

GLOBAL TRADE LAW SERIES

THE RELATIONSHIP OF WTO LAW AND REGIONAL TRADE AGREEMENTS IN DISPUTE SETTLEMENT

From Fragmentation to Coherence

Malebakeng Agnes Forere



Wolters Kluwer

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The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement

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The *Global Trade Law Series* addresses key issues in international trade law. It covers a broad range of topics, including WTO dispute settlement, free trade agreements, investment law and arbitration, export control, and compliance with international trade obligations.

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*To the love of my life, my little girl Joanne Molapo and my late mother Mahai
Josephina Forere*

About the Author

Malebakeng Agnes Forere is a senior lecturer at the School of Law of the University of the Witwatersrand. She lectures International Trade Law and Intellectual Property Law at Masters level; Labour Law and Law of Property at undergraduate level. Her main research interests are International Trade Law, Investment Law and Intellectual Property Law. Prior to joining the University of the Witwatersrand, Malebakeng Agnes Forere was a lecturer at the University of KwaZulu-Natal – the position she held for five years.

Malebakeng Agnes Forere obtained BA Law and LL.B from the National University of Lesotho. She further obtained Master of Laws with Merit from the University of Essex, United Kingdom and a PhD *magna cum laude* from the University of Bern, Switzerland.

Forere has published extensively in accredited South African journals and in international listed journals. She is a member of African International Economic Law Network and the Society of International Economic Law. She has done consultancy works for local and international institutions such as the World Bank.

Foreword

The advent of the World Trade Organization in 1995 was accompanied by a two-tier system of dispute settlement, composed of ad hoc panels and a permanent Appellate Body. Building upon the experience of GATT, it emerged as one of the most efficient and successful instruments to settle trade disputes, accompanied by disciplines of enforcement and sanctions. The judicial quality of it placed the system at the heart of the multilateral system, today of greater importance than multilateral negotiations at the WTO. For the last twenty years, we have witnessed a shift to preferential trade negotiations and agreements around the world. There are more than seven hundred preferential trade agreements today, deviating from the principle of MFN. While some, in particular in Europe, date back to the post war era, most of the agreements emerged in the 1990s and in recent years. Today, developments are led by negotiations on a new generation of plurilateral inter-regional agreements, in particular the Trans-Pacific Partnership (TTP) and the Transatlantic Trade and Investment Partnership between the US and the EU (TTIP), and the Regional Comprehensive Economic Partnership (RCEP) led by China. These projects will likely provide for their own dispute settlement mechanism, while most existing preferential trade agreements, with the exception of the EU, NAFTA the Andean Pact and perhaps Mercosur, mainly show weak mechanism of dispute resolution, if not even being devoid of them. Preferential trade agreements in Africa in particular are based upon bargaining and negotiations and effective avenues of legal dispute settlement have not emerged.

The work by Dr Malebakeng Agnes Forere, supported by a scholarship of the Swiss State Secretariat for the Economy (SECO) scholarship at the World Trade Institute and the Department of Economic Law of the University of Bern, Switzerland, takes up the issue to what extent WTO dispute settlement could be combined with preferential trade agreements, and to what extent existing deficiencies and lacunae could be filled. To this effect, the present book, based upon her PhD thesis submitted and adopted by the Faculty of Law in 2013, examines the complex legal relationship of WTO law and preferential trade agreements and explores possible avenues and options to combine the two avenues with a view to overall enhance the benefits of trade liberalization and rule based trade regulation. At this stage, the legal framework is characterised by strict fragmentation. WTO law does not allow relying upon RTAs in

dispute settlement, and RTAs cannot be submitted for dispute settlement to the WTO. The book succeeds in exploring different options and avenues as to how regional trade agreements could be combined with dispute settlement based upon the law of the World Trade Organization and its institutions. The book contributes to an emerging debate and is one of the first works dealing with the issue in a comprehensive manner. It offers an interesting and important contribution, in particular from an African perspective.

It was a pleasure working with Malebakeng at the World Trade Institute. While researching for, and writing on, her thesis, she contributed to the life and debate at the Institute and was instrumental in organising the first pan-African WTO conference at the Mandela Institute of the University of the Witwatersrand in Johannesburg, South Africa. We are most grateful to her for a substantial contribution to the field of international economic law, in this book and beyond.

*Professor Thomas Cottier
Bern, August 2015*

Preface

Whereas the General Agreement on Trade and Tariffs (GATT) of 1947 has always allowed the formation of regional trade agreements in the form of Free Trade Agreements and Customs Unions, the advent of the World Trade Organization and adoption of GATT 94 has witnessed the surge in the formation of regional trade agreements or preferential trade agreements, probably because of stagnation in concluding DOHA Round. In recent years, the rise of mega-regionals such as Transatlantic Trade and Investment Partnership are feared to have the potential of displacing the WTO. Some scholars have even termed the WTO core principle of most favoured nation (MFN) as least favoured nation given that almost all WTO Members are parties to an average of eleven RTAs. Nevertheless, the dispute settlement part of the WTO remains unparalleled among other international courts such as the International Criminal Court (ICC) or the International Court of Justice (ICJ). Equally, it remains unmatched by the dispute settlement mechanisms of the preferential or regional trade agreements.

Since regional trade agreements are exceptions to the MFN only, they are not exempted from other WTO obligations, and this creates overlaps between WTO Dispute Settlement Body and RTA tribunals thereby fragmenting the global trading system. Consequently, scholars in international economic law commenced a debate in finding ways to solve this puzzle. This book joins the ongoing vibrant debate and it is among the first, if not the first one, to be dedicated to the topic of dispute settlement of the WTO and RTAs. Thus, it challenges the views posed by renowned scholars in the field who maintained that there are avenues, such as Article 25 of the Dispute Settlement Understanding, in which RTA disputes can be settled in the WTO. The book proves that WTO law is watertight; it currently does not allow RTA claims to be settled in the WTO. Garnering support from the ICC and ICJ practices, the book advances arguments for the creation of both contentious and referral jurisdiction of the WTO DSB in respect of RTA claims, irrespective of whether such claims raise WTO law or WTO-plus norms. These proposals are based on the claim that WTO and RTAs are related, that is, they are parts of one system; and, this claim is based on the theory of multilevel governance and Article XXIV of the GATT.

Given the intensive extrapolation of WTO law and cases relating to RTAs, I believe that this book will provide clarity on this complex phenomenon to scholars and students in international economic law, and assist governments in formulating their opinion in building a coherent multilateral trading system that takes cognizance of the RTAs, which are equally formed and financed by the very same governments that have created and continue to finance the WTO. Thus, if the WTO works very well in settling trade disputes and poorly in trade negotiation why can't governments use WTO to settle trade disputes that raise RTA claims and continue to use RTAs as testing grounds for new trade topics? Why should there be duplication of efforts?

This work was undertaken at the World Trade Institute (WTI) of the University of Bern with the financial support of the Swiss State Secretariat for Economic Affairs (SECO); as such, my heartfelt gratitude goes to the Swiss people through the SECO project for making it possible for me to undertake this tremendous research project. Further, the WTI boasts an excellent library on international economic law; it houses world class experts drawn from top Universities around the world on different areas of international economic law and it is home to countless workshops, conferences and seminars on exciting international economic law topics. As such, I am grateful that this work was commissioned at the WTI, and therefore built on a very strong foundation. I doubt it could have been this engaging if carried out elsewhere.

My sincere gratitude goes to Professor Dr. Thomas Cottier for his excellent guidance from the conception of this project until its finality; his insightful comments, encouragement, constructive criticism shaped this work tremendously. I could not have possibly pulled it through without him and I hope one day I can follow in his footsteps and be a world renowned scholar.

I also acknowledge the support I got from Professor Dr. Matthias Oesch who always gave me an opportunity to bounce ideas through to him, and also for reading some preliminary chapters of this manuscript.

At the time of preparing this manuscript, I was expecting my little Joanne and the support I got from my friend Dr Danie Jost was unimaginable, and I will always be indebted to Danie.

I am grateful to my friends and colleagues Dr. Maria Anna Corvaglia, Dr. Rodrigo Polanco, Romulo Brillo, Professor Victor Sacu, and the entire staff of the World Trade Institute for the moral and intellectual support, as well as those lunch hours we spent together. I cannot forget the able administrative assistance from Rosemarie Coeppicus and Margrit Vetter.

I thank my friend and colleague Ms Lee Stone for proof-reading this work; it definitely is a daunting task to create time to read one's book – it requires dedication, patience and utmost friendship or collegiality.

My family, in particular my partner Sekoala Molapo for his patience and support while I neglected him and got married to this project, my dearest uncle Dr. Mohaeka Raselimo and his wonderful wife aunty Mamookho Raselimo for their unwavering support throughout the writing of this manuscript. Of course, I could not have finished this book if it were not for the assistance I got from my aunt – Mamotselisi Lehaliko – for taking care of my little Joanne especially during the final preparation of this book.

Above all, I thank God for everything.

List of Abbreviations

AB	Appellate Body
AEC	African Economic Community
ASEAN	Association of Southeast Asian Nations
AU	African Union
COMESA	Common Market of East and Southern Africa
CRTA	Committee on Regional Trade Agreements
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
EBA	Everything But Arms
EC	European Communities
ECJ	European Court of Justice
EEC	European Economic Community
EFTA	European Free Trade Agreement
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	Generalised System of Preferences
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ITLOS	International Tribunal on the Law of the Sea
ITO	International Trade Organization
MERCOSUR	Common Market of the South

List of Abbreviations

MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Justice
PTA	Preferential Trade Agreements
RECs	Regional Economic Communities
RTA(s)	Regional Trade Agreement(s)
SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Agreement
UN	United Nations
UNCLOS	United Nations Convention on the Law of Sea
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

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