

A Deal is a deal: Party Autonomy, the multiplication of PTAs, and WTO dispute settlement

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1. *Introduction*

With the multiplication of preferential trade agreements (PTAs)¹, the landscape of international trade dispute settlement is becoming increasingly populated. Many of the new-generation PTAs are equipped with dispute settlement mechanisms (DSM) modelled on that of the WTO.² There is an expectation that the conclusion of the so-called mega-regional agreements will significantly add to this scenario in relation to important subsets of the WTO membership, increasing the possibility of overlap between WTO and PTA dispute settlement procedures. Moreover, since the WTO does not have jurisdiction to adjudicate disputes on ‘WTO-plus’ or ‘WTO-extra’ commitments between given PTA members, the deepening of trade liberalization by subsets of the WTO membership creates the conditions for new disputes that will necessarily need to be addressed in the PTA context – and therefore outside of the WTO. These developments have renewed hotly debated questions about the coexistence and coordination of PTAs’ and the WTO’s DSMs.

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¹ Although much of the literature refers to the acronym RTAs (regional trade agreements), this Note employs the acronym PTA as it is thought to better encompass the collection of different types of preferential trade agreements.

² See C Chase, A Yanovich, J-A Crawford, P Ugaz, *Mapping of DSMs in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Staff Working Paper ERSD-2013-07 (2013).



Interestingly, a parallel phenomenon to the spread of PTAs and their DSMs has been the increase in and intensification of the activity within the WTO DSM itself. WTO adjudication has operated at particularly high rates over the past few years,³ notwithstanding a protracted stalemate in the organization's negotiating front – softened, more recently, by the conclusion of the Agreement on Trade Facilitation and of the Nairobi Package. At the same time, and quite remarkably, very few PTA's DSMs have been active.⁴ In fact, many of the disputes that have congested the WTO's docket could also be litigated under a PTA against the background of provisions textually similar to those of the WTO. This confirms the clear resilience of the WTO as the forum of preference for interstate trade disputes.

In light of this combination of developments, this note argues that WTO members addressing forum selection and curbing multiplicative litigation through PTA provisions may and should be given recognition by WTO panels and the Appellate Body. This is a matter of party autonomy which may and should be properly addressed on a PTA-level and recognized in WTO adjudication from both a policy and a legal perspective. In the first section, it is suggested that coordination rather than a policy of alienation is a better course for the international trading system and the countries involved in a given dispute arising under both WTO and PTA rules. The second section then outlines three legal avenues for the potential recognition by WTO panels and the Appellate Body of PTA provisions which address forum shopping.

³ See, for example, DG Roberto Azevêdo's address to the WTO Dispute Settlement Body on 26 September 2014, available at <www.wto.org/english/news_e/spra_e/spra32_e.htm>, and DSB's Chair Fernando de Mateo remarks at the Graduate Institute of International and Development Studies on 15 March 2015, available at <www.wto.org/english/tratop_e/dispu_e/fmateo_14_e.htm>.

⁴ See Chase and others (n 2). One could call this a paradox: more PTA DSMs, *but* more WTO disputes. However, the conjecture is possible that more PTAs are a factor behind the increase in WTO disputes: given the WTO's magnetism and more PTAs, there are more WTO disputes between PTA members themselves (for instance, in line with increased trade) and between parties and non-parties to given PTAs (for instance, related to lost trade or as an attempt to influence negotiations towards a PTA).



2. *The policy: alienation or coordination*

Underlying the discussion about WTO law that permits the coordination with PTA dispute settlement is the question of whether coordination should be fostered or restrained, and of how coordination might be implemented from a WTO-perspective.⁵ When the WTO was established, there were considerably fewer PTAs in place, and dispute resolution was dominated by a diplomacy-oriented ethos. It would have been hard to imagine that two decades later more than 500 disputes would have been formally brought to a DSM that stands-out in international adjudication under almost any count or account; one which has delivered many thousands of pages of very detailed legal reasoning interpreting the global ground-rules of trade. It would also have been hard to foresee the now commonly made contrast between a relative lack of new firm commitments after the end of the Uruguay Round on the one hand, and the intense use of the WTO DSM on the other hand. And it would have been equally hard to imagine that an impressively growing number of PTAs would have been negotiated and concluded, repeating commitments bound at the WTO, providing for deepened commitments and for commitments in areas not regulated by WTO rules at all, and establishing DSMs that often mimic that of the WTO, but that have remained relatively inactive nonetheless.

The combination of the WTO DSM's relative success contributing to the crystallization and densification of WTO rules, with the spread of PTAs overlapping with WTO regulation raises the issue of structuring and implementing a division of labour between the adjudicative systems of the WTO and of PTAs – particularly regarding disputes between two members of a PTA. This challenge did not arise in the same manner when the WTO was established. The challenge is now compounded by the fact that the WTO DSM has been recently strained by an overflow of disputes, at least some of which could theoretically be addressed through other means.

⁵ This Note does not focus on the question of coordination from the perspective of PTA adjudicative bodies. Many PTA adjudicative bodies are mandated to take into account developments under WTO case law and the discussion about coordination from a PTA-perspective does not raise the question about the avenues for coordination discussed in Section 3 below in the same manner as it is dealt with here.

Broadly speaking, there are two possibilities for conceiving the division of labour between the WTO's and PTA's DSMs in the current institutional landscape. Envisaging these two possibilities assumes that the WTO does not clearly spell-out how the said division of labour is to be established as a legal matter.

2.1. *First possibility: no division of labour or alienation*

A first possibility for WTO adjudicative bodies' conceiving their division of labour with PTA bodies would be to reject any such division. From this perspective, the WTO would constitute a separate legal order, sealed-off from PTA developments, including rules in PTAs and decisions by PTA adjudicators. Regardless of whether given disputes might be about identical or similar factual backgrounds and between the same parties, and of whether the rules at play might be similarly or even identically crafted, the fact that the sources of law (i.e., WTO versus PTAs) are different alone would suffice to prevent PTA developments from being recognized in WTO disputes. In effect, this approach would mean that decisions by PTAs have no value as such for the WTO other than as facts to be adjudicated from the perspective of the WTO DSM.⁶ More importantly, procedure regulating rules in PTAs would never be validly invoked in WTO dispute settlement, as any principles and provisions in PTAs regulating access to dispute settlement under the DSU would fail to be recognized by a WTO panel. In sum, the WTO would refuse to attach relevance to apparent jurisdictional overlaps: it would always be available as a forum and it would always be an appropriate forum to try issues under its jurisdiction, similar litigation could always move forward in parallel at the WTO and PTAs, and potentially inconsistent decisions would never be a (formal) cause of concern to the WTO, a decision of which would never be affected by the developments within a PTA.⁷

⁶ In practice, a decision by a PTA DSM might be used as a source of inspiration for a WTO panel. But any value accorded to the decision would be based on the persuasiveness of the subjacent reasoning at best, instead of the formal status of the decision.

⁷ Conversely, any attempt to coordinate between the WTO- and PTA proceedings would take place exclusively before PTAs.



The main problems with this approach are denying the party autonomy of WTO members, enabling the proliferation of substantially similar cases, and the incapacity to prevent or deal with conflicting decisions which would leave disputes unresolved. Imagine France taking a case to the WTO rather than to the European Court of Justice about a German ban on the importation of a certain product. Imagine a WTO panel ignoring the allegedly exclusive jurisdiction of the European Court and a previous decision under the same fact pattern negative to France, and then issuing a holding positive to France in contrast to a previous decision by the European Court. This result would be contrary to a widespread preference for order over randomness, to settlement over the extension of disputes, and to coherence and consistency over incoherence and inconsistency. And it would deny effect to France and Germany's commitment to deal with their trade grievances within the European Union.

2.2. Second possibility: coordination

The institutional alternative to alienation is coordination. In this scenario, WTO adjudicative bodies would recognize applicable principles and provisions in PTAs regulating access to dispute settlement,⁸ thus respecting the party autonomy of the members of the WTO and the PTA. For instance, a fork in the road clause in a PTA could preclude access to WTO dispute settlement after a similar case had been taken before a PTA DSM by the same complainant. Or an exclusive jurisdiction clause in a PTA could preclude access to WTO dispute settlement full stop between two countries. In either case, if the responding party at the WTO raised the issue as a preliminary objection, a WTO panel would then stop its examination of the case based on the legal impediment arising from the situation (or rule) in the PTA. In this examination, while this would not place a requirement on an WTO panel decision to coordinate, a potential holding within the PTA DSM

⁸ If there is no explicit regulation on choice of forum or multiplicative litigation, it is difficult to conceive of general principles of law applying as such to foster relevant coordination between PTA and WTO dispute settlement. While doctrines such as *res judicata*, *collateral estoppel* and the protection of *lis pendens* might apply to some extent, they require rather specific conditions, and in any event at least substantial of parties, issues and requests.

that the WTO complainant was violating the PTA could help resolve potential doubts and should be accorded persuasive force by a WTO panel.

Granted, coordination will raise difficult practical questions and can only take place on a case by case basis. The WTO DSM should nevertheless face and address the issues as they arise, given the benefits of coordination over alienation. Coordination would make functional dozens of choice of forum and procedure regulating-clauses carefully negotiated by numerous different subsets of the WTO membership. Coordination may help in taming multiplicative litigation across the WTO and PTAs – which would be worrisome, especially for developing and least developed countries with scarcer legal resources. Recognizing procedure regulating rules in PTAs may also help in alleviating the burden over the WTO DSM, which is under serious pressure given the amount of cases being processed presently. Coordination may contribute to avoiding conflicting decisions under PTAs and the WTO. Furthermore, coordination would lead to more conscientious choice of forum by WTO members and provide more legal certainty to their selection of a forum. This is particularly important as PTAs increasingly include WTO-plus and WTO-extra provisions which will necessarily be litigated at the PTA, and as disputes about those provisions may be entangled with issues under WTO law. Accordingly, the choice to use a PTA DSM should attract the legal consequences that the PTA establishes.

There may be a concern that recognizing WTO members' right to contract-out of the DSU might diminish the relevance of the WTO and its DSM. However, the WTO DSM's current comparative advantages have naturally made it a magnet forum. Members value the expertise and availability of the WTO secretariat, the multilateral surveillance process and the informal pressures for compliance, the legitimacy of decisions, the possibility of appeals and the credibility of the Appellate Body, the strong inclination to abide by legal text, the detailed case law and the legal certainty that this engenders. The spread of PTAs has not changed that: the WTO DSM has a solid tradition of deciding trade disputes with considerable effectiveness and efficiency and will likely remain the key forum adjudicating these cases in the foreseeable future. The fact that the WTO DSM will not adjudicate disputes referring to WTO-plus and WTO-extra commitments in PTAs is inherent to the



political process at the WTO – and is not directly related to the strength or weakness of the WTO DSM.

There may be another concern that stronger WTO members ‘force’ weaker WTO members to forego the latter’s DSU rights in PTAs in order to facilitate the perpetuation of WTO-inconsistent measures. But this paternalistic concern has not arisen thus far in relevant form in practice. By contrast, at least assuming the overall compatibility of PTAs with WTO rules, further and substantial trade liberalization through PTAs would benefit the WTO member that eventually foregoes a limited set of DSU rights in exchange. It may also benefit other WTO members to the extent that there are commitments in PTAs which in practice apply on a MFN-basis and can be locked-in later at the WTO. The fact that given WTO-inconsistent measures might perpetuate, notwithstanding WTO and PTA commitments, and might be partially carved out of WTO dispute settlement concerning PTA members could be considered a small price to pay in exchange for bigger concessions. In addition, any WTO member that is not a PTA member could still challenge any allegedly WTO-inconsistent measure under the DSU, and the solution to this kind of dispute must be implemented on a MFN-basis by the PTA member in question. Hence, WTO members considering shielding WTO-inconsistent measures from WTO scrutiny in PTA clauses would still be subject to the WTO DSM.

3. *The law: collectivism or party autonomy*

Alongside the policy-dimension of the debate, twenty years of case law have not resolved all of the underlying questions about the status of non-WTO law within WTO dispute settlement. The effect of PTA clauses that aim to regulate choice of forum and multiplicative litigation involving the WTO in particular remains open to discussion. Certain scholars have argued that, from a WTO-perspective, dispute settlement clauses in PTAs can hardly be used to coordinate WTO- and PTA-dispute settlement. This view interprets Article 23(1) of the DSU as an absolute jurisdictional promise by WTO members,⁹ one effect of which

⁹ Art 23(1) of the DSU is drafted in the style of an exclusive jurisdiction clause: ‘When Members seek redress of a violation of obligations or other nullification or



is to prevent WTO members from relinquishing their right to resort to WTO dispute settlement under the DSU.¹⁰ This view may be said to resonate with the broader position that WTO law would limit the application of international rules from outside the WTO by panels and the Appellate Body,¹¹ to the extent that the lack of WTO-recognition of any relinquishment of DSU rights is related to an alleged broader impermissibility of modifying WTO rights and obligations *inter partes*. The underlying premise of this view is that the WTO Treaty outlaws modifications of WTO-based rights and obligations by subsets of the membership among them. This view prioritises collectivism and an arguably *erga omnes partes* character of WTO obligations over and above conceiving WTO provisions as bundles of bilateral relationships¹² governed by the notion of party autonomy or ‘contractual freedom’.

The present author does not adhere to this view, which downplays the party autonomy of subsets of the WTO membership to derogate from most WTO provisions among themselves – provided that third-parties are not negatively affected and that the WTO Treaty does not prohibit the modification in question. In *Mexico – Taxes on Soft Drinks*, the Appellate Body recognized that a legal impediment could lead a WTO panel to decline from exercising validly established jurisdiction, but it left open what could constitute such a legal impediment.¹³ Accordingly, the remainder of this section will briefly present three potential legal avenues whereby dispute settlement clauses from PTAs could be invoked in raising an ‘impediment’ to the exercise of jurisdiction by

impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding.’

¹⁰ See, for example, K Kwak, G Marceau, ‘Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements’, in L Bartels, F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 465, 484; see also F Piérola, G Horlick, ‘WTO Dispute Settlement and Dispute Settlement in the ‘North-South’ Agreements of the Americas’, 41 *J World Trade* (2007) 885, 893.

¹¹ See, for example, J Trachtman, ‘Jurisdiction in WTO Dispute Settlement’, in R Yerxa and B Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005), 136.

¹² See also J Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral of Collective in Nature?’, 14 *European J Int L* (2003) 907.

¹³ *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, Report of the Appellate Body, WT/DS/308/AB/R, paras 48-54.



WTO adjudicators over the merits of a WTO case. It is argued that by any of these three avenues it is theoretically possible for WTO panels to refrain from deciding cases, and therefore to implement coordination with PTAs in line with *Soft Drinks*.¹⁴ Yet, the scope for coordination under PTA rules can be widened or restrained depending on the path taken. While this author does not consider that the avenues are mutually exclusive and believes that they may apply together or independently, the recent Appellate Body decision in *Peru – Agricultural Products* arguably points respondents to the first avenue presented below in asking panels not to decide a WTO case based on a PTA rule.¹⁵

3.1. *First avenue: GATT Article XXIV, GATS Article V and the enabling clause*

A first, more conservative avenue to avoid the multiplication of disputes and conflicts of jurisdiction between WTO- and PTA-dispute settlement at the WTO is to use the WTO provisions explicitly authorizing the formation of PTAs, namely GATT Article XXIV, GATS Article V and the Enabling Clause as bridges to recognize procedure regulating rules negotiated in PTAs. This route avoids the broader questions of the interrelationship between WTO law and non-WTO law and focuses squarely on the (explicitly regulated) status of PTAs under WTO law.¹⁶ In *Peru – Agricultural Products*, the Appellate Body highlighted this more conservative and narrower path in discussing the *merits* of the case. The question at issue was whether Peru was permitted to maintain a WTO-inconsistent price range system in assessing certain tariffs – in

¹⁴ For a more complete discussion, which refers to the WTO, PTAs and tribunals operating in other areas of international law, see L E Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (CUP 2013).

¹⁵ *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, Report of the Appellate Body (31 August 2015) WT/DS/457/AB/R.

¹⁶ From the perspective of the Vienna Convention on the Law of Treaties (1969), PTAs are expressly permitted *inter se* modifications of the WTO Treaty between subsets of WTO Members under art 41(1)(a). Curiously, the Appellate Body held in *Peru – Agricultural Products* that the WTO-specific provisions on amendments, waivers and exceptions for regional trade agreements ‘prevail over’ art 41 of the Vienna Convention (para 5.112). The Appellate Body thereby seems to assume a conflict between WTO-law provisions and the provisions on modifications to a treaty by certain parties only in the Vienna Convention.



the light of a PTA provision that allegedly authorized the price range system but that was not yet in force. It is equally possible, however, that WTO provisions permitting the formation of PTAs apply as the foundation of *procedural* objections to halt WTO adjudication. The question, then, would be whether WTO members may curb among themselves in a PTA their own ability to resort to WTO dispute settlement.

The Appellate Body reasoned 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.’¹⁷ From this perspective, respondents before the WTO can ask WTO panels to take into account and give due recognition to PTA procedure regulating clauses as a matter of both PTA- and WTO-law. For instance, NAFTA Article 2005(1) allows the complainant party to select either the WTO or the NAFTA in disputes regarding matters arising under both the NAFTA and the GATT. However, NAFTA Article 2005(6) states that the forum selected shall be used to the exclusion of the other after dispute settlement proceedings have been initiated. Hence, if a case brought by the United States against Mexico before the NAFTA leads to the initiation of dispute settlement proceedings, and if the U.S. later takes an identical or substantially similar case to the WTO, Mexico would be entitled to ask that the WTO panel refrained from deciding the case and the panel should do so – provided that the conditions for a PTA-based defence under WTO law were met.

If the Appellate Body’s ruling in *Turkey – Textiles* on the conditions for a defence based on GATT Article XXIV were to be applied to the hypothetical at hand, Mexico would then be required to show (i) that the measure (in this case, the PTA provision foreclosing subsequent resort to WTO dispute settlement) was introduced upon the formation of a WTO-consistent PTA and (ii) that the absence of the measure would prevent the formation of the PTA.¹⁸ Importantly, if applied to their extreme, these are severely restrictive conditions on the odds of any request for coordination between PTA- and WTO-dispute settlement; es-

¹⁷ *Peru – Agricultural Products*, para 5.113.

¹⁸ *Turkey – Restrictions on Imports of Textile and Clothing Product (Turkey – Textiles)*, Report of the Appellate Body (19 November 1999) WT/DS34/AB/R, paras 58-59.



pecially the demonstration that the absence of the fork in the road clause would prevent the formation of a PTA. Therefore, while the provisions within the WTO Treaty permitting the formation of PTAs provide an avenue to avoid the multiplication of disputes and conflicts of jurisdiction between the WTO and PTAs consistently with recent Appellate Body case law, if the conditions spelled-out in *Turkey – Textiles* were to apply rigorously, this avenue will not be the fast lane one might expect.

3.2. *Second avenue: DSU Article 3(10) and the principle of good faith*

A second, intermediate avenue to avoid the multiplication of disputes and conflicts of jurisdiction between WTO- and PTA-dispute settlement at the WTO is for the respondent's to rely on Article 3(10) as a transmission-belt of commitments under PTAs not to sue at the WTO. Such commitments may be found in PTA-procedure regulating rules such as fork in the road clauses, exclusive jurisdiction clauses or preferential jurisdiction clauses. This route also avoids the broader questions of the interrelationship between WTO-law and non-WTO law, this time to focus squarely on the procedural effect of choice of forum and preclusion clauses in PTAs on the assessment of good faith as a condition to a complainants' resorting to and being entitled to WTO dispute settlement. From this perspective, the PTA commitment becomes a factor in the analysis of whether the initiation of WTO procedures is estopped or could amount to an abuse of rights, as part of an assessment of the complainant's engagement in WTO procedures in good faith.

Article 3(10) of the DSU states that WTO members will engage in WTO procedures in good faith, an obligation that covers the entire spectrum of WTO dispute settlement.¹⁹ Accordingly, to the extent that a respondent can show that a complainant's resorting to WTO dispute settlement is contrary to the latter's good faith obligation (for instance, contrary to a PTA commitment), the former may succeed in having a

¹⁹ See *European Communities – Export Subsidies on Sugar (EC – Sugar)*, WT/DS/265/AB/R, WT/DS/266/AB/R, WT/DS/283/AB/R, Report of the Appellate Body (28 April 2005) para 312.



WTO panel refrain from deciding a case on its merits based on Article 3(10) of the DSU.

In *Peru – Agricultural Products*, Peru argued that Guatemala had relinquished its right to have recourse to WTO dispute settlement in an FTA that had been signed, but that Peru had not ratified. In Peru's view, Guatemala's FTA commitment that Peru 'may maintain' a certain price range system followed by Guatemala's resorting to WTO dispute settlement was contrary to Guatemala's obligation of good faith under the DSU. The fact that the FTA between Guatemala and Peru was not in force,²⁰ the fact that Peru conceded that there was no procedural bar for Guatemala's WTO action, and the fact that the provision in the FTA relied upon by Peru potentially affected the merits of the case (instead of the ability of Guatemala to resort to WTO dispute settlement) gave sufficient grounds for the Appellate Body to rule out Peru's argument without further notice. Yet, the Appellate Body interestingly went on to leave open a door to WTO members' 'clearly' agreeing not to use WTO dispute settlement. The Appellate Body stated 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.'²¹ The requirement that the relinquishment of DSU rights is 'clear' does raise the bar for respondents' objecting to a case being decided at the WTO. But the Appellate Body's recognition that such a relinquishment is possible leaves another avenue open for indirectly enforcing, at the WTO, PTA clauses regulating choice of forum and the multiplication of litigation.²²

²⁰ See, for a similar fact pattern in this regard and a rejection of an argument of estoppel, *Argentina – Poultry Anti-Dumping Duties (Argentina – Poultry)*, Report of the Panel (22 April 2003), WT/DS/241/R.

²¹ *Peru – Agricultural Products*, para 5.25.

²² The Appellate Body's reasoning is not entirely clear and difficult to pin down. There is an allusion in a footnote to the fact that members may not relinquish their rights and obligations under the DSU beyond the settlement of specific disputes. This allusion, nevertheless, seems to be restricted to a discussion of whether the contested measure by Peru had been the object of a solution mutually agreed by the parties. See *Peru – Agricultural Products*, para 5.26 and fn 106.



3.3. *Third avenue: modifications of Article 23(1) of the DSU through PTA provisions*

A third avenue for WTO dispute settlement's recognizing PTA rules on choice of forum or that restrict multiplicative litigation depends on the possibility that subsets of WTO members are entitled to contract out of Article 23(1) of the DSU between or among themselves in PTAs, and that WTO panels may apply PTA provisions as procedural defences. This is potentially the widest avenue of the three outlined here, as it might allow unilateral acts and agreements other than exclusively WTO-consistent PTAs to curb access to WTO adjudication. The two other avenues presented above to coordinate PTA and WTO dispute settlement refer directly to WTO provisions (for instance, GATT Article XXIV or DSU Article 3(10) as the anchor of coordination. On the other hand, if the ability of subsets of WTO members to derogate from Article 23(1) of the DSU is recognized, then WTO adjudicative bodies should take into account derogations to Article 23(1) to the extent that the respondent raises an objection to the admissibility of the WTO-based claims in the light of a commitment elsewhere by the WTO complainant.

The Appellate Body has until recently avoided taking a clear stance on the possibility of modifications to WTO provisions *inter partes*, and the occasion had never presented itself for an explicit holding about this regarding Article 23(1) of the DSU.²³ Apart from *Peru – Agricultural Products*, *US – Continued Suspension* perhaps offers the most interesting illustration in the DSU context to date. In that case, the disputing parties had jointly asked the Appellate Body to make public its substantive hearing, in stark contrast to Article 17(10) of the DSU that establishes the confidentiality of appellate proceedings. Notably, the Appellate Body acceded to the request notwithstanding Article 17(10). The Appellate Body reasoned that the provision at stake was 'more properly understood as operating in a relational manner'²⁴ and that the confidentiality requirement was not 'absolute'²⁵. In short, the Appellate Body

²³ But see (n 22) above.

²⁴ *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (US – Continued Suspension)*, Report of the Appellate Body (16 October 2008), WT/DS/320/AB/R, Annex VI, para 6.

²⁵ *US – Continued Suspension*, Annex VI, para 4.



conceded that a DSU provision could be derogated from, even if third parties held different views. Likewise, in the hypothesis under consideration here, DSU Article 23(1) could be said to operate in a relational manner, as a promise of each WTO member to each other WTO member, and it could be said to implicate a less than absolute commitment that is subject to derogation by two disputing parties jointly.

However, as described above, in *Peru – Agricultural Products* the Appellate Body directed WTO respondents mounting defences based on PTA provisions to channel their case through the WTO provisions explicitly authorizing a departure from WTO rules in PTAs: GATT Article XXIV, GATS Article V, and the Enabling Clause, which, according to the Appellate Body, would ‘prevail over’ the general provisions on treaty modifications by certain parties under the Vienna Convention on the Law of Treaties (Article 41). In this sense, the Appellate Body in *Peru – Agricultural Products* seems to have clogged up the avenue under discussion here.

On the other hand, if this reading is correct, under the line of reasoning of the Appellate Body, parties to PTAs could still modify Article 23(1) and regulate their entitlements to resort to DSU proceedings between or among themselves as in the first avenue described here. Consequently, choice of forum provisions and provisions curbing multiplicative litigation in PTAs would still be applicable in WTO dispute settlement. One might conclude that, for the purposes of the present discussion (which refers specifically to PTAs), there is no major difference in finding a legal hook for coordination based on a residual ability to modify Article 23(1) (third avenue outlined here) or in an ability to modify Article 23(1) by reason of the formation of a PTA (first avenue outlined here). Yet, if the success of an objection to the admissibility of a WTO case based on a PTA provision depended upon a respondent strictly meeting the test for a PTA-based defense established in *Turkey – Textiles*, the practicality of coordinating proceedings under the DSU and under PTAs would be significantly affected.

4. *Conclusion*

The spread of PTAs next to the WTO raises the question of how a division of labour between PTA's DSMs and WTO DSM might be implemented under the current institutional set-up. Coordination would be a welcome development, and may take place if the party autonomy of WTO members to negotiate other dispute settlement options between themselves is duly recognized. This recognition can take place especially (i) under WTO provisions concerning the formation of PTAs and explicitly authorizing departure from WTO rules (which would consequently authorize PTA procedure regulating rules); (ii) under the requirement that WTO members engage in dispute settlement proceedings in good faith (which would consequently permit giving effect to commitments not to resort to WTO dispute settlement); (iii) or by approaching Article 23(1) as a bilateral promise of each WTO member to another which is subject to modification *inter partes* under the conditions provided for in general international law, and by identifying the incidental jurisdiction of WTO adjudicative bodies to recognize such modification. In *Peru – Agricultural Products*, while apparently stating that it could uphold a clear relinquishment of DSU rights in the context of a good faith-assessment, the Appellate Body seemed to route respondents through the first option above in raising a procedural bar to WTO dispute settlement based on PTA provisions. As a result, the conditions for a PTA-based defence under GATT Article XXIV, GATS Article V or the Enabling Clause may become an important element in the WTO DSM's overall ability and promptness to coordinate with PTA DSMs.