SPHERES OF COMMERCE: THE WTO LEGAL SYSTEM AND REGIONAL TRADING BLOCS—A RECONSIDERATION*

Robert Howse** & Joanna Langille***

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* Our title is loosely inspired by Michael Walzer’s Spheres of Justice.
** Lloyd C. Nelson Professor of International Law, NYU School of Law.
*** Fellow, Institution for International Law and Justice, NYU School of Law.
I. INTRODUCTION

Among the most enduring debates in international trade law is how should we understand the legal\(^1\) relationship between the multilateral trading system, as established by the law of the World Trade Organization (WTO), and preferential trade agreements (PTAs).\(^2\) This debate is generated by a fundamental conflict between the WTO’s central legal obligation of non-discrimination,\(^3\) which requires WTO Member states to accord equal treatment to the goods and services of other Member states, and PTAs, which by definition allow Member states to accord more favorable market access to some trading partners while excluding others. If PTAs “entrench the very discrimination that WTO rules seek to eliminate,”\(^4\) how should the legal relationship between them be understood?

The tension between the WTO and PTAs has dogged the international trading system since its inception in the General Agreement on Tariffs and Trade (GATT) in 1947 and through its institutional transformation into the WTO in 1995.\(^5\) The multilateral trading system has always provided Member states with the right to form preferential trade agreements—most famously in Article XXIV of the GATT.\(^6\) But throughout its history, the

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\(^1\) In this paper, we largely put to one side the important economic debates about the relationship between multilateral and regional trade. For important commentary on the economic aspects of regionalism, see, e.g., JACOB VINE, THE CUSTOMS UNION ISSUE (1950); JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK (1991); Jagdish Bhagwati, Regionalism and Multilateralism: An Overview, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime de Melo & Arvind Panagariya eds., 1993); Paul Krugman, Regionalism Versus Multilateralism: Analytical Notes, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime de Melo & Arvind Panagariya eds., 1993).

\(^2\) In this paper, we use the term “preferential trade agreements” (PTAs) to refer to treaties regulating trade between two or more WTO Member states, including customs unions and free trade agreements. While the WTO uses the term “regional trade agreements” (Regional Trade Agreements, https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 6, 2017)), we prefer the term PTAs because many such agreements are not regional in nature, and because the term “preferential” highlights the fact that the agreements diverge from MFN. But see JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT / WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT, at xx (2002) (adopting RTAs as preferred terminology).


\(^5\) For a discussion of the history of the relationship between PTAs and the GATT, see MATHIS, supra note 2, at 1–11.cx.

\(^6\) GATT, supra note 3, art. XXIV. See also General Agreement on Trade in Services art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex
legal limits that GATT/WTO law places on the right to form PTAs have remained frustratingly opaque. Member states have generally failed to come to any agreement on whether the PTAs notified to the WTO have complied with the requirements of Article XXIV. And while scholars hoped that the WTO’s permanent Dispute Settlement Mechanism (DSM) would more clearly articulate and enforce the requirements of Article XXIV, they have found little guidance in the WTO’s jurisprudence. In particular, scholars have argued that the leading WTO case on the interpretation of Article XXIV—the Turkey – Textiles dispute from 1999—leaves many unanswered questions regarding the legal relationship between the WTO and PTAs.\(^7\) Scholars have argued that the case is “inconclusive,”\(^8\) leaving Article XXIV “mired in doubt.”\(^9\)

In the contemporary moment, the international trading system is facing a new range of political developments in favor of establishing preferential trading arrangements of very different types. On the one hand, the slate of Megaregional trade agreements currently under negotiation and implementation has focused on deep regional integration through regulatory cooperation and other types of non-tariff barrier reductions.\(^10\) On the other hand, President Donald Trump has called for the United States to pursue bilateral trade agreements and to renegotiate regional arrangements such as the North American Free Trade Agreement (NAFTA) to better protect U.S. markets by exploiting the United States’ negotiating power and through the

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\(^8\) Peter Hilpold, Regional Integration According to Article XXIV GATT – Between Law and Politics, 7 MAX PLANCK U.N.Y.B. 219, 224 (2003).

\(^9\) Lockhart & Mitchell, supra note 4, at 252.

\(^10\) The current slate of “Megaregionals” and other regional arrangements under negotiation (and renegotiation or, in the case of CPTPP, at the ratification stage) includes the Comprehensive Progressive Trans-Pacific Partnership (CPTPP); the Transatlantic Trade and Investment Partnership (TTIP); the Regional Comprehensive Economic Partnership (RCEP); the Trade in Services Agreement (TiSA); and the North American Free Trade Agreement (NAFTA). For more discussion of this new slate of agreements, see the MegaReg project at NYU’s Institute for International Law and Justice. MegaReg, INST. FOR INT’L L. & JUST., http://www.iilj.org/megareg/ (last visited Nov. 6, 2017). See also CHAD BOWN, MEGA-REGIONAL TRADE AGREEMENTS AND THE FUTURE OF THE WTO (Council on Foreign Rel. ed., 2016); MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TiSA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS (Stefan Griller, Walter Obwexer & Erich Vranes eds., 2017).
use of protectionist legal mechanisms like safeguards. These different approaches to regionalism bring the enduring problem of how to understand the legal relationship between the WTO and PTAs to the fore.

If new PTAs, including both ever-deeper modalities of integration and new forms of protectionism, are under negotiation, it is essential to know the rules of the game—to understand how WTO law regulates and limits what Member states can agree to in PTAs. This Article seeks to clarify some important aspects of the WTO/PTA relationship by exploring a novel interpretation of WTO jurisprudence. In particular, we focus our analysis on *Turkey – Textiles*, the leading case on Article XXIV; although, we also seek to highlight other neglected cases that help to define the legal terms of the WTO/PTA relationship. While the WTO’s PTA jurisprudence is often thought to have left many questions about the WTO/PTA relationship unsettled—including which WTO obligations can be derogated through forming PTAs and whether Member states can oust WTO adjudicatory jurisdiction through PTAs—we argue that *Turkey – Textiles* and other subsequent jurisprudence offers important legal guidance on when the right to form a PTA is consistent with the law of the WTO. This guidance is particularly relevant to the types of PTAs that are currently under negotiation.

In conducting this analysis, we explore the WTO’s jurisprudence through a conceptual lens that we have begun to develop in prior writing: What we have termed a “pluralist” approach to understanding the law of the WTO. This approach has several important features. Our approach resists a constitutional or totalizing approach to legal authority under the law of the

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WTO.\textsuperscript{13} We take seriously the idea that WTO law can accommodate competing sites of legal authority, including the right of WTO Member states to regulate through domestic legislation for reasons that they consider to be important (what has been termed the “right to regulate”).\textsuperscript{14} This focus on regulatory autonomy and the need to protect the policy space of WTO Members has also led us to argue that a particular conception of liberalization is most consistent with the goals and aims of the WTO. Instead of liberalization conceived of as deregulation on the one hand or as regulatory harmonization on the other, we focus on the non-discriminatory aspect of free trade. Thus, according to our \textit{grundnorm}, WTO law guarantees a certain kind of policy space and seeks to promote a certain kind of liberalization. This perspective also generates the need for the WTO’s adjudicatory bodies to be able to take jurisdiction over important questions that go to the states’ right to regulate and to the meaning of liberalization.\textsuperscript{15}

This paper begins to connect this perspective to the regionalism issue—how can we conceive of a system in which PTAs are permitted (as an alternative and novel source of legal authority and norm generation in their own right) without hollowing out the state and its fundamental right to regulate, on the one hand, and without eviscerating the WTO’s disciplines that protect liberalization conceived as non-discrimination, on the other?

While this Article will not provide a complete or comprehensive picture of the relationship between the multilateral and regional systems, it will highlight important aspects of the legal restrictions imposed by WTO law on PTAs that are particularly relevant to today’s regulatory context. Contrary to the common perception that WTO jurisprudence is too vague to provide much guidance on how PTAs can be rendered compatible with the law of the WTO, we argue that in fact there are important indications from WTO case law that specify when PTAs are WTO-compliant.


This Article will proceed in four parts. In Part II, we provide a brief review of the legal interface between the WTO and PTAs, focusing on Article XXIV of the GATT, and outline what are thought to be important ambiguities in the WTO/PTA relationship. Parts III and IV examine Turkey – Textiles with fresh eyes. We provide an overview of the facts and the Panel Report in Part III, and in Part IV we explore the Appellate Body’s reasons. We argue that the Appellate Body’s report (particularly when read in dialogue with the Panel’s report, and with our pluralist approach in mind) actually addresses many of the core ambiguities that scholars have argued pervade the WTO/PTA relationship. These include the meaning of important terms within Article XXIV and which GATT obligations can be contracted out of through PTAs. Part IV also addresses an important ambiguity in the WTO’s internal separation of powers: Whether the WTO’s adjudicatory bodies have the power—vis-à-vis the WTO’s Member states—to determine whether the general requirements for a customs union or free trade area are met by a proposed PTA. Part V considers another fundamental ambiguity in the relationship between the WTO and PTAs: Competing jurisdiction to adjudicate between the WTO’s dispute settlement procedure and those developed by PTAs.

II. THE WTO/PTA LEGAL RELATIONSHIP: ARTICLE XXIV AND ITS AMBIGUITIES

The legal relationship between the WTO and PTAs is set out in several WTO disciplines and agreements including: 16 Article XXIV of the GATT, which covers trade in goods; the so-called Enabling Clause, which provides special and differential treatment for developing countries and which largely exempts PTAs between developing countries from the requirements of GATT Article XXIV; 17 the Understanding on the Interpretation of Article XXIV, a product of the Uruguay Round; 18 Article V of the GATS, which covers trade in services; 19 and the waiver power granted to the WTO’s political organs by Article IX(3) of the WTO Agreement, which authorizes

16 There are other relevant provisions that are excluded from this list, such as the TBT Agreement and SPS Agreement provisions on bilateral mutual recognition agreements; the Agreement on Safeguards; GATS Article V bis, which applies to labor market integration agreements; and the Agreement on Rules of Origin, which covers rules of origin in PTAs.
17 See Enabling Clause, supra note 6.
18 GATS, supra note 6.
19 The GATS was a result of the Uruguay Round of negotiations that produced the WTO, and it expands WTO disciplines to cover trade in services. GATS Article V addresses PTAs that impact services. The Article contains four main provisions that largely mirror the requirements of GATT Article XXIV.
the WTO’s Ministerial Conference to waive WTO legal obligations.\textsuperscript{20} But while these other provisions have played important roles in defining the contours of the WTO/PTA legal relationship, GATT Article XXIV has been the locus of most scholarly debate and GATT/WTO practice and jurisprudence. This Article will therefore largely focus on how Article XXIV constructs the WTO/PTA relationship.\textsuperscript{21} This Part provides a brief overview of Article XXIV and its key ambiguities.

A. Article XXIV

We can begin by considering five key requirements set out in the text of Article XXIV. First, Article XXIV limits the type of PTAs that Member states are permitted to establish. The chapeau of Article XXIV(5) provides that the “provisions of this Agreement shall not prevent” Member states from forming: (1) customs unions (CUs), (2) free trade areas (FTAs), and (3) interim agreements necessary for the formation of a CU or an FTA.\textsuperscript{22} Article XXIV(8) goes on to define what CUs and FTAs are. Both customs unions and FTAs require Member states to form a “single customs territory, . . . so that duties and other restrictive regulations of commerce . . . are eliminated with respect to substantially all the trade between the constituent territories of the union. . . .”

A second important aspect of Article XXIV is that it sets out the basis on which CUs and FTAs are distinguished. Article XXIV(8)(a)(ii) states that customs unions must have a common external tariff and trade policy: Each member state of the union must apply “substantially the same duties and other regulations of commerce” to trade from countries that are not part of the union. By contrast, FTAs need not meet this requirement, and thus parties to an FTA are not obligated to harmonize their external trade policy.


\textsuperscript{21} We also include a discussion of how competing WTO/PTA jurisdiction works, which is not entirely in view of Article XXIV. In future work, we will explore other legal aspects of the WTO/PTA relationship, including the Enabling Act, GATS Article V, and waiver practice.

\textsuperscript{22} General Agreement on Tariffs and Trade art. XXIV(5), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter Chapeau] (stating, “the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or 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 . . .”).
However, both CUs and FTAs must comply with a third important aspect of Article XXIV: The so-called “internal trade requirement” set out in Article XXIV(8)(a)(i) and (b). For a CU or an FTA to be WTO-compatible, the parties must eliminate duties and “other restrictive regulations of commerce” “with respect to substantially all trade” among the parties to the CU or FTA. That is, the parties must liberalize their internal trade within the PTA.

Fourth, CUs and FTAs are also required to comply with the “external trade requirement” in Article XXIV:5. Members are permitted to form PTAs, so long as the duties and other regulations (maintained or imposed) on the trade of other WTO Member states “shall not on the whole be high or more restrictive” than “prior to the formation” of the agreement. That is, Member states are permitted to form CUs or FTAs so long as their agreement does not raise trade barriers to other WTO Member states that are excluded from the PTA.

Fifth, Article XXIV contains a notification requirement: When WTO Member states decide to form a PTA, they are expected to notify the GATT/WTO. The PTA is then to be assessed by the WTO’s Member states, acting through an ad hoc Working Party formed to analyze the proposed PTA (during the GATT era) or the permanent Committee on Regional Trade Agreements (during the WTO era).

B. Ambiguities in the WTO/PTA Relationship

While Article XXIV may seem relatively straightforward when presented in these terms, it has been continually criticized as being replete with ambiguity. These ambiguities have persisted even after several attempts to
find ways to clarify the requirements of Article XXIV by WTO Member states.27

First, at a fundamental level, Article XXIV does not specify which aspects of the GATT treaty to which it is an exception. That is, it does not specify which WTO disciplines can be contracted out of through PTAs. The preamble to Article XXIV(5) states that “the provisions of this Agreement shall not prevent . . . 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.” But which “provisions of this Agreement” does that allow Member states to exempt themselves from through a PTA?28 Clearly some aspects of the MFN requirement of GATT Article I are implicated by Article XXIV, as mentioned above, but beyond that, which aspects of the GATT are included?29 And does Article XXIV provide an exemption for other WTO agreements beyond the GATT, such as the TBT and SBS agreements?30 (A tentative answer would be no. As a textual matter, “this Agreement” refers clearly to the GATT, and other covered agreements have their own provisions that relate to the relationship of regional integration to that agreement).31
This ambiguity is exacerbated by a larger debate in the literature on the WTO: Whether we should conceptualize the WTO as a constitutional arrangement from which all (or little) derogation is permissible, or whether the WTO is better understood as a web of bilateral agreements that Member states are permitted to alter at will. Since the debate between conceptual models of the WTO is often framed in these terms—either as a totalizing constitutional approach that strictly limits contracting out, or as a largely derogable agreement—it is difficult to conceptualize an appropriate limit on which GATT/WTO obligations can be derogated from through Article XXIV.

Second, and relatedly, is the question of whether Member states can contract out of the WTO’s dispute settlement procedures by forming alternative disputes settlement arrangements under PTAs. Can Member states choose to oust the WTO’s jurisdiction to adjudicate through forum selection clauses? What is the relationship between WTO and PTA dispute settlement procedures and remedies? Article XXIV does not contemplate this issue, and scholars have argued that it has not been satisfactorily determined by WTO jurisprudence.

A third ambiguity is temporal. Article XXIV specifies that it applies to PTAs at their formation. But when should we consider a CU or FTA to be “formed”? Are measures added subsequent to the enactment of a PTA covered by Article XXIV? Many important PTAs (most notably the EU) have been frequently amended throughout their existence, and thus an important issue is how those subsequent amendments should be addressed (both as a substantive and a procedural matter) by the law of the WTO (an issue raised by the current NAFTA renegotiations). Article XXIV provides no explicit way of dealing with a subsequent amendment.

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Agreements and the WTO, 1 J. INT’L DISP. SETTLEMENT 80–81 (2010) (arguing that Turkey – Textiles holds that any GATT discipline can be exempted through Article XXIV).


34 See, e.g., Marceau & Wyatt, supra note 31.


36 Lockhart & Mitchell, supra note 4, at 6.
Fourth, several key terms in Article XXIV have long been thought to elude definition. To take one important example, scholars have long wondered about how to define the phrase “other restrictive regulations of commerce” on “substantially all trade” within the internal trade requirement. Parties to a PTA must eliminate some trade barriers within their trading bloc, but which barriers must be removed? A similar language also reoccurs in relation to the common external trade policy requirement imposed on CUs, whereby the members of the customs union must apply “substantially the same duties and other regulations of commerce” to those Member states who are not party to the CU; and in the external trade requirement imposed on CUs and FTAs, which prohibits raising trade barriers to third parties such as that “the duties and other regulations of commerce imposed” by the CU/FTA “shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations commerce applicable” before the CU/FTA was formed. Since in some sense any difference in the regulatory policy of two states creates a restriction on commerce (a point frequently made by those who urge regulatory cooperation and integration), it is unclear what degree of regulatory harmonization is mandated by the internal trade requirement and the common external tariff requirement for a customs union, and what degree of similarity to the prior regulatory system is imposed by the external trade requirement.

Finally, Article XXIV does not specify the internal WTO separation of powers regarding PTAs—it does not specify on its face the respective roles of the WTO’s judicial and political bodies in assessing compliance with Article XXIV. Through the notification requirement discussed above, it appears that the WTO Member states are meant to have a direct role in deciding whether PTAs are Article XXIV-compliant. But what role (if any) does this leave for the WTO’s adjudicatory bodies in assessing PTAs?

This issue is compounded by the failure of the WTO’s Member states to act through the ad hoc Working Parties (in the GATT era) or through the CRTA (in the WTO era) to evaluate PTAs. During the GATT era, the process for analyzing whether proposed PTAs were Article XXIV-compliant was an ad hoc Working Party system. But the Working Parties were largely ineffective, as no PTA ever notified to the GATT was judged by a Working

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37 See Mathis, supra note 28.
38 Chapeau, supra note 22, at (a)–(b).
39 These questions are particularly relevant in the context of new PTAs where regulatory harmonization and other non-tariff barriers are the primary focus of negotiations.
40 As discussed below, this issue was clarified by the Understanding on Article XXIV. Similarly, the GATS clarifies the role of the WTO’s adjudicatory bodies in assessing PTAs.
Party to be in violation of Article XXIV,\textsuperscript{41} and only four Working Parties were ever able to agree on that a PTA satisfied the requirements of Article XXIV.\textsuperscript{42}

Following a call at the Singapore Ministerial Meeting in 1996 for an end to the ad hoc Working Party Review system,\textsuperscript{43} the creation of the WTO following the Uruguay Round ushered in a new process for responding to PTAs notified to the WTO. The Understanding on the Interpretation of Article XXIV mandated a Working Party review of every agreement notified to the WTO and affirmed the need to clarify and enforce the Article.\textsuperscript{44} The WTO General Council established the permanent Committee on Regional Trade Agreements (CRTA) composed of all WTO Members to assess the compatibility of the RTA with the multilateral rules.

But while the CRTA has the power to strike down a proposed CU or FTA,\textsuperscript{45} in practice the CRTA has proved no different from the GATT Working Parties in its ability to achieve consensus and determine whether notified RTAs are WTO compliant, and the 2006 Transparency Mechanism essentially phrased out Member review of the legality of PTAs altogether.\textsuperscript{46} Given this lack of effectiveness by the political/legislative aspect of the WTO, what role remains for the WTO’s adjudicatory bodies?

Ultimately, these ambiguities in the WTO/PTA relationship have led many scholars to conclude that Article XXIV is effectively a dead letter.\textsuperscript{47} Scholars such as Mavroidis and Pauwelyn routinely dismiss the disciplines of Article XXIV as being irrelevant to the relationship between the regional and multilateral trading systems.\textsuperscript{48} This has led to a relative side lining of WTO disciplines in recent negotiations of new PTAs, including the emerging

\textsuperscript{41} ROBERTO V. FIORENTINO, LUIS VERDEJA & CHRISTELLE TOQUEBOEUF, DISCUSSION PAPER NO. 12 THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS: 2006 UPDATE (WTO Secretariat ed., 2007).

\textsuperscript{42} BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 219 (1995). Three of these agreements were formed prior to the examination of the EEC (the Treaty of Rome), which established a precedent that discouraged agreement on examination; after the Treaty was accepted, almost no agreements notified under Article XXIV were determined to have met the GATT legal requirements. JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM 4 (1997).

\textsuperscript{43} MATTHIS, supra note 2, at 131.

\textsuperscript{44} Understanding on Article XXIV, supra note 27.

\textsuperscript{45} MATSUHITA ET AL., supra note 23, at 351.

\textsuperscript{46} Transparency Mechanism, supra note 27.

\textsuperscript{47} HOEKMAN & KOSTECKI, supra note 42, at 219.

\textsuperscript{48} See, e.g., Joose Pauwelyn, Legal Avenues to ‘Multilateralizing Regionalism’: Beyond Article XXIV, in MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 368, 368–69 (Richard Baldwin & Patrick Low eds., 2009) (taking as its starting point that Article XXIV is inoperable).
Megaregional systems. For some commentators, the multilateral system is thought to be both an ineffective negotiating forum for achieving further trade liberalization (as a political matter) and as irrelevant to the type of regulatory integration that is currently being pursued at the regional level (as a legal matter).49

III. TURKEY—TEXTILES—THE DISPUTE AND THE PANEL REPORT

The first systematic effort of the dispute settlement system to address the interaction of PTAs with the WTO legal regime under the provisions of GATT Article XXIV took place in the Turkey—Textiles dispute.50 While scholars have generally concluded that the case does not fundamentally resolve many of the important ambiguities outlined above,51 this Article will provide a novel analysis of the case, arguing that in fact it provides important guidance on the WTO/PTA relationship that has been confirmed in subsequent WTO jurisprudence. This Part begins to establish this claim by outlining the facts of the dispute and by providing an overview of the Panel’s reasons.

A. Facts

Turkey—Textiles emerged out of a dispute between India and Turkey regarding quantitative restrictions (QRs), or import quotas, that Turkey imposed on imports of Indian textiles.52 Turkey was in the process of forming a customs union with the European Union (EU), which maintained quantitative restrictions on certain products under the relevant provisions of the Uruguay Round Agreement on Textiles and Clothing (ATC)—including on imported Indian textiles. To harmonize its external trade policies with the

49 The classic statement to this effect was Larry Summers’ call to pursue trade integration through all means necessary, when multilateralism faltered. Lawrence H. Summers, Regionalism and the World Trading System, in FED. RESERVE BANK KAN. CITY SYMP.: POL’Y IMPLICATIONS OF TRADE AND CURRENCY ZONES (1991).

50 Panel Report, Turkey—Textiles, supra note 7; AB Report, Turkey—Textiles, supra note 7. However, the earlier unadopted reports in the Bananas dispute did address this issue to some extent. See MATHIS, supra note 2, ch 5.

51 This is not to say that scholars have not taken the case seriously. The case has been subject to extensive analysis, and scholars have attempted to clarify its holdings in various ways. We think that it is appropriate to conclude, though, that Turkey—Textiles is not thought to provide sufficient systematic guidance on the relationship between the WTO and PTAs.

52 Panel Report, Turkey—Textiles, supra note 7, ¶ 1.1.
EU, Turkey also imposed quantitative restrictions on imported Indian textiles.\footnote{For a discussion of why the EU was able to impose QRs on India while Turkey was not, see AB Report, \textit{Turkey – Textiles}, supra note 7, ¶ 1.2.}

India challenged Turkey’s import quotas on textiles through the WTO’s dispute settlement procedure, arguing that they violated WTO law. India argued that Turkey’s new quotas were a violation of Article XI of the GATT, which prohibits quantitative restrictions, and of the ATC. Turkey responded by arguing that Article XXIV of the GATT—and in particular the chapeau in Article XXIV(5), which states that nothing in the GATT shall prevent the formation of a customs union or free trade area—operated as a \textit{carve out} for measures inconsistent with GATT, when taken in the formation of customs union. On Turkey’s approach, once it was established that certain trade-restrictive measures pertained to the formation of a customs union, all such measures must be entirely exempt from analysis under GATT disciplines.\footnote{Panel Report, \textit{Turkey – Textiles}, supra note 7, ¶¶ 6.35–6.36, 9.27, 9.46, 9.88.} Turkey therefore argued that Article XXIV should be understood as a carve out that applies to \textit{all} GATT disciplines.

Turkey also addressed the internal WTO separation of powers question discussed above: It argued that once the WTO Member states had acquiesced to or accepted the formation of a particular custom union on the terms in question, measures such as Turkey’s quotas that were incidental to that formation were not justiciable by the dispute settlement organs.\footnote{Id. ¶ 6.125.} Since the WTO’s Member states (and thus its political branch) are tasked with considering whether a proposed PTA is compatible with Article XXIV, Turkey denied that the WTO’s adjudicatory bodies could also have jurisdiction.

\textbf{B. The Panel Report}

The Panel of first instance took a quite different approach to the meaning of Article XXIV from the interpretation for which Turkey had argued. Citing the Understanding on Article XXIV, the Panel found that it had the authority to examine whether measures “arising from” the arrangements contemplated by Article XXIV were compatible with WTO rules.\footnote{Id. ¶ 9.50.} And taking a teleological view of Article XXIV, the Panel interpreted the role of Article XXIV as connected to the purpose of facilitating deeper integration
and freer trade.\textsuperscript{57} Compatible with this telos was the notion that Article XXIV, in as much as it provides relief from GATT disciplines, does so primarily with respect to the MFN non-discrimination obligation, which is, fundamentally, what would otherwise prevent freer trade among a subset of WTO Members.\textsuperscript{58} The Panel then proceeded to take the position that any deviation from WTO disciplines other than MFN in the formation of a customs union must have an explicit basis in the text of Article XXIV (or some other GATT exception).\textsuperscript{59}

One such textual basis for deviating from the legal disciplines of the GATT could be in the criteria that Article XXIV states must be met in order for a particular regional arrangement to constitute a “customs union.” As noted above, Article XXIV(8)(a)(ii) incorporates a common external trade policy requirement into the definition of a customs union: CU members must ensure that “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade or territories not included in the union.”\textsuperscript{60} Among Turkey’s arguments was that if the harmonization of external commercial policies (as required by Article XXIV(8)(a)(ii)) was an essential aspect of a customs union, Turkey’s CU with the EU would not be possible unless Turkey also introduced import quotas. That is, if Turkey was required to harmonize its external trade policy with that of the EU to meet the definition of a CU, it should be allowed to impose the same quotas as the EU.

A difficulty with this argument, however, is that it would also be possible to form a Turkey-EU customs union if the EU removed its own quotas, thus resulting in harmonization to a more liberal common external commercial policy. To rebut this argument, Turkey relied on a particular interpretation of the external trade requirement that, as discussed above, prohibits members of a CU or FTA from raising barriers to trade with third parties. This requirement states that: “[T]he duties and other regulations of commerce imposed [on other WTO Members not part of the customs union] . . . shall not on the whole be higher or more restrictive than [the prior] . . . duties and regulations of commerce applicable [to WTO Members].”\textsuperscript{61} Turkey claimed that the phrase “on the whole” in this provision allowed them room to

\textsuperscript{57} Id. ¶¶ 9.98–9.100.

\textsuperscript{58} Id. ¶ 9.98. That is MFN requires Member states to accord equal treatment to trade in goods from all of their trading partners. Without a specific exception, this obligation would prevent Member states from forming PTAs by offering some of their trading partners more favorable terms and deeper integration than is available to the Member state’s other trading partners.

\textsuperscript{59} Id. ¶ 9.208 (summarizing this conclusion).

\textsuperscript{60} GATT, supra note 3, art. XXIV(8)(a)(ii) (the common external tariff requirement).

\textsuperscript{61} Id. art. XXIV(5)(a) (emphasis added) (the external trade requirement).
maneuver, so that the new member of a customs union could introduce a new, otherwise WTO-incompatible, restriction when harmonizing its trade policy with other members of the customs union, as long as overall the new duties and regulations of commerce imposed on third parties outside the CU were not more restrictive than before.62

The Panel’s approach to Article XXIV in many respects develops out of its rejection of this reading of the external trade requirement. For the Panel, the external trade requirement is an additional discipline or condition on the right to form a customs union under the WTO, and does not serve as a justification for, or render GATT-compatible any new (otherwise GATT-prohibited) restriction on trade, whether a tariff or other regulation of commerce.63 The explicit textual evidence for the Panel’s reading, which it cites, is Article XXIV(6), which requires that if any rate of duty is to be increased beyond the MFN bound rate, the tariff renegotiation procedures apply and compensatory adjustment must be provided.64 In other words, according to the Panel, any new (otherwise GATT-prohibited) restriction imposed at the formation of a customs union must be consistent both with the requirement that the overall incidence of duties and regulations of commerce be no more restrictive, and each restriction must be capable of being rendered GATT-compatible through some explicit process or provision. But, with respect to non-tariff measures, such as Turkey’s QRs, Article XXIV is silent; no explicit avenue exists for rendering them compatible with the GATT.

But is there then a conflict between the common external trade policy requirement for customs unions on the one hand,65 and prohibitions on QRs in the GATT on the other,66 such that Turkey would not be able to meet the customs union requirements and therefore exercise its general right to form a customs union without violating the provisions on QRs in the GATT? As noted, one way of avoiding such a conflict is for the EU to liberalize its quotas, which would avoid the need for Turkey to impose its own. However, this would have meant that the EU would be forced to choose between exercising specific rights it had under the ATC to impose the quotas and exercising the right to form a customs union under the provisions of Article XXIV.

The Panel suggests that such a result is prevented by virtue of the language setting out the internal trade requirement in Article XXIV(8)(a)(i).

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63 Id. ¶¶ 9.121, 9.122.
64 GATT, supra note 3, art. XXIV(6); Panel Report, Turkey – Textiles, supra note 7, ¶ 9.127.
65 As set out in Article XXIV(8)(a)(ii).
66 As set out in Article VI.
This provision allows some restrictions between the members of a new customs union to remain, because it only requires the members to eliminate “substantially all” internal trade barriers—i.e., not all duties and other restrictive regulations of commerce—when forming their customs union.\(^{67}\) Further, the Panel notes, the internal trade requirement refers explicitly to internal QRs as among those measures that do not have to be entirely removed.\(^{68}\) Thus, the internal trade requirement does not require the EU and Turkey to harmonize its QRs. The EU can form a customs union with Turkey while continuing to exercise its right to impose quotas on imports of textiles from third countries. And the EU can prevent, through restrictions internal to the customs union, goods in excess of the quotas entering the EU through Turkey, without Turkey having to impose its own new QRs on third countries.

In sum, the Panel’s approach strongly suggests that Article XXIV only functions as a broad exception to the MFN obligation of the GATT in order to permit preferentiality, but otherwise does not provide flexibility to deviate from WTO rules. The Panel simply was not persuaded that deviation from such rules would be necessary in order to form a customs union, given the flexibility built in to the definitional criteria for a custom union.

IV. THE APPELLATE BODY’S APPROACH TO ARTICLE XXIV

The Appellate Body reached the same result as the Panel, concluding that internal restrictions could be used as a WTO-consistent alternative to QRs in order to harmonize the external commercial policy of Turkey and the EU. But although the result was the same as the decision reached by the Panel, the Appellate Body understood the architecture of Article XXIV quite differently in several key respects. These systematic aspects of the Appellate Body’s reasons in Turkey – Textiles have important implications for how we understand the legal relationship between the WTO and PTAs.

A. The Necessity Test

First and most importantly, the Appellate Body focused its attention on the preamble to Article XXIV(5), which the Appellate Body argued was key to understanding the WTO/PTA relationship. The Appellate Body held that:

\(^{67}\) Panel Report, Turkey – Textiles, supra note 7, ¶ 9.150.

\(^{68}\) The internal trade requirement exempts “where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX),” QRs are covered by Article XI. Id.
[T]he chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal. . . . the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible ‘defense’ to a finding of inconsistency.69

By focusing on the chapeau of paragraph 5, the Appellate Body was able to articulate the steps or elements in applying the exception to a challenged measure—what is known as the “necessity test.”

As the Appellate Body sets out, the first step in the “necessity test” analysis is to consider whether the measure under consideration was introduced upon the formation of a customs union.70 This implies both a temporal and a substantive dimension: The party invoking Article XXIV as a defense must demonstrate that the arrangement “fully meets the requirements [for a customs union set out in] sub-paragraphs 8(a) and 5(a)” of Article XXIV.71

Next, the second step is to determine whether the challenged measure is GATT-inconsistent “only to the extent” necessary to allow the possibility of the formation of a customs union.72 In this second step, according to the Appellate Body, it is necessary to deploy the definition of a customs union set out in Article XXIV(8): The key question is to whether the challenged measure’s deviation from GATT rules is indispensable—i.e., *logically required*—for the PTA under consideration to acquire all the defining features of a customs union.

Third and finally, the Appellate Body set out, the CU must meet the external trade requirement: that, with respect to third countries, the “general incidence” of duties not be higher than that applied by the individual members prior to the customs union, and that the “general incidence” of “other regulations of commerce” not be more restrictive.73

B. Jurisdiction to Adjudicate and the WTO’s Internal Separation of Powers

In setting out this three-step necessity test, the Appellate Body’s decision differs in an important way from the approach taken by the Panel in *Turkey – Textiles*. The Panel was uncertain whether it had the jurisdiction to

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70 Id. ¶ 45.
71 Id. ¶ 58.
72 Id. ¶ 46.
73 Id. ¶ 54.
determine whether the arrangement between the EU and Turkey met all the requirements of a customs union; it proceeded, exercising judicial economy, on the basis that even if the arrangement did meet those requirements, Turkey’s deviation from GATT rules would not be justifiable under Article XXIV. While this aspect of the Panel ruling was not appealed, and the Appellate Body made no direct judgment on whether in fact the EU-Turkey arrangement qualified as a customs union, the AB noted that “it may not always be possible to determine whether or not applying a measure would prevent the formation of a customs union [i.e., step 2 of the necessity test] without first determining whether there is a customs union [i.e. step 1 of the necessity test].” The Appellate Body thus clearly sees the dispute settlement organs as having the jurisdictional competence to directly assess whether a particular measure meets the requirements of a customs union that are set out in Article XXIV.

In deviating from the Panel and suggesting that the dispute settlement organs might have the competence and even the responsibility in certain cases to determine whether the general requirements for a customs union or free trade area had been fulfilled, the Appellate Body attracted considerable controversy. GATT practice was understood by many to be that proposed PTAs, or those in the process of formation, would be notified to the membership, discussed in the relevant Committee, and ultimately voted on for its compatibility with Article XXIV.

Yet the Appellate Body’s assertion of jurisdiction is consistent with both the law and practice of the GATT/WTO. While Article XXIV establishes procedures for notification of new PTAs to the membership, and the possibility of the membership making “recommendations” in light of the examination of the PTA in the appropriate committee, there is no requirement that the membership make an actual determination as to whether a PTA is consistent with Article XXIV. In addition, the committees’ consensus-based decision-making practice means that it would be very unlikely to have a situation where through “recommendations” the Membership makes a negative finding of the inconsistency of a notified PTA with Article XXIV, given that the members of the PTA would have to vote.

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74 Panel Report, Turkey – Textiles, supra note 7, ¶ 9.54.
75 AB Report, Turkey – Textiles, supra note 7, ¶ 59.
76 Now, however, that the Transparency Mechanism has clarified that the WTO’s judicial bodies have this power. Transparency Mechanism, supra note 27.
against themselves as part of the consensus. This has been born out in practice, where the ad hoc Working Parties of the GATT era and the CRTA of the WTO era have not been able to come to any consensus on whether PTAs comply with the requirements of Article XXIV. The Uruguay Round Understanding on Article XXIV strongly suggests that the function of notification requirements and discussion of new PTAs in the CRTA is now understood largely as transparency or information-exchange (rather than determining compliance). The Understanding gives an explicit role to the dispute settlement system with respect to application of Article XXIV, and notes the need to develop good economic evidence that allows application of the criteria in Article XXIV. But it does nothing to enhance any decision-making authority of the membership, or in particular, the CRTA. The 2006 Transparency Mechanism goes even further in the direction of structuring the consideration of PTAs in the CRTA as merely an exchange of information. These emerging practices suggest that the Appellate Body was correct to assert jurisdiction over PTAs in Turkey – Textiles.

Indeed, the absence of action by the WTO’s political organs to judge compliance with Article XXIV could be considered a kind of subsequent state practice, within the meaning of the Vienna Convention on the Law of Treaties, Article 31. Perhaps this state practice means that the WTO treaties have evolved regarding their internal separation of powers on which bodies have the jurisdiction to determine whether a PTA complies with Article XXIV, an interpretation which would affirm the approach taken by the Appellate Body in Turkey – Textiles. At the same time, the Appellate Body’s approach does not negate political control over Article XXIV matters, as there remain avenues for states to exercise ultimate political control over the requirements of Article XXIV.

78 Petros Mavroidis, If I don’t Do It, Somebody Else Will (Or Won’t): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules, J. WORLD TRADE 187, 187 (2006).
79 Id.
80 Understanding on Article XXIV, supra note 27.
81 Id.
82 Transparency Mechanism, supra note 27.
84 Indeed, perhaps one could make an even stronger version of this argument: Perhaps a WTO Member would be estopped from arguing before the dispute settlement organs that a PTA does not meet the general requirements of Article XXIV if the Member had not previously raised the issue when the PTA is considered by the Committee.
85 Article XXIV itself notably provides for the possibility of a waiver, where an arrangement is non-conforming, and the general waiver provisions have been invoked in many
This approach is also consistent with our “pluralist” interpretation of WTO law, which highlights the need for the WTO’s adjudicatory bodies to act to decide disputes that establish the boundaries of state authority under WTO law. While we have argued that the WTO’s disciplines should be read in a way that protects states’ right to regulate, this implies jurisdiction for the WTO’s dispute settlement bodies over matters that set out the scope of states’ policy space and regulatory autonomy—a matter that, as we argue below, is implicated by the requirements of Article XXIV.

C. The “Formation” of a PTA

A third important implication of the Appellate Body’s ruling relates to what it means to “form” a CU or a FTA. Recall that an important debate regarding Article XXIV is how to understand what it means—both temporally and substantively—to form a CU or an FTA. While the Panel had noted that Article XXIV does not define the “concept” of formation, the Appellate Body emphasizes the importance of understanding what “formation” means, because the Article XXIV defense applies only to measures introduced at the “formation” of a customs union. CUs and FTAs are often changed by parties subsequent to their formation; are these changes non-justiciable?

The Appellate Body’s articulation of the necessity test suggests that preferential removal of restrictions by members of a customs union subsequent to “formation” could not be justified as a departure from MFN under Article XXIV, since each departure must be subject to the analysis they outline. In addition, the fact that their approach allows an arrangement to qualify as a customs union where some trade is still not liberalized and some commercial policies are still not harmonized suggests that a customs union may still be in a process of formation even after it passes the definitional threshold. It may therefore be appropriate to view “formation” as an ongoing process.

This approach would be consistent with what both the Panel and the Appellate Body agree is the purpose of Article XXIV: to facilitate more

cases where preferential arrangements (such as the Lome Convention) did not conform either to the requirements of Article XXIV (or the Enabling Clause MFN exception).

86 Howse, supra note 15; Howse & Langille, Permitting Pluralism, supra note 12.
87 See supra Part II.B.
88 Panel Report, Turkey – Textiles, supra note 7, ¶ 9.133.
89 AB Report, Turkey – Textiles, supra note 7, ¶ 46.
90 Given the Appellate Body’s emphasis on justiciability and the application of the necessity test to any departure.
liberalization or deeper integration.91 If a PTA is only subject to scrutiny at
the initial moment of formation and not on an ongoing basis, this would
encourage parties to alter the terms of their PTAs after their initial formation,
in order to adopt new measures that did not comply with the liberalizing
requirements of Article XXIV. This approach is also consistent with the
judiciary’s role under a pluralist conception of WTO law, where the DSM
must play an important role in ensuring that the law of the WTO pursues a
certain conception of liberalism—and if that objective could only be pursued
at the initial formation of an agreement, the WTO’s adjudicatory bodies
would be unable to play this important monitoring role on an ongoing basis.

D. “Other Regulations of Commerce”

In their analysis of Turkey’s import quotas, both the Panel and the
Appellate Body had no difficulty concluding that QRs constitute “other
regulations of commerce” that must be harmonized in accordance with the
common external trade policy requirement for customs unions. When
reaching this conclusion, the Panel took an extremely broad approach to
defining “other regulations of commerce.” They held that:

[T]he ordinary meaning of the terms “other regulations of
commerce” could be understood to include any regulation
having an impact (such as measures in the fields covered by
WTO rules, e.g. sanitary and phytosanitary, customs valuation,
anti-dumping, technical barriers to trade; as well as any other
trade related domestic regulation, e.g. environmental standards,
export credit schemes).92

In responding to the Panel’s finding, the Appellate Body made no explicit
effort to directly identify the scope of “other regulations of commerce.”
However, it did cite the Understanding on Article XXIV to the effect that
“quantification and aggregation of regulations of commerce other than duties
may be difficult.”93 This statement seems to presuppose that the Appellate
Body had in mind some definition of “regulations of commerce” other than
duties, but no explicit definition is to be found, either in Article XXIV itself

91 Panel Report, Turkey – Textiles, supra note 7, ¶¶ 9.98–9.100; AB Report, Turkey –
Textiles, supra note 7, ¶¶ 56–57.
92 Panel Report, Turkey – Textiles, supra note 7, ¶ 9.121.
93 AB Report, Turkey – Textiles, supra note 7, ¶ 54.
or in the Understanding.\footnote{See supra Part II.B.} Can the Appellate Body’s reference be parsed, in order to set out an appropriate account of “other regulations of commerce”?\footnote{GATT, supra note 3, art. XXIV(8)(a)(i), (b) (emphasis added).}

We can begin by considering whether the Appellate Body would have accepted the Panel’s broad approach. To assess the normative and practical consequences of such a broad and dynamic definition of “other regulations of commerce,” we need to look closely at the role of this expression in Article XXIV. It appears three times within the text of the article. First, the \textit{internal trade requirement} states that in both a customs union and a free trade area, “other restrictive regulations of commerce . . . are \textit{eliminated} with respect to substantially all the trade between the constituent territories.”\footnote{\textit{Id.} art. XXIV(5) (emphasis added).} Secondly, the \textit{external trade requirement}, which also applies to both customs unions and free trade areas, provides that “other regulations of commerce” imposed on trade with third countries “shall not on the whole be higher or \textit{more restrictive} than the general incidence” prior to the establishment of the customs union or FTA.\footnote{\textit{Id.} art. XXIV(8)(a)(ii).} And third, the \textit{common external trade policy requirement for customs unions} states that “substantially the same duties and other regulations of commerce are applied by each of the members of the union” to third countries.\footnote{Understanding on Article XXIV, supra note 27.}

One immediately observes that in both the internal and external trade requirements, the expression “other regulations of commerce” is used in conjunction with the adjective “restrictive.” This suggests that “other regulations of commerce” are measures of which the \textit{trade restrictive character} is readily identifiable, even if, as the Understanding acknowledges, they are difficult to quantify or aggregate in some cases.\footnote{\textit{Id.} art. XXIV(8)(a)(ii).} These would include not only quantitative restrictions, but also various kinds of requirements and norms that are clearly and explicitly related to border restrictions (such as rules of origin, customs formalities, valuation, etc.).

Furthermore, the internal trade requirement exempts from the requirement of elimination “regulations of commerce” permitted under various exceptions in the GATT, and refers in particular to those in Articles XI, XII, XIII, XIV, XV and XX. Articles XI-XV all deal with \textit{border restrictions} that take a form other than tariffs. Notably there is no reference to “other regulations of commerce” permitted under Article III National Treatment,\footnote{GATT, supra note 3, art. III.} which has exceptions of its own, or even under Articles V and VI, which
deal with dumping and subsidies.100 These textual considerations suggest a much narrower scope in the meaning of “other regulations of commerce” than the Panel’s broad and dynamic conception of “any regulation having an impact on trade.”

In addition, the normative and practical consequences of the Panel’s proposed definition suggest that the text of Article XXIV contains a narrower conception of “other regulations of commerce.” Under the right to regulate that the Appellate Body has identified as a central tenet of the WTO system,101 WTO Members have a right to maintain regulations having an impact on trade, even those that have trade-restrictive aspects, provided that they are not unnecessary and/or discriminatory obstacles to trade.102 Few countries, if any, and understandably so, would commit to an agenda for customs union or FTA negotiations that entails the elimination of substantially all regulations that have some restrictive impact on trade.103 To the extent that they impose some requirements or standards on traded products, essentially all regulations have trade-restrictive effects. Indeed, no actual FTA or customs union, not even the EU, comes close to eliminating substantially all regulations that have an element or potential element of trade-restrictiveness.

In addition, we can consider the history of Article XXIV when parsing the meaning of “other regulations of commerce.” The drafters of Article XXIV had in mind the kinds of regulations of commerce that it was appropriate to eliminate for the sake of free or freer trade, such as protective border restrictions. But they did not contemplate eliminating internal regulations, that might be the subject of tighter disciplines in FTAs or customs unions (such as best regulatory practices, transparency, or cooperation requirements) but which are not to be eliminated because they serve essential public policy purposes—even if their trade-restrictiveness is to be reduced to that which is unavoidable, perhaps through regulatory rapprochement or harmonization. In light of the purpose of Article XXIV—the facilitation of freer trade—it would make little sense if Article XXIV imposed requirements with respect to internal regulations that are largely irreconcilable with almost any country’s notion of its sovereignty, meaning

100 Id. arts. V, VI. Neither in the Can.-U.S. FTA nor under the NAFTA has the use of anti-dumping and countervailing duties between the parties been constrained substantively beyond the limits in the WTO Agreements.
101 See, e.g., China – Publications, supra note 14, ¶ 222.
102 As we have argued in prior work. See Howse & Langille, Permitting Pluralism, supra note 12, at 432; Howse et al., Pluralism in Practice, supra note 12, at 91.
103 This point is made by Mathis in interpreting the ORC and ORRC language in Article XXIV. Mathis, supra note 28, at 91. See also Howse, supra note 28, at 142.
that the ability of WTO Members to reduce clearly protectionist, restrictive border measures through PTAs and in a manner consistent with WTO law would be held hostage to a requirement of surrender of regulatory sovereignty that, realistically, no state could be expected to accept across-the-board.

The Panel’s definition would mean that, in the case of a CU, almost all trade-impacting domestic regulations would have to be harmonized. The customs union would have to be able to exercise competence over all areas of domestic regulation with an impact or potential impact on trade, powers far greater than even those that the EU authorities exercise. This clearly contradicts the conception of pluralism on which, in other work, we have argued the WTO legal system is grounded.104 Moreover, in the case of customs unions, if one takes the harmonization requirement along with the requirement that after the formation of the customs union the general incidence of regulations cannot on the whole be higher or more restrictive (the external trade requirement), then on the Panel’s definition of “other regulations of commerce,” harmonization upward (towards the standards maintained by the strictest regulator among the members of the CU) would be rendered well-nigh impossible, because ratcheting up regulatory standards would almost of necessity result in overall higher or more restrictive regulations than prior to the CU.105

For these reasons, we argue that the Panel’s wide-ranging approach would not have been accepted by the Appellate Body if it had directly addressed the meaning of “other regulations of commerce.” Instead, we will propose a more limited understanding of the term that is more consistent with our pluralist approach.

E. Article XXIV and Regulatory Discrimination

As discussed above in Part II.B, an essential debate about the meaning of Article XXIV concerns the extent to which WTO non-discrimination obligations be contracted out of through PTAs. Scholars have often assumed that home country regulation or mutual recognition approaches that may exist in customs unions or FTAs, where imported products are accepted into another Member of the arrangement on the basis that they meet the


105 For a discussion of the so-called “California Effect”—the idea that economic integration may lead to the ratcheting up of regulatory standards—see Richard Perkins & Eric Neumayer, Does the ‘California Effect’ Operate Across Borders? Trading- and Investing-up in Automobile Emission Standards, 19 J. EUR. PUB. POL’Y 217 (2012).
regulatory standards of the Member exporting them, are compatible with Article XXIV.\footnote{See Howse, supra note 28.} That is, scholars assume that the MFN exemption that enables the elimination of tariffs and other border restrictions such as QRs, also applies to preferential regulatory treatment of goods originating in other members of the customs union or FTA. In our view, however, the Appellate Body Report in Turkey – Textiles calls this assumption into question.

Contrary to the Panel’s notion that Article XXIV operates as a broad exemption from MFN to enable preferentiality in customs unions and FTAs (while offering no flexibility to deviate from other WTO obligations), the Appellate Body determined instead that the defense or exception in Article XXIV operates much like, for example, the Article XX defense or exception.\footnote{AB Report, Turkey – Textiles, supra note 7, ¶¶ 52, 57.} The party invoking the exception \textit{regardless of what WTO obligation} is involved must show that it is impossible to form a customs union or FTA unless the parties can deviate from a particular obligation.\footnote{Id. ¶ 58.} The parties must prove in each instance that the deviation from WTO obligations is \textit{logically necessary} to form the customs union or FTA.

In practice, of course, it would be relatively easy to invoke the exception to justify preferential elimination of tariffs and other border measures, given Article XXVI’s definition of a CU or FTA. However, given our understanding of the term “other regulations of commerce,” we see it as questionable as to whether home country-regulation, mutual recognition agreements, or other discriminatory approaches to regulatory standards which favor products produced under a regulatory regime within the customs union or FTA are logically necessary for the formation of a customs union.\footnote{As required by the necessity test set out by the Appellate Body in Turkey – Textiles.} One could meet the definition of a customs union or FTA under Article XXIV by eliminating internal tariffs and other border restrictions (and in the case of a customs union, harmonizing external commercial policies, as opposed to other sorts of regulatory policies), without in any way needing to create a “regulatory fortress.”

Furthermore, while allowing departure from MFN to facilitate elimination of tariffs and QRs among the members of the customs union or FTA clearly serves the purpose the Panel and Appellate Body identify as informing all of Article XXIV—which is to promote freer, less restrictive trade—regulatory understandings that discriminate against products from third countries do not as such make trade freer. Indeed, giving some kind of preference to products produced under the regulatory standards of a member of the customs union or FTA arguably has the potential to introduce a new barrier to goods from
third countries, a kind of regulatory cartel. Regulatory discrimination may in fact be designed to facilitate the creation of regulatory requirements or standards that in effect shut out non-member third countries. It makes little sense, in terms of the avoidance of PTAs resulting in new restrictions of trade, to altogether remove such arrangements from examination under the MFN discipline.\textsuperscript{110}

This claim is reinforced by the fact that the SPS and TBT Agreements do not provide any kind of carve out or exception from their own MFN obligations for PTAs.\textsuperscript{111} Nor can it reasonably be argued that Article XXIV itself is now extended, post-Uruguay Round, to SPS and TBT. The Uruguay Round Understanding on Article XXIV contains no such extension, and the WTO Appellate Body has stated that that GATT exceptions do not apply to the TBT Agreement.\textsuperscript{112} In fact, when one examines the provisions of SPS and TBT, they seem designed to avoid discriminatory regional arrangements, suggesting that mechanisms like mutual recognition agreements should be open to all WTO Members who are able to satisfy the objective regulatory criteria, and that regulations should be based on standards enacted by standardization bodies that are inclusive, open to participation by the standardization authorities of all WTO Members.\textsuperscript{113}

We stress that the implication of our analysis is not that the emphasis on regulatory matters in newer PTAs needs to be shut down in order to make PTAs compliant with Article XXIV (a highly unrealistic proposition); rather, whatever regulatory arrangements exist regionally under PTAs must be open to WTO Members who are not in the PTA on non-discriminatory terms, provided they and their products conform to the objective criteria in question.


\textsuperscript{111} There is bilateral mutual recognition, but this is not intended to be discriminatory. Indeed, TBT and SPS both include articles regarding conformity to international standards, which suggests that any regulatory standards must be open for other parties to join and should comply with an international/multilateral approach where possible. See, e.g., Agreement on Technical Barriers to Trade arts. 2.4, 2.6, Jan. 1, 1995, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].


\textsuperscript{113} See also on this point, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (May 16, 2012) [hereinafter Tuna – Dolphin II]; Howse, supra note 28, at 137–51.
How MFN can operate to ensure that regulation is non-discriminatory is well-illustrated by EEC – Beef.\textsuperscript{114} In that case, Europe had conditioned preferential access for certain beef imports on their quality certification by the United States Department of Agriculture (USDA).\textsuperscript{115} Canada brought a complaint before a GATT Panel, arguing this stipulation violated the MFN provision because it gave advantageous treatment to beef imports from the United States, which were in fact the only products certified by the USDA to the quality standard in question.\textsuperscript{116} Canada stated it could provide evidence that its beef was of equivalent quality,\textsuperscript{117} and the Panel found an MFN violation to the extent that Canadian beef of equivalent quality was excluded by virtue of the arrangement based on USDA certification.\textsuperscript{118}

The lesson for PTAs is they should be operated like open plurilateral agreements dealing with regulatory issues. In our interpretation of Article XXIV, all WTO Members and their products should be able to participate on a non-discriminatory basis, provided that objective criteria are satisfied.

This circumscribed understanding of which aspects of the non-discrimination obligation can be avoided through the formation of a PTA is also in line with our general pluralist approach to interpreting the law of the WTO. As noted above, this approach preserves individual states’ regulatory autonomy by not making regulatory coherence or integration a mandatory aspect of the formation of a PTA.\textsuperscript{119} While it permits states to form new sources of legal authority through forming PTAs, it also ensures that states retain their ability to regulate for reasons that they consider to be important; they do not need to pursue regulatory integration to exercise their right to form a PTA. The idea that PTA regulatory regimes should remain open to outsiders’ approaches also increases the regulatory options available to states who are not party to a PTA. They do not need to join the PTA to have their regulatory approach recognized as equal, allowing them to preserve their regulatory autonomy. Finally, this approach also reduces opportunities for group-based protectionism and discriminatory behavior, which is (generally) the type of liberalization about which we are concerned.

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\textsuperscript{115} Id. at 2.

\textsuperscript{116} Id. at 3.

\textsuperscript{117} Id. at 2.

\textsuperscript{118} Id. at 5.

\textsuperscript{119} See supra note 12. This is particularly important in the context of developing country-developed country RTAs, given the extraordinary inequality in bargaining power.
F. Affirming the Appellate Body’s Approach: Article XXIV as a Lex Specialis or Quasi-Constitutional Norm of the WTO System in Peru – Agricultural Products

After Turkey – Textiles, some commentators speculated that the activation by the Appellate Body of Article XXIV as a “hard law” framework for disciplining the departure of PTAs from GATT norms would have little significance, as WTO Members would still be reluctant to litigate matters concerning PTAs in the WTO dispute system. Many commentators still consider Article XXIV to be a dead letter, and in that sense conclude that Turkey – Textiles has not altered the institutional context in which Article XXIV issues are resolved.

Given this standard picture of Article XXIV’s legal force, it is worth noting that the Appellate Body reinforced the centrality of the Article XXIV framework in the subsequent Peru – Agricultural Products case.120 In that case, Guatemala challenged a variable pricing mechanism that Peru operated for certain agricultural products under the WTO Agreement on Agriculture.121 One of Peru’s responses to this challenge was that in a PTA negotiated but not ratified by Guatemala and Peru, there was an explicit clause allowing the maintenance of such a variable price mechanism; Peru argued that this was a case where, in conformity with Article 41 of the Vienna Convention on the Law of Treaties, a subset of parties to a multilateral treaty (here the WTO Agreements) modified the obligations of the treaty as applicable between themselves through a PTA.122 While not really resolving whether the PTA actually did purport to modify WTO obligations, or what should be significance of non-ratification of the PTA, the Appellate Body made this broad jurisprudential determination:

[W]e note that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the

121 Id. at 8.
122 Id. ¶ 5.85; VCLT, supra note 83, art. 41.
level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA.

In the light of the above, we consider that the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements . . . namely: [Article XXIV, the Enabling Clause, and GATS Article V].

The Appellate Body is in effect stating here that, even where trade with other WTO Members is unaffected, any attempt by two or more Members to modify WTO obligations among themselves must pass through the relevant WTO legal architecture that deals with changes to obligations, whether Article XXIV (for trade in goods), the Enabling Clause (for developing country trade), or GATS Article V (for trade in services). This arguably goes beyond the obvious purpose of ensuring that PTAs do not lead to more restrictive trade with third countries, or to ensuring that they in general result in freer trade, to assuring the unity and integrity of the WTO as a legal system. Preferential elimination of border restrictions is obviously tolerated to allow for freer trade, but other departures are subject to a high level of scrutiny or perhaps are largely impermissible except by waiver. Here, the Appellate Body adopts an approach to preserve the relative autonomy and universality of a multilateral regime under pressure from “spaghetti-bowl” fragmentation.

V. FREE TRADE AGREEMENTS, CUSTOMS UNIONS, AND JURISDICTION TO ADJUDICATE AT THE WTO

While Article XXIV, as interpreted in Turkey – Textiles and Peru – Agricultural Products, is the cornerstone for the legal interface between WTO law and PTAs, another jurisprudential edifice on this matter has been built up in parallel through disputes in the WTO about how PTAs affect the jurisdiction of the WTO’s dispute settlement organs. The most obvious issue

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123 AB Report, Peru – Agricultural Products, supra note 120, ¶¶ 5.112–5.113 (internal citations omitted).
124 In Bhagwati’s well-known terminology.
arises where a similar or identical claim has been brought in a PTA forum and in the WTO: Are such parallel proceedings compatible with the DSU?  

Since there is considerable overlap in coverage between many FTA and WTO provisions and FTAs frequently cite or even incorporate large swathes of WTO law, a legally and/or factually identical dispute might be brought under either or both a FTA or in WTO dispute settlement. At first glance, one might think that the language of DSU Article 23 solves this problem, as it states that Members undertake to settle disputes “under the covered agreements” in accordance with the DSU. But this only grants the WTO’s DSM jurisdiction over disputes related to the substance of the covered agreements—it does not explicitly state that the WTO’s DSM is hierarchically superior to those of FTAs/CUs. And as a matter of general international law, there is no prohibition on parallel proceedings, and regional and international tribunals have frequently found themselves deciding or opining on what could be considered aspects of the same situation or the same legal problem.

However, some PTAs have directly addressed this issue by stating that where a dispute may be brought either at the WTO or in the regional forum that the claimant must choose the latter. The question that has arisen in the case law has thus been whether such a choice of forum provision is consistent with the spirit of Article 23 of the DSU.

For example, this issue arose in the Tuna – Dolphin II dispute. In that case, Mexico brought a dispute with the U.S. (its NAFTA partner) to the WTO, even though the choice of forum clause in the NAFTA indicated that environmental disputes (like the claim Mexico was bringing) were to be decided in the NAFTA forum. The United States raised this issue when the Dispute Settlement Body (DSB) was dealing with the request for a WTO

however, a Panel was struck despite the United States’ concern that Mexico was in breach of the choice of forum provision in the NAFTA.  

Crucially, though, the United States did not actually argue before the Panel itself that it should refrain from taking jurisdiction. This was likely because, absent any general doctrine of international law that might be applicable to the situation in question, there does not seem to be a strong textual basis in the DSU for panels to refuse jurisdiction on the grounds that the claim has been brought in violation of the complaining Member’s obligations under another international agreement.

Attempts by defending Members to challenge jurisdiction in these types of cases have thus focused on notions such as good faith (which is explicitly incorporated into the DSU), as well as the concept of estoppel. However, as we explore below, Panels and the Appellate Body have never fully accepted any of these arguments—although they have also not explicitly concluded that an agreement between two or more WTO Members could never be the basis for a panel to decline jurisdiction. Instead, the Panels and the Appellate Body have left open the possibility that there might be a valid claim against jurisdiction of the WTO dispute settlement if the parties both accept a clear, unambiguous, binding agreement to opt out of WTO dispute settlement.

A. Argentina – Poultry

The first case where the issue of the impact of an FTA or customs union on jurisdiction was before a WTO Panel was the Argentina – Poultry dispute. In that case, Brazil had already challenged the anti-dumping measure at issue in proceedings in MERCOSUR. Argentina argued that the WTO Panel should decline jurisdiction on the grounds that Brazil, given its actions in MERCOSUR, should be estopped from bringing a claim.

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132 See supra note 113.

133 See id. at 53.

134 See supra notes 126–34 and accompanying text.

135 See supra notes 126–34 and accompanying text.

136 See supra note 127, art. 3.10.

137 See supra note 127, art. 3.10.

against the same measure before a WTO Panel. Argentina argued that the jurisdiction of the WTO Panel should be conditioned on estoppel as a general principle of international law (and not that this estoppel principle was contained in any particular provision of the text of the DSU itself). Argentina also invoked, in relation to estoppel, the principle of good faith. Brazil countered that, even if the measure was the same, the legal issues raised in the WTO proceedings were different from those before the MERCOSUR tribunal.

Regarding the good faith claim, the Panel followed the reasoning of the Appellate Body in the prior Byrd Amendment case, holding that for there to be a breach of good faith there would need to be a breach of some provision of the covered agreements and something more (e.g., an egregious breach). Given that in Argentina – Poultry, Argentina was not alleging that there was any breach of any DSU provision, let alone an egregious breach, this argument did not succeed.

The Panel’s disposition of the estoppel argument hinged critically upon the Protocol of Olivos, a MERCOSUR instrument not yet in force between the parties. Under the Protocol, a state party is required to make an exclusive choice of dispute forum. Thus, if MERCOSUR is chosen as the forum, the state party would be precluded from bringing proceedings in another forum such as the WTO. The Panel noted that Brazil had not made any explicit statement on which Argentina might have relied regarding not bringing further proceedings in the WTO. According to the Panel, the fact that the Protocol of Olivos was not yet in force (and that its predecessor instrument did not require exclusivity in choice of forum) further strengthened the notion that there was no reasonable basis for Argentina to rely on Brazil’s MERCOSUR claim as an undertaking not to bring proceedings in the WTO.

With respect to the estoppel claim, the Panel expressed no explicit view as to whether the principle of estoppel could ever be applied to defeat the jurisdiction of a WTO Panel. The Panel simply found that Argentina had not met the conditions Argentina itself asserted would have to be present to establish an estoppel, including a clear statement or undertaking that induces

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138 Id. ¶¶ 7.65, 7.67.
139 Id. ¶ 7.18.
140 Id.
141 Id. ¶ 7.22.
142 Id. ¶ 7.35.
143 Id. ¶ 7.36.
144 Id. ¶ 7.37.
145 Id. ¶ 7.38.
146 Id.
reliance.\textsuperscript{147} The Panel also rejected Argentina’s argument in the alternative. Argentina claimed that should the Panel decide to accept jurisdiction, the findings of the MERCOSUR tribunal ought to be considered \textit{res judicata}, as a matter of the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that other relevant rules of international law applicable between the parties be taken into account in interpreting the treaty in question (here the WTO Anti-Dumping Agreement). The Panel noted that, in fact, Argentina had not specified any particular interpretation of the Anti-Dumping Agreement that was supported by MERCOSUR law. The Panel further observed: “We note we are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies.”\textsuperscript{148}

The Argentina – Poultry Panel Report was not appealed. However, in a subsequent case, \textit{EC – Sugar},\textsuperscript{149} where similar estoppel and good faith arguments were raised to claim that the Panel should decline jurisdiction,\textsuperscript{150} the Appellate Body held that “to the extent that this concept applies at all, it is reasonable for a panel to examine estoppel in the context of determining whether a Member has engaged ‘in these procedures in good faith’, as required under Article 3.10 of the DSU.”\textsuperscript{151} In \textit{EC – Sugar}, the issue had nothing to do with proceedings in a different forum; the EC instead was asserting an implicit understanding among WTO Members that, despite a technical scheduling error, its sugar regime was insulated from challenge in WTO dispute settlement. In response, the Appellate Body upheld the Panel’s findings that on the facts the assertions of estoppel and bad faith by the EU could not be sustained; the Appellate Body held that there was simply no explicit statement on the basis of which the reliance of the EU on the non-challenge of these measures could be founded. Overall, the language of the Appellate Body, while not entirely closing the door to estoppel-like considerations being relevant to good faith under DSU 3.10, suggested considerable skepticism as to whether such an objection to Panel jurisdiction would ever prevail.

\textsuperscript{147} \textit{Id.} ¶ 7.39.
\textsuperscript{148} \textit{Id.} ¶ 7.41.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} ¶ 307.
B. Peru – Agricultural Products

In *Peru – Agricultural Products*, the arguments about good faith and estoppel were again raised in relation to the provision of an FTA, where Peru claimed it had been agreed that a price band mechanism could be maintained notwithstanding WTO law. As in the situation with the Protocol of Olivos in the *Argentina – Poultry* dispute, the relevant FTA had not yet entered into force. As a matter of judicial economy, the Appellate Body might have relied on this fact to dismiss Peru’s estoppel and good faith claims, on the basis that a commitment in a treaty not yet in force is incapable of setting up the requisite reliance interest (even assuming that estoppel could be a basis for defeating the jurisdiction of a WTO Panel). Instead, the Appellate Body took the opportunity to elaborate on the approach it had sketched in *EC – Sugar*.

The Panel in *Peru – Agricultural Products* had begun from the proposition that its terms of reference, which were to make findings or rulings with respect to relevant provisions of the covered agreements, excluded any consideration of non-WTO international law unless "based on a relevant provision of the covered agreements that has been invoked by one of the parties to the dispute." Thus, in this instance, the point of departure was articles 3.7 and 3.10 of the DSU, and the concept of "good faith." While relying on the Appellate Body’s approach to good faith in *EC – Sugar*, the Panel also drew from a different Appellate Body decision in the *Bananas III* dispute. The question there concerned the status of a negotiated settlement of part of the dispute between the litigants, and whether such a negotiated settlement precluded further WTO dispute settlement proceedings under DSU 21.5. The Appellate Body held that "the complainants could be precluded from initiating Article 21.5 proceedings by means of these Understandings only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse [to WTO dispute settlement]." In other words, the Appellate Body in *Bananas III* appeared to provide a clear standard, articulating what conditions would have to be met to have an agreement that would effectively

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152 AB Report, *Peru – Agricultural Products*, supra note 120.
153 Id. ¶ 5.119.
155 Id. ¶¶ 7.72–7.73.
156 Id. ¶ 7.82.
preclude the jurisdiction of a WTO Panel: an explicit or logically necessary waiver of WTO jurisdiction.

As discussed above in Part IV.F, the Appellate Body in *Peru – Agricultural Products* held that the WTO legal system does not allow Members to depart from the rights and obligations of the covered agreements, except in accordance with the lex specialis of the WTO itself concerning such deviations, including above all GATT Article XXIV.\textsuperscript{157} But, could two or more Members who sought to do so work around this limitation by deviating from WTO rights and obligations through an explicit and unambiguous agreement not to enforce those rights and obligations in the context of WTO dispute settlement?\textsuperscript{158}

In *Peru – Agricultural Products*, the Appellate Body seems to narrow the circumstances where an agreement to forbear WTO dispute settlement would be effective in defeating the panels’ right to exercise jurisdiction to those where the forbearance is in the context of a “solution mutually acceptable to the parties” that is “consistent with the covered agreements.”\textsuperscript{159} The implication is that, however clear and unambiguous, ex \emph{ante} exclusion\textsuperscript{160} of WTO dispute settlement in a regional agreement will not be effective to defeat the jurisdiction of a WTO Panel. Thus, if the facts in the *Argentina – Poultry* dispute had been different, and the Protocol of Olivos had been in force, constituting a clear statement of the commitment to an exclusive forum, this would still not have been a sufficient basis for an estoppel/good faith grounds to defeat the jurisdiction of the WTO Panel.

The implications of *Peru – Agricultural Products* are thus significant. The Appellate Body’s ruling seems at the same time to constitutionalize WTO law as a legal system from which deviations are only permitted by its own specialized rules, while also constitutionalizing the dispute settlement system by permitting an opt out from the WTO’s judicial jurisdiction only where the WTO’s dispute settlement organs determine, through exercising their competence-competence, that the “solution” is itself “consistent with the covered agreements.”\textsuperscript{161}

While this approach appears to reinforce the status of the Appellate Body as a supreme judicial organ for the interpretation and application of

\textsuperscript{157} AB Report, *Peru – Agricultural Products*, supra note 120.

\textsuperscript{158} See Panel Report, *Peru – Agricultural Products*, supra note 154, ¶ 7.82 (in accordance with *Bananas III* standard).

\textsuperscript{159} AB Report, *Peru – Agricultural Products*, supra note 120, ¶¶ 5.25–5.26; DSU, supra note 127, art. 3.5.

\textsuperscript{160} I.e., prior to a dispute under the DSU.

international trade law, it also preserves the integrity of the political/diplomatic waiver process that provides explicitly for the possibility of deviations from WTO norms and indeed the possible exclusion of WTO dispute settlement altogether. Where one or more Members seek to limit their WTO rights and obligations, even inter se, they must proceed through this political/diplomatic track, which is transparent and entails deliberation and negotiation with the entire WTO community. Peru — Agricultural Products and Turkey — Textiles are, thus, mutually reinforcing, for in Turkey — Textiles the Appellate Body imposes a strict necessity test on any trade restrictive deviation from WTO rules in the context of a free trade area or customs area.

What we might call the “constitutionalization” effect of Peru — Agricultural Products and Turkey — Textiles, taken together, has an important implication in the regionalism context: Side-deals, bilateral or plurilateral, cannot be used be adjust liberalization downward from what is legally entrenched in the WTO system; such deals cannot be used to retake national sovereignty on an ad hoc basis, as it were. New types of safeguards or trade remedies, as proposed in the context of the Trump Administration, for example, cannot be enacted through “deals” with individual countries, to the extent that they are not WTO-consistent. The Appellate Body’s constitutionalization approach seems to address, at the jurisprudential level, the fear that through the proliferation of preferential or regional arrangements, the multilateral trading order could unravel into a bowl of spaghetti. These cases ensure that WTO law operates autonomously and in full enforceable effect, from anything that might be agreed bilaterally or regionally.

C. Mexico — Soft Drinks

The clash of jurisdictions issue also arose in the Mexico — Soft Drinks case, a case involving the United States and Mexico that arose out of what was initially a NAFTA dispute. According to Mexico, the United States and Mexico had negotiated an understanding (under NAFTA rules) concerning sweeteners in soft drinks, including cane sugar and High-Fructose Corn Syrup (HFCS). Mexico felt that the United States was in breach of this understanding and that it had persistently blocked the

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formation of a NAFTA dispute panel to resolve the matter—itself a NAFTA breach. In response to these alleged violations of NAFTA, Mexico imposed a discriminatory tax on HFCS, favoring domestic producers of cane sugar. The United States brought proceedings in the WTO, claiming that the discriminatory tax was in violation of GATT Article III:2. Mexico argued that the Panel should decline jurisdiction to hear the dispute, on the grounds that the appropriate and adequate forum was NAFTA, given that the underlying dispute concerned the resolution of Mexico’s complaints that the United States had violated NAFTA.

Mexico’s position was not, however, based on any explicit choice of forum clause in NAFTA that might be an impediment to bringing proceedings at the WTO. Instead, Mexico maintained that the Panel should exercise its inherent discretion under the DSU to refuse jurisdiction where a WTO ruling would not contribute to a “positive solution” of the dispute. Moreover, Mexico asserted that NAFTA was the more appropriate forum, since a NAFTA tribunal would have jurisdiction to consider both parts of the claim: Mexico’s arguments about the United States’ NAFTA violations and the United States’ argument that the tax measures were illegal. And in the WTO proceedings, Mexico would have no opportunity to pursue its counterclaims against the United States for NAFTA violations, since the WTO dispute settlement organs cannot provide a remedy for violations of non-WTO law.

The Panel’s report indicates that, as a general matter, the DSU places it under a legal obligation to take jurisdiction over complaints of violations of the covered agreements, since the DSU gave Members a right of recourse to dispute settlement in cases of an alleged violation of WTO disciplines. Thus, to refuse jurisdiction would be to diminish rights and obligations under the DSU, which is prohibited under DSU Article 3.2. The Panel noted that there might be other cases where its jurisdiction is “legally constrained” even though there is a valid complaint of violation, and adequate terms of reference flowing from that complaint. But this was not such a situation. (This may have been because in this case, Mexico did not allege bad faith on

163 GATT, supra note 3, art. III:2 (the National Treatment obligation); see Panel Report, Mexico – Soft Drinks, supra note 162, ¶ 1.2.
164 Panel Report, Mexico – Soft Drinks, supra note 162, ¶ 3.2.
165 Unlike the United States’ concern about Mexico’s own choice of forum in Tuna II.
167 This is because NAFTA essentially incorporates GATT III:2.
169 Id. ¶ 7.10.
the part of the United States in bringing the proceedings. Instead, its argument was better understood as essentially a forum non conviens claim.)

The Panel also referred to Article 3.10 of the DSU, which states that WTO Members should not link “complaints and counter-complaints in regard to distinct matters.” 170 But the Panel did not consider in any depth Mexico’s argument that in fact the matters were not distinct since the measures complained of in the WTO were in fact countermeasures in response to alleged violations of a different treaty—NAFTA. The Panel then suggested that, in theory, there might be some circumstances where a Panel “might be entitled . . . to find that a dispute would more appropriately be pursued before another tribunal.” 171 But it could not do so by reason of the advantage to the claimant of being able to link a different claim or distinct counter-claim in the other forum; the Panel suggested if that kind of concern could be taken into account there could be a slippery slope where “the decision to exercise jurisdiction would become political rather than legal in nature.” 172

Mexico appealed the Panel’s decision to exercise jurisdiction. On appeal, the Appellate Body reiterated its position that while there may be some inherent discretion that a Panel has to decide the boundaries of its jurisdiction, it must operate always in accordance with the provisions of the DSU. 173 The Appellate Body found no basis in the DSU for the Panel to decline jurisdiction in this case, upholding its general reasoning. However, the Appellate Body also stated that it was not ruling on how a Panel might decide on jurisdiction if there were an exclusive forum clause that was activated under the other treaty or if the underlining dispute had already been decided in the other forum. 174

Mexico had also argued that the Appellate Body should follow the clean hands doctrine articulated in Chorzow Factory case, which holds that “one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.” 175 The only reason the Soft Drinks dispute was before the WTO, Mexico argued, was because the United States was preventing Mexico from accessing “the tribunal which would have been

170 Id. ¶ 7.15; DSU, supra note 127, art. 3.10.
172 Id.
173 AB Report, Mexico – Soft Drinks, supra note 162.
174 Id. ¶ 54.
175 Id. ¶ 31.
open to it” through an illegal act—the United States’ violation of NAFTA dispute settlement procedures which prevented a NAFTA claim from being brought. In response, the Appellate Body held that applying this doctrine would require it to make a judgment that NAFTA had been violated, and that the WTO dispute settlement system cannot be used “to determine rights and obligations outside the covered agreements.”

It is this last jurisprudential move that, arguably, has real systemic and perhaps constitutional significance for the WTO/PTA relationship. It strongly establishes the autonomy of the WTO dispute settlement system from other legal orders, in perhaps, analogously the way that the European Court of Justice Grand Chamber established the autonomy of the UN Charter legal framework from the European law framework that the Court was required to apply. The question is whether this autonomy is inconsistent with the deep structure of international law.

One might also argue, though, that the strong notion of autonomy here expressed by the Appellate Body also protects the WTO system itself from the consequences of regional trade forums making their own determinations that WTO norms have been violated—which Members of the WTO are prohibited from allowing under Article 23 of the DSU. In other words, the WTO’s holding in *Soft Drinks* may imply a sort of comity, where the WTO neither countenances determinations of its own rules and obligations by other fora nor accepts jurisdiction to determine rights and obligations under those agreements, not even for the purpose of resolving any possible policy or legal conflict arising from the joint applicability in the respective fora of the rights and obligations of each legal system.

VI. CONCLUSION

Recent developments in the politics of international trade have once again brought debates over the legal relationship between regionalism and multilateralism to the fore. In light of these developments and the scholarly consensus that the WTO’s jurisprudence has provided insufficient guidance
on the regionalism/multilateralism relationship, this Article has undertaken a reassessment of WTO jurisprudence on regionalism to explore certain key aspects of the legal relationship between PTAs and the WTO.

We argue that there are two key aspects of this legal relationship that can be gleaned from WTO case law, which are crucial to determining what types of PTAs are WTO-compatible. First, the WTO’s adjudicatory bodies have continually asserted their jurisdiction to adjudicate whether PTAs are WTO-compatible, both vis-à-vis the WTO’s political organs and PTA dispute settlement mechanisms. This approach is evident in the Appellate Body’s report in \textit{Turkey – Textiles}, which made clear that all aspects of Article XXIV were justiciable by the WTO’s dispute settlement bodies (and not just the WTO’s political bodies), and it was affirmed in the subsequent \textit{Peru – Agricultural Products} case. And it is evident in the Appellate Body’s jurisprudence on competing PTA fora, where in cases like \textit{Argentina – Poultry}, \textit{Peru – Agricultural Products}, and \textit{Mexico – Soft Drinks}, the Appellate Body has limited the ability of Member states to contract out of the WTO’s dispute settlement procedures and asserted the autonomy of the WTO’s legal order.

Second, the WTO’s adjudicatory bodies have strictly limited the extent to which states can contract out of the substance of WTO obligations through PTAs. On our reading of \textit{Turkey – Textiles}, the Appellate Body has held that Article XXIV only permits states to derogate from WTO obligations that are logically necessary to the formation of a CU or FTA—a standard that does not include regulatory discrimination. And this standard is to be applied by the WTO’s dispute settlement bodies not just at the initial moment when a PTA is signed and ratified but rather should apply to any subsequent amendments to the PTA.

Ultimately, the approach of the Appellate Body to the interaction of preferential trade arrangements, bilateral or regional, with the WTO legal system is to reinforce the autonomy, if not a certain kind of supremacy or at least primacy, of the WTO legal order, at a time when regional and bilateral agreements and negotiations proliferate, partially in response to the supposed blockage or failure of the political and diplomatic processes of the WTO. On balance, the Appellate Body makes exit to regional dispute settlement harder and certainly shows no interest in treaty interpretations that could accommodate or facilitate harmonious co-existence with regional regimes. The question now, however, concerns the durability of the Appellate Body as a supreme judicial authority for the WTO system. The United States’ blockage of the appointment of new Appellate Body Members, based on a critique of the Appellate Body that is far from clear in its emphasis or scope, has led to considerable anxiety about the future of the Appellate Body’s role.
This subject is beyond the remit of the present Article; however, the jurisprudence of the Appellate Body that we have discussed remains as the “shadow of the law” in which any political accommodations between the WTO system and regional arrangements (such as waivers) will be formulated.