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HOW REGIONAL TRADE AGREEMENTS DEAL WITH DISPUTES CONCERNING THEIR TBT PROVISIONS?

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Abstract: This paper investigates how RTAs treat disputes concerning their TBT provisions, in particular whether they treat them differently from other types of dispute, and how they deal with any potential overlap with the WTO when the substantive obligations of the RTA and the WTO TBT Agreement are the same (or similar). Our analysis covers 260 RTAs, of which 200 include at least one provision on TBT. We find that in general disputes on TBT provisions arising under RTAs are not treated differently from other type of RTA disputes. Fifteen per cent of RTAs with TBT provisions include provisions that apply exclusively to the resolution of TBT disputes and do so in general to favour the WTO dispute settlement mechanism over that of the RTA; only in one RTA – NAFTA – do the parties provide under some conditions for the exclusive use of the RTA DSM for certain types of TBT disputes. In the remaining RTAs, the parties do not provide for a specific way of dealing with TBT disputes and apply instead the general dispute settlement (DS) provisions under the RTA. Under the general DS provisions, the parties do not give exclusivity to one forum, with one exception EU-Chile RTA, but allow instead for the selection of the forum in case of jurisdictional overlapping and in accordance with certain rules. RTAs with such a forum-choice clause account for 55% of the RTAs with TBT provisions, while 24% do not provide for any guidelines in the case of jurisdictional overlapping, which can be problematic, and 5% do not have their own dispute settlement mechanism (DSM), so that in the event of a dispute over the same (or similar) obligation under the RTA and the WTO, the WTO DSM would be the only possible forum.

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* Molina (corresponding author): World Trade Organization. E.mail: anacristina.molina@wto.org. Khoroshavina: international trade law expert. E.mail: khoroshavina.vera@gmail.com. This is a working paper, and hence it represents research in progress. The opinions expressed in this paper should be attributed to its authors. They are not meant to represent the positions or opinions of the WTO and its Members and are without prejudice to Members' rights and obligations under the WTO. Special thanks to Rohini Acharya and Gabrielle Marceau for their comments and invaluable support throughout this project. We are also grateful to Peter Milthorp, Jo-Ann Crawford, Sybilla Fries, Lauro Locks, and Erik Wijkstrom for their comments on earlier drafts, and to Christelle Renard for data assistance. Mistakes are only ours.

1 INTRODUCTION

With the decline of tariffs, concerns about the use of non-tariff measures to restrict imports have grown (Malouche and Cadot 2012). Technical barriers to trade (TBT), which comprise standards, technical regulations, and conformity assessment procedures[1], are one of the types of non-tariff measures that have increased considerably over the past ten years. During the period 2005-2017, 1400 TBT measures were notified on average each year to the WTO, compared to an average of 625 during the period 1995-2005. This rise in the number of TBT measures has been accompanied with a surge in the number of specific trade concerns raised by Members in the WTO TBT Committee since 2005, that went from 128 in 2005 to 548 in 2017 (Annex 1).[2]

The growing importance of TBT measures is also reflected in the content of regional trade agreements (RTAs).[3] About 77% of RTAs include at least one provision concerning TBT measures and since 2010 the inclusion of such provisions in RTAs has been systematic (McDaniels and al., 2018). Today RTA provisions on TBT cover *inter alia* the development and application of standards, technical regulations, conformity assessments, but also transparency, equivalence, harmonization, and regulatory co-operation; and while some RTAs include these provisions in the form of single articles, others, especially recent ones, contain a dedicated section or chapter referring to *Technical Barriers to Trade*. The WTO Agreement has inspired much of the content of RTAs in this area, so that most RTA provisions on TBT tend to mirror the provisions under the WTO TBT Agreement, while few go beyond the latter (Molina and Khoroshavina, 2015).

Most RTAs have also their own procedures to resolve disputes, and to the extent that RTA provisions on TBT are the same as (or similar to) provisions under the WTO TBT Agreement, the risk of overlap and conflicting rulings between the WTO and the RTA dispute settlement mechanisms (DSM) is latent. Such overlap, often referred to as *jurisdictional overlap,* can occur if a dispute can be brought to the RTA DSM and WTO DSM (Marceau, 2015, and Marceau and Wyatt, 2010), and this can happen when the dispute is over a provision that is the same (or similar) under the RTA and the WTO Agreement. This overlap may in turn lead to a conflict of rulings if the WTO Member does bring the dispute to both the RTA DSM (under RTA law) and WTO DSM (under WTO law) and obtains inconsistent or contradictory rulings.

To avoid such potential conflicts of rulings, the parties to an RTA can follow different strategies, which can apply to all or some of the matters covered by the RTA. In particular, they can (a) provide for the exclusive use of the WTO DSM, (b) provide for the exclusive use of the RTA DSM, or (c) allow for the selection of the forum while prohibiting recourse to multiple fora.

In this paper, we investigate how *disputes over an RTA TBT provision* (hereafter TBT disputes) are regulated in RTAs, in particular the extent to which RTAs treat such disputes differently from other types of disputes, and how they deal with any potential overlap with the WTO over a measure that is subject to the same (or similar) rules under the RTA and the WTO TBT Agreement. The majority of studies in this area have focused on the characteristics and relationship between the RTA and WTO DSMs (see for instance Chase and all. 2010; Mestral, 2013; Hammond, 2012; Kwak, K. and

[1] As defined in the WTO TBT Agreement. We follow the WTO definition of technical barriers to trade (TBT) throughout this paper.

[2] The number of disputes concerning TBT measures brought to the WTO has remained surprisingly low so far. But there is no doubt that the growing number of TBT measures and trade concerns increases the potential risk of a dispute. As of December 2017, the WTO TBT Agreement had been invoked 54 times during Members' request for consultations out of 534 requests notified to the WTO Dispute Settlement Body and only in 5 of them (that's is 9% of the total number of requests), the panel's findings were based on the WTO TBT Agreement. One reason for the low number of disputes brought to the WTO could be that WTO Members can raise their concerns in the TBT Committee, and discuss and clarify them before escalating them into disputes.

[3] In this paper, we follow the WTO terminology, namely Regional Trade Agreements (RTAs), to refer to agreements providing for reciprocal trade preferences between countries, irrespective of whether they are located in the same region or not. Other terms often used to refer to these preferential trade relationships are for example Free Trade Agreements or Preferential Trade Agreements.

G. Marceau, 2010, and Marceau and Wyatt, 2009). But they do not specifically look at whether the RTA provisions on dispute settlement vary with the nature of the dispute.

Among the 260 RTAs studied, we find that 200 have TBT provisions and of these, 15% include *specific provisions for the resolution of TBT disputes* (hereafter TBT-specific DS provisions) and do so in general to favour the WTO DSM over the RTA DSM; only in one RTA – NAFTA – do the parties give exclusivity to the RTA DSM for certain types of TBT disputes provided some conditions are met.[4] In 80% of RTAs with TBT provisions, the parties do not provide for a specific way of dealing with TBT disputes and apply the general dispute settlement provisions, which in most cases specify how to proceed in the event of overlap between the RTA and WTO DSMs. The remaining 5% of RTAs do not have their own DSM, and so in the event of a dispute over the same (or similar) provision under the RTA and the WTO, the WTO DSM is the only possible adjudication forum.

The paper proceeds as follows. Section 2 introduces the data and classifies RTAs into two groups based on the nature of their dispute settlement (DS) provisions (TBT-specific or general). The first group consists of RTAs that include TBT-specific DS provisions; while the second group contains RTAs that do not include TBT-specific DS provisions but have general DS provisions. Section 3 reviews the main features of the TBT-specific DS provisions contained in the first group of RTAs. Section 4 focuses on the second group of RTAs, and assesses how the general DS provisions in these RTAs differ from the TBT-specific DS provisions and how they deal with any overlap with the WTO DSM. In section 5, we review other DS-related provisions specific to TBT matters included in RTAs, like for example consultations. Section 6 concludes. Before moving to Section 2 and for greater clarity, we use TBT as a generic term and so the terms "TBT" and "TBT measures" (interchangeably) to refer to standards, technical regulations, and/or conformity assessment procedures; and "TBT provisions" to refer to provisions dealing with standards, technical regulations, and/or conformity assessment procedures.

2 DATA AND OVERVIEW

The study covers all RTAs in force and notified to the WTO as of December 2017, with a few exceptions.[5] Out of the 260 RTAs covered (see Annex 2), our analysis focuses only on those RTAs that have at least one provision on TBT, that is, 200 RTAs (or 77% of the RTAs covered). When available, we have also examined protocols, side letters, and any other legal instruments incorporated into the agreement.

In general, RTAs provide for the parties to resolve a dispute through consultations. If consultations fail, they can initiate a formal arbitration process. Of the RTAs with TBT provisions, nearly all contain provisions on consultations and most have provisions describing their own DSM (only eleven do not).[6] In addition to these provisions, which are of general application, RTAs can include provisions on consultations and dispute settlement that are specific to TBT.[7] The data shows that only 15% (30 RTAs) of the 200 RTAs with TBT provisions contain TBT-specific DS provisions in addition to the general provisions applicable to all disputes. In these RTAs, the parties agree to treat TBT disputes differently from other type of disputes by (mostly) excluding them (completely or partially) from the application of the DSM set out in the RTA. By doing so, the parties are

[4] NAFTA Article 2005(4).

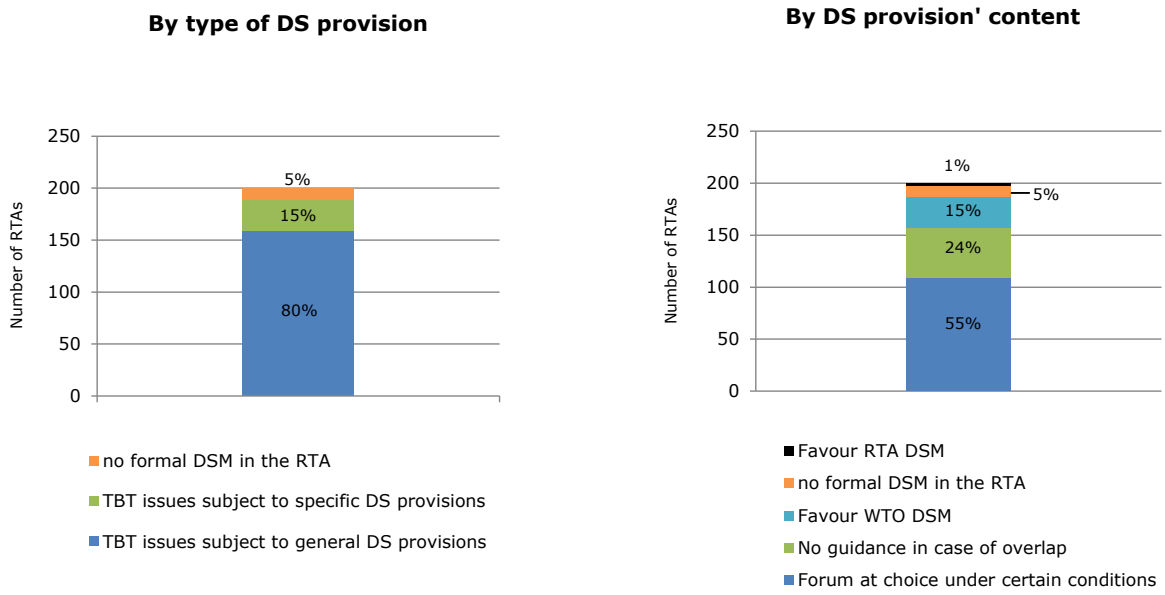
[5] In total, 17 RTAs were not included in the study, because among other reasons, they have been superseded by subsequent RTAs, they have limited scope or because they involved a complex legal structure which could lead to misleading conclusions regarding the inclusion and scope of provisions dealing with TBT measures. This group of RTAs include: the Andean Community, EU – Overseas Countries and Territories RTA, the European Economic Area, the Dominican Republic - Central America Free Trade Agreement, the Global System of Trade Preferences among Developing Countries (GSTP), the Latin American Integration Association, and the Protocol on Trade Negotiations.

[6] In these cases, the WTO DSM will presumably be the only choice if a dispute on TBT arises under the RTA, provided that the issue at dispute falls within the coverage of the WTO TBT Agreement.

[7] Specific provisions can also be found in other areas, for instance in competition, and sanitary and phytosanitary measures.

ensuring that in case of a dispute the matter is dealt with by the WTO DSM only and that there is no overlap of proceedings (Figure 1).

Figure 1: Resolution of TBT disputes in RTAs by type and content of the DS provision



Source: Authors' calculations based on the information contained in the WTO RTA database.

If the RTA contains no specific DS provisions on TBT, the RTA's general DS provisions would apply in the event of a dispute. Very often the RTA will indicate how to proceed if the dispute is covered by both the RTA and the WTO TBT Agreement (i.e. the dispute is over a provision on TBT that is the same or similar under the RTA and the WTO TBT Agreement) – so as to avoid any conflicting ruling. Such overlap in the substantive TBT provisions does not of itself pose a problem to the WTO DSM, unless the parties - which are also WTO Members - have recourse to both DS fora (simultaneously or subsequently) and obtain different rulings on the same measure subject to the same (or similar) rules. In this situation both the WTO and RTA DSMs could be undermined, as the responding party may be automatically in breach of its obligation under the other agreement regardless of which decision it chooses to implement. To maintain coherence with the multilateral trading system and avoid any conflict of rulings, the parties to an RTA can explicitly indicate in the RTA how to proceed in case of an overlap between the RTA and the WTO DSMs. Several studies have identified the most common approaches used in this situation (see for instance Chase et al., 2013 and Marceau and Kwak, 2010). Here, we expand their scope by examining all RTAs notified up to 2017 and provide a detailed description of the main features of these strategies in the following sections. Overall, we have found that to try to avoid the duplication of proceedings (when the RTA and WTO substantive provisions on TBT are the same or similar) and regardless of whether a TBT-specific DS provision is or not included in the RTA, 55% of RTAs with TBT provisions allow for the choice of the forum under certain conditions, 15% of RTAs favour the WTO DSM, and 1% favours the RTA DSM. Twenty-four per cent of them do not provide any guidance in this regard, and 5% do not have a DSM (Figure 1 and Table 1).

Table 1: Number of RTAs by type of DS provision

DS provisions in RTAs	Type of DS provisions			Total number of RTAs covering TBT issues
DS provisions' content	TBT-specific DS provisions (apply only to TBT disputes)	General DS provisions	No general DS provisions (i.e. no RTA DSM)	
Favour RTA DSM	1	1	Not applicable	2 (1%)
Favour WTO DSM	27	3	Not applicable	30 (15%)
Forum at choice	2	107	Not applicable	109 (55%)
None of the above	0	48	Not applicable	48 (24%)
No RTA DSM	Not applicable	Not applicable	11	11 (5%)
Total number of RTAs covering TBT issues	30 (15%)	159 (80%)	11 (5%)	200

Source: Authors' calculations based on the information contained in the WTO RTA database.

3 RTAS WITH TBT-SPECIFIC DS PROVISIONS

Despite the increasing concerns about the application of TBT measures, only 15% (30 RTAs) of RTAs with TBT rules contain provisions that apply exclusively to the resolution of TBT disputes. These RTAs are geographically diverse. They involve economies in the Americas, Asia-Pacific, and Europe, and except for three, they all favour the WTO DSM (explicitly or implicitly).

3.1 RTAs with TBT-specific DS provisions that favour the WTO DSM

RTAs can favour the WTO DSM to resolve TBT disputes by either designating the WTO DSM as the only forum to adjudicate this type of dispute; or by stipulating that the RTA DSM does not apply to TBT disputes, thus making *de facto* the WTO DSM the only available forum. Three RTAs follow the first approach and provide for the use of the WTO DSM for any dispute under the RTA that also relates to their rights and obligations under the WTO TBT Agreement (i.e. Canada-Honduras, Canada-Costa Rica and Chinese Taipei-Honduras-El Salvador). The other 24 RTAs follow the second approach and incorporate a non-application clause of the RTA DSM.[8] Japan follows this approach almost systematically: ten of its 13 RTAs with TBT provisions exclude TBT disputes from the application of the RTA DSM.[9] Other countries that have incorporated this non-application clause in their RTAs include Australia, Mexico, and EFTA member states.

The scope of the non-application clause can vary across RTAs but in general all RTA disputes on TBT subject to a potential jurisdictional overlapping with the WTO DSM are excluded from the RTA DSM, except in Australia-Chile and Australia-US RTAs. In these two RTAs, the scope of the exclusion is limited to disputes relating to technical regulations[10], while the other TBT measures

[8] The way in which the non-application clause is drafted can differ across RTAs but in most cases (15 of 24 RTAs), the clause states that the RTA DSM does not apply or is not applicable to TBT disputes (i.e. EFTA-Serbia, EFTA-Canada, EFTA-Chile, EFTA-Mexico, EU-Mexico RTAs and ten RTAs signed by Japan). In some RTAs (8 of 24 RTAs) the non-application clause states that the parties cannot have recourse to the RTA DSM for any TBT matters covered by the RTA (e.g. RTAs between Turkey-Malaysia, Australia-Chile, Australia-China, Panama-Singapore, and Israel-Mexico), and only in one RTA (Republic of Korea-India), it states that TBT disputes arising under the RTA shall not be brought to the RTA DSM, unless the parties agree otherwise.

[9] Of the 13 RTAs notified to the WTO and covering TBT provisions, only Japan – Philippines, Japan – Thailand and Japan – Singapore did not exclude TBT disputes from the application of the RTA DSM.

[10] This is achieved by excluding only the article on technical regulations of the TBT chapter from the application of the RTA DSM. Other provisions typically included in the TBT chapter of these RTAs refer to provisions on standards, conformity assessments, cooperation and consultations. It is worth mentioning that these provisions do not necessarily refer to WTO-plus obligations only.

covered by the RTA are subject to the RTA DSM.[11] In the other 22 RTAs, the parties exclude the entire TBT chapter/section from the application of the RTA DSM, which is the approach followed by Japan; or explicitly indicate that the exclusion covers disputes referring to the rights and obligations under the WTO TBT Agreement, so that for *WTO-plus* obligations (if any) the parties can still invoke the RTA DSM.[12] The latter approach is found in six RTAs, involving mainly EFTA countries, Australia, Chile and the US.[13]

In this paper, we focus on the inclusion of DS provisions in RTAs that apply exclusively to TBT matters, and find that in general these provisions are used to favour (explicitly or implicitly) the WTO DSM. In addition, there are some RTAs that do not include this type of DS provisions but may favour the WTO DSM through other means. Such is the case with some RTAs that specify that all TBT matters are exclusively governed by the WTO TBT Agreement[14], or incorporate by reference the entire WTO TBT Agreement (including Article 14 on consultations and dispute settlement) into the RTA.

3.2 RTAs with TBT-specific DS provisions that do not favour the WTO DSM

Three RTAs with TBT-specific DS provisions, namely NAFTA, Colombia-Northern Triangle (El Salvador, Guatemala y Honduras) FTA, and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), do not favour the WTO DSM for disputes over TBTs arising under the RTA.

In NAFTA, the parties included a DS provision for *standards-related measures*, in which they agree that if the dispute concerns a "measure adopted or maintained by a party to protect its human, animal or plant life or health, or to protect its environment", and "that raises factual issues concerning the environment, health, safety or conservation" the responding party can request that the issue be considered under the RTA DSM.[15] Upon receipt of such request, the complaining party shall withdraw its claim, if any,[16] from the WTO dispute settlement proceedings, and may have recourse to the RTA DSM.[17] This type of provision has led to debate about the extent to which it is enforceable since a WTO Member cannot in principle be precluded from exercising its rights under the WTO and submitting a claim to the WTO DSM.[18] This ongoing debate goes beyond the scope of this paper, but one example is the dispute between Mexico and the US over tuna labelling initiated in 2009. That year, Mexico submitted a complaint to the WTO regarding the US labelling rules for "dolphin safe" tuna. Following Mexico's submission, the US argued that according to NAFTA this type of dispute could only be considered under NAFTA's DSM and requested Mexico to move its claim to the NAFTA dispute settlement.[19] Mexico did not agree with the US and decided to pursue

[11] The general DS provisions of these RTAs provide for the selection of the forum by the complaining party if the issue is covered by both the WTO TBT Agreement and the RTA, but once the forum has been selected, it shall be used to the exclusion of the other. Forum-selection clauses are discussed in Section 4.

[12] This is achieved by excluding from the application of the RTA DSM the article under which the RTA parties reaffirm the WTO TBT Agreement, or indicate that their rights and obligations with respect to TBT are governed by the WTO TBT Agreement.

[13] EFTA – Serbia (2009), EFTA – Canada (2008), Australia – Chile (2008), US – Australia (2004), EFTA – Chile (2003), and EU – Mexico (1997). Moreover, under EFTA-Canada, issues referring to mutual recognition of conformity assessments are to be regulated by their mutual recognition agreements. Also, in EFTA-Serbia the article on the non-application of the DS chapter is suspended until Serbia becomes member of the WTO, which implies that the parties can have recourse only to the RTA DSM (Annex VII of this RTA).

[14] It is worth mentioning that some of the RTAs indicating that TBT matters are governed by the WTO TBT Agreement contain nonetheless a non-application clause of the RTA DSM for TBT disputes.

[15] Article 2005(4) of the NAFTA.

[16] The RTA does not specify how to proceed if the other party rejects the request of the responding party to resolve the matter under NAFTA DSM (Article 2005(5) of the NAFTA).

[17] For other type of disputes, the parties can choose the forum to settle the dispute, but once the forum has been selected it shall be used to the exclusion of the other unless the responding party requests to resolve it under the NAFTA DSM.

[18] Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes mandates exclusive jurisdiction of the WTO DSM over the violations of WTO provisions.

[19] Minutes of the WTO Dispute Settlement Body meeting held on 20 April 2009, WTO document WT/DSB/M/267 of 26 June 2009; and Press Release by the Office of the United States Trade Representative issued on 5 November 2009 and available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over#.

its complaint at the WTO rather than under NAFTA. In 2015, the WTO Appellate Body handed down its report on a dispute brought by Guatemala against Peru's price band mechanism on agricultural products with some new insights in this regard. Although not the reason for its decision, in its report the Appellate Body provided interesting indications on the relationship between WTO and RTA rules (see section 4.1.4).[20]

In EU-Canada (CETA) and Colombia-Northern Triangle FTAs, the parties included a DS provision on TBT to regulate the use of the RTA and WTO DSMs when the RTA and WTO provisions on TBT are in substance the same (or similar). In the Colombia-Northern Triangle FTA, the parties agreed to use the RTA DSM to resolve any issue regarding the application of the TBT chapter, but explicitly indicate that they can elect to use the WTO DSM for disputes regarding provisions covered by the WTO TBT Agreement. They further indicate in the DS chapter of the RTA that in case the issue is covered by both the RTA and WTO Agreement, the claiming party must select one forum to the exclusion of the other.[21]

In CETA, signed in 2016, the TBT- specific DS provision lists the conditions that certain type of TBT disputes must meet in order to be brought to the RTA DSM. This RTA incorporates Articles 2 to 9 and Annexes 1 and 3 of the WTO TBT Agreement, and specifies that the RTA DSM can be invoked with respect to Articles 3, 4, 7, 8 and 9 "where *a party considers that the other party has not achieved satisfactory results under these articles and its trade interests are significantly affected*", which mirrors Article 14.4 of the WTO TBT Agreement.[22] Articles 3, 4, 7, 8 and 9 of the WTO TBT Agreement require *inter alia* that WTO Members ensure that local governments, non-governmental bodies, and international and regional systems comply with the WTO TBT Agreement. For other TBT disputes, the general DS provisions apply which allow the parties to select the forum. However, the parties cannot submit a claim seeking redress for the breach of a *substantially equivalent obligation* under this RTA and under the WTO Agreement in the two fora, unless the forum selected fails, for procedural or jurisdictional reasons.[23] A similar provision was also included in EU-Moldova RTA (2014) (see section 4.1.1).

4 RTAS WITH GENERAL DS PROVISIONS ONLY (AND NO TBT-SPECIFIC DS PROVISIONS)

Of the RTAs with TBT provisions, 80% (159 RTAs) do not include any TBT-specific provisions on dispute settlement, leaving TBT provisions to be covered by the RTA's general DS provisions. The general DS provisions are usually described in a separate chapter and can be more or less detailed depending on the RTA, in particular when describing the adjudication process and the procedures in the event of an overlap of substantive TBT provisions. In this regard, they differ substantially from the TBT-specific DS provisions in that they do not necessarily give preference to the WTO DSM or the RTA DSM. Instead, if a dispute is covered by both the RTA and the WTO DSMs they tend to allow for the choice of the forum but impose certain requirements to prevent "forum shopping" and the duplication of proceedings. Of the 159 RTAs that regulate TBT disputes through their general DS provisions, 67% (107 RTAs) follow this approach. Another three RTAs favour the WTO DSM; and one favours the RTA DSM. The remaining RTAs (48) do not give any indications on how to proceed in case of overlapping substantive TBT provisions. This is problematic since a party could, in principle, have recourse to both forums simultaneously or subsequently in a matter

[20] Peru – Additional Duty on Imports of Certain Agricultural Products (WTO document WT/DS457/AB/R).
[21] Articles 10.2 and 18.4 of the Agreement between Colombia and the Northern Triangle.
[22] Article 4.2 of CETA.
[23] Article 29.3 of CETA. In this regard, recall that violations of a WTO TBT provision can only be covered by the WTO DSM (Article 23 of the WTO DSU) and in RTAs, only violations of the RTA provision can be brought to the RTA DSM.

involving the breach of an RTA obligation that is the same as (or similar to) a WTO obligation; and this could, potentially, lead to inconsistencies between RTA and WTO rulings.[24]

4.1 RTAs with general DS provisions that include a forum-choice clause

To avoid the risk of conflicting rulings most RTAs with general DS provisions (107 RTAs) leave the choice of the forum to the complaining party but prohibit parallel and typically subsequent proceedings in another forum. Under the most common version of this provision – often referred as to "choice-of-forum" clause – a party can use the WTO DSM or the RTA DSM to resolve a dispute arising under both agreements, but once it has initiated proceedings under one forum, it must use it to the exclusion of the other. In recent years, spurred by the EU, choice-of-forum clauses have evolved to become more precise, and, to allow for subsequent proceedings (in the jurisdiction not selected first) under certain conditions. In fact, of the 17 RTAs signed by the EU since 2007, all contain a revisited version of the forum-choice clause, except four (RTAs with the Eastern and Southern Africa States[25], Central America, Colombia, Peru and Ecuador, and Moldova). With some exceptions, the EU approach has not been replicated by other countries.

4.1.1 Traditional forum-choice clauses - the prohibition of parallel and subsequent proceedings

Under the most common version of forum-choice clause, a party can use the WTO or RTA DSMs to resolve a dispute arising under both agreements, but must select one to the exclusion of the other, thus prohibiting in principle parallel and subsequent proceedings (94 RTAs out of 107).[26] Traditionally, forum-choice clauses have also referred to the disputes they cover in *general terms* without characterizing the disputes that are barred from litigation (parallel and subsequent) in another forum. This approach is reflected in the majority of RTAs with a forum-choice clause (66 RTAs), and involves mainly economies in the Americas and Asia, in particular, the US, Chile, Peru, China, Malaysia and Singapore. In these RTAs, the parties indicate for instance that when a dispute *(regarding any matter)* arises under the RTA and the WTO Agreement, the complaining party may select the dispute settlement procedure in which to settle the dispute and the forum selected shall be used to the exclusion of the other.[27]

While this general approach continues to be widely used, in recent years some RTAs have modified the forum-choice clause to specify the degree of similarity/dissimilarity that a dispute must have to be barred from ligation (parallel and subsequent) in a second forum. By reducing room for ambiguity, these RTAs aim to enhance the functioning of the clause. We distinguish three approaches. RTAs that prohibit parallel and subsequent proceedings: 1) of disputes on the *same matter/issues* (but do not provide a definition of "same matter"); 2) of a dispute submitted elsewhere unless the dispute refers to *substantially separate and distinct rights or obligations under different international agreements*; and 3) of disputes which are *identical* based on the similarity of the measure and/or the obligation at dispute.

The first approach is followed by 18% of RTAs (19 RTAs) with a forum-choice clause. In these RTAs (all signed after 2002) the complaining party can choose the forum in which to settle the dispute but also commits not to initiate another proceeding on the *same matter* in the other

[24] It is important to note that if the RTA and the WTO provisions on TBT differ on substance the fact that a dispute can take place under the RTA DSM or the WTO DSM (in parallel or subsequently) will not cause any inconsistency as they will be dealing with different subject-matters.

[25] Although, this RTA does not contain TBT provisions, and therefore not analysed, we mention it here for sake of completeness.

[26] Some examples include: Thailand-Japan, Japan-Singapore, Thailand-New Zealand, Thailand-Australia, Japan-Philippine, China-Singapore and ASEAN-Australia-New Zealand.

[27] In one RTA (CEFTA), the parties used another language and indicated that disputes under consultation or arbitration under this RTA shall not be submitted to the WTO for dispute settlement, or vice-versa (Article 43 of CEFTA).

forum.[28] These RTAs do not define what they consider to be RTA and WTO disputes on the *same matter,* and involve mainly EFTA countries.

Six percent of RTAs (6 RTAs) with a forum-choice clause followed the second approach, and were also signed after 2002. Under this approach, the parties define the applicability of the forum-selection clause based on the degree of *dissimilarity* of disputes and agree to select one forum to the exclusion of the other except when *substantially separate and distinct rights or obligations under different international agreements are in dispute* (e.g. Thailand-New Zealand and Thailand-Australia RTAs). In such cases, a party could presumably (always) have recourse to more than one forum for disputes that are *substantially* different.

Finally, three RTAs (involving the EU and signed after 2012) follow the third approach and prohibit parallel and subsequent proceedings in a second forum based on the degree of similarity of the measure and/or the obligation under the dispute. In the RTA between EU and Moldova (signed in 2014), the parties can select the forum, but once a dispute on *a particular measure* has been initiated under one agreement, the party cannot bring *a claim seeking redress for the breach of a substantially equivalent obligation* under the other agreement, unless the forum selected fails, for procedural or jurisdictional reasons. In the RTA with Colombia, Peru, and Ecuador (signed in 2012 by Colombia and Peru, and 2016 by Ecuador), the parties are permitted to choose the forum for disputes related to the *same measure* arising under the RTA and the WTO; but once selected the RTA prohibits the initiation of another proceeding on *the same matter* in another forum. The RTA defines disputes on the *same matter* under the RTA and the WTO as disputes involving the same parties, referring to the *same measure* and dealing with *the same substantive violation.*[29] In the RTA with Central America (signed in 2012), the parties cannot submit a dispute to a second forum which is *identical* to a dispute brought previously to another forum. In this RTA, "*identical dispute*" is defined as a dispute based on the *same legal claims* and *measures challenged*.[30] Like in EU-Moldova, EU-Central America and EU-Colombia, Peru and Ecuador, re-litigation would be allowed if the first forum fails for procedural or jurisdictional reasons to take a decision.

A minority of the RTAs that prohibit parallel and subsequent disputes (21 RTAs) provide some additional flexibility regarding the choice of the forum. In particular, in 13 of these RTAs the parties are allowed to deviate from this provision if they expressly agree to do so. These RTAs involve mainly countries in the Asia-Pacific region.[31] In another eight RTAs, mainly involving Canada, the parties specify that the selected forum must be used to the exclusion of the other except when referring to environmental and conservation related disputes.[32]

4.1.2 Recent forum-choice clauses – prohibiting parallel proceedings but allowing for subsequent ones

Over the last decade, more sophisticated and detailed forum-choice clauses have been introduced in RTAs. This new generation of forum-choice clauses prohibits parallel proceedings but allow for subsequent proceedings on the *same measure* provided that certain conditions are met.[33] Thirteen RTAs have adopted this approach.[34] Twelve involve the EU, the exception being Turkey-Republic of

[28] Only one RTA in this group (Mexico-Uruguay) uses a different language and prohibits parallel and subsequent proceedings for claims *based on substantially equivalent issues*.

[29] Article 319 of the RTA between the EU, and Colombia, Peru and Ecuador.

[30] In this RTA, the parties go even further by indicating that for non-identical disputes related to the same measure, they "shall refrain from initiating concurrent dispute settlement procedures".

[31] Some examples are: Malaysia – Australia, China - Costa Rica, Peru - Republic of Korea, ASEAN - Australia - New Zealand, Japan – Thailand, Thailand - New Zealand, Thailand – Australia, and Japan – Singapore.

[32] Some examples are: Canada - Ukraine, Canada - Panama, Canada – Jordan, and Canada – Colombia.

[33] Although less stringent, these provisions could be problematic if the RTA and WTO DSMs, operating one after the other, interpret the same (or similar) provisions differently.

[34] All 13 RTAs also explicitly acknowledge the role of the WTO DSM by stating that the RTA DSM shall not adjudicate disputes referring to WTO rights and obligations, which mirrors Article 23 of the WTO Dispute Settlement Understanding. But, as highlighted in Kwak and Marceau (2010), Article 23 of the WTO DSU cannot

Korea (2012). The first RTA to allow for subsequent proceedings was EU-Mexico through a decision under the RTA taken by the parties in 2001[35], but only since 2007, the EU has included similar provisions almost systematically in its RTAs.

In nine of these 13 RTAs, the parties may submit a claim regarding a measure to a second forum but only once the proceedings in the first forum regarding a claim addressing the *same measure* have been concluded. This provision is found in the RTAs between EU and Ghana (signed 2016), SADC (2016), Cameron (2009), Papua New Guinea (2009), Bosnia Herzegovina (2008), CARIFORUM (2008), Cote d'Ivoire (2008), Serbia (2008), and Montenegro (2007).[36]

In the remaining four RTAs (EU-Georgia (2014), EU-Ukraine (2014), Turkey-Republic of Korea (2012), and EU-Republic of Korea (2010)), the conditions under which a party can submit a dispute to a second forum are more stringent as there are additional requirements. In these RTAs, the parties may bring a claim regarding the same measure *to a second forum* once the proceedings in the first forum have been concluded, and provided the claim does not address *an identical obligation* under the RTA and the WTO Agreement. In other words, if the claim addresses the same measure and also *an identical obligation* under the RTA and the WTO Agreement, proceedings in a second forum are prohibited (Table 2). Such prohibition would not apply if the first forum fails to make findings for procedural or jurisdictional reasons.

Table 2: Forum-choice restrictions by disputes' degree of similarity in selected RTAs

Measure to be addressed by Forum 2 / Obligation to be addressed by Forum 2	Identical obligation (compared to Forum 1)	Non-identical obligation (compared to Forum 1)
Same measure (compared to forum 1)	The RTA prohibits parallel and subsequent proceedings	The RTA prohibits parallel proceedings but allows for subsequent ones
Different measure (compared to forum 1)	No restriction	No restriction

Interestingly, these 13 RTAs, except for Turkey-Republic of Korea RTA, also include provisions on the application of retaliatory measures authorized under the WTO or RTA DSM in the event that a party does not implement the ruling of the respective DS Body. Under these provisions, the parties agreed that nothing in the RTA shall preclude a party from applying a suspension of benefits authorised by the WTO DS Body, and similarly that the WTO Agreement shall not be invoked to preclude a party from suspending benefits in accordance with the RTA DSM. Some of these RTAs go even further and require the RTA DS Body to "take into account relevant interpretations established in reports" adopted by WTO DS bodies (i.e. EU-Georgia RTA), or to "adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body" when dealing with an RTA obligation that is identical to an obligation under the WTO Agreement (i.e. EU-Republic of Korea and EU-Ukraine).[37] These RTA provisions aim to ensure that the functioning of the WTO DSM is not hindered by the RTA and vice-versa, recognising the parties' wish to ensure maximum coherence between the WTO and RTA DSMs.

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prohibit another jurisdiction from examining claims arising from their treaty provisions that run parallel to, or overlap with, WTO provisions.

[35] Decision No 2/2001 of the EU-Mexico Joint Council of 27 February 2001, implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (2001/153/EC). The EU-Mexico RTA also contains TBT-specific DS provisions, reason why it is covered in section 3 and not included in the group of 13 RTAs analysed in this section.

[36] This provision is also found in the EU-Mexico RTA covered in section 3.

[37] These provisions are also found in the RTAs between EU and Central America, Moldova and Canada, covered in other sections of this paper.

4.1.3 The right to choose the forum

The right to choose the forum generally belongs to the complaining party, and this is explicitly mentioned in the analysed RTAs. A few RTAs are silent in this regard or require, if possible, consensus of the RTA parties, as it is the case in the Mercosur-SACU, Mercosur-India and Chile-India RTAs. In these three RTAs, the parties shall try to agree on a single forum, and if no agreement can be reached, the complaining party shall select the forum of dispute. Therefore, collaboration and coordination can play an important role in preventing the duplication of proceedings. In another RTA, the Trans-Pacific Strategic Economic Partnership, the complaining party has to select the forum in which it wishes to settle the dispute, but if another complaining party wishes to have recourse to a different forum, the complaining parties must consult each other in order to agree on a single forum. This RTA does not specify which forum should be used if the complaining parties fail to reach an agreement. Twenty-four RTAs, involving mainly the EU and Asian countries, in particular Japan and Thailand, do not explicitly invest the complaining party with the exclusive right to select the forum.[38] However, since these RTAs do not require consensus in the choice of the forum, in principle such choice falls *de facto* on the party initiating the DS proceeding. It is however possible that two RTA parties may initiate similar disputes in different fora.

4.1.4 Forum-choice clauses: some remarks

Although choice-of-forum clauses are intended to prevent forum shopping and ensure the coherent coexistence of the WTO and RTA DSMs, there are two important considerations to keep in mind when assessing their effectiveness, and value.

First, even if an RTA does not explicitly mention that a party can choose between the WTO and the RTA DSM, the RTA party, which is also a WTO Member, has the right to bring a dispute before the WTO DSM for a violation of a WTO provision (Article 23 of the WTO Dispute Settlement Understanding).

Second, even when the parties to an RTA have agreed to opt exclusively for the RTA DSM and relinquish their rights to bring a dispute under the WTO DSM, the concerned countries may debate whether this agreement indeed prevents a WTO Member from filing a dispute under the WTO DSM, as illustrated by the claim filed in the WTO by Mexico against the US over tuna labelling in 2009 (see Section 3). In this regard, the 2015 report by the WTO Appellate Body (AB) on the dispute between Peru and Guatemala over the application of *additional duties on imports of certain agricultural goods* under Peru's price band system sheds new light on the relationship between WTO and RTA rules.[39]

In its report, the Appellate Body (AB) recalled that the "relinquishment of rights granted under the DSU cannot be lightly assumed" and must be made clearly.[40] It also noted that, while Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, it did not consider that WTO Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes.[41] Finally, when addressing the extent to which Article XXIV of the GATT 1994 may provide justification for measures that are inconsistent with certain other GATT 1994 provisions, the AB recalled that Article XXIV:4 of the GATT 1994 refers to agreements of *closer* integration and provides that the purpose of an FTA is to facilitate trade between its parties and not to raise barriers to the trade with third countries. In this context, the AB considered that "these references in Article XXIV:4 are not consistent with an interpretation of

[38] Some examples include: Japan – Philippines, EU - CARIFORUM States, Pakistan – Malaysia, Japan – Thailand, Thailand - New Zealand, Thailand – Australia and Japan – Singapore.

[39] Peru – Additional Duty on Imports of Certain Agricultural Products (WTO document WT/DS457/AB/R).

[40] Appellate Body Report, *Peru – Agricultural Products*, para. 5.25 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, paras. 217-218).

[41] Appellate Body Report, *Peru – Agricultural Products*, para. 5.26.

Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements".[42] For a broader discussion on RTAs and the AB report, see Marceau (2015), Hartmann (2016), and Shaffer and Winters (2017).

In light of this report, and although there is not yet any ruling by a WTO DS panel on choice-of-forum clauses used in RTAs, RTA negotiators may want to reflect on these recent developments in WTO jurisprudence when designing choice-of-forum clauses that are effective in preventing the duplication of proceedings.

4.2 RTAs with general DS provisions that favour the WTO DSM or the RTA DSM

Of the 159 RTAs that do not have TBT-specific DS provisions and regulate TBT disputes through their general DS provisions, three RTAs favour the WTO DSM and one RTA seems to favour the RTA DSM to resolve any type of dispute (not only TBT disputes). Of the three RTAs that favour the WTO DSM RTAs, only in EU-Chile, do the parties opt exclusively for the WTO DSM in the event of overlaps between RTA and WTO obligations.[43] In this RTA, the parties must (unless they agree otherwise) use the WTO DSM for any dispute resulting from the breach of an obligation under the RTA "which is equivalent in substance to a WTO obligation". Once the DS proceedings have been initiated, if the WTO DSM has not declined its jurisdiction, it shall be used to the exclusion of the other. Here one should understand that the claim submitted to the WTO DSM would be for a violation of a WTO obligation and not the RTA obligation as such.

Two other RTAs, Japan-Philippines, and the Treaty on the Free Trade Area between the Commonwealth of Independent States of 2011 (CIS FTA) also favour the WTO DSM but without explicitly giving it exclusivity. The CIS FTA states that "disputes on issues which are in this Treaty to be settled by referring to the provisions of the WTO Agreements, shall be resolved among the parties which are WTO Members in the procedure stipulated by the relevant WTO Agreements". However, the CIS FTA further indicates that this requirement shall not impede the parties which are WTO Members to settle disputes in accordance with the RTA DSM.[44]

In Japan-Philippines, the RTA provides for the exclusive use of one forum but specifies that parties "shall give priority consideration to having recourse" to the WTO DSM when an "infringement of the obligations" under this RTA "constitutes an infringement of the obligations under the WTO Agreement".[45]

Finally, in EU-South Africa, the parties are encouraged to settle disputes relating to specific obligations under the RTA through the RTA DSM but, unless agreed otherwise, the RTA DSM will "not consider issues relating to each party's WTO rights and obligations" (Article 104). However, it is not clear (like in the CIS FTA) how the parties would deal with a dispute over an RTA provision that overlaps with a WTO provision.

4.3 RTAs with general DS provisions that are silent on how to proceed in the event of overlap between the RTA and WTO DSMs

A quarter (48 RTAs) of the RTAs with TBT provisions do not specify how the parties must proceed when a claim is covered by the RTA and the WTO TBT Agreement. This vacuum is potentially problematic if a dispute concerns the same (or similar) RTA and WTO provisions as the parties could have recourse to both the WTO and RTA DSMs, which may lead to inconsistencies. The vast majority of these RTAs were signed prior to 2005, and involve mainly EFTA, the EU and Turkey with countries in the Middle East such as Egypt, Lebanon and Jordan.

[42] Appellate Body Report, *Peru – Agricultural Products*, para. 5.116.
[43] Article 189 of the Agreement establishing an association between the European Union and Chile.
[44] Article 19 of the Treaty on a Free Trade Area between the Commonwealth of Independent States.
[45] Article 149 of the Agreement between Japan and Philippines for an Economic Partnership.

5 OTHER DS-RELATED PROVISIONS SPECIFIC TO TBT ISSUES UNDER RTAS

5.1 Provisions on consultations specific to TBT

While a minority of RTAs include provisions on dispute settlement specific to TBT, 62% (123) of the 200 RTAs with TBT provisions provide for consultations among the parties on such TBT matters.[46] In two thirds of these RTAs (87) such provision is included in the article describing the functions of the RTA TBT committee or equivalent body. In the remaining RTAs, the parties provide for (technical) consultations for TBT matters arising under the RTA either in a dedicated article (e.g. Peru-Mexico or New Zealand-Malaysia RTAs), or together with other provisions under the TBT chapter/section (e.g. EFTA-Peru and EFTA-Republic of Korea).

5.2 Provisions on the impairment or nullification of benefits

Some of the RTAs with general DS provisions complement them by adding a provision on the impairment or nullification of RTA benefits, which applies to TBT measures. This type of provision expands the scope of application of the RTA DSM by allowing a party to have recourse to the RTA DSM if it considers that a TBT measure applied by the other party and consistent with the RTA nullifies or impairs the benefits of the agreement. This provision is found in about 18% of the RTAs (36 out of 200 RTAs), involving mainly countries in the Americas[47], and can also cover other measures such as intellectual property and sanitary and phytosanitary measures.

6 CONCLUSION

Given the growing concern about the use of TBT measures and the increasing risk of trade disputes, this study focuses on the way RTAs treat disputes concerning their TBT provisions. We review 260 RTAs and analyse the extent to which such disputes are treated differently from other disputes arising under the RTA, and how the parties address the potential risk of overlap between the RTA and the WTO DSMs when the substantive obligations of the RTA and the WTO TBT are the same (or similar). We find that in general disputes over TBT provisions arising under RTAs are not treated differently from other type of RTA disputes. In 80% of the 200 RTAs with TBT provisions, disputes over these provisions are subject to the general DS provisions under the RTA, while in 15% of RTAs (30), such disputes are subject to specific-DS provisions. The remaining RTAs (5% or 11 RTAs) do not include a formal DSM, which implies that if the RTA parties disagree over the interpretation or application of a provision under the RTA, the parties could have recourse only to the WTO DSM provided that the RTA obligation is in substance the same (or similar) to that of the WTO TBT Agreement.

The RTAs that include specific provisions to resolve disputes concerning their TBT provisions do so in general to favour the WTO DSM over the general RTA DSM. In nearly all these RTAs, the parties provide for the exclusive use of the WTO DSM for such disputes, only three do not. One of these three RTAs is NAFTA which gives exclusivity to the NAFTA DSM for certain type of disputes relating to the TBT provisions under this RTA. This is the only case with such provision in the entire set of RTAs, including those that contain only general DS provisions. In the two other RTAs, EU-Canada and Colombia-Northern Triangle, the specific DS provision clarifies to some extent the use of the RTA and WTO DSMs.

In the 80% of RTAs (159 RTAs) that do not subject disputes on their TBT provisions to any specific guidelines, the general DS provisions under the RTA apply. The majority of these RTAs (107 RTAs out of 159) specify how to proceed in case a dispute is covered by both the WTO TBT Agreement and TBT provisions under the RTA, but almost one third (48 RTAs) do not provide any indications

[46] In most cases, TBT specific provisions on formal DS proceedings or consultations are included in the TBT chapter/section of agreements, while the general provisions on consultations and formal DS proceedings are contained in the chapter on dispute settlement. The Chapter on dispute settlement, except otherwise provided, is applicable to the whole RTA.

[47] For instance Canada, Chile, Mexico, Panama and the US.

in this regard. A further two RTAs encourage the use of the WTO DSM, one encourages the use of the RTA DSM, and one mandates the exclusive use of the WTO DSM for all disputes.

By providing guidelines on the use of the RTA and WTO DSMs in case they overlap, the RTA parties are showing their willingness to prevent so-called "forum shopping" and promote coherence between the WTO and RTA DSMs. Although these guidelines vary across RTAs and have become more detailed over time –and sometimes more complex, too–, the main approach by countries has been to allow for the choice of the forum but to prohibit simultaneous and subsequent proceedings in a second forum. In these cases, the complaining party has to choose the forum in which it wishes to settle the dispute but once the forum has been selected it must be used to the exclusion of the other. In recent years, the EU has introduced some variations to this approach by allowing for the possibility to bring a claim on the *same measure* to a second forum under certain conditions, thus making the forum-choice clause less stringent to a certain extent. However, given the recent AB judgement in *Peru — Additional Duty on Imports of Certain Agricultural Products,* the way forum-choice clauses are drafted may continue to evolve so as to ensure their good functioning and consistency with the multilateral trading system.

What does this mean for the multilateral trading system? Overall, 70% of the RTAs with TBT provisions aim to ensure coherence between the RTA and the multilateral trading system and avoid conflicts of rulings. The remaining RTAs do not have their own DSM, making the WTO the only option when the WTO and RTA provisions are in substance the same (or similar), or are silent regarding the relationship between the WTO and RTA DSM. The latter are probably the most problematic as they do not provide any guidance on how to proceed when a measure is covered in the same (or similar) way by the WTO TBT Agreement and the RTA. In principle, the RTA parties, which are also WTO Members, could have recourse to the WTO and RTA DSMs simultaneously or subsequently, thus contributing to the risk of forum shopping, conflicting rulings by different fora and legal fragmentation. Yet, considering the current trend of DS provisions in RTAs becoming more detailed and the difficulty of obtaining evidence on the use of the RTA DSMs, and in particular of duplication of rulings, those risks seem low.

REFERENCES

Chase, C., A. Yanovich, J. Crawford, and P. Ugaz, (2013). "Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?" Staff Working Paper ERSD-2013-07 20 of the WTO.

Davey, W. J. (2010). "Dispute Settlement in the WTO and RTAs: A Comment", in L. Bartels and F. Ortino (eds.), Regional Trade Agreements and the WTO Legal System.

De Mestral, A. C. M. (2013). "Dispute Settlement under the WTO and RTAs: an uneasy relationship", Journal of International Economic Law, 16, pages 777-825.

Gao, H. and C. L. Lim (2008). "Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes", Journal of International Economic Law.

Hammond, F. (2012). "A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Dispute', Trade, Law. and Development, Vol. 4, No. 2.

Hartmann, S. (2016). "Recognizing the limitations of WTO dispute settlement -the peru-price bands dispute and sources of authority for applying non-WTO law in WTO disputes", George Washington International Law Review 48(3), pages 617-652.

Henckels, C. (2009). "Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO", The European Journal of International Law, Vol. 19 No. 3.

Kwak, K. and G. Marceau (2010). "Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements", in L. Bartels and F. Ortino (eds), Regional Trade Agreements and WTO Legal System.

Lee, Ti-Ting (2012). "Technical Barriers to Trade Provisions in Regional Trade Agreements", Online Proceedings Working Paper No. 2012/12, 3rd Biennial Global Conference of the SIEL, Singapore (2012).

Lesser, C. (2007). "Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge Towards the Multilateral Trading System?", OECD Trade Policy Papers, No. 58, OECD Publishing.

Cadot, O. and M. Malouche (2012). Non-tariff Measures: a Fresh Look At Trade Policy's New Frontier. Washington, DC: The World Bank and the International Bank for Reconstruction and Development.

Marceau, G. (2015). "The primacy of the WTO dispute settlement system", Questions of International Law, 2015, vol. 23, pages 3-13.

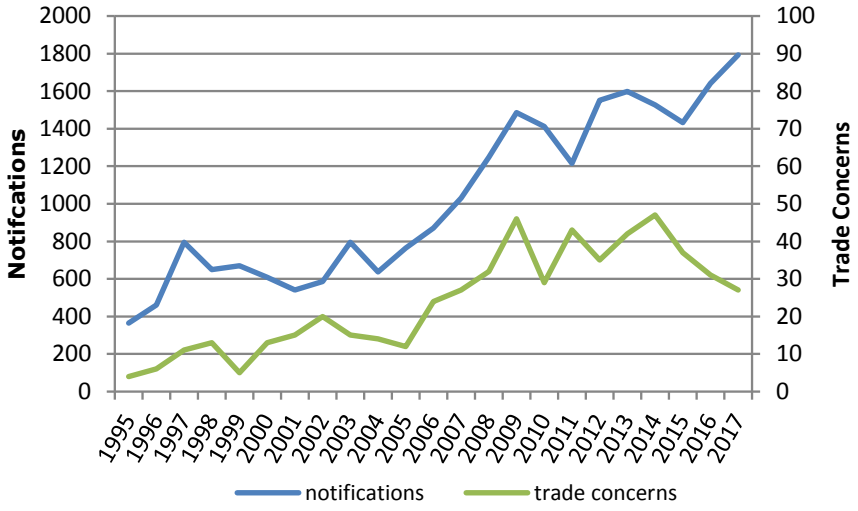
Marceau, G. and Wyatt J. (2010). "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO", Journal of International Dispute Settlement, Vol. 1, No. 1.

McDaniels, D., A.C. Molina and E. Wijkström (2018). "How does the regular work of the WTO influence Regional Trade Agreements? The Case of International Standards and the TBT Committee. WTO Staff Working Paper ERSD-2018-06.

Piermartini, R. and M. Budetta (2009). "A mapping of regional rules on technical barriers to trade" in *Regional Rules in the Global Trading System* edited by A. Estevadeordal, K. Suominen, R.Teh.

Shaffer, G. and L. A. Winters (2017). "FTA law in WTO dispute settlement: Peru–additional duty and the fragmentation of trade law", World Trade Review, 16 (2). pages 303-326.

ANNEX 1: TBT NOTIFICATIONS AND SPECIFIC TRADE CONCERNS 1995-2017



Source: WTO TBT Information Management System.

ANNEX 2: LIST OF RTAS COVERED IN THIS STUDY

N°	RTA Name	year of signature*	year of entry into force*	Provisions on TBT	RTA DSM (general application)	TBT-specific DS provisions
1	Hong Kong, China - Macao, China	2017	2017	yes	no	no
2	EU - Canada	2016	2017	yes	yes	yes
3	Canada - Ukraine	2016	2017	yes	yes	no
4	Chile - Thailand	2013	2015	yes	yes	no
5	EFTA - Georgia	2016	2017	yes	yes	no
6	MERCOSUR - SACU	2008	2016	yes	yes	no
7	India - Thailand	2003	2004	no	n.a.	n.a.
8	Eurasian Economic Union (EAEU) - Viet Nam	2015	2016	yes	yes	no
9	EU - SADC	2016	2016	yes	yes	no
10	EU - Ghana	2016	2016	yes	yes	no
11	Guam (Azerbaijan; Georgia; Moldova, Republic of; Ukraine)	2002	2003	yes	yes	no
12	Turkey - Malaysia	2014	2015	yes	no	yes
13	Turkey - Republic of Moldova	2014	2016	yes	yes	no
14	Pacific Alliance	2014	2016	yes	yes	no
15	Costa Rica - Colombia	2013	2016	yes	yes	no
16	Republic of Korea - Colombia	2013	2016	yes	yes	no
17	Mexico - Panama	2014	2015	yes	yes	no
18	Japan - Mongolia	2015	2016	yes	yes	yes
19	Panama - Dominican Republic	1985	1987	no	n.a.	n.a.
20	Republic of Korea - Viet Nam	2015	2015	yes	Yes	no
21	China - Republic of Korea	2015	2015	yes	Yes	yes
22	Agadir Agreement	2004	2007	yes	Yes	no
23	Australia - China	2015	2015	yes	Yes	yes
24	Republic of Korea - New Zealand	2015	2015	yes	Yes	no
25	Mauritius - Pakistan	2007	2007	yes	yes	no
26	Gulf Cooperation Council (GCC) - Singapore	2008	2013	yes	Yes	no
27	Chile - Viet Nam	2011	2014	yes	yes	no
28	Canada - Honduras	2013	2014	yes	yes	yes
29	Canada - Republic of Korea	2014	2015	yes	yes	no
30	Japan - Australia	2014	2015	yes	yes	yes
31	EFTA - Bosnia and Herzegovina	2013	2015	yes	yes	no
32	EFTA - Central America (Costa Rica and Panama)	2013	2014	yes	yes	no
33	Switzerland - China	2013	2014	yes	yes	no
34	Iceland - China	2013	2014	yes	yes	no
35	Hong Kong, China – Chile	2012	2014	yes	yes	no
36	EU - Eastern and Southern Africa States Interim EPA[48]	2009	2012	no	n.a.	n.a.
37	Singapore - Chinese Taipei	2013	2014	yes	yes	no
38	EU - Georgia	2014	2014	yes	yes	no
39	EU - Republic of Moldova	2014	2014	yes	yes	no
40	EU - Ukraine	2014	n.a.	yes	yes	no
41	Republic of Korea - Australia	2014	2014	yes	yes	yes
42	New Zealand - Chinese Taipei	2013	2013	yes	yes	no
43	Costa Rica - Singapore	2010	2013	yes	yes	no
44	Costa Rica - Peru	2011	2013	yes	yes	no
45	Turkey - Mauritius	2011	2013	yes	yes	no
46	Malaysia - Australia	2012	2013	yes	yes	no
47	Republic of Korea - Turkey	2012	2013	yes	yes	no
48	Ukraine - Montenegro	2011	2013	yes	yes	no
49	Canada - Panama	2010	2013	yes	yes	no
50	EU - Central America	2012	2013	yes	yes	no

[48] This RTA does not contain TBT provisions, but provides for future negotiations on TBT measures under a rendez-vous clause.

N°	RTA Name	year of signature*	year of entry into force*	Provisions on TBT	RTA DSM (general application)	TBT-specific DS provisions
51	EU - Colombia and Peru	2012	2013	yes	yes	no
52	Mexico - Central America	2011	2012	yes	yes	no
53	El Salvador - Cuba	2011	2012	yes	yes	no
54	Chile - Central America	1999	2012	yes	yes	no
55	Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS)	2011	2012	yes	yes	no
56	Canada - Jordan	2009	2012	yes	yes	no
57	Chile - Malaysia	2010	2012	yes	yes	no
58	US - Panama	2007	2012	yes	yes	no
59	EFTA - Montenegro	2011	2012	yes	yes	no
60	EFTA - Hong Kong, China	2011	2012	yes	yes	no
61	EFTA - Ukraine	2010	2012	yes	yes	no
62	US - Colombia	2006	2012	yes	yes	no
63	Panama - Peru	2011	2012	yes	yes	no
64	Republic of Korea - US	2007	2012	yes	yes	no
65	Japan - Peru	2011	2012	yes	yes	yes
66	Peru - Mexico	2011	2012	yes	yes	no
67	China - Costa Rica	2010	2011	yes	yes	no
68	Canada - Colombia	2008	2011	yes	yes	no
69	India - Japan	2011	2011	yes	yes	yes
70	EFTA - Colombia	2008	2011	yes	yes	no
71	India - Malaysia	2011	2011	yes	yes	no
72	Peru - Republic of Korea	2011	2011	yes	yes	no
73	EU - Republic of Korea	2010	2011	yes	yes	no
74	EFTA - Peru	2010	2011	yes	yes	no
75	Turkey - Jordan	2009	2011	yes	yes	no
76	Turkey - Chile	2009	2011	yes	yes	no
77	Hong Kong, China - New Zealand	2010	2011	yes	yes	no
78	EU - Serbia	2008	2010	yes	yes	no
79	EFTA - Albania	2009	2010	yes	yes	no
80	EFTA - Serbia	2009	2010	yes	yes	yes
81	ASEAN - India	2009	2010	yes	yes	no
82	Turkey - Serbia	2009	2010	yes	no	No
83	ASEAN - Australia - New Zealand	2009	2010	yes	yes	no
84	Turkey - Montenegro	2008	2010	yes	no	no
85	Peru - China	2009	2010	yes	yes	no
86	ASEAN - Republic of Korea	2006	2010	yes	yes	no
87	Republic of Korea - India	2009	2010	yes	yes	yes
88	New Zealand - Malaysia	2009	2010	yes	yes	no
89	Panama - Central America (Costa Rica, Guatemala, El Salvador, Honduras y Nicaragua)	2008	2009	yes	yes	no
90	Colombia - Northern Triangle (El Salvador, Guatemala, Honduras)	1994	1995	yes	yes	yes
91	Chile - Peru	2006	2009	yes	yes	no
92	EU - Papua New Guinea / Fiji	2009	2009	yes	yes	no
93	India - Nepal	2009	2009	no	n.a.	n.a.
94	MERCOSUR - India	2004	2009	yes	yes	no
95	Japan - Viet Nam	2008	2009	yes	yes	yes
96	EU - Cameroon	2009	2014	yes	yes	no
97	Japan - Switzerland	2009	2009	yes	yes	yes
98	Chile - Colombia	2006	2009	yes	yes	no
99	EFTA - Canada	2008	2009	yes	yes	yes
100	Canada - Peru	2008	2009	yes	yes	no
101	Peru - Singapore	2008	2009	yes	yes	no
102	Australia - Chile	2008	2009	yes	yes	yes
103	China - Singapore	2008	2009	yes	yes	no

N°	RTA Name	year of signature*	year of entry into force*	Provisions on TBT	RTA DSM (general application)	TBT-specific DS provisions
104	US - Peru	2006	2009	yes	yes	no
105	US - Oman	2006	2009	yes	yes	no
106	EU - Côte d'Ivoire	2008	2009	yes	yes	no
107	Honduras - El Salvador - Chinese Taipei	2007	2008	yes	yes	yes
108	ASEAN - Japan	2008	2008	yes	yes	yes
109	Nicaragua - Chinese Taipei	2006	2008	yes	yes	no
110	China - New Zealand	2008	2008	yes	yes	no
111	Turkey - Georgia	2007	2008	yes	yes	no
112	Japan - Philippines	2006	2008	yes	yes	no
113	EFTA - SACU	2006	2008	yes	yes	no
114	EU - CARIFORUM States EPA	2008	2008	yes	yes	no
115	Brunei Darussalam - Japan	2007	2008	no	n.a.	n.a.
116	EU - Bosnia and Herzegovina	2008	2008	yes	yes	no
117	Japan - Indonesia	2007	2008	no	n.a.	n.a.
118	Turkey - Albania	2006	2008	yes	no	no
119	Panama - Chile	2006	2008	yes	yes	no
120	Pakistan - Malaysia	2007	2008	yes	yes	no
121	EU - Montenegro	2007	2008	yes	yes	no
122	Chile - India	2006	2007	yes	yes	no
123	Pakistan - China	2006	2007	yes	yes	no
124	Japan - Thailand	2007	2007	yes	yes	no
125	Egypt - Turkey	2005	2007	yes	yes	no
126	Chile - Japan	2007	2007	yes	yes	yes
127	Central European Free Trade Agreement (CEFTA) 2006	2006	2007	yes	yes	no
128	EFTA - Egypt	2007	2007	yes	yes	no
129	Turkey - Syria	2004	2007	yes	yes	no
130	EFTA - Lebanon	2004	2007	yes	yes	no
131	Russian Federation - Serbia	2000	2006	yes	no	no
132	Guatemala - Chinese Taipei	2005	2006	yes	yes	no
133	Ukraine - Belarus	1992	2006	no	n.a.	n.a.
134	Iceland - Faroe Islands	2005	2006	no	n.a.	n.a.
135	India - Bhutan	2006	2006	no	n.a.	n.a.
136	South Asian Free Trade Agreement (SAFTA)	2004	2006	yes	Yes	no
137	Chile - China	2005	2006	yes	yes	no
138	Trans-Pacific Strategic Economic Partnership	2005	2006	yes	yes	no
139	Panama - Singapore	2006	2006	yes	yes	yes
140	EU - Albania	2006	2006	yes	yes	no
141	US - Bahrain	2005	2006	yes	yes	no
142	EFTA - Republic of Korea	2005	2006	yes	yes	no
143	Japan - Malaysia	2005	2006	yes	yes	yes
144	Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR)	2004	2006	yes	yes	no
145	Republic of Korea - Singapore	2005	2006	yes	yes	no
146	Turkey - Morocco	2004	2006	yes	yes	no
147	US - Morocco	2004	2006	yes	yes	no
148	Ukraine – Republic of Moldova	2003	2005	yes	no	no
149	Pakistan - Sri Lanka	2002	2005	no	n.a.	n.a.
150	India - Singapore	2005	2005	yes	yes	no
151	EU - Algeria	2002	2005	yes	yes	no
152	Jordan - Singapore	2004	2005	no	n.a.	n.a.
153	Thailand - New Zealand	2005	2005	yes	yes	no
154	ASEAN - China	2004	2005	yes	yes	no
155	Turkey - Palestinian Authority	2004	2005	yes	yes	no
156	Turkey - Tunisia	2004	2005	yes	yes	no
157	EFTA - Tunisia	2004	2005	yes	yes	no

N°	RTA Name	year of signature*	year of entry into force*	Provisions on TBT	RTA DSM (general application)	TBT-specific DS provisions
158	Japan - Mexico	2004	2005	yes	yes	yes
159	Thailand - Australia	2004	2005	yes	yes	no
160	US - Australia	2004	2005	yes	yes	yes
161	Mexico - Uruguay	2003	2004	yes	yes	no
162	Panama - Chinese Taipei	2003	2004	yes	yes	no
163	Common Economic Zone (CEZ)	2003	2004	no	n.a.	n.a.
164	Southern African Customs Union (SACU)	2002	2004	yes	yes	no
165	EFTA - Chile	2003	2004	yes	yes	yes
166	EU - Egypt	2001	2004	yes	yes	no
167	Republic of Korea - Chile	2003	2004	yes	yes	no
168	China - Macao, China	2003	2003	no	n.a.	n.a.
169	China - Hong Kong, China	2003	2003	no	n.a.	n.a.
170	US - Singapore	2003	2004	yes	yes	no
171	US - Chile	2003	2004	yes	yes	no
172	India - Afghanistan	2003	2003	no	n.a.	n.a.
173	Pacific Island Countries Trade Agreement (PICTA)	2001	2003	no	n.a.	n.a.
174	EU - Chile	2002	2003	yes	yes	no
175	Singapore - Australia	2003	2003	yes	yes	no
176	Turkey - Bosnia and Herzegovina	2002	2003	yes	no	no
177	EU - Lebanon	2002	2003	yes	yes	no
178	EFTA - Singapore	2002	2003	yes	yes	no
179	Gulf Cooperation Council (GCC)	2001	2003	no	n.a.	n.a.
180	EU - San Marino	1991	2002	no	n.a.	n.a.
181	Ukraine - Tajikistan	2001	2002	no	n.a.	n.a.
182	Canada - Costa Rica	2001	2002	yes	yes	yes
183	EU - Jordan	1997	2002	yes	yes	no
184	Japan - Singapore	2002	2002	yes	yes	no
185	EFTA - Jordan	2001	2002	yes	yes	no
186	EFTA - The former Yugoslav Republic of Macedonia	2000	2002	yes	yes	no
187	Ukraine - The former Yugoslav Republic of Macedonia	2001	2001	yes	no	no
188	Armenia - Kazakhstan	1999	2001	no	n.a.	n.a.
189	India - Sri Lanka	1998	2001	no	n.a.	n.a.
190	US - Jordan	2000	2001	no	n.a.	n.a.
191	EU – The former Yugoslav Republic of Macedonia	2001	2001	yes	yes	No
192	New Zealand - Singapore	2000	2001	yes	yes	no
193	EFTA - Mexico	2000	2001	yes	yes	yes
194	Southern African Development Community (SADC)	1996	2000	yes	yes	no
195	Israel - Mexico	2000	2000	yes	yes	yes
196	Georgia - Turkmenistan	1996	2000	no	n.a.	n.a.
197	Turkey - The former Yugoslav Republic of Macedonia	1999	2000	yes	no	no
198	EU - South Africa	1999	2000	yes	yes	no
199	EU - Morocco	1996	2000	yes	yes	no
200	East African Community (EAC)	1999	2000	yes	yes	no
201	EU - Israel	1995	2000	yes	yes	no
202	EU - Mexico	1997	2000	yes	yes	yes
203	Chile - Mexico	1998	1999	yes	yes	no
204	Georgia - Kazakhstan	1997	1999	no	n.a.	n.a.
205	EFTA - Morocco	1997	1999	yes	Yes	no
206	EFTA - Palestinian Authority	1998	1999	yes	yes	no
207	Ukraine - Kazakhstan	1994	1998	no	n.a.	n.a.
208	Georgia - Armenia	1995	1998	no	n.a.	n.a.
209	Kyrgyz Republic - Ukraine	1995	1998	no	n.a.	n.a.
210	Kyrgyz Republic - Uzbekistan	1996	1998	no	n.a.	n.a.
211	EU - Tunisia	1995	1998	yes	Yes	no

N°	RTA Name	year of signature*	year of entry into force*	Provisions on TBT	RTA DSM (general application)	TBT-specific DS provisions
212	Russian Federation - Belarus - Kazakhstan	1995	1997	no	n.a.	n.a.
213	Turkey - Israel	1996	1997	yes	Yes	no
214	Canada - Chile	1996	1997	yes	Yes	no
215	EU - Palestinian Authority	1997	1997	yes	yes	no
216	EU - Faroe Islands	1996	1997	no	n.a.	n.a.
217	Canada - Israel	1996	1997	yes	Yes	no
218	Ukraine - Azerbaijan	1995	1996	no	n.a.	n.a.
219	Ukraine - Uzbekistan	1994	1996	no	n.a.	n.a.
220	Armenia - Turkmenistan	1995	1996	no	n.a.	n.a.
221	Armenia - Ukraine	1994	1996	no	n.a.	n.a.
222	Georgia - Azerbaijan	1996	1996	no	n.a.	n.a.
223	Georgia - Ukraine	1995	1996	no	n.a.	n.a.
224	Kyrgyz Republic – Republic of Moldova	1995	1996	no	n.a.	n.a.
225	EU - Turkey	1995	1996	yes	yes	No
226	Colombia - Mexico	1994	1995	yes	yes	no
227	Ukraine -Turkmenistan	1994	1995	no	n.a.	n.a.
228	Armenia – Republic of Moldova	1993	1995	no	n.a.	n.a.
229	Kyrgyz Republic - Armenia	1994	1995	no	n.a.	n.a.
230	Kyrgyz Republic - Kazakhstan	1995	1995	no	n.a.	n.a.
231	South Asian Preferential Trade Arrangement (SAPTA)	1993	1995	no	n.a.	n.a.
232	Faroe Islands - Switzerland	1994	1995	no	n.a.	n.a.
233	Georgia - Russian Federation	1994	1994	no	n.a.	n.a.
234	Melanesian Spearhead Group (MSG)	1993	1994	no	n.a.	n.a.
235	Commonwealth of Independent States (CIS) Free Trade Area of 1994	1994	1994	yes	Yes	no
236	Common Market for Eastern and Southern Africa (COMESA)	1993	1994	yes	yes	no
237	North American Free Trade Agreement (NAFTA)	1992	1994	yes	yes	yes
238	Russian Federation - Turkmenistan	1992	1993	no	n.a.	n.a.
239	Russian Federation - Uzbekistan	1992	1993	no	n.a.	n.a.
240	Russian Federation - Azerbaijan	1992	1993	no	n.a.	n.a.
241	Economic Community of West African States (ECOWAS)	1993	1993	no	n.a.	n.a.
242	Faroe Islands - Norway	1992	1993	no	n.a.	n.a.
243	EFTA - Israel	1992	1993	yes	yes	no
244	ASEAN Free Trade Area (AFTA)	1992	1992	yes	yes	no
245	Economic Cooperation Organization (ECO)	1992	1992	no	n.a.	n.a.
246	EFTA - Turkey	1991	1992	yes	no	no
247	EU - Andorra	1991	1991	no	n.a.	n.a.
248	Lao People's Democratic Republic - Thailand	1991	1991	no	n.a.	n.a.
249	US - Israel	1985	1985	no	n.a.	n.a.
250	Australia - New Zealand (ANZCERTA)	1982	1983	yes	no	no
251	South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)	1980	1981	no	n.a.	n.a.
252	EU - Syria	1977	1977	no	n.a.	n.a.
253	Australia - Papua New Guinea (PATCRA)	1976	1977	no	n.a.	n.a.
254	Asia Pacific Trade Agreement (APTA)	1975	1976	yes	yes	No
255	Caribbean Community and Common Market (CARICOM)	1973	1973	yes	yes	no
256	EU - Norway	1973	1973	no	n.a.	n.a.
257	EU - Iceland	1972	1973	no	n.a.	n.a.
258	EU - Switzerland - Liechtenstein	1972	1973	no	n.a.	n.a.
259	European Free Trade Association (EFTA)	1960	1960	yes	yes	no
260	EC Treaty	1957	1958	yes	yes	no

* For RTAs that also cover services the signature and entry into force of the services section took place in some cases subsequently.

Source: WTO RTA Database.