KLUWER LAW INTERNATIONAL

AUTHOR GUIDELINES FOR BOOKS

This guide is a working document and will be periodically updated and redistributed. Comments for revision should be addressed to Suzanne Leppen (Suzanne.Leppen@wolterskluwer.com)

Contents

Introduction

Kluwer Law International provides invaluable publications for practitioners and academics worldwide. Authors can expect a high level of professionalism from the early stages of production through to distribution and marketing. We look forward to working with you and building a positive and enduring working relationship.

These guidelines contain vital information on the publication process of books. It includes a process overview, manuscript and proof guidelines. For further information on style, the Kluwer Law International (KLI) House Style Guide is available.

For your convenience, both the Author Guidelines and the House Style Guide can also be found on the Wolters Kluwer Author Portal (authors.wolterskluwerblogs.com) under the “Guidelines” section.

Concise Overview of the Publication Process

Process Steps	*Kluwer Law International Action*	*Author Action*
1. Book Proposal	– The Acquisition Manager (AM) reviews the proposal and responds to any queries from the Author about ideas/projects. – If applicable, the proposal will also be sent to a series editor or editorial board for approval. – The AM will submit the official proposal for Kluwer Law International management, and will inform the Author of the outcome. Process time: 3 weeks*	– The Author contacts one of the Acquisition Managers with a proposal for a book and submits the Author Questionnaire (available on the Wolters Kluwer Author Portal, under the "How to Become an Author" section)
2. Book Contract	– Based on the approved proposal, the AM will send a contract to the Author. – If it is a contributed volume, the AM will also send a Consent to Publish form to the General Editor. – Once the contract has been countersigned by Kluwer Law International, a copy will be returned to the Author.	– The Author signs and sends the contract back to AM for countersigning. – In case of a contributed volume, the General Editor informs the authors and sends them the Consent to Publish.
3. Writing Stage	The AM will contact the Author regularly.	The Author keeps the AM informed on the project, including any changes in content, planning or other important developments that impact the project.
4. Sample Chapter	*If agreed with AM that a sample chapter is not necessary, jump to step 5.* – The sample chapters are reviewed by the AM, Kluwer Law International vendor (Newgen), and if applicable the series editor. – After review, the AM sends the Author feedback on structure, language, content and/or style.	– The Author submits at least two sample chapters to the AM. For multi-author manuscripts, the General Editor of the project will submit one sample chapter to the AM that best represents the book in its entirety. – The Author receives approval of sample chapters, including comments. If necessary, the Author needs to resubmit a sample, following the comments received. It is the General Editor's responsibility to pass on all comments to authors.

Process Steps	*Kluwer Law International Action*	*Author Action*
5. Manuscript Submission	– Manuscript will be approved by the AM and, if applicable, the series editor. – The AM then sends it on to the vendor (NewGen).	– Submission of the complete and final manuscript, including features & benefits and a keyword list, by the Author (*see also KLI House Style Guide, and § 2.A. Manuscript Checklist in this guide).* – In case of a contributed volume, the Editor should include the Consent to Publish forms from all contributors. – The Author should notify the AM at this time of his/her whereabouts during the proof stage (e.g., holidays, long absences, etc.).
6. Manuscript Review	– After the manuscript has been received for processing, the vendor (NewGen) will send an introductory e-mail with an invitation for an 'Author Editorial Review (ER) Intake meeting'. This meeting takes the form of a phone call during which the vendor (NewGen) will discuss with you their findings from their initial review of the manuscript, and any special requests or questions you may have. – During the production process, the vendor (NewGen) will also send an e-mail notification with an initial production schedule – At the appointed time the vendor (NewGen) will send the final copy-edited Word file (with track changes) to the Author. A Galley PDF will be provided together with the copyedited Word files. The Galley PDF is to give the Author a vision on the final print product. – If a second round is necessary, a revised Galley PDF will be provided to the Author with the updated/revised Word file.	– The Author approves the final version of the manuscript by accepting or rejecting the changes in the Word file. This is the last opportunity for additions, deletions or corrections. The Galley PDF is not meant for marking corrections. Only the copy-edited Word files can be used to insert corrections. – The final Word file must be sent to the vendor (NewGen) within the time indicated in the production schedule. This final, approved manuscript will be typeset without any further editing. – The Author approves the promotional text that will serve as the basis for all marketing content
	Process Time: 5 weeks (or a max. of 9 weeks depending on number of contributors, pages and level of editing)	Correction Time: 2 weeks (or a max. of 3 weeks depending on number of contributors and pages)

Process Steps	*Kluwer Law International Action*	*Author Action*
7. Final Stage	– The vendor (NewGen) reviews the corrections for clarity and relevance and consults the Author if there are any queries. – The compositor incorporates the corrections and adds the final index. – The vendor (Newgen) checks the final PDF against the corrections, and ensures that the index is complete and correct. – The vendor (Newgen) prepares a proof of the cover and sends it to the Author. – If necessary the Author will receive a second cover proof.	– The Author: – Sends the postal address(es) for the complimentary copies, if asked by the AM or vendor. – Checks Index, if applicable, and sends approval to the vendor (Newgen). – Checks spelling of his/her own name and the title of the book carefully. The back cover text, if applicable, should be checked for any latent typographical errors only. Any errors on the cover should immediately be reported to the vendor (Newgen).
	Process Time: 5 weeks with index; 4 weeks without index, depending on the number of pages and corrections.	Time: 2 days
8. Printing, Distribution and Promotion	– The vendor (Newgen) sends the final proofs to the printer. – Upon completion of printing and binding, the books will be delivered to the distribution centre. Free copies will be sent to the Author once published. – Digital offprints will be emailed to the Author by the vendor (Newgen). – If applicable, the files of the book will be uploaded and published online on one of the Kluwer Law International websites at the same time.	
	Process Time: 3 weeks (excluding distribution/delivery time)	

* All listed process times are approximate.

General Manuscript Guidelines

A. Manuscript Checklist

The Author should review the following checklist before submitting a final manuscript to an Acquisition Manager (AM).

MS Word: The final manuscript should be delivered in MS Word.

Running heads: The Author should provide short titles for running heads if the title of the document is longer than 70 characters.

Word count: Please ensure that the length of the manuscript (based on word count) is as agreed in the contract. For large deviations in size (more than 15%), a new proposal needs to be submitted, so this needs to be discussed with the AM first. Furthermore, larger size books greatly affect the production schedule, which in turn affect the Author's writing/proofing timetable.

Copyright: It is the Author's responsibility to obtain permission(s) from the copyright holder to reproduce any text, photographs, tables, charts, figures, diagrams, maps or illustrations in the manuscript. The copyright holder can either be the author or the publisher of a work; a society; a museum; a family, trust or foundation. If the Author is reproducing his/her own work but does not hold copyright of the publication, permission must still be obtained. Credit must either be included in the caption of the material, or annotated in the desired format of the copyright holder. It is also the responsibility of the Author to obtain written permission for quotations from unpublished material and for all quotations in excess of 250 words in one extract, or 500 words in total, from any work still in copyright. Kluwer Law International must be supplied with all letters of request and permission granted, to be submitted with the final manuscript. (See our Rights and Permission Guide for more information and our Permissions Request Letter Template, which are both available on the Wolters Kluwer Author Portal under the "Rights & Permissions" section).

Style: Make sure that the text is absolutely consistent with Kluwer Law International House Style (The House Style Guide is available on the Wolters Kluwer Author Portal under the "Guidelines" section)

Footnotes: It is the Author's responsibility to make sure that all footnote cross-references are correct. Authors must carefully check all footnote cross-references in the proof because footnote numbers may change during the typesetting process, and the compositor will not automatically convert cross-references. (Please see the KLI House Style Guide for details on footnote style.)

Tables: should be submitted as part of the manuscript, created with the Table function in Word. (See KLI House Style Guide for more information.)

Figures: should be submitted as separate files along with the manuscript, and it is very important that they are high quality: .tif or .jpg files with a resolution of at least 600 dpi. Image material that has been downloaded from the internet generally is not acceptable due to low resolution.

Keywords/Index: Though Authors may choose to create their own index, it is preferred that just a list of key terms is sent instead. We recommend that the Author compile this list of keywords while

writing. The keyword list should be sent along with the final manuscript. The vendor will add page numbers once the PDF is final.

Format: The manuscript file that you send should be 'clean' (see also the KLI House Style Guide):

- No bookmarks, running document footers, extraneous pagination, tracked changes, etc.
- Use as little formatting (type sizes, fonts, tabs, etc.) as possible. It does not matter which font type is used in the manuscript, because all formatting will be changed to house style by our compositor.
- The use of underlining and bold to emphasize words is strictly prohibited.
- Use italics only sparingly and where needed, to place emphasis on words.
- Use left, not full justification.
- Do not use a space before or after a forward slash.
- There should be no double spaces present throughout the manuscript.
- Automatic hyphenation should be turned off.
- Avoid pressing 'Enter' at the end of a line, and only do so at the end of a paragraph, heading, etc.
- Avoid using the space bar for centring or laying out text, or any other line or page formatting, and use it only for separating words.

Single file: Authors are urged to send in their final manuscript in a single file document (with the exception of manuscripts which include figures). For multi-author volumes, the general editor is responsible for this task. Separate files are acceptable, as long as the files are clearly and logically identified (e.g., 'Chapter1', 'Bibliography').

Deadline: And finally, Authors should deliver their manuscript on the agreed deadline in the contract or earlier. Personal circumstances such as illness should be communicated to the AM as early as possible in order to facilitate alterations in the production schedule. Sending in partially completed manuscripts or a few chapters at a time is not acceptable.

B. Components of a Publication

1. Front Matter or Preliminaries

The following pages are added by Kluwer Law International:

Half title page (p. i): Features only the main title, not the subtitle or edition.

Series page (p. ii or final page of the book): If applicable, features information on the series, and otherwise this page is blank.

Title page (p. iii): Contains the full title, Author/Editor name(s), logo, etc.

Copyright page (p. iv): Contains a copyright statement, publisher's address, etc.

The Author may include some or all of the following components, to be placed in the order outlined below.

Dedications page: The phrasing is left to the Author's discretion.

About the Author/List of Contributors: Includes a note on the Author and a brief biography. For multi-author books, an alphabetical list of authors can be added, with their affiliations or brief biographies. Alternatively, the Author affiliation can be placed in a footnote at the outset of each Author's contribution.

Table of Contents: This should be based on the headings and subheadings (up to three levels) included in the manuscript. For multi-author volumes, it is customary to also add a 'Summary Table of Contents' mentioning just chapter titles and author names.

List of Tables/Figures: This may include the number of each item, followed by a title. Brief descriptions may be included. Footnotes are not necessary.

List of Abbreviations: A two-column list of the abbreviations that are used in the text and their expansions. They should be placed in alphabetical order.

Foreword: A statement regarding the book by someone other than the Author.

Preface: A statement by the Author regarding the purpose and scope of the book, including its genesis, methodology, and any acknowledgements (though if lengthy these may be included in a separate Acknowledgements page, see below).

Acknowledgements: Personal and professional credits, as well as accreditation for reproducing copyright material, if applicable.

Introduction: Contains pertinent information which does not belong in either the Preface or the Acknowledgements page but which the reader should know before reading the text. Not to be confused with the 'introductory' chapter of the book.

Please see Annex I for an Example of the Standard Format & Layout of our books.

2. Main Text

The structure of the text should be lucid and logical – headings and subheadings should be concise and descriptive. The number of subheading levels should be limited to five, excluding chapter level; any more would make the structure unclear.

If a chapter title exceeds 70 characters, a short title must be provided to use in the running headline.

Chapter numbers should be indicated with Arabic numerals (1, 2, 3, etc.). A number of chapters may be grouped together to form a part, but this is optional.

The following system is used for numbering the headings below chapter level:

(Example Chapter 1)

Level 1: §1.01, §1.02, §1.03, etc.

Level 2: [A], [B], etc.

Level 3: [1], [2], etc.

Level 4: [i], [ii], etc.

Level 5: unnumbered heading

(Example Chapter 2)

Level 1: §2.01, §2.02, §2.03, etc.

Level 2: [A], [B], etc.

Level 3: [1], [2], etc.

Level 4: [i], [ii], etc.

Level 5: unnumbered heading

The Author should carefully check the numbering system and cross references. During the editing process, if the heading numbers do not follow one of the two systems above, and if the Author has not specifically indicated that another logical system has been used, the heading numbers in the manuscript will be adapted to our preferred style.

Parts are introduced by a Part Title Page containing the word ‘Part’ plus a roman numeral (I, II, III, etc.) and, the title of the part, if applicable.

All style considerations can be found in the KLI House Style Guide.

3. End Matter

The Author may include some or all of the following components, to be placed in the order outlined below.

Appendices: May contain any material that is not essential to the text such as texts of laws, treaties and conventions; lists of member states; very long tables, etc. The Appendices should be numbered as follows: 'Appendix 1', 'Appendix 2', etc. Please note the appendices should not constitute more than 25% of the total work.

Bibliography and List of References: A bibliography features all works consulted by the Author for the monograph and other works that are deemed appropriate; a list of references contains only those titles that are cited or quoted from in the text. For a detailed explanation on preferred presentation with examples, please refer to the KLI House Style Guide.

Table of Cases/Legislation/Statutes: A table of cases can include all available report references for any cases mentioned in the text. Tables of statutes and statutory instruments are done in alphabetical order. A table of EU treaties and secondary legislation should be listed separately as regulations, directives, etc., in numerical order. For more information, please see the KLI House Style Guide. Page numbers can be added by our compositor.

Index (recommended): Including an index will enhance the publication's practical use.

C. Copyedit Definitions

All manuscripts/content submitted into Kluwer's production process are copyedited to Kluwer's own House Style Guide (Which can be found on the Author Portal: authors.wolterskluwerblogs.com). Content and language is assessed for the correct 'copyedit level' to be applied (light, or medium-level). These levels are defined as follows:

LEVEL 1: LIGHT

- KLI House Style to be applied, unless otherwise stated.
- Grammar checked, with a focus on technically-correct grammar.

LEVEL 2: MEDIUM

- KLI House Style to be applied, unless otherwise stated.
- Grammar checked to also show a better understanding of the text, which includes making good stylistic corrections and choices, rather than simply checking that the text is 'technically' correct.

LEVEL 3: HEAVY

- This level is for content that is assessed as 'unpublishable' at time of submission to Kluwer. This type of content is assessed as having to be rewritten by a freelance native English speaker and will only be undertaken after discussion/agreement with the publisher.

Annex I: Standard Format & Layout

Protection of Foreign Investment in India and Investment Treaty Arbitration

Standard Typeset Example

Not for Use as Reference Material for Kluwer House Style

Refer to Kluwer House Style Guide

Protection of Foreign Investment in India and Investment Treaty Arbitration

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Foreword

This book fulfils the expectations which are raised by its title, and it goes beyond. It provides a well-structured and comprehensive account of the law relating to the protection of foreign investment in India. But it is not merely a treatise which faithfully records this country's law and the practice regarding investment protection. This book also offers a historically informed and politically sensitive analysis of the Indian experience with investment protection from the time of independence to the complex situation today.

The author, Dr Aniruddha Rajput, is particularly qualified to write this book. After getting deeply acquainted with the topic academically, he was called, by the Government of India, to contribute to developing the new Indian Model BIT 2015. This unique combination of experience has enabled Dr Rajput to offer a meticulous description of the Indian practice over time, with an emphasis on the present situation, as well as an authentic articulation of the spirit of the current Indian policy. This spirit is self-confident and ambitious. One of its characteristics is the apparent tension between a perceived 'progress' in investment protection in India and a simultaneous 'regress' in the possibility of investors to bring claims before international investment tribunals. Dr Rajput, who, as an Advocate at the Supreme Court of India, has a strong basis in national law, can credibly describe the important protections which Indian Law, and in particular the Indian judiciary, provide for investors. At the same time, Dr Rajput, who is now also a member of the UN International Law Commission, displays a keen sense of the international political and legal situation in the area of investment protection more generally situates the Indian law and policy within this general framework. This entails the credible ambition of India to change from being a norm-taker to that of a norm maker.

This book is an important read, not only for those who wish to get a reliable sense of the state of investment protection in India, but also for those want to become familiar with the political dynamics and motivations in this context. Investment protection in

Foreword

India is an important element of investment protection law more generally, and its development. Dr Rajput's book gives us a missing piece in the development of investment law, and international law more generally.

Georg Nolte
Professor of Law, Humboldt University Berlin
Member and Chair of the International Law Commission
Berlin, September 2017

List of Abbreviations

BIPAs	Bilateral Investment Promotion and Protection Agreements
BIT	Bilateral Investment Treaty
CCEA	Cabinet Committee on Economic Affairs
CPC	Code of Civil Procedure, 1908
DPC	Dabhol Power Company
DTH	Direct to home
EU	European Union
FCN	Friendship Commerce and Navigation
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
FERA	Foreign Exchange Regulation Act
FET	Fair and Equitable Treatment
FIB	Foreign Investment Board
FIPB	Foreign Investment Promotion Board
FPS	Full Protection and Security
FTA	Free Trade Agreement
G77	Group of 77
GATT	General Agreement on Tariff and Trade
GE	General Electric
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes

IFAD	International Fund for Agriculture Development
IIAs	International Investment Agreements
ILC	International Law Commission
IMF	International Monetary Fund
ISA	International Seabed Authority
ITA	Investment treaty arbitration
LCIA	London Court of International Arbitration
LDCs	least developed countries
LIBOR	London Interbank Offered Rate
LLP	Limited Liability Partnership
MAI	Multilateral Agreement on Investments
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agreement
MNCs	Multinational Corporations
MSEB	Maharashtra State Electricity Board
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
PCIJ	Permanent Court of International Justice
RBI	Reserve Bank of India
SEBI	Securities and Exchange Board of India
TRIM	Trade Related Investment Measures
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
USA	United States of America
USD	United States Dollars
VCFs	Venture Capital Funds
VCLT	Vienna Convention on Law of Treaties, 1969
WTO	World Trade Organization

Acknowledgements

I take this opportunity to thank various persons and institutions that have contributed immensely for the successful completion of this book. Most portions of the book were written during my stay at Berlin with the KFG International Rule of Law Rise or Decline? My sojourn in Berlin was possible due to the generous invitation extended by Professor Georg Nolte – an invitation supported by his colleagues Professor Heike Krieger and Professor Andreas Zimmermann. The intellectual environment there was robust and gratifying, which facilitated the work on this book. Researchers at the research group were helpful to find books and other material from time to time.

I must also thank students that assisted me at various stages of the project. They are Sarthak Malhotra, Vikhyat Oberoi, Rouble Sorkkar, Debaranjan Goswami, Karthik Tayur, Vaishali Movva, Gayathree Devi K.T., Vishakha Choudhary, Nirmal Mathew and Pradyumna Duwarah.

Equally crucial has been the role of the publishers: Kluwer International. The professional and experienced team allowed, facilitated and expedited the preparation of the book; and its presentation in the form in which the readers have it before them.

My parents Dr Dhananjay Rajput and Mrs Vasundhara Rajput have always been a source of inspiration. Despite all my failings and drawbacks they always believed in me and persuaded me to undertake and continue in an uninterrupted manner, an 'intellectual journey' – of which, the present book is a part.

Standard Typeset Example

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CHAPTER 2

Multilateralism and Regionalism: Are the RTAs Building Blocks to the Global Trading System?

§2.01 INTRODUCTION

The debate on regionalism and multilateralism centres on two broad issues, namely: welfare effects – whether RTAs are trade creating or trade diverting[1] and the second one is the political economy of RTAs for multilateralism, which seeks to determine whether RTAs are a building block or stumbling block to multilateralism,[2] and this will be looked at from the dispute settlement point of view. In this study, the latter will be the subject of discussion to the exclusion of welfare effects. In other words, this chapter does not address the question of whether RTAs are good or bad, put differently, whether RTAs cause trade creation or trade diversion. This is so because it is no longer relevant whether or not RTAs are welfare creating or welfare decreasing;[3] the bottom line is that imperfect as they are,[4] RTAs are here and not going anywhere. That is the case primarily because multilateralism does not imply that countries forego their

1. Jacob Viner, *The Customs Union Issue* (Carnegie Endowment for International Peace 1950).
2. Mina Mashayekhi, Taisuke Ito and Lakshmi Puri, 'Multilateralism and Regionalism: The New Interface' in Mina Mashayekhi and Taisuke Ito (eds), *Multilateralism and Regionalism: The New Interface* (UNCTAD 2005) 5.
3. Also, focusing on trade creation or trade diversion is pointless because usually the trade volumes in the majority of these agreements is very small compared to the trade with other partners, see John Whalley, 'Recent Regional Agreements: Why So Many, Why So Much Variance in Form, Why Coming So Fast, and Where Are They Headed?' (2008) 31 World Economy 517, 518. It is on this basis that Brown and Stern, relying on trade flows within RTAs, concluded that the trade diversion impact of RTAs is exaggerated.
4. They are imperfect in the sense that the majority of them do not comply with Article XXIV since some are sectoral while others do not cover any substantial trade even though 'substantial trade' is still ambiguous.

sovereignty on economic policy choices; rather, multilateralism operates as a framework within which countries can freely choose their trading partners often for diverse reasons or within which tariffs and non-tariff barriers to trade can be reduced in the regional blocks or among regional blocks and by individual countries (unilateralism).[5] To aspire for the disappearance of the RTAs is out of the question and it is too simplistic an approach to trade liberalisation and governance especially since some sectors, such as monetary policies, are best served at the RTA level than at the multilateral level.[6] Consequently, what is important is to find ways to deal with regionalism and multilateralism in the global trading system with a view to achieving coherence. In any event, the global trading system is the totality of the multilateral, regional and bilateral regimes governing trade and economic relations between nation states and within nation states.[7]

As it has been indicated in the previous chapter, this work looks at the interface between the RTA and WTO dispute settlement mechanisms as they affect the global trading system. Thus, the hypothesis here is that the multilateral and regional dispute settlement arrangements must be regarded as mutually complementary and coherent rather than antagonistic. To this effect, this chapter aligns with the viewpoint that RTAs are or should be the building blocks to multilateralism,[8] and that the two (regionalism and multilateralism) are building blocks to the global trading system.

In unravelling the stumbling or building block debate on the RTA and WTO dispute settlement mechanisms, we commence by giving an overview of multilateralism. We then pay specific attention to the WTO dispute settlement mechanism, and give a descriptive outline of the WTO dispute settlement. Given the broad scope of WTO dispute settlement, this study only focuses on some attributes or features of the system; namely, standing, standard of review and remedies. These features are key for the creation of the relationship between the RTA and WTO dispute settlement mechanisms. With regard to regionalism, the discussion will give a background of regionalism and political economy of RTA dispute settlement mechanisms. Lastly, the chapter concludes by looking at the question of whether the RTA dispute settlement institutions are a building or stumbling block to a coherent global trading system.

§2.02 MULTILATERALISM: OVERVIEW

Whereas there are diverse reasons behind the eruption of World War II, economic disparities among states is one of the major stimulants of the catastrophic political period in the modern world.[9] Thus, at the end of World War II, the economies of countries in Europe had been destroyed and nations continued to experience the effects of the Great Depression that had swept through the 1930s. As a result, countries forged

5. Krugman (n. 20) 82.
6. The Warwick Commission, 'The Multilateral Trade Regime: Which Way Forward?' (University of Warwick 2007) 45.
7. The Warwick Commission (n. 201) 7.
8. Mashayekhi, Ito and Puri (n. 197) 1.
9. Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press 2007) 5.

an agenda based on integration of markets to achieve peace, economic strength and power.[10] In particular, states came together during the UN Monetary and Financial Conference held in Bretton Woods in 1944, which saw the adoption of Articles creating the International Monetary Fund (IMF) and the World Bank.[11] The two institutions were created with a view to govern monetary systems (notably balance of payments and exchange rates) and for the reconstruction of world economies,[12] of which Western Europe became the first beneficiary.[13] Alongside the IMF and the World Bank, the International Trade Organization (ITO) was to be created whose function was to govern world trade.[14] However, the idea failed because Congress in the US thought that the body such as the ITO would threaten Congress' sovereignty on trade policy.[15] The ITO's Charter also founded the General Agreement on Trade and Tariffs of 1947 (known as GATT 47),[16] which was created in preparation for the ITO.

Notwithstanding the ITO's failure to take off, the GATT contracting parties went ahead with the GATT. Therefore, the GATT 47 was a response to the protectionist and discriminatory effects (nationalism of trade rules, beggar-thy-neighbour policies and double figure tariff hikes) of the 1920s and 1930s in world trade. Its objective was to lower tariffs on a non-discriminatory basis with a view to facilitating global freer trade.[17] Through its first six rounds, GATT 47 dropped tariffs among Contracting Parties to an average of 4%.[18]

The idea of the GATT non-discrimination and most favoured nation (MFN) to trade was promoted by the US with the expectation that the world economy could perform better with MFN as well as putting an end to the unfriendly relations in Europe that were caused by protectionist trade practices and economic disparities. It is on this basis that the concept of multilateralism in international trade surfaced. Multilateralism relates to the 'degree in which discrimination is absent or the proportion of trade partners that receive identical treatment'.[19]

Relevant to this work is the dispute settlement mechanism that was embodied in the failed Havana Charter creating the ITO.[20] As the Charter failed to be adopted, it

10. Martin Holland, *European Integration: From Community to Union* (Pinter Publishers 1995) 6.
11. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (n. 133) 92.
12. Peter Gallagher, *The First Ten Years of the WTO: 1995–2005* (Cambridge University Press 2005) 16.
13. International Bank for Reconstruction and Development, available at: < http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21130269 ~ menuPK:3168298 ~ pagePK:64168445 ~ piPK:64168309 ~ theSitePK:3046012,00.html > , accessed 10 December 2012.
14. Douglas A Irwin, 'The GATT in Historical Perspective' (1995) 85 The American Economic Review 323, 325.
15. John H Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Inst. of Intl Affairs 1998) 12.
16. General Agreement on Trade and Tariffs, 30 Oct. 1947, 61 Stat. (pt. 5) A3, T.I.A.S. No. 1700, 55 UNTS 188 (hereinafter GATT 47).
17. GATT 47, Preamble.
18. Gallagher (n. 207) 2.
19. L Alan Winters, *Regionalism versus Multilateralism* (World Bank 1996) 3.
20. Final Act of the United Nations Conference on Trade and Employment: Havana Charter an International Trade Organisation, 24 Mar. 1948, Ch. VIII.

follows that even the Chapter on dispute settlement fell between the cracks. The GATT Contracting Parties continued without any proper mechanism for settlement of disputes.[21] Since the GATT was meant to be absorbed into the ITO, when the ITO failed to take off, it operated under a highly wanting organisational structure. Consequently, the dispute settlement mechanism was built from the scanty provisions of Article XXIII dealing with nullification and impairment of benefits accruing to the aggrieved member,[22] and Article XXII dealing with consultations. Article XXIII was not only limited to violations of GATT agreements; rather it extended even to measures which frustrate member's trade interests but which do not necessarily infringe any GATT provision.[23] The broad nature of Article XXIII reflects multiplicity and divergent goals that members wanted to achieve in this provision. Thus, members wanted to create procedure for redress where GATT has been infringed yet again members wanted to create a mechanism to address more general situations where a member's interests had been trampled upon by a measure that does not violate provisions of the GATT,[24] thereby using the dispute settlement system of the GATT as the negotiation platform.

Despite the fact that the GATT dispute settlement had institutional and procedural deficits, the system worked rather well because GATT Contracting Parties wanted it to work; there was a much needed political will to sustain the system even though the structure was based on a shaky foundation.[25] The GATT developed a third-party panel procedure with informal procedures. The GATT panel rulings were not typical legal judgments because members were careful to maintain relations while still trying to obtain compliance with the GATT discipline.[26] The solution to the problem was negotiated by the parties involved. Thus, the GATT rulings were more akin to diplomatic communications.[27] The system worked fairly well given that the whole process was based on consensus, which means that parties ought to agree on the outcome of the decision. The negotiated settlement seemed to have increased the level of implementation. Specifically, in the earlier years of the GATT system, the rate of compliance was high, valued at over 90%.[28] Hudec explains this success as an indication that the contracting parties owned the agreements and were guarding the system jealously, and also that the system made economic sense.[29] In addition, Hoekman and Kostecki add that members knew that they will, one way or the other, be

21. TN Srinivasan, *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (Westview Press 1998) Ch. 2.
22. Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 Minn. J. of Global Trade 1, 10.
23. Australian Subsidy of Ammonium Sulphate BISD; treatment by Germany on Imports of Sardines; United States Manufacturing Clause.
24. William J Davey, 'Dispute Settlement in GATT' (1987) 11 Fordham International Law Journal 51, 56–57.
25. Hudec (n. 217) 11.
26. Robert E Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Lexis Law Pub 1993) 12.
27. Hudec (n. 221) 12.
28. Hudec (n. 221).
29. Hudec (n. 221) 13.

plaintiffs, and as such, they would not want to frustrate the system by blocking the establishment of the panel or panel reports.[30]

As GATT membership grew, it brought with it heterogeneity of membership; it no longer was a rich man's club as developing countries also joined. The developing countries became mainly concerned with the diplomatic settlement of disputes, which proved to have challenges for developing countries. Notably, the system was not predictable as it was not rule-based but consensus based. Also, developing countries found it hard to negotiate settlement of disputes with developed countries in a power-orientated system as the latter would easily get their way.[31] Other than developing countries, some developed nations, particularly the US, were dissatisfied with the non-compliance (in particular from the EU, then EC) rate and also finally joined developing countries in their quest for a rule-based institution. The EU was also frustrated by unilateralism that the US took against other countries – the famous section 301.

As a sign of members' discontent to the diplomatic settlement of trade disputes, at some point there were no complaints filed with the GATT panels especially between 1963 and 1969.[32] Controversial cases such as *DISC* added to mistrust in the system.[33] Nevertheless, the decline in the use of the system was not only occasioned by members' dissatisfaction with the system but some external factors such as formation of European Communities, which comprised of individual Member States that actively used the system. Post EC, disputes arising from European Communities were dealt with internally.[34] Subsequent to this dry period and uncertain future of the GATT system, members strengthened the GATT dispute settlement through the Tokyo Codes although it was not extended to the GATT.[35] The Tokyo Round (1973–1979) brought a lot of significant improvements to the GATT dispute settlement. In particular, the 1979 Understanding on Dispute Settlement codified the existing panel procedures on dispute settlement and strengthened the standard of review.[36] To this end, Article 16 of the 1979 DSU which prescribes the function of the GATT panels[37] has been interpreted as a guide to the panels on the applicable standard of review of facts and law – an

30. Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd edn, Oxford University Press 2001) 75.
31. In particular, EC and US wanted disputes to be settled through negotiation.
32. Hudec (n. 221) 11–13.
33. United States Tax Legislation BISD. This is the case in which the EC complained that the US tax law amounted to export subsidy and in response the US also argued that EC laws amounted to export subsidies. It took three years for the panel to be formed and after it has been formed, the panel came to the most unpopular conclusion by upholding both claims. The report was only adopted five years later.
34. Davey, 'Dispute Settlement in GATT' (n. 219) 63.
35. Tokyo Round – Agreed Description of Customary Practice of the GATT in the Field of Dispute Settlement, (Article XXIII:2), BISD 26S/215 (1980).
36. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, L/4907, adopted 28 Nov. 1979, BISD 26S/210.
37. Article 16 provides as follows: The function of a panel is to assist the Contracting Parties in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the Contracting Parties, make such other findings as will assist the Contracting Parties in making

objective assessment of a matter.[38] The problem with Article 16 is that it never prescribed how such an objective assessment should be carried out, that is, whether to exercise some deference or undertake a de novo review.[39] In fact, GATT panels never invoked or used Article 16 as embodying the standard of review. In practice however, the panels were haphazard in dealing with the question of an appropriate standard of review. In some cases, a de novo review was carried out while in other cases some judicial limitation was exercised (deference).[40] Overall, the Tokyo Round renewed interest in the dispute settlement procedures and members resorted to the system with vigour, with thirty-two cases in the 1970s and 115 in the 1980s.[41]

Further improvements to the dispute settlement of the GATT, largely referred to as early harvest, were made in 1988.[42] Three major significant improvements were made; members reduced the period of settling disputes to fifteen months, and this was important given that GATT disputes could take years without being settled.[43] Further, as developing countries were joining the GATT yet they did not know the rules of the game, members availed legal experts from the Technical Co-operation Division to provide legal assistance to the developing country member involved in a dispute. Most importantly, members agreed to involve states that are involved in a dispute in reaching a settlement, and this highlighted the principle of negotiated solution in settling disputes and this is what distinguished the GATT system from other adversarial international dispute settlement institutions. The negotiated solution approach was replicated in the 1994 DSU, which provides for consultations as a primary means for settling disputes. Also, members introduced surveillance and monitoring of implementation of recommendations and rulings adopted by the GATT panels.[44] These improvements were later incorporated in the WTO DSU and they remain core to the WTO dispute settlement system.

Overall, there were 101 adopted reports within the framework of GATT 47.[45] Nonetheless, the Codes brewed another major problem – forum shopping since each agreement had its own dispute settlement. Also, the 'veto power' that each GATT member had and the absence of strict time lines for concluding disputes were

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the recommendations or in giving the rulings provided for in Article XXIII:2. In this connection, panels should consult regularly with the parties and give them adequate opportunity to develop a mutually satisfactory solution.

38. Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar Pub 2012) 41.
39. Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press, USA 2004) 62.
40. *New Zealand – Imports of Electrical Transformers from Finland*, L/5814-32S/55 (1985) (de novo review); *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 (1983) (deference).
41. Hudec (n. 221) 13.
42. Decision of 12 Apr. 1989 on improvements to the GATT dispute settlement rules and procedures. (BISD 36S/61) [hereinafter 1989 Improvements to the GATT].
43. *Ibid*., para. G.4.
44. *Ibid*., para. I.
45. Adopted panel reports within the framework of GATT 1947, available at: < https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm > , accessed 12 Mar. 2015.

significant failures of the GATT dispute settlement system, which inevitably warranted an overhaul of the system if it were to maintain its relevance.

As a result of the apparent need to reform the GATT as reflected above, the Uruguay Round saw the adoption of the new GATT in 1994,[46] known as the GATT 94. The GATT 94 was accompanied by the establishment of the World Trade Organization (WTO) to oversee implementation of the new GATT.[47] As a global trade governing body, WTO has three arms of governance: legislative,[48] administrative[49] and adjudicative bodies. This structure makes the WTO a distinct international organisation among many. The focus in this book is limited to the WTO adjudicative body known as the Dispute Settlement Body (DSB), which operates through ad hoc panels and the standing Appellate Body (AB).

§2.03 WTO ADJUDICATIVE BODY: DSB[50]

As the General Council, the DSB is made up of all WTO members who are usually government representatives, particularly diplomatic delegates residing in Geneva. These diplomatic delegates are generally from trade departments or foreign ministries of their home countries. The key purpose of the DSB is to provide security and predictability to the multilateral system,[51] which is now under siege due to the presence of RTA dispute settlement mechanisms running parallel to the DSB. Nevertheless, the DSB remains the ultimate and unmatched international forum for settling trade disputes as will be seen in the sections to follow. The rules and procedures of the current system reflect the evolution of practices and rules since GATT 47,[52] and as such, it can be seen as a tested mechanism that responds to the needs and practices of members on trade regulation.

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46. GATT 1994.
47. The Marrakesh Agreement Establishing the World Trade Organisation, Article 1. The WTO differs from GATT in many respects: While there were ten agreements making up to eighty pages under GATT, Uruguay Round alone concluded twenty-eight agreements with 26,000 pages. To this effect, subjects covered by two articles under GATT were turned into individual agreements under WTO, for example, Article XXb of GATT – protection of human, animal and plant life or health was elaborated into an agreement on Sanitary and Phytosanitary (SPS) under WTO.
48. The WTO legislative body is the conference of Ministers of Trade from all the WTO member countries. This is the highest decision-making body of the WTO and it meets once in two years, (The Marrakesh Agreement Establishing the World Trade Organisation, Article IV). It takes its decision by consensus. Since the ministerial conference sits once in two years, the day-to-day decisions are carried out by the General Council. The General Council is made up of all WTO members, usually the diplomats, and it can take three different shapes. Specifically, the General council can sit as the General Council or Trade Policy Review Body or the Dispute Settlement Body (DSB) although each of the three bodies can elect their own chairperson, (The Marrakesh Agreement Establishing the World Trade Organisation, Article IV.2, 3 &4).
49. The WTO administrative body is made up of the secretariat and over sixty different councils and committees while GATT had roughly twenty such committees. The headquarters are in Geneva, and this is where the WTO administrative body seats.
50. DSU, Article 2.1.
51. DSU, Article 3.2.
52. World Trade Organization, *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication* (Cambridge University Press 2004) 1.

The task of the DSB is to administer the rules and procedures enshrined in the Dispute Settlement Understanding (DSU) and the covered agreements in the WTO law. Also, the DSB is tasked with surveillance mechanism over the implementation of the rulings and recommendations it has made pursuant to the panel or AB's report. As indicated above, the DSB functions in the form of ad hoc panels and the standing AB.[53]

The DSB has been used extensively by developed countries and to some extent, developing countries.[54] Whereas there was an increase in the developing countries' involvement in the WTO dispute settlement processes, both as plaintiffs and defendants, the least developed countries were and still are isolated. This could be due to a number of diverse reasons, ranging from little participation in international trade, lack of expertise in the WTO subject matter to determine nullification or impairment of their trade benefits, and most importantly, the costs of using the system which are disproportionately high for the least developed countries.[55]

As we have indicated earlier, while there are many facets of the WTO dispute settlement architecture, this work focuses only on the jurisdiction of the DSB, standing before the DSB, standard of review and remedies. These four components are critical for the proposed relationship between the RTA and the WTO dispute settlement mechanisms.

[A] Jurisdiction of the DSB

As provided for in the DSU, the DSB has compulsory and exclusive jurisdiction in determining trade disputes between WTO members on trade issues arising from the covered agreements in the Marrakesh Agreement.[56] The subject matter of WTO covers goods, agriculture, sanitary and phytosanitary measures, textile and clothing, technical barriers to trade, trade-related investment measures, pre-shipment inspection, rules of origin, import licensing, subsidies and countervailing measures, safeguards, services, intellectual property and dispute settlement.[57] The DSB has no competences in dealing with other areas outside of trade governance and liberalisation other than liberalisation/governance within the WTO framework. Given the comparative success of the DSB as against other international tribunals such as the World Intellectual Property Organization (WIPO) or the International Labour Organization (ILO), interest

53. DSU, Article 2.1.
54. See in general, Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why It Matters, the Barriers Posed' in James C Hartigan (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing Limited 2009).
55. Bernard M Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23 The World Economy 527, 527; Shaffer (n. 249); Chad P Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes' (2004) 27 The World Economy 59.
56. Peter van den Bossche, 'Reform of the WTO Dispute Settlement System: What to Expect from the Doha Development Round?' in Steve Charnovitz, Debra P Steger and Peter Van den Bossche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge University Press 2005) 105 <http://dx.doi.org/10.1017/CBO9780511494499.012>; DSU, Article 23.
57. WTO Agreement, Annexes 1 and 2.

groups have since tried to push through non-WTO subjects in order to benefit from the WTO system. Nonetheless, DSB is only limited to the covered agreements in the Marrakesh Agreement.

The concept of a single undertaking under WTO law is of pivotal importance in that it prohibits reservations to the WTO Agreements. Also, it subjects WTO members to the DSB automatically, unlike with most international tribunals where members make a separate undertaking accepting the tribunal's jurisdiction. The concept also makes the WTO unique because the settlement of all trade-related disputes is done by one body instead of creating special bodies for each agreement.[58]

From the covered agreements, there are three kinds of disputes that can be brought before the WTO DSB: violation complaints, non-violation complaints and situation complaints. Specifically, Article XXIII provides that:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.[59]

With regard to violation complaints, it is important to note that once a violation is established, it is rebuttably presumed that the impairment or nullification as a result of the measure that is complained of exists. However, no case has succeeded in rebutting this presumption. Therefore, no matter how little the impact of the violation on a member's trade has been, the offending member will be asked to bring the measures into conformity with the WTO law.

Prima facie, the non-violations complaints can be seen as an attempt by the WTO to go beyond its powers by founding violation in areas not prohibited in the WTO Agreement. However, this can only be understood from the point of view that trade issues are so broad that WTO law cannot be exhaustive, therefore any measure that impairs or nullifies rights of the members enshrined in the WTO law has to be addressed even though such measure is not precluded by the WTO law or put differently, the measure is compliant with the WTO but frustrates the benefits accruing

58. However, single undertaking can be viewed as problematic in that it has become difficult to conclude new GATT Rounds because 'nothing is agreed until everything is agreed' although this is a bit exaggerated given that where parties did not agree on certain subjects such as agriculture during the Uruguay Round, they were deferred to another Round so that at least an agreement could be reached, Seminar delivered by Mendoza at the WTI on the 18 Apr. 2012.
59. GATT 94, Article XXIII.

to another WTO member.[60] The WTO DSB's concern is on anything that impedes market access, whether specifically outlawed by the WTO Agreements or not.[61] Nevertheless, it is important to note that this remedy is used in limited cases as it is an exceptional remedy. There are three conditions that must be satisfied for a member to make a claim under non-violation complaints, and those are: (1) that a WTO member has applied a measure that (2) impairs or nullifies (3) the benefits accruing to the complaining WTO member.[62]

Situation complaints have never been invoked and should they be invoked, the old rules still apply and that means any member can block the adoption of the report since the negative consensus rule does not apply.

[B] Standing before the DSB

Notwithstanding the fact that private parties are usually the ones who suffer when the WTO provisions are violated; they do not have direct access to the DSB because only governments and certain customs unions have *locus standi* before the DSB.[63] This also applies to NGOs who, in most international tribunals, represent the rights of weaker parties or represent issues of general interest, such as those representing environmental interests or animal welfare. Private parties can only access DSB by exerting pressure on their governments to institute a complaint to the DSB. But, even if they persuade governments to lodge complaints with the WTO, they do not have access to the WTO proceedings. This is particularly so because the WTO dispute settlement is characterised by confidential proceedings, which are not meant for public consumption until after the DSB has adopted the reports.[64] The confidentiality goes to the extent of not allowing third-party member governments into the proceedings unless they have notified their intention to act as third parties.[65] Since private parties only have, at their disposal, an opportunity to influence their governments to lodge cases before the WTO dispute settlement, it means that the former must be highly organised, and that their trade must be significant to have such interest. It is for this reason that closer

60. Thomas Cottier and Krista Nadakavukaren Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1st edn, Kluwer Law International 1997) 146.
61. Bown (n. 250) 65; Cottier and Schefer (n. 255) 146.
62. *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R as modified by the Appellate Body, WT/DS2/AB/R (1996), [hereinafter US – Gasoline].
63. Despite that only the actions or inaction of the governments or contracting parties are subject to dispute before the WTO dispute settlement, where the action by the private party has direct link with the government, such an action can stand before the WTO.
64. Although Srinivasan attributes the issue of non-transparency to the disputants' member countries and not the WTO arguing that DSU does not prohibit disputants from publicising their report, Srinivasan, 'The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives' (n. 121) 1053, one still considers the WTO to be the source for this seeming non-transparency in the WTO. This is so because disputants can only publish their own submissions and not the whole report including submissions of the other government in litigation. This means whatever the DSU allows to be made public is not an official report because it is in piecemeal.
65. DSU, Articles 4.6 and 14.

collaboration between states and companies is important in order for companies to be protected by the DSB against other WTO members who threaten trade interests.[66] Consequently, some governments, and especially the government of the US, have alerted their companies to keep an eye on circumstances that deny them access to market in foreign countries, and report where such incidents occur.[67]

Not only are private parties not allowed to use the WTO dispute settlement, even the WTO as an institution does not have powers to use the dispute settlement mechanism because it is only open to the WTO members. Thus, the WTO cannot bring a claim against a member where a member has violated its obligations under the covered agreements. Granting the WTO standing before the WTO DSB could be beneficial to developing countries, especially least developed countries that never use the system. However, Srinivasan argues that such a move could make the WTO too legalistic, thereby leading to its demise.[68] On the other hand, there have been arguments in favour of granting private export companies access to the WTO on the ground that governments are not always ready to take complaints to the WTO. Nonetheless, this proposal is widely discouraged, and a lot of scholars favour the current situation whereby it is only governments that are granted access to the WTO. Indeed, it is not always in the interests of governments to take cases to the WTO; governments usually look at the trade-offs of non-trade issues such as aid, and this usually happens with developing and least developed countries.[69] Even developed countries do not always resort to the WTO for settling dispute.[70] In particular, unlike governments that are concerned with general welfare as a whole, private export companies are primarily oriented towards gains and will not care what the ripple effect of the case will be on the general welfare. On the hand, the option to grant export companies access to the DSB may not even be attractive to firms since there is no monetary compensation available in the WTO.

Whereas private export companies do not have direct access to the DSB, the AB broke the barriers and introduced amicus curiae in the WTO. The concept of friends of the court (amicus curiae) is an important part of modern judicial practice both at national and international level. This concept had not been in practice in the old GATT proceedings until the early years of the GATT 94 when in 1998 the AB in the *Shrimp-Turtle* case ruled that NGOs could submit their views before the panel and the AB.[71] In particular, the AB ruled that Article 13 of the DSU encompasses amicus curiae

66. Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Inst Pr 2003).
67. Trade Compliance Centre, available at: < http://tcc.export.gov/Report_a_Barrier/ > , accessed 7 Aug. 2013.
68. Srinivasan, 'The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives' (n. 121) 1061.
69. Hoekman and Kostecki (n. 225) 87.
70. Hoekman and Kostecki (n. 225) 87.
71. *United States – Import Prohibition of Certain Shrimp and Shrimp Turtle Products*, WT/DS58/R as modified by the Appellate Body, WT/DS58/AB/R (1998), [hereinafter *US – Shrimp-Turtle*], paras 106–110. See also, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, WT/DS138/AB/R (2000), para. 39.

in that the panel or AB's right to seek information, to add or deviate from the Working Procedures basically allows the panel or AB to accept or reject unsolicited information, thus implicating the amicus curiae.[72] However, this ruling has been met with criticism from the WTO Members arguing that the WTO proceedings are purely between members and that Article 13 of the DSU does not allow the panel or the AB to receive any unsolicited briefs.[73] Other than WTO Members, other prominent scholars have criticised this approach arguing that judicial activism that AB has embarked on through the *Shrimp-Turtle* case can potentially destabilise the WTO if it persists.[74] Despite this criticism, the AB opinion stands especially because other than the WTO Rounds, the WTO has no legislative body that can impose checks on the DSB. In practice though, there has not been any single case where the panel or the AB has accepted an amicus curiae, except where such is attached to one of the parties' submissions, in which case the party whose submissions include an amicus curiae is responsible for its accuracy. Nevertheless, it does not seem like there is future for amicus curiae because no single proposal on amicus curiae appeared in the Chairman's text on the review of the DSU.[75]

On appeal, only parties to the disputes may appeal the panel report and not the third parties. Only third states parties who expressed interest to the DSB can be allowed to make submission to the AB.[76]

[C] Standard of Review

This is an important aspect of procedural law in administrative law cases. It defines both vertical (between different levels of an organ of the institution, e.g., panel and AB) and horizontal (between different organs of the same institution or between different institutions, e.g., DSB and secretariat or TPRM or RTAs) power relationships.[77] Essentially, the standard of review mirrors the separation of powers. Thus, it relates to the degree to which judges should respect the decisions made by the administrative or legislative bodies.[78] Both vertical and horizontal power relationships are important to this book against the backdrop of Chapter 4 (*infra*), which identifies the relationship between RTAs and the WTO as both vertical and horizontal.

The standard of review relates 'to the manner in which an adjudicative body reviews a party's compliance with a form of regulation or the correctness of prior decisions made in the same matter'.[79] It follows that there are situations where the

72. *US – Shrimp-Turtle*, para. 109.
73. Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO' in Roger B Porter (ed.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) 60–61.
74. Srinivasan, 'The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives' (n. 121) 1060.
75. van den Bossche (n. 251) 123.
76. DSU, Article 11.
77. Oesch (n. 234) 36–38.
78. Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law' (2004) 7 J. of Intl Econ. L. 491, 493.
79. Becroft (n. 233) 4.

reviewing institution limits its review (deference) and there are times where a review is not limited, that is, it reviews all aspects of the matter without any regard to the findings of the previous or original institution (de novo review).[80]

Without the standard of review in place governing the relationship between the WTO dispute settlement and that of the RTA, questions of the WTO DSB intruding into RTA affairs may arise. The standard of review will assist the WTO adjudicative bodies to determine how far they can go with reviewing the RTA panel decisions in the proposed relationship between the RTA and the WTO dispute settlement institutions.

As at present, the WTO has no general standard of review. The Uruguay Round failed to include a chapter on standard of review. In fact, the standard of review debate nearly caused the collapse of the dispute settlement negotiations.[81] It is only the anti-dumping chapter that has a specific standard of review, which was pushed through by the US. The rest of the WTO Agreements do not contain a general or specific standard of review. In the end, the question of the standard of review for the rest of the WTO Agreements was left to the DSB, particularly through the AB.[82] Consequently, the WTO panels and AB invoked Article 11 of the DSU and ruled that it prescribed the standard of review.[83] It is interesting to note that Article 11 is an exact replica of Article 16 of the 1979 DSU yet the GATT panels never saw it as a cornerstone for establishing a standard of review.

EC-Hormones became a landmark case for the standard of review as it was the first case in which the AB had to decide on the standard of review.[84] Briefly, the *EC-Hormones* called the AB to review the panel decision in which the panel found the EC measure that prohibited importation of meat treated with hormones for faster growth not conforming to the Sanitary and Phytosanitary (SPS) Agreement.[85] In this case, the EC argued that the panel erred in applying a de novo standard of review, especially the scientific analysis in which the panel carried out its own analysis.[86] However, the US argued that the panel correctly applied the de novo review.[87] The AB however rejected both arguments, reasoning that Article 11 of the DSU clearly prescribes the standard of review for the WTO panels, which is neither de novo or total deference but an objective assessment of facts.[88] This means that the panel's standard of review is somewhere between de novo and total deference.[89]

The AB ruling did not bring a solution to the challenges around the standard of review debate – there still needs to be a clear guide on the degree of restriction and

80. Andrew T Guzman, 'Determining the Appropriate Standard of Review in WTO Dispute Resolution' (2009) 42 Cornell J. of Intl L. 45, 47.
81. Oesch (n. 234) 76.
82. Becroft (n. 233) 46.
83. *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS28/AB/R (1998), [hereinafter *EC – Hormones*].
84. *EC – Hormones*.
85. *EC – Hormones*.
86. *EC – Hormones*, paras 13–16.
87. *EC – Hormones*, para. 41.
88. *EC – Hormones*, para. 117.
89. Becroft (n. 233) 51.

intrusion that can be tolerated in a proper standard of review.[90] It does not help to say that the standard of review is the objective assessment of the facts.

This broad articulation of the standard of review (objective assessment) has resulted in different approaches to the standard of review, with different agreements being reviewed differently.[91] Nonetheless, this may not necessarily signal bad results as some supra-national jurisdictions, notably the European Court of Justice (ECJ), apply different standards of review for different subjects or obligations.[92] It is important to note that applying different standards for different WTO Agreements or obligations is a deliberate decision on the part of the DSB. To this end, in the *US-Countervailing Duty Investigation on DRAMS*, the AB made it clear that Article 11 of the DSU must be considered in the light of covered agreement in dispute.[93]

While the panel (or RTA tribunal) makes both factual findings and legal findings, the AB assesses the correctness of the WTO panel (RTA tribunal) decision against the backdrop of Article 17.6 of the DSU. In light of the limited scope of appeals to the AB,[94] it goes without saying that the AB standard of review in determining the correctness of the panel's decision will only be based on issues of law and legal interpretations developed by the panel. Therefore, the AB does not lightly interfere with the panel's factual findings.[95] It is only when it is alleged that the panel failed to make an objective assessment of facts that the AB will intervene because the latter has been regarded as a legal issue.[96] To this effect, the AB in another case ruled that:

> [N]ot every error in the appreciation of a particular piece of evidence will rise to the level of a failure by the Panel to comply with its duties under Article 11 of the DSU. In order for us to reverse the Panel's finding in respect of the A380 on the basis of Article 11 of the DSU, we would have to be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment of whether Airbus would have been able to launch the A380 in 2000 without LA/MSF. Thus, the question before us is whether the Panel did commit the errors alleged by the European Union and, if so, whether they demonstrate that the Panel's conclusion that LA/MSF was a 'necessary precondition' for the launch of the A380 in 2000, no longer had a sufficient evidentiary and objective basis.[97]

The AB must be satisfied that the panel exceeded its bounds of discretion for the former to hold that the panel failed to carry out an objective assessment of facts.

Guzman proposes that a more deferential standard of review should be adopted when assessing factual matters but that the WTO panels should engage in de novo review with regard to interpretations of WTO law. Thus, he argues that if de novo

90. Becroft (n. 233) 51.
91. For deeper analysis of differing standards of review, see Becroft (n. 233) 52–59.
92. GS Desmedt, 'Hormones: "Objective Assessment" and (or As) Standard of Review' (1998) 1 J. of Intl Econ. L. 695, 697–698.
93. *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R (2005), para. 184.
94. Article 17.6 of the DSU.
95. *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (2000), para. 151.
96. *EC – Hormones*, para. 132.
97. *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (2011), para. 1318.

review is not adopted on legal interpretations, it means that states can interpret WTO law in any manner, and that is likely to prejudice other states.[98] The de novo review on legal interpretations is what the WTO panels and AB already undertake.[99] The area that attracted a lot of debate among scholars is on the standard of review on factual findings.

Overall, the difficulty inherent in Article 17.6 is that it is not easy to draw a distinction between law and facts; but, this is not a problem only with respect to the WTO, but is equally a problem for national and regional courts.[100]

[D] Remedies

The DSU encourages parties to find a mutually agreed positive solution before the panel process can be initiated. If parties cannot find an amicable solution, the panel will recommend to the recalcitrant party to withdraw its inconsistent measure, and where that cannot be immediately done, the recalcitrant party is expected to pay compensation until the inconsistent measure is removed. As a last resort, the DSB will authorise retaliation. Therefore, WTO remedies comprise of withdrawal of inconsistent measures, compensation and suspension of concessions, which will in turn be looked at below.

[1] Withdrawal of Inconsistent Measures

With regard to measures that have been found to be incompatible with the WTO law, the respondent member can choose any manner in which to bring the measure in line with the WTO agreements in contention. The panel or AB is not under an obligation to recommend how the respondent member can rectify the measure.[101] In the event that the panel or AB makes suggestion; the respondent is not obliged to take the recommendation but can choose any suitable way of bringing the measure into conformity.[102] With non-violation complaints, the respondent member is not obliged to withdraw the measure; rather, the panel makes a recommendation to the respondent to make adjustments.[103]

[2] Compensation

In a case where the immediate withdrawal of measures is impracticable, compensation can be provided as a temporary measure until such time that the inconsistent measure

98. Guzman (n. 275) 52.
99. Oesch (n. 234) 174.
100. Simon Lester, 'The Development of Standard of Appellate Review for Factual, Legal, and Law Application Questions in WTO Dispute Settlement' (2012) 4 Trade, Law and Development 125, 146.
101. DSU, Article 19.1.
102. This is so because the primary objective is to bring the measure to conformity with covered agreements and the 'how' part is left with the member concerned.
103. DSU, Article 26.1(b).

has been removed.[104] Compensation is voluntary and it must conform to the WTO agreements.[105] Conformity with the WTO agreements implies MFN among others, and that means whatever compensation that the respondent member offers to the complaining member will have to be equally enjoyed by the other WTO members. It is important to note that compensation does not imply monetary compensation; rather, it means that the respondent member can offer, for instance, tariff reduction equivalent to the benefit that is impaired or nullified by the WTO inconsistent measure of the respondent member.[106] The reduction of tariffs does not have to relate to the sector in dispute. So far, compensation is the least used remedy in the WTO DSB. This remedy was first used in *Japan – Taxes on Alcoholic Beverages*.[107] Perhaps one of the reasons for why compensation is less utilised is that it has to be applied in line with the existing WTO legal framework such as the MFN, and this presumably deters members from offering compensation.

Developing countries, especially in Africa, have argued for monetary compensation.[108] The nature of the WTO remedies is to keep a balance of concessions; therefore, it is not the WTO's primary goal or interest to award monetary compensation.[109] In fact, Hoekman and Kostecki warn that attaching monetary compensation to WTO remedies may bring undesirable effects whereby members will be reluctant to expand areas of liberalisation.[110]

[3] Suspension of Measures

As a last resort, the DSB can authorise the suspension of concession equivalent to the trade distorted by the inconsistent measure of the respondent member,[111] that is, retaliation against the offending Member State. Like all dispute settlement issues, suspension of concessions is put under surveillance and it is revoked once the offending member has complied with the DSB rulings and findings.[112] The suspension of concessions shall be on the same sector under the same agreement, where that is not possible, the suspension shall be on a different sector(s) under the same agreement, and if that is not possible as well, it shall be on a different agreement.[113] This cross-retaliation is often important for the cases that involve developing and developed

104. DSU, Article 21.1.
105. DSU, Article 21.1.
106. DSU, Article 22; Marco Bronckers and Naboth van den Broek, 'Financial Compensation in the WTO Improving the Remedies of WTO Dispute Settlement' (2005) 8 J. of Intl Econ. L. 101.
107. *Japan – Taxes on Alcoholic Beverages*, WT/DS10/AB/R (1996) and WT/DS11/AB/R (1996).
108. See for instance, WTO, *Negotiations on the Dispute Settlement Understanding – Proposal by the LDC Group*, WTO Doc. TN/DS/W/17, 9 Oct. 2002; WTO, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations – Communication from Kenya*, WTO Doc. TN/DS/W/42, 24 Jan. 2003.
109. Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press, USA 2009) 86.
110. Hoekman and Kostecki (n. 304) 87.
111. DSU, Article 22.2.
112. DSU, Article 22.8.
113. DSU, Article 22.3.

countries. For instance, a measure involving intellectual property may not be important to the small developing country because smaller developing countries do not generally trade in intellectual property, therefore the suspension of intellectual property may not be helpful to them. As such, cross-retaliation makes it possible for smaller developing countries to be hit hard with another sector. For instance, in the *EC – Regime for the Importation, Sale and Distribution of Bananas*, Ecuador was granted its request to suspend concessions on GATT, GATS and TRIPS against EC in an amount of USD 210 million.[114] But the banana industry in Ecuador did not gain anything from this suspension.

Where the parties do not agree on whether the retaliation is equivalent to the trade distortion caused by the inconsistent measure or they do not agree on principles for cross-retaliation, the matter is referred to an arbitrator, whose decision is not subject to appeal,[115] and it will be adopted by the DSB as discussed above. Since developing countries do not have powers to retaliate, it is for this reason that African countries prefer monetary compensation instead of retaliation.[116] Some scholars have argued that WTO sanctions should be multilateralised to avoid the imbalance where weaker plaintiffs cannot retaliate effectively.[117] In addition, Mexico proposed that retaliation rights be auctioned.[118] However, retaliation is not good even to the retaliating country; the removal of the inconsistent measure is always the best option.[119]

[4] Surveillance

WTO law subjects the implementation of the DSB ruling to a surveillance mechanism wherein the matter is placed on the agenda until implementation has fully been made.[120] During the DSB meeting that adopts the panel or AB report, a respondent member indicates its intentions on how it will implement the DSB recommendations and rulings.[121] The DSB then puts the member under surveillance to monitor progress on the implementation of DSB recommendations and rulings, and the concerned member provides the DSB with a progress report ten days prior to the DSB meetings because such issue remains on the DSB agenda until the recommendations have been implemented.[122] Where a developing country is involved, the DSB not only takes into

114. *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/ARB/ECU (2000).
115. DSU, Article 22.7.
116. Alan O Sykes, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 The J. of Legal Studies 631, 641–642.
117. Hoekman and Mavroidis (n. 250) 540; Kenneth W Abbott, 'GATT as a Public Institution: The Uruguay Round and Beyond' (1992) 18 Brooklyn J. of Intl L. 31, 64–65.
118. Srinivasan, 'The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives' (n. 121) 1060.
119. Hoekman and Kostecki (n. 225) 90.
120. DSU, Article 21.6.
121. DSU, Article 21.3.
122. DSU, Article 21.6.

account trade coverage of measures but also the impact of such measures on the economy of the developing country when determining the appropriate action to be taken against the offending party.[123]

Over and above surveillance mechanism, the DSU makes available a compliance panel procedure.[124] In essence, where a complaining member feels that the respondent member has not fully complied and the respondent member argues that it has fully complied, the complaining member can request the DSB to intervene.[125] In such a case, the DSB will refer the matter to the panel that presided over the original case to determine whether the respondent member has fully complied or not.[126]

While the WTO dispute settlement procedure is more legalised compared to the GATT system, which was largely power-based,[127] unfortunately the enforcement of WTO judgments is still power-orientated. Thus, a poor country that has been favoured by the WTO ruling against the developed nation does not have the means (critical export market of the offensive party) to threaten retaliation in the case of non-compliance by the developed nation. This is particularly the case as Bown has empirically proven that retaliation threats basically influence compliance with WTO rulings.[128] Developing countries that are more reliant on aid of the offending developed country member are unlikely to lodge a dispute against that member. In the unlikely event that a developing country member lodges a claim, they are unlikely to obtain compliance with the WTO ruling (liberalisation) from that offending member, and if they do get compliance, it will just be less liberalisation.[129] Other than retaliation, compensation is also power-based. Specifically, it is only when a complaining country exports trade to the offending country's market that compensation can be meaningful. So, with a case of least developed and developing countries with low export trade, compensation becomes insignificant as poor countries are highly unlikely to be exporting significant volumes to the developed offending country's market.

[5] Effectiveness: Compliance

Generally, the WTO dispute settlement has been viewed as the most successful component of the Uruguay Round, with its high compliance rate compared to other international tribunals and to some extent it even out-competes domestic judiciaries in some countries. We have indicated above that the WTO dispute settlement procedure remains one of the most successful among international tribunals. However, this does not mean that there have not been challenges with certain disputes, which could not be resolved at the WTO level. For instance, the *Softwood Lumber*, *EC – Bananas* cases

123. DSU, Article 21.8.
124. DSU, Article 21.5.
125. DSU, Article 21.5.
126. DSU, Article 21.5.
127. John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edition, The MIT Press 1997).
128. Bown (n. 250) 61.
129. Bown (n. 250) 70–71.

have been settled through bilateral negotiations between the concerned parties.[130] This has caused some scholars to conclude that political solutions (negotiations) are better than the legalised WTO dispute settlement process. They argue that there is less chance for the settlement or compliance to be implemented after the panel ruling if the defendant has not complied at the negotiation stage.[131] Of course not all cases have been settled and all decisions complied with, but that does not create a compliance crisis.[132] It is important to give a balance between the compliance and non-compliance rates. These scholars turn a blind eye to the many cases that were settled by the DSB, in which members undertook to comply with the DSB ruling while in some cases members had already complied.[133] Further, these scholars ignore the fact that the DSU allows consultations and where the parties have reached a political settlement, it is well within the purview of the DSU because DSU does not outlaw consultations or negotiations. What is primarily important for the DSU is that there is a positive solution to the dispute. Therefore, to argue that where solutions are found outside of the WTO framework it indicates a failure of the WTO dispute settlement process is oblivious of the broader aim of the DSU – finding positive solutions to the dispute.

In summary, the WTO dispute settlement mechanism has been and continues to be a success even though cases take too long in the WTO, despite the strict time frames. Meanwhile, the aggrieved member continues to suffer harm yet no interim relief is made during the period that the case is ongoing in the WTO. Also, even after the case is completed and the implementing member has been found to have contravened WTO law, no compensation is made to the aggrieved member.[134] Nevertheless, compared to the other international tribunals, the WTO dispute settlement is unparalleled; thus, its compulsory nature coupled with implementation mechanisms make the WTO exceptional.[135]

In conclusion, while the WTO is intended to be a multilateral body in charge of multilateral agreements operating on an MFN basis, the regional agreements were however allowed both in the GATT 47 and GATT 94. The next section therefore looks at regionalism in general, and proceeds to discuss the political economy of RTAs especially on dispute settlement.

§2.04 REGIONALISM

Regionalism can be defined as 'any policy designed to reduce barriers between a sub-set of countries regardless of whether those countries are contiguous or even close

130. Andrew G Brown and Robert M Stern, 'Issues of Fairness in Dispute Settlement' in James C Hartigan (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Reprint, Emerald Group Publishing Ltd 2009) 64–66.
131. Marc Busch and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) 24 Fordham Intl L. J. 158.
132. John Magnus, 'Compliance with WTO Dispute Settlement Decisions: Is There a Crisis?' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press 2005) 242.
133. Wilson (n. 3).
134. World Trade Organization (n. 247) 117.
135. World Trade Organization (n. 247) 117.

to each other'.[136] The end result is that members accord one another preferential treatment while maintaining discrimination against the rest of the world contrary to the MFN principle.[137] In more economic terms, regionalism refers to economic integration of two or more countries based on formal agreements wherein the trading partners accord one another trade benefits to the exclusion of non-members, thereby placing non-members at a disadvantage.[138] It follows that such economic integration is basically preferential in nature and it can take the following forms: preferential trade zone (common to developing countries) wherein members do not entirely remove tariffs as against partners as permitted by the Global System of Trade Preferences (GSTP). Other than the preferential trade zone for developing countries, the preferential trade agreements (PTAs) as exceptions to the MFN principle can take the form of Free Trade Agreements (FTA), customs unions, common markets,[139] economic unions and monetary unions, which will briefly be discussed in the section to follow. In addition, increasingly preferential agreements include partnership or cooperation agreements where members spell out endeavours to cooperate in tourism, rural development and so on.[140] However, these cooperative or partnership agreements together with common markets and economic unions will not be considered in depth in this work as they do not fall within the scope of GATT Article XXIV and GATS Article V or the Enabling Clause. In the WTO, the term used for these preferential agreements is regional trade agreements (RTAs), which refers to FTAs and CUs; it does not matter whether they are bilateral or involve more than two states, and the geographic location is also not a consideration.[141]

[A] Free Trade Agreements[142]

This arrangement occurs when a group of countries decide substantially to eliminate tariffs and other trade barriers between them on products originating from members of such FTA.[143] Each member maintains its own external trade policy against non-members. The inherent problem with an FTA is the import of goods through low tariff

136. Winters (n. 214) 355.
137. Enzo R Grilli, 'Multilateralism and Regionalism: A Still Difficult Coexistence' in Riccardo Faini and Enzo R Grilli (eds), *Multilateralism and Regionalism after the Uruguay Round* (Palgrave Macmillan 1997) 194. The term regionalism is highly dynamic and debatable given recent trends wherein countries spanning different continents are also classified as regionalism.
138. Guido Glania and Jýýrgen Matthes, *Multilateralism or Regionalism?: Trade Policy Options for the European Union* (Centre for European Policy Studies 2006) 4.
139. GATT 94, Article XXIV and GATS, Article V.
140. Whalley (n. 198) 523.
141. Lorand Bartels, 'Regional Trade Agreements' in Rudiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 853–854.
142. The term FTA is usually used to refer to Free Trade Agreement or Free Trade Arrangement instead of Free Trade Area. Whatever the case may be, FTA often gives a wrong impression that it is free trade without any discrimination, and yet it is always not the case, see Arvind Panagariya, 'The Regionalism Debate: An Overview' (1999) 22 World Economy 455, 478.
143. GATT 94, Article XXIV.8.b; GATS, Article V.

member countries and trans-shipment to higher tariff member countries.[144] This problem can however be curbed with the introduction of rules of origin, although rules of origin also have their inherent problems in that they are very complicated. More so, given that WTO members are usually a party to at least more than one FTA, thereby creating spaghetti bowl, it makes the rules of origin even more complex due to overlapping membership.[145]

It is important to note however that in practice, an FTA can comprise some attributes of a common market; for instance, free movement of capital within the region as is done in NAFTA.[146] In many cases, an FTA can exclude certain products from liberalisation, such as agriculture but still regarded as an FTA in line with the WTO law. This is so because of the difficulty in determining or lack of agreement on what 'elimination of duties and other restrictive regulations to commerce on substantially all trade' means. It is important to note that the requirement of the elimination of restrictions on substantially all trade does not apply to the developing countries forming a regional trade block within the framework of the GSTP among developing countries.[147] By allowing FTAs and CUs through Article XXIV, GATT is seen by economists as not purely an economic treaty but one which enshrines political motives to sustain world trade liberalisation. In particular, the requirement that discrimination against non-members to a regional block must be tightened has been viewed as economically unsound, and further that it can only be understood from the political perspective as trying to minimise the number of regional arrangements.[148] Nonetheless, the motive is not achieved as the number of RTAs keeps on increasing. In fact, contracting parties to the GATT do not want to ensure that RTAs meet the requirements contained in the GATT XXIV precisely because all of the WTO members except Mongolia are parties to the RTAs. Yet, most of the RTAs do not satisfy Articles XXVI and V of the GATT and GATS respectively.[149] Understandably, a reasonable man would not want to start throwing stones at others while living in a glasshouse. It is for this reason that some European countries propose to grandfathering the existing RTAs thereby making them immune from compliance scrutiny to the GATT XXIV and GATS V requirements.[150]

In summary, FTAs make the biggest number of RTAs such that out of 358 notified RTAs as at December 2013, 320 are FTAs. One of the reasons why FTAs are so common

144. Michael J Trebilcock and Robert Howse, *The Regulation of International Trade, 3rd Edition* (3rd edn, Routledge 2005) 28.
145. Won-Mog Choi, 'Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade' (2010) 13 J. of Intl Econ. L. 111.
146. North American Free Trade Agreement, 32 ILM 289, 605 (1993).
147. Agreement on the Global System of Trade Preferences among Developing Countries, *done* 12 Apr. 1988, 27 ILM 1208, *entered into force* 19 Apr. 1989, [hereinafter GSTP], Article 6.
148. Jagdish Bhagwati, 'Regionalism and Multilateralism: An Overview' in Jaime de Melo and Arvind Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993) 25. < http://dx.doi.org/10.1017/CBO9780511628511.004 > .
149. In fact, only one RTA has been found to comply with the requirements of GATT Article XXIV. 5 and 8, and that is Czech-Slovak customs union.
150. Mashayekhi, Ito and Puri (n. 197) 11.

compared to customs unions is that members maintain individual external tariff, yet they are able to limit or curtail free movement of trade internally. Thus, FTAs allow members to achieve their motives for concluding such agreements while also restricting internal trade;[151] FTAs allow members to maintain leverage on their trade policy relations with third countries.

[B] Customs Unions

Customs Unions (CUs) basically occur where a group of countries form a single customs territory in which tariffs and other barriers to commerce are eliminated on substantially all trade between the constituent countries for products originating in these countries; and there is a common external trade policy (common external tariff) that applies to non-members. A customs union is therefore equivalent to an FTA, with the addition of a common external tariff.[152] Clearly, CUs command deeper integration as countries are no longer at liberty to unilaterally reduce barriers or to conclude RTAs with third countries. However, in practice, this rule seems to bend with some CU. For instance, in the Southern African Customs Union (SACU), members continue to conclude RTAs with third countries disregarding the golden rule underlying CUs.[153] Similar to the FTAs, some customs unions enshrine certain attributes of the common market in that they liberalise some factors of production within the union.

The concerns alluded to above on FTAs, especially on the ambiguity of the GATT, apply equally to the CUs given that the requirement – 'elimination of duties and other restrictive regulations to commerce on substantially all trade' has the same ambiguities as those under FTAs.

[C] Common Markets

In addition to eliminating trade barriers and introducing a common external tariff, members agree to allow free movement of the factors of production, such as capital and labour, across national borders within the integration area.[154] The positive effects of a common market are that production is undertaken in the area that suits it best. In addition, it ensures that, where there is an advantage in the large-scale production of a commodity, it will be produced on a large-scale in one place or a few places, for the whole area, instead of being produced on an uneconomically small scale in a number

151. James Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (1st edn, TMC Asser Press 2002) 147.
152. Bartels, 'Regional Trade Agreements' (n. 336) 858; GATT 94, Article XXIV.8.a; GATS, Article V.
153. For instance, South Africa concluded trade and development agreement with the EU – Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, *signed* October 1999, *entered into force* January 2000.
154. Trebilcock and Howse (n. 339) 26.

of places.[155] Common market basically relates to Mode Four of Services Agreement,[156] and this is the most contentious area within the WTO and RTAs. Thus, there are a few RTAs aiming to be common markets but progression to liberalisation of labour movement has proved difficult to attain.[157] In Africa, there are quite a number of RTAs aiming to be common markets, for example, COMESA planned to be a common market by 2008 and CEMAC by 2007 but all these have not materialised due to difficulties in allowing the free movement of persons. Until today, it is still only the EU which is a common market and has liberalised the movement of persons within EU. The content and functioning of common markets will not be discussed further than this since GATT/WTO law knows of no common market.

[D] Economic Union

This is a common market with unified monetary and fiscal policies, including a common currency. The best example that illustrates both a common market and economic union is the EU. Similar to a common market, an economic union will not form part of this work since it does not appear anywhere in the GATT/WTO law.

§2.05 HISTORICAL BACKGROUND OF RTA

As indicated above, bilateral or PTAs were seen by states as fuelling economic depression witnessed in 1930s and the general feeling was to create an international economic order, an idea highly supported by the United States. To this effect, the US rallied behind MFN and shunned discriminatory and preferential agreements.[158] The key question in this section is – why was regionalism, that is, Articles XXIV and V allowed into the GATT and GATS respectively? The main supporter of multilateralism – United States saw merit in allowing exception to MFN because it was necessary for Western Europe economic peace and stability, and also, customs unions were seen as more trade creating because they dismantle internal barriers.[159] Again, it was necessary to cater for the existing customs union at the time that the international community decided to go multilateral.[160] Also, CUs were meant to deal with cases of dissolution of states to govern trade between them such as Sweden and Norway.[161] This exception was not seen as a problem to the GATT because customs unions have the intrinsic

155. United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa: ECA Policy Research Report* (United Nations 2004) 14.
156. GATS Mode 4 – presence of natural persons.
157. For example, MERCOSUR has not achieved this stage although it was long planned.
158. John H Jackson, *World Trade and the Law of GATT* (Lexis Law Pub 1969) 576–577.
159. Zakir Hafez, 'Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs' (2003) 79 North Dakota Law Review 879, 883.
160. Such as that in Italy, Switzerland, Southern Africa (SACU) 1909.
161. Whalley (n. 198) 519.

elements of a single nation.[162] It is by reason of having elements of a single nation that each customs territory, irrespective of whether it is made up of one or more countries, is to be considered as a contracting party to the GATT for purposes of territorial application of GATT 94.[163]

With regard to the FTAs, the US in particular supported trade liberalisation in Europe for security reasons, especially in the wake of the cold war, which could potentially have heated up to arms if the relations between Germany and France were not carefully nurtured. It is for this reason that the European Coal and Steel Agreement was accepted and registered with the GATT despite that it did not conform to the GATT requirements because it was a sectoral agreement.[164] Not only the US, but also Lebanon and Syria pushed for inclusion of a provision on FTAs; the idea here was to enable developing countries to trade. The basis upon which Lebanon and Syria advocated for FTAs was because they felt that FTAs were a better option for them as developing countries as opposed to customs unions, which required harmonisation of trade policies.[165] More generally, FTAs were not seen as potentially posing a threat to the global trading system particularly because (other than Europe), major economies were wholly rallying behind the GATT regime. Unlike customs unions which are regarded as contracting parties to the GATT, FTAs are not.

Before the 1980s, there were few RTAs in the world. Although GATT 47 allowed RTAs to be formed, only Western Europe formed an RTA while the attempted RTAs in Latin America and Africa were close to non-existent because they were ineffective.[166] Even with the Enabling Clause, the RTAs between developed and developing countries were minimal. As a result, it was never foreseeable that RTAs would be so prolific to a point that they would potentially threaten the multilateral trading system. In any event, Australia, Canada, the US, Japan and Korea were fully rallying behind multilateralism. Who would have thought that this phenomenon would be this rampant?

The shift from multilateralism to regionalism or the interface between multilateralism and regionalism can best be understood by looking at the three waves of regionalism since World War II[167] and the political economy of RTAs below specifically focusing on dispute settlement.

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162. Theresa Carpenter, 'A Historical Perspective on Regionalism' in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge University Press 2009) 16; Bhagwati, 'Regionalism and Multilateralism' (n. 343) 25–26.
163. Anna G Tevini, 'Article XXIV GATT 1994' in Rudiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser (eds), *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff Publishers 2006) 216.
164. Tevini (n. 358) 216.
165. Tevini (n. 358) 216.
166. Panagariya (n. 337) 480.
167. This is so because regionalism is not new. It can be traced as far back as nineteenth century, see Mansfield and Milner (n. 15) 596–597. However, the reason this work considers regionalism post World War II is because there existed multilateral regime after WW II, which is argued to be threatened by regionalism. To this end, at the heart of this chapter is whether regionalism is a building or stumbling block to multilateralism, therefore a period before WWII cannot be considered because there was no multilateral regime.

[A] First Wave

The first wave or phase of regionalism was either South-South or North-North, and it is basically the period before 1986, that is, before the start of Uruguay Round.[168] Regionalism in this wave took place against the backdrop of the cold war, decolonisation and the new multilateral trade regime.[169] Also, it was overwhelmingly more prominent in Western Europe, Latin America and Africa while North America and Asia were not part of the game. To this end, the powers in both North America and Asia, that is, US and Japan, respectively preferred global trade over regionalism.[170] Other than Western Europe, regionalism was more appealing to developing countries probably because developing countries and LDCs wanted to strengthen bargaining capacity with the industrialised nations. In this first phase, regionalism was primarily focused on trade liberalisation although its motivation was largely for political reasons, notably peace and security. The first wave of regionalism since World War II became more fashionable in the 1960s as developing countries emulated Europe and it was soon to collapse in 1970s, except in Western Europe. In the first wave of regionalism, although developing countries were stimulated by Europe, they pursued regionalism for different economic reasons. Thus, they sought to benefit from economies of scale by trading amongst themselves; however, the problem was that they allocated industries by bureaucratic negotiation instead of allowing trade liberalisation to allocate industries.[171]

[B] Second Wave: Post-1986 up to 1994 (Uruguay Round)

The second phase of regionalism came in the second half of the 1980s, and this time North America joined suit with Israel in the conclusion of the US first FTA in 1985, followed by the US-Canada FTA (CUSFTA) in 1988. Soon after CUSFTA, NAFTA came to life in 1992, which comprises of the US, Canada and Mexico. Latin America also joined. Thus, in 1990, Argentina and Brazil created an FTA, which then lead to MERCOSUR in 1991 between Argentina, Brazil, Paraguay and Uruguay. Parallel to this, were the efforts to resuscitate or transform the existing arrangements. For instance, the Southern Africa Development Coordination Conference was transformed to a more

168. Carpenter (n. 357) 17.
169. Mansfield and Milner (n. 15) 600.
170. Grilli (n. 332) 197.
171. Bhagwati, 'Regionalism and Multilateralism' (n. 343) 28; Robert Baldwin, 'Regionalism and Multilateralism: An Overview' in Jaime De Melo and Arvind Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993) 53. However, Baldwin in his commentary to Bhagwati submits that it is also important for politics to cheap in to distribute the gains of regionalisation because if this is left only to the markets, then the results would be catastrophic as weaker countries tend to lose during the early stages of regionalism. An example can be made about East African Community which collapsed because trade benefits were not be shared equitable and weaker states lost to powerful states within the community.

economic body in 1992,[172] and in West Africa, the treaty of the Economic Community of West African States was revised in 1993 to include an objective for economic integration.[173] However, the EC saw expansion of its membership to include Spain and Portugal and also deepening its integration efforts through a goal of becoming a Single Market.

With the second wave of regionalism, most RTAs have been formed amongst neighbours and along continental lines.[174] This wave was also characterised to some extent by North-South arrangements, and did not only cover goods but extended to investments, services, labour and environmental standards.[175] There is no definite explanation behind the second phase of regionalism; however, it can be linked to the difficulty of the international community to conclude the Uruguay Round.[176] Therefore, regionalism was pursued as a contingent plan due to fear of the GATT system seemingly failing. However, the second wave of regionalism could be linked to strategic regionalism and market access, which was widespread in developing countries.[177]

Most of the agreements concluded in the second wave of regionalism have a chapter on dispute settlement, which resemble that of the WTO. This is largely because the negotiators in many of these RTAs were the same as those in the Uruguay Round. Therefore, the language used for dispute settlement in the DSU was easily incorporated in the different RTAs since negotiators were very familiar with them. To this effect, some RTAs established ad hoc panels just like the WTO while others created standing tribunals. Despite the creation of these institutions at the RTA level, very few of them are functional; members continue to use WTO dispute settlement mechanism to the extent that as of 2010, 19% of WTO cases are between parties who are RTA members at the same time.[178] Even for RTAs that have functional dispute settlement mechanisms, at times members of that RTA use WTO dispute settlement mechanism, such as MERCOSUR.[179]

172. Treaty of the Southern Africa Development Community, 1992, Article 5.1 read with Article 5.2.g.
173. Julius Emeka Okolo, 'Integrative and Cooperative Regionalism: The Economic Community of West African States' (1985) 39 International Organization 121, 128.
174. Shang-Jin Wei and Jeffrey A Frankel, 'Open Regionalism in a World of Continental Trade Blocs' (National Bureau of Economic Research, Inc 1995) IMF Working Paper 5272 400. < http://ideas.repec.org/p/nbr/nberwo/5272.html > accessed 3 Apr. 2013.
175. Grilli (n. 332) 199.
176. Viet D Do and William Watson, 'Economic Analysis of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 9.
177. Grilli (n. 332) 200.
178. Claude Chase and others *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?* (n. 195) 15.
179. For example, *Argentina – Poultry*; *Brazil – Anti-dumping Measures on Imports of Certain Resins from Argentina* WT/DS 355/R (2006); *Argentina – Transitional Safeguard Measures on Certain Imports of Woven Fabric Products of Cotton and Cotton Mixtures Originating in Brazil* WT/DS190/R (2000).

[C] Third Wave: Post-Uruguay Round

In the third wave of regionalism, there is an increasing rate of North-South and more so of South-South agreements, which now make two-thirds of all the RTAs. This means that in the third wave of regionalism, RTAs span across continents; they are no longer contiguous. Therefore, the term regionalism is used to refer to any preferential agreement between or among trading partners irrespective of the location.[180] Another characteristic of the new regionalism is the rise of mega-regionals, which brings a paradigm shift to trade policy.[181]

There are many reasons to this paradigm shift, which cannot all be exhausted in this section. Nevertheless, the emergence of mega-regionals has largely been linked to the rise of global value chains or production networks resulting from globalisation wherein the supply chains 'expanded from regional production-sharing arrangements to fully-fledged global supply chains'.[182] For instance, although Amazon Kindle 2 e-reader was designed in California (United States), its major parts are manufactured in China, Taiwan, South Korea and others thereby bringing Asia and North America together.[183] Another example is Boeing as captioned in the picture below, which brings Asia, Europe and North America together, and it is not surprising that the new wave of regionalism spans across continents. However, WTO is unable to catch up with new demands such as governance for global value chains; consequently, the new wave of regionalism is witnessing the rise of mega-regionals such as Trans Pacific-Partnership (TPP) or Transatlantic Trade and Investment Partnership (TTIP),[184] which will soon be

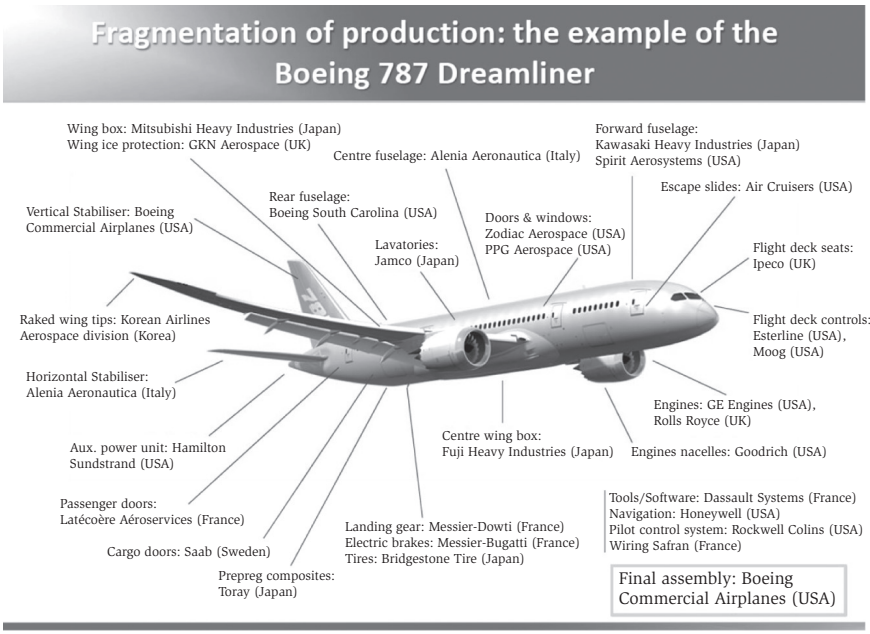
180. Winters (n. 214) 357.
181. Abbott suggests that GATT was not essentially a global institution but a 'Western liberal political confronting a perceived threat from a Second World of "communist" and "socialist" countries.' Therefore, one may argue that what we see as a paradigm shift to trade policy in light of mega-regionals is actually an attempt for Western countries to reposition themselves as lead countries in trade policy against emerging economies such as China, Russia, Brazil and others. Otherwise, why would the mega-regionals exclude the emerging economies if they were concluded purely for economic gains? The current phenomenon is, in a way, similar to the situation of GATT 47 wherein the West dictated trade terms to everyone who joined the club; it is expected that mega-regionals such as TTP and especially TTIP will be open to other countries who will be expected to just adopt the rules of the new club, Frederick M Abbott, 'A New Dominant Trade Species Emerges: Is Bilateralism a Threat?' in William J Davey and John Jackson (eds), *The Future of International Economic Law* (Oxford University Press 2008) 135 & 141.
182. Gary Gereffi and Joonkoo Lee, 'Why the World Suddenly Cares About Global Supply Chains' (2012) 48 Journal of Supply Chain Management 24, 25. However, one can question the assertion that global value chains propelled the formation of mega-regionals because when one looks at TTP, for instance, it excludes economies such as China, yet China is a major and important trading partner for the United States in the value chain.
183. Gary P Pisano and Willy C Shih, 'Restoring American Competitiveness' (2009) 87 Harvard Business Review 5.
184. TPP is made up of the following countries: Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States, available at: < http://www.dfat.gov.au/fta/tpp/ > , accessed 16 Sep. 2013. With regard to TTIP, the first round of negotiations started in July 2013 between the EU and the US; it is unclear if it will become a closed bilateral or be open to other countries. Once concluded, it will be the biggest RTA in the world, available at: < http://ec.europa.eu/trade/policy/in-focus/ttip/ > , accessed 16 Sep. 2013.

a platform for providing rules for supply chain trade while WTO, through the Doha Round, is stuck on agriculture and non-agricultural market access (NAMA).[185] These mega-regionals are feared by many as having the potential to render WTO irrelevant by providing a new platform for trade governance especially because it has become increasingly difficult for WTO to keep up with the growing demands from members.[186] However, some scholars view these fears as alarmist because RTAs, irrespective of the size and coverage, are concluded not purely for economic reasons, as a result, they cannot replace WTO.[187] The EU or NAFTA has not replaced the WTO. Nevertheless, the effect of RTAs, especially the mega-regionals, is that they favour powerful economies such as the US or EU in that the latter dictate the terms of trade to other countries,[188] which is not necessarily the case at the multilateral level as evidenced with the failing Doha Round wherein developing or smaller economies have made their voice to be heard hence stagnation of the Doha Round. Despite these fears, WTO is still regarded as the only organisation that is suited for dealing with trade among nations and reforms are therefore necessary for the organisation to play its key role.[189] For purposes of this book, such reform can be in the field of dispute settlement. Specifically, WTO DSB can be used to litigate cases arising from these mega-regionals; in that way, there will be complementarity between WTO and mega-regionals for the good of the global trading system.

As Professor John Jackson indicated or warns, regionalism can be important to allow a few countries to foster economic cooperation but there is a potential danger of tensions between economic blocs – potentially *TTIP v. BRICS* countries, particularly because there are always political motives behind conclusion of economic blocs;[190] therefore a global or multilateral institution is desirable to mediate any tensions that can arise between blocks using multilateral rules.[191]

185. Richard Baldwin, 'WTO 2.0: Thinking Ahead on Global Trade' in Richard Baldwin, Masahiro Kawai and Ganeshan Wignaraja (eds), *The Future of the World Trading System: Asian Perspectives* (Centre for Economic Policy Research 2013) 25; Mark L Movsesian, 'The Sutherland Report and Dispute Settlement' (2005) 2 International Organizations Law Review 201, 201.
186. Baldwin, 'WTO 2.0: Thinking Ahead on Global Trade' (n. 380).
187. Sam Laird, 'Regional Trade Agreements: Dangerous Liaisons?' (1999) 22 World Economy 1179, 1180.
188. Abbott (n. 376) 133.
189. Biswajit Dhar, 'The Future of the World Trade Organization' in Richard Baldwin, Masahiro Kawai and Ganeshan Wignaraja (eds), *The Future of the World Trading System: Asian Perspectives* (Centre for Economic Policy Research 2013) 121.
190. John H Jackson, 'Perspectives on Regionalism in Trade Relations' (1996) 27 Law and Policy in International Business 873, 875.
191. Jackson, 'Perspectives on Regionalism in Trade Relations' (n. 385) 874.

Figure 2.1 Boeing Supply Chain[192]



As far as the South-South RTAs are concerned, these RTAs mainly address region specific needs such as migration or water shortages while also the rise of South-South RTAs can be linked to newly emerging hubs in the developing world.[193] The third wave of RTAs goes beyond WTO scope and covers areas such as standards, investment, services – specifically, the North-South RTAs have a chapter on services or investment, for instance.[194] With the rise in North-South RTAs, the third wave is more towards multilateralism in that it moves away from GATT exceptions (GSP) and fosters the GATT overarching principle of reciprocity.[195] More significantly, the third wave has seen West and East Asia joining the RTA spree such that of the twenty-seven RTAs in

192. Fragmentation of Production: The Example of Boeing 787 Dreamliner, available at: < https://www.google.co.uk/search?q=boeing+company+value+chain&tbm=isch&tbo=u&source=univ&sa=X&ei=6_M2UqX2II_A7Aau_IDYDQ&ved=0CDYQsAQ&biw=1920&bih=772&dpr=1#facrc=_&imgdii=_&imgrc=bRcLjwNV-Z-dUM%3A%3BJRjtxeaW1K375M%3Bhttp%253A%252F%252Fsiteresources.worldbank.org%252FINTTRADERESEARCH%252FImages%252FBoeing787_.jpg%3Bhttp%253A%252F%252Fweb.worldbank.org%252FWBSITE%252FEXTERNAL%252FTOPICS%252FTRADE%252F0%252C%252CcontentMDK%253A22894003~menuPK%253A2644066~pagePK%253A64020865~piPK%253A51164185~theSitePK%253A239071%252C00.html%3B1164%3B844 > , accessed 16 Sep. 2013.
193. Roberto V Fiorentino, Jo-Ann Crawford and Toqueboeuf Christelle, 'The Landscape of Regional Trade Agreements and WTO Surveillance' in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge University Press 2009) 36.
194. Whalley (n. 198) 518.
195. Fiorentino, Crawford and Christelle (n. 388) 36.

West Asia, eighteen entered into force and were notified post the Uruguay Round.[196] Equally, of the sixty-one RTAs in East Asia, fifty-six came into force after the Uruguay Round, with the majority concluded in the 2000s.[197] In this current wave of regionalism, all the WTO members, except Mongolia, are a member to at least one RTA. In fact, the WTO report indicates that the average number of RTAs per WTO member has risen from two in 1990s to twelve in 2011.[198]

The question remains – what is it that the Uruguay Round brought to stimulate the RTAs? Is it because of the disappointing results of the Doha Round? There is conflicting opinions to this question: some scholars argue that the disappointing results of the Doha Round has caused WTO members to conclude RTAs, meaning that members see RTAs as policy alternative to the WTO.[199] However, there are scholars who hold that RTAs have participated in the sluggish pace of concluding the Doha Round,[200] while other scholars argue that there is no correlation between prolific RTAs and sluggish multilateralism. The reason behind the latter is that where the GATT has stalled, even the RTAs have stalled[201] although this is not always the case because there are areas where RTAs have made significant headway.[202] However, some scholars submit that the reduction of tariffs negotiated in the Uruguay Round may somehow have helped lowering the costs of RTAs.[203] Thus, it is no longer economically costly for countries to conclude an RTA because tariffs have been lowered by the Uruguay Round.

Overall, the number of RTAs in the second and third wave has grown tremendously.[204] With the rise in the RTA number comes the rise of diverse regional dispute

196. List of RTAs, available at: < http://rtais.wto.org/UI/PublicSearchByCrResult.aspx > , (accessed, 12 Jun. 2012).
197. List of RTAs, available at: < http://rtais.wto.org/UI/PublicSearchByCrResult.aspx > , (accessed, 12 Jun. 2012).
198. World Trade Organization (n. 7) 55.
199. Petersmann, 'The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms: Trade and Human Rights' (n. 123) 282.
200. Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008) 43; Debra P Steger, 'The Culture of the WTO: Why It Needs to Change' in William J Davey and John Jackson (eds), *The Future of International Economic Law* (Oxford University Press 2008) 52. < http://search.ebscohost.com/login.aspx?direct = true&scope = site&db = nlebk&db = nlabk&AN = 467659 > accessed 13 Sep. 2013. Steger indicates that different and complicated rules of origin in the 300 RTAs have made it difficult on WTO members to agree on anything resulting in the Doha Round negotiations to be very complex and difficult.
201. Bernard Hoekman, 'Trading Blocs and the Trading System: The Services Dimension' (1995) 10 J. of Econ. Integration 1, 13.
202. The new wave of RTAs cover areas such as competition, services, investment, environmental and labour standards; and, these are the areas that are difficult to conclude at the DOHA Round.
203. Do and Watson (n. 371) 9.
204. However, Pomfret warns that to allege that regionalism is rife in the current wave by counting the number of RTAs is misleading because the count also includes defunct or abrogated RTAs as well as those involving non-WTO members. To this end, he makes an example of the enlargement of EU, pointing out that it effectively reduced the number of RTAs by 65 because those 65 RTAs were among members that are now part of the EU, rendering 65 RTAs defunct. Also, the separation of RTAs notified under GATT and GATS between same members inflate the number, for example, Thailand and Australia notified RTA(s) on the 5 Jan. 2005 involving goods and services and that was treated as two RTAs notified under GATT and GATS

settlement mechanisms, whose jurisdiction overlaps with that of the WTO. Not only has the third wave of regionalism replicated WTO areas of trade regulation while also adopting WTO-plus standards, it has also replicated WTO dispute settlement mechanism as well.[205] Nevertheless, the RTA dispute settlement mechanisms remain dysfunctional. With the WTO-plus standards, it is imperative that the WTO should be redesigned to serve as a platform for solving global disputes on trade; otherwise, the global trading system is under siege especially against the backdrop of mega-regionals.

Summing up this section, what is striking with the RTAs dispute settlement mechanisms is that often RTA members still approach the WTO dispute settlement yet their disputes could well be settled at the RTA level. As a result, it becomes difficult to understand the reasons for why RTAs created dispute settlement organs and this creates an opportunity for WTO to serve as a global institution for settling disputes because seemingly members have a trust in the WTO DSM. The section below interrogates the political economy of the RTA dispute settlement mechanisms with a view to understanding why RTAs created these procedures. This determination will assist in unraveling the question of whether RTAs are a stumbling or building block to the coherent global trading system.

§2.06 POLITICAL ECONOMY OF RTA DSM

A lot of studies have critically examined the political economy behind the prolific conclusion of RTAs.[206] Often, the studies are homogenous albeit with a varying depth of analysis and approaches. To this effect, some scholars have approached the political economy discussion from the political point of view, while others have approached it from a legal or economic angle. Nonetheless, the following political economy factors

respectively, Promfet. Other than double counting, Pomfret is of the view that some RTAs are of less importance to the global economy to be counted because they involve bilateral agreements between small countries, which are insignificant to the global economy – as a result, such RTAs cannot divert nor create trade, also, they cannot be regarded as building or stumbling blocks. In addition, a distinction must be drawn between RTAs that are created as a result of regional disintegration as it happened in the aftermath of breakdown of USSR and former Yugoslavia, which saw countries acceding to WTO and notified the bilateral agreements they already had. Also, Fiorentino, Crawford and Toqueboeuf caution that the count of PTAs based on WTO count is flawed in that some RTAs notified have not even entered into force while approximately seventy operational PTAs are not notified to the WTO, Roberto Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf 'The Landscape of Regional Trade Agreements' 33.

205. For overlaps between RTA and WTO DSM, see Kwak and Marceau (n. 17) 486–525.

206. Jeffrey A Frankel, Ernesto Stein and Shang-Jin Wei, *Regional Trading Blocs in the World Economic System* (Institute for International Economics 1997); Bhagwati, *Termites in the Trading System* (n. 395); Chad Damro, 'The Political Economy of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006); Edward L Mansfield and Helen V Milner (eds), *The Political Economy of Regionalism* (Columbia University Press 1997).

have always come up in the discussion: Often the decline of US's hegemony, which created a vacuum in the WTO leadership and the US's participation in RTAs have been argued to have caused many countries to follow suit.[207] However, some scholars argue that the interdependence of markets – globalisation and deeper integration, both of which are associated with international production networks, are drivers behind the conclusion of RTAs.[208] Moreover, the move to neo-liberal economic development, especially on the part of developing countries that have largely been free-riders (although this factor is also favourable to multilateralism) saw the conclusion of many RTAs.[209] Yet the other side of neo-liberal economic development made developing countries conclude RTAs for fear of competition at the multilateral sphere, hoping to gain from economies of scale while learning trade negotiation tactics among peers.[210] Also, developing countries conclude RTAs to increase negotiating leverage at the multilateral level although in practice they can still succumb to pressure from just one major economy such as US. Other RTAs are concluded to lock-in domestic reforms, and Mexico is often cited as a good example in relation to NAFTA.[211] Another factor, which has been cited by many scholars, is the push for WTO-plus standards by the developed world – an agenda which fails at the multilateral level.[212] Yet some North-South RTAs are concluded out of coercion from developed countries.[213] A good example of such RTAs is the EU Economic Partnership Agreement (EPA).[214] Some RTAs are concluded as part of foreign policy[215] but a recent move by the US to trade with Russia indicates

207. The former USTR (Robert Zoellick) would deny that US has changed focus Robert Zoellick, 'The United States, Europe and the World Trading System' (2001) <http://www.ustr.gov/archive/assets/Document_Library/USTR_Speeches/2001/asset_upload_file206_4282.pdf>.
208. World Trade Organization (n. 7) 113.
209. Robert Gilpin and Jean M Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001) 5.
210. Bhagwati, *Termites in the Trading System* (n. 395) 41.
211. Frankel, Stein and Wei (n. 401) 216–217. However, this argument is not persuasive enough given that a country can better lock in reforms under the WTO than under RTA as RTA trade policies are easy to change due to limited number of players unlike with the WTO where all the 158 WTO members have to agree to change a certain policy position. Nonetheless, the stronger argument for locking in reforms through RTA is that due to small number of players, monitoring of policy changes is very intense other than with the WTO where members may not even realise when a member has reversed policies, Chad Damro 'The Political Economy of Regional Trade Agreements' in Lorand Bartels & Federico Ortino *Regional Trade Agreements and the WTO Legal System* (2006) 36.
212. Whalley (n. 198) 518 & 531.
213. Bhagwati, *Termites in the Trading System* (n. 395) 43.
214. Singapore Declaration: Issues of environment (*Tuna-Dophin* case under GATT 47 panel) and Labour standards (developing countries feared that labour standards would be used for protectionist policies while developed countries wanted labour standards pushed through) in the Singapore Ministerial Declaration, WT/Min(96)/Dec adopted 18 Dec. 1996, para. 4. Added to environment and labour standards were information technology and pharmaceutical – the negotiations on removal of tariff barriers on information technology were sponsored by US, EU, Canada and Japan – and this resulted in the Declaration on Trade in Information Technology adopted July 1997. Singapore put more new agenda items – trade and investment; trade and competition policy; government procurement.
215. Petros C Mavroidis and others, 'Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?' (1998) 31 Journal of World Trade 147, 154.

the shift from foreign policy to economic benefits.[216] Another political economy factor for a lot of RTAs is just the fear of being left out – marginalisation syndrome.[217] Other RTAs are concluded for security reasons, especially those concluded with developed nations such as the US, or those that have had security problems in the past[218] while some RTAs are concluded to address common problems such as drugs or illegal migration, which has been situation in SADC.[219] However, RTA conclusion has become a career opportunity for both diplomats negotiating these agreements and politicians using them as campaigning tools.[220] Economic recession[221] and the ease with which RTAs are negotiated in comparison to WTO agreements are also factors fuelling RTA conclusion.[222] From this summary, it appears there are more political reasons behind the conclusion of RTAs than there are economic reasons. It is for these reasons that Cottier and Foltea submit that whereas countries joining the WTO do so for economic gains arising from the MFN principle, the same could not be said for RTAs as political reasons seem to be a driving force for membership to the RTAs.[223]

Contrary to other studies on political economy of RTAs as summarised above, this work looks at the political economy of RTA dispute settlement mechanisms. The idea is to understand the reasons behind the creation of such institutions against the backdrop of the existing DSB in the multilateral arena. To this end, most RTAs have a chapter on dispute settlement, a lot of which copycat WTO DSB.[224] Also, a lot of RTA provisions replicate those of the WTO while in some provisions, RTAs simply refer to WTO provisions – meaning, material jurisdiction is almost the same. As a result, RTA disputes can easily be resolved at the WTO. In the same manner, there is nothing novel with many RTA dispute settlement processes. In fact, many RTAs emulate the WTO process – consultation, good offices, conciliation and mediation.[225] In addition, RTAs

216. James Politi and Neil Buckley, 'US Moves Closer to Russia Trade Bill' *Financial Times* (25 Jul. 2012) 7. < http://www.ft.com/cms/s/0/799e278a-d5aa-11e1-a5f3-00144feabdc0.html#axzz2PQ29qUHR > accessed 3 Apr. 2013.
217. Bhagwati, *Termites in the Trading System* (n. 395) 45.
218. Glania and Matthes (n. 333) 14; Bhagwati, *Termites in the Trading System* (n. 395) 44; WTO, 'The WTO and Preferential Trade Agreements: From Co-Existence to Coherence' (WTO 2011) 95 < http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf > accessed 20 Oct. 2012; Strom C Thacker, 'NAFTA Coalitions and the Political Viability of Neoliberalism in Mexico' (1999) 41 Journal of Inter-American Studies and World Affairs 57.
219. Damro (n. 401) 32–33.
220. Whalley (n. 198) 518 & 531.
221. WTO (n. 413) 42.
222. Glania and Matthes (n. 333) 18; Hoekman (n. 396) 13; Richard Baldwin, 'Stepping Stones or Building Blocks? Regional and Multilateral Integration' (2004) 4–5.
223. Thomas Cottier and Marina Foltea, 'Constitutional Functions of the Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 44.
224. For the comprehensive analysis of the subject matter, see Kwak and Marceau (n. 17).
225. See for example, NAFTA, Ch. 20; ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *done at* Vientiane, Lao PDR on 29 Nov. 2004, Articles 3 & 4; SADC Consolidated Protocol on Trade as amended – zero draft, (2012) Annex VI, Articles 3 & 4. Of course, there are those RTAs which do not necessarily follow WTO processes for settlement of disputes, for example, Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, signed in 2001, [hereinafter Revised CARICOM Treaty], Ch. 9.

also follow the panel process, and some have even established appeal processes to the standing courts.[226] Consequently, one wonders about the reasons for why the RTAs established their own dispute resolution mechanisms when they could simply resort to the WTO DSB. On this note, the following section on the political economy of RTA dispute settlement seeks to unlock this issue – that is, why did the RTAs establish their own dispute settlement mechanisms?

[A] Consequence of Creation of New Norms

As indicated in the introductory chapter, the purpose of the RTAs is to provide WTO-plus standards which are not in conflict with the WTO law. Further, it was indicated in the introductory chapter that creation of rights and obligations presupposes the creation of a dispute settlement mechanism to enforce such rights and obligations. Therefore, RTAs, as well, created dispute settlement mechanisms. Without their own dispute settlement mechanisms, it would be difficult for RTAs to enforce WTO-plus standards given that such standards go beyond the WTO covered agreements, which then makes it impossible to enforce them at the WTO level because WTO panels do not have jurisdiction over WTO-plus obligations.

[B] No Functional Dispute Settlement Prior to WTO

Prior to the advent of the WTO, there was no optimally functional dispute settlement mechanism since the GATT system was marred with problems as indicated in the previous sections of this work. In particular, the consensus rule that existed under the GATT system discouraged countries from lodging cases before the GATT as it became difficult to establish the panel, let alone adopting the GATT decisions. Other than the positive consensus rule for the adoption of panel and panel decisions, the problem of forum shopping among the eight Agreements made it even slower for establishment of the panels.[227] Also, the increase in non-compliance with the GATT decisions, the low rate of settlement of anti-dumping and countervailing duties, and the increasing rate of unilateral trade sanctions made the GATT dispute settlement mechanism undesirable.[228] As a result, RTAs established in the second wave of regionalism post World

226. For example, NAFTA, Ch. 20; ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Articles 5 & 12; Agreement between New Zealand and Singapore on Closer Economic Relationship, *entered into force* on 1 Jan. 2001, Part 10; Free Trade Agreement between the EFTA States and the United Mexican States, *singed at* Mexico City on 27 Nov. 2000, *entered into force* on 1 Jul. 2001, [hereinafter, EFTA-Mexico FTA], Article 73; SADC Protocol on Trade *adopted* in Maseru, Lesotho in 1996, *entered into force* 25 Jan. 2000, Article 32 read with Treaty of Southern African Development Community, 32 ILM 120, [hereinafter SADC Treaty], Article 32; MERCOSUR Protocol on Settlement of Disputes *signed at* Olivos, Argentina on 18 Feb. 2002, 42 I.L.M. 2, *entered into force* January 2004, available in Spanish at < http://www.mercosur.int/innovaportal/file/102/1/protocolo_olivos_es.pdf > , Articles 9 and 18.
227. Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1st edn, Kluwer Law International 1997) 53.
228. Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System* (n. 422) 53.

War II were persuaded to establish their own dispute settlement mechanisms even though they were equally dysfunctional. The Canada–US FTA Chapter 18 dispute settlement on anti-dumping and countervailing duties was a reflection of a loss of confidence in the GATT dispute settlement mechanism.

[C] Deeper Integration

One of the reasons for concluding RTAs stems from the need for deeper integration,[229] which at the moment is outside of the WTO's scope of work. Judging from the current mode of production, it appears that WTO Member States need deeper integration. This is so because production is no longer limited to one country; goods are produced at different stages in different countries to utilise the economies of scale and comparative advantage.[230] As a result, countries involved in a production network of a particular good will want to conclude an RTA. In addition, production network is no longer limited to developed countries; increasingly developed and developing countries find themselves involved in a production network of particular goods yet the developing countries may not have sophisticated laws to govern trade in intermediate goods. Consequently, RTAs involving countries in a production network are likely to go beyond shallow integration to deeper integration so as to fill in the governance gap existing in the developing partner countries.[231] Examples can be drawn from Mexico in relation to NAFTA and accession of Eastern European countries into the EC. In this case, Mexico and Eastern European countries had to go through stringent policy and governance changes. Given that deep integration usually requires the establishment of common institutions to oversee policy change, implementation and regulation on the issues concerned,[232] dispute settlement mechanisms are among the institutions that are bound to be created at the RTA level.

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229. Trade agreements that deal with removal of tariffs at the border and non-discrimination of foreign goods at the domestic market are referred to as shallow integration. Such agreements do not go beyond removal of tariffs and national treatment – they do not venture into domestic policy. On the other hand, trade agreements that include domestic regulation are referred to as deep integration, see Robert Z Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (Brookings Institution Press 1996) 17; World Trade Organization (n. 7) 110. Two features of deep integration are (1) increase the coverage of trade beyond tariff removal or liberalisation (2) institutional depth of an agreement – that is, the extent to which policy prerogatives are delegated to supra-national body of the region. Of course, these two features are often related since often extending trade coverage requires creation of common institution to administer this deep integration.
230. OECD, *Interconnected Economies Benefiting from Global Value Chains: Benefiting from Global Value Chains* (OECD Publishing 2013) 108.
231. Kazuhiko Yokota, 'Parts and Components Trade and Production Networks in East Asia: A Panel Gravity Approach' in Daisuke Hiratsuka and Yoko Uchida (eds), *Vertical Specialization and Economic Integration in East Asia* (IDE-JETRO 2008) Ch. 3; Lawrence (n. 424) 10–18.
232. For instance, ASEAN has South East Asian Central Banks established in 1993, ASEAN University Network established in 1995, ASEAN-EC Management Centre established in 1991, all available at: < http://www.aseansec.org/asean-centres-facilities/ > ; CARICOM has development bank although it is an associate institution. A list of other institutions in the CARICOM is found at: < http://www.caricom.org/jsp/community/institutions.jsp?menu = community > ; EFTA has institutions such as EFTA Council, EFTA Authority and EFTA Court; East

Other than policy and governance needs (deeper integration), countries are interested in behind-the-border regulation (domestic regulation). The WTO MFN seems to be inadequate and need to be supplemented by domestic regulation. It is for this reason that many RTAs concluded today are much more concerned with domestic regulation, and NAFTA is the perfect example in this regard. Therefore, the RTA focus on domestic regulation creates a new regime, which in turn calls for dispute settlement institutions to adjudicate on matters arising out of domestic regulation within an RTA. For instance, one of the concerns for the Trans-Pacific Partnership is behind-the-border regulation.[233]

[D] WTO-Plus Standards

When the WTO found it difficult to conclude the Doha Round, developed countries instigated to get their demands through the backdoor through the adoption of RTAs. Today, a lot of RTAs concluded between the developed and developing countries enshrine the Singapore issues. A good example is the EU–EPAs (and NAFTA even though it was concluded before the launch of Doha), both of which contain chapters on stronger intellectual property rights, government procurement, labour standards, services, investment, and competition policy. What is striking is the observation made by Whalley in which he indicated that countries that were in favour of issues that were not concluded at the multilateral level concluded RTAs enshrining those issues. Also, Whalley found that there is a pattern in the agreements on competition or investment reflecting the text that was the basis of the Doha negotiation.[234]

Since the WTO-plus standards are outside of the WTO jurisdiction, it follows that there arises a need to have a dispute settlement mechanism at the RTA level to adjudicate over this new regime. As a result, WTO-plus standards are the contributing factor behind the creation of the RTA dispute settlement mechanisms.

[E] 'Monkey Do, Monkey See' Effect: Emulating the EU Model

Developing countries, especially those in Africa, often want to emulate the European Communities model. Since the EC created a court, African RTAs also followed suit contrary to their intrinsic value – dialogue.[235] It is for this reason that trade dispute settlement mechanisms are never deployed in Africa yet a lot of treaty violation takes place there. These bodies, although intended to settle trade disputes within these

African Community has institutions reflecting deeper integration such as East African Legislative Assembly, Council of Ministers, East African Court of Justice available at: < http://www .eac.int/index.php?option = com_content&view = article&id = 49&Itemid = 66 > .

233. Andrew L Stoler, 'WTOplus Issues in the Multilateral Trading System', *Trade and Development Symposium* (ICTSD 2011) 2.

234. Whalley (n. 198) 519.

235. African governments do not believe in adversarial dispute settlement – rather, they believe in dialogue no matter how legal the issue is. From trade to human rights and international crimes, they always want to negotiate, and reach consensus which often proves impossible.

blocks, are white elephants, which have now been hijacked by citizens and transformed into human rights courts. Even so, most governments are not happy with these human rights judgments in Africa to an extent that in Southern Africa, SADC Tribunal was suspended after it issued human rights rulings against Zimbabwe.[236]

Not only Africa emulates Europe but other regions as well. Many RTAs are based on the EC model. For instance, other regions such as Asia and Latin America also grandfather EC.[237] It is for this reason that many of these RTA dispute settlement institutions are dysfunctional because there was no clear objective behind their establishment other than emulating Europe or the WTO.

[F] Hegemon's Interests

While the WTO dispute settlement procedure has been hailed for its success, RTAs involving the hegemonic powers are not willing to subject their disputes to the WTO. As a result, it is imperative for them to create their own dispute settlement. This is evidenced by many, if not all, of the EC RTAs. For instance, in the negotiations for EC-Switzerland FTA, the EC refused to have the FTA under WTO dispute settlement mechanism despite proposals made by Switzerland.[238] EC simply does not want to be subjected to the WTO dispute settlement mechanism. This is primary because a lot of RTAs concluded by the EC resemble EC law, and the EC does not want any institution other than the European Court of Justice (ECJ) to interpret their law.[239]

§2.07 ARE RTAs BUILDING BLOCKS OR STUMBLING BLOCKS TO THE GLOBAL TRADING SYSTEM?

Having outlined the political economy of RTA dispute settlement above, in what follows is the discussion on the level of cooperation between the RTA and WTO dispute settlement mechanisms. The rationale is to determine whether RTAs are stumbling or building blocks to the global trading system. This question has been looked at before[240] and proved difficult to assess since theory and practice give conflicting results.[241] Thus, there has not been a definite answer as to whether RTAs are building blocks to multilateralism – the answer simply depended on the school of thought the researcher aligned himself with. For this work though, the building and stumbling block debate is approached from the perspective of dispute settlement, instead of the conventional approach. The central question is whether the RTA dispute settlement institutions are a building or stumbling block to multilateralism (WTO) thereby fragmenting the global

236. SADC Tribunal, available at: < http://www.sadc.int/about-sadc/sadc-institutions/tribun/ > , accessed 12 Jan. 2013.
237. For instance, MERCOSUR in Latin America, ASEAN in Asia and CARICOM in the Caribbean.
238. This is the information I got from the Professor Matthias Oesch, a Swiss professor who had the privilege to know the negotiation process between EU and Switzerland.
239. Opinion 1/91 on Draft Agreement between EEC and EFTA, of 13 Dec. 1991.
240. C Fred Bergsten, 'Open Regionalism' (1997) 20 World Economy 545, 549; Lawrence (n. 424) 2–4; Panagariya (n. 337) 507.
241. Lawrence (n. 424) 4–6.

trading system in light of the dictates of multilevel governance that the world is now operating under. Thus, in the light of multilevel governance doctrine, not only do the RTAs have to act within the framework of the larger unit – the WTO, but in turn the WTO has to take cognizance of the lower bodies – RTAs. In this way, an architecture building to the global trading system is created and coherence ensues.

Unlike the conventional approach to building or stumbling block debate where a definite answer has not been established, the same is not the case with dispute settlement. With regard to dispute settlement, it is submitted that there lies a definite answer to the stumbling or building block debate. In what follows is an assessment on whether or not the RTA dispute settlement institutions are stumbling or building block to the coherent global trading system.

[A] Reference to WTO Law

Before any tribunal is the question of whether norms have been violated or not. Norm setting is intrinsic in determining whether RTAs are a stumbling block to multilateralism. Thus, if RTAs adopt norms outlawed by the WTO and disregard WTO law, this would invariably be regarded as a stumbling block. In multilevel governance, it is not surprising that RTAs reiterate WTO standards in numerous provisions while in some provisions RTAs do not go further than referring to the WTO agreements. Of course, in other instances, RTAs provide standards higher than those of the WTO,[242] and this should not come as a surprise because WTO law is a minimum threshold. In essence, RTAs are meant to facilitate further liberalisation (better standards) than the WTO; otherwise there is no point in forming an RTA.[243] Yet again, there are those instances where RTAs go below the minimum threshold (WTO-minus), and in a few instances

242. By providing for WTO-plus standards, RTAs serve a testing ground for new areas that can, in future, be adopted at the multilaterally. In this way, RTAs are building blocks to multilateralism. An example can be drawn from e-trade, which is one area where the WTO rules are silent yet much of the trade takes place on the internet, unregulated. As a result, RTAs have largely covered this area and WTO can model around the best practice or the successful e-trade regulation from RTAs, although the best practice will resemble North practices to the detriment of the South, see Pierre Sauvè, '"The Future of the WTO and the International Trading System: Investigating Institutional Crisis" A Paper Presented at the Workshop on "Future of the WTO and the International Trading System",' *Future of the WTO and the International Trading System* (European Parliament 2012) 16.

243. It is for this reason that the author finds fears expressed by Mashayeki et al. that RTAs can substitute WTO because of WTO-plus standards being baseless, Mina Mashayekhi, Lakshmi Puri and Taisuke Ito, 'Multilateralism and Regionalism: The New Interface' in Mina Mashayekhi and Taisuke Ito (eds) Multilateralism and Regionalism: The New Interface (2005: UNCTAD) 6. These fears are baseless because RTAs cannot be a sufficient ground for international trade; countries will always need the WTO as no region is independent from the rest of the world, Robert Lawrence Regionalism, Multilateralism, and Deeper Integration (1996) 20. Other than this, non-members want to join the WTO and no country has ever left the WTO, Peter Gallagher, *The first ten years of the WTO 1995-2005*, 128.

RTAs adopt policies that have been outlawed by the WTO.[244] All of these contraventions (WTO-minus and incorporation of subjects outlawed in the WTO) are not supposed to happen. In fact, such instances ought to have been rectified during the notification stage had things been normal in the WTO. It is pity that WTO Member States do not want to interrogate RTAs that are WTO-incompatible. Nevertheless, not only do RTAs reiterate the WTO law, RTA panels/tribunals go even further and seek aid from the WTO DSB decisions when deciding RTA disputes.[245] For these reasons, RTAs are regarded as building blocks to the global trading system.

[B] Replication of the WTO Dispute Settlement Institutions and Processes

RTAs seem to copycat the WTO dispute settlement process, albeit with a small differing margin, largely due to financial constraints and size of the respective RTAs. To this effect, as far as the institutions are concerned, RTAs have panels similar to those of the WTO to settle disputes. Some RTAs even provide for appeal or review mechanisms similar to the WTO AB. Other than institutions, just as it is done in the WTO, RTAs provide for good offices, conciliation and mediation. When this fails, RTAs resort to arbitration and establish panels while others go further and allow appeals to standing courts or committees.[246] In this way, procedural law for settling trade disputes has been adopted, irrespective of whether settlement of disputes happen at the RTA or WTO level, and this is good for the global trading system. On this note, RTAs are regarded as building blocks to the global trading system.

[C] Attempt to Present RTA Matters in the WTO DSB

There has been an attempt from some WTO Member States to present RTA matters before the WTO dispute settlement mechanism. For instance, in *Mexico – Soft Drinks*, the US brought a complaint against Mexico in the WTO on a dispute that arose at the RTA level. Mexico pleaded in the alternative for the panel to consider the Mexico – US sugar agreement under NAFTA. The panel declined Mexico's request and this was affirmed by the AB. In essence, the Appellate Body indicated that were Mexico's request allowed by the panel, it would drive the panel to consider whether or not the US has acted in line with or contrary to NAFTA obligations; a determination which the panel could not do because its jurisdiction is only limited to the covered agreements and NAFTA is not one of them.[247]

244. An example can be drawn from the trade-related investment measure, which has been outlawed in the WTO yet MERCOSUR introduced it on firms operating within the region, see Panagariya (n. 337) 500.
245. See for instance, *Cross border Trucking Services*, USA-MEX-98-2008-01, NAFTA Panel Report (2001).
246. For RTA DSM, see Kwak and Marceau (n. 17) 486–525.
247. *Mexico – Soft Drinks*, para. 56.

Another case where an attempt was made by an RTA member to have the WTO take cognizance of the RTA dispute settlement is *Argentina – Poultry*.[248] This is the case lodged by Brazil against Argentina arising from the Argentina anti-dumping duties levied on poultry from Brazil. As a result, Brazil claimed that Argentina violated its GATT obligations by imposing anti-dumping duties on poultry imports from Brazil. In response, Argentina raised two preliminary issues, relevant to this work. The first was whether Argentina's request to the panel should take into consideration proceedings that took place in MERCOSUR on the same complaint before the WTO panel.[249] In the alternative, Argentina claimed that the panel should be bound by the MERCOSUR ruling in light of Articles 31.3(c) of the VCLT and 3.2 of DSU.[250]

The panel rejected Argentina's request on the basis that Argentina had not alleged that Brazil had violated substantive provisions of the WTO agreements by bringing a claim against Argentina to the WTO panel. Consequently, Brazil cannot be deemed to have acted in bad faith.[251] On Argentina's request that in the alternative the panel should be bound by the MERCOSUR ruling, the panel ruled that it is not bound by the previous WTO panel decision, and therefore it cannot in any way be bound by non-WTO arbitral panels.[252]

Quite glaringly, the WTO panels and AB blatantly disregard RTA law and tribunals' rulings on matters that are at the centre of the WTO claims. From the cases referred to above, there is no doubt that forum shopping takes place in the global trading system, which is perpetuated by the WTO disregard of the RTAs. Not only does the WTO panels' indifference cause forum shopping but it also causes confusion in the WTO jurisprudence itself. Thus, while the panel refused to consider NAFTA law in *Mexico – Soft-Drinks*, the panel in *Argentina – Anti-Dumping* considered MERCOSUR treaties (Protocol of Brasilia and Protocol of Olivos).

§2.08 CONCLUSION

From the introductory section of this chapter, it was clearly indicated that the core determination of this chapter is to find out whether RTAs are a stumbling or building block to multilateralism. On the face of it, it looks as if RTAs are a stumbling block by virtue of having created own dispute settlement mechanisms yet a closer look indicates

248. *Argentina – Poultry.*
249. *Argentina – Poultry*, para. 7.21.
250. Argentina submits that Article 3.2 of the DSU provides a rule of interpretation for the panel, and WTO legal practice has confirmed that rule by referring to Articles 31 and 32 of the Vienna Convention. Argentina asserts that, in accordance with Article 31.3(c) of the Vienna Convention, the interpretation of a treaty must take account of all relevant rules of international law applicable between the parties at the time of implementation. In Argentina's view, the regulatory framework of MERCOSUR and the legal consequences deriving from the implementation of the Protocol of Brasilia by the Ad Hoc Arbitral Tribunal in the case at issue are relevant rules of public international law within the meaning of Article 31.3(c) of the Vienna Convention, such that the panel is bound by earlier MERCOSUR rulings regarding the measure at issue, *Argentina – Poultry*, para. 7.21.
251. *Argentina – Poultry*, para. 7.36.
252. *Argentina – Poultry*, para. 7.41.

otherwise. In particular, although some of the reasons deduced above behind creation of RTA dispute settlement can be feared to be stumbling blocks, RTA willingness to submit cases to WTO indicates that RTA are a building block. In summary, contrary to the most commonly held position that RTAs are the stumbling block to multilateralism, the conclusion drawn here is that RTAs are willing to be building blocks to the global trading system while the WTO is the stumbling block by virtue of disregarding RTA claims and laws.

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Appendices

Standard Typeset Example

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APPENDIX I

The Association of Litigation Funders of England and Wales – Code of Conduct for Litigation Funders – November 2016 Revision

CODE OF CONDUCT FOR LITIGATION FUNDERS[1]

November 2014[2]

1. This code ('the Code') sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of disputes within England and Wales.
2. A litigation funder:
   2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or
   2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'), ('a Funder') in each case:
   2.3 to fund the resolution of disputes within England and Wales; and

1. Copyright Association of Litigation Funders, 2016. Reprinted with Permission. The original version of this document is available at http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf.
2. This is the date of the original version of this document available on the Association of Litigation Funders website. However, the date at the end of this document is November 2016, which is the correct date of the latest revision of this Code. The only change from the 2014 version to the 2016 version is that the capital adequacy amount was raised from GBP 2 million to GBP 5 million in Section 9.4.2, below.

2.4 where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of resolving disputes by litigation, arbitration or other dispute resolution procedures.

In return the Funder, Funder's Subsidiary or Associated Entity:

2.5 receives a share of the proceeds if the claim is successful (as defined in the LFA); and

2.6 does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of disputes within England and Wales.
4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party, which shall be a matter governed, if at all, by the provisions of the LFA.
5. A Funder shall inform a Funded Party as soon as possible and prior to execution of an LFA:
   5.1 if the Funder is acting for and/or on behalf of a Funder's Subsidiary or an Associated Entity in respect of funding the resolution of disputes within England & Wales; and
   5.2 whether the LFA will be entered into by the Funder, a Funder's Subsidiary or an Associated Entity.
6. The promotional literature of a Funder must be clear and not misleading.
7. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity.
8. An LFA is a contractually binding agreement entered into between a Funder, a Funder's Subsidiary or Associated Entity and a Funded Party relating to the resolution of disputes within England and Wales.
9. A Funder will:
   9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;
   9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;
   9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder;
   9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities

to fund all the disputes that they have agreed to fund and in particular will;

9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;

9.4.1.1. to pay all debts when they become due and payable; and

9.4.1.2. to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.

9.4.2 maintain access to a minimum of £5 m of capital or such other amount as stipulated by the Association;

9.4.3 accept a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify timeously the Association and the Funded Party if the Funder reasonably believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances;

9.4.4 undertake that it will be audited annually by a recognised national or international audit firm and shall provide the Association with:

9.4.4.1. a copy of the audit opinion given by the audit firm on the Funder's or Funder's Subsidiary's most recent annual financial statements (but not the underlying financial statements), or in the case of Funders who are investment advisors to an Associated Entity, the audit opinion given by the audit firm in respect of the Associated Entity (but not the underlying financial statements), within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the Association shall be entitled to enquire further into the qualification expressed and take any further action it deems appropriate; and

9.4.4.2. reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the Funder or Funder's Subsidiary or Associated Entity satisfies the minimum capital requirement prevailing at the time of annual subscription.

9.5 comply with the Rules of the Association as to capital adequacy as amended from time to time.

10. The LFA shall state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Party is liable to the Funded Party to:

10.1 meet any liability for adverse costs;

10.2 pay any premium (including insurance premium tax) to obtain costs insurance;
10.3 provide security for costs; and
10.4 meet any other financial liability.

11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may:
    11.1 provide input to the Funder Party's decisions in relation to settlements;
    11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:
        11.2.1 reasonably ceases to be satisfied about the merits of the dispute;
        11.2.2 reasonably believes that the dispute is no longer commercially viable; or
        11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.
12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Party to terminate a LFA in the absence of the circumstances described in clause 11.2.
13. If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that:
    13.1 if the Funder or Funder's Subsidiary or Associated Entity terminates the LFA, the Funder or Funder's Subsidiary or Associated Entity shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 11.2.3;
    13.2 if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.
14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder.
15. The Association shall maintain a complaints procedure. A Funder consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission by the Funder, Funder's Subsidiary or Associated Entity.
16. The Code (as amended) applies to LFAs commencing on or after the date hereof.

November 2016

APPENDIX II

Civil Law (Amendment) Bill*

REPUBLIC OF SINGAPORE
GOVERNMENT GAZETTE
BILLS SUPPLEMENT
Published by Authority

NO. 38] MONDAY, NOVEMBER 7 [2016

First published in the Government Gazette, Electronic Edition, on 7th November 2016 at 5:00 pm.

Notification No. B 38 — The Civil Law (Amendment) Bill is hereby published for general information. It was introduced in Parliament on 7th November 2016.

Civil Law (Amendment) Bill

Bill No. 38/2016.

Read the first time on 7 November 2016.

A BILL
intituled

An Act to amend the Civil Law Act (Chapter 43 of the 1999 Revised Edition) and to make a related amendment to the Legal Profession Act (Chapter 161 of the 2009 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act is the Civil Law (Amendment) Act 2016 and comes into operation on a date that the Minister appoints by notification in the Gazette.

New sections 5A and 5B

2. The Civil Law Act is amended by inserting, immediately after section 5, the following sections:

"Abolition of tort of maintenance and champerty

5A. —(1) It is declared that no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law.

(2) Subject to section 5B, the abolition of civil liability under the law of Singapore for maintenance and champerty does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Validity of certain contracts for funding of claims

5B. —(1) This section applies only in relation to prescribed dispute resolution proceedings.

(2) A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.

(3) Every qualifying Third-Party Funder and funded party must, in relation to a third-party funding contract, comply with and ensure that such requirements as may be prescribed under subsection (8) are complied with.

(4) Where a Third-Party Funder —

(a) ceases to be a qualifying Third-Party Funder; or

(b) fails to comply with any prescribed requirement mentioned in subsection (3),

the rights of the Third-Party Funder under or arising out of the third-party funding contract affected by or connected with the disqualification or non-compliance are not enforceable by action or other legal proceedings, including arbitration proceedings.

(5) A Third-Party Funder may apply to the court or arbitral tribunal for relief against the disability imposed by subsection (4).

(6) The court or arbitral tribunal, on being satisfied —

(a) that the disqualification or non-compliance was accidental or due to inadvertence or some other sufficient cause; or

(b) that on other grounds it is just and equitable to grant relief,

may grant such relief either generally, or as respects any third-party funding contract, on such conditions (if any) as the court or arbitral tribunal may impose, including (but not limited 20 to) a condition that the costs of the application be paid by the Third-Party Funder.

(7) Subsection (4) does not prejudice the rights of any other party as against the Third-Party Funder in respect of a third-party funding contract.

(8) The Minister may make regulations necessary or convenient to be prescribed for carrying out or giving effect to this section, including—

(a) prescribing the qualifications and other requirements that a Third-Party Funder must satisfy or comply with to be a qualifying Third-Party Funder;

(b) prescribing the class or classes or description of dispute resolution proceedings to which this section applies; and

(c) governing the provision and manner of third-party funding including the requirements that the Third-Party Funder and the funded party must comply with.

(9) Any addition, deletion or other variation to the qualifications and other requirements of a Third-Party Funder or the class or classes or description of dispute resolution proceedings prescribed under subsection (8) does not affect any contract which was entered into before the date of commencement of that addition, deletion or variation.

(10) In this section, unless the context otherwise requires —

"arbitral tribunal" or "court" means any arbitral tribunal or court before which proceedings to enforce a right referred to in subsection (4) are commenced or before which an issue relating to subsection (4) arises;

"dispute resolution proceedings" means the entire process of resolving or attempting to resolve a dispute between 2 or more parties and includes any civil, mediation, conciliation, arbitration or insolvency proceedings;

"funded party" means a party to dispute resolution proceedings who enters into an agreement with a Third-Party Funder for the funding of all or part of the costs of the proceedings and includes a liquidator or judicial manager;

"qualifying Third-Party Funder" means a Third-Party Funder who satisfies and continues to satisfy such qualifications and other requirements as may be prescribed;

"Third-Party Funder" means a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party;

"third-party funding contract" means a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled.".

Related amendment to Legal Profession Act

3. Section 107 of the Legal Profession Act (Cap. 161) is amended by inserting, immediately after subsection (3), the following subsections:

"(3A) To avoid doubt, this section does not prevent a solicitor from —

(a) introducing or referring a Third-Party Funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;

(b) advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and

(c) acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract.

(3B) In subsection (3A) —
"direct financial benefit" does not include any fee, disbursement or expense payable by the solicitor's client for the provision of legal services by the solicitor to the client;
"Third-Party Funder" and "third-party funding contract" have the same meanings as in section 5B of the Civil Law Act (Cap. 43).".

EXPLANATORY STATEMENT

This Bill seeks to amend the Civil Law Act (Cap. 43) to permit the funding of the costs of certain prescribed class or classes or description of dispute resolution proceedings by qualifying Third-Party Funders. The phrase "dispute resolution proceedings" is defined to mean the entire process of resolving or attempting to resolve a dispute between 2 or more parties and includes any civil, mediation, conciliation, arbitration or insolvency proceedings.
The Bill seeks to achieve the following objectives:

(a) to clarify that the common law tort of maintenance and champerty is abolished in Singapore;
(b) to clarify that in certain prescribed categories of dispute resolution proceedings, third-party funding contracts are not contrary to public policy or illegal;
(c) to provide for regulations to be made for the prescribed qualifications and other prescribed requirements that every Third-Party Funder has to comply with;
(d) to provide that a Third-Party Funder that fails to comply with any prescribed qualification or other prescribed requirement cannot enforce its rights arising from or under the third-party funding contract;
(e) to make a related amendment to the Legal Profession Act (Cap. 161) to clarify that section 107 of that Act does not prevent a solicitor from —
    (i) introducing or referring a Third-Party Funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;
    (ii) advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and
    (iii) acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract.

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.

APPENDIX III

Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016

Contents

Bill

To Pay

Amend the Arbitration Ordinance and the Mediation Ordinance to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

(1) This Ordinance may be cited as the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2016.
(2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.
(3) The following provisions come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette—
  (a) section 3, in so far as it relates to Divisions 3 and 5 of the new Part 10A;
  (b) section 4, in so far as it relates to the new section 7A(c) and (d).

2. Enactments amended

(1) The Arbitration Ordinance (Cap. 609) is amended as set out in Part 2.
(2) The Mediation Ordinance (Cap. 620) is amended as set out in Part 3.

Part 2

Amendment to Arbitration Ordinance

3. Part 10A added

After Part 10—

Add

"Part 10A

Third Party Funding of Arbitration

Division 1—Purposes

98E. Purposes

The purposes of this Part are to—

(a) ensure that third party funding of arbitration is not prohibited by particular common law doctrines; and
(b) provide for measures and safeguards in relation to third party funding of arbitration.

Division 2—Interpretation

98F. Interpretation

In this Part—

advisory body (諮詢機構) means the person appointed by the Secretary for Justice under section 98W(1);
arbitration (仲裁) includes the following proceedings under this Ordinance—
(a) court proceedings;
(b) proceedings before an emergency arbitrator; and
(c) mediation proceedings;
arbitration body (仲裁機構)—
(a) in relation to an arbitration (other than the proceedings mentioned in paragraphs (b) and (c))—means the arbitral tribunal or court, as the case may be;
(b) in relation to proceedings before an emergency arbitrator—means the emergency arbitrator; or
(c) in relation to mediation proceedings—means the mediator appointed under section 32 or referred to in section 33, as the case may be;
arbitration funding (仲裁資助), in relation to an arbitration, means money, or any other financial assistance, in relation to any costs of the arbitration;
authorized body (獲授權機構) means the person appointed by the Secretary for Justice under section 98W(2);
code of practice (實務守則) means the code of practice issued under Division 4 and as amended from time to time;
costs (費用), in relation to an arbitration, means the costs and expenses

of the arbitration and includes—

(a) pre-arbitration costs and expenses; and

(b) the fees and expenses of the arbitration body;

emergency arbitrator（緊急仲裁員）has the meaning given by section 22A;

funded party（受資助方）—see section 98I;

funding agreement（資助協議）—see section 98H;

mediation proceedings（調解程序）means mediation proceedings referred to in section 32(3) or 33;

potential third party funder（潛在出資第三者）means a person who carries on any activity with a view to becoming a third party funder;

provision（提供）—

(a) in relation to the provision of arbitration funding to a person (***recipient***)—includes the provision of the arbitration funding to another person (for example, to the recipient's legal representative) at the recipient's request; and

(b) in relation to the provision of arbitration funding by a person (***funder***)—includes the provision of the arbitration funding by another person that is arranged by the funder;

third party funder（出資第三者）—

(a) means a third party funder within the meaning of section 98J; and

(b) in Division 4, includes a potential third party funder;

third party funding of arbitration（第三者資助仲裁）—see section 98G.

98G. Meaning of *third party funding of arbitration*

(1) Third party funding of arbitration is the provision of arbitration funding for an arbitration—

(a) under a funding agreement;

(b) to a funded party;

(c) by a third party funder; and

(d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.

(2) However, third party funding of arbitration does not include the provision of arbitration funding directly or indirectly by a person practising law, or providing legal services, whether in Hong Kong or elsewhere.

98H. Meaning of *funding agreement*

A funding agreement is an agreement for third party funding of arbitration that is—

(a) in writing;

(b) made between a funded party and a third party funder; and

(c) made on or after the commencement date of Division 3.

98I. Meaning of *funded party*

(1) A funded party is a person—
  (a) who is a party to an arbitration; and
  (b) who is a party to a funding agreement for the provision of arbitration funding for the arbitration to the person by a third party funder.
(2) In subsection (1)(a), the reference to a party to an arbitration includes—
  (a) a person who is likely to be a party to an arbitration that is yet to commence; and
  (b) a person who was a party to an arbitration that has ended.

98J. Meaning of *third party funder*

(1) A third party funder is a person—
  (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and
  (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement.
(2) In subsection (1)(b), the reference to a person who does not have an interest in an arbitration includes—
  (a) a person who does not have an interest in the matter about which an arbitration is yet to commence; and
  (b) a person who did not have an interest in an arbitration that has ended.

Division 3—Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort

98K. Particular common law offences do not apply

The common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third party funding of arbitration.

98L. Particular tort does not apply

The tort of maintenance (including the tort of champerty) does not apply in relation to third party funding of arbitration.

98M. Other illegality not affected

Sections 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

98N. Limited application of Part 10A for non-Hong Kong arbitration

Despite section 5, this Part applies in relation to an arbitration for which the place of arbitration is outside Hong Kong or there is no place of arbitration as if—

(a) the place of arbitration were in Hong Kong; and
(b) the definition of costs in section 98F were replaced by the following—

> "***costs***（費用）, in relation to an arbitration, means only the costs and expenses of services that are provided in Hong Kong in relation to the arbitration;".

Division 4—Code of Practice

98O. Code of practice may be issued

(1) The authorized body may issue a code of practice setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration.
(2) The authorized body may amend or revoke the code of practice.
(3) Section 98Q applies in relation to an amendment or revocation of the code of practice in the same way as it applies in relation to the code of practice.

98P. Content of code of practice

(1) Without limiting section 98O, the code of practice may, in setting out practices and standards, require third party funders to ensure that—
  (a) any promotional material in connection with third party funding of arbitration is clear and not misleading;
  (b) funding agreements set out their key features, risks and terms, including—
    (i) the degree of control that third party funders will have in relation to an arbitration;
    (ii) whether, and to what extent, third party funders (or persons associated with the third party funders) will be liable to funded parties for adverse costs, insurance premiums, security for costs and other financial liabilities; and
    (iii) when, and on what basis, parties to funding agreements may terminate the funding agreements or third party funders may withhold arbitration funding;
  (c) funded parties obtain independent legal advice on funding agreements before entering into them;

(d) third party funders provide to funded parties the name and contact details of the advisory body;
(e) third party funders have a sufficient minimum amount of capital;
(f) third party funders have effective procedures for addressing potential, actual or perceived conflicts of interest and the procedures enhance the protection of funded parties;
(g) third party funders have effective procedures for addressing complaints against them by funded parties and the procedures allow funded parties to obtain and enforce meaningful remedies for legitimate complaints;
(h) third party funders follow the procedures mentioned in paragraphs (f) and (g);
(i) third party funders submit annual returns to the advisory body on—
(i) any complaints against them by funded parties received during the reporting periods; and
(ii) any findings by a court or arbitral tribunal of their failure to comply with the code of practice or Division 5; and
(j) third party funders provide to the advisory body any other information it reasonably requires.

(2) Without limiting subsection (1), the code of practice may—
(a) specify terms to be included, or not to be included, in funding agreements; and
(b) specify what is to be included, or not to be included, in order to have effective procedures.

(3) The code of practice—
(a) may be of general or special application; and
(b) may make different provisions for different circumstances and provide for different cases or classes of cases.

98Q. Process for issuing code of practice

(1) Before issuing a code of practice, the authorized body must—
(a) consult the public about the proposed code of practice; and
(b) publish a notice to inform the public of the proposed code of practice.

(2) In preparing the proposed code of practice for public consultation, the authorized body may consult a person with knowledge or experience of arbitration or third party funding of arbitration.

(3) The notice must state the following information—
(a) the purpose and general effect of the proposed code of practice;
(b) how a copy of the proposed code of practice may be inspected; and
(c) that written submissions by any person about the proposed code of practice may be made to the authorized body before a specified time.

(4) After considering all written submissions made before the specified time, the authorized body may issue the code of practice (with or without revision) by publishing it in the Gazette.

(5) The code of practice comes into operation on the day on which it is published in the Gazette under subsection (4).
(6) The code of practice is not subsidiary legislation.

98R. Non-compliance with code of practice

(1) A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings.
(2) However—
  (a) the code of practice is admissible in evidence in proceedings before any court or arbitral tribunal; and
  (b) any compliance, or failure to comply, with a provision of the code of practice may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

Division 5—Other Measures and Safeguards

98S. Communication of information for third party funding of arbitration

(1) Despite section 18(1), information referred to in that section may be communicated by a party to a person for the purpose of having, or seeking, third party funding of arbitration from the person.
(2) However, the person may not further communicate anything communicated under subsection (1), unless—
  (a) the further communication is made—
    (i) to protect or pursue a legal right or interest of the person; or
    (ii) to enforce or challenge an award made in the arbitration,
  in legal proceedings before a court or other judicial authority in or outside Hong Kong;
  (b) the further communication is made to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication; or
  (c) the further communication is made to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding of arbitration.
(3) If a further communication is made by a person to a professional adviser under subsection (2)(c), subsection (2) applies to the professional adviser as if the professional adviser were the person.
(4) In this section—

communicate（傳達）includes publish or disclose.

98T. Disclosure about third party funding of arbitration

(1) If a funding agreement is made, the funded party must give written notice of—
  (a) the fact that a funding agreement has been made; and
  (b) the name of the third party funder.
(2) The notice must be given—
  (a) for a funding agreement made on or before the commencement of the arbitration—on the commencement of the arbitration; or
  (b) for a funding agreement made after the commencement of the arbitration—within 15 days after the funding agreement is made.
(3) The notice must be given to—
  (a) each other party to the arbitration; and
  (b) the arbitration body.
(4) For subsection (3)(b), if there is no arbitration body for the arbitration at the time, or at the end of the period, specified in subsection (2) for giving the notice, the notice must instead be given to the arbitration body immediately after there is an arbitration body for the arbitration.

98U. Disclosure about end of third party funding of arbitration

(1) If a funding agreement ends (other than because of the end of the arbitration), the funded party must give written notice of—
  (a) the fact that the funding agreement has ended; and
  (b) the date the funding agreement ended.
(2) The notice must be given within 15 days after the funding agreement ends.
(3) The notice must be given to—
  (a) each other party to the arbitration; and
  (b) the arbitration body (if any).

98V. Non-compliance with Division 5

(1) A failure to comply with this Division does not, of itself, render any person liable to any judicial or other proceedings.
(2) However, any compliance, or failure to comply, with this Division may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

Division 6—Miscellaneous

98W. Appointment of advisory body and authorized body

(1) The Secretary for Justice may, by notice published in the Gazette, appoint as the advisory body a person the Secretary for Justice considers appropriate to monitor and review the operation of this Part.

(2) The Secretary for Justice may, by notice published in the Gazette, appoint as the authorized body a person the Secretary for Justice considers appropriate to exercise the powers under section 98O.".

Part 3

Amendment to Mediation Ordinance

4. Section 7A added

After section 7—

Add

"7A. Third party funding of mediation

Part 10A of the Arbitration Ordinance (Cap. 609) applies in relation to a mediation as if—

(a) in that Part—
  (i) a reference to arbitration were a reference to mediation; and
  (ii) a reference to an arbitration body were a reference to a mediator;
(b) in section 98F of that Ordinance, the definitions of ***arbitration***, ***arbitration body***, ***emergency arbitrator*** and ***mediation proceedings*** were omitted;
(c) section 98N of that Ordinance were replaced by the following—

"98N. Limited application of Part 10A for non- Hong Kong mediation
(1) Despite section 5(1) of the Mediation Ordinance (Cap. 620), this Part applies in relation to a mediation that does not fall within the description of that section as if—
  (a) the mediation were a mediation conducted in Hong Kong; and
  (b) the definition of ***costs*** in section 98F were replaced by the following—

"***costs*** (費用), in relation to a mediation, means only the costs and expenses of services that are provided in Hong Kong in relation to the mediation;".

(2) In this section—
mediation (調解) has the meaning given by section 4 of the Mediation Ordinance (Cap. 620).."; and

(d) in section 98S(1) of that Ordinance—
  (i) the reference to "section 18(1)" were a reference to section 8(1);
  (ii) the reference to "information referred to in that section" were a reference to a mediation communication; and

(iii) the reference to "a party" were a reference to a party to a mediation or an agreement to mediate.".

Explanatory Memorandum

The main object of this Bill is to settle the legal position regarding whether the common law doctrines of maintenance and champerty apply to third party funding of arbitration and mediation in Hong Kong. The Bill is based on the recommendations made in the Report on Third Party Funding for Arbitration published by the Law Reform Commission of Hong Kong in October 2016 (***LRC Report***).

New Part 10A added to Arbitration Ordinance

2. In particular, clause 3 adds a new Part 10A to the Arbitration Ordinance (Cap. 609) (***AO***). The new Part 10A, which is based on the draft provisions in the LRC Report, contains 6 Divisions.

3. The new Part 10A is intended to come into operation in 2 stages: Divisions 1, 2, 4 and 6 will commence on the gazettal of the Ordinance, while Divisions 3 and 5 will commence on a day to be appointed (see clause 1(2) and (3)). This is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation.

Division 1—Purposes

4. Division 1 of the new Part 10A states the purposes of that Part. These are to ensure that third party funding of arbitration is not prohibited by particular common law doctrines and to provide for related measures and safeguards (new section 98E).

Division 2—Interpretation

5. Division 2 of the new Part 10A provides for the interpretation of key concepts.

6. Significantly, in the new section 98F—

(a) arbitration is given an extended meaning to include not only arbitrations to which the AO applies, but also proceedings before the court, an emergency arbitrator or a mediator that are covered by the AO; and
(b) the meaning of ***provision*** in relation to the provision of arbitration funding to or by a person is also extended to cover the cases where the person arranges for the provision of the arbitration funding to or by another person.

7. The new section 98G provides for the definition of ***third party funding of arbitration***, which is central to the new Part 10A—

(a) One of the essential features of third party funding of arbitration is that the arbitration funding is provided in return for the third party funder receiving a financial benefit only if the arbitration is successful (new section 98G(1)(d)).
(b) Also, the definition of ***third party funding of arbitration*** excludes the provision of arbitration funding by lawyers and persons providing legal services (new section 98G(2)). This is to avoid any conflict of interest that might arise if those who provide legal services also engaged in third party funding.

8. The new section 98H defines ***funding agreement*** as an agreement which (among other requirements) is made on or after the commencement date of Division 3 of the new Part 10A. That means funding agreements made before that date are not covered by the new Part 10A.

9. The new sections 98I and 98J define ***funded party*** and ***third party funder*** respectively. A person can be a funded party or third party funder whether before, during or after an arbitration.

Division 3—Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort

10. Division 3 of the new Part 10A seeks to ensure that third party funding of arbitration is not prohibited by the common law doctrines of maintenance, champerty and barratry (both as to civil and criminal liability).

11. The new sections 98K and 98L declare that those doctrines do not apply in relation to the provision of arbitration funding under a funding agreement as defined in the new section 98H. Notably, that means the legal position regarding funding agreements made before the commencement date of Division 3 of the new Part 10A is not affected. The new section 98M also makes it clear that the declaration does not affect whether a contract is to be treated as illegal for other reasons.

12. Under section 5 of the AO, in general, the AO applies only to an arbitration where the place of arbitration is in Hong Kong. For cases where the place of arbitration is outside Hong Kong or there is no place of arbitration, the new section 98N extends the application of the new Part 10A to these arbitrations but only in respect of funding the costs and expenses of services provided in Hong Kong. This is to facilitate the third party funding of services provided in Hong Kong in relation to non- Hong Kong arbitrations.

Division 4—Code of Practice

13. Division 4 of the new Part 10A seeks to facilitate the regulatory framework for third party funding of arbitration in Hong Kong.

14. The new section 98O empowers an authorized body (see paragraph 22) to issue a code of practice setting out the practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. The authorized body may also amend or revoke the code of practice.

15. The new section 98P sets out some of the matters that may be covered in the code of practice, including those regarding funding agreements, internal procedures of third party funders and measures to facilitate monitoring by an advisory body (see paragraph 22).

16. The new section 98Q sets out the process which is to be followed in issuing the code of practice. The process includes public consultation and publishing the finalized code of practice in the Gazette. It applies in relation to an amendment or revocation of the code of practice as well.

17. Under the new section 98R, a person will not incur legal liability simply because the person fails to comply with the code of practice. However, the code of practice will be admissible in evidence in court or arbitral proceedings and any compliance or failure to comply with it may, if relevant to a question being decided by a court or arbitral tribunal, be taken into account by the court or arbitral tribunal.

Division 5—Other Measures and Safeguards

18. Division 5 of the new Part 10A provides for certain measures and safeguards where an arbitration involves third party funding.

19. The new section 98S allows the communication of confidential information to an existing or potential third party funder and its professional adviser. However, the recipient is then subject to confidentiality requirements.

20. The new sections 98T and 98U deal with disclosure of third party funding. If a funding agreement is made, the funded party must inform each other party and the arbitration body by written notice of that fact and the name of the third party funder within a specified time frame (new section 98T). Similarly, disclosure about the end of a funding agreement is also required (new section 98U). This is to minimize the possibility of conflicts of interest being the subject of a challenge to the arbitration process.

21. The new section 98V makes similar provisions to the new section 98R about the consequence of a failure to comply with the new Division 5. It is not necessary to provide for the admissibility in evidence of the legislation because sections 11 and 98 of the Interpretation and General Clauses Ordinance (Cap. 1) already provide for this.

Division 6—Miscellaneous

22. Division 6 of the new Part 10A contains a new section 98W, which empowers the Secretary for Justice to appoint an advisory body and an authorized body for the

purposes of the new Part 10A and provides that the appointments are to be made by notice published in the Gazette.

New section 7A added to Mediation Ordinance

23. Apart from proposing draft provisions to be added to the AO, the LRC Report also recommended that consideration be given to whether to amend the Mediation Ordinance (Cap. 620) (***MO***) at the same time to extend the application of the new Part 10A of the AO to mediation to which the MO applies (***MO mediation***).

24. In response to this, clause 4 adds a new section 7A to the MO, which provides for the application of the new Part 10A of the AO in relation to MO mediation with modifications to adapt the provisions of the new Part 10A to the MO context.

25. For instance, modifications are made to construe references to arbitration and arbitration body respectively as references to mediation and mediator covered by the MO. Certain definitions specific to the AO context are omitted, and references to certain AO provisions are replaced with references to similar provisions in the MO.

Standard Typeset Example

Not for Use as Reference Material for Kluwer House Style

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