates either the RTA dispute settlement mechanism or the WTO DSS

⁵⁷ Picker, *supra* note 3, at 306.

⁵⁸ For example, Article 2005.1 of the North American Free Trade Agreement [“NAFTA”] provides: “[d]isputes regarding any matter arising under both this Agreement and [GATT 1994] . . . may be settled in either forum at the discretion of the complaining Party.” Article 2005.6 provides: “Once dispute settlement procedures have been initiated under [this Agreement] or dispute settlement proceedings have been initiated under the [GATT 1994], the forum selected shall be used to the exclusion of the other.”

as the exclusive dispute resolution forum.⁵⁹ Because a party may be liable for a breach of the RTA if it chooses to ignore the choice of forum clause, the risk of parallel claims is significantly mitigated. However, as the WTO is technically not bound by the choice of forum clause in an RTA, it may continue to accept jurisdiction to settle a claim even if it has already been adjudicated under the RTA in breach of the choice of forum clause. A similar scenario arose in the *Mexico–Soft Drinks* dispute where Mexico argued that the WTO panel should decline jurisdiction on the basis that it was inextricably linked to a broader dispute already brought under the NAFTA dispute settlement system. In a finding later upheld by the Appellate Body, the panel noted it had no discretion to decline to exercise its jurisdiction.⁶⁰

Under this proposal, even though disputes under RTAs would technically be brought to the WTO DSS as an institution, RTAs would still include a choice of forum clause (whether ‘fork in the road’ or ‘exclusive’) under which a party can either take its dispute to the WTO DSS under the WTO Agreement, or alternatively, take a dispute to the WTO DSS under the RTA. By providing a single institution to resolve both disputes, this proposal significantly decreases the risk of parallel disputes and double remedies. First, the package of proposed amendments to the DSU could include a provision that generally provides that a panel or the Appellate Body must refuse jurisdiction if a dispute that is substantively equivalent (appropriately defined) has already been brought before it, even if the dispute is brought under a different set of rules. Even if this kind of amendment is not feasible, an RTA party may be deterred from attempting to bring parallel claims under my proposal. Assuming the relevant provisions are substantively equivalent, a party may not reasonably expect a different result if panelists under the same institution, and if appealed, the same Appellate Body, is deciding the dispute. DSU Article 3.7 provides that the “aim of the dispute settlement mechanism is to secure a positive solution to a dispute”. Although it is not clear, it may be possible that a WTO panel or the Appellate Body may take a number of steps to prevent parallel disputes or double remedies in the interests of securing a “positive solution”. For example, a WTO dispute settlement body may rely on doctrine such as *res judicata*;⁶¹

⁵⁹ See WORLD TRADE REPORT, *supra* note 2, at 173.

⁶⁰ Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R (Mar. 6, 2006), at 44-57.

⁶¹ See WORLD TRADE REPORT, *supra* note 2, at 174, which notes,

[C]ommentators have also referred to several international law doctrines that could be used to avoid or resolve conflicts between overlapping jurisdictions. The doctrine of *res judicata* or finality refers to situations where a matter has been decided by a competent adjudicative body barring its relitigation in subsequent proceedings. *Lis Alibi Pendens* . . . refers to parallel proceedings and is a principle pursuant to which once a dispute is pending in one forum, it cannot be brought before another

the use of its power under the DSU to consolidate complaints ‘related to the same matter’;⁶² or its ability to determine whether the level of suspension of concessions is equivalent to the level of nullification or impairment.⁶³

D. *Applicable Law*

Although the rules under the WTO Agreement and an RTA are likely to overlap in a number of areas, this proposal does not attempt to impose a hierarchy between the two sources of law. As discussed, the relevant WTO dispute settlement body would apply the law as set out in the agreement under which the party brought the claim. If the complainant brought the dispute under the RTA, the panel would apply the rules as set out under the RTA. Similarly, if a dispute was brought under the WTO Agreement, the panel would apply the rules under that Agreement. Under this approach, there may be scope for a dispute settlement panel to take into account rules under parallel agreements in accordance with Article 31 of the Vienna Convention on the Law of Treaties,⁶⁴ however, the substantive rules to be applied are those under the relevant agreement. This approach contrasts with Picker’s approach which provides that “the [WTO] DSB shall employ WTO jurisprudence to the extent of any inconsistency with the

forum. However, for these doctrines to apply, there must be an “inextricable link” between the proceedings, which usually is understood as an identity of the parties and of the issues.

The panel in *India — Measures Affecting the Auto Sector*, WT/DS146/R (Dec. 21, 2001) discussed the applicability of *res judicata* in the WTO dispute settlement context. At 7.66, the panel noted it

Therefore considers that for *res judicata* to have any possible role in WTO dispute settlement, there should, at the very least, be in essence identity between the matter previously ruled on and that submitted to the subsequent panel. This requires identity between both the measures and the claims pertaining to them. There is also, for the purposes of *res judicata*, a requirement of identity of parties.

In that case the panel did not need to apply *res judicata* as it found that the relevant previous dispute did not meet the requirements.

⁶² DSU art. 9.1.

⁶³ Although it is not clear from the text of the DSU that a WTO dispute settlement body would have this power, it is possible an arbitrator or panelist may determine that if remedies have already been granted that are equivalent to the level of the relevant nullification or impairment concerned, additional remedies are not required as this would not necessarily achieve the “first objective of the dispute settlement mechanism” as set out in DSU art. 3.7 to “secure the withdrawal of the measures concerned”

⁶⁴ DSU art. 3.2 provides that the DSS serves to “[c]larify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” See, Pauwelyn, *supra* note 44.

[RTA] jurisprudence".⁶⁵ As discussed, this proposal is designed to draw on the strengths of both the WTO and the RTA systems and does not attempt to secure the WTO system as dominant as envisaged under a hierarchical approach. By taking a parallel approach, the carefully negotiated substantive provisions under the RTAs are preserved, meaning it is likely to be more politically acceptable to the majority of WTO Members that have entered into RTAs.

E. Dispute Resolution Procedures

1. Consultations

In referring a dispute to the WTO DSS, the parties under an RTA could specifically adopt the DSU provisions that govern consultations. Under the DSU, if a party makes a request for consultations under the WTO Agreement, the other party must respond within 10 days and enter into consultations within 30 days. If consultations fail, after 60 days the complaining party may request the establishment of a panel.⁶⁶ As discussed, RTA parties could either adopt the consultation provisions under the DSU, or alternatively, in order to preserve additional flexibility, RTA parties could continue to use their own consultation provisions as set out in the RTA and opt-in to the WTO DSS at the point of establishing a panel in the event consultations fail.

2. Panel Procedures

Under this proposal, disputes under an RTA may be referred to a panel established in accordance with the procedure in the DSU. Under the DSU, following the consultations process outlined above, the complainant party may request the DSB to establish a panel. The DSB must agree to this request unless the DSB decides by consensus not to establish a panel.⁶⁷ Panel members must have the required qualifications and expertise and will be selected by the WTO Secretariat.⁶⁸ In the event of a dispute over the selection of panelists, the Director-General of the WTO in consultation with the parties will determine the final composition of the panel.⁶⁹ The DSU procedures governing the panel process, including time frames, the right to seek information, confidentiality of deliberations and provisions regarding the interim review stage, will also apply to the settlement of RTA disputes where possible.

⁶⁵ Picker, *supra* note 3, at 308.

⁶⁶ DSU art. 4. There are various mechanisms under the DSU to shorten the consultation period, such as by mutual agreement (DSU art. 4.7), in cases of urgency (DSU art. 4.9), or if the party does not respond to a request for consultations (DSU art. 4.3).

⁶⁷ DSU art. 6.1.

⁶⁸ DSU arts. 8.1-8.6.

⁶⁹ DSU art. 8.7.

The procedure for the selection of panelists under the WTO DSS represents a relatively significant departure from the arbitration-style dispute settlement approach taken in many RTAs. RTAs often adopt an ad hoc arbitration model where each party to a dispute selects one arbitrator (who is usually a national of that party) and then a ‘chair’ is selected in a neutral manner (for example, by agreement of the parties, the arbitrators, or a neutral third person or institution).⁷⁰ The advantage of the WTO DSS panelist selection procedure is that all three panelists are appointed through a neutral process from a pool of persons that have expertise in international trade law and usually have had experience as a panelist. Also, as noted by Amelia Porges, because the panelist selection process under the DSU involves selection by the Secretariat in the first instance, followed by selection by the Director-General in the event of a dispute, these procedures successfully prevent “moral hazard” which may arise under RTAs when a defending party refuses to name its arbitrator or cooperate in the process.⁷¹

3. Appellate Body Procedures

A party to a dispute under an RTA will have the right to refer a dispute to the standing Appellate Body following the panel procedures under this proposal. The membership of the Appellate Body and procedures that apply to appellate review will be as set out in the DSU. As noted, it is relatively rare for RTAs to provide recourse to appeal. The availability of recourse to an experienced standing appellate body will provide a robust avenue of judicial determination for RTA parties, and, as will be discussed in Part IV, it will assist in ensuring some consistency in international trade law jurisprudence.

4. Participation of Third Parties

Under the WTO DSS, third party Members that have a “substantial interest” in a matter have limited rights to participate in that dispute.⁷² These rights include the right to receive the written submissions of the parties to the first panel hearing and to be heard by, and make submissions to, the panel and the Appellate Body.⁷³ This proposal provides that third party Members would also have these rights in relation to disputes brought to the WTO DSS under RTAs. Even though these Members are not party to the RTA that is the subject of a dispute, given the overlaps that often exist between RTAs and the WTO Agreement and also as between RTAs, a number of Members are likely to have at least a “systemic”⁷⁴

⁷⁰ See Porges, *supra* note 27, at 484.

⁷¹ *Id.*

⁷² DSU art. 10.1.

⁷³ DSU arts. 10.2, 10.3 and 17.4.

⁷⁴ Third party Members that claim a ‘systemic interest’ in a dispute, rather than a

interest in the outcome. This approach generally supports the aim of increased integration and interaction between the two international law regimes. If, however, this aspect of the proposal proves to be not politically feasible, an alternative approach would be to allow third party Members to participate, except if all disputing RTA parties refuse to allow such participation.⁷⁵

F. Adoption of Reports, Implementation, and Suspension of Concessions

1. Adoption of Panel and Appellate Body Reports

This proposal provides that the DSB will continue to be charged with administering the rules and procedures under the DSU in relation to an RTA dispute. Under the DSU, in order for reports issued by a panel and the Appellate Body to be binding, they must be adopted by the DSB. Similar to the decision to establish panels, unless all DSB parties by consensus agree not to adopt the report, it will be adopted.⁷⁶ This procedure would generally continue to apply to reports issued in relation to RTA disputes. If a non-WTO Member is a party to an RTA, then that party may also be included in the vote on whether to adopt the report. In practice, given that the ‘winning’ party would have to vote against the adoption of the report, it is unlikely that the involvement of other WTO Members will substantively interfere with the dispute resolution process as between RTA parties. However, as with the aspects of the proposal that continue to require DSB approval for the establishment of panels and the allowance of third party participation in RTA disputes, this process serves as an opportunity to increase the linkages between the two systems and promotes the active engagement by the broader WTO Membership with RTAs.

2. Implementation of Recommendations

The process for the implementation of recommendations in an adopted report relating to an RTA dispute will largely reflect those set out in the DSU, including in relation to setting the reasonable period of time for implementation, assessment of compliance and surveillance by the DSB.⁷⁷

substantial trade interest, are often granted permission to participate in a dispute. See Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 58 *WORLD POL.* 446, 451-52 (2006).

⁷⁵ Gao and Lim have suggested a similar approach in relation to the participation of third parties, “[s]uch an arrangement will . . . not only ensure the highest degree of support among all parties who might have an interest in such cases, but also the highest degree of uniformity between different cases as well.” See Gao & Lim, *supra* note 3, at 924.

⁷⁶ DSU art. 17.14.

⁷⁷ Refer generally to DSU art. 21.

3. Suspension of Concessions

Under the DSU, in the event a Member fails to bring its measure into compliance with the WTO Agreement following a recommendation to do so by a panel or the Appellate Body, the parties to the dispute must enter into negotiations to agree on compensation, and in the event negotiations fail, the complainant party may seek authorisation from the DSB to suspend concessions or other obligations under the WTO Agreement.⁷⁸ The level of the suspension must be equivalent to the level of nullification or impairment.⁷⁹ Under this proposal, a similar system in relation to compensation and suspension of concessions would apply, but the obligations or concessions to be suspended would be limited to those that exist under the RTA. Some RTAs provide a variation to the DSU mechanism such as the requirement under some U.S. RTAs to provide an annual monetary assessment in lieu of the suspension of concessions.⁸⁰ If considered necessary, the RTA parties may specify particular modifications to the sanctions process under the DSU. Although a number of RTAs already include remedies that involve the suspension of concessions, some even reflecting the DSU approach, a number of RTAs do not provide for the imposition of sanctions.⁸¹ By introducing direct access to remedies that are backed up by a mechanism for judicial review (including appellate review) and increased transparency via scrutiny by the WTO Membership, my proposal may act to strengthen compliance under RTAs.

G. Resourcing

One of the issues currently facing the WTO DSS is the increasing workload being placed on the institution, and in particular, the Appellate Body. Currently, the WTO DSS is funded from the WTO budget supported by general WTO Member contributions.⁸² In order to account for any increased strain on resources due to disputes under RTAs, RTA parties that refer a dispute to the WTO DSS could be required to contribute additional funds, for example, on a set fee or a per day basis. The International Centre for the Settlement of Investment Disputes (ICSID), which sets a schedule of fees to be paid by the parties to a dispute that is referred to it, may be used as a possible model for this arrangement.⁸³

⁷⁸ DSU art. 22.

⁷⁹ DSU art. 22.4.

⁸⁰ See Porges, *supra* note 27, at 491.

⁸¹ *Id.*, at 490-91.

⁸² See World Trade Organization, *The WTO: Secretariat and Budget*, http://www.wto.org/english/thewto_e/secret_e/budget_e.htm (last visited Apr. 24 2012).

⁸³ See ICSID, *Schedule of Fees*, <http://icsid.worldbank.org/ICSID/FrontServlet?RequestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main> (last visited Apr. 24, 2012). Various mechanism may also be introduced to assist developing country Members

As the number and complexity of disputes increase, the WTO Appellate Body increasingly has had to request extended time frames beyond those set out in the DSU for the resolution of disputes.⁸⁴ Currently there are seven Appellate Body Members appointed by the DSB.⁸⁵ In order to deal with the increased pressure that would result from the additional workload for the Appellate Body created by the referral of RTA disputes to the WTO DSS, the number of Appellate Body Members could be increased.⁸⁶ The fees paid by RTA parties could go toward subsidising the consequential increase in expenses. The DSU would need to be amended to reflect any decision of the Members to increase the number of Appellate Body Members—this amendment could be included in the bundle of other DSU amendments proposed in this note.

In the next part, a critique of this proposal will be offered and how the proposal will achieve its aim of rebalancing the international trade law system will be outlined.

IV. RESTORING THE BALANCE: ANALYSIS

This proposal is fundamentally designed to restore the balance between the judicial and legislative arms of the international trade law system to ensure its sustainability. To achieve this, if implemented, the proposal would: provide the WTO DSS with an expanded mandate to consider emerging issues of international trade law; provide RTAs with access to a robust judicial mechanism to resolve disputes between the parties; and encourage increased interaction between the two systems, and in doing so, create a path for de facto convergence in trade law jurisprudence. By drawing together the key strengths of both systems—the success of the WTO dispute resolution system and the dynamism of RTAs in making rules—a symbiotic relationship is created.

meet this fee, for example, the fee scale could be adjusted for Least Developed Countries and Developing Countries.

⁸⁴ For example, the WTO Appellate Body received some criticism due to the delays in issuing its report in the complex Boeing and Airbus disputes. *See, e.g., EU angered over WTO delay of Boeing ruling*, EU BUSINESS, (Jul. 8, 2010), <http://www.eubusiness.com/news-eu/us-aerospace-wto.5i3>; Pilita Clarke, *Airbus fears delay to Boeing report*, FINANCIAL TIMES, (Dec. 20, 2009), <http://www.ft.com/cms/s/0/8e491306-edaa-11de-ba12-00144feazb49a.html#axzz1szBU7rk4>.

⁸⁵ DSU art. 17.1.

⁸⁶ Other international tribunals have varying numbers of Members, for example, the International Court of Justice is composed of 15 judges, *see* International Court of Justice, *Members of the Court*, <http://www.icj-cij.org/court/index.php?p1=1&p2=2> (last visited Apr. 24, 2012).

A. Expanding the Mandate of the WTO DSS

Facing roadblocks in the multilateral system, parties have detoured to RTAs to achieve their trade liberalisation objectives. As discussed, one of the key distinguishing features of RTAs is the inclusion of “WTO-plus” and “WTO-X” provisions. By allowing the WTO DSS to resolve disputes between RTA parties, questions of how to interpret provisions that reach beyond the existing WTO rules will inevitably fall to WTO dispute settlement panels and the Appellate Body for consideration. The judicial arm of the WTO will therefore have a legitimate mandate to interpret emerging issues of importance in the international trade regime whilst avoiding the specter of judicial activism.

Debra Steger states “looking into the future, a vibrant, relevant WTO would have a mandate to deal with international economic regulation generally, not just trade.”⁸⁷ One normative concern that may be raised in response to my approach is that the WTO DSS should not adjudicate WTO-plus and WTO-X provisions. According to Youri Devuyt & Asja Serdarevic, the “WTO is partial in the sense of being biased in favour of liberal trade values, to the detriment of broader societal norms that are often expressed in regional agreements”.⁸⁸ Robert Howse and Kalypso Nicolaidis contend that instead of the WTO “transforming itself into a socially just global economic government, by assimilating social and environmental governance into its institutions”, what should be emphasised is the “importance of non-WTO institutions and norms in treaty interpretation that represent values other than free or freer trade”.⁸⁹ Devuyt and Serdarevic conclude that “[t]he limited range of competence of WTO law should lead to modesty in proposals for expanded constitutional supervisory powers over RTAs”.⁹⁰ Another possible objection beyond the normative question is the practical question of whether the WTO DSS can competently deal with WTO-X issues as it lacks expertise in dealing with issues outside the trade sphere.

First, normative arguments about the danger of viewing “non-trade” issues through a trade lens make an arbitrary distinction between ‘trade’ policies and

⁸⁷ Debra P. Steger, *Why Institutional Reform is Necessary*, in REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 1, 10 (Debra P. Steger ed., 2009).

⁸⁸ Youri Devuyt & Asja Serdarevic, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18 DUKE J. COMP. & INT’L L. 1, 56 (2007) [hereinafter Devuyt & Serdarevic]. See also, Jeffrey L. Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. INT’L L. 647 (2006).

⁸⁹ Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73, 75 (2003).

⁹⁰ Devuyt & Serdarevic, *supra* note 88, at 60.

other policies such as social, developmental, economic, and environmental policies. All of these policies are inextricably linked. This is demonstrated most clearly by the fact that parties have chosen to include WTO-X provisions in RTAs—they are making a clear statement that these issues should be viewed in the framework of trade, at least in the context of the RTA. As the parties have already taken steps to regulate the relationship between trade and broader issues under the RTA, the WTO, in interpreting these provisions, would arguably not be taking steps beyond the original intention of the parties. If parties to an RTA viewed an issue as inherently political or specialised and therefore not suitable for resolution by the WTO DSS, they could carve it out of the scope of the dispute resolution provision, similar to the approach currently taken in some RTAs on certain issues such as labour and environment.⁹¹ Secondly, on the practical question of whether the WTO DSS could competently deal with issues outside its trade expertise, the WTO DSS currently deals with a number of issues that may be viewed as falling outside traditional trade issues such as border measures and tariffs. These issues include behind the border measures such as sanitary and phytosanitary measures and technical regulations as well as broader issues such as intellectual property. In interpreting these issues, the WTO DSS may also call on experts under its express power under DSU Article 13⁹² and have reference to existing international instruments in the field.⁹³ It is not such a stretch to expect that the WTO DSS could competently deal with additional issues in RTAs other than ‘traditional’ trade issues. In doing so, the WTO would in fact be responding to the modern demands of world trading partners.

B. Strengthening Judicial Review under RTAs

Similar to explanations offered for why the WTO should not be used to resolve WTO-plus or WTO-X issues under RTAs, scholars rely on a dichotomy where RTAs are positioned as ‘political’ agreements and WTO agreements as ‘legal’ agreements in order to justify differences in approaches to dispute

⁹¹ See Porges, *supra* note 27, at 482-83.

⁹² DSU art. 13 provides that panels have a “right to seek information and technical advice from any individual or body which it deems appropriate.” A panel may also “consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.”

⁹³ For example, the Appellate Body in the dispute, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, referred to existing international instruments including international environmental agreements in interpreting the expression “exhaustible natural resources” in GATT 1994 art. XX. The Appellate Body noted that that the words “must be read in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” See Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, 129-130 WT/DS58/AB/R (Oct. 12, 1998).

resolution. As RTAs are inherently political, so the argument goes, it is not appropriate to ‘judicialise’ them through formal dispute resolution systems. Rather than take what John H. Jackson characterises as a judicial, “rule-oriented” approach, a diplomatic, “power-oriented” approach to dispute settlement is more appropriate.⁹⁴ David Jacyk has advocated a roll back to from the formalized WTO dispute settlement approach to an arbitration-based approach for “politically charged issues”.⁹⁵ Jacyk contends that for these types of issues, one of the main disadvantages associated with judicial settlement and a right to appeal is that “they may serve to entrench the position of the parties and foster inflexibility within domestic political factions, creating potential hurdles to a negotiated resolution”.⁹⁶

It may be true that some of the flexibility and impetus to resolve disputes diplomatically is reduced by the existence of a judicial model of dispute resolution. However, there are a number of benefits to a judicial approach over a purely diplomatic or ‘power-oriented’ approach. For example, a number of scholars have advocated judicial dispute resolution processes as a way to level the playing field.⁹⁷ A 2000 Report on the Future of the WTO by the Consultative Board to the WTO Director-General notes: “[e]veryone has an interest in the continued success of the WTO as an institution, but no group has a greater interest than the weak and the poor.”⁹⁸ Having analysed the various advantages and disadvantages between WTO dispute settlement and dispute settlement under RTAs from the perspective of developing countries, Peter Drahos concludes that the WTO dispute settlement mechanism offers an advantage over bilateral dispute resolution as “the third-party procedures of the DSU offer the smaller state the possibility of prevailing as part of a coalition”.⁹⁹

Judicial dispute settlement has significant advantages for the larger trading

⁹⁴ See John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, in JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 277, 278 (2000).

⁹⁵ Jacyk, *supra* note 18, at 239.

⁹⁶ *Id.*

⁹⁷ As noted by J. H. H. Weiler, “the new DSU makes legal resolution more attractive to Members because, for example, it can equalize egregious disparities of power which exist at the negotiation table”. See J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 6 (Harvard Jean Monnet Working Paper No. 9, 2000).

⁹⁸ Peter Sutherland et al., *The Future of the WTO, Report by the Consultative Board to the Director General Supachai Panitchpakdi* (2004), available at http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf.

⁹⁹ Drahos, *supra* note 28, at 193.

partners with greater bargaining power as well. At a basic level, if the provisions in an RTA reflect to a large degree the interests of the more powerful party in the negotiation, that party logically has an enhanced interest in seeing it enforced. For example, a number of large capital-exporting states have eschewed diplomatic espousal in favour of dispute settlement provisions that provide international arbitration in order to protect their interests under bilateral investment treaties.¹⁰⁰ Judicial dispute resolution may also be used by large trading states to ensure domestic “policy lock-in” where the state leverages the threat of being challenged under a formal dispute settlement system in order to counter domestic resistance to the implementation of measures that are consistent with the state’s international trade law obligations, but potentially harmful to specific domestic constituencies.¹⁰¹ Finally, judicial dispute settlement mechanisms may become more important for current trading powers as the geopolitical landscape evolves and new world trading powers emerge. For example, the United States is increasingly utilizing the WTO DSS to challenge a measures implemented by China that it considers to be inconsistent with WTO rules.¹⁰²

Importantly, the fact that parties are increasingly incorporating ‘judicial’ style dispute resolution provisions in their RTAs indicates that parties do not necessarily view judicial resolution of disputes under these agreements as inappropriate.¹⁰³ As RTAs mature, parties appear to be increasingly comfortable with a judicialised dispute settlement approach.¹⁰⁴ For example, in RTAs entered into by the European Union pre-2000, political settlement as a dispute resolutions mechanism was preferred. The European Union’s policy has since shifted to prefer an ad hoc arbitration.¹⁰⁵ The ASEAN Free Trade Area (“AFTA”) ‘judicialised’ its existing dispute settlement mechanism by introducing the “ASEAN Protocol on Enhanced Dispute Settlement Mechanism” in 2004 replacing a 1996 protocol that was based

¹⁰⁰ See e.g. Judge Stephen M. Schwebel, *Lecture: The Overwhelming Merits of Bilateral Investment Treaties*, 32 SUFFOLK TRANSNAT’L L. REV. 263 (2009); Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT’L STUD. Q. 1, 3 (2010).

¹⁰¹ See Ann Capling & Patrick Low, *The Domestic Politics of Trade-Policy Making, in GOVERNMENTS, NON-STATE ACTORS AND TRADE POLICY-MAKING, NEGOTIATING PREFERENTIALLY OR MULTILATERALLY?* 4, 23 (Ann Capling & Patrick Low eds., 2010).

¹⁰² For a list of disputes refer to World Trade Organization, *Disputes by country/territory*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Apr. 24, 2012).

¹⁰³ As noted by Drahos, “[t]he same commitment to rule orientation in trade dispute settlement seems to be finding its way into the regional trade agreements.” See Drahos, *supra* note 28, at 191.

¹⁰⁴ According to Porges, RTA dispute settlement provisions have generally evolved from a diplomatic settlement model to a judicial model. See Porges, *supra* note 27, at 468.

¹⁰⁵ Porges, *supra* note 27, at 468.

on diplomatic dispute resolution.¹⁰⁶ Further evidence of the existence of a demand for a judicialised dispute resolution in general, and through the WTO DSS in particular, is the fact highlighted in this paper that RTA parties are continuing to use the WTO DSS to resolve disputes that could also technically be resolved under their RTA.¹⁰⁷ William Davey concludes that, “the apparent superiority of the WTO dispute settlement system is a significant reason why regional trade agreements do not ultimately threaten to supplant...the WTO system”.¹⁰⁸

C. Creating De Facto Convergence

A key benefit of this proposal is that it breaks down barriers between the two international trade law regimes. Dispute resolution mechanisms under the WTO and RTAs, despite often dealing with the same substantive issues, currently operate largely as ‘silos’ with little interaction or coordination between them.¹⁰⁹ This runs the risk of fragmentation in international trade law.¹¹⁰ Fragmentation not only has the potential to emerge as between WTO and RTA jurisprudence, but also in jurisprudence as between RTAs and even in relation to the same RTA due to ad hoc arbitration panels that are not subject to oversight by a standing appellate body. Nguyen Tan Son warns: “[t]he security and predictability of the world trading system would suffer if disputes concerning very similar issues were to be resolved inconsistently by the WTO and RTAs’ dispute settlement entities.”¹¹¹ As discussed, a number of scholars have suggested solutions to this issue. For example, by providing that WTO jurisprudence prevails to the extent of inconsistency with RTA jurisprudence, Picker’s proposal aims at creating “uniform international trade jurisprudence”.¹¹² Rather than adopt a hierarchical approach, this proposal challenges the isolation between the systems by funnelling disputes to the same institution for resolution. First, the proposal encourages active

¹⁰⁶ See ASEAN Protocol on Enhanced Dispute Settlement Mechanism available at <http://www.aseansec.org/16754.htm>.

¹⁰⁷ See WORLD TRADE REPORT, *supra* note 2, at 176.

¹⁰⁸ William Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343, 354-56 (Lorand Bartels & Federico Ortino eds., 2006). See also, Pauwelyn, *supra* note 44, at 388.

¹⁰⁹ As noted by Nguyen Tan Son, “WTO and RTAs’ dispute settlement have no institutional relationship that can instruct the interpretation as well as application of WTO and RTA law by adjudicatory bodies. Therefore, it is totally reasonable to be concerned about the clinical isolation of WTO and RTA law on issues that are substantially similar.” See Nguyen Tan Son, *Towards a Compatible Interaction between Dispute Settlement under the WTO and Regional Trade Agreements*, 5 MACQUARIE J. BUS. L. 113, 130 (2008) [hereinafter Nguyen Tan Son].

¹¹⁰ See David Morgan, *supra* note 2, at 257.

¹¹¹ Nguyen Tan Son, *supra* note 109, at 127.

¹¹² Picker, *supra* note 3, at 308.

engagement by the WTO Membership with RTA disputes by preserving the role of the DSB in forming panels, adopting reports and monitoring compliance as well as the ability for non-RTA parties to join a dispute as a third party. Further, although the two systems of law will technically continue to run in parallel, it is argued that de facto convergence in jurisprudence may result.

Noemi Gal-Or posits that in an international dispute resolution system, consistency can be conceptualized as “vertical” and “horizontal”.¹¹³ Vertical consistency arises from “interpretation of the law as progressing through a hierarchy of authoritative adjudicatory instances”, usually represented by a system of appeals.¹¹⁴ Horizontal consistency “secures that rights and obligations remain identical and universal across time and subject matter as they arise in different cases and under varying circumstances”, usually manifest in some form of precedent.¹¹⁵ These two conceptions of consistency “are not contradictory and, combined, contribute to integrity”.¹¹⁶ By introducing a system of appeals to RTA disputes via access to the WTO Appellate Body, this proposal introduces vertical consistency. In the investor-state arbitration field Susan Franck has warned of a “legitimacy crisis” arising from conflicting decisions due to reliance on ad hoc arbitration.¹¹⁷ Franck, among others, has proposed the introduction of an appellate mechanism to the system to avert this crisis.¹¹⁸ In contrast, although Donald McRae has acknowledged the ability of the WTO Appellate Body to ensure “coherence and consistency” in WTO jurisprudence, he has questioned whether an appellate body would be able to reproduce this coherence and consistency in deciding questions under a myriad of bilateral investment agreements as opposed to the same collection of agreements under the umbrella WTO Agreement.¹¹⁹ McRae contends that this could be achieved only if “the interpretative body were to impose on the various bilateral agreements its own conception of obligations undertaken by the parties, regardless of the actual wording used”.¹²⁰ Such an approach, McRae posits, “would undermine the legitimacy of the interpretative body”.¹²¹

¹¹³ Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT'L L. 43 (2008).

¹¹⁴ *Id.* at 47.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

¹¹⁸ *Id.* at 1524.

¹¹⁹ Donald McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, J. INT'L DISPUTE RESOLUTION 1, 14 (2010)

¹²⁰ *Id.*

¹²¹ *Id.*

In areas where they overlap, RTA provisions often mirror the wording of the corresponding WTO provisions. In addition, there are often similarities in wording between RTAs, particularly given the regular use of ‘model’ RTAs. This indicates that the differences between these agreements may not be so great as to prevent the Appellate Body from being able to legitimately provide some ‘vertical consistency’ in its interpretation of at least broader concepts under RTAs and the WTO Agreement. Unlike ad hoc tribunals, the WTO Appellate Body is also more likely to be cognizant of its previous decisions and would be reluctant to depart from its own approach unless differences in the text require it.

This proposal is also designed to bring a level of horizontal consistency in jurisprudence between the two systems. There is no formal system of precedent in the WTO DSS. However, an informal, or ‘de facto’ system of precedent has emerged: through the issuance and publication of Appellate Body decisions, disputing parties usually refer to decisions of panels and the Appellate Body in their submissions and WTO panels and the Appellate Body do the same. As McRae notes, the Appellate Body has been able to maintain the integrity of the system and “has always had a sense of its role as the guardian of the WTO system and has demanded that panels respect that role.”¹²² This de facto system of precedent would arguably continue to evolve if the WTO DSS was charged with resolving disputes under RTAs. As noted by Gao and Lim, “under the stewardship of the Appellate Body, the law will in time work itself pure”.¹²³

Under a hierarchical approach where WTO rules prevail to the extent of inconsistency with RTA rules, a consistent body of jurisprudence is more likely to directly result. However, under the parallel approach outlined in this proposal, the rights of states to enter into RTAs and craft their own approaches to international trade law issues would be preserved, whilst at the same time, a path would be created for the de facto convergence between RTA rules and WTO rules by the introduction of varying degrees of both vertical and horizontal consistency.

IX. CONCLUSION

In this note, a proposal for how to maintain a strong and balanced international trade law framework has been outlined. The existing framework, consisting of the WTO and the network of RTAs, is suffering from an imbalance between its legislative and judicial arms. In the WTO, as the rule-making body remains in a decade-long deadlock, the WTO DSS is faced with the difficult choice of failing to adequately address the current needs of its Members or venturing into

¹²² *Id.* at 8.

¹²³ Gao & Lim, *supra* note 3, at 920.

the realm of judicial activism. In contrast, although most RTAs include dispute resolution mechanisms, it appears that these mechanisms are failing to meet the dispute resolution demands of the parties who are largely continuing to rely on the WTO DSS to provide a judicial check. This situation is also unsustainable as inevitably, disputes will arise between RTA parties that implicate provisions that fall outside the current mandate of the WTO DSS.

In order to address these issues and restore equilibrium, it has been proposed that disputes under RTAs are referred to the WTO DSS for resolution. If implemented, this proposal would provide the WTO DSS with an expanded mandate to consider emerging issues in international trade law; provide RTAs with access to a robust judicial mechanism to resolve disputes; and encourage increased engagement and interaction between the two systems. Through the introduction of a degree of both horizontal and vertical consistency, *de facto* convergence in trade law jurisprudence may result. This proposal aligns the key strengths of both systems: a robust judicial mechanism provided by the WTO and a dynamic source of international trade law provided by the ever-expanding network of RTAs. This will create a sustainable international trade law framework to support the trade liberalisation ambitions of world trading partners.