

CONFLICTING LAWS AND JURISDICTIONS IN THE DISPUTE SETTLEMENT PROCESS OF REGIONAL TRADE AGREEMENTS AND THE WTO

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ABSTRACT

With emerging new Regional Trade Agreements (RTAs) and the stagnating of the Doha Round negotiations, the conflict of overlapping laws and jurisdictions between WTO tribunals and those of RTAs has become an important issue. That conflict should be addressed multilaterally and regionally. The examination of the DSU shows that the WTO treaty negotiators did not perceive potential conflicts of jurisdictions with RTAs. Since there is no general rule of primacy between WTO norms and those of RTAs, it has been suggested that the DSU (Dispute Settlement Understanding) should be amended and that under certain conditions choice of forum and/or exclusive forum clauses of RTAs could lead a panel to suspend jurisdiction until the issue has been cleared. This article points out that conflicts of laws and jurisdictions should constantly be borne in mind while setting up RTAs. Moreover, a forum selection rule might not always be sufficient to prevent conflicts of jurisdictions. If there are norms in an RTA that address matters differently from the WTO-covered agreements, an effective remedy under the RTA is especially crucial for those rights to be enforceable. If those norms are not contrary to Article XXIV of the GATT, Article V of the GATS and

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the enabling clause, there should be a possibility for parties to opt for exclusive RTA jurisdiction in those matters.

KEYWORDS: *RTA, conflict of law, conflict of jurisdiction, DSU*

I. INTRODUCTION

The following article deals with conflicting laws and jurisdictions in the dispute settlement process of Regional Trade Agreements (RTAs) and the WTO. As an RTA may be understood a Free Trade Area (FTA) or a Customs Union. While RTAs have originally been concluded mostly within regional blocks (such as NAFTA or MERCOSUR), there has been a recent trend of “global RTAs”, between trading partners of different continents (such as the EU-Chile, EU-Mexico, or the US-Korea FTAs). In a time where new RTAs are emerging and the Doha Round negotiations are stagnating, these conflicts are not likely to get any less complex. Conflicting jurisprudence is possible among members of an RTA and the WTO, and between RTA members and third parties. However, the current work focuses solely on conflicts between members of an RTA that are also members of the WTO.

After a comprehensive analysis of WTO and RTA norms and case law on conflicting laws and jurisdictions some suggestions are made how to mitigate those conflicts. They should be addressed from three sides. Firstly by WTO adjudicators themselves when deciding on jurisdiction and the applicable law, secondly by including norms dealing with those conflicts in RTAs and thirdly by explicitly addressing the matter through an amendment of the multilateral rules, regulating the relationship between the WTO and RTAs. None of the suggested approaches is sufficient by itself.

The first sections provides an introduction to the concept of conflicting laws and jurisdictions and examines how the WTO handles these conflicts. Part V describes how the MERCOSUR, the NAFTA, the EU-Mexico and EU-Chile Free Trade Agreements (FTAs) deal with conflicting jurisdictions. The main emphasis of this research will be the possible effect of RTA clauses dealing with such conflicts before a WTO Panel or Appellate Body (AB). Several RTAs have incorporated jurisdictional clauses, which prohibit their contracting parties to bring the same factual matter before both fora (the WTO and the RTA forum). The relevant case law is introduced in order to clarify how WTO Panels and Appellate Bodies have addressed the matter so far. Since there has not been a single case in which a WTO defendant has successfully relied on an RTA clause that prohibits the complainant to initiate proceedings under the WTO, some general conclusions will be drawn on how a WTO Panel could possibly decide such a case in the future.

In the final part of the article some suggestions are given on how conflicting norms and jurisdictions between RTA tribunals and the WTO could be addressed in order to mitigate the adverse effects of multiple proceedings.

II. INTRODUCING CONFLICT OF LAW AND CONFLICT OF JURISDICTION IN THE WTO-RTA CONTEXT

A conflict of jurisdiction arises if a dispute can be brought entirely or partly before two or more different courts or tribunals, while a conflict of law results from two or more norms which are different in substance but apply to the same or similar facts, and whose application would lead to contrary decisions, so that a choice must be made between them.¹ Because of the vertical relationship between different courts and applicable laws on a domestic or EC level, the appropriate judicial forum, as well as which law is to be used for a specific claim can be determined as a result of a hierarchical order, which is for instance based on primacy of the national law over state law (in federations) or EC law over domestic law (within the European Community). In contrast to those examples there is no such “*intrinsic*”² priority between obligations, which are derived from (public) international law. In contrast to domestic law, the relationships of different jurisdictions and different bodies of international law are generally horizontal. All treaty rights and obligations exist next to each other on an equal footing alongside with rules of customary international law. It can be argued that this lack of hierarchy is responsible for conflicts jurisdictions³ and conflicts of laws in international law. While in private international law the issue of conflicts between laws and jurisdictions has been widely addressed, in public international law the topic has not been much debated until the recent emergence of different international treaties and tribunals. In light of the WTO, this has resulted in an increasing signing of Regional Trade Agreements by WTO members, as well as in a recent trend to incorporate adjudical dispute settlement mechanisms into those agreements. The European Union (EU), for example, has traditionally oppose arbitration or standing tribunals in its FTAs and has preferred political, consensus-based mechanisms to solve intergovernmental trade disputes. The foundation of the European Economic Area (EEA) in 1994 has certainly been an exception to this trend. But because of its close connection with the EU, the EEA should not be classified as a mere RTA, but rather as a system *sui generis* between European States, based on the *acquis communautaire* of the EU internal market.⁴ Furthermore, the competences of the EEA court were declared to be in violation of TEC

¹ The International Law Commission, *Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 23-25, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

² See *id.* ¶ 208.

³ See Laurence Boisson de Chazournes, *Recent Books on International Law*, 98 AM. J. INT’L L. 610, 622 (2004) (reviewing YUVAL SHANY, *THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS* (2003)).

⁴ P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN UNION LAW* 19 (9th ed., 2007).

Article 292 by the ECJ, because these competences could interfere with the autonomous community legal order.⁵ However, starting with the entering into force of the EU-Mexico and EU-Chile FTAs in 2000 and 2001, the EU has begun to adopt quasi-adjudicative models of Dispute Settlement Mechanisms⁶ (DSMs) in its trade agreements. As illustrated by Kwak and Marceau, the potential for conflicts of jurisdictions between RTA DSMs and the WTO DSM increases the more these RTA DSMs are based on judicial means. Whereas the potential for conflicts is generally low for dispute settlement mechanisms based entirely on consensus, it increases with arbitrational systems and it reaches the highest level if a standing judicial body is incorporated into the RTA.⁷ The current trend in FTAs around the world seems to be an arbitrational model of dispute settlement based on panel review.⁸

III. DEFINING CONFLICTS OF LAW

In general there is a presumption against conflict in public international law, meaning that it is presumed that different international treaties apply next to each other, and if a treaty “does not contract out of a pre-existing rule, that rule continues to exist”.⁹ Probably because of this background several legal scholars such as Kelsen or Jenks have adopted a strict definition of conflict in international law, according to which conflict only arises if “a party to the two treaties cannot simultaneously comply with its obligations under both treaties.”¹⁰ The WTO Panel has issued a definition of conflict in accordance with this approach. In *Indonesia-Autos* it has maintained that conflict would only arise if two norms were “mutually exclusive.”¹¹ While the Appellate Body in *Guatemala – Anti-dumping Investigations Regarding Portland Cement from Mexico* has upheld a

⁵ See ECJ Opinion 1/91, *EEA*, 1991 E.C.R. I-6079, ¶ 35.

⁶ See Edna Ramirez Robles, *Political & Quasi Adjudicative Dispute Settlement Models in European Union Free Trade Agreements – Is the Quasi-Adjudicative Model a Trend or is It just Another Model?*, WTO Staff Working Paper ERSD-2006-09, at 36, www.wto.org/english/res_e/reser_e/ersd200609_e.pdf (last visited Oct. 17, 2008).

⁷ See generally Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organisation and Regional Trade Agreements*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 465, 486-523 (Lorand Bartels & Federico Ortino eds., 2006).

⁸ See *id.*

⁹ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) *AM. J. INT'L L.* 535, 542 (2001).

¹⁰ See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW – HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 167 (2003).

¹¹ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.99, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998).

similar strict definition,¹² in *European Communities – Regime for the Importation Sale and Distribution of Bananas III* [hereinafter *EC-Bananas III*] the Panel also included in its definition of possible conflicts of laws “the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.”¹³ Pauwelyn suggests an even wider definition for conflicts of norms, including two norms that may address the same subject matter and circumstances but in a different way (“conflicting commands that are merely different”).¹⁴ An example for this type of conflict would be a norm in an RTA that is less stringent than the WTO norm or a WTO plus provision. Complying merely with the WTO provision would mean a violation of the RTA, in which the WTO plus provision has been incorporated, or in the opposite scenario a violation of the WTO-covered agreements would still mean compliance with the RTA. In accordance with the presumption against conflict, a genuine conflict could be averted by compliance with the more demanding norm. It is likely that the complainant will take the dispute to the forum with the more demanding norm, and through this conduct a conflict of norms will be avoided.

In the case of one rule in a particular treaty and an exception to that rule in another treaty, it could be argued that the presumption against conflict obliges the parties not to exercise the exception. Complying with the rule would then ensure compliance of both treaties at the same time. However, this would certainly jeopardise the aim of the exception, which would in turn undermine the sovereign will of the parties relying on the exception.

It seems obvious that in order to assess possible conflicts between laws fully, a wide definition of conflict of laws should be pursued like the Panel has done in *EC-Bananas III*; *i.e.* not only including conflicts that arise if a party “cannot simultaneously comply with two different agreements,” but also comprising potential conflicts that may occur if a party freely chooses to take advantage of a right or an exception in one agreement which would result in a breach of the other agreement. Consequently, in this paper the term “conflict of laws” will be used in a broad sense, including the potential conflicts just mentioned. According to that definition, a conflict arises if the exercise of one norm (no matter if that norm is a command or merely a right) will lead to the violation of another norm.

The dispute of *Canada – Certain Measures Concerning Periodicals* [hereinafter *Canada-Periodicals*] shows that a strict definition of conflict is

¹² Appellate Body Report, *Guatemala – Anti-dumping Investigations Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/AB/R (Nov. 2, 1998) [hereinafter *Guatemala-Antidumping Appellate Body Report*].

¹³ Panel Report, *European Communities – Regime for the Importation Sale and Distribution of Bananas III*, ¶ 337, WT/DS27/R/ECU (May 22, 1997).

¹⁴ See PAUWELYN, *supra* note 10, at 180.

not appropriate for dealing with conflicts of law between the WTO and RTAs. *Canada-Periodicals* concerned a dispute that was decided in favour of the U.S. before a WTO Panel and AB against Canada, since the latter had violated the national treatment obligation by discriminating against split run periodicals originating from the former.¹⁵ The U.S. had brought its complaint under the WTO DSM, because under NAFTA rules, there is a cultural industries exemption between Canada and the U.S. and between Canada and Mexico,¹⁶ which permitted the Canadian measure. Had the complaint been brought under the NAFTA, Canada could have invoked that exemption and would have probably won the case. However, Canada decided not to invoke the NAFTA exemption as a defence and lost the case. Under a strict definition of conflict as it was suggested by Jenks, there would not have been a conflict of law, since Canada was free not exercise the right granted by the NAFTA and therefore could comply with both agreements (the GATT and NAFTA) at the same time.

IV. PROVISIONS ON CONFLICT OF LAW AND CONFLICT OF JURISDICTION IN THE WTO-COVERED AGREEMENTS

A. *The Exclusive Jurisdiction of WTO Adjudicating Bodies under Article 23 of the DSU*

Article 23 of the Dispute Settlement Understanding [hereinafter DSU] provides for exclusive jurisdiction of all disputes arising under the WTO-covered agreements by the WTO dispute settlement mechanism. Article 23.1 of the DSU states that “when members seek the redress of a violation of obligations or other nullification of 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 of procedures of this Understanding”. Furthermore Article 23.2 prohibits WTO members to “make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding”. However, the exclusive jurisdiction established in Article 23 of the DSU is certainly not comparable to the exclusive jurisdiction of a forum like the ECJ.¹⁷ Besides

¹⁵ See generally Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997).

¹⁶ North American Free Trade Agreement, U.S.-Can.-Mex., art. 2106, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

¹⁷ Treaty Establishing the European Community, art. 292, Feb. 7, 1992, 1 C.M.L.R. 573 [hereinafter TEC].

the possibility for parties to alternatively have recourse to arbitration¹⁸ and the provision that “specific rules and procedures on dispute settlement contained in the covered agreements”¹⁹ override the exclusive jurisdiction contained in Article 23 of the DSU, adjudicators can be confronted with a conflict of jurisdiction between the WTO DSM and other fora in several other ways, conflicts which cannot be resolved by the provisions of Article 23 of the DSU alone.

To examine Article 23 of the DSU, recourse can be held to the interpreting rules in Articles 31 and 32 of the Vienna Convention of the Law of Treaties [hereinafter VCLT], because according to Article 3.2 of the DSU existing provisions of the WTO-covered agreements are to be clarified “in accordance with customary rules of interpretation of public international law”. According to Article 31.1 of the VCLT recourse first has to be held to the objective method of treaty interpretation, meaning “in good faith and in accordance with the ordinary meaning” of the words. Article 23.2 of the DSU bars the unilateral “determination” by members that a treaty has been breached. Therefore if members “seek the redress of a violation” of a WTO-covered agreement the WTO DSM is compulsory. Shany observes that Article 23 of the DSU does not explicitly preclude referring disputes about the “interpretation”²⁰ of WTO-covered agreements to an external court or tribunal.²¹ The dictionary clarifies determination in the judicial context as “to officially decide something”, while interpretation is “the particular way in which sth. is understood or explained.”²² The NAFTA, for example, has incorporated several WTO provisions²³ and NAFTA panels are frequently interpreting them while adjudicating on disputes between NAFTA members on NAFTA norms. However, in this context the NAFTA panels do not determine whether WTO obligations between the NAFTA members have been violated; since those provisions are

¹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 25.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

¹⁹ DSU art. 1.2. An example for this exception is art. 11.3 of the Agreement on the Application of Sanitary and Phytosanitary measures [hereinafter SPS], which explicitly allows WTO Members to have recourse to “the good offices or dispute settlement mechanisms of other international organisations or established under any international agreement.”

²⁰ YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 184 (2004).

²¹ In contrast to art. 23 of the DSU, art. 292 of the TEC (*e.g.*) confers the exclusive interpretation or application of the EC Treaty upon the courts that are empowered to do so by the TEC.

²² ALBERT SYDNEY HORNBY & SALLY WEHMEIER, *OXFORD ADVANCED LEARNER’S DICTIONARY OF CURRENT ENGLISH* 343, 680 (2000).

²³ *See, e.g.*, art. 301(1) of the NAFTA on national treatment, which incorporated art. III of GATT, art. 309(1) of the NAFTA and art. XI of the GATT (prohibition quantitative restrictions), art. 2101(1) of the NAFTA and art. XX of the GATT (general exceptions); the provided examples are not exhaustive.

incorporated into the NAFTA, they solely decide upon obligations under the NAFTA.

B. WTO Provisions on Conflict of Law

Under Article 1.1 of the DSU, Panels and the Appellate Body only have jurisdiction to examine “the provisions listed in Appendix 1 to this understanding” and “the Agreement establishing the World Trade Organisation”, namely the WTO-covered agreements. Trachtmann has argued that DSU tribunals are *a priori* precluded from applying laws outside of the WTO agreements.²⁴ However, a distinction needs to be made between jurisdiction and the law applicable to a dispute.²⁵ The fact that the jurisdiction of WTO Panels is strictly limited to WTO agreements does not mean that the applicable law before a WTO Panel has to be distinguished from all outside laws. On the contrary, it is part of customary international law that when a treaty is interpreted, “any relevant rules of international law applicable in the relations between the parties”²⁶ have to be taken into account. The Appellate Body has explicitly stated that the GATT “is not to be read in clinical isolation from public international law.”²⁷, which is in conformity with Article 31.3(c) of the VCLT.²⁸

Pauwelyn distinguishes two types of cases in which Non-WTO law may be applied by a WTO Panel. Firstly Non-WTO law could lead a panel to decline jurisdiction, even if it had jurisdiction without the invocation of the Non-WTO norm; secondly Non-WTO law could serve as a justification for a challenged act that would otherwise be a violation of WTO rules.²⁹ However, the question of how far a defence based on Non-WTO law could go is controversial. Some scholars are even of the opinion that Non-WTO law cannot be invoked at all as a defence during a WTO dispute.³⁰ What if a party to a dispute invoked an RTA norm as a defence, which is not

²⁴ See Joel P. Trachtmann, *Recent Books on International Law*, 98(4) AM. J. INT'L L. 855 (2004) (reviewing JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (Richard B. Bilder ed., 2003)).

²⁵ PAUWELYN, *supra* note 10, at 460. See also Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35(3) J. WORLD TRADE 499, 503 (2001).

²⁶ Vienna Conventions on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

²⁷ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (Apr. 29, 1996). See generally Gabrielle Marceau, *A Call for Coherence in International Law – Praises for the Prohibition against “Clinical Isolation” in WTO Dispute Settlement*, 33(5) J. WORLD TRADE 87 (1999).

²⁸ Art. 31(3)(c) of the VCLT provides: There shall be taken into account, together with the context: . . . (c) any relevant rules of international law in the relationship between the parties.

²⁹ Joost Pauwelyn, *How to Win a World Trade Organisation Dispute Based on Non-World Trade Organisation Law? Questions of Jurisdiction and Merits*, 37(6) J. WORLD TRADE 997, 998 (2003).

³⁰ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 59 (2005).

covered by WTO law. Would Panels be allowed to give way to that defence or would it mean that they would “add or diminish rights and obligations of WTO Members”?³¹ While it would be a violation of Article 1.1 of the DSU if Panels extended their jurisdiction to any law outside of the WTO-covered agreements, Article 31.3(c) of the VCLT certainly enables Panels to take the outside law “in the relations between the parties” into account while judging on WTO norms. However, contrary to Article 31(2)(a) of the VCLT, which explicitly states that its norm applies to “all the parties in the connection with the conclusion of the treaty”, Article 31(3)(c) of the VCLT, leaves the meaning of the term “parties” ambiguous. The study group of the international law commission advocates an approach, whereas the meaning of “parties” in the cited article should be flexible, depending on whether the treaty in question contains reciprocal or integral obligations.³² Even though decisions of the WTO Appellate Body create no binding precedent, it was held by the AB that adopted Panel reports create legitimate expectations among the parties³³, because it is common that the AB and the Panel rely on the reasoning and conclusion of previous AB decisions, to support their reasoning. Therefore the WTO dispute settlement system could be characterised as *de facto*³⁴ based on judicial precedence. This function would be undermined if Panels had jurisdiction over norms, to which not all WTO members have consented to. But does that mean that Article 31(3)(c) of the VCLT does only permit the Panel to take agreements into consideration, to which all WTO members are parties, like the Panel in *EC – Measures Affecting the Approval and Marketing of Biotech Products*³⁵ concluded? Certainly not, since the reasoning of the AB proves that it is possible to take norms into consideration under Article 31(3)(c), which are not binding on all parties, as long as they ascertain the *common intentions*³⁶ of the parties to the agreement (in our case parties is to be understood as the WTO members). Because of that reasoning it is not even necessary that those norms are binding on all disputing parties as long as the common intentions of the WTO members as a whole are respected. Therefore the WTO adjudicating bodies would only be permitted to take the substance of RTA obligations into consideration if they reflect the *common intentions* of

³¹ Gabrielle Marceau, *Conflict of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties*, 35(6) J. WORLD TRADE 1081, 1130 (2001).

³² See Report of the Study Group of the International Law Commission, *supra* note 1, ¶ 472.

³³ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996).

³⁴ Joshua Metzler, *Interpreting the WTO Agreements – A Commentary on Professor Pauwly’s Approach*, 25 MICH. J. INT’L L. 917, 921 (2004).

³⁵ Panel Report, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.68-7.70, WT/DS291-293/INTERIM (Sep. 29, 2006) [hereinafter *EC-Biotech Products*].

³⁶ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 84, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998).

all WTO members and if they are interpreted in connection with WTO norms. This might be true for certain provisions concerning the environment or human rights as well, but that is definitely not the case if an RTA contains a cultural industries exemption for example. Even though the WTO adjudicating bodies are not competent to interpret norms dealing with cultural industries exceptions, they could theoretically lead a Panel to decline its jurisdiction on the basis of certain principles which are contained in the WTO treaty³⁷, but that has never been the case so far.

Bartels has suggested that even though “the DSU does not place any *a priori* restrictions on the sources of international law applicable in a dispute,” the provision that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”³⁸ could be interpreted as a conflicts rule in favour of WTO law.³⁹ However, if there is a provision under an RTA that could be read as an express agreement to refrain from WTO dispute settlement in a certain case, Bartels explicitly states that in such a case certain principles of equity like abuse of rights or estoppel could lead a Panel “to condition the ability of a party to a dispute to rely on an express treaty right on its own conduct.”⁴⁰ So far the WTO adjudicating bodies have managed to circumvent issuing an explicit statement as to whether they would give effect to a bilateral agreement not to invoke the WTO DSM.⁴¹ In *India – Measures Affecting the Automotive Sector* the Panel was even reluctant to clearly state whether a mutually agreed-upon solution between the EC and India to refrain from WTO dispute settlement under certain conditions (agreed upon in the settlement of an earlier dispute under the WTO and notified to the DSB) would be accepted under the WTO DSM.⁴²

Since WTO adjudicating bodies have substantive jurisdiction only over the WTO-covered agreements, they are prohibited from determining violations under Non-WTO agreements. Nevertheless, provisions of RTAs and decisions by RTA panels are part of the “applicable law cited by the parties to a dispute” and therefore should be taken into account while deciding upon WTO claims. In cases where an RTA provision would lead a WTO Panel to interpret a WTO norm in a particular way, it could be argued that WTO adjudicators parties should take an integrationalist approach and interpret WTO provisions in the light of RTA rights and obligations. One example is clauses in an RTA, which enable its members to suspend their trade commitments towards RTA members, which have

³⁷ See *infra* Part V.

³⁸ DSU art. 3.2 & art. 19.2.

³⁹ Bartels, *supra* note 25, at 507.

⁴⁰ *Id.* at 518.

⁴¹ See also *infra* Part V (describing the panels argumentation on choice of forum clauses in RTAs).

⁴² Panel Report, *India – Measures Affecting the Automotive Sector*, ¶ 7.116, WT/DS146/R, WT/DS175/R (Dec. 21, 2001).

been found to violate human rights. In those cases the suspension of commitments could be justified with a public moral exception under Article XX(a) of the GATT.⁴³ If a violation of such a clause has already been determined by an RTA panel, the WTO Panel should exercise judicial comity⁴⁴ and take the reasoning of the RTA adjudicating body into consideration as factual guidance, while determining whether the conditions under Article XX(a) of the GATT are fulfilled.

Moreover, there is a political argument why decisions of RTA panels, which give priority to certain non-trade values such as environmental protection or human rights among RTA Members, should be taken into account under the WTO DSM. Setting up an RTA entails deeper trade integration between the RTA Members. Even if RTA Members decide to give priority to enforcing non-trade norms in certain areas, on the whole a RTAs priority is still the market integration of its members. Both are therefore possible at the same time-deeper economic integration and the enforcement of certain non-trade values. In addition to that, it can be argued that such non-trade measures are still in conformity with the internal requirement of RTAs to liberalise all trade between RTA members substantially.⁴⁵

It has become clear that WTO Panelists are able to mitigate the conflict between different laws, if they take an integrationalist approach and take RTA obligations into consideration in connection with WTO norms. However, this is only possible if the RTA obligations reflect the *common intentions* of all WTO members. Therefore the case where such an approach will be possible are quite limited, considering that over 150 countries are WTO members. Nevertheless there might still be RTA obligations – arguably certain environmental or human rights norms, or simply obligations which confirm WTO norms – which fulfil that test. In such a case an integrationalist approach by WTO adjudicators would help to prevent contradictory judgements in certain (limited) cases. Therefore the issue has also to be addressed regionally within the RTAs and multilaterally through an amendment of the DSU, as it will be argued on the following pages.

V. HOW DIFFERENT RTAs DEAL WITH CONFLICTING JURISDICTIONS

⁴³ See Isabelle Van Damme, *Role of Regional International Law in WTO Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, *supra* note 7, at 553, 574.

⁴⁴ On judicial comity, see also *infra* Part VI.A.

⁴⁵ On the conditions that RTAs have to fulfill to be in conformity with the WTO-covered agreements, see *infra* Part VI.B.

In the following section a number of RTAs will be introduced and the way their DSM interacts with the WTO DSM will be briefly described. Since the relevant WTO case law has involved MERCOSUR and NAFTA disputes, those will be introduced first.

A. MERCOSUR

The current MERCOSUR DSM is regulated by the Treaty of Asuncion and the two protocols of Ouro Preto and Olivos.⁴⁶

1. Provisions on Conflicts of Jurisdiction. — There are two types of dispute settlement mechanisms: one for state-to-state disputes, and the other for private party complaints. The protocol of Brasilia provided for compulsory jurisdiction for all primary and secondary laws, adopted under the MERCOSUR. Under the Protocol of Brasilia the state parties declared “that they recognise as obligatory, *ipso facto* and without need of a special agreement the jurisdiction of the Arbitral Tribunal, which in each case is established in order to hear and resolve all controversies that are referred to in the present protocol.”⁴⁷ The Protocol of Olivos (PO), which went into force in 2004⁴⁸ and replaced the Protocol of Brasilia, contains a choice of forum clause, under which the complaining party can choose a forum if there is a dispute that can also be addressed under the dispute settlement of the WTO or other preferential trade agreements. In general the forum selection is for the complaining party, but parties can jointly agree on another forum.⁴⁹ The Protocol of Olivos rules out the possibility of the same dispute “being submitted either concomitantly or successively, to both fora.”⁵⁰ Thus once a forum has been selected, the parties are not allowed to submit the same case to any other forum. This forum selection rule has been criticised, because it was argued that MERCOSUR – being a customs union with a goal of establishing a common market – should preclude its members from submitting disputes between themselves that also fall under the MERCOSUR competence to the WTO DSM.⁵¹ The exclusive jurisdiction of the ECJ and its precedents in connection with a judicial protection, based on primacy and direct effect, certainly has

⁴⁶ See James A. Whitelaw, *The Mercosur Dispute Settlement System*, in INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES 215, 216 (Jaime Granados & Julio Lacarte eds., 2004).

⁴⁷ Kwak & Marceau, *supra* note 7, at 471.

⁴⁸ See Gabriella Giovanna Lucarelli de Salvio & Jeanine Gama Sá Cabral, *Considerations on the Mercosur Dispute Settlement Mechanism and the Impact of Its Decisions in the WTO Dispute Resolutions System*, at 6, www.iadb.org/Intal/aplicaciones/uploads/ponencias/i_foro_ELSNIT_2007_10_02_Jeanine_Gama_Sa_Cabral.PDF (last visited Oct. 18, 2008).

⁴⁹ Whitelaw, *supra* note 46, at 218.

⁵⁰ The Olivos Protocol for the Settlement of Disputes in Mercosur, art. 1.2, Feb. 18, 2002, 42 I.L.M. 2 (2003).

⁵¹ Salvio & Cabral, *supra* note 48.

contributed to the establishment of the EC internal market, which is why the example of the EC supports the previous argument.

2. *The Lawsuit Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil and its Argumentation on Competing Jurisdictions.* — In 2002 Brazil challenged the antidumping measures that Argentina had introduced on the import of poultry from Brazil. Prior to the WTO proceedings the same factual dispute had been decided by a MERCOSUR *ad hoc* arbitral tribunal in favour of Argentina. Argentina claimed that the panel “should be bound by the ruling of the MERCOSUR tribunal”⁵² and therefore decline jurisdiction.

(a) *Good Faith.* — The first argument brought forward by Argentina was that Brazil had acted in bad faith by first challenging the measure under the MERCOSUR tribunal, and then-after losing the dispute – taking the matter to the WTO, without indicating in its reference to the Panel that the matter had already been decided.⁵³ The Panel did not *a priori* rule out the possibility of invoking bad faith, but instead it quoted the test that had previously been established by the AB in the *United States – Continued Dumping and Subsidy Offset Act of 2000*. In order to find that a Member has failed to act in good faith, a Member first of all “must have violated a substantive provision of the WTO agreements.” Secondly there must be “something more than a mere violation”.⁵⁴ Since Argentina had not alleged that Brazil was in violation of any substantive provision of the WTO agreements it did not meet the first requirement of the test and was therefore precluded from invoking that Brazil had not acted in good faith. By not only having recourse to the general public international law principle of good faith, but also judicially creating a test to be met in order for good faith to be invoked before a WTO Panel or AB, a good faith principle specifically for WTO law was created “by applying certain principles derived from the municipal law of the WTO members.”⁵⁵ Brownlie has observed it is general practice that an international tribunal “chooses, edits and adapts elements from better-developed systems: the result is a new element of international law.”⁵⁶ Mitchell concluded that “of all the principles of international law, the principle of good faith is perhaps the hardest to define.”⁵⁷ Therefore, if an international tribunal defines the

⁵² Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.18, WT/DS241/R (Apr. 22, 2003) [hereinafter *Argentina-Definitive Anti-Dumping Panel Report*].

⁵³ *Id.* ¶ 7.19.

⁵⁴ *Id.* ¶ 7.36.

⁵⁵ MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT 119 (2006).

⁵⁶ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (2003).

⁵⁷ See Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7(2) MELB. J. INT'L L. 339, 344 (2006).

conditions under which a party can invoke the provision of good faith, it increases the predictability and the legal certainty for disputants planning to rely on that doctrine.

From the previous case law it does not necessarily follow that Argentina was precluded from invoking the principle of good faith as an argument that the Panel should decline jurisdiction. A year prior to the poultry case in *Mexico – Antidumping Investigation on High Fructose Corn Syrup (HFCS) from the United States* [hereinafter *Mexico-Corn Syrup*], the AB ruled that Article 3.7, which states that “before bringing a case a Member shall exercise its judgement as to whether action under these procedures would be fruitful,” “reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU.”⁵⁸ Furthermore, in *EC-Bananas III* the AB stated that a Panel must presume a complainant has “duly exercised its judgement as to whether recourse to that Panel would be fruitful.”⁵⁹ Argentina did not rely on any of those cases but instead referred to the AB report in *United States – Tax Treatment for Foreign Sales Corporations* in order to invoke “a principle of good faith with respect to the objective presentation of the facts of a dispute”.⁶⁰ This argument was not upheld in this particular context because the AB referred to the duty “to comply with the requirements of the DSU” (and related requirements in other covered agreements) in good faith. Since Argentina had not claimed that Brazil was failing to comply with any requirements of the DSU (or related requirements) in good faith, the AB ruled that Argentina could not invoke that argument. Taking into consideration the AB Reports in *Mexico-Corn Syrup* and *EC-Bananas III*, it might have been possible for Argentina to rebut the presumption that Brazil had acted in good faith by violating Article 3.7 of the DSU (see above) in connection with Article 3.10 of the DSU, which states that “if a dispute arises all Members will engage in these procedures in good faith.” In order for Argentina’s claim to have been successful it would have had to prove that Brazil had not previously assessed whether bringing a claim would be fruitful, frivolously triggering the WTO DSM in the process. It is difficult to judge the possible outcome of that claim, since from Brazil’s perspective it might certainly be fruitful to resort to another claim, while from a global perspective it would not be fruitful to have two concurrent judgements on the same facts. It is also not clear at all whether it could have been proven that Brazil had acted frivolously, since that term might not even cover the

⁵⁸ Appellate Body Report, *Mexico – Antidumping Investigation on High Fructose Corn Syrup (HFCS) from the United States – Recourse to Art. 21.5 of the DSU by the United States*, ¶ 73, WT/DS132/AB/RW (Oct. 22, 2001).

⁵⁹ *Id.*

⁶⁰ *Argentina-Definitive Anti-Dumping Panel Report*, *supra* note 52, ¶ 6.3.

act of bringing successive proceedings. Therefore, we can conclude that it will be difficult to prevent the successive or parallel taking of an RTA dispute to the WTO DSM by invoking the argument of good faith, because this notion is neither directly nor indirectly addressed in the DSU.

(b) *Estoppel and the Forum Selection Clause under the Olivos Protocol.* — Argentina also brought forward the argument that Brazil was estopped from initiating further proceedings. Argentina had asserted that the principle of estoppel applies if there is a statement of fact, which is clear and unambiguous, voluntary, unconditional and authorised.⁶¹ Argentina submitted that Brazil had previously complied with all its other MERCOSUR proceedings and thus provided a statement of fact which met the requirements of being clear, unambiguous, voluntary, unconditional and authorised.

Furthermore Argentina brought forward the fact that Brazil had signed the Protocol of Olivos, in which it accepted to refrain from successive or parallel proceedings, only to request the establishment of a Panel a week later.⁶²

The Panel rejected Argentina's claim, because "Brazil had made no clear and unambiguous statement, to the effect that, having brought a case under the MERCOSUR . . . it would not subsequently resort to WTO dispute settlement proceedings." Additionally the Panel quoted that in *EEC – Member States' Import Regimes for Imported Bananas*, it had been found that a party can only rely on estoppel if there was "an express or in exceptional cases implied consent from the parties".⁶³ Even though no disputing party has ever succeeded in claiming that its opponent was estopped from bringing a certain claim and it seems that WTO adjudicators are reluctant when deciding whether to accept such claims,⁶⁴ this quotation could imply that a WTO Member would be entitled to rely on the principle of estoppel if it could prove that the conditions of express or implicit consent are fulfilled. Moreover estoppel is accepted by the ICJ as a general principle of international law.⁶⁵ In civil law countries the duty of the protection of legitimate expectations corresponds to the common law doctrine of estoppel. Therefore it seems that it is possible to bring forward estoppel as a valid claim, which would lead a Panel to decline its jurisdiction, since a choice of forum clause in an RTA could be understood

⁶¹ *Id.* ¶ 7.37.

⁶² *Id.*

⁶³ *Id.* ¶ 7.38. See also Panel Report, *EEC – Member States' Import Regimes for Imported Bananas*, ¶ 361, DS32/R (June 3, 1993).

⁶⁴ See P. J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 25 NETHERLANDS Y.B. INT'L L. 227, 231 (1994).

⁶⁵ See *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. Rep., ¶ 6 (June 15), quoted in REBECCA M. M. WALLACE, *INTERNATIONAL LAW* 24 (5th ed., 2005).

as an express consent of the parties to refrain from bringing a claim. It could even be enough when, in the absence of a choice of forum clause, the parties agreed *ad hoc* before an RTA tribunal to refrain from further proceedings, because such an agreement would probably be considered an express consent.

As a further argument Argentina brought forward that Brazil is estopped from bringing further proceedings, because previously it had never challenged any MERCOSUR arbitral awards before a WTO Panel. It seems unlikely that such a practice does suffice in order to rely on estoppel. This is in line with the rejection of the EC's argument in *EC-Export Subsidies on Sugar*. Neither the Panel nor the AB accepted the EC's reasoning that Australia, Brazil and Thailand were estopped because they had not challenged the contested measure previously.⁶⁶ Therefore it can be concluded that the mere practice of not challenging the final decisions of RTA tribunals before the WTO DSM does not estopp a WTO Member from initiating further proceedings before a WTO Panel. It can also be argued that such a possibility would be problematic as it would undermine the exclusive jurisdiction of the WTO DSM. In addition to this it would also be an impediment to legal certainty, because parties would constrain their sovereign right to invoke proceedings under the DSU by regular conduct, possibly without intending to waive their right to bring proceedings under the DSU after a dispute under an RTA has been initiated.

The Panel also dismissed Argentina's argument that the signing of the Protocol of Olivos (PO) should be understood as a statement by Brazil that it would refrain from the possibility of requesting further proceedings in the current case, given the fact that the PO had not entered into force at the time of the case⁶⁷. Moreover, it found that the Protocol of Brasilia, which was in force during the time of the dispute, did not contain any restrictions on the right to bring subsequent WTO proceedings.⁶⁸ The PO on the other hand did not apply to disputes that had already been decided under the Protocol of Brasilia. In conclusion, the Panel assessed that since both parties had seen a need to conclude the PO, it showed that they had been aware of the fact that it was possible to bring subsequent claims under the Protocol of Brasilia. It continued its findings by clarifying that "the Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event does not apply in respect of disputes already decided in accordance with the MERCOSUR

⁶⁶ Appellate Body Report, *European Communities – Export Subsidies on Sugar*, ¶¶ 314-317, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005) [hereinafter *EC-Sugar* Appellate Body Report].

⁶⁷ *Argentina-Definitive Anti-Dumping* Panel Report, *supra* note 52, ¶ 7.38.

⁶⁸ *Id.*

Protocol of Brasilia.”⁶⁹ Even though the Panel did not explicitly state that it considers itself bound by choice of forum clauses of RTAs, this reasoning possibly implies that Article 1 of the Protocol of Olivos created legally binding obligations between the parties, and as a result the Panel would have declined jurisdiction if the PO had been in force. Therefore any party to a dispute wishing to invoke a choice of forum clause as a reason for a Panel or AB to decline jurisdiction, should make a reference to the quoted lines in its submissions and a choice of forum clause should logically be accepted by a Panel in the future. However, Marceau and Kwak have raised doubts on whether a choice of forum clause in an RTA would have any legal effects before a WTO Panel. They emphasise this argument by stating that a NAFTA party that disregarded the choice of forum clause in NAFTA Chapter 20 and initiated a request for a WTO Panel would indeed be liable for that violation before a NAFTA Panel, but that there would be no “legal impediment” against double or successive proceedings, since the NAFTA and the WTO Panels would be “considering different matters under different applicable law.”⁷⁰ As a further restraint they submit that even if a Panel did generally accept a jurisdictional clause, “it is doubtful whether this type of provision would suffice to allow a WTO Panel to refuse to hear the matter, because it might be difficult for a Panel to assess if the facts, which were raised in both fora, are exactly the same.”⁷¹ While this potential problem has not been addressed in the current case, it could be suggested that should there be a choice of forum clause and should a WTO adjudicating body be in doubt as to whether the facts before it are exactly the same as before the RTA tribunal, it could provisionally decline jurisdiction and submit the matter back to the RTA panel to assess whether it has already decided upon the matter. Or it could seek information from an RTA panel before deciding on the admissibility of the case instead.⁷² Through this procedure a choice of forum clause could work well in practice, and the impediment highlighted by Kwak and Marceau could be overcome.

In response to the argument that a jurisdictional clause cannot “allow a WTO Panel to refuse to hear the matter,” it could be argued that except for the provisions in Article XXIV of the GATT and Article V of the GATS (and if developing or less developed countries are involved the enabling clause), there is no hierarchy between the WTO agreements and RTAs. Since forum selection clauses arguably do not fall under those provisions, ignoring them could be considered applying WTO law “in clinical

⁶⁹ *Id.*

⁷⁰ Kwak & Marceau, *supra* note 7, at 470.

⁷¹ *Id.* at 471.

⁷² See DSU art. 13.1 (giving panels the right “to seek information and technical advice from any individual or body which it deems appropriate”).

isolation” from RTA law. Furthermore, the reasoning of the panel in the present case might well be understood as implied consent to the recognition of such a clause. This argument can also be supported by Pauwelyn’s view, which states that the considerations of the panel regarding the Protocol of Olivos “indicate a willingness on behalf of the WTO Panel to apply forum exclusion clauses in other Non-WTO treaties.”⁷³ Contrary to Pauwelyn’s argumentation and in line with Kwak and Marceau, the reasoning of the AB in *EC – Export Subsidies on Sugar* suggests that even if estoppel found application in WTO dispute settlement, this would only be in connection with the DSU provisions. It stated that the DSU provisions could hardly “limit the rights of WTO Members to bring an action.”⁷⁴ Furthermore the AB pointed out that if the principle of estoppel could inhibit a Member’s right to bring proceedings it would fall under the parameters of Articles 3.7 and 3.10 of the DSU, according to which a member must assess whether bringing a claim “would be fruitful” and must furthermore engage in dispute settlement proceedings in good faith. Since estoppel falls under the wider notion of good faith, it could be argued that Article 3.10 would be violated by bringing a claim in violation of an RTA forum exclusion clause. However, it would be very difficult to argue that a principle covered by the broader notion of good faith could override the specific right and duty of WTO Members to bring a dispute about the violation of the covered agreements under the WTO DSM.⁷⁵ It is an accepted customary rule of treaty interpretation, that a *lex specialis derogat legi generali* rule overrides a general rule.⁷⁶ This is also in line with the argumentation of the AB in *EC-Hormones*, where it was found that the precautionary principle cannot override specific provisions⁷⁷ of the SPS Agreement. However, if a Panel accepts that the exclusive forum clause of the RTA and the right to initiate proceedings under the DSU are on the same hierarchical level, it might also accept the argument that a party which violates such a clause is estopped from bringing proceedings under the DSU.

B. NAFTA

⁷³ Pauwelyn, *supra* note 29, at 1013.

⁷⁴ *EC-Sugar* Appellate Body Report, *supra* note 66, ¶ 312.

⁷⁵ See DSU art. 3.2 in connection with art. 23.

⁷⁶ PAUWELYN, *supra* note 10, at 385. Because of the wide application of the principle of *lex specialis derogat legi generali* by international courts and tribunals, it is arguably a broadly accepted customary international law principle of treaty interpretation, although it is not contained in the VCLT and there have also been some disputes as to whether it has the status of customary int. law.

⁷⁷ Appellate Body Report, *EC – Measures concerning Meat and Meat Products (Hormones)*, ¶¶ 123-25, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

1. *Chapter 20.* — Chapter 20 comprises the general dispute settlement procedure for state-to-state disputes.⁷⁸ Luo characterises NAFTA Chapter 20 as a traditional state-to-state *ad hoc* arbitration system.⁷⁹ The panelists are to be selected from a roster of 30 potential arbitrators previously agreed upon by the parties.⁸⁰ A peculiarity of the NAFTA DSM is that the complaining party has to select panellists of the same nationality as the party complained against and vice versa. This cross selection system was designed to contribute to the neutrality of the panellists.⁸¹ If a disputing party does not appoint its panellists within the time frame of 15 days the panellists “shall be selected by lot among the roster members who are citizens of the other disputing party.”⁸² In practice this system does not work, however, since the NAFTA Members have never been able to agree on such a roster in the first place. NAFTA Article 2009 obliges the parties to establish the abovementioned roster, but due to the absence of a consensus this has never happened. Therefore the panellists have to be selected *ad hoc* on a case-by-case basis. As a consequence it is possible for parties to stall the selection procedure or not to select their panellists at all and thus effectively block the initiation of a panel. Steger views these difficulties and delays in the selection of panellists as “serious impediments to the proper functioning” of Chapter 20.⁸³

NAFTA Chapter 20 contains a choice of forum clause. In cases where a complaint can be issued under the NAFTA as well as under the WTO, NAFTA Article 2005.6 provides that “once dispute settlement procedures have been initiated . . . the forum selected shall be used to the exclusion of the other.” Initiation means a request for a Panel under the WTO,⁸⁴ and under NAFTA Chapter 20 the request for conciliation by the Free Trade Commission.⁸⁵ If the complaining party chooses the WTO DSM, a third party “which has a substantial interest into the case and prefers the NAFTA forum,” may ask for consultations.⁸⁶ If no agreement is reached on this point, the NAFTA forum is to be preferred.⁸⁷ In matters “involving the relationship of the NAFTA to specified environmental agreements, and

⁷⁸ All together there are seven different types of dispute settlement enshrined in the NAFTA. See Armand L.C. De Mestral, *NAFTA Dispute Settlement: Creative Experiment or Confusion?*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, *supra* note 7, at 359, 361.

⁷⁹ See Yan Luo, *Dispute Settlement in the proposed East Asia Free Trade Agreement*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, *supra* note 7, 419, 435.

⁸⁰ NAFTA art. 2009(1).

⁸¹ *Id.* at 11.

⁸² NAFTA art. 2011(1)(c).

⁸³ Debra Steger, *Dispute Settlement under the North American Free Trade Agreement*, in INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES, *supra* note 46, 287, 296.

⁸⁴ NAFTA art. 2005(7).

⁸⁵ NAFTA art. 2007.

⁸⁶ Luo, *supra* note 79, at 9.

⁸⁷ NAFTA art. 2005(2).

matters involving sanitary and phytosanitary measures or standards measures relating to the environment, health, safety or conservation”⁸⁸ the Party complained against may oppose the use of the WTO forum. In other words, if the respondent wishes it so, the NAFTA forum is to be preferred in those areas. Where the dispute relates to a multilateral environmental agreement covered by NAFTA Article 104, the NAFTA panel has exclusive jurisdiction.⁸⁹ Until now there has been no case where a complaining party ignored these provisions and proceeded under the WTO in violation of the NAFTA. De Mestral has suggested that it is questionable whether such a violation could be raised under the WTO, because there is no *forum non conveniens* rule under any of the WTO-covered agreements.⁹⁰

2. *Mexico-Soft Drinks*. —

(a) *Argumentation on Choice of Forum*. — Unlike *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* [hereinafter *Argentina-Poultry*], *Mexico – Tax Measures on Soft Drinks and other Beverages* [hereinafter *Mexico-Soft Drinks*] did not relate to a factual matter that had been previously decided by an RTA tribunal. The dispute was about a Mexican 20% tax imposed on soft drinks using sweeteners other than cane sugar.⁹¹ Mexico argued that it had been levied in response to a broader dispute under the NAFTA and therefore, while acknowledging that the panel had *prima facie* jurisdiction, it should decline its jurisdiction as a result of its “implied power”⁹² to decide upon its own jurisdiction. The AB agreed with Mexico that Panels have “a margin of discretion” to address “specific provisions that may arise in a particular case and that are not explicitly regulated.”⁹³ However, this discretion cannot lead to alter “substantive provisions of the DSU”⁹⁴. Assessing that according to Article 11 of the DSU, “the Panel should make an objective assessment of the matter before it,” the AB was of the opinion that a Panel does not comply with that duty if it declines “validly established jurisdiction”.⁹⁵ Moreover, according to the Panel the exclusive jurisdiction of Article 23 of the DSU means that a Member which considers any of its benefits (under the covered agreements) to be “impaired . . . is entitled to a ruling by a WTO

⁸⁸ FREDERICK M. ABBOTT, *LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM* 100 (1995), see also NAFTA art. 2005(3)-2000(4).

⁸⁹ De Mestral, *supra* note 78, at 359, 364.

⁹⁰ *Id.*

⁹¹ Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA “Spaghetti Bowl” is Cooking*, 9(1) *J. INT’L ECON. L.* 197, 198 (2006).

⁹² Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and other Beverages*, ¶ 45, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico-Soft Drinks Appellate Body Report*].

⁹³ *Id.*

⁹⁴ *Id.* ¶ 46.

⁹⁵ *Id.* ¶ 51.

Panel.” In connection with that statement the AB did, however, not address if that is still the case if a Member has voluntarily waived this right in certain circumstances under a different agreement, such as an RTA.

Prior to the appeal the Panel had found that in general it had no discretion to decide “whether or not to exercise its jurisdiction.”⁹⁶ It added that there could only be discretion to decide upon its jurisdiction under the DSU, if the complaining party has no right that a validly established claim is decided by a WTO Panel.⁹⁷ On appeal the AB emphasised that Mexico had confirmed that the Panel had jurisdiction and besides this it had not submitted “that there are legal obligations under the NAFTA or any other international agreement . . . which might raise legal impediments to the panel hearing the case.”⁹⁸ Moreover Mexico had confirmed that the choice of forum clause under NAFTA Article 2005 does not apply in the current dispute. The AB clarified that “it does not express any view on whether a legal impediment to the exercise of a Panel’s jurisdiction would exist in the event that such features as those mentioned were present.”⁹⁹ In other words the AB refused to clarify if a forum election clause in an RTA could be a valid legal basis for a panel to decline its jurisdiction.

Since the AB left unanswered the question as to how a WTO tribunal should deal with a forum election clause in an RTA (similarly to the Panel in *Argentina-Poultry*), it is open to speculation if such a clause would be sufficient to have a panel decline its jurisdiction of a dispute that would normally fall under its scope of jurisdiction. If a case should come before a panel where an RTA Member has violated such a clause and this fact has been submitted by its opponent, it will be forced to explicitly decide upon this issue, but this has not happened yet. Nevertheless, it might be argued that if there are “legal obligations”¹⁰⁰ which could be a challenge to the jurisdiction of a panel, a forum selection clause of an RTA could possibly be understood as such a “legal impediment to the panel hearing the case.”¹⁰¹

(b) *Article XX(d) of the GATT.* — The general GATT exception in Article XX(d) allows contracting parties to adopt measures “which are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.” In its appeal of the panel report in *Mexico-Soft Drinks*, Mexico invoked Article XX(d) of the GATT as being necessary to secure compliance with an obligation of the

⁹⁶ Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.8, WT/DS308/R (Oct. 7, 2005).

⁹⁷ *Id.* ¶ 7.7

⁹⁸ *Mexico-Soft Drinks* Appellate Body Report, *supra* note 92, ¶ 44.

⁹⁹ *Id.* ¶ 54.

¹⁰⁰ *Id.* ¶ 44.

¹⁰¹ *Id.*

USA towards Mexico under the NAFTA.¹⁰² The Appellate Body found that the rules, to which Article XX(d) refers, are those rules “that form part of the domestic legal system of a WTO Member.”¹⁰³ The non-exhaustive list of measures in Article XX points in particular to border measures under internal obligations,¹⁰⁴ which supports the AB’s finding that the term “to secure compliance” (with laws or regulations) is strictly limited to internal rules and does not “encompass the international obligations of another WTO Member.” According to the AB the rules deriving from an international agreement can only be subject to Article XX(d), if they are incorporated into the domestic legal system of a WTO Member. Furthermore, the AB added that “Mexico’s interpretation would allow WTO Members based upon a unilateral determination” to find that another Member had breached its obligation under an international agreement. That term could even include obligations under the WTO. Therefore such a determination would be contrary to the principles of the DSU and the GATT.¹⁰⁵

The AB decision that compliance with the law of international agreements is not covered by Article XX(d) is to be welcomed for another reason as well. Under RTAs and other international agreements it is often the case that norms are not enforceable in a way comparable to the WTO DSU. On the contrary, a lot of dispute settlement mechanisms of RTAs are not compulsory and their awards have no binding effect.¹⁰⁶ If WTO Members were entitled to adopt measures under Article XX(d) in order to secure compliance under international agreements, this would not only be a unilateral determination of a violation, it would also create a tool of enforcement that was not intended by the parties to the international agreement. Even if an RTA dispute settlement body had determined there was a violation of the RTA and the losing party failed to comply with that judgement, it could be problematic if the winning party was able to adopt measures to secure compliance with the judgement and justify them with Article XX(d) of the GATT, because an RTA or other international agreement might provides for the judgement on a particular dispute by an adjudicating body, but not for the enforcement of that judgement. In other words, if Article XX(d) could be used to seek compliance with RTAs, it could be used as a tool to enforce provisions that are not meant to be enforceable.

¹⁰² *Id.* ¶ 13.

¹⁰³ *Id.* ¶ 69.

¹⁰⁴ See *case analysis Mexico-Soft Drinks*, 2(2) S.C.Q.T.D. 9, 14 (Apr.-June 2006), www.southcentre.org/info/scquarterlytradedisputes/TradeDisputesQtrly2006q2.pdf (last visited Oct. 18, 2008).

¹⁰⁵ *Mexico-Soft Drinks* Appellate Body Report, *supra* note 92, ¶ 77.

¹⁰⁶ Kwak & Marceau, *supra* note 7, at 486-93.

3. *NAFTA Chapter 19 and the Lumber Disputes.* — NAFTA Chapter 19 dispute settlement covers disputes about anti-dumping (AD) and countervailing duties (CD).¹⁰⁷ Each NAFTA Member is entitled to keep its domestic laws in those fields.¹⁰⁸ Chapter 19 establishes a binational review mechanism, which may be exercised at the initiative of a private party or a NAFTA Member to review domestic court decisions on AD and CD.¹⁰⁹ The Chapter 19 panel applies the domestic law of the country where the AD and CV duties are imposed. It is not a state-to-state DSM and it does not apply the law of the NAFTA, nor WTO AD/CV provisions, nor public international law. NAFTA does not contract out of WTO agreements on AD and CV. The Chapter 19 panels do not overrule domestic court decisions but affirm decisions of domestic agencies or send them back for redetermination.¹¹⁰ Redeterminations have the force of law, they are binding, but do not constitute the force of *res judicata*.¹¹¹ Unlike in Chapter 20, the quasi-automatic establishment of the panels in Chapter 19 does work in practice, since the roster of panellists has already been composed. It has occasionally happened that the panel was composed in delay.¹¹² While Chapter 19 is typically used by private parties, a state party can challenge a Chapter 19 panel's ruling before an Extraordinary Challenge Committee if the fundamental procedural rights listed in NAFTA Article 1904(3) have been violated. These include gross misconduct of the panel or the manifest exceeding of its powers.¹¹³

Furthermore, Chapter 19 does not preclude parties to the WTO from initiating parallel or successive proceedings before the WTO on related matters.¹¹⁴ Examples of such multiple proceedings are the Lumber IV disputes.¹¹⁵ While the dispute was initially the same, the NAFTA and the WTO Panel examined different subject matters. In a 2002 NAFTA softwood lumber issue, the NAFTA panel made its finding with "reference to a U.S. determination of May 2002", while the WTO Panel in 2004 dealt with "a December 2004 re-determination concerning the same period of investigation (as the NAFTA dispute), but made on a basis of a different record."¹¹⁶ A different record was used because the WTO rules of

¹⁰⁷ Luo, *supra* note 79, at 435.

¹⁰⁸ De Mestral, *supra* note 78, at 367.

¹⁰⁹ See Steger, *supra* note 83, at 301.

¹¹⁰ See *id.* at 302.

¹¹¹ De Mestral, *supra* note 78, at 367.

¹¹² See Steger, *supra* note 83, at 305.

¹¹³ See *id.* at 303.

¹¹⁴ De Mestral, *supra* note 78, at 367.

¹¹⁵ See *id.* For a comprehensive study of the Softwood Lumber disputes, see Greg Anderson, *Can Someone Please Settle This Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO*, 29(5) THE WORLD ECON. 585, 586 (2006).

¹¹⁶ See Pauwelyn, *supra* note 91, at 5.

determination were incompatible with the NAFTA determination rules under which the finding had originally been made.

Additionally, when initiating several disputes about the same facts, the multiple costs have to be taken into account, which could certainly pose a problem if there is an asymmetry between the financial strengths of the two opponents. However, if one takes into account that Chapter 19 “simply binationalises domestic judicial review,”¹¹⁷ as Steger puts it, there seems to be no more or less conflict than between WTO law and domestic law. Since there are no NAFTA norms on AD and CD, Article VI of the GATT, the Agreement on Implementation of Article VI of the GATT and the SCM Agreement are applied between the parties. The cited norms may be violated by decisions of Chapter 19 panels. In one of the lumber disputes both the NAFTA and the WTO Appellate Body Report were in favour of the Canadian lumber importers and did not accept the US finding of a threat of material injury by Canadian imports of softwood lumber.¹¹⁸ But if the AB had ruled in the opposite way, in line with the previous Panel, the WTO tribunal decision would have been contradictory to a finding of a Chapter 19 panel, which might have been a problem for the domestic authorities when deciding which tribunal to follow.

There is no NAFTA law on AD and CV and the conflict is only between domestic law and WTO law, but the domestic authorities would still be bound by the decision of the Chapter 19 panel. Therefore, it might be beneficial to include a provision in Chapter 19 that in case of contradictory findings of a NAFTA Chapter 19 panel on the one hand and a WTO tribunal on the other, the WTO decision has primacy over the NAFTA panel, but not over domestic law. This would avoid domestic authorities being bound by the contradictory decisions of two different international tribunals at the same time.

4. *NAFTA Article 103.* — Unlike MERCOSUR, the NAFTA does contain a provision on conflict of law. NAFTA Article 103 states that the contracting parties of the NAFTA confirm their rights and duties between each other under the GATT, but that in case of discrepancies the NAFTA agreements shall have primacy. However, since there is no exclusive jurisdiction of the NAFTA, but a choice of forum, it seems that this Article was intended to explicitly address NAFTA panels. Otherwise it would make no sense to give the complainant the freedom to choose a forum.

¹¹⁷ See Steger, *supra* note 83, at 291.

¹¹⁸ See Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, ¶ 187, Secretariat File No. ECC-2004-1904-01-USA (Aug. 10, 2004); Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber – Recourse to Article 21.5 of the DSU by Canada*, ¶ 162. WT/DS277/AB/RW (Apr. 13, 2006).

Moreover, it is unlikely that such a provision could be invoked under the WTO, since the DSU does not provide such a possibility.

C. How the EU Mexico and EU Chile FTAs Deal with the Conflict of Law and Jurisdiction¹¹⁹

During the negotiations of the EU-Mexico FTA, Mexico opted for a similar choice of forum clause like Article 2005 of the NAFTA. The EU in return was against a choice of forum clause which precludes successive proceedings, because it was feared that such a provision would weaken the FTA dispute settlement, since in a dispute where both fora could be chosen, a complainant would probably favour the tried-and-tested WTO DSM. Furthermore, opting for a procedural device was not deemed desirable, as this would lead to giving up future WTO rights. As a compromise between the positions of Mexico, which wanted a forum selection similar to the NAFTA, and the EU, which wanted to strengthen the bilateral DSM, it was agreed that if a dispute can be brought under both agreements, a complainant is empowered to select a forum, but no parallel proceedings are allowed.¹²⁰ In contrast to the NAFTA or MERCOSUR forum selection rule, once a dispute is decided successive proceedings in the other forum are possible.¹²¹ Until now the DSM of the Mexico-EU FTA has not been triggered. A provision to allow successive proceedings seems problematic at first sight, since it could lead to contradicting judgements on the same factual matter. In such a situation compliance with one judgement would mean a violation of the other. However Article 47(3) of the quoted Joint Council Decision provides that “arbitration proceedings established under this title will not consider issues relating to each party’s rights and obligations under the Agreement establishing the World Trade Organisation”. In addition to this, articles dealing with anti dumping and countervailing measures, balance of payments restrictions, trade agreements with third parties and intellectual property – all of which rules have a potential of overlapping with WTO norms – are all excluded from the FTA dispute settlement.¹²² A conflict of two contrary judgements is therefore not likely to arise. However, in a case where an FTA provides an exception to an obligation under the WTO, such as the cultural exception in *Canada-Periodicals* for example, successive proceedings will be possible.

¹¹⁹ The following chapter is based on the information from: Ignacio Garcia Bercero, *Dispute in European Union Free Trade Agreements: Lessons Learned? in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM*, *supra* note 7, 383, 400-05.

¹²⁰ Decision No. 2/2000 of the EC-Mexico Joint Council of 23 March 2000, art. 47(4), 2000 O.J. (L 157) 10, 26.

¹²¹ *See id.*

¹²² *See id.* art. 41(2).

Unlike the EU-Mexico FTA, the EU-Chile FTA contains a rule of forum exclusivity, and thus successive or parallel proceedings are prohibited once a DSM has been initiated either under the FTA or the WTO. But contrary to the NAFTA, a defendant may raise a jurisdictional objection in favour of WTO proceedings within 10 days after a panel has been established under the FTA. To such an objection a preliminary ruling must be made within 30 days.¹²³ Furthermore, the FTA panel is precluded to rule on FTA norms, which are equivalent in substance to WTO obligations.¹²⁴

Contrary to the NAFTA, both the EU-Chile and the EU-Mexico FTA (to a lesser extent) include provisions which preclude bilateral panels to interpret and apply norms that overlap with WTO law. Garcia Bercero though considers that this might pose a problem, because “it might be impossible for a bilateral panel to apply a bilateral provision without at the same time considering issues in relation to each party’s rights and obligations under the WTO. Moreover recourse to WTO dispute settlement does not provide an alternative, since WTO panels may not enforce the WTO plus elements included in the FTA.”

D. Conclusions for Future Negotiations of RTAs

Even though negotiators of RTAs can currently not be certain whether forum selection clauses would have any effect before a WTO panel, such clauses should nevertheless be included into RTAs for two reasons. Firstly, these clauses would be applicable under the RTA dispute settlement and therefore help to avoid conflicts of jurisdiction. Secondly, as has been pointed out, it is not impossible that such clauses would find application in WTO dispute settlement, even if this is far from clear. Moreover, the insertion of exclusive forum clauses in RTAs should be considered in certain areas where the RTA norm conflicts with the WTO norm and a choice of the WTO forum by a complainant would endanger the exercise of that norm and thus create a right without a remedy.

If contracting parties to an RTA opt for quasi adjudical dispute settlement, they should make sure that the dispute settlement process functions properly. As Pauwelyn rightly observes: “the Soft Drinks case is at least partly the result of a deficient dispute process in a regional trade agreement.”¹²⁵ Under NAFTA Chapter 20 it would theoretically be possible

¹²³ Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, art. 189(4)(d), Dec. 30, 2002, 2002 O.J. (L 352) 2, 59.

¹²⁴ See *id.* art. 189(4)(a).

¹²⁵ See Joost Pauwelyn, *Choice of jurisdiction: WTO and regional dispute settlement mechanisms: Challenges, options and opportunities*, ICTSD/ GIAN-RUIG dialogue on the “Mexico-Soft Drinks dispute: Implications for regionalism and for trade and sustainable development”, art. 1,

to block the initiation of a panel and at the same time invoke NAFTA Article 2005 before a WTO Panel as a reason to decline jurisdiction. Even though such an act might be considered as an abuse of rights, it is possible because after the initiation of a NAFTA dispute settlement procedure, the selected forum shall be used “to the exclusion of the other.”¹²⁶ Since initiation under the NAFTA means a request for conciliation by the Free Trade Commission,¹²⁷ a dispute would be initiated before the establishment of a panel, and as a consequence the forum selection clause under Article 2005 would apply. Therefore, as a pre-condition for coping with overlapping jurisdictions, parties negotiating an RTA should make sure that the RTA dispute settlement works in practice.

In areas where an RTA simply confirms WTO obligations, excluding those norms from RTA dispute settlement could be considered. By doing this a uniform interpretation of WTO norms through the WTO adjudicating bodies would be ensured.

In areas where an RTA contains a WTO plus provision it is likely that a complainant will choose the RTA forum. However, in a future WTO round this provision might be “upgraded” and would then be more ambitious than the RTA norm. Leaving the complainant the choice in such a case would ensure that compliance with both norms is possible. For these reasons it does not seem necessary to opt for exclusive RTA jurisdiction in these cases. If there is a WTO plus provision in an RTA, it should be considered to explicitly authorise the RTA panel to refer to WTO law, as it is practice under the NAFTA. This suggestion is in line with Garcia Bercero’s argumentation that “in such cases it is difficult to see how a bilateral panel could properly apply the (in our case WTO plus-) provisions of the FTA without also referring to WTO law.”¹²⁸

If an RTA contains an exception to WTO obligations it is advisable to give exclusive jurisdiction to the RTA. The example of the *Canada-Periodicals* case shows that the USA chose the right forum as a complainant, whereas Canada could not rely on that exception anymore, since successive or parallel proceedings under the NAFTA were not possible as a result of the prohibition in NAFTA Article 2005. Therefore in the *Canada-Periodicals* case the cultural exemption under the NAFTA was a right without a remedy from Canada’s perspective. Even though it is questionable whether a WTO Panel would accept an exclusive jurisdiction clause of an RTA provision, it would at least provide a party with the possibility to rely on such a clause, and to ask for retaliation under the RTA,

http://www.ictsd.org/dlogue/2006-05-30/dialogue_materials/Joost_Pauwelyn_speaker_notes.pdf
(last visited Aug. 25, 2008).

¹²⁶ See NAFTA art. 2005(6).

¹²⁷ See NAFTA art. 2007.

¹²⁸ See Ignacio Garcia Bercero, *supra* note 119, at 401.

since it would be a violation of the RTA if a complainant were to choose the WTO forum. However, all those approaches are quite limited if the current WTO provisions, which deal with RTAs will not be amended.

VI. POSSIBLE SOLUTIONS TO ADDRESS THE PROBLEM OF OVERLAPPING AND CONFLICTING JURISDICTIONS BETWEEN RTAS AND THE WTO

A. Comity

Comity is a principle derived from national legal systems, mostly from common law countries.¹²⁹ It calls on courts “to respect and demonstrate a degree of deference to the law” and the court decisions of other jurisdictions.¹³⁰ It enables judges to apply norms originating in other judicial systems. While there is no obligation to do so judges have discretion to apply comity if this contributes to an equitable solution of the case before them. The U.S. Supreme Court has already held in 1895 that “comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”.¹³¹

While comity has been a long-established practice of some nations there are difficulties to recognising it as a general principle of law according to Article 38(1)(c) of the Statute of the ICJ. Many countries do not give any effect to foreign judgements in absence of a judgement recognition convention.¹³² Moreover, there is no uniformity among nations on how much consideration they give to foreign proceedings. Even if it was accepted that comity is a widely exercised principle, it would be difficult to exactly define the notion. Furthermore, comity is not to be regarded as a legally binding judicial principle, but rather as a “gentleman’s agreement between courts”.¹³³ Shany has suggested that comity “may derive its legal effect from courts’ inherent authority to manage their proceedings in accordance with principles of justice and efficiency”.¹³⁴ The benefit of applying comity is that it increases the legitimacy and quality of the

¹²⁹ See SHANY, *supra* note 20, at 260.

¹³⁰ See YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 166 (2007).

¹³¹ See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

¹³² See SHANY, *supra* note 20, at 263.

¹³³ See Nikolaos Lavranos, *Das Rechtsprechungsmonopol des EuGH im Lichte der Proliferation Internationaler Gerichte*, 42 (4) EUROPARECHT 440, 466 (2007).

¹³⁴ See SHANY, *supra* note 130, at 172.

judgements.¹³⁵ As a consequence of this stronger legitimacy, compliance with judgements also improves and conflicts with other jurisdictions are avoided.

Comity can be exercised to encourage litigation before more suitable fora, to mitigate the effects of parallel proceedings, or to consider effects of previous decisions on the same matter.¹³⁶ Comity may be exercised at three different stages of a multi-fora litigation. Firstly, it can be invoked if no further proceedings are initiated but the possibility exists and the tribunal which was charged with the case takes this into account. The second and third possibilities are if parallel or successive proceedings have already been initiated.¹³⁷ If a court or tribunal exercises comity, it is not in the position to fully decline jurisdiction if there is no legal obligation to do so, since that would go beyond its power and contravene the rights of the parties to seek a ruling from that tribunal. Therefore, if this right has not been waived by the parties, a tribunal that exercises comity and is in doubt about there being a legal obligation of the parties to refrain from proceedings as a result of another tribunal having exclusive jurisdiction, it may only suspend proceedings.¹³⁸ If it declines jurisdiction both tribunals could end up declining jurisdiction. This would result in a potential complainant, originally enjoying the possibility of bringing the case before two different fora, being left without a remedy at all. This possibility was addressed in the *Southern Pacific vs. Egypt* case by an ICSID tribunal. Originally the ICSID tribunal had suspended proceedings, because there were parallel proceedings ongoing before the French *cour de cassation*. However, the tribunal was aware that declining jurisdiction could lead to a “negative conflict of jurisdiction”.¹³⁹ Therefore the ICSID tribunal had “as a matter of comity”,¹⁴⁰ not exercised its jurisdiction, while there was a decision pending by the other tribunal. After the *cour de cassation* had declined jurisdiction, the ICSID tribunal took up the case again.

1. The UNCLOS Decision in the MOX Plant Case. — In 2001, Ireland initiated proceedings against the UK after having unsuccessfully demanded information from the UK about radioactive waste from the MOX and THORP plants, recycling plutonium and other nuclear material at Sellafield, located on the west coast of England.¹⁴¹ Ireland had long been concerned

¹³⁵ See *id.* at 167.

¹³⁶ See *id.* at 177-84.

¹³⁷ See *id.* at 176.

¹³⁸ See *id.*

¹³⁹ See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, ¶ 129 (Apr. 14, 1988), 3 ICSID Rep. 131, 264 (1995).

¹⁴⁰ See *id.*

¹⁴¹ See Michel Petite, *Current Legal Issues in the External Relations of the European Union* 10, (Eur. U. Inst., Working Paper No. 2006/38), <http://www.ssrn.com/abstract=965723> (last visited Oct. 18, 2008).

that waters of the Irish Sea might be contaminated by this radioactive material. After consultations both states agreed to have recourse to an arbitration tribunal of the OSPAR (Convention for the Protection of the Maritime Environment of the North-East Atlantic) as well as to a tribunal that would rule on the dispute under the UNCLOS (UN Law of the Sea Convention).¹⁴²

Before the OSPAR Ireland argued that the UK had violated its duty of disclosure of information “on activities or measures adversely affecting or likely to affect” (the state of the maritime area).¹⁴³ The OSPAR tribunal decided that not making available the requested information to Ireland, was not a violation of the OSPAR convention by the UK.¹⁴⁴ While deciding the case the tribunal did not consider suspending jurisdiction because of a potential violation of Article 292 TEC, nor did it take into consideration any EC law such as EC Directive 90/313 (now EC Directive 2003/4), the Aarhus convention or relevant EC precedents.¹⁴⁵ Hence, the OSPAR tribunal did not exercise any judicial comity, but rather interpreted the OSPAR convention as a “self-contained dispute settlement regime”, which compelled the arbitrators to only take the OSPAR convention into consideration.¹⁴⁶ Contrary to this finding Lavranos convincingly argues that the OSPAR tribunal was empowered to exercise judicial comity and to take those conflicting norms into consideration in one way or another. According to Article 32(5)(a) OSPAR “the arbitral tribunal shall decide according to the rules of international law, in particular, those of the Convention”. Lavranos points out that if there is a broad understanding of norms belonging to international law, EC law could also fall under that category.¹⁴⁷

On the other hand, the arbitral tribunal of the permanent court of arbitration, which was established under Annex VII of the UNCLOS, accepted an objection brought forward by the United Kingdom, which was that even though an ILTOS tribunal had established that there was *prima facie* jurisdiction under the UNCLOS, according to Article 292 TEC the ECJ had exclusive jurisdiction for the matter in question. Therefore the UNCLOS tribunal suspended proceedings in favour of the ECJ in order to find out if it had definitive jurisdiction. The tribunal deemed it not appropriate to continue proceedings, “bearing in mind considerations of

¹⁴² See Lavranos, *supra* note 133, at 446.

¹⁴³ See OSPAR art. 9(2), *quoted in* Nikolaos Lavranos, *Protecting its Exclusive Jurisdiction: The MOX Plant-Judgement of the ECJ*, 5(3) THE L. & PRAC. OF INT’L CTS AND TRIB. 479, 482 (2006).

¹⁴⁴ See Lavranos, *supra* note 133, at 447.

¹⁴⁵ See Lavranos, *supra* note 143, at 484.

¹⁴⁶ See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)*, Final Award, 2003 ¶ 143 (Perm. Ct. Arb. 2003),

<http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf> (last visited Oct. 18, 2008).

¹⁴⁷ See Lavranos, *supra* note 133, at 447.

mutual respect and comity which should prevail between judicial institutions.”¹⁴⁸ However, unlike the OSPAR, the UNCLOS explicitly gives its Members the choice to bring a dispute before different fora,¹⁴⁹ including dispute settlement bodies established by bilateral or regional agreements.¹⁵⁰ Even though this possibility exists, Ireland and the UK had not been able to agree on a forum and therefore were obliged to have recourse to an arbitration procedure in accordance with Annex VII Article 287(5) of the UNCLOS.

2. *The MOX Plant Dispute – An Example for the WTO?* — The WTO Panel and AB have been criticised for not considering exercising comity towards RTA tribunals. It has been suggested that “for the sake of judicial comity and coherence, WTO Panels ought to recognise and respect exclusion clauses in Non-WTO agreements”.¹⁵¹ But considering the way the AB defined the scope of a Panel’s discretion in terms of its jurisdiction it is very unlikely that an exclusion clause would have any effect in the WTO dispute settlement.¹⁵²

Regarding a choice of forum clause such as Article 1 of the Olivos Protocol or Article 2005 of the NAFTA, it was argued that it could fall under the inherent powers of a WTO Panel to recognise a choice of forum clause in an RTA. As a consequence it has been suggested that if such a clause exists in an RTA, a panel could decline jurisdiction in a case where it is evident that the same facts between the same parties of a particular dispute have already been decided or if proceedings are pending before such an RTA tribunal. However, it might not always be entirely clear whether a particular dispute is based on exactly the same facts as a parallel or previous one. Moreover, if an exclusive jurisdiction clause exists in an RTA (such as Article 292 TEC), a WTO Panel might be in a position where – if it wants to exercise judicial comity – it would have to suspend proceedings before it and refer the case to the RTA tribunal. Afterwards it could decline jurisdiction or take the case again, depending on the outcome of the proceedings before the RTA tribunal. There might be legal impediments under the WTO as well as under the RTA, however, which would hinder such an approach. The dispute settlement mechanism in an RTA, for example, might only be triggered if there is a consensus between

¹⁴⁸ See Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. U.K.), the MOX Order Case, Order No. 3, ¶ 28 (Perm. Ct. Arb. 2003), <http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf> (last visited Aug. 25, 2008).

¹⁴⁹ See UNCLOS art. 287 & 288, quoted in Nikolaos Lavranos, *Jurisdictional Competition between the ECJ and Other International Courts and Tribunals*, 4 EUR. L. REP. 156, 158 (2007).

¹⁵⁰ See UNCLOS art. 282, quoted in *id.*

¹⁵¹ See *supra* note 104, at 13.

¹⁵² See *id.*

the two opponents to initiate proceedings. Under such circumstances a disputing party could block the initiation of proceedings under the RTA and a WTO tribunal would have to wait endlessly until it could continue its proceedings. This problem could be tackled by introducing a time limit into the DSU or on a case-by-case basis until the time where RTA proceedings would have to be initiated in such a case. If RTA proceedings have not started by the end of the set time limit, a WTO Panel could then continue its proceedings.

The existence of time limits leads to another issue that would certainly pose problems to a WTO Panel if it were to suspend proceedings in a similar situation like the UNCLOS tribunal in the MOX plant case. Under the DSU strict time limits have to be kept,¹⁵³ which is important as in trade issues every additional day of ongoing proceedings might mean a heavy financial burden for the parties involved. It is one of the advantages of a WTO dispute that parties can – unlike during proceedings before the ICJ for example – estimate how long it will take until a case is decided. Therefore, it would not seem practical if panels and ABs were to start exercising their rights to suspend jurisdiction as a consequence of judicial comity on an *ad hoc* basis. Furthermore, it could be argued that comity depends on mutual exercise between different tribunals. While some RTA tribunals have taken into consideration obligations under the WTO, others have totally rejected an impact of the WTO on their jurisprudence. A NAFTA Chapter 19 panel (which was obliged to verify if a U.S. court had applied U.S. law correctly), for example, has held that even though DSB decisions are not directly binding on U.S. courts, “the obligations of the WTO Agreement have been clarified in the WTO Softwood Lumber Decision, and that clarification was accepted by the United States in the Final Section 129 Determination.”¹⁵⁴ It would appear from this line of argumentation that the DSB decision had not been incorporated into the U.S. anti-dumping law yet, but the NAFTA Chapter 19 panel had taken the U.S.’ intention – which was expressed in the Final Section 129 Determination – to do so into consideration as an act of judicial comity towards the WTO DSB report. The fact that the WTO obligations of the NAFTA Members are confirmed in several passages of the NAFTA¹⁵⁵ has possibly contributed to this approach. Other RTAs on the other hand contain no references to WTO law and are applied “in clinical isolation” from the obligation of its Members under the WTO. Lavranos, for example, contends that the ECJ “should show more respect and comity towards the

¹⁵³ See DSU art. 12.9, 17.5, 20.

¹⁵⁴ See NAFTA chapter 19 bi-national panel, *Certain Softwood Lumber Products from Canada: Final Affirmative Anti-dumping Determination*, Decision of 9 June 2005, at 42-43.

¹⁵⁵ See *supra* note 23.

jurisdiction of other international courts and tribunals.”¹⁵⁶ However, while the ECJ in the WTO context should probably be compared to U.S. domestic tribunals (with the exception of those areas that fall under the exclusive competence of the Member States) rather than the NAFTA, there are arguably other RTA tribunals that treat WTO obligations of its Members similar to the ECJ.

Since comity is a discretionary principle, the fact that there is no legal certainty whether and how a WTO tribunal would exercise that principle could be a further problem. However, in the absence of any norms it might be better for a tribunal to exercise comity compared to applying its own norms in clinical isolation and not taking the obligations of the disputing parties under other jurisdictions into consideration at all.

B. Article XXIV of the GATT, Article V of the GATS as Rules of Primacy

Regional Trade Agreements are allowed as a general exception to MFN obligations. The provisions that set out the conditions for RTAs are contained in Article XXIV of the GATT and Article V of the GATS. During the Uruguay Round a further agreement on the understanding of the interpretation of Article XXIV was reached. Article XXIV 5(a) of the GATT requires that the external “duties and regulations of commerce” of a customs union towards third countries do not increase as a result of its adoption. Article XXIV 8(a)(i) and (b) of the GATT¹⁵⁷ oblige Members of an RTA to eliminate duties and other restrictive regulations of commerce in respect to “substantially all trade between them”. The problem of that rather vague requirement is that its exact definition has been troubling from the beginning.¹⁵⁸ In *Turkey-Textiles* it was found by the Panel and the AB that the term substantially provides for both “qualitative and quantitative components” and that “the terms of sub-paragraph 8(a)(i) offer some flexibility to the constituent members of a customs union when liberalising their internal trade.”¹⁵⁹ Until today there has been no agreement to further clarify the meaning of “substantially all”. Furthermore Article XXIV 8(a)(i) and (b) explicitly allow Members of an RTA to maintain restrictions amongst themselves, which are allowed under Articles XI, XII, XIII, XIV, XV and XX of the GATT.

¹⁵⁶ See Lavranos, *supra* note 133, at 491.

¹⁵⁷ See also art. V(1)(a) of the GATS for the provisions on services.

¹⁵⁸ See Youri Devuyt & Asja Serdarevic, *The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap*, 18(1) DUKE J. COMP. & INT'L L. 1, 23 (2007).

¹⁵⁹ See *id.* at 25.

WTO Members must notify their intention to enter into an RTA to the Council for Trade in Goods. These notifications are examined by the Committee on Regional Trade Agreements (CRTA), which then adopts recommendations (by positive consensus) on the GATT consistency of RTAs.¹⁶⁰ Since the CRTA has only been able to reach a consensus once (on the Czech-Slovak customs union),¹⁶¹ in practice it is left to the Panels and Appellate Body to judge upon the compatibility of RTAs with the conditions in Article XXIV of the GATT, Article V of the GATS and the enabling clause. In *Turkey – Restrictions on Imports of Textile and Clothing Products* [hereinafter *Turkey-Textiles*] a two-tier test was established in order to determine whether a measure found inconsistent with WTO obligations can be justified under Article XXIV of the GATT. It is for the defendant party to prove that the measure in question is introduced upon the formation of a customs union, which fully meets the requirements of Article XXIV 5(a) and 8(a), and that the measure in question was necessary for the formation of the customs union.¹⁶² The WTO adjudicating bodies have so far been reluctant to rule upon the overall compatibility of RTAs with the GATT. In the recent *Brazil – Measures Affecting Imports of Retreaded Tyres* case, for example, the EC questioned whether MERCOSUR fulfilled the criteria of a customs union, but neither the panel nor the appellate body examined whether MERCOSUR is a customs union consistent with GATT Article XXIV.¹⁶³ Instead they focused on examining whether a discriminatory MERCOSUR exemption on a ban on retreaded tires, which was justified under Article XX(b), was arbitrary or unjustifiable. Even in *Turkey-Textiles* the “overall GATT/WTO compatibility of the Turkey-EC Customs Union was not tested.”¹⁶⁴ It seems that in practice it is rather problematic that the *Turkey-Textiles* test obliges panels to examine the overall justification of a customs union, while deciding if a specific measure, which was introduced as a result of the customs union, is compatible with the GATT. Therefore, even though panels and the AB have the jurisdiction to consider the overall compatibility of an RTA, in practice they have limited themselves to examining the contested measure.

Thomas Cottier and Marina Foltea have argued that RTAs correspond to *inter se* modifications of the WTO-covered agreements within the

¹⁶⁰ See VAN DEN BOSSCHE *supra* note 30, at 661.

¹⁶¹ See *id.*

¹⁶² See Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 58, WT/DS34/AB/R (Oct. 22, 1999).

¹⁶³ See *id.* at 22.

¹⁶⁴ See de Salvio & Cabral, *supra* note 48, at 21.

meaning of Article 41 of the VCLT,¹⁶⁵ since it can be argued that Article 41 of the VCLT is part of customary law. According to Cottier/Foltea, RTAs are “treaty modifications provided for by the treaty”.¹⁶⁶ This line of argumentation is convincing since Article XXIV GATT and Article V GATS set out conditions under which RTAs have to operate to be in conformity with WTO law.

Cottier and Foltea point out that under Article 41 “a constitutional and hierarchical relationship”¹⁶⁷ between the WTO and RTAs exists as RTAs are “subject to the conditions of WTO law.”¹⁶⁸ As was emphasised in the previous paragraph, the overall compatibility of RTAs is not examined under the WTO in practice. Therefore Cottier and Foltea suggest a constitutional approach, regulating preferential trade agreements by and through the disciplines of WTO law.¹⁶⁹ According to this approach, RTAs that are inconsistent with Article XXIV GATT and Article V GATS would be illegal. The unlawful agreements would no longer be applicable between Members of an RTA and in respect to third countries.¹⁷⁰ Cottier argues “it is inconsistent to establish conditions and criteria for preferential agreements, yet refraining to enforce them also among Members”¹⁷¹ (and not only in respect to third parties).

Cottier and Foltea suggest that in addition to defining the hierarchy of norms there should be some procedural reforms to ensure compliance of RTAs with WTO rules. Since the current review process of RTAs is ineffective, notification and examination of RTAs would take place prior to the entry into force of RTAs and as a condition for the entry into force of RTAs.¹⁷² Secondly, the review of RTAs by an independent expert committee, rather than by the political body of the CRTA is proposed.¹⁷³ Moreover, remedies to challenge incompatible RTAs should be strengthened in the opinion of Cottier and Foltea. As an additional safeguard to ensure the WTO compatibility of RTAs, the WTO Secretariat would be empowered to challenge the incompatibility of RTAs with WTO

¹⁶⁵ See Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, *supra* note 7, 43, 50.

¹⁶⁶ See art. 41(1)(a) of the VCLT

¹⁶⁷ See Cottier & Foltea, *supra* note 165, at 57.

¹⁶⁸ See *id.*

¹⁶⁹ See Thomas Cottier, *The Legal Framework for Free Trade Areas and Customs Unions in WTO Law*, section 6 of the third workshop hosted by the State secretariat for Economic Affairs (SECO) and the World Trade Institute (WTI), at 12, http://www.acp-eu-trade.org/library/files/Cottier-Thomas_EN_15042004_World-Trade-Institute_The-Legal-Framework-for-Free-Trade-Areas-and-Customs-Unions-in-WTO-Law.pdf (last visited Aug. 25, 2008).

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See Cottier & Foltea, *supra* note 165, at 69.

¹⁷³ See *id.* at 70.

rules before the WTO DSM.¹⁷⁴ This function as guardian can be compared to the role of the Commission within the EU.

It seems that what Cottier and Foltea suggest is not a general rule of primacy, compared to a constitution on a domestic level, but rather that “WTO rules relating to the formation of RTAs trump regional agreements inconsistent with those rules.”¹⁷⁵ Here Cottier/Foltea do not talk about a primacy of all WTO rules as such, but about those “relating to the formation of RTAs”. It is argued that “by doing so a hierarchy of trade rules would be established to the effect that the multilateral system would prevail over preferential agreements that are not compatible with WTO law.”¹⁷⁶ Obviously Cottier/Foltea are not concerned with WTO law as such, but as stated in the previous sentence “rules relating to the formation of RTAs”. Members of an RTA have to abolish duties and other restrictive regulations of commerce in respect to “substantially all trade between them” (see above). There is no provision that states RTAs have to be compatible with all other WTO norms. It can be argued that it is easily possible to comply with this one rule, while simultaneously adopting other measures inconsistent with the WTO agreements. Assuming that the NAFTA fulfils all the requirements set out in Article XXIV GATT and Article V GATS, the cultural industries exception under NAFTA Article 2106 derogates from the rules of WTO law at the same time. There seems to be a certain discretion on behalf of RTA members to adopt rules that derogate from the WTO-covered agreements. On the other hand, WTO panels are only entitled to rule on WTO law. Therefore a conflict of norms that arises in a case like *Canada-Periodicals* could not be prevented by Cottiers and Folteas suggestions for reform.

Apart from the effective enforcement of Article XXIV GATT, Article V GATS, one might think of a general rule of primacy of the WTO-covered agreements over RTAs. Such a rule would decide all conflicts of norms in favour of WTO law. This type of rule could be adopted together with a requirement for the exhaustion of RTA remedies or a preliminary ruling mechanism similar to the EU. However, while such a rule would solve the conflicts of laws and jurisdiction between RTAs and the WTO, it is not likely that it would find support from the governments of WTO Members. Even more importantly, it is highly doubtful if such a rule would be desirable in the first place. RTAs and WTO law belong to the same regime of international trade. Consequently it could be argued that within the same regime the multilateral WTO law should have primacy over RTA law. On the other hand, however, many RTAs address issues such as environmental law, human rights or culture in a much more detailed manner than the

¹⁷⁴ See *id.* at 71.

¹⁷⁵ See *id.* at 68.

¹⁷⁶ See *id.*

WTO. Those norms would not be enforceable under WTO dispute settlement and as a consequence would be subordinated to WTO law.

C. *Abuse of rights*

The abuse of right doctrine originates from civil law countries, and is applied by several international courts or tribunals.¹⁷⁷ Shany argues that the abuse of rights doctrine “can probably be viewed as part and parcel of customary international law or as a general principle of law.”¹⁷⁸ The WTO AB has held in *US-Shrimp* that “the doctrine of abuse *de droit* prohibits the abusive exercise of a state’s (treaty) rights.”¹⁷⁹ Furthermore, the principle of abuse of rights is incorporated into the possibility of bringing a non-violation complaint.¹⁸⁰ The quoted treaty provisions and the AB do, however, refer to the abuse of WTO treaty rights, which cause an impairment of other WTO norms. It is questionable if an abuse of WTO rights, which jeopardises RTA rights or obligations, would be accepted as a valid defence by a WTO Panel.

It has been suggested that the reasoning of the panel in *Argentina-Poultry* could imply that a panel will accept that a party is estopped from bringing subsequent or parallel proceedings under the WTO if this violates a choice of forum clause of an RTA. Furthermore, it could be argued that if a defending party contends a panel ought to decline jurisdiction because the complainant is in violation of a choice of forum or an exclusive forum clause of an RTA, that claim should be accepted under the doctrine of abuse of rights. Because “one set of rights cannot be exercised in disregard of another set of rights and obligations.”¹⁸¹ It follows that if a party makes use of its right to initiate proceedings under the DSU in violation of an obligation under an RTA to refrain from exercising that right, this conduct might be considered as an abuse of rights and ought to be refrained from jurisdiction.

If there is no exclusive forum or forum selection clause in an RTA, it could be possible for a defendant to invoke the abuse of rights principle, if it can be proven that WTO proceedings have been initiated in an “arbitrary or malicious manner.”¹⁸² However in practice this would be a difficult task, because if states have committed themselves to the possibility of using different fora in parallel or subsequently, it might be hard to argue that the exercise of that right constitutes an abuse.

¹⁷⁷ See SHANY, *supra* note 130, at 191.

¹⁷⁸ See SHANY, *supra* note 20, at 257.

¹⁷⁹ See Appellate Body Report, *United States – Import Prohibitions of certain Shrimp and Shrimp products*, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998).

¹⁸⁰ See art. 1 (b) of DSU, art. XXIII of GATT.

¹⁸¹ See SHANY, *supra* note 20, at 258.

¹⁸² See *id.* at 260.

D. Amending the DSU

Even though it has been argued that WTO adjudicating bodies could accept forum selection and/or exclusive forum clauses of RTAs as a valid defence to decline jurisdiction through the principles of estoppel and/or abuse of rights, it is unclear if panels or the AB would accept either one of those doctrines as a valid legal requirement to suspend or decline jurisdiction. For that reason it should be considered amending the DSU through including a provision that refers to such clauses in RTAs. Such an amendment would give WTO Members legal certainty that their forum selection agreements under an RTA are regarded as a legally valid obligation under the DSU. If there is a forum selection clause similar to the NAFTA or MERCOSUR, a provision could be included that panels shall decline jurisdiction in favour of the RTA, if it is without doubt that the factual matters of the dispute are the same as those under the RTA dispute. An example where that arguably has been the case is the *Argentina-Poultry* dispute. If it is not entirely clear whether a dispute has already been decided by an RTA panel or is a genuinely new dispute, a provision could be inserted that panels ought to suspend proceedings, similar to the UNCLOS tribunal in the MOX plant case, and refer the matter back to the RTA tribunal. For such cases there would need to be a certain time limit incorporated into the DSU until an RTA panel shall have ruled on such a matter. These time limits should also be incorporated into RTAs themselves, to make sure that the RTA panel is bound by it.

A similar provision would also make sense in areas where parties have agreed to refrain *inter se* from invoking WTO proceedings between themselves and have given the RTA DSM exclusive jurisdiction. In such cases RTA parties could explicitly agree to waive their right to invoke the WTO dispute settlement. Such multilateral agreements between RTA Members could be notified to the CRTA or an independent expert committee.¹⁸³ These kinds of agreements could contain a clause to refrain from all WTO proceedings, or certain specified agreements, or articles of an agreement if the dispute concerns measures that fall under the cultural industries exemption, for example. Such a provision could be justified because there would be no adverse effect on third members. On the contrary, if a cultural exemption exists between RTA members, it should be easier for Non-RTA members to export cultural products into the RTA, than without its existence. In addition to that the exemption would arguably

¹⁸³ The term independent expert committee has originally been used by Cottier. Cottier suggests to set up such a committee to examine the overall compatibility of an RTA with art. XXIV of GATS, art. V of GATS. See Cottier & Foltea, *supra* note 165, at 70.

still not undermine the overall requirement to substantially liberalise all trade between the RTA members.¹⁸⁴

Nevertheless, the problem of the suggested piecemeal approach is that it undermines the predictability of the multilateral trading system. Furthermore, if an RTA is negotiated between a political powerful member such as the EC or the U.S. and another WTO member with relatively little political influence, the weaker member might be forced to give up important rights. A compromise would be to only allow members to waive the right to invoke the WTO DSM in certain specified exceptional cases such as measures to protect the environment, human rights or cultural diversity. As an additional safeguard there could be an obligation that those waivers would have to be in conformity with Article XXIV GATT, Article V GATS and the enabling clause. Furthermore, it could be argued that such an exception should only be possible if the RTA in question has a functioning adjudical dispute settlement mechanism. Otherwise the RTA might provide for further trading rights between its members, but those rights might not be enforceable. Hence waiving WTO dispute settlement in certain areas might de facto contribute to overall less trade remedies between the parties than before the conclusion of the RTA.

Alternatively, it could be suggested to adopt a general provision that would preclude parallel and successive RTA-WTO proceedings, similar to the status of *res judicata* and/or *lis alibi pendens* (also known as *prior tempore*) in private international law.¹⁸⁵ Thus parallel and successive RTA-WTO proceedings would be prohibited. However, RTAs have so far dealt with this issue in a different manner; Many RTAs have actually not addressed the issue at all. Others have adopted an *electa una vita* provision, which allows the complaining party to select a forum, but as soon as proceedings have been initiated in one forum, no further claims are possible (e.g. NAFTA, MERCOSUR). Even differently other RTAs prohibit parallel proceedings, which can be considered similar to a *lis alibi pendens* rule, but allow successive proceedings. Therefore if a common provision similar to *lis alibi pendens* and/or *res judicata* were to be incorporated into the DSU it would jeopardise this variety of approaches and thus undermine party autonomy.

VII. CONCLUSION

The conflict of overlapping laws and jurisdictions between WTO tribunals and those of RTAs should be addressed in two ways –

¹⁸⁴ See *infra* Part IV.B, where this argument has already been made.

¹⁸⁵ The term *lis alibi pendens* might be used in two ways, as a definition of parallel proceedings as such and as a prohibition of parallel proceedings. Here it is used in the meaning of a ban on parallel proceedings.

multilaterally and regionally. Therefore, this issue is of crucial importance while negotiating new RTAs as well as future trade rounds.

The examination of the DSU shows that the WTO treaty negotiators were not aware of potential conflicts of jurisdictions with RTAs, or at least that they did not find it necessary to include provisions explicitly dealing with such conflicts in the terms of reference of the panel. In general Article 23 DSU provides for exclusive jurisdiction of the WTO DSM. However, it has been suggested that the doctrines of abuse of rights or estoppel, which fall under the broader notion of good faith, could lead a panel to give effect to forum selection and/or exclusive forum clauses in RTAs. Until now WTO adjudicators were reluctant to clearly state “whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits before it.”¹⁸⁶ As has been argued, the reasoning of the panel and the AB concerning choice of forum clauses can be interpreted either way. Disputes such as *Argentina-Poultry* have shown that in the future a panel might be forced to rule on the matter. Only because the PO had not yet entered into force at the time was the panel able to circumvent the matter. It would certainly not be an easy task for a defendant to claim that an opponent is precluded from initiating WTO proceedings before a WTO tribunal because of a violation of a choice of forum or an exclusive forum clause in an RTA. On the other hand, the reasoning of the Panel in *Argentina-Poultry* and the AB in *Mexico-Soft Drinks* shows that WTO adjudicators chose not to *a priori* rule that possibility out either. For such a claim to be successful it would first of all be necessary that estoppel is accepted as a valid claim before a WTO Panel, which is not yet clear. Furthermore, a Panel would have to be willing to exercise judicial comity towards the RTA tribunal. Yet even if that were the case, there might still be a problem; if a panel suspends jurisdiction the strict time limits under the DSU cannot be kept, time limits essential for the functioning of the multilateral DSM under the WTO. Therefore, it seems desirable to adopt an amendment to the DSU that addresses this matter. Since RTAs have coped with the problem of competing jurisdictions in a different way so far, a general rule which obliges WTO adjudicating bodies to refrain from parallel or successive proceedings of a dispute which has already been brought under the RTA would not be desirable. Moreover, it could be problematic if a panel gave effect to RTA jurisprudence when the RTA does not have a functioning DSM and impedes the effective enforcement of decisions of RTA tribunals.

A general rule which prescribes to either first exercise the RTA remedies or the reverse case to trigger the WTO DSM before an RTA case on the same subject matter can be initiated would be contradictory to the

¹⁸⁶ *Mexico-Soft Drinks* Appellate Body Report, *supra* note 92, ¶ 54.

different approaches followed in RTA dispute settlement as well. Additionally, it would be problematic because there is no general rule of primacy between WTO norms and those of RTAs. Therefore, it has been suggested that the DSU should be amended and that under certain conditions a choice of forum and/or exclusive forum clauses of RTAs should lead a panel to suspend jurisdiction until the issue has been cleared. In such a case a time limit, which stipulates for how long proceedings could be suspended at the most, needs to be incorporated into the DSU as well.

While the exercise of comity might be problematic if it leads to a panel temporarily suspending jurisdiction, there are other cases where even under the current rules of procedure it would be less problematic. In the *Argentina-Poultry* case, for example, there was no doubt that the dispute concerned a matter which had already been settled by a MERCOSUR tribunal. Furthermore, it has been argued that a WTO panel could exercise judicial comity towards an RTA while determining if the necessity test in Article XX(a) or (b) GATT is fulfilled. With such an approach a panel would consider RTA tribunal decisions on human rights, health standards or environmental laws. For its final determination a panel should be able to rely on the decision of the RTA tribunal as expert advice. Such an approach is to be welcomed for three reasons. First of all, it would be in accordance with the sovereign will of the parties. Secondly, it would acknowledge the fact that WTO members have obligations other than trade that are nevertheless on the same hierarchical level. Thirdly, it would comply with the presumption against conflict in international law, since the exercise of both RTA and WTO norms would not lead to a breach of either one.

The dispute of *Canada-Periodicals* shows that conflicts of laws and jurisdictions should constantly be borne in mind while setting up RTAs. A strict definition of conflict in the traditional sense is not sufficient, since this definition does not cover a norm or conduct that one agreement allows and another explicitly forbids. Moreover, this particular dispute shows that a forum selection rule might not always be sufficient to prevent conflicts of jurisdictions. In certain cases an exclusive forum rule seems more appropriate for supplying an effective remedy to the right provided for under the RTA. If and what kind of effect such a clause should have under the WTO is controversial. On the one hand the multilateral trade system cannot be undermined, but on the other hand there should be a certain discretion for the disputants to adopt rules which is not covered under the WTO Agreement. It is not likely, for example, that the Doha round negotiators will be able to agree upon a cultural industries exemption under the WTO, but if parties decide to incorporate such a provision in an RTA it should be enforceable as well. It is for negotiators of RTAs to bear the mutual obligations of the RTA contracting parties in mind while deciding

on RTA norms and dispute settlement. If there are norms in an RTA that address matters differently from the WTO-covered agreements, then an effective remedy under the RTA is especially crucial for those rights to be enforceable. If those norms are not contrary to Article XXIV GATT, Article V GATS and the enabling clause, there should be recognition on the WTO level as well for parties to opt for exclusive RTA jurisdiction in those matters.

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