FTAs in WTO Dispute Settlement[*1]

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Abstract

Although the co-existence of the World Trade Organization (WTO) and free trade agreements (FTAs) has now become normal, the legal relationship between them is unclear from many aspects. In this respect, in light of the relevant WTO jurisprudence, the following points can be mentioned with respect to the status and function of FTAs in WTO dispute settlement. First, the jurisdiction of a WTO panel is firmly based on the Dispute Settlement Understanding (DSU) from the viewpoints of panel's obligation to examine a case on the one hand and Members' right to initiate WTO dispute settlement proceedings on the other hand. Therefore, even if a dispute brought to a WTO panel is related to an FTA, the existence of the panel's jurisdiction is not denied. This also applies to the assessment of the consistency of FTAs themselves with WTO provisions. Even so, secondly, in specific cases, the presence of an FTA could affect the exercise of a WTO panel's jurisdiction. To be more specific, it is theoretically possible for parties of an FTA to waive their right as WTO Members to initiate WTO dispute settlement proceedings when they adopt an alternative option in that FTA, such as a "mutually agreed solution" (MAS) under the DSU, a forum selection clause and so on. Attention needs to be paid to how the relationship between the WTO dispute settlement system and FTAs explained above will affect future FTA negotiations and the interpretation of specific FTA provisions, and how much the WTO dispute settlement system will be able to contribute to the ordering of the legal relationship between the WTO and FTAs under the current multi-layered economic governance structure.

Keywords: WTO, FTAs, WTO dispute settlement, DSU, panel, Appellate Body, *Peru–Agricultural Products*, standard of review
JEL Classification: F13, K33

I. Introduction

The role played by free trade agreements (FTAs) in relation to regulating international economic relations is gradually growing, which not only appears as a simple increase in numbers, but also deepens the substance of the regulation over time. On the other hand, although its relative influence is fading, World Trade Organization (WTO), still continues to hold sway over the real economy and has made essential contributions to establishing the

[*1] This article is translated from a Japanese version which was previously published in *Financial Review*, Vol. 140 (2019).

rule of law in international trade[1]. While how to evaluate this coexistence of the WTO and FTAs is itself problematic, the reality is that international economic relations today is conducted in several layers through a variety of treaties,[2] and it is not easily conceivable that this schema will change in the near future.

However, notwithstanding the reality of international society, the legal relationship between the WTO and FTAs remains unclear in many respects. Looking from the WTO side in particular, what can the existence of individual FTAs affect the rights and obligations between WTO Members, and therefore, the multilateral legal system of the WTO? Moreover, if an FTA that conflicts with WTO law is concluded or measures that conflict with WTO law are taken under an FTA, how can WTO law respond in these circumstances?

Given the state of the issues as above, this paper sheds light on the legal relationship between the WTO and FTAs from the perspective of WTO dispute settlement. The reason is that, in WTO dispute settlement, there are several precedents in which FTA-related issues came into dispute and in each case, the panels and the Appellate Body appear to have provided useful, albeit fragmented, hints for considering the above issues. Thus, the objective of this paper is to clarify the problems described above (although partially) by investigating the status and function of FTAs in WTO dispute settlement, using these precedents as the main materials.

II. The background to FTAs becoming an issue in WTO dispute settlement

II-1. The growth of FTAs and the activity of WTO dispute settlement

According to the WTO's database, a total of 294 effective FTAs have been notified to the WTO as of May 2019,[3] but compared to the spread of FTAs, there are extremely few instances of the use of dispute settlement procedures under FTAs,[4&5] allowing an appreciation of the trend, which is characteristic enough to be described as "Many [F]TA-DSMs, Few Cases[6]". By contrast, the recent activity in WTO dispute settlement is well known,[7] and even looking at the ten-year period from 2009 to 2018, as many as 185 requests for consultation were filed, of which 139 went to requests for the establishment of a panel.[8]

Amid these contrasting circumstances, it is noteworthy that parties to the same FTA tend to favor use of the WTO dispute settlement procedures when a dispute arises.[9] More worthy

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[1] Hirami (2017), pp. 213-214.
[2] With respect to the current multi-layered economic governance structure in international society, *see*, Suzuki (2017), pp. 186-204.
[3] http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (visited 9 May 2019).
[4] Chase et al. (2013), pp. 46-47; Vidigal (2017), pp. 928-929. Exceptionally, "only the ECJ, EFTA, MERCOSUR, the Andean Community and the CACM show significant activity". Chase et al. (2013), p. 46.
[5] Japan has also never used the dispute settlement procedures in its FTAs. Matano (2016), pp. 24-25.
[6] Chase et al. (2013), p. 46., DSM stands for Dispute Settlement Mechanism.
[7] *See e.g.*, Director-General's Statement at the DSB Meeting of 28 October 2015 available at: https://www.wto.org/english/news_e/spra_e/spra94_e.htm (visited 9 May 2019).
[8] *See in detail*, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (visited 10 June 2019).
[9] *See*, WTO Secretariat (2011), p. 15; Chase et al. (2013), p. 47.

of attention is the indication by Marceau (2015) from the WTO Legal Affairs Division that about 25% of the disputes referred to the WTO dispute settlement system had subject matters that could have been referred to dispute settlement procedures under an FTA.[10] Leaving aside the question of how strictly this statistic was calculated, recent cases such as *Thailand – Cigarettes* (DS371) and *US – Tuna II (Mexico)* (DS381), or *US – COOL* (DS384, DS386), for example, were matters for which the parties could have filed a dispute under the relevant FTA, as far as can be seen from the subject matters of the disputes and the substance of the claims,[11] and it appears unquestionable that there is a certain trend to prefer the WTO dispute settlement system.[12]

In that case, the question is why are WTO dispute settlement procedures preferred over FTA dispute settlement procedures, or in other words, what is it about the WTO dispute settlement procedures that attracts disputes, but many authors have attempted a range of explanations for this point to date.[13] The first common feature we can mention is the set of procedural features of the WTO dispute settlement system, among which the existence of de facto compulsory jurisdiction due to the automation of the establishment of a panel (Dispute Settlement Understanding (DSU) 6.1), the automation of other procedures (DSU 16.4, 17.14, 22.6 and 22.7), the strengthened system for ensuring implementation (DSU 22) and others provide motivation for bringing disputes to the WTO dispute settlement system. Besides these, authors have pointed out many attractions of the WTO dispute settlement procedures when compared with FTAs, including the availability of appellate review by the Appellate Body, high-level legal stability and predictability of WTO law, thanks to the accumulation of precedent, a multilateral surveillance of disputes through the Dispute Settlement Body (DSB), advanced legal and technical support by the WTO Secretariat for the proceedings, and the availability of the Advisory Centre on WTO Law (ACWL) to developing countries.

II-2. When FTA-related issues are referred to WTO dispute settlement

In any case, the background to these circumstances appears to be that WTO dispute settlement is preferred and shows significant activity despite FTAs being in their heyday at present, but in what specific cases are FTA-related issues referred to WTO dispute settlement? Here, we will confirm the two situations set out below as typical examples.

First, in general, considerable overlap can be observed between the substantive rules of FTAs and the substantive rules under the WTO,[14] and this identity or similarity of the rules

[10] Marceau (2015), p. 13.
[11] Chase et al. (2013), p. 48, fn. 207.
[12] *Ibid.*, p. 48., It should be noted that Eduardo Salles (2015) has presented the theory that the spread of FTAs is a factor in the increase in WTO disputes, pointing to the grounds that, firstly, the likelihood of dispute occurring between parties to an FTA increases as the volume of trade grows, and furthermore, disputes may arise between FTA parties and non-parties in relation to the loss of trade triggered by the conclusion of the FTA or with the aim of influencing FTA negotiations, and he argues that if we consider the combination of this situation and the attraction of WTO dispute settlement discussed below, the expected outcome will be an increase in WTO disputes. Eduardo Salles (2015), p. 16, fn. 4.
[13] *E.g.*, Davey (2006), p. 343; Busch (2007), p. 735; Leal-Arcas (2011), pp. 1-25; Porges (2011), p. 492; Lewis & Van den Bossche (2014), pp. 9-25; Marceau (2015), pp. 4-6; Eduardo Salles (2015), p. 20; Vidigal (2017), pp. 927-950.

suggests that a dispute arising between FTA parties could be related to both FTA provisions and provisions under WTO covered agreements. Under these circumstances, a dispute subject that could be characterized as a problem under an FTA on the one hand encompasses scope to be constituted as a problem under WTO law as well on the other hand, and as a matter of fact, examples in which disputes have been brought to the WTO dispute settlement system in this form have occurred frequently.[15] Then, because FTAs often lie at the core of or behind the disputes in this case, FTA-related issues are also filed in various forms in WTO dispute settlement forums, as discussed below.

Incidentally, for the avoidance of doubt, the mega-FTAs common in recent years sometimes create obligations exceeding the WTO's regulatory level, referred to as "WTO-plus" or the like, but if a dispute concerning these provisions arises between parties to the FTA, the jurisdiction of the WTO panel will naturally not be established (DSU 3.2 and 3.3, etc.), and the only method of resolving this kind of dispute is to use the dispute settlement procedures set out in the relevant FTA.[16]

Next, the other possible circumstance is that if one WTO member refers the consistency of another member's measures with the WTO law to the WTO dispute settlement system, the respondent may invoke the FTA and raise the affirmative defense that the measures are justified under Article XXIV of the GATT and other provisions, because the measures themselves were taken in relation to the formation of an FTA that it was party to. Evaluation of the FTA can also become an issue in WTO dispute settlement in this case as well.[17]

III. Review of FTAs in WTO dispute settlement

III-1. Scope of WTO panel's jurisdiction over FTA-related issues

Given that disputes sparked by FTAs are sometimes brought into the WTO dispute settlement system, the scope of the WTO panel's jurisdiction over FTA-based issues is not necessarily self-evident. The starting points when considering this question is the Understanding on the Interpretation of Article XXIV of the GATT 1994, and Paragraph 12 thereof stipulates as follows:

> Paragraph 12 (Dispute Settlement)
>
> The Provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any matters arising from the application of those provisions of Article XXIV relating to custom unions, free-trade areas or interim agreements leading to the formation of a custom union or free-*

[14] Garcia Bercero (2006), p. 399. In addition, to explain the background that gave rise to this overlap from the reality of treaty negotiation, Matano (2016), p. 39.

[15] For examples where a dispute initially argued under an FTA was later reconstituted as an issue of WTO law and brought to the WTO dispute settlement system, Porges (2011), pp. 494-496.

[16] Eduardo Salles (2015), pp. 15, 20.

[17] *Turkey – Textiles* is a typical example (details is explained below).

trade area. (italics added)

The tenor of Paragraph 12 of this Understanding is to confirm that issues relating to GATT Article XXIV are eligible for WTO dispute settlement, and therefore, it is beyond doubt that FTA-based issues can be reviewed by a panel. Conversely, the way that the italic portion, which stipulates the causes of action in dispute settlement, is written does not make it clear what FTA issues can be reviewed by a panel, or in other words, whether a panel can review only the individual measures taken in relation to the formation of the FTA or the consistency of the concluded FTA itself with Article XXIV of the GATT, thus, giving rise to the question about the scope of the WTO panel's jurisdiction.

In relation to this, it is notable that in December 1993, in the final stages of Uruguay Round negotiations, 29 GATT contracting parties, including the EC, submitted a proposal regarding the draft version of this Understanding, in which the EC and others argued that they could in no way agree to the panel being able to consider the consistency of the FTA itself with GATT Article XXIV under Paragraph 12 of the Understanding, and proposed amendments to Paragraph 12 that would remove this concern.[18] However, as a result of the EC and others placing higher importance on concluding the Uruguay Round and merely raising the issue of the above proposal as a task to be handled after the establishment of the WTO,[19] Paragraph 12 of the Understanding remained in its original form. Thus, the fact that the limits of judicial review of FTAs were recognized and regarded as a problem among some member states means that the scope of the panel's jurisdiction over FTAs was uncertain when the WTO came into being in the first place.

As background to this drafting process, the first WTO dispute settlement case in which the question of GATT Article XXIV was the main point of dispute was *Turkey – Textiles* (DS34).[20] This case is a matter in which the consistency with the WTO covered agreements of Turkey's import restriction measures imposed on textiles manufactured in India; the respondent Turkey raised the defense that the quantitative restrictions were measures adopted as a consequence of the formation of the custom union between Turkey and the EC, and therefore, the consistency of the measures with the covered agreements cannot be determined separately from the evaluation of the consistency of the custom union with GATT Article XXIV. Thus, in this case, the scope of the panel's jurisdiction over problems under Article XXIV of the GATT was in question, but the panel organized the questions and considered them in order: (1) whether a panel can review measures adopted by one or more Members on the occasion of the formation of an FTA in which it or they participate, and if the answer is found in the positive, (2) whether a panel is authorized to examine the overall consistency of the FTA with WTO provisions.

First, regarding (1), the panel focused on the phrase "any matters arising from the appli-

[18] GATT Doc. MTN.TNC/W/125, 13 December 1993, paras. 1-4.
[19] *Ibid.*
[20] Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R, adopted 19 November 1999; Panel Report, *Turkey – Textiles*, WT/DS34/R, circulated 31 May 1999.

cation of those provisions of Article XXIV" in Paragraph 12 of the Understanding and drew a positive conclusion from the terms "arising from" and "any matters," on the basis that any specific measures taken on the occasion of the formation of an FTA are clearly within the panel's jurisdiction.[21]

As to the question of (2), the panel pointed out that assessing the consistency of an FTA itself with WTO provisions is "generally" a matter suited to the Committee on Regional Trade Agreements (CRTA), based on the CRTA's competence within the WTO to assess FTAs from the economic, legal, and political perspectives.[22] Having done so, they held that it is arguable that the panel has jurisdiction over this matter,[23] and finally exercised judicial economy and carefully avoided making a decision on this point.[24]

By contrast, despite the panel's view in (2) above not being appealed, the Appellate Body brought up this panel's reasoning in obiter dicta and referred to the Appellate Body Report for *India – Quantitative Restrictions*,[25] which had contents opposed to the view of the panel, thereby tacitly agreeing that the panel's jurisdiction extends to assessing the consistency of FTAs themselves with GATT Article XXIV.[26] At present, many authors share the understanding that the Appellate Body affirmed the panel's jurisdiction on this matter through this circuitous argument.[27]

The difference in opinion between the panel and the Appellate Body that can be glimpsed in the report of *Turkey – Textiles* tells of the difficult position of WTO dispute settlement relating to FTAs, and in academic theory as well, authors from inside the GATT/WTO, such as Roessler (2000)[28] and Davey (2001),[29] prefer the panel's approach and cast doubt upon the Appellate Body's position. However, from a practical point of view, given that the Appellate Body has indicated its view as above and does not appear to have changed it since then, the current situation is that the panel's jurisdiction must be construed as potentially extending to assessing the consistency of FTAs themselves with WTO provisions.

To date, there have not been any cases in which the consistency of FTAs themselves with WTO provisions has been disputed head-on in WTO dispute settlement system, which may be an indication of the self-restraint exercised by Members in the awareness how serious the economic and political effects of filing such a dispute would be. Nevertheless, as the relative weight of FTAs in international economic relations increases, the likelihood of a

[21] Panel Report, *Turkey – Textiles*, paras. 9.49-9.51.
[22] *Ibid.*, para. 9.52.
[23] *Ibid.*, para. 9.53.
[24] *Ibid.*, para. 9.54.
[25] What the Appellate Body referred to was the Appellate Body Report, *India – Quantitative Restrictions*, paras. 80-109, and these paragraphs argue that the structure of the allocation of powers within the WTO (specifically, concurrence between the review authority of the Committee on Balance-of-Payments Restrictions and the review authority of panels) does not necessarily deny the panels' jurisdiction, which is firmly founded on the DSU.
[26] Appellate Body Report, *Turkey – Textiles*, para. 60.
[27] For example, Roessler (2000), p. 338-340; Bartels (2004), p. 879; Iwasawa (2009), p. 191; Howse (2016), p. 35.
[28] Roessler (2000), pp. 337-344. In addition to the assertion that the assessment of the consistency of FTAs themselves with GATT Article XXIV involves policy judgments that far exceed the capacities of the panels, Roessler (2000) argues that it is a further problem that the WTO compatibility of an FTA is determined in a situation where one party to the FTA cannot participate, since the DSU does not allow for the status of co-defendant. *Ibid*., p. 332.
[29] Davey (2001), pp. 87-88.

dispute on the WTO compatibility of an FTA itself must also increase, meaning that the trends in disputes in the future remain unpredictable.

III-2. FTAs influence on a WTO panel's exercise of jurisdiction

As discussed above, the scope of a WTO panel's *potential* jurisdiction over FTA issues can be considered far-reaching, but in that case, could exercises of the panel's jurisdiction not be restricted according to the specific contents of FTAs? In this regard, when a WTO complaint arising in relation to an FTA is referred to the WTO dispute settlement system, the respondent sometimes raises the preliminary objection that the panel's jurisdiction should be rejected.[30] Based on the past WTO cases, arguments against jurisdiction under these conditions can be broadly divided into two types: (1) arguments against the panel's jurisdiction based on a forum selection clause in the FTA; and (2) arguments that seek to exclude the availability of WTO dispute settlement procedures between the parties to the FTA by deeming the FTA agreement to be mutually agreed solutions (MAS)[31] in DSU Article 3.7, for example. In brief, both of these arguments can be considered to call into question whether WTO Members can waive their DSU rights to bring the case before the WTO dispute settlement system through provisions in an FTA. We will consider each of these cases in order.

III-2-1. Forum selection clauses in FTAs

FTAs sometimes include so-called forum selection clauses, which aim to prevent the conflict of jurisdictions between dispute settlement procedures in different treaties, and the vast majority of FTAs concluded in recent years include this type of clause.[32] One example is Article 28.4 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which provides as follows:

> Article 28.4 (Choice of Forum)
>
> 1 If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
>
> 2 Once a complaining Party has requested the establishment of, or referred a matter to, a panel or other tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora.

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[30] In the context of WTO dispute Settlement, this kind of argument appears to be raised substantially as an issue of admissibility, but the panels and the Appellate Body both tend to use the concepts of admissibility and jurisdiction interchangeably, and in view of this, this paper organizes it as an issue of jurisdiction. As to the interchangeable use of these concepts in WTO dispute settlement, *see in detail*, Cook (2015), pp. 1-2.

[31] According to Stoll (2006), "The term 'mutually agreed solutions' covers any solution which has been reached by agreement between the parties rather than by decision of the DSB." Stoll (2006), p. 305, para. 63.

[32] Chase et al. (2013), pp. 21-23, 51.

Similarly, Article 21.27 of the Japan–EU EPA has a forum selection clause, albeit through a different provision to the CPTPP:

> Article 21.27 (Choice of forum)
> 1 Where a dispute arises with regard to the alleged inconsistency of a particular measure with an obligation under this Agreement and a substantially equivalent obligation under any other international agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
> 2 Once a Party has selected the forum and initiated dispute settlement proceedings under this Chapter or under the other international agreement with respect to the particular measure referred to in paragraph 1, that Party shall not initiate dispute settlement proceedings in another forum with respect to that particular measure unless the forum selected first fails to make findings on the issues in dispute for jurisdictional or procedural reasons.
> (paragraphs 3 and 4 are omitted)

In contrast with these attempts in FTAs, the DSU, which governs WTO dispute settlement proceedings, has no provisions aimed at regulating jurisdictional conflicts. Therefore, the question becomes what functions do forum selection clauses in FTAs have in WTO dispute settlement. In this respect, this question has not been directly dealt with in any WTO cases, which means that there is no definitive answer to this question at present. However, on the other hand, several dispute cases have provided valuable hints for considering the issue.

The first case in which a preliminary objection was raised on the grounds of dispute settlement procedures under an FTA in relation to the WTO panel's exercise of its jurisdiction was *Argentina – Poultry Anti-dumping Duties* (DS241).[33] In this case, the complainant, Brazil, referred the same anti-dumping measure taken by Argentina to a MERCOSUR Ad hoc Arbitral Tribunal prior to bringing WTO dispute settlement proceedings, and on the basis of this fact, the respondent Argentina raised a preliminary issue, arguing that the WTO panel should refrain from ruling on the claims raised by Brazil.[34] Specifically, Argentina argued that Brazil's ex post facto bringing the claim to WTO dispute settlement proceedings in respect to the same measure was prohibited under the principle of good faith and the principle of estoppel. The panel rejected this argument, holding that conditions for the application of the principle of estoppel were not fulfilled in the present case, on the basis that Brazil had not explicitly manifested its intention not to bring subsequent WTO dispute settlement proceedings in respect to the same measure.[35] It can be inferred that Argentina was forced to

[33] Panel Report, *Argentina – Poultry Anti-dumping Duties*, WT/DS241/R, adopted 19 May 2003.
[34] *Ibid*., para. 7.17.
[35] *Ibid*., paras. 7.38-7.39. Argentina's good faith argument was easily rejected by the panel because of its insufficient argumentation. *Ibid*., para. 7.36.

found its own jurisdictional argument on general principles of international law, such as the principle of good faith and the principle of estoppel, due to the lack of a forum selection clause in MERCOSUR at the time of this dispute.

The second case that a preliminary objection on the grounds of an FTA was raised is *Mexico – Taxes on Soft Drinks* (DS308),[36] in which the relationship between WTO and NAFTA were at issue. In this case, where the United States raised a dispute about the GATT compatibility of the sugar market-access in Mexico, the respondent Mexico raised as a preliminary issue the defense that the United States' claims in this case were closely linked to the preceding broader dispute under NAFTA, and therefore, only the NAFTA panel was in a position to resolve the issue and the WTO panel, which was not in a position suited to settling this dispute, should refrain from exercising its jurisdiction.[37] What is important in understanding the meaning of this defense is the occurrence of a separate dispute between the United States and Mexico, which preceded the WTO dispute in a manner where Mexico asserted the United States' breach of its market-access commitments on sugar under NAFTA. The Appellate Body upheld the panel's decision to dismiss Mexico's defense. Specifically, the Appellate Body denied that the panel had the discretion *not* to exercise its jurisdiction on the grounds of relevant provisions of the DSU, holding that if the panel were to refrain from exercising the jurisdiction once validly established, this would be inconsistent with the panel's obligations under the DSU (DSU7 and 11) and diminish Members' rights to bring disputes before WTO dispute settlement procedures to seek the redress of a violation of the covered agreements (DSU3.3 and 23).[38]

As Mexico did not present any robust argument with respect to the forum selection clause of the NAFTA,[39] its preliminary objection did not shake the foundations of the panel's jurisdiction. However, notable in this case is the Appellate Body's tacit indication of the effect that forum selection clauses in FTAs could have on WTO dispute settlement proceedings.

To explain, the Appellate Body paid attention to the precise scope of Mexico's arguments (Mexico merely argued that the panel should refrain from exercising its jurisdiction in view of the characteristics of the dispute, and it did not call into question whether the panel's exercise of its jurisdiction would be legally excluded), yet confirmed, as if to reinforce the above conclusion, that the situation in this case did not satisfied the requirements for the application of the forum selection clause of the NAFTA. Specifically, the Appellate Body mentioned in detail that Mexico did not object to the panel's finding that neither the subject matter nor the respective positions of the parties were identical in this WTO dispute and the dispute under the NAFTA, that Mexico also stated that it could not identify a legal basis that would allow it to raise, in the WTO dispute settlement proceeding, the market-ac-

[36] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, adopted 24 March 2006; Panel Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/R, circulated 7 October 2005.
[37] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 40, 54.
[38] *Ibid.*, paras. 47-53, 57.
[39] Zang (2019), p. 40.

cess claims it was pursuing under the NAFTA, and in addition, that Mexico itself expressly stated that the forum selection clause in Article 2005.6 of the NAFTA had not been exercised.[40] Having done so, the Appellate Body added the reservation that "we do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present",[41] but ultimately concluded that "we see no legal impediments applicable in this case."[42]

Contrasting with its careful wording, the above reasoning by the Appellate Body can be considered to suggest that exercise of the panel's jurisdiction could be excluded if there is some sort of "legal impediment," an understanding shared by other authors as well.[43] However, because the Appellate Body did not present its view on what specifically could constitute a "legal impediment," this point has been left vague.

Shedding light on this unclear situation is the recent case of *Peru – Agricultural Products* (DS457).[44] As discussed below, this case provides important hints on the possibility of WTO Members waiving their own rights under the DSU to have recourse to the WTO dispute settlement procedures.

III-2-2. MAS and other means

Peru – Agricultural Products was a case in which the complainant Guatemala took issue with the Price Range System (PRS) adopted by Peru, considering it not consistent with the covered agreements, and brought a dispute against Peru before WTO dispute settlement in 2013. Notable in this case is the fact that in 2011, Peru and Guatemala had concluded an FTA with a provision in Paragraph 9 of Annex 2.3 thereof that stated, "Peru may maintain its Price Range System, established in Supreme Decree No. 1152001EF and the amendments thereto, with regard to the products subject to the application of the system marked with an asterisk in column 4 of Peru's Schedule as set out in this Annex." In addition, Article 1 of the FTA confirmed Peru's and Guatemala's existing rights and obligations under the WTO agreements and included a conflict settlement clause that stipulated that the FTA would prevail over the WTO, namely, "In the event of any inconsistency between this Treaty and the [WTO] agreements … , this Treaty shall prevail to the extent of the inconsistency, unless otherwise provided in this Treaty." But interestingly, at the point of Guatemala bringing the WTO dispute settlement proceedings, the above FTA was not yet in force because Peru had neglected its ratification procedures.

The respondent Peru focused on the presence of this FTA agreement including the above contents and sought to have the panel's exercise of its jurisdiction rejected. Specifically, Peru raised as a preliminary issue the defense that given that Guatemala had recognized Peru's maintenance of the PRS, and then, prevailing the FTA over WTO agreements through

[40] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 54.
[41] *Ibid.*
[42] *Ibid.*
[43] *E.g.*, Chase et al. (2013), p. 51, fn. 224; Kawase (2017), p. 49.
[44] Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015; Panel Report, *Peru – Agricultural Products*, WT/DS457/R, circulated 27 November 2014.

the conclusion of the FTA, it must have waived its rights to initiate WTO dispute settlement proceedings, which resulted in Guatemala bringing the dispute breaching the principle of good faith under DSU Articles 3.7[45] and 3.10.[46] For this reason, Peru then argued in the defense that the panel should refrain from exercise of its jurisdiction.[47] In brief, Peru asserted that the presence of the FTA agreement limits Guatemala's right to initiate WTO dispute settlement proceedings through the good faith obligation under DSU Articles 3.7 and 3.10, resulting in restriction on the panel's exercise of its jurisdiction.

The panel dismissed Peru's defense in a form that avoided venturing deep into the issue described above, on the grounds that the FTA between Peru and Guatemala was not in force yet in the first place.[48] The Appellate Body then took the opposite approach to the panel and carefully considered the contents of the FTA provisions, without paying any particular attention to the fact that the FTA was not in force,[49] handling the issue in a form that attacked Peru's defense head-on. Incidentally, in the Appellate Body report on this case, the question of the possibility of waiving rights under the DSU and the question of whether the good faith principle was breached, which assumed the first question, were dealt with as a perfect whole, and although the thread of the argument cannot easily be considered clear. It can be organized so that these issues were examined through two concrete points: firstly, whether the relevant provisions of the Peru-Guatemala FTA constitute an MAS in the context of DSU Article 3.7,[50] and secondly, if there is an MAS, does that agreement mean that the parties to the FTA waive their right under the DSU to initiate WTO dispute settlement proceedings.[51] In this case, the Appellate Body expressed noteworthy views on these systemic issues.

First, the Appellate Body, relying on the precedent set by *EC – Banana III (Article 21.5 – Ecuador II / Article 21.5 – US)*,[52] confirmed that "the relinquishment of rights granted by the DSU cannot be lightly assumed,"[53] and then held that "while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, … any such relinquishment must be made clearly."[54] The Appellate Body also found that the ques-

[45] DSU Article 3.7 stipulates that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreement is clearly to be preferred. …" In this regard, the Appellate Body confirmed that the first sentence of this Article reflects a good faith principle. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, WT/DS132/AB/RW, adopted 21 November 2001, para. 73.

[46] DSU Article 3.10 stipulates that "[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. …"

[47] Panel Report, *Peru – Agricultural Products*, paras. 7.24-7.25, 7.43-7.51; Appellate Body Report, *Peru – Agricultural Products*, para. 5.21.

[48] Panel Report, *Peru – Agricultural Products*, para. 7.88.

[49] Pauwelyn (2016), p. 18.

[50] According to the report, Peru itself characterized the relevant provisions in the FTA as a "positive solution" under DSU Article 3.7 and developed its arguments on this basis. Appellate Body Report, *Peru – Agricultural Products*, para. 5.26, fn. 103.

[51] Zang (2019), p. 44.

[52] Appellate Body Reports, *EC – Banana III (Article 21.5 – Ecuador II / Article 21.5 – US)*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, WT/DS27/AB/RW/USA, adopted 22 December 2008, para. 217.

[53] Appellate Body Report, *Peru – Agricultural Products*, para. 5.25.

tion on whether there is a waiver of the rights granted by the DSU "should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU."[55] In addition, the Appellate Body pointed out in a footnote of its report that "[w]hile Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes."[56] Incidentally, it is emphasized in several places that an MAS must be consistent with the covered agreement, as is explicitly stated in DSU Articles 3.5 and 3.7.[57] In brief, the Appellate Body appeared to find that a waiver of rights under the DSU can be possibly subject to the waiver: (1) being clear; (2) being performed within the framework of the DSU; (3) not having a scope exceeding the settlement of specific disputes; and (4) if the waiver is made in the form of an MAS, the agreement being consistent with the covered agreement. Other authors have broadly organized the points in the same way.[58]

Based on the above, the Appellate Body determined that the substance of the relevant provisions of the Peru – Guatemala FTA (maintaining the PRS in Paragraph 9 of Annex 2.3) was inconsistent with the WTO covered agreements,[59] and therefore, did not constitute an MAS under the DSU in the first place.[60] Moreover, it concluded that the FTA cannot be deemed to represent a definite waiver by Guatemala of its rights under the DSU,[61] on the grounds that Paragraph 9 of Annex 2.3 contained ambiguity in that Peru's and Guatemala's views on the interpretation of the provision were not in agreement,[62] and that the presence of the forum selection clause in Article 15.3 of the FTA conversely demonstrated that parties to the FTA had the right to bring claims under the WTO covered agreements to the WTO dispute settlement system.[63] Thus, Peru's defense was dismissed.

The reasoning shown here contains several valuable suggestions about in what cases the exercise of a WTO panel's jurisdiction might be restricted. In this case, the Appellate Body went as far as allowing that rights under the DSU could be waived not only through an MAS, but *through any other means as well*; although it set various conditions for the waiver as discussed above, it did not impose any particular restrictions on the means of the waiver.[64]

If this is so, we could construe that there is scope for waiving rights under the DSU through FTA provisions, whether or not these provisions constitute an MAS,[65] and even if a

[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*, fn. 106.
[57] *Ibid.*, paras. 5.25-5.26, fn. 102.
[58] Pauwelyn (2016), pp. 18-19; Shaffer & Winters (2017), p. 318; Kawase (2017), p. 46.
[59] The Appellate Body found that the PRS was inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1 (b) of the GATT. Appellate Body Report, *Peru – Agricultural Products*, sections 5.3.1 and 5.3.2.
[60] *Ibid.*, para. 5.26.
[61] *Ibid.*, para. 5.28.
[62] *Ibid.*, para. 5.26.
[63] *Ibid.*, para. 5.27.
[64] Zang (2019), p. 45.
[65] Pauwelyn (2016), p. 19; Zang (2019), pp. 45-46.

forum selection clause mentioned above is invoked for this purpose, for example, it would theoretically be able to limit the exercise of a WTO panel's jurisdiction as long as the clause has been designed carefully to satisfy the various conditions above. In this regard, Pauwelyn (2016) argues that the forum selection clauses in Article 29.3 of the CETA[66] and the above-mentioned Article 28.4 of the CPTPP, for instance, are candidates for FTA provisions that could satisfy the requirements for waiving rights under the DSU.[67]

Nevertheless, the Appellate Body's statement in *Peru – Agricultural Products* has more than a few unclear points. For example, it has been pointed out in relation to the requirement (3) that the scope of the waiver of rights under the DSU be limited to "the settlement of specific disputes," that it is not clear what a specific dispute means in the first place. As Shaffer & Winters (2017) observes, "[i]t could refer narrowly to a WTO complaint, or it could refer broadly to a general measure that is subsequently litigated under the DSU."[68] Even if a WTO complaint naturally constitutes a "specific dispute," it is not clear whether a forum selection clause, for example, which itself is provided generally but by the application of which the availability of WTO dispute settlement proceedings is determined for each dispute, will be allowed as a waiver of rights under the DSU.[69]

Furthermore, the requirement (4) that an agreement on waiving rights be consistent with the WTO covered agreements appears to be unique to an MAS, in view of DSU Article 3.5 and 3.7, and if this is true, the question would arise on whether this requirement is needed for means other than an MAS.

Finally, attention is needed for the requirement (1) for clarity of the waiver of rights, as the Appellate Body seems to demand an extremely strict level of clarity for waivers of rights, whichever means is used.[70] In *Peru – Agricultural Products*, the Appellate Body considered the meaning of the relevant FTA provisions at issue to be vague on the basis that the disputing parties had differing views on it. But if this evaluation method is used, the clarity of FTA provisions could be easily denied according to the way a complaining Member frames its argument when it later conceives of initiating WTO dispute settlement proceedings. The merest vagueness in relevant FTA provisions will be able to operate to a complaining Member's advantage and result in bringing WTO dispute settlement.[71] To cope with this strictness on the clarity requirement, it seems that there is no choice to indicate that rights

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[66] The relevant part of CETA Article 29.3 (Choice of forum) are as follows.
1. Recourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party.
2. Notwithstanding paragraph 1, if an obligation is equivalent in substance under this Agreement and under the WTO Agreement, or under any other agreement to which the Parties are party, a Party may not seek redress for the breach of such an obligation in the two fora. In such case, once a dispute settlement proceeding has been initiated under one agreement, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement, unless the forum selected fails, for procedural or jurisdictional reasons, other than termination under paragraph 20 of Annex 29-A, to make findings on that claim. …"

[67] Pauwelyn (2016), pp. 19-20, fn. 68.

[68] Shaffer & Winters (2017), p. 318, fn. 30.

[69] Kawase (2017), p. 47.

[70] Mathis (2016), pp. 97-105.

[71] Zang (2019), p. 45.

under the DSU are waived by clear wording that is obvious to anyone and leaves no leeway for any other interpretation. In any case, the clarification of these unclear points must be left to future dispute settlement cases.

It is true that to date, there have been no examples of exercises of the WTO panel's jurisdiction to examine a case being rejected due to a consideration of provisions in an FTA. However, the development of WTO jurisprudence that we have followed, especially the clarification of the possibility to waive rights under the DSU in *Peru – Agricultural Products*, greatly contributes to understanding the status and function of an FTA agreement in WTO dispute settlement, and as a result, it is expected to influence litigation strategy in WTO dispute settlement as a matter of course, but also to affect in no small way the negotiation of future FTAs.

IV. Conclusion

In view of the ongoing lack of clarity in the legal relationship between the WTO and FTAs, this paper has focused on the legal status of FTAs in the WTO dispute settlement and considered them based on dispute settlement cases. The panel and the Appellate Body's case law that has accumulated in the 20 years since the establishment of the WTO allow us to highlight at least the following points regarding the above issue.

First, because the jurisdiction of WTO panels is firmly founded upon the DSU in terms of the panels' obligation to examine a case on the one hand and in terms of the Members' right to use the procedures on the other, this jurisdiction cannot be denied, even if the issue referred relates to an FTA. And, it is notable that the Appellate Body has come to affirm the existence of the panels' jurisdiction for problems that require extremely difficult economic, legal, and political evaluations in the form of evaluation whether FTAs themselves are consistent with Article XXIV of the GATT. To date, no issues like this have actually been referred for the WTO dispute settlement, but as the volume of economic activity regulated by FTAs increases, the number of disputes that arise is also expected to grow,[72] and we cannot deny the possibility that in some cases, issues of the consistency of FTAs themselves with the Article XXIV of the GATT will be referred for the WTO dispute settlement and come before a panel or the Appellate Body for review.

Incidentally, as evaluations of the consistency of FTAs themselves with Article XXIV of the GATT necessarily involves extremely difficult multifaceted, complex assessments as discussed above, if the WTO dispute settlement faces such issues in the future, the degree of standard of review that panels and the Appellate Body will choose to resolve them is likely to be a key aspect. Because no precedents have clearly shown this standard of review, clarification is left to future dispute settlement.[73]

Second, although panel's jurisdiction has a broad range as shown above, the existence of FTAs may affect the *exercise* of the jurisdiction in specific disputes. As was clarified in the

[72] Eduardo Salles (2015), p. 16, fn. 4.

recent decision of *Peru – Agricultural Products*, waiving the right of Members under the DSU to initiate WTO dispute settlement proceedings by an MAS, forum selection clause, or other means between parties to FTAs can itself be considered possible in theory. As discussed above, it cannot be denied that the system carries with it problems for its future operation, such as requiring an extremely strict level for clarity of waivers of the above right, but in any case, as long as provisions in FTAs are designed carefully, parties to FTAs can exclude the availability of the WTO dispute settlement system (that is, exclude a WTO panel's exercise of its jurisdiction) as between themselves.

Our attention needs to be paid to the questions of how the relationship between FTAs and the WTO dispute settlement system as understood in this way will affect future FTA negotiations and the interpretation of specific FTA provisions, and of how much the WTO dispute settlement system can contribute to the ordering of the legal relationship between the WTO and FTAs under the current multi-layered economic governance structure.

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[73] Nevertheless, based on the Appellate Body's statements and decisions to date, it is inferred that if an FTA itself was to be assessed on its consistency with the WTO covered agreements, a strict standard of review is likely to be adopted as it is in other issues. For example, the Appellate Body's statements in the obiter dictum in *Turkey – Textiles* mentioned above (the point that so-called institutional balance has no effect on the panel's jurisdiction over FTA issues) and its treatment of the FTA when interpreting the WTO agreements in *Brazil – Retreaded Tyres* (its lack of care for the existence of MERCOSUR when assessing whether Brazil's measure satisfied the requirements in the chapeau of Article XX of the GATT) tell of the Appellate Body's lack of interest in the coexistence of the WTO and FTAs. In other words, the Appellate Body has attached importance to the autonomy of the WTO law and has kept its strict stance towards exceptions to Article XXIV of the GATT. In view of this stance, it seems that the Appellate Body would not hesitate to apply a strict standard of review when assessing the consistency of FTAs themselves with the WTO covered agreements as well.

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