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碩士論文

世界貿易組織與區域貿易協定之競合與衝突研究
—以爭端解決機制為中心

Conflict and Overlapping of Dispute Settlement Mechanism Jurisdiction between the World Trade Organization and Regional Trade Agreements

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摘要

1994 年世界貿易組織（WTO）成立後，其即繼 GATT 而成為最重要的多邊國際貿易組織；而 WTO 下設成立的爭端解決機制，也因強制管轄權的賦予，而被認定為維繫 WTO 有效運作的重要基石。然而，隨著區域貿易協定（RTA）在 1990 年後的快速成長，目前 RTA 已成為國際貿易規範不可忽略的一環，且在多邊貿易協定新回合談判陷入僵局的同時，RTA 之發展即更令人注意。除了 WTO 的爭端解決機制，目前許多 RTA 也自行設有爭端解決機制；此外，隨著擴張 RTA 爭端解決機制管轄權的爭端管轄條款的訂定，以及排除 WTO 對會員間爭端解決管轄權行使的場域選擇條款之出現，WTO 和 RTA 爭端解決機制間管轄權重疊和競合狀況即隨之發生，並曾在 WTO 訴訟中被提出。

本論文之研究，首先將對目前生效適用的 RTA 進行分析，並將管轄權條款依其對 WTO 爭端解決機制管轄權之影響加以分類；其次，根據對 WTO 判決先例研究所得之分析以及國際法相關原則的適用，本論文將提出 WTO 爭端解決機制調和 WTO 和 RTA 管轄權衝突之可能方法，並希望藉由此論文研究之提出，能對 WTO 和 RTA 規範之調和有所貢獻，並避免國際法脆裂狀況之發生。

關鍵字：世界貿易組織，區域貿易協定，爭端解決，管轄權衝突

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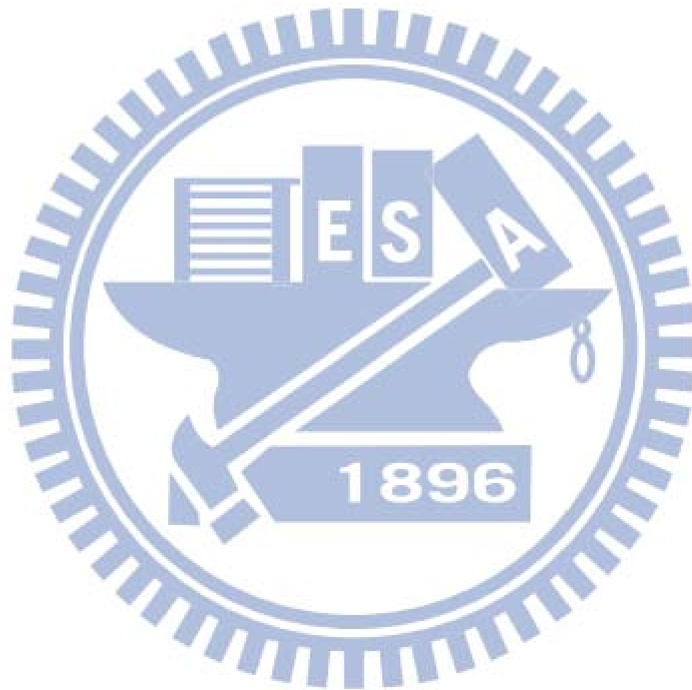
ABSTRACT

Succeeding the old GATT system, the World Trade Organization (WTO) has become the most dominant multilateral international trade organization since its establishment in 1994. The efficient Dispute Settlment Mechanism (DSM) under WTO with compulsory jurisdiction over disputes among WTO members is also the pillar of WTO and has also been hailed as “jewel of the crown”. However, after the 1990s, Regional Trade Agreements (RTAs) have developed rapidly and become the mainstream of nowaday’s international trade regulation while the WTO struggled with difficulties during the Doha negotiation Round. Moreover, RTAs also established its own DSM, and with the adoption of jurisdiction clause or forum selection clause to expand the RTA DSM’s jurisdiction or to exclude WTO’s jurisdiction over disputes. The overlapping jurisdiction has become a serious problem between WTO and RTAs’ DSMs, and dispute upon this issue has also been raised before WTO panel and Appellate Body.

By analyzing RTAs in force, this thesis will first indicate the trend of jurisdictional clauses used by members under RTAs, and will classify it by how it would affect WTO

DSM's jurisdiction over disputes. Furthermore, based on the guidance extract from WTO jurisprudence and implementation of related international principles, this thesis will also bring up suggested solutions for WTO DSM in order to harmonize the conflict of jurisdictions between DSMs. With the content mentioned above, the findings and suggestions of this thesis may contribute to the harmonization of relationship between WTO and RTAs, and thus prevent the international trade law from fragmentation.
Keyword: WTO, RTA, dispute settlement, conflict of jurisdiction



謝　　誌

"Go as far as you can see; when you get there you'll be able to see farther."

－ *Thomas Carlyle*

看著眼前的論文，回想碩士班這三年及從小到大的學習，整理著心中百感交集的情緒，我才發現發覺謝誌竟是整本論文最難下筆的一段。

本篇論文的完成，首要感謝我的指導教授倪貴榮教授，在課業和論文撰寫中所給我的指導與教誨，以及日常生活中的關心與照顧，您治學及研究的嚴謹和認真，永遠是我最好的模範。感謝口試委員羅昌發教授以及施文真教授，在口試過程中的討論和問答，讓我能更深入的思考論文的內容與方向，您們給予的建議，也使此本論文能更臻完整。感謝交大科法所王敏銓教授、王立達教授、林欣柔教授、林志潔教授以及劉尚志教授，曾給我的幫助與教導。另外，特別要感謝林其昂教授，從大三起擔任您研究助理的二年多，帶領我進入並得以窺探研究的世界，一起前往丹麥參訪聯合國氣候變遷框架公約第十五次締約方大會的北歐之行，更是我永遠難忘的回憶。

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「結束，是另一段旅程的開始」，這本論文的完成，記錄了自己在此階段的成長，也提醒著自己要準備另一個階段的到來。謹以此論文和學位，獻給我最親愛的家人。

張愷致　謹誌

2012 年 7 月　台北夏夜

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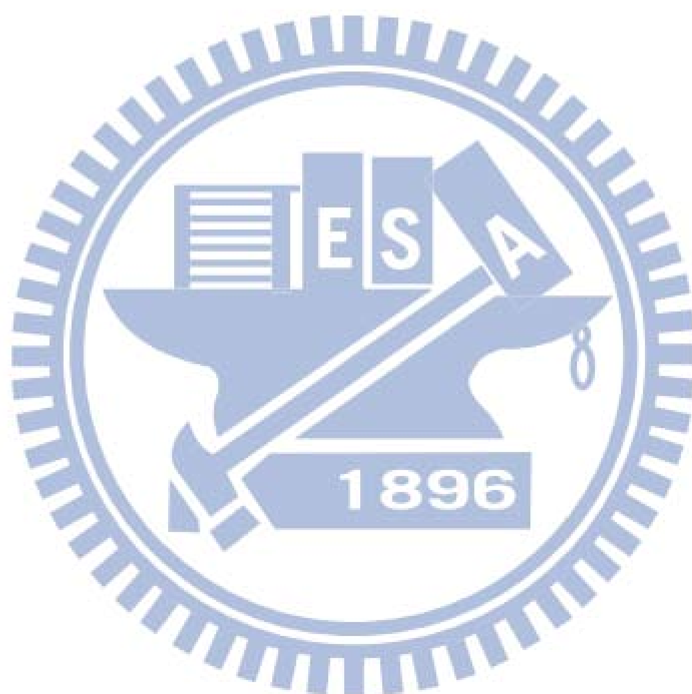

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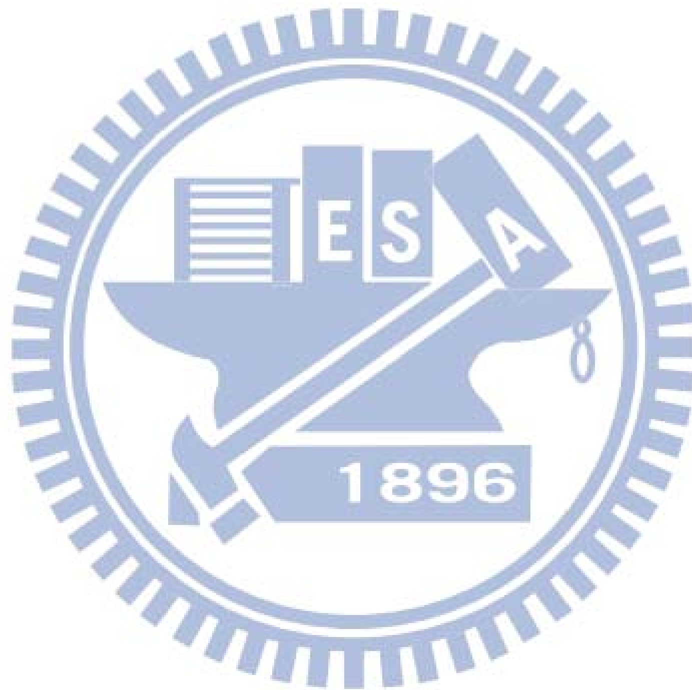

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第壹章 緒論

第一節 研究動機與研究目的

爭端解決機制自世界貿易組織（World Trade Organization, 以下簡稱WTO）成立以來，即被視為維繫WTO有效運作的最重要因素之一，其中因WTO協定中規範爭端解決之「爭端解決規則與程序瞭解書（Dispute Settlement Understanding, DSU）[1]」，賦予會員國於其他會員國因違反WTO內括協定（covered agreement）以致其權益受損時，將案件提交予WTO爭端解決機制尋求救濟之權利，此外，DSU並賦予WTO爭端解決機制對案件之強制管轄權，且要求爭端解決機構應依WTO協定對爭端進行裁決，以建立一以「規範本位（rule-oriented）」的爭端解決機制[2]，並藉爭端解決機構之統一裁決，建立統一且具一致性的法制。然而，近年來WTO會員國除了依WTO之入會承諾開放其市場外，會員國彼此間更依據「關稅暨貿易總協定（General Agreement on Tariff and Trade，簡稱GATT）」第XXIV條[3]、東京回合授權條款第二條(c)款[4]，以及「服務貿易協定（General Agreement on Trade in Services，簡稱GATS）」第V條[5]之規定，簽訂區域貿易協定（Regional Trade Agreement，簡稱RTA）或自由貿易協定（Free Trade Agreement，簡稱FTA），藉WTO以外雙邊或多邊貿易協定的簽署，進一步促成締約國間區域經濟整合，甚或相互形成更緊密之關稅同盟貿易關係。根據WTO秘書處之統計，此類已生效的RTA和FTA之數量自 2011 年 12 月為止，已超過 300 個之譜[6]，並有更多

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[2] 參見陳淑慧，WTO 爭端解決機制及其程序爭點之研究，東海大學法律研究所碩士論文，頁 12（2004）。

[3] General Agreement on Tariffs and Trade 1994, art. XXIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994) [hereinafter GATT].

[4] Enabling clause art. 2(c): “.

[5] General Agreement on Trade in Services art. V: “Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, [hereinafter GATS].

[6] *See* World Trade Organization, *Regional Trade Agreements: facts and figures, How many regional trade*

在洽談及協商中，因此有認為RTA的大量簽署，已在WTO之外另創造了一個新的平行國際貿易體系。[7]

然而，區域貿易協定的出現，其內容除可能涉及會員國間就商品、服務貿易的特別約定,而影響會員國於 WTO 體制規範下權利享有和義務負擔,許多 RTA 在簽署時，亦另在區域貿易協定下設立爭端解決機制,供會員國解決因 RTA 解釋適用和權利義務履行負擔上的貿易爭端。然而，隨著 RTA 逐漸地發展，RTA 的爭端解決機制所處理的案件，也不純然以 RTA 解釋適用上發生之爭端為限，其管轄權行使更開始擴及處理 WTO 協定的解釋適用問題。此狀態發展的原因，可能出於許多區域貿易協定中的規範內涵與 WTO 規範相似或多所重疊，因此倘會員國間就 RTA 條文適用發生爭執，實際上對於蘊含同樣意涵或概念的 WTO 規範，會員國間亦可能出現爭端，是而面對此種會員國間單一爭端事件，卻因有兩套平行且內容相似的規範同時存在，此時會員國倘欲對此貿易爭端解決訴諸於爭端解決機制尋求救濟，即必須先釐清其在訴訟中所欲援引者為 WTO 法規，抑或是 RTA 義務的違反，才能進一步思考究竟係 WTO 或 RTA 之爭端解決機制對該案件擁有管轄權。尚且，除了貿易紛爭中當事國援引法規不同而可能影響爭端解決機制對案件是否有管轄權出現歧異狀況外，隨著 RTA 的發展，締約國也逐漸擴張 RTA 爭端解決機構的管轄權行使範圍,此也造成 RTA 和 WTO 爭端管轄權重疊和衝突問題的白熱化。

其中，原先RTA爭端解決機制的設立目的在於處理RTA締約國間就RTA解釋適用上發生之爭端，姑且撇除前述WTO和RTA規範實體內涵出現重複規範的問題，理論上WTO和RTA之爭端解決機構對案件事務管轄權之有無，應可以直接從該案件中原被告所主張之法律依據為RTA或WTO規範加以分辨。然而，因近年來許多RTA爭端解決機

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agreements have been notified to the WTO?, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Dec. 21, 2011).

[7] 林彩瑜，「論 WTO 與區域貿易協定爭端解決機制之衝突與調和」，台大法學論叢，第 40 卷第一期，頁 431。

制在設計上，除了提供締約國間解決RTA適用下發生的問題外，亦將其事務管轄客體擴及於WTO爭端，造成對於涉及WTO義務違反之案件，RTA和WTO的爭端解決機制可能同時對案件享有管轄權，況且隨著RTA中所謂「一般型專屬管轄」或「別訴權利排除型專屬管轄」等場域選擇條款[8]之訂定，更造成貿易爭端案件由RTA爭端解決機制審理後，WTO會員依RTA之規定，其向WTO爭端解決機制尋求救濟之權利將被排除。在此情況下，同為WTO會員國之RTA締約國間倘遇有貿易爭端時，即可能面臨該爭端究應提交由WTO或RTA爭端解決機制審理，以及WTO於案件經RTA爭端解決機制審理後是否仍得行使管轄權之問題，並將對會員國間涉及WTO義務履行紛爭具有強制管轄權的WTO爭端解決機制和RTA之爭端解決機制間的管轄權產生衝擊。[9]

此種在RTA爭端解決機制設立後多元貿易爭端解決途徑並存所導致會員國處理貿易爭端解決場域選擇複雜化的狀況[10]，以及爭端解決機制管轄權重疊與競合發生，更可能導致複數爭端解決機制（構）對同一事件根據相同或相異法規作出不同裁決之狀況，並引發單一實體事件因法律適用結果分歧，而產生訴訟判決歧異，使會員國有無違反國際貿易法義務懸而未定，並造成貿易紛爭國間應以何爭端解決機構裁決為最終依據意見分歧，並造成勝、敗訴國均無法確知系爭案件之適法性為何，敗訴國亦不知是否有更改其貿易政策，此最終將導致國際法法律適用之割裂，而造成國際法脆裂（fragmentation of International Law）的發生。[11]

就現實面而言，我國自 2004 年加入WTO成為會員國後，近年來亦積極與他國洽

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[8] 關於「一般型專屬管轄」及「別訴權利排除型專屬管轄」場域選擇條款之介紹，請見本論文第貳章第三節說明。

[9] *See* Martin Lovell, *Regional Trade Agreements and the WTO – An analysis of the efficacy of the ACFTA forum selection clause in resolving jurisdiction al conflict*, Working Paper Series, *available at* http://ssrn.com/abstract=1114770 (last visited June 3, 2012).

[10] 關於「場域選擇」(forum shopping)可能引發之問題和論述，參見林彩瑜，前揭（註 7），頁 394–99。

[11] 對國際法脆裂（fragmentation of International Law）的介紹，參見林彩瑜，前揭（註 7），頁 394–99；亦可見 Chun-ming Chen, On a Coherence Approach towards Jurisdictional Conflicts between the WTO and RTAs, Master Thesis of Graduate Institute of Law, College of Law, National Taiwan University, at 4–7 (2009).

談締結RTA以獲得更優惠之關稅，並進一步消弭他貿易國間貿易障礙，開拓我國之國際貿易市場；以我國目前已與中國大陸簽訂之「兩岸經貿合作框架協定」（Economic Cooperative Framework Agreement, 以下簡稱ECFA）為例，ECFA之第十條表示兩岸將於ECFA下設立爭端解決機制，以處理ECFA下之貿易爭端，在此情況下，因我國與中國大陸同時為WTO及ECFA之簽署國，是而兩岸間所發生之貿易爭端除可能涉及ECFA義務之違反外，亦可能涉及WTO內括協定義務之履行，故若兩岸間發生貿易爭端，當事國究應依循ECFA抑或是WTO爭端解決機構尋求救濟，即可能出現前述之問題。[12]

為了處理相異爭端解決機構並存而衍生的管轄衝突和競合狀況，在過往WTO爭端解決機制曾審理的案件中，爭端當事國及訴訟參加第三國均曾對此管轄權衝突議題提出爭辯，並主張藉「一事不再理原則」、「既判力拘束效」等國際法原則之適用而請求WTO爭端解決機構尊重締約國間RTA的特別約定，而限縮其對案件管轄權之行使，以調和RTA和WTO所可能產生之管轄競合和衝突影響[13]。鑒於WTO爭端解決機制被賦予對會員強制管轄權之設計，一向被認為是維繫WTO會員國在貿易政策法制一致性（consistency）和可預測性（predictability）的重要基礎[14]，因此RTA爭端管轄和場域選擇條款對WTO爭端解決機制所得行使的管轄權可能造成的衝擊，除可能根本地影響一國國際貿易權益的維護和貿易政策的推行外，更對WTO國際貿易體系的維繫以及國際法脆裂的發生與否有著舉足輕重的影響。

本論文將針對WTO和RTA下之爭端解決機制管轄之競合與衝突進行研究，藉由對

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[12] 關於兩岸間貿易爭端之場域選擇分析，可參見陳小坪，WTO 架構下兩岸經貿互動之研究，國立臺灣師範大學政治學研究所碩士學位論文，頁 105–114（2009）；亦可參見陳筱筠，臺灣在 WTO 爭端解決機制下處理兩岸經貿爭端研究，國立政治大學外交研究所碩士論文（2004）；洪守億，區域貿易協定與兩岸經濟合作架構協議爭端解決機制之探討，世新大學法學院碩士論文，頁 118 以下（2011 年）。

[13] 對案件詳細介紹見本論文第肆章內容。

[14] *See generally* MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 104–16, (2d edn., 2006); DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 17 (2d edn., 2004).

WTO實際案例之分析，探討各類型RTA爭端解決及場域選擇條款對WTO爭端解決機制管轄權所可能產生的影響和衝擊，以及此議題未來可能之發展方向，並提出未來WTO爭端解決機制審酌RTA條款所造成管轄權衝突問題的可能解決方法[15]，除一方面期待能維護RTA和WTO之履行，並希望釐清WTO和RTA之關係及其未來之發展方向，最後更希望論文研究之結果，能對我國未來草擬RTA和相關國際貿易協定時提供參考之方向，期能提升並強化我國國際貿易權益之保護，並促進我國國際貿易法制的發展。

第二節　研究方法與章節安排

第一項　研究方法

本論文所使用的研究方法，主要為文獻分析以及個案研究，並藉簡單統計分析當前 RTA 發展狀況。

第一款　文獻分析及個案研究

本論文蒐集學者曾就 WTO 和 RTA 關係與互動分析之論文，以了解當前對 WTO 和 RTA 爭端解決機制間研究之方向以及學理之研究和發展方向。

此外，因WTO以及其成立前之GATT時代，均有爭端解決機制審理當事國請求裁決之貿易爭端[16]，此等貿易爭端除反映了國際經貿環境及政策制度的現狀外，爭端解決機構對案件作出的裁決也因其係對爭端當事國措施和政策是否符合國際貿易規範之有權認定與解釋，使當事國將必須依裁決結果調適內國政策（規範）以符合國際規範，而具有引導國際貿易制度發展的作用。因此，從對爭端解決案件的分析研究中，我們除了一方面能了解國際貿易實務的發展趨勢外，更能理解現行爭端解決機構對WTO法制的解釋適用方法。

[15] 陳俊銘在其碩士論文中，亦針對 WTO 和 RTA 之爭端解決機制管轄權衝突進行探討，並認爲 WTO 爭端解決機制應以權利濫用概念出發，對會員國救濟權限加以限縮。*See* Chen, *supra* note 11, at 7–11.

[16] WTO 和 GATT 之爭端解決機制和審理機構之說明，請見本論文第參章第二節、一之說明。

基此，本論文也將以個案研究為研究方法，藉由對 WTO 爭端解決機構之判決先例進行研究，藉由對 RTA 之分析以及過往 WTO 爭端解決機構在處理 WTO 和 RTA 爭端解決機制管轄衝突之裁決中曾提出之論理，探討目前 WTO 爭端解決機構對處理管轄權衝突問題時採取之立場及適用的法理。

第二款　對 RTA 爭端解決管轄條款法律效果分析與分類

為了釐清 RTA 下爭端解決管轄條款出現和適用對 WTO 爭端解決機制所可能產生的影響，本論文將就 RTA 之爭端管轄條款進行分類，並探討各類型條款之適用法律效果為何。

1. RTA 爭端解決管轄條款之分析與類型化

為了瞭解 RTA 不同類型爭端解決管轄條款，對締約國尋求貿易救濟時「場域選擇」以及爭端解決機構管轄權所可能造成之影響，本論文將以目前已生效施行的區域貿易協定之爭端解決管轄條款為研究對象，將 RTA 下之爭端解決管轄條款依其管轄客體（*ratione materiae*）對象，以及限制當事國於爭端經審議後另尋其他爭端解決機制裁決之場域選擇條款加以區分並類型化，俾利後續進一步分析其效果。

2. 對各類別 RTA 爭端管轄即場域管轄條款之法律效果分析

在將RTA下的爭端解決管轄條款依其管轄客體和對當事國向其他爭端解決機制尋求救濟的限制規範類型化後，本論文將進一步借用WTO判決先例所提出之各項法理，以及「維也納條約法公約（Vienna Convention on the Law of Treaties，簡稱條約法公約）[17]」所提供之條約解釋方法，釐清RTA爭端管轄條款之效力，並研究在國際法一般法律原則（general principle of law）適用下，各類型爭端解決條款的法律效果為何，藉以知悉WTO之爭端解決機制之管轄權，將在何種情況下將因RTA爭端管轄和場域選擇條款

[17] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

而受到的改變，並瞭解各類型條款適用對WTO法制將造成的衝擊和影響程度。

第二項　章節安排

本論文的第壹章，將先針對本論文的研究動機和研究目的加以介紹；並說明本論文研究架構和章節安排。

第貳章中，為進一步說明本研究探討主題之內涵和重要性，論文將就 WTO 和區域貿易協定的成立背景、意義和基礎概念進行說明，並就 WTO 和區域貿易組織的爭端解決機制狀況進行介紹，以建立讀者對本論文探討議題之基本認識。此外，為了瞭解目前實務 RTA 簽署狀況，以及其下爭端管轄條款及場域轄條款所對 WTO 爭端解決機制管轄權行使造成之影響，此章節中本論文亦將蒐集對當前生效施行的的 RTA 爭端管轄條款研究分析，將各種 RTA 爭端解決條款依其審理案件客體和法律效果類型化，並統計目前各類型 RTA 爭端管轄條款被適用狀況，以建立本論文研究 RTA 爭端管轄條款和場域管轄條款所可能造成影響之基本認識，並使讀者對 RTA 和 WTO 爭端解決機制管轄權之可能衝突與競合問題有所認識。

第參章中，本論文為探討處理RTA和WTO爭端解決機制衝突與競合之可能方式，在此章節中先針對本論文欲使用研究方法及途徑—亦即 WTO 判決先例研究上之重要性以及一般國際法原則的適用—理論基礎加以說明。

第肆章的研究，將對 WTO 爭端解決機構在 *Mexico – Taxes on Soft Drinks* 和 *Argentina – PoulryAnti-Dumping Duties* 案的裁決報告進行介紹，指摘出 WTO 爭端解決機構處理 RTA 爭端解決條款對其既有管轄權所可能造成影響的說明，以及爭端當事國欲此等爭議時對相關問題之探討。

第伍章，延續第肆章對 WTO 爭端解決機制處理管轄權衝突爭端時的討論，本論文將對 WTO 判決之重要法理進行整理與歸納，並對其不足之處或值得持續追蹤其發展的法理進行探討，並擬從對 RTA 爭端解決機制定位的討論中，釐清 RTA 各類型條款的適用於 WTO 爭端解決機制下適用之可能。

第陸章中，針對分析並歸類後的各種爭端解決管轄條款，本論文將嘗試藉 WTO 爭端解決機構在判決先例中曾提及相關聯的法律原則，以及其他可能可供適用的國際法原理原則之分析，探詢各類型 RTA 爭端解決條款之適用可能性及其效果，並嘗試就 RTA 爭端解決條款所造成的 RTA 與 WTO 管轄競合問題提出解答。

在最後之第柒章中，將總結本論文對目前 RTA 爭端解決機制和各類型管轄條款發展適用狀況分析，並提出處理 WTO 與 RTA 爭端解決機制管轄權衝突與競合問題可適用法理和規範；在結論上也將對 RTA 和 WTO 規範的互動上進行反思，期能對我國日後設置 RTA 爭端解決機制之談判上或面對相關法律爭端時，提出對我國貿易協定之簽署—特別是 RTA 爭端解決機制條款訂定—提供建言與助益。

第三節　研究範圍與研究限制

本論文之研究核心，在於探討 RTA 下訂定的爭端解決及場域選擇條款對 WTO 爭端解決機制既有管轄權行使的影響，因此論文之研究將以 WTO 爭端解決機制對管轄權衝突和競合問題的見解和分析為核心脈絡，並探討藉國際法相關法理分析 RTA 和 WTO 爭端解決管轄競合議題未來的發展趨勢，並對 WTO 爭端解決機構未來處理相關爭端時可能採取的見解進行預測。最後，本論文亦將分析我國目前所簽署 RTA 下的爭端解決條款加以分析，並評估此些 RTA 爭端管轄與場域選擇條款對我國就貿易爭端向 WTO 提訴權利行使之影響，期能對我國洽簽 RTA 並訂定爭端管轄條款時參考之用，以確保對我國貿易救濟權益最周延的保護。

為更進一步釐清本論文分析、結論及建議之可適用範圍，本論文之研究範圍和限制說明如下：

首先，本論文之研究主題為 RTA 爭端管轄及場域管轄條款對 WTO 爭端解決機制管轄權行使的可能影響分析，因此研究論理及所作推論，僅適用於會員國藉 WTO 爭端解決小組和上訴機構對案件管轄權尋求救濟時，WTO 爭端解決機構管轄權所受衝

擊之探討，至於若當事國向國際法院起訴請求審理或是以商業仲裁處理，甚或是將案件交由 RTA 爭端解決機構審理所可能出現的狀況，則不在本論文之研究範圍中，在此先予說明。

其次，本論文之研究立論於對當前生效運作 RTA 下的爭端解決條款進行研究和分析；但因資料蒐所限制及閱讀語言關係，本論文仍未能對當前現存之所有 RTA 進行分析，因此對於本論文未分析之各 RTA 的爭端解決機制設計及其下條款的適用效力，對 WTO 爭端解決機制的影響，也非本論文研究所能涵蓋，因此對於此些本論文未探究影響性之爭端管轄條款，本論文僅能就所介紹之相關法理提供適用參考。

再者，本論文探討者乃是對 WTO 爭端解決機構過往處理相關案件論理，和對各 RTA 爭端管轄條款效力之歸納整理，並進而推論 WTO 爭端解決機構未來審議相關案件時之論理發展。因此本論文研究結論之提出乃是對未來法制的預測，僅提供法理論邏輯推演的可能結果，實務上則仍應依個案事實、爭端條款內容，以及原被告訴訟中主張推論法院之可能立場，且若 WTO 爭端解決機構在後案審理中對 RTA 管轄條款效力提出新見解或對既有論理變更而與本論文論述相異時，此也將超出本論文的研究範圍。

另外，因本論文以 WTO 爭端解決機制管轄權受 RTA 條款影響而可能對會員國救濟途徑選擇衝擊為核心，故論文研究所得結論僅代表作者認為 WTO 爭端解決機構審議相關案件時對的推論，而不包含 RTA 爭端解決機構審議 RTA 與 WTO 管轄衝突，或 RTA 與 RTA 管轄衝突議題的看法，於此一併說明。

最後，鑒於杜哈回合談判中，各會員國提出是否應對當前 WTO 爭端解決機制規範加以修改之討論，然而因目前尚未見有會員國已取得共識之草案可供探討，因此若未來 WTO 爭端管轄機制應遵循的 DSU 在對管轄權或法規衝突解釋上有所修正或增修變動，因此 WTO 未來相關協定修正後的法規適用狀況不在本論文的研究範圍內，因此對於修法後 WTO 爭端解決機制處理管轄權爭議的可能變化，亦不在本論文的研究

範圍之中。

第貳章　WTO 和 RTA 背景介紹及問題意識之提出

第一節　世界貿易組織和 RTA

第一項　世界貿易組織概述

第一款　WTO 之前身—GATT 時期

設立國際組織以促進並統合國際貿易發展的概念，起源於 1944 年在美國New Hampshire舉行，針對國際貨幣和金融問題處理探討，最終並通過成立「國際貨幣基金（International Monetary Fund，簡稱IMF）」以及「國際復興開發銀行（International Bandk for Reconstruction and Development，又稱「世界銀行」，World Bank）」的「布列登森林會議（Bretton Woods conference）」；雖然在該會中認為對國際貿易亦有建立與IMF或世界銀行相似的國際組織以相互配合運作[18]，但在該會中並未對國際貿易組織的成立加以探討[19]。在 1945 年聯合國正式成立後，多邊貿易談判也在聯合國「經濟社會理事會」的展開協商，並在 1946 年達成成立「國際貿易組織（International Trade Organinzation，簡稱ITO）」的決議。

在ITO的成立協商談判進行中，「關稅暨貿易總協定（General Agreement on Tariffs and Trade，WTO成立以前的關稅暨貿易總協定以下簡稱為GATT 1947）」於 1947 年簽署通過，雖然最終ITO的成立因為美國國會的拒絕批准而宣告失敗；然而，藉由「暫時適用議定書（Protocol of Provisional Application，簡稱PPA）」的簽署[20]，GATT 1947

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[18] 當時建立 ITO 的目的在於使之與 IMF 和世界銀行共同成爲國際經濟三位一體的規範架構，以便在二戰後促成經濟發展、重建歐洲並促進國際貿易。*See* William Davey, *The World Trade Organization: A Brief Introduction*, *in* INTERNATIONAL TRADE LAW 83, 83. (Andrew T. Guzman & Joost H.B. Pauwelyn eds., Wolters Kluwer, 2009).

[19] *See* MATSUSHITA ET AL., *supra* note 14, at 1–2; 亦可見羅昌發，國際貿易法，頁 4，第二版，台北：元照（2010）。 有認爲與貿易相關協定並未在該會議中討論，係因該會議之與會代表多爲財政部官員而非貿易部官員。*See* PALMETER & MAVROIDES, *supra* note 14, at 1.

[20] 關於各國接受 PPA 狀況及牽涉之「祖父條款（grandfather rights）」，參見羅昌發，前揭（註 19），頁 5、48–50。

保留了下來而成為WTO於 1995 成立前規範國際貿易長達 47 年的國際規範[21]。然而，GATT 1947 原先僅設計為ITO之部分規範，但隨著ITO成立的失敗，ITO的「臨時委員會（Interim Commission）」仍嗣後成為了GATT秘書處（Secretariat），GATT也轉變為國際組織並將GATT 1947 作為其章程。只是GATT原先僅設計為ITO規範之一部分，因此在讓GATT轉變為國際組織的狀況下，GATT始終面對著John Jackson教授描述為先天缺陷（birth defact）之下列問題：（1）欠缺賦予GATT法人格及其組織架構和程序的成設立章程；（2）GATT 1947 僅為暫時適用；（3）PPA允許與會員國與GATT 1947 相衝突之「祖父條款」存在；以及（4）GATT的職權、法律地位及決議能力的模糊和混淆。[22]

在GATT下，締約國間對關稅減讓和其他貿易障礙消除的進行了八個回合的談判[23]，其中在烏拉圭回合談判（Uruguay Round）中，締約國達成了訂定新國際貿易規範的共識，並於 1994 年 4 月 15 日於摩洛哥作成了「Marrakesh宣言」[24]，該會中的最後決定

[21] 關於 ITO 的建構發展始末介紹，*see generally* JOHN J. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2d edn. 1997); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d edn. 1990); PALMETER & MAVROIDES, *supra* note 14, at 1–4.

[22] John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 161, 163 (Anne O. Krueger ed. 1998); JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATION 84 (2000).

[23] 各回合談判時間如下表：

回合名稱	談判時間
Geneva Round	1947
Annecy Round	1949
Torquay Round	1950
Geneva Round	1956
Dillon Round	1960–1961
Kennedy Round	1962–1967
Tokyo Round	1973–1979
Uruguay Round	1986–1994

[24] Marrakesh Declaration of 15 April 1994, *available at* http://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.pdf.

（Final Act）將GATT轉型為目前眾所皆知依據「馬拉喀什建立世界貿易組織協定」而成立的「世界貿易組織」。[25]

第二款　WTO 之成立

1. WTO 之組織、目標及會員

(1) WTO之宗旨與目標[26]

根據Marrakesh協定前言及GATT前言觀察，WTO之成立宗旨在於提高生活水準、確保充分就業以及確保實際收入、與有效需求之穩定以及擴大貨品與服務貿易生產與貿易，而在追求此些貿易與經濟發展的同時，亦須注意資源最適當運用（optimal use）、環境保護以及永續發展（sustainable development）的觀念[27]；除此之外，WTO尚包含了:（1）提供會員國對現在或未來面對之貿易議題進行談判之場域；（2）掌管爭端解決制度；（3）掌管貿易政策檢驗機制；以及（4）在需要時與IMF和世界銀行共同合作等四個目標。[28]

(2) WTO之組織架構[29]

WTO乃採會員制的國際組織，WTO會員可在各委員會表達其意思。WTO之最高

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[25] MATSUSHITA ET AL., *supra* note 14, at 6–7.

[26] 此部份論述者眾，本文僅作基本簡介。相關論述 *see generally* MATSUSHITA ET AL., *supra* note 14, at 9–11; PALMETER & MAVROIDES, *supra* note 14, at 13–15; WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE LAW, CHAPTER 4 THE WTO: HISTORY AND STRUCTURE 79, 79–88. (Andrew T. Guzman & Joost H.B. Pauwelyn eds. 2009); 羅昌發，前揭（註 19），頁 12–17.

[27] Marrakesh Agreement Establishing the World Trade Organization, preamble, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; GATT preamble.　參見羅昌發，前揭（註 19），頁 12。

[28] Marrakesh Agreement arts. I, III, VIII.

[29] 此部份論述者眾，本文於此僅作基本簡介。*See generally* MATSUSHITA ET AL., *supra* note 14, at 10–11; PALMETER & MAVROIDES, *supra* note 14, at 14–15; World Trade Organization, Understanding the WTO, Chapter 7: The Organization, *in* INTERNATIONAL TRADE LAW, CHAPTER 4 THE WTO: HISTORY AND STRUCTURE 89, 89–94 (Andrew T. Guzman & Joost H.B. Pauwelyn eds. 2009); WTO website, The WTO in Brief: Part 2 The organization, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited June 11, 2012); 羅昌發，前揭（註 19），頁 12–17。

決議機關為由各WTO會員之代表組成的部長會議（Ministerial Conference），最少每兩年召開一次會議，並有對多邊協定事宜作成決定之權限；其下又設有總理事會（General Council）、總理事會之貿易政策檢視委員會（General Council meeting as Trade Policy Review Body）以及總理事會之爭端解決機構（General Council meeting as Dispute Settlement Body）。在部長會議召開期間，由WTO全體會員之代表所組成之常設總理事會，扮演著WTO的決策者和政策制定主體；為了處理WTO協定下各議題之探討、發展與運作，總理事會下另設有若干理事會和機構對其加以處理和運作。[30]

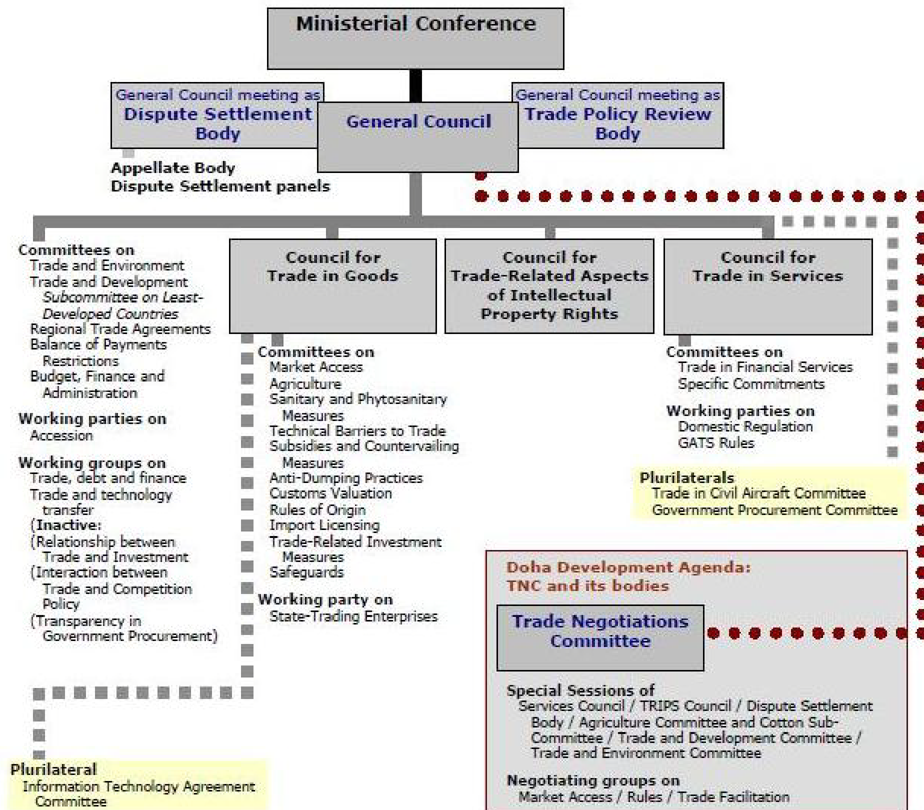
此外，為了處理WTO相關行政事務之運作，WTO亦設有秘書處（the Secretariat）與由部長會議任命之秘書長（Director-General）；秘書長及秘書處下所轄人員均應以國際官員身分自處（international official），並不得尋求或接受任何政府或其他國際機構之指示；而為了保障其身分立場及職務之行使，WTO及其官員在其獨立履行與WTO有關之範圍內被賦予特權與豁免權（privileges and immunities）。[31]

WTO之組織圖如下（圖一）所示[32]：

[30] 總理事會下的理事會包括了：貨品貿易理事會（Council for Trade in Goods）、服務貿易理事會（Council for Trade in Services）、與貿易有關之智慧財產權理事會（Council for Trade-Related Aspects of Intellectual Property），以及如貿易與環境委員會等個別委員會（committee）或工作小組（working group）。

[31] WTO 會員國代表在其獨立履行 WTO 與 WTO 有關之範圍內職務時，亦被賦予特權與豁免權。WTO Agreement art. VIII:2.

[32] WTO Website, Understanding the WTO: Structure, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf.



（圖一）WTO 組織架構圖

(3) WTO 之會員

WTO 之創始成員包括了 WTO 協定生效前 GATT 1947 之締約國及歐洲聯盟（European Community），其餘倘欲加入 WTO 而成為會員者，則需經過入會協商（negotiation terms of accession）始可加入 WTO。

在成為WTO會員之條件上，首先，WTO會員的主體資格並不限於國家（State）[33]，對於在處理對外商務關係及本協定（WTO協定）與多邊貿易協定所規定事務上有充分自主權之個別關稅領域（separate custom union）亦可成為會員[34]；再者，申請加入者，

[33] 因此 WTO 組成以會員（Member）稱呼。

[34] Marrakesh Agreement art. XII:1, “[A]ny ***state*** or ***separate customs territory*** possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements [annexes thereto].” (emphasizes added).

依規定部長會議應以WTO會員三分之二之多數決通過並明列加入WTO條件之協定[35]，惟目前實務上則係經WTO全體會員國共識決始獲通過。[36]

成為WTO會員國後，根據WTO協定第16條第四項規定，WTO會員應確保其法律、規章及行政程序符合在WTO協定下所負義務[37]。台灣從 2002 年 1 月 1 日起，也以獨立關稅領域身分正式加入並成為WTO會員。[38]

(4) WTO 之決策

GATT時期之決策（decision making），根據GATT 1947 第XXV條規定：締約方應經常集會，以使本協定中涉及集體行動之條文得以實現，並促使本協定目的之達成；當本協定規定提交與締約國為集體行動時，其係被賦予「締約國全體」之地位而為之[39]。因此除爭端解決和豁免權決定等狀況外，根據同條第三、第四項規定，以一國一票之多數決決定[40]，而與IMF和世界銀行等以經貿實力計算會員國表決權數之「比重投票

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[35] Marrakesh Agreement art. XII:2.

[36] MATSUSHITA ET AL., *supra* note 14, at 11.

[37] Marrakesh Agreement art. XVI:4 provides, “Each Member shall ensure the conformity of its laws, regulation and administrative procedures with its obligations as provided in the annexed Agreement.”

[38] 台灣在 WTO 之正式名稱，爲「台灣、澎湖、金門、馬祖獨立關稅領域（the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu），簡稱爲中華台北（Chinese Taipei）」。台灣加入 WTO 過程，爲避免政府或國家承認問題，GATT 理事會主席在 1992 年台灣申請加入時之討論時，曾表示我國所使用之名號對主權問題並無意涵。See GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 813–14 (1994).

[39] GATT 1947 art. XXV, ¶ 1 provides, “Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and generally, with a view to facilitating the operation and furthering the objective of this Agreement. Whenever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.”

[40] GATT 1947 art. XXV, ¶¶ 3, 4 provides, “Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.” “Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes case.” 然而，相較於採行投票決定方式，GATT 時期會員更常利用協商與談判形成意思決定，此情況下，獲得經濟上具影響力之會員之支持即顯重要，因此某程度上仍有以實力爲導向之意義。參見羅昌發，前揭（註 19），頁 22。

制」（Weighted Voting System）[41]有所不同。[42]

WTO基本上延續了GATT 1947 的決議方式，在一般性決策上，每一會員國均有一票，而決議除另有規定外者外，應以共識決（by consensus）為之[43]。而所謂「共識」，根據WTO協定的註解，其指作成決議的會議中並無出席者對該決議案提出異議[44]，其與要求投票者全體同意之一致同意（unanimity）亦有所不同[45]。除了共識決外，除非協定另有規定，WTO部長會議和總理事會在決議無法以共識決通過時，則以投票者之過半數為之。[46]

2. WTO 下之協定

在WTO協定的簽署中，所有的貿易協定均被納為WTO協定之附件（annexes），而使所有WTO之締約國均受Marrakesh協定下規範之拘束。[47]

而 Marrakesh 協定下的附件總共有四，其中附件一下包含了：1994 年關稅及貿易總協定（General Agreement on Tariffs and Trade，簡稱 GATT）、農業協定（Agreement on Agriculture）、食品安全檢驗與動植物防疫檢疫措施協定（Agreement on the Application of Sanitary and Phytosanitary Measures）、紡織品及成衣協定（Agreement on Textiles and Clothing）、技術性貿易障礙協定（Agreement on Technical Barriers to Trade）、與貿易有

[41] 比重投票在經濟貿易的議題常較常出現，依對這個組織的貢獻而決定投票權多寡，例如國際貨幣基金會或是世界銀行就常用這樣的方式，以會費出資的多少來決定權力大小；但是這樣的權利也是有範圍的，不是沒有限制，通常一個國家的繳交會費的上限不會超過 25%以免濫權，而下限也不會少於千分之 4，以免出現 Free-rider 現象。

[42] MATSUSHITA ET AL., *supra* note 14, at 12.

[43] Marrakesh Agreement art. IX, ¶ 1, "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947."

[44] Marrakesh Agreement n.1, "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."

[45] MATSUSHITA ET AL., *supra* note 14, at 12.

[46] Marrakesh Agreement art. IX:9.

[47] *Id.* art. II:2.

關投資措施協定（Agreement on Trade-Related Investment Measures）、反傾銷協定（Agreement on Antidumping）、關稅估價協定（Agreement on Customs Valuation）、裝運前檢驗協定（Agreement on Preshipment Inspection）、原產地規則協定（Agreement on Rules of Origin）、輸入許可發證程序協定（Agreement on Import Licensing Procedures）、補貼暨平衡措施協定（Agreement on Subsidies and Countervailing Measures）、防衛協定（Agreement on Safeguards）、服務貿易總協定及其附錄（General Agreement on Trade In Services and Annexes）、與貿易有關智慧財產權協定（Agreement on Trade-Related Aspects of Intellectual Property Rights）；附件二則為：爭端解決規則與程序瞭解書（Understanding on Rules and Procedures Governing the Settlement of Disputes），附件三為：貿易政策審查機制（Trade Policy Review Mechanism），以及附件四的：複邊貿易協定（Plurilateral Trade Agreements）。

第二項　區域性貿易組織發展概述

以國際多邊組織形式建構國際貿易規範，其目的乃在避免各國採行單方（unilateral）貿易措施而使國際貿易規範呈現高度不確定性，並避免各國形成區域性集團，而形成集團或國家間對抗[48]；其中，WTO之前身GATT，即是在二次大戰後希望藉由經貿合作以深化整合（integration）而維持締約國間和平而設立之多邊貿易規範。WTO在 1995 年成立後，承繼了GATT此深化整合締約國間關係之任務，並在要求會員遵循最惠國待遇（Most Favoured Nation，簡稱MFN）、市場開放和公平競爭以及有效的爭端解決機制支持下，推動此一目標之實現。[49]

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[48] 羅昌發，前揭（註 19），頁 37。

[49] Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreement*, *in* REGIONAL TRADE AGREEMENT AND THE WTO LEGAL SYSTEM 43, 44–45 (Lorand Bartels & Federico Ortino eds. 2006). 對於建立多邊體系規範之優點，*see* Ulrich Sieber, *Legal Orderin a Global World*, *in* MAX PLANCK YEARBOOK OF UNITED NATION LAW 1, 12–13 (A. von Bogdandy & R. Wolfrum eds. 2010). 亦可見陳昭仁，GATT／WTO 架構下之區域貿易協定－以 GATT 第二十四條為中心，國立中正大學法學院財

區域性貿易組織根據其經貿整合程度，基本上可分為五種形式，依其整合程度低到高分別為：成員間授予彼此優惠之貿易待遇，且排除非締約國此等優惠享受之優惠是貿易安排（preferential trading arrangement）[50]；成員國間相互同意消弭彼此間貿易障礙，但保留各自對外關稅及貿易政策之自由貿易區（free trade area）；成員國同意消除彼此間貿易障礙，且協議共同對外關稅與貿易政策之關稅同盟（custom union）；除消弭彼此貿易障礙並擁有共同對外關稅與貿易政策外，更允許勞動與資本等生產資本於締約國間流動之共同市場（common market）；以及綜合上述經貿整合特色外更包含共同決定經濟和貨幣政策之經濟同盟（economic union）。[51]

各類型區域性貿易組織之特性定義分析如下（表一）所示：

特性定義	會員國部門別產品優惠貿易之待遇	撤除關稅等貿易障礙	對外採取共同之對外關稅及貿易政策	允許其他生產要素(如人員、資金、勞務、商品)之自由流動	彼此協商制訂共同之經濟政策及貨幣政策
優惠性貿易	V				
自由貿易區	V	V			
關稅同盟	V	V	V		
共同市場	V	V	V	V	
經濟同盟	V	V	V	V	V

（表一）區域性貿易組織特性及定義表[52]

雖然區域貿易組織的發展將經貿整合和發展侷限於區域內，其破除貿易壁壘和促

經法律學研究所碩士論文，頁 17–27（2008）。

[50] 除 GATT 第一條第二項(a)到(d)款等宗主國授與附屬地優惠外，此種優惠性貿易基本上爲 WTO 所禁止。如ＥＥＣ

[51] 羅昌發，前揭（註 19），頁 35–36。

[52] 區域經貿整合分類表擷取自陳美菊，區域貿易協定的發展趨勢—兼論東亞經貿整合之進展（中正大學經濟系 96 年 6 月 10 日授課投影片），*available at* econ.ccu.edu.tw/academic/master_paper/070610seminar_2.ppt。

進國際貿易的貢獻在與採多邊貿易規範模式相比較下是否有必要性[53]，抑或反將造成多邊體系與區域貿易組織規範的衝突仍值討論[54]。但不可否認的是，單以WTO之多邊貿易架構推動貿易自由化亦有其限制，在此情形下，倘成員間可藉由區域性貿易組織的締結，推動消弭關稅及非關稅貿易障礙，區域性貿易組織仍有其貢獻和價值[55]，此外，本論文認為藉由區域貿易組織整併成員國間貿易政策，將有助於彙整成員國意見，而可在未來在多邊架構下談判進行前，將成員國分歧之意見統整為各區域貿易組織見解，而簡化談判之進行（此當然亦可能朝相反方向進行，而形成區域組織間發展出迥然不同的貿易政策，且因彼此經貿實力均強大而在多邊談判進行下形成對抗式僵局）。[56]

目前GATT和GATS[57]所承認之區域性貿易組織，GATT第XXIV條中包含了自由貿

[53] 對於區域經貿協定之政治及經濟上意義，*see generally* Viet D. Do & William Watson, *Economic Analysis of Regional Trade Agreement*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 7 (Lorand Bartels & Federico Ortino eds. 2006); Chad Damro, *The Political Economy of Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 23 (Lorand Bartels & Federico Ortino eds. 2006); Cottier & Foltea, *supra* note 49, at 43.

[54] Bartels 和 Ortino 教授並指出區域性貿易協定的大量締結，可能造成多邊貿易體系的根基—最惠國原則受到影響。*See* LORAND BARTELS & FEDERICO ORTINO, *Introduction*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 1, 1–2; *see generally* JAGDISH BHAGWATI & ARVIND PANINGARIYA, *Preferential Tradeing Areas and Multilateralism: Strangers, Friends or Foes?*, *in* FREE TRADE AREAS OR FREE TRADE? THE ECONOMICS OF PREFERENTIAL TRADING AGREEMENT 1 (1996). 另可參見陳櫻琴、邱政宗，WTO 與貿易法，頁 311–315（2009）；林淑娟，WTO 架構下兩岸簽署自由貿易協定問題之法制探討，國立高雄大學法律學系研究所碩士論文，頁 9–36（2007）；田永弘，兩岸簽署經濟合作架構協議（ECFA）之研究，淡江大學中國大陸研究所碩士班（文化教育組）碩士論文，頁 11-47（2011 年）；洪守億，前揭（註 12），頁 6–10。其中，亦有從經濟學角度分析區域貿易協定對自由化之影響者，可參見黃意文，WTO 區域貿易協定自由化範圍之研究，中國文化大學經濟學研究所博士論文，頁 54 以下整理及分析（2005）。

[55] 羅昌發，前揭（註 19），頁 36。

[56] 區域貿易組織可能對多邊貿易體系造成之影響討論，*see generally* V. Zahrnt, *How Regionalization can be a Pillar of a More Effective World Trade Organization*, 39 JWT 671 (2005); R. Lawrence, *Emerging Regional Arrangement: Building Blocks or Stumbling Blocks?*, *in* FINANCE AND THE INTERNATIONAL ECONOMY:5, THE AMEX BANK REVIEW PRIZE ESSAYS 22 (R. O'Brien ed. 1991); *see also* Damro, *supra* note 53, at 25.

[57] General Agreement on Trade in Services, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

易區以及關稅同盟二種形式，區域性貿易組織在該條下被要求應促進成員國間貿易，在合理期間內絕大部份之貿易範圍，應被涵蓋且不應增加非成員國與該區域組之間的關稅或其他貿易障礙，在程序上亦應將區域貿易組織之成立或協定之簽署，通知貨品貿易理事會，使之得由工作小組加以審查並對會員國提出建議[58]；而GATS第V條對區域貿易組織之規範，則並未提及自由貿易區或關稅同盟之形式要件要求，而係以經貿整合為推動目標，在GATS中，區域貿易組織締約國須使協定涵蓋相當之服務部門，並應在合理期間內消除所涵蓋部門之絕大多數不符國民待遇的歧視措施，消除並禁止既有和新訂歧視措施的存在[59]。符合前述各特定條件下的區域貿易組織，在WTO架構可合法存在而成為WTO最惠國待遇（Most Favoured Nation，簡稱MFN）原則之例外。[60]

雖然GATT等規範是以區域整合（regional integration）作為締約國在多邊協定外另訂定協定促成彼此間經貿整合之目標，因此論述上多亦以區域貿易協定相稱；然而，從當前自由協定簽訂狀況觀察，締結此MFN例外協定者並不限於同一區域內之國家，舉凡如韓國與歐體（Korea – EC）、新加坡與美國（Singapore – US）所簽訂的自由貿易協定，簽署者相互間並不一定具地域性關係，因此如松下滿雄教授等學者即認為RTA稱呼此等協定並無法充分描述WTO下締約國所另外簽署之協定，且從此等協定可排除WTO最惠國待遇適用點加以觀察，此種協定本質上即為締約國間的「優惠貿易協定（Preferential Trade Agreement，簡稱PTA）」，而將根據GATT第XXIV條和GATS第V條等成立之自由貿易協定統稱為PTA[61]。然而，鑒於WTO秘書處及許多學者仍以RTA作

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[58] GATT art. XXIVl; MATSUSHITA ET AL., *supra* note 14, at 554–73; 羅昌發，前揭（註 19），頁 37–41。

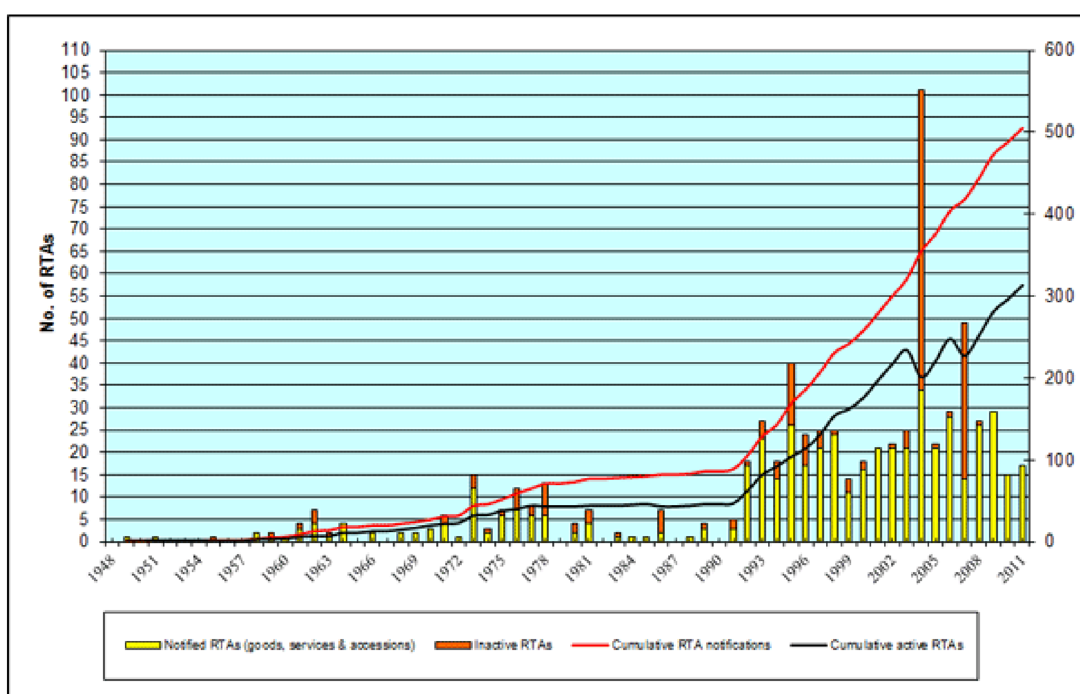
[59] GATS art. V; 羅昌發，前揭（註 19），頁 41–42。

[60] 開發中國家根據 GATT 1947 時期之受權條款(Enabling Clause; Decision of 28 November 1979 (L/4903)）訂定相互優惠的自由貿易協定，則不受 GATT 第 XXIV 條要件之限制。參見羅昌發，前揭（註 19），頁 42。GATT 第 XXIV 條對 RTA 之要件限制，可參見陳昭仁，前揭（註 49），頁 37–62。

[61] *See e.g.*, MATSUSHITA ET AL., *supra* note 14, at 548–49; see also the discussing in Cottier & Foltea, *supra* note 49, at 44 n.2.

為此些貿易協定之名稱[62]，且為了避免與同樣可簡稱為PTA之一般適用於宗主國與附屬國間經濟整合型式之優惠性貿易（preferential trade arrangement）相混淆，本論文仍以RTA作為區域經貿協定之通稱。

根據WTO秘書處統計，截至 2012 年 1 月 15 日為止，共有 511 個RTA向WTO通報（notified），其中 319 個有效施行（in force），目前RTA統計如（圖二）所示：[63]



（圖二）RTA 統計圖（此表統計至 2011）

目前我國與其他國家亦簽有RTA，包括了與尼加拉瓜、與巴拿馬、與瓜地馬拉、與宏都拉斯以及與中國大陸所簽訂的ECFA等五個（WTO官方網站顯示為四個，ECFA尚未被放入WTO資料庫中），其內容涵蓋貨品與服務貿易等領域。[64]

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[62] WTO website, Regional Trade Agreement, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited June 8, 2012); *see also e.g.*, Do & Watson, *supra* note 50, at 7; Damro, *supra* note 53, at 23; Lovell, *supra* note 9.

[63] WTO Website, Regional Trade Agreements: facts and figures, http://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited June 8, 2012).

[64] 簽署 RTA 對台灣發展影響及台灣當前 RTA 簽署狀況研究，可參見施延林，WTO 架構下的兩岸經貿

第三項　WTO和RTA之互動[65]

多邊的WTO協定與雙邊簽訂的RTA協定，姑且不論GATT及GATS中允許會員締結RTA而可成為其違反最惠國待遇的例外是否導致RTA成為WTO協定之一部分[66]，基本上二者在國際法下均有相同的條約法地位，而可相互獨立存在[67]。然而，因二國際規範均主要適用於貿易規範上，其內容相似或相異形成了規範的重疊、相衝突等適用問題[68]，且學說上對於RTA的大量出現，除擔憂其所造成的貿易移轉現象並導致全球貿易經濟效益減弱的問題外，並認為RTA將逐漸侵蝕WTO下維持會員國平等待遇MFN的重要性[69]；此外，由於RTA之目的在於消弭締約國間貿易障礙俾促成市場開放，從此觀點出發，防衛機制（safeguard measure）、反傾銷（anti-dumping）等具限制貿易性質的貿易救濟措施是否可適用於RTA締約國間亦成爭議[70]；尚且，在目前RTA內容涵蓋

之政治經濟分析，國立花蓮教育大學社會發展研究所碩士論文，頁 65–92（2008）；台灣目前締結 RTA 之發展，可參見林淑娟，前揭（註 54），頁 52–69。

[65] *See generally* Joost Pauwelyn, Editorial Comment,*Adding Sweeteners To Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. INT'L ECON. L. 197 (2006); Cottier & Foltea, *supra* note 49, at 51–58; William J. Davey, *Regional Trade Agreements and the WTO: General Observations and NAFTA Lessons for Asia* (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 05-18, Nov. 30, 2005) *available at* http://ssrn.com/abstract=863846; Colin B. Picker, *Regional Trade Agreement v. The WTO: A Proposal for reform of Article XXIV to Counter this Institutional Threat*, *available at* http://www.law.upenn.edu/journals/jil/articles/volume26/issue2/Picker26U.Pa.J.Int'lEcon.L.267(2005).pdf.

[66] Alberta Fabbricotti, *The Interplay Between the WTO and RTAs: Is it a Question of Interrelation Between Different Sources of International Law?*2–3 (Inaugural Conference, Geneva, July 15–17, 2008, working paper No. 12/08), *available at* http://www.ssrn.com/link/SIEL-Inaugural-Conference.html.

[67] Cottier & Foltea, *supra* note 49, at 51–58.

[68] *See generally* Fabbricotti, *supra* note 66.

[69] 認爲多邊架構下的 MFN 將變爲「最低度優惠原則（Least Favoured Nation，LFN），在此狀況下，將造成締約國趨向於 RTA 之訂定。*See generally* BHAGWATI & PANINGARIYA, *supra* note 54.　Supachai Panichpakdi 甚至表示在 RTA 衝擊下 WTO 最惠國待遇已成爲例外，至多僅能撐之爲基礎優惠待遇（Least Favoured Nation，LFN），Peter Sutherland et al., *The Report on the Future of the WTO – Addressing Institutional Challenges in the New Millennium*, ¶ 19, at 19, *available at* http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

[70] *See generally* Angela T. Gobbi Estrella & Gary N. Horlick, *Mandatory Abolition of Anti-Dumping, Countervailing Duties and Safeguards in Custom Union and Free Trade Areas Constituted between WTO Members: Revisiting a Long-Standing Discussion in Light of the Appellate Body's Turkey – Textiles Ruling*, *in*

如環境、勞動等貿易以外之承諾或規範特點，也形成了所謂WTO–Plus規範的出現，更進一步複雜化了WTO與RTA之關係[71]。雖然RTA在當前國際貿易中確實扮演了重要的角色，但其快速成長和規範的複雜性，在RTA作為違反WTO規範的例外條款時，也造成了多邊貿易受衝擊的風險，許多RTA在WTO的適法性亦受挑戰，而形成了WTO和RTA之規範衝突。[72]

第二節 世界貿易組織和區域貿易協定爭端解決機構發展

第一項 WTO 貿易爭端解決機制

第一款 GATT 時期之爭端解決

由於原先應定有ITO爭端解決規範之哈瓦那憲章(Havana Charter)未能獲得通過，導致GATT時期的爭端解決，僅能依GATT 1947 第XXII和第XXIII條之有限規定處理，在經過多邊協商而未能獲得解決方案時，將爭端提交由締約方大會，由其調查並對會員作出適當建議。[73]

起初，因GATT組織建構尚未完備，因此當時之爭端解決裁決係先由締約方大會主席提出，在無異議狀況下該裁決進而成為全體締約方所作出之裁決[74]；由於當時正值GATT和ITO協商甫結束時期，而各國之代表先前也因參與相關協定制定而對協定內

REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 109 (Lorand Bartels & Federico Ortino eds., 2006)

[71] *See generally* CHANG-FA LO, WTO-PLUS IN FREE TRADE AGREEMENT (2010). 羅昌發，前揭（註 19），頁 879；洪德欽，WTO 之發展趨勢與挑戰，WTO 法律與政策專題研究，頁 432（2003）。

[72] 對於 RTA 和 WTO 間之問題，*see generally* Nicolas JS Lockhart & Andrew D. Mitchell, *Regional Trade Agreement Under GATT 1994: An Exception and Its Limits*, *in* CHALLEGES AND PROSPECTS FOR THE WTO 217, 240 (Andrew D. Mitchell ed. 2005).

[73] GATT 1947 arts. XXII, XXIII, "[T]he matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate."

[74] HUDEC, *supra* note 21, at 75–76.

容甚為了解，是而此種爭端解決模式在GATT草創階段尚能有效運作[75]。其後，GATT開始設立「工作小組」（working party）對爭端進行調查並提出建議，基本上此工作小組由爭端之利害關係締約方和部分獨立政府代表參與其運作；在 1955 年時，實務上轉為設立爭端解決小組（Panel），而由非政府代表之公正之第三者對事實進行認定（finding），雖然此時爭端解決小組所作成決議上並非具拘束力之文件，但因其決議將呈交至可對爭端作出適當建議之GATT總理事會，並由總理事會決定是否採納，因此爭端解決小組決議所具有效力仍不可小覷[76]；此外，此種由當事國審議爭端發展至由中立第三者對爭端進行認定之審議者轉變，亦證明了GATT實務上朝「規範完整性」（rule integrity）發展的趨勢；而GATT爭端解決小組對案件採取詳細推理方式進行審議，與法院作成之判決理由也具有高度相似性。[77]

然而，雖然GATT時期爭端解決小組對爭端之裁決已朝向規範本位發展，而不再以外交協商談判為基礎，但因GATT本身對爭端解決程序規範的欠缺，以及爭端解決小組報告須經總理事會全體同意始獲通過，形成爭端輸方可能藉拒絕採認報告以阻止裁決生效[78]，和締約國在裁決履行上問題之存在[79]，因此從東京回合到烏拉圭回合談判中，各國代表即展開對GATT爭端解決機制修正之協商，並於WTO成立時訂定能改善舊有問題之新爭端解決規範。[80]

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[75] JEFF WAINCYMER, WTO LITIGATION PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 74–75 (Camaron May).

[76] MATSUSHITA ET AL., *supra* note 14, at 105–06.

[77] JACKSON, *supra* note 21, at 93–94.

[78] 因 GATT 1947 第 XXIII 條要求是全體締約方（CONTRACTING PARTIES）對爭端作出裁決與建議，因此爭端解決小組報告亦須全體締約方採認始具效力。

[79] ERNST-ULRICH PETERSMANN, INTERNATIONAL TRADE LAW AND THE GATT-WTO DISPUTE SETTLEMENT SYSTEM 53(1997).

[80] MATSUSHITA ET AL., *supra* note 14, at 106–07; WAINCYMER, *supra* note 75, at 76–77. 另亦可參見吳嘉生，國際貿易法析論—WTO 時代之挑戰，頁 616（2004）

第二款　WTO 之爭端解決

1. WTO 爭端解決機制之設立

根基於 GATT 時期建立的爭端解決機制基礎，WTO 在烏拉圭回合中通過了規範爭端解決的「爭端解決規則與程序瞭解書（Dispute Settlement Understanding，簡稱DSU）」作為 WTO 爭端解決程序處理之規範。

WTO爭端解決機制下主要有三機構。首先，是有成立爭端解決小組（panel）、採認小組和上訴機構報告、監督會員國對爭端解決機構裁決和建議實踐狀況，以及在會員未遵守實現其所作成裁決和建議時，授權其他會員國終止履行WTO及內括協定（covered agreement）義務權力之WTO爭端解決機構（Dispute Settlement Body，簡稱DSB）[81]；再者，因WTO總理事會亦應在適當時間召開會議行使DSU所定爭端解決機構的職責，是而雖DSB另有自己的主席和處理程序，但WTO總理事會仍具爭端解決機構的性質[82]；最後，DSU下設有常設的上訴機構（Appellate Body）以檢視爭端解決小組（Panel，亦簡稱為小組）之報告，並提供二審救濟程序。

2. WTO 爭端解決機制之程序

根據DSU第 2.1 條規定，WTO爭端解決機構具有組成爭端解決小組、採認爭端解決小組報告以及上訴機構報告以達成解決會員國對WTO和內括協定下爭端之權力[83]。WTO爭端解決程序由當事國對該爭端依規定行調解程序（Consultation）後開啟[84]，WTO爭端解決機構對爭端的解決尚有屬第一審之爭端解決小組，以及第二審之上訴機

[81] PALMETER & MAVROIDES, *supra* note 14, at 15; MATSUSHITA ET AL., *supra* note 14, at 108.

[82] Marrakesh Agreement art. IV:3.

[83] DSU art. 2.1 provides: "The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements".

[84] DSU art. 4; *see also* PALMETER & MAVROIDES, *supra* note 14, at 86.

構的不同審議階段，根據DSU第 11 條，爭端解決小組之功能，係協助DSB 履行其依本瞭解書及內括協定所應負之責任[85]，因此小組應向DSB 提出案件之客觀評估，包括案件事實與相關內括協定之適用性及一致性之客觀評估，協助DSB 依內括協定作建議或裁決之其他調查[86]，而上訴機構的管轄權除了不可對爭端事實進行認定外，其對法律適用的檢驗亦限於經爭端解決小組審議者。[87]

爭端解決小組或上訴機構的報告採認上，雖然締約國可以拒絕採認之方式而使小組或上訴機構所作成報告無效；但因WTO下之爭端解決報告採認改以負面共識決（negative consensus）方式進行，除非全體會員均拒絕採認爭端解決報告之共識（基本上可能性極低，因甚難想像會有連勝訴國都願意拒絕採認的報告），否則小組或上訴機構作成之報告將有效成立。[88]

每一裁決中的爭端解決小組成員為三人（例外亦有五人組成情形），由被會員國推薦提名的高度合格政府代表或非政府人士中選認，小組成員亦須超然於國家之外進行裁決。上訴機構之成員，由 7 位在法律及國際貿易領域專精之獨立於各成員國之人士組成，每一裁決中由其中三位進行審議[89]，而無論是否參與該案件審理，全體上訴機構成員間對審議爭端應保持一致的態度[90]；此二種判決因其審議者不論在資格或是程

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[85] Appellate Body Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 156, at 65, WT/DS344/AB/R (Dec. 20, 2007).

[86] DSU art. 11, second sentence: "[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 relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

[87] *See* Dispute Settlement Understanding, Article 17.6; *see also* WAINCYMER, *supra* note 75, at 80.

[88] PALMETER & MAVROIDES, *supra* note 14, at 15.

[89] DSU arts. 17.1, 17.3.

[90] *See* Working Procedure drafted by the Appellate Body (Working Procedures for Appellate Review, Dated Feb. 28, 1997 (WT/AB/WP/3) provides for "collegiality" of members of the Appellate Body); *see also* MATSUSHITA ET AL., *supra* note 14, at 109 n.23.

序上均有差異，因此也連帶影響了上訴機構和爭端解決小組裁決報告之效力判斷。[91]

3. WTO 爭端解決機制之管轄權

為呼應DSU第 3.2 條所表示WTO的爭端解決機構是維護複邊貿易體系健全（security）和可預測性（predictability）的核心要素[92]，WTO爭端解決機制在制度設計上，與一般國際公法爭端解決要求需經爭端原被告當事國雙方同意後始能開啟或受理有所不同[93]。以聯合國之國際法院（International Court of Justice）為例，國際法院規約（Statute of International Court of Justice）第 36 條即規定「國際法院在當事國（們）將案件遞交於其時，得對案件行使管轄權」[94]，此條文中，除了顯示國際法院對案件審理的被動性，而僅能在當事國提訴後取得案件管轄權外，更顯示了國際法院對國際間發生之爭端，需被告國同意國際法院方取得對案件之管轄權[95]；當然，根據同條第二項及其後之規定，案件當事國除可在個案中作出其願接受國際法院管轄之表示外，亦可事前、概括地表達此接受國際法院管轄的同意。[96]

相對的，WTO為達成DSU前述保障WTO多邊貿易體系的健全運作之目標， DSU 第 23 條賦予爭端解決機制對案件的強制管轄權[97]，亦即是任何WTO會員國認為其WTO和內括協定下權利受其他會員國侵害時，各會員國均有向WTO爭端解決機構尋

[91] 參見陳淑慧，前揭（註 2），頁 30–37；亦可參見本論文第參章、第二節、第一項說明。

[92] Dispute Settlement Understanding Article 3.2: “the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”

[93] PALMETER & MAVROIDES, *supra* note 14, at 16.

[94] Statute of the International Court of Justice art. 36(1), 33 U.N.T.S. 993 (June 26, 1945) [hereinafter ICJ Statute], “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

[95] 因國際法院規約第 36 條第一項所用文字爲“ all cases ***parties*** refer to it”，因此國際法院須取得管轄需全體當事國（們）的同意後，才能取得案件之管轄權，此處的全體當事國，除開啓訴訟程序的原告國外，亦包含被訴國在內。

[96] *See* ICJ Statute arts. 36(2)–(6).

[97] *See* DSU art. 23; PALMETER & MAVROIDES, *supra* note 14, at 17.

求救濟之「權利」[98]，在*US – Section 301 Trade Act*案[99]中，WTO爭端解決小組也肯認向WTO爭端解決機制提訴為DSU第 23 條所闡釋會員國的「權利」[100]；雖然在該案中，小組認為將爭端訴諸WTO爭端解決機制解決，亦同時為會員國在DSU第 23 條下負擔之「義務」，但此會員國應循WTO爭端解決機制解決會員國間貿易爭端「義務」之論述，其重點在於說明締約國不應單方決定他會員國WTO下權利義務的負擔[101]，因此本論文認為DSU第 23 條說明者，在於WTO會員國均有向WTO爭端解決機制尋求救濟之「權利」，至於提訴與否，會員國仍得自由選擇是否行使此訴訟救濟「權利」[102]。

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[98] *See* DSU art. 23, "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they ***shall have recourse to***, and abide by, the rules and procedures of this Understanding." (emphasizes added). 條文之中譯為：「會員對內括協定義務之違反，或基於內括協定得享有之利益遭剝奪或損害，或內括協定之任何目標之達成受到阻礙，欲尋求救濟時，**應可訴諸**並遵照本瞭解書之規則及程序」。針對條文"***shall have recourse to***"一句之翻譯，國內有將之翻為「會員應訴諸…」一詞，並因此認 WTO 爭端解決機制對涉及 WTO 內括協定之貿易爭端具有「專屬」管轄權；然而，本文認為此條文之句意為「會員應可訴諸…」，表徵 WTO 爭端解決機制為提供會員國遇貿易爭端時，可供選擇適用而尋求救濟之管道，且此機制之選用與否為會員之「權利」，而非指會員國於遇有貿易爭端時強制必須適用之爭端解決方法。另參見林彩瑜，前揭（註 7），頁 398–399，註 12；吳嘉生，前揭（註 80），頁 619；陳淑慧，前揭（註 2），頁 28（2004）。曾更瑩，WTO 爭端解決程序對美國實施三 0 一條款之限制，萬國法律，第 85 期，頁 42（1996）。WTO 判決先例對 DSU 第 23 條保障締約國向 WTO 爭端解決機制訴訟救濟「權利」之論述，亦可參見本論文第五章、第一節、第二項、1.說明。另外，即使在 GATT 時期之爭端解決，根據 GATT 1947 第 23 條規定，會員國亦有權選擇是否開啓訴訟權利，參見郭懿美，認識 GATT 之爭端解決機制，國際貿易法律專題研究（一），頁 3-87（1997）。

[99] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) (adopted Jan. 27, 2000) [hereinafter *US – Section 301Trade Act*].

[100] Panel Report, *US – Section 301Trade Act*, ¶ 7.35. 另參見陳淑慧，前揭（註 2），頁 28。

[101] *Id.*, at ¶ 7.35; *id.*, at ¶ 7.43 also provides, "First, it imposes on ***all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency***. In these circumstances, ***Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations***. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU." (emphasis added). 陳櫻琴、邱政宗，前揭（註 54），頁 262，其亦認為 WTO 爭端解決小組於 *US – 301 Act* 案中，乃強調 WTO 會員應以多邊爭端解決機制處理貿易爭端，而不應以單方行為處理。

[102] 對於 *US – Section 301Trade Act* 中所提會員國有向 WTO 爭端解決機制提請解決爭端之「義務」說明，似應認 WTO 會員國不得循 WTO 爭端解決機制以外方式解決當事國間爭端，然本論文認為提訴義務故

在此設計下，不論被控訴國是否表示願意接受WTO爭端解決機構對此案件的管轄，WTO爭端解決機構均可對案件加以裁判 [103]，藉以鞏固多邊協定之運作 [104]。相較於其他國際爭端解決機構之任擇管轄設計，強制管轄權制度使WTO爭端解決機制具有統一裁決會員爭端之效力，而可統一解決規範適用並促成會員對WTO義務之遵守。[105]

WTO爭端解決機制之客體管轄權範圍，根據DSU第 1 條，所有WTO多邊協定下發生的貿易爭端均可依DSU程序進行解決 [106]，而所謂的WTO多邊協定，即係統稱為「內括協定（covered agreement）」的DSU附件一下所列協定。至於WTO對非內括協定的國際法，或是會員國的內國法是否亦有管轄權，此目前仍係眾所爭執而未有定論之部分，雖然DSU第 3.2 條規範禁止爭端解決機構增加或減損會員於內括協定所得享有之權益，但在無明文禁止爭端解決機制適用其他國際法或習慣的情形下，此亦可解釋為爭端解決機制可在不增加或減損成員於內括協定權益狀況下，對其他國際規範進行適用。[107]

源自於締約國簽署 DSU 後所形成之拘束力及國際義務負擔，然而此義務在 WTO 締約國間另訂定 RTA 後，既締約國間另有對爭端解決權利義務負擔之約定，其自可變更於 WTO DSU 下由 WTO 爭端解決機制統管與 WTO 有關爭端之義務，此可從維也納條約法公約第 30 條後協定變更前協定法理適用（維也納條約法第 30 條之適用見本論文第陸章第一節第二項說明）而加以說明；此外，亦可認爲是 RTA 簽署後締約國間解除彼此必須向 WTO 爭端解決機制尋求救濟之「義務」負擔，而將向 WTO 爭端解決機制解釋爲締約國得自由選定權利之行使，而不再是絕對義務的負擔。*See id.*, at ¶ 7.43.

[103] 相較於國際法院規約第 36 條，規定國際法院在當事國（包含原、被告雙方）同意將案件遞交後方對案件取得管轄權，WTO 之 DSU 和其他內括協定均未對 WTO 爭端解決機構的管轄權加以規範，也因此，WTO 爭端解決機構對案件管轄權的取得，並未如國際法院般有要求當事國同意之要件，WTO 爭端解決機構對爭端具有強制管轄權的論理也由事而生。*See* PALMETER & MAVROIDES, *supra* note 14, at 17.

[104] Panel Report, *US – Section 301Trade Act*, ¶ 7.35. 亦可參見陳櫻琴、邱政宗，前揭（註 54），頁 259。

[105] *See generally* Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementaiton of DSB Recommendations*, 9 J. INT'L ECON. L. 383 (2006). 此文對 WTO 爭端解決機制之角色及運作有相當詳細之說明。

[106] 參見陳淑慧，前揭（註 2），頁 32。

[107] MATSUSHITA ET AL., *supra* note 14, at 110–11. 關於WTO爭端解決機制之可適用法源及審判客體討論，參見本論文第參章第二節。關於 WTO 爭端解決機制介紹，亦可參見陳小坪，前揭（註 12），頁 93–103。

第三款　小結

綜上所論，WTO爭端解決機制強調於司法（法院）形式和以規範為主之取向[108]，配合其對會員間爭端之強制管轄權[109]，形成了維繫WTO制度穩定健全有效運作之基石，WTO之爭端解決機制也因此被喻為王冠上的珠寶（jewel of the crown）。[110]

第二項　RTA 之爭端解決機制與管轄條款

第一款　概述

和 WTO 協定相同，RTA 締約國間對 RTA 規範的適用亦會產生分歧，且協定履約所生爭端亦須處理，雖然部分 RTA 以外交協商方式處理締約國間爭議，但 RTA 中為數不少者亦設有爭端解決機制（RTA 下設有爭端解決機制數據分析見後述）。目前 RTA 所採用的爭端解決機制，包括了常設（permanent）或特設（ad hoc）審判庭或仲裁等型態，而審理程序先交當事國間協商或先組成委員會（committee）而進行調解程序（consultation）後方進行司法或爭端解決者。

第二款　RTA 爭端解決機制之管轄客體

RTA 爭端解決機制的建構，誠如 WTO 或其他國際審判/爭端解決機構，其主要目

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[108] 羅昌發，前揭（註 19），頁 15。

[109] ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 150 (2002) (calling the WTO dispute settlement system "the most complete system of international dispute settlement in history.”).

[110] John Ragosta et al., *WTO Dispute Settlement: the System is Flawed and Must be fixed*, 37 INT’L L. 697, 697 (2003); David Palmeter, *The WTO Dispute Settlement System in the Next Ten Years* (Apr. 7, 2006) (unpublished manuscript), *available at* http://www.sipa.columbia.edu/wto/pdfs/PalmeterWorkingPaper.pdf (“The dispute settlement system has been, and no doubt will continue to be, the crown jewel”); Karen J. Alter, *Resolving or exacerbating disputes? The WTO’s new dispute resolution system*, 79 INT’L AFF. 783, 784 (2003); Adam Gross, *Can Sub-Saharan African Countries Defend their Trade and Development Interests Effectively in the WTO? The Case of Cotton*, 18 EUR. J. DEV. RES. 368, 368 (2006); Anna Lanoszka, *The Promises of Multilateralism and the Hazards of ‘Single Undertaking’: The Breakdown of Decision Making within the WTO*, 16 MICH. ST. J. INT’L L. 655, 655 (2008).　WTO 和 GATT 爭端解決機制的比較，可參見陳小坪，前揭（註 12），頁 104–105。

的在於處理所屬規範之解釋適用，並對締約國履約爭端進行裁決，在此觀察下 RTA 爭端管轄機制管轄權行使客體，自為締約國間 RTA 規範解釋適用及所衍生之爭端之裁決。

然而，因 RTA 屬貿易取向規範，也因此對於單一事件倘有包含 RTA 在內之複數規範適用涉及在內時，此時不論在締約國義務之確認，或是締約國履約之爭端，自有可能形成單一事件複數規範適用且生複數爭端的狀況。此外，在各規範（如 WTO 和 RTA）均同時對該爭端提供爭端解決之救濟途徑時，單一事件之複數爭端解決狀況即可能出現，且為擴大締約國對 RTA 爭端解決機制之適用，許多 RTA 在其爭端管轄條款（jurisdictional clause）下亦擴張其管轄客體範圍，將 WTO 協定之解釋適用和履約爭議亦納於 RTA 爭端解決機制管轄之內。

舉例而言，北美自由貿易協定（North America Free Trade Agreement，簡稱 NAFTA）[111]的爭端解決機制設計中，其第 2005 條第 1 項即規定，對於可能同時涉及 RTA和GATT及其後續協定解釋適用及履行之爭端，當事國可選擇以RTA或WTO之爭端解決機制作為爭端解決場域[112]；縱使此時RTA爭端解決機制所得審議者，為RTA和WTO規範重疊之部分，然相同的，RTA爭端解決機制在此等爭端處理中，仍將裁決當事國措施在WTO和RTA下之適法性，而形成裁決中對當事國在WTO下適法性判斷，可能與WTO爭端解決機制之管轄出現重疊。

第三款　RTA 與 WTO 爭端解決機制管轄衝突問題

WTO 與 RTA 的爭端解決機制，其各自管轄對象本應為因 WTO 協定及 RTA 解釋

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[111] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (1994) [hereinafter NAFTA].

[112] NAFTA art. 2005.1 provides, "Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party." 其他相似 RTA 爭端解決條款，可參見本論文附件一之整理表。

適用所生的爭端，然而，WTO 和 RTA 爭端解決機制間是否可能產生管轄權重疊或衝突，在開始思考爭端解決機制管轄衝突之解決前，以下即先分析管轄權衝突或重疊所指到底為何？以及判斷案件是否已由爭端解決機制審議，而不應另尋救濟之爭端「同一性」之判斷問題。

1. 何謂管轄權衝突

所謂管轄權重疊，學說上有認是指相異條約下之複數爭端解決機制，對當事國間之同一爭端均有管轄權，而形成複數裁判者狀態[113]；或是同一爭端能被複數爭端解決機制所審議[114]。由是可知，倘當事國間貿易爭端可能同時適用WTO協定以及RTA，此時在RTA和WTO均設有爭端解決機制情況，當事國自可能就同一爭端項複數爭端解決機至尋求救濟，而產生管轄權重疊之狀況[115]。至於所謂管轄權衝突，則是指當事國因條約協定之拘束，數爭端解決機制對同一爭端的管轄權無法同時並存行使，而形成爭端解決機制間管轄權相互排斥，而呈現相互衝突之狀況。

2. 管轄權衝突同一性認定問題

本論文欲處理 RTA 和 WTO 爭端解決機制管轄衝突問題之原因，乃希望確保相同的爭端不致由 RTA 和 WTO 爭端解決程序同時或先後處理，以建構規範的確定性並預先防範裁判衝突的狀況出現。然而，在思考對一案件是否有重複審理裁決問題，或適用既判力原則時所要求的「爭執客體」和「爭執事件」同一性要件時，我們均須面對何時爭端具同一性而須避免管轄和裁判衝突的狀況。目前 RTA 爭端管轄條款及國際審判機構中最常用之同一性標準，主要有下列二種：

(1) 事實同一性

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113 Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191, 191 (1999).

114 Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreement*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 465, 467 (Lorand Bartels & Federico Ortino eds. 2006).

115 *Id.* at 466-47.

以事實同一性為檢驗爭端是否同一之標準時，其概念出自於一客觀事實不應給予複數評價，因此倘爭端事實為同一，此時該事件即具有同一性；至於基於該同一基礎事實當事國可援引之複數法律上主張，並不影響爭端同一性之認定，因為基本上倘當事國在爭端審議中未適時提出其主張，此時爭端解決機構自可利用「禁反言原則」或「失權效」等概念拒絕接受當事國事後補提之主張，而使該案件除經上訴外而能終局獲得確定。

(2) 規範同一性

以規範同一性標準檢驗爭端是否同一時，此時我們所考慮者乃是當事國對於同一事實在訴訟中爭執的規範是否同一，以規範同一性為出發的觀點主要認為當事國於各規範下之權利義務應受同等尊重，倘前訴訟中僅對當事國間部份的權利義務作出裁判，對於尚未經裁判之權利義務部分，當事國自可再行主張爭執。以規範同一性為爭端同一性認定標準之見解。在以規範同一性作為爭端是否同一之見解，其中又包含了以規範「名義（nominal）」及「實質（substaintial）」作區分之二種分類法。

在以規範名義為區分者，不論各條約規範內容是否相同，舉凡當事國所簽署締結之條約，本於締約國有遵循義務及各條約相互獨立之點觀察，當事國自亦可對同一事實所衍生之個?法律適用爭端，要求締約國遵循對各個別條約加以遵守，縱使前後訴訟中涉及相異條約下之相異條文規範目的、方法甚至使用文字均相同，此時在「名目」意義下理解各條約間的異同時，規範內容實質相同但訂於不同條約下的規範自會被視為相異規範，當事國對不同條約之實質內容相同者提起的前後訴訟也將被認定為相異爭端而無重複審理或避免管轄競合的問題出現。

倘若以實質規範內容作為規範同一性的區分標準，此時不同條約下規範內涵相同（identical）或相似（similar）者將被認定為相同規範，是而當事國間在同一事實下發生之爭端，雖然名義上可能同時構成二條約規範之違反，然因此二條約規範內容相同或相似，因而締約國乃僅違反了一個國際法下義務（亦即是將複數條約下相同的規範

理解為當事國在國際法下的同一義務)，因而在當事國僅有一個國際法義務履行爭端狀況下，無論由何爭端解決機構審理，國際法下爭端解決機制僅應對此單一的國際法爭端為一次性裁決。

目前 WTO 實務上，因 DSU 要求 WTO 爭端解決機構僅具審理會員國間就「內括協定」解釋適用所產生之紛爭，延續此思考脈絡，WTO 爭端解決機制所重視者，亦僅限於該爭端下的 WTO 規範權利義務是否已經審理，RTA 規範縱使與 WTO 規範相同或相似，其仍非 WTO 爭端解決機制所重視；此外，對於由 RTA 爭端解決機制審理的 WTO 爭端，因 DSU 下並無對其他國際法院或爭端解決機構判決承認條款存在，故此時 WTO 爭端解決機制對於在 RTA 所作出裁決之 WTO 爭端，當事國是否可主張既判力原則頗令人懷疑。

第四款　以場域選擇條款解決管轄衝突之可能

所謂爭端解決機制的管轄權競合或衝突更有甚者，為了使貿易爭端能獲一次性解決，並避免對單一爭端之複數裁判衝突而導致當事國權利義務負擔之紊亂，有時締約國在RTA 下更訂定了爭端解決之場域選擇條款（forum selection clause），無論該條款係以限制當事國之特定爭端僅可由特定爭端解決機制審議目的而存在，或是在爭端當事國對爭端提訴並獲裁判後之別訴禁止，均限制了締約國於爭端解決制度下救濟權之行使。對於RTA中各種不同之爭端管轄或場域選擇條款，此些條款對其他爭端解決機制管轄權行使，或對締約國向其他爭端解決機制尋求救濟所將造成影響即值思考。[116]

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[116] 對於當事國遇爭端時對於選擇 RTA 或 WTO 作爲爭端解決場域之分析，可見 Leal-Arcas 教授文章，其以 WTO 與 NAFTA 間關係爲例剖析當事國場域選擇之各種利弊得失。*See generally* Rafael Leal-Arcas, *Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?*, 16 MINN. J. INT'L L. 1 (2007), *available at* heep://ssrn.com/abstract=975452.　Pauwelyn 教授亦對於 NAFTA 和 WTO 爭端解決機制程序利弊等作有論述，*see* Pauwelyn, *supra* note 65, at 204–05.

第三節　目前 RTA 爭端解決機制之分析

承前所述，因 WTO 爭端解決機制強制管轄權的設計，使得其對 WTO 會員間之爭端均有管轄權，因此本論文之核心研究目標將著重於 RTA 爭端管轄或場域選擇條款對 WTO 爭端解決機制管轄權或 WTO 會員向 WTO 尋求救濟之影響為何。

依分析，RTA 爭端解決條款將與 WTO 爭端解決機制形成管轄衝突或競合狀況主要有二：其一，為 RTA 爭端解決機制將其管轄權擴及對 WTO 爭端之處理，而形成 RTA 和 WTO 可能對同一 WTO 規範解釋適用或履約爭端均有管轄權而呈現管轄競合狀況；其二，則是 RTA 場域選擇條款要求締約國在對同一事件已尋求救濟並獲裁決後，限制締約國另尋救濟之模式。為了更進一步瞭解各 RTA 爭端管轄條款及場域選擇條款在實務上之適用情況，以下本論文即就現生效適用之 RTA 進行研究，並將 RTA 下各種條款分類如下：

第一項　研究對象

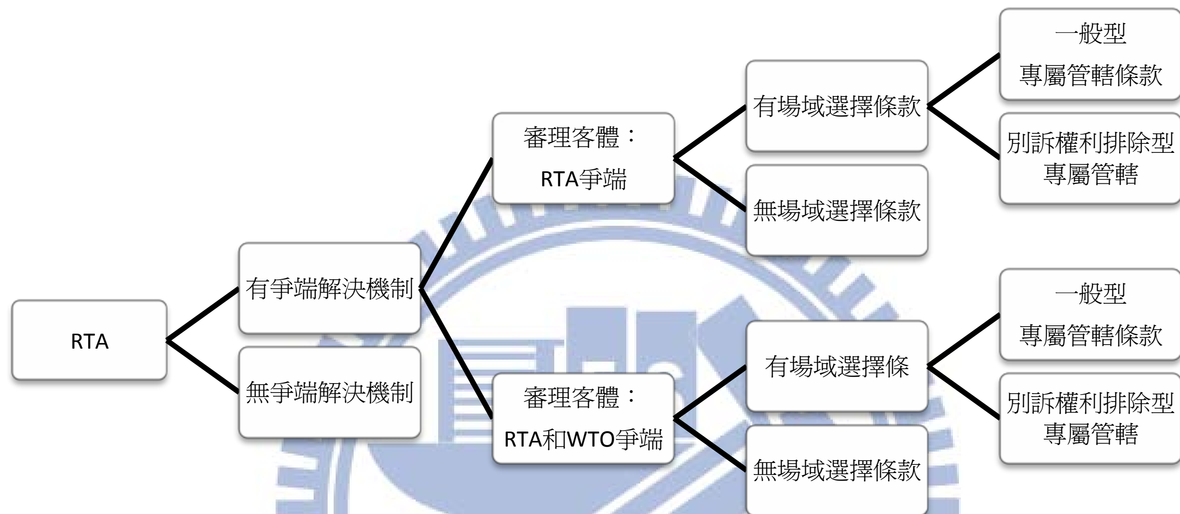
為了對 RTA 下爭端管轄機制及其各類型條款進行分析，以釐清 RTA 條款對 WTO 爭端解決機制因規範衝突與競合可能影響，本論文對目前 WTO 公布正生效適用的 RTA 為研究對象進行分析，共計 231 個 RTA（見附件二）；然而，實際搜尋並分析 RTA 條款時，扣除使用西班牙文本之 RTA（作者無閱讀西班牙文之能力）以及連結失效而無法尋獲之 RTA，本論文實際研究分析 RTA 數量為 165 個（附件二上底色者為本論文納入分析研究之 RTA）。

第二項　RTA 爭端解決機制分類

本論文首先將 RTA 依其是否有爭端解決機制進行分類，此部分之爭端解決機制採較廣義解釋，無論係以仲裁（arbitral）、審判庭（tribunal）、爭端解決委員會（committee）或理事會（council）形式存在均無不可，只要該機制能提供當事國間就協定解釋適用或履約適法性之有權裁決即可。其次，對於有爭端解決機制者，則根據 RTA 爭端管轄

機制對爭端客體管轄範圍限為 RTA 爭端或擴及於 WTO 爭端加以區別。此外，因部分 RTA 之場域選擇條款將限制締約國選擇爭端解決場域後所能另外尋求的救濟途徑，為探討其效力，本論文依條款中對締約國救濟途徑限制描述方式，區分為「一般型專屬管轄」及「別訴權利排除型專屬管轄」。

上述 RTA 爭端解決機制分類階層表如下（圖三）所示：



（圖三）RTA 爭端解決機制分類階層

第三項　RTA 爭端解決機制類型分析

第一款　RTA 設置爭端解決機制比例

根據分析，在本論文研究所蒐集的 165 個 RTA 中，其中 120 個 RTA 下設有各類型審判庭和委員會之爭端解決機制，至於未設爭端解決機制的 45 個 RTA，有部分係以締約國之外交協商（negotiation）方式，或是讓當事國選用其他國際法上已存在如國際法院等爭端解決機制，以處理當事國間條約解釋適用或履約爭端。

根據前述數據計算，研究樣本中 RTA 下設有爭端解決機制者所占百分比為 73%，未設爭端解決機制者所占百分比為 27%，其比較表格如下（表二）所示：

RTA 下是否設爭端解決機制	數量	百分比
是	120	73%
否	45	27%

（表二）RTA 設爭端解決機制比例分析表

第二款　RTA 有爭端解決機制者管轄客體分析

本論文研究設有爭端解決機制的 120 個 RTA 中，為了檢視 RTA 爭端解決機制和 WTO 爭端解決機制管轄衝突與競合之可能狀況，針對各爭端解決機制之管轄客體加以分析，由於 WTO 爭端解決機制僅處理 WTO 內括協定下所衍生之爭端，因此締約國是否亦賦予 RTA 爭端解決機制審議 WTO 內括協定下爭端權限，也將直接影響 RTA 和 WTO 爭端解決機制管轄權是否出現重疊的狀況。

經分析後，120 個設有爭端解決機制的 RTA 中，其中 25 個 RTA 允許締約國將彼此間就 WTO 適用所生爭端遞交由 RTA 爭端解決機制處理，是而在此 25 個 RTA 爭端解決機制中，一旦締約國間就 WTO 內括協定適用發生爭端，締約國則將面對應將爭端交由 RTA 或 WTO 爭端解決機制處理之問題；除此之外，倘當事國間糾紛已在 RTA 或 WTO 爭端解決機制提訴並獲裁決，此時當事國是否可向另一爭端解決機制尋求救濟亦為問題。

其他 95 個管轄範圍僅處理 RTA 爭端之 RTA 爭端解決機制，與 WTO 爭端解決機制仍有出現管轄權衝突之可能。基本上，對於特定政策或措施所引發之紛爭事實，在不同規範適用下可能被賦予不同的評斷，也因此倘當事國 A 向 WTO 進行爭執當事國 B 措施違反 WTO 規範，不論 WTO 爭端解決機制對該案勝敗評斷為何，此時當事國 A 或 B 是否又可另外於 RTA 下對同一事件相似法律規範進行爭執，也同樣的產生了複數爭端解決機制管轄權競合的問題，尤其是當締約國間訂有限制當事國重複救濟或對爭端解決機制管轄權行使限制的場域管轄條款時，此時各爭端解決機制對案件之管轄

權是否將受到影響，本論文將在下段就各類型場域選擇條款加以分類。

第三款　各類型場域選擇條款分析

所謂「場域選擇條款」係指對當事國爭端解決場域（forum）選定或限制之條款，依其使爭端當事國只能以特定場域解決爭端特點觀察，其具有使爭端解決場域具「專屬性」之特色，本論文將其統稱為「專屬管轄條款」。然而，由於各種專屬管轄條款因其條文訂定方式所可能產生的不同法律效果，本論文又將之分為「一般型專屬管轄」條款以及「別訴權利排除型專屬管轄」條款。

1. 各類場域選擇條款之分類定義

「一般型專屬管轄」，係指條款中約定當事國就特定爭端僅能由特定爭端解決機制審議，或是當事國提訴後所獲得裁決具終局確定性。舉例而言，巴基斯坦和中國大陸簽署之RTA，約定RTA下特別審判庭作成之裁決對當事國有拘束力且具終局確定性[117]，或是如加拿大和智利間RTA所約定經被告主張後對涉及環境和保育協定之爭端，原告僅能利用RTA下爭端解決機制救濟[118]之規定，由於此等條款限制了當事國之爭端解決場域，並強調特定爭端解決機制對特定爭端管轄之專屬性，因此本論文將其歸類為場域選擇條款中的「一般型專屬管轄」條款。

「別訴權利排除型專屬管轄」，首先，其和一般型專屬管轄相同，均是希望限縮當事國的爭端解決場域；然而，和一般型專屬管轄不同的是，別訴權利排除型專屬條款約定一旦當事國決定該爭端之爭端解決場域，當事國在條款中明示放棄向其他爭端解決機制尋求救濟權利的行使；以日本和祕魯間RTA為例，其規定當事國選定爭端解決

[117] RTA between Pakistan and China art. 53, “Such award shall be final and binding upon both Parties.”

[118] RTA between Canada and Chile art. N-05, “[W]here the responding Party claims that its action is subject to Article A-04 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter ***have recourse to dispute settlement procedures solely under this Agreement.***”

機制處理爭端後，將直接「排除」利用其他爭端解決機制救濟之可能 [119]，從其明示排除當事國利用其他爭端解決機制可能之特點，本論文將其歸類為「別訴權利排除型專屬管轄」。

簡言之，「一般型專屬管轄」條款和「別訴權利排除型專屬管轄」轄條款均係欲限制當事國就同一爭端尋求複數救濟和裁決，均係專屬管轄條款之不同表現型態；然而，此二者最大之差異在於當事國是否明示約定爭端解決場域擇定並獲裁決後，即放棄向其他爭端解決機制尋求救濟之權利，至於此二者條款效力上異同，則見本論文第陸章之分析。

2. 各類型場域選擇條款於 RTA 被適用狀況

在 120 個設有爭端解決機制的 RTA 中，有 37 個未訂定場域選擇條款，其比例佔有爭端解決機制者之 31%；其他有場域管轄條款之 RTA，採用「一般型專屬管轄」條款者共 11 個（9%），採用「別訴權利排除型專屬管轄」條款者共 72 個（60%），其比較表如下（表三）所示：

<table>
<tr><th>有無場域選擇條款</th><th>場域選擇條款類型</th><th>數量</th><th colspan="2">百分比</th><th>總計</th></tr>
<tr><td rowspan="2">有場域選擇條款</td><td>一般型專屬管轄</td><td>11</td><td>9%</td><td rowspan="2">69%</td><td rowspan="2">83</td></tr>
<tr><td>別訴權利排除型
專屬管轄</td><td>72</td><td>60%</td></tr>
<tr><td>無場域選擇條款</td><td></td><td>37</td><td colspan="2">31%</td><td>37</td></tr>
</table>

（表三）RTA 場域選擇條款分析表

[119] RTA between Japan and Peru art. 207 (Choice of Forum), “[O]nce the complaining Party has requested the establishment of an arbitral tribunal under an agreement referred to in paragraph 1 with respect to a particular dispute, ***that procedure selected shall be used to the exclusion of any other procedure for that particular dispute.***” (emphasizes added).

3. RTA 場域管轄條款的設置

統整而論，RTA 爭端解決機制類型分析表則如下（表四）所示：

有無爭端解決機制	管轄客體	場域選擇條款類型	數量	占有爭端解決者之比例	總百分比
有爭端解決機制	RTA	無場域選擇條款	37	31%	22%
		一般型專屬管轄	11	9%	7%
		別訴權利排除型專屬管轄	47	40%	28%
	RTA & WTO	一般型專屬管轄	1	1%	1%
		別訴權利排除型專屬管轄	24	19%	15%
無爭端解決機制			45		27%

（表四）RTA 爭端解決機制類型分析統計總表

第四款　我國所簽署 RTA 之爭端解決機制分析

我國與尼加拉瓜、與巴拿馬、與瓜地馬拉、與宏都拉斯以及與中國大陸所簽訂的兩岸經濟合作框架協定（Economic Cooperation Framework Agreement，簡稱ECFA）等五個RTA中，除了ECFA爭端解決機制尚待後續談判以完成建構者外，其餘四者均在RTA下設有爭端解決機制(但根據ECFA第 10 條規定，其下亦將設置爭端解決機構)。[120]

此些 RTA 中，除與尼加拉瓜之 RTA 的爭端解決機制限於 RTA 爭端之審議，與瓜地馬拉、宏都拉斯和巴拿馬簽訂之 RTA 爭端解決機制管轄權，均包含了 RTA 及 WTO 爭端之審議，且此四者均採「別訴權利排除型專屬管轄」之場域選擇條款。其分析如下（表五）所示：

[120] 兩案貿易爭端解決方法研究，可參見李孟鎔，兩岸經貿互動過程中 WTO 爭端解決機制之研究，國立東華大學公共行政研究所碩士論文，第四章頁 80 以下（2004）。

RTA 簽署國	爭端解決機制 管轄客體	場域選擇條款類型
台灣—尼加拉瓜	RTA	別訴權利排除型 專屬管轄
台灣—瓜地馬拉	RTA & WTO	
台灣—宏都拉斯		
台灣—巴拿馬		

（表五）我國所簽署 RTA 之爭端解決機制分析表

第四項　小結

本論文分析之 165 個RTA中，共有 120 個設有爭端解決機制；此 120 個有爭端解決機制的RTA中，83 個訂有場域選擇條款。此統計結果顯示在目前各國所簽署之RTA中，爭端解決機制的設置係相當普遍的現象，其中以訂定場域選擇條款處理與其他爭端解決機制間管轄權衝突問題者亦不在少數，國際爭端解決機制管轄權確似有朝賦予爭端解決機制強制管轄權設計的趨勢[121]。至於此些RTA爭端解決機制以及各類型場域選擇條款，對WTO爭端管轄機制管轄權將造成的影響，則見本論文後續分析。

[121] *See* Cesare R. Romano, *The Shift From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Concent*, 39 N.Y.U. J. INT'L & POL'Y 791, 867 (2007).

第參章　WTO 法源之分析

本論文中，將倚賴 WTO 爭端解決機制先前處理 WTO 和 RTA 爭端解決機制管轄衝突時曾提出法理以及一般國際法原則，作為判斷各類型爭端解決條款影響和效力的依據。為說明本論文選擇以 WTO 爭端解決機構判決先例為分析對象之原因，以下本論文將分別介紹 WTO/GATT 時期爭端解決判決先例對國際貿易法制發展和研究的重要性，以對本論文所欲探討主題之重要性及其所能提供之貢獻，以及一般國際法原則可適用於 WTO 法體系下以解決規範衝突之理由。

第一節　WTO/GATT 判決先例可適用分析

第一項　WTO/GATT 爭端解決機構判決先例的重要性

WTO/GATT下的爭端解決，主要可分為WTO成立前的GATT時期及WTO成立後之爭端解決。因WTO和GATT之爭端解決裁決必須經過會員國採認（adoption）程序後才會對會員國發生效力，而GATT爭端解決機制之爭端解決裁決，又因其採認程序採正面表列方式而和採負面表列之WTO裁決採認程序迥異，造成了GATT爭端裁決較WTO爭端裁決不易獲得會員國採認而影響其效力 [122]；因此在探討WTO/GATT爭端解決裁決對國際貿易法制發展之影響時，將區分該裁決是否獲得採認而有所差異。

以下本論文將對 GATT 時期及 WTO 時期之爭端解決裁決報告效力進行介紹，並論述該裁決報告見解對國際貿易規範發展研究之重要性；因 WTO 成立後爭端解決審理又分為由爭端解決小組（panel）審理之第一審，以及由上訴機構（appellate body）處理之上訴第二審，故也將針對對小組和上訴機構作成報告之地位和效力異同加以介紹，以說明本論文分析 WTO 爭端解決裁決對 WTO 研究具有的意義。

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[122] 關於 GATT 和 WTO 爭端解決裁決採認程序差異，以及採認程序差異對爭端裁決效力造成之影響之詳細介紹，見本論文第貳章第二節「WTO 貿易爭端解決機制」說明。

第一款　GATT 時期之爭端解決裁決

1. 經採認報告（adopted GATT Reports）

GATT 時期爭端解決小組作成並經會員國採認之報告（以下簡稱經採認報告）所具有的法律地位，雖目前學說與實務均認為經採認報告對後案具法理適用之參考性，然而，對於是否應賦予經採認報告等同於 WTO 協定之法律地位，則仍具爭議。

實務上，WTO爭端解決小組在*Japan – Alcoholic Beverages II*案[123]中，認為GATT經採認報告構成「GATT 1947 締約國作成的『決定』(“decisions” of the Contracting Parties to GATT 1947)」，因此依GATT 1994 第I條第(b)項第(iv)款[124]規定，將此種「決定」(亦即是經採認的GATT裁決) 認定為GATT 1994 的規範內容之一[125]。然而，上訴機構則駁斥了爭端解決小組將GATT經採認報告認為係「GATT 1947 締約國作成的『決定』」的看法，而認為會員國採認爭端解決報告的「決定」和GATT 1994 第 1 條第(b)項第(iv)款所稱的「決定」並不相同[126]；此外，上訴機構亦不認為爭端解決機構的報告和會員國採認的決定，屬於條約法公約第 31 條[127]中條約締約國對條約的後續實踐（subsequent practices)，而無須在解釋WTO相關規範時一同納為規範之解釋對象[128]。雖然上訴機構表示經採認報告在效力上和國際法院規約第 59 條[129]相似，經採認報告

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[123] Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS/11R (July 11, 1996) (adopted Nov. 1, 1996), as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, [hereinafter *Japan – Alcoholic Beverages II*].

[124] GATT art. 1(b)(iv) provides: “1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: …. (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement: … . (iv) other decisions of the CONTRACTING PARTIES to GATT 1947. … .”

[125] Panel Report, *Japan – Alcoholic Beverages II*, ¶ 6.10.

[126] Appellate Body Report, *Japan –Alcoholic Beverages II*, at 14.

[127] 此處指維也納條約法公約第 31 條第(3)項第(b)款。

[128] Vienna Convention art. 31(3)(b): “3.There shall be taken into account, together with the context: … ; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;… .”

[129] ICJ Statute art. 59 provides, “The decision of the Court has no binding force except between the parties

除就對個案當事國具有拘束力外，對其他締約國無拘束力[130]，但其仍常在爭端解決機構審理相似議題的後案時被加以援引或參考，因此仍是WTO重要的法理（*acquis*）之一，並將對WTO會員產生遵循此裁決見解之「具法效性的期待（legitimate expectation）」。[131]

學理上，學者Palmeter和Mavroidis認為，上訴機構在*Japan – Alcoholic Beverages II*案僅指明「會員國採認爭端解決報告的『決定』」和「GATT 1994 第 1 條第(b)項第(iv)款所稱的『決定』」兩者相異，卻未直接否認「經採認報告係GATT 1994 第 1 條第(b)項第(iv)款所稱的『決定』」之點作反面解釋，即表示上訴機構同意經採認裁決可被認定為WTO實質規範的一部分[132]，也因此GATT經採認報告效力並不限於被視為可供於後案中參考的WTO法理；進一步推論，Palmeter和Mavroidis更認為經採認報告可被認定為國際法院規約第 38 條下的司法判決，具有國際法輔助法源的地位；而學者Long和Kuijper則認為爭端解決報告的採認，代表著會員國對爭端解決見解的支持（endorsement）而具有參考價值[133]；學者Raj Bhalae更認為相較於以負面共識決採認的WTO爭端解決報告，因GATT時代的爭端解決報告採認係依正面共識決進行，故GATT時期經採認報告應具有更高的可參考價值[134]。相反的，持反對見解者則認為，根據規範對WTO協定解釋的DSU第 3.2 和第 7 條規定，雖然對WTO的解釋適用應依循國際法之一般解釋規則而可適度的參考前案見解，但前案見解卻不具有可拘束後案的

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and in respect of that particular case.”

[130] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 14.

[131] *Id.*, “Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”

[132] PALMETER & MAVROIDES, *supra* note 14, at 53.

[133] OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 46 (1985); Pieter Jan Kuijper, *The Law of GATT as a Special Field of International Law*, 25 NETH. Y.B. INT’L L. 227, 239 (1994).

[134] Raj Bhala, *The Myth of Stare Decisis and International Trae Law*, 14 AM.U. INT’L L. REV. 845, 868 (1999).

地位；此外，在WTO法制中可直接適用國際法者，亦僅限於「解釋適用」部分而不及於國際法法源等規定，如Palmeter等學者以國際法法源方式解讀GATT經採認報告地位之見解，已過分擴張而超脫出可允許範圍[135]。對於此一爭議，學者John Jackson則認為，會員國對報告的採認，除表示會員國接受該報告對系爭爭端的解決方式外，不具其他意涵。[136]

2. 未經採認報告（unadopted GATT Reports）

根據GATT 1947 第XXIII條，爭端解決小組的裁決應經過全體締約國的同意才能獲得採認[137]，因此*Japan – Alcoholic Beverages II*案爭端解決小組和上訴機構均表示未經全體締約國採認的爭端解決報告不具任何法律地位。[138]

實務上，雖然未經採認報告因未能通過採認程序而對所審議爭端不具拘束力，然而，此不代表未經採認報告對後案不具參考性。在否認未經採認報告法律上效力的*Japan – Alcoholic Beverages II*案中，上訴機構表示未經採認報告仍可在檢視相關事件時提供論理上的參考[139]；*Argentina – Textiles and Apparel*案中，上訴機構亦認為該案爭端解決小組在審理過程中，曾適用並倚賴未經採納報告的論理且未予駁斥[140]。然而，

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[135] *See* WAINCYMER, *supra* note 75, at 495–96, 511–12; *see also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 342 (1999).

[136] John J. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1272–73 (1992). GATT 經採認報告效力分析，另可參見張佑安，世界貿易組織爭端解決架構下救濟方式之研究，國立臺灣大學法律學研究所碩士論文，頁 44–53（2004）。

[137] GATT 1947 第 XXIII 條第二項規定："The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate." 因此雖然對爭端的裁決係由爭端解決小組所作成，但仍須經由全體締約國的同意方生效力。更詳細說明請見本論文第貳章、第二節。

[138] Panel Report, *Japan – Alcoholic Beverages II*, ¶ 6.10; Appellate Body Report, *Japan – Alcoholic Beverages II*, at 14–15.

[139] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 15.

[140] See Appellate Body Report, *Argentina – Certain Measures affecting Imports of Footwear, Textiles, Apparel and other items*, ¶ 43, WT/DS56/AB/R (Mar. 27, 1998) [hereinafter *Argentina –Textiles and Apparel*] for: "[T]he Panel's use of the Bananas II panel report appears to have gone beyond deriving "useful guidance" from the reasoning employed in that unadopted panel report. The Panel, in fact, relies upon the Bananas II

WTO實務見解並非一致的認為未經採認報告對後案論理具參考價值，在*EC – Banana III*案[141]中，上訴機構即對歐盟援引*US - Taxes on Automobiles*案[142]之未經採認報告以支持其主張的行為採取了批判的態度[143]，顯見未經採認報告的可參考及適用性尚不確定。

學理上，學者Pescatore認為爭端解決機構的未經採認報告，是「麻煩」、「無權威性」且「對讀者無助益」的素材[144]；學者Waincymer則認為，縱使未經採認報告的拘束力和權威性是值得注意的問題，但此並不妨礙在探討相關問題的時候參考未經採認報告中採用的思考邏輯和論理見解，因此不應全盤否認未經採認報告對WTO法制研究的貢獻。[145]

第二款　WTO 時期爭端解決裁決

1. 爭端解決小組報告（Panel Report）

WTO爭端解決小組報告和GATT時期爭端解決報告相似之處，在於爭端解決裁決仍需經全體會員國同意；然而，根據成立WTO之「馬拉喀什建立世界貿易組織協定」（Marrakesh Agreement Establishing the World Trade Organization，以下簡稱WTO協定或Marrakesh Agreeement）第IX條第一項，WTO決定仍應以共識決為原則[146]，爭端解

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panel report.”

[141] Appellate Body Report, *European Communities – Regime For The Importation, Sale And Distribution Of Bananas*, WT/DS27/AB/R (Sep. 9, 1997) (adopted Sep. 25) [hereinafter *EC – Banana III*].

[142] GATT Panel Report, *United States - Taxes on Automobiles*, at 152, DS31/R (Oct. 11, 1994) (*unadopted report)*.

[143] Appellate Body Report, *EC – Banana III*, ¶ 241.

[144] *See* Pierre Pescatore, *The GATT Despute Settlement Mechanism: Its Present Situation and its Prospects*, 27 J. INT’L ARBITRATION 5, 36 (1993); *see also* Pierre Pescatore, *Drafting and Analysing Decisions on Dispute Settlement*, *in* HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 32 (Pescatore et al. eds. 1998).

[145] WAINCYMER, *supra* note 75, at 516.　GATT 未經採認報告效力探討，亦可參見張佑安，前揭（註 129），頁 53–57。

[146] Marrakesh Agreement art. IX(1), “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.”

決機構的裁決亦不例外。不同的是，根據DSU第 2 條註一說明，爭端解決機構作成的裁決將被推定為由會員國共識決作成的決定[147]，因此除非由全體會員國重新投票反對爭端解決機構的裁決，基本上WTO爭端解決小組作成的裁決並無因少數會員國反對無法獲得採納而成為未經採認報告的問題，是而在探討WTO爭端解決小組報告效力時，僅討論經採認報告即可。

實務上，目前並沒有直接討論WTO經採認報告法律效力的判決論述，但縱使WTO和GATT爭端解決報告在採認程序上共識決程序不同，然而，其在法律上仍係經會員國採認的報告，因此我們可將對GATT經採認報告的論理運用於對WTO爭端解決報告效力的探討，並認為WTO經採認爭端解決報告雖然對該個案當事國以外會員無拘束力，但和GATT時期經採納報告一樣，其仍可對WTO會員國產生「具法效性的期待」[148]。此外，如*India – Patents (EC)*案[149]爭端解決小組報告所述：爭端解決小組審理案件時不受爭端解決小組及上訴機構在前案作出見解的拘束；但爭端解決小組和上訴機構所作出的論理和結論仍會在後案審理時被加以考量[150]，顯見WTO實務亦同樣支持WTO爭端解決小組報告論理可被後案所參酌之見解。

2. 上訴機構報告（Appellate Body Report）

對於WTO上訴機構報告的地位，我們可以從兩個角度加以觀察。首先，實務上，

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[147] DSU art. 4, n.1, “The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.”

[148] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 14–15.

[149] Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products – Complaint by the European Communities*, WT/DS79/R, (Dec. 19, 1997) (adopted Sep. 22, 1998) [hereinafter *India – Patents (EC)*].

[150] Panel Report, *India – Patents (EC)*, ¶ 7.30, “[P]anels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. . . . However, . . . we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in [an earlier dispute] (emphasis in original).

根據爭端解決小組在*US – Lead and Bismuth II*案[151]的見解，上訴機構報告對爭端解決小組而言，和經採認爭端解決小組報告具有類似地位，亦即：對後案無拘束力，但仍對會員國創造了「法期待性」[152]；除此之外，*India – Patents (EC)*案爭端小組報告中也同樣提及上訴機構報告可作為審議案件時論理之參考[153]；*EC – Sardines*案中，爭端解決小組在審議TBT協定時也借用了上訴機構在*EC – Hormones*案[154]處理SPS爭端的論理[155]；上訴機構在*US – Shrimp (Article 21.5 – Malaysia)*案中，更以*Japan Alcoholic II*論述為基礎，進一步說明上訴機構報告亦為WTO法理的一部份[156]；以上之例證，均說明了上訴機構報告對後案論理所能提供之協助和指引。

再者，從理論加以探討，學者MacCormick認為在具層級的審判體系中，下級法院任意悖離上級法院論理乃是導致（司法論理）混淆的主因，而此也正是上級法院見解應拘束下級法院的原因[157]；此外，相較於爭端解決小組成員在挑選上均採個案特別挑選，而導致每個案件的承審小組成員不固定的狀態，因上訴機構審理案件時乃由其固定七名成員中抽選三名組成，且上訴機構承審成員在遞交案件裁決時亦會將案件與其他未承審成員討論見解[158]，因此上訴機構報告見解可能較具一致性[159]；此外，上訴

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[151] Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000) (adopted June 7, 2000) [hereinafter *US – Lead and Bismuth II*].

[152] *Id.,* n. 78.

[153] Panel Report, *India – Patents (EC)*, ¶ 7.30.

[154] Appellate Body Report, *European Communities – Measures affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *EC – Hormones*].

[155] Panel Report, *European Communities – Trade Description of Sardines*, ¶¶ 7.59–.60, WT/DS231/R and Corr.1 (May 29, 2002), as modified by the Appellate Body Report, WT/DS231/AB/R [hereinafter *EC – Sardines*]. 上訴機構報告並未推翻爭端解決小組對判決先例效力適用的論理。

[156] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (*Article 21.5*)*, ¶¶ 108–09, WT/DS58/AB/RW (Oct. 22, 2001) (adopted Nov. 21, 2001) [hereinafter *US – Shrimp (Article 21.5 – Malaysia)*].

[157] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 227 (Oxford 1999).

[158] Appellate Body Rule 6(1) [hereinafter AB Rule].

機構在對爭端進行審議時，很多時候是檢視爭端解決小組法律見解是否和上訴機構見解相符的問題，此時上訴機構為了維護其身為WTO爭端解決最高審理者的權威性（姑且排除採認程序所可能造成之影響），其勢必會避免悖離自己過往判決說理而維持論理的一致性。綜上所述，有認為上訴機構報告之參考價值和對後案之指引性勝於爭端解決小組報告。[160]

第二項　小結

從上述對WTO及GATT等時期爭端解決報告對後案效力的介紹中，我們可以清楚的發現，WTO和GATT時期爭端解決機制作成之裁決報告除具拘束個案爭端當事國（會員）外，對於其他非當事國並無拘束力，且各裁判亦無既判例之效力[161]；然則，根據上訴機構在*Japan – Alcoholic II*案見解，本於對條文解釋之一致性並維繫WTO協定解釋適用之和諧，爭端解決機構小組及上訴機構所做出判決中闡述之論理，仍對會員國義務遵循建立了「具法效性的期待」，而WTO實務中不論是小組或是上訴機構的判決報告中，亦多援引爭端解決機制先前對相似議題或條文之解釋作為裁判上論理之依據。學者對WTO/GATT爭端解決報告後案拘束力的論述，除了均同意裁決報告對非本案當事國無拘束例外，對於此些報告在WTO法源上的地位則有極大的差異，從學者Mavroidis認為爭端解決報告屬會員國對WTO條約的後續實踐而應被視為WTO規範一部份，而賦予爭端解決報告極高強度效力，Waincymer等則認為爭端解決報告係解釋適用法規時可參考的依據[162]，到Pescatore全盤否定爭端解決機構的未經採認報告效力的見解[163]；然而，對於經會員國採認的報告（無論是以正面共識決或負面共識決所採

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[159] PALMETER & MAVROIDES, *supra* note 14, at 213–14.

[160] MACCORMICK, *supra* note 157, at 227.

[161] 詳見本論文第陸章之分析。

[162] 相似見解參見 MATSUSHITA ET AL., *supra* note 14, at 56–66。Matsushita 教授等將對爭端解決報告效力之介紹，編排於 WTO 法源下「解釋素材（interpretative element）」章節下加以論述。

[163] *See* Pescatore, *The GATT Despute Settlement Mechanism*, *supra* note 144, at 36; *see also* Pescatore,

認者)，本論文認為其至少可對爭端解決後案提供論理和邏輯上協助，因此仍可將其納為輔助性法源（subsidiary source）而加以參考。

對WTO法制進行研究時，除依維也納條約法公約對協定內容進行解釋外，判決先例之研究亦為觀察檢視WTO法制發展不可或缺之部份。而學者亦認為縱使WTO爭端解決經採認報告不具拘束後案效力，但從爭端解決裁決者被賦予對法規適用的獨佔權威觀察，倘其無法在解釋適用法規時採取具一致性和延續性的立場，面對具相似事實背景、涉及相同法規適用的案件時，任意偏離爭端解決機關在前案中作成的決定或論理，將可能導致法體系適用穩定性不足使受拘束國對信賴感降低，並危及法體系的延續與發展[164]，誠如國際法院法官Mohamed Shahabuddeen所說：「縱使有權，法院也不會輕易的行使其偏離在前案曾作出的見解」。[165]

綜上，鑒於爭端解決機構在後案裁決中對前案報告見解的遵循，我們可以了解到對WTO前案進行分析研究而獲得的法理論述，對整體WTO法制發展研究所能提供的助益，因此本論文研究將借重對WTO對管轄權衝突判決先例之分析，以及其所提出的指引和論理，以掌握探討「爭端解決機構管轄和裁決衝突競合」時的核心問題，最終，並試以WTO法以及國際法之相關原理原則，對研究分析所得問題提出解決和後續發展之預測和建言。[166]

Drafting and Analysing Decisions on Dispute Settlement, *supra* note 144, at 32.

[164] PALMETER & MAVROIDES, *supra* note 14, at 57.

[165] MOHOMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 3 (1996).

[166] 在研究方法上，雖亦有質性及量化研究方法可供使用，然因曾對本論文欲研究之爭端解決機制管轄競合及衝突進行論述之判決仍不多見，因此對其進行量化研究並無法取得有意義之數據。此外，即使對各國簽署之 FTA 爭端管轄條款加以統計分析，因 FTA 之簽署以及其下爭端解決機制之設置方式，將因簽署國間所欲藉 FTA 簽署達成之不同目標以及締約國間所欲形成關係之緊密程度而有所差異，FTA 管轄條款類型化的統計縱使能呈現當前較常被適用的管轄條款，但實際上國家簽署 FTA 選擇管轄條款時仍會以該條款對國家貿易救濟之影響利弊進行評估，而不會以國際趨勢作爲 FTA 下管轄條款設計時之考量，因此此種統計數據對本論文所欲探討之主題無法提供助益，是而本論文將不會採取統計之量化研究分析。

至於質性研究之進行，由於本論文所欲觀察者之主題，理論上可能訪談對象包括了各國對外貿易

第二節　一般國際法原則可適用性分析

第一項　可處理爭端解決管轄權衝突之原理原則

本論文在第貳章對 RTA 爭端管轄條款的分析後，我們可以發現各類型爭端解決條款對 WTO 爭端解決機制管轄權所可能造成的衝擊不一而定；本論文第肆章的研究，也將藉分析 WTO 過往處理管轄權衝突爭端的判決先例，找出 WTO 爭端解決機制對 RTA 爭端管轄條款適用的態度。然而，本論文除了對 WTO 爭端解決機構就爭端解決管轄衝突及競合已提出的觀點作整理外，更希望就 WTO 爭端解決機構論述不完全及其他可供解決此問題的潛在論點提出可能的解決方案，鑒於本論文研究核心在於處理 WTO 和 RTA 協定適用上競合，故本論文將進一步就國際法上各類處理規範適用順序以及規範衝突競合的國際法原則進行探討，期能發掘可供處理 RTA 爭端解決條款衝突競合處理之法理。以下即就一般國際法原則於 WTO 下的可適用性加以介紹：

第二項　一般國際法原則可適用於 WTO 法體系之理由

第一款　WTO 法源概述

在討論WTO可適用的法源（source of law）時，除本節前段所介紹的GATT/WTO

談判代表，以及實際參與爭訟案件裁決之裁判者，然則實際上因下列因素之存在，將使質性訪談研究方法無法使用於本論文研究。首先，綜理論上對參與對外貿易談判之談判代表進行訪談將並進行分析，將有助於理解各國在簽訂自由貿易協定時，是否有意識到相異爭端解決機構彼此管轄權相衝突之可能狀況？以及其對另設爭端解決機制所採取之態度爲何？然而，實務上因各會員國間經貿互動關係密切性不一，且此等區域貿易協定談判多涉及國家對外貿易政策，因此對個別談判代表人員進行訪談，基於保密等相關因素，將影響以質性訪談進行研究時可獲得之結果。至於藉對實際參與爭端解決機制裁判者進行訪談，雖可藉此獲悉其應適用對法規意涵之見解和論述，以推知裁判者之心證並預測往後判決和法制之發展方向；然則，在探討「WTO 和區域貿易組織爭端解決機制管轄競合和衝突」議題時，裁判者於個案中面對之爭端解決條款設計可能均不相同，縱使設計各類管轄衝突或裁決競合作爲模擬案例，對於統整裁判者對此議題之心證仍有困難；且在訪談對象挑選上，亦因訪問 WTO 爭端解決小組或上訴機構成員有一定困難，且縱使其受訪，所得內容亦僅屬其個人見解，縱使將其理解爲國際法院規約第 38 條之著名學者意見，在法理上亦僅有供 WTO 爭端解決裁判者參考之效力，對往後爭端之審議不具指引效力。

判決先例可作為WTO輔助法源外，我們首應注意到WTO乃是各會員國共同締結條約而成立的國際經貿組織，而各締約國則則進一步依其主權在國際框架下，於內國法之制定與政策推行上實現國家所負擔之條約義務；因此成立WTO所簽署之「馬拉喀什建立世界貿易組織協定」及其內括協定（covered agreement）下的條約，自然是對WTO各會員國均可援引適用之法源依據[167]；然而，在WTO法制研究中，WTO下可適用之法源，並不限於前述之馬拉喀什協定和WTO內括協定。[168]

WTO上訴機構在*US – Gasoline*案中表示，根據DSU第 3.2 條指示： WTO爭端解決機構應以國際公法之解釋習慣規則釐清內括協定之意涵，以維護會員國內括協訂下的權利和義務[169]，因此WTO應依據在國際法解釋適用已具有習慣法地位之條約法公約，對WTO內括協定加以解釋適用[170]；此外，上訴機構亦表示此種對WTO協定的解釋適用，同時反應了WTO法制不應獨立於國際法體系外之意涵[171]。雖然*US – Gasoline*案中上訴機構僅表示在對WTO及其內括協定解釋適用時有具國際習慣法地位的條約法公約的適用[172]，但嚴格而論，上訴機構在該案中表示國際公法可適用於WTO法制者限於「解釋適用」法理範疇，而未論及國際公法之其他概念亦可適用於WTO體系。[173]

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[167] *See* WAINCYMER, *supra* note 75, at 374–75; *see also* PALMETER & MAVROIDES, *supra* note 14, at 49–50.

[168] WAINCYMER, *supra* note 75, at 374.

[169] DSU art. 3.2 provides, "…. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. ... ."

[170] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, at 17, WT/D2/AB/R (Apr. 29, 1996) (adopted May 20, 1996) [hereinafter *US – Gasoline*].

[171] *Id.* at 17.

[172] *Id.* at 17.

[173] 需注意，上訴機構在 US – Gasoline 中僅表示其根據 DSU 第 3.2 條可根據國際法習慣解釋方法釐清 WTO 協定之義務，並基此引進適用維也納條約法公約，然而，上訴機構用運國際公法之解釋方法論，僅顯示 WTO 體系亦具有國際法之性質，因此在解釋適用上以維也納條約法爲依歸，但此並不表示所有國際公法之概念和原理原則均可適用於 WTO 會員並對其產生拘束力。See *id.* at 17 for: "That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which **the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General***

根據學者Malcolm Shaw之見解，雖然國際法院規約第 38 條係國際法院審理案件時可適用法源規定，但其認為因為此條文呈現了國際法法源的通認觀點[174]，且根據WTO上訴機構在*US – Gasoline*案認為WTO應可被認係國際公法之一部分[175]，因此在WTO的 DSU下未如國際法院規約第 38 條明訂其可適用法源時，我們亦可借用國際法院規約第 38 條以在探討其他國際爭端解決機制的可適用法源時提供參考和指引[176]。此外，學者Thomas Schoenbaum認為，吾等應對DSU第 19 條[177]採取寬鬆解釋，而將之解讀為一個允許爭端解決小組和上訴機構審理案件中各種爭議的「授權條款（implied power clause）」，並認WTO爭端解決機構亦可援引國際公法解決當事國間紛爭[178]；學者Palmeter和Mavroidis則認為DSU第 7 條[179]寓有國際法院規約第38條原理的概念[180]，且舉凡WTO/GATT的爭端解決報告、WTO會員國實踐、習慣、國際法著名學者的建議，以及其他對WTO發展及成長有所助益之國際法，均應被認為係可適用之「WTO規範（WTO Law）」。[181]

Agreement* and the other "covered agreements" of the *Marrakesh Agreement Establishing the World Trade Organization" (emphasizes added).

[174] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 55 (3d edn. 1991). 丘宏達及黃異採相同見解，參見丘宏達，現代國際法，二版，頁 60（2006）；黃異，國際法在國內法領域中的效力，頁 17–36（2006）。

[175] Appellate Body Report, *US – Gasoline*, at17.

[176] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 35 (7th edn. 1997).

[177] DSU art. 19 (Panel and Appellate Body Recommendations), "1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[178] T. J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L. Q. 647, 653 (1998).

[179] DSU art. 7 (Terms of Reference of Panels), "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

[180] PALMETER & MAVROIDES, *supra* note 14, at 50.

[181] *Id.*

第二款　國際法法源適用於 WTO 之可能

為了進一步探討國際法院規約第 38 條對 WTO 可適用法源所能提供之指示，該條規定：

「一、法院對於陳訴各項爭端，應依國際法裁判時應適用：

（1）不論普通或特別國際協約，確立訴訟當事國明白承認之條規者。

（2）國際習慣，作為通例之證明而經接受為法律者。

（3）一般法律原則為文明各國所承認者。

（4）在第五十九條規定之下，司法判例及各國權威最高之公法學家學說，作為確定法律原則之補助資料者。

二、前項規定不妨礙法院經當事國同意本於公允及善良原則裁判案件之權。」[182]

因此根據國際法院規約第 38 條規定，國際法院可適用之法源包括了：（1）國際協定（international conventions）；（2）國際習慣（international custom）；（3）一般法律原則（general principles of law）；以及（4）司法判例及學者學說。由於對 WTO 判決先例可參考性已如本節前段所述，因此本段將集中探討國際協定、國際習慣以及一般法律原則對在 WTO 法制下之可適用性，以說明本論文分析其他 RTA 協定對 WTO 之影響，並希望藉國際習慣和一般法律原則為題材分析處理 WTO 和 RTA 管轄條款競合之可行性。

1. 國際協定之可適用性

（1）WTO 及其內括協定之可適用性

根據DSU第 7 條指示，WTO內括協定乃是WTO體係下首應考慮適用的協定，而根據DSU附件一給予的定義[183]，WTO內括協定包含了WTO協定及其附件（annexes）之多邊協定（multilateral agreement）以及包含「政府採購協定（Agreement on Government

[182] ICJ Statute art. 38.

[183] DSU Appendix I.

Procurement）[184]」和「民航協定（Agreement on Trade in Civil Aircraft）[185]」在內的複邊協定（plurilateral agreement）均是處理WTO案件時應優先適用的條約法源[186]；而部分如巴黎公約（Paris Convention）、伯恩公約（Berne Convention）、羅馬公約（Rome Convention）等非屬WTO內括協定之國際條約，仍因WTO內括協定「指涉（referred to）」會員國應遵循此些條約義務，或將此些國際條約納入（incorporate）WTO內括協定中，而使此些國際條約亦成為WTO下可直接適用之法源。[187]

（2）其他國際協定之可適用性

對於非WTO內括協定，且未在WTO內括協定中被提及應遵循之國際協定在WTO之可適用性，我們可以從幾個WTO爭端解決機構判決中略見端倪：

首先，非WTO內括協定且非被指示應遵循多邊條約之適用，我們可以從*US – Shrimp*案[188]加以觀察，在該案中上訴機構引用並摘錄了包括「生物多樣性公約（Convention on Biological Diversity）[189]」和聯合國海洋法公約（United Nations Conventions on the Law of the Sea）[190]」在內的非WTO內括協定多邊條約以輔助WTO

[184] Agreement on Government Procurement, Apr. 15, 1994, 1915 U.N.T.S. 103.

[185] Agreement on Trade in Civil Aircraft, Jan. 1, 1980, 1186 U.N.T.S. 170.

[186] WTO 內括協定包含之全部協定，列於本論文第貳章、第一節、一。

[187] 如Canada – Pharmaceutical案，WTO爭端解決小組即以伯恩公約的準備文件解釋TRIPS規範之意涵，以釐清 TRIPS 協訂下的條約義務履行。*See Canada – Patent Protection of Pharmaceutical Products*, ¶ 7.70, WT/DS114/R (Mar. 17, 2000).　EC – Sardines 案中，爭端解決小組亦認定聯合國食品法典委員會（Codex Alimentarius Commission）設定之標準爲技術貿易障礙協定（Agreement on Technical Barriers to Trade, TBT, Apr. 15, 1994, 1868 U.N.T.S. 120）第 2.4 條之「國際標準（international standard）」而加以適用，使Codex 標準亦適用於屬 WTO 內括協定之 TBT 協定中。*See* Panel Report, *European Communities – Trade Description of Sardines*, ¶¶ 7.67, 7.103, WT/DS231R (May 29, 2002) (adopted Oct. 2002), as modified by Appellate Body Report WT/DS231/AB/R [hereinafter *EC – Sardines*].　其他案例，*See generally* PALMETER & MAVROIDES, *supra* note 14, at 69–73.

[188] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (adopted Nov. 6, 1998) [hereinafter *US – Shrimp*].

[189] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

[190] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396.

條文之解釋適用[191]；據此，學者Palmeter和Mavoroidis認為，因前述之生物多樣性公約等並非國際習慣法之解釋習慣，因此在*US – Shrimp*案中，爭端解決機構對此些多邊條約內涵理解適用的狀況下，其他國際法條約意涵已被納入WTO規範中而被加以適用，是而DSU第 3.2 條下的WTO法源並不限於國際習慣法之條約解釋習慣[192]。此外，*EC – Poultry*案[193]中，上訴機構將歐盟和巴西簽訂的雙邊協定作為解釋適用WTO規範的輔助性工具（supplementary means of interpretation）[194]；*Turkey – Textile*案[195]和*Argentina – Poultry Anti-Dumping Duties*案[196]中，爭端解決小組亦審議檢視雙邊自由貿易協定對WTO規範所可能造成的影響[197]。

由此而觀，WTO 內括協定以外之國際條約，縱使非 WTO 體系中可直接適用的法源，但不論在條文解釋適用抑或是相關法理運用時，此些國際條約仍可以提供輔助之幫助，且從 WTO 審議此些多邊和雙邊協定而觀，我們也可推論此些國際條約的存在，確實將對 WTO 法制造成一定的衝擊，因此在審議 WTO 案件時，應將此些國際條約視為參考之輔助工具而一併納入討論。

2. 國際習慣可適用性

國際習慣法（customary international law）在WTO可適用性之論述，可參考爭端解決機構在*EC – Hormones*案[198]的論理，在該案中歐盟主張「預警原則（precautionary

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[191] Appellate Body Report, *US – Shrimp*, ¶ 130.

[192] PALMETER & MAVROIDES, *supra* note 14, at 74.

[193] Appellate Body Report, *European Communities – Measures affecting Importation of Certain Poultry Products*, WT/DS69/AB/R (July 13, 1998) (adopted July 23, 1998) [hereinafter *EC – Poultry*].

[194] *Id.* ¶ 83.

[195] Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 9.178, WT/DS34/R (May 31, 1999) (adopted Nov. 19, 1999), as modified by Appellate Body Report WT/DS34/AB/R [hereinafter *Turkey – Textile*].

[196] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.20, WT/DS241/R (Apr. 22, 2003) (adopted May 19, 2003) [hereinafter *Argentina – Poultry Anti-Dumping Duties*].

[197] Panel Report, *Turkey – Textile*, ¶ 9.178; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.20.

[198] Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) –*

principle）[199]」是一個國際習慣法，而加以援引以正當化其限制美國和加拿大曾施打賀爾蒙牛肉之進口措施不構成WTO協定（特別是SPS協定）之違反；然而，WTO爭端解決小組和上訴機構均表示，不論預警原則是否具有國際習慣法之效力或地位，其均無高於WTO協定之地位而不能變更會員國WTO協定下之義務[200]。由此可知，在WTO協定與國際習慣法相衝突時，WTO爭端解決機構乃採取WTO協定優位之態度。

但對於WTO協定和國際習慣法無衝突狀態時國際習慣法之適用可能性，爭端解決小組在*Korea – Procurement*案[201]中表示可適用於WTO之國際習慣法不限於解釋方法[202]，因而除了在WTO協定和國際習慣法有明顯衝突（conflict）、不一致（inconsistency）甚或是與WTO明示語意有所違背狀況外，國際習慣法應可適用於WTO法體系中。[203]

3. 一般國際法原則[204]可適用性

Complaint by the United States, WT/DS26/R/USA (Aug. 18, 1997) [*hereinafter EC – Hormones (US)*]; Panel Report, *EC – Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada*, WT/DS48/R (Aug. 18, 1997) [hereinafter *EC – Hormones (Canada)*]; Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones*].

[199] Precautionary principle 在介紹上，有論者將之翻譯為「預防原則」；然而本論文為了區別 prevention principle 和 precautionary principle 二者的差異，因此將前者翻譯為「預防原則」，後者則譯為「預警原則」。

[200] Panel Report, *EC – Hormones (US)*, ¶ 8.157, at 699; Panel Report, *EC – Hormones (Canada)*, ¶ 8.160, at 235; Appellate Body Report, *EC – Hormones*, ¶ 123, at 135.

[201] Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R (May 1, 2000) (adopted June 19, 2000) [hereinafter *Korea – Procurement*].

[202] 因 US – Gasoline 案中，WTO 上訴機構已表示國際習慣法之條約解釋規則在 WTO 亦有適用。

[203] Panel Report, *Korea – Procurement*, ¶ 7.96. 對於國際習慣法在 WTO 之地位，可參見楊健弘，論習慣國際法於世界貿易組織爭端解決案件之地位，國立東華大學財經法律研究所碩士論文（2010），該論文中從國際法院（ICJ）適用之國際習慣法加以整理，並對國際習慣法在 WTO 爭端解決機制下之可適用性，有十分詳細之說明和分析。

[204] 國際法院規約的草擬者 Root 和 Phillimore 認為所謂國際法一般法律原則，係指為全體文明國家所肯認的法律原則（the general principles of law recognized by civilized nations）；然而，Oppenheim 則認為，所謂國際法一般法律原則的存在，係為了授權國際法院在審理案件時使用源於內國法而對當事國有適用的概念。因此對於國際法院規約第 38 條第 3 項第(c)款所指法源究竟為何，即有將之區別為「國際法一般法律原則（general principle of International Law）」和「一般法律原則（general principle of law）」之不同論述。*See generally* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS

誠如先前所述，WTO 之DSU中並未明確規定國際法院規約第 38 條第 1 項第(c)款所謂「為文明國家所共認之法律原則（the general principle of law recognized by civilized nation）[205]」之「一般國際法原則（general principle of international law）」是否為WTO體系可適用之法源，但對於一般國際法原則在WTO的可適用性，我們仍可以從DSU第 3.2 條切入觀察。

根據DSU第 3.2 條規定，WTO爭端解決機構應以合於國際習慣法之方式對WTO協定加以解釋適用[206]。這裡所指的國際習慣法之條約解釋方法，即是指在條約法公約第 31 和第 32 條中明文化的解釋方式。條約法公約第 31 條第 3 項第(c)款規定，在解釋適用條約時，其他可適用於締約國的國際法亦應被加以考量[207]，縱使對所謂「可適用於締約國的國際法」採狹義解釋的狀況下，將造成只有在其他國際法義務負擔國和WTO締約國均相同的時候，才可將其他國際法納入考量[208]；但倘我們對國際法一般法律原則採較廣義解釋，而認為凡對爭端當事國均有適用之國際法均可納入考量[209]，甚或是如Palmeter和Mavroidis更進一步擴張認為對任一締約國適用的國際法均可適用[210]，則此時因一般國際法原則理論上均為國際上多數國家所肯認，因此在對國際法於WTO可

AND TRIBUNALS (2006); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16–19 (7th ed. 2008).

[205] ICJ statute art. 38(1)(c).

[206] DSU art. 3.2: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements ***in accordance with customary rules of interpretation of public international law***. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." (emphasizes added).

[207] Vienna Convention art.31.3(c): "any relevant rules of international law applicable in the relations between the parties."

[208] GATT Panel Report, *United States – Restrictions on Imports of Tuna – Complaint by the ECC and the Netherlands*, ¶ 5.18, DS29/R (June 19, 1994) [hereinafter *US – Tuna II*].

[209] Gabrielle Marceau, *A Call for Coherence in International Law: Praise for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 125 (1999).

[210] PALMETER & MAVROIDES, *supra* note 14, at 57.

適用性採取較寬鬆解釋方式下，一般國際法原則應對全體WTO會員國均有適用而可成為爭端解決機構適用的法源之一。

從實務上觀察，*EC – Hormones*案中，上訴機構在判決中認為適用例外條款時應採取較嚴格的解釋方式，而適用了「例外解釋從嚴」的一般法律原則[211]； *US – Shrimp*案中，上訴機構亦表示GATT第XX條前言（chapeau），乃是節制國家避免「權利濫用（*abus de droit*）」狀況出現之一般國際法原則「誠信原則（good faith）」的表現[212]；此外在*US – Gasoline*案、*Japan – Alcoholic Beverage II*案以及*US – Underwear*案中，爭端解決機構在解釋適用規範上，亦適用了「解釋適用規範文義時，應避免規範出現相互矛盾或無效狀況」之解釋原則[213]；故雖DSU第3.2條已表示對WTO規範的解釋適用，應依國際法一般解釋原則為之，但此並不妨礙此些案例所可佐證一般國際法原則（縱使其只是解釋規則）在WTO之可適用性。

第三款　小結

雖然在*EC – Poultry*和*Argentina – Footwear*案中，上訴機構和學者Trachtman同樣認為WTO爭端解決機構審理案件時儘能依WTO內括協定決定會員國之權利和義務[214]，但從前述介紹可知，爭端解決機構在審議WTO爭端時，無論在解釋適用WTO內括協定意涵，抑或是WTO會員國權利義務負擔時，無論是以直接或間接之方式，在論述中相當程度均適用了非WTO之國際條約和國際法一般法律原則，因此本論文認為如上訴機構在*US – Gasoline*案所說，WTO非全然獨立於國際法之外，在解釋適用WTO條文時，

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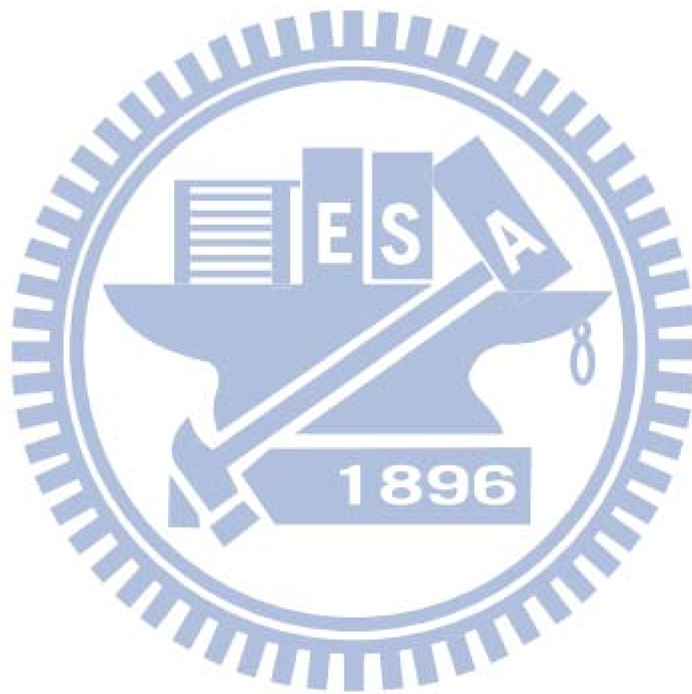
[211] Appellate Body Report, *EC – Hormones*, ¶ 104.

[212] Appellate Body Report, *US – Shrimp*, ¶ 158.

[213] *See* Appellate Body Reports, *US – Gasoline*, at 3; Appellate Body Reports, *Japan – Alcoholic II*, at 12; Appellate Body Reports, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, at 16, WT/DS24/AB/R (Feb. 10, 1997) (adopted Feb. 25, 1997) [hereinafter *US – Underwear*].

[214] Appellate Body Report, *EC – Poulty*, ¶¶ 79–80; Appellate Body Report, *Argentina – Safegurad Measures on Imports of Footwear*, ¶¶ 70–72, WT/DS121/AB/R (Dec. 14, 1999) (adopted Jan. 12, 2000) [hereinafter *Argentina – Footwear (EC)*]; Trachtman, *supra* note 135, at 342.

也應將國際法相關論理納入其中以解決處理WTO案件時可能面對之問題，對於非WTO內括協定之RTA條款，在WTO下自亦有適用之可能。



第肆章　WTO 爭端解決機制對管轄權衝突之處理

第一節　概述

為了進一步釐清WTO會員國於RTA下設定爭端解決條款後，其中的一般型專屬或別訴權利排除型專屬管轄條款，對WTO會員國向WTO爭端解決機制尋求救濟之可能影響，鑒於WTO爭端解決機構所作成裁決，在WTO法制研究上所具有的重要參考價值以及其對後案影響[215]，本章節中將針對WTO爭端解決機構所曾審理，涉及WTO和RTA爭端解決機制管轄權爭議的案件加以介紹，並分析可供後案參考之法理論述，以剖析WTO爭端解決機構對RTA爭端管轄條款適用上的態度和趨勢。

由於RTA管轄條款可能造成WTO爭端解決機構是否有權審理案件而屬管轄權爭議問題，縱使目前DSU中未對爭端解決機構之管轄權有所爭執時之適法裁決者，但從DSU規定WTO爭端解決機構有權組成爭端解決小組以審議當事國間爭端此點觀察，WTO爭端解決機構似為認定其對案件有無管轄權之裁決者[216]，而WTO上訴機構曾明確表示「國際審判機構有權決定自己的管轄權以確定其審議之案件為妥適，已是被普遍接受的規則」[217]，且「對於案件本質上的爭議，不論當事國對其是否加以爭執，爭端解決機構均有權並應於必要時，甚至自行提出審議對本案管轄權有無之檢驗」[218]，

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[215] WTO 判決先例對 WTO 法制研究之重要性請見本論文第參章、第二節、一。

[216] WAINCYMER, *supra* note 75, at 207.

[217] Appellate Body Report, *United States – Anti-Dumping Act of 1916*, ¶ 54 n. 30,WT/DS136/AB/R, WT/DS162/AB/R, (Aug. 28, 2000) (adopted Sep. 26, 2000) [hereinafter *US – 1916 Act*], "[I]t is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case before it." 國際法院在諾特朋案（Nottebohn Case）中，也曾針對國際審判機構管轄權有無之認定爭議作出相似見解，*see* Judgement of Nottebohn case, 1953 I.C.J. 111, 119, "in the absence of any agreement to the contrary, **an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction**" (emphasizes added).

[218] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCs) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW (Oct. 22, 2001) (adopted Nov. 21, 2001) [hereinafter *Mexico – Corn Syrup (Article 21.5 – US)*], "[P]anels have to

因此WTO爭端解決機構有權決定其對系爭案件管轄權有無，並決定管轄權範圍之權。[219]

綜上而論，WTO 爭端解決機構為了確認其審理案件之適法性，當其對 WTO 會員國間爭端管轄權之行使可能因 RTA 管轄條款而受影響時，WTO 對管轄權問題自有釐清義務，並針對其有無管轄權作出說明，以下即將曾論及 RTA 管轄條款對 WTO 爭端解決機構管轄權之 *Argentina – Poultry Anti-Dumping Duties* 案及 *Mexico – Taxis on Soft Drinks* 案加以介紹分析。

第二節　Argentina – AD Poultry 案

第一項　案件事實

1997 年起，阿根廷對自巴西進口的家禽展開了傾銷調查，並在 2000 年認定阿根廷的市場因巴西的傾銷行為而受損害，基於此認定，阿根廷經濟部發布了第 574 號決議，對自巴西進口的家禽產品施予為期三年的反傾銷措施；相對的，巴西則認為阿根廷在對傾銷成立與否調查的發動、調查程序，以及最終對巴西家禽產品之家的反傾銷措施，均違反了WTO下傾銷協定的規範[220]，因此巴西向WTO之爭端解決機構尋求救濟，並請求其判決要求阿根廷更正施行之反傾銷措施，並修正第 574 號決議。[221]

本案中巴西和阿根廷兩當事國除均為WTO會員國外，因彼此在 1991 年 3 月 26 日簽署了建立南錐共同市場的「亞松森條約（Treaty of Asunción）[222]」，其亦均為「南錐

address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. … [P]anels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panel must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed."

[219] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45, at 18–9, "[P]anels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction."

[220] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 3.1(a), at 4–7.

[221] *Id.* ¶ 3.1(b)–(d), at 7.

[222] Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil,

共同市場（MERCOSUR）」之會員國。「亞松森條約」下，締約國除針對貿易及反傾銷措施另有約定外，亦包含了成立獨立「南錐共同市場特別審判庭（MERCOSUR Ad Hoc Tribunal）」以解決區域貿易爭端的「巴西利亞議定書（Protocol of Brasilia）[223]」。

在*Argentina – AD Poultry Dumping* 案中產生爭議者，除實體上阿根廷是否違反WTO之反傾銷規範措施外，由於巴西在2001年11月向WTO爭端解決機構提起訴訟前，已在2000年8月於RTA就同一爭端請求「南錐共同市場特別審判庭」進行審理，且在2001年遭判決敗訴[224]，因此當巴西再將此案件提交請求WTO下爭端解決機構處理時，阿根廷即主張本案既已在區域協定下之爭端解決機構經判決確定，WTO之爭端解決小組應拒絕對巴西所提之訴訟加以審理[225]，以避免不同爭端解決機構間裁判發生歧異。且鑒於審判機構對管轄權之有無，乃是爭端解決機構在評議爭端前所必須先予解決之問題，因此阿根廷請求WTO爭端解決小組應做出是否對本案行使管轄權之判斷。[226]

第二項　當事國及第三國主張

第一款　阿根廷之主張

面對巴西主張阿根廷違反反傾銷協定而向WTO爭端解決機構提起訴訟，阿根廷除重申此一反傾銷措施之適法性外[227]，並認為在巴西向「南錐共同市場特別審判庭」提訴並遭判決敗訴確定後，WTO爭端解決小組應該避免對同一事件再行審理[228]；此外，阿根廷同時提出縱使WTO爭端解決小組認為其可審理此案，其審理案件時亦應受「南

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the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1040, 2140 U.N.T.S. 319, *available at* http://untreaty.un.org/unts/144078_158780/11/9/4261.pdf (last visited Nov. 6, 2010) [hereinafter Treaty of Asuncion].

[223] MERCOSUR/CMC/DEC. Nº 01/91: Protocol of Brasilia for the Solution of Controversies, Dec. 17, 1991.

[224] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 2.10, at 3.

[225] *Id.* ¶ 7.17, at 15.

[226] *Id.* Annex B-1, First Written Submission of Argentina, ¶ 9–15, B-5 to -9.

[227] *Id.* ¶ 32, at 7–8.

[228] *Id.* ¶ 7.17, at 15.

錐共同市場特別審判庭」先前對同一案件的裁決見解拘束之備位聲明。[229]

細論阿根廷之主張及請求權基礎，首先，阿根廷認為巴西身為南錐共同貿易市場的成員，有義務遵守包括亞松森條約及巴西利亞議定書在內的組織規範[230]，且過往巴西和阿根廷間運用MERCOSUR特別審判庭裁決解決彼此紛爭，均為當事國接受MERCOSUR特別審判庭制度的表現[231]。然而，將案件提訴於一爭端解決機構後，出於對裁決結果不滿之因素而另於另一制度尋求救濟，此種忽略前訴訟程序及結果的行為，顯然將使爭端複雜化並構成誠信原則的違反[232]；且從巴西已簽署的「奧立佛斯議定書（Protocol of Olivos）」[233]約束MERCOSUR會員國於MERCOSUR特別審判庭訴訟後不得再向WTO提訴規定而觀，巴西的重複提訴也將違反「禁反言原則（estoppel）」[234]，因此阿根廷主張WTO爭端解決機構，應依一般國際法原則中之禁反言原則拒絕受理巴西本案訴訟。[235]

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[229] *Id.* ¶ 7.17, at 15.

[230] *Id.* Annex B, ¶ 20, at B-7.

[231] *Id.* Annex B, ¶ 20 n. 10, at B-7, citing three cases including: I. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the dispute on communications Nos. 37 of 17 December 1997 and 7 of 20 February 1998 from the Department of Foreign Trade Operations (Decex) of the Secretariat for Foreign Trade (Secex): Application of restrictive measures to reciprocal trade. Date: 28 April 1999; II. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to hear the complaint of the Argentine Republic against the Federative Republic of Brazil on subsidies for the production and exportation of pork. Date: 27 September 1999; also III. Award of the MERCOSUR Ad Hoc Arbitral Tribunal constituted to rule on the application of safeguard measures to textile products (Res. 861/99) by the Ministry of the Economy and Public Works and Services. Date: 10 March 2000.

[232] *Id.* ¶¶ 7.18-.19, at 15–16.

[233] The Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 18, 2002, 42 I.L.M. 2 [hereinafter Protocol of Olivos].

[234] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶¶ 7.18, 7.20, at 15–16.

[235] 阿根廷主張行爲構成禁反言原則需有三個要件的實現，首先爲聲明爲明確無疑義的，再者爲該聲明係行爲者有權、無條件且自願情況下所作出；最後，則是援引禁反言原則者，對該聲明盡最大善意而信賴之，且將因該聲明的遵循將受有利益。原文爲：(i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith upon the statement … to the advantage of the party making the statement。See *id.* ¶ 7.20, at 16, for Argentina assertion of the essential elements of estoppels.

此外，阿根廷亦援引DSU第 3.2 條以及*US – Gasoline*案WTO上訴機構所闡釋之WTO法規之適用不應偏離於國際法基本原則的概念[236]，主張依據條約法公約第 31 條第三項第(c)款規定，WTO之爭端解決小組解釋適用WTO涵蓋協定時，應同時考慮對兩造同樣適用的其他國際法規範[237]，而本案中基於巴西和阿根廷應履行巴西利亞議定書的義務，阿根廷主張MERCOSUR特別審判庭作出的裁決亦為WTO爭端解決機構應加以考量並適用之國際法[238]，是而WTO爭端解決小組對本案爭端之裁判，應受MERCOSUR特別仲裁審判庭前案裁決之拘束。[239]

第二款　巴西之主張

面對阿根廷主張WTO爭端解決機構應拒絕審理本案，巴西則主張MERCOSUR特別審判庭中審理之爭端和其向WTO爭端解決小組請求救濟者並不相同，並認為禁反言原則在本案中並不適用。[240]

首先，巴西表示其在MERCOSUR特別仲裁審判庭訴訟中主張者，乃是阿根廷違反MERCOSUR下之反傾銷協定，至於本訴中巴西所欲請求裁決者，乃是阿根廷對WTO反傾銷協定之違反[241]，鑒於巴西乃對不同法律規範合致性進行爭訟，縱使巴西向不同爭端解決機構尋求複數裁決，也不會構成國際法義務之違反。[242]

其次，對於「當事國間達成協議後，國家不應做出違反其原先承諾事項之行為[243]」之禁反言原則，巴西認為單從其將爭端提交由MERCOSUR特別審判庭裁決，並不能導

[236] *Id.* ¶ 7.21, at 16, citing Appellate Body Report, *US – Gasoline*, at 20.
[237] *Id.* ¶ 7.21, at 16.
[238] *Id.*
[239] *See id.* ¶ 7.21, at 16.
[240] *Id.*
[241] *Id.* ¶ 7.22, at 17.
[242] *Id.* ¶ 7.22, at 16-17.
[243] *Id.* ¶ 7.22, at 16, citing Black's Law Dictionary (6th ed. 1990), at 551.

出巴西同意不將此爭端提請WTO裁決之結論[244]；此外，巴西亦主張縱使其簽署了內含禁止會員國就同一紛爭不得再向WTO尋求救濟條款之「奧立佛斯議定書」，因巴西先前於MERCOSUR特別審判庭所提之前訴訟，乃是根據「巴西利亞議定書」進行裁決，因此並無理由援引「奧立佛斯議定書」下條款，認定巴西有明確放棄向WTO尋求救濟的意思表示；況且亦無理由認為後簽署的「奧立佛斯議定書」，可適用於已依「巴西利亞議定書」裁決完畢的案件[245]；簡述之，巴西不認本案有禁反言原則之適用可能。[246]

最後，巴西認為DSU第 3.2 條規範僅處理WTO爭端解決機構對WTO協定釋疑的問題[247]，特別是要求爭端解決小組應在WTO涵蓋協定被違反時做出正確之評決保護其他會員國利益[248]，而非如阿根廷所主張課予WTO爭端解決小組必須遵循其他國際審判機構決定之義務[249]，因此WTO爭端解決小組並不需遵循MERCOSUR特別審判庭之論理或判決結果。[250]

綜上，巴西認為阿根廷主張WTO爭端解決小組應拒絕行使對本案管轄權之請求無理由，並主張WTO爭端解決機制拒絕受理巴西之提訴，將侵害巴西WTO下可享有的權利。[251]

第三款　其他第三國之主張

對於本案 WTO 爭端解決小組管轄權有無之爭議，訴訟當事國以外之第三國亦發表了下列的意見：

1. 認為 WTO 爭端解決小組應對本案行使管轄權者

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[244] *Id.* ¶ 7.22, at 16-17.
[245] *Id.* ¶ 7.22, at 16-17.
[246] *Id.* ¶ 7.22, at 16.
[247] *Id.* ¶ 7.23, at 17.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.* Annex A-2, First Oral Statement of Brazil, ¶ 12, at A-104.

首先，智利認為鑒於巴西在MERCOSUR及WTO下分別提出之訴訟牽涉之法律爭議並不相同，因此巴西向WTO之提訴並無任何問題。[252]

再者，歐盟則指出，DSU第 3.2 條僅是對WTO法規解釋適用之指示，而非對WTO可適用法源之規定[253]；且因MERCOSUR特別審判庭判決和本案涉及反傾銷協定解釋適用間欠缺明顯關連性，因此並無援引維也納條約法公約而使MERCOSUR判決得以在WTO後審案件中被遵循之理由[254]。此外，歐盟亦認為參照WTO上訴機構在*EC – Banana I*案[255]所對禁反言原則要件及適用作出之闡釋，無論從前訴訟適用的「巴西利亞議定書」甚或是巴西先前於MERCOSUR提訴後從未再向WTO尋求救濟之行為而觀，均無法得出巴西有明確放棄就該爭端再向WTO提出爭訟之表示，因此並無禁反言原則適用之可能。[256]

美國對本案件則表示，MERCOSUR特別審判庭所處理的案件中，巴西所爭執者並非阿根廷違反WTO涵蓋協定之義務，而係MERCOSUR義務之違反[257]；因此根據DSU第 7.1 條，因WTO爭端解決機構所處理者限於會員國對WTO義務違反之判斷，是而當阿根廷在本案訴訟中並未提出巴西利亞議定書之違反與巴西違反WTO內括協定關聯之說理時，此爭端並不屬WTO爭端解決機構可管轄案件；退步言之，縱使巴西確實違反巴西利亞議定書，因巴西利亞議定書非屬WTO涵蓋協定下之爭端，故倘阿根廷確實欲對巴西不遵守巴西利亞議定書之行為請求裁判，此時阿根廷亦係應將此爭端向MERCOSUR爭端解決機制提訴以尋求救濟[258]，是故阿根廷之主張並不影響WTO爭端

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[252] *Id.* ¶ 7.25, at 17.

[253] *Id.* ¶ 7.26, at 17.

[254] *Id.*

[255] GATT Panel Report, *EEC – Member States' Import Regimes for Bananas*, ¶ 361 n. 44, DS21/R (June 3, 1993) (unadopted report) [hereinafter *EEC – Bananas I*].

[256] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.27, at 17-18.

[257] *Id.* ¶ 7.31, at 18-19.

[258] *Id.* ¶ 7.30, at 18.

解決小組對本案之審理和管轄權行使。[259]

對於本案是否有禁反言原則適用之爭議，美國認為WTO法體系下並無禁反言原則存在及可適用之明文規定，WTO判決先例中也未曾援引適用此原則[260]，在考量任意將DSU以外的規範納入考量範圍（意即對未明訂於DSU中的禁反言原則加以適用），或是任意將少數會員國私下訂定的協議納入考量並允許其影響WTO爭端解決小組對爭端之管轄權，將危害WTO全體會員國共同同意遵循的DSU制定運作之情形[261]，美國反對以禁反言原則作為決定WTO爭端解決機構是否有管轄權之依據。[262]

2. 反對 WTO 爭端解決小組對本案行使管轄權者

和前述國家相反的，巴拉圭認為 WTO 爭端解決機構對本案應無管轄權存在，因此 WTO 爭端解決小組應不得對本案行使管轄權。

巴拉圭之立論著眼於「巴西利亞議定書」第 21 條，該條規定各會員國均應受已裁決案件之拘束，且不可對裁決再行上訴[263]；因此，倘本案爭端經MERCOSUR特別審判庭作出裁決後，自然有「一事不再理原則」（*res judicata*）之適用[264]，本於一般國際法原則，WTO爭端解決機構自不應再對此案重複審理[265]。此外，巴拉圭並以MERCOSUR下新簽訂的爭端解決協定「奧立佛斯議定書」為佐證，認為縱使巴西擁有選擇將案件提訴於WTO爭端解決機構或MERCOSUR特別審判庭之權利，但是案件一旦繫屬於任一機構，或經任一機構裁判，巴西將案件提訴於另一機構之權利將被剝奪，而不得將請求其他爭端解決機構評決爭端[266]。綜上，巴拉圭而主張WTO爭端解決機

[259] *Id.*
[260] *Id.* ¶ 7.31, at 18-19.
[261] *Id.* ¶ 7.31, at 19.
[262] *Id.*
[263] *Id.* ¶ 7.28 note 50, at 18.
[264] *Id.* ¶ 7.28, at 18.
[265] *Id.*
[266] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.28, at 18.

構對本案應無管轄權。[267]

第三項　爭端解決小組見解

WTO 爭端解決小組對本案管轄權爭議，主要可分下列三者討論：（1）會員國是否違背遵守條約之誠信原則（principle of good faith）；（2）巴西向 WTO 爭端解決機構提訴是否構成禁反言原則之違反；（3）縱使 WTO 審理此案，WTO 爭端解決機構是否會受到 MERCOSUR 特別審判庭前訴訟判決之拘束。

（1）會員國是否違背遵守條約之誠信原則

對於巴西是否依誠信原則履行條約，爭端解決小組援引了WTO上訴機構*US – Offset Act (Byrd Amendment)*案[268]見解，表示對證明一國依誠信遵循其所簽訂之條約，除須舉出一國違反條約義務之事實外，更須證明其對條約義務的違反係出於「故意」而非僅為單純「過失」[269]；然而，因阿根廷在本案中並未主張審議巴西違反禁止其重複提訴之條約，因而在第一個要件的檢驗上即不成立，故巴西並不構成誠信原則之違反。[270]

（2）巴西向 WTO 爭端解決機構提訴是否構成禁反言原則之違反

本案中是否有禁反言原則之適用，爭端解決小組首先贊同對禁反言原則之要件應參考歐盟所提出*EC – Bananas I*案見解[271]，認為禁反言原則僅在當事國間已存有明確

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[267] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.29, at 18.

[268] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003) [hereinafter *US – Offset Act (Byrd Amendment)*].

[269] *See id.* ¶ 298, “Nothing, however, in the covered agreements supports the conclusion that simply because a WTO member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be ***necessary to prove more than mere violation*** to support such a conclusion” (emphasizes added).

[270] *See id.* ¶¶ 7.35–.36, at 19–20.

[271] *See id.* ¶ 7.38, at 21.

合意時方有適用[272]，然而本案中巴西在簽署「巴西利亞議定書」時，並未明確約定當事國對爭端向MERCOSUR審判庭提訴後，將放棄向WTO提起訴訟之權利[273]，因此也不可將巴西向MERCOSUR審判庭提訴之行為，解釋為巴西有放棄向WTO提訴之表示，因此巴西向WTO爭端解決機構提訴請求判決，並不構成禁反言原則之違反，巴西向WTO請求解決爭端之權利也不因此受影響。[274]

（3）WTO 爭端解決機構審理此案是否會受到 MERCOSUR 特別審判庭前裁決之拘束

最後，爭端解決小組在檢視DSU第 3.2 條以及條約法公約第 31 條規定後，認定此二條文乃是處裡條約解釋之規範[275]，但是本案中阿根廷並未要求爭端解決小組應該採用特定的條約「解釋方式」，而是要求以特定方式適用所涉及法規，依爭端解決小組認為此主張早已超出DSU第 3.2 條及條約法公約第 31 條之範圍，阿根廷的主張並不可採[276]；至於WTO爭端解決小組對案件之認定是否受前MERCOSUR判決之影響，由於DSU第 3.2 條和其他條文中，未有WTO爭端解決小組應遵循MERCOSUR特別審判庭甚或是其他WTO裁判之規定，因此爭端解決小組並無受其他審判裁決見解拘束之理由[277]，阿根廷此項主張亦無理由，WTO爭端解決小組無須拒絕行使對本案之管轄。[278]

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[272] *See* Panel Report, *EC – Bananas I*, ¶ 361 n.44, “[E]stoppel can only result from the express, or in exceptional cases implied consent of the complaining parties.” *See also* Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, n.791, WT/DS156/R (Oct. 24, 2000) (adopted Nov. 17, 2000) [hereinafter *Guatemala – Cement II*].

[273] *Id.* ¶ 7.38, at 21.

[274] *Id.*

[275] *Id.* ¶ 7.41, at 22.

[276] *Id.*

[277] *Id.* ¶¶ 7.40–.41, at 22–23.

[278] *Id.* ¶ 7.42, at 23.

第三節　Mexico – Taxes on Soft Drinks 案

第一項　案件事實

*Mexico – Taxes on Soft Drinks*案[279]之爭端，肇因於美國和墨西哥間因食糖所發生的貿易糾紛。在美國和墨西哥的貿易發展中，食糖一直是極具爭議性的產品，其中自 1997 年起，因墨西哥對人工甜味劑（artificial sweeteners）及甜味替代品（sugar substitutes）實施進口限制，而引發了美、墨兩國間的貿易磨擦；其中，又以對含高果糖玉米糖漿（high fructose corn syrup, 簡稱HFCs）及含此類甜味劑飲料的貿易限制最受矚目。[280]

1997 年時，墨西哥認定從美國進口的HFCs構成了傾銷，因而對其課徵反傾銷稅[281]；相反的，美國則以向NAFTA及WTO提起訴訟[282]作為反制並獲得勝訴判決[283]。2000 年，墨西哥為了遵守WTO爭端解決小組判定其行為違法的裁決，決議修改對美國反傾銷稅的課徵；然而，美國和墨西哥間「糖的戰爭」並未因此而結束。

2002 年，墨西哥國會另通過了甘蔗持續發展法（Sugar Cane Sustainable Development Act, SCSDA）[284]，在此法案下，使用非蔗糖為甜味劑的飲料在進口和轉

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[279] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005) (adopted Mar. 24, 2006) as modified by Appellate Body Report WT/DS308/AB/R; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) (adopted Mar. 24, 2006) [hereinafter *Mexico – Taxes on Soft Drinks*].

[280] *See generally* Alice Vacek-Aranda, Sugar Wars: Dispute Settlement Under NAFTA and the WTO As Seen Through The Lens of the HFCS Case, and Its Effects on U.S.–Mexican Relations, 12 TEX. HISP. J.L. & POL'Y 121, 121–160 (2006); 亦可見陳麗娟，墨西哥對美國高果糖漿進行反傾銷調查案，可見於經濟部貿易調查委員會貿易救濟入口網：http://portal.moeaitc.gov.tw/portal/document/wFrmDocument02.aspx?doctype1=A&docid=989979 （最後點閱時間：2011 年 12 月 26 日）。

[281] *See generally* John Nagel, *Mexican Congress OKs Tax Measures for 2003, Including Maintaining HFCS Tax*, 19 INT'L TRADE REP. 2183, 2183–85(Dec. 19, 2002).

[282] Final Decision, Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, Case: MEX-USA-98-1904-01.

[283] Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, WT/DS132 (Jan. 28, 2000) (adopted Feb. 24, 2000) [hereinafter *Mexico – Corn Syrup*].

[284] 墨西哥總統 Vicente Fox 因認爲國會通過的甘蔗持續發展法(Sugar Cane Sustainable Development Act）

運，以及進行商仲、代理以及經銷等服務時，均將被課徵 20%的稅，以保障墨西哥蔗農以及製糖產業的發展 [285]。然而，此法案的推行，卻也造成美國認為依飲料使用蔗糖或其他增甜劑原料做為區分，並對使用蔗糖以外原料之產品課徵較高之關稅，對美國飲料及HFCS產品構成歧視性待遇，因而美國向WTO控訴墨西哥違反GATT第III條下之國民待遇原則，請求WTO爭端解決機制進行裁決。[286]

美國此次所提訴訟除涉及WTO關貿總協定之違反外，因美國和墨西哥之間簽訂之NAFTA，針對糖製品的進出口數量（quotas）等訂有特別規範，NAFTA中亦要求會員國貿易政策應符合國民待遇原則而禁止締約國對他國商品之不當歧視 [287]，故本案墨西哥對飲料核課不同稅率，同時也將涉及墨西哥對NAFTA特別約定之遵循問題 [288]。然而，根據NAFTA第 20 章規定，NAFTA下亦設有獨立之仲裁審判庭（arbitral panel），

係過時的保護政策，最後並將使製糖業債臺高築，因而於 2002 年 3 月 5 日行使否決權否決此法案；然而墨西哥最高法院推翻了總統可行使否決權的看法，並使該法案於 2002 年 7 月 12 日恢復效力。*See generally, e.g.*, Rossella Brevetti & John Nagel, *Corn Products International Files NAFTA Arbitration Case on HFCS Tax*, 20 INT'L TRADE REP. 1759–60 (2003); Raj Bhala & David A. Gantz, *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299, 306 n.17.

[285] See Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 2.2, at 2 for fact of measures: "The tax measures concerned include: (i) a 20 per cent tax on the transfer or, as applicable, the importation of soft drinks and other beverages that use any sweetener other than cane sugar ("soft drink tax"); (ii) a 20 per cent tax on specific services (commission, mediation, agency, representation, brokerage, consignment and distribution), when provided for the purpose of transferring products such as soft drinks and other beverages that use any sweetener other than cane sugar ("distribution tax"); and, (iii) a number of requirements imposed on taxpayers subject to the "soft drink tax" and to the "distribution tax" ("bookkeeping requirements")."

[286] *Id.* ¶¶ 1.2, 3.2.

[287] NAFTA 第 301 條要求會員國之措施應符合 GATT 第 III 條國民待遇規範，且對於類似、可相互替代、及有競爭關係之產品，均應給予最惠國之待遇；*See* NAFTA article 301: 1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement. 2. The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.

[288] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 3.2.

根據該章第 2003、2005 以及第 2008 條規定，NAFTA之仲裁審判庭除可對會員國違反NAFTA義務之爭議加以裁決外，更可對NAFTA會員國間涉WTO義務違反之爭端加以裁判[289]；因此在本訴訟中，雖美國將本案提交於WTO爭端解決機構尋求裁判，但依NAFTA規定，NAFTA爭端解決機構亦擁有對此案件的管轄權，故面對美國之提訴，WTO爭端解決小組對本案是否應行使管轄權，抑或是應讓NAFTA仲裁審判庭處理美、墨間之紛爭，即為本案WTO爭端解決機構應否行使管轄權之爭議所在。[290]

第二項　當事國及第三國之主張

第一款　墨西哥（被告）之主張

面對美國選擇於WTO作為爭端處理之場域（forum），墨西哥表示決定對處理案件是否有管轄權，乃任何爭端解決機構均擁有之固有權（inherent right）[291]，且從WTO實務觀察，雖DSU第 7.2 條要求爭端解決機關應對所有向其提出的主張進行裁判，但從WTO爭端解決機關曾以訴訟經濟（judicial economy）為由而未對當事國所提主張進行審議，此亦可證明WTO爭端解決機構有權拒絕對向其提交的案件行使管轄權。[292]

墨西哥認為本案除涉及墨西哥對WTO協定義務之違反外，亦將觸及美國和墨西哥間於NAFTA下對糖品市場開放之約定，且因NAFTA下之仲裁審判庭，可同時審議墨西哥於NAFTA下可向美國主張之糖品市場開放問題[293]，以及美國所質疑墨西哥對糖課稅的適法性問題[294]，因此NAFTA方為最適的爭端解決機構[295]。此外，雖然爭端解決機構拒絕行使管轄權的情況，應僅限於在極例外情況始能被援用，但倘本案由WTO

[289] *See* NAFTA Chapter Twenty articles 2004, 2005, 2008.

[290] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 7.1–.2, at 111.

[291] *Id.* ¶¶ 4.102, 4.103, at 22.

[292] *Id.* ¶ 4.189, at 39.

[293] *Id.* ¶ 4.98, at 22.

[294] *Id.* ¶ 4.99, at 22.

[295] *Id.* ¶ 4.155, at 33.

爭端解決機制進行裁判，將使墨西哥於NAFTA下可主張之其他國際法規則及權利無法獲得適用和救濟，而造成法規適用的分裂並減損墨西哥之權利[296]；尚且，相較於墨西哥於WTO爭端解決機制前無法援引NAFTA規範抗辯的不利益，因NAFTA第 301 條與GATT第III條規範相似，是而縱使將本案提交於NAFTA解決，亦對美國之權利亦無減損。[297]

綜上而論，墨西哥認為WTO爭端解決機制無法有效對本案涉及所有爭端作出裁決，並非解決本案的最適機構，因此在存有可同時審議NAFTA及WTO規範的NAFTA仲裁審判庭（即墨西哥所認之最適裁判機構）時，WTO爭端解決機構應放棄行使對本案之管轄權[298]，並請求WTO爭端解決小組對其是否行使管轄權作出「初步裁定（preliminary ruling）」。[299]

第二款　美國（原告）之主張

訴訟中，美國主張現行WTO和DSU中，並無任何支持爭端解決機構可拒絕行使管轄權之明文規定，因此墨西哥的主張並無根據[300]，且基於下列原因，美國認為爭端解決機制不應拒絕對本案行使管轄權：

首先，美國表示其選擇WTO作為爭端解決之場域，是希望就墨西哥是否遵循其WTO義務獲得裁判，至於墨西哥是否符合其他如NAFTA等WTO內括協定以外的規範，均不在本訴訟所應考量的範圍之內[301]；且根據DSU第 11 條規定，WTO爭端解決機構對於美國向其提起之訴訟有裁判之義務，否則其將違反爭端解決機制之程序暨組織

[296] *See id.* ¶ 4.104
[297] *Id.* ¶ 4.107, at 22.
[298] *Id.* ¶ 4.105, at 22; ¶ 4.190, at 40.
[299] *Id.* ¶ 4.183, at 38.
[300] *Id.* ¶ 4.213, at 43.
[301] *Id.* ¶ 4.218, at 44.

法—即DSU之規範[302]。再者，根據上訴機構在*Mexico – Corn Syrup (Article 21.5 – US)*案所提出「爭端解決小組有義務對向其提起之爭端加以解決」之見解[303]，美國主張倘爭端解決機構對會員國提訴之案件拒絕行使管轄權，將違反DSU第 3.2 及第 19.2 條規定，並造成WTO會員國向WTO爭端解決機構尋求裁判之權利受到損害[304]；對於墨西哥所提出爭端解決機構應依「訴訟經濟原則」而拒絕對本案行使管轄權之說理，美國則主張「訴訟經濟原則」係爭端解決機構對於部分實體爭議事項不做出裁判時之情形，與爭端解決機構處理行使管轄權問題無關。[305]

綜合上述理由，美國主張WTO爭端解決機構必須對其所提出之訴訟加以裁判，不應拒絕行使對本案管轄權。[306]

第三款　其他第三國之主張

對於 WTO 爭端解決小組應避免行使本案管轄權之主張，WTO 其他會員國亦提出了其各自的意見：

1. 主張 WTO 爭端解決機構應審理此案者

首先，加拿大認為依據DSU中第 3.2 及第 11 條，WTO爭端解決機構之目的在於保障會員國於WTO涵蓋協定下的權利，並對提訴案件有作出客觀裁判的義務[307]；再者，因美國於本案所爭執者為其GATT下權益受侵害，是而在DSU中無其他條文顯示爭端解決小組可以援引「訴訟經濟原則」拒絕對案件裁判時，依DSU第 7.1 及第 3.4 條規定，爭端解決小組不能以此為由而拒絕行使管轄權[308]。此外，加拿大尚主張根據上訴機構

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[302] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 22, at 8–9.

[303] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, ¶ 66, at 22, “[P]anels are required to address issues that are put before them by the parties to a dispute.”

[304] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 23, at 9.

[305] *Id.* ¶ 24, at 9.

[306] *Id.* ¶ 21, at 8.

[307] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 5.13, at 43.

[308] *Id.* ¶ 5.15, at 96.

在*Australia – Salmon*案所闡釋：「在爭端解決機制下援引訴訟經濟原則時，必須謹記爭端解決機構負有確保提請其解決之案件能獲得有效處理之義務[309]」，並主張除非爭端解決小組確定美、墨間此爭端一定可以獲得有效之處理，否則即不應拒絕行使對系爭案件之管轄權。[310]

中國大陸在本案中表示，根據DSU第7及第11條規定，WTO爭端解決機構並無拒絕執行其法定職務（statutory function）的權力[311]，且拒絕對本案行使管轄權將危害WTO法體制之法安定性，因而反對WTO爭端解決機構拒絕行使管轄權。[312]

歐盟則主張，墨西哥所援引的訴訟經濟原則只是為使爭端解決小組能減縮與案件解決無關抑或是非必要部分聲明裁判而設，因此「訴訟經濟原則」並非爭端解決機構拒絕行使本案管轄的適法理由[313]；此外，縱使美國和墨西哥間之爭端可能全部或部分再次於其他國際協定下發生，但仍不影響WTO爭端管轄機構對案件應行使之管轄權[314]，且DSU第11條規定，WTO爭端解決機構亦必須對系爭案件加以裁判。[315]

最後，瓜地馬拉表示根據DSU第6.1、第6.2以及第7條規定，WTO爭端解決小組對本案應享有管轄權[316]；但瓜地馬拉亦提醒WTO會員國，在自由貿易協定下有另行建立爭端解決機構並選擇以該爭端解決機構處理彼此間紛爭之自由。[317]

2. 主張WTO爭端解決機構不應審理此案者

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309 Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 223, WT/DS18/AB/R (Nov. 6, 1998) [hereinafter *Australia – Salmon*], "[T]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'."

310 Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 5.16, at 96.

311 Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 34, at 12–13.

312 *Id.*

313 Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 5.35, at 99.

314 *Id.* ¶ 5.37, at 99.

315 Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 36, at 13.

316 Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 5.68–.69, at 104.

317 *Id.* ¶ 5.75, at 104.

本案中無其他訴訟第三國支持墨西哥之立場而認為 WTO 爭端解決機構應放棄行使對本案之管轄權。

第三項　爭端解決小組見解

此訴訟中，無論是美國或墨西哥均不爭執WTO對本案所可行使的管轄權[318]；相對的，墨西哥僅請求WTO運用其「裁量空間（margin or discretion）」放棄對本案進行管轄[319]。對此，爭端解決小組表示因依DSU規定，WTO會員均有向WTO爭端解決機構尋求救濟之權利，因此除非會員國所主張者非其在法律上所得享受之權利，否則爭端解決小組並無拒絕審理會員國所提訴訟之權力[320]；且倘爭端解決小組拒絕對案件行使管轄權，亦將會造成於解釋適用涵蓋協定時會員得享有權利之減損，並因而違反DSU第 3.2 和第 19.2 條規定。[321]

此外，雖墨西哥主張NAFTA規範之適用與否將影響本案裁決，但爭端解決小組認為墨西哥並未具體指出遵守NAFTA條文會如何形成「法律障礙」狀況，並構成WTO爭端解決機構應放棄對本案管轄之原因[322]；且縱使注意到墨西哥目前亦在NAFTA機制下尋求對本爭端之救濟，但考量二案件中訴訟主張及原被告與本案均恰巧相反，爭端解決小組並無理由認定NAFTA下之案件和本訴訟為相似[323]；且即使其二者相似，而可能依DSU第 3.10 條在「本訴和反訴應被視為同案件」狀況下有一事不再理原則的適用，然因本案件之審理僅限於認定會員國WTO內括協定下權益是否受侵害，而與NAFTA等其他國際協定之遵循無關，因此本訴訟進行中案件是否同時平行地在

[318] *Id.* ¶ 7.4, at 111.
[319] *Id.* ¶ 7.7, at 111.
[320] *Id.* ¶¶ 7.1, 7.7, 7.8, at 111.
[321] *Id.* ¶ 7.9, at 111.
[322] *Id.* ¶¶ 7.11–.13, at 112.
[323] *Id.* ¶ 7.14, at 112.

NAFTA中爭訟，對WTO爭端管轄機構之管轄權並無關係。[324]

綜上，爭端解決小組表示倘在本案中依「訴訟裁量權」拒絕對案件行使管轄權，將減損WTO會員所應得享有之權利，且縱使有權對管轄權之有無加以判斷，本案中仍欠缺足夠事實證明WTO爭端解決機構應放棄對本案行使管轄權，因此爭端解決小組拒絕了墨西哥之請求，並對本訴訟實體爭議加以審理。[325]

第四項　爭端解決上訴機構見解

本案經提起上訴後，WTO上訴機構首先反駁爭端解決小組認為其並無決定對案件有無管轄權之權力，而贊同墨西哥之主張爭端裁判機構有決定對案件是否有管轄權及管轄權範圍之「固有權」，且WTO爭端解決機構也早已在*US – 1916 Act*案[326]中確認其審酌管轄權有無及範圍之權力[327]；此外，上訴機構亦多次確認在符合正當程序情況下，WTO爭端解決機構可依「裁量餘地」排除審議在規範範圍外的特定案件問題[328]，是而「訴訟經濟原則」確係用於認定受理案件裁判範圍的原理，亦係WTO爭端解決機構擁有決定裁判範圍固有權之佐證[329]。然而，縱使承認WTO爭端解決機構對所審理案件亦有決對管轄權有無的固有權，但這樣裁決權限的享有並不表示爭端解決機構可變更其於DSU下所負擔的義務，鑒於DSU亦從未授與WTO爭端解決機構忽略或變更DSU規範的權利[330]， WTO爭端解決機構對於會員國向其提訴的案件，不必然享有拒絕行

[324] *Id.* ¶ 7.15, at 112.

[325] *Id.* ¶ 7.1, at 111.

[326] Appellate Body Report, *United States – Anti-Dumping Act of 1916 (“US – 1916 Act”)*, ¶ 54, WT/DS136/AB/R, WT/DS162/AB/R (Sep. 26 2000) [hereinafter *US – 1916 Act*].

[327] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45, at 17–18.

[328] *Id.* ¶ 45, at 18; Appellate Body Report, *EC – Hormones*, ¶ 152 n.138; Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, ¶¶ 247–248, WT/DS108/AB/RW, [hereinafter *US- FSC (Article 21.5 – EC)*].

[329] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45, at 18.

[330] *Id.* ¶ 46, at 18–19, citing Appellate Body Report, Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 92, WT/DS50/AB/R (Nov. 12, 1997)

使管轄權的權限。[331]

再者，根據DSU第 7 及第 11 條規定，上訴機構表示WTO爭端解決機構有義務對向其提訴之案件加以裁決[332]，且DSU第 23 條亦保障WTO會員於其WTO涵蓋協定下權益受損時，均有請求爭端解決機制救濟之權利[333]。循此敘述，倘WTO爭端解決機構對案件拒絕行使管轄權，則將會構成WTO會員權利義務之減損，並構成DSU第 3.2 及第 19.2 條規定之違反[334]；此外，因本案中墨西哥也並未援引NAFTA第 2005 條第六項「別訴權利排除型專屬管轄」場域排除權利之行使，因此上訴機構認為本案中未有足影響WTO爭端解決機構管轄的「法律障礙」出現。[335]

此外，雖然上訴機構表示其了解墨西哥請求WTO拒絕行使管轄權的原因，係因美國不正當的阻撓了NAFTA爭端解決機構的建立，但上訴機構仍認為因其欠缺對NAFTA義務違反的裁判權限，故倘以此對美國阻撓NAFTA爭端解決機構建立的行為加以評判，將使爭端解決機構行使超越其權限的管轄。[336]

第五項　小結

綜上，本案中上訴機構維持爭端解決小組的判斷，認為縱使WTO爭端解決機構有決定提交於前案件審理範圍之權利，但對於合法的提訴，其仍不得拒絕對案件進行裁判[337]，對於拒絕行使管轄權的決定，爭端解決機構將違反DSU第 11 條應對提訴於前案件進行裁判的義務[338]，且因DSU第 23 條賦予WTO會員提訴解決爭端之權利，故根

(adopted Jan. 16, 1998).

[331] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 46, at 18.

[332] *Id.* ¶¶ 49–51, at 19–20.

[333] *Id.* ¶ 52, at 20–21.

[334] *Id.* ¶ 53, at 21.

[335] *Id.* ¶ 54, at 21–23.

[336] *Id.* ¶ 55–56, at 23.

[337] *Id.* ¶ 57, at 24.

[338] *Id.* ¶ 51, at 20.

據DSU第 3.2 和第 19.2 條，爭端解決機制並無權以解釋之方法減損會員國於WTO涵蓋協議所享有之權益，是而爭端解決機構應無自由決定是否行使管轄權之權限。[339]

值得注意的是，上訴機構在此判決中特別表示，本案中WTO爭端解決機構應行使管轄權認定之作成，並未論及可能影響案件管轄權的「法律障礙」問題，也因此本案並未建立以「法律障礙」作為抗辯理由的判例[340]；此外，上訴機構也表示墨西哥在本訴中並未爭執本案中的爭議點和NAFTA下涉及爭議條文「相似（identical）」[341]，且NAFTA第 2005 條第六項中墨西哥所可援引「排除條款（exclusion clause）」也並被主張均係其未放棄行使本案管轄權之原因[342]，綜合上述原由，WTO爭端解決機構未接受墨西哥之請求而放棄對本案行使管轄權。

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[339] *Id.* ¶ 53, at 21.

[340] *Id.* ¶ 54, at 22–23.

[341] *Id.* ¶ 54, at 22, "[M]exico does not take issue with the Panel's finding that 'neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA … and the dispute before us'."

[342] *Id.* "[W]e note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been exercised." 對墨西哥此訴訟策略探討，*see* Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 89 (2009).

第伍章　WTO 或區域貿易協定爭端解決機制調和與省思

本論文第肆章中，已針對 WTO 爭端解決機構曾審理涉及管轄權爭議的案件加以介紹，然而前述之判決先例受限於其涉訟事實和當事國聲明之審理，其所處理之議題不論是在管轄條款類型抑或是在論理上均仍有不足之處，因此本論文在本章中將先統整 WTO 判決先例所闡釋法理加以歸納，並針對其所未探討或適用、或僅做出部分論述之部分，及尚未探討審理管轄條款類型的可能影響加以研析。

本章之第一節，將先統整第肆章中 WTO 判決先例之內容，並點出其論述不完整或有所缺漏之處。第二節則將分別從授權會員國簽署 RTA 之 GATT 第 XXIV 條反思 RTA 與 WTO 間之關係，並探討 WTO 爭端解決機構應如何解讀 RTA 管轄條款之存在及其效力所可能造成之影響。第三節將針對第一節統整出處理 RTA 管轄條款造成 RTA 和 WTO 爭端管轄機制管轄衝突論述不備之處，藉國際法原理原則和解釋方法之導入以找出解決 RTA 和 WTO 爭端解決機制管轄衝突問題之方法，並勾勒出 RTA 和 WTO 爭端管轄機制在貿易爭端處理上的互動模式及管轄範圍界線。

第一節　Mexico – Taxes on Soft Drinks 案和 Argentina – Poultry Anti-Dumping Duties 案件評析

本章將統整 WTO 爭端解決機構在 *Mexico – Taxes on Soft Drinks* 案和 *Argentina – Poultry Anti-Dumping Duties* 案中就管轄競合議題之論理，並分析此些論理被後案援用之可能範圍，並找出 WTO 和 RTA 爭端解決管轄競合議題上，爭端解決機構在此二案件中尚未處理之部分，以釐清本章處理 RTA 和 WTO 爭端解決管轄衝突待決問題之核心。

第一項　WTO 判決先例所處理管轄衝突類型整理與歸納

第一款　案件處理之 RTA 管轄條款類型

1. Mexico – Taxes on Soft Drinks 案

在 *Mexico – Taxes on Soft Drinks* 案中，WTO 爭端解決機構所處裡之 RTA 管轄條款，具本論文所作分類中將 RTA 爭端解決機制管轄權擴及於審理 WTO 爭端之「爭端管轄條款」。

首先，在*Mexico – Taxes on Soft Drinks*案中，墨西哥並不爭執WTO爭端解決機構對本案行使管轄權之適法性，反而是在承認WTO爭端解決機構具本案管轄權後復請求WTO爭端解決機構本於其裁量權而放棄行使本案管轄[343]；再者，從墨西哥在本案中並未援引NAFTA第 2005 條第六項「別訴權利排除型專屬管轄」這點觀察，也顯示了*Mexico – Taxes on Soft Drinks*案中，WTO爭端解決機構所處理者並非「別訴權利排除型專屬管轄」適用下對WTO爭端解決機構管轄權的影響。因此，從墨西哥同意此案件可能由WTO以及NAFTA二爭端解決機構審議以及本案中就「別訴權利排除型專屬管轄」之適用進行爭執情況下，本論文認為*Mexico – Taxes on Soft Drinks*案提供了WTO爭端解決機構對RTA另設爭端解決機制之看法，因此本於裁決僅就相似案件具參考性之原則，*Mexico – Taxes on Soft Drinks*案對後案的參考性，亦以RTA設有爭端解決機制且當國對選擇貿易爭端解決機制出現紛爭時，最具可參考性。

2. Argentina – Poultry Anti-Dumping Duties 案

Argentina – Poultry Anti-Dumping Duties 案中，WTO 爭端解決機構所處理之 RTA 管轄條款，屬本論文所作分類中 RTA 之「一般型專屬管轄」條款類型。

在*Argentina – Poultry Anti-Dumping Duties*案訴訟中，我們首應注意的是，阿根廷在本案中主要主張者乃在巴西將同一事實遞交於MERCOSUR特別審判庭裁決後，因巴西簽署「奧利佛斯議定書」之行為包含巴西放棄就同一事件再向WTO爭端解決機構請求救濟之表示，是而根據「奧利佛斯議定書」第一條「會員國選擇將爭端遞交由WTO或RTA爭端解決機構裁決後，將被禁止將同一爭端遞交由另一爭端解決機構尋求救

343 Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 4.105, at 22; ¶ 4.190, at 40.

濟」[344]之規定，巴西自不得在向MERCOSUR特別審判庭請求裁決後復請求WTO爭端解決小組審議此案；而此種明文規定一旦當事國選擇救濟途徑後及不得再向他爭端解決機構請求裁決者，屬本論文分類中之「別訴權利排除型專屬管轄」類型案件。

雖然阿根廷之論理相當程度仰賴「奧利佛斯議定書」中的「別訴權利排除型專屬管轄」條款，但需注意者是，「奧利佛斯議定書」在WTO爭端解決機構審理此案件時尚未生效（entered into force），因此WTO爭端解決小組以此為由認為尚未生效之「奧利佛斯議定書」在該案中並無適用餘地[345]，並回歸適用已生效之「巴西利亞議定書」。鑒於「巴西利亞議定書」第 1 條規定對於涉及「亞松森條約」及其架構下共同市場成員所作決定和決議之解釋適用爭端，均應依「巴西利亞議定書」加以處理[346]；且該議定書第 19 條亦規定MERCOSUR特別審判庭裁決案件時可適用規範為「亞松森條約」和該架構下作成之決定和決議[347]，因此適用巴西利亞議定書之MERCOSUR審判庭，並無依WTO協定進行審判之可能。此外，因巴西利亞議定書第 21 條賦予MERCOSUR審判庭作成決定有「既判力效力（res judicata）」，且當事國亦不得對其裁決再行上訴救濟[348]，因此阿根廷和巴拉圭亦據此主張巴西再行提訴將違背此不得再行上訴的表示，

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[344] Protocol of Olivos art. 1(2) provides, "Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanism established in the other fora, as definde by the article 14 of this Protocol."

[345] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.38, at 21.

[346] Protocol of Brasilia art. 1 provides: "The controversies which arise between the State Parties regarding the interpretation, application or non-compliance of the dispositions contained in the Treaty of Asuncion, of the agreements celebrated within its framework, as well as any decisions of the Common Market Council and the resolutions of the Common Market Group, will be submitted to the procedure for resolution established in the present Protocol."

[347] *Id.* art. 19(1) provides, "The Arbitral Tribunal will decide the controversy based on the dispositions of the Treaty of Asuncion, of the agreements celebrated within its framework, on the decisions of the Common Market Council, the resolutions of the Common Market Group, as well as on the principles and dispositions of international law which are applicable to the matter."

[348] *Id.* art. 21 provides, "The decisions of the Arbitral Tribunal cannot be appealed, and are binding on the State Parties to the controversies from the moment the respective notification is received and will be deemed by them to have the effect of res judicata.

而構成誠信原則以及禁反言原則之違反。

循此論理，阿根廷主張巴西在第一次向 MERCOSUR 特別審判庭提訴後，其就爭端尋求救濟之權利已消滅，因此除最先審理貿易爭端之 MERCOSUR 特別審判庭外，其餘爭端解決機構對該案將無管轄權，由此判斷，本案係屬因 RTA 爭端管轄條款適用而導致僅有先受理案件者取得對案件專屬管轄權之狀況，且在巴西利亞議定書中賦予其裁決「既判力效力」及「不得上訴限制」而觀，*Argentina – Poultry Anti-Dumping Duties* 案中巴西利亞議定書爭端解決條款應有將案件限制由第一個審理爭端解決機構處理之效力，具「一般型專屬管轄」特性，且在巴西利亞議定書中未明示排除其他爭端解決機構管轄權的情況下，其並不具「別訴權利排除型專屬管轄」特性，故本論文將之歸類為「一般型專屬管轄條款」類型。

第二款　案例所闡釋 WTO 爭端解決機構所能處理案件客體類型

1. Mexico – Taxes on Soft Drinks 案

*Mexico – Taxes on Soft Drinks*案中，WTO爭端解決小組對於RTA是否為WTO爭端解決機構管轄客體（*ratione materiae*），認為WTO爭端解決機構之管轄客體限於認定會員國WTO內括協定下權益是否受侵害，至於會員國在RTA下權利是否受損，則非WTO爭端解決機構應管轄之案件。[349]

由是可知，WTO爭端解決機構認為其對案件之管轄權僅限於WTO內括協定爭端之處理，縱使WTO內括協定內容與RTA或其他國際協定實質相同（substantially identical），此亦不使WTO爭端解決機構得擴張其管轄權範圍，而取得裁決會員國所簽署與WTO協定具相同內容的其他國際協定之履約狀況。根本而論，除非RTA或其他國際協定被WTO明文納為規範之一部分[350]，否則WTO爭端解決機構管轄權將無法對

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[349] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.15, at 112.

[350] WTO 爭端解決機構對其管轄客體之範圍限定，與其被允許使用之法源有關，此部分可參見本論文第貳章、第二節之說明。

RTA或其他國際協定所生爭端進行管轄。

2. Argentina – Poultry Anti-Dumping Duties 案

本案中，爭端解決小組並未對能否審酌 RTA 條款作出認定，因而並未對 WTO 爭端解決機構之審議客體範圍權限作出說明。

第二項　WTO 判決先例對涉及管轄衝突原理原則適用見解統整

1. WTO 會員國在 WTO 爭端解決機構尋求救濟之權利

*Mexico – Taxes on Soft Drinks*案中，上訴機構表示DSU第 11 條要求WTO爭端解決機構對案件有客觀審判義務（objective assessment of the matter）之規定，凸顯了WTO爭端解決機構審理當事國間爭端之義務（obligation）和職責（duty）[351]；而DSU第 23 條亦重申會員國在內括協定權益受損時向WTO爭端解決機構尋求救濟之權利 [352]；DSU第 3.3 條更顯示了以適當爭端解決機構保護會員國權利，對整體WTO運作之重要性。[353]

綜上，上訴機構表示WTO爭端解決機構拒絕對爭端行使管轄權，將會減損會員國依DSU第 23 條被保障的救濟權利 [354]，並因其減損WTO會員國在內括協訂下的權利而構成DSU第 3.2 和第 19.2 條之違反 [355]；由是可知，上訴機構在*Mexico – Taxes on Soft Drinks*案中肯認向爭端解決機構尋求救濟之訴訟權，亦屬WTO會員國在內括協定下所得享有之「權利」。

2. 誠信原則之適用

*Argentina – Poultry Anti-Dumping Duties*案中，爭端解決小組跟隨上訴機構在*US –*

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[351] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 51, at 20.

[352] *Id.*, ¶ 52, at 20.

[353] *Id.*

[354] *Id.*, ¶ 53, at 21.

[355] *Id.*, ¶ 53 n.102, at 21; Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.9, at 111.

*Offset Act (Byrd Amendment)*見解[356]，認為誠信原則之牴觸包含（1）會員國違反了WTO之實質規定；以及（2）會員國違反WTO規定外其他足以證明會員國違反最大善意之行為。[357]

3. 禁反言原則之適用

*Argentina – Poultry Anti-Dumping Duties*案中，阿根廷主張禁反言原則之適用應有三要件，分別為：（1）聲明為清楚且不模糊；（2）該聲明為有權、自願性且無條件而提出的；以及（3）他人將因善意信賴此聲明而對作出該聲明者獲得利益。[358]

然而，爭端解決小組則根據*EC – Banana I*認為禁反言原則之成立，必須是在「當事國已清楚的表達或例外的已在意思表示上取得合致（result from the express, or in exceptional cases implied consent of the complaining parties）」。[359]

基本上，WTO 爭端解決小組和阿根廷在本案中對禁反言原則要件的論述差異不大，其二者認為禁反言原則之實質內涵均為「當事國之前聲明需能清楚的表達當事國之意思」。

4. DSU 第 3.2 條及條約法公約第 31 條第(c)款之適用是否造成 WTO 爭端解決機構應遵循其他爭端解決機構裁決之認定

*Argentina – Poultry Anti-Dumping Duties*案中，爭端解決小組認為DSU第 3.2 條和條約法公約第 31 條第(c)款均是規範條約解釋之條文[360]，但此些條文僅規定爭端解決機構在解釋WTO條文時可將國際公法下相關條約納入考量，DSU無任何條文規定WTO爭端解決機構應依其他爭端解決機構認定加以裁決（rule in a particular way），也無要求WTO爭端解決機構以特定方式解釋適用（apply in a particular way）WTO協定[361]。

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356 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.35–.36, at19–20.

357 Appellate Body Report, *US – Offset Act (Byrd Amendment)*, ¶ 298.

358 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.20.

359 Panel Report, *EC – Bananas I*, ¶ 361 n.44.

360 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.41, at 22.

361 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.40, at 22.

基此，DSU第 3.2 條和條約法公約第 31 條(c)款的適用，並不會使WTO爭端解決機構審理案件時有依循其他非WTO爭端解決機構裁決見解之義務。[362]

5. WTO 爭端解決機構受 RTA 裁決之影響

WTO爭端解決機構審理當事國間爭端時，倘當事國間已在其他爭端解決機構就同一案件或相關連案件爭執並經該他爭端解決機構作出裁決，爭端解決小組在 *Argentina – Poultry Anti-Dumping Duties*案中明確的表示，DSU中並無任何條文要求WTO爭端解決機構審理會員國提訴爭議時將受其他爭端解決機構裁決之影響[363]；且在WTO爭端解決機構所作裁決對自己已無拘束力的狀況下，並無理由認為WTO爭端解決機構之裁決應依循其他爭端解決機構見解或受其見解之影響。[364]

第二節、WTO 判決先例對管轄衝突處理之不足與評析

在本章第一節已統整 WTO 判決先例針對爭端解決機制管轄權衝突曾作出的論理後，鑒於該些判決中涵蓋及論述之不足導致 RTA 管轄條款適用上法理和適用結果仍未臻明確，因此本節將先探討 RTA 爭端管轄條款究竟是否可能影響 WTO 爭端解決機構管轄權的行使，以釐清本論文後續論述之必要性；其次，本節將統整羅列出包括：RTA 條款在 WTO 體系下擁有的地位；RTA 條款對 WTO 會員國權利義務認定上所可能產生影響；以及在法理上 RTA 條款所可能對 WTO 帶來之影響等 WTO 判決先例未作評述之部分，俾利後續章節對此些議題之補充和續探。

第一項　RTA 爭端管轄條款對 WTO 爭端解決機制管轄權行使之可能影響

第一款　WTO 爭端解決機構可拒絕管轄「不合法提訴」之案件

誠如前述，WTO爭端解決機構如同其他國際審判機構一樣，有權認定其對向其提

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362 *Id.* ¶ 7.41, at 22–23.

363 *Id.* ¶ 7.41, at 22.

364 *Id.* citing Appellate Body Report, *Japan – Alcoholic Beverage II*, at 125.

訴之案件是否有管轄權[365]，*Mexico – Taxes on Soft Drinks*案之上訴機構也清楚的表示為了確保會員國提訴之權利並達成爭端解決機構處理WTO締約國間紛爭之設置目的，一旦當事國合法向WTO爭端解決機構提起訴訟，WTO爭端解決機構即不得任意選擇是否對案件行使管轄權，而有受理案件之義務。[366]

簡言之，上訴機構認為 WTO 爭端解決機構不可拒絕會員國「合法提訴」之案件；反面推論，對於會員國的「不合法提訴」，WTO 爭端解決機構似仍可拒絕行使管轄權。倘前述 WTO 爭端解決機構可拒絕對會員國「不合法提訴」行使管轄權推論為真的話，本論文於本章中將進一步嘗試找出可能被 WTO 爭端解決機構認定為不合法提訴的狀況及其要件，以釐清會員國之何種措施將導致其喪失向 WTO 爭端解決機構尋求救濟之權利。

第二款　WTO 爭端解決機構審酌 RTA 爭端管轄條款之妥適性

從前述的*Mexico – Taxes on Soft Drinks*及*Argentina – Poultry Anti-Dumping Duties*案判決中，我們可以發現WTO爭端解決機構認為根據DSU第 7、第 11 和第 23 條規範，其對會員國間就「WTO內括協定」下所發生之紛爭均有管轄審判的義務。然而，因一般通認的「WTO內括協定」，係指WTO協定及其附件下之多邊協定及複邊協定[367]，因此究竟在RTA下的管轄條款履行是否也是WTO爭端解決機制在審判時可審酌或應該納入考慮的法源，並讓此等條款得以影響WTO爭端解決機構對案件之管轄權，亦為探討的重點。

首先，雖然 WTO 爭端解決機構目前不傾向審理會員國間 RTA 爭端，但鑒於許多會員國在 RTA 中，尚訂有一般型專屬管轄或別訴權利排除型專屬管轄條款，而將締約國間貿易紛爭統一交由 RTA 之爭端解決機制解決；在此情況下，爭端管轄條款條款所

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[365] WTO 爭端解決機構有權認定對案件管轄權之說明見本論文第四章第一節。

[366] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 49–53, at 19–21.

[367] DSU Appendix I

造成影響，並非單純 WTO 爭端解決機構是否願意審議 RTA 權利義務履行的問題，而是 RTA 條款是否將改變 WTO 會員國向 WTO 爭端解決機制請求裁決和救濟權利的問題；倘認為 WTO 會員國簽署訂定 RTA 之爭端管轄條款，將影響其向 WTO 爭端解決機構尋求裁決的權利，此時若 WTO 會員仍向 WTO 爭端解決機制提訴，此是否屬前述 WTO 爭端解決機構可拒絕行使管轄權的「不合法提訴」，也就更值得省思。

在現有 WTO 判例下，雖然在 *Mexico – Taxes on Soft Drinks* 及 *Argentina – Poultry Anti-Dumping Duties* 案中爭端解決機構均分別檢視了 NAFTA 及 MECOSUR 的爭端管轄條款，但 WTO 從未對 RTA 爭端管轄條款造成 RTA 和 WTO 爭端解決機制管轄衝突和競合時，RTA 爭端管轄條款作為 WTO 爭端解決機制適用法源可能性作出說理。因此，為了釐清 RTA 爭端管轄條款在 WTO 爭端解決程序之可適用性及其應如何被導入 WTO 規範之框架下，本章之後續討論也將嘗試從 RTA 之定位以及其和 WTO 間之關係作切入，從 WTO 框架下 RTA 扮演角色與定位出發以了解 RTA 之被適用可能及可能影響結果，並找出 RTA 爭端管轄條款對 WTO 會員國向 WTO 爭端解決機構提訴權利之可能影響和變化。

第二項　Mexico – Taxes on Soft Drinks 及 Argentina – Poultry Anti-Dumping Duties 未處理問題

在 *Mexico – Taxes on Soft Drinks* 和 *Argentina – Poultry Anti-Dumping Duties* 案中，鑒於二案中案例事實及當事國主張之限制，WTO 爭端解決機制並未全面的檢視各種可能可運用處理爭端管轄權競合的理論，以下將論述不全而尚待補充之爭議點羅列如下：

第一款　別訴權利排除型專屬管轄條款適用效果不明

如前述，*Mexico – Taxes on Soft Drinks*案中所涉及之管轄條款為「一般型專屬管轄

類型」[368]。雖然上訴機構在判決中曾提及俗稱「排他條款（exclusion clause）」的NAFTA第 2005 條第 6 項的「別訴權利排除型專屬管轄，但因該案中墨西哥並不主張該NAFTA條款亦不爭執WTO對本案之管轄權而僅要求WTO自願放棄行使管轄權，因此*Mexico – Taxes on Soft Drinks*案對後案的可適用性，僅限於一般型專屬管轄條款之適用。

至於如 NAFTA 第 2005 條第 6 項此種所謂「排他條款」被援引後的可能影響，WTO 爭端解決機構則並未加以分析，而造成或「別訴權利排除型專屬管轄」對 WTO 的影響仍不清楚。

同樣的，*Argentina – Poultry Anti-Dumping Duties* 案中，雖阿根廷並不主張適用「奧利佛斯議定書」下的「別訴權利排除型專屬管轄」，而僅主張在該條款簽署後即代表當事國於擇定將案件交由一爭端解決機構後放棄另行提訴之權利。然而，雖然爭端解決小組在審理中駁斥了阿根廷之論理，但對於具「排他條款」特性的奧利佛斯議定書對 WTO 爭端解決機制管轄權的可能影響，爭端解決小組卻僅以「奧利弗斯議定書」尚未生效、該「別訴權利排除型專屬管轄」尚無適用餘地為由，而迴避對「別訴權利排除型專屬管轄」效力作出結論。

綜上，對於本論文於第貳章所分類出之：（1）僅審理 RTA 適用爭議的一般管轄條款、（2）擴張 RTA 管轄權而可審理 RTA 和 WTO 爭端的爭端管轄條款、（3）明示由 RTA 爭端解決機構審理案件的「一般型專屬管轄」條款；以及（4）明示由 RTA 爭端解決機構審理案件且同時明示排除其他爭端解決管轄機構管轄之「別訴權利排除型專屬管轄」等四種管轄條款類型，WTO 爭端解決機構明顯的在案件的審理中並未就「別訴權利排除型專屬管轄」類型條款對案件管轄權之衝擊加以分析或說明，而造成此種條款適用效力尚待研析。

368 見本論文第伍章、第一節、第一項。

第二款　法律障礙的要件及效果不明

*Mexico – Taxes on Soft Drinks*案中上訴機構論述開啟了WTO爭端解決機構面對會員國「不合法提訴」時拒絕行使管轄權的可能；同樣的，上訴機構在該案中面對NAFTA第 2005 條第 6 項的「別訴權利排除型專屬管轄」時，也提出了此等條款造成法律障礙（legal impediment）出現，並導致WTO爭端解決機構不得對案件行使管轄權的可能，但對於「法律障礙」究竟是什麼樣的法律概念，上訴機構對其構成要件和法律效果則未加以交代[369]，因此倘RTA爭端管轄條款可能造成法律障礙並導致WTO爭端解決機構喪失對案件的管轄，法律障礙的實質要件及其效果即有繼續探討之必要。

第三款　既判力遵循原則是否有適用可能（*res judicata*）

*Argentina – Poultry Anti-Dumping Duties*案中，巴拉圭認為既然阿根廷和巴西已在MERCOSUR特別審判庭下訴訟並獲得裁決，此時巴西在WTO爭端解決機構所提訴訟和在MERCOSUR下爭執者應為同一案件，根據巴西利亞議定書第 21 條之不可上訴規範MERCOSUR特別審判庭之裁決對兩照當事國自有既判例效力，而可阻卻該案中當事國另行提起訴訟爭執。[370]

然而，WTO 爭端解決小組在審理中並未對巴拉圭提出將阻卻當事國就同一事件再行起訴既判力原則的可適用性及其效果加以說明，而造成該案中「不可上訴條款」下蘊含的既判力拘束效適用結果未明。

第四款　可否藉特別法與普通法關係理解 RTA 爭端管轄條款所具有的法律地位

一般而言，在條約必須遵守原則（*pacta sunt survanda*）的適用下，WTO及其內括協定對會員國均有適用而無優劣之分。然而，在WTO各協定間涵蓋範圍有所重疊且其

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[369] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 554, at 22–23, provides: “We do not express any view on whether a legal impediment to the exercise of a panel’s jurisdiction would exist in the event that features such as those mentioned above were present.”

[370] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.28, at 18.

中個別協定對特定主題有所規範時，學者Pauwelyn認為為了解決可適用規範間的衝突或重複適用問題，倘二規範間存在特別法與普通法關係，此時即可藉特別法優於普通法原則（*lex specilalis derogate legi generali*），解決規範適用的競合與衝突問題。[371]

故倘我們可認為 RTA 爭端管轄條款係 WTO 會員國間，對於 WTO 下規範爭端解決程序之 DSU 以外之特別規範，則「特別法優於普通法原則」即可能用於解決 WTO 和 RTA 爭端解決機構間管轄權爭議，因此本論文將於後續章節中針對特別法與普通法原則，探討其在爭端解決機構管轄權爭議的可適用性加以分析。

第五款　後簽署之 RTA 爭端管轄條款是否屬後法而應較 WTO 規範優先適用

目前已生效的RTA，絕大多數乃是WTO成立後方簽署的[372]，相較於 1994 年烏拉圭回合談判後訂定規範WTO爭端解決程序的DSU，RTA（爭端管轄條款）自屬後於WTO（DSU）簽訂之協定。

因此 RTA 爭端管轄條款所造成 RTA 和 WTO 爭端解決機構的管轄競合和衝突狀況，由於 RTA 和 DSU 均係處理「相同客體（same subject matter）」—亦即是當事國解決貿易爭端之規範，因此倘我們可以「後法」與「前法」的關係理解 DSU 和 RTA 爭端管轄條款的關係，此時在所謂後法優於前法（*lex posterior derogate legi priori*）的概念下，表徵締約國間最新意思的新法自應優先於舊法而被適用，而可作為 RTA 爭端管轄條款簽署後出現的規範衝突的解決方式。

第六款　其他

Argentina – Poultry Anti-Dumping Duties 案中特別值得注意的一點，在於 WTO 爭端解決小組提出其拒絕適用含有「別訴權利排除型專屬管轄」的「奧利佛斯議定書」

[371] *See generally* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO RELATES TO OTHER RULES OF INTERNATIONAL LAW 411–12 (2006).

[372] 根據目前 WTO 官方統計已生效的 230 個「自由貿易協定（FTA）」和「關稅同盟（Custom Union）」中，僅有 21 個係 WTO 成立之 1994 年以前簽訂的，相當於 91%的 FTA 均係 WTO 成立後方簽署的。

的理由在於巴西將該案遞交於 WTO 爭端解決機構時「奧利佛斯議定書」尚未生效，而造成該議定書下條款無適用可能性；然而，在本文作者觀察中，「奧利佛斯議定書」下的「別訴權利排除型專屬管轄」在該案中並非全然無適用之可能。

首先，含有「別訴權利排除型專屬管轄」的「奧利佛斯議定書」在*Argentina – Poultry Anti-Dumping Duties*案審議時尚未生效乃不可否認的事實，然同樣不可否認的，巴西和阿根廷在巴西向WTO提訴時，確實也已簽署該爭端解決議定書。對於會員國已簽署但尚未生效的條約效力，根據條約法公約第 28 條規定，尚未生效之條約於生效前對當事國不產生拘束力[373]；然而，條約法公約第 18 條卻同樣規範當事國於條約生效前應避免作出將侵害其已簽訂但尚未生效條約宗旨之行為[374]。簡言之，雖然條約締約國在條約生效前尚不負擔遵守條約的法律上義務，但為了避免條約的目的與宗旨受到減損，此時締約國仍須避免導致侵害條約目的之行為。[375]

在*Argentina – Poultry Anti-Dumping Duties*案中，本論文認為「奧利佛斯議定書」的狀態正屬此種已簽署但尚未生效的條約類型[376]，故縱使巴西在該案中不因「奧利佛

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[373] Vienna Convention art. 28 (Non-retroactivity of treaties): Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

[374] *Id.* art. 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force): A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

[375] 從維也納條約法公約第 18 條文意而觀，容易讓人認為此條文要求締約國在條約生效前也應履行條約義務或至少不牴觸條約規範，然此種認為條約簽署後締約國即應履行的想法，混淆了條約生效（enter into force）效力與締約國條約簽署後義務的概念，並造成條約生效概念失去意義。然而，縱使締約國簽署後義務效力不若條約生效後締約國受拘束效力般強，但其仍要求簽署國不應悖離或為與該條約目的扞格之行為。詳細分析參見 ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 117–19 (2d ed. 2007).

[376] 根據國際法委員會（International Law Commssion）的定義，「議定書（Protocol）」亦屬條約（Treaty）的一種形式，因此在效力和適用上均和條約（Treaty）及公約（Convention）相同，維也納條約法公約第 2 條第一項第(a)款也表示條約不因其名稱而影響其性質。因此在本論文中論及各類型爭端解決條款

斯議定書」的適用而面臨向WTO爭端解決機構請求救濟的「法律障礙」問題，但不可忽略的是，在前述條約法公約第 18 條的適用下，在WTO爭端解決小組已認為「奧利佛斯議定書」簽署目的在於防堵MERCOSUR締約國對同一事件重複提訴狀況發生的情況下[377]，「奧利佛斯議定書」之條約宗旨與目的即在於避免締約國重複提訴而造成對同一事件之多數判決出現，是而在條約法公約第 18 條的適用下，縱使該條條文僅使用「會員國應避免（state is obliged to refrain）」而未使用「會員不得（state shall not）」而賦予其較弱規範效力，但WTO爭端解決機構在該案中並非沒有機會依條約法第 18 條規定認定巴西不應違反禁止別訴的「奧利佛斯議定書」的宗旨與目的。

本論文認為，WTO 爭端解決小組在該案中為了避免對複雜的「法律障礙」狀況作出裁決，其單純以「奧利佛斯議定書」尚未生效即拒絕審議其相關內容，使其喪失了一個釐清 RTA 爭端管轄條款對 WTO 爭端解決機構對案件管轄權影響並推動 WTO 法制進步的良好的機會，WTO 爭端解決機構此種保守和被動的態度，讓人感到十分的惋惜。

第三項　小結

由上述說明可知，雖然在*Mexico – Taxes on Soft Drinks*案中，上訴機構似乎表示「WTO爭端解決機構無義務拒絕對涉及WTO協定之貿易紛爭行使管轄權」[378]，而*Argentina – Poultry Anti-Dumping Duties*中爭端解決小組也表示「WTO爭端解決機構不因RTA爭端管轄條款的存在而應拒絕行使對案件管轄權」，但必須了解的是，從前述對此二WTO判決先例的探討中可以發現，WTO爭端解決機構對RTA爭端管轄條款的探討其實仍有著許多的缺漏。

或議定書效力時，將以條約作爲統稱使用，於此特別說明。*See* U.N. INTERNATIONAL LAW COMMISSION, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (II) 161 (1962); Vienna Convention art. 2(1)(a).

[377] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.28, at 18.

[378] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 57, at 24 provides, "under the DSU, it ha[d] no discretion to decline to exercise jurisdiction in the case that ha[d] been brought before it."

首先，WTO 爭端解決條款其實並未真正的審酌過「別訴權利排除型專屬管轄」條款的適用效力，而僅停留在對一般型專屬管轄類型條款的檢驗，相較之下，誠如 *Argentina – Poultry Anti-Dumping Duties* 案中爭端解決小組所表示，「別訴權利排除型專屬管轄」才可能是真正要解決重複應訴問題存在而設置的，故在當前 WTO 判決先例中對此部份論述仍有欠缺的狀況下，RTA 爭端管轄條款對 WTO 爭端解決機構所可能造成的衝擊的結果尚難以預料。

此外，縱使在對「爭端管轄條款」抑或是「場域選擇管轄」條款的效力探討中，WTO 判決先例在論述上，不論是在禁反言原則適用上、特別法普通法關係關係等均仍有不完整之處，鑒於當前 RTA 的簽署在 WTO 多邊貿易談判陷入膠著後成為 WTO 會員國進一步推動國際貿易發展的發展重點，本論文第貳章的研究中也可以發現 73%的 RTA，不論是採用仲裁（arbitration）或爭端解決機制（dispute settlement mechanism）等模式亦設有爭端解決機構，並訂有爭端管轄或場域排除條款，RTA 和 WTO 爭端解決機構在管轄權議題上所可能出現的爭議，乃是我們不可迴避而須面對的問題。

原先 RTA 和 WTO 爭端管轄機構在設計上，本應分別職司認定其各自協定之解釋適用，然而根據本論文統計已有 16%的 RTA 締約國，亦授權當事國可選擇是否將 WTO 之爭端交由 RTA 爭端解決機構審議，而造成 RTA 和 WTO 爭端解決機構的管轄權出現重疊。在此情況下，因複數爭端解決機構可能同時對單一爭端均享有管轄權，因此倘無法釐清此複數爭端解決機構間管轄權的範圍和行使權限時，將可能出現單一爭端卻有複數裁決的情形；更令人擔憂的是，因各爭端解決機構在其程序規範上對無論是可適用法源、審理程序、裁決者組成背景等均有所不同，此種狀況也將導致各判決在事實或法律上認定或裁決結果出現歧異的可能性大幅提高，且倘各爭端解決機構對於同一法規解釋適用見解出現紛歧，除可能導致當事國無法確認其權利義務外，在裁決結果出現歧異時，會員國究竟應如何調整（或是否需要調整）其貿易政策措施也可能出現混亂；更嚴重的情況下，RTA 和 WTO 下的各爭端解決機構對法規適用和裁決的論

理結論均相互悖離，更可能導致法體系間規範的割裂適用而造成「國際法破碎化（fragmentation of International Law）」問題的發生。

為了建構完整的理論以調和 RTA 和 WTO 爭端解決機構間管轄權的行使，此章節後面之論述，將對 RTA 爭端解決機制定位問題進行分析，鑒於各爭端解決機構對案件管轄權的行使均依循其所屬國際協定及管轄條款，因此本論文將嘗試以一般國際法原則和一般解釋規則（general rules of interpretation）之適用以解決規範爭端解決機構管轄權的國際協定間的競合與衝突狀況，期能補足 WTO 判決先例不足之處，並找尋 RTA 各類型爭端管轄條款對 WTO 爭端解決機制管轄權之影響和適用可能性，並對 RTA 爭端解決機構對貿易爭端作出之裁決對 WTO 之影響及被採納可能性進行分析，以調和 WTO 和自由貿易協定競合及衝突。

第三節　RTA 爭端解決機制之定位

第一項　WTO 爭端解決機構審酌 RTA 爭端之可能性

第一款　從 GATT 第 XXIV 條思考 RTA 在 WTO 下的角色

由於目前RTA之簽署乃藉由GATT第XXIV條、GATS第V條及「1979 年授權條款（Enabling Clause）」（後以GATT第XXIV條統稱前述條文款項）之授權[379]，使WTO會員國雙邊給予彼此更優惠於其他會員國之貿易措施與政策，而能排除WTO最惠國待遇規範之適用[380]；鑒於WTO亦希望藉由RTA之簽署而使自由貿易區內或關稅同盟內成員國能促成經濟整合，並在成員國間貿易障礙消除後促進市場法則的運作[381]，會員國是否履行其RTA下義務也將影響自由貿易協定簽署國間經貿整合之成效，並對GATT第

[379] 本論文為論述上方便，對於均含有授權 WTO 會員國簽署 FTA 而得以違反最惠國待遇條款之 GATT 第 XXIV 條、GATS 第 V 條以及 1979 年授權條款之條文，本論文後續論及使 FTA 成為最惠國待遇適用的例外條款時，均僅以「GATT 第 XXIV 條」為統稱。

[380] 羅昌發，前揭（註 19），頁 35–37。

[381] 羅昌發，前揭（註 19），頁 35–36。

XXIV條設立目的地達成與否具決定性影響。因此在會員國可主張締約國間之RTA而正當化（justify）其違反最惠國待遇原則的邏輯推衍下，既GATT允許符合第XXIV條之RTA作為最惠國待遇適用之例外條款[382]，此時符合GATT第XXIV條之RTA似可被認為係為GATT所認可並得用以阻卻WTO義務違反之例外條款，因此可被認為係WTO實體規範的延伸。[383]

第二款　RTA 變更 WTO 會員間權利義務之可能

在RTA和WTO規範相似或有所重疊情況下，有認為RTA規範屬維也納條約法公約第 41 條規定之「彼此間協定」（*Inter se* agreement），而能修正了WTO會員間WTO權利義務之負擔[384]，且此種變更WTO會員權利義務之條約或協定，亦不以WTO內括協定形式訂定者為限，舉凡協定之結論將變更WTO協定對其會員之適用者均屬之[385]。且在GATT第XXIV條第 5 項規定其並不禁止會員國間締結RTA時[386]，此亦可被理解為滿足了條約法公約第 41 條第 1 項第(a)款條約允許會員締結變更義務之條約，或同條項第(b)款所稱條約所不禁止之特定修正[387]，而形成當事國在滿足條約法公約第41條後，

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[382] 羅昌發，前揭（註 19），頁 35；陳昭仁，前揭（註 49），65–66。

[383] Nicolas 和 Mitchell 認爲 GATT 第 XXIV 條對 RTA 之規範和拘束並不足夠，而此些規範限制的存在也造成了 WTO 受 RTA 之撼動。*See* Lockhart & Mitchell, *supra* note 72, at 340.

[384] *See, e.g.*, PAUWELYN, *supra* note 371, at 315-16. *Contra* Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdiction: The relationship between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1081, 1104 (2001). 關於彼此間協定之介紹，可參見丘宏達，前揭（註 174），頁 246–247。

[385] 丘宏達，前揭（註 174），頁 247。

[386] GATT art. XXIV:5 provides, “Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a freetrade area.”

[387] 此處需注意的是，條約法公約第 41 條規範者，乃是多邊協定下部分締約國間對其條約義務之變更（*inter se* modification），和其相類似之規範，在於條約法公約第 40 條，規範了多邊協定下全體締約國對條約義務之修正（amendment），前者之重點不在於變動條約內涵，而在變更特定締約國間條約之適用。International Law Commission, Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 302, U.N. Doc. A/CN/4/L.92 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC, Fragmentation of International Law Report]. *See also*

可依該條變更彼此間條約義務之負擔[388]。

惟需注意的是，由於將RTA協定視為所謂「彼此間協定」，並認定其管轄條款將變更WTO會員國向WTO爭訟權利之行使時，仍需注意RTA是否能通過條約法公約第 41 條第 1 項第(b)款下：(1) 不影響其他當事國享有條約上權利或履行其義務；以及(2) 不干涉任何如予減損即與整個條約之目的及宗旨不合之規定者等二要件之檢驗。[389]

然而，因 DSU 第 23 條第 1 項賦予 WTO 會員國向 WTO 爭端解決機制提訴之權利，一向被視為維繫 WTO 法制健全運作的重要基石之一，因此對於將影響 WTO 會員向 WTO 爭端解決機制救濟權行使的「彼此間協定」，似已減損了 DSU 最主要的目的與宗旨，而違背條約法公約第 41 條第 1 項第(b)款(2)之規定，因此本論文認為藉條約法公約第 41 條「彼此間協定」解釋 RTA 爭端管轄條款效力，有其困難及限制。

第三款　當前 WTO 爭端解決機構對 RTA 爭端管轄條款的適用態度

如前所述，RTA是在GATT第XXIV條、GATS第V條和 1979 年授權條款的授權下所簽訂的，然而，因WTO協定中未對RTA在WTO之地位作明確的規範，前述將RTA視為WTO協定實體規範的延伸，抑或是修正部分締約國間WTO協定適用協定的「彼此間協定」，其在論理上固然有其立論基礎，然目前WTO實務對涉及RTA之爭端，似未採取將RTA解釋為WTO涵蓋協定之廣義解釋立場；相反的，WTO爭端解決機構所指的「WTO內括協定」—亦即WTO爭端解決機構審議案件時應適用之規範，仍限於DSU附件一[390]所列之協定[391]，因此對於會員國所另行簽署非屬於DSU附件一協定之RTA，

Chen, *supra* note 11, 20–21.

[388] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*,art. 38, ¶ 1, 2 Y.B. INT'L L. COMM'N 187, U.N. Doc. A/CN.4/191 (1966).

[389] Vienna Convention, art. 41(1).

[390] DSU Appendix 1 (Agreements Covered by the Understanding):

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

並非WTO爭端解決機構所可審議的範圍。[392]

第二項 RTA 條款之定位與解釋適用

第一款 以 WTO 本位出發之思考

在WTO爭端解決機構對其可審議協定範圍採取狹義認定的狀況下[393]，也導致RTA爭端管轄條款被排除於WTO爭端解決機構解決當事國紛爭時可適用的規範，會員國間針對RTA解釋適用及履行所發生之爭端，也無法向WTO爭端解決機構尋求救濟和解決。

同樣的，對於WTO會員國間在RTA下彼此達成協議，意欲將彼此間WTO和RTA下發生的爭端遞交由RTA下的爭端解決機構處理，在WTO爭端解決機構不認為RTA條款可更動會員國在WTO協定下包括向爭端解決機構提訴在內的權利時[394]，要求WTO爭

Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights
Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
(C) Plurilateral Trade Agreements
Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement
The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

[391] *See generally* PAUWELYN, *supra* note 371, at 40–44; WAINCYMER, *supra* note 75, at 376–78.

[392] Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 N.D. L. REV. 879, 904 (2003).

[393] Appellate Body Report, *Australia – Salmon*, ¶ 223, “the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes.”

[394] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.9, at 111; Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 53 n.102, at 21. 林彩瑜教授認爲 Mexico – Taxes on Soft Drink 案上訴機構乃指在 DSU 下，小組對已提交之案件無拒絕行使「領域管轄權（field jurisdiction）—亦即『法庭之管轄權領域』」的裁量權。見林彩瑜，前揭（註 7），頁 410。

端解決機構接受其管轄權將在RTA適用下受到拘束亦係難以期待之事。

此外，雖然條約法公約第 41 條為部分會員對多邊協定之修訂提供了細膩的規範，然而，誠如前述，既 DSU 第 23 條第 1 項所保障的 WTO 會員訴權是 WTO 協定（DSU）重要之精髓，因此在修正強制管轄權可能影響此條約維護法制安定性之宗旨與目的時，其是否能通過條約法公約第 41 條要求會員國對條約之修正，不應影響原條約宗旨與目的之限制，亦值懷疑。

第二款　以獨立之國際條約處理 RTA 協定之適用

在前述無法將 RTA 解讀為 WTO 實體規範之一部，或是修正 WTO 協定的「彼此間協定」狀況下，而遵循 WTO 爭端解決機構認為 RTA 並不屬其可審議之 WTO 協定範圍，此時為了解決會員國就應如何尋求 RTA 協定內容獲得實現的問題，我們即須先了解 RTA 所具有之地位為何。

1. RTA 具國際條約地位

首先，雖然在WTO規範上，RTA乃係WTO根據GATT第XXIV條等條文授權而另外簽署以促成區域貿易整合的經貿協定，但從其係國際法主體間所簽訂而受國際法規範的書面國際協定此點觀察[395]，RTA仍具有國際法「條約」之地位[396]，而與WTO同為國際法下之次系統（sub-system）之一。然而，因RTA的締約國可能包含了「國家（State）」或「獨立關稅領域（separate custom union）」二種[397]，而和國際公法上一般要求以「國

[395] Vienna Convention art. 2(1)(a) provides: “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.　For introduction and definition of International Treay, see BROWNLIE, *supra* note 204, at 62–64, 607–11; *see also* AUST, *supra* note 375, at 16–31.

[396] 如巴勒斯坦，台澎金馬關稅獨立區等國際法地位仍有爭議之主體，其仍與他國簽有 FTA；歐盟、東南亞國協（ASEAN）等非傳統國際法所認知國家主體，亦簽署了大量的 FTA。FTA 一覽表見：附件二。

[397] Merrakesh Agreement Establishing the World Trade Organization, art. XII(1): “Any ***State*** or ***separate customs territory*** possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement,

家」為主體之限制有所不同，因而對於以「獨立關稅領域」身分加入WTO而簽署RTA者。例：台灣與巴拿馬、巴勒斯坦和EFTA間RTA）是否將因簽署主體不符合國際公法要求的「國家」資格而不具條約地位，及值思考。

本論文認為，雖然「獨立關稅領域」和「國家」確實係相異的國際法概念，然而，「獨立關稅領域」和「國家」卻未必是互斥的概念，其中「國家」可能係一個「獨立關稅領域」,「國家」也同樣可能分割為數個「獨立關稅領域」，同樣的，具「獨立關稅領域」形態者，也可能包含「國家」甚或是其他國際法上「特殊主體（special type of personality）」，由於國際公法下的「國家」資格認定牽涉到複雜的國家承認等國際關係和國際政治議題，因此我們可合理懷疑WTO既是以推動國際貿易議並消弭貿易障礙為宗旨之機構，其以「國家」和「獨立關稅領域」為其會員主體資格，除一方面可避免涉入國家承認複雜問題之泥淖，另一方面更可擴大其會員組成而將具「獨立關稅領域」資格而可獨立設置貿易規範或障礙者納於其中。尚且， WTO協定之締約會員同樣包含「國家（State）」或「獨立關稅領域（separate custom union）」二種[398]，在多數均肯定WTO協定所具有的「條約」地位的情況下，並無堅強理由認為RTA在同樣情況下將因主題問題而被排除於「條約」之範疇。[399]

因此在此我們後續將RTA以「條約」地位加以討論時，即暫不討論「獨立關稅領域」資格者是否能締結條約之問題；對於屬國際條約的RTA，本論文認為根據維也納條約法第 26 條之條約必須遵守原則[400]，RTA締約國自有遵循其簽訂之RTA條款的義

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on terms to be agreed between it and the WTO." (emphasizes added).

[398] Merrakesh Agreement art. XII(1): "Any ***State*** or ***separate customs territory*** possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO." (emphasizes added).

[399] 和本文同樣認 RTA 和 WTO 係國際法下相異法體系關係者，*see* Fabbricotti, supra note 66, at 27–28, *available at* http://ssrn.com/abstract=1151386 (last visited Apr. 12, 2012).

[400] Vienna Convention art. 26 (*pacta sunt servanda*) provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

務。[401]

2. 如何確保締約國履行其 RTA 義務

在確認 RTA 締約國有義務遵循 RTA 下約定後，吾等應思考的問題即在於何人有權認定締約國是否履行其 RTA 義務。

首先，倘RTA下設有爭端解決條款或相關規定，此時RTA締約國間就爭端解決處理已有約定的情況下，對於RTA下所生爭端或解釋適用的爭議，自然應依照會員國在RTA下約定處理；再者，倘RTA下締約國間並未建立爭端解決機制，則此時締約國間除了可藉由諮商（consultation）或協商談判（negotiation）方式解決問題外[402]，因RTA可認為是國際法下的次系統（sub-system）之一[403]，故在符合有當事國之同意等國際法院訴訟要件情況下，職司國際法爭端處理的國際法院自可對締約國RTA之適用爭端

[401] 維也納條約法公約在前言中即闡明，條約必須遵守原則乃是普世承認的國際法規則，由是可推論，條約必須遵守原則甚至已具有國際習慣法（customary international law）的地位，因此不論條約締約者是否爲維也納條約法公約之締約國，其均受此原則之拘束。*See* Vienna Convention on Law of Treaties, preamble: "Noting that the principles of free consent and of good faith and ***the pacta sunt servanda rule are universally recognized***."(emphasizes added). 前任 WTO 上訴機構法官 Florentino Feliciano 甚至認爲「條約必須遵守原則」具備「絕對法/強行法（*jus cogens*）」的地位，而對全體國際社群均有適用。*See* PAUWELYN, *supra* note 371, at 37, n.43.

[402] *See e.g.*, Common Economic Zone (CEZ) FTA art. 7 provides, "Disputes and differences between the Parties as to the interpretation and/or application of the provisions of the present Agreement shall be settled by holding consultations and negotiations."; Commonwealth of Independent States (CIS) FTA art. 19 provides, "(1) Any disputes and disagreements between the Contracting Parties concerning the interpretation and/or application of provisions of this Agreement, as well as other disputes affecting rights and obligations of the Contracting Parties under this Agreement or in connection with it, shall be settled in the following way: - the interested Contracting Parties conduct immediate consultations between each other or by mutual consent with the participation of representatives of other Contracting Parties;
- within the framework of a special conciliatory procedure (by creating working parties to study materials of dispute and work out recommendations);
- in the Economic Court of the CIS;
- within the framework of other procedures provided by international law.
(2) Transition to the subsequent procedure is possible by mutual consent of the Contracting Parties between which disputable questions or disagreements arose, or by the order of one of them if agreement is not reached within six months from the day of the beginning of the procedure.

[403] 關於國際法「次系統」概念的說明，請見次節說明。

加以裁決。

然而，此種以獨立國際條約定義檢視RTA性質之模式，不論是藉由RTA自身之爭端解決機構解決爭端或是由ICJ審理，雖然最終仍將有有權者的裁決而指引締約國應如何履行其條約義務，但在締約國間就WTO協定爭端交由RTA爭端解決機構裁決的RTA爭端管轄條款實現上，縱使RTA爭端解決機構或ICJ等爭端解決機構要求締約國應履行其承諾，一旦WTO爭端解決機構表示：「WTO爭端管轄機構亦不受其他國際爭端解決機構裁決拘束」[404]，而不願因RTA管轄條款存在而放棄對RTA締約國間爭端行使管轄權，此時不論RTA爭端解決機構或ICJ的裁決為何，RTA下所訂的爭端管轄條款目的終將無法達成，甚至造成WTO和其他爭端審判機構間法規適用不同而造成國際法的割裂適用。

第三款　WTO爭端解決機構拒絕適用RTA規範可能造成之國際法脆裂結果[405]

根據前述討論，倘我們將RTA條款定位為WTO協定之一部，不論以衝突法（conflict of laws）的概念解釋RTA爭端管轄條款將對WTO會員國提訴權利產生的衝擊，並考量RTA管轄條款和DSU相互衝突情況下而選擇適用DSU，抑或是參考林彩瑜教授所提出，WTO爭端解決機構係從「領域管轄權」認定出發，而認為WTO爭端解決機構有遵循DSU規範審議會員國間爭端之義務，且RTA條款並非WTO爭端解決機構所得審議客體的論述加以解讀[406]，RTA爭端管轄條款是否會在WTO爭端解決機構下被審酌甚或發揮其效力令人擔憂。

然而，倘我們將 RTA 解讀為 WTO 協定外的獨立國際條約，並將 RTA 條款與 WTO 協定分離，此時雖然締約國可循其他爭端解決途徑就 RTA 之適用尋求救濟，但此種論述，除了前述可能造成 RTA 條款目的無法獲得實現的結果外，此種消極的處理，更無

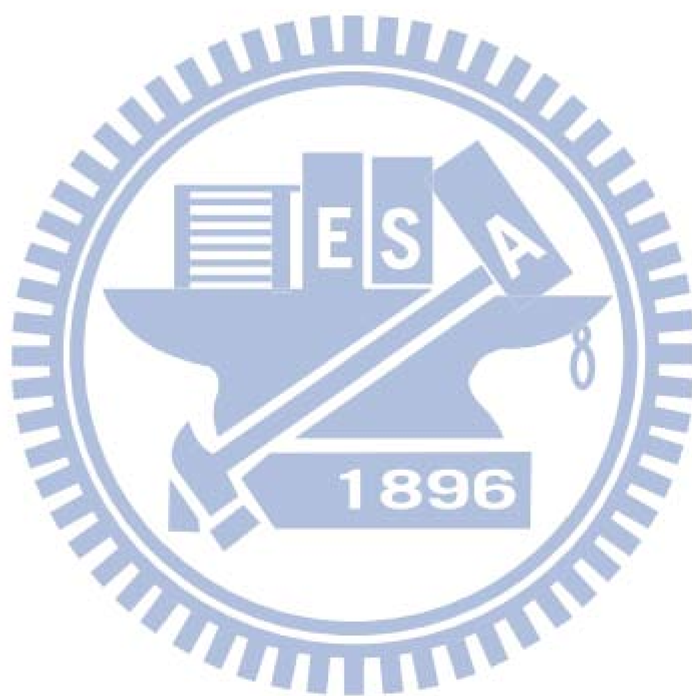
[404] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶¶ 7.41–.42, at 22–23.

[405] WAINCYMER, *supra* note 75, at 373.

[406] 參見林彩瑜，前揭（註 7），頁 408–411。

異是使 WTO 與其他國際法協定相互切割，而認為 WTO 是自我封閉（self-constraint）的法體系，而忽略了 WTO 協定與其他國際法的互動關係及整體國際法解釋適用的和諧和一致性。

且在 WTO 杜哈回合談判陷入僵局而 RTA 又大量簽署的今日，WTO 體系倘忽略並存之 RTA 規範發展,除了將無法達成 WTO 允許會員國締結 RTA 以區域經貿整合而與多邊貿易規範共同推動國際貿易發展的目標，更將導致此二原先共同推動國際貿易發展的制度相互扞格，對國際貿易的發展不可不謂重大。



第陸章　RTA 和 WTO 爭端解決機構管轄衝突之處理

第一節　以一般國際法原則及解釋方法處理 RTA 和 WTO 爭端解決機構管轄衝突解決方法

本論文認為 WTO 協定和 RTA 均係國際法的一部，為了維護整體國際法的和諧並避免規範割裂使用而造成國際法的脆裂，本論文以下將試以國際法條約解釋方法和一般國際法原則的適用，以解決 WTO 和 RTA 間爭端解決機制競合與衝突之問題。

第一項　概論

如本論文第一章第三節中所述，WTO下可適用規範除了WTO內括協定外，國際法之條約解釋規範和國際習慣法及一般國際法原則在WTO下亦均有適用[407]，以下先就國際法條約解釋規範和國際習慣法及一般國際法原則概念加以簡介，並對為何以之作為解決WTO和RTA爭端管轄機制因RTA管轄條款所產生管轄權衝突問題方法論述如下：

第一款　條約解釋適用規範

1. 何謂條約解釋適用規範

WTO規範和RTA既屬國際條約，締約國自應依條約必須遵守原則而有履行條約的義務外；然而，條約在適用上最常出現爭議者，在於如何理解條約規範效力及締約國所負擔義務[408]，因而國際間也就在多邊架構下建立了「規範條約的條約（the treaty on treaties）」[409]—亦即維也納條約法公約，以解決國際條約解釋適用發生之問題。

2. 以條約解釋適用方法解決 WTO 和 RTA 爭端解決機制管轄競合之原因

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[407] WTO 上訴機構在 US – Gasoline 案中已表示 WTO 並不獨立於國際法，且在 DSU 第 3.2 和第 19.2 條規範的包攝下，國際法院規約第 38 條下包含一般法律原則等法源在 WTO 下亦有適用。Appellate Body Report, *US –Gasoline*, at 17.

[408] BROWNLIE, *supra* note 204, 607–08.

[409] AUST, *supra* note 375, at 6.

既維也納條約法公約的是為了處理國際條約解釋適用而設立的規範[410]，在本論文所研究的WTO和RTA爭端解決機制競合問題上，也是源自於RTA的爭端管轄條款和WTO下DSU相互適用的條約衝突問題，是而對此問題之解決，維也納條約法公約自是找尋衝突解決方法之首選。

第二款　國際習慣法及一般國際法原則[411]

1. 何謂國際習慣法及一般國際法原則

(1) 國際習慣法[412]

根據國際法院規約第 38 條第(1)項第(b)款，國際習慣（法）是「各國所共通接受具有規範效力的國際實踐（general practice accepted as law）」，其亦是國際法主要法源之一[413]；欲構成國際習慣法，該規範必須：(1) 有相當數量之國家實踐佐證；(2) 國家對該規範的實踐具有「法之信念（*opinio juris*）」。[414]

(2) 一般國際法原則

本論文所討論之一般國際法原則，係指國際法院規約第 38 條第(1)項第(c)款的「一般法律原則（general principle of law）[415]」，根據該條文，一般法律原則乃是「文明國

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[410] BROWNLIE, *supra* note 204, 607.

[411] WAINCYMER, *supra* note 75, at 495.

[412] *See generally* Arthur Watts, *The International Court and the Continuing Customary International Law of Treaties*, *in* LIBER AMICORUM JUDGE SHIGERU ODA VOL. I 251–66 (Nisuke Ando,Edward McWhinney & Rüdiger Wolfrum eds., Cambridge 2002).

[413] WAINCYMER, *supra* note 75, at 382.

[414] Aust 對國際習慣法的定義爲：(1) evidence of a substantial uniformity of practice; and (2) *opinio juris* – a general recognition by states that the practice is settled enough to amount to a binding obligation in international law. See AUST, *supra* note 375, at 11. 其他對國際習慣法之介紹，*see generally* BROWNLIE, *supra* note 204, 6–12; ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 6–8 (2d edn. 2005); SHAW, *supra* note 174, at 68–88.

[415] 對國際法上所謂一般法律原則，有又將之細分爲「一般法律原則（general principle of law）」和「國際法一般法律原則（general principle of international law）」概念，然本文認爲嚴格遵循此種分類方式並無太大實義，畢竟二者概念上重疊者甚眾，在許多法律原則同時存在於各國又存在於國際法上時，將其概括理解爲可適用於國際法的一般法律原則即可（亦即是對一般法律原則採角廣意的解釋）。相似見解，*see* BROWNLIE, *supra* note 204, 19。

家所共認的法律原則（the general principles of law recognized by civilized nations）[416]」。國際法院規約允許法院以一般法律原則為裁決依據，雖要求法院僅可適用全體所普遍接受的法律原則，但實際上其乃是賦予國際審判機構隨社會法律思維變革而調整可適用規範之空間[417]，也將普遍被接受的內國法及本質上具公共政策、正義或衡平概念的法律原則引入國際法之適用。[418]

2. 以國際習慣法及一般國際法原則解決 WTO 和 RTA 爭端解決機制管轄競合之原因

思考條約解釋適用問題時，維也納條約法公約的規範自是適用的首選；然而，維也納條約法公約並無法在有限的條文內對每一種條約解釋適用狀況均作出處理，因此對於該公約所未規範之狀況，自應回歸國際習慣法處理[419]。然而，除國際習慣法之外，既一般法律原則乃是所謂「共認的法律原則」，倘其原理原則亦可於條約解釋適用問題的探討，在其已被廣泛接受為國際法法源之一時，WTO 自可對其加以利用以解決規範間之適用衝突問題。

第二項　以條約解釋方法處理爭端解決機構管轄衝突問題

第一款　條約必須遵守原則（pacta sunt survanda）

根基於誠信原則的條約必須遵守原則，不論其係被成文化（codify）的習慣法或國際法一般法律原則，甚或是具有強行法（*jus cogen*）地位[420]，條約生效後締約國應以最大善意遵守條約規範乃不可否認的國際法義務，是而在條約必須遵守的概念下，

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[416] ICJ Statute art. 38(1)(c).

[417] BROWNLIE, *supra* note 204, 16–17. 對於一般法律原則納入國際法法源之目的和其影響及其他相關學理在國際法學上探討者眾，本文在此即不予詳述，參見 IAN BROWNLIE 書註 90–92 古根漢等學者之說明。

[418] SHAW, *supra* note 174, at 77–78.

[419] *See* Vienna Convention, preamble, "Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". *See also* BROWNLIE, *supra* note 204, at 608.

[420] Vienna Convention, preamble; *see also* PAUWELYN, *supra* note 371, at 37 n.43.

不論是WTO下的DSU亦或是各國於RTA下訂定之爭端管轄條款，簽署締約國均有以最大善意遵約義務。

然而，在面對條約規範可能相互衝突時，為了確保締約國對其簽署批准之 RTA 和 WTO 內括協定均能有效遵約以實踐條約必須遵守原則，倘在處理條約競合衝突狀況下僵化地適用單一規範，勢必將造成被選定適用以外之條約規範遭到忽略，造成締約國無法履行對該條約的遵約義務，因此雖然條約必須遵守原則並未提供締約國處理相牴觸或相異國際規範間的適用指示，然對於各相異國際規範間的選擇適用，仍須仰賴其他條約解釋或一般法律原則論理提供適用上之說理與依據加以補充，然此原則闡釋的各締約國應以最大善意遵約的基本原則，仍係吾等對數條約之衝突競合規範尋求和諧解釋之根基。

第二款　對條約解釋的後續協定或實踐（subsequent agreements and practice）

根據維也納條約法公約第 31 條第(3)項第(b)款，締約國對條約解釋的後續協定或實踐，應在解釋適用條約時和條約約文一併納入解讀 [421]，締約國（在彼此合意下）可藉此事後修正條約規範或賦予條約權威性解釋而指引該條約之適用 [422]，且此種對條約解釋的後續實踐並不必然需所解釋條約之全體締約國共同為之。[423]

在 WTO 規範爭端解決程序的 DSU 中，僅說明各締約國可於對條約解釋適用有所爭議時向其請求救濟和裁決，然而對於 WTO 爭端解決機構在何種情況下不應行使或已喪失對案件管轄權，在 DSU 中則未見相關要件和規範，由於 RTA 爭端管轄條款亦係締約國間對彼此間貿易爭端處置之協定，當 RTA 爭端管轄條款中已明確說明 RTA

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[421] Vienna Convention art. 31(3)(b) provides, "…. There shall be taken into account, together with the context: …; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; …."

[422] 且此後續協定並不要求以條約（Treaty）等特定形式呈現，如國際協定（agreement）或瞭解書（understanding）等均無不可。*See* AUST, *supra* note 375, at 238–39.

[423] *See* BROWNLIE, *supra* note 204, at 633–34.

和 WTO 爭端解決機構對締約國間爭端的管轄問題處置時，縱使此協定並非全體 WTO 締約國所簽訂，但從前述對條約解釋的後續協定訂定者和實踐者無須為原條約全體締約國此點可知，RTA 確實可能被認係締約國間對 WTO 下 DSU 對案件管轄權行使之後續指示和闡述，在適當條件下以 RTA 爭端管轄條款排除 WTO 爭端管轄機制對案件管轄權並非不可能之事。

至於對條約解釋之後續實踐，誠如同聯合國對其憲章第 27 條第(3)項的解釋一般，雖該條中要求安理會對非程序事項的表決須取得五位常任理事國的「同意（concurring vote）」始通過，然而在實踐上將之解釋為常任理事國「不反對（not objecting）」，而此種對憲章第 27 條第(3)項「同意」之解釋方式，在安理會授權聯合國維和部隊介入韓戰之決議及ICJ在西南非案審理中獲採納，而成為此條項之被肯定之解釋方法 [424]。相同的，在*Argentina – Poultry Anti-Dumping Duties*案中，阿根廷亦曾提出從MERCOSUR締約國將案件提交MERCOSUR特別審判庭裁決後，在過往實踐上當事國均未再將案件提交請求WTO爭端解決機構裁決，從此點切入，WTO爭端解決機構並非不能將此等選定爭端解決管轄機構之模式，解釋為係MERCOSUR會員國認定在將案件提交由RTA爭端解決機構後WTO爭端解決機構即對案件無管轄之實踐。是而縱使DSU並未就WTO爭端解決機制何時不得行使對案件管轄權加以明訂，但根據MERCOSUR締約國在*Argentina – Poultry Anti-Dumping Duties*案之前的實踐中，卻均認當事國擇定爭端管轄機構後即不得將案件提交請求其他爭端解決機構審議，WTO爭端解決機構實可根據此締約國實踐，並將之解釋為締約國在選定爭端解決機制後有排除其他爭端解決機制管轄權限之意思，而拒絕對已審酌案件重複管轄以避免多重救濟或裁決並存狀況發生。

[424] *See* AUST, *supra* note 375, at 242–43.

第三款　維也納條約法公約第 30 條

維也納條約法公約第 30 條規定就同一事項先後訂定條約時，倘後訂定者未如條約法公約第 60 條終止（terminated）前條約的適用，此時後條約應優先於先訂定者適用[425]；倘前後二條約締約國不完全相同時，則後條約優先規則僅適用於同為二條約締約國之間。[426]

雖然對於維也納條約法第 30 條所謂規範「同一事項」要件應以寬鬆或嚴格方式解釋尚無定見[427]，但本文認為縱採嚴格解釋，對明訂可管轄WTO爭端之RTA條款，此顯然和WTO下DSU授權WTO爭端解決機制審理WTO爭端係同一事項之規範；此外，倘採寬鬆解釋，舉凡規範締約國就貿易爭端管轄機構的RTA條款自與WTO下DSU同屬對同一事項的規範，因此條約法公約第 30 條在RTA和WTO爭端管轄機制管轄權因RTA爭端管轄條款而產生衝突競合時，自然有適用空間，而倘RTA下爭端管轄條款簽署於WTO之DSU規範訂定之後，此時RTA爭端管轄條款自應優先適用。

雖然在國際法一般原理下亦有後法優於前法（見後述）等與維也納條約法第 30 條相似的概念，但此條文是否是國際習慣法的成文化仍有爭論[428]，且雖WTO上訴機構在*US – Gasoline*案中表示，對解釋適用條約具國際習慣法地位之維也納條約法公約在WTO體系下亦有適用，但上訴機構在該案中僅明示條約公約第 31 和第 32 條為其適用規範，至於第 30 條等其於部分則未見說明。因此倘對上訴機構在*US – Gasoline*見解採嚴格解釋，WTO爭端解決機構可適用者則將限於條約法公約第 31 和第 32 條，相對

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[425] Vienna Convention art. 30(3).

[426] *Id.* art. 30(4)(a).

[427] 認爲應採嚴格解釋者，*see e.g.*, AUST, *supra* note 375, at 227–28；採寬鬆解釋者，*see e.g.*, L. GURUSWAMY & BR. HENDRICKS, INTERNATIONAL ENVIRONMENTAL LAW (1997).

[428] WOLFRUM 和 MATZ 教授認爲維也納條約法第 30 條不是被成文化的國既習慣法。*See* RÜDIGER WOLFRUM & NELE MATZ, CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW 148 n.317, *citing* E. Sciso, *On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties*, ÖZöRV 28 (1987), 161 et seq. (165) (2003). 持相反見解者，*see* AUST, *supra* note 375, at 227–28; *see also* Jan B. Mus, *Conflicts between Treaties in International Law*, 45 NETH. INT'L L. REV. 208, 208–32 (1998).

倘採較寬鬆解釋，則似可認舉凡維也納條約法公約對條約解釋適用之指示說理在WTO下均可適用，而形成維也納條約法公約第 30 條將以條約法形式被適用，抑或是以國際習慣或一般法律原則適用，將取決於對*US – Gasoline*案解釋寬嚴而有所不同之現象；惟本文認為，*US – Gasoline*上訴機構之意思在於說明WTO規範不應異於國際習慣法之解釋方式，因此縱使條約法公約第 30 條在該案中並未被列舉為WTO可適用規範，但從使WTO和國際法相互融合之立場出發，此條文仍可作為解決WTO和RTA爭端管轄條款適用關係之規範。

第四款　後法優於前法原則（the principle lex posteria derogate lex priori）

和維也納條約法公約第 30 條相似的，後法優於前法概念乃係同一事項先後訂定條約時，後訂定者應優先於先訂定者適用[429]，而在適用此原則時及應注意（1）二條約是否係對同一事項之規範；及（2）二條約締約國是否全部相同。

首先，WTO在*India – Autos*案的判決中顯示，對於二條約是否為對「同一事項」規定應採嚴格解釋[430]，然而因RTA和DSU均係對締約國間貿易爭端救濟程序之規範，因此將之認定為同一事項應無問題，且縱使採取最嚴格之解釋，吾等也至少RTA爭端管轄條款論及RTA對WTO爭端審判決及對締約國別訴限制之部分認定為和DSU屬同一事項之規範。然而，在二條約締約國是否相同問題上，因國際法一般法律原則下的後法優於前法概念，未如維也納條約法公約第 30 條般針對條約締約國是否相同而賦予此原則適用之不同效力[431]，也因此在適用此僅以時間軸之先後作為認定對同一事項規

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[429] Black's Law Dictionary's definition, "The principle that a later statute negates the effect of a prior one if the later statute expressly repeals, or is obviously repugnant to, the earlier law" (9th edn. 2009).

[430] Panel Report, *Indonesia – Measures Affecting the Automotive Sector*, ¶ 14.99, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) (adopted July 23, 1998) [hereinafter *Indonesia – Autos*].

[431] WOLFRUM 和 MATZ 教授認爲，在締約國不完全相同的多邊協定下，後法優於前法概念並不適合用予解決條約適用關係。*See* WOLFRUM & MATZ, *supra* note 428, at 152 provides, "For those multilateral treaties not having identical States Parties or for those referring to distinct functional objectives, it might be inappropriate to refer to a general *lex posterior* rule.

範的條約適用優先順序時，因各條約之議決方式和締約國締約時的主觀亦是可能均有所差異，因此似宜採較嚴格之解釋，而僅可在先後訂定條約均有相同締約國時適用此原則[432]，本文亦贊同此見解。在此情況下，因RTA和WTO間其締約國並非全不相同[433]，是而RTA爭端管轄條款和WTO下DSU之適用關係似無法以後法優於前法概念加以調適適用。

第五款　特別法優於普通法原則（the principle lex specialis derogat legi generali）[434]

在二條約發生真實規範衝突時，特別法優於普通法原則乃指示此時「特定性規範（more special norm）」應優先於「原則性規範（general norm）」之適用[435]，而此原則也被國際法院在*Gabcikovo*案中用以擇定應適用條約[436]。根據Pauwelyn教授所整理Grotius、de Vattel和Pufendorf等學者對特別法優於普通法原則之法理，特定性規範應優先於原則性規範之主要原因為「特定性規範係較有效或精確之規範，在適用有助於產生較少的例外情況；且特定性規範能較精確反映締約國處理面對問題之解決合意」[437]，其中對特定性之認定又可分別從「規範事務（subject matter）」以及「締約國

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432 Jenks 教授對僅以時間爲決定要素而讓條約之訂定時間先後作爲條約適用持反對態度，*see* C.W. Jenks, *the conflict of Law Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 405 (1953)；*see also* PAUWELYN, *supra* note 371, at 369–70。

433 當然也有可能出現 FTA 和 WTO 締約國相同狀況，不過締約國間選擇以 FTA 形式簽訂貿易協定之目的，即係爲了避免多邊談判可能面對的複雜狀況，因此

434 *See* AUST, *supra* note 375, at 249.

435 PAUWELYN, *supra* note 371, at 385.

436 *Case Concerning the Gabcikovo–Nagymaros Project* (Hungary v. Slovakia), 1997 ICJ Report, ¶ 132 [hereinafter *the Gabcikovo case*].

437 PAUWELYN, *supra* note 371, at 387 provides, "(i) the special norm is the more effective or precise norm, allowing for fewer exceptions (the lex specialis, if it prevails, is, indeed, already an exception to the lex generalis); and (ii) because of this, the special norm reflects most closely, precisely and/or strongly the consent or expression of will of the states in question." 前述概念統整自 HUGO GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX 413 (D. Alland and S. Goyard-Fabre, eds., Paris: Presses Universitaires de France, 1999); EMER DE VATTEL, LES DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE 511 (Lyons: Gauthier, 1802); SAMUEL VON PUFENDORF, DROIT DE LA NATION ET DES GENS, Book V, Chapters XII–XXIII (*quoted in* DE VATTEL, DROIT

（membership）」二點進行觀察。[438]

首先，以條約規範事務而認定之規範特定性，乃對於同一主體而其一條約對該主體有更精確或直接之規範，舉例而言，相較於一般國際公法，WTO自係對國際法中貿易領域之特別規範；而WTO規範中，為處理締約國間生物檢疫措施施行而制定之「食品安全檢驗與動植物防疫檢疫措施協定（the Agreement on the Application of Sanitary and Phytosanitary Measures，簡稱SPS協定）[439]」和為處理技術性標準和規範而訂定的「技術性貿易障礙協定(Agreement on Technical Barriers of Trade，簡稱TBT 協定)[440]」，即被認係GATT之特別規範而於涉及生物檢疫措施和技術性規範時優先獲得適用[441]。至於以締約者作為條約特定或原則性區分者，並非指二條約比較下締約國較少者即具特別法資格[442]，相對的，其係指特定締約國在特定性規範中，不論在規範細節或二條約共同目的之實踐上，訂定了較原則性規範更進一步的規定[443]。WTO爭端解決機構在*Canada – Periodicals*案中，及處理了GATT和GATS潛在衝突時的規範適用問題，其中並認為當GATT對系爭爭端具較細節規範時應優先適用，此外，在*EC – Sardines*案爭端解決小組處理GATT和TBT協定關係時和*EC – Banana III*上訴機構處理*Agreement on Import Licensing Procedures*和GATT第X條第(3)項第(a)款時，均運用了特別法優於普通法原則以決定應適用規範[444]，*Indonesia – Autos*之爭端解決小組更直言特別法原則在處理條約衝突競合時乃相連結之概念（*lex specialis* principle is inseparable linked to the

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DES GENS, 511).

[438] PAUWELYN, *supra* note 371, at 389.

[439] Marrakesh Agreement Establishing the World Trade Organization annex 1A, Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

[440] Marrakesh Agreement Establishing the World Trade Organization annex 1A, Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[441] PAUWELYN, *supra* note 371, at 397–98.

[442] *Id.* at 390.

[443] *Id.*

[444] Appellate Body Report, *EC – Banana III*, ¶ 204; Panel Report, *EC – Sardines*, ¶¶ 7.15–.19.

question of conflict）[445]，特別法優於普通法原則自係WTO下可用以解決規範衝突之國際法原則。[446]

綜上，對於WTO和RTA爭端之管轄規範議題，既在DSU下WTO締約國在對WTO協定適用有所疑義或認其權益受損之 情況下均有提訴權利，DSU之規範對WTO締約國自屬原則性爭端解決規範；相對的，RTA爭端解決條款之訂定，僅處理特定當事國間發生貿易爭端時RTA締約國間之貿易救濟規範，更遑論此等條款之發動往往更包含了如涉及貿易環境等爭端之處理[447]，和DSU相比之下，RTA爭端管轄條款自係締約國間就特定事項（或特定對象間）適用之特別規範而屬特定性規範條款。因此，當面對締約國在RTA下設定爭端管轄條款而可能造成WTO爭端解決機制不得行使管轄權時，根據特別法優先於普通法規範，締約國間特別訂定之RTA爭端管轄條款自應優先於DSU而適用，是而倘締約國已合意在特定情形下排除WTO爭端解決機構對爭端之強制管轄權，該特定性條款自應或優先之適用。

第六款　誠信原則

誠信原則在條約解釋和在一般國際法原則下，具有不同意涵並扮演著不同角色[448]。一般國際法原則下的誠信原則，強調的是締約國如何踐行條約履行的問題[449]；相對的，

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[445] Panel Report, *Indonesia – Autos*, ¶ 14.63.

[446] 相同見解，*see* PALMETER & MAVROIDES, *supra* note 14, at 82.

[447] *See, e.g.*, NAFTA art. 2005(4) provides: "In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,
where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement."

[448] WAINCYMER, *supra* note 75, at 498.

[449] *See id.* at 499. 舉例而言，維也納條約法公約第 26 條的條約必須遵守原則和聯合國憲章第 2 條第 2

條約解釋下誠信原則概念，則強調於維也納條約法公約第 31 條第一項的實踐。[450]

(1) 遵約概念下的誠信原則

*US – Offset Act (Byrd Amendment)*認為締約國就遵約概念下誠信原則違反之要件，乃締約國故意的違反條約規範[451]，因此倘RTA締約國間訂有排除WTO爭端解決機制管轄之爭端管轄條款，又復將案件遞交請求WTO爭端解決機制，此情形下基本上應不難認定原告國有意違背相互簽署之RTA管轄條款而違反誠信原則。

然而，WTO上訴機構雖肯認爭端解決機構有權認定締約國對所簽署條約最大善意之違反[452]，然而對WTO之爭端解決機構而言，其對誠信原則違反之權限，亦僅止於對締約國是否遵循WTO規範[453]，是而在*Argentina – Poultry Anti-Dumping Duties*案中，雖被告在該案中抗辯當事國間的奧利佛斯議定書將影響WTO對爭端解決機制對案件之管轄權，而使原告之提訴行為構成對奧利佛斯議定書遵約之誠信原則的違反，但因WTO爭端解決小組維持其不認RTA或其附帶議定書屬WTO內括協定之一部份且對該些協定履約無管轄之見解，造成不論締約國是否以誠信原則遵循RTA爭端管轄條款，WTO均對此等爭端無管轄權亦無審酌餘地。[454]

(2) 條約解釋概念下之誠信原則

在*US – Shrimp*案中，上訴機構認為誠信原則的應用之一即係「權利濫用（*abus de droit*）」，並要求締約國應以「善意（bona fide）」且「合理（reasonable）」方式解釋適

項規定，即包含了以最大善意遵守締約國所簽訂條約的概念；此外，維也納條約法公約第 18 條條約簽署國於條約生效前應避免從事違背條約宗旨和目的的行爲，亦係對簽署國以最大善意遵循所簽訂條約之要求。

[450] Vienna Convention art. 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

[451] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, ¶ 298.

[452] *Id.* ¶ 297.

[453] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.36 at 20.

[454] *Id.*

用規範[455]；而在*US – Section 301* 案中，爭端解決小組更認為對可能同時有多數解釋方法的條約進行解釋時，與其決定何種解釋方法不符合誠信原則（in bad faith），更好的處置是決定何種解釋方法表徵了締約者較佳的善意（better faith），更能完整體現誠信原則的意涵。[456]

在 WTO 和 RTA 間因 RTA 爭端管轄條款所生的爭端解決機制管轄競合關係中(特別是訂有別訴權利排除型專屬管轄之 RTA 下)，將可能產生全然排除 RTA 適用、優先適用 WTO 規範而於二規範不衝突狀況下以 RTA 補充、優先適用 RTA 規範甚或是完全排除 WTO 規範適用等狀況。然則，根據前述爭端解決小組在 *US – Section 301* 案的解釋，在締約國簽署 WTO 和 RTA 下，逕行全然排除此二中其一者之適用，顯然不符合締約者應儘可能履行其條約義務之概念，故縱「誠信原則」遵約概念未能指示條約衝突時規範適用之必然處理方式，但其至少顯示對二衝突規範不應任意對其一逕行拒絕適用，因此在 WTO 和 RTA 規範均可能有適用空間下，爭端解決機構審酌其對案件管轄權有無時，自也應盡可能的對 WTO 和 RTA 規範均加以適用，單純排除一規範之適用並非妥適之條約衝突處理方式。

第三項　以一般國際法原則處理爭端解決機構管轄衝突問題

第一款　禁反言原則（principle of estoppels）

1. 概念介紹

禁反言原則，乃係誠信原則之子概念，其認為表意者不得嗣後否認其曾為表意之事實[457]；鑒於禁反言原則主旨乃一國應受其自身表示之拘束概念，在實踐上，禁反言

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[455] Appellate Body Report, *US – Shrimp*, ¶ 158.

[456] Panel Report, *US – Sections 301 Trade Act*, ¶ 7.68.

[457] *See* BROWNLIE, *supra* note 204, at 643. 但禁反言原則和前述誠信原則違反之差異在於此原則之適用，一國之行為無須係出於惡意（bad faith），*see also* T.W. Bowett, *Estoppel Before International Trivunals and its Relation to Acquiescence*, 28 BRIT. Y.B. INT'L L. 156, 176；亦可參見俞寬賜，國際法新論，頁 49（2005）。

原則又較常被適用於程序問題之處理上[458]。根據國際判決和各國實踐所整理出之禁反言原則要件，其包含了：（1）該聲明事實清楚而不模糊；（2）此聲明之作出為自願、無條件且有權的；以及（3）將因此聲明不被遵守而受損害者或因此聲明之實踐而獲得利益者，係以最大善意信賴此聲明[459]。而常設國際法院（Permanent Court of International Justice，簡稱PCIJ）在東格陵蘭法律地位案[460]中，認為挪威外交部長在向丹麥政府表示，其將不爭辯格陵蘭全島之政經利益的「依連宣言（the Ihlen Declaration）」之內容，將對挪威有拘束力[461]，因此挪威不得就丹麥對格陵蘭島島主權行使加以抗議，亦不得占領該島之部分土地[462]，而凸顯了一國受其先前表示之拘束；而國際法院在「維希神廟」案中論及禁反言原則時，表示此原則係避免一國於法院再度爭執對其前已陳述之事實，並使他國得基於一國之聲明保有其應享受之利益[463]；在學理上，眾多學者亦認為禁反言原則係一般國際法原則。[464]

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[458] WAINCYMER, *supra* note 75, at 505.

[459] Bowett, *supra* note 457, at 176, "(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."

[460] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 15).

[461] *Id.* at 71.

[462] *Id.* at 73.

[463] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 ICJ Report 6, 143–44, "operate to prevent a state contesting before a court a situation contrary to a clear and unequivocal representation previously made by it to another state, either expressly or impliedly, on which representation the other states was, in the circumstances, entitled to rely and in fact did rely, and as a result that the other state has been prejudiced or the state making it has secured some benefit or advantage for itself." [hereinafter *Temple case*].

[464] *See* BROWNLIE, *supra* note 204, at 17–8. The court has used this source sparingly, and it normally appears, without any formal reference or label, as a part of judicial reasoning. However, the Court has an occasion referred to general notions responsibility. In the *Chorzow Factory* case the court observed: '. . . one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, be some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him'. In a later stage of the same case the following statement was made: '. . . the Court observes that it is a principle of international law,

2. WTO 下之禁反言原則

WTO規範下是否有禁反言原則之適用，學理上仍有爭論，其中認為禁反言原則在WTO下無適用者之主要論述依據，在於爭端解決小組在*EC – Bananas I*中駁回了此原則之適用[465]；然而，從*Argentina – Poultry Anti-Dumping Duties*案在處理禁反言原則適用問題時仍回歸適用*EC – Bananas I*賦予禁反言原則之定義可知[466]，縱使*EC – Bananas I*案中小組似乎未採納當事國禁反言原則之主張，然而，從小組在該案中拒絕適用禁反言原則之原因並非該原則不可適用於WTO下，而係因該原則之構成要件在系爭案件中並未被滿足之點觀察，且如*Mexico – Corn Syrup (Article 21.5 – US)* 案中，上訴機構表示當事國不得在訴訟程序中，就其在協商階段未提出反對之點復行主張[467]，以及在*US – FSC*[468]和*US – Softwood Lumber*[469]等案中，雖然上訴機構或爭端解決小組在判決中未直接使用「禁反言」文字，但其仍依禁反言原則之法理審酌一國是否因其過往聲明而不得對他國再行主張，前述之WTO判決顯示了WTO實務已接受並已於審判實務中對禁反言原則實質適用之事實，此外，許多學者亦同樣認為禁反言原則已係在WTO下

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and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’. In a number of cases the principle of estoppels or acquiescence (preclusion) has been relied on by the Court, and on occasion rather general references to abuse of rights and good faith may occur. *See also* Judge Alfaro and Fitzmaurice in the *Temple case*, 1962 ICJ Report 39–51, 61–65; Bowett, *supra* note 457, at 202; H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 168–72 (2d edn. 1958). 施文真教授之文章，對東格陵蘭法律地位案和維希神廟案亦有詳細之介紹，參見施文貞，由「片面宣言之效力」與「禁反言原則」於 WTO 爭端解決之適用論我國片面遵守環保公約之政策，綠化 WTO？—貿易、環境與台灣，頁 208–211（2008）。

[465] GATT Panel Report, *EEC – Banana I*, ¶¶ 361–63, at 79. Waincymer 教授認爲禁反言原則在 WTO 之適用尚不明確，*see* WAINCYMER, *supra* note 75, at 507.

[466] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.17, *citing* GATT Panel Report, *EEC – Banana I*, ¶ 361, “estoppel could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES.”.

[467] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, ¶ 51–75.

[468] Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”*, ¶ 133, WT/DS108/AB/R, (Feb. 24, 2000) (adopted Mar. 20, 2000) [hereinafter *US – FSC*].

[469] GATT Panel Report, *United States – Measures Affecting Imports of Softwood Lumber from Canada*, ¶¶ 308–25, B.I.S.D. 40S/358, 480–86 (adopted Oct. 27, 199) [hereinafter *US – Softwood Lumber*].

加以運用的一般國際法原則。[470]

因各國對各條約約款之簽署和批准，可認為係締約國接受該約款拘束之意思表示，而WTO和RTA爭端管轄機制因RTA爭端管轄條款而出現之管轄競合競合或衝突問題，吾等亦可將其解讀為係締約國同意受DSU和RTA爭端管轄條款拘束，所產生的意思表示衝突問題而加以處理。對於禁反言原則之定義，*Guatemala – Cement II*案採用了Ian Brownlie教授的見解認為其係指「一國信賴他國之前行為倚賴於他國之保證，因而倘他國改變立場將導致信賴國受損時，他國變更立場之行為將被禁止」[471]，與前述國際法院見解相似的，其均要求禁反言原則的適用，需達成(1)該聲明事實清楚而不模糊；（2）此聲明之作出為自願、無條件且有權的；以及（3）將因此聲明不被遵守而受損害者或因此聲明之實踐而獲得利益者，係以最大善意信賴此聲明，等三個要件的合致[472]，以下即就各要件分別論述之：

3. 禁反言要件之檢驗

(1) 聲明明確性要件

根據*Argentina – Poultry Anti-Dumping Duties*案之操作，禁反言原則適用之要件，則依*EC – Banana I*案見解認為「禁反言原則僅在當事國先前已存有明確合意時方有適

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[470] *See* Thomas Cottier & Krista N. Schefer, *Non-Violation Complaints in the WTO/GATT Dispute Settlement: Past, Present and Future*, *in* INTERNATIONAL TREADE LAW AND THE GATT-TWTO DISPUTE SETTLEMENT SYSTEM 145, 177 (Petersmann ed. 1997); *see also* Kuijper, *supra* note 133, at 231–32. *Contra* MATSUSHITA ET AL., *supra* note 14, at 83 provides, "[t]he *estoppel* principle as we know it in public international law has not achieved its place in the WTO legal regime."

[471] Panel Report, *Guatemala – Cement II*, ¶¶ 8.23–.24, *citing* BROWNLIE, *supra* note 204, at 640–42, "Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded."

[472] Bowett, *supra* note 457, at 176, "(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."

用[473]」；針對要件中當事國之合意需為「明確」之要求，由於明確與否乃不確定法律概念，因此於下即試分析各類型RTA爭端管轄條款中是否構成締約國「明確放棄對同一事件再提請裁決之合意」。

A. RTA 未設爭端解決機制或無爭端管轄條款者

根據本論文第貳章第三節中對 RTA 爭端解決條款之分類，由於未設有爭端解決條款者當事國間根本無爭端管轄衝突問題之存在，因此自無分析明確性要件適用可行性問題；而在 RTA 下設有爭端管轄機制但僅規定該機制可管轄締約國間貿易爭端時，因締約國在該種 RTA 爭端管轄條款中並作出將影響其於 WTO 或其他爭端解決機制救濟權行使之意思表示，是故基本上應不能認以滿足締約國有放棄對同一爭端另尋裁決「明確」意思表示而無禁反言原則之適用。

B. 一般型專屬管轄和別訴權利排除型專屬管轄者

對於締約國在 RTA 下設有爭端解決機制並授予其對特定貿易爭端裁決權，且在「一般型專屬管轄」和「別訴權利排除型專屬管轄」此二類型的 RTA 爭端管轄條款下達成對 RTA 或 WTO 爭端管轄機制管轄權限之意思表示時，相異爭端解決機構間即有依禁反言原則決定締約國可行使救濟權之問題。

在「一般型專屬管轄」類型條款中（即締約國表示特定爭端僅可由特定爭端解決機制處理，如 NAFTA 第 2005 條第 4 項表示涉及環境保護等特定爭端，僅可由 NAFTA 爭端解決機制管轄並裁決），締約國在一般型專屬管轄條款下明示「該爭端謹可由特定爭端解決機制管轄」，此時締約國一旦將該爭端提交於其他爭端解決機制處理，根據禁反言原則及其適用，締約國向他爭端解決機制的提訴將被禁止。

在「別訴權利排除型專屬管轄」類型條款下，締約國則是以約定在爭端經裁決後排除其他爭端解決機制對該爭端之管轄以避免複數裁決之出現，因此種爭端管轄條款

[473] Panel Report, *EC – Banana I*, ¶ 361 n.44. 當事國並未就爭端解決小組對禁反言原則之見解提起上訴。

明示締約國於爭端經審議後「不得向他爭端解決機制尋求救濟」，因此和一般型專屬管轄相似的，因締約國於此條款中表達了在爭端經裁決後放棄向其他爭端解決機制尋求救濟之意思，因而在訂有此等條款下締約國尋求重複裁決之行為將因禁反言原則之適用而遭到阻卻。

C. 一般型專屬管轄和別訴權利排除型專屬管轄適用禁反言原則之差異

在上述分析中，「一般型專屬管轄」和「別訴權利排除型專屬管轄」的規範形式雖不相同，但二種條款似均可適用禁反言原則而避免締約國對同一爭端尋求複數裁決。惟本論文認為，採正面表列「可裁決締約國爭端之爭端解決機制」的「一般型專屬管轄條款」和以反面排除方式訂定「締約國不可尋求其他爭端解決機制之救濟」之「別訴權利排除型專屬管轄」，對禁反言原則適用的可能性將因對該原則之「明確性」要件適用寬嚴差異而有所不同。

首先，以禁反言原則處理 RTA 和 WTO 爭端解決機制衝突與競合之目的，在於擇定一爭端解決機制以避免同一爭端經相異爭端解決程序審議而出現複數裁決，而由於向爭端解決機制尋求救濟可被認為係締約國於協定下之權利，因此倘欲適用禁反言原則而排除締約國對其救濟權或訴權之行使，端視締約國放棄行使該救濟權或訴權之意思是否明確。

在「別訴權利排除型專屬管轄」條款中，無疑問的，締約國已明確的同意排除其在其他爭端解決機制下之訴權行使；然而，在「一般型專屬管轄」條款中，我們認定締約國適用禁反言原則而不能重複提訴原因，乃係「推論」締約國「明示」將對爭端之裁決權限制由一爭端解決機制行使時，締約國同時帶有放棄向其他爭端解決機制尋求救濟之「默示」表示。雖然在此分析下「別訴權利排除型專屬管轄」條款和「一般型專屬管轄」條款之差異性僅在於「一般型專屬管轄」條款下締約國放棄訴權之意思表示，並未直接明文定於條文而係邏輯推導所得出之默示表示；然而，倘對禁反言原則之「明確性」要件採最嚴格解釋，則此時亦可能僅有在條文「明示」締約國於擇定

爭端解決機制後放棄對其他爭端解決機制之訴權的狀況下，方能以禁反言原則排除締約國之重複提訴，在此情況下，僅具默示放棄項其他爭端解決機制提訴之「一般型專屬管轄」條款，自有可能不符合明確性要件而無法援引禁反言原則以釐清爭端解決機制間管轄權競合的所產生之爭議。

(2) 自願性及有權表示

一國受其表示之拘束而不得為相反主張之前提，在於該表示係有效的。在禁反言要件中，為了確保國家主張之有效性，首先除要求該表示為有權者所作出者外，更要求表示在作成時，表示人係出於自願性，以排除在強暴、脅迫下等有瑕疵意思表示之適用。基本上，RTA 管轄條款應係締約國之有權代表簽署所作之表示，在自願性及有權要件上，並無太大問題。

(3) 他國利益因禁反言而受損害

經有權者在意思自由下作出之表示，國家尚並不必然受其拘束，禁反言原則之成立，尚需有第三國因信賴該表示而取得利益，並將因表示國違反該宣言而受損害才會成立。RTA 之爭端管轄條款倘欲適用禁反言原則，而使 RTA 締約國簽署專屬管轄款後，選定 RTA 爭端解決機制審理紛爭時，不得再向 WTO 爭端解決機制提訴，援引禁反言原則為抗辯之 RTA 締約國，自需證明其因他造不遵守 RTA 專屬管轄條款所受之損害。

雖然在 *Argentina – Poultry Anti-Dumping Duties* 案中，爭端解決小組認為在該案中並看不出，同樣以對造國在 RTA 下之表示而適用禁反言原則的阿根廷，因對造國巴西不遵守專屬管轄，所讓巴西取得之利益或對使阿根廷受有損害，然本論文認為爭端解決小組在該案的論述有所違誤。首先，爭端解決小組忽略了倘巴西不遵守專屬管轄條款之行為不受限制，此時專屬條款對巴西顯然將失去拘束力，巴西也將因此獲得掙脫 RTA 條款限制以及無須遵守條約協定之利益。再者，既巴西和阿根廷在 MERCOSUR 下以就爭端解決機制有所約定，倘巴西得恣意排除專屬管轄之適用，此時阿根廷在 MERCOSUR 中專屬管轄條款之條約利益即無法達成，自也將因此受有損害。此外，

倘因此案在 MERCOSUR 下爭端解決機制審議，因可同時適用 MERCOSUR 之規範，對阿根廷而言，RTA 規範之適用與否自也對其於訴訟之勝敗有極深之影響，難謂阿根廷之利益不受其影響。綜上，Argentina 案中爭端解決小組認為阿根廷並未因巴西不遵守專屬管轄條款而受有損害之見解，甚難贊同。

延續對 *Argentina – Poultry Anti-Dumping Duties* 案爭端解決小組見解之分析，本論文認為舉凡 RTA 訂有爭端管轄條款者，倘訴訟中一造欲援引 RTA 爭端解決條款以擇定爭端管轄機關時，雖然 RTA 條約義務之違反可能將以國家責任加以處理，但不可否認的是，主張適用 RTA 爭端管轄條款之當事國，至少有 RTA 之履行利益存在，且倘因 RTA 爭端管轄條款適用，對締約國在應訴或法庭近用便利性等，均難謂無利益存在，因此對於以 RTA 條款主張禁反言要件時，要求信賴利益或將受損害之第三要件之合致，亦應無適用問題。

4. 小結

綜上，基於禁反言原則乃 WTO 下已被接受適用之國際法原則，而「一般型專屬管轄」和「別訴權利排除型專屬管轄」條款中，分別有締約國放棄擇定爭端解決機制後，放棄向其他爭端解決機制提訴之「明示」或「默示」意思表示，因此倘爭端當事國間簽訂有此二類型條款，且又無合意將已經裁決之爭端另交由其他爭端解決機制再行審理，此時拒絕讓案件被重複審理之當事國自主張禁反言原則使其他當事國重複提訴行為之不生效力；且縱使如前所述對禁反言原則之明確性要件採最嚴格解釋，至少採行「別訴權利排除型專屬管轄」條款之締約國間符合明確性要件，在表示自願性和信賴利益等要件履行無意外狀況下，其將有禁反言原則之適用，而可阻卻他國重複提訴行為之發生。

5. 與片面宣言之比較

在國際法上與禁反言原則相似之概念，尚有ICJ在法國核子試爆案[474]中適用的「片

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[474] Judgement of Nuclear Test (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Judgement of Nuclear Test (N.Z. v.

面宣言」。所謂的片面宣言，是指國家所為之片面、單方行為，所可能對國家形成之特定法律義務，其與禁反言原則之最大差異，在於片面宣言中，不論其他國家是否對該宣言有所信賴，在符合特定要件後行為或宣言作成國，均將因其宣言或表示負擔國際法義務。[475]

然而，因 RTA 下爭端管轄條款之性質，屬 RTA 締約國間合意形成之國際法義務，因此與片面宣言之單方性要件有所不同；此外，目前片面宣言僅除在 ICJ 核子試爆案中，因此其要件及法律效果及地位均上不明確，與已普遍被肯認具一般國際法原則的禁反言原則比較下，亦不宜直接將片面宣言納入 WTO 規範之適用，故本論文認為對 RTA 爭端管轄條款效力之探討上，甚難以片面宣言而形成其法律效果。

第二款　既判力原則（principle of *res judicata*）

既判力此一般國際法原則[476]，其概念係指倘一事件已經司法裁決，此案件不應被重複訴訟[477]。在WTO體系下，既判力亦係一已被成熟適用的國際法原則[478]，不論在

Fr.), 1974 I.C.J. 457 (Dec. 20).

[475] 關於片面宣言介紹，參見施文真，前揭（註 464），頁 182–205、213–214。

[476] *See e.g.*, WAINCYMER, *supra* note 75, at 510, 519 (*citing* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996: VOL.3, PROCEDURE 1656 n.206 (3rd edn. 1997)); CHENG, *supra* note 204, at 336–64; Effect of Awards of Compensation Made by the UN Administrative Tribunal, advisory opinion, 1954 I.C.J. 47, 61 (July 13).　亦可參見黃異，國際法，頁 42（2010）。

[477] *See* WAINCYMER, *supra* note 75, at 519, "*Res judicata* is a principle suggesting that if a matter has been judicially determined, it cannot be relitigated." *See also* BROWNLIE, *supra* note 204, 17–18. "[A]n international tribunal may be bound by its constitute instrument, usually an agreement between two or more states, to accept certain categories of national decisions as conclusive of particular issues."; *see also* BLACK'S LAW DICTIONARY (9th edn. 2009), "[Latin "a thing adjudicated"] 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit."

[478] PAUWELYN, *supra* note 371, at 110. 惟因既判力原則顯已係超越「條約解釋方法（rules of interpretation）」的國際法原則，因此受爭議之點仍在於不屬條約解釋方法之國際法一般法律原則，在現行 DSU 或 WTO 規範下是否可作為審議 WTO 爭端之法源依據。

Japan – Alcoholic Beverage II 、*US – FSC*、 *US – Shrimp (Article 21.5 – Malaysia)* 以及 *US – Offset Act (Byrd Amendment)*案中，我們均可發現爭端解決機構對此原則之適用 [479]；而此原則適用之要件包含了：(1) 爭端當事國相同 (identity of parties)；(2) 爭端為同一事實 (identity of object or subject matter)；以及 (3) 爭端所爭執客體相同 (identity of cause or legal basis of the action)。[480]

在既判力原則的適用下，已經過司法裁決的案件不得再次訴訟而可避免重複判決，且亦可避免複數判決出現情形下判決所持歧異見解歧異的狀況出現；相似的，在 WTO 和 RTA 所出現管轄衝突競合問題的處理上，我們同樣是欲避免相同當事國對相同爭端重複訴訟，而產生可能造成國際法脆裂之結果發生，因此倘既判力原則之重複訴訟禁止效果可適用於當事國對 WTO 和 RTA 爭端解決機構所提訴訟之處理，自可限縮締約國重複救濟之主張。

然對於既判力原則適用之三要件，認定二爭端之當事國和爭端事實同一並不困難，但亦發生爭議者在於當事國間「爭執客體」異同之認定。首先，「爭執客體」相似性可從當事國爭執之規範加以認定，在此概念下，爭執客體是否相同取決於當事國在二訴訟中所主張之違反之規範是否相同，基本上因條約締約國對其所簽訂之各條約均有遵守義務，因此不論A和B條約中規範是否相同，倘前訴訟中當事國爭執者為A條約規範之違反，而後訴訟中當事國復爭執B條約規範的違反，此時因當事國在二訴訟中奶分

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[479] *See* Appellate Body Report, *Japan – Alcoholic Beverage II*, at 14; Appellate Body Report, *US – FSC*, ¶ 108; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, ¶ 97; Appellate Body Report, *US – Offset Act*, ¶ 7.57.

[480] *See* Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFRICAN J. INT'L L. 38, 38–39 (1996). 上訴機構在 *US – Offset Act* 中表示既判力原則適用之要件爲"[F]or *res judicata* to have any possible role in WTO dispute settlement, there should, at the very least, be essence identity between the matter previously ruled on and that submitted to the subsequent panel"，從其中「向後續法院請求救濟（submitted to the subsequent panel）」論述，"subsequent"應非單純指提訴時間先後問題，而係蘊含了二案件遞交之法院間有「同一法院」或「相關聯法院」之關係，因此亦可認既判力原則適用包含了第四個要件，亦即是審理爭端法院間「同一性」或「相關聯性」的要求，*see also* Appellate Body Report, *US – Offset Act*, ¶ 7.66。

別請求法院裁決當事國對A條約和B條約義務的履行，因此前訴訟對A條約遵守之認定和對B條約遵守之認定並不相同，並無法滿足「爭執客體」相同的概念，亦無既判力原則之適用。然而，倘對「爭執客體」的相似性係從規範本質或內容而非當事國對各個別條約之履行加以決定，此時倘A條約和B條約規範內容實質相同（甚至使用文字等均相同，其差別僅在於一訂於A條約另一訂於B條約），不論當事國間就A條約或B條約之規範違反之爭執已經過裁決，此時當事國即不得再對另一條約另訴而請求裁判。簡言之，既判力原則是否能有助於解決當事國於不同爭端解決機制下的重複訴訟，將取決於對「爭執客體」相似性要件之認定方法，一般而言，因國際法下各國對其所簽署之條約各有遵約義務，除條約間具有從屬關係之外，各條約間的遵約狀況亦獨立判斷，因此對「爭執客體」相似性多以所爭執規範是否相同加以決定[481]。

此外，在以既判力原則處理RTA和WTO爭端解決管轄競合與衝突之處理方式時，吾等亦須認識到操作適用既判力原則而排除後提訴訟者，不論是從*US – Offset Act (Byrd Amendment)*案對「subsequent panel」之解釋[482]或從當前國內法院判決和國際審判機關間有無既判力原則適用之論述觀察[483]，一般認為不同法體系間作成的判決並無既判力原則之適用，從此可知既判力原則的適用，除了需具備係相同當事國對同一事實同一規範所發生之爭執之三要件外，尚包含了向「同一法院」請求裁決之第四要件，

[481] 目前FTA下別訴權利排除型專屬條款類型，亦有以規範內容實質同一性為要件，而要求WTO和FTA規範相同時排除締約國對一爭端請求並獲裁決後另訴之權利。*See, e.g.*, EU – Korea FTA, Article 14.19 (Relation with WTO obligations): 2. However, where a Party has, with regard to a particular measure, initiated a dispute settlement proceeding, either under this Chapter or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has been concluded. In addition, a ***Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums. In such case, once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress of the identical obligation under the other Agreement to the other forum***, unless the forum selected fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation (emphasizes added).

[482] *See* Appellate Body Report, *US – Offset Act*, ¶ 7.66

[483] WAINCYMER, *supra* note 75, at 522.

因此對於RTA和WTO此二相異爭端解決機制間所作成判決，在爭端解決機制間未規範或設置有相互承認判決制度情況下，該原則是否仍可適用以解決爭端解決機制間的管轄衝突問題即值懷疑。

第三款　遵循先例原則（principle of *stare decisis*）

遵循先例原則乃係源自於普通法系之內國法原則[484]，乃指法院對一法律爭議之見解在被更上級法院修正前，對所有涉及相似爭端的當事國均有適用[485]，並藉以產生法律的「確定性（fixity）」。[486]倘遵循先例原則可適用於WTO和RTA對爭端之管轄競合與衝突之處理，一旦爭端經任一爭端解決機制審理後，根據遵循先例原則，此時後審理法院即須依前審法院見解加以審判，而有助於統整規範適用之一致性，似亦可達成避免爭端裁決歧異出現的目標，並防免國際法之脆裂。

然而，國際法下並無判決先例拘束效概念之存在[487]，國際法院規約第59條亦已明確表示國際法院所作出裁決除對各該當事國外並無拘束效力[488]；此外，WTO爭端解決機制亦已多次表示其審理案件時不受上訴機構和爭端解決小組前案見解的拘束[489]，顯而易見的，遵循先例原則在WTO法下並無適用可能性，因此並無法仰賴此

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[484] *Id.* at 510.

[485] *Id.* at 520; *see also* BLACK'S LAW DICTIONARY, "Latin "to statnd by things decided"] The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation". For general concept of *stare decisis*, *see generally* Hon. Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. 11 (1929).

[486] Henry, *supra* note 485, at 12–13.

[487] WAINCYMER, *supra* note 75, at 510.

[488] ICJ Statute art. 59.

[489] *See, e.g.*, Appellate Body Report, *Japan – Alcoholic Beverages II*, p.14–15; Appellate Body Report, *US – FSC*, ¶ 108; Panel Report, *India – Patents (EC)*, ¶ 7.30. 前上訴機構成員松下滿雄（Mitsuo Matsushita）教授認為，雖然WTO法制發展有朝普通法系靠攏之趨勢，但仍強調WTO下無遵循前例原則之概念，*see* MITSUO MATSUSHITA, 5 SELECTED GATT/WTO PANEL REPORTS: SUMMARIES AND COMMENTARIES ix (Fair Trade Center, Tokyo, 1999).

原則以解決WTO和RTA爭端管轄競合之問題。[490]

第四項　WTO 爭端解決報告提示之爭端解決機構管轄衝突處理方法

第一款　法律障礙（legal impediment）

法律障礙的概念乃在*Mexico – Taxes on Soft Drinks*案所提出[491]，該案中爭端解決小組提及此概念緣由在於表示當事國（墨西哥）在案件中未指出將影響小組行使對該案管轄權之論述[492]；然而因小組在報告中並未表示管轄權法律障礙的發生必然將導致WTO爭端解決機構「不得」行使管轄權，本論文認為*Mexico – Taxes on Soft Drinks*案小組審議階段提及的法律障礙概念，僅係描述WTO和RTA間DSU和爭端管轄條款所可能出現的「規範衝突」「現象」而已，並未賦予此「現象」任何具體的法律效果[493]。但當此案件經上訴後，上訴機構雖然表示受限於上訴國之主張，而不會對該案中是否有「法律障礙」狀況存在加以認定[494]，但其在論述中似進一步賦予了「法律障礙」處理管轄權「規範衝突」「現象」時之法律效果—亦即認為管轄權法律障礙發生時爭端解決

[490] 與本論文研究方法之結論相同，在無遵循前例原則適用下，本論文認為 WTO 或 FTA 爭端解決機制所作成之裁決，對於後審理爭端之法院仍可提供論理上助益，*Canada – Periodical* 案中上訴機構將小組前案論理認定為無拘束力但論理具參考價值之法院「附帶意見（*Obiter dicta*）」。*See* Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, at 33, WT/DS31/AB/R (June 30, 1997) (adopted July 30, 1997). 「附帶意見（*Obiter dicta*）」之定義，參見 BLACK'S LAW DICTIONARY, "[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."

[491] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.13, at 113.

[492] *Id.* provides, "Mexico did not argue, nor is there any evidence on record to indicate, that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, ***which might raise legal impediments to the Panel hearing this case or to the United States bringing its complaint to the WTO***." (emphasizes added).

[493] 小組在判決中認為根據 DSU 規範，其無拒絕審理會員國之有權請求。*See* Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.18, at 113, "[U]nder the DSU, it has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."　林彩瑜教授批評此種對 DSU 的機械式操作，在維護 WTO 多邊貿易體系穩定下，並未保留足夠的彈性。參見林彩瑜，前揭（註 7），頁 393–451，409。

[494] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 53, at 21–23.

機制審酌該爭端之權力將能被排除。[495]

上訴機構在*Mexico – Taxes on Soft Drinks*案賦予「法律障礙」「現象」排除特定爭端解決機制行使管轄權之「法律效果」，對本論文欲處理的RTA和WTO爭端解決機制管轄權競合問題的解決是有幫助的。首先，因概念的適用似使WTO爭端解決機構可掙脫DSU第 3.2、第 3.3、第 7、第 11、第 19.2 和第 23 條等解釋規範時，不得侵害會員國權利（包括訴權）和必須處理締約國遞交爭端之僵硬規定[496]；再者，既上訴機構已明確表示此概念之法律效果為可使特定爭端解決機構排除或拒絕行使對爭端管轄權之行使，此時倘RTA下條款能和WTO之DSU形成「法律障礙」，即能藉該概念擇定由單一法院行使管轄權而簡化裁決。

基本上，誠如林彩瑜教授所分析，上訴機構藉由「法律障礙」概念的提出，賦予了WTO爭端解決機制決定是否於個案中行使管轄權之權限[497]；但不可否認的是，上訴機構此種賦予「法律障礙」特定法律效果之見解，在未以國際法解釋方法或一般法律原則補充法理的狀況下，*Mexico – Taxes on Soft Drinks*案中的上訴顯然已超越了「適用法律」而進入「司法者立法」階段，因此「法律障礙」之法律效果是否會繼續被後案小組或上訴機構所依循而成為WTO實質規範之一部尚待觀察[498]；此外，從*Mexico – Soft Drink*案中，我們除知悉RTA爭端管轄條款（或林彩瑜教授所謂之場域排除條款）的援引可能構成「法律障礙」狀況的出現外，對於以「法律障礙」作為爭端解決機構拒絕行使管轄權時尚須滿足何種要件，在WTO爭端解決機制以司法實踐補充前[499]，

[495] *Id.* ¶ 53, at 21.

[496] 林彩瑜教授認為上訴機構此種見解，提供了侷限性的適用剛性 DSU 規範外，更較彈性之管轄權判斷方法。參見林彩瑜，前揭（註 7），頁 393–451，409。

[497] 林彩瑜，前揭（註 7），頁 393–451。

[498] 對於 WTO 爭端解決機構逾越裁判者角色而成為 WTO 規範之立法和執行者之批評，*see* Ragosta et al., *supra* note 110, at 750–51.

[499] 因法律障礙非 DSU 或 WTO 下之概念或規範，因此其法律要件的分析，亦須待司法實踐後復從個案中加以分析獲得。

此概念之適用方法尚不明確。

值得思考的是，根據本論文先前之介紹與分析，禁反言原則是指在他國善意信賴並將因此獲利的情況下，一國受其自身先前清楚自願之聲明所拘束；而法律障礙概念也與禁反言原則有某程度的相似性存在。

首先，根據 *Mexico – Taxes on Soft Drinks* 案，上訴機構認為 NAFTA 下「別訴權利排除型專屬管轄」條款的適用，可能與會員國向 WTO 爭端解決機制尋求救濟之規範呈現法律障礙狀況，但從別訴權利排除型專屬管轄意涵及 DSU 賦予 WTO 會員向 WTO 爭端解決機制尋求救濟之「權利」觀察，後者是保障 WTO 會員提訴救濟之權利，前者則是會員對限制行使該權利所作出之意思表示，亦不脫會員間因聲明而導致喪失向特定場域請求救濟之權利，故若此種限制權利行使的意思表示在由會員間訂定條約或協定而形成時將被上訴機構賦予「法律障礙」的名稱，也或許我們可以直接將「法律障礙」定義為「以法規範訂定形式發生的禁反言原則」，而援用禁反言原則基本概念操作、適用法律障礙。亦即是「在他國善意信賴並因此或有利益之情況下，一國受其自身先前清楚自願性訂定規範之拘束，而不得恣意悖離」，對法律障礙採取此種理解的狀況下，除一方面有助於釐清並理解法律障礙的操作與適用，更可進一步將法律障礙中當事國受其自願訂定之協定拘束要件，結合誠信原則、條約必須遵守原則等一同適用，賦予國際法下各次系統規範相互適用之可能，並促進各國際法系統間之調和適用。

綜上，*Mexico – Taxes on Soft Drinks*案上訴機構提出的法律障礙概念，或許是未來解決WTO和RTA爭端解決機制管轄衝突以提升法確定性之重要關鍵，但法律障礙在未來實踐上究竟是僅會被以「規範衝突」之 「現象」角度理解，亦或是將成為「解決規範衝突」之「方法」，目前尚不明確，本論文所提出以「禁反言原則」觀點理解「法律障礙」之說理，甚至使其與「誠信原則」和「條約必須遵守原則」一同適用均可供未來參考，以上之問題與解釋適用之優劣，仍待後續司法實踐方能進一步釐清。[500]

[500] 以其他國際法原則處理 WTO 與 RTA 爭端解決衝突問題之論述，Kennedy 嘗試以「耗盡當地救濟原

第柒章　結論與建議

第一節　研究發現

第一項　RTA 爭端管轄條款之發展與趨勢

第一款　RTA 爭端解決機制的設立

如本論文第貳章分析，本研究分析的 168 個 RTA 中，其中 73%均設有各類型爭端解決機制以處理締約國間爭端，顯見在目前 RTA 制度設計中，設立爭端解決機制已係普遍的現象。

第二款　RTA 爭端管轄條款的設置

多數 RTA 在其設立爭端解決機制的議定書或條文中，均明示該爭端解決機制之設置目的，在於處理締約國間就 RTA 解釋適用發生之爭端；然而，因 RTA 和 WTO 同樣是規範經貿議題之國際協定，因此此二規範在規範客體（如關稅或貿易救濟措施）上多有重複之處，當事國在 RTA 設置了爭端解決機制後，為了便宜或使締約國能更靈活的選用最適宜的爭端解決方式，因此部分 RTA 爭端解決機制的管轄權也擴及於對 WTO 爭端之審議，本研究分析設有爭端解決機制的 RTA 中 30%是屬此類。

第三款　RTA 場域管轄條款的設置

RTA設置爭端解決機制者，為了進一步規範RTA和WTO審議案件後對其他爭端解決機制案件管轄權行使之影響，設有爭端解決機制的RTA中，69%訂有場域選擇條款，其中 10%採「一般型專屬管轄者」形式，59%採更高度拘束締約國爭端解決場域的「別訴權利排除型專屬管轄」類型。其中以南錐共同市場（MERCOSUR）的爭端解決機制

則（exhaustion of local remedies）」處理 WTO 和 RTA 爭端解決機構間平行審理程序存在問題，*see* Kevin C. Kennedy, *Parallel Proceeding at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform*, 39 GEO. WASH. INT'L L. REV. 47, 76 (2007).

為例，締約國從巴西利亞議定書採用的「一般型專屬管轄」發展至奧立佛斯議定書採用的「別訴權利排除型專屬管轄」，誠如WTO爭端解決小組在*Argentina – Poultry Anti-Dumping Duties*案的觀察，其可能表現了締約國為解決爭端當事國重複提訴問題，而改善既有爭端解決程序規範，並設置更周密嚴謹爭端解決機制的態度。[501]

由是可見，隨著 RTA 的簽署與發展，不論是從當前 RTA 的爭端解決機制的設立觀察，抑或是藉場域選擇條款的訂定進一步規範締約國間的權利義務，RTA 爭端解決機制的設制及其規範的細膩化，係整體國際的趨勢與潮流。

第四款　我國目前已簽署之 RTA 爭端管轄機制概況

目前我國與尼加拉瓜、巴拿馬、瓜地馬拉以及宏都拉斯四個已完成談判正式生效的 RTA 中（ECFA 目前僅早收清單生效，其於條款尚待後續談判，爭端解決機制建構談判亦尚未完成），此四者均設有爭端解決機制。

對於 RTA 爭端解決機制的管轄範圍問題，我國與尼加拉瓜之 RTA 爭端解決機制限於審議 RTA 爭端，我國與瓜地馬拉、宏都拉斯和巴拿馬之其他 RTA 的爭端解決機制，其管轄權均涵蓋 RTA 及 WTO 爭端之審議，並均訂有場域選擇條款，且四者均選用「別訴權利排除型專屬管轄」之型式。

第二項　WTO 與 RTA 爭端解決機制管轄競合與衝突之立場

第一款　WTO 實務對爭端解決機制處理態度

DSU 第 7、第 11 及第 23 條中規定，會員國遇 WTO 內括協定解釋適用所生爭端時，其有向 WTO 爭端解決機制提訴之權利，而 WTO 爭端解決機制亦有審理會會員合法提訴之義務。由此觀察，既 WTO 爭端解決機制不得恣意剝奪會員之訴權，此時似僅在會員自行放棄此權利之行使或會員之提訴「不合法」時，WTO 爭端解決機制

[501] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.38, at 21.

方得拒絕對會員所提訴訟行使管轄權。

在 *Argentina – Poultry Anti-Dumping Duties* 案中，雖然阿根廷認為該案中 RTA 和爭端管轄機制管轄競合，而 WTO 不應對巴西所提訴訟進行審議之主張並未被接受；但從爭端解決小組在報告中強調該案所適用 RTA 中的爭端解決條款並無場域選擇條款，並表示 MERCOSUR 會員國後續修正並增訂的 RTA 場域選擇條款，具有補正先前 RTA 未明確規範 RTA 和 WTO 爭端解決管轄競合之處置觀察，場域選擇條款之援引和適用將影響 WTO 爭端解決機制對爭端管轄權之行使。

在 *Mexico – Taxes on Soft Drinks* 案中，WTO 上訴機構表示墨西哥未在訴訟中援引 NAFTA 第 2005 條第 4 項的場域選擇條款而排除 WTO 對該案之管轄權，但值得觀察的是，上訴機構前述說理，是否代表 WTO 接受會員於訴訟中援引如 NAFTA 之 RTA 等非 WTO 內括協定，並進而「增加或減損（add or diminish）」WTO 會員於 WTO 下之權利，值得思考。且同案中，上訴機構對爭端解決小組於報告中「爭端解決無拒絕審議會員間爭端」的見解作出補充，並提出在遇有「法律障礙」狀況下，WTO 爭端解決機制管轄權確實可能受到影響。

至於「法律障礙」的概念，從 *Mexico – Soft Drink* 案上訴機構表示墨西哥未主張 NAFTA 第 2005 條第 4 項之別訴權利排除型專屬管轄條款，因而「無」法律障礙說理反推，其似表示別訴權利排除型專屬管轄的適用，將導致「法律障礙」的發生，並對 WTO 爭端解決機制既有管轄權產生衝擊。

綜上，雖然在目前 WTO 涉訟案件中，WTO 爭端解決機構尚未以 RTA 爭端解決或場域選擇條款，而限縮或排除 WTO 爭端解決機構對會員提訴爭端的管轄權行使，但從本論文對 *Mexico – Taxes on Soft Drinks* 和 *Argentina – Poultry Anti-Dumping Duties* 案分析中可知，WTO 爭端解決機構對於會員向 WTO 提訴權利以及 WTO 審議爭端義務不容侵犯之立場，已有所動搖。

第二款　處理 RTA 和 WTO 爭端解決機制管轄權衝突與競合可適用的國際條約解釋適用方法及一般國際法原則

根據本論文第伍章之分析，可供解決 WTO 和 RTA 爭端解決機制管轄權衝突之條約解釋方法和國際法原則，包括了禁反言原則、特別法優於普通法以及法律障礙。

在禁反言原則適用的需符合的（1）該聲明事實清楚而不模糊；（2）此聲明之作出為自願、無條件且有權的；以及（3）將因此聲明不被遵守而受損害者或因此聲明之實踐而獲得利益者，係以最大善意信賴此聲明之三要件中，因別訴權利排除型專屬管轄最清楚的表達了締約國在選定爭端管轄機制後，排除向其他爭端解決機制尋求救濟的意思而符合清楚且不模糊的聲明，既 WTO 爭端解決機制目前放棄對案件行使管轄權的可能狀況，僅包含會員「自己放棄提訴權利」或是「該提訴不合法」，因此當會員在 RTA 爭端解決條款和場域選擇條款明示其放棄另尋救濟之權利時，除締約國再行提訴之行為將因違反禁反言原則而被禁止外，此也符合在當事國自行放棄訴權狀況下，WTO 爭端解決機構構可拒絕對案件行使管轄權的狀況。

至於一般型專屬管轄之場域選擇條款，雖然締約國在該等條款下對擇定爭端管轄機制後放棄向其他爭端管轄機制之表示，不若別訴權利排除型專屬管轄明顯，但若採較寬鬆之解釋，其仍有適用禁反言原則之可能，WTO 爭端解決機構亦可依此原則限縮或排除對案件之管轄權行使。

在特別法優於普通法概念下，既 WTO 之 DSU 中並未就 WTO 與其他爭端解決機制發生管轄競合時之處理方式訂定規範，因此在締約國另於 RTA 對爭端解決機制管轄衝突制定場域選擇條款，RTA 下的場域選擇條款自係對爭端管轄機制較細部且特定之規範。況且，既然 *Mexico – Taxes on Soft Drink* 案中，WTO 上訴機構已默認了在 WTO 訴訟中援引 RTA 規範作為抗辯或主張之可能，此時屬特別法之 RTA，自亦可在 WTO 訴訟爭被加以主張並為 WTO 爭端解決機制所審酌，並依特別法優於普通法原則，優先依循對爭端解決管轄衝突有所規範的 RTA 場域管轄條款。

最後，在法律障礙適用下，雖此法律概念的要件和法律效果仍不甚明確，而有待後續的建構和補充；但因從 *Mexico – Taxes on Soft Drinks* 案中，我們可推衍出在訂有 RTA「別訴權利排除型專屬管轄條款」狀況下，當事國提訴後復就同一事件向其他爭端解決機制再循救濟時，將有法律障礙狀況的出現，並影響 WTO 會員向 WTO 爭端解決機制提訴之權利；是而，別訴權利排除型專屬管轄的設置，確實將對 WTO 會員既有向 WTO 提訴之權利產生改變。

在禁反言原則、特別法優於普通法及法律障礙等三個概念的適用下，本論文認為 WTO 爭端解決機制的管轄權，確實可能因 RTA 場域選擇條款的存在而受到影響，且此些原則之適用，也將在釐清 RTA 和 WTO 爭端解決機制管轄權衝突時，提供之可行之解決方式。

第二節　研究結論與建議

第一項　WTO 和 RTA 爭端解決機制競合與衝突處理之醒思與困境

在前章中，我們探討了包括條約必須遵守原則、誠信原則、條約生效前的遵約義務、締約國後續實踐、特別法優於普通法、後法優於前法、既判力原則、禁反言原則，以及遵循前例原則等國際法之條約解釋適用方法和國際法一般法律原則的適用，希望此些理論的提出和適用，能對 WTO 和 RTA 爭端解決機制管轄權競合問題之處理提供助益。然而，現行 WTO 或 RTA 爭端解決機制處理爭端管轄競合問題時，在探討其可適用的國際法原則之外，爭端解決機制審理程序中應如何援引前述之國際法原則，以處理爭端解決機制管轄競合問題，以及 RTA 爭端解決或場域選擇條款是否能在 WTO 訴訟中被援引等問題，仍端視後續發展方能知悉。

第二項　WTO 爭端解決機制對 WTO 與 RTA 規範互動之立場與問題

本論文所提各國際法原理原則，在個案中能否使 WTO 將 RTA 爭端解決條款納入考量，固端視各法律原則的要件在個案中是否能被滿足；然而，在解決 WTO 和 RTA

爭端解決機制管轄衝突問題時，各爭端解決機構之審判範圍和各國際法次系統間的關係與互動，亦將影響 WTO 爭端解決機構處理此等問題時之態度，以下即針對 WTO 爭端解決機構處理此等問題時所受限制，及所面對之困難並提出可能之改善方式：

第一款　DSU 無解決管轄衝突條文，也未訂有衝突法條款

DSU為WTO爭端解決機制處理WTO會員國間規範解釋適用應遵循之規範，然而，目前DSU中並未就國際爭端解決機制間的管轄權競合訂定場域選擇條款，對於WTO規範與其他國際規範出現適用競合時，因衝突法選法條款的欠缺而導致了WTO爭端解決機制面對與其他國際爭端解決機制出現管轄權競合時，DSU無法提供擁有管轄權問題的解答[502]。倘WTO認為確實不應允許在RTA下設立爭端解決機制，此時自可明文規定要求會員不得以任何方式作成將影響WTO爭端解決機制爭端管轄權形式之協議；相對的，若WTO認為RTA下的爭端解決機制可被設立，為了釐清DSU和RTA下爭端解決和場域選擇條款的適用問題，自亦將公約與其他國際協定之互動與適用關係加以明定，其中聯合國海洋法公約第 311 條第三項之規範方式，即為可參考的範例之一。[503]

面對 DSU 第 7、第 11、第 23 條等已明確表示 WTO 爭端解決機構對會員國爭端有管轄權，且 WTO 無衝突法選法規則的狀態下，即形成了在 DSU 表示 WTO 爭端解

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[502] 關於衝突法訂定的重要性及影響，*see* Sieber, *supra* note 49, at 33–34.

[503] United Nations Convention on the Law of the Sea, art. 311(3), Apr. 29, 1958, 1833 U.N.T.S. 3 (enter into force on Dec. 10, 1982) provides, "Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."　聯合國海洋法公約第 311 條第三項中譯:「本公約兩個或兩個以上締約國可訂立僅在各該國相互關係上適用的、修改或暫停適用本公約的規定的協定，但須這種協定不涉及本公約中某項規定，如對該規定予以減損就與公約的目的及宗旨的有效執行不相符合，而且這種協定不應影響本公約所載各項基本原則的適用，同時這種協定的規定不影響其他締約國根據本公約享有其權利和履行其義務。」

決機制對案件有管轄權，但 RTA 場域選擇條款表示 WTO 爭端解決機制無管轄權時，雖然本論文在本章中以嘗試以國際條約之解釋適用和一般法律原則補充了處理此問題的可能解決方案，但在可供解決爭端管轄競合問題之非 WTO 規則適用可能性及優先性尚不明確情況下，為使 WTO 爭端解決機制未來處理此爭議時能有較明確的規範，而非由會員間自行立法或在個案中掙扎的嘗試主張各種國際法原則，以認定爭端管轄權之歸屬，此問題的根本解決辦法為在 DSU 中訂定場域選擇條款，藉由明文規範 WTO 與其他國際爭端解機構的關係提供 WTO 爭端解決機構處理管轄權衝突時場域選擇的明確指示及依據。

第二款 DSU 下明訂對非 WTO 規則之適用規範

雖然根據 DSU 第 3 條第二項規定，WTO 體系下吾等可能將國際法之其他「非 WTO 規則（non-WTO rules）」適用於 WTO 法系下，但對 DSU 第 3 條第二項採嚴格解釋狀況下，其顯然限用於對「非 WTO 之條約解釋歸則」的適用，此除造成爭端當事國可否援引具特別法性質的 RTA 場域管轄條款解決 WTO 和 RTA 爭端解決競合狀況陷於不確定外，在本質上當事國可否在 WTO 爭端解決機制程序中援引 RTA 規範都將受到挑戰和懷疑。

既目前學理討論多傾向將WTO解釋為非封閉式法體系，WTO爭端解決機制在對爭端的審議上，自也應擴大對非WTO規範的適用 [504]；根本而論，未來在新回合談判對DSU的修正中，WTO會員也應思考如何調合WTO與RTA及其他國際法下次系統之適用關係。此外，倘同意於WTO下有非WTO規則的適用情況下，為進一步釐清「非WTO規則」在WTO的適用可能性和範圍之外，未來亦可思考在WTO下訂定衝突法規則，以在WTO和RTA等其他國際法規範予WTO產生衝突狀況下，進一步解決WTO規則和

[504] 學者 Ulrich Sieber 即批評採取自我封閉體制將導致該制度流於封閉狹隘。*See* Sieber, *supra* note 49, at 43 provides, "[S]elf –constained regimes oftern sufferfrom tunnel vision, i.e., they regulate only a narrow section of social life and do not take competing interest into consideration."

非WTO規則衝突時選擇適用之疑義，並促成相異國際法次系統的和諧適用。[505]

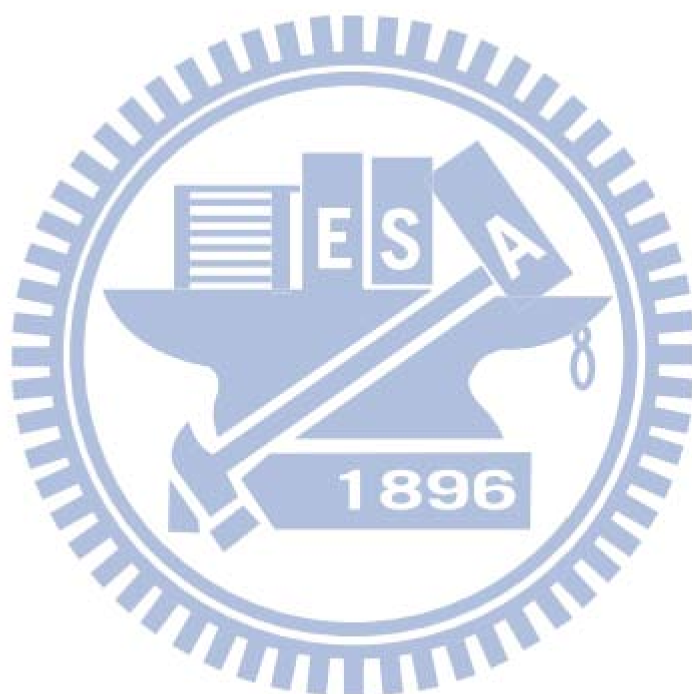
第三項　總結

根據本論文分析，在 RTA 下另設爭端解決機制以處理締約國間所發生爭端已成為當前之趨勢，然而，此並不表示 RTA 下爭端解決機制的設立有其絕對必要。對締約國而言，只要其所簽訂的條約協定能獲得有效施行和落實，不論是以談判協商之外交方式處理，抑或是設立爭端解決機制以處理爭端，爭端解決所採行的形式並非那麼重要。然而，既然目前許多 WTO 會員間簽署的 RTA，已選擇設置爭端解決機制以解決紛爭，此時RTA和WTO爭端解決機制間所可能產生的管轄衝突與競合問題，即需加以處理；且除了以本論文所提出的條約解釋和國際法原則的適用以處理管轄衝突問題外，為了進一步釐清 WTO 會員在 RTA 條款簽署後對既有權利之影響，WTO 是否應在未來新回合談判中將衝突法規則，或是場域選擇條款訂入 DSU 條款中，而從根本上建構對規範適用及管轄權衝突處理之解答，也是可以思考的解決方式。

對我國而言，與他國洽簽 RTA 並建立貿易夥伴關係以提升我國貿易競爭力，係我國目前努力發展的目標，咸信不論在目前正進行的 ECFA 爭端解決協定談判上，抑或是我國欲洽簽和加入的台美貿易暨投資架構協定（Trade and Investment Framework Agreement，簡稱 TIFA）或是泛太平洋夥伴關係（Trans-Pacific Partnership，簡稱 TPP）中，爭端解決管轄競合與衝突都是在擬定和對此些規範進行談判時，我國所應注意之重點。此外，雖然締約國在 RTA 設置爭端解決機制的目的，在於提供締約國遇 RTA 或貿易爭端時，以其所認為最適的爭端救濟途徑解決此些爭端，而從調和各國際法適用的概念下，WTO 爭端解決機制對 RTA 等各爭端解決條款也應給予相當之尊重並加

[505] DSU 的新回合談判亦尚有許多問題待會員形成共識，其中包括 DSB 決議方式應採司法或應納入政治考量，裁決執行、甚或是是否應將投資等其他國際經濟法議題納入 WTO 爭端解決機制之處理均仍未形成共識。*See generally* Heinz Hauser & Thomas A. Zimmermann, *The Challege of Reforming the WTO Dispute Settlement Understanding*, 38 INTERECONOMICS – REV. EURO. ECON. POL'Y 241 (2003).

以適用；惟締約國在簽訂各爭端解決或場域選擇條款時，自也應慮及此些 RTA 條款對原先以有效運作之 WTO 爭端解決機制可能造成的衝擊與影響，特別是 WTO 爭端解決機制對會員間爭端之強制管轄權，及其規範本位和以司法體制審議特性，為 WTO 此多邊貿易協定帶來穩定之適用和健全有效的發展而被譽為「王冠上的珠寶」時，RTA 爭端解決機制的建立其下各類型場域選擇條款是否可能動搖 WTO 爭端解決機制維繫多邊貿易協定運作之根基，也是各締約國訂定相關 RTA 條款或解決爭端解決機制管轄衝突時我們所應思考的問題。



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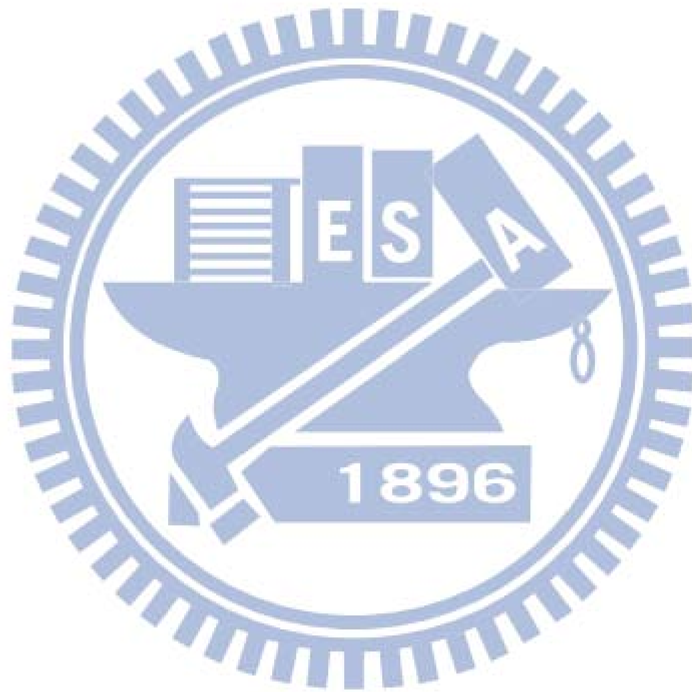

附件

附件一　RTA 爭端解決機制分析表

附件二　目前生效施行 RTA 統計表

附件一　RTA 爭端解決機制分析表

說明：

1. 本附件一為對 RTA 下爭端解決條款之分析。首先，依 RTA 下是否設爭端解決機制作分類；第二步，依 RTA 爭端解決機制管轄客體範圍分類為處理 RTA 爭端者以及處理 RTA 和 WTO 爭端者；第三步，則是依 RTA 下場域選擇條款有無及其類型區分為無場域選擇條款者，有場域選擇條款者再區分為一般型專屬管轄、別訴權利排除型專屬管轄。
2. RTA 依其性質分類，註釋中則為各 RTA 之爭端解決條款。以粗體標示者為條號以及用以區辨爭端解決條款之部分條文，粗體加斜體標示者為區辨場域選擇條款之部分條文。

類型	管轄客體	場域選擇條款類型	RTA 名稱	總數
有爭端解決機制	RTA	一般型專屬管轄	1. Pakistan – China[1] 2. Southern African Customs Union (SACU) Agreement[2] 3. EFTA – Albania[3] 4. EFTA–Israel[4] 5. EFTA – Egypt[5]	11

[1] **Article 53 (Settlement of Disputes between Parties)**

2. If a dispute cannot be settled through consultations within six months, it shall, upon the request of either Party, be submitted to an **ad hoc arbitral tribunal**.

6. The arbitral tribunal shall reach its award by a majority of votes. ***Such award shall be final and binding upon both Parties.*** The arbitral tribunal shall, upon the request of either Party, explain the reasons of its award.

[2] **Article 13 (Tribunal)**

1. Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, shall be settled by an **ad hoc Tribunal**.

3. The Tribunal shall decide by majority vote and ***its decision shall be final and binding***.

[3] **Article 33 (Arbitration)**

1. **Disputes between the Parties relating to the interpretation of rights and obligations under this Agreement**, which have not been settled through direct consultations or in the Joint Committee within 60 days from the date of the receipt of the request for consultations, **may be referred to arbitration by the complaining Party by means of a written notification addressed to the Party complained against**. A copy of this notification shall be communicated to all other Parties so that each of those Parties may determine whether to participate in the dispute.

7. The arbitration panel shall examine the matter referred to it in the request for the establishment of an arbitration panel in light of the provisions of this Agreement applied and interpreted in accordance with the rules of interpretation of public international law. ***The award of the arbitration panel shall be final and binding upon the parties to the dispute.***

[4] **Article 25 bis 1 (Arbitration procedure)**

1. Disputes between Parties to this Agreement relating to the interpretation of rights and obligations of the Parties to this Agreement, which have not been settled through consultation or in the Joint Committee within six months, **may be referred to arbitration by any party to the dispute by means of a written notification addressed to the other party to the dispute.** A copy of this notification shall be communicated to all Parties to this Agreement.

4. The award of the arbitral tribunal ***shall be final and binding upon the parties to the dispute.***

[5] **Article 41 (Arbitration)**

(1) **Disputes between the Parties, relating to the interpretation of rights and obligations under this**

			6. EFTA – Former Yugoslav Republic of Macedonia[6] 7. EFTA – Jordan[7] 8. EFTA – Morocco[8] 9. EFTA – Palestinian[9] 10. EFTA – Serbia[10]	

Agreement, which have not been settled through direct onsultations or in the Joint Committee within 90 days from the date of the receipt of the request for consultations, **may be referred to arbitration by any Party to the dispute by means of a written notification addressed to the other Party to the dispute.** A copy of this notification shall be communicated to Egypt or the EFTA Secretariat, as the case may be. Where more than one Party requests the submission to an arbitral tribunal of a dispute with the same Party relating to the same question a single arbitral tribunal should be established to consider such disputes whenever feasible.
(2) The constitution and functioning of the arbitral tribunal shall be governed by Annex VI. **The award of the arbitral tribunal shall be final and binding upon the Parties to the dispute.**

[6] **Article 31 (Dispute Settlement Procedure)**
1. The Parties shall at all times endeavour to agree on **the interpretation and application of this Agreement,** and shall make every attempt through co-operation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.
7. ***The award of the arbitral tribunal shall be final and binding upon the Parties to the dispute.***

[7] **Article 31 (Dispute Settlement Procedure)**
1. **The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement**, and shall make every attempt through co-operation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.
7. ***The award of the arbitral tribunal shall be final and binding upon the Parties to the dispute.***

[8] **Article 24 (arbitration Procedure)**
1. **Disputes between States Parties to this Agreement**, relating to the interpretation of rights and obligations of the States Parties to this Agreement, which have not been settled through consultation or in the Joint Committee within six months, **may be referred to arbitration by any State party to the dispute by means of a written notification addressed to the other State party to the dispute.** A copy of this notification shall be communicated to all States Parties to this Agreement.
4. ***The award of the arbitral tribunal shall be final and binding upon the States parties to the dispute.***

[9] **Article 29 (Arbitration Procedure)**
1. **Disputes between Parties to this Agreement**, relating to the interpretation of rights and obligations of the Parties to this Agreement,....
4. ***The award of the arbitral tribunal shall be final and binding upon the parties to the dispute.***

[10] **Article 34 (Arbitration)**
1. **Disputes between the Parties relating to the interpretation of rights and obligations under this Agreement**, which have not been settled through direct consultations or in the Joint Committee within 60 days from the date of the receipt of the request for consultations, may be referred to arbitration by the complaining

			11. EFTA – Tunisia[11]	
		別訴權利排除型	1. Asean – Australia – New Zealand[12] 2. ASEAN – China[13]	47

Party by means of a written notification addressed to the Party complained against. A copy of this notification shall be communicated to all other Parties so that each of those Parties may determine whether to participate in the dispute.

5. The arbitration panel shall examine the matter referred to it in the request for the establishment of an arbitration panel in light of the provisions of this Agreement applied and interpreted in accordance with the rules of interpretation of public international law. ***The award of the arbitration panel shall be final and binding upon the parties to the dispute.***

[11] **Article 38 (Arbitration)**

1. Disputes between the Parties, **relating to the interpretation of rights and obligations under this Agreement,** which have not been settled through direct consultations or in the Joint Committee within 90 days from the date of the receipt of the request for consultations, may be referred to arbitration by any Party to the dispute by means of a written notification addressed to the other Party to the dispute.

2. The constitution and functioning of the arbitral tribunal shall be governed by Annex VI. ***The award of the arbitral tribunal shall be final and binding upon the Parties to the dispute.***

[12] **Article 5 (Choice of Forum)**

(1) Where a dispute concerning any matter arises under this Agreement and under another international agreement to which the Parties to the dispute are party, ***the Complaining Party may select the forum in which to address that matter and that forum shall be used to the exclusion of other possible fora in respect of that matter.***

(2) For the purposes of this Article, the Complaining Party shall be deemed to have selected the forum in which to settle the dispute when it has requested the establishment of an arbitral tribunal pursuant to Article 8 (Request for Establishment of Arbitral Tribunals) or requested the establishment of, or referred a matter to, a similar dispute settlement panel under another international agreement

[13] **Article 2 (Scope and Coverage)**

(1) This Agreement **shall apply to disputes arising under the Framework Agreement** which shall also include the Annexes and the contents therein. Hereinafter, any reference to the Framework Agreement shall include all future legal instruments agreed pursuant to it unless where the context otherwise provides.

(2) Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, ***the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.***

Article 6 Appointment of Arbitral Tribunals

1. If the consultations referred to in Article 4 fail to settle a dispute within 60 days after the date of receipt of the request for consultations or within 20 days after such date in cases of urgency including those which concern perishable goods, the complaining party may make a written request to the party complained against to appoint an arbitral tribunal under this Article. A copy of this request shall also be communicated to the rest

		專屬管轄	3. ASEAN – India[14] 4. ASEAN – Japan[15] 5. ASEAN – Korea, Republic of [16]	

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of the Parties.

[14] **Article 2 (Coverage and Application)**

(1)**This Agreement shall apply with respect to the avoidance or settlement of all disputes arising between the Parties under the covered agreements.** Unless otherwise provided in this Agreement or any other covered agreement, this Agreement shall apply to all disputes between the Parties.

(5) Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such Parties arising under the covered agreements and that other treaty, ***the forum selected by the Complaining Party shall be used to the exclusion of any other for such dispute***.

Article 6 (Establishment of Arbitral Panels)

1. If the consultations under Article 4 fail to settle a dispute within 60 days after the date of receipt of the request for consultations or within 20 days after such date in cases of urgency, including those which concern perishable goods, **the Complaining Party may make a written request to the Party Complained Against to establish an arbitral panel**. A copy of this request shall also be communicated to the rest of the Parties.

[15] **Article 60 (Scope of Application)**

(1) Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of all disputes between the Parties concerning the interpretation or application of this Agreement.**

(4) Notwithstanding paragraph 3, once dispute settlement proceedings have been initiated under this Chapter or under any other international agreement to which all of the parties to a dispute are parties with respect to a particular dispute, ***the forum selected by the complaining party shall be used to the exclusion of any other fora for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.*** Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such Parties arising under the covered agreements or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.

Article 64 (Establishment of Arbitral Tribunals)

1. **The complaining party may request in writing, to the party complained against, the establishment of an arbitral tribunal**:...

[16] **Article 2 (Coverage and Application)**

Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such Parties arising under the covered agreements or that other treaty, ***the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.***

Article 5 (Establishment of Arbitral Panels)

1. If the consultations under Article 3 fail to settle a dispute within sixty (60) days after the date of receipt of the request for consultations or within twenty (20) days after such date in cases of urgency including those

			6. Brunei Darussalam – Japan[17] 7. Chile – China[18] 8. Chile – Japan [19] 9. China – Costa Rica[20]	

which concern perishable goods, **the complaining party may make a written request to the party complained against to establish an arbitral panel.** A copy of this request shall also be communicated to the rest of the Parties.

[17] **Article 107**

(3) Notwithstanding paragraph 2, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

Article 110 (Establishment of Arbitral Tribunals)

1. ***The complaining Party may request in writing the establishment of an arbitral tribunal to the Party complained against***:…

[18] Article 80 Scope of Application

Except as otherwise provided in this Agreement, **the dispute settlement provisions of this Chapter shall apply:**

(a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement

Article 81 (Choice of Forum)

(1) Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which both Parties are parties or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

(2) ***Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.***

[19] **Article 176 (Choice of Dispute Settlement Procedure)**

(1) Where a dispute regarding any matter arises under both this Agreement and the WTO Agreement, the complaining Party may select the dispute settlement procedure in which to settle the dispute.

(2) Notwithstanding paragraph 1, once the complaining Party has requested the establishment of an arbitral tribunal under this Chapter or a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to the WTO Agreement with respect to a particular dispute**, *the arbitral tribunal or panel selected shall be used to the exclusion of the other procedure for that particular dispute.***

[20] **Article 142 (Choice of Forum)**

(1) Where a dispute arises under this Agreement and under other agreements including another free trade agreement to which both Parties are Party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

			10. China – New Zealand[21] 11. China – Singapore[22] 12. Dominican Republic – Central America – United States [23] 13. EFTA – Colombia[24]	

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(2) Without prejudice to the Party's rights and obligations under the WTO Agreement, once the complaining Party has requested a panel under an agreement referred to in paragraph 1, ***the forum selected shall be used to the exclusion of the dispute settlement provisions under those agreements in respect of that matter, unless both Parties agree otherwise***

[21] **Article 184 (Scope of Application)**

1. Except as otherwise provided in this Agreement, **this Chapter shall apply to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement**, except for Chapter 14 (Cooperation).

Article 185 (Choice of Forum)

(1) Except as provided in this Article, this Chapter is without prejudice to the rights of the Parties to have recourse to dispute settlement procedures available under other agreements to which they are party.

(2) Where a dispute regarding any matter arises under this Agreement and under another agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

(3) ***Once the complaining Party has requested a particular forum, the forum selected shall be used to the exclusion of other possible fora.***

[22] **Article 92 (Scope and Coverage)**

(1) **This Chapter shall apply to disputes arising under this Agreement which shall also include the Annexes and the contents therein.**

(6) Once dispute settlement proceedings have been initiated under this Chapter or under any other treaty to which the Parties are parties, concerning a particular right or obligation arising under this Agreement or that other treaty, ***the forum selected by the complaining Party shall be used to the exclusion of any other for such dispute.***

[23] Article 20.3 (Choice of Forum)

(1) Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

(2) ***Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.***

[24] **Article 12.2 (Scope of Application)**

Except as otherwise provided in this Agreement, **the dispute settlement provisions of this Chapter shall apply with respect to the settlement of all disputes between the Parties regarding the interpretation or application of this Agreement**, in particular when a Party considers that a measure of another Party is inconsistent with the obligations of this Agreement.

Article 12.3 (Choice of Forum)

			14. EFTA – Mexico[25] 15. EU – Cameroon[26] 16. EU – Korea, Republic of [27]	

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1. Disputes regarding the same matter arising under this Agreement and the WTO Agreement may be settled in either forum at the discretion of the complaining Party.
2. Unless otherwise agreed by the disputing Parties, once the complaining Party has requested a WTO panel under Article 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "DSU") or a panel under this Agreement pursuant to paragraph 1 of Article 12.6 (Request for a Panel), ***the forum selected shall be used to the exclusion of the other in respect of that matter.***

[25] **Article 71 (Scope)**
1 **The provisions of this Chapter shall apply to any matter arising from this Agreement, unless otherwise specified in this Agreement.**
Article 77 (Choice of forum)
3. Once dispute settlement procedures have been initiated under this Agreement pursuant to Article 73 or dispute settlement proceedings have been initiated under the WTO Agreement, ***the forum selected shall be used to the exclusion of the other.***

[26] **Article 86 (Relationship to WTO obligations)**
1. Arbitration bodies set up under this Agreement shall not adjudicate disputes concerning each Party's rights and obligations under the Agreement establishing the WTO.
2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, ***where a Party or, as appropriate, the signatory Central African States has/have instituted a dispute settlement proceeding with regard to a particular measure, either under Article 70(1) or under the WTO Agreement, it/they may not institute a dispute settlement proceeding with regard to the same measure in the other forum until the first proceeding has ended.*** For the purposes of this paragraph, dispute settlement proceedings under the WTO Agreement shall be deemed to be initiated by the request of a Party or, as appropriate, of the signatory Central African States for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.

[27] **Article 14.19 (Relation with WTO obligations)**
1. Recourse to the dispute settlement provisions of this Chapter shall be without prejudice to any action in the WTO framework, including dispute settlement action.
2. However, where a Party has, with regard to a particular measure, initiated a dispute settlement proceeding, either under this Chapter or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has been concluded. In addition, **a Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums.** In such case, ***once a dispute settlement proceeding has been initiated, the Party shall not bring a claim seeking redress of the identical obligation under the other Agreement to the other forum,*** unless the forum selected fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation.

			17. EU – Papua New Guinea Fiji[28] 18. Hong Kong, China – New Zealand[29] 19. India – Malaysia[30]	

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3. For the purposes of paragraph 2:
(a) dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement (hereinafter referred to as the 'DSU') and are deemed to be concluded when the DSB adopts the Panel's report, and the Appellate Body's report as the case may be, under Articles 16 and 17.14 of the DSU; and
(b) dispute settlement proceedings under this Chapter are deemed to be initiated by a Party's request for the establishment of an arbitration panel under Article 14.4.1 and are deemed to be concluded when the arbitration panel issues its ruling to the Parties and to the Trade Committee under Article 14.7.
4. Nothing in this Agreement shall preclude a Party from implementing the suspension of obligations authorised by the DSB. The WTO Agreement shall not be invoked to preclude a Party from suspending obligations under this Chapter.

[28] **Article 66 (Relation with WTO obligations)**
1. **Arbitration bodies set up under this Agreement shall not arbitrate disputes on each Party's or, as the case may be the relevant Pacific State's rights and obligations under the Agreement establishing the WTO.**
2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, ***where a Party, or as the case may be, the relevant Pacific State has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 51(1) of this Agreement or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended.*** For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's or, as the case may be, Pacific State's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.

[29] **Article 2 (Scope and Coverage)**
1. Except as otherwise provided in this Agreement, this Chapter shall apply:
(a) with respect to the **avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement;**
Article 3 (Choice of Forum)
1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.
2. ***Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora in respect of the dispute.***

[30] **Article 14.1 (Scope and Coverage)**
1. Except as otherwise provided in this Agreement, **this Chapter shall apply to the avoidance or settlement of disputes between the Parties concerning the interpretation, implementation or application of this**

			20. India – Japan[31] 21. Japan – Indonesia[32] 22. Japan – Malaysia[33] 23. Japan – Mexico[34]	

Agreement,

Article 14.3 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which the Parties are party, the complaining Party may select the forum in which to settle that matter from among the forums prescribed under the relevant agreements.

3. ***Once the complaining Party has selected a particular forum for settling a matter, that forum shall be used to the exclusion of other fora in respect of that matter.***

Article 14.7 (Request for Establishment of Arbitral Tribunal)

1. The complaining Party may request in writing **for the establishment of an arbitral tribunal** if: …

[31] Article 133 (Scope)

1. Unless otherwise provided for in this Agreement, this Chapter shall apply with respect to the **settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

2. Nothing in this Chapter shall prejudice any right of the Parties to have recourse to dispute settlement procedures available under the WTO Agreement.

3. Notwithstanding paragraph 2, once the establishment of an arbitral tribunal under this Chapter or a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to the WTO Agreement is requested with respect to a particular dispute, ***the arbitral tribunal or panel selected shall be used to the exclusion of any other procedure for that particular dispute.***

[32] Article 138 Scope

1. This Chapter shall apply with respect to the settlement of disputes between the Parties arising out of the interpretation and/or application of this Agreement.

3. Nothing in this Chapter shall prejudice any rights of the Parties to have recourse to dispute settlement procedures available under any other international agreement to which both Parties are parties.

4. Notwithstanding paragraph 3, once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute.

[33] **Article 145 (Scope)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of disputes between the Countries concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2 of this Article, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Countries are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

[34] **Article 150 (Scope and Coverage)**

			24. Japan – Philippine[35] 25. Japan – Singapore[36] 26. Japan – Switzerland[37]	

Except as otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of all disputes between the Parties regarding the interpretation or application of this Agreement.**

Article 151 (Choice of Dispute Settlement Procedure)

2. Notwithstanding paragraph 1 above, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

[35] **Article 149 (Scope and Coverage)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the avoidance and settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2 above, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

5. Where an infringement of the obligations assumed under this Agreement constitutes an infringement of the obligations assumed under the WTO Agreement, the Parties shall give priority consideration to having recourse to the dispute settlement procedures under the WTO Agreement.

[36] **Article 149 (Scope and Coverage)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the avoidance and settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2 above, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

5. Where an infringement of the obligations assumed under this Agreement constitutes an infringement of the obligations assumed under the WTO Agreement, the Parties shall give priority consideration to having recourse to the dispute settlement procedures under the WTO Agreement.

[37] **Article 138 (Scope and Coverage)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2, ***once the complaining Party has requested the establishment of an arbitral***

			27. Japan – Thailand[38] 28. Japan – Vietnam[39] 29. Jordan – Singapore[40] 30. Southern Common Market (MERCOSUR)[41]	

tribunal under this Chapter or a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to the WTO Agreement with respect to a particular dispute, the arbitral tribunal or panel selected shall be used to the exclusion of the other procedure for that particular dispute.

[38] **Article 159 (Scope and Coverage)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2 above, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

[39] **Article 116 (Scope)**

1. Unless otherwise provided for in this Agreement, **this Chapter shall apply with respect to the settlement of disputes between the Parties concerning the interpretation or application of this Agreement.**

3. Notwithstanding paragraph 2, ***once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which both Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute. However, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

[40] **Article 7.1 (Scope and Coverage)**

1. The provisions of this Chapter and Annex 7A **shall apply with respect to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement.**

3. Where a dispute regarding any matter referred to in Articles 7.2.2(a) and (b) arises under both this Agreement and the WTO Agreement and any amendments thereto, the complaining Party may select the forum in which to settle the dispute.

4. ***Once dispute settlement procedures have been initiated by a complaining Party, the forum selected shall be used to the exclusion of the other.***

[41] Olivos Protocol for the Settlement of Disputes in MERCOSUR

Article 1 (Scope of application)

1. **Any disputes between the State Parties regarding the interpretation, application or breach of the Treaty of Asuncion, the Protocol of Ouro Preto, the protocols and agreements executed within the framework of the Treaty of Asuncion, the Decisions of the Common Market Council, the Resolutions of the Common Market Greoup and the Instrucions of the Mercosur Trade Commission will be subject to**

			31. New Zealand – Malaysia[42] 32. Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu [43]	

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the procedures established in this Protocol.

2. Disputes falling wihtin the scope of application of this Protocol that may also be referred to the desputes settlement system of the World Trade Organisaion or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to on forum of the other, as decided by the requesting party. Provided, however, that the parties to the dispute may jointly agree on a forum.

Once a dispute settlement procedure prusuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora, as defined by article 14 of this Protocol.

[42] **Article 16.3 (Scope and Coverage)**

1. Except as otherwise provided in this Agreement, **this Chapter shall apply to the settlement of disputes between the Parties regarding the interpretation, implementation or application of this Agreement.**

Article 16.4 Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another agreement to which the disputing Parties are party, the complaining Party may select the forum in which to address that matter.

3. ***Once the complaining Party has selected a particular forum for addressing a matter, that forum shall be used to the exclusion of other possible fora in respect of that matter.***

[43] **Article 22.02 (Scope of Application)**

Except as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply:

(a) with respect to the **avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement**;

Article 22.03 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. In any dispute referred to in paragraph 1 ***where the Party complained against claims that its action is subject to Article 1.04 (Relation to Other International Agreement in Environmental and Conservation) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.***

3. Where a Party has requested the establishment of an arbitral group under Article 22.07. or has requested the establishment of a arbitral group under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, ***the forum chosen shall be used to the exclusion of the other.***

Article 22.07 (Request for Establishment of an Arbitration Group)

1. If the Parties fail to resolve a matter within: ... any Party that requested a meeting of the Commission with regard to the measure or other matter in accordance with Article 22.06 **may request in writing the establishment of an arbitral group to consider the matter.**

			33. Peru – China[44] 34. Peru – Korea, Republic of [45] 35. Thailand – Australia[46] 36. Thailand – New Zealand[47]	

[44] **Article 174 (Scope of Application)**

Except as otherwise provided in this Agreement, **the dispute settlement provisions of this Chapter shall apply with respect to the settlement of all disputes between the Parties regarding the interpretation or application of this Agreement,** whenever a Party considers that the other Party has failed to carry out its obligations under this Agreement.

Article 175 (Choice of Forum)

1. **Where a dispute arises under this Agreement and under another free trade agreement to which both Parties are parties or the WTO Agreement, the complaining Party may select the forum to settle the dispute.**

2. Once the complaining Party has requested a Panel under other agreements referred to in paragraph 1, ***the forum selected shall be used to the exclusion of the others in respect of that matter.***

[45] **Article 2 (Scope and Coverage)**

1. Except as otherwise provided in this Agreement, **this Chapter shall apply:**

(a) with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement;

Article 23.3 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Unless otherwise agreed by the Parties, once the complaining Party has requested the establishment of a dispute settlement panel under an agreement referred to in paragraph 1 or the intervention of the Joint Commission, the forum selected shall be used to the exclusion of the others in respect of that matter.

[46] **Article 1801 (Scope)**

1. This **Chapter shall apply to the avoidance and settlement of disputes between the Parties concerning the interpretation, implementation or application of this Agreement** except for Chapter 6, Chapter 12 and Chapter 15. In relation to Chapter 11, this Chapter shall only apply to Article 1102.

4. ***Once a dispute settlement procedure has been initiated between the Parties with respect to a particular dispute under this Chapter or under any other international agreement to which the Parties are parties, that procedure shall be used to the exclusion of any other procedure for that particular dispute. This paragraph does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

Article 1804 (Request to Establish an Arbitral Tribunal)

1. If the consultations referred to in Article 1802 fail to settle a dispute within 60 days of the date after receipt of the request for consultations, **the Party which made the request for consultations may make a written request to the other Party to establish an arbitral tribunal.**

			37. Trans–Pacific Strategic Economic Partnership[48] 38. Turkey – Chile[49] 39. US – Australia[50]	

[47] **Article 17.1 (Scope)**

1. Except as otherwise provided in this Agreement, **this Chapter shall apply to the avoidance and settlement of disputes between the Parties concerning the interpretation, implementation or application of this Agreement.**

4. ***Once a dispute settlement procedure has been initiated between the Parties with respect to a particular dispute under this Chapter or under any other international agreement to which the Parties are party, that procedure shall be used to the exclusion of any other procedure for that particular dispute. This paragraph does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.***

Article 17.4 (Request to Establish an Arbitral Tribunal)

1. If the consultations referred to in Article 17.2 fail to settle a dispute within 60 days of the date after receipt of the request for consultations, the Party which made the request for consultations **may make a written request to the other Party to establish an arbitral tribunal.**

[48] **Article 15.3 (Choice of Forum)**

1. Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which the disputing Parties are party, the complaining Party may select the forum in which to settle the dispute.

3. ***Once a complaining Party has initiated dispute settlement proceedings under Article 15.6, under the WTO Agreement or any other trade agreement to which the disputing Parties are party,1 the forum selected shall be used to the exclusion of the others.***

Article 15.6 (Establishment of an Arbitral Tribunal)

1. The complaining Party may request, by means of a written notification addressed to the Party complained against, **the establishment of an arbitral tribunal** if the consulting Parties fail to resolve the matter within…

[49] Article 38 (Scope and Coverage)

Unless otherwise provided for in this Agreement, this Title shall apply with respect to the **avoidance or settlement of disputes between the Parties concerning the interpretation and implementation of this Agreement**, when a Party considers that:

a) a measure of the other Party is inconsistent with its obligations under this Agreement; or

b) the other Party has otherwise failed to carry out its obligations under this Agreement.

Article 39 (Choice of Dispute Settlement Procedure)

1. Where a dispute regarding any matter arises under this Agreement and the WTO Agreement, the complaining Party may select the dispute settlement procedure in which to settle the dispute.

2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, **the forum selected shall be used to the exclusion of the other.**

[50] **Article 21.4 (Choice of Forum)**

			40. US – Bahrain[51] 41. US – Israel[52]	

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1. Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. ***Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.***

Article 21.7 (ESTABLISHMENT OF PANEL)

1. If the Joint Committee has not resolved a matter within 60 days after delivery of the notification described in Article 21.6, within 30 days where the matter concerns perishable goods, or within such other period as the Parties may agree, **the complaining Party may refer the matter to a dispute settlement panel** by delivering written notification to the other Party's office designated under Article 21.3.

[51] **Article 19.4 (Choice of Forum)**

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

3. ***Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora.***

Article 19.7 (Establishment of Panel)

1. If the Joint Committee has not resolved a matter within 60 days after delivery of the notification described in Article 19.6, 30 days where the matter concerns perishable goods, or such other period as the Parties may agree, **the complaining Party may refer the matter to a dispute settlement panel** by delivering written notification to the other Party.

[52] **Article 19 (Dispute Settlements)**

1. a. **Whenever a dispute arises concerning the interpretation of this Agreement, or whenever a Party considers that the other Party has filed to carry out its obligations under this Agreement, the dispute settlement mechanism described in this Article maybe invoked.** In addition, **the dispute settlement mechanism may also be invoked if one Party considers that measures taken by the other Party, including a violation of the Annex an subsidies, severely distort the balance of trade benefits accorded by this Agreement or substantially undermine fundamental objectives of this Agreement.** This paragraph shall not apply to the imposition of antidumping or countervailing duties.

d. If a dispute referred to the Joint Committee has not been resolved within a period of sixty days after the dispute was referred to it, or within such longer period as the Joint Committee has agreed upon, **either Party may refer the matter to a conciliation panel.** The conciliation panel shall be composed of three members: each Party shall appoint, within fifteen days of the date of referral, one member, and the two appointees shall choose, within forty-five days of the date of referral, a third who will serve as the chairman. The panel shall establish its own rules of procedure.

f. If the conciliation panel under this Agreement or any other applicable international dispute settlement mechanism has been invoked by either Party with respect to any matter, the mechanism invoked shall have

			42. US – Jordan[53] 43. US – Morocco[54] 44. US – Oman[55]	

exclusive jurisdiction over that matter.

[53] **Article 17 (Dispute Settlement)**

1. (a) The Parties shall make every attempt to arrive at a mutually agreeable resolution through consultations under Article 17, whenever

(i) **a dispute arises concerning the interpretation of this Agreement;**

(ii) **a Party considers that the other Party has failed to carry out its obligations under this Agreement;** or...

(c) If a matter referred to the Joint Committee has not been resolved within a period of 90 days after the dispute was referred to it, or within such other period as the Joint Committee has agreed, **either Party may refer the matter to a dispute settlement panel.** Unless otherwise agreed by the Parties, the panel shall be composed of three members: each Party shall appoint one member, and the two appointees shall choose a third who will serve as the chairman.

4. (c) If a dispute involves both a claim described in subparagraph (a) or (b) and another claim, subparagraph 1(e) shall not prevent a Party from invoking another international dispute settlement mechanism with regard to such other claim. ***Nothing in this subparagraph shall allow a Party to invoke the dispute settlement mechanism of both this Article and another international dispute settlement mechanism with regard to the same claim.***

[54] **Article 20.2 (Scope of Application)**

Except as otherwise provided in this Agreement or as the Parties agree otherwise, **this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement** or wherever a Party considers that:

Article 20.4 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

3. ***Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora.***

[55] **Article 20.2 (Scope of Application)**

Except as otherwise provided in this Agreement or as the Parties agree otherwise, **this Chapter shall apply with respect to the prevention or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement** or wherever a Party considers that:

(a) a measure of the other Party is inconsistent with its obligations under this Agreement;

Article 20.4 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

			45. US – Peru[56] 46. US – Chile[57] 47. US – Singapore[58]	

3. ***Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora.***

[56] **Article 21.2 (Scope of Application)**

1. Except as otherwise provided in this Agreement, **the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement** or wherever a Party considers that:

(a) an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement;

(b) another Party has otherwise failed to carry out its obligations under this Agreement; or

Article 21.3 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. ***Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.***

[57] **Article 22.2 (Scope of Application)**

Except as otherwise provided in this Agreement, **the dispute settlement provisions of this Chapter shall apply: (a) with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement;**

Article 22.3 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which both Parties are party or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. ***Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.***

[58] **Article 20.4 (Additional Dispute Settlement Procedures)**

1. Except as otherwise provided in this Agreement or as the Parties otherwise agree, **the provisions of this Article shall apply wherever a Party considers that:**

(a) a measure of the other Party is inconsistent with the obligations of this Agreement;

(b) the other Party has otherwise failed to carry out its obligations under this Agreement;

3. (a) Where a dispute regarding any matter referred to in paragraph 1 arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

(c) ***Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora.***

		無管轄衝突條款	1. Armenia – Moldova[59] 2. Armenia – Russian Federation[60] 3. Armenia – Turkmenistan[61] 4. (1) ASEAN Protocol on Dispute Settlement Mechanism[62] (2) ASEAN Protocol on Enhanced Dispute Settlement Mechanism[63]	37

59 **Article 15**
Disputes between Contracting Parties related to interpretation or application of provisions of this Agreement shall be resolved by means of negotiations.
Contracting Parties establish that claims and disputes between economic entities of both countries resulting from interpretation or implementation of commercial contracts or transactions, in case they cannot be settled amicably on the basis of consultations and negotiations and unless agreed otherwise, will be the exclusive competence of arbitration tribunals permanent or ad hoc) established in the territory of Contracting Parties or the territory of the third states specified by the Parties having signed the contract.

60 **Article 16**
Disputes between Contracting Parties related to interpretation or application of provisions of this Agreement shall be resolved by means of negotiations.
Contracting Parties establish that claims and disputes between economic entities of both countries resulting from interpretation or implementation of commercial contracts or transactions, in case they cannot be settled amicably on the basis of consultations and negotiations and unless agreed otherwise, will be the exclusive competence of arbitration tribunals (permanent or ad hoc) established in the territory of Contracting Parties or the territory of the third states specified by the Parties having signed the contract.

61 **Article 14**
Disputes between Contracting Parties related to interpretation or application of provisions of this Agreement shall be resolved by means of negotiations.
Contracting Parties establish that claims and disputes between economic entities of both countries resulting from interpretation or implementation of commercial contracts or transactions, in case they cannot be settled amicably on the basis of consultations and negotiations and unless agreed otherwise, will be the exclusive competence of arbitration tribunals (permanent or ad hoc) established in the territory of Contracting Parties or the territory of the third states specified by the Parties having signed the contract.

62 **Article 1 (Coverage and Application)**
The **rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix 1 and future ASEAN economic agreements (the "covered agreements").**

63 **Article 1 (Coverage and Application)**
The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation

			5. EFTA – Lebanon[64] 6. EU – Albania[65] 7. EU – Algeria[66] 8. EU – Andorra[67] 9. EU – Bosnia and Herzegovina[68] 10. EU – Côte d'Ivoire[69]	

and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the "covered agreements").

[64] **Article 34 (Arbitration)**

1. **Disputes between the Parties, relating to the interpretation of rights and obligations of the Parties, which have not been settled, pursuant to Article 32 of this Agreement**, through direct consultations or in the Joint Committee within 90 days from the date of the receipt of the written request for consultations, **may be referred to arbitration by one or more Parties to the dispute by means of a written notification addressed to the Party complained against**. A copy of this notification shall be communicated to all Parties.

[65] Article 119

Each Party shall refer to the Stabilisation and Association Council any dispute relating to the application or interpretation of this Agreement. The Stabilisation and Association Council may settle the dispute by means of a binding decision.

[66] Article 35 Dispute settlement

Where disputes arise in relation to the verification procedures of Article 34 which cannot be settled between the customs authorities requesting a verification and the customs authorities responsible for carrying out this verification or where they raise a question as to the interpretation of this Protocol, they shall be submitted to the Customs Cooperation Committee.

[67] Article 18

1. Any disputes arising between the Contracting Parties over the interpretation of the Agreement shall be put before the Joint Committee.

[68] **Article 14 (Arbitration panel decisions and rulings)**

2. All rulings of the arbitration panel shall be binding on the Parties.

Article 16 (Relation with WTO obligations)

Upon the eventual accession of Bosnia and Herzegovina to the World Trade Organisation (WTO), the following shall apply:

(a) Arbitration panels set up under this Protocol shall not adjudicate disputes on each Party's rights and obligations under the Agreement establishing the World Trade Organisation.

[69] Article 65 Links with the WTO obligations

1. The arbitration authorities set up under this Agreement shall not deal with disputes relating to the rights and obligations of each Party pursuant to the Agreement establishing the WTO.

2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any possible action in the WTO framework, including a dispute settlement action. However, when a Party has initiated a dispute-settlement procedure with regard to a given measure, either under Article 49(1) or under the

			11. EU – Croatia[70] 12. EU – Eastern and Southern Africa States EPA[71] 13. EU – Former Yugoslav Republic of Macedonia[72] 14. EU – Jordan[73] 15. EU – Lebanon[74] 16. EU – Montenegro[75]	

Agreement establishing the WTO, it may not initiate a dispute-settlement procedure for the same measure with the other forum before concluding the first procedure. For the purposes of this paragraph, a Party is considered to have initiated a dispute-settlement procedure under the Agreement establishing the WTO once it has requested the establishment of a panel pursuant to Article 6 of the WTO Dispute Settlement Understanding.
3. This Agreement cannot prevent a Party from applying the suspension of obligations authorised by the WTO Dispute Settlement Body.

[70] Article 33 Dispute settlement
Where disputes arise in relation to the verification procedures of Article 32 which cannot be settled between the customs authorities requesting a verification and the customs authorities responsible for carrying out this verification or where they raise a question as to the interpretation of this Protocol, they shall be submitted to the Stabilisation and Association Committee.

[71] **Article 54 (Consultations)**
1. The Parties shall endeavour to **resolve any dispute concerning the interpretation and application of this Agreement** by entering into consultations in good faith with the aim of reaching an agreed solution.
Article 55 (Dispute settlement)
1. If consultations do not succeed in settling the dispute within the 60 days or 30 days referred to in Article 54, **either Party may request settlement of the dispute by arbitration.**
4. ***Each Party to the dispute shall be bound*** to take the measures necessary to carry out the decision of the arbitrators.

[72] **Article 111**
Each Party may refer to the Stabilisation and Association Council any dispute relating to the application or interpretation of this Agreement. The Stabilisation and Association Council may settle the dispute by means of a binding decision.

[73] **Article 97**
1. **Each of the Parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.**
2. The Association Council may settle the dispute by means of a decision.

[74] **Article 34 (aa82)**
1. **Each of the Parties may refer to the Cooperation Council any dispute relating to the application or interpretation of this Agreement.**
2. The Cooperation Council may settle the dispute by means of a decision.

			17. EU – Morocco[76] 18. EU – San Marino[77] 19. EU – Serbia[78]	

[75] **Article 14 (Arbitration panel decisions and rulings)**

2. ***All rulings of the arbitration panel shall be binding on the Parties.*** They shall be notified to the Parties and to the Stabilisation and Association Committee, which shall make them publicly available unless it decides by consensus not to do so.

Article 16 (Relation with WTO obligations)

Upon the eventual accession of Montenegro to the World Trade Organisation (WTO), the following shall apply:

(a) **Arbitration panels set up under this Protocol shall not adjudicate disputes on each Party's rights and obligations under the Agreement establishing the World Trade Organisation;**

[76] Article 86

1. Either Party may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.

2. The Association Council may settle the dispute by means of a decision.

[77] Article 24

1. Any disputes arising between the Contracting Parties over the interpretation of the Agreement shall be put before the Cooperation Committee.

2. If the Cooperation Committee does not succeed in settling the dispute at its next meeting, each Party may notify the other of the designation of an arbitrator; the other Party shall then be required to designate a second arbitrator within two months. …

Each Party in the dispute shall be required to take the measures needed to ensure the application of the arbitrators' decision.

[78] **Article 2 (Scope)**

The provisions of this Protocol shall only apply with respect to any differences concerning the interpretation and application of the following provisions, including where a Party considers that a measure adopted by the other Party, or a failure of the other Party to act, is in breach of its obligations under these provisions:

(a) Title II (Free movement of goods), except Articles 18 (SAA Article 33), 25 (SAA Article 40), 26 (SAA Article 41), 33, 40, 41, paragraphs 1, 4 and 5 (insofar as these concern measures adopted under paragraph 1 of Article 26 (SAA Article 41)) and Article 32 (SAA Article 47);

(b) Title III (Other Trade and Trade-Related Provisions): Articles 35 (SAA Article 62) and 40 paragraph 2 (SAA Article 75, paragraph 2).

Article 14 (Arbitration panel decisions and rulings)

2. ***All rulings of the arbitration panel shall be binding on the Parties.***

Article 16 (Relation with WTO obligations)

Upon the eventual accession of Serbia to the World Trade Organisation (WTO), the following shall apply:

(b) The right of any of the Parties to have recourse to the dispute settlement provisions of this Protocol shall be

			20. EU – Tunisia 21. Eurasian Economic Community (EAEC)[79] 22. European Economic Area (EEA) 23. Global System of Trade Preferences among Developing Countries (GSTP[80] 24. Gulf Cooperation Council (GCC)[81] 25. India – Singapore[82]	

without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 3(1) of this Protocol or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO;

[79] **Article 8 (Community Court)**

2. **The Community Court shall consider also economic disputes arising between the Contracting Parties on issues of implementation of decisions of the EAEC bodies and provisions of agreements effective between the Community members, provide explanations and opinions in respect thereof.**

[80] **Article 19 (Consultation)**

2. The Committee may, at the request of a participant, consult with any participant in respect of any matter for which it has not been possible to fin a satisfactory solution through such consultation under pargraph 1 above.

Article 21 (Settlement of Dispute)

Any dispute that may arise among the participants regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework shall be amicably settled by agreement between the parties concerned in line with article 19 of this Agreement. **In the event of failure to settle a dispute, it may be referred to the Committee by a party to the dispute.**

[81] **Article 27 (Settlement of Disputes)**

1. The Secretariat General shall hear and seek to amicably settle any claims brought by any GCC citizen or official entity, regarding non-implementation of the provisions of this Agreement or enabled resolutions taken to implement those provisions.

2. If the Secretariat General could not settle a claim amicably, it shall be referred, with the consent of the two parties, to the GCC Commercial Arbitration Center to hear the dispute according to its Charter. Should the two parties not agree to refer the dispute to arbitration, or should the dispute be beyond the competence of the Center, it shall be referred to the judicial body set forth in Paragraph 3 of this Article.

3. **A specialized judicial commission shall be formed, when deemed necessary, to adjudicate disputes arising from the implementation of this Agreement or resolutions for its implementation. The Financial and Economic Committee shall propose the charter of this commission.**

[82] **Article 15.1 (Scope and Coverage)**

			26. New Zealand – Singapore[83] 27. Pacific Island Countries Trade Agreement (PICTA)[84] 28. Pakistan – Sri Lanka[85] 29. Singapore – Australia[86]	

1. Unless otherwise agreed by the Parties elsewhere in this Agreement, the provisions of this Chapter shall apply with respect to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement.

Article 15.5 (Appointment of Arbitral Tribunals)

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, **the Party which made the request for consultations may make a written request to the other Party to appoint an arbitral tribunal under this Article.** The request shall include a statement of the claim and the grounds on which it is based.

[83] **Article 58 (Scope and Coverage)**

The rules and procedures of this Part shall apply with respect to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement, but are without prejudice to the rights of the Parties to have recourse to dispute settlement procedures available under other agreements to which they are party.

Article 61 (Appointment of Arbitral Tribunals)

1. **If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the Party which made the request for consultations may make a written request to the other Party to appoint an arbitral tribunal.** The request shall include a statement of the claim and the grounds on which it is based.

[84] **Article 22 (Dispute Resolution)**

1. The Parties shall endeavour, as far as is possible, to settle any differences concerning the interpretation, implementation or operation of this Agreement through amicable consultation in accordance with Article 21. Such consultations shall be undertaken with appropriate regard to relevant cultrual values and customary procedures for resolving differences in the Pacific region.

3. Where the mediation process referred to in Paragraph 2 has failed within 60 days, or such time period as agreed to by the Parties to the dispute, to resolve the dispute between the Parties, **any Party to the dispute may notify the Secretary General and the other Parties to the dispute of its decision to submit the dispute to arbitration, pursuant to the provisions of Annex V.**

[85] **Article XIII (Settlement of Disputes)**

2. Any dispute between the Contracting Parties regarding the interpretation and application of this Agreement or any instrument adopted within its framework shall be amicably settled through negotiations **failing which a notification may be made to the Committee by any one of the Contracting Parties for settlement of the dispute.**

[86] **Article 1 (Scope and Coverage)**

1. Unless otherwise agreed by the Parties elsewhere in this Agreement, **the provisions of this Chapter shall**

			30. Turkey – Georgia[87] 31. Turkey – Israel[88] 32. Turkey – Jordan[89] 33. Turkey – Morocco[90] 34. Turkey – Palestinian Authority[91] 35. Turkey – Syria[92]	

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apply with respect to the avoidance or settlement of disputes between the Parties concerning their rights and obligations under this Agreement.

Article 4 (Appointment of Arbitral Tribunals)

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, t**he Party which made the request for consultations may make a written request to the other Party to appoint an arbitral tribunal under this Article.** The request shall include a statement of the claim and the grounds on which it is based.

Article 4 (Appointment of Arbitral Tribunals)

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the Party which made the request for consultations **may make a written request to the other Party to appoint an arbitral tribunal under this Article.** The request shall include a statement of the claim and the grounds on which it is based.

[87] **Article 32 (Dispute Settlement)**

1. **Either Party may refer to the Joint Committee any dispute relating to the application or interpretation of this Agreement.**

[88] **Article 30 (Settlement of Disputes)**

1. **Each Party may refer to the Joint Committee any dispute relating to the application or interpretation of this Agreement.**

[89] **Article 48 (Dispute Settlement)**

1. The Parties shall take all necessary measures to e**nsure the achievement of the objectives of this Agreement and the fulfillment of their obligations under this Agreement.**

3. If the dispute referred to the Association Committee has not been settled within 60 days after the dispute was referred to it, or within such other period as the Association Committee has agreed upon, the **complaining Party may notify the other Party by a written request to establish an arbitration tribunal.**

[90] **Article 33 (Dispute Settlement)**

1. **The Parties shall take all necessary measures to ensure the achievement of the objectives of this Agreement and the fulfilment of their obligations under this Agreement.**

3. If the dispute referred to the Joint Committee has not been settled within 60 days after the dispute was referred to it or within such longer period as the Joint Committee has agreed upon, **the complaining Party may notify the other Party to refer the matter to a dispute settlement panel**.

[91] **Article 46 (Dispute Settlement)**

1. **Either Party may refer to Joint Committee any dispute relating to the application or interpretation of this Agreement.**

			36. Turkey – Tunisia[93] 37. EU – South Africa[94]	
	RTA & WTO	一般型專屬管轄	1. Canada – Columbia[95]	1
		別訴權利排除型	1. Canada – Chile[96]（兼具一般型專屬管轄） 2. Canada – Costa Rica[97]（兼具一般型專屬	24

[92] **Article 44 (Dispute Settlement)**

1. **Either Party may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.**

[93] **Article 48 (Dispute Settlement)**

1. **Either Party may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.**

[94] Article 105

10. Without prejudice to their right to have recourse to WTO dispute settlement procedures, the Community and South Africa shall endeavour to settle disputes relating to specific obligations arising under Titles II and III of this Agreement through recourse to the specific dispute settlement provisions of this Agreement. Arbitration proceedings established under this Agreement will not consider issues relating to each Party's WTO rights and obligations, unless the Parties agree to refer any such issues to the arbitration.

[95] **Article 2103 (Choice of Forum)**

(1) Subject to paragraph 2, disputes regarding any matter arising under both this Agreement and the WTO Agreement or any another free trade agreement to which both Parties are party, or any successor agreement thereto, may be settled in either forum at the discretion of the complaining Party.

(2) In any dispute referred to in paragraph 1 **where the Party complained against claims that its measures are subject to Article 103 (Initial Provisions and General Definitions - Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party, in respect of that matter, may have recourse to dispute settlement procedures only under this Agreement.**

[96] **Article N-05 (WTO Dispute Settlement)**

(1) Subject to paragraph 2, **disputes regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, may be settled in either forum at the discretion of the complaining Party.**

(2) In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article A-04 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, ***the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.***

[97] **Article XIII.5 (Recourse to Dispute Settlement Procedures)**

Except as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of the other

		專屬管轄	管轄） 3. Canada – Israel[98] 4. Canada – Peru[99]（兼具一般型專屬管轄）	

Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex XIII.5 (Nullification and Impairment).

Article XIII.6 (WTO Dispute Settlement)

(1) Subject to paragraph 2, Article VI.4 (Dispute Settlement in Emergency Action Matters), Article VII.1.5 (Antidumping Measures), Article IX.5.1.2 (Sanitary and Phytosanitary Measures) and Article XI.6.3 (Consultations), **disputes regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, *may be settled in either forum at the discretion of the complaining Party*.**

(2) ***In any dispute referred to in paragraph 1 where the Party complained against claims that its action is subject to Article I.4 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.***

(3) The Party complained against shall deliver a copy of a request made pursuant to paragraph 2 to its Section of the Secretariat and the other Party. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 2, the Party complained against shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article XIII.8.

(4) Once dispute settlement procedures have been initiated under Article XIII.8 or dispute settlement proceedings have been initiated under the WTO Agreement, ***the forum selected shall be used to the exclusion of the other unless a Party makes a request pursuant to paragraph 2.***

[98] Article 8.1 (Application)

(1) This Chapter applies with respect to the avoidance or settlement of all disputes regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 8.1 unless the Parties agree to use another procedure in any particular case.

(2) **Disputes arising under both this Agreement and the WTO Agreement, including the General Agreement on Tariffs and Trade 1994 (WTO), and its successor agreements, to which both Parties are party, may be settled in either forum**, according to the rules of that forum, at the discretion of the complaining Party.

(3) ***Once the dispute settlement provisions of this Agreement or the WTO have been initiated pursuant to Article 8.7 or the WTO with respect to any matter, the procedure initiated shall be used to the exclusion of any other.***

[99] **Article 2103 (Choice of Forum)**

(1) Subject to paragraph 2, **disputes regarding any matter arising under both this Agreement and the WTO Agreement or any other free trade agreement to which both Parties are party, or any successor agreement thereto, may be settled in either forum** at the discretion of the complaining Party.

			5. Chile – India[100] 6. EFTA (Iceland, Liechtenstein, Norway and Switzerland) – Canada[101] 7. EFTA – Canada[102]	

(2) ***In any dispute referred to in paragraph 1 where the Party complained against claims that its measures are subject to Article 103 (Initial Provisions and General Definitions - Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party, in respect of that matter, may have recourse to dispute settlement procedures only under this Agreement.***

(3) Where the complaining Party requests the establishment of a dispute settlement panel under an agreement referred to in paragraph 1, ***the forum selected shall be used to the exclusion of the other, unless the Party complained against makes a request pursuant to paragraph 2.***

[100] **Article I**

(1) **Any dispute that may arise in connection with the interpretation, application or non-compliance with the provisions of this Agreement, shall be submitted to this Dispute Settlement Procedure established in this Annex.**

(2) **Any dispute regarding matters arising under this Agreement that are regulated also in the agreements negotiated at the WTO may be settled in accordance with this Annex** or with the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (DSU).

(4) ***Once a dispute settlement procedure has been initiated under this Annex or under the WTO Agreement, the forum selected shall exclude the other for the same subject matter of the dispute.***

[101] Article 27 (Choice of forum)

(1) Subject to paragraph 2 and except as otherwise provided elsewhere in this Agreement, **any dispute regarding any matter arising under both this Agreement and the WTO Agreement may be settled in either forum at the discretion of the complaining Party.**

(2) ***Before Canada initiates against an EFTA State or an EFTA State initiates against Canada a dispute settlement proceeding in the WTO on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify the other Parties of its intention. If an EFTA State initiates a dispute settlement proceeding against Canada and another EFTA State wishes also to have recourse to dispute settlement procedures against Canada as a complainant under this Agreement regarding the same matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreeing on a single forum. If those Parties cannot agree, the dispute shall be settled under this Agreement.***

(3) Once dispute settlement procedures have been initiated under this Agreement pursuant to Article 29 or dispute settlement proceedings have been initiated under the WTO Agreement, the forum selected shall be used to the exclusion of the other

[102] **Article 88 (Choice of forum)**

(1) **Disputes on the same matter arising under both this Agreement and the WTO Agreement, or any agreement negotiated thereunder, to which the Parties are party, may be settled in either forum** at the

			8. EFTA – Chile[103] 9. EFTA – Korea, Republic of[104] 10. EFTA – Peru[105] 11. EFTA – SACU[106] 12. EFTA – Singapore[107]	

discretion of the complaining Party. ***The forum thus selected shall be used to the exclusion of the other.***

[103] **Article 12.3 (Choice of Forum)**

(1) **Disputes regarding the same matter arising under this Agreement and the WTO Agreement may be settled in either forum** at the discretion of the complaining Party.

(2) Unless otherwise agreed by the disputing Parties, once the complaining Party has requested a WTO panel under Article 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "DSU") or a panel under this Agreement pursuant to paragraph 1 of Article 12.6 (Request for a Panel), ***the forum selected shall be used to the exclusion of the other in respect of that matter.***

[104] **Article 9.1 (Scope and Coverage)**

1. The provisions of this Chapter shall apply with respect to the avoidance or the settlement of any dispute arising from this Agreement, taking into account the modalities set out in Article 4.21 of this Agreement and Article 25 of Annex I.

2. **Disputes on the same matter arising under both this Agreement and the WTO Agreement may be settled in either forum** at the discretion of the complaining Party. ***The forum thus selected shall be used to the exclusion of the other.***

[105] **Article 12.3 (Choice of Forum)**

1. **Disputes regarding the same matter arising under this Agreement and the WTO Agreement may be settled in either forum** at the discretion of the complaining Party.

2. Unless the disputing Parties agree otherwise, once the complaining Party has requested a WTO panel under Article 6 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes or a panel under this Agreement pursuant to paragraph 1 of Article 12.6 (Request for a Panel), ***the forum selected shall be used to the exclusion of the other in respect of that matter***.

[106] **Article 37 (Arbitration)**

1. Disputes between Parties, relating to the interpretation of rights and obligations of the Parties under this Agreement, which have not been settled, pursuant to Article 35, through direct consultations or in the Joint Committee within 90 days from the date of the receipt of the written request for consultations, may be referred to arbitration by one or more parties to the dispute by means of a written notification addressed to the Party complained against. A copy of this notification shall be communicated to all Parties.

2. **Disputes on the same matter arising under both this Agreement and the WTO Agreement may be settled in either forum** at the discretion of the complaining Party. ***The forum thus selected shall be used to the exclusion of the other.*** Before a Party initiates dispute settlement proceedings under the WTO Agreement against another Party or Parties, that Party shall notify all other Parties of its intention to do so.

[107] **Article 56 (Scope and Coverage)**

2. **Disputes on the same matter arising under both this Agreement and the WTO Agreement, or any**

			13. EU – Chile[108] 14. Guatemala – the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu [109] 15. Honduras – El Salvador and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu[110]	

agreement negotiated thereunder, to which the Parties are party, may be settled in either forum at the discretion of the complaining Party. ***The forum thus selected shall be used to the exclusion of the other.***

108 **Article 189 (General provisions)**

2. Unless the Parties otherwise agree, **the procedure before the arbitration panel** shall be governed by the Model Rules of Procedure set out in Annex XV. The Association Committee may, whenever it considers necessary, amend the Model Rules of Procedure and the Code of Conduct set out in Annex XVI, by means of a decision. 3. The hearings of the arbitration panels shall be closed to the public, unless the Parties decide otherwise.

4. (a) **When a Party seeks redress of a violation of an obligation under the WTO Agreement, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.**

(b) When a Party seeks redress of a violation of an obligation under this Part of the Agreement, it shall have recourse to the rules and procedures of this Title.

(c) Unless the Parties otherwise agree, w**hen a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.**

(d) ***Once dispute settlement procedures have been initiated, the forum selected, if it has not declined its jurisdiction, shall be used to the exclusion of the other.*** Any question on the jurisdiction of the arbitration panels established under this Title shall be raised within 10 days of the establishment of the panel, and shall be settled by a preliminary ruling of the panel within 30 days of the establishment of the panel.

109 **Article 18.03 (Choice of Forum)**

1. **The disputes arising in connection with the provisions of this Agreement and the WTO Agreement or agreements negotiated in accordance with the WTO Agreement may be settled in one of those fora**, as the complaining Party chooses.

2. Where a Party has requested the establishment of the arbitral panel under Article 18.07, or has requested the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, ***the forum chosen shall be used to the exclusion of the other.***

110 **Article 15.03 Choice of Forum**

1. **The disputes arising in connection with the provisions of this Agreement and the WTO Agreement or agreements negotiated in accordance with the WTO Agreement may be settled in one of those fora**, as the complaining Party chooses.

			16. Japan – Peru[111] 17. Korea, Republic of – India[112] 18. Korea, Repulic of – Singapore[113] 19. Korea, Republic of – US[114] 20. MERCOSUR – India[115]	

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2. Where a Party has requested the establishment of the arbitral panel under Article 15.07, or has requested the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, ***the forum chosen shall be used to the exclusion of the other.***

[111] **Article 207 (Choice of Forum)**

1. **Where a dispute arises regarding any matter covered under this Agreement and another international agreement to which both Parties are parties, including the WTO Agreement, the Party requesting consultations (hereinafter referred to in this Chapter as "the complaining Party") may select the forum in which to settle the dispute.**

2. Unless otherwise agreed by the Parties, once the complaining Party has requested the establishment of an arbitral tribunal under an agreement referred to in paragraph 1 with respect to a particular dispute, ***that procedure selected shall be used to the exclusion of any other procedure for that particular dispute.***

[112] **Article 14.3 (Choice of Forum)**

1. **Disputes regarding any matter covered both by this Agreement and the WTO Agreement or any agreement negotiated thereunder, or any successor agreement thereto, may be settled in the forum selected by the complaining Party.**

2. Once dispute settlement procedures are initiated under Article 14.6 or under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement, ***the forum thus selected shall be used to the exclusion of the other.***

[113] **Article 20.3 (Choice of Forum)**

1. **Disputes regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, may be settled in the forum selected by the complaining Party.**

2. Once dispute settlement procedures have been initiated under Article 20.6 or dispute settlement proceedings have been initiated under the WTO Agreement, ***the forum selected shall be used to the exclusion of the other.***

[114] **Article 20.3 (Choice of Forum)**

1. **Disputes regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, may be settled in the forum selected by the complaining Party.**

2. Once dispute settlement procedures have been initiated under Article 20.6 or dispute settlement proceedings have been initiated under the WTO Agreement, ***the forum selected shall be used to the exclusion of the other.***

[115] **Article 2**

2. **Any dispute regarding matters arising under the Agreement that are regulated also in the agreements negotiated at the World Trade Organisation (hereinafter referred to as "the WTO") may be settled in accordance with this Annex or with the Understanding on Rules and Procedures Governing the**

			21. NAFTA[116] 22. Panama – Singapore[117] 23. Panama and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu [118]	

Settlement of Disputes of the WTO (hereinafter referred to as "the DSU").

3. After the end of direct negotiations as established in Chapter II of this Annex, the Parties shall endeavour to reach an agreement on a single forum. If no agreement is reached on the forum, the complaining Party shall select the forum of dispute.

4. ***Once a dispute settlement procedure has been initiated under this Annex or under the WTO covered agreements, the forum selected shall exclude the other for the same subject matter of the dispute.*** However, this provision may be reviewed within 5 years of implementation of the Agreement.

[116] Article 2005 (GATT Dispute Settlement)

1. Subject to paragraphs 2, 3 and 4, **disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.**

2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement.

3. In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

6. ***Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other,*** unless a Party makes a request pursuant to paragraph 3 or 4.

[117] Article 15.5 (Choice of Forum)

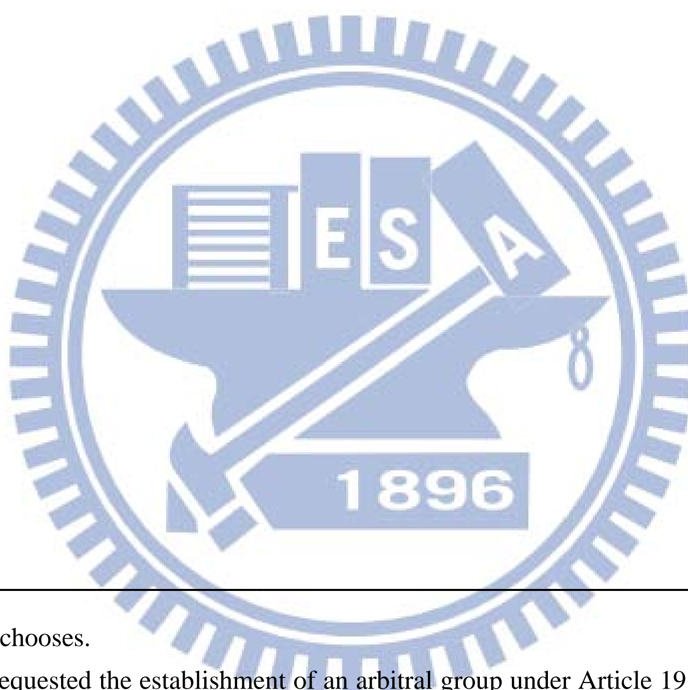
1. **Disputes regarding any matter arising under this Agreement as well as the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, may be settled in the forum selected by the complaining Party.**

2. Once a Party has requested the establishment of an arbitral panel under Article 15.6 or under the WTO Agreement, ***the forum selected shall be used to the exclusion of the others.*** The complaining Party shal notify the other Party in writing of its intention to bring a dispute to a particular forum before doing so.

[118] **Article 19.04 (Choice of Fora)**

1. **The disputes arising in connection with the provisions of this Agreement and the WTO Agreement or agreements negotiated in accordance with the WTO Agreement may be settled in one of those fora,** as

			24. Peru – Singapore[119]	
		無場域選擇條款		0



the complaining Party chooses.

2. Where a Party has requested the establishment of an arbitral group under Article 19.09 or has requested the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement, ***the forum chosen shall be used to the exclusion of the other.***

[119] Article 17.2 (Scope of Application)

1. Except as otherwise provided in this Agreement, the **dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement** or wherever a Party considers that:

Article 17.3 (Choice of Forum)

1. Where a dispute regarding any matter arises under this Agreement or under another free trade agreement to which both Parties are party, or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Once the complaining Party has requested either way the intervention of the Commission or a panel under an agreement referred to in paragraph 1, ***the forum selected shall be used to the exclusion of the others in respect of that matter***, unless both Parties otherwise agree.

無特設爭端解決機制		1. Armenia – Kazakhstan 2. Common Economic Zone (CEZ)[120] 3. Commonwealth of Independent States (CIS)[121] 4. East African Community (EAC)[122] 5. EFTA – Turkey 6. EU – Faroe Island 7. EU – Iceland 8. EU – Norway 9. EU – Overseas Countries and Territories (OCT) 10. EU – Palestinian Authority 11. EU – Switzerland – Liechtenstein 12. EU – Syria 13. Georgia – Armenia	45

[120] Article 7
Disputes and differences between the Parties as to the interpretation and/or application of the provisions of the present Agreement shall be settled by holding consultations and negotiations.
[121] Article 19 Procedure of dispute settlement
(1) Any disputes and disagreements between the Contracting Parties concerning the interpretation and/or application of provisions of this Agreement, as well as other disputes affecting rights and obligations of the Contracting Parties under this Agreement or in connection with it, shall be settled in the following way:
- the interested Contracting Parties conduct immediate consultations between each other or by mutual consent with the participation of representatives of other Contracting Parties;
- within the framework of a special conciliatory procedure (by creating working parties to study materials of dispute and work out recommendations);
- in the Economic Court of the CIS;
- within the framework of other procedures provided by international law.
(2) Transition to the subsequent procedure is possible by mutual consent of the Contracting Parties between which disputable questions or disagreements arose, or by the order of one of them if agreement is not reached within six months from the day of the beginning of the procedure.
[122] Article 32 Arbitration clauses and special agreements
The Court shall have jurisdiction to hear and determine any matter:
(a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
(b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
(c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

		14. Georgia – Azerbaijan[123] 15. Georgia – Kazakhstan[124] 16. Georgia – Turkmenistan[125] 17. Iceland – Faroe Islands 18. India – Bhutan 19. India – Nepal 20. Australia – Papua New Guinea (PATCRA) 21. Economic and Monetary Community of Central Africa (CEMAC) 22. Australia – New Zealand 23. Kyrgyz Republic – Armenia[126] 24. Kyrgyz Republic – Kazakhstan[127] 25. Kyrgyz Republic – Moldova[128]	

[123] Article 13

Disputes between Sides, concerning interpretation and application of the agreement's provisions, will be settled through negotiations. Sides will attempt to avoid conflicts in reciprocal trade. Sides determine, that claims and disputes, arising through implementation and interpretation of commercial contacts and transactions between economic entities of both countries, are in the competence of arbitrages that are established on the areas of the Sides or on the area of the third country, which will be determined by Sides, if settlement of such disputes and claims is impossible through consultations and negotiations.

[124] Article 14

Disputes between Sides, concerning interpretation and application of the agreement's provisions, will be settled through negotiations.

[125] Article 12

Disputes between Sides concerning interpretation and application of the agreement's provisions will be settled through negotiations.

[126] Article 14

Disputes between the Contracting Parties regarding the interpretation or application of the provisions hereof will be settled by way of negotiations.

[127] **Article 15**

1. **Disputes between the Parties regarding the interpretation or application of the provisions hereof shall be settled by way of negotiations.**

3. The Parties shall determine that if claims and disputes between business entities of both countries, as a result of the interpretation or fulfillment of commercial contracts or transactions, are impossible to be settled in a friendly way on the basis of consultations and negotiations, unless otherwise agreed, shall be under the exclusive competence of Arbitration Courts (permanent or "ad hoc") created on the territory of the Parties or on the territory of the third States determined by the Parties which have signed the Contract.

[128] **Article 14**

		26. Kyrgyz Republic – Russian Federation[129] 27. Kyrgyz Republic – Ukraine[130] 28. Kyrgyz Republic – Uzbekistan[131] 29. Lao People's Democratic Republic – Thailand 30. Melanesian Spearhead Group (MSG) 31. South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA) 32. Turkey – Albania 33. Turkey – Bosnia and Herzegovina 34. Turkey – Croatia 35. Turkey – Former Yugoslav Republic of Macedonia 36. Turkey – Serbia 37. Ukraine – Azerbaijan[132] 38. Ukraine – Belarus[133]	

Disputes between the Contracting Parties regarding the interpretation or application of the provisions hereof shall be settled by way of negotiations.

The Contracting Parties shall determine that claims and disputes between business entities of both countries as a result of interpretation or fulfilment of commercial contracts or deals (if they are impossible to be settled in a friendly way on the basis of consultations and negotiations), unless otherwise coordinated, shall be the exclusive competence of Economic Courts (permanent or "ad hoc") created on the territories of the Contracting Parties or on the territory of third states determined by the Parties which have signed Contract.

[129] Article 17

Disputes between the Contracting Parties regarding the interpretation or application of the provisions hereof will be settled by way of negotiations.

[130] Article 12

Disputes between the Contracting Parties regarding interpretation or application of the provisions hereof shall be settled by way of negotiations.

[131] Article 16

Disputes between the Contracting Parties regarding the interpretation or application of the provisions hereof shall be settled by way of negotiations or by any other way acceptable for the Contracting Parties.

[132] Article 12

Disputes between the Contracting Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations

[133] Article 14

Disputes between the Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations.

		39. Ukraine – Former Yugoslav Republic of Macedonia[134] 40. Ukraine – Kazakhstan[135] 41. Ukraine – Moldova[136] 42. Ukraine – Russian Federation[137] 43. Ukraine – Tajikistan[138] 44. Ukraine – Uzbekistan[139] 45. Ukraine –Turkmenistan[140]	

(Article 14 supplemented by paragraph 2 in compliance with the Protocol of October 18, 2005)

[134] Article 30 Settlement of disputes

In the event of a dispute concerning a procedure for conducting verification under Article 29, and if it is impossible to settle this dispute between the customs bodies that submitted a request for verification, and the customs bodies responsible for such verification, or if they raise the issue of interpretation of this Protocol, the Contracting Parties shall endeavor to resolve their differences by means of direct consultations.

[135] Article 11

Disputes between the Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations.

[136] Article 30 Settlement of Disputes

1. All disputes that arise from the interpretation or application of the provisions of the present Agreement shall be settled by mutual agreement, giving preference to the consultations within the Working Group.

2. If the settlement of a dispute specified in Item 1 of this Article was not possible within the Working Group or three months elapsed since the first notification by the opposite Party about the substance of the dispute, the derogated Party shall be entitled to take measures derived from its WTO member status and, in particular, from the agreement on the rules and procedures governing the settlement of disputes in WTO.

[137] Article 14

Disputes between the Contracting Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations. For achieving agreement, the Parties shall take guidance from the provisions of the present Agreement and the documents concluded on its basis.

[138] Article 12

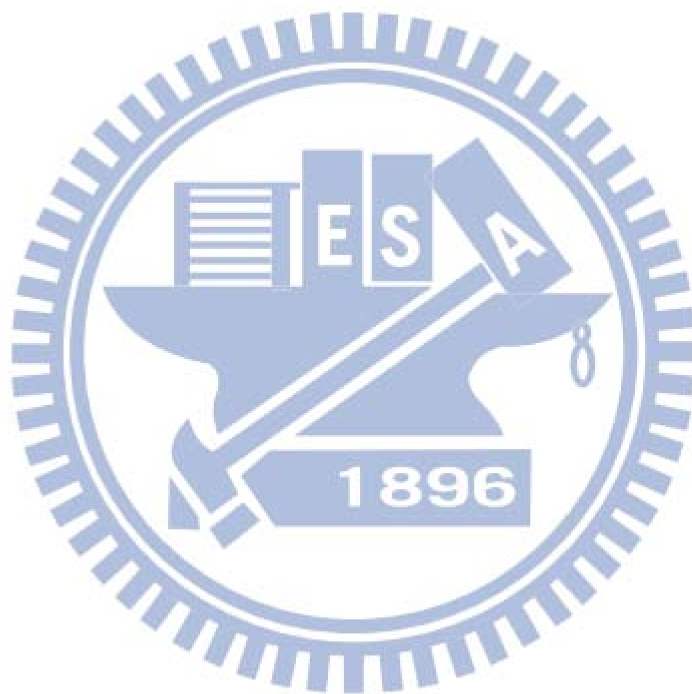
Disputes between the Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations.

[139] Article 13

Disputes between the Contracting Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations or in another manner acceptable to the Parties Contracting Parties.

[140] Article 11

Disputes between the Contracting Parties as to the interpretation or application of provisions of the present Agreement shall be settled through negotiations.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附件二

說明：

一、以下為向 WTO 備案目前生效之所有 RTA。

二、本論文已蒐集並分析完畢其爭端解決條款者，以灰階為底色標示。

RTA Name	Coverage	Type	Notification	Date of entry into force	Status
Andean Community (CAN)	Goods	CU	Enabling Clause	25-May-88	In Force
Armenia – Kazakhstan	Goods	FTA	GATT Art. XXIV	25-Dec-01	In Force
Armenia – Moldova	Goods	FTA	GATT Art. XXIV	21-Dec-95	In Force
Armenia – Russian Federation	Goods	FTA	GATT Art. XXIV	25-Mar-93	In Force
Armenia – Turkmenistan	Goods	FTA	GATT Art. XXIV	7-Jul-96	In Force
Armenia – Ukraine	Goods	FTA	GATT Art. XXIV	18-Dec-96	In Force
ASEAN – Australia – New Zealand	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-10	In Force
ASEAN – China	Goods & Services	PSA & EIA	Enabling Clause & GATS Art. V	01-Jan-2005(G) /01-Jul-2007(S)	In Force
ASEAN – India	Goods	FTA	Enabling Clause	1-Jan-10	In Force
ASEAN – Japan	Goods	FTA	GATT Art. XXIV	1-Dec-08	In Force
ASEAN – Korea, Republic of	Goods & Services	FTA & EIA		01-Jan-2010(G) /01-May-2009(S)	In Force
ASEAN Free Trade Area (AFTA)	Goods	FTA	Enabling Clause	28-Jan-92	In Force
Asia Pacific Trade Agreement (APTA)	Goods	PSA	Enabling Clause	17-Jun-76	In Force
Asia Pacific Trade Agreement (APTA) – Accession of China	Goods	PSA	Enabling Clause	1-Jan-02	In Force
Australia – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	6-Mar-09	In Force
Australia – New Zealand (ANZCERTA)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Jan-1983(G) /01-Jan-1989(S)	In Force
Australia Papua New Guinea (PATCRA)	Goods	FTA	GATT Art. XXIV	1-Feb-77	In Force
Brunei Darussalam – Japan	Goods &	FTA & EIA	GATT Art. XXIV &	31-Jul-08	In Force

	Services		GATS Art. V		
Canada – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	5-Jul-97	In Force
Canada – Colombia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-Aug-11	In Force
Canada – Costa Rica	Goods	FTA	GATT Art. XXIV	1-Nov-02	In Force
Canada – Israel	Goods	FTA	GATT Art. XXIV	1-Jan-97	In Force
Canada – Peru	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-09	In Force
Caribbean Community and Common Market (CARICOM)	Goods & Services	CU & EIA	GATT Art. XXIV & GATS Art. V	01-Aug-1973(G)/ 04-Jul-2002(S)	In Force
Central American Common Market (CACM)	Goods	CU	GATT Art. XXIV	4-Jun-61	In Force
Central European Free Trade Agreement (CEFTA) 2006	Goods	FTA	GATT Art. XXIV	1-May-07	In Force
Chile – China	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Oct-2006(G) / 01-Aug-2010(S)	In Force
Chile – Colombia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	8-May-09	In Force
Chile – Costa Rica (Chile - Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-Feb-02	In Force
Chile – El Salvador (Chile - Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jun-02	In Force
Chile - Guatemala (Chile - Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	23-Mar-10	In Force
Chile - Honduras (Chile - Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	19-Jul-08	In Force
Chile – India	Goods	PSA	Enabling Clause	17-Aug-07	In Force
Chile – Japan	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	3-Sep-07	In Force
Chile – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-99	In Force
China – Costa Rica	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-11	In Force
China – Hong Kong, China	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	29-Jun-03	In Force

China – Macao, China	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	17-Oct-03	In Force
China – New Zealand	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Oct-08	In Force
China – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-09	In Force
Colombia – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-95	In Force
Common Economic Zone (CEZ)	Goods	FTA	GATT Art. XXIV	20-May-04	In Force
Common Market for Eastern and Southern Africa (COMESA)	Goods	CU	Enabling Clause	8-Dec-94	In Force
Commonwealth of Independent States (CIS)	Goods	FTA	GATT Art. XXIV	30-Dec-94	In Force
Costa Rica – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-95	In Force
Dominican Republic – Central America	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	4-Oct-01	In Force
Dominican Republic – Central America - United States Free Trade Agreement (CAFTA-DR)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Mar-06	In Force
East African Community (EAC)	Goods	CU	Enabling Clause	7-Jul-00	In Force
EC (10) Enlargement	Goods	CU	GATT Art. XXIV	1-Jan-81	In Force
EC (12) Enlargement	Goods	CU	GATT Art. XXIV	1-Jan-86	In Force
EC (15) Ennlargement	Goods & Services	CU & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-95	In Force
EC (25) Enlargement	Goods & Services	CU & EIA	GATT Art. XXIV & GATS Art. V	1-May-04	In Force
EC (27) Enlargement	Goods & Services	CU & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-07	In Force
EC (9) Enlargement	Goods	CU	GATT Art. XXIV	1-Jan-73	In Force
EC Treaty	Goods & Services	CU & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-58	In Force

Economic and Monetary Community of Central Africa (CEMAC)	Goods	CU	Enabling Clause	24-Jun-99	In Force
Economic Community of West African States (ECOWAS)	Goods	CU	Enabling Clause	24-Jul-93	In Force
Economic Cooperation Organization (ECO)	Goods	PSA	Enabling Clause	17-Feb-92	In Force
EFTA – Albania	Goods	FTA	GATT Art. XXIV	1-Nov-10	In Force
EFTA – Canada	Goods	FTA	GATT Art. XXIV	1-Jul-09	In Force
EFTA – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Dec-04	In Force
EFTA – Colombia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-11	In Force
EFTA – Croatia	Goods	FTA	GATT Art. XXIV	1-Jan-02	In Force
EFTA – Egypt	Goods	FTA	GATT Art. XXIV	1-Aug-07	In Force
EFTA – Former Yugoslav Republic of Macedonia	Goods	FTA	GATT Art. XXIV	1-Jan-01	In Force
EFTA – Israel	Goods	FTA	GATT Art. XXIV	1-Jan-93	In Force
EFTA – Jordan	Goods	FTA	GATT Art. XXIV	1-Jan-02	In Force
EFTA – Korea, Republic of	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Sep-06	In Force
EFTA – Lebanon	Goods	FTA	GATT Art. XXIV	1-Jan-07	In Force
EFTA – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-01	In Force
EFTA – Morocco	Goods	FTA	GATT Art. XXIV	1-Dec-99	In Force
EFTA – Palestinian Authority	Goods	FTA	GATT Art. XXIV	1-Jul-99	In Force
EFTA – Peru	Goods	FTA	GATT Art. XXIV	1-Jul-11	In Force
EFTA – SACU	Goods	FTA	GATT Art. XXIV	1-May-08	In Force
EFTA – Serbia	Goods	FTA	GATT Art. XXIV	1-Oct-10	In Force
EFTA – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-03	In Force
EFTA – Tunisia	Goods	FTA	GATT Art. XXIV	1-Jun-05	In Force
EFTA – Turkey	Goods	FTA	GATT Art. XXIV	1-Apr-92	In Force
EFTA accession of Iceland	Goods	FTA	GATT Art. XXIV	1-Mar-70	In Force
Egypt – Turkey	Goods	FTA	Enabling Clause	1-Mar-07	In Force
EU – Albania	Goods &	FTA & EIA	GATT Art. XXIV &	01-Dec-2006(G)	In Force

	Services		GATS Art. V	/ 01-Apr-2009(S)	
EU – Algeria	Goods	FTA	GATT Art. XXIV	1-Sep-05	In Force
EU – Andorra	Goods	CU	GATT Art. XXIV	1-Jul-91	In Force
EU – Bosnia and Herzegovina	Goods	FTA	GATT Art. XXIV	1-Jul-08	In Force
EU – Cameroon	Goods	FTA	GATT Art. XXIV	1-Oct-09	In Force
EU – CARIFORUM States EPA	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Nov-08	In Force
EU – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Feb-2003(G) / 01-Mar-2005(S)	In Force
EU – Côte d'Ivoire	Goods	FTA	GATT Art. XXIV	1-Jan-09	In Force
EU – Croatia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Mar-2002(G) / 01-Feb-2005(S)	In Force
EU – Eastern and Southern Africa States EPA	Goods	FTA	GATT Art. XXIV		In Force
EU – Egypt	Goods	FTA	GATT Art. XXIV	1-Jun-04	In Force
EU – Faroe Islands	Goods	FTA	GATT Art. XXIV	1-Jan-97	In Force
EU – Former Yugoslav Republic of Macedonia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Jun-2001(G) / 01-Apr-2004(S)	In Force
EU – Iceland	Goods	FTA	GATT Art. XXIV	1-Apr-73	In Force
EU – Israel	Goods	FTA	GATT Art. XXIV	1-Jun-00	In Force
EU – Jordan	Goods	FTA	GATT Art. XXIV	1-May-02	In Force
EU – Korea, Republic of	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-11	In Force
EU – Lebanon	Goods	FTA	GATT Art. XXIV	1-Mar-03	In Force
EU – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Jul-2000(G) / 01-Oct-2000(S)	In Force
EU – Montenegro	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Jan-2008(G) / 01-May-2010(S)	In Force
EU – Morocco	Goods	FTA	GATT Art. XXIV	1-Mar-00	In Force
EU – Norway	Goods	FTA	GATT Art. XXIV	1-Jul-73	In Force
EU – Overseas Countries and Territories (OCT)	Goods	FTA	GATT Art. XXIV	1-Jan-71	In Force
EU – Palestinian Authority	Goods	FTA	GATT Art. XXIV	1-Jul-97	In Force
EU – Papua New Guinea / Fiji	Goods	FTA	GATT Art. XXIV	20-Dec-09	In Force
EU – San Marino	Goods	CU	GATT Art. XXIV	1-Apr-02	In Force
EU – Serbia	Goods	FTA	GATT Art. XXIV	1-Feb-10	In Force

EU – South Africa	Goods	FTA	GATT Art. XXIV	1-Jan-00	In Force
EU – Switzerland - Liechtenstein	Goods	FTA	GATT Art. XXIV	1-Jan-73	In Force
EU – Syria	Goods	FTA	GATT Art. XXIV	1-Jul-77	In Force
EU – Tunisia	Goods	FTA	GATT Art. XXIV	1-Mar-98	In Force
EU – Turkey	Goods	CU	GATT Art. XXIV	1-Jan-96	In Force
Eurasian Economic Community (EAEC)	Goods	CU	GATT Art. XXIV	8-Oct-97	In Force
European Economic Area (EEA)	Services	EIA	GATS Art. V	1-Jan-94	In Force
European Free Trade Association (EFTA)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	03-May-1960(G) / 01-Jun-2002(S)	In Force
Faroe Islands – Norway	Goods	FTA	GATT Art. XXIV	1-Jul-93	In Force
Faroe Islands – Switzerland	Goods	FTA	GATT Art. XXIV	1-Mar-95	In Force
Georgia – Armenia	Goods	FTA	GATT Art. XXIV	11-Nov-98	In Force
Georgia – Azerbaijan	Goods	FTA	GATT Art. XXIV	10-Jul-96	In Force
Georgia – Kazakhstan	Goods	FTA	GATT Art. XXIV	16-Jul-99	In Force
Georgia – Russian Federation	Goods	FTA	GATT Art. XXIV	10-May-94	In Force
Georgia – Turkmenistan	Goods	FTA	GATT Art. XXIV	1-Jan-00	In Force
Georgia – Ukraine	Goods	FTA	GATT Art. XXIV	4-Jun-96	In Force
Global System of Trade Preferences among Developing Countries (GSTP)	Goods	PSA	Enabling Clause	19-Apr-89	In Force
Guatemala – the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-06	In Force
Gulf Cooperation Council (GCC)	Goods	CU		1-Jan-03	In Force
Honduras – El Salvador and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Mar-08	In Force
Hong Kong, China – New Zealand	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-11	In Force
Iceland – Faroe Islands	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Nov-06	In Force

India – Afghanistan	Goods	PSA	Enabling Clause	13-May-03	In Force
India – Bhutan	Goods	FTA	Enabling Clause	29-Jul-06	In Force
India – Japan	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-11	In Force
India – Malaysia	Goods & Services	FTA & EIA	Enabling Clause & GATS Art. V	1-Jul-11	In Force
India – Nepal	Goods	PSA	Enabling Clause	27-Oct-09	In Force
India – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-05	In Force
India – Sri Lanka	Goods	FTA	Enabling Clause	15-Dec-01	In Force
Israel – Mexico	Goods	FTA	GATT Art. XXIV	1-Jul-00	In Force
Japan – Indonesia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-08	In Force
Japan – Malaysia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	13-Jul-06	In Force
Japan – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Apr-05	In Force
Japan – Peru	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Mar-12	In Force
Japan – Philippines	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	11-Dec-08	In Force
Japan – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	30-Nov-02	In Force
Japan – Switzerland	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Sep-09	In Force
Japan – Thailand	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Nov-07	In Force
Japan – Viet Nam	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Oct-09	In Force
Jordan – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	22-Aug-05	In Force
Korea, Republic of – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Apr-04	In Force
Korea, Republic of – India	Goods & Services	FTA & EIA		1-Jan-10	In Force
Korea, Republic of –	Goods &	FTA & EIA	GATT Art. XXIV &	2-Mar-06	In Force

Singapore	Services		GATS Art. V		
Korea, Republic of – US	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-Mar-12	In Force
Kyrgyz Republic – Armenia	Goods	FTA	GATT Art. XXIV	27-Oct-95	In Force
Kyrgyz Republic – Kazakhstan	Goods	FTA	GATT Art. XXIV	11-Nov-95	In Force
Kyrgyz Republic – Moldova	Goods	FTA	GATT Art. XXIV	21-Nov-96	In Force
Kyrgyz Republic – Russian Federation	Goods	FTA	GATT Art. XXIV	24-Apr-93	In Force
Kyrgyz Republic – Ukraine	Goods	FTA	GATT Art. XXIV	19-Jan-98	In Force
Kyrgyz Republic – Uzbekistan	Goods	FTA	GATT Art. XXIV	20-Mar-98	In Force
Lao People's Democratic Republic – Thailand	Goods	PSA	Enabling Clause	20-Jun-91	In Force
Latin American Integration Association (LAIA)	Goods	PSA	Enabling Clause	18-Mar-81	In Force
Melanesian Spearhead Group (MSG)	Goods	PSA	Enabling Clause	1-Jan-94	In Force
MERCOSUR – India	Goods	PSA	Enabling Clause	1-Jun-09	In Force
Mexico – El Salvador (Mexico - Northern Triangle)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-Mar-01	In Force
Mexico – Guatemala (Mexico - Northern Triangle)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-Mar-01	In Force
Mexico – Honduras (Mexico - Northern Triangle)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jun-01	In Force
Mexico – Nicaragua	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-98	In Force
New Zealand – Malaysia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-10	In Force
New Zealand – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-01	In Force
Nicaragua and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-08	In Force
North American Free Trade Agreement (NAFTA)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-94	In Force

Pacific Island Countries Trade Agreement (PICTA)	Goods	FTA	Enabling Clause	13-Apr-03	In Force
Pakistan – China	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	01-Jul-2007(G) / 10-Oct-2009(S)	In Force
Pakistan – Malaysia	Goods & Services	FTA & EIA	Enabling Clause & GATS Art. V	1-Jan-08	In Force
Pakistan – Sri Lanka	Goods	FTA	Enabling Clause	12-Jun-05	In Force
Panama – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	7-Mar-08	In Force
Panama – Costa Rica (Panama – Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	23-Nov-08	In Force
Panama – El Salvador (Panama – Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	11-Apr-03	In Force
Panama – Honduras (Panama - Central America)	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	9-Jan-09	In Force
Panama – Peru	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-May-12	In Force
Panama – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	24-Jul-06	In Force
Panama and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-04	In Force
Pan-Arab Free Trade Area (PAFTA)	Goods	FTA	GATT Art. XXIV	1-Jan-98	In Force
Peru – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Mar-09	In Force
Peru – China	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Mar-10	In Force
Peru – Korea, Republic of	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-11	In Force
Peru – Mexico	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Feb-12	In Force
Peru – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-09	In Force
Protocol on Trade Negotiations (PTN)	Goods	PSA	Enabling Clause	11-Feb-73	In Force

Singapore – Australia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	28-Jul-03	In Force
South Asian Free Trade Agreement (SAFTA)	Goods	FTA	Enabling Clause	1-Jan-06	In Force
South Asian Preferential Trade Arrangement (SAPTA)	Goods	PSA	Enabling Clause	7-Dec-95	In Force
South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)	Goods	PSA	Enabling Clause	1-Jan-81	In Force
Southern African Customs Union (SACU)	Goods	CU	GATT Art. XXIV	15-Jul-04	In Force
Southern African Development Community (SADC)	Goods	FTA	GATT Art. XXIV	1-Sep-00	In Force
Southern Common Market (MERCOSUR)	Goods & Services	CU & EIA	Enabling Clause & GATS Art. V	29-Nov-1991(G) / 07-Dec-2005(S)	In Force
Thailand – Australia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-05	In Force
Thailand – New Zealand	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jul-05	In Force
Trans-Pacific Strategic Economic Partnership	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	28-May-06	In Force
Turkey – Albania	Goods	FTA	GATT Art. XXIV	1-May-08	In Force
Turkey – Bosnia and Herzegovina	Goods	FTA	GATT Art. XXIV	1-Jul-03	In Force
Turkey – Chile	Goods	FTA	GATT Art. XXIV	1-Mar-11	In Force
Turkey – Croatia	Goods	FTA	GATT Art. XXIV	1-Jul-03	In Force
Turkey – Former Yugoslav Republic of Macedonia	Goods	FTA	GATT Art. XXIV	1-Sep-00	In Force
Turkey – Georgia	Goods	FTA	GATT Art. XXIV	1-Nov-08	In Force
Turkey – Israel	Goods	FTA	GATT Art. XXIV	1-May-97	In Force
Turkey – Jordan	Goods	FTA	GATT Art. XXIV	1-Mar-11	In Force
Turkey – Montenegro	Goods	FTA	GATT Art. XXIV	1-Mar-10	In Force
Turkey – Morocco	Goods	FTA	GATT Art. XXIV	1-Jan-06	In Force
Turkey – Palestinian Authority	Goods	FTA	GATT Art. XXIV	1-Jun-05	In Force
Turkey – Serbia	Goods	FTA	GATT Art. XXIV	1-Sep-10	In Force
Turkey – Syria	Goods	FTA	GATT Art. XXIV	1-Jan-07	In Force

Turkey – Tunisia	Goods	FTA	GATT Art. XXIV	1-Jul-05	In Force
Ukraine – Azerbaijan	Goods	FTA	GATT Art. XXIV	2-Sep-96	In Force
Ukraine – Belarus	Goods	FTA	GATT Art. XXIV	11-Nov-06	In Force
Ukraine – Former Yugoslav Republic of Macedonia	Goods	FTA	GATT Art. XXIV	5-Jul-01	In Force
Ukraine – Kazakhstan	Goods	FTA	GATT Art. XXIV	19-Oct-98	In Force
Ukraine – Moldova	Goods	FTA	GATT Art. XXIV	19-May-05	In Force
Ukraine – Russian Federation	Goods	FTA	GATT Art. XXIV	21-Feb-94	In Force
Ukraine – Tajikistan	Goods	FTA	GATT Art. XXIV	11-Jul-02	In Force
Ukraine – Uzbekistan	Goods	FTA	GATT Art. XXIV	1-Jan-96	In Force
Ukraine – Turkmenistan	Goods	FTA	GATT Art. XXIV	4-Nov-95	In Force
US – Australia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-05	In Force
US – Bahrain	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Aug-06	In Force
US – Chile	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-04	In Force
US – Colombia	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	15-May-12	In Force
US – Israel	Goods	FTA	GATT Art. XXIV	19-Aug-85	In Force
US – Jordan	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	17-Dec-01	In Force
US – Morocco	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-06	In Force
US – Oman	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-09	In Force
US – Peru	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Feb-09	In Force
US – Singapore	Goods & Services	FTA & EIA	GATT Art. XXIV & GATS Art. V	1-Jan-04	In Force
West African Economic and Monetary Union (WAEMU)	Goods	CU	Enabling Clause	1-Jan-00	In Force