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On a Coherence Approach towards Jurisdictional Conflicts between the WTO and RTAs

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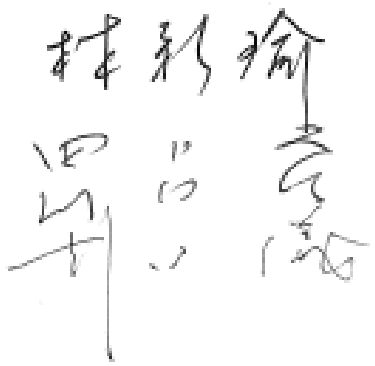

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Dedicated to my beloved parents, to whom I'm forever indebted.

摘要

在過去幾十年以來，隨著各類特殊法規範體系的大量產生、以及各個國際法庭的齊頭發展，國際法的破碎現象（包括規範意義與組織意義的破碎）已然引發多方的關切。然而，若能予以善加運用，國際法中的調和原則可資用以確保某種程度的協調性、並在各種國際法規範中尋求一個有意義的關連性。其中，維也納條約法公約第 31(3)(c)條可用以確保國際法實體規範的系統性整合，而在各個規範間因有真實的衝突而無法加以協調時，國際法亦含有若干衝突解決規範，可依個案狀況用以在各個彼此衝突的規範中找出一個優先順序。從而，國際法規範的破碎現象得以緩和，而國際法秩序的協調性亦得獲得確保。

就國際法組織的破碎現象而言，其中一個環節，乃係各個國際法庭間缺乏充分協調及互動所致。其結果，最嚴重者，莫過於各個國際法庭就同一事件做出不一致、甚至相互衝突的判決。

為了提升各個依條約成立的國際法庭間的協調性，一般而言，國際法庭可仰賴若干管轄權規範（例如一事不再理原則）用以解決各個法庭間的管轄權衝突問題。然而，在世界貿易組織（WTO）裁決機構與區域貿易協定（RTA）下裁決機構間的關係中，管轄權衝突問題乃係一個益加困難的現象。本文就不同的 RTA 管轄權條款加以分析、分類後，發現其中有幾類管轄權條款，不但規定 RTA 裁決機構就若干事項具有專屬管轄權，並進而禁止當事國就此等事項提起 WTO 訴訟。在若干情況下，一個 WTO 會員國可能甘冒違反此等 RTA 管轄權條款之風險，就若干事項提起 WTO 訴訟；此等訴訟相當有可能被認定為相關訴訟權利的濫用。類此情況，在過去已有先例（如墨西哥軟性飲料稅捐案），且在未來發生的可能性，亦可能隨著 RTA 的大量增加而提升。當此種情況發生時，WTO 裁決機構處理的方式即帶有根本、系統性的影響。若 WTO 裁決機構對於原告國起訴乃係明顯違反 RTA 管轄權條款、且有權利濫用的事實，予以完全漠視、進而就實體問題加以裁決，不但有違國際法下的調和原則，更有可能影響其正當性，蓋其裁決相當可能與 RTA 裁決機構就同一案件所做認定嚴重扞格。另一方面，若 WTO 裁決機構意欲積極處理此一問題，並展現開放的態度，欲考量相關 RTA 管轄權條款以及國際法下的管轄權規範，則 WTO 裁決機構即必須面對一個具有高

度爭議性的問題：在 WTO 相關法規範以外，WTO 裁決機構是否有權適用其他國際法規範？持平而言，WTO 裁決機構所面臨的問題是相當困難的。

為解決此等問題，本文首先探究 WTO 裁決機構的管轄權範圍，並特別處理幾個基本原則，包括：WTO 裁決機構的管轄權，係基於爭端當事國的同意；以及指出管轄權及案件可受理性兩個概念間的差異性。在此方面，本文特別強調：雖然 WTO 會員國依爭端解決瞭解書（DSU）第 23.1 條享有提起 WTO 訴訟之權利，此等起訴之權利並非完全沒有限制。

就爭議性極大的適用法規範範圍問題，本文仔細分析各種差異性極大的學術見解，並在其差異中，尋求折衷的立場。本文達到的重要結論是：若就一個程序問題而言，DSU 並未設有任何明文規範，則 WTO 裁決機構為了適當地履行其作為司法裁決機關的功能，得以超越 WTO 法規範的範圍，援引其他相關的國際法規範。從而，WTO 裁決機構乃有權援引相關 RTA 管轄權條款、以及國際法下的管轄權規範，用以評估此等國際法規範對於 WTO 裁決機構的管轄權究竟發揮了何等影響。

為了幫助 WTO 裁決機構能夠有系統地處理此類問題，本文基於現有的 WTO 法律體系，提出一套雙軌架構，或可提供若干解決方案。依此架構，若原告國提起 WTO 訴訟因明顯違反 RTA 管轄權條款、或因其他因素而認有權利濫用之情形，WTO 裁決機構應可直接駁回訴訟，而其駁回之理由可能是 WTO 裁決機構就該爭端無管轄權、亦可能是雖有管轄權但無法受理。必須強調的是：WTO 裁決機構駁回訴訟，並不代表向 RTA 裁決機構退讓或低頭；在此等狀況下，WTO 裁決機構若能駁回訴訟，乃係展現其發現、認知到相關當事國間的真意、並就當事國的真意賦予法律上的意義。若此，則 WTO 裁決機構不但能減低國際法規範面及制度面的破碎程度，更能有效地促進國際法體系的協調性。

關鍵字：案件可受理性；適用法；協調性；衝突；管轄權；普通法優於特別法；後法優於先法；區域貿易協定；系統性整合；條約解釋；世界貿易組織

ABSTRACT

The phenomenon of fragmentation of international law, both in its normative and institutional aspects, has generated much concern over the past decades, together with the surge of specialized rule-systems and various treaty-based international tribunals. Albeit that, the principle of harmonization in international law seeks to secure certain level of coherence and identify a meaningful relationship between different norms of international law. This is achieved mainly through the systemic integration as promoted by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, as well as relevant conflict-resolution techniques that would serve to justify a choice of priority to norms of international law that genuinely conflict. As such, the normative aspect of fragmentation in international law can be alleviated, and coherence of the international legal system secured.

As a specific facet of the institutional fragmentation in international law, the fragmentation between international tribunals is resulted from poor levels of coordination and interaction between different tribunals created by different treaty regimes. The most acute consequence is the risk of inconsistent and mutually conflicting judgments/rulings that may be rendered by different tribunals in respect to the same or similar matters.

To increase coherence, international tribunals generally can resort to certain traditional jurisdiction-regulating norms, such as *lis alibi pendens*, *res judicata* and comity, so as to minimize jurisdictional conflicts. However, in the context of jurisdictional conflicts between the WTO Tribunal and RTA Tribunals, particular difficulties are encountered. As identified and classified in this thesis, certain types of RTA jurisdictional clauses not only preserve jurisdiction exclusively to RTA Tribunals,

but also preclude RTA parties from instituting WTO litigation over a matter which is amendable to the jurisdiction of RTA Tribunals. In certain circumstances, a WTO Member may decide to initiate WTO litigation even though doing so would breach such RTA jurisdictional clauses, and upon legal analysis, the manner in which such WTO litigation is instituted may be considered to be genuinely abusive. Indeed, this is a real possibility, in light of past cases (e.g. *Mexico – Taxes on Soft Drinks*) as well as the proliferation of RTAs. When that happens, the manner in which the WTO Tribunal approaches such problem would be of cardinal and systemic importance. If the WTO Tribunal entertains such claims without paying any regard whatsoever to the abusive manner in which the WTO litigation is instituted, it would seem to depart from the principle of harmonization in international law and thereby undermine its own legitimacy, as the WTO Tribunal may ultimate rule in a way that is irreconcilable with a ruling by the relevant RTA Tribunal over the same dispute. On the other hand, if the WTO Tribunal wishes to confront this issue and take into consideration the abusive manner in which the WTO litigation is filed, the RTA jurisdictional clauses in question as well as contemplate the possibility of applying jurisdiction-regulating norms, the WTO Tribunal would need to face another highly controversial issue that has long divided commentators: whether, and if yes to what extent, can the WTO Tribunal apply these norms of international law that stand outside the four corners of the WTO legal system. Indeed, it appears that the WTO Tribunal would easily find its own hands tied up.

To address these issues, this thesis first examines the jurisdictional scope of the WTO Tribunal. In the course of this, several significant points are made, including that the jurisdiction of the WTO Tribunal, as a treaty-based international tribunal, is also consent-based, and that there is a need to maintain a distinction between jurisdiction and

admissibility, both of which can serve as legal basis for preliminary objections that would, if sustained, preclude the WTO Tribunal from entering into the merits of a dispute. Also, this thesis submits that the right to initiate WTO litigation, as provided for in Article 23.1 of the DSU, is by no means an absolute one.

Turning to one of the most controversial issue concerning the applicable law in WTO dispute settlement, this thesis surveys relevant academic views that seem to stand diametrically opposed to each other, and, upon engaging in critical analysis of these divergent views, this thesis seeks to identify unity within diversity and endeavors to bridge the chasm. The conclusion thus attained is: in the determination of procedural issues that are not dealt with anywhere in the DSU, the WTO Tribunal, for the purpose of discharging its judicial functions, is in the position to have recourse to norms of international law external to the WTO legal system. Though this, the WTO Tribunal is fully capable of applying certain jurisdiction-regulating norms as well as relevant RTA jurisdictional clauses for the purpose of ascertaining whether and how its jurisdiction is affected in situations where WTO litigation is being abused.

In light of the desirability that the WTO Tribunal confront these issues of systemic importance, this thesis aims to present a framework, consisting of two tracks of analysis, that can hopefully serve to offer solutions on the basis of the current WTO legal system as it stands today. Under this framework, where WTO proceedings are initiated in a genuinely abusive manner, the WTO Tribunal would be able to, and indeed expected to dismiss the WTO complaint for lack of jurisdiction or on the grounds of inadmissibility. To do this is not to show a general deference to RTA Tribunals, but, rather, would reflect the WTO Tribunal's cognizance of the relevant WTO Members' true intentions; by giving effect to the Members' true intentions, the WTO Tribunal could mitigate

fragmentation of international law in both the normative sense and the institutional sense, thereby securing and promoting the coherence in the international legal system.

KEYWORDS: admissibility; applicable law; coherence; conflict; jurisdiction; *lex specialis*; *lex posterior*; regional trade agreement (RTA); systemic integration; treaty interpretation; World Trade Organization (WTO)

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LIST OF ABBREVIATIONS

AB	Appellate Body
AFTA	ASEAN Free Trade Agreement
Anti-dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CRTA	Committee on Regional Trade Agreements
CU	customs union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities / European Community
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EU	European Union
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MAS	Mutually Agreed Solution(s)

MEA	multilateral environmental agreement
Mercosur	Southern Common Market
MFN	most-favored-nation
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PTA	preferential trade agreement
RTA	regional trade agreement
RTA Understanding	Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994
SACU	Southern African Customs Union
Safeguards Agreement	Agreement on Safeguards
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, 2363
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, 10225
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Certain EC Products	Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R

	and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R, DSR 2001:II, 413
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, 1675
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Gambling (Article 21.3(c))	Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the*

	DSU, WT/DS285/13, 19 August 2005, DSR 2005:XXIII, 11639
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, 4107
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473

US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Section 110(5) Copyright Act (Article 25)	Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, 9 November 2001, DSR 2001:II, 667
US – Section 110(5) Copyright Act	Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, 3769
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR

	1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, as upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, 6529
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body

	Report WT/DS267/AB/R, DSR 2005:II, 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW, circulated to WTO Members 14 May 2009
US – Zeroing (EC) Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, circulated to WTO Members 17 December 2008

LIST OF GATT CASES

Canada – FIRA	GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, L/5504, adopted 7 February 1984, BISD 30S/140
Canada – Herring and Salmon	GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, adopted 22 March 1988, BISD 35S/98
EC – Article XXVIII	Award by the Arbitrator, *Canada/European Communities – Article XXVIII Rights*, DS12/R, 16 October 1990, BISD 37S/80

CHAPTER ONE

INTRODUCTION

I. FRAGMENTATION AND COHERENCE OF THE INTERNATIONAL LEGAL SYSTEM

A. International Law as a Legal System

Notwithstanding its limited degree of systemic coherence resulting *inter alia* from its decentralized nature, it is well-established that international law is indeed a legal system.[1] In comparison with domestic legal systems, the international legal system has certain distinguishing characteristics.

First, unlike domestic legal systems where a more or less clear hierarchic normative structure is in place, all norms[2] of international law (including treaties, customary international law and general principles of law)[3] are generally considered to be on the

[1] *See, e.g.*, HIGGINS (1999), at 1; SHANY (2004), at 93-94; ILC Conclusion on Fragmentation of International Law, ¶ 14(1).

[2] It is acknowledged that sometimes a distinction is made between "rules" and "standards" or between "rules" and "principles"; *see, e.g.*, Trachtman (1999), at 350-51 (suggesting a distinction between "rules" and "standards": "a law is a 'rule' to the extent that it is specified in advance of the conduct to which it is applied . . . . a standard . . . . establishes general guidance to both the person governed and the person charged with applying the law but does not, in advance, specify in detail the conduct required or proscribed"); MITCHELL (2008), at 7-10 (suggesting a distinction between "rules" and "principles"); PANIZZON (2006), at 37-38 (reviewing the distinction between "principles" and "rules"); Hilf (2001), at 112 (distinguishing "principles" from "rules"). However, that distinction is not employed in this thesis as it is unnecessary for the relevant issues to be explored here. Instead, the term "norms" is employed to be generally inclusive of all rules, principles and standards, whatever the wording, as long as they form part of the international legal system and are legally binding.

[3] *See* ICJ Statute art. 38(1). *See also infra* Ch. 3.

same normative footing;[4] this point will be further reviewed below. Second, unlike domestic legal systems where legislators prescribe norms that bind the entire population, norms of international law are primarily created by States[5] and those norms are designed to bind the States themselves in their relations with each other; put differently, in international law, there is a convergence between the role of States as the makers of international law, on the one hand, and as primary actors regulated by international law, on the other.[6] Nevertheless, these differences do not deprive international law of its status as a legal system.[7]

B. No Intrinsic Hierarchy between Norms of International Law

Generally speaking, there is no intrinsic hierarchical relationship between norms of international law, be they derived from treaties, customary international law or general principles of law. As stated above, this is one of the salient characteristics of the international legal system that distinguishes it from domestic legal systems: whereas domestic legal systems are organized in a strictly hierarchical way, with the constitution

[4] SHANY (2004), at 95.

[5] *See, e.g.*, BOYLE & CHINKIN (2007), at 41-97 (arguing that although States are presumed to be the primary actors in international law-making, there are other non-State entities that have exerted substantial impact upon the formation of international law). *See also* HIGGINS (1999), at 39 ("States are, at this moment of history, still at the heart of the international legal system."). By virtue of the notion of sovereignty, States are bound only by those norms that have been consented to by States; thus, generally speaking, norms of international law are created through the consent of States, and this proposition is true not only with respect to treaties but also with respect to customary international law and general principles of law. *See* Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."); *see also* Pauwelyn (2001), at 535-36.

[6] *See, e.g.*, SHANY (2004), at 96; CASSESE (2001), at 117; Pauwelyn (2001), at 535.

[7] *See* SHANY (2004), at 94-99.

being at the highest level, there is no such formal "constitution" in the international legal system.[8]

Nevertheless, some norms of international law (sometimes designated as "fundamental" or expressive of "elementary considerations of humanity"[9] or "intransgressible principles of international law"[10]) are indeed characterized as more important than others, and, for this reason, enjoy a superior position or special status in the international legal system.[11]

For instance, a norm of international law may be intrinsically superior to other norms on account of the importance of its content as well as the universal acceptance of its superiority;[12] this is the case of peremptory norms of international law (*jus cogens*)[13], which prevail over all, past[14] and future[15], treaty norms.

Also, a norm of international may be superior to other norms by virtue of a treaty provision; this is called a "conflict clause." A prominent example is Article 103 of the U.N. Charter, by virtue of which "[i]n the event of a conflict between the obligations of

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[8] *See, e.g.*, ILC Report on Fragmentation of International Law, ¶ 324; BROWNLIE (2008), at 5 ("The provisions [of Article 38(1) of the ICJ Statute] are not stated to represent a hierarchy. . . . Moreover, it is probably unwise to think in terms of hierarchy dictated by the order (a) to (d) in all cases."); Pauwelyn (2001), at 535-36.

[9] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 22 (Apr. 9).

[10] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 257 (July 8).

[11] ILC Conclusion on Fragmentation of International Law, ¶ 14(31).

[12] ILC Conclusion on Fragmentation of International Law, ¶ 14(32).

[13] A peremptory norms of international law (*jus cogens*) is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; VCLT art. 53.

[14] VCLT arts. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

[15] VCLT art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

the Members of the United Nations under the [U.N.] Charter and their obligations under any other international agreement, their obligations under the [U.N.] Charter shall prevail." However, such superiority is derived from certain treaty clauses ("conflict clauses") instead of the intrinsic nature of the norms concerned, and, therefore, is better dealt with elsewhere.[16]

Thus, with possibly the only exception of *jus cogens*,[17] there does not exist any *intrinsic* hierarchical relationship between all norms of international law. But this does not mean that one could not, in a particular case, decide on an order of precedence among conflicting rules (if conflict exists).[18] Indeed, when a potential conflict between different norms of international law is identified and cannot be avoided by way of treaty interpretation, one norm may be held to override another by virtue of a conflict clause (such as the aforementioned Article 103 of the U.N. Charter), *lex specialis* or *lex posterior*. This will be further examined below.[19]

C. Fragmentation of International Law: Normative and Institutional Aspects

[16] *See infra* Ch. 4.

[17] It is noted that a further exception has been identified: the rules created by different organs of the same international organization often have an inherent hierarchical status corresponding to the hierarchical status of the organ that made the rule; *see, e.g.*, ORAKHELASHVILI (2006), at 7 ("A specific kind of normative hierarchy is observable in international institutional law between constitutive instruments of international organizations and acts enacted within those organizations"); Pauwelyn (2001), at 537. However, such superiority might otherwise flow from the constituent instrument of the international organization concerned (instead of the intrinsic nature of the norm concerned), and, in any event, this is irrelevant for present purposes as the focus of this thesis is on treaties, customary international law and general principles of law.

[18] ILC Report on Fragmentation of International Law, ¶ 325.

[19] *See infra* Ch. 4.

Over the past decades, the international community has witnessed the emergence and proliferation of specialized rule-systems and legal institutions, and what once appeared to be governed by "general international law" has gradually become dominated by a number of specialist systems, such as "trade law," "human rights law," "environmental law," and so forth.[20] This phenomenon of fragmentation of international law can be best illustrated by the famous *MOX Plant* incident. There, the question of the possible environmental effects of the operation of the "MOX Plant" nuclear facility at U.K. has been raised at three different fora: (i) an Arbitral Tribunal set up under Annex VII to the UNCLOS; (ii) the compulsory dispute settlement procedure under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)[21]; and (iii) the European Court of Justice. Hence, three rule-systems (the UNCLOS, the OSPAR convention and the relevant EC law) appear to address the same factual circumstances, whereas three different institutions were seized of the matter. Pending the establishment of an Arbitral Tribunal under Annex VII to the UNCLOS, the ITLOS was seized of the matter to examine Ireland's request for provisional measures, and, in consideration of U.K.'s preliminary objection to the Arbitral Tribunal's jurisdiction in light of the fact that the matter was then pending before an OSPAR arbitral tribunal as well as the ECJ, the ITLOS made the following statement[22]:

[20] ILC Report on Fragmentation of International Law, ¶ 8.

[21] Convention on the Protection of the Marine Environment of the North-East Atlantic, *opened for signature* Sept. 22, 1992, 32 I.L.M. 1228 [hereinafter OSPAR Convention].

[22] MOX Plant (No. 10) (Ir. v. U.K.) (Req. for Provisional Measures), Order of Dec. 3, 2003, ¶¶ 50-51 (Int'l Trib. L. of the Sea 2003), *available at* http://www.itlos.org/case_documents/2001/document_en_197.pdf (last visited July 25, 2009).

> [E]ven if the OSPAR Convention, the E.C. Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention. . . .
>
> . . . . the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.

On the other hand, in respect of the same matter, the ECJ ruled that the dispute being a concerning the interpretation or application of the E.C. Treaty,[23] Ireland, in submitting the matter to the Arbitral Tribunal under Annex VII to the UNCLOS, had violated Article 292 of the E.C. Treaty,[24] which provides for exclusive jurisdiction of the ECJ over all disputes concerning the interpretation or application of the E.C. Treaty.[25]

Evidently, the fragmentation of international law poses two different aspects of problems: normative and institutional.[26] Whereas the normative aspect involves the fragmentation of substantive international law, the institutional aspect involves the fragmentation of institutions, and, more pertinently for present purposes, the

[23] Treaty Establishing the European Community (Consolidated Version), 2006 O.J. (C 321 E) 37 [hereinafter E.C. Treaty].

[24] *Id.* art. 292 ("Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.").

[25] Case C-459/03, Comm'n v. Ire., *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0459:EN:HTML (May 30, 2006).

[26] ILC Report on Fragmentation of International Law, ¶ 13.

fragmentation of international tribunals. Both aspects of fragmentation raise challenges to the coherence of international law.

With respect to the normative aspect of the fragmentation of international law, new types of specialized fields of international law emerge to respond to specific needs, with each specialized rule-system espousing highly specific objectives and principles that may often point in a direction that differs from another. Very often, new rule-systems develop precisely for the purpose of deviating from pre-existing general international law, and as such deviations grow frequent, the coherence of international law may suffer.[27]

With respect to the institutional aspect of the fragmentation of international law, it is observed that the degree of coherence between international tribunals is quite limited, if any. First, the jurisdictions of various international tribunals are not neatly divided, and thus jurisdictional overlaps and even conflicts might occur from time to time; second, rules regulating such jurisdictional overlaps and conflicts are rather sporadic, with each international tribunal paying little attention to the jurisdictions of other tribunals; third, international tribunals do not function in a hierarchical environment, and there is no international "supreme court" to which all questions of international law can eventually converge. Given the poor levels of coordination and structural interaction between international tribunals, it seems that, at least for the time being, international tribunals do not form a coherent system.[28] This, in turn, generates serious concerns such as forum shopping, multiplication of litigation, accelerated fragmentation of substantive

[27] *Id.* ¶ 15.

[28] SHANY (2004), at 108-14.

international law,[29] and, perhaps the gravest of all, conflicting or inconsistent judgments.[30] Indeed, as a consequence of inconsistent or conflicting judgments by different international tribunals, "the situation of the parties will be intolerable, with each of them in danger of being deprived in one place of what it has been awarded in another."[31]

D. Coherence of International Law: the Principle of Harmonization

As aforesaid, despite its relatively lower degree of coherence (as compared to domestic legal systems), international law indeed forms a legal system, and, as a legal system, international law is not a random collection of norms; indeed, there are meaningful relationships between all norms of international law.[32] First of all, albeit the proliferation of specialized rule-systems, there may be some areas where no specific treaty clause governs, and even where a treaty clause is relevant, it may not be applicable to a situation (for instance, due to the fact that one of the States concerned is

[29] *Id.* at 10. *See also* Lowe (1999), at 191 ("This is by no means a purely theoretical problem. As international tribunals proliferate, it is inevitable that the forum for the litigation of an international dispute will often be chosen because of the perceived advantages conferred upon the applicant state by the particular powers and procedures of the selected tribunal, regardless of what one might regard as the 'essential nature' of the dispute."). *See also* Kwak & Marceau (2006), at 467 ("Overlaps of jurisdiction in dispute settlement . . . . [u]nder certain circumstances . . . may lead to difficulties relating to 'forum-shopping,' whereby disputing entities would have a choice between two adjudicating bodies or between two different jurisdictions for the same facts. When the dispute settlement mechanisms of two agreements are triggered in parallel or in sequence, there are problems on two levels: first, the two tribunals may claim final jurisdiction (supremacy) over the matter and, second, they may reach different, or even opposite, results.").

[30] *See, e.g.*, Pauwelyn & Salles (2009), at 79-85; Petersmann (2006), at 364 ("Concurrent jurisdiction of, forum shopping among, and parallel litigation in national, regional and worldwide fora create the risk of incompatible judgments and fragmentation of law.").

[31] Cuniberti (2006), at 419-20.

[32] ILC Conclusion on Fragmentation of International Law, ¶ 14(1). *See also* SHANY (2004), at 99 ("[O]ne should view the various branches and subsystems of international law are linked to each other, being parts of a bigger whole.").

not a contracting party to the relevant treaty).[33] When such is the case, there is a gap in treaty law, and this gap will have to be filled by customary international law or general principles of law, as customary international law and general principles of law are applicable unless deviated from or "contracted out" by specific treaty clauses.[34] Second, there may be frequent cases where two norms of international law appear to bear upon the same issue, and when this happens, the relationship between these two norms fall into two general types: (i) relationship of interpretation, where one norm assists in the interpretation of the other; and (ii) relationship of conflict, where the two norms point to incompatible results, making it necessary to make a choice between them.[35]

In international law, there is a strong presumption against conflict between different norms. As the ICJ put it[36]:

> [I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.

Thus, when facing two ostensibly conflicting norms of international law, legal reasoning would first seek to harmonize the two norms through interpretation; in this connection, Article 31(3)(c) of the VCLT, which dictates treaty interpreters to take into account, together with the context, "any relevant rules of international law applicable in

[33] *See* VCLT art. 34 ("A treaty does not create either obligations or rights for a third State without its consent.").

[34] Pauwelyn (2001), at 537.

[35] ILC Conclusion on Fragmentation of International Law, ¶ 14(2).

[36] Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 125, 142 (Nov. 26).

the relations between the parties," may serve to secure systemic coherence in the international legal system.[37]

Nevertheless, harmonization has its limit: while harmonization may resolve apparent (ostensible) conflict between norms of international law, it cannot resolve genuine conflicts.[38] Of course, States can always endeavor to resolve genuine conflicts; indeed, "between the parties, anything may be harmonized as long as the will to harmonization is present."[39] However, such a will may not always be present, and at times genuine conflicts between norms of international law will have to be decided by international tribunals, which, in turn, will have to establish a relationship of priority between genuinely conflicting norms of international law through conflict-resolution techniques, such as conflict clauses, *lex specialis* and *lex posterior*. These conflict-resolution techniques help to define a systemic relationship between norms of international law and justify the choice of a particular norm over the other.[40] In this sense, the fragmentation of substantive international law is eased to certain extent.

Turning then to the institutional aspect of fragmentation of international law, there seems to be no reason why the lack of coherence between international tribunals cannot be improved, more or less, through the principle of harmonization. First, States can always endeavor to resolve jurisdictional overlaps and conflicts through negotiations. Second, jurisdictional conflicts can be understood as conflicts between the jurisdictional clauses of different international tribunals, and, in this sense, the aforesaid conflict-avoidance techniques (through treaty interpretation) and conflict-resolution techniques

[37] *See generally* McLachlan (2005).

[38] ILC Report on Fragmentation of International Law, ¶ 42; PAUWELYN (2003), at 272-73.

[39] *Id.* ¶ 41.

[40] *Id.* ¶ 36.

applicable to the avoidance and resolution of conflicts in substantive international law can be equally applicable for the purpose of identifying a systemic relationship between the jurisdictions of different international tribunals. Third, in cases where litigation is being used in a genuinely abusive manner, certain norms of international law might help to alleviate the problems concerned. These will be further examined in later chapters.

II. SPECIAL CONSIDERATIONS IN THE CONTEXT OF WTO AND RTAS[41]

As noted above, the fragmentation of international law has both normative and institutional aspects, and this is also true in the specific context of WTO and RTAs. While the normative fragmentation between the WTO and RTAs is as complex as, and is intertwined with, the institutional fragmentation between these two, it is the latter that forms the main focus of this thesis.[42]

In the context of the relationship between the WTO and RTAs, the phenomenon of institutional fragmentation may bring forth certain particular difficulties. These difficulties arise, *inter alia*, from the characterization of the WTO as a "self-contained"

[41] The term "regional trade agreement" or "RTA" has been criticized by some as misleading; *see, e.g.*, MATSUSHITA ET AL. (2006), at 548-49 (arguing that the term "preferential trade agreement" or "PTA" should be used instead); Bartels & Ortino (2006), at 1 n.5; MAVROIDIS (2005), at 225 (arguing that the term "preferential trade agreement" or "PTA" should be used instead). It is also noted that other denominations, such as "regional integration agreements" and "RIAs" are used; *see, e.g.*, Trachtman (2007). Nevertheless, this term is adopted in this thesis for consistency with the WTO practice; *see* Committee on Regional Trade Agreements, *Decision of 6 February 1996*, preamble, para. 1 n.1, WT/L/127 (Feb. 7, 1996) (defining RTAs as "all bilateral, regional, and plurilateral trade agreements of a preferential nature").

[42] On the normative aspect of fragmentation and coherence between the substantive rules of the WTO and those of RTAs, see generally REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM (2006).

system of law, as well as from the long divided views concerning the scope of applicable law in the WTO Tribunal.[43] These difficulties will be examined below.

A. WTO Law and RTA Law as Part of the International Legal System

The term "WTO law," as it appears in this thesis, may be roughly defined as the body of law enshrined in the WTO covered agreements,[44] which, as the Appellate Body pointed out, include the "WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU."[45] The WTO covered agreements are integrated into the WTO Agreement[46] as a "single undertaking."[47] In other words, all the WTO covered agreements together constitute one single treaty.[48] Specifically in the context of dispute settlement, the WTO covered agreements are "expressly recognized by the contesting states" in the sense of Article 38(1)(a) of the ICJ Statute.[49] As such, it would

[43] For the purpose of this thesis, the term "WTO Tribunal" is used to refer, individually or collectively, the *ad hoc* panels, the standing Appellate Body as well as the DSB.

[44] The scope of "WTO law" will receive further treatment later; *see infra* Ch. 3.

[45] Appellate Body Report, *Brazil – Desiccated Coconut*, 13 (quoting DSU art. 1 & Appendix 1).

[46] WTO Agreement art. II:2 ("The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members."). This is without prejudice to plurilateral trade agreements, which are binding upon only those Members that have accepted them. WTO Agreement art. II:3 ("The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as 'Plurilateral Trade Agreements') are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.").

[47] *See, e.g.*, Appellate Body Report, *Brazil – Desiccated Coconut*, 12 ("[T]he WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a 'single undertaking.'").

[48] As clearly indicated in the VCLT, a treaty may be "embodied in a single instrument or in two or more related instruments." VCLT art. 2(1)(a).

[49] *See, e.g.*, PALMETER & MAVROIDIS (2004), at 49-50; Palmeter & Mavroidis (1998), at 398.

be quite stating the obvious to say that as a treaty, the WTO covered agreements is part of international law.[50]

In this connection, it is noted that sometimes the WTO legal system is characterized as a "self-contained" system.[51] Leaving aside the divergent meanings that may pertain to the term "self-contained,"[52] and whatever one's view towards putting such a label onto the WTO regime, there can be no plausible ground in arguing that the WTO system forms a closed circuit isolated from international law,[53] as the Appellate Body has emphatically rejected this position by noting that the WTO covered agreements shall not be read "in clinical isolation from public international law."[54] This statement clearly instructs the WTO Tribunal to *interpret* WTO law in light of international law; indeed,

[50] *See, e.g.*, Appellate Body Report, *Japan – Alcoholic Beverages II*, 15 ("The WTO Agreement is a treaty -- the international equivalent of a contract."); JACKSON (1997), at 25; Pauwelyn (2001), at 538 ("[M]y call . . . for WTO rules to 'be considered as creating international legal obligations that are part of public international law' is a truism." (citation omitted); McRae (2000), at 28 (viewing the WTO law as "just a specialized branch of international law"). *See also* Petersmann (1999).

[51] *See, e.g.*, Kuyper (1994), at 251-52.

[52] *See, e.g.*, ILC Report on Fragmentation of International Law, ¶¶ 123-37.

[53] *See, e.g.*, SHANY (2004), at 100 ("[I]t seems that there can be no real 'self-contained' regimes under international law. Each subsystem that meets international law's principle of normative integration . . . has necessarily been created as part thereof and derives its legitimacy from that of the international legal system."); JACKSON (2006), at 165 ("[S]ome advocates supported the view that GATT was a separate regime, and therefore had a totally stand-alone jurisprudence and legal structure. Many others, including this author, opposed that view."); Pauwelyn (2001), at 539 ("No one has spoken of self-contained regimes in the sense of treaty regimes that are completely isolated from all rules of international law."); Abi-Saab (2006), at 462-63 (seemingly rejecting that the WTO legal system forms a "self-sufficient . . . a hermetic or "self-contained regime"); Higgins (2003), at 16 ("That the WTO treaty is not a totally sealed system seems to be generally accepted. It is agreed, too, that WTO rules are part of the wider corpus of international law.").

[54] Appellate Body Report, *US – Gasoline*, 16. This remark resembles the language used by the ECtHR; *see, e.g.*, McElhinney v. Ireland, 2001-XI Eur. Ct. H.R., ¶ 36 ("The Convention . . . cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part, including those relating to the grant of State immunity."); Bankovic v. Belgium, 2001-XII Eur. Ct. H.R., ¶ 57 ("[T]he Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.") (citation omitted).

the WTO Tribunal "must situate those [WTO] rights and obligations within the overall context of general international law."[55]

This does not, however, prevent the emergence of a specific "WTO ethos" in the interpretation of the WTO covered agreements, given that the WTO legal system, as much as other specialized rule-systems (such as human rights conventions), is designed with very specific objectives; nor does this preclude the possibility that the WTO covered agreements may contain specific provisions that deviate from general international law.[56] As the *Korea – Procurement* Panel stated[57]:

> We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such *international law applies to the extent that the WTO treaty agreements do not 'contract out' from it*. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the

[55] ILC Report on Fragmentation of International Law, ¶ 170.

[56] *Id.* ¶ 170. *See also* McRae (2006), at 369 (arguing that the WTO legal system is a (partially) self-contained regime in that it has "its own underlying objectives, purposes and assumptions" and that "through the interpretation of the WTO agreements, the Appellate Body itself is contributing to the development of a more recognizable and systematic international trade law regime").

[57] Panel Report, *Korea – Procurement*, ¶ 7.96 (citation omitted).

customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

Thus, to the extent that the WTO law contains a provision specifically deviating from general international law, such a provision may sometimes be considered *lex specialis* vis-à-vis international law and thus override international law.

This, in turn, would trigger a highly controversial issue: whether (and, if yes, to what extent) norms of international law *other than* WTO law is applicable in the WTO dispute settlement system? As this issue will be examined later,[58] it suffices here to say that in light of the fact that the WTO legal system forms a part of international law, and irrespective of whether the WTO legal system is characterized as "self-contained," it is crystal clear that the WTO covered agreements shall be *interpreted* with reference to other norms of international law, and that as a matter of principle, all norms of international law should be *applicable* except where the WTO law "contracts out."[59] This last point is, of course, without prejudice to the possibility that the WTO covered agreements may specifically rule out the applicability of non-WTO norms of international law; nevertheless, as this departs from the general proposition (*viz.* that all norms of international law apply except deviated from), this thesis submits that the

[58] *See infra* Ch. 3.

[59] As the PCA observed with respect to the relationship between the OSPAR Convention and general international law, "[i]t should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the parties have created a *lex specialis*." Access to Information under Article 9 of the OSPAR Convention (Ire. v. U.K.), Final Award of July 2, 2003, ¶ 84 (Perm. Ct. Arb. 2005), *available at* http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf (last visited July 29, 2009). Similarly, the ICJ observed with respect to the local remedies rule under international law that "[t]he Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty ; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42 (July 20).

"burden of proof"[60] would rest upon anyone who argues *against* the applicability of norms of international law other than WTO law; put differently, for anyone to argue that non-WTO norms of international are not applicable in the WTO dispute settlement system, she/he should prove that the relevant WTO provisions specifically provides to this effect; it should not be the other way around.[61]

Finally, as much as the WTO law is part of international law, RTAs are also treaties that form part of the international legal system. And, much like the case of WTO, generally speaking, RTA provisions are to be read in light of international law,[62] and international law is applicable in RTA regimes unless such applicability is specifically ruled out or where the RTA provision concerned specifically deviates from international law. Furthermore, just like the WTO law may be considered *lex specialis* vis-à-vis general international law, in certain areas RTAs may be considered *lex specialis* vis-à-vis WTO law to the extent that the RTA provision concerned is more specific and detailed than a WTO provision dealing with the same subject matter.

[60] It is noted, however, that the scope of applicable law in the WTO dispute settlement system being a question of law, instead of a question of fact, no "burden of proof" in a legal sense will be involved because of the application of the principle *jura novit curia* (the judge knows the law); *see, e.g.*, PAUWELYN (2003), at 450; Pauwelyn (2001), at 556. That being said, it seems practical, in light of the long divided debate on the applicability of non-WTO norms in the WTO dispute settlement system and given the general applicability of all norms of international law in the dispute settlement system of every international tribunal, that an analogy be made to the question of jurisdiction and argue accordingly that it is for the party which stands against the applicability of non-WTO norms to submit an argument that is preponderantly forceful; *see* Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26) ("[T]he Court will, in the event of an objection . . . only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant."); Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 76 (Dec. 20) (citing the said *Factory at Chorzow* ruling with approval).

[61] This proposition seems to be supported by the ILC also. *See* ILC Report on Fragmentation of International Law, ¶ 423 ("[A]lthough a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say 'other' international law.").

[62] *See, e.g.*, Marvin Feldman v. Mexico, ¶¶ 98-107, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award of the Tribunal (Dec. 16, 2002) (interpreting the term "expropriation" under Article 1110 of the NAFTA by reference to, *inter alia*, "principles of customary international law").

B. No Intrinsic Hierarchy between Customary International Law, WTO Law and RTA Law

As the WTO law and RTA law are both part of international law, generally speaking there would be no intrinsic hierarchy between the WTO law, RTA law and other norms of international law; they all have the same legal value (except, of course, *jus cogens*, and without prejudice to priority being given to a norm on the basis of conflict clauses (if any), *lex specialis* and/or *lex posterior*). It has been argued, however, that the WTO law enjoys "primacy" over RTAs. As will be substantiated below, such a "primacy" does *not* exist in a general sense. Before proceeding into the examination of this issue, it seems desirable that some general observations on the relationship between the WTO and RTAs be offered.

1. RTAs (both substantive rights/obligations and dispute settlement mechanisms) as expressly recognized under the WTO

The WTO, as indicated by its very name, is designed as a multilateral trading system.[63] As one central pillar of trade policy generally[64] and of the WTO particularly,[65] the MFN obligation[66] dictates equal treatment and non-discrimination.[67]

[63] WTO Agreement, preamble, para. 4.

[64] *See, e.g.*, JACKSON (1997), at 157.

[65] *See, e.g.*, LOWENFELD (2008), at 30-31.

[66] *See, e.g.*, GATT 1947 art. I:1; GATS, art. II:1; TRIPS Agreement art. 4.

[67] *See e.g.*, LO (1999), at 65-66; JACKSON (1997), at 157. It is worth noting that sometimes "MFN" is equated with the "multilateralism"; these two concepts, however, can be distinguished upon further examination; JACKSON (1997), at 158.

Simply put, by virtue of this obligation, each WTO member has to extend to any other WTO member any trade benefit with respect to import and export of goods (e.g. tariff concessions) that it grants to any other nation.[68]

On the other hand, although a multilateral approach to international trade was much desired by the founding fathers of the WTO (as well as the GATT, its predecessor), the significance of a bilateral approach was explicitly acknowledged by the WTO itself.[69] Under the bilateral approach as understood in the WTO context, Members conclude RTAs, including FTAs and CUs in the GATT context[70] as well as economic integration in the GATS context,[71] where the members of such RTAs afford trade benefits to other such members while denying the same trade benefits to nations outside the coverage of such RTAs. As such, RTAs represent a significant exception to the aforesaid MFN obligation in the WTO.[72]

Up to December 2008, some 421 RTAs[73] have been notified[74] to the WTO. This phenomenon of RTA proliferation has generated much concern[75] and raised such questions as whether RTAs have functioned as "building blocks" or "stumbling blocks"

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[68] JACKSON (1997), at 157. For more on this notion, see, for example, MATSUSHITA ET AL. (2006), at 205-19; MAVROIDIS (2005), at 110-27.

[69] RTA Understanding, preamble, paras. 2-3.

[70] GATT 1947 art. XXIV.

[71] GATS art. V.

[72] *See* MATSUSHITA ET AL. (2006), at 220.

[73] World Trade Organization, Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited July 25, 2009).

[74] WTO members are obliged to notify RTAs to the WTO; *see* GATT 1947 art. XXIV:7(a); GATS art. V:7(a).

[75] Recently, the WTO Director-General characterized the proliferation of RTAs as a "breeding concern"; Pascal Lamy, Dir.-Gen., WTO, Opening Address at the Conference on Multilateralizing Regionalism (Sept. 10, 2007), http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm (last visited July 25, 2009).

vis-à-vis the multilateral trading system.[76] Apart from this, another (and more concrete) question that deserves particular attention is whether a specific RTA is WTO-consistent, i.e., whether a given RTA conforms to the legal benchmark set forth in the WTO (more specifically, Article XXIV of the GATT and Article V of the GATS).[77] Explicit as their wording may be, such legal standards are vague and flexible enough to be subjected to different interpretations.[78] As such, it is quite understandable why the examination of a given RTA has taken place on very limited occasions, either through "multilateral route" in the CRTA or the "bilateral route" in WTO dispute settlement.[79] As a result, even with all the debate and concern, the parallel existence of the WTO and RTAs has not yet been seriously disturbed.[80] Simply put, WTO Members have a right to conclude RTAs,[81] and this right has been seldom challenged.

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[76] *See e.g.* Committee on Regional Trade Agreements, *Note by the Secretariat, Synopsis of "Systemic" Issues Related to Regional Trade Agreements*, ¶ 3, WT/REG/W/37 (Mar. 2, 2000); Do & Watson (2006), at 10-20; Damro (2006), at 25-26, 39-41; MATSUSHITA ET AL. (2006), at 551-53 (arguing that this issue should be examined on a case-by-case basis); Trakman (2008) (critically reviewing arguments for and against RTAs).

[77] For a more detailed analysis, see, for example, MATSUSHITA ET AL. (2006), at 555, 562-572, 578-81; MAVROIDIS (2005), at 228, 231-41; MATHIS (2002); LO (1999), at 50-56; Marceau & Reiman (2001); Pauwelyn (2004c); Marceau (2007), at 409-11; Lockhart & Mitchell (2005); Trachtman (2007), at 160-66.

[78] World Trade Organization, The Doha Declaration Explained, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#regional (last visited July 25, 2009). This explains why part of the current Doha Round negotiations in the WTO is dedicated to "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements"; Doha Declaration, ¶ 29.

[79] The multilateral route is for the CRTA to examine the WTO-consistency of a notified RTA, whereas the bilateral route is for a WTO member to challenge (and thus for the WTO Tribunal to review) the WTO-consistency of a given RTA; *see* MATSUSHITA ET AL. (2006), at 555-77; MAVROIDIS (2005), at 228-46; Abbott (2000), at 176 (contemplating the possible reason for a lack of decision in the CRTA); RTA Understanding, ¶ 12 (providing that RTAs may be subject to WTO dispute settlement). The CRTA and its predecessor (GATT Article XXIV Working Parties) have never reached any consensus that a notified RTA was WTO/GATT-inconsistent, whereas among the nine occasions where a given RTA was discussed in the WTO/GATT jurisprudence, none ruled a given RTA to be WTO-inconsistent either.

[80] *See, e.g.*, Joost Pauwelyn, *Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV* 2-3 (paper presented at the Conference on Multilateralizing Regionalism, Sept. 10-12, 2007, Geneva, Switzerland), *available at* http://www.wto.org/english/tratop_e/region_e/con_sep07_e/pauwelyn_e.pdf (last visited July 29, 2009) ("Politically, WTO members consistently fail to check regional agreements; in dispute settlement, WTO members shy away from challenging regional agreements and where Article XXIV is raised as a defense, panels and the Appellate Body do everything to avoid it. The political and

RTAs being co-existent with the WTO, it is noted that sometimes the substantive rights and obligations of numerous RTAs are parallel or even identical to those under the WTO legal system, and at times the RTA rights/obligations are more specific than, more burdensome than, or intentionally deviate from, WTO rights/obligations. As long as the legal requirements set forth in Article XXIV of the GATT and/or Article V of the GATS, such RTA rights/obligations are recognized under the WTO legal system. Not only substantive RTA rights/obligations, but the dispute settlement mechanisms established by different RTAs should also be recognized under the WTO legal system, as these RTA dispute settlement systems are designed to enforce RTA provisions and, therefore, can be plausibly considered to pass the legal benchmark set forth in Article XXIV of the GATT and/or Article V of the GATS.[82]

2. RTAs as "*inter se* modifications" in the sense of Article 41 of the VCLT

As seen above, RTAs contain substantive rights and obligations that are may or may not be similar to the WTO provisions, and, therefore, it has been argued that RTAs are "*inter se* modifications" of the trade relations between certain WTO Members only. The concept "*inter se* modifications" is governed in Article 41 of the VCLT, which is reproduced below:

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legal reality is, therefore, that regional agreements are here to stay, whether or not they comply with WTO rules.") (citation omitted).

[81] *See, e.g.*, Kwak & Marceau (2006), at 466.

[82] *See, e.g., id.* at 476; Lo (2007), at 458 ("Since FTAs are admitted under WTO law, a mechanism designed to deal with disputes arising from the interpretation and application of an agreement should, as a matter of course, be part of the authorization of Article XXIV of the GATT 1994 and Article V of the GATS.").

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) the possibility of such a modification is provided for by the treaty; or
   (b) the modification in question is not prohibited by the treaty and:
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

At the outset, one should clearly distinguish "*inter se* modifications" (Article 41 of the VCLT) from "amendments" (Article 40 of the VCLT): while "amendments" concern *all* parties to a multilateral treaty, *inter se* modifications" concern only *some* of the parties; this has been explicitly confirmed by the ILC, the drafting body of the VCLT.[83] More specifically, the difference between "amendments" and "*inter se* agreements" is that the purpose of the latter is "not to revise the original treaty, [but]

[83] ILC Draft Articles on the Law of Treaties with Commentaries, arts. 35 & 36, ¶ 6 ("Although an amending instrument may equally turn out to operate only between certain of the parties, the Commission considered that a clear-cut distinction must be made between the amendment process *stricto sensu* and *inter se* agreements modifying the operation of the treaty between a restricted circle of the parties. For this reason, *inter se* agreements are dealt with separately in [Article 41] while the opening phrase of paragraph 2 of [Article 40] underlines that it is concerned only with proposals to amend the treaty as between *all* the parties."). It is noted that draft articles 35, 36 and 37 correspond to Articles 39, 40 and 41 of the current VCLT. *See also* PAUWELYN (2003), at 315-16; Cottier & Foltea (2006), at 55 n.37.

merely to modify its application in relations between [] certain parties."[84] Thus, whereas Article X of the WTO Agreement requires an amendment to the WTO Agreement to be consented to by *all* WTO Members,[85] it does not, *per se*, preclude the possibility that certain WTO Members may conclude *inter se* modifications as between them.[86]

Turning back to the question of *inter se* modifications, certain commentators assume that *inter se* modifications are understood in a wide sense as to include outside treaties whose very conclusion changes the legal relationship as between certain WTO Members, without having explicitly changed any provision of the WTO covered agreements as applied between those Members.[87] Thus, RTAs, while being "outside" the WTO covered agreements, are considered *inter se* modifications of the trade relations between certain WTO Members. In this connection, it is noted that Article XXIV:5 of the GATT provides, in pertinent part, that the GATT "shall not prevent . . . the formation of [RTAs] . . . provided that" certain conditions are met. On this basis, it has been argued that RTAs are *inter se* modifications in the sense of Article 41 of the VCLT that are either expressly permitted by the WTO[88] (and thus fall within Article

[84] ILC Report on Fragmentation of International Law, ¶ 302.

[85] *See* WTO Agreement art. X.

[86] *See, e.g.*, PAUWELYN (2003), at 315-16. *Contra* Marceau (2001), at 1104 (seemingly confusing "amendments" with "*inter se* modifications" by arguing that "the WTO Agreement contains specific rules for its amendment (Article X of the [WTO Agreement]), excluding the application of bilateral amendments amending a multilateral treaty (Article 41.2 of the [VCLT])").

[87] PAUWELYN (2003), at 316; Cottier & Foltea (2006), at 55.

[88] *See, e.g.*, MATHIS (2002), at 277-78 ("Article XXIV appears on its face to grant a permissive, albeit conditional, right for members to make modifications by forming free-trade areas and customs unions."); Cottier & Foltea (2006), at 55-56 ("[I]t is Article 41(1)(a) that applies since RTAs represent an explicit authorization to modify the multilateral agreement. . . . Both Article XXIV GATT and Article V GATS thus explicitly authorize the conclusion of international agreements in the form of CUs and FTAs, to the exclusion of other types of RTAs."); ILC Report on Fragmentation of International Law, ¶ 305 ("[I]n some cases the drafters of the original treaty may have expressly foreseen and permitted particular types of inter se deviation. For example, article XXIV of the General Agreement on Tariffs and Trade (GATT)

41(1)(a) of the VCLT) or are not prohibited by the WTO[89] (and thus fall within Article 41(1)(b) of the VCLT).

However, this thesis submits that such a debate does not make much practical sense. First of all, in either case (Article 41(1)(a) or 41(1)(b) of the VCLT), the conditions set forth in Article XXIV of the GATT and/or Article V of the GATS would have to be fulfilled. If one takes the view that RTAs are *inter se* agreements expressly permitted by the WTO, such permission comes with conditions nevertheless; if one takes the view that RTAs are *inter se* agreements that are not prohibited by the WTO, the prohibition is excused when the same conditions are met. Second, even in the case of Article 41(1)(b) of the VCLT, the two requirements set forth therein would normally be satisfied. With respect to the requirement in Article 41(1)(b)(i), i.e. that the *inter se* modification shall not "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations," since an RTA could be invoked *by* and *against* its parties only (and not *by* or *against* any third party), it is hardly the case where an RTA would be considered to prejudice the rights or add to the burdens of other WTO Members.[90] With respect to the requirement in Article 41(1)(b)(ii), i.e. that the *inter se* modification shall not "relate to a provision, derogation from which is incompatible with

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provides for the formation and maintenance of "customs unions" and "free-trade areas" on [certain] condition[s].").

[89] *See, e.g.*, PAUWELYN (2003), at 317-18 (arguing that the WTO prohibits *inter se* modifications in the form of RTAs *unless* the RTAs conform with the conditions laid down in Article XXIV of the GATT and/or Article V of the GATS).

[90] *See id.* at 319-20 (arguing that in the context of *trade restrictions* (as opposed to *trade liberalizations* enshrined in RTAs), *inter se* modifications do not affect third party rights because "trade obligations under the WTO treaty are reciprocal in nature, not integral"). *Contra* Marceau (2001), at 1105 (arguing that "WTO obligations are always the same for all Members" and thus "such bilateral modification of WTO rights and obligations may simply not be possible without affecting the rights of other third WTO Members").

the effective execution of the object and purpose of the treaty as a whole,"[91] it is quite difficult to discern any WTO provision that is so fundamentally significant that any derogation from such provision would threaten the effective execution of the object and purpose of the WTO legal system as a whole.[92]

Thus, if RTAs are characterized as *inter se* modifications in the sense of Article 41 of the VCLT, the question that really counts is whether RTAs fulfill the WTO conditions (Article XXIV of the GATT and Article V of the GATS). The question that follows is: when an RTA fails to satisfy such conditions and thus fails the test of Article 41 of the VCLT, what are the legal consequences? This will be examined immediately below.

3. The "primacy" of WTO law over RTA law by virtue of Article 41 of the VCLT?

[91] Examples of such provisions – derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole – are *inter se* agreements modifying substantive provisions of a disarmament or neutralization treaty. *See* ILC Draft Articles on the Law of Treaties with Commentaries, art. 37, ¶ 2. On such treaties which contain "interdependent type" of obligations as well as other treaties that contain "integral type" of obligations, see, for example, *id.*, art. 26, ¶ 8 n.117 ("A treaty containing 'interdependent type' obligations . . . is one where the obligations of each party are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty regime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples . . . were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. A treaty containing 'integral type' obligations was defined . . . as one where 'the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others.' The examples given . . . were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war, etc., International Labour Conventions and treaties imposing an obligation to maintain a certain regime or system in a given area, such as the regime of the Sounds and the Belts at the entrance to the Baltic Sea.").

[92] PAUWELYN (2003), at 320-21. *See also* ILC Report on Fragmentation of International Law, ¶¶ 305, 309-13 (stating that RTAs are *inter se* modifications expressly permitted (with conditions of course) under the WTO system while recognizing that some treaties containing "non-reciprocal" obligations may not permit *inter se* agreements).

While Article 41 of the VCLT lays down "the conditions under which *inter se* agreements may be regarded as permissible,"[93] it does not explicitly address the legal consequences that would follow if an *inter se* modification does not pass the Article 41 test. One thing is certain, though: when the Article 41 test is not passed, an *inter se* modification is *impermissible*. But being *impermissible* does not follow that an *inter se* agreement would be *invalidated*; once again, the ILC clearly points out that an "*inter se* agreement concluded in deviation from the original agreement is not thereby invalidated. It would seem . . . that it should depend on an interpretation of the original treaty as to what consequences should follow."[94] In addition, an *inter se* agreement that fails the Article 41 test may have two consequences: suspension/termination of the original treaty, and State responsibility.[95] Applied to the WTO context, it seems that when an RTA fails to meet the criteria laid down in Article XXIV of the GATT and/or Article V of the GATS, the RTA would not be invalidated *ipso facto*; one of the concrete consequences is that none of the parties to such an RTA would be able to invoke the defense under Article XXIV of the GATT (or Article V of the GATS) against other WTO Members (and thus cannot avoid State responsibility under the WTO system that flows from its breach of WTO norms).[96]

[93] ILC Draft Articles on the Law of Treaties with Commentaries, art. 37, ¶ 1.

[94] ILC Report on Fragmentation of International Law, ¶ 319.

[95] *See id.*

[96] *See, e.g.*, Appellate Body Report, *Turkey – Textiles*, ¶ 58 ("[The GATT Article XXIV] 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of *a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV*. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.") (emphasis added).

Viewing the relationship between RTAs and the WTO from the perspective of Article 41 of the VCLT, some commentators argue that the WTO enjoys "primacy" over RTAs[97]:

> We recall again that international treaties, whatever their form, normally find themselves on the same level of hierarchy. . . . However, under the WTO as a multilateral treaty defining terms and conditions for the deviation of non-discriminatory rights and obligations, a constitutional and hierarchical relationship between WTO rules and RTAs emerges under Article 41 [of the] VCLT. RTAs are subject to the conditions of WTO law, in the same way as legislation, in a domestic context, is subject to the requirements of constitutional law. In the case of conflict and non-compliance with WTO law, RTAs need to cede. They are not on the same footing.

This statement could easily give an impression that it is suggesting a constitutional hierarchy between all WTO and RTA norms, which would invalidate RTA norms to the extent inconsistent with WTO norms (as the case would be in domestic legal systems). However, the "primacy" of WTO norms over RTAs, if any, would not be "the same" as the constitutional hierarchy in domestic legal systems. This is partly because an *inter se* agreement would not be *invalidated* merely because of its lack of compliance with the conditions in Article 41 of the VCLT. More significantly, Article 41 of the VCLT does not give preference to the WTO law *in its entirety* over RTAs; rather, under Article 41 of the VCLT, it is only those requirements laid down in the WTO, *viz.* Article XXIV of

[97] Cottier & Foltea (2006), at 56-57.

the GATT and Article V of the GATS, that regulate the *formation* of RTAs; once an RTA satisfies these requirements, there would not be any hierarchical relationship between RTAs and the WTO norms in a general sense.[98] Put differently, even if there is any "primacy" to be attached to the WTO, that "primacy" would exist only to the narrow extent where the *formation* of RTAs is concerned; when an RTA satisfies the conditions set forth in Article XXIV of the GATT and/or Article V of the GATS as well as passes the test in Article 41 of the VCLT, the legal priority between an RTA provision and a WTO provision, where these two provisions genuinely conflict with each other, would have to be decided in accordance with applicable conflict-resolution techniques under international law, *viz.* conflict clauses, *lex posterior* (as codified in Article 30 of the VCLT) and *lex specialis*.[99]

C. Jurisdictional Conflicts between the WTO Tribunal and RTA Tribunals as a More Complicated Issue

Having made the above observations concerning the general relationship between WTO law, RTA law and other norms of international law, this thesis now moves a bit towards the central issue, i.e. the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals by illustrating why this problem is particularly difficult (as opposed to the jurisdictional conflicts between other international tribunals). As the various sub-

[98] Indeed, the commentators opened this line of arguments by stating that "Article 41 [of the] VCLT establishes that WTO rules *pertaining to the formation of [RTAs]* are inherently of a higher ranking." *Id.* at 56. *See also* Graewert (2008), at 323 ("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.").

[99] *See, e.g.*, PAUWELYN (2003), at 321.

issues involved will be addressed more specifically in later chapters, here only a few observations will be offered for the purpose of sharpening the analysis that will follow.

First of all, the problem of jurisdictional conflict between the WTO Tribunal and RTA Tribunals is not purely of academic interest; it would potentially take place in the real world. For instance, in *Argentina – Poultry*, Argentina asserted, *inter alia*, that the Panel should refrain from ruling on the merits of the case because Brazil challenged the same measure before a Mercosur ad hoc arbitral tribunal.[100] In the end, the *Argentina – Poultry* Panel rejected this argument by noting that although Article 1(1) of the Protocol of Olivos[101] could have prevented Brazil from opening a subsequent WTO litigation over the same measure, this Protocol of Olivos had not yet come into force at that time and in any event it did not apply to the dispute because the Protocol of Brasilia[102] (which does not contain a similar provision) solely controlled the Mercosur dispute.[103] However, if the Protocol of Olivos had entered into force at that time,[104] and if Brazil had challenged the measure pursuant to the Protocol of Olivos before the Mercosur arbitral tribunal, the *Argentina – Poultry* Panel would have found it inevitable to address

[100] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.17.

[101] Protocolo de Olivos [Olivos Protocol for the Settlement of Disputes in Mercosur], art. 1(2), Feb. 18, 2002, *translated in* 2251 U.N.T.S. 288 [hereinafter Protocol of Olivos] ("Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. . . . Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora.").

[102] Protocolo de Brasília [Brasilia Protocol for the Settlement of Disputes], Dec. 17, 1991, *translated in* 2145 U.N.T.S. 282 [hereinafter Protocol of Brasilia].

[103] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.38. *See also* Protocol of Olivos art. 50 ("Pending disputes initiated pursuant to the system of the Protocol of Brasilia shall be governed solely by such Protocol until definitively ended.").

[104] It is noted here that this Protocol of Olivos already entered into force on January 1, 2004 and, as of that date, had replaced the Protocol of Brasilia; Protocol of Olivos art. 55(1) ("As from its effective date, this Protocol shall substitute the Protocol of Brasilia on Dispute Settlement, signed on December 17, 1991, and shall substitute the Regulation of the Protocol of Brasilia, CMC Decision 17/98.").

the possible jurisdictional conflict between the WTO Tribunal and the Mercosur arbitral tribunal resulting from the possible conflict between Article 23.1 of the DSU and Article 1(2) of the Protocol of Olivos. More recently, in *Mexico – Taxes on Soft Drinks*, Mexico attempted to enforce sugar quotas allegedly allocated to Mexico under NAFTA, but the NAFTA procedure was stranded in the panel selection stage because (according to Mexico) the United States refused to appoint panelists in violation of NAFTA;[105] thus, Mexico imposed, as a measure of retaliation, a discriminatory tax on imports of U.S. soft drinks;[106] subsequently, the United States challenged the tax measure imposed by Mexico before the WTO Tribunal, whereas Mexico requested the WTO Tribunal to decline the exercise of its jurisdiction "in favour of a NAFTA Chapter Twenty Arbitral Panel."[107] In the end, the WTO Tribunal rejected Mexico's request by noting, *inter alia*, that both the subject matter and the parties in the NAFTA case (Mexico, as complainant, making market access claims against the United States under the NAFTA) are different from the WTO litigation (the United States, as the complainant, challenging the Mexican tax measure under the WTO), and that Article 2005(6) of the NAFTA[108] was not even applicable.[109] However, as the WTO Tribunal specifically pointed out, it remains a possibility that by virtue of Article 2005(6) of the NAFTA (where applicable), the WTO Tribunal's "jurisdiction might be legally constrained, notwithstanding its approved terms of reference"[110] and "legal impediments could exist that would preclude

[105] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 19 n.33.

[106] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.14.

[107] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.11.

[108] NAFTA art. 2005(6) ("Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.").

[109] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 54.

a panel from ruling on the merits of the claims that are before it."[111] Simply put, the above two case scenarios sufficient illustrates the point that the jurisdictional conflict between the WTO Tribunal and RTA Tribunals poses real concerns.[112]

Secondly, as evident from the foregoing instances, the question of "jurisdictional conflict" may be properly understood as a question of "conflict between jurisdictional clauses." This is a law of treaties issue.[113] Notwithstanding that jurisdictional conflicts may be examined from perspectives other than the law of treaties perspective, as advocated in this thesis,[114] the examination of jurisdiction conflict between the WTO Tribunal and RTA Tribunals would largely be focused upon the conflict between the jurisdictional clause of the WTO Tribunal and those pertaining to RTA Tribunals (for instance, the aforementioned Article 1(2) of the Protocol of Olivos and Article 2005(6) of the NAFTA). Without going too deep into this question here, it is noted that the most prominent treaty clause establishing the jurisdiction of the WTO Tribunal is Article 23.1 of the DSU, which entitles each WTO Member to initiate WTO litigation over allegedly WTO-inconsistent measures maintained by any other WTO Member. Also, as RTAs differ from each other significantly, it would be virtually impossible to accurately approach the jurisdictional conflict between the WTO Tribunal and RTA Tribunals without first classifying divergent RTA jurisdictional clauses and focusing upon certain type(s) thereof. Thus, such a classification will be offered immediately below, followed

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[110] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 7.10.

[111] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 54.

[112] For other case scenarios in which the jurisdiction of the WTO Tribunal may possibly conflict with the jurisdiction of RTA Tribunals, see, for example, SHANY (2004), at 53-59; Pauwelyn (2006); Kwak & Marceau (2006), at 468-74.

[113] *See, e.g.*, Lowe (1999), at 193-94 ("The question of jurisdiction is thus one that may be approached *via* the Law of Treaties.").

[114] Such other approaches towards jurisdictional conflicts will be reviewed later; *see infra* Ch. 2.

by a preliminary observation concerning the conflict between the RTA jurisdictional clauses and Article 23.1 of the DSU. Then, the reason why such jurisdictional conflict between the WTO Tribunal and RTA Tribunals is particularly difficult will be substantiated.

1. A classification and preliminary analysis of divergent RTA jurisdictional clauses

A classification of RTA jurisdictional clauses may involve a number of considerations.[115] Specifically with respect to the interaction between the jurisdiction of the WTO Tribunal and that of RTA Tribunals, given that a single measure may give rise to both a violation of WTO law and an RTA incompatibility, and given further that Article 23.1 of the DSU entitles each WTO Member to challenge a measure for its WTO-inconsistency before the WTO Tribunal,[116] the crucial question to be asked is: whether, and if yes, how such a right is affected by an RTA jurisdictional clause. For instance, if an RTA clause provides for exclusive jurisdiction to be exercised by the RTA Tribunal over such a measure, does this take away the jurisdiction of the WTO Tribunal? Or, if an RTA clause permits the complainant to choose between the WTO Tribunal and the RTA Tribunal but mandates that the chosen forum be used to the

[115] Kwak & Marceau (2006), at 468 (listing six considerations: (i) whether the RTA clause in question provides for compulsory jurisdiction of the RTA Tribunal; (ii) whether the clause makes reference to the WTO dispute settlement system; (iii) whether the clause provides for exclusive jurisdiction of the RTA Tribunal; (iv) whether it provides for choice of forum; (v) whether the RTA Tribunal's ruling is binding; and (vi) what type(s) of remedies are provided.

[116] The relevant issues pertaining to this entitlement, including whether WTO Members are required to submit WTO disputes to the WTO Tribunal on an exclusive basis and whether such an entitlement is absolute, i.e. free of any limitation inside or outside the DSU, will be examined later; no matter what view is taken, it is unquestionable that Article 23.1 of the DSU does confers such a right to WTO Members; *see infra* Ch. 2.

exclusion of the other, where the complainant first submits to the jurisdiction of the RTA Tribunal and then to the WTO Tribunal, how does this affect the jurisdiction of the WTO Tribunal?

Along the line of these questions, RTA jurisdictional clauses can be first roughly divided into two groups, one providing for RTA jurisdiction on a *permissive* basis and the other on an *exclusive* basis. Then, each group of RTA jurisdictional clauses can be further broken down into two categories on the basis of the degree of their *interaction with the jurisdiction of the WTO*. Also, as will be seen below, an intermediary group of RTA jurisdictional clauses may be considered to exist in between. By this approach, conceptually at least five different types of RTA jurisdictional clauses can be discerned, listed below in an order that generally corresponds to each type's potential to conflict with the WTO Tribunal's jurisdiction, and each type contains an actual example of RTA jurisdictional clause as well as some preliminary analysis of its potential to give rise to jurisdictional conflict with the WTO Tribunal.

a) *Type 1: RTA jurisdictional clauses providing for RTA jurisdiction on a permissive basis, but excluding RTA jurisdiction when a dispute involves WTO rights/obligations*

An example of such Type 1 RTA jurisdictional clauses is Article 41 of the E.C.-Mexico FTA,[117] which essentially provides that while the arbitration procedures are applicable to disputes arising out of this FTA, the same procedures "shall not be applicable in the case of disputes concerning [the Anti-dumping Agreement, the SCM

[117] E.C.-Mexico Joint Council Decision No. 2/2000 of 23 Mar. 2000, 2000 O.J. (L157) 10 [hereinafter E.C.-Mex. FTA].

Agreement, the TBT Agreement and the SPS Agreement],"[118] which are incorporated into this FTA.[119] Put differently, although the relevant WTO rights and obligations under these WTO covered agreements are incorporated into, and thus have also become rights and obligations under, the E.C.-Mexico FTA, the *ad hoc* arbitral tribunals envisaged in this FTA do not have jurisdiction to examine these rights and obligations.[120] Along the same line, Article 189 of the E.C.-Chile FTA[121] essentially provides that when a complainant seeks redress of a violation of an RTA obligation which is "equivalent in substance" to a WTO obligation, the complainant "shall have recourse" to the WTO dispute settlement.[122] Under such an RTA jurisdictional clause, it seems that the jurisdiction of the RTA Tribunal would not address issues that fall within the WTO Tribunal, and, hence, the probability of jurisdictional conflict would be minimal.

b) Type 2: RTA jurisdictional clauses providing for RTA jurisdiction on a permissive basis, without excluding RTA jurisdiction even when a dispute involves WTO rights/obligations

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[118] *Id.* art. 41 ("1. The provisions of this Title shall apply with respect to any matter arising from this Decision or from Articles 2, 3, 4, and 5 of the Interim Agreement (hereinafter the 'covered legal instruments'). 2. By way of exception, the arbitration procedure laid down in Chapter III shall not be applicable in the case of disputes concerning Articles 14, 19(2), 20(1), 21, 23, and 40 of this Decision.").

[119] *Id.* arts. 14, 19(2) & 20(1).

[120] *See also id.* art. 47(3) ("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 (WTO).").

[121] Association Agreement, E.U.-Chile, Oct. 3, 2002, *available at* http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlagr_en.htm [hereinafter E.U.-Chile FTA].

[122] *Id.* art. 189(4)(c) ("Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement.").

An example of such Type 2 RTA jurisdictional clauses is the AFTA. The dispute settlement in the AFTA is now governed by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.[123] While Article 1(1) of this Protocol provides that the dispute settlement system is applicable to disputes pertaining to the AFTA,[124] Article 1(3) of the same Protocol provides that the dispute settlement system under this Protocol is "without prejudice to the rights of Member States to seek recourse to other for a for the settlement of disputes involving other Member States."[125] Thus, under such an RTA dispute settlement system, both the RTA Tribunal and the WTO Tribunal may have jurisdiction concurrent to each other. Nevertheless, the probability of jurisdictional conflict would still be minimal, and this is essentially because Article 23.1 of the DSU (i.e. the jurisdictional clause of the WTO Tribunal), on the one hand, and such Type 2 RTA jurisdictional clause, on the other, would be hardly considered to be "mutually

[123] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, *available at* http://www.aseansec.org/16754.htm (last visited Aug. 1, 2009) [hereinafter ASEAN Protocol on Enhanced Dispute Settlement], *replacing* Protocol on Dispute Settlement Mechanism, Nov. 20, 1996, *available at* http://www.aseansec.org/16654.htm (last visited Aug. 1, 2009) [hereinafter ASEAN Protocol on Original Dispute Settlement].

[124] ASEAN Protocol on Enhanced Dispute Settlement art. 1(1) ("The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the 'covered agreements').").

[125] ASEAN Protocol on Enhanced Dispute Settlement art. 1(3) ("The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.") Here, it is also noteworthy that the second sentence of this provision seems to suggest that *after* a panel is established, the complainant would be *barred* from seeking recourse to other fora (ostensibly including the WTO Tribunal). To this extent, this provision is similar to a Type 3 jurisdictional clause. *Cf.* ASEAN Protocol on Original Dispute Settlement art. 1(3) ("The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage *before the Senior Economic Officials Meeting ('SEOM') has made a ruling on the panel report.*") (emphasis added).

exclusive" or otherwise considered to constitute a genuine conflict in international law. This will be further substantiated later.[126]

c) *Type 3: RTA jurisdictional clauses providing for choice of forum (RTA Tribunal or WTO Tribunal), but requiring that the chosen forum be used "to the exclusion of" the other*

Like Type 1 and Type 2, this Type 3 of RTA jurisdictional clauses (initially) provide for RTA jurisdiction on a *permissive* basis: Type 3 RTA jurisdictional clauses initially offer a choice of forum,[127] and, at this stage, the jurisdiction of RTA Tribunals is merely permissive rather than exclusive; to the extent that a complainant chooses to vindicate its rights in the RTA Tribunal, however, the RTA Tribunal would have *exclusive* jurisdiction over the matter, and when this happens, this Type 3 may be considered to resemble Type 4 and Type 5 below.[128] Most notably, not only is the jurisdiction of the RTA Tribunal (if chosen) *exclusive*, but the complainant (and perhaps also the respondent) is also *barred* from initiating a subsequent WTO litigation because the RTA Tribunal shall be "used to the exclusion of" the WTO Tribunal. Prominent examples of such Type 3 RTA jurisdictional clauses can be found in the aforementioned

[126] *See infra* Ch. 2.

[127] It is noted that "[t]he choice of a dispute settlement forum is often an expression of the importance that states give to the system of norms that may be enforced by the related dispute settlement mechanism." Kwak & Marceau (2006), at 466. This thesis, however, does not address the policy concerns that may be involved in the choice of either the WTO Tribunal or RTA Tribunals; for these concerns, see, for example, Leal-Arcas (2007); Pauwelyn (2004a), at 246-64; Gao & Lim (2008) (arguing for the WTO Tribunal to review all RTA disputes on a *lex ferenda* basis).

[128] Some commentators characterize such Type 3 RTA jurisdictional clauses as enshrining a "lis alibi pendens" approach; *see*, *e.g.*, Gao & Lim (2008), at 907.

Mercosur[129] and NAFTA[130], and can also be found in certain RTAs to which the United States is a party,[131] certain RTAs to which the EFTA is a party,[132] a number of RTAs in Asia[133] (including all RTAs to which Taiwan is a party)[134] and elsewhere.[135] Among

[129] Protocol of Olivos art. 1(2) ("Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. . . . Once a dispute settlement procedure pursuant to the preceding paragraph has begun, *none of the parties may request the use of the mechanisms established in the other fora*.") (emphasis added).

[130] NAFTA arts. 2005(1) & (6) ("Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party. . . . Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected *shall be used to the exclusion of the other*, unless a Party makes a request pursuant to paragraph 3 or 4.") (emphasis added).

[131] *See, e.g.*, Free Trade Agreement, U.S.-Austl., art. 21.4, May 18, 2004, *available at* http://tcc.export.gov/static/AFTA.full_text.pdf [hereinafter U.S.-Austl. FTA]; Free Trade Agreement, U.S.-Bahr., art. 19.4, Sept. 4, 2004, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_006966.asp [hereinafter U.S.-Bahr. FTA]; Free Trade Agreement, U.S.-Cent. Am.-Dominica, art. 20.3, Aug. 5, 2004, State Dept. No. 06-63 [hereinafter CAFTA-DR]; Free Trade Agreement, U.S.-Chile, art. 22.3, June 6, 2003, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000984.asp [hereinafter U.S.-Chile FTA]; Free Trade Agreement, U.S.-S. Korea, art. 22.6, June 30, 2007, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter U.S.-S. Korea FTA]; Free Trade Agreement, U.S.-Morocco, art. 20.4, June 15, 2004, *available at* http://tcc.export.gov/static/final_text_Morocco_FTA.pdf [hereinafter U.S.-Morocco FTA]; Free Trade Agreement, U.S.-Sing., art. 20.4(3), May 6, 2003, *available at* http://tcc.export.gov/static/text_final.pdf [hereinafter U.S.-Sing. FTA].

[132] *See, e.g.*, Free Trade Agreement, EFTA-Chile, art. 88, June 26, 2003, *available at* http://www.efta.int/content/legal-texts/third-country-relations (follow "Chile" hyperlink) [hereinafter EFTA-Chile FTA]; Free Trade Agreement, EFTA-Mex., art. 77, Nov. 27, 2000, *available at* http://www.efta.int/content/legal-texts/third-country-relations (follow "Mexico" hyperlink) [hereinafter EFTA-Mex. FTA]; Free Trade Agreement, EFTA-SACU, art. 37(2), June 26, 2006, *available at* http://www.efta.int/content/legal-texts/third-country-relations (follow "Southern African Customs Union (SACU)" hyperlink) [hereinafter EFTA-SACU FTA]; Free Trade Agreement, EFTA-Sing., art. 56, June 26, 2002, *available at* http://www.efta.int/content/legal-texts/third-country-relations (follow "Singapore" hyperlink) [hereinafter EFTA-Sing. FTA]; Free Trade Agreement, EFTA-S. Korea, art. 9.1, Dec. 15, 2005, *available at* http://www.efta.int/content/legal-texts/third-country-relations (follow "Republic of Korea" hyperlink) [hereinafter EFTA-S. Korea FTA].

[133] *See, e.g.*, Economic Partnership Agreement, Japan-Brunei, art. 107(3), June 18, 2007, *available at* http://www.mofa.go.jp/region/asia-paci/brunei/epa0706/agreement.pdf [hereinafter Japan-Brunei EPA]; Strategic Economic Partnership Agreement, Japan-Chile, art. 176, Mar. 27, 2007, *available at* http://www.mofa.go.jp/region/latin/chile/joint0703/agreement.pdf [hereinafter Japan-Chile SEPA]; Economic Partnership Agreement, Japan-Indon., art. 138, Aug. 20, 2007, *available at* http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf [hereinafter Japan-Indon. EPA]; Economic Partnership Agreement, Japan-Malay., art. 145(3), Dec. 13, 2005, *available at* http://www.mofa.go.jp/region/asia-paci/malaysia/epa/content.pdf [hereinafter Japan-Malay. EPA]; Economic Partnership Agreement, Japan-Mex., art. 151(2), Sept. 17, 2004, *available at* http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf [hereinafter Japan-Mex. EPA];

them, Mercosur may stand out as the most prominent in that it expressly prohibits *both* the complainant *and* the respondent from initiating a subsequent litigation.[136] And a

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Economic Partnership Agreement, Japan-Phil., art. 149(3), Sept. 9, 2006, *available at* http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf [hereinafter Japan-Phil. EPA]; New-Age Economic Partnership Agreement, Japan-Sing., art. 139(3), Jan. 13, 2002, *available at* http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf [hereinafter Japan-Sing. New-Age EPA]; Economic Partnership Agreement, Japan-Thail., art. 159(3), Apr. 3, 2007, *available at* http://www.mofa.go.jp/region/asia-paci/thailand/epa0704/agreement.pdf [hereinafter Japan-Thail. EPA]; Closer Economic Partnership Agreement, Malay.-Pak., art. 113(6), Nov. 8, 2007, *available at* http://www.commerce.gov.pk/PMFTA/PAk-Malaysia-FTA(TXT).pdf [hereinafter Malay.-Pak. CEPA]; Free Trade Agreement, P.R.C.-Pak., art. 60, Nov. 24, 2006, *available at* http://www.commerce.gov.pk/PK-CN(FTA)/Pak-China_FTA_Agreement.pdf [hereinafter P.R.C.-Pak. FTA]; Free Trade Agreement, P.R.C.-N.Z., art. 185, Apr. 7, 2008, *available at* http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf [hereinafter P.R.C.-N.Z. FTA]; Free Trade Agreement, Sing.-Jordan, art. 7.1, May 16, 2004, *available at* http://www.fta.gov.sg/fta_sjfta.asp?hl=5 (follow "legal text" hyperlink) [hereinafter Sing.-Jordan FTA]; Free Trade Agreement, Sing.-Pan., art. 15.5, Mar. 1, 2006, *available at* http://www.fta.gov.sg/fta_psfta.asp?hl=10 (follow "legal text" hyperlink) [hereinafter Sing.-Pan. FTA]; Free Trade Agreement, Thail.-Austl., art. 1801(3), July 5, 2004, *available at* http://www.dfat.gov.au/trade/negotiations/aust-thai/aus-thai_FTA_text.pdf [hereinafter Thail.-Austl. FTA]; Closer Economic Partnership Agreement, Thail.-N.Z., art. 17.1(4), Apr. 19, 2005, *available at* http://www.mfat.govt.nz/downloads/trade-agreement/thailand/thainzcep-december2004.pdf [hereinafter Thail.-N.Z. CEPA]; Trans-Pacific Strategic Economic Partnership Agreement, art. 15.3, *opened for signature* July 18, 2005, *available at* http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf [hereinafter Trans-Pacific Strategic EPA].

[134] All of the RTAs concluded by Taiwan includes such a jurisdictional clause; *see* Free Trade Agreement, Taiwan-El Sal.-Hond., art. 15.03, May 7, 2007, *available at* http://cweb.trade.gov.tw/kmi.asp?xdurl=kmif.asp&cat=CAT514 [hereinafter Taiwan-El Sal.-Hond. FTA]; Free Trade Agreement, Taiwan-Guat., art. 18.03, Sept. 22, 2005, *available at* http://ekm92.trade.gov.tw/BOFT/web/report_list.jsp?data_base_id=DB009&category_id=CAT3515 [hereinafter Taiwan-Guat. FTA]; Free Trade Agreement, Taiwan-Nicar., art. 22.03, June 16, 2006, *available at* http://ekm92.trade.gov.tw/BOFT/web/report_list.jsp?data_base_id=DB009&category_id=CAT3910 [hereinafter Taiwan-Nicar. FTA]; Free Trade Agreement, Taiwan-Pan., art. 19.04, Aug. 21, 2003, *available at* http://ekm92.trade.gov.tw/BOFT/web/report_list.jsp?data_base_id=DB009&category_id=CAT2412 [hereinafter Taiwan-Pan. FTA].

[135] *See, e.g.*, Free Trade Agreement, Can.-Chile, art. N-05, Dec. 5, 1996, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en [hereinafter Can.-Chile FTA]; Free Trade Agreement, Can.-Costa Rica, art. XIII.6, Apr. 23, 2001, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/Costa_Rica_toc.aspx?lang=en&menu_id=2&menu=R [hereinafter Can.-Costa Rica FTA]; Free Trade Agreement, Chile-Costa Rica, art. 19.04, Oct. 18, 1999, *notified to the WTO in* WT/REG136 (May 14, 2002) [hereinafter Chile-Costa Rica FTA]; Free Trade Agreement, Chile-El Sal., art. 19.04, Oct. 19, 1999, *notified to the WTO in* WT/REG165 (Feb. 16, 2004) [hereinafter Chile-El Sal. FTA]; Free Trade Agreement, Chile-Mex., art. 18-03, Apr. 17, 1998, *Notified to the WTO in* WT/REG125 (Mar. 8, 2001) [hereinafter Chile-Mex. FTA]; Free Trade Agreement, Mex.-Isr., art. 10-04, Apr. 10, 2000, *notified to the WTO in* WT/REG124 (Mar. 8, 2001) [hereinafter Mex.-Isr. FTA]; Free Trade Agreement, Pan.-El. Sal., art. 20.04, Mar. 6, 2002, *notified to the WTO in* WT/REG196 (Mar. 18, 2005) [hereinafter Pan.-El Sal. FTA].

[136] Protocol of Olivos art. 1(2) ("Once a dispute settlement procedure pursuant to the preceding paragraph has begun, *none of the parties may request the use of the mechanisms established in the other fora*.") (emphasis added).

sub-group of Type 3 RTA jurisdictional clauses specifically provide that the obligation to use the chosen forum to the exclusion of the other is *not* applicable where the rights/obligations that may be addressed by different fora are "substantially separate and distinct."[137] In a word, such Type 3 RTA jurisdictional clauses are designed to improve certainty and to avoid multiplication of dispute settlement proceedings.[138]

As a preliminary analysis, this Type 3 RTA jurisdictional clause will very likely lead to jurisdictional conflict between the WTO Tribunal and RTA Tribunals where a complainant acts in violation of such clause. Here, it is useful to distinguish between two different case scenarios. The first case scenario is where a complainant first chooses the WTO Tribunal to sue, and subsequently reverts back to the RTA Tribunal; in such scenario, there is no jurisdictional conflict because the RTA Tribunal's jurisdiction is simply excluded. On the other hand, in the second case scenario where a complainant first chooses the RTA Tribunal to seek redress and subsequently initiates WTO litigation, a conflict between Article 23.1 of the DSU and such Type 3 RTA jurisdictional clause would potentially occur: notably (and this is one of the main submissions in this thesis), such Type 3 RTA jurisdictional clause prohibits the complainant from exercising its right under Article 23.1 of the DSU to initiate WTO litigation, and this amounts to a genuine conflict (although possibly avoidable through treaty interpretation).

[137] *See, e.g.*, Japan-Brunei EPA art. 107(3); Japan-Malay. EPA art. 145(3); Japan-Mex. EPA art. 151(2); Japan-Phil. EPA art. 149(3); Japan-Sing. New-Age EPA art. 139(3); Japan-Thail. EPA art. 159(3); Malay.-Pak. CEPA art. 113(6); Thail.-Austl. FTA art. 1801(3); Thail.-N.Z. CEPA art. 17.1(4); Trans-Pacific Strategic EPA art. 15.3.

[138] *See, e.g.*, Kwak & Marceau (2006), at 476-77.

d) Type 4: RTA jurisdictional clauses providing for exclusive jurisdiction to RTA Tribunals, without specifically barring WTO litigation

The dispute settlement system under the Andean Community serves as an example of such Type 4 RTA jurisdictional clauses. According to Article 47 of the Cartagena Agreement,[139] all disputes concerning the Andean Community law shall be settled by the Treaty Creating the Court of Justice of the Cartagena Agreement, which, as amended,[140] provides that the Members of the Andean Community "shall not submit any dispute that may arise from the [Andean Community law] to any court, arbitration system or proceeding whatsoever except for those stipulated in this Treaty."[141] Thus, with respect to the Andean Community law, the Andean Community Court of Justice has exclusive jurisdiction. However, where a dispute concerns both the Andean Community law as well as WTO covered agreements, this jurisdictional clause does *not* prevent the WTO Tribunal from hearing the dispute, and this is essentially because the cause of action before the WTO Tribunal is different: even when a particular provision of the WTO covered agreements is identical to a provision of the Andean Community law, the WTO Tribunal would be adjudicating the dispute in respect of WTO-consistency, rather than consistency with the relevant Andean Community law. Likewise, the E.C. Treaty, which similarly bars its Member States from submitting any

[139] Andean Subregional Integration Agreement (Cartagena Agreement), art. 47, May 26, 1969, *available at* http://www.comunidadandina.org/INGLES/normativa/ande_trie1.htm ("The settlement of any disputes that may arise as a result of the application of Andean Community Law shall abide by the provisions of the Treaty establishing the Court of Justice.") [hereinafter Cartagena Agreement].

[140] Cochabamba Protocol Amending the Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1996, *available at* http://www.comunidadandina.org/INGLES/normativa/ande_trie2.htm.

[141] *Id.* art. 42 ("Member Countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding whatsoever except for those stipulated in this Treaty.").

dispute concerning the interpretation or application of the Treaty to any other forum,[142] would not preclude the WTO Tribunal from hearing a dispute even where the WTO provision in question is identical to a provision in the E.C. Treaty. Thus, although such Type 4 RTA jurisdictional clauses confer exclusive jurisdiction to RTA Tribunals, very likely they would not produce a genuine conflict with Article 23.1 of the DSU (the jurisdictional clause of the WTO Tribunal).[143]

e) Type 5: RTA jurisdictional clauses providing for exclusive jurisdiction to RTA Tribunals, and specifically barring WTO litigation

As seen above, Article 2005 of the NAFTA is generally characterized as a Type 3 RTA jurisdictional clause in that although Article 2005(1) offers a choice of forum, Article 2005(6) requires that the chosen forum be used to the exclusion of the other.[144] However, this is the general case, as Article 2005(1) makes the choice of forum "subject to paragraphs 2, 3 and 4."[145] Under Article 2005(3) of the NAFTA, where the responding party in a dispute considers that the dispute concerns environmental issues

[142] E.C. Treaty art. 292 ("Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.").

[143] *But see* Pauwelyn (2003), at 1011 (suggesting that in the event where a Type 4 RTA jurisdictional clause provides for exclusive jurisdiction to an RTA Tribunal, that RTA clause would conflict with Article 23.1 of the DSU, that in such event, the RTA jurisdictional clause would prevail, and that, consequently, the WTO Tribunal "ought, in those circumstances, to decline jurisdiction" in the sense that the WTO Tribunal lacks jurisdiction).

[144] NAFTA art. 2005(6) ("Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected *shall be used to the exclusion of the other*, unless a Party makes a request pursuant to paragraph 3 or 4.") (emphasis added).

[145] NAFTA art. 2005(1) ("Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party."). *See also* TREBILCOCK & HOWSE (2005), at 149; Lo (2007), at 466; Abbott (2000), at 182.

and requests that the dispute be adjudicated in NAFTA, then the complaining party shall "have recourse to dispute settlement procedures solely under [NAFTA]."[146] Likewise, where the responding party in a dispute considers that the dispute concerns SPS or standards-related issues and requests that the dispute be adjudicated in NAFTA, then the complaining party shall "have recourse to dispute settlement procedures solely under [NAFTA]."[147] Furthermore, in such cases, where the complaining party has already initiated WTO litigation, upon receipt of the responding party's request (that the dispute be adjudicated in NAFTA), the complaining party "shall promptly withdraw" from the WTO litigation and instead pursue NAFTA proceedings.[148] Evidently, such Type 5 RTA jurisdictional clauses can be readily distinguished from Type 4 in that although both Type 4 and Type 5 provide for exclusive jurisdiction to the RTA Tribunals concerned, Type 5 takes a step further in specifically *barring* RTA parties from pursuing WTO litigation. For reasons similar to Type 3, such Type 5 RTA jurisdictional clauses would very likely lead to genuine conflict with Article 23.1 of the

[146] NAFTA art. 2005(3) ("In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.").

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

[148] NAFTA art. 2005(7) ("The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or to the other Parties and to its Section of the Secretariat. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.").

DSU and thus produce jurisdictional conflict between the WTO Tribunal and RTA Tribunals.

The foregoing analysis may be summarized in the following table:

TABLE 1: CLASSIFICATION OF RTA JURISDICTIONAL CLAUSES

Type	RTA Jurisdiction	Interaction with WTO Jurisdiction	Potential to Cause Jurisdictional Conflict
1	Permissive	Excluding RTA jurisdiction when dispute is subject to WTO Tribunal	Minimal
2	Permissive	None	Minimal
3	Initially permissive, but will become exclusive once chosen	Once RTA Tribunal is chosen, would bar complainant (and possibly also respondent) from initiating WTO litigation	High
4	Exclusive	None	Low
5	Exclusive	Barring complainant from initiating WTO litigation (even requiring complainant to withdraw WTO litigation)	High

2. The difficulty arising out of the diametrically opposed views on the scope of applicable law in the WTO dispute settlement system

As seen above, Type 3 and Type 5 of RTA jurisdictional clauses would very likely produce jurisdictional conflict between the WTO Tribunal and RTA Tribunals essentially because these two types of RTA clauses prohibit the complainant in a given case from opening (or require the complainant to withdraw from) WTO litigation. Also, it is recalled that in a case before an RTA Tribunal operating under a Type 3 jurisdictional clause, when the RTA dispute is initiated *after* WTO litigation has been instituted (and thus in violation of such RTA clause), the RTA Tribunal can simply dismiss the case for lack of jurisdiction. The WTO litigation would proceed unaffected, and there would be no jurisdictional conflict. However, when the case is turned the other way around, where the complainant first initiates RTA litigation and subsequently opens WTO litigation, such course of conduct would certain violate both Type 3 and Type 5 RTA jurisdictional clauses. If the WTO Tribunal, when seizing of the matter, is fully competent to apply such RTA jurisdictional clauses, it could readily dismiss the WTO case for lack of jurisdiction (or inadmissibility).[149] However, the problem is that there has long been diametrically opposed views concerning whether any non-WTO law can be applicable in the WTO dispute settlement system. If one holds the view that non-WTO law (including RTA jurisdictional clauses here) is applicable, the problem is largely solved with ease (*viz.* that the WTO Tribunal can simply dismiss the WTO case by applying the RTA jurisdictional clause in question and finding lack of jurisdiction

[149] The distinction between jurisdiction and admissibility (although both preliminary matters in international litigation) would be examined below; *see infra* Ch. 2 & Ch. 4.

(or inadmissibility)); however, if one opposes the applicability of non-WTO law in the WTO dispute settlement system, the WTO Tribunal would have to proceed with the WTO litigation as if no such RTA jurisdictional clauses ever existed. To provide a definitive answer, tremendous efforts would be needed to first ascertain the jurisdictional scope of the WTO Tribunal as well as define the scope of applicable law in WTO litigation. These, as well as other side issues, will be examined in later chapters.

III. SCOPE AND METHODOLOGY OF RESEARCH

A. Scope of Research

The question of jurisdictional conflicts in general, and the jurisdictional conflict between the WTO Tribunal and RTA Tribunals in particular, is too complex to be comprehensively addressed in this thesis; thus, it is necessary to cut it down to a manageable size for the purpose of the present thesis. Accordingly,

First, this thesis limits its aim to providing a *practical* solution in response to jurisdictional conflicts between the WTO Tribunal and RTA Tribunals which arise from *Type 3 and Type 5 RTA jurisdictional clauses*, as aforementioned.

Second, as such problem is much more complicated in the WTO dispute settlement system (than in RTA contexts, where, as stated above, the application of RTA jurisdictional clauses provide a ready answer), this thesis narrows its focus on such jurisdictional conflict as it arises *in the WTO Tribunal*.

Third, for the purpose of seeking a practical solution in the WTO Tribunal, this thesis will concentrate on developing a solution that is workable in the *current* WTO

legal system; put differently, this thesis endeavors to ascertain a solution that is *lex lata* in nature (as opposed to *lex ferenda* solutions).

Finally, it bears emphasizing that this thesis is *not* concerned with the elements set forth in Article XXIV of the GATT and/or Article V of the GATS, as these elements have been treated extensively elsewhere and, more significantly, do not *per se* bear upon the issue of jurisdictional conflict. Thus, for the purpose of this thesis, RTAs are analyzed on the assumption of full compliance with these GATT/GATS conditions.

B. Methodology of Research

As stated previously, any attempt to solve jurisdictional conflict between the WTO Tribunal and RTA Tribunals could prove inaccurate without first formulating a classification of divergent RTA jurisdictional clauses. Thus, this thesis engages in empirical research into relevant RTA practice, seeking a unity within divergence. It is noted, however, that due to time and space considerations, such empirical research, while sufficient for present purposes, does not proclaim to be comprehensive.

Recalling that WTO law is part of international law, and in light of the fact that the problem of jurisdictional conflicts is not peculiar to the WTO/RTA context but is prevalent in the wider corpus of international law, the analysis of each issue or concept in this thesis will begin with an examination of international law, making extensive reference to norms of international law as well as practice of international tribunals (other than the WTO Tribunal). Then, within the context of international law, analysis will proceed into the concentrated area of WTO law, where relevant WTO covered agreements and the jurisprudence of the WTO Tribunal will be constantly consulted. In the course of this, the particularities (if any) within the WTO legal system, as

distinguished from the wider context of international law, will be identified and addressed. Academic writings, including those concerning international law generally and those specifically pertaining to the WTO, will also be extensively surveyed with critical analysis.

Given that this thesis attempts to seek a practical solution, once again, emphasis will be placed upon *lex lata* rather than *lex ferenda* solutions. In addition, to be practical in the WTO context, the solution to be ascertained in this thesis will be largely based upon (explicitly or implicitly) relevant WTO jurisprudence or, at the very least, would not contradict with the settled practice of the WTO Tribunal. Upon examination of relevant concepts and analysis of relevant issues, this thesis will propose a framework as a workable solution to respond to problems, as they appear in the WTO context, posed by jurisdictional conflicts between the WTO Tribunal and RTA Tribunals. And, finally, this thesis will evaluate the solution, as enshrined in the proposed framework, against its contribution to the coherence in international law, so as to minimize the risk of inconsistent rulings.

IV. CENTRAL ISSUE PRESENTED

Based upon the aforementioned analysis, the central issue to be solved in this thesis is specific to the following narrowly defined scenario, which arises from Type 3 and Type 5 RTA jurisdictional clauses, as examined above.

First, suppose that State A (Respondent) and State B (Complainant) are both Members of the WTO and parties to an RTA.

Second, suppose that the Respondent implements a measure that is potentially in violation of certain provision of the WTO covered agreements, and the same measure is

at the same time susceptible to challenge on the basis of an RTA provision that is identical to (or is a simple incorporation of) the WTO provision concerned.

Third, suppose that the RTA (i) contains a Type 3 jurisdictional clause, which provides that in such situations, the Complainant is free to seek redress either in the RTA Tribunal or in the WTO Tribunal, and that the chosen forum shall be used to the exclusion of the other, or, (ii) alternatively, contains a Type 5 jurisdictional clause, which provides that the measure in question is subject to the exclusive jurisdiction of the RTA Tribunal and which bars the Complainant from litigating the dispute in the WTO Tribunal.

Fourth, suppose, (i) in the context of Type 3 jurisdictional clause, that the Complainant institutes proceedings before the RTA Tribunal, claiming that the Respondent's measure violates the RTA provision in question, that the RTA Tribunal delivers a final and binding judgment where the challenged measure maintained by the Respondent is found to be RTA-consistent, and that the Complainant, dissatisfied with the outcome of litigation in the RTA Tribunal, subsequently challenges the same measure for alleged violation of the WTO provision in question before the WTO Tribunal notwithstanding the jurisdictional clause barring such subsequent WTO litigation, or, (ii) in the context of Type 5 jurisdictional clause, the Complainant directly institutes WTO dispute settlement proceedings in violation of the jurisdictional clause.

In this scenario, this thesis endeavors to answer the following issue:

> Whether, and (if yes) how, is the WTO Tribunal's jurisdiction affected by the RTA's dispute settlement clause and the Complainant's course of conduct?

CHAPTER TWO

THE JURISDICTION OF THE WTO TRIBUNAL AND ITS (POTENTIAL) CONFLICT WITH RTA TRIBUNALS

The concept of jurisdiction is indeed a multi-faceted one. As far as States are concerned, jurisdiction is an aspect of State's sovereignty and refers to three types of competences: legislative jurisdiction, administrative jurisdiction and judicial jurisdiction.[150] As far as international organizations are concerned, jurisdiction can be similarly understood as referring to legislative, administrative and judicial functions of international organizations.[151] Specifically with respect to judicial jurisdiction, *viz.* the jurisdiction normally exercised by domestic and international tribunals, it can be generally defined as "[a] court's power to decide a case or issue a decree"[152] or, perhaps more specifically, "the scope of a court or tribunal's power to hear claims and proceedings, examine the determine the facts, interpret and apply the law, make orders, and declare judgment."[153] It is first noted that as this thesis is concerned with the jurisdictional conflict between the WTO Tribunal and RTA Tribunals, for present

[150] *See, e.g.*, BROWNLIE (2008), at 299; OPPENHEIM'S INTERNATIONAL LAW (1996), at 456.

[151] *See* SANDS & KLEIN (2001), at 263-438 (categorizing the functions of international organizations as legislative, administrative and judicial functions without using the word "jurisdiction"). *See also* Kwak & Marceau (2006), at 465 ("Jurisdiction is often defined in terms of either legislative or judicial jurisdiction – that is, the authority to legislate or to adjudicate on a matter."); Pauwelyn (2004b), at 135 (making a distinction between the legislative jurisdiction and the judicial jurisdiction of the WTO Tribunal); Guruswamy (1998), at 302-26 (maintaining a distinction between the legislative jurisdiction and judicial jurisdiction of international tribunals).

[152] BLACK'S LAW DICTIONARY 857 (8th ed. 2004).

[153] MITCHELL (2008), at 89 (quoting AUSTRALIAN LEGAL DICTIONARY 651 (Peter Nygh & Peter Butt eds., 1997).

purposes the concept "jurisdiction" refers to "judicial jurisdiction" exercised by international tribunals.

A jurisdiction in this sense can be further divided into different aspects, including: (i) personal jurisdiction (jurisdiction *ratione personae*), relating to the question of who can be parties to a dispute before the tribunal concerned; (ii) subject matter jurisdiction (jurisdiction *ratione materiae*), relating to the question of what types of claims can be brought before the tribunal concerned; and (iii) temporal jurisdiction (jurisdiction *ratione temporis*), relating to the temporal reach of the jurisdiction of the tribunal concerned. There are also a number of other related concepts, such as the concept of inherent jurisdiction. To the extent relevant, these different aspects of jurisdiction will be reviewed below.

In Part I of this Chapter, some general observations are provided concerning the jurisdiction of international tribunals, as a background against which further discussions will be made. Part II discusses the jurisdiction of the WTO Tribunal, examining the different aspects involved. Part III is principally devoted to the examination of the concept "jurisdictional conflict" in general international law, and identifies the existence of (potential) jurisdictional conflict between the WTO Tribunal and RTA Tribunals. Part IV concludes with some remarks which serve as the basis for further discussions in later chapters.

I. JURISDICTION OF INTERNATIONAL TRIBUNALS GENERALLY

With respect to international tribunals generally, the scope of jurisdiction is often stipulated expressly in the constituent instrument of the tribunals concerned. In this

connection, it may be useful to take the ICJ for instance.[154] Article 34(1) of the ICJ Statute indicates the ICJ's jurisdiction *ratione personae* by providing that "[o]nly states may be parties in cases before the Court." With regard to the ICJ's subject matter jurisdiction, Article 36(1) of the same Statute provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Thus, there does not appear to be any *a priori* limitation on the ICJ's jurisdiction *ratione materiae*;[155] indeed, "any question of international law" can be adjudicated by the ICJ.[156] On the other hand, the jurisdiction *ratione materiae* of other international tribunals may be more limited in scope. For instance, by express provisions, the subject matter jurisdiction of the ITLOS is limited to disputes concerning the interpretation or application of the UNCLOS or of other treaties related to the UNCLOS.[157]

A. Consent as a Requisite Basis for Jurisdiction

By virtue of the notion of State sovereignty, any international tribunal cannot exercise jurisdiction over a State without its consent.[158] For instance, the jurisdiction of

[154] Here, the discussion covers only the ICJ's jurisdiction in contentious cases and does not extend to the ICJ's jurisdiction in instances of advisory opinions. For an overview of the ICJ's competence to give advisory opinions, see COLLIER & LOWE (1999), at 182-85.

[155] *See, e.g.*, SHANY (2004), at 29-30 ("The only permanent international courts and tribunals that may review any international dispute between any two or more states (i.e. courts endowed with universal personal jurisdiction and unlimited subject-matter jurisdiction) are the ICJ and the PCA.). *Cf.* ILC Report on Fragmentation of International Law, ¶ 45 ("[T]he jurisdiction of a[n] [international tribunal] is limited (as it always – even in the case of the International Court of Justice – is).").

[156] ICJ Statute art. 36(2)(b). This refers to the situations where States confer jurisdiction to the ICJ through "Optional Clause"; *see generally* COLLIER & LOWE (1999), at 140-55.

[157] UNCLOS, arts. 288(1) & 288(2).

[158] *See, e.g.*, SHANY (2004), at 2 ("[I]t is well accepted that states cannot be compelled to participate in adjudication against their will."); COLLIER & LOWE (1999), at 198 ("All international litigation . . . is

the ICJ also depends upon State consent: in one way or another, the parties must have voluntarily conferred jurisdiction upon the ICJ. The claimant State expresses its consent to the jurisdiction of the ICJ by the initiation of a case before the ICJ; however, unless the defendant State has also given its consent, the ICJ would lack jurisdiction to hear the case.[159]

Generally speaking, there are four ways for States to express their consents to the ICJ's jurisdiction. Before a dispute has arisen, such consent may be conferred (i) where a treaty or convention in force between the States in question provides for the jurisdiction of the ICJ; and (ii) where there are declarations accepting the "compulsory"[160] jurisdiction of the ICJ. States may also confer jurisdiction to the ICJ after a dispute has arisen (iii) where the States in question conclude a special agreement to refer their dispute to the ICJ; and (iv) where the doctrine of *forum prorogatum* (the defendant State's implied submission to the jurisdiction) applies.[161] This illustrates the point that whether given before or after a concrete dispute arises, consent is indeed indispensable to the jurisdiction of the ICJ and all other international tribunals alike (including the WTO Tribunal). As the PCIJ pointed out, an international tribunal's

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consensual. There has to be at some stage a voluntary submission to the jurisdiction of the tribunal, whether it be the ICJ, and ICSID arbitration panel, or any other tribunal."); WAINCYMER (2002), at 120 ("In international law, jurisdiction is based on consent of the parties."); Lowe (1999), at 193 ("It is almost axiomatic that the jurisdiction of international tribunals derives from the consent of each state party; or, to put it another way, no state can be obliged to submit to the jurisdiction of an international tribunal unless that state has at some point consented so to submit and its consent remains, as a matter of law, effective.").

[159] COLLIER & LOWE (1999), at 132.

[160] It should be noted here that it is optional for States to make the ICJ's jurisdiction compulsory under Article 36(2) of the ICJ Statute (the "Optional Clause"); *see generally* COLLIER & LOWE (1999), at 140-55.

[161] *Id.* at 133.

jurisdiction "is always a limited one, existing only in so far as States have accepted it."[162]

B. Inherent Jurisdiction

Every international tribunal has inherent jurisdiction, which flows from the very nature of the judicial function of the tribunal.[163] As a necessary component in the exercise of the judicial function, the inherent jurisdiction "does not need to be expressly provided for in the constitutive documents" of the tribunal in question.[164]

This inherent jurisdiction, or implied or incidental jurisdiction, as it is sometimes called, has been broadly illustrated by the ICJ in the following passage[165]:

> In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of al1 matters in dispute, to ensure the observance of the

[162] Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26). *See also* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 183 (Nov. 6) ("The Court is always conscious that it has jurisdiction only so far as conferred by the consent of the parties.").

[163] MITCHELL (2008), at 98. *See also* PAUWELYN (2003), at 447.

[164] Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Oct. 2, 1995) ("It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals . . . .").

[165] Nuclear Test (Austl. v. Fr.), 1974 I.C.J. 253, 259-60 (Dec. 20). *See also* Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 338-39 (Dec. 15) (separate opinion of Judge Higgins) ("The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules.").

> 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' . . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

From this general statement, it can be inferred that an international tribunal has the inherent jurisdiction to decide all matters linked to the exercise of its jurisdiction, including burden of proof and due process.[166] There are other aspects of inherent jurisdiction, including: (i) the jurisdiction "to interpret the submissions of the parties" in order to "isolate the real issue in the case and to identify the object of the claim";[167] (ii) the jurisdiction to decide whether to refrain from exercising the validly established jurisdiction;[168] and (iii) the jurisdiction to order remedies, including cessation of the breach,[169] assurances of non-repetition,[170] and reparation for breach.[171]

Among the various facets of inherent jurisdiction, perhaps the pertinent one for present purposes is the jurisdiction to determine, *proprio motu* (*viz.* without the issue having been raised by any of the parties), whether the tribunal has jurisdiction over the

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[166] PAUWELYN (2003), at 448.

[167] Nuclear Test (Austl. v. Fr.), 1974 I.C.J. 253, 262 (Dec. 20).

[168] *See, e.g.*, Appellate Body Report, *US – Wool Shirts and Blouses*, 19.

[169] Rainbow Warrior (N.Z. v. Fr.), 20 R. Int'l Arb. Awards 217, 270 (Fr.-N.Z. Arb. Trib. 1990).

[170] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 485 (June 27).

[171] Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 22 (July 26) ("Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation").

matter before it (the principle of *la competence de la competence*).[172] In this connection, it is noteworthy that where one of the parties (typically the defendant State) challenges the jurisdiction of the international tribunal in question, the other party (typically the claimant State) may establish the existence of jurisdiction by submitting an argument whose force is so preponderant as to show the existence of an intention on the part of the parties to confer jurisdiction to the international tribunal in question.[173]

C. Jurisdiction and Admissibility as Legally Distinct Concepts

A distinction must be made between the jurisdiction of an international tribunal over a certain case, on the one hand, and the admissibility of the case, on the other. Lack of jurisdiction means that an international tribunal cannot hear a particular case at all,

[172] *See, e.g.*, Administration of the Prince von Pless (F.R.G. v. Pol.), 1933 P.C.I.J. (ser. A/B) No. 52, at 15 (Feb. 4); Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93, at 116 (July 22) (individual opinion of Judge McNair); Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26); Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 43 (July 6) (separate opinion of Judge Lauterpacht); Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 104 (Mar. 21) (dissenting opinion of Judge Lauterpacht) ("[I]n the matter of its jurisdiction, an international tribunal, and not the interested party, has the power of decision whether the dispute before it is covered by the instrument creating its jurisdiction."). *See also* Appellate Body Report, *US – 1916 Act*, ¶ 54 n.30 ("[I]t is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."); CHENG (1993), at 275-78. At times, such inherent jurisdiction to determine questions of jurisdiction is explicitly provided for in the constituent instrument of the tribunal; *see, e.g.*, UNCLOS, art. 288(4) ("In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.").

[173] Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26) ("[T]he Court will, in the event of an objection . . . only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it."). *See also* Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 76 (Dec. 20) (citing the said *Factory at Chorzow* ruling with approval). Note, however, that this does not involve "burden" of proof (even though the word "preponderant" may find its place in the rules on burden of proof (for instance "preponderance of evidence")); *see, e.g.*, PAUWELYN (2003), at 450 ("[N]o burden of proof is involved in establishing jurisdiction."); Pauwelyn (2001), at 556 ("[N]o burden of proof is involved in establishing jurisdiction."). *See also* Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 76 (Dec. 20) (stating that while a question of fact involves burden of proof, "[t]he existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts").

whereas non-admissibility means sometimes that the international tribunal in question could have heard the case at one time but cannot do so now, or that it cannot hear it now but might do so in the future.[174] In international litigation, usually[175] it is the respondent State that raises preliminary objections to the jurisdiction or admissibility, and typically there is a sequential relationship involved: in normal cases, the question of admissibility can only be approached when jurisdiction has been assumed.[176] The distinction between jurisdiction and admissibility has been best illustrated by the ICJ in these words[177]:

> Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.

For instance, standing, or *locus standi*, is a matter of admissibility.[178] Under public international law, a claimant State cannot put forward an international claim against another State if the claimant State does not have standing, or legal interest, in the matter

[174] *See, e.g.*, COLLIER & LOWE (1999), at 155-56.

[175] In extremely rare circumstances, the claimant State may raise such preliminary objections. For instance, in *Monetary Gold Removed from Rome in 1943*, Italy, which agreed to the ICJ's jurisdiction over the dispute, successfully argued that the ICJ should not exercise its jurisdiction because the resolution of the dispute was dependent upon the determination of the responsibility of a third party to the proceedings. *See* Monetary Gold Removed from Rome in 1943 (Italy v. Fr.), 1954 I.C.J. 19, 32 (June 15) ("In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.").

[176] BROWNLIE (2008), at 475.

[177] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 177 (Nov. 6).

[178] Apart from standing, there are various grounds for an international tribunal to dismiss a claim for inadmissibility. *See generally* BROWNLIE (2008), at 475-505; COLLIER & LOWE (1999), at 155-62, 191-98.

in question.[179] For instance, where State A perpetrates certain internationally wrongful act towards a national of State B, State B would normally have standing to invoke the responsibility of State A; this is because State B, in bringing such claim, is "in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."[180] State C, however, would normally lack standing to bring an international claim on behalf of the injured person against State A.[181] However, where an international tribunal does have jurisdiction to hear such an international claim (e.g. where all three States have accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute, and where the compulsory jurisdiction of the ICJ thus accepted covers such matters), the fact that State C is not the national State of the victim and thus lacks standing does not deprive the tribunal of its established jurisdiction; rather, the tribunal would have to dismiss the claim on grounds of inadmissibility.

For the purpose of this thesis, the crucial question is this: in the circumstances where a claimant State lacks the right to initiate a claim before an international tribunal, whether the tribunal has to dismiss the claim on the ground that it lacks jurisdiction over the claim, or that the claim is inadmissible? There does not seem to be a clear answer to this question.[182] In the context of the jurisdictional conflicts between the WTO Tribunal

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[179] *See, e.g.*, Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) ("In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so."). *See also* BROWNLIE (2008), at 467-72.

[180] Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28).

[181] This is subject to exceptions, the most prominent example of which is instances where the obligation being violated is owed *erga omnes*, that is, towards the international community as a whole. In the case where the obligation being violated is owed *erga omnes*, each and every State in the international community as a whole would have standing to invoke the responsibility of the violating State. For an excellent overview of the concept *erga omnes*, see generally TAMS (2005); on the distinction between *erga omnes* and *jus cogens*, see, for example, ILC Report on Fragmentation of International Law, ¶¶ 361-409; on the specific application of the concept *erga omnes* in the field of State responsibility, see, for example, ILC Draft Articles on State Responsibility with Commentaries, art. 48.

[182] It is noted that apart from lack of standing, the ICJ has developed a sophisticated body of jurisprudence concerning various grounds of inadmissibility (such as failure to exhaust local remedies,

and RTA Tribunals, specifically where a complainant Member lacks the right to institute WTO litigation because of Type 3 or Type 5 RTA jurisdictional clauses, some commentators seem to suggest that the WTO Tribunal, while having jurisdiction, should dismiss the case on the ground that the case is inadmissible, whereas this thesis submits that the WTO Tribunal simply lacks jurisdiction.[183]

D. Jurisdiction *Ratione Materiae* and Applicable Law as Legally Distinct Concepts

The subject matter jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. However, a limited jurisdiction *ratione materiae* does not necessarily imply a limitation of the scope of the law applicable in the interpretation and application of those treaties.[184] Here, it is important to recognize the distinction between (i) the subject matter of a dispute that falls within the jurisdiction *ratione materiae* of an international tribunal; and (ii) the applicable law that may be used by an international tribunal for the resolution of disputes.[185]

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hypothetical nature of the case, mootness of the case, legal interest of third parties); *see* COLLIER & LOWE (1999), at 155-62, 191-98. However, such grounds do not seem to encompass the situations where the claimant lacks the right to sue.

[183] *See infra* Ch. 4.

[184] ILC Report on Fragmentation of International Law, ¶ 45.

[185] PAUWELYN (2003), at 460; Bartels (2001), at 501; Pauwelyn (2001), at 560 ("Crucially . . . the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements."); Marceau (2002), at 766 ("The 'jurisdiction' (or competence) of WTO panels and the Appellate Body and the relevant 'applicable law' between two WTO Members are two legally distinct concepts."). *See also* Lindroos & Mehling (2006), at 860-66. It is noted, however, that some commentators do not seem to maintain a distinction between the concept of "jurisdiction" and the concept of "applicable law"; *see, e.g.*, Trachtman (2005), at 135 (seemingly mixing these two concepts by phrases such as "[j]urisdiction to apply law" and "[t]he most important jurisdictional question regarding WTO

Sometimes, the distinction is clearly made in the constituent instrument of an international tribunal. For instance, while Article 36(1) of the ICJ Statute maps the subject matter jurisdiction of the ICJ, Article 38(1) of the same Statute specifies the applicable law in ICJ proceedings:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Thus, in the *Lockerbie* case, although the ICJ's jurisdiction is limited to Libyan claims under the Montreal Convention, this did not prevent the Court from examining other international law, in particular U.N. Security Council resolution 748, as applicable law.[186] Also, in the *MOX Plant* case, it is explicitly recognized that "there is a cardinal

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dispute settlement is that of applicable law"); MITCHELL (2008), at 89 ("Three relevant elements of jurisdiction can be identified: subject-matter jurisdiction (the particular types of claims and proceedings that may be brought before a court or tribunal); applicable law (the law that a court or tribunal may interpret and apply); and inherent jurisdiction (the court or tribunal's intrinsic powers, derived from its nature as a judicial body).").

[186] PAUWELYN (2003), at 460 (quoting Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. 9, 25 (Feb. 27)). *See also* Pauwelyn (2001), at 560. It should be noted that while Security Council resolution 748 was considered by the ICJ, it was eventually dismissed as inapplicable for considerations relating to temporal issues; *see* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. 9, 26 (Feb. 27).

distinction between the scope of its jurisdiction . . . on the one hand, and the law to be applied by the Tribunal . . . on the other hand."[187]

Another (and perhaps more illustrative) example will be the ITLOS. Article 288(1) of the UNCLOS (entitled "Jurisdiction") expressly stipulates that the subject matter jurisdiction of the ITLOS is limited to "any dispute concerning the interpretation or application of [the UNCLOS]," whereas Article 293(1) (entitled "Applicable Law") explicitly sets out the applicable law in ITLOS proceedings:

> A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

This perfectly establishes the proposition that while the subject matter jurisdiction of an international tribunal may be limited, this does not necessarily place a corresponding limitation upon the law applicable to disputes before that tribunal.[188]

II. JURISDICTION OF THE WTO TRIBUNAL

As aforementioned, the jurisdiction of the ICJ and that of the ITLOS are clearly indicated in their respective constituent instruments, with the wording "jurisdiction" used. On the other hand, the constituent instrument of the WTO Tribunal (the WTO Agreement in general and the DSU in particular) does not contain any provision

[187] MOX Plant (Ir. v. U.K.), Order No. 3, ¶ 19 (Arb. Trib. under Annex VII of UNCLOS 2003), *available at* http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf (last visited July 25, 2009).

[188] Bartels (2001), at 502. Specifically on the applicable law for the ITLOS, see, for example, Treves (2006).

explicitly using the wording "jurisdiction" or otherwise specifying the jurisdiction of the WTO Tribunal. Nevertheless, jurisdiction remains a fundamental requirement for the WTO Tribunal to hear any case,[189] and the jurisdiction of the WTO Tribunal is indeed delineated by certain DSU provisions without using the term "jurisdiction" as well as by the terms of reference of the WTO Tribunal.[190]

Before proceeding into the examination of the WTO Tribunal's jurisdiction, one thing should be first pointed out: in light of the fact that the WTO Tribunal is in nature an international tribunal, the foregoing considerations relating to the jurisdiction of international tribunals would generally also be applicable to the WTO Tribunal. Thus, as in the case of other international tribunals, consent is also a requisite basis for the jurisdiction of the WTO Tribunal; the WTO Tribunal enjoys inherent jurisdiction, whether founded in its constituent instrument or not;[191] and in proceedings before the WTO Tribunal, the concept of jurisdiction *ratione materiae* remains legally distinct from the concept of applicable law.[192]

A. Personal Jurisdiction (Jurisdiction *Ratione Personae*) of the WTO Tribunal

[189] Appellate Body Report, *US – 1916 Act*, ¶ 54 ("The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."). In this connection, it is interesting to note that while objection to jurisdiction is generally regarded as a preliminary objection and shall be dealt with by an international tribunal before entering into the merits of a case, the timing issue relating to jurisdictional challenge under the WTO dispute settlement is treated somewhat differently. *See, e.g.*, Appellate Body Report, *US – 1916 Act*, ¶ 54 (holding that while issues of jurisdiction should be raised as early as possible in the proceedings, "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.").

[190] *See, e.g.*, Trachtman (2005), at 132-35, 140-43; PALMETER & MAVROIDIS (2004), at 17.

[191] *See infra* Pt. II.E.

[192] *See, e.g.*, PAUWELYN (2003), at 460-63; OESCH (2003), at 208; Bartels (2001), at 501-503; Pauwelyn (2001), at 554-66; Marceau (2002), at 757-79; Lindroos & Mehling (2006), at 860-66.

The personal jurisdiction of the WTO Tribunal is a rather straight-forward question: only WTO Members may become parties to a dispute of which the WTO Tribunal is seized; non-members may neither take advantage of the WTO, nor are they subject to its requirements.[193] As the Appellate Body clearly pointed out in *US – Shrimp*[194]:

> It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel.

In reaching this conclusion, the Appellate Body finds basis from Articles 4, 6, 9 and 10 of the DSU.[195]

Similarly, the *Turkey – Textiles* Panel made the following observation[196]:

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[193] *See, e.g.*, PALMETER & MAVROIDIS (2004), at 29; WAINCYMER (2002), at 119. This seems to be a reflection of the well-established principle of *pacta tertiis*, as codified in the VCLT; *see* VCLT, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent.").

[194] Appellate Body Report, *US – Shrimp*, ¶ 101.

[195] *Id.* ¶ 101 n.70.

[196] Panel Report, *Turkey – Textiles*, ¶ 9.41.

> Importantly, we note that the WTO dispute settlement system is based on Member's rights; is accessible to Members only; and is enforced and monitored by Members only.

Thus, it seems unquestionable to say that the WTO Tribunal enjoys jurisdiction *ratione personae* over WTO Members, and WTO Members only.[197]

B. Subject Matter Jurisdiction (Jurisdiction *Ratione Materiae*) of the WTO Tribunal

Though not expressly indicated in any DSU provision, there is a broad consensus holding that the subject matter jurisdiction of the WTO Tribunal is limited to claims based on WTO covered agreements.[198] Put differently, the WTO Tribunal does not enjoy the jurisdiction to consider claims based on non-WTO norms. This conclusion is strongly supported by reference to various DSU provisions and, more specifically, the terms of reference of the WTO Tribunal; and, indeed, seldom has it been argued to the contrary.[199]

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[197] *Cf.* Trachtman (2005), at 132-35, 142 ("Technically speaking, the WTO DSB does not have jurisdiction 'over' Members. Rather, it merely has the authority to make 'findings' and 'recommendations,' although it is clear that these have legal consequences. In any event, the only persons for whom DSB actions have direct legal consequences are Members.").

[198] *See, e.g.*, PALMETER & MAVROIDIS (2004), at 21; MITCHELL (2008), at 93; PAUWELYN (2003), at 444 ("[N]o claims of violation of rules of international law *other* than those set out in WTO covered agreements can be brought to a WTO panel."); Marceau (2001), at 1102, 1107.

[199] *See, e.g.*, Pauwelyn (2004b), at 135 ("No one has ever argued . . . that WTO panels have jurisdiction to condemn countries for breach of, for example, a regional trade agreement, or customary international law."). *But see* Schoenbaum (1998), at 652-53 ("Do WTO bodies have competence to decide all aspects of this dispute or only those legal questions directly relating to a covered agreement? The DSU [Article 11] resolves this question by granting panels and the Appellate Body the authority to 'make such other findings as will assist the DSB in making the recommendation or in giving the rulings provided for in the covered agreements.' This is an 'implied powers' clause which should be interpreted broadly so that the panels and the Appellate Body can decide all aspects of a dispute. This is both advisable and necessary to

1. Terms of reference

The terms of reference of a WTO panel is set forth in Article 7.1 of the DSU:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The terms of reference of a WTO panel are important for two basic reasons: (i) they fulfill an important due process objective by giving the respondent Member and interested third parties sufficient information concerning the claims at issue in the dispute to allow them to respond to the complainant Member's case; and (ii) they establish the subject matter jurisdiction of the panel by defining the precise claims at issue in the dispute.[200] As to the latter point, it may perhaps be useful to distinguish between several different, yet inter-related, terms: "matter," "measure,"[201] and "claim."

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avoid piecemeal decision-making that leaves relevant legal questions involved in a dispute undecided."). This seems to suggest that the WTO Tribunal has jurisdiction *ratione materiae* to adjudicate non-WTO claims.

[200] Appellate Body Report, *Brazil – Desiccated Coconut*, 167, 186. This ruling has been extensively cited in WTO jurisprudence; on a recent instance, *see, e.g.*, *China – Publications and Audiovisual Products*, ¶ 7.27 (citing *Brazil – Desiccated Coconut* with approval); PALMETER & MAVROIDIS (2004), at 18.

A complaining Member refers a *matter* to the DSB, and this becomes the subject of a WTO panel's terms of reference.[202] As to the term "matter," the Appellate Body clearly indicated[203]:

> The "*matter* referred to the DSB", therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*). . . .
>
> . . . . Taken together, the "measure" and the "claims" made concerning that measure constitute the "matter referred to the DSB," which forms the basis for a panel's terms of reference.

This has two-fold meanings. First, in a general sense, the terms of reference restrict the subject-matter jurisdiction of WTO panels to claims based on the WTO covered agreements.[204] Thus, a WTO panel could not treat non-WTO norms (such as principles of customary international law or general principles of law), of themselves, as the basis for a WTO claim.[205] Second, with respect to a particular WTO panel, the terms of reference would limit the WTO panel's jurisdiction to only those WTO claims raised by the complaining Member.[206] In this connection, it is worth noting that although a given

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[201] On the concept of measure subject to challenge before the WTO Tribunal, see, for example, Yanovich & Voon (2005).

[202] DSU, art. 7.1.

[203] Appellate Body Report, *Guatemala Cement I*, ¶¶ 72-73.

[204] *See, e.g.*, MITCHELL (2008), at 91; Marceau (2001), at 1107.

[205] MITCHELL (2008), at 91.

[206] *See, e.g.*, Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, ¶ 6.8 n.17 ("We recall that, under Article 3.7 of the *DSU*, the aim of the dispute settlement mechanism is to secure a positive resolution to a dispute, and that our role under Article 21.5 is to render a decision 'where there is disagreement' as to the existence or consistency with a covered agreement of measures taken to comply with the

WTO panel's subject matter jurisdiction is limited to claims specified in its terms of reference, this does not prevent the panel from considering the defenses raised by the respondent Member. For instance, a complaining Member may assert that a measure is inconsistent with the national treatment provisions of Article III of the GATT, whereas the respondent Member is not prohibited from arguing that the inconsistency is excused by Article XX even though Article XX is not specified in the terms of reference.[207]

Finally, it is noted that whereas the foregoing holds true when a WTO panel is established on standard terms of reference specified in Article 7.1 of the DSU, it is sometimes argued Members could agree on special terms of reference pursuant to Article 7.3 of the DSU, and, on that basis, agree for a WTO panel to consider claims based on non-WTO norms.[208] Nevertheless, in light of Articles 1.1 and 3.2 of the DSU, even in the case where special terms of reference are agreed, the WTO Tribunal's subject matter jurisdiction would have to be limited to "disputes brought pursuant to the consultation and dispute settlement provisions of the [WTO covered agreements." Thus, it seems plausible to argue that even where the parties agree on special terms of reference for a WTO panel to adjudicate a non-WTO claim (i.e. a claim based on non-WTO norms), such a non-WTO claim would still have to "have a close connection with at least some WTO claims."[209] The same would hold true with respect to the arbitration pursuant to Article 25 of the DSU: even in the case of arbitration under Article 25 of the

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recommendations or rulings of the DSB. Accordingly, we shall address only claims that are put before us.").

[207] PALMETER & MAVROIDIS (2004), at 102-103.

[208] *See, e.g.*, MITCHELL (2008), at 91 ("Only if non-standard terms of reference were adopted for a particular Panel might a Panel consider other claims [based on non-WTO norms].). *Cf.* Bartels (2001), at 505 (suggesting that if a WTO panel is established with non-standard terms of reference, it would be possible for such a panel to be "mandated by the DSB to apply sources of law other than the rules set out in the covered agreements").

[209] PAUWELYN (2003), at 444.

DSU, the subject matter of the arbitration would seem to have to have a close connection with the WTO covered agreements.[210] In any event, it remains the rule that if a claim does not refer to any WTO covered agreement at all, such a claim would simply fall outside the terms of reference of, and thus the subject matter jurisdiction of, a WTO panel.[211]

2. Other DSU provisions relevant to the WTO Tribunal's subject matter jurisdiction

Apart from the terms of reference of WTO panels, as set out in Article 7 of the DSU, some other provisions of the DSU also pertain to the subject matter jurisdiction of the WTO Tribunal. These include[212]: Article 1.1,[213] which specifies the coverage and application of the DSU to WTO disputes; Article 2.1,[214] which directs the DSB to

[210] *See* DSU, art. 25.3 ("Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto."). *See also* Award by the Arbitrator, *EC – Article XXVIII*, 4-5 ("In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT Arbitration procedures.").

[211] Panel Report, *Canada – Aircraft Credits and Guarantees*, ¶ 7.49 ("We note that Claim 2 contains no reference at all to a WTO provision and it is therefore clear that even the 'minimum prerequisite' of Article 6.2 is not fulfilled. Brazil has not supplied the elements necessary for Claim 2 to fall within our terms of reference. Accordingly, we find that Brazil's Claim 2 does not fall within our terms of reference."). *See also* Report of the Panel, *Canada – FIRA*, ¶ 1.4 ("[I]t [is] presumed that the Panel would be limited in its activities and findings to within the four corners of GATT.").

[212] PALMETER & MAVROIDIS (2004), at 17.

[213] DSU, art. 1.1 ("The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements').").

[214] DSU, art. 2.1 ("The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements.").

administer the DSU; Article 3.2,[215] which states that the WTO Tribunal serves to preserve the WTO Members' rights and obligations under WTO covered agreements; and Article 6.2,[216] which requires a panel request to identify the measure in question and specify the claim. These various DSU provisions, taken together, add up to the certainty created by the terms of reference relating to the subject matter jurisdiction of the WTO Tribunal.

3. Other aspects of the WTO Tribunal's subject matter jurisdiction

The terms of reference as well as other DSU provisions reviewed above pertain to the subject matter jurisdiction of the WTO Tribunal in generally and that of WTO panels specifically. The WTO Tribunal, however, is not limited to WTO panels, but includes other bodies as well, and a review of the jurisdiction of the WTO Tribunal cannot be completed without also looking into the jurisdiction of those other bodies, including the Appellate Body and other DSU proceedings. Whereas this thesis is mainly concerned with the subject matter jurisdiction of WTO panels, it seems necessary to also have a brief look at, without going into unnecessary details of, the jurisdiction of such other bodies.

a) Subject matter jurisdiction of the Appellate Body

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

[216] DSU, art. 6.2 ("The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."). *See also* Appellate Body Report, *EC – Bananas III*, ¶ 143 ("Article 6.2 of the DSU requires that the claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.").

Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." In other words, this provision limits the subject matter jurisdiction of the Appellate Body to "issues of law covered in the panel report and legal interpretations developed by the panel." In this sense, the Appellate Body's subject matter jurisdiction is a subset of panels' subject-matter jurisdiction.[217] As to panels' factual determinations, the Appellate Body is entitled to consider, as a matter of law, whether the WTO panel in question has made an objective assessment of the facts as required by Article 11 of the DSU; other than that, the Appellate Body has no jurisdiction to review panels' factual determinations.[218]

b) Subject matter jurisdiction of other DSU proceedings over compliance and remedies

Apart from regular panel and Appellate Body proceedings, the WTO Tribunal has jurisdiction over certain other matters relating to the compliance and remedies under the WTO dispute settlement system. These include[219]: (i) the Article 21.3© arbitration on the period of time provided for a Member to comply with recommendations and rulings

[217] MITCHELL (2008), at 91.

[218] *See, e.g.*, Appellate Body Report, *EC – Hormones*, ¶ 132 ("The consistency or inconsistency of a given fact or set of acts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review."). *See also* Trachtman (2005), at 142-43; PALMETER & MAVROIDIS (2004), at 45-48.

[219] *See, e.g.*, MITCHELL (2008), at 92; Trachtman (2005), at 143; PALMETER & MAVROIDIS (2004), at 28-29.

of the DSB. The Article 21.3© arbitrator's subject-matter jurisdiction is limited to identifying a reasonable period of time for compliance;[220] (ii) Article 21.5 proceedings, in which a Member may claim that the measure taken by a Member to comply with DSB recommendations and rulings does not comply with those rulings or is otherwise inconsistent with the WTO agreements;[221] (iii) Article 22.6 arbitration, which has a narrow subject-matter jurisdiction, including the identification of a level of suspension equivalent to the level of nullification or impairment resulting from the failure to implement and determination of whether the concessions to be suspended accord with the Article 22.3 of the DSU.[222]

4. RTAs as a particular aspect of the WTO Tribunal's subject matter jurisdiction

As evident from limited scope of the WTO Tribunal's subject matter jurisdiction, certainly a WTO Member cannot sue another Member under the WTO dispute settlement system for alleged violation of RTA norms. However, this does not dismiss altogether the relevance of RTAs in the WTO dispute settlement system. As regards the WTO Tribunal's subject matter jurisdiction, RTAs have generated two issues: (i) whether measures adopted under RTAs can be subject to review by the WTO Tribunal; and (ii) whether the WTO Tribunal has jurisdiction to pronounce upon the overall compatibility of RTAs with the WTO requirements as set forth in Article XXIV of the GATT and Article V of the GATS.

[220] *See, e.g.*, Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, ¶¶ 28, 33.

[221] *See, e.g.*, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, ¶ 79.

[222] *See* DSU, arts. 22.4, 22.6.

These two issues appeared in *Turkey – Textiles*. In that case, India challenged certain quantitative restrictions applied by Turkey as WTO-inconsistent; in defense, Turkey asserted, *inter alia*, that the challenged measures were adopted as a consequence of its RTA with the EC and were necessary for the RTA, that the WTO Tribunal does not have jurisdiction to examine the WTO-compatibility of measures adopted under RTAs, and furthermore that the WTO Tribunal does not have jurisdiction to examine the overall compatibility of the RTA with Article XXIV of the GATT.[223]

As to the first question whether the WTO Tribunal has jurisdiction to assess the WTO-compatibility of measures adopted under RTAs, the *Turkey – Textiles* Panel first took note of the RTA Understanding, which provides, in relevant part[224]:

> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any matters arising from the application* of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.
>
> (emphasis added)

From this, the *Turkey – Textiles* Panel concluded that it had jurisdiction to review the WTO-compatibility of measures adopted under RTAs[225]:

[223] Panel Report, *Turkey – Textiles*, ¶¶ 9.45-9.46.

[224] RTA Understanding, ¶ 12.

[225] Panel Report, *Turkey – Textiles*, ¶ 9.50.

> We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine "any matters 'arising from' the application of those provisions of Article XXIV". For us, this confirms that a panel can examine the WTO compatibility of one or several measures "arising from" Article XXIV types of agreement . . . . For us, the term "any matters" clearly includes specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union.

This seems to be correct. As stated above, the WTO Tribunal's subject matter jurisdiction covers (or, more specifically, is limited to) claims based on WTO covered agreements. Thus, even where a challenged measure is adopted under a given RTA, as long as the complaining Member's claim with regard to that measure is framed on the basis of certain WTO covered agreements, such claim would normally fall within the scope of the WTO Tribunal's subject matter jurisdiction. As the *Turkey – Textiles* Panel found, WTO Members' right to challenge measures adopted under RTAs is not limited or conditioned anywhere in the DSU, Article XXIV of the GATT or the RTA Understanding.[226]

As to the second question whether the WTO Tribunal has jurisdiction to pronounce upon the overall WTO-compatibility of a given RTA, the *Turkey – Textiles* Panel hesitated to assume this responsibility: in its view, such examination would be better left to the CRTA instead of the WTO Tribunal,[227] and, after noting that a given RTA as a

[226] Panel Report, *Turkey – Textiles*, ¶ 9.51.

[227] *Id.* ¶ 9.52.

whole is not a "measure" subject to challenge under the DSU,[228] it exercised judicial economy over this issue.[229]

The Appellate Body, on the other hand, took a different view. In this respect, the Appellate Body first found that for Turkey, as a respondent Member, to succeed in its Article XXIV defense, there are two conditions to be met[230]:

> First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.

[228] *Id.* ¶ 9.53.

[229] *Id.* ¶ 9.54.

[230] Appellate Body Report, *Turkey – Textiles*, ¶¶ 58-59. *See also* Appellate Body Report, *Argentina – Footwear (EC)*, ¶ 109 (confirming the Appellate Body's view in *Turkey – Textiles*). With regard to the second condition, the *US – Line Pipe* Panel stated that this condition, as pronounced by the Appellate Body in *Turkey – Textiles*, is specific to the factual circumstances of that case, *viz.* where a *new* restriction was introduced; on the other hand, the factual circumstances in *US – Line Pipe* involved elimination of existing restrictions rather than introduction of new restrictions, and, therefore, the second condition was inapplicable. *See* Panel Report, *US – Line Pipe*, ¶¶ 7.147-7.148. This finding, however, was later declared "moot" and with "no legal effect" by the Appellate Body; Appellate Body Report, *US - Line Pipe*, ¶ 199. With regard to other requirements under Article XXIV of the GATT, see, for example, Panel Report, *Canada – Autos*, ¶¶ 10.51-10.57 (noting that Canada's duty exemption applies to countries outside the NAFTA, and, in addition, does not apply to *all* manufacturers from the U.S. and Mexico, and concluding that the measure does not provide for duty-free treatment of imports of products from parties to a free-trade area and, therefore, Article XXIV does not provide a justification for the inconsistency with Article I:1). In addition, in *Brazil – Retreaded Tyres*, Brazil invoked the Article XXIV defense to justify its measure (*viz.* the Mercosur exemption); however, the *Brazil – Retreaded Tyres* Panel exercised judicial economy on that issue; *see* Panel Report, *Brazil – Retreaded Tyres*, ¶¶ 7.448-7.456. On appeal, the Appellate Body did not rule on this issue, either; *see* Appellate Body Report, *Brazil – Retreaded Tyres*, ¶ 256; nevertheless, the Appellate Body seemed to indicate its disagreement with the Panel's exercise of judicial economy in an *obiter dictum*; *see* Appellate Body Report, *Brazil – Retreaded Tyres*, ¶ 257.

> We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union.

Thus, in the opinion of the Appellate Body, not only is the WTO Tribunal fully competent to examine whether a given RTA complies with the Article XXIV requirements, but it is indeed expected to do so.[231]

As evident from the above, the two questions regarding the WTO Tribunal's jurisdiction with respect to RTAs seem to have been answered quite definitively: the WTO Tribunal has jurisdiction to examine not only the WTO-consistency of measures adopted under RTAs, but also the WTO-consistency of a given RTA as a whole.[232]

Finally, beyond the foregoing analysis, it is noted that on the basis of the plain wording of the RTA Understanding, the WTO dispute settlement system may be "invoked with respect to *any matters arising from the application* of those provisions of

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[231] Tevini (2006), at 252.

[232] As to the standard of proof regarding whether a given RTA satisfies the conditions laid down in Article XXIV of the GATT, the *US – Line Pipe* Panel considered that "the information provided by the United States in these proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ('CRTA') (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b)." Panel Report, *US – Line Pipe*, ¶ 7.144. This finding, once again, was later declared "moot" and with "no legal effect" by the Appellate Body; Appellate Body Report, *US - Line Pipe*, ¶ 199. With respect to the specific questions surrounding the relationship between Article XXIV of the GATT and Article 2 of the Safeguards Agreement, see Panel Report, *Argentina – Footwear (EC)*, ¶¶ 8.93-8.101; the *Argentina – Footwear (EC)* Panel's findings, however, were dismissed as irrelevant and thus reversed by the Appellate Body; *see* Appellate Body Report, *Argentina – Footwear (EC)*, ¶ 110.

Article XXIV,"[233] there may be some room for arguing that WTO Members could challenge a measure in the WTO Tribunal for its alleged inconsistency of RTAs, i.e. making RTA claims in the WTO Tribunal, as RTA provisions could possibly be considered "matters arising from the application of . . . Article XXIV" of the GATT. While such interpretation may be sound plausible (and in fact very convenient for the purpose of resolving the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals), it simply goes against the WTO jurisprudence, as examined above, to the effect that the subject matter jurisdiction of the WTO Tribunal is limited to WTO claims.

5. Interim conclusion on the subject matter jurisdiction of the WTO Tribunal

As the foregoing indicates, the terms of reference as well as relevant provisions of the DSU conclusively point out that the subject matter jurisdiction of the WTO Tribunal is limited to WTO claims, i.e. claims of violations of the WTO covered agreements. As the Appellate Body stated in *Mexico – Taxes on Soft Drinks*, there is "no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes."[234]

However, the WTO Tribunal's lack of subject matter jurisdiction to adjudicate non-WTO claims does not *ipso facto* lead to the conclusion that the WTO Tribunal does not have the competence to address violations of non-WTO norms in any way whatsoever. In *India – Autos*, India (the respondent Member) cited a mutually agreed solution (MAS) concluded between India and EC, which, according to India, was intended as a final settlement of the matter, and India asserted on that basis that the MAS barred EC from

[233] RTA Understanding, ¶ 12.

[234] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 56.

bringing a complaint concerning the same matter before the WTO Tribunal. In the examination of this issue, the *India – Autos* Panel took note of the EC's argument that the MAS "is not a [WTO] covered agreement" and observed that the possibilities that the MAS could affect the Panel's jurisdiction by virtue of *res judicata* or *estoppel* "suggest that the issue cannot necessarily be resolved simply through an acknowledgement that an MAS is not a covered agreement as was argued by the EC. That argument simply is another way of noting that the DSU does not expressly give a panel a mandate to consider whether a 'violation' of such an agreement might exist as a distinct basis for a dispute under the DSU."[235] This clearly indicates that while a complaining Member cannot sue another Member for alleged violation of non-WTO law as a distinct legal basis, the violation of non-WTO law (e.g. general principles of law such as *res judicata* and *estoppel* as well as non-WTO agreements (such as Type 3 and Type 5 RTA jurisdictional clauses) could possibly be considered by the WTO Tribunal at least in the examination of jurisdiction. This will be further substantiated later.[236]

C. Automatic and Compulsory Jurisdiction of the WTO Tribunal

As aforementioned, in international law, jurisdiction of an international tribunal is based on consent of the parties. Under the WTO dispute settlement system, on the other hand, panels have automatic[237] and compulsory jurisdiction at the behest of the

[235] Panel Report, *India – Autos*, ¶ 7.115 n.364.

[236] *See infra* Ch. 3.

[237] It is noted that some commentators consider the jurisdiction of the WTO Tribunal to be "quasi-automatic"; *see, e.g.*, Kwak & Marceau (2006), at 467.

complainant party, as respondent has already given its prior consent *ex ante* through the DSU and other treaty provisions, and no additional consent is required at the time of a particular dispute.[238] This is perhaps the most distinguishing feature of the WTO dispute settlement system.[239]

The "compulsory" nature of the WTO Tribunal's jurisdiction is understood *not* as compelling any WTO Member to initiate WTO litigation; as the Appellate Body clearly indicated[240]:

> Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".

Rather, the compulsory nature of the WTO Tribunal's jurisdiction is understood only that a respondent Member would not be able to block, at its own will,[241] the

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[238] *See* WAINCYMER (2002), at 120; PAUWELYN (2003), at 442. *Contra* Francioni (2006), at 153-54 ("[T]he mandatory mechanism of dispute resolution and the right of members to have a dispute[] adjudicated by a panel are *exceptions* to the general principle of state consent under general international law.") (emphasis added). It is noted, once again, that State consent is requisite for the jurisdiction of any international tribunal, and this is true also with respect to the WTO Tribunal; the WTO Tribunal does not qualify as an "exception"; the difference between the WTO Tribunal and other international tribunals is only that in the context of the WTO Tribunal, the consent of the respondent has already been given *ex ante*.

[239] PALMETER & MAVROIDIS (2004), at 17.

[240] Appellate Body Report, *EC – Bananas III*, ¶ 135.

[241] *See* DSU, art. 6.1 ("If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."). That is, a WTO panel will be established unless there is consensus not to do so; this is the so-called "negative consensus."

establishment of a WTO panel or otherwise refuse consent.[242] Put differently, the compulsory nature of the WTO Tribunal's jurisdiction focuses on the responding member's consent having been provided *ex ante*.

In addition, the automatic and compulsory nature of the WTO Tribunal's jurisdiction is taken by some to mean that there is no preliminary analysis of the complaining Member's right to bring an action.[243] This, if correctly understood, shall mean that there is no need for a complaining Member to show its legal interest in the matter, or, in the words of public international law generally, the standing or *locus standi*. It is noted that under international law, a claimant State needs to prove its legal interest in a matter before raising an international claim against another State. Under the WTO, however, the complaining Member does not need to prove any specific economic[244] or legal interest[245] nor provide any evidence of the trade impact of the challenged measure[246] in order to initiate WTO litigation.[247] This, nevertheless, does not negate the concept of "admissibility" in the WTO dispute settlement system. As aforementioned, legal interest is essential to prove standing in international litigation, and a claimant State's lack of standing in a specific case would compel an international tribunal to dismiss the case for inadmissibility. Here in the WTO context, although in a

[242] WAINCYMER (2002), at 120 n.6 ("Nor is there any preliminary analysis of the claimant's right to bring an action.").

[243] WAINCYMER (2002), at 120.

[244] Panel Report, *Korea – Dairy*, ¶ 7.13.

[245] Appellate Body Report, *EC – Bananas III*, ¶¶ 132-38.

[246] *See* DSU, art. 3.8 ("In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.").

[247] Kwak & Marceau (2006), at 466-67. By comparison, the EU system seems to adopt a more restrictive approach towards standing; *see, e.g.*, Horovitz (2005), at 281-84.

given dispute the complaining Member does not need to prove its legal interest or standing, that should be understood as a presumption of legal interest or standing. Indeed, standing, as well as the wider concept of admissibility, should be applicable in the WTO dispute settlement system, much like in the case of other international tribunals.[248] In addition, although the concept of admissibility is not mentioned anywhere in the DSU, it is not negated by that fact; otherwise, the concept of "jurisdiction" would have also been altogether irrelevant in the WTO dispute settlement simply because of the fact that it is not mentioned anywhere in the DSU. But this is not the case.

Turning back to the compulsory jurisdiction of the WTO Tribunal, notwithstanding that the WTO Tribunal has compulsory jurisdiction over a respondent Member in light of the respondent Member's having given consent *ex ante* through the DSU, and notwithstanding that in WTO litigation the standing of the complaining Member will not be reviewed, it remains true that the jurisdiction of the WTO Tribunal shall be based upon the consent validly given by *both* parties – the respondent Member and the

[248] *See, e.g.*, Pauwelyn & Salles (2009), at 94 ("The DSU does not contain [the distinction between jurisdiction and admissibility], but that alone is not a reason to disregard the distinction out of hand. In fact, the dichotomy between jurisdiction and admissibility is embedded in the separation between the authority of the tribunal (determined by its own constitutive instruments – jurisdiction) and the more general procedural relationship between the parties (determined by the set of legal norms binding on them – admissibility). The development of this distinction before the ICJ, and its spillover to the ECHR and arbitral tribunals, indicates that there is a more general role for it in international dispute settlement. Analogously . . . the distinction between jurisdiction and admissibility should also be applied in WTO dispute settlement."). *Cf.* Appellate Body Report, *EC – Bananas III*, ¶ 133 ("The participants in this appeal have referred to certain judgments of the International Court of Justice and the Permanent Court of International Justice relating to whether there is a requirement, in international law, of a legal interest to bring a case. We do not read any of these judgments as establishing a general rule that in all international litigation, a complaining party must have a 'legal interest' in order to bring a case. Nor do these judgments deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty."). Here, it is noted that while the Appellate Body seems to have reservations with respect to the requirement of standing as common to all international litigation, it does not reject this requirement in the WTO context either; correctly understood, this ruling is only saying that while standing *may* be required in proceedings before other international tribunals, a complainant in a WTO dispute does not need to prove standing because of the express WTO provisions (Article XXIII:1 of the GATT and Article 3.7 of the DSU) and, more importantly, because every WTO Member is presumed to have sufficient legal/economic interest and thus standing.

complaining Member. While the complaining Member typically expresses its consent to the jurisdiction of the WTO Tribunal through its initiation of the DSU mechanism, it remains a possibility that a complaining Member may lack the right to bring WTO litigation or is even prohibited from bring WTO litigation.[249] In such event, it is possible that even though the complaining Member does express its consent to the jurisdiction of the WTO Tribunal through its institution of a WTO complaint, such consent is *invalidly* given (i.e. in contravention of the applicable limitation or even prohibition of the right to sue). This possibility, as well as its legal implications, will be further discussed below.[250]

D. Exclusive Jurisdiction by virtue of Article 23.1 of the DSU?

1. Exclusive jurisdiction of the WTO Tribunal over WTO claims?

A somewhat debatable issue regarding the WTO Tribunal's jurisdiction is whether the WTO Tribunal has *exclusive* jurisdiction over WTO disputes. The starting point for an examination of this issue will be DSU article 23.1, which is worth setting forth in full:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they

[249] It is noted that some commentators hold that every WTO Member has an "absolute" right to initiate WTO litigation; *see, e.g.*, Marceau (2001), at 1116 n.91, 1130 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, 13). However, as will be discussed below, such right is in no way "absolute" in the sense that it is subject to no limitation at all; *see infra* Pt. II.D.

[250] *See infra* Ch. 4.

> *shall* have recourse to, and abide by, the rules and procedures of this Understanding.
>
> [*emphasis added*]

At first sight, the language "shall" used in this provision seems to suggest that any dispute concerning WTO rights and obligations can only be resolved by the WTO dispute settlement regime[251] and therefore a claim based on WTO provisions cannot be submitted to any other international tribunal (say, the ICJ) for resolution.[252] However, the purpose of Article 23.1 of the DSU seems merely to prevent WTO Members from taking unilateral actions against alleged WTO violations.[253] As the *US – Section 301 Trade Act* Panel stated[254]:

> Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations.

[251] *See e.g.*, JACKSON (1997), at 124.

[252] *See, e.g.*, Kwak & Marceau (2006), at 476 ("Article 23 of the DSU . . . seems to prevent other jurisdictions from adjudicating WTO law violations."); Marceau (2001), at 1101 ("If a WTO Member were to act contrary to Article 23 of the DSU in pursuing the matter unilaterally or in taking it to another forum, that WTO Member would be violating the WTO Agreement and might become subject to sanctions corresponding to the level of trade benefits nullified or impaired."); Marceau (2002), at 760 ("Article 23 of the DSU . . . also provides that the WTO has exclusive jurisdiction to provide remedies for violation of the WTO treaty."); Steger (2004), at 143 ("Thus, the WTO dispute settlement system has not only *compulsory* jurisdiction over matters arising under the covered agreements, it also [has] *exclusive* jurisdiction over such matters."); Steinmann (2006), at 559 ("[R]edress under the DSU is to be the only remedy."); Gonzalez-Calatayud & Marceau (2002), at 278 ("[Article 23 of the DSU] provides that the WTO has exclusive jurisdiction for allowing remedies for violations of the WTO Treaty.").

[253] *Cf.* SHANY (2004), at 185 (while acknowledging that Article 23.1 of the DSU confers exclusive jurisdiction to the WTO Tribunal, also recognizing the fact that "the parties to the negotiations of the WTO Agreement were more concerned with the possibility of precluding unilateral determinations by member states that GATT law had been breached . . . than with barring determinations by competing international procedures.").

[254] Panel Report, *US – Section 301 Trade Act*, ¶ 7.35.

In this connection, it is noted that the *US – Certain EC Products* Panel made the following statement concerning Article 23.1 of the DSU[255]:

> Article 23.1 of the DSU prescribes that when a WTO Member wants to take any remedial action in response to what it views as a WTO violation, it is obligated to have recourse to and abide by the DSU rules and procedures. In case of a grievance on a WTO matter, *the WTO dispute settlement mechanism is the only means available to WTO Members to obtain relief*, and only the remedial actions envisaged in the WTO system can be used by WTO Members.
> (emphasis added)

While this statement (particularly the wording "only") may suggest the exclusive nature of the WTO Tribunal's jurisdiction, it is noted, however, that regarding the same question in the same dispute, the Appellate Body stated[256]:

> Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements *only by recourse to the rules and procedures of the DSU, and not through unilateral action*. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close

[255] Panel Report, *US – Certain EC Products*, ¶ 6.23.

[256] Appellate Body Report, *US – Certain EC Products*, ¶ 111.

relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They *all* concern the obligation of Members of the WTO not to have recourse to unilateral action.

(first emphasis added)

From this passage, especially the close connection between recourse to the DSU and prohibition of unilateral action, the Appellate Body seems to be emphasizing the legal implications of Article 23.1 of the DSU as prohibiting unilateral action instead of suggesting the exclusive jurisdiction of the WTO Tribunal.

Turning back to the *US – Section 301 Trade Act*, nevertheless, the Panel indicated in very specific terms[257]:

> Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system *to the exclusion of any other system*, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "*exclusive dispute resolution clause*", is an important new element of Members' rights and obligations under the DSU.

[257] Panel Report, *US – Section 301 Trade Act*, ¶ 7.43 (emphasis added).

Thus, it seems that no matter what the legislative purpose of Article 23.1 of the DSU is, it does confer *exclusive* jurisdiction to the WTO Tribunal over WTO claims. Nevertheless, this will not, and shall not, prevent other tribunals established by other treaties from exercising jurisdiction over claims arising from their treaty provisions that run parallel to, or overlap with, the WTO covered agreements.[258] Hence, where the same fact patterns may simultaneously give rise to a violation of WTO covered agreements and a violation of RTA norms, Article 23.1 of the DSU, however characterized, would not prohibit the RTA Tribunal concerned to exercise subject matter jurisdiction over RTA claims based on RTA provisions, even if the RTA provisions in question run parallel to or overlap with certain WTO covered agreements.[259] Indeed, any argument to the contrary would meet substantial obstacles in the face of the fact that RTAs are explicitly permitted under Article XXIV of the GATT and Article V of the GATS as well as the settled practice of WTO/RTA Members.[260]

2. WTO Members' "absolute" right to initiate WTO litigation?

[258] Kwak & Marceau (2006), at 476; Marceau (2001), at 1111. *See also* Lo (2007), at 466 ("There is no provision in the DSU requiring that every conceivable trade dispute between two parties be resolved exclusively under the WTO. Generally speaking, neither do FTAs provide that disputes be resolved only under the dispute settlement procedures of FTAs. If there is no specific provision under FTAs in this regard, certainly contracting parties to the FTAs will have the right to decide whether to initiate a dispute settlement procedure under the WTO or under the relevant FTA.").

[259] This is, of course, subject to the exceptional circumstances where Type 1 RTA jurisdictional clauses prevent the complainant from pursuing RTA litigation; *see, e.g.*, E.C.-Mex. FTA art. 41 ("1. The provisions of this Title shall apply with respect to any matter arising from this Decision or from Articles 2, 3, 4, and 5 of the Interim Agreement (hereinafter the 'covered legal instruments'). 2. By way of exception, the arbitration procedure laid down in Chapter III shall not be applicable in the case of disputes concerning Articles 14, 19(2), 20(1), 21, 23, and 40 of this Decision."); E.C.-Chile FTA art. 189(4)(c) ("Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement."). *See also supra* Ch. 1.

[260] Kwak & Marceau (2006), at 483.

a) WTO Members' right to initiate WTO litigation

Article XXIII:1 of the GATT provides that "[i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned." On this basis, the Appellate Body indicated in *US – Wool Shirts and Blouses*[261]:

> The foundation of dispute settlement under Article XXIII of the GATT 1994 is the assurance to Members of the benefits accruing directly or indirectly to them under the GATT 1994. This was true as well of dispute settlement under the GATT 1947. If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then *dispute settlement is available*.
>
> (emphasis added)

Under the DSU, Article 3.3 provides that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is

[261] Appellate Body Report, *US – Wool Shirts and Blouses*, 13.

essential to the effective functioning of the WTO." Thus, the Appellate Body stated in *Mexico – Taxes on Soft Drinks*[262]:

> The fact that a Member may initiate a WTO dispute whenever it considers that "any benefits accruing to [that Member] are being impaired by measures taken by another Member" implies that that Member is *entitled* to a ruling by a WTO panel."
>
> (emphasis added)

Also, Article 3.7 of the DSU provides that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful." On this basis, the Appellate Body indicated in *EC – Bananas III*[263]:

> Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".

Finally, as stated above, under Article 23.1 of the DSU, when a WTO Member is seeking redress of any WTO violation, it has an obligation to have exclusive recourse to the DSU mechanism. Here, it must be pointed out that WTO Members do not have any

[262] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 52.

[263] Appellate Body Report, *EC – Bananas III*, ¶ 135.

"obligation" to initiate WTO litigation; Article 23.1 of the DSU simply mandates that *if* a WTO Member wishes to bring forth a complaint based on WTO covered agreements, it must submit the dispute to the WTO Tribunal. Indeed, every WTO Member has "broad discretion in deciding whether to bring a case against another Member under the DSU."[264] Thus, apart from granting exclusive jurisdiction to the WTO Tribunal over WTO claims, Article 23.1 of the DSU grants a procedural right to WTO Members to litigate WTO claims before the WTO Tribunal,[265] and no more.

All the foregoing leads to one same conclusion: under the WTO, every Member has a right to trigger the DSU mechanism to see that its WTO rights and benefits are vindicated. While this is beyond any question, it remains debatable whether such a right is an "absolute" one. As will be substantiated below, this question should be answered in the negative.

b) WTO Members' right to initiate WTO litigation: absolute or not?

With respect to whether WTO Members' right to initiate WTO litigation is an absolute one or not, it is first noted that the Appellate Body stated in *EC – Export Subsidies on Sugar*[266]:

[264] Appellate Body Report, *EC – Bananas III*, ¶ 135.

[265] *See, e.g.*, Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 53 ("A decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the *right* of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of *Article 23* of the DSU.") (emphasis added).

[266] Appellate Body Report, *EC – Export Subsidies on Sugar*, ¶ 312.

> We see *little* in the DSU that explicitly limits the rights of WTO Members to bring an action.
>
> (emphasis added)

From this, two things are clear. First, the Appellate Body has never ruled out the possibility that WTO Members' right to bring a WTO suit may somehow be limited by virtue of certain DSU provisions.[267] Second, the Appellate Body has never ruled out the possibility that such right may find certain limitation *outside the DSU*.

In this connection, it is noted that the *India – Autos* Panel, in the course of examining whether a mutually agreed solution between two WTO Members may conclusively settle a matter and thereby carry *res judicata* effect barring subsequent WTO litigation, made the following observation[268]:

> On the one hand, the Panel recognizes that the right for any WTO Member to bring a dispute to the DSB is one of the fundamental tenets of the DSU, and that it could not be lightly assumed in what particular circumstances the drafters of the DSU might have intended such right to be foregone. On the other hand, it may also be the case that it could not be lightly assumed that those drafters intended mutually agreed solutions, expressly promoted by the DSU, to have no meaningful legal effect in subsequent proceedings.

[267] Indeed, the Appellate Body itself identified one such limitation in Article 3.10 of the DSU under which WTO Members "must engage in dispute settlement procedures in good faith." Appellate Body Report, *EC – Export Subsidies on Sugar*, ¶ 312.

[268] Panel Report, *India – Autos*, ¶ 7.115.

Thus, the *India – Autos* Panel implicitly recognizes that WTO Members' right to litigate WTO claims may be subject to certain limitations outside the DSU (in this case, by limitations arising out of the mutually agreed solution); otherwise, the *India – Autos* Panel would have simply stated that such a right is absolute. Similarly, the *Mexico – Taxes on Soft Drinks* Panel, after having observed that Article 23.1 of the DSU gives rise to a right to initiate WTO litigation, pointed out that "it makes no findings about whether there may be other cases where a panel's jurisdiction might be legally constrained, notwithstanding its approved terms of reference."[269]

Some commentators argue for the proposition that WTO Members enjoy an "absolute" right to bring WTO litigation. For instance, it has been argued[270]:

> The WTO jurisprudence has confirmed that any WTO Member that is a 'potential exporter' has the sufficient legal interest to initiate a WTO Panel process (Appellate Body Report, *EC – Bananas III*, ¶ 136); and in WTO disputes, there is no need to prove any trade effect for a measure to be declared WTO inconsistent (Art. 3.8 of the DSU). This is to say, in the context of a dispute between two WTO Members, involving situations covered by both the RTA and the WTO Agreement, any member that considers that any of its WTO benefits have been nullified or impaired has an *absolute right* to trigger the WTO dispute settlement mechanism and request consultations and the establishment of a panel (Appellate Body Report, *US – Wool Shirts and Blouses*, ¶ 13).

[269] Panel Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 7.9-7.10.

[270] *See, e.g.*, Kwak & Marceau (2006), at 484 n.59.

(emphasis added)

As evident from this quoted passage, the proposition that such a right to sue is absolute is understood as meaning that a complaining Member does not need to prove any specific economic or legal interest nor provide any evidence of the trade impact of the challenged measure in order to initiate WTO litigation. This is not contested by, but is indeed in line with the position taken by, the present thesis.[271] However, this does not necessarily lead to the conclusion that WTO Members' right to litigate WTO claims is subject to no limitation whatsoever, inside or outside the DSU. Indeed, even in *US – Wool Shirts and Blouses*, which the quoted passage relies as part of its authority, the Appellate Body has never employed the adjective "absolute" to characterize such a right.

In this connection, it is noted that the *US – FSC* Panel stated that footnote 59 of the SCM Agreement does not circumscribe WTO Members' right to initiate the DSU mechanism. Footnote 59 of the SCM Agreement provides, in pertinent part, that "[i]n such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994." Without ruling upon the question whether the phrase "shall normally" leads to an explicit legal obligation to resort to dispute resolution venues other than the WTO,[272] the Panel believed that while "a restriction on the ability of a Member to pursue dispute settlement at any time would prejudice the rights of a WTO Member" and that the phrase "without prejudice to the rights and obligations of Members under GATT 1994"

[271] *See supra* Pt. II.C.

[272] Panel Report, *US – FSC*, ¶ 7.18.

contained in footnote 59 of the SCM Agreement shows that it "was not intended to restrict a Member's right to pursue dispute settlement at any time."[273] However, this case cannot be taken to mean that WTO Members' right to litigate WTO claims is subject to no limitation at all: the conclusion that footnote 59 of the SCM Agreement does not curb such right stems *not* from the premise that such a right is absolute, but, rather, from the very phrase "without prejudice to the rights and obligations of Members under GATT 1994" contained therein.

Thus, under the WTO dispute settlement system, there does not seem to be any solid basis for arguing that every WTO Member enjoys an absolute right to initiate WTO litigation that is subject to no limitation either within or outside the WTO. As aforementioned, the WTO legal system is part of the wider legal system of public international law. And, as the *Korea – Procurement* Panel stated, "[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it."[274] As will be substantiated later,[275] customary international law and general principles of law (and potentially also Type 3 and Type 5 RTA jurisdictional clauses) are *directly applicable* at least to the resolution of *procedural* matters (as opposed to *substantive* rights and obligations) in the WTO dispute settlement regime; to the extent that WTO Members' right to initiate WTO litigation is considered a *procedural* matter, there seems to be nothing that would prevent customary international law and general principles of law (and potentially also

[273] *Id.* ¶ 7.19.

[274] Panel Report, *Korea – Procurement*, ¶ 7.96.

[275] *See infra* Ch. 3.

Type 3 and Type 5 RTA jurisdictional clauses) from depriving or otherwise restricting such right under specific circumstances.

E. Inherent Jurisdiction of the WTO Tribunal[276]

As aforementioned, every international tribunal has inherent jurisdiction, which flows from the very nature of the judicial function of the tribunal, and such inherent jurisdiction does not need to be expressly provided for in the constitutive documents of the tribunal in question; the scope of inherent jurisdiction includes: (i) the inherent jurisdiction to decide all matters linked to the exercise of its jurisdiction, including burden of proof and due process; (ii) the jurisdiction "to interpret the submissions of the parties" in order to "isolate the real issue in the case and to identify the object of the claim"; (iii) the jurisdiction to decide whether to refrain from exercising the validly established jurisdiction; (iv) the jurisdiction to order remedies, including cessation of the breach, assurances of non-repetition, and reparation for breach; and (v) the jurisdiction to determine, *proprio motu*, whether the tribunal has jurisdiction over the matter before it.[277]

In this connection, it is first observed that some features of the WTO Tribunal are not typical of international tribunals; for one thing, WTO panels are not standing bodies but are established on an *ad hoc* basis; for another, the legal findings and conclusions of WTO panels and the Appellate Body merely culminate into "recommendations," which, in turn, would have to be adopted by the DSB before obtaining any legally binding force.

[276] *See generally* PAUWELYN (2003), at 447-49; MITCHELL (2008), at 93-103; Pauwelyn (2001), at 555-56.

[277] On authorities for the existence of the relevant inherent jurisdictions, see *supra* Pt. II.B.

However, given the quasi-automatic establishment of WTO panels[278] and the quasi-automatic adoption of panel and Appellate Body recommendations,[279] indeed the WTO Tribunal is an international judicial tribunal.[280]

As an international tribunal, the WTO Tribunal also has such jurisdiction inherent in its adjudicative function.[281] This has been expressly confirmed in WTO jurisprudence. For instance, the Appellate Body indicated in *EC – Hormones*[282]:

> [T]he DSU . . . leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.

More specifically, a WTO panel has the jurisdiction to determine on its own initiative whether it has, and, if yes, the scope of, jurisdiction over the matter before it,[283] and this jurisdiction is also enjoyed by the Appellate Body.[284] Also, WTO panels

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[278] DSU art. 6.1.

[279] DSU arts. 16.4 & 17.14.

[280] *See* MITCHELL (2008), at 97-98; Pauwelyn (2001), at 554. *See also* Weiler (2001), at 201 ("The Appellate Body is a court in all but name."); McRae (2004), at 8 ("In short, although the euphemism 'quasi-judicial' is sometimes used to describe the WTO dispute settlement process, in practice and in substance, it is a judicial process."); Abi-Saab (2006), at 456 ("[I]n the manner of a self-fulfilling prophecy, the Appellate Body has, from the outset, consciously and systematically affirmed and consolidated its judicial character both in its modalities of functioning and in its processes of reasoning.").

[281] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45 ("WTO panels have certain powers that are inherent in their adjudicative function.").

[282] Appellate Body Report, *EC – Hormones*, ¶ 152 n.138.

[283] Appellate Body Report, *US – 1916 Act*, ¶ 54 n.30 ("[I]t is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."). *See also* Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45 ("Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction."); Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, ¶ 36 ("[P]anels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to

have the competence to decide whether or not to refrain from exercising validly established jurisdiction in respect of certain claims, or, the so-called "judicial economy."[285]

As a final note, it has to be cautioned that while WTO panels have the discretion to decline the exercise of validly established jurisdiction over *certain* claims in a dispute, they do not enjoy the discretion to freely decline the exercise of jurisdiction over the *entirety* of the claims in a dispute.[286] That said, another distinction remains crucial: even though the WTO Tribunal does not enjoy the *discretion* to freely decline the

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proceed."); Panel Report, *US – 1916 Act (EC)*, ¶ 6.72 ("Irrespective of the question of judicial economy, the Panel considers that it has the 'competence of its competence', i.e. that it may determine whether a given claim can be addressed, irrespective of the positions expressed by the parties on the issue."); Panel Report, *Mexico – Taxes on Soft Drinks*, ¶ 4.186 ("A review of WTO jurisprudence also indicates that WTO panels and the Appellate Body have implied or incidental jurisdictional powers. For example, in *US – 1916 Act*, the Appellate Body explicitly confirmed that a WTO panel can determine whether it has substantive jurisdiction to decide a matter."); Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, ¶ 5.6 ("[A] panel has the responsibility to determine its jurisdiction and that assessing the scope of its terms of reference is an essential part of this determination."); Panel Report, *Korea – Certain Paper*, ¶ 7.257 (noting the late date at which Korea raised its argument on inclusion of a particular claim in the terms of reference, but explaining that, as this is a "fundamental issue" that concerns the Panel's jurisdiction, it could not make a finding on a claim which had not been raised in the panel request and which is therefore not properly before it); Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, ¶ 7.20 ("Therefore, while it is true that the United States did not make a preliminary objection on this [jurisdictional] matter, we considered it appropriate, and indeed, necessary, to raise this issue on our own motion and resolve it."); Panel Report, *EC – Export Subsidies on Sugar (Australia)*, ¶ 7.10 ("The Panel is not convinced that the European Communities raised all its objections at the earliest possible time. Nevertheless, some of the European Communities' objections are concerned with the jurisdiction of this Panel, for which deficiencies cannot be cured. These objections may thus be viewed as so fundamental that they could be considered at any stage of the Panel proceeding."); Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, ¶¶ 2.1-2.7 (stating that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its jurisdiction on its own initiative, and that this principle applies also to arbitration bodies).

[284] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, ¶ 208 ("[T]he issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal.").

[285] *See, e.g.*, Appellate Body Report, *US – Wool Shirts and Blouses*, 19 ("A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."). *See also* Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶ 45 ("[P]anels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings are not necessary 'to resolve the matter in issue in the dispute.'"). The Appellate Body has cautioned, however, that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy." Appellate Body Report, *Australia – Salmon*, ¶ 223.

[286] *See, e.g.*, Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 46-53; Panel Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 7.1-7.18.

exercise of jurisdiction over the entirety of the claims, it remains possible for there to be certain grounds that will *preclude* the exercise of established jurisdiction or, more specifically, *compel* the WTO Tribunal to decline the exercise of established jurisdiction; in the latter case, the WTO Tribunal does not enjoy any measure of discretion but is legally bound to act in that manner. This is exactly what happens when the WTO Tribunal must decline the exercise of jurisdiction on the ground of inadmissibility (by virtue of the complainant Member's lack of right to initiate WTO litigation or by virtue of the complainant Member's being prohibited from initiating WTO litigation).

III. IDENTIFICATION OF JURISDICTIONAL CONFLICTS BETWEEN THE WTO TRIBUNAL AND RTA TRIBUNALS

Having reviewed the jurisdiction of international tribunals generally and that of the WTO Tribunal in particular, this thesis now turns to the question of jurisdictional conflict between the WTO Tribunal and RTA Tribunals.

First, it is noted that the question of jurisdiction may be analyzed from the perspective of allocation.[287] In terms of allocation of jurisdiction, it has been proposed that under international law, there are three basic types of allocation of jurisdiction: (i) horizontal allocation of jurisdiction among States; (ii) horizontal allocation of jurisdiction among international organizations; and (iii) vertical allocation of jurisdiction between States and international organizations.[288] The allocation of jurisdiction between the WTO Tribunal and RTA Tribunals, the focus of this thesis,

[287] Kwak & Marceau (2006), at 465.

[288] Trachtman (2002), at 79. *See also* Trachtman (2008).

may be considered to fall within the second category proposed above, *viz.* horizontal allocation of jurisdiction between international tribunals.

Thus, the WTO Tribunal is allocated the jurisdiction to adjudicate WTO claims, whereas RTA Tribunals are allocated the jurisdiction to adjudicate RTA claims that arise from relevant RTA provisions.[289] Although WTO claims are based on WTO covered agreements while RTA claims on RTA provisions, it remains possible for the same fact pattern to simultaneously give rise to violation of WTO covered agreements and violation of RTA provisions to the extent that the relevant RTA provisions are parallel or even identical to certain provisions of the WTO covered agreements. Where such is the case, the same fact pattern may be simultaneously subject to the jurisdiction of the WTO Tribunal and that of RTA Tribunals.[290] As has been pointed out by the arbitral tribunal established under Annex VII of the UNCLOS, "[t]here is frequently a parallelism of treaties, both in their substantive context and in their provisions for settlement of disputes arising thereunder."[291]

That being said, whether there is any jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals remains to be examined. Although the same fact pattern may be subject to the jurisdiction of the WTO Tribunal and that of RTA Tribunals, the legal basis for a WTO claim before the WTO Tribunal, on the one hand, is distinct from the legal basis for an RTA claim before an RTA Tribunal: a WTO claim is based upon WTO covered agreements, while an RTA claim is based upon RTA provisions

[289] It is noted that the jurisdiction of RTA Tribunals may be determined on a case-by-case basis, as different RTAs may grant different scopes of jurisdiction to tribunals created thereunder. For present purposes, the subject-matter jurisdiction of RTA Tribunals are generally defined as being limited to RTA claims, *viz.* claims on the basis of RTA provisions.

[290] Kwak & Marceau (2006), at 466-67.

[291] Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, ¶ 52, 39 I.L.M. 1359 (Arb. Trib. under Annex VII of UNCLOS 2000).

(different causes of action). Thus, even between the same parties and based upon the same fact pattern, the dispute before the WTO Tribunal and that before RTA Tribunals may be said to be different as far as the legal basis is concerned. In such circumstances, would the jurisdiction of the WTO Tribunal and that of RTA Tribunals be said to in "conflict"? This shall be examined below. Prior to the examination of jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals, it is noted that conceptually, it seems that an "overlap" is the minimum requirement for "conflict." Thus, jurisdictional "overlap" will be briefly analyzed.

A. Jurisdictional "Overlap" between the WTO Tribunal and RTA Tribunals

Below, different definitions of jurisdictional "overlap" will be first reviewed. On that basis, attempt will be made to examine whether there is any jurisdictional "overlap" between the WTO Tribunal and RTA Tribunals. Ultimately, however, this thesis sets out reasons to reject the need for a definition of jurisdictional "overlap," and will examine the more concrete problem of jurisdictional "conflict" subsequently.

1. Different definitions of jurisdictional "overlap"

Attempts have been made to proffer a broad definition of jurisdictional "overlap." For instance, jurisdictional overlap has been defined as situations where "a certain dispute can be addressed by more than one available forum . . . . only proceedings which address similar or related disputes . . . between similar or related parties qualify

as competing procedures."[292] Jurisdictional overlap has also been defined as referring to "situations where dispute settlement provisions in two or more treaties each appear to give jurisdiction over a single dispute to a designated tribunal, and the designated tribunals differ,"[293] or "situations where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems."[294] Under this broad definition, for jurisdictional overlap to occur, it seems that the minimum requirement is the existence of certain degree of "similarity" between two disputes.

A "dispute," in turn, has been defined as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons";[295] for there to be a dispute, there must be opposing claims by the parties.[296] Thus, the concept of "dispute" encompasses the concept of "(opposing) claims"; in this sense, the concept of "dispute" under international law seems to be in line with the concept of "matter" under WTO law, which consists of "the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[297] Along this line, for jurisdictional overlap to occur, the *claims* before different tribunals must "exhibit a certain degree of similarity".[298]

Beyond the general definition, it has been proposed that jurisdictional overlap should be assessed against the conditions for the applicability of jurisdiction-regulating

[292] SHANY (2004), at 21.

[293] Lowe (1999), at 191.

[294] Kwak & Marceau (2006), at 467.

[295] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

[296] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 328 (Dec. 21) ("It must be shown that the claim of one party is positively opposed by the other.).

[297] Appellate Body Report, *Guatemala Cement I*, ¶ 72.

[298] SHANY (2004), at 21.

norms, such as *lis alibi pendens* (prohibiting initiation of competing proceedings concerning the same dispute pending before a tribunal), *res judicata* (prohibiting re-litigation of the same dispute on which a final judgment by a competent tribunal has been rendered) and *electa una via* (precluding a party from seizing another tribunal after having selected a certain dispute settlement resolution).[299] Put differently, if the conditions for the applicability of those jurisdiction-regulating norms are met, i.e. "same parties" and "same issues," jurisdictional overlap can be said to exist. As to "same parties," the dominant test that had emerged in practice is "virtual identity" or "essentially the same parties."[300] As to "same issues," this requirement includes two sub-elements: the "same fact pattern" and the "same legal claims"; as to the "same legal claims," certain international tribunals have flexibly interpreted this sub-element as "essentially the same" claims.[301] Accordingly, jurisdictional overlap exists when two requirements are met: (i) same parties; and (ii) same (or essentially the same) claims based on the same fact pattern. Admittedly, however, this approach exhibits circular argumentation: the actual application of jurisdiction-regulating norms governs the definition of what should be considered situations of jurisdictional overlap amenable to regulation.[302]

2. Analysis of jurisdictional "overlap" between the WTO Tribunal and RTA Tribunals

[299] *Id.* at 21-28. These relevant concepts will be examined in more detail in Chapter Three.

[300] *Id.* at 24-25.

[301] *Id.* at 25-26.

[302] *Id.* at 21.

In line with the foregoing definitions of jurisdictional overlap, it seems that jurisdictional overlap occurs when the dispute subject to the jurisdiction of one international tribunal is "similar" to the dispute subject to the jurisdiction of another international tribunal in the sense that both disputes have (i) the same parties; (ii) the same fact pattern; and (iii) similar or essentially the same (broad definition) or identical claims (strict definition). Applying such definition to the WTO/RTA context, given that the claim before the WTO Tribunal and the claim before a given RTA Tribunal are different (although possibly very similar or essentially the same in the case where the WTO provision in question is identical to the RTA provision in question), a jurisdictional "overlap" would possibly be non-existent under the strict definition (identical claims) but will be identified under the broad definition (similar or substantially the same). Even in the specific context of the central issue in this thesis, *viz.* where WTO litigation is barred by Type 3 or Type 5 RTA jurisdictional clauses, a jurisdictional "overlap" would be difficult to ascertain under the strict definition (identical claims): although a Type 3 or Type 5 RTA jurisdictional clause specifically bars the complainant from raising a WTO claim in the WTO dispute settlement, in the RTA Tribunal it is nevertheless an RTA claim that is being litigated.

However, for the following reasons, this thesis submits that jurisdictional "overlap" is irrelevant (at least for the purpose of providing a solution to the central issue in this thesis).

First, even though a jurisdictional "overlap" may not be discerned under the strict definition (while identifiable under the broad definition), that does not preclude the identification of jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals; as will be examined below, such a jurisdictional "conflict" is, indeed, clearly identified in the context of Type 3 and Type 5 RTA jurisdictional clauses. As long as there is a

jurisdictional conflict, there is a need and legitimate expectations for a solution, notwithstanding the (possible) lack of jurisdictional "overlap" (under the strict definition).

Second, the existence of jurisdictional "overlap" (potentially existing under the broad definition) does not necessarily lead to jurisdictional "conflict." In this connection, the following passage may cast some light[303]:

> [A]n *overlap* of jurisdiction *occurs*: (1) when two fora claim to have exclusive jurisdiction over the matter; (2) when one forum claims to have exclusive jurisdiction and the other one offers jurisdiction, on a permissive basis, for dealing with the same matter or a related one; or (3) when the dispute settlement mechanisms of two different fora are available (on a non-mandatory basis) to examine the same or similar matters. *Conflicts* are *possible* in any of these three situations.
>
> (emphasis added)

Thus, even when the jurisdiction of the WTO Tribunal and the jurisdiction of RTA Tribunals overlap, whether such overlap leads to conflicts of jurisdiction is another issue.

Third, even when a jurisdictional "overlap" is identified, that, *per se*, does not entail any legal implications, as the applicability of jurisdiction-regulating norms are *not necessarily applicable*; instead, for any jurisdiction-regulating norm to be applicable,

[303] Kwak & Marceau (2006), at 467.

the elements specific to each jurisdiction-regulating norm will need to be examined individually.[304]

For the foregoing reasons, this thesis submits that it is unnecessary to examine whether there is any jurisdictional "overlap." At best, jurisdictional "overlap" may serve descriptive purposes: it may be convenient to adopt the term jurisdictional "overlap" to generally describe the circumstances where a dispute may be amenable to the jurisdiction of two or more different international tribunals. To the extent that jurisdictional "overlap" is adopted for descriptive purposes, this thesis submits that it be understood in a general sense, encompassing circumstances where the disputes between different international tribunals would have complete or partial "overlap" in terms of the parties and the claims, and, in this sense, a jurisdictional overlap may occur when two or more disputes have the same or similar parties or claims.[305] The rationale for a general understanding of jurisdictional overlaps (if adopted at all) is this: by understanding jurisdictional overlaps broadly, the likelihood that jurisdiction-regulating norms are applied may be increased (to the extent that one believes that the existence of jurisdictional overlap is a necessary (yet in any event insufficient) premise for the applicability of jurisdiction-regulating norms[306]), and, thereby, the likelihood of inconsistent rulings by different tribunals may be decreased. This, in turn, may help minimize fragmentation of international law, both normatively (involving the risk that

[304] *See infra* Ch. 3.

[305] In fact, such an approach may find support in the jurisprudence of international tribunals. *See, e.g.*, Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, ¶ 54, 39 I.L.M. 1359 (Arb. Trib. under Annex VII of UNCLOS 2000) ("[T]he Parties to this dispute – the real terms of which have been defined above – are the same Parties grappling not with two separate disputes but with what in fact is *a single dispute arising under both Conventions*. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.").

[306] *See, e.g.*, SHANY (2004), at 21.

different tribunals may reach different interpretations with respect to the same legal issue) and institutionally (involving possible inconsistent or even conflicting rulings), and help ensure the coherence in international law. It bears emphasizing, once again, that a finding of jurisdictional overlap does not necessarily lead to any concrete legal implications; specifically, even a broad understanding of the concept of jurisdictional overlaps will not have any bearing, whatsoever, upon the applicability of any of the jurisdiction-regulating norms. The applicability of any such norm shall be determined individually, *independently* of whether there is any jurisdictional overlap.

Having said the above, this thesis now turns to the more concrete issue of whether there is any jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals.

B. (Potential) Jurisdictional "Conflict" between the WTO Tribunal and RTA Tribunals

Jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals essentially concerns the "conflict" between the jurisdictional clause of the WTO Tribunal and the jurisdictional clause of RTA Tribunals. In this sense, the question of jurisdictional conflicts is a law of treaties issue.[307]

Before proceeding any further, it is noted that there may be other approaches towards jurisdictional conflicts; for instance, one may approach this question from the perspective of the disputes put before different international tribunals. This approach sometimes uses jurisdictional "overlaps" and jurisdictional "conflicts" in an

[307] *See, e.g.*, Lowe (1999), at 193-94 ("The question of jurisdiction is thus one that may be approached *via* the Law of Treaties."). *See also* SHANY (2004), at 166 ("Another approach to the question of conflicting jurisdictions is to analyze the phenomenon in accordance with the law of treaties.").

interchangeable way;[308] to that extent, the foregoing analysis concerning jurisdictional overlaps would have equal application. One may also distinguish jurisdictional conflict from jurisdictional overlap by, for instance, imposing additional requirements to be fulfilled before a finding of jurisdictional conflict is made; for instance, it has been proposed that a finding of jurisdictional conflicts, as opposed to jurisdictional overlaps, requires further that the rulings by different international tribunals could not be complied with simultaneously (narrow sense of jurisdictional conflicts) or that there is a risk that different tribunals may suggest different ways of dealing with the dispute (broad sense of jurisdictional conflicts).[309] The rationale for this approach, however, seems insufficient: on the one hand, it seems impossible to predict *ex ante* whether the rulings by different international tribunals would be mutually exclusive, whereas, on the other hand, there seems always a risk that different tribunals may rule differently (albeit not necessarily mutually exclusively) even with respect to the same issue.

As aforementioned, this thesis submits that legally speaking, it makes little sense to adopt any defined concept of jurisdictional overlaps, and that to the extent that jurisdictional overlaps may serve descriptive purposes, this concept should be defined broadly so as to minimize the fragmentation of international law and ensure coherence in international law. Arguably, these considerations also apply when attempts are being made to define jurisdictional conflicts from the perspective of disputes before different

[308] *See, e.g.*, SHANY (2004) (seemingly using jurisdictional "competition," "overlap" and "conflict" interchangeably).

[309] *See* Martin Lovell, *Regional Trade Agreements and the WTO*, 18-21, *available at* http://ssrn.com/abstract=1114770 (2007) (broadly defining jurisdictional overlaps as situations where a single dispute or certain aspects of it may be adjudicated by more than one international tribunals, distinguishing jurisdictional overlaps from jurisdictional conflicts by adding more conditions to be met for the purpose of finding jurisdictional conflicts (including, *inter alia*, that "the parties are unable to comply with the terms of one ruling without breaching the other" (narrow sense) or that there is "a risk that rulings of the dispute settlement bodies will suggest different ways of dealing with the dispute" (broad sense), and adopting the broad sense of jurisdictional conflicts).

international tribunals (hereinafter referred to as the "Institutional Approach," as opposed to the "Law of Treaties Approach" espoused in this thesis). Thus, if and to the extent that the concept of jurisdictional conflicts is understood under the Institutional Approach, in light of the somewhat interchangeability between jurisdictional "overlaps" and "conflicts" and in the further light of the fact that adding additional requirements upon jurisdictional conflicts seems futile, this thesis submits that jurisdictional conflicts, understood under the Institutional Approach, should be defined broadly in line with jurisdictional overlaps. By virtue of the Institutional Approach thus understood, jurisdictional conflicts between the WTO Tribunal and RTA Tribunals can be identified in the pre-defined case scenarios concerning Type 3 and Type 5 (and perhaps also other types) of RTA jurisdictional clauses. Once again, even a broad understanding of the concept of jurisdictional conflicts (under the Institutional Approach) will not have any bearing, whatsoever, upon the applicability of any of the jurisdiction-regulating norms. The applicability of any such norm shall be determined individually, *independently* of whether there is any jurisdictional conflict under the Institutional Approach.

On the other hand, defining jurisdictional conflicts from the perspective of conflicts between jurisdictional clauses of different international tribunals (i.e. the Law of Treaties Approach) would produce concrete legal implications. As will be seen below, an identification of conflict between jurisdictional clauses will trigger the avoidance of conflict through treaty interpretation, and, failing that, resolution of conflict through conflict clauses, *lex posterior* and *lex specialis*.

That said, both the Institutional Approach and the Law of Treaties Approach have their respective merits. As the Institutional Approach addresses jurisdictional conflicts largely by examining the applicability/application of jurisdiction-regulating norms (such as *res judicata*), it will receive further treatments in Chapter Three, where certain such

norms are examined. For the rest of the current Chapter, the examination of jurisdiction conflict between the WTO Tribunal and RTA Tribunals would take the Law of Treaties Approach and begin with the concept of "conflict" between treaties (or other rules of international law, e.g. customary international law).

1. The concept of "conflict" under international law generally[310]

Conflicts between norms are a phenomenon in every legal order, be it within the domestic legal order or in the international legal system.[311] The question of "conflict" may be approached from two perspectives: the subject-matter of the relevant rules or the legal subjects bound by it. Article 30 of the VCLT, for example, appears to adopt the former perspective by suggesting techniques for dealing with successive treaties relating to the "same subject-matter."[312] As to what constitutes the "same subject matter," this has generated numerous discussions in international law.[313] Generally speaking, if an attempted simultaneous application of two norms of international law to one single set of facts leads to *incompatible* results, it can safely be assume that the test of "sameness" under Article 30 is satisfied.[314] However, beyond the basic situation of incompatibility between two norms in the sense that compliance with one norm leads to incompliance with another, there seems to be other types of situations where a conflict may be

[310] For a definitive treatment of this subject, see generally PAUWELYN (2003).

[311] ILC Report on Fragmentation of International Law, ¶ 26.

[312] *Id.* ¶ 21.

[313] *See, e.g.*, *Id.* ¶¶ 253-56 (summarizing the ILC's discussions on the "same subject matter" concept in Article 30 of the VCLT).

[314] *Id.* ¶¶ 22-23 (emphasis added).

identified.[315] Thus, a wide notion of conflict has been proposed as referring to "a situation where two rules or principles suggest different ways of dealing with a problem."[316] Appealing as it is, this general definition of conflict does not seem to be precise enough to be practically workable. Thus, a classification of different conflicts is desirable and is reviewed below.

a) Different types of conflicts

Under international law, there are principally four types of norms serving different functions: (i) command (imposing an obligation to do something); (ii) prohibition (imposing an obligation not to do something; (iii) exemption (granting a right not to do something); and (iv) permission (granting a right to do something).[317] Such norms may interact in two ways: accumulate or conflict – two norms accumulate when they can be applied together and without contradiction in all circumstances; otherwise there is a conflict.[318]

For a conflict between two norms of international law to arise, there are a number of preconditions, *inter alia*, an overlap between two treaty norms in respect of *ratione materiae, personae and temporis*: both norms must have at least some overlap in terms of subject matter and state parties, and both must exist or interact at one point in time.[319]

[315] *Id.* ¶ 24.

[316] *Id.* ¶ 25.

[317] PAUWELYN (2003), at 158-59.

[318] *Id.* at 161.

[319] *Id.* at 165.

Such preconditions having been met, the next question is: how should "conflict" be defined. Albeit various definitions of conflict have been provided,[320] Pauwelyn, one of the leading scholars on this subject, has defined conflict as a situation where one norm "constitutes, has led to, or may lead to, a breach of the other."[321] Where one norm, in and of itself, constitutes a breach of the other by its mere conclusion or emergence, there is an inherent normative conflict; on the other hand, the more common type of conflict is where one norm, by granting certain rights or imposing certain obligations which, once exercised or complied with, will constitute a breach of the other norm; this situation is referred to as conflicts in the applicable law.[322] Conflicts in the applicable law, as compared to inherent normative conflicts, are more common in general, and inherent normative conflicts are not relevant to the present thesis, as the WTO covered Agreements do not prohibit the conclusion of RTAs;[323] rather, the conclusion of RTAs are explicitly authorized (with conditions, of course) under Article XXIV of the GATT as well as Article V of the GATS; thus, the focus of examination for the purpose of this thesis will be on possible conflicts in the applicable law. Conflicts in the applicable law can be further broken down to two types: necessary conflicts and potential conflicts,

[320] *Id.* at 165-75 (outlining various definitions of conflict in academic writings).

[321] *Id.* at 175-76.

[322] *Id.* at 176-77.

[323] Provided, of course, that a given RTA satisfies the conditions set forth in Article XXIV of the GATT and/or Article V of the GATS. It is recognized that when a given RTA fails to fulfill such conditions, it would contradict with the GATT/GATS and thus produce a normative conflict (as the very formation of the RTA in question is in violation of the GATT/GATS provisions). However, as stated in Chapter 1, this thesis is not concerned with these conditions but instead assume that the RTA in question is full consistent with the conditions in Article XXIV of the GATT and/or Article V of the GATS.

each further consists of two situations; such conflicts in the applicable law can be summarized in the following table:[324]

TABLE 2: CONFLICTS IN THE APPLICABLE LAW[325]

	Type	Norm 1 Obligation of State A vis-à-vis State B	Norm 2 Compliance with obligation, or exercise of right by State A constituting a breach of Norm 1 vis-à-vis State B
Necessary Conflicts	1	Command: in a given situation State A shall do X	Command: in the same situation State A shall do Y (Y being either different from or mutually exclusive with X)
	2	Command: in a given situation State A shall do X	Prohibition: in the same situation State A shall not do X
Potential Conflicts	3	Command: in a given situation State A shall do X	Right (Exemption): in the same situation State A need not do X
	4	Prohibition: in a given situation State A shall not do X	Right (Permission): in the same situation State A may do X

[324] PAUWELYN (2003), at 176, 179. For a narrow notion of conflict, see, for example, Marceau (2002), at 791-96; Marceau (2001), at 1083-86; Steger (2004), at 142 ("[R]eal conflicts – in the true international law sense – between the WTO *obligations* of parties and their other international *obligations* . . . are extremely rare.") (emphasis added).

[325] PAUWELYN (2003), at 179.

b) Techniques for the avoidance of conflicts and resolution of conflicts

First of all, conflicts can be avoided in many cases by the operation of the presumption against conflict as well as treaty interpretation.

Regarding the presumption against conflict in public international law, it is noted that every new norm of international law is created within the context of pre-existing international law, and, thus, the new norm is presumed to build upon pre-existing law. The major consequences of such presumption are three-fold: (i) unless otherwise indicated by explicit language, the new norm should not be presumed to deviate from pre-existing norms; (ii) the State claiming a conflict bears the burden of proof; and (iii) when a number of interpretations exist, the interpretation that harmonizes the meaning of the two norms in question and thus avoids conflict should be adopted.[326]

Regarding treaty interpretation as a conflict-avoidance method, it should be borne in mind that treaty interpretation has some inherent limitations – in particular, treaty interpretation is limited to giving meaning to a norm and cannot create new norms.[327] Within its limits, treaty interpretation, including all interpretative methods enshrined in the VCLT, may be utilized to avoid conflict from arising.

Where a conflict is identified and cannot be avoided, the question then remains is how such conflict should be resolved. In most instances, conflicts can be resolved through the application of (i) explicit conflict clauses (treaty provisions dealing with the

[326] *Id.* at 240-41.

[327] *Id.* at 244-47.

resolution of conflicts); (ii) *lex posterior*; and (iii) *lex specialis.*[328] These conflict-resolution norms will be examined further below.[329]

2. The concept of "conflict" under the WTO legal system

Under the WTO, the term "conflict" appears in two conflict clauses: (i) General Interpretative Note to Annex 1A of the Marrakesh Agreement, which provides that "[i]n the event of *conflict* between a provision of the [GATT] and a provision of another agreement in Annex 1A to the [WTO Agreement], the provision of the other agreement shall prevail *to the extent of the conflict*" (emphasis added); and (ii) Article 1.2 of the DSU, which provides, in relevant part, that "[t]he rules and procedures of this Understanding shall apply *subject to* such special or additional rules and procedures on dispute settlement contained in the covered agreements . . . . To the extent that there is a *difference* between the rules and procedures of this Understanding and the special or additional rules and procedures . . . the special or additional rules and procedures . . . shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a *conflict* between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the [DSB]), in consultation with the parties to the dispute, shall determine the rules and

[328] *Id.* at 327-439. *See also* Marceau (2001), at 1090 ("If, after efforts of interpretation with a view to avoiding conflicts, an irreconcilable conflict between a WTO provision and another treaty provision remains, Article 30 of the [VCLT] offers some guidance as to which treaty should prevail. Article 30 provides two main rules governing conflicts between treaties relating to the same subject-matter and the same parties: (1) specific provisions in treaties governing conflicts with other treaties must be respected (Article 30(2)); (2) generally, the treaty later in time should prevail over the earlier one on the same subject-matter (*lex posterior*, Article 30(3)-(4). A third principle relevant to conflicts between treaties but not mentioned in Article 30 (although recognized by the jurisprudence) is that of the *lex specialis*.").

[329] *See infra* Ch. 4.

procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to *avoid conflict*."

However, nowhere in the WTO covered agreements is the term "conflict" expressly defined, and, therefore, no "special meaning" is expressly given to the term "conflict" within the WTO legal system.[330] Thus, theoretically speaking, the foregoing definition as well as classification of "conflict" under general international law shall also be applicable in the WTO dispute settlement system.[331]

In its practice, the WTO Tribunal seems to depart from general international law on the question of conflict. For instance, the *EC – Bananas III* Panel observed[332]:

> As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) *clashes between obligations* contained in GATT 1994 and *obligations* contained in agreements listed in Annex 1A, where those obligations are *mutually exclusive* in the sense that a Member *cannot comply with both obligations at the same time*, and (ii) the situation where a rule in one agreement *prohibits* what a rule in another agreement *explicitly permits*.

[330] *See* VCLT, art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

[331] PAUWELYN (2003), at 189.

[332] Panel Report, *EC – Bananas III (US)*, ¶¶ 7.159-7.160 (emphasis added) (citation omitted).

> However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

Thus, the *EC – Bananas III* Panel envisages "conflict" as covering type 1 (to the extent that the two obligations in question are mutually exclusive), type 2 and type 4 of conflicts under general international law reviewed above. That is, the *EC – Bananas III* Panel recognizes (i) a conflict between two mutually exclusive commands (type 1); (ii) a conflict between a command and a prohibition (type 2); and (iii) a conflict between a prohibition and a permission (type 4). It seems that the *EC – Bananas III* Panel lost sight of type 3 (a conflict between a command and an exemption).[333]

The *Indonesia – Autos* Panel, however, seemed to have adopted a narrower definition of conflict[334]:

[333] PAUWELYN (2003), at 191. On the contrary, some commentators suggest that the *EC – Bananas III* Panel could have reached the same result, through the rule of "effective interpretation", without expanding the definition of conflict to include situations where a right conflicts with an obligation; *see, e.g.*, Marceau (2001), at 1085.

[334] Panel Report, *Indonesia – Autos*, ¶ 14.49 (emphasis added).

> In considering this issue of whether a measure covered by the SCM Agreement can also be subject to the obligations contained in the TRIMs Agreement, we need to examine whether there is a general conflict between the SCM Agreement and the TRIMs Agreement. We note first that the interpretive note to Annex IA of the WTO Agreement is not applicable to the relationship between the SCM Agreement and the TRIMs Agreement. The issue of whether there might be a general conflict between the SCM Agreement and the TRIMs Agreement would therefore need to be examined in the light of the general international law presumption against conflicts and the fact that under public international law a *conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter*.

This may seem to suggest a narrower definition of conflict by also excluding type 4 (conflict between a prohibition and a permission) that was recognized by the *EC – Bananas III* Panel.[335] However, in proposing this narrower definition, the *Indonesia – Autos* Panel did not refer to, and thus did not overturn, the foregoing statement made by the *EC – Bananas III* Panel. Also, while the *Indonesia – Autos* Panel said that "a conflict exists in the narrow situation of mutually exclusive obligations," it did not proffer this definition on an exclusive basis; indeed, the *Indonesia – Autos* Panel did not say that this is the "only" situation where conflict exists. In light of the foregoing, it may probably be safe to assume, on considerations of security and predictability within

[335] PAUWELYN (2003), at 193.

the WTO dispute settlement system,[336] that the *Indonesia – Autos* Panel merely omitted to mention, and thus did not rule out, type 4 of conflict in the WTO legal system.

In *Guatemala – Cement I*, the Appellate Body stated[337]:

> Article 1.2 of the DSU provides that the "rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding." (emphasis added) It states, furthermore, that these special or additional rules and procedures "shall prevail" over the provisions of the DSU "[t]o the extent that there is a *difference* between" the two sets of provisions (emphasis added) Accordingly, if there is no "difference", then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision

[336] *See* Appellate Body Report, *Japan – Alcoholic Beverages II*, 14 ("Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."); Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, ¶ 109 ("This reasoning applies to adopted Appellate Body Reports as well."); Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, ¶ 188 ("Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."); Appellate Body Report, *US – Stainless Steel (Mexico)*, ¶ 160 ("Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."). *See also* Cottier & Oesch (2007), at 59.

[337] Appellate Body Report, *Guatemala – Cement I*, ¶ 65. *See also* Appellate Body Report, *US – Hot-Rolled Steel*, ¶ 51.

> will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.

Again, the Appellate Body in this case omitted to mention type 4 of conflict and did not expressly refer to, and therefore did not overturn, the *EC – Bananas III* Panel's statement. For similar reasons, it may be safe to assume that type 4 of conflict remains recognized under the WTO.

More recently, in *US – Upland Cotton*, the U.S. argued, in the context of the relationship between Agreement on Agriculture and the SCM Agreement, that in light of Article 21.1 of the Agreement on Agriculture, which makes the application of the SCM Agreement "subject to" the Agreement on Agriculture,[338] the agricultural subsidy in question was subject to the Agreement on Agriculture, which allowed for domestic support subsidies, and was not subject to Article 3.1(b) of the SCM Agreement, which generally prohibits local content subsidies "[e]xcept as provided in the Agreement on Agriculture."[339] In response, the Panel stated[340]:

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[338] Agreement on Agriculture art. 21.1 ("The provisions of GATT 1994 and of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.").

[339] SCM Agreement art. 3.1(b) ("Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited . . . subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.").

[340] Panel Report, *US – Upland Cotton*, ¶¶ 7.1036, 7.1038-39.

This provision expressly acknowledges the application of the GATT 1994 and the SCM Agreement to agricultural products, while indicating that the Agreement on Agriculture would take precedence in the event, and to the extent, of any conflict.

. . . .

We understand that Article 21.1 of the *Agreement on Agriculture* could speak to a situation where, for example, the domestic support provisions of the *Agreement on Agriculture* would prevail in the event that an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the *SCM Agreement* existed in the *text* of the *Agreement on Agriculture*. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the *Agreement on Agriculture* and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*.

For the purposes of resolving this dispute, it is not necessary for us to decide upon any single fixed meaning of a "conflict" or to identify a particular situation that might fall to be decided subject to the order of precedence set out in Articles 21.1 of the *Agreement on Agriculture* and the introductory clause to Article 3.1(b) of the *SCM Agreement*. This flows from our view that none of the situations just mentioned arise in this dispute from the relevant provisions in the *Agreement on Agriculture*.

Although the *US – Upland Cotton* Panel made it clear that it was not "decid[ing] upon any single fixed meaning of a 'conflict,'" nevertheless, it *implicitly* acknowledged a type 4 conflict (between prohibition and a permission) by saying that "[a]nother situation [of conflict] might be where there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*." Furthermore, the Appellate Body's view in the same case has been taken to *expressly* recognize type 4 of conflicts in the WTO dispute settlement context.[341]

3. Identification of (potential) jurisdictional conflict between the WTO Tribunal and RTA Tribunals

It has been argued that the definition of "conflict" under public international law shall be equally applicable in the WTO legal regime.[342] Leaving this issue aside, whether the WTO recognizes all four types of conflict or merely type 1 (to the extent that the two obligations in question are mutually exclusive), type 2 and type 4, a conflict between the jurisdictional clause of the WTO Tribunal and the jurisdictional clause of RTA Tribunals may occur.

As discussed above, although the DSU does not explicitly use the word "jurisdiction" to define the jurisdictional scope of the WTO Tribunal, several DSU provisions do pertain to the jurisdiction of the WTO Tribunal. Among them, Article 23.1 provides that "[w]hen Members seek the redress of a violation of obligations or other

[341] Marceau (2006), at 346 ("Once again, the Appellate Body endorsed the narrow definition of conflict that is limited to situations where two provisions are mutually exclusive and situations where one provision 'authorizes' what another provision prohibits.").

[342] PAUWELYN (2003), at 190-99.

nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." For reasons stated above, this provision simply confers a procedural "right" to WTO Members for initiation of WTO litigation, with the wording "shall" referring to the exclusive jurisdiction of the WTO Tribunal over WTO claims.

On the other hand, Type 3 RTA jurisdictional clauses (such as the Protocol of Olivos under the Mercosur[343] and Article 2005(6) of the NAFTA[344]) and Type 5 RTA jurisdictional clauses (such as Article 2005(3) and (4) of the NAFTA[345]), in certain circumstances,[346] would effectively bar the complaining party from initiating the WTO dispute settlement system.

In such circumstances, a jurisdictional conflict between the WTO Tribunal and the RTA Tribunal may be readily identified: the RTA jurisdictional clause explicitly prohibits the complaining party from litigating before the WTO Tribunal, while Article

[343] Protocol of Olivos art. 1(2) ("Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. . . . Once a dispute settlement procedure pursuant to the preceding paragraph has begun, *none of the parties may request the use of the mechanisms established in the other fora*.") (emphasis added).

[344] NAFTA, art. 2005(6) ("Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.").

[345] NAFTA art. 2005(3) ("In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.") & art. 2005(4) ("In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures): (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters, where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.").

[346] *See supra* Ch. 1, Pt. IV.

23.1 of the DSU expressly entitles the complaining party to do so. In the words of the *EC – Bananas III* Panel, the RTA jurisdictional clause "prohibits what [Article 23.1 of the DSU] explicitly permits."[347] This is a type 4 conflict recognized under public international law as well as within the WTO legal system.

At this stage, a few words of caution may be desirable. As stated above, a conflict in the applicable law (conflict between a prohibition and a permission) between Article 23.1 of the DSU and a Type 3 or Type 5 RTA jurisdictional clauses is identified. This interim conclusion is, first of all, subject to the conflict-avoidance techniques; that is to say, if the conflict thus identified can be avoided through conflict-avoidance techniques, there would not be any genuine jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals (although the WTO Tribunal in such circumstances would possibly be said to lack jurisdiction based on grounds other than jurisdictional conflict). Secondly, this identification of conflict is subject to a very significant premise, *viz.* that RTA jurisdictional clauses are directly "applicable" in the WTO dispute settlement system. As pointed out above, this identified conflict is one type of "conflicts in the applicable law"; thus, if RTA jurisdictional clauses are inapplicable in the first place, then, RTA jurisdictional clauses would not be in any position to conflict with the DSU in the WTO dispute settlement system. Put differently, if RTA jurisdictional clauses are not applicable, then, the question of conflict with the DSU does not arise at all in the WTO dispute settlement system. These significant issues will receive further treatment later.

IV. CONCLUSION ON CHAPTER TWO

[347] Panel Report, *EC – Bananas III (US)*, ¶¶ 7.159-7.160 (emphasis added) (citation omitted).

This Chapter first examines the jurisdiction of international tribunals generally, and has established (i) that consent by both parties is required for the jurisdiction of any international tribunal, (ii) that each international tribunal has certain jurisdiction that is inherent in its very nature as an international adjudicating body, including specifically the jurisdiction to examine its own jurisdiction, (iii) that jurisdiction and admissibility, though both preliminary matters that would preclude an international tribunal from entering into the merits of a case, are indeed distinct from each other, and (iv) that very significantly, jurisdiction of a given international tribunal and the law to be applied by that tribunal for the purpose of dispute settlement are legally distinct.

These considerations must be borne in mind at all times in the examination of the jurisdiction of the WTO Tribunal, an international tribunal in nature. Thus, (i) although normally the consent of the respondent Member in a dispute has already been given *ex ante*, it remains possible that the complaining Member, although conferring its consent through the very initiation of the WTO litigation, may have invalidly given that consent because its right to open WTO litigation is limited; (ii) the WTO Tribunal, like other international tribunals, also has certain jurisdiction that is inherent for the purpose of proper administration of its judicial functions, including the jurisdiction to examine, *proprio motu*, the existence and scope of its jurisdiction; (iii) even in the WTO context, jurisdiction and admissibility have to be distinguished; (iv) although the WTO Tribunal's jurisdiction is narrowly limited to claims based upon the WTO law (and not, for example, RTA law), that narrow scope of subject matter jurisdiction does not necessarily limit the scope of the applicable law in the WTO dispute settlement system; and (v) the right to open WTO litigation, as conferred by Article 23.1 of the DSU, is by no means an absolute one; it is subject to restrictions both within the DSU and outside the DSU.

Also, this Chapter has already identified a jurisdictional "conflict" between the WTO Tribunal and RTA Tribunals in the circumstances where the complaining Member's initiation of the WTO litigation is in plain violation of Type 3 or Type 5 RTA jurisdictional clauses. For such conflict to arise, however, the necessary premise is that RTA jurisdictional clauses are applicable in the WTO dispute settlement system.[348] This has been one of the most controversial issue, and, in Chapter Three, this thesis endeavors to answer this issue in a way that is amply sufficient for the purpose of providing a positive solution to the jurisdictional conflict between the WTO Tribunal and RTA Tribunals (without the need to take any side with the diametrically opposed academic views). After that, Chapter Four will propose a framework to tackle with the jurisdictional conflict identified.

[348] *See, e.g.*, PAUWELYN (2003), at 472 (arguing that if MEAs are altogether inapplicable in the WTO dispute settlement system, a conflict between MEAs and WTO norms "could never arise in the first place").

CHAPTER THREE

NON-WTO NORMS AS APPLICABLE LAW IN WTO DISPUTE SETTLEMENT: CUSTOMARY INTERNATIONAL LAW, GENERAL PRINCIPLES OF LAW AND NON-WTO TREATIES

As stated previously, the Law of Treaties Approach identifies a (potential) conflict between the jurisdictional clause of the WTO Tribunal (*viz.* Article 23.1 of the DSU) and (Type 3 and Type 5) jurisdictional clauses of RTA Tribunals (without prejudice to the question whether such conflict may be avoided through treaty interpretation). Under the alternative Institutional Approach, too, jurisdictional conflicts between the WTO Tribunal and RTA Tribunals can also be identified. The question that follows is: under the WTO dispute settlement system, what are the legal implications that flow from such jurisdictional conflicts. Even if the conflict cannot be avoided and RTA jurisdictional clauses are found to override the jurisdictional clause of the WTO Tribunal by virtue of, say, *lex specialis*, it remains an open question whether RTA jurisdictional clauses are applicable in the WTO dispute settlement system. Indeed, as stated previously, the applicability of RTA jurisdictional clauses is the starting point for any discussion of a conflict (in the applicable law) between RTA jurisdictional clauses and the DSU. Also, even where RTA jurisdictional clauses are not applicable in the WTO dispute settlement system, it remains possible that the jurisdiction of the WTO Tribunal may be affected by virtue of some other non-WTO norms, such as *estoppel*.

Therefore, in this Chapter, the central question is: to what extent non-WTO norms can be applicable in the WTO dispute settlement system. Part I of this Chapter first

defines the concept "applicable law" and distinguishes it from other related concepts. Part II identifies the WTO law applicable in the WTO dispute settlement system. As a further step, Part III examines different approaches to the applicability of non-WTO norms in the WTO dispute settlement system, and presents the approach adopted in this thesis. Proceeding on that basis, Part IV identifies certain non-WTO law applicable before the WTO Tribunal. Finally, some concluding remarks are offered in Part V.

I. APPLICABLE LAW DEFINED

Before examining the applicable law in the WTO dispute settlement system, it is imperative that the concept "applicable law" be defined. In this connection, it is first recalled that both under public international law and in the WTO legal system, the concept of (subject matter) jurisdiction is distinct from the concept of applicable law. For instance, while Article 36(1) of the ICJ Statute shapes the subject matter jurisdiction of the ICJ, Article 38(1) of the same Statute specifies the applicable law in ICJ proceedings:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

It is noted that it seems to be a settled practice to refer to Article 38(1) of the ICJ Statute as setting forth the "sources of law" in public international law.[349] However, "judicial decisions" and "teachings" referred to as "subsidiary means for the determination of rules of law" in Article 38(1)(d) are not directly applicable, although they may constitute evidence of the state of law.[350] Thus, a "source of law" is not necessarily directly applicable, whereas the focus of this thesis is the direct applicability of certain non-WTO norms. For this reason, and also in order to avoid unnecessary questions concerning the distinction between "formal" sources of law and "material" sources of law[351] that may derive from the phrase "sources of law," in this thesis the phrase "applicable law" is adopted instead of "sources of law."

When a norm is considered "applicable law," it means that it is directly applicable. In this connection, it is also relevant to consider the distinction between treaty "application" and treaty "interpretation." It is one thing for an international tribunal to

[349] *See, e.g.*, BROWNLIE (2008), at 5 ("Article 38 is generally regarded as a complete statement of the sources of international law."); PALMETER & MAVROIDIS (2004), at 49 ("Modern discussions of the sources of international law usually begin with a reference to Article 38(1) of the [ICJ Statute]."); Palmeter & Mavroidis (1998), at 398 ("Modern discussions of the sources of international law usually begin with a reference to Article 38(1) of the [ICJ Statute]."); BOYLE & CHINKIN (2007), at 41 ("The traditional statement of the sources of international law [is] . . . Article 38(1) [of the ICJ Statute].").

[350] BROWNLIE (2008), at 19, 24.

[351] *Id.* at 3-4.

directly apply a norm, while it is another thing to refer to that norm as guidance for the interpretation of another norm.[352]

Here, it is noted that the distinction between treaty application and treaty interpretation may not be always readily discernable; not only is it sometimes difficult to see whether an international tribunal is applying certain norm or simply resorting to that norm for the interpretation of another, but at times the application of a norm may achieve the same result as the using the norm for the interpretation of another norm.[353] For instance, in the examination of whether certain challenged measures were attributable to Turkey, the *Turkey – Textiles* Panel resolved this question by directly applying rules of customary international law concerning State responsibility;[354] on the other hand, some commentators argue that the *Turkey – Textiles* Panel could have reached the same results by using these rules of customary international law as guidance for the interpretation of the word "Member" in the GATT.[355]

Although there is only a fine line between treaty application and treaty interpretation, this distinction is nevertheless meaningless in the context of the WTO dispute settlement system. For instance, in *US – Shrimp*, the Appellate Body referred to the

[352] Bartels (2001), at 510-12 (suggesting that the use of non-WTO law as guidance for the interpretation of WTO law is different from the direct application of non-WTO law); Trachtman (2005), at 132 ("[W]e must distinguish between the use of general international law in connection with interpretation and construction of WTO law, and the use of general international law as applicable law."); Pauwelyn (2004b), at 136-37.

[353] *See, e.g.*, MITCHELL (2008), at 82, 97 ("A fine line distinguishes interpretation from application, and a principle may sometimes be used in either an interpretative or non-interpretative manner to achieve the same result.") ("[T]he distinction between application and interpretation is not concrete, and it may in some cases be difficult to determine whether a WTO Tribunal is applying international law or simply using international law to interpret a WTO provision."); GARDINER (2008), at 26-29 (noting the inextricable relationship between treaty interpretation and treaty application).

[354] Panel Report, *Turkey – Textiles*, ¶¶ 9.42-9.43.

[355] Bartels (2001), at 512 ("What is interesting is that while it might have been possible to treat the issue as an interpretation of the 'Member' bound by the GATT, the Panel did not phrase its enquiry in this way. And this was presumably not only because to do so would have been unnecessarily strained; but also because it would have changed nothing in the Panel's reasoning."). *See also* MITCHELL (2008), at 82.

UNCLOS as well as other non-WTO treaties concerning environmental protection as guidance for the interpretation of the term "exhaustible natural resources" contained in Article XX:(g) of the GATT.[356] However, this does not necessarily mean that the UNCLOS or those other non-WTO treaties may be directly applicable for the resolution of disputes in the WTO dispute settlement system; in fact, the direct applicability of such non-WTO treaties in the WTO dispute settlement system has generated vigorous debates, as will be discussed further below. Thus, in light of such controversy, it is indeed necessary to maintain a distinction between treaty application and treaty interpretation.

Another distinction exists between the use of a certain norm as "fact" or "evidence", on the one hand, and the use of a certain norm as applicable law, on the other. For instance, in *US – Shrimp*, the Appellate Body referred to the Inter-American Convention for the Protection and Conservation of Sea Turtles, a non-WTO treaty, as factual evidence that the lack of serious efforts on the part of U.S. to negotiate a comparable treaty with other WTO Members constituted unjustifiable discrimination in the sense of the chapeau of Article XX of the GATT.[357] Likewise, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body observed that "[t]he Panel rightly used the Inter-American Convention as a factual reference in this exercise of comparison" between U.S. efforts to negotiate the Inter-American Convention with one group of shrimp-exporting States and U.S. efforts to negotiate a comparable treaty with another group of shrimp-exporting States.[358] Thus, in these cases, the Inter-American Convention was relied not as part of the applicable law, but as factual evidence for the determination of

[356] Appellate Body Report, *US – Shrimp*, ¶¶ 130-34.

[357] Appellate Body Report, *US – Shrimp*, ¶¶ 169-76. *See also* PALMETER & MAVROIDIS (2004), at 74.

[358] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, ¶ 130.

whether the U.S. had engaged in comparable negotiations for a similar treaty as required under the chapeau of Article XX of the GATT.[359]

From the foregoing discussions, it is evident that a distinction should be maintained between three different uses of a norm: (i) use of a norm as factual evidence; (ii) use of a norm as guidance for the interpretation of another norm; and (iii) use of a norm as directly applicable law.[360] Therefore, the concept "applicable law" is defined as including only those norms that are directly applicable. Also, "applicable law" includes all norms applicable as law "in the chain of legal reasoning."[361] It may follow that not only those norms applicable to the formulation of "claims," but those norms applicable to the "defenses" raised against the claims are also part of the applicable law.

II. APPLICABLE LAW IN THE WTO DISPUTE SETTLEMENT SYSTEM: WTO LAW

Before entering into the question whether non-WTO law is part of the applicable law in the WTO dispute settlement system, it is perhaps useful to first address a less controversial question: what is the scope of "WTO law" directly applicable before the WTO Tribunal.

A. WTO Covered Agreements

[359] PAUWELYN (2003), at 464.

[360] Bartels (2001), at 510-12. *See also* Trachtman (2005), at 136 (denying the applicability of non-WTO norms while acknowledging that non-WTO norms of international law "may in appropriate circumstances be used by panels and the Appellate Body in interpretation, where specifically incorporated, and as fact").

[361] Bartels (2001), at 511-12.

First of all, the WTO covered agreements are, without any question, part of the applicable law in the WTO dispute settlement system. This is not only by virtue of Articles 1 and 7 of the DSU,[362] but also because in a dispute before the WTO Tribunal, the WTO covered agreements are "expressly recognized by the contesting states" in the sense of Article 38(1)(a) of the ICJ Statute.[363] Thus, the WTO covered agreements are the most fundamental applicable law in the WTO dispute settlement system.

B. Non-WTO Treaties Incorporated into, or Referenced by, or Concluded under, the WTO

At times, the WTO covered agreements incorporate other non-WTO treaties, and to this extent, such non-WTO treaties become part of the applicable law in WTO litigation.[364] For instance, the TRIPS Agreement has incorporated certain intellectual property treaties,[365] and, on this basis, the Appellate Body concluded that "WTO Members, whether they are countries of the Paris Union or not, are obliged, under the *WTO Agreement*, to implement those provisions of the Paris Convention (1967) that are incorporated into the *TRIPS Agreement*."[366]

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[362] *See, e.g.*, MATSUSHITA ET AL. (2006), at 37 ("The covered agreements are a source of law according to legislative postulate: Art[icle] 1 [of the] DSU and Art[icle] 7 [of the] DSU . . . make it clear that they constitute the prime input for the work by the WTO adjudicating bodies.").

[363] *See, e.g.*, PALMETER & MAVROIDIS (2004), at 49-50; Palmeter & Mavroidis (1998), at 398.

[364] *See, e.g.*, PAUWELYN (2003), at 445; Trachtman (1999), at 343.

[365] TRIPS Agreement, art. 1.3.

[366] Appellate Body Report, *US – Section 211 Appropriations Act*, ¶ 125. *See also* Panel Report, *Canada – Pharmaceutical Patents*, ¶ 7.70 (referring to the preparatory work of the Berne Convention in the interpretation of the TRIPS Agreement).

In this connection, it is noted that at some other times, a non-WTO treaty may be incorporated into the WTO in an implicit manner. For instance, the GATT General Council granted, and the WTO General Council extended, a waiver (Lomé waiver) of specified obligations (including MFN obligation set forth in Article I:1 of the GATT, which would otherwise require EC to extend the trade preferences under the Lomé Convention to all other WTO Members) to the EC with respect to the Lomé Convention, which required EC to extend preferential treatment to goods originating in certain African, Caribbean and Pacific (ACP) countries. It has been argued that as the Lomé waiver effectively incorporated the Lomé Convention into the WTO, the Lomé Convention, to the extent incorporated into the WTO by the Lomé waiver, became part of the applicable law.[367]

On the other hand, some WTO covered agreements do not incorporate, but merely make explicit reference to non-WTO treaties. For instance, the SPS Agreement refers to international standards adopted by the Codex Alimentarius Commission, the International Office of Epizootics and the Secretariat of the International Plant Protection Convention; [368] the TBT Agreement refers to international standards established by an "international body or system,"[369] including the International Agency for Research on Cancer;[370] and the SCM Agreement makes reference, though implicitly,

[367] *See* Appellate Body Report, *EC – Bananas III*, ¶ 167; Panel Report, *EC – Bananas III (US)*, ¶ 7.98. *See also* PALMETER & MAVROIDIS (2004), at 71-72; Trachtman (1999), at 343. *Cf.* OESCH (2003), at 210 (arguing that the Lomé Convention is explicitly incorporated into the WTO). This thesis submits, however, that the same results would seem to have been reached by interpreting the Lomé waiver (part of WTO law) by reference to the Lomé Convention as a "fact," without considering the Lomé Convention being incorporated into the WTO; indeed, this seems to be what has been done by the WTO Tribunal in *EC – Bananas III*; *see* Appellate Body Report, *EC – Bananas III*, ¶¶ 168-78.

[368] SPS Agreement, Annex A, ¶ 3.

[369] TBT Agreement, Annex 1, ¶ 4.

[370] Panel Report, *EC – Asbestos*, ¶ 8.186.

to the OECD Arrangement on Guidelines for Officially Supported Export Credits.[371] Such non-WTO norms, as referenced by but not incorporated into the WTO covered agreements, are not part of the applicable law in the WTO dispute settlement, although they may serve as a benchmark or a basis for the assessment of a distinct WTO-specific obligation.[372]

On a related subject, in the *EC – Poultry* case, the WTO Tribunal was faced with legal issues concerning the Oil Seeds Agreement concluded between EC and Brazil under Article XXVIII of the GATT, on the one hand, and EC's Schedule LXXX, on the other. The Appellate Body noted in that case that the Oil Seeds Agreement, although concluded under Article XXVIII of the GATT, "had not been integrated" into the WTO covered agreements, was not "referred to" anywhere in the WTO covered agreements, and, accordingly, was not eligible as a legal basis for WTO claims;[373] nevertheless, the Appellate Body stated that the Oil Seeds Agreement served as a "supplementary means of interpretation" in the sense of Article 32 of the VCLT for the purpose of interpreting EC's Schedule LXXX.[374] As evident from the Appellate Body's ruling in *EC – Poultry*, a bilateral agreement, though negotiated under the auspices of the GATT, could not serve as the legal basis for a *claim* before the WTO Tribunal. This is in line with the subject matter jurisdiction of the WTO Tribunal, as previously reviewed, which is

[371] *See* SCM Agreement, Annex I, ¶ (k); Appellate Body Report, *Brazil – Aircraft*, ¶ 181 ("We believe that the *OECD Arrangement* can be appropriately viewed as one example of an international undertaking providing a specific market benchmark by which to assess whether payments by governments, coming within the provisions of item (k)."). *See also* Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, ¶ 5.83; Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, ¶ 5.78 ("It is well accepted that the OECD Arrangement is an 'international undertaking on official export credits' in the sense of the second paragraph of item (k)."); Panel Report, *Canada – Aircraft Credits and Guarantees*, ¶ 7.234.

[372] PAUWELYN (2003), at 445.

[373] Appellate Body Report, *EC – Poultry*, ¶¶ 79-81.

[374] Appellate Body Report, *EC – Poultry*, ¶ 83. *See also* Steger & Lester (2004), at 138.

limited to claims based on WTO covered agreements. However, this does not, *ipso facto*, lead to the conclusion that a bilateral agreement can never serve as the legal basis for a *defense* in a dispute before the WTO Tribunal. This point will be substantiated further below.

C. Other "Secondary" WTO Authorities

As aforementioned, the WTO covered agreements as well as those non-WTO treaties incorporated into the WTO are part of the applicable law, i.e. directly applicable in the WTO dispute settlement system. Apart from these, there are certain other "secondary"[375] WTO authorities which the WTO Tribunal may refer to but may not rely as applicable law *per se*. These include: panel (including both GATT panels and WTO panels) and Appellate Body reports[376] as well as decisions and recommendations by various WTO organs.[377] These are not directly applicable as "law" in the WTO dispute settlement system and thus are not considered as part of the "applicable law" for present purposes.

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[375] Bartels (2001), at 500.

[376] *See, e.g.*, MATSUSHITA ET AL. (2006), at 58-64; PALMETER & MAVROIDIS (2004), at 51-64; Palmeter & Mavroidis (1998), at 400-406. Suffice to say, for present purposes, that panel and Appellate Body reports create security and predictability in the WTO legal system and are usually followed absent cogent reasons to do otherwise; *see* Appellate Body Report, *Japan – Alcoholic Beverages II*, 14 ("Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."); Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, ¶ 109 ("This reasoning applies to adopted Appellate Body Reports as well."); Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, ¶ 188 ("Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."); Appellate Body Report, *US – Stainless Steel (Mexico)*, ¶ 160 ("Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.").

[377] *See, e.g.*, MATSUSHITA ET AL. (2006), at 64-66.

III. APPLICABLE LAW IN THE WTO DISPUTE SETTLEMENT SYSTEM: NON-WTO NORMS

Turning now to one of the most crucial questions in this thesis, *viz.* to what extent non-WTO norms can be directly applicable in the WTO dispute settlement system. In this connection, it is first recalled that both under public international law generally and within the WTO legal system specifically, the concept of jurisdiction is legally distinct from the concept of applicable law, and that it seems generally accepted that the jurisdiction *ratione materiae* of the WTO Tribunal is limited to claims based on WTO covered agreements.[378] However, views begin to diverge on the scope of applicable law in the WTO dispute settlement system.

Unlike the ICJ[379] and the ITLOS[380], the applicable law in the WTO dispute settlement system is not explicitly defined by any provision of the DSU. Thus, the question of the scope of applicable law in the WTO dispute settlement system has seemed problematic.[381] As will be seen below, recourse has been made to various provisions of the DSU to establish the scope of applicable law in WTO, including particularly Articles 1.1, 3.2, 7, 11, and 19.2 of the DSU, and these provisions have been used to argue both ways – for and against a more extensive scope of applicable in the WTO dispute settlement system.[382]

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[378] *See supra* Ch. 2.

[379] ICJ Statute, art. 38(1).

[380] UNCLOS, art. 293(1).

[381] ILC Report on Fragmentation of International Law, ¶ 45.

[382] *Id.* ¶ 45 n.43.

Discussions of the applicability of non-WTO norms in the WTO dispute settlement system may begin with Article 3.2 of the DSU, which provides, in relevant part, that "[t]he Members recognize that [the WTO dispute settlement system] serves . . . to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Therefore, in its very first case, the Appellate Body made the oft-cited statement[383]:

> [T]he [GATT] "is not to be read in clinical isolation from public international law."

Hence, it is well-established that customary international law concerning treaty interpretation is directly applicable in the WTO dispute settlement system. Beyond that, the *Korea – Procurement* Panel made the following statement[384]:

> We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. *Customary international law* applies generally to the economic relations between the WTO Members. Such international law *applies to the extent that the WTO treaty agreements do not "contract out" from it*. To put it another way, to the extent there is no conflict

[383] Appellate Body Report, *US – Gasoline*, ¶ 17.

[384] Panel Report, *Korea – Procurement*, ¶ 7.96 (emphasis added).

or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

There, it seems to suggest the direct applicability of customary international law in the WTO legal system to the extent that the WTO law does not "contract out" from customary international law. However, this is subject to vigorous debate.

In light of the foregoing, and in the particular light of the fact that discussions on the applicability and non-applicability of non-WTO norms in the WTO dispute settlement system review and seek support from the relevant DSU provisions, it seems to be a good starting point to first of all take a brief look at those relevant DSU provisions.

A. Relevant DSU Provisions on Applicable Law in the WTO Dispute Settlement System

Reproduced below are the DSU provisions relevant to the delineation of the scope of applicable law in the WTO dispute settlement system, including Articles 1.1, 3.2, 7, 11, and 19.2 of the DSU.

1. Article 1.1 of the DSU

The rules and procedures of this Understanding shall *apply to disputes brought pursuant to the consultation and dispute settlement provisions of the* agreements listed in Appendix 1 to this Understanding (referred to in this

Understanding as the "*covered agreements*"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.
(emphasis added)

2. Article 3.2 of the DSU

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

3. Article 7 of the DSU

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"*To examine, in the light of the relevant provisions in* (name of the *covered agreement(s)* cited by the parties to the dispute), *the matter* referred to the DSB by (name of party) in document ... *and to make such findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in *that/those agreement(s).*"

2. Panels *shall address the relevant provisions in any covered agreement or agreements cited* by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

(emphasis added)

4. Article 11 of the DSU

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an *objective assessment of the matter before it, including an objective assessment of* the facts of the case and *the applicability of and conformity with the relevant covered agreements,* and

make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the *covered agreements*. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

5. Article 19.2 of the DSU

In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body *cannot add to or diminish the rights and obligations provided in the covered agreements*. (emphasis added)

B. Different Approaches to the Applicability of Non-WTO Norms in the WTO Dispute Settlement System

1. Restrictive Approach: Only WTO covered agreements are applicable law, and non-WTO norms are *altogether inapplicable* in the WTO dispute settlement system[385]

[385] On views towards limiting the scope of applicable law in WTO dispute settlement to WTO law only, see generally Trachtman (2005); Trachtman (2004); Trachtman (2002); Trachtman (1999); Marceau (1999); Marceau (2001); Marceau (2002); Kwak & Marceau (2006). *See also* Steger (2004), at 143-44 ("The practical fact that there is compulsory jurisdiction in the WTO, although it creates certain inequities with respect to enforcement of non-WTO obligations under other treaties, is not sufficient in itself to extend the jurisdiction of WTO panels and the Appellate Body into areas of international law they were never intended, and are not competent or qualified, to adjudicate."); Guruswamy (1998), at 311 ("The law applied by GATT/WTO is confined to that found in itw own treaties and does not recognize any broader corpus of general international law."); Smitmans (2006), at 254 ("WTO will not enforce the rights and obligations arising from regional and preferential trading arrangements if they are not part of the WTO Agreements."); Cameron & Gray (2001), at 264 ("Since the [WTO Tribunal] is a creature of a treaty and

Commentators advocating for the proposition that the law applicable in the WTO dispute settlement system is limited to the WTO covered agreements (referred to in this thesis as the "Restrictive Approach") rely heavily upon the DSU's repeated reference to the term "covered agreements" as well as its emphasis that the WTO Tribunal cannot "add to or diminish" the rights and obligations under the covered agreements. Indeed, they find rather potent textual support.

For instance, Trachtman, one of the leading scholars advocating this approach, quite strongly pointed out that "[w]ith so much specific reference [in Articles 3.2, 7 and 11 of the DSU] to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable."[386]

With respect to the DSU provisions, Trachtman first relies on Article 3.2 of the DSU, and (i) emphasizes that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements,"[387]; (ii) argues that in light of the phrase "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" in this provision, "if [the draftsmen] had intended to also admit other rules, they should have deleted the restrictive reference to 'rules of interpretation'" in Article 3.2 of the DSU, and pursuant to *expressio unius* (the reference to one of a group, by implication, excludes other members of the group), Article 3.2 of the DSU "demonstrated an intent [on the part of the draftsmen] to exclude other international law by virtue of their decision not to

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is designed to interpret its parent legislation, its jurisdiction is primarily limited to applying the provisions of the WTO Agreements.").

[386] Trachtman (1999), at 342.

[387] Trachtman (2005), at 137.

mention it;"[388] and asserts that the phrase "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" in this provision "also suggests the limited scope of applicable law in WTO dispute settlement."[389] Turning to Article 7.1 of the DSU, Trachtman argues that the "mandate [of the WTO Tribunal] is to examine the matter in light of the relevant provisions of the covered agreements, and nothing more."[390] Turning then to Article 11 of the DSU, Trachtman argues that the "objective assessment" to be carried out by WTO panels "consists of two things: first, an objective assessment of the facts, and second, an assessment of the applicability of and conformity with the relevant covered agreements. The reference to other findings is to assist the DSB, but is not part of the objective assessment of the matter before the panel. Thus, again, other international law is clearly excluded."[391]

Trachtman also seeks support from the WTO/GATT jurisprudence, and argues (i) that the GATT Panel held in *Canada – Herring and Salmon* that "under the GATT 1947, other international law was not considered applicable under the GATT dispute settlement," and that by virtue of Article 3.1 of the DSU[392] as well as Article XVI:1 of the WTO Agreement[393], this holding still remains true in the WTO;[394] (ii) that the

[388] Trachtman (2005), at 138.

[389] *Id.*

[390] *Id.*

[391] *Id.* at 139.

[392] DSU, art. 3.1 ("Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.").

[393] WTO Agreement, art. XVI:1 ("Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.").

Appellate Body held in *EC – Poultry* that "a tariff agreement settling a matter between two WTO members does not constitute WTO law applicable by a panel";[395] (iii) that the Appellate Body held in *Argentina – Textiles and Apparel* that "a purported agreement between Argentina and the IMF would not modify WTO obligations";[396] and (iv) with respect to *EC – Hormones*, that "[i]f other international law were applicable, the Appellate Body decision in the *EC – Hormones* case not to determine whether or not the precautionary principle is part of customary international law would be negligent . . . . The only answer is that there is no obligation, or authority, to apply other international law."[397] Beyond the WTO jurisprudence, Trachtman further relies on the ICJ's practice and argues that "[i]n [*Oil Platforms*], the ICJ scrupulously avoided applying general international law, and instead portrayed its examination of the laws of armed warfare as interpretation of the Iran-US Friendship, Commerce and Navigation treaty."[398]

As Trachtman forcefully concludes, "[t]here is much textual and contextual evidence of the intent of the Members that only WTO law would be applicable in WTO dispute settlement. Arguments to the contrary face an overwhelming barrage of inconsistent textual evidence."[399]

Generally along the same line, Marceau generally believes that "under the DSU not all sources of law may be applied or enforced by WTO adjudicating bodies"[400] and

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[394] Trachtman (2005), at 137.

[395] Trachtman (1999), at 342-43.

[396] *Id.* at 343.

[397] Trachtman (2005), at 139.

[398] *Id.* at 138 (quoting Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 181-82 (Nov. 6)).

[399] Trachtman (2005), at 139.

[400] Marceau (1999), at 110.

advocates, more specifically, that "the WTO adjudicating bodies do not have a general international law jurisdiction: they can only examine whether WTO law has been violated. Thus, the applicable law before WTO adjudicating bodies is only WTO law, i.e. whether WTO law has been violated."[401] In particular, Marceau seems to rely more heavily on Articles 3.2 and 19.2 of the DSU, and argues that if the WTO Tribunal applies non-WTO law, it may "add to or diminish" WTO Members' rights and obligations under the WTO covered agreements and that this is explicitly prohibited by the said provisions.[402]

Even though this approach advocates that the applicable law in WTO dispute settlement is limited to WTO covered agreements, it nevertheless seems to acknowledge that the WTO Tribunal may *apply* international law with a view to *ensuring the WTO Tribunal's functions* and *resolving procedural matters* not provided for in the DSU. For instance, Trachtman acknowledges that "other international law may be used in construction in order to complete the procedural structure of the DSU itself and to ensure an 'objective assessment of the matter' under Article 11 of the DSU. An example is the decision in *US – Wool Shirts and Blouses* regarding the allocation of the burden of

[401] Marceau (2001), at 1116. *See also* Marceau (2002), at 763 ("In sum, the mandate of the panels and the Appellate Body is defined and limited: to interpret WTO law and determine whether a provision of the covered agreements has been violated. In doing so, the panels and the Appellate Body apply and enforce WTO law. Formally, the WTO adjudicating bodies only have the capacity to interpret and apply WTO law and cannot interpret, let alone reach any legal conclusion of a violation of or compliance with, other treaties or customs.").

[402] Marceau (2002), at 764 ("WTO panels and the Appellate Body cannot enforce or give effect to human rights provisions, to the extent that such provisions would add to or diminish WTO rights and obligations."); Marceau (2001), at 1102, 1116. *See also* Steger (2004), at 144 ("Professor Pauwelyn argues that panels and the Appellate Body would not 'add to or diminish' the rights and obligations in the WTO agreements by applying other international law in force between the parties to a dispute because that other international law is also binding on those parties. However, his analysis ignores the clear wording in two provisions of the DSU emphasizing that panels, the Appellate Body, and the DSB do not have the legal authority to 'add to or diminish' the '*rights and obligations provided in the covered agreements*.'"). *See also* Weiss (2003), at 193-94 ("A direct application of international treaties outside WTO law might also diminish or add to the rights and obligations of the covered agreements – contrary to Art. 3.2 DSU.").

proof."[403] Marceau also refers to *US – Wool Shirts and Blouses*[404] and makes a similar observation that "WTO adjudicative bodies have indeed made reference to general principles of law with a view to ensuring the effectiveness of the adjudication process."[405]

Also, it is interesting to note that while denying the applicability of international law in the WTO dispute settlement, Marceau nevertheless acknowledges that "because of its very nature, *jus cogens* would be part of all laws and thus would have direct effect in WTO law."[406]

2. Liberal Approach: All norms of international law are (potentially) applicable in the WTO dispute settlement system[407]

[403] Trachtman (2005), at 136.

[404] Appellate Body Report, *US – Wool Shirts and Blouses*, 14 ("In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.") (citation omitted).

[405] Marceau (2002), at 765. *See also* Steger (2004), at 146 ("In some cases involving questions of practice and procedure not expressly provided for in the WTO DSU, the Appellate Body has sought guidance from the practice of other international legal systems and tribunals.")

[406] Marceau (2002), at 756. *See also* Weiss (2003), at 199 ("[P]anels and the Appellate Body have to apply *ius cogens*.").

[407] On views towards recognizing public international law as part of the applicable law in WTO dispute settlement, see generally PALMETER & MAVROIDIS (2004); PAUWELYN (2003); OESCH (2003); Palmeter & Mavroidis (1998); Bartels (2001); Pauwelyn (2004b); Pauwelyn (2003); Pauwelyn (2005); Pauwelyn (2001). *Cf.* Schoenbaum (1998), at 658 (seemingly suggesting that the applicable law in the WTO dispute settlement should include international law on a *lex ferenda* basis).

Generally speaking, commentators advocating that the applicable law in the WTO dispute settlement system is not limited to WTO covered agreements but extends to other international law tend to emphasize the distinction between jurisdiction and applicable law as different concepts.[408] The commentators advocating this approach criticizes that the Restrictive Approach "places too restrictive an interpretation on the relevant provisions of the DSU, is unduly positivistic, and does not reflect the actual practice of Panels and the Appellate Body."[409] While recognizing that the WTO covered agreements constitute the most fundamental part of the applicable law in the WTO dispute settlement system, they argue that all other norms as listed in Article 38(1) of the ICJ Statute, in particular customary international law, general principles of law and other non-WTO treaties, are also *potential* applicable law to be applied by the WTO Tribunal.[410]

Commentators advocating this Liberal Approach tend to defend their position by broadly construing the relevant DSU provisions. For instance, with respect to the specific identification of "customary rules of interpretation of public international law" in Article 3.2 of the DSU, Bartels argues that this "does not exclude the application of other rules of public international law"[411] and, in this connection, relies on the *Korea* –

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[408] *See, e.g.*, PAUWELYN (2003), at 460-63; Bartels (2001), at 501-503; Pauwelyn (2001), at 554-66. It is noted that this distinction between jurisdiction and applicable is also maintained by commentators rejecting the applicability of international law in the WTO dispute settlement system; *see, e.g.*, Marceau (2002), at 757-79.

[409] Bartels (2001), at 499.

[410] PALMETER & MAVROIDIS (2004), at 50 ("The texts [of the WTO covered agreements], however, are only 'first of all.' They do not exhaust the sources of potentially relevant law. To the contrary, all of the subparagraphs of Article 38(1) [of the ICJ Statute] are potential sources of law to be drawn on in WTO dispute settlement."); Palmeter & Mavroidis (1998), at 399 ("The texts [of the WTO covered agreements], however, are only 'first of all.' They do not exhaust the sources of potentially relevant law. To the contrary, all of the subparagraphs of Article 38(1) [of the ICJ Statute] are potential sources of law to be drawn on in WTO dispute settlement."). *See also* Bartels (2001), at 499 n.2, 502 (agreeing that all norms set forth in Article 38(1) of the ICJ Statute are potential applicable law in WTO dispute settlement).

[411] Bartels (2001), at 506.

Procurement Panel's finding that "[w]e see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply."[412]

With respect to Article 7 of the DSU, Bartels argues that (i) the phrase "in the light of" in Article 7.1 "does not limit the sources of law that might be relevant in examining the 'matter'"; [413] (ii) the phrase "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" in Article 7.2 "does not prevent Panels from 'addressing' other sources of law in the course of deciding the dispute";[414] and (iii) the possibility of a WTO panel being established with non-standard terms of reference, as envisaged in Article 7.3, suggests the possibility that such a WTO panel could be "mandated by the DSB to apply sources of law other than the rules set out in the covered agreements."[415]

With respect to Article 11 of the DSU, Bartels maintains that not only does this provision "say[] nothing about law from other sources not being applicable to the facts of the case," but, on the contrary, this provision indeed "implies that the application of general principles of international law will be necessary to determine whether (or not) the covered agreements are applicable."[416]

With respect to Articles 3.2 and 19.2, Bartels argues that these two provisions constitute a "conflicts rule" ensuring "primacy" of WTO covered agreements over other applicable international law, while acknowledging that these provisions are "not a normal conflicts rule in that [they do] not purport to regulate conflicts between the

[412] Panel Report, *Korea – Procurement*, ¶ 7.96 n.753.

[413] Bartels (2001), at 505.

[414] *Id.*

[415] *Id.*

[416] *Id.* at 506.

covered agreements and other agreements as a matter of substantive international law."[417] In this connection, Bartels relies, *inter alia*, on the Appellate Body's holding in *EC – Hormones* that "the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*."[418]

Thus, the line of arguments advocated by Bartels can be generally summarized as: (i) recognizing the limited jurisdiction *ratione materiae* of the WTO Tribunal; (ii) advocating that apart from WTO covered agreements, all international law are applicable law in the WTO dispute settlement; and (iii) arguing that to the extent of conflict, WTO covered agreements prevail over other international law by virtue of the conflict rule enshrined in Articles 3.2 and 19.2 of the DSU.

This final point, *viz.* whether Articles 3.2 and 19.2 of the DSU constitute a conflict rule giving primacy to the WTO covered agreements over other international law, is perhaps where Bartels can be most notably distinguished from Pauwelyn, conceivably the most assertive advocate of the Liberal Approach. Considering the influence generated by Pauwelyn's writings in this subject, it seems desirable to spend some time reviewing his line of arguments.

While acknowledging that the subject matter jurisdiction of the WTO Tribunal is limited to WTO claims,[419] Pauwelyn asserts that potentially all international law, including customary international law, general principles of law as well as other non-WTO treaties, also forms part of the applicable law that can be invoked by the respondent Member as *substantive* and *procedural* defenses.[420]

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[417] *Id.* at 507.

[418] Appellate Body Report, *EC – Hormones*, ¶ 125.

[419] *See, e.g.*, PAUWELYN (2003), at 460-63; Pauwelyn (2001), at 554-66.

[420] *See generally* Pauwelyn (2003).

Pauwelyn counters the Restrictive Approach's heavy reliance on DSU provisions by first arguing that the cited DSU provisions, including Articles 3.2, 3.3 and 11 "relate to the *jurisdiction* or *substantive mandate* of WTO panels to enforce judicially only claims under WTO covered agreements, not to the *law* that may be applied in doing so."[421] As to Article 3.2 of the DSU, which instructs the WTO Tribunal to apply customary international rules of treaty interpretation, Pauwelyn argues that this confirmation of the applicability of customary international rules of treaty interpretation "does not amount to excluding" the applicability of all other norms of international law (as opposed to Trachtman's view that the confirmation of applicability of customary international rules of treaty interpretation by negative implication excludes the applicability of all other norms of international law); rather, "international law continues to apply to the WTO treaty *unless* the WTO treaty has contracted out of it," and while the WTO legal system may contract out of certain norms of international law, the WTO law cannot contract out of the international legal system entirely.[422]

As to the direction in Articles 3.2 and 19.2 of the DSU that the WTO Tribunal cannot "add to or diminish" WTO rights/obligations, Pauwelyn argues that these two provisions "do not address the *jurisdiction* of panels nor the *applicable law* that a panel can apply to a particular dispute, [n]or do they proclaim that WTO covered agreements must necessarily and always prevail over all past and future law";[423] rather, Pauwelyn asserts that these two provisions confirm a limitation (which would have existed under international law even without these explicit provisions) upon the WTO Tribunal's judicial function to engage in treaty interpretation of the WTO covered agreements in

[421] PAUWELYN (2003), at 465.

[422] *Id.* at 214-15, 467.

[423] *Id.* at 353.

that the WTO Tribunal cannot turn its interpretative function into law-making exercises.[424] Also, Pauwelyn argues that these two provisions do not constitute "conflict clauses" (as opposed to Bartels' view that they constitute "conflict clauses" which give precedence to WTO law over all other norms of international law), and that even if they do, they "would have no effect in respect of post-1994 treaty norms" because they cannot override future treaties (the only conflict clause prevailing over future treaties being Article 103 of the U.N. Charter).[425]

With respect to Articles 7.1 and 7.2 of the DSU, which oblige the WTO Tribunal to examine the matter before it "in the light of the relevant provisions in [the WTO covered agreements cited by the parties]" and to "address the relevant provisions in any covered agreement or agreements cited by the parties," Pauwelyn argues that although these two provisions create an obligation upon the WTO Tribunal to apply the WTO covered agreements, they do not preclude the WTO Tribunal from "addressing and, as the case may be, applying other rules of international law in order to decide the WTO claims" before the WTO Tribunal.[426]

Finally, Pauwelyn relies heavily on the WTO jurisprudence where, according to Pauwelyn, non-WTO norms are directly applied by the WTO Tribunal (as opposed to

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[424] *Id. See also* Stoll (2006), at 302 ("In institutional perspective, [the direction that the WTO Tribunal cannot add to or diminish WTO rights and obligations, as contained in Articles 3.2 and 19.2 of the DSU,] clarifies that it is not for the [WTO Tribunal] but rather for the political institutions of the WTO to alter or modify rights and duties of Members, particularly by way of an authoritative interpretation in accordance with Article IX:2 [of the] WTO Agreement."). On the judicial function of interpretation and its restraint more generally, see, for example, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 221, 229 (July 18) ("It is the duty of the Court to interpret the Treaties, not to revise them. The principle of interpretation . . . often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions [of the Treaty in question] a meaning which . . . would be contrary to their letter and spirit."); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 48 (July 18) ("As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.").

[425] PAUWELYN (2003), at 353-55.

[426] *Id.* at 466-69. *See also* Pauwelyn (2004b), at 138.

being resorted to for the interpretation of any WTO provision). Specifically, Pauwelyn argues that the WTO Tribunal has applied certain rules of general international law, including (i) the law of treaties, such as the principle of non-retroactivity of treaties and error in treaty formation; (ii) rules on State responsibility, such as rules on attribution and countermeasures; and (iii) procedural rules governing dispute settlement, such as standing, representation by private counsel, la competence de la competence, burden of proof, the treatment of municipal law, the authority to accept *amicus curiae* briefs and to draw adverse inferences and judicial economy. In addition, Pauwelyn argues that the WTO Tribunal has also applied other non-WTO treaties (such as the Lomé Convention) as well as unilateral acts of WTO Members.[427]

3. Approach adopted in this thesis

a) Critical analysis of the Restrictive Approach and the Liberal Approach

Before taking any approach, this thesis first engages in a brief analysis of both the Restrictive Approach and the Liberal Approach towards the scope of applicable law in the WTO dispute settlement regime. The core question here is: whether non-WTO norms are part of the applicable law in the WTO dispute settlement system.

First of all, the "burden of proof" should be established. Admittedly, legally speaking, no burden of proof is involved in the determination of a question of law, and the scope of applicable law in the WTO dispute settlement system being a legal question

[427] PAUWELYN (2003), at 470-71.

(as opposed to a factual issue), no burden of proof is involved.[428] Nevertheless, in light of the fact that the WTO legal system forms a part of international law, as a matter of principle, all norms of international law should be *applicable* except where the WTO law "contracts out."[429] Of course, it remains possible that the WTO covered agreements may specifically rule out the applicability of non-WTO norms of international law;[430] nevertheless, as this departs from the general proposition (*viz.* that all norms of international law apply except deviated from), this thesis considers it practical to make an analogy to the question of jurisdiction and argue accordingly that it is for the party which stands against the applicability of non-WTO norms to submit an argument that is preponderantly forceful.[431] Simply put, this thesis submits that it is for the Restrictive Approach to submit an argument that is so preponderantly forceful as to establish the inapplicability of non-WTO norms in the WTO dispute settlement system.[432]

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[428] *See, e.g., id.* at 450; Pauwelyn (2001), at 556 (arguing that jurisdiction being a question of law, no burden of proof is involved).

[429] As the PCA observed with respect to the relationship between the OSPAR Convention and general international law, "[i]t should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the parties have created a *lex specialis*." Access to Information under Article 9 of the OSPAR Convention (Ire. v. U.K.), Final Award of July 2, 2003, ¶ 84 (Perm. Ct. Arb. 2005), *available at* http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf (last visited July 29, 2009). Similarly, the ICJ observed with respect to the local remedies rule under international law that "[t]he Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty ; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42 (July 20).

[430] It is noted that the constituent treaty of an international tribunal may specifically rule out the applicability of certain norms of international law. For instance, the UNCLOS specifically rules out the applicability of norms of international law which are "incompatible with" the UNCLOS; UNCLOS art. 293(1) ("A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.").

[431] *See* Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 32 (July 26) ("[T]he Court will, in the event of an objection . . . only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant."); Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, 76 (Dec. 20) (citing the said *Factory at Chorzow* ruling with approval).

[432] It is also noted that this proposition seems to be in line with the *Korea – Procurement* Panel's approach: by saying that "we can see no basis [in Article 3.2 of the DSU] for an *a contrario* implication

That being said, this thesis considers the textual reliance by Restrictive Approach of relevant DSU provisions to be have some merits. Indeed, "[w]ith so much specific reference [in Articles 3.2, 7 and 11 of the DSU] to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable."[433] However, the Restrictive Approach would seem to be on less firm grounds in arguing that in terms of the applicable law in WTO litigation, the explicit inclusion of WTO norms would necessarily lead to the exclusion of non-WTO norms.[434] After all, by suggesting that WTO norms are applicable in WTO litigation, the relevant DSU provisions never specifically rule out the applicability of non-WTO norms by stipulating, say, that "only" WTO norms are applicable.

It is also noted that the Restrictive Approach's reliance on case law is far from being conclusive. For instance, Trachtman's argument against the applicability of non-WTO treaties relies in part on the Appellate Body's finding in *Argentina – Footwear* that "[t]he Agreement between the IMF and the WTO, however, does not modify, add to or diminish the rights and obligations of Members under the WTO Agreement."[435] However, a closer examination into this case would suggest that the reason why this non-WTO treaty does not modify any WTO right/obligation is *not* necessarily because

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that rules of international law other than rules of interpretation do not apply," the Panel seems to confirm that while the DSU is silent on the applicability of non-WTO norms of international law, such silence cannot be equated with a rejection of applicability. *See* Panel Report, *Korea – Procurement*, ¶ 7.96 & n.753. *But see* MITCHELL (2008), at 95 ("In my view, the presumption that WTO Tribunals may apply all sources of international law except to the extent that their use is expressly prohibited seems inappropriate, as would be a presumption that WTO Tribunals may apply only laws that are expressly allowed or mandated.").

[433] Trachtman (1999), at 342.

[434] *See, e.g.*, Panel Report, *Korea – Procurement*, ¶ 7.96 n.753 ("We should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply.").

[435] Appellate Body Report, *Argentina – Textiles and Apparel*, ¶ 72.

any non-WTO treaty is inapplicable, but, rather, because this non-WTO treaty does not even contain any provision that would override or justify Argentina's breach of Article VIII of the GATT.[436] Simply put, the reason that this non-WTO treaty does not modify any WTO right/obligation is because of its substantive content, not because of its inapplicability. For another instance, Trachtman's reliance on *EC – Poultry* in arguing that non-WTO treaties are not applicable law may prove inappropriate. True, the Appellate Body in *EC – Poultry* noted that the Oil Seeds Agreement, being a non-WTO treaty, does not "forms the legal basis for this dispute";[437] but this statement seems to suggest only that this non-WTO treaty cannot form the legal basis for a WTO claim, and one does not seem to be able to rely on this statement with absolute confidence to argue that this non-WTO treaty cannot form the legal basis for a defence (as opposed to a claim).

The Restrictive Approach, while arguing against the applicability of non-WTO norms, also acknowledges that in the course of determining procedural issues not regulated by the DSU, the WTO Tribunal has applied certain non-WTO norms. In this connection, the Restrictive Approach does not seem to provide an answer to the question of why *substantive* non-WTO norms are inapplicable while *procedural* non-WTO norms are applicable.

In addition, Marceau, being an advocate of the Restrictive Approach, further acknowledges that norms of *jus cogens* would override WTO norms in the event of inconsistency (although such event would be quite rare). Such an argument would necessarily be predicated upon the premise that norms of *jus cogens*, notwithstanding

[436] *Id.* ¶¶ 72-74.

[437] Appellate Body Report, *EC – Poultry*, ¶¶ 79-81.

non-WTO norms, are directly applicable in the WTO dispute settlement system. This triggers a question: norms of *jus cogens* being part of customary international law, why should one recognize the applicability of *jus cogens* but all the while deny the applicability of other norms of customary international law? Upon further thought, however, this position seems to have certain merits. As aforementioned, all norms of international law should be applicable in the WTO dispute settlement system except where the relevant WTO covered agreements explicitly rule out the applicability of such non-WTO norms or contract out of them by making more specific provisions (which would override such non-WTO norms of international law by virtue of *lex specialis* and/or *lex posterior*). This, again, evidences the consent-based nature of the international legal system. However, the applicability and legal force of norms of *jus cogens* do not depend upon the will of States: States cannot deviate from norms of *jus cogens* or deny the applicability of them (whereas, on the other hand, States can always deviate from other norms of international law by their will (as enshrined in, for instance, specific treaties designed to deviate certain rules of customary international law).[438] Simply put, WTO Members cannot preclude the applicability of *jus cogens* by any express provision of the WTO covered agreements; *jus cogens* is always applicable.[439] It bears noting, however, that this thesis supports Marceau's view only to the extent that norms of *jus cogens* are always applicable in the WTO dispute settlement system, without prejudice to the applicability of other non-WTO norms.

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[438] *See, e.g.*, OESCH (2003), at 8-9. *See also* ILC Draft Articles on the Law of Treaties with Commentaries, art. 50, ¶ 2 ("[T]he majority of the general rules of international law do not have that character [of *jus cogens*], and States may contract out of them by treaty.").

[439] *See, e.g.*, Francioni (2006), at 147 ("Considering that these norms [of *jus cogens*], by definition, may not be derogated from and are capable of rendering null and void any international agreement concluded in their violation, it is axiomatic that any act or measure adopted within the WTO institutional structure, including the dispute settlement rulings, must ensure their respect and their *application* in the context of trade relations and disputes.") (citation omitted) (emphasis added).

Turning to the Liberal Approach, this Approach seems to be on firm grounds in arguing that because the WTO law is part of international law, all norms of international law would be applicable in the WTO legal system, except those which the WTO legal system has contracted out of, and that nothing in the DSU explicitly rules out the applicability of non-WTO norms in WTO litigation. However, the Liberal Approach is not conclusive, either. Specifically with respect to the requirement in Articles 3.2 and 19.2 of the DSU that the WTO Tribunal shall not "add to or diminish" the WTO Members' rights and obligations under the WTO covered agreements, Pauwelyn argues that "[i]f Article[s] 3.2 [and 19.2] did indeed mean that WTO panels can only look at WTO provisions and not ever add to or diminish from them, *not even when WTO members themselves have agreed to do so*, how then does one explain the process of interpreting WTO terms with reference to other international law? There as well one adds to or diminishes from WTO provisions."[440] However, in the course of *interpretation*, the WTO rights and obligations are not being "added to or diminished": although the meaning and scope of relevant WTO rights and obligations are being ascertained and delineated with reference to the wider corpus of international law, they remain rights and obligations under the WTO covered agreements; nothing is added to or diminished.[441] Also, while Pauwelyn's interpretation of these two provisions are quite creative (that these provisions do not relate to the question of applicable law but only prohibit the WTO Tribunal from exceeding the permissible scope of treaty

[440] Pauwelyn (2004b), at 138.

[441] The ILC has specifically and quite forcefully addressed this point. *See* ILC Report on Fragmentation of International Law, ¶ 447 ("[I]nterpretation does not 'add' anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment . . . . Interpretation does not add or diminish rights or obligations that would exist in some lawyers' heaven where they could be ascertained 'automatically' and independently of interpretation. All instruments receive meaning through interpretation.").

interpretation), that does not conclusively answer this question: how can the WTO Tribunal not "add to or diminish" the WTO Members' rights and obligations under the WTO covered agreements when the WTO Tribunal, through the application of certain non-WTO norms, create rights and obligations that are found nowhere in the WTO covered agreements? True, two or more WTO Members (as opposed to the WTO Tribunal) are more than entitled to conclude another treaty in which they agree to restrict or increase the intensity of certain rights and obligations under the WTO covered agreements; however, if such other treaty is altogether inapplicable in the WTO dispute settlement system, the WTO Tribunal would be unable to apply it, and, as a consequence, the fact that the relevant WTO Members have themselves agreed to, say, taken away a certain WTO right under another non-WTO treaty cannot be considered by the WTO Tribunal (except, of course, where such non-WTO treaty may be considered in the course of *interpreting* WTO provisions); ultimately, in the eyes of the WTO Tribunal, the relevant WTO rights and obligations remain intact as if no such non-WTO treaty existed.

From the foregoing analysis, this thesis submits that Articles 3.2 and 19.2 of the DSU, in and of themselves, do *not* settle the scope of applicable law in WTO litigation, and this is true from both the perspective of the Restrictive Approach and that of the Liberal Approach. *If* non-WTO norms are *inapplicable*, the question of whether applying non-WTO norms would add to or diminish WTO rights/obligations does not even arise. On the other hand, *if* WTO norms are *applicable*, the WTO Tribunal, by applying non-WTO norms, would not be adding to or diminishing WTO rights and obligations. This is because, as Pauwelyn submits, it is the WTO Members themselves, as opposed to the WTO Tribunal, who are adding to or diminishing their own WTO rights and obligations. Not only that, but this thesis further submits that (again, on the

premise that non-WTO norms are applicable) in the event where two or more WTO Members have already agreed to take away a WTO right/obligation by a non-WTO treaty, such a WTO right/obligation would no longer exist under the WTO covered agreement, and if the WTO Tribunal should choose to ignore such non-WTO treaty and apply the non-existent WTO right/obligation, the WTO Tribunal would be "adding to or diminishing" the relevant WTO Members' rights and obligations under the WTO covered agreements. Simply put, if non-WTO norms are applicable in WTO litigation, not only that the WTO Tribunal's application of such non-WTO norms would not add to or diminish WTO rights/obligations, but, more importantly, also that the WTO Tribunal's failure to apply such non-WTO norms would add to or diminish rights/obligations under the WTO legal system.

More crucially, the Restrictive Approach's argument, *viz.* that non-WTO norms are inapplicable (partly) *because of* Articles 3.2 and 19.2 of the DSU, might be logically insufficient as there is hardly a necessary causational relationship between these DSU provisions, on the one hand, and the inapplicability of non-WTO norms, on the other. As observed from the foregoing analysis, Articles 3.2 and 19.2 of the DSU, as a premise, can simultaneously accommodate both the conclusion of applicability *and* the conclusion of inapplicability of non-WTO norms: while these DSU provisions can be consistent with the conclusion that non-WTO norms are inapplicable (the application of inapplicable non-WTO norms would add to or diminish WTO rights/obligations), the same DSU provisions can equally accommodate the conclusion that non-WTO norms are applicable in that, as aforementioned, the WTO Tribunal's application of applicable non-WTO norms would not add to or diminish any WTO right/obligation on the grounds that such adding to or diminishing is done by the WTO Members themselves. To make the analysis more concrete, suppose, for instance, that an RTA provision

explicitly forbids RTA parties from imposing any anti-dumping duty, thereby taking away the RTA parties' right under the Anti-dumping Agreement to impose anti-dumping duties under certain circumstances, and suppose also that such RTA provision (if applicable) would override the relevant provisions of the Anti-dumping Agreement by virtue of *lex posterior* and *lex specialis*. In such case scenario, one can clearly see that on the one hand, Articles 3.2 and 19.2 of the DSU are fully consistent with the conclusion of inapplicability of such RTA provision: the application of such inapplicable RTA provision would take away and thereby diminish the parties' WTO right to impose anti-dumping measures. On the other hand, these same DSU provisions are equally consistent with the conclusion of applicability of such RTA provision: the application of such applicable RTA provision having taken away the WTO right to impose anti-dumping duties, such a WTO right no longer exists; the WTO Tribunal, in reaching such a finding, is simply confirming the manifestation of the relevant WTO Members' intention in the RTA provision by enforcing the applicable RTA provision; furthermore, if the WTO Tribunal should choose to ignore the applicable RTA provision and reaching a finding that such a WTO right still exists, the WTO Tribunal would be adding to the relevant WTO Members' right in the WTO. Evidently, since these DSU provisions can equally accommodate both the proposition of applicability and the proposition of inapplicability of non-WTO norms, the two propositions being mutually exclusive, it would make much more logical sense in arguing that these DSU provisions do not have any bearing upon the question of applicability of non-WTO norms.

One final note concerning Articles 3.2 and 19.2 of the DSU is this: in its jurisprudence, the WTO Tribunal has applied a number of non-WTO norms, at least with respect to procedural matters not regulated anywhere in the WTO covered

agreements, without provoking any serious challenge that such application is unwarranted judicial activism (for instance, the WTO Tribunal finding that WTO Members have a right to retain private counsel[442] as well as its findings with respect to burden of proof[443]). If the application of each and every non-WTO norm to matters not provided for in the WTO covered agreements would contravene with these DSU provisions, then the Appellate Body itself would have long lost its legitimacy. Clearly, when a certain non-WTO norm is applicable, the application of such non-WTO norm by the WTO Tribunal would not add to or diminish any WTO right/obligation; in light of the WTO jurisprudence, to argue to the contrary would necessarily negate the overall legitimacy of the WTO Tribunal.

In addition, it is observed that while the Liberal Approach relies heavily on WTO case law for the purpose of establishing the applicability of non-WTO norms in WTO litigation, at times the case-law reliance is problematic. For instance, Pauwelyn cites Appellate Body's ruling in *EC – Bananas III* in arguing that the WTO Tribunal has applied a non-WTO treaty.[444] This thesis submits, however, that this ruling does *not* contribute to the position taken by the Liberal Approach for two reasons. First, this thesis submits that in *EC – Bananas III*, the Appellate Body was *not* applying the Lomé Convention independently; rather, it was merely interpreting a phrase ("as required by . . . the Lomé Convention") in the Lomé waiver (part of WTO law).[445] Second, even if the Appellate Body could be taken as *applying* the Lomé Convention (as opposed to consulting it in the course of interpreting the WTO law), that could have been justified

[442] *See* Appellate Body Report, *EC – Bananas III*, ¶¶ 5-12.

[443] *See, e.g.*, Appellate Body Report, *US – Wool Shirts and Blouses*, 12-17.

[444] PAUWELYN (2003), at 471 & n.104 (citing Appellate Body Report, *EC – Bananas III*, ¶ 167).

[445] *See* Appellate Body Report, *EC – Bananas III*, ¶¶ 168-78.

by the assumption that the Lomé Convention was implicitly incorporated into the Lomé waiver and thus became part of WTO law;[446] put differently, if this was the case, the Appellate Body would be merely applying WTO law. Likewise, while Pauwelyn takes the *Canada – Dairy* Panel's ruling as recognizing the applicability of the customary rule of attribution in State responsibility,[447] it seems that in fact the *Canada – Dairy* Panel was merely referring to this rule of customary international law in the *interpretation* of the term "agency" in Article 9.1(a) of the SCM Agreement.[448]

That said, the WTO jurisprudence, as relied upon by the Liberal Approach, does clearly show that not only is *procedural* non-WTO norms, but the WTO Tribunal has also applied *substantive* non-WTO norms in WTO litigation. For instance, Pauwelyn makes reference to Appellate Body's ruling in *Brazil – Desiccated Coconut* in establishing the applicability of the principle of non-retroactivity of treaties in WTO litigation.[449] The relevant passage is reproduced below[450]:

> Article 28 of the Vienna Convention contains a general principle of international law concerning the nonretroactivity of treaties. . . .

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[446] *See, e.g.*, PALMETER & MAVROIDIS (2004), at 71-72; Trachtman (1999), at 343.

[447] PAUWELYN (2003), at 470 & n.101 (citing Panel Report, *Canada – Dairy*, ¶ 7.77 & n.427).

[448] Panel Report, *Canada – Dairy*, ¶ 7.77 ("While we acknowledge that producers play an important role in the provincial marketing boards, we also note that these boards act under the explicit authority delegated to them by either the federal or a provincial government. Accordingly, they can be presumed to be an 'agency' of one or more of Canada's governments in the sense of Article 9.1(a).") & n.427 ("In this respect, we refer to Article 7:2 of the Draft Articles on State Responsibility of the International Law Commission (ILC) - which might be considered as reflecting customary international law - which states: 'The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.'").

[449] PAUWELYN (2003), at 470 & n.98 (citing Appellate Body Report, *Brazil – Desiccated Coconut*, 15).

[450] Appellate Body Report, *Brazil – Desiccated Coconut*, 15.

> Article 28 states the general principle that a treaty shall not be applied retroactively "unless a different intention appears from the treaty or is otherwise established." Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force. Article 32.3 of the SCM Agreement is an express statement of intention which we will now examine.

Indeed, this ruling does seem to recognize the applicability of the customary rule of non-retroactivity of treaties, as codified in Article 28 of the VCLT (otherwise, the Appellate Body would not have applied it by saying that "Article 32.3 of the SCM Agreement is an express statement of intention" in the sense of this rule). And this rule of non-retroactivity of treaties is *not* a customary rule of treaty *interpretation* (such as Article 31 and Article 32 of the VCLT[451]), but a customary rule of treaty *application*[452] that is dispositive of *substantive* rights and obligations. There seems to be no plausible ground in arguing that a rule such as Article 28 of the VCLT, which controls the

[451] The Appellate Body has specifically confirmed that Articles 31 and 32 of the VCLT enshrine customary rules of treaty interpretation; *see, e.g.*, Appellate Body Report, *US – Gasoline*, 17 ("That general rule of interpretation [in Article 31 of the VCLT] has attained the status of a rule of customary or general international law."); Appellate Body Report, *Japan – Alcoholic Beverages II*, 10 ("We stressed there that this general rule of interpretation 'has attained the status of a rule of customary or general international law.' There can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status.") (citation omitted). *See also* Guillaume (2006), at 468 ("As a general matter, states do not really dispute the position that the treaty interpretation rules of the *Vienna Convention* now reflect customary law.").

[452] Suffice to say that while Articles 31 and 32 of the VCLT are placed under the heading "Section 3: Interpretation of Treaties," Article 28 of the VCLT is placed under the heading "Section 2: Application of Treaties." *But see* ILC Report on Fragmentation of International Law, ¶ 225 ("[A]longside the *lex specialis* maxim, the principle that 'later law supersedes earlier law' or *lex posterior derogat lege priori* has been often listed as a principle of interpretation or conflict-solution in international law."); Panel Report, *EC – Hormones (Canada)*, ¶ 8.28 ("According to established practice, the fundamental rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties ('Vienna Convention') form part of these customary rules of *interpretation*. The general principle in international law, as embodied in *Article 28* of the Vienna Convention, is that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to ... any situation which ceased to exist before the date of the entry into force of the treaty.'") (emphasis added).

application of treaties, could be considered a *procedural* rule of customary international law.

Nevertheless, even though the Liberal Approach can make a solid case in arguing that the WTO Tribunal has itself applied certain *substantive* non-WTO rules of customary international law concerning the law of treaties and those concerning State responsibility, the rules being applied have been characterized as "secondary rules" (or "rules on rules"), that is, rules governing the "substantive" or "primary rules" laying down the prescribed conduct of subjects in international law.[453] Meanwhile, the Liberal Approach seems unable to point to any single WTO case where a "primary" rule of customary international outside the four corners of the WTO (*viz.* excluding those non-WTO norms incorporated into the covered agreements) has been directly applied (*viz.* excluding those instances where non-WTO norms are referred to in the course of *interpreting* WTO provisions). But once again, much like the distinction between *procedural* and *substantive* non-WTO norms, the distinction between *primary* and *secondary* non-WTO norms could possibly prove superficial in terms of the applicability.

As analyzed in the foregoing, it seems that although it would be for the Restrictive Approach to raise a preponderantly forceful argument against the applicability of non-WTO norms in the WTO dispute settlement regime, both the Restrictive Approach and the Liberal Approach have established a quite solid case; at the same time, however, neither the Restrictive Approach nor the Liberal Approach is conclusive. Implicitly,

[453] *See, e.g.*, Abi-Saab (2006), at 458 (characterizing the law of treaties as secondary rules); ILC Draft Articles on State Responsibility with Commentaries, General Commentary, ¶ 1 ("The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules.").

this thesis leans a bit on the scale of diverging views towards the Liberal Approach in stressing that the WTO legal system is part of the wider corpus of international law and upholding the general applicability of all norms of international law in WTO litigation except where such applicability is explicitly ruled out. Also, this thesis considers that there seems to be little merit in arguing against the applicability of *substantive* non-WTO norms while acknowledging the applicability of *procedural* non-WTO norms, nor does there seem to be solid ground for maintaining a distinction between *primary* and *secondary* non-WTO norms in terms of their applicability in the WTO dispute settlement system. That said, the distinction maintained between *substantive* and *procedural* non-WTO norms as well as that between *primary* and *secondary* non-WTO norms may be justified on the grounds that *procedural* and *secondary* non-WTO norms are more closely connected to the WTO Tribunal's exercise of its judicial functions than would be *substantive* and *primary* non-WTO norms, and, accordingly, are more likely to be considered applicable law in the exercise of the WTO Tribunal's inherent jurisdiction (as will be discussed below).

For the purpose of this thesis, however, it is unnecessary to take side with either approach. As will be seen below, the chasm between these two approaches seems bridgeable, and the common ground to be ascertained below will provide a workable solution to the issues involved in this thesis.

b) In search of common ground between the Restrictive Approach and the Liberal Approach

It is first identified that as common to the Liberal and Restrictive Approaches, non-WTO norms can be consulted, where appropriate, in the interpretation of WTO norms.

This is unequivocally confirmed by Article 3.2 of the DSU, which instructs the WTO Tribunal to apply customary rules of treaty interpretation (principally Articles 31 and 32 of the VCLT) in the course of construing WTO provisions, and, by virtue of Article 31(3)(c), non-WTO norms (including customary international law, general principles of law and non-WTO treaties (where appropriate)) shall be consulted. This last point will be further elaborated in Chapter Four.

Second, notwithstanding one's view, it remains crystal clear that the WTO jurisprudence has confirmed the applicability of non-WTO norms in the determination of *procedural* issues where such issues find no regulation anywhere in the DSU.[454] This point, apart from being supported by the review of aforementioned WTO jurisprudence, has been explicitly confirmed by the WTO Tribunal itself when it opined that "it is certainly true that certain widely recognized principles of international law have been found to be applicable in WTO dispute settlement, *particularly concerning fundamental procedural matters*."[455] This is crucial to this thesis. The question of jurisdictional conflict between the WTO Tribunal and RTA Tribunals is evidently a procedural issue: when facing such issue, the WTO Tribunal shall consider the legal implications that may arise from Type 3 and Type 5 RTA jurisdictional clauses upon the *jurisdiction* of the WTO Tribunal and perhaps also the *admissibility* of matters properly before the WTO Tribunal. Both jurisdiction and admissibility are procedural issues. Accordingly, in the eyes of both the Restrictive Approach and the Liberal Approach, non-WTO norms are doubtlessly applicable in the determination of jurisdiction and admissibility in WTO litigation. In this sense, non-WTO norms of international law are

[454] *See, e.g.*, Abi-Saab (2006), at 463 ("[N]obody protested against [the applicability of procedural rules of general principles of law and of international law in the exercise of the WTO Tribunal's judicial function.]").

[455] Panel Report, *India – Autos*, ¶ 7.57 (emphasis added).

applicable in the WTO dispute settlement system in the WTO Tribunal's exercise of its inherent jurisdiction in the determination of its jurisdiction over a given dispute and the admissibility of the dispute.[456] Indeed, the application of non-WTO norms in respect of procedural issues which go to the very essence of the WTO Tribunal's judicial functions but which do not find any express guidance in the DSU is an "inevitable outcome."[457]

Finally, in the determination of procedural issues, the application of non-WTO norms by the WTO Tribunal does not "add to or diminish" WTO Members' rights/obligations under the WTO covered agreements. As aforementioned, Articles 3.2 and 19.2 of the DSU, in and of themselves, do *not* settle the scope of applicable law in WTO litigation; this is essentially because there does not appear to be any causal relationship between these two DSU provisions and the (in)applicability of non-WTO norms. Consistent with the foregoing analysis, non-WTO norms are applicable in WTO litigation for the purpose of determining procedural issues. On that basis, the WTO Tribunal, by applying non-WTO norms, would not be adding to or diminishing WTO rights and obligations, because it is the WTO Members themselves (as opposed to the WTO Tribunal) who are adding to or diminishing their own WTO rights and obligations; not only that, but as this thesis further submits, in the event where two or more WTO Members have already agreed to take away a WTO right/obligation by a non-WTO treaty, if the WTO Tribunal should choose to take a blind eye on such non-WTO treaty

[456] For a consistent view, see MITCHELL (2008), at 102 ("[I]t is legitimate for WTO Tribunals to use principles in the exercise of inherent jurisdiction in WTO disputes, subject to two conditions. . . . The first condition is that the use of the principle must be necessary to the maintenance and exercise of the tribunal's subject-matter jurisdiction and judicial function. . . . The second condition is that the principle must be used to resolve procedural matters and not as a source of substantive rights or obligations.").

[457] FOOTER (2006), at 311-12 ("[Notwithstanding Article 3.2 of the DSU, which bars the WTO Tribunal from adding to or diminish WTO rights and obligations,] the creation of subsidiary rules by judicial bodies such as the Appellate Body (and to a lesser extent quasi-judicial bodies like the panels), is an inevitable outcome of a vibrant judicial dispute settlement and a necessary one in order to ensure that these bodies are engaged in the proper exercise of their judicial function.").

and apply the non-existent WTO right/obligation, the WTO Tribunal would be "adding to or diminishing" the relevant WTO Members' rights and obligations under the WTO covered agreements (as such WTO rights/obligations do not exist anymore). This is particularly true in the determination of procedural issues and for the purpose of proper exercise of the WTO Tribunal's judicial functions. In the context of Type 3 and Type 5 RTA jurisdictional clauses, a complaining Member's right to initiate WTO litigation under Article 23.1 of the DSU may be taken away. While the universe of possibilities that may lead to this conclusion will be further explored later,[458] some preliminary observations are made here. First, the WTO Tribunal may have to dismiss a dispute for lack of jurisdiction through treaty interpretation pursuant to Article 31(3)(c) of the VCLT in light of relevant RTA jurisdictional clauses, and such a ruling does not prejudice the DSU right to initiate WTO litigation (the dispute is dismissed notwithstanding the DSU right, as lack of jurisdiction necessarily precludes the WTO Tribunal from taking up the dispute altogether. Second, the WTO Tribunal may rule that the complainant lacks the right to initiate WTO litigation (otherwise provided for in Article 23.1 of the DSU) on account of the application of RTA jurisdictional clauses or by virtue of the application of certain norms of international law in light of RTA jurisdictional clauses, and thereby dismisses the dispute for lack of jurisdiction (or inadmissibility); in such cases, the DSU right to institute WTO litigation is taken away by the agreement or conduct of the relevant WTO Members themselves, and if the WTO Tribunal ignores the fact that the otherwise existing DSU right does not exist anymore and finds that it has jurisdiction (or that the dispute is admissible) notwithstanding the complainant's lack of the DSU right, such a ruling by the WTO

[458] *See infra* Ch. 4.

Tribunal would "add to" the complainant's WTO right in violation of Articles 3.2 and 19.2 of the DSU.

c) RTAs as a "special class" of non-WTO norms

On top of the position taken above (*viz.* that non-WTO norms are applicable in WTO litigation in the determination of procedural issues), this thesis further submits that the Liberal Approach may gain particular momentum with respect to RTAs.

As opposed to other non-WTO norms (such as MEAs and human rights treaties), RTAs are expressly recognized under the WTO legal system (in Article XXIV of the GATT and Article V of the GATS). In this connection, it is noted that the *Turkey – Textiles* Panel "[understood] from the wording of paragraph 12 of the [RTA Understanding] that panels have jurisdiction to examine any matters 'arising from' the application of those provisions of Article XXIV."[459] Although textually speaking, this statement could possibly lead to the impression that RTAs, being "matters 'arising from' the application of" Article XXIV of the GATT, fall within the jurisdiction of the WTO Tribunal, to say that WTO Members can challenge another Member for violations of RTA provisions would clearly run counter to the well-established WTO jurisprudence. That said, at least one could discern the difference between RTAs and other norms of international law here, as no similar statement has been made with respect to other non-WTO norms.

In *EC – Poultry*, the Appellate Body rejected the Oil Seeds Agreement as a distinct legal basis for a claim to be heard by the WTO Tribunal, noting that the Oil Seeds

[459] Panel Report, *Turkey – Textiles*, ¶ 9.50.

Agreement "had not been integrated" into the WTO covered agreements and was not "referred to" anywhere in the WTO covered agreements.[460] RTAs, however, though similarly not integrated into the WTO covered agreements, are indeed "referred to" in the GATT and the GATS. There, the distinction between RTAs and other non-WTO norms of international law is once again ascertainable.

Also, in *EC – Article XXVIII*, it was held that "[i]n principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT Arbitration procedures."[461] Could it be said, from this holding, that "given the close connection of [RTAs] with the GATT, the fact that [RTAs are] consistent with the objectives of the GATT" (for instance, the objective of trade liberalization), "[a]n exception is warranted" to allow a claim based on RTAs to be brought under the WTO dispute settlement system? Again, such an argument would clearly contravene with the WTO jurisprudence holding that the WTO Tribunal enjoys jurisdiction over WTO claims only (even in the context of arbitrations under Article 25 of the DSU).[462]

The point to be made here, rather, is as simple as this: given the fact that RTAs are explicitly recognized under the WTO legal system, given the close connection of RTAs with the WTO, and given further that RTAs are generally consistent with the trade liberalization objectives of the WTO, it is clear that RTAs are distinctively different

[460] Appellate Body Report, *EC – Poultry*, ¶ 79.

[461] Award by the Arbitrator, *EC – Article XXVIII*, 4-5.

[462] *See supra* Ch. 2, pt. II.B.1.

from other non-WTO norms (such as MEAs and human rights treaties). On this basis, it seems legitimate to argue that if non-WTO treaties generally are part of the applicable law in WTO litigation, RTAs would certainly stand out as the prime candidate of such non-WTO treaties. That said, again, this thesis does not take the position of the Liberal Approach in advocating the applicability of all norms of international law, much like this thesis does not take side with the Restrictive Approach in limiting the applicable law to the four corners of the WTO; rather, this thesis submits that in the determination of procedural issues such as jurisdiction and admissibility, the WTO Tribunal is fully entitled to, and indeed is required to, apply RTAs (particularly RTA jurisdictional clauses) side by side with other norms of international law.

IV. CANDIDATES OF NON-WTO LAW AS APPLICABLE LAW IN THE WTO DISPUTE SETTLEMENT SYSTEM

Set forth below are certain candidates of non-WTO law that may (or may not) be considered to form part of the applicable law in the proceedings before the WTO Tribunal. It is noted that this list is not intended to be exhaustive, nor does it proclaim to be; rather, the candidates identified hereunder are considered to be of particular relevance to the central issue of this thesis, *viz.* jurisdictional conflicts between the WTO Tribunal and RTA Tribunals. It is noted that while certain rules of customary international law appear to be applicable in WTO litigation, including certain law of treaties rules (other than those concerning treaty interpretation)[463] and certain rules

[463] On the notion of *pacta sunt servanda* (as codified in Article 26 of the VCLT), see, for example, Panel Report, *Korea – Procurement*, ¶¶ 7.93-102. On the principle of non-retroactivity of treaties (as codified in Article 28 of the VCLT), see, for example, Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, ¶ 298; Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, ¶¶ 8.168-69; Appellate Body Report, *EC – Sardines*, ¶¶ 196-216; Panel Report, *EC – Sardines*, ¶¶ 7.53-7.60; Appellate Body Report, *Canada –*

concerning State responsibility,[464] those rules of customary international law are not covered in the following list owing to their remote relationship with the question of jurisdictional conflicts to be addressed in this thesis. In addition, as evident from the foregoing analysis, RTA jurisdictional clauses (particularly Type 3 and Type 5) are applicable for the purpose of resolving procedural issues pending before the WTO Tribunal; as relevant RTA jurisdictional clauses have already been examined previously,[465] they will not be covered in the following list, either. Thus, only certain norms that could (or could not) have attained the status of general principles of law. As these norms have been extensively treated elsewhere, each will receive only brief mention, with particular attention being paid to the content of each norm as well as its applicability in the WTO dispute settlement system, bearing in mind at all times the aforementioned position that non-WTO norms are applicable in WTO litigation in the determination of *procedural* issues.

Patent Term, ¶¶ 70-74; Panel Report, *Canada – Aircraft*, ¶¶ 9.42-44; Appellate Body Report, *EC – Hormones*, ¶¶ 126-30; Panel Report, *EC – Hormones (US)*, ¶¶ 8.24-8.27; Panel Report, *EC – Hormones (Canada)*, ¶¶ 8.27-8.30; Appellate Body Report, *Brazil – Desiccated Coconut*, 15. On the *lex posterior* principle (as codified in Article 30 of the VCLT), see, for example, Panel Report, *US – Section 110(5) Copyright Act*, ¶ 6.41; Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, ¶¶ 49-52. On the notion of *inter se* modifications (as codified in Article 41 of the VCLT), see, for example, Panel Report, *Turkey – Textiles*, ¶¶ 9.181-9.182. On the rules concerning errors in treaty formation (as codified in Article 48 of the VCLT), see, for example, Panel Report, *Korea – Procurement*, ¶¶ 7.120-7.126. On termination of treaties as a consequence of breach (as codified in Article 60 of the VCLT), see, for example, Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, ¶¶ 3.6-3.10; Panel Report, *EC – Commercial Vessels*, ¶¶ 7.204-7.205. On consequences of treaty termination (as codified in Article 70 of the VCLT), see, for example, Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, ¶¶ 3.6-3.10.

[464] On attribution, see, for example, Panel Report, *Turkey – Textiles*, ¶¶ 9.42-9.43; Panel Report, *Canada – Dairy*, ¶ 7.77 & n.427. On countermeasures, see, for example, Appellate Body Report, *US – Cotton Yarn*, ¶ 120; Appellate Body Report, *US – Line Pipe*, ¶ 259; Appellate Body Report, *Canada – Continued Suspension*, ¶ 382; Appellate Body Report, *US – Continued Suspension*, ¶ 382. On the principle that domestic law does not serve as defense against breach of international law, see, for example, Panel Report, *Argentina – Textiles and Apparel*, ¶ 6.68 & n.198. *See also* PETERSMANN (1998), at 135-42 (reviewing State responsibility generally and its application in the WTO context).

[465] *See supra* Ch. 1.

A. The Notion of Good Faith and Its Corollaries

1. Good faith

The notion of good faith is a fundamental principle of every legal system.[466] Be it recognized as a general principle of law[467] or a general principle of customary international law[468], the notion of good faith is certainly a legal principle in international law.[469] However, as it is rather difficult (or even impossible) to define good faith,[470] attempts are commonly made to examine the particular and more concrete expressions of this notion, such as treaty interpretation in good faith, abuse of rights and estoppel.[471] Prior to proceeding into the examination of these specific corollaries of good faith, it is noted here that various corollaries of good faith can be systematically categorized.[472] First, recalling the distinction between treaty interpretation and treaty application, the first expression of good faith is interpretation of a treaty provision in good faith. This is confirmed in Article 31(1) of the VCLT, which requires that "[a] treaty shall be interpreted in good faith." Second, the notion of good faith can be applied as a

[466] *See, e.g.*, CHENG (1993), at 105 (suggesting on the basis of case law that good faith "should, therefore, be the fundamental principle of every legal system).

[467] *See id.*

[468] *See, e.g.*, MITCHELL (2008), at 110-12 (suggesting that the principle of good faith is a principle of customary international law).

[469] *See, e.g.*, Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 53 (July 6) (separate opinion of Judge Lauterpacht) ("Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.").

[470] *See, e.g.*, CHENG (1993), at 105 ("What exactly this principle implies is perhaps difficult to define."); MITCHELL (2008), at 112-14 (reviewing attempted definition of good faith while acknowledging the difficulty to define it).

[471] *See, e.g.*, CHENG (1993), at 105-60; MITCHELL (2008), at 114-21.

[472] *See* PANIZZON (2006), at 7-9.

substantive notion; manifestations of substantive notion of good faith may include the protection of legitimate expectations, *pacta sunt servanda* (as codified in Article 26 of the VCLT), and the prohibition of abuse of rights. Finally, the procedural notion of good faith may be applied to procedural matters in dispute settlements. It is this last *procedural* notion of good faith that concerns this thesis the most.

In the specific WTO context, the notion of good faith is also recognized as a general principle of law (and a principle of general international law).[473] Specifically with respect to the procedural notion of good faith,[474] it is expressly referred to in Article 3.10[475] of the DSU, and, though implicitly, in Article 3.7[476] of the DSU. These two DSU provisions[477] will be briefly examined below. Before that, however, it is noted

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[473] *See, e.g.,* Appellate Body Report, *US – Shrimp*, ¶ 158 ("The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states."); Appellate Body Report, *US – FSC*, ¶ 166 ("Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.").

[474] It is noted that apart from the procedural notion of good faith, other aspects of good faith have also been recognized under the WTO; *see, e.g.,* RTA Understanding, ¶ 5 ("These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment."); TRIPS Agreement art. 48.2 ("In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law."). However, for the purpose of jurisdictional conflict issues, this thesis is concerned only with the manifestations of good faith in the DSU.

[475] DSU art. 3.10 ("It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, *all Members will engage in these procedures in good faith* in an effort to resolve the dispute.") (emphasis added).

[476] DSU art. 3.7 ("Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.").

[477] It is noted that Article 4.3 of the DSU also makes explicit reference to good faith; DSU art. 4.3 ("If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and *shall enter into consultations in good faith* within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.") (emphasis added). However, while Article 4.3 of the DSU concerns the *respondent*'s procedural obligation to engage in consultations in good faith, the core issue addressed by this thesis concerns jurisdictional conflicts between the WTO Tribunal and RTA Tribunals arising from the *complainant*'s violation of Type 3 or

that although the procedural notion of good faith is closely related to the notion of due process, these two notions are not equivalent or interchangeable.[478] Also, a distinction is maintained between using the procedural notion of good faith as a *standard* for compliance with DSU provisions, on the one hand, and using the procedural notion of good faith as an *obligation*, on the other.[479] With respect to the former, the Appellate Body has indicated in *US – FSC* that the procedural notion of good faith "requires both complaining and responding Members to comply with the requirements of the DSU . . . in good faith . . . . The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[480] In that sense, the procedural good faith establishes a "fair, prompt and effective" standard for compliance with DSU provisions.

With respect to the latter, i.e. procedural notion of good faith as an obligation, Articles 3.10 and 3.7 of the DSU come into play. Article 3.10 of the DSU essentially imposes a duty upon all relevant Members (thus including both the complainant and the respondent in a given case) to engage in DSU procedures "in good faith in an effort to resolve the dispute," and this duty covers "the entire spectrum of dispute settlement, from the point of initiation of a case through implementation."[481] Recalling the

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Type 5 RTA jurisdictional clauses. In this context, Article 4.3 of the DSU is irrelevant, and, accordingly, is not addressed any further in this thesis. On the notion of good faith as enshrined in Article 4.3 of the DSU, see, for example, PANIZZON (2006), at 309-14.

[478] *See, e.g.*, PANIZZON (2006), at 275; MITCHELL (2008), at 124-25 (reviewing relevant WTO jurisprudence which appears to confuse good faith with due process, and arguing that these two notions should be distinguished).

[479] *See, e.g.*, PANIZZON (2006), at 273.

[480] Appellate Body Report, *US – FSC*, ¶ 166.

[481] Appellate Body Report, *EC – Export Subsidies on Sugar*, ¶ 312 ("[The obligation to engage in dispute settlement procedures in good faith by virtue of Article 3.10] covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation.").

distinction between procedural good faith and due process, it is noted that the WTO Tribunal has examined this provision in a number occasions[482] and sometimes interpreted the procedural notion of good faith in Article 3.10 of the DSU in such a manner as to be seemingly intertwined with due process. For instance, in *US – Gambling*, the Appellate Body suggested that Article 3.10 of the DSU "implies" that the respondent Member shall state the legal basis for its defence "at the earliest opportunity";[483] in *US – FSC*, the Appellate Body opined that by virtue of Article 3.10 of the DSU, complaining Members shall "accord to the responding Members the full measure of protection and opportunity to defend" while at the same time the responding Members shall "reasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes."[484] However, these issues, such as the timing concerning the submission of legal basis for defence as well as procedural objections, would be better characterized as pertaining to due process.[485] In any event, the WTO jurisprudence does not seem to work out a concrete criterion; generally speaking, it seems that if the complaining Member in a given dispute uses WTO litigation proceedings as a mere strategy or tactic to achieve some unrelated result instead of "in an effort to resolve the dispute," the responding Member would arguably

[482] *See, e.g.*, Appellate Body Report, *EC – Export Subsidies on Sugar*, ¶¶ 301-20; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, ¶¶ 223-28. For a more comprehensive review of WTO jurisprudence on Article 23.1 of the DSU, see, for example, PANIZZON (2006), at 286-308.

[483] Appellate Body Report, *US – Gambling*, ¶ 269.

[484] Appellate Body Report, *US – FSC*, ¶ 166.

[485] *See, e.g.*, MITCHELL (2008), at 124-25.

have a case in asserting a violation of Article 3.10 of the DSU on the part of the complainant.[486]

Turning to Article 3.7 of the DSU, which provides that "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under [the DSU] procedures would be fruitful," while this provision does not contain any reference to the procedural notion of good faith, it seems that Article 3.10 of the DSU serves as the relevant context and thus informs the interpretation of Article 3.7 of the DSU.[487] Thus, the Appellate Body opined that Article 3.7 of the DSU "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,"[488] and, furthermore, that since WTO Members have "a broad discretion" and are "expected to be largely self-regulating in deciding whether [to bring a case] would be 'fruitful,'"[489] the WTO Tribunal "must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'. . . . the Panel was not obliged to consider this issue on its own motion."[490] This statement leaves open the possibility that the WTO Tribunal may find, upon request by the responding Member (as opposed to "on its own motion"), that the complaining Member in a given dispute has failed to exercise such discretion in good faith.[491]

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[486] *Id.* at 122.

[487] *Id.* at 126-27.

[488] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, ¶ 73.

[489] *Id.* (quoting Appellate Body Report, *EC – Bananas III*, ¶ 135).

[490] *Id.* ¶ 74.

[491] *See* MITCHELL (2008), at 126.

As evident from the foregoing, it seems that whether in the wider context of international law or in the specific context of WTO (particularly Articles 3.10 and 3.7 of the DSU), the procedural notion of good faith does not offer a very concrete and operable benchmark against which an evaluation of whether any course of conduct would be considered to be undertaken in bad faith can be made with certainty. Thus, this thesis now turns to more concrete manifestations of the notion of good faith.

2. Abuse of rights (*abus de droit*) / abuse of process

The doctrine of abuse of rights (*abus de droit*), being an application of the principle of good faith to the exercise of rights,[492] is also a general principle of law.[493] In international law generally, three broad categories of *abus de droit* have been recognized[494]: the first category involves circumstances where a State's exercise of its right is considered malicious (in the sense that the right is exercised for the sole purpose of causing injury to another State) or fictitious (in that the right is exercised for the purpose of evading legal obligations);[495] the second category involves circumstances where the exercise of a State's right impinges upon another State's enjoyment of right in such way that, with the conflicting interests of the respective parties weighed against each other, the exercise of right is not fair and equitable between the parties;[496] and the

[492] CHENG (1993), at 121.

[493] *See, e.g.*, SHANY (2004), at 257 ("Given the extensive practice of international bodies and the near consensus in the writing of jurists on the matter, the theory can probably be viewed as part and parcel of customary international law or as a general principle of law.").

[494] *See, e.g.*, MITCHELL (2008), at 119-20.

[495] CHENG (1993), at 121-23.

[496] *Id.* at 123-32.

third category involves circumstances where a State exercises its discretion (or discretionary right) unreasonably, dishonestly or without due regard to the interests of other States.[497] It is noted that as much as bad faith cannot be presumed, an abuse of right cannot be presumed either; the burden of proof rests upon the party which alleges abuse of right.[498] Finally, it is noted that where a right is exercised in an abusive manner, that exercise of right would be precluded.[499]

In the WTO context, the doctrine of *abus de droit* is also recognized as an application of the general principle of good faith.[500] In *US – Shrimp*, the Appellate Body made, in the context of the chapeau of Article XX of the GATT, the following observations concerning the notion of abuse of rights[501]:

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[497] CHENG (1993), at 132-36.

[498] *See, e.g.*, Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 30 (May 25) ("Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement."); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7) ("A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.").

[499] *See* CHENG (1993), at 122 ("The exercise of a right – or supposed right, since the right *no longer exists* – for the sole purpose of causing injury to another is thus *prohibited*.") (emphasis added). *But see* Cottier & Schefer (2007), at 143 ("If a court finds that Party A has breached its duty of good faith (whether by abusing another's rights or violating the other's legitimate expectations), the consequences are that Party A will have to provide reparation to the injured complainant party – that is, make the injured Party 'whole.'").

[500] *See, e.g.*, Appellate Body Report, *US – Shrimp*, ¶ 158. *See also* Appellate Body Report, *US – Gasoline*, 22 ("The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.").

[501] Appellate Body Report, *US – Shrimp*, ¶ 158 (citation omitted).

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.

The doctrine of *abus de droit* in this sense falls into the second category of circumstances where the exercise of a State's right impinges upon another State's enjoyment of right or breaches its own obligations in such way that is not fair and equitable between the parties.[502] It is noted, however, that in the end, the Appellate Body did not directly *apply* this doctrine of abuse of rights but instead used it in the *interpretation* of the chapeau of Article XX of the GATT. Notwithstanding, this does not preclude the applicability in the WTO dispute settlement system of the doctrine of *abus de droit* which, being a general principle of law, is indeed applicable law for the purpose of procedural issues unregulated in the DSU. That said, a straightforward application of *abus de droit* seems to suggest that where a complaining Member's initiation of WTO litigation, in the *exercise of its right* to do so under Article 23.1 of the DSU, is in violation its *obligation* under (Type 3 and/or Type 5) RTA jurisdictional

[502] *See also* SHANY (2004), at 258 (The exercise of [a] right . . . in breach of treaty obligations should therefore be considered abusive.").

clauses that prohibit exactly such initiation of WTO litigation, it would be considered an abuse of rights; consequently, the WTO Tribunal shall find that the complaining Member is precluded from initiating the WTO litigation.

Apart from the doctrine of abuse of rights, the doctrine of "abuse of process" seems equally confirmed in international law[503] and, arguably, as well as in the WTO.[504] Abuse of process may perhaps be considered a particular aspect of abuse of rights – an abuse of *procedural rights*. By virtue of this doctrine of abuse of process, where litigation is considered "inherently vexatious" (for instance, where litigation is for the purpose of harassing the defendant, where the claim is "frivolous or manifestly groundless" or where the claim "could and should have been raised in earlier proceedings"), such process would be considered abusive and, accordingly, arguably the tribunal seized of the litigation "should" [505] or "ought to"[506] decline jurisdiction. Instances where an action may be considered inherently vexatious would include situations where the action is instituted "in violation of a binding instrument mandating that the case be adjudicated before a different forum," for instance an exclusive jurisdictional clause.[507]

From the foregoing analysis, it seems that whether under the doctrine of abuse of (procedural) rights or the doctrine of abuse of process, if WTO litigation is instituted in breach of Type 3 and Type 5 RTA jurisdictional clauses, it has been argued that the

[503] *See, e.g.*, Lowe (1999), at 202 ("The doctrine of abuse of process is equally well established.").

[504] *See, e.g.*, PAUWELYN (2003), at 116 (quoting Rutsel (2001)).

[505] Lowe (1999), at 202-203.

[506] SHANY (2004), at 258.

[507] *Id.* at 258.

WTO "should" or "ought to" decline jurisdiction.[508] This may consist of two possibilities: (i) that even in such circumstances, the WTO Tribunal still has jurisdiction, but it's only that the WTO Tribunal should decline the exercise of its jurisdiction; or (ii) that under such circumstances, the WTO Tribunal does *not* have jurisdiction in the first place. This point will be further explored later.[509]

3. Estoppel

As a corollary of the principle of good faith, estoppel has been clearly recognized a general principle of law[510] (and a principle of customary international law[511]). Under international law, the principle of estoppel contains three essential elements: (i) a statement which is clear and unambiguous; (ii) the statement having been made in a voluntary, unconditional and authorized manner; and (iii) reliance in good faith upon such statement either to the detriment of the party so relying or to the advantage of the party making the statement.[512] The ICJ's jurisprudence has explicitly confirmed these

[508] *Contra* Marceau (2002), at 812; Marceau (2001), at 1116-18 (arguing that the doctrine of abuse of process and that of abuse of procedural rights cannot be employed to address jurisdictional conflicts between international tribunals); Kwak & Marceau (2006), at 478 ("[I]t is unlikely that any adjudicating body, including those of the WTO, would find the allegations that their constitutional treaty has been violated to be 'vexatious,' especially when, in all probability, the claims would be drafted to capture the specific competence of that tribunal."). Nevertheless, it needs to be pointed out that the issue addressed in this thesis is concerning the violation of Type 3 and Type 5 RTA jurisdictional clauses, not violations of the DSU (as Marceau seems to be more concerned with).

[509] *See infra* Ch. 4.

[510] *See, e.g.*, CHENG (1993), at 141-42 ("Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted. In the international sphere, this principle has been applied in a variety of cases."). On the principle of estoppel as applied in domestic legal systems, see generally WILKEN (2006); COOKE (2003).

[511] *See, e.g.*, BROWNLIE (2008), at 644 ("A considerable weight of authority supports the view that estoppel is a general principle of international law."); MITCHELL (2008), at 117.

[512] BROWNLIE (2008), at 643-44.

elements of estoppel,[513] and, more specifically, that such a statement could be made either expressly or impliedly (but in any event must be clear and unequivocal),[514] and that not only a statement, but a conduct can give rise to estoppel.[515]

In the WTO jurisprudence, the principle of estoppel has been referred to in a number of occasions,[516] and in other instances the notion of estoppel seems to be applied

[513] *See, e.g.*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 1998 I.C.J. 275, 303 (June 11) ("An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice."); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92, 118 (Sept. 13) (suggesting the elements of estoppel as "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.").

[514] Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 143-44 (June 15) (dissenting opinion of Judge Spender) ("In my opinion the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, *either expressly or impliedly*, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.") (emphasis added). It is also noted that the concept of estoppel, particularly when the statement in question is made impliedly, may be similar to the concept of acquiescence; *see, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 413 (Nov. 26) ("[T]he constant acquiescence of [Nicaragua] in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court."). *See also* Panel Report, *Guatemala – Cement II*, ¶ 8.23 ("We note that 'acquiescence' amounts to 'qualified silence,' whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent. The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence."). It is noted, however, that acquiescence would be remotely connected to the core issues addressed in this thesis, as Type 3 and Type 5 RTA jurisdictional clauses are more appropriately considered in the context of estoppel (a clear and unequivocal statement not to initiate WTO litigation) than in the context of acquiescence, and for that reason, the treatment of acquiescence stops here.

[515] North Sea Continental Shelf (F.R.G. v. Den. / F.R.G. v. Neth.), 1969 I.C.J. 3, 26 (Feb. 20) ("[O]nly the existence of a situation of estoppel could suffice to lend substance to this contention [that the Federal Republic of Germany was bound by the Geneva Convention on the Continental Shelf], – that is to Say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past *conduct*, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, *in reliance on such conduct*, detrimentally to change position or suffer some prejudice.") (emphasis added).

[516] *See, e.g.*, Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, ¶¶ 223-28; Appellate Body Report, *EC – Export Subsidies on Sugar*, ¶¶ 301-20; Panel Report, *EC – Export Subsidies on Sugar (Australia)*, ¶¶ 7.54-7.75; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶¶ 7.37-7.39; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, ¶¶ 6.89-6.91; Panel Report, *Guatemala – Cement II*, ¶¶ 8.23-8.24; Panel Report, *EC – Asbestos*, ¶ 8.60 ("From a legal point of view, the question seems to be whether there is estoppel on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. This would be the case if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position.).

implicitly.[517] It is noted that the applicability of estoppel in the WTO dispute settlement system has been questioned by the WTO Tribunal;[518] but its applicability has *never* been ruled out anywhere in the WTO jurisprudence. Simply put, the WTO Tribunal has neither supported nor repudiated the applicability of estoppel. That being so, it is recalled that general principles of law form part of the applicable law in WTO litigation (at least) to the extent that it bears upon a procedural issue not governed anywhere in the DSU.

Applied to the scenario of jurisdictional conflicts between the WTO Tribunal and RTA Tribunals, it is recalled that Type 3 RTA jurisdictional clauses would bar subsequent WTO litigation once RTA litigation is initiated, whereas Type 5 RTA jurisdictional clauses clearly bar a complainant from initiating WTO litigation at all. Thus, by virtue of Type 3 and Type 5 RTA jurisdictional clauses, a complainant in a given case has waived its right to initiate WTO litigation otherwise guaranteed under

[517] The principle of estoppel seems to have been applied in an implicit manner (without mentioning "estoppel" *per se*); *see, e.g.*, Panel Report, *US – Steel Plate*, ¶¶ 7.28-7.29 ("That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. . . . Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim. Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner.") (citation omitted); Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, ¶ 50 ("When a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.") (citation omitted). *See also* PALMETER & MAVROIDIS (2004), at 43 (suggesting that the WTO Tribunal applied estoppel in the cited two instances without using the term). Here, it is also noted that to the extent that it is applied to preclude the re-assertion of an abandoned right, the notion of estoppel seems related to the concept of waiver. To this extent, the concept of waiver is treated similarly as *res judicata* in this thesis. *But see* Panel Report, *Export Subsidies on Sugar (Australia)*, ¶ 7.63 ("The principle of estoppel has never been applied by any panel or the Appellate Body."); Appellate Body Report, *Export Subsidies on Sugar*, ¶ 312 ("The principle of estoppel has never been applied by the Appellate Body.").

[518] *See, e.g.*, Panel Report, *Export Subsidies on Sugar (Australia)*, ¶ 7.63 ("In the Panel's view, it is far from clear whether the principle of estoppel is applicable to disputes between WTO Members in relation to their WTO rights and obligations."); Appellate Body Report, *Export Subsidies on Sugar*, ¶ 310 ("We agree with the Panel that it is far from clear that the estoppel principle applies in the context of WTO dispute settlement.").

Article 23.1 of the DSU through a clear and unambiguous statement (in the context of Type 5 RTA jurisdictional clauses) and conduct (in the context of Type 3 RTA jurisdictional clauses, i.e., the conduct of engaging RTA Tribunals). Consequently, the complainant would be precluded from asserting before the WTO Tribunal that it is entitled to institute the WTO proceedings.[519] Simply put, in the WTO litigation, the complainant simply lacks the procedural right to sue. The result is that the WTO Tribunal shall dismiss the WTO litigation either on the ground of lack of jurisdiction or on the ground of inadmissibility. This will be further addressed later.[520]

B. Jurisdiction-Regulating Norms concerning Parallel Proceedings: *Lis Alibi Pendens*

By virtue of the *lis alibi pendens* doctrine (or *litispendence*), a tribunal seized of a matter should decline jurisdiction if an identical case is pending before another competent tribunal.[521] By far, the status of this doctrine in international law seems open to debate, and the jurisprudence of international tribunals remains unclear.[522] As the

[519] *Contra* Kwak & Marceau (2006), at 469 ("If there is an allegation of WTO violation, it would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure claimed to be inconsistent with the WTO Agreement on the ground that the complaining or defending member is alleged to have a more specific or more appropriate defence or remedy in another forum concerning the same legal facts. Before a WTO panel, should the NAFTA parties have explicitly waived their rights to initiate dispute settlement proceedings under the WTO, the situation would be the same.").

[520] *See infra* Ch. 4.

[521] *See* SHANY (2004), at 22 ("This doctrine of litispendence entails that during the pendency of one set of proceedings before a judicial body it is prohibited to commence another set of competing proceedings concerning the same dispute before another judicial body."); Lowe (1999), at 202 ("The doctrine [of *lis alibi pendens*] indicates that if a substantially identical case is already pending before a competent tribunal, the forum may decline to exercise its own jurisdiction.") (citation omitted). *See also* PAUWELYN (2003), at 116.

[522] *See, e.g.*, SHANY (2004), at 244 ("[I]t looks as if existing case-law on the question of *lis alibi pendens* is also too scarce and non-definitive to establish the existence of such a general rule or principle in international law, in the relations between two international courts and tribunals.").

PCIJ pointed out, "[i]t is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of *litispendence*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country."[523]

In light of its controversial status, it seems natural that the doctrine of *lis alibi pendens* has never been referred to by the WTO Tribunal. Leaving aside its status, the doctrine of *litispendence* would seem difficult to apply to the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals for one simple reason: the cause of action before the WTO Tribunal (i.e. WTO law) is distinct from that before RTA Tribunals (i.e. RTA law).[524] That being so, the doctrine of *lis alibi pendens* would receive no further treatment in this thesis.

C. Jurisdiction-Regulating Norms concerning Subsequent Proceedings: *Res Judicata*

[523] Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6, at 20 (Aug. 25).

[524] *See, e.g.*, Pauwelyn & Salles (2009), at 110; Marceau (2002), at 812; Marceau (2001), at 1116-18 (arguing that *lis pendens* cannot be employed to address jurisdictional conflicts between international tribunals); Kwak & Marceau (2006), at 481 ("It is generally difficult to speak of . . . *lis pendens* between two dispute settlement mechanisms under two different treaties. The parties may be the same and the subject matter may be a related one but, legally speaking, in the WTO and RTAs, the applicable law would not be the same.").

The principle of *res judicata* (or the principle of finality) is well-established as either a general principle of law[525] or even a rule of customary international law.[526] In either case, this principle of *res judicata* has been explicitly confirmed by international tribunals.[527] Essentially, there are three conditions for the application of *res judicata*: (i) identity of parties; (ii) identity of cause of action; and (iii) identity of subject matter.[528] Once these elements are satisfied, a second-in-time tribunal would be unable to re-adjudicate the merits of a case previously settled by another tribunal.[529]

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[525] *See, e.g.*, Interpretation of Judgments Nos. 7 and 8 (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 27 (Dec. 16) (dissenting opinion of Judge Anzilotti) ("[I]t appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognized by civilized nations' . . . that case is assuredly the [doctrine of *res judicata*]."); Amco Asia v. Indonesia, ¶ 26, ICSID (W. Bank) Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983) ("The principle of res judicata is a general principle of law."); CHENG (1993), at 336 ("There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings."); COLLIER & LOWE (1999), at 261 ("*Res judicata* is a general principle of law.").

[526] *See, e.g.*, SHANY (2004), at 245 ("*Res judicata* (or the principle of finality) has long been considered a well established rule of international law.").

[527] *See, e.g.*, Societe Commerciale de Belgique (Belg. v. Greece), 1939 P.C.I.J. (ser. A/B) No. 78, at 174 (June 15) ("[S]ince the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal,' and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part."); Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 30 (May 16) ("[T]he Court of Arbitration applied the doctrine of *res judicata* because not only the Parties but also the matter in dispute was the same."); Interpretation of Judgments Nos. 7 and 8 (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 21 (Dec. 16) ("The interpretation adds nothing to the decision, which has acquired the force of *res judicata*, and can only have binding force within the limits of what was decided in the judgment construed."); Factory at Chorzow (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 75 (Sept. 13) (dissenting opinion of Judge Ehrlich) ("[I]n international law, one of the conditions on which the existence of *res judicata* is dependent is that there must be 'identity of the subject matter' and that the point which was decided must relate to the 'merits of the case.'"); Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 214 (Nov. 18) (holding that since the arbitral award in question was not subject to appeal, the Court could not "pronounce on whether the arbitrator's decision was right or wrong").

[528] *See* Interpretation of Judgments Nos. 7 and 8 (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 23-27 (Dec. 16) (dissenting opinion of Judge Anzilotti); Lowe (1996), at 40.

[529] *See, e.g.*, SHANY (2004), at 251.

The WTO Tribunal has referred to the doctrine of *res judicata* in a few instances,[530] and arguably, the WTO Tribunal has implicitly applied *res judicata* in *EC – Bed Linen (Article 21.5 – India)* without using the term "*res judicata*".[531] In this connection, it is noted that the WTO Tribunal seems to deny the applicability of *res judicata* in *Argentina – Poultry Anti-Dumping Duties*: "we are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies."[532] This seems to be incorrect. In making this statement, the *Argentina – Poultry Anti-Dumping Duties* Panel relies upon the Appellate Body's finding in *Japan – Alcoholic Beverages II* to the effect that "[a]dopted panel reports . . . are not binding."[533] But it seems that the Appellate Body's holding is concerned with *stare decisis*, rather than *res judicata*. As the full sentence would reveal, "[a]dopted panel reports . . . are not binding *except with respect to resolving the particular dispute between the parties to that dispute*";[534] this in effect

[530] *See, e.g.*, Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, ¶¶ 8.252-8.264; Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, ¶¶ 7.239-7.262; Panel Report, *India – Autos*, ¶¶ 7.42-7.103.

[531] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, ¶ 93 ("[A] reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB—with respect to the particular claim and the specific component of the measure that is the subject of the claim."); Panel Report, *EC – Bed Linen (Article 21.5 – India)*, ¶ 6.51 ("[T]he portions of the original Report of the Panel that are not appealed, together with the Appellate Body report resolving the issues appealed, must, in our view, be considered as the final resolution of the dispute, and must be treated as such by the parties, and by us, in this proceeding."). *See also* PALMETER & MAVROIDIS (2004), at 42 (suggesting that in *EC – Bed Linen (Article 21.5 – India)*, the WTO Tribunal has confirmed (without using the term "*res judicata*") the *res judicata* effect carried by adopted panel and Appellate Body reports towards subsequent WTO litigation between the same parties and in respect of the same matter).

[532] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.41.

[533] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.41 n.63 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, 14).

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

means that adopted panel (and Appellate Body) reports would carry *res judicata* towards subsequent panels.

That said, it is quite significant to note that while the WTO Tribunal seems to recognize the doctrine of *res judicata*, such recognition would seem to be limited to the WTO Tribunal's own decisions: the WTO Tribunal is bound by prior decisions rendered by the WTO Tribunal itself (with respect to the same parties and the same dispute, of course). The WTO Tribunal has never recognized any *res judicata* effect that may pertain to decisions rendered by non-WTO tribunals. Indeed, to give the benefit of doubt to the *Argentina – Poultry Anti-Dumping Duties* Panel, its holding that "we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies"[535] would rest upon the fact that even with respect to the same parties and same measure, the dispute before an RTA Tribunal would never carry *res judicata* effect towards the WTO Tribunal because the cause of action is different (RTA law before the RTA Tribunal, and WTO law before the WTO Tribunal).[536]

D. Others (Im)possible Candidates

1. *Forum non conveniens*?

[535] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, ¶ 7.41.

[536] *See, e.g.*, Pauwelyn & Salles (2009), at 104. *See also* Marceau (2002), at 812; Marceau (2001), at 1116-18 (arguing that *res judicata* cannot be employed to address jurisdictional conflicts between international tribunals); Gonzalez-Calatayud & Marceau (2002), at 283; Kwak & Marceau (2006), at 481 ("It is generally difficult to speak of *res judicata* . . . between two dispute settlement mechanisms under two different treaties. The parties may be the same and the subject matter may be a related one but, legally speaking, in the WTO and RTAs, the applicable law would not be the same.").

Without going too deep into this doctrine, it suffices to say that where certain circumstances exist, a domestic tribunal seized of a matter may decline jurisdiction in favor of a foreign tribunal on the general idea that the seized tribunal considers itself an inconvenient forum. This doctrine is an expression of a concern for the interests of the litigants (for instance, that bringing a foreigner as defendant before the tribunal would be inappropriate because evidence and relevant witnesses are situated abroad) as well as a concern for the general interest of justice.[537] That said, the doctrine of *forum non conveniens*, essentially a notion under domestic legal systems, cannot be "translated into the international legal system" because a number of distinguishing features of inter-State actions before international tribunals (for instance, that in international litigation, the location of evidence and witnesses is usually immaterial as international litigation usually takes place in a "neutral" location chosen for the convenience of the judges and parties rather than for any connecting factor that links the location with certain underlying factual circumstances).[538]

Specifically in the context of WTO litigation, *forum non conveniens* would be inapplicable for another reason. As an abstention doctrine (as opposed to preclusion doctrines such as *res judicata*), *forum non conveniens* involves an exercise of discretion by the seized tribunal to determine whether to rule on the merits of the case. However, as previously stated, while WTO panels have the discretion to decline the exercise of validly established jurisdiction over *certain* claims in a dispute, they do not enjoy the

[537] *See, e.g.*, Lowe (1999), at 200.

[538] *Id.* at 200-201. *See also* Marceau (2002), at 812; Marceau (2001), at 1116-18 (arguing that *forum non conveniens* cannot be employed to address jurisdictional conflicts between international tribunals); Kwak & Marceau (2006), at 480 ("In the current state of international jurisdictional law, the doctrine of *forum non conveniens* . . . absent an agreement among states, appears to be inapplicable to an overlap of jurisdiction in public international law tribunals . . . . The WTO forum is always a 'convenient' forum for any WTO grievance.").

discretion to freely decline the exercise of jurisdiction over the *entirety* of the claims in a dispute.[539] Without such discretion, the WTO Tribunal is clearly unable to decline jurisdiction on the basis of *forum non conveniens*.[540]

This is, nevertheless, different from the circumstances where the WTO Tribunal is legally *precluded* or compelled to decline jurisdiction. As stated above, where a complaining Member initiates WTO litigation in violation of the doctrine of abuse of rights/process, arguably the WTO Tribunal would have to decline jurisdiction (although this thesis submits instead, as will be seen later, that in such case the WTO Tribunal simply lacks jurisdiction). Here, the WTO Tribunal is legally precluded from exercising jurisdiction; it has no discretion at all.

2. Comity?

The notion of comity essentially involves mutual respect and deference between different tribunals.[541] As desirable as comity may be for the purpose of promoting systemic coherence between international tribunals, this notion does not appear to have attained the status of general principle of law or customary international law; thus, absent any express treaty language, it would be difficult for an international tribunal to stay proceedings or decline jurisdiction based on this notion of comity.[542]

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[539] *See, e.g.*, Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 46-53; Panel Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 7.1-7.18.

[540] For a consistent view, see, for example, Pauwelyn & Salles (2009), at 112-13. *See also* Kwak & Marceau (2006), at 480 ("The WTO forum is always a 'convenient forum' for any WTO grievance.).

[541] *See, e.g.*, SHANY (2004), at 260.

[542] *See id.* at 261-66.

It has been argued that in the WTO/RTA context, the WTO Tribunal should, in the exercise of its inherent jurisdiction, apply comity where a WTO dispute is inextricably connected to an antecedent or concurrent RTA dispute.[543] However, the notion of comity would be inapplicable for the reason similar to the inapplicability of *forum non conveniens* in the WTO context: just like *forum non conveniens*, comity is characterized as an abstention doctrine and involves discretion, while the WTO Tribunal simply lacks the discretion to freely decline the exercise of jurisdiction over the *entirety* of the claims in a dispute.[544] Without such discretion, the WTO Tribunal is clearly unable to decline jurisdiction on the basis of comity.[545] But again, this is without prejudice to the situations where the WTO Tribunal may be legally precluded from (as opposed to through the exercise of discretion) exercising jurisdiction.

V. CONCLUSION ON CHAPTER THREE

Even today, the applicability of non-WTO norms in the WTO dispute settlement system remains a highly controversial issue that divides commentators far apart. The WTO Tribunal itself, with a number of opportunities to give a definitive treatment on

[543] Henckels (2008), at 594-97. *See also* Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 339 (Dec. 15) (separate opinion of Judge Higgins) ("The very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has, or in connection with the conduct or the merits of a case. The judges who jointly dissented in the Nuclear Tests cases did not challenge the existence of such inherent powers. They asserted that their use 'must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require.'"). However, it is noted that while an international tribunal has the inherent jurisdiction to decline the exercise of jurisdiction, this quoted opinion by Judge Higgins does not refer to comity specifically and could possibly refer to other doctrines than comity.

[544] *See, e.g.*, Appellate Body Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 46-53; Panel Report, *Mexico – Taxes on Soft Drinks*, ¶¶ 7.1-7.18.

[545] For a consistent view, see, for example, Gao & Lim (2008), at 909.

this issue, has been able to avoid this thorny issue.[546] In light of the compulsory jurisdiction enjoyed by the WTO Tribunal, "[i]t is almost inevitable that the WTO procedures will exert a gravitational pull, drawing into the WTO system disputes that could not easily find a forum elsewhere and recasting them as 'trade' disputes."[547] Thus, it seems that the WTO Tribunal would soon find itself unable to avoid this issue as it used to. When (instead of "if") that happens, this thesis submits that in light of the general principle that all norms of international law are applicable except where a treaty regime specifically excludes the applicability or otherwise contract out, the burden would largely fall upon the party that argues against the applicability of non-WTO norms to provide an argument that is preponderantly forceful.

As seen above, the Restrictive Approach argues that the applicable law in WTO litigation is limited to the four corners of the WTO covered agreements, and its reliance on DSU provisions, though inclusive, proves to be quite forceful. On the other hand, the Liberal Approach heavily relies upon the actual practice of the WTO Tribunal and advocates for the applicability of potentially all (substantive and procedural) non-WTO norms in the WTO legal system. Even so, the chasm is a bridgeable one. Notably, even the Restrictive Approach concedes that non-WTO norms may be applicable in the course of determining procedural issues that have received no treatment anywhere in the DSU; indeed, this is confirmed by the WTO jurisprudence. On the other hand, the Liberal Approach, in asserting the applicability of non-WTO norms, relies on the WTO

[546] *See, e.g.*, Appellate Body Report, *EC – Hormones*, ¶ 123 ("The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question.").

[547] COLLIER & LOWE (1999), at 104.

jurisprudence that has applied procedural non-WTO norms as well as secondary substantive norms of international law outside the ambit of the WTO. Without taking any side, this thesis submits that for the purpose of tackling with the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals, it is sufficient to identify the common ground between the Restrictive Approach and Liberal Approach and come to the conclusion that non-WTO norms (including customary international law, general principles of law and treaties alike) are applicable, in the exercise of the WTO Tribunal's inherent jurisdiction, to address procedural issues that are not dealt with by any DSU provision. Also, as aforementioned, this thesis submits that in light of the close relationship between RTAs and the WTO, RTAs could be distinguished from other non-WTO treaties and stand out as the prime candidate as applicable law in the WTO dispute settlement system, at least for the purpose of resolving procedural issues.

A crucial point made in this thesis is this: the applicability of non-WTO norms cannot be reduced to the question of whether such application would "add to or diminish" WTO rights/obligations as prohibited by Articles 3.2 and 19.2 of the DSU. For the reasons set forth above, this would be overly simplistic, because there does not appear to be a logical relationship between the applicability of non-WTO norms, on the one hand, and Articles 3.2 and 19.2 of the DSU, on the other. More significantly, where a certain non-WTO norm is applicable and, for instance, takes away a WTO right, it is the WTO Tribunal's *non-application* of such non-WTO norm that would "add to" a WTO right that does not exist anymore.

As identified above, certain non-WTO norms are applicable in WTO litigation for the purpose of resolving procedural issues not addressed in the DSU, or, more specifically, for addressing jurisdictional conflicts between the WTO Tribunal and RTA Tribunals that arise from Type 3 and Type 5 RTA jurisdictional clauses; these include

RTA jurisdictional clauses, the notion of good faith, the doctrine of abuse of rights/process and the doctrine of estoppel. Other non-WTO norms (even though they might possibly be considered general principles of law) are inapplicable to the context of WTO/RTA jurisdictional conflicts, and the reason is either because such the constituent elements of such non-WTO norms can hardly be satisfied (including *res judicata* and *lis alibi pendens*), or because the WTO Tribunal lacks the discretionary power called for by such non-WTO norms (including *forum non conveniens* and comity).

Having made the foregoing analysis, it is now appropriate to enter into the very core issue addressed by this thesis: how is the WTO Tribunal's jurisdiction affected by such non-WTO norms in the event of jurisdictional conflicts? That will be fully addressed in the next Chapter.

CHAPTER FOUR

THE LEGAL IMPLICATIONS OF RTA JURISDICTIONAL CLAUSES UPON THE JURISDICTION OF THE WTO TRIBUNAL: FRAMEWORK PRESENTED AND EXPLAINED

Before proceeding further, it is recalled that in Chapter One, Type 3 and Type 5 RTA jurisdictional clauses have been singled out, among the divergent universe of RTA jurisdictional clauses, as these two types of RTA jurisdictional clauses would most likely give rise to jurisdictional conflicts with the WTO Tribunal in the sense of conflicts between jurisdictional clauses (law of treaties approach); also, Chapter One pre-defines the specific case scenarios for the purpose of facilitating analysis.

Chapter Two establishes certain ground rules: (i) although normally the consent of the respondent Member in a dispute has already been given *ex ante*, it remains possible that the complaining Member, although conferring its consent through the very initiation of the WTO litigation, may have invalidly given that consent because its right to open WTO litigation is limited; (ii) the WTO Tribunal, like other international tribunals, also has certain jurisdiction that is inherent for the purpose of proper administration of its judicial functions, including the jurisdiction to examine, *proprio motu*, the existence and scope of its jurisdiction; (iii) even in the WTO context, jurisdiction and admissibility have to be distinguished; (iv) although the WTO Tribunal's jurisdiction is narrowly limited to claims based upon the WTO law (and not, for example, RTA law), that narrow scope of subject matter jurisdiction does not necessarily limit the scope of the applicable law in the WTO dispute settlement system;

and (v) the right to open WTO litigation, as conferred by Article 23.1 of the DSU, is by no means an absolute one; it is subject to restrictions both within the DSU and outside the DSU. In Chapter Two, (potential) jurisdictional conflicts between the WTO Tribunal and RTA Tribunals have been identified in the pre-defined case scenarios concerning Type 3 and Type 5 RTA jurisdictional clauses, both under the Law of Treaties Approach, which this thesis is mainly concerned with, and under the alternative Institutional Approach.

Chapter Three takes some pain to reach the indisputable position that in the course of determining procedural issues regarding which the DSU does not give an answer, norms of international law outside the four corners of the WTO (including customary international law, general principles of law and non-WTO treaties (RTAs in particular)) are applicable law for the WTO Tribunal to resort to and directly apply in WTO litigation; within these narrow parameters, not only that the WTO Tribunal's application of such non-WTO norms would be consonant with Articles 3.2 and 19.2 of the DSU, but also that the WTO Tribunal's non-application of such non-WTO norms would violate these DSU provisions. In addition, Chapter Three identifies certain general principles of law (including the notion of good faith, the doctrine of abuse of rights, the doctrine of abuse of process and the principle of estoppel), together with Type 3 and Type 5 RTA jurisdictional clauses, as applicable to address the (potential) jurisdictional conflicts between the WTO Tribunal and RTA Tribunals identified in Chapter Two.

Now, in this Chapter Four, the major task is to integrate the Law of Treaties Approach and the alternative Institutional Approach towards jurisdictional conflicts, and present a framework for analysis of jurisdictional conflicts between the WTO Tribunal and RTA Tribunals, as previously identified. In Part I of this Chapter, this framework will be presented and briefly explained. As further implementation of this framework,

Part II addresses the jurisdictional conflicts issues under the Law of Treaties Approach, whereas Part III engages the discussions under the alternative Institutional Approach. Part IV builds upon analysis and further examines the concrete legal implications; in the course of this, the distinction between jurisdiction and admissibility would be revisited, and the possible question of "negative conflict" of jurisdiction will be addressed. In this connection, it is recalled that for the reasons set forth previously, the line of argumentation based on Articles 3.2 and 19.2 of the DSU does not affect the legal analysis here. These reasons are not repeated here. Finally, Part V concludes this Chapter by way of summary.

I. FRAMEWORK PRESENTED: TWO-TRACK ANALYSIS

The framework presented in this thesis consists of two alternative tracks: first, jurisdictional conflicts between the WTO Tribunal and RTA Tribunals are addressed from the perspective of conflicts between the jurisdictional clauses pertaining respectively to the WTO Tribunal and RTA Tribunals (Law of Treaties Approach); second, such jurisdictional conflicts are addressed from the perspective of similarity between disputes respectively before the WTO Tribunal and RTA Tribunals (Institutional Approach). It is noted that such framework is by no means a novel one; it is implicit in various works by distinguished commentators.[548] Instead, this thesis builds upon the foundation as laid down by relevant discussions and further develops it

[548] *See, e.g.*, SHANY, at 229-66 (examining jurisdictional conflicts between international tribunals under the Institutional Approach), 266-69 (addressing jurisdictional conflicts from the Law of Treaties Approach). Evidently, however, the Law of Treaties Approach receives much less attention than the Institutional Approach.

with an emphasis on the Law of Treaties Approach, and applies it into the WTO/RTA context.

Under the first track of analysis (Law of Treaties Approach), it is first recalled that a potential conflict between the jurisdictional clause of the WTO Tribunal (*viz.* Article 23.1 of the DSU), on the one hand, and Type 3 and Type 5 RTA jurisdictional clauses, on the other, has been identified. In accordance with the presumption against conflicts, such potential conflict, as identified, would have to be interpreted away to the extent possible; that is, where possible, a treaty interpreter should adopt an interpretation that would remove such potential conflict. In this connection, the most pertinent provision is Article 31(3)(c) of the VCLT. To the extent that the jurisdictional conflict can be interpreted away by reference to the notion of good faith, the doctrine of abuse of rights/process, the principle of estoppel and/or Type 3/Type 5 RTA jurisdictional clauses, the scope of Article 23.1 of the DSU would be narrowed down, and the jurisdictional scope of the WTO Tribunal's jurisdiction would be carved out in a way that it does not encompass situations where potential jurisdictional conflicts would arise from Type 3/Type 5 RTA jurisdictional clauses.

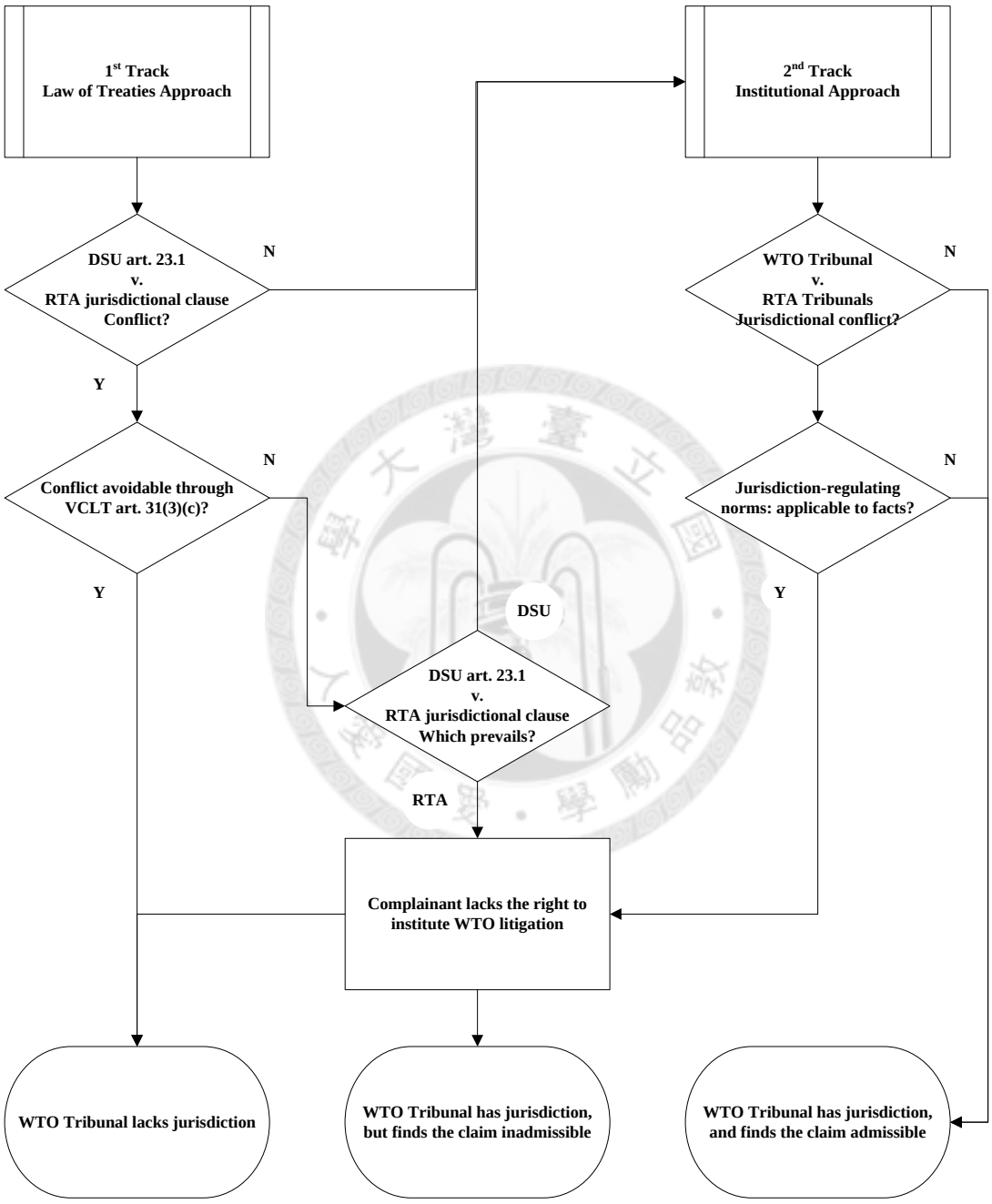
If the conflict proves to be a genuine one in the sense that it cannot be avoided through treaty interpretation, the conflict would have to be resolved through conflict clauses, if any, the principle of *lex posterior* and that of *lex specialis*. Most likely, Type 3/Type 5 would prevail over Article 23.1 of the DSU, and lead to the conclusion that the complaining Member in such case scenarios would lack the right (otherwise existing under Article 23.1 of the DSU) to institute the WTO litigation. As will be further examined in Part IV, this would compel the WTO Tribunal to dismiss the WTO claim either for lack of jurisdiction or on the ground of inadmissibility.

Under the second track of analysis (Institutional Approach), the question whether there is any potential or genuine conflict between Article 23.1 of the DSU and Type 3/Type 5 RTA jurisdictional clauses becomes irrelevant. This track of analysis will proceed independently of whether one identifies any such conflict between jurisdictional clauses. Rather, this second track of analysis focuses on the applicability/application of relevant jurisdiction-regulating norms, and in the specific WTO/RTA context, these would particularly include the notion of good faith, the doctrine of abuse of rights/process and the principle of estoppel. If applied, these jurisdiction-regulating norms would lead to the conclusion (similar to that reached under the Law of Treaties Approach where a genuine conflict exists) that the complaining Member in such case scenarios would lack the right (otherwise existing under Article 23.1 of the DSU) to institute the WTO litigation. Likewise, as will be further examined in Part IV, this would compel the WTO Tribunal to dismiss the WTO claim either for lack of jurisdiction or on the ground of inadmissibility.

For clarity, this framework is summarized in the flowchart that appears in the following page:

FLOWCHART:

FRAMEWORK OF TWO-TRACK ANALYSIS ON WTO/RTA JURISDICTIONAL CONFLICTS



As the flowchart shows, even when the first track fails to address the jurisdictional conflict between the WTO Tribunal and RTA Tribunals, one can still, at all times, resort

to the second track for solution. This is generally because the "conflict" under the Law of Treaties Approach is much narrower than the jurisdictional "conflict" under the Institutional Approach, and also because the analysis under the Institutional Approach does not depend upon anything in the Law of Treaties Approach. These two tracks are independent to each other, while interconnected in some way. Further explanations will be offered immediately below. One final note: as have been reviewed previously in Chapter Three, the relevant general principles of law (good faith, abuse of righs/process and estoppel) would be approached without repeating their constituent elements; reference is made to the discussions in Chapter Three above.

II. FIRST TRACK: LAW OF TREATIES APPROACH

A. Avoidance of Conflict through Treaty Interpretation: Article 31(3)(c) of the VCLT

Here, the main task is this: to interpret Article 23.1 of the DSU in light of Type 3/Type 5 RTA jurisdictional clauses (where this is justified), as well as certain general principles of law, the most relevant of them having been identified as the notion of good faith, the doctrine of abuse of rights/process and the principle of estoppel. In the course of interpreting Article 23.1 of the DSU, these non-WTO norms are "extrinsic"[549] to the text being interpreted. Thus, they would best be situated, in the context of Articles 31 and 32 of the VCLT (both concerned with treaty interpretation), under Article 31(3).

[549] ILC Draft Articles on the Law of Treaties with Commentaries, arts. 27 & 28, ¶ 9 ("[The elements of Article 31(3)] are extrinsic to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.").

Article 31(3) of the VCLT, in turn, contains three elements. This provision instructs a treaty interpreter to "take[] into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties."[550] Without going into unnecessary depth, suffice it to say for present purposes that instead of Article 31(3)(a) or Article 31(3)(b), the potentially relevant non-WTO norms identified above (RTA jurisdictional clauses, good faith, abuse of rights/process and estoppel) would be more concerned with Article 31(3)(c), as these non-WTO norms would not be plausibly considered as either subsequent practice or subsequent agreement regarding the interpretation of Article 23.1 of the DSU.[551] Thus, the focus here will be to interpret the jurisdictional scope of the WTO Tribunal, as established by Article 23.1 of the DSU, pursuant to Article 31(3)(c) of the VCLT in light of RTA jurisdictional clauses (where this is justified), good faith, the doctrine of abuse of rights/process and estoppel.

1. Ascertainment of Article 31(3)(c) of the VCLT: relevant "rules of international law" applicable in the relations between the "parties"

[550] VCLT art. 31(3).

[551] For more on Articles 31(3)(a) and 31(3)(b), see, for example, GARDINER (2008), at 203-49.

Article 31(3)(c) of the VCLT expresses the principle of "systemic integration."[552] As the ILC stated[553]:

> All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.

Simply put, all treaties function – in terms of both interpretation and application – in the context of other rules of international law.[554]

Turning to the wording of this provision, Article 31(3)(c) instructs that a treaty interpreter shall[555] take into consideration "any relevant rules of international law applicable in the relations between the parties." A number of issues are involved here,

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[552] *See generally* McLachlan (2005). *See also* ILC Report on Fragmentation of International Law, ¶ 413; RICHARD K. GARDINER, TREATY INTERPRETATION 260 (2008) ("[A]rticle 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.").

[553] ILC Report on Fragmentation of International Law, ¶ 414.

[554] *See* MCNAIR (1961), at 466 ("Treaties must be applied and interpreted against the background of the general principles of international law.").

[555] *See, e.g.*, RICHARD K. GARDINER, TREATY INTERPRETATION 259 (2008) ("The obligatory character of article 31(3)(c) is the same as that of the provisions which immediately precede it. This means that the provision must be applied where it has a role in any particular instance, not that there will always be a role for its application."). *See also* Panel Report, *EC – Approval and Marketing of Biotech Products*, ¶ 7.69 ("It is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ('[t]here shall be taken into account'); it does not merely give a treaty interpreter the option of doing so.").

but the most pertinent of them for present purposes would be: (i) what is meant by "relevant"; (ii) does the phrase "rules of international law" include all norms of international law (including customary international law, general principles of law and treaty law) or just some of them; and, perhaps the most controversial, (iii) what is meant by "parties"?

Although this provision enshrines values of great importance, the relevant jurisprudence in international law is far from sufficient.[556] That said, the first two issues would be much easier to answer than the last one. First, for present purposes, it seems reasonable to argue that since the RTA jurisdictional clauses, good faith, abuse of rights/process doctrine and the principle of estoppel all touch upon a complaining Member's right to initiate WTO litigation under Article 23.1 of the DSU, these non-WTO norms are relevant for the purpose of interpreting this DSU provision pursuant to Article 31(3)(c) of the VCLT.[557] Second, it seems to be well settled that the phrase "rules of international law" includes not only customary international law and general principles of law[558], but also treaty[559] law. However, by saying that Article 31(3)(c)

[556] ILC Report on Fragmentation of International Law, ¶ 433 ("Until recently, there have been few references to article 31 (3) (c) in judicial or State practice."). For a survey of relevant case law, see, for example, *id.* ¶¶ 434-60.

[557] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 260 (2008) ("It seems reasonable to take the ordinary meaning of 'relevant' rules of international law as referring to those touching on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation."); PAUWELYN (2003), at 263-64 ("If this 'other rule' sheds light on the meaning of the WTO term, it is 'relevant.' If it has no bearing on it, it is not 'relevant.'").

[558] *See, e.g.*, Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 182 (Nov. 6) ("Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty."). *See also* MITCHELL (2008), at 83 ("Article 31(3)(c) would include principles of customary international law because customary international law binds all WTO Members. Similarly, general principles of law are not linked to specific

covers treaties external to the treaty being interpreted, this does not necessarily justify reliance upon all treaties in the context of Article 31(3)(c). This point is closely interconnected with the last issue concerning "parties."

The most crucial issue concerning "parties" is this: "is it necessary that *all* the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes"?[560] As a further step, McLachlan has identified four different possibilities concerning the meaning of "parties"[561]: (i) *all parties to the treaty* being interpreted must be parties to any other treaty being used; (ii) *all parties to the dispute* over interpretation must be parties to any other treaty being used; (iii) a rule being invoked from any other treaty must be shown to be a *customary rule*; and (iv) a rule being invoked in another treaty must have been *implicitly accepted or tolerated by all parties to the treaty* under interpretation.

This issue has divided commentators somewhat apart. Marceau, Palmeter and Mavroidis seem to suggest that the term "parties" refer to the disputing parties[562]

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conventions and therefore can be seen as applying more generally to all WTO Members."); Abi-Saab (2006), at 463 ("These *a fortiori* include the rules of general international law which are applicable to all members of the international community.").

[559] *See, e.g.*, PAUWELYN (2003), at 254-56; ILC Report on Fragmentation of International Law, ¶ 470 ("[A]rticle 31 (3) (c) goes beyond the truism that 'general international law' is applied generally and foresees the eventuality that another rule of conventional international law is applicable in the relations between the parties."); RICHARD K. GARDINER, TREATY INTERPRETATION 261-63 (2008) ("It seems clear from the preponderant meaning of 'international law,' the ILC preparatory work above, the developing practice considered below, and ILC and academic studies, that other relevant treaties between parties in dispute about interpretation of a treaty between them are viewed as admissible in treaty interpretation . . . .").

[560] ILC Report on Fragmentation of International Law, ¶ 470.

[561] McLachlan (2005), at 314.

[562] *See, e.g.*, Marceau (1999), at 119, 125 n.38 ("Under certain circumstances, a bilateral agreement might also be considered under Article 31(3)(c) . . . . [The term 'parties' means] more generally . . . a subset of all the parties to the treaty under interpretation, i.e. the specific countries the relations of which are under examination in light of the treaty at issue."); Marceau (2001), at 1087 ("The requirement that any such rule be 'applicable to the relations between the parties' in the WTO/MEAs debate, implies that the two WTO Members must be parties to the MEA for it to be used in the interpretation of the WTO provision."); Gonzalez-Calatayud & Marceau (2002), at 283 ("A MEA dispute avoidance and settlement mechanism

(second possibility); Pauwelyn suggests that for a treaty to be referred to in the sense of Article 31(3)(c), that treaty must reflect the "*common* intentions of all parties to the treaty, not a few of them"[563] and argues more specifically that for a treaty rule to be relied upon in the course of interpreting a WTO term, that treaty rule must be "at least *implicitly* accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means"[564] (fourth possibility). It is noted that the ILC seems to lean towards the second and fourth possibilities, away from the first possibility that would require the "parties" to be all parties to the treaty being interpreted[565]:

> A better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty. Although this creates the possibility of eventually divergent interpretations (depending on which States parties are also parties to the dispute), that would simply reflect the need to respect (inherently divergent) party will as elucidated by reference to those

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constitutes legal rules applicable between parties, which must be taken into account by a WTO adjudicating body (pursuant to Article 31(3)(c) of the Vienna Convention) when interpreting WTO obligations and in respect of the procedural stages of its dispute-settlement mechanism.") Palmeter & Mavroidis (1998), at 411 ("The word 'parties,' as used in [Article 31(3)(c) of the VCLT], would seem to refer to the parties to the particular dispute, not to the parties to the multilateral agreement."). It is noted that some commentators seem to take a further step in arguing that even where *not all disputing parties* are parties to a treaty rule, that treaty rule would assist in the interpretation of a WTO term in the sense of Article 31(3)(c); *see, e.g.*, Damme (2006), at 559 ("As long as the interpretation does not interfere with the rule of *pacta tertiis nec nocent nec prosint* and with the rights and obligations of other WTO Members provided in the WTO covered agreements, panels and the Appellate Body should not exclude *ipso facto* from the interpretative framework relevant 'regional' international law because not all disputants are bound by the 'regional' norm or not all WTO Members have implicitly supported that rule.").

[563] PAUWELYN (2003), at 257.

[564] *Id.* at 261. *Cf.* QURESHI (2006), at 23 ("It would be an inappropriate interpretation of Article 31(3)(c) if the analogous reasoning for the interpretation of Article 31(3)(b), aligned to the practice of decision-making by consensus, were adopted here.").

[565] ILC Report on Fragmentation of International Law, ¶ 472.

> other treaties as well as the bilateralist character of most treaties underpinned by the practices regarding reservations, *inter se* modification and successive treaties, for example . . . . In addition, it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been "implicitly" accepted or at least tolerated by the other parties "in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned". This approach has in fact been adopted in some of the decisions of the WTO Appellate Body. It gives effect to the sense in which certain multilateral treaty notions or concepts, though perhaps not found in treaties with identical membership, are adopted nevertheless widely enough so as to give a good sense of a "common understanding" or a "state of the art" in a particular technical field without necessarily reflecting formal customary law.

In any event, this remains an unresolved issue in international law.

Turning to the WTO context, it is first observed that the WTO Tribunal also recognizes the function of Article 31(3)(c) as ensuring coherence in international law,[566] and it also recognizes that general principles of international law,[567] customary international law and treaty law[568] as "rules of international law" in the sense of Article

[566] Panel Report, *EC – Approval and Marketing of Biotech Products*, ¶ 7.70 ("Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.").

[567] Appellate Body Report, *US – Shrimp*, ¶ 158 & n.157 ("our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law [in the sense of Article 31(3)(c) of the VCLT].").

[568] Panel Report, *EC – Approval and Marketing of Biotech Products*, ¶ 7.67 ("In considering the provisions of Article 31(3)(c), we note, initially, that it refers to 'rules of international law'. Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international

31(3)(c) of the VCLT. This is generally consistent with the established understanding in international law. Regarding the term "parties," however, the WTO Tribunal seems to (but, importantly, not necessarily so) have adopted the narrowest possible view, *viz.* that for a non-WTO treaty to be relied upon in interpreting a WTO term, *all WTO Members* must also be parties to that non-WTO treaty[569]:

> Taking account of the fact that Article 31(3)(c) mandates consideration of other applicable rules of international law, and that such consideration may prompt a treaty interpreter to adopt one interpretation rather than another, we think it makes sense to interpret Article 31(3)(c) as *requiring consideration* of those rules of international law which are applicable in the relations between *all parties to the treaty which is being interpreted*.

Regarding this seemingly restrictive attitude adopted by the WTO Tribunal,[570] the ILC cautions: "[b]earing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such

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law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are 'rules of international law' within the meaning of Article 31(3)(c)."). It is noted, however, that the *EC – Approval and Marketing of Biotech Products* Panel did not explicitly recognize general principles of law (as opposed to "general principles of international law") as such "rules of international law; *id.* ("Regarding the recognized general *principles* of law which are applicable in international law, it may not appear self-evident that they can be considered as '*rules* of international law' within the meaning of Article 31(3)(c)."). This would not affect the legal analysis in this thesis, as the general principles of law relevant here, including good faith, abuse of rights/process and estoppel have all been recognized as general principles of law as well as general principles of international law. *See supra* Ch. 3.

[569] Panel Report, *EC – Approval and Marketing of Biotech Products*, ¶ 7.70 (emphasis added).

[570] It is noted that the restrictive view was adopted on the panel-level, whereas the Appellate Body does not seem to have adopted any explicit position regarding this issue.

conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law."[571]

Upon further examination, however, it appears that the WTO Tribunal is *not necessarily* so restrictive in its attitude. Essentially, the quoted finding by the WTO Tribunal can happily co-exist with both the view that the term "parties" be interpreted as "all disputing parties" (Marceau) as well as the proposition that the term "parties" be interpreted as meaning that the non-WTO treaty reflects the "common intentions" of WTO Members (Pauwelyn). Indeed, if the WTO Tribunal adopts either of these two benchmarks, it could have reached the same conclusion: if the WTO Tribunal considers that it is *required* by virtue of Article 31(3)(c) to rely on a non-WTO treaty to which all disputing parties are parties (Marceau) or which reflects the common intentions of WTO Members, then, the WTO Tribunal *would necessarily be required* to rely on a non-WTO treaty to which all WTO Members are parties (as such a non-WTO treaty would necessarily be one to which all disputing parties are parties as well as one which reflects the common intentions of WTO Members). More crucially, the WTO Tribunal, by saying that it is required to rely non-WTO treaties to which all WTO Members are parties, it never says that it is required to rely *only* such non-WTO treaties; on the contrary, the WTO Tribunal explicitly leaves it an open question by making the following observations[572]:

[571] ILC Report on Fragmentation of International Law, ¶ 471. *See also* Marceau (2002), at 781.

[572] Panel Report, *EC – Approval and Marketing of Biotech Products*, ¶ 7.72.

> Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.

Simply put, as to whether the WTO Tribunal would be required, by virtue of Article 31(3)(c) of the VCLT, to rely on a non-WTO treaty binds all disputing parties but not all WTO Members, the WTO Tribunal "do[es] not take a position." Thus, one seems to be safe in arguing that by far, the WTO Tribunal has not taken any definitive position regarding the meaning of "parties," and it remains an open possibility that in the future where the WTO Tribunal is compelled to give an answer, it may perhaps take a position similar to Marceau's or to Pauwelyn's.

Pending any definitive ruling (either by the WTO Tribunal or any other international tribunal), this thesis does not align itself with any position. It suffices to note two things here. First, whatever position one takes, the notion of good faith, the doctrine of abuse of rights/process and the principle of estoppel, as identified to be particularly relevant to the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals, would undoubtedly satisfy Article 31(3)(c). Second, as far as Type 3/Type 5 RTA jurisdictional clauses are concerned, there are only two meaningful positions: one either takes the view that "parties" means all disputing parties and thereby makes these RTA jurisdictional clauses qualified for the purpose of Article 31(3)(c), or rejects RTA

jurisdictional clauses by taking any other view (as RTA jurisdictional clauses are certainly not binding upon all WTO Members, and, furthermore, in light of the divergent RTA practice, it would be quite difficult to characterize Type 3/Type 5 RTA jurisdictional clauses as reflecting the common intentions of WTO Members). The analysis that follows will be based upon these observations.

2. Interpretation of Article 23.1 of the DSU by recourse to non-WTO norms in the sense of Article 31(3)(c) of the VCLT

It is noted that even when Article 31(3)(c) of the VCLT justifies the interpretation of a treaty by reference to another treaty, the "weight" to be given to that other treaty would need to be decided on a case-by-case basis.[573] Specifically, interpreting Article 23.1 of the DSU in light of non-WTO norms (such as RTA jurisdictional clauses) does not necessarily mean that the DSU provision has to "defer" to the non-WTO norms being relied upon. As a commentator succinctly pointed out[574]:

> [T]he purpose of interpreting by reference to "relevant rules" is, normally, not to defer the provisions being interpreted to the scope and effect of those "relevant rules," but to clarify the content of the former by referring to the latter. "Relevant rules" may not, generally speaking, override or limit the scope or effect of a provision.

[573] ILC Report on Fragmentation of International Law, ¶ 474.

[574] *See, e.g.*, GARDINER (2008), at 287. *See also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 86-87 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ("International law seeks the accommodation of this value [of the prevention of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over the other.").

Also, treaty interpretation is, by its very nature, subject to certain limitations. For instance, treaty interpretation cannot go beyond or against the clear meaning of the treaty term being interpreted;[575] specifically with respect to treaty interpretation as a conflict-avoidance tool, it has been noted that while treaty interpretation can avoid apparent conflicts, it cannot avoid genuine conflicts.[576]

Having noted these considerations, this thesis now turns to assess whether the potential conflict between Article 23.1 of the DSU and Type 3/Type 5 RTA jurisdictional clauses could be avoided through treaty interpretation by reference to such RTA jurisdiction clauses and/or certain general principles of law under the auspices of Article 31(3)(c) of the VCLT.

First, regarding Type 3/Type 5 RTA jurisdictional clauses, it is recalled that such RTA jurisdictional clauses are designed specifically to serve as a procedural bar to WTO litigation under certain circumstances. In light of this specific purpose served by such RTA jurisdictional clauses, to the extent that one considers RTA jurisdictional clauses to be "relevant rules of international law" in the sense of Article 31(3)(c) of the VCLT, there seems to be some ground in asserting that the jurisdictional scope of the WTO Tribunal under Article 23.1 of the DSU (which, if taken literally, would encompass the case scenarios where WTO litigation is instituted in blatant violation of Type 3/Type 5 RTA jurisdictional clauses) should be interpreted in such as way as to mean that the WTO Tribunal's jurisdictional reach does not extend to such case scenarios where WTO litigation is specifically barred by such RTA jurisdictional

[575] *See, e.g.*, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 221, 229 (July 18) ("[T]o adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty."). *See also* PAUWELYN (2003), at 244-47.

[576] ILC Report on Fragmentation of International Law, ¶ 42; PAUWELYN (2003), at 272-73.

clauses. Admittedly, such interpretation asks the DSU to "defer" to the RTA clauses, and, as previously noted, this is generally an unwarranted exercise in terms of treaty interpretation under Article 31(3)(c) of the VCLT. However, in light of the general nature of Article 23.1 of the DSU as well as the specific nature of Type 3/Type 5 RTA jurisdictional clauses as designed to specifically exclude WTO litigation, perhaps one can still argue (albeit not necessarily convincingly) that by virtue of *lex specialis* as a principle of treaty interpretation,[577] asking the DSU to defer to RTA jurisdictional clauses is warranted. Furthermore, in so interpreting the DSU provision, arguably one is not going beyond or against any clear meaning in the DSU provision: Article 23.1 of the DSU contains no specific language to address such apparent conflicts. Also, by so interpreting the DSU provision, one can avoid the potential conflict between the DSU provision and Type 3/Type 5 RTA jurisdictional clauses, as in such case scenarios, Article 23.1 of the DSU, as so interpreted, does *not* entitle any WTO Member to initiate WTO litigation and, more significantly, the WTO Tribunal would not have jurisdiction to entertain such litigation. That said, if one does not consider RTA jurisdictional clauses as "rules of international law" within the meaning of Article 31(3)(c) of the VCLT, no such issue would arise, and the analysis would then go to the next stage where the conflict would have to be addressed by conflict-resolution norms.

Second, regarding relevant general principles of law, including good faith, abuse of rights/process and estoppel, it is recalled that such principles would arguably fall with the scope of Article 31(3)(c) of the VCLT. In the case scenarios concerning potential conflicts between Article 23.1 of the DSU and Type 3/Type 5 RTA jurisdictional

[577] *See, e.g.*, ILC Report on Fragmentation of International Law, ¶ 56 ("The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.").

clauses, it seems likely (although, once again, not necessarily convincing) that the scope of Article 23.1 of the DSU could be interpreted in such way as to exclude situations where WTO litigation is instituted in a genuinely abusive manner (*viz.* in violation of good faith, or properly considered as an abuse of procedural rights or DSU procedures) or otherwise prohibited (or, estopped). Arguably, it would seem inconceivable to assert that Article 23.1 of the DSU is ever intended to grant jurisdiction to the WTO Tribunal without any regard being paid to the attendant circumstances of each case – specifically, it would be against common sense if one argues that the WTO Tribunal has jurisdiction and the complaining Member in any given case has an unfettered right to initiate WTO litigation even where the WTO litigation in question is instituted in a genuinely abusive manner, after the WTO jurisprudence has confirmed in repeated occasions the notion of good faith.

This foregoing lines of argumentation, concededly, are by no means conclusive and may perhaps be characterized as far-reaching, depending on one's perception towards relevant issues. It bears noting that this thesis does not proclaim to be conclusive, but, rather, is more concerned with presenting a workable framework. In any event, if one finds such argumentation to be meritless, the analysis could proceed to the next phase where the unavoidable conflicts between Article 23.1 of the DSU and Type 3/Type 5 RTA jurisdictional clauses would be resolved.

3. <u>(Possible) Immediate legal implications: the WTO Tribunal lacks jurisdiction</u>

One final note: to the extent that one finds the foregoing analysis to be of some merit, so that the scope of Article 23.1 of the DSU is narrowed down a bit, through

treaty interpretation, so as to exclude the case scenarios addressed in this thesis (i.e. where WTO litigation is instituted in blatant breach of Type 3/Type 5 RTA jurisdictional clauses, thereby rendering the initiation of WTO litigation a genuinely abusive exercise of rights/process or estopping the complaining Member from so doing), the immediate legal implications would be as simple as this: the WTO Tribunal would lack jurisdiction to entertain the litigation, as its jurisdictional competence is correspondingly limited together with the narrowed scope of Article 23.1 of the DSU.

B. Resolution of Conflicts

It is once again recalled that treaty interpretation cannot avoid genuine conflicts. To the extent that the conflicts between Article 23.1 of the DSU, on the one hand, and Type 3/Type 5 RTA jurisdictional clauses, on the other, are considered to be genuine conflicts that cannot be removed by treaty interpretation, the analysis would proceed to assessing how such genuine conflicts should be resolved. Here, three different conflict-resolution techniques will be discussed, and attempts will be made to resolve the said genuine conflicts (if considered as such).

1. Resolution of conflicts by recourse to conflict clauses[578]

When States enter into a treaty that might conflict with other treaties, it would be desirable that they create treaty rules that settle the relationship between such treaties

[578] *See generally* ILC Report on Fragmentation of International Law, ¶¶ 267-94; PAUWELYN (2003), at 328-61.

where conflict arises. Such treaty rules are called "conflict clauses."[579] From the perspective of which relationship a given conflict clause deals with, three types of conflict clauses have been identified as (i) those relating to pre-existing treaties; (ii) those relating to future treaties; and (iii) those regulating conflict of norms within the same treaty.[580] A prominent example of conflict clauses is Article 103 of the U.N. Charter, by virtue of which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the [U.N.] Charter and their obligations under any other international agreement, their obligations under the [U.N.] Charter shall prevail."

The most pertinent question here is: whether there is any conflict clause that addresses jurisdictional conflicts between the WTO Tribunal and RTA Tribunals?

It is noted that while acknowledging that non-WTO norms are applicable in WTO litigation, Bartels also argues that when a non-WTO norm is in conflict with a WTO norm, the WTO norm prevails by virtue of Articles 3.2 and 19.2 of the DSU, which, in Bartels' view, constitute conflict clauses.[581] In this connection, Bartels relies in part on the Appellate Body's holding in *EC – Hormones* that "the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*."[582] Other reasons aside, this thesis submits that the *EC – Hormones* holding – that the precautionary principle does not override Articles 5.1 and 5.2 of the SPS Agreement – does not necessarily result from the proposition that the WTO covered agreements

[579] *See, e.g.*, ILC Conclusion on Fragmentation of International Law, ¶ 14(30); PAUWELYN (2003), at 328.

[580] PAUWELYN (2003), at 328. *See also* ILC Report on Fragmentation of International Law, ¶ 268 (identifying seven types of conflict clauses).

[581] Bartels (2001), at 506-509.

[582] Appellate Body Report, *EC – Hormones*, ¶ 125.

override any conflicting international law by virtue of Articles 3.2 and 19.2 of the DSU, but, rather, results from the simple ground that Articles 5.1 and 5.2 of the SPS Agreement, by requiring scientific evidence, have "contracted out" from the precautionary principle and thus have become *lex specialis*.

Pauwelyn holds a view contrary to Bartels'.[583] Pauwelyn asserts that Articles 3.2 and 19.2 of the DSU do not constitute conflict clauses; to Pauwelyn, these two DSU provisions relate neither to the jurisdiction of the WTO Tribunal nor the applicable law in WTO litigation; these DSU provisions serve to caution that the WTO Tribunal cannot exceed its competence as a judicial organ and turn treaty interpretation into law-making exercises.[584]

In approaching this issue, at least two things must be noted. First, Articles 3.2 and 19.2 of the DSU, which directs the WTO Tribunal not to "add to or diminish" WTO rights/obligations, do not appear to be phrased clearly as conflict clauses normally are. Bartels also acknowledges that these two DSU provisions are "not a normal conflicts rule in that it does not purport to regulate conflicts between the covered agreements and other agreements as a matter of substantive international law."[585] Second, if following Bartels' logic, WTO norms would prevail over all non-WTO norms to the extent of conflict, whether such non-WTO norms predate or postdate the WTO covered agreements. This position would be particularly problematic when a non-WTO norm is a later law in relation to the WTO law; in this connection, it suffices to take note of the

[583] *See, e.g.*, PAUWELYN (2003), at 352-55; Pauwelyn (2003), at 1003. *See also* Marceau (2002), at 777 ("[T]here is no justification or benefit in considering Articles 3(2) and 19(1) of the DSU as conflict rules.").

[584] *See* PAUWELYN (2003), at 353.

[585] Bartels (2001), at 507.

ILC's observations concerning the relationship between conflict clauses and the maxim of *lex posterior*[586]:

> On the other hand, Article 103 apart, clauses in treaties which purport to give the treaty priority over another treaty, whether earlier or later in date, do not by themselves appear to alter the operation of the general rules of priority set out in paragraphs 3 and 4 of the article.

In addition, although Bartels is characterized as one of the commentators advocating the Liberal Approach, Bartels' position in taking these two DSU provisions as *indirectly* giving priority to WTO norms over other norms of international law seems to be along similar lines with the Restrictive Approach: both Bartels and the Marceau (Restrictive Approach) essentially hold that by the application of non-WTO norms, the WTO Tribunal would violate Articles 3.2 and 19.2 of the DSU.[587] To this extent, the reasons previously set forth to respond to Marceau's arguments based on these two DSU provisions would largely be equally applicable to respond to Bartels' position.

For the foregoing reasons, this thesis lines with Pauwelyn in arguing that Articles 3.2 and 19.2 of the DSU, taken together, do not constitute any conflict clause. That being so, the conflicts, as identified previously, between Article 23.1 of the DSU and Type 3/Type 5 RTA jurisdictional clauses cannot be resolved through any conflict clause.

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[586] ILC Draft Articles on the Law of Treaties with Commentaries, art. 26, ¶ 5.

[587] *See* Bartels (2001), at 507-508. *See also supra* Ch. 3.

2. Resolution of conflicts by recourse to *lex posterior* and *lex specialis*

The maxim of *lex posterior derogat legi priori* (or *lex posterior*) dictates that "later law supersedes earlier law."[588] This principle is codified in Article 30 of the VCLT, which provides, in pertinent part[589]:

> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

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In the specific case scenarios addressed by this thesis,[590] although the parties to a given RTA do not contain all WTO Members (and thus making Article 30(3) inapplicable), the complaining Member and the responding Member, as envisaged, are both parties to the RTA and Members of the WTO. Thus, Article 30(4)(a), by invoking

[588] ILC Conclusion on Fragmentation of International Law, ¶ 14(24).

[589] VCLT arts. 30(3) & 30(4).

[590] *See supra* Ch. 1, Pt. IV.

Article 30(3), would dictate that as between these two WTO Members, the WTO covered agreements apply "only to the extent that [the WTO provisions] are compatible with those of the [RTA]," provided, of course, that the RTA in question is a "later" law in relation to the WTO legal system. In this connection, it is noted that most[591] of the RTAs that contain Type 3/Type 5 RTA jurisdictional clauses, as identified previously, are concluded *after* April 15, 1994, i.e. the date of conclusion of the WTO Agreement, and, therefore, generally speaking, these RTA jurisdictional clauses could be considered as *later* law in relation to Article 23.1 of the DSU.[592]

It is important to note that for the *lex specialis* principle to be applicable, the two treaty norms in question must be "relating to the same subject matter."[593] Without going into unnecessary details, it suffices for present purposes to say that Type 3/Type 5 RTA jurisdictional clauses (which bars a complaining Member from initiating WTO proceedings in certain circumstances), one the one hand, and Article 23.1 of the DSU (which grants such a procedural right to institute WTO litigation), on the other, could be reasonably considered to be "relating to the same subject matter," as the RTA jurisdictional clauses prohibit exactly the same thing that is granted in the DSU provision.

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[591] Of course, there are exceptions, including the NAFTA (which was signed on December 17, 1992).

[592] This statement presupposes that one determines the temporal sequence in terms of the date of conclusion of the relevant treaty. *See, e.g.*, AUST (2000), at 183. Admittedly, this is subject to debate. *See, e.g.*, BOYLE & CHINKIN (2007), at 250 ("[I]t [is] not always clear when one treaty pre-dates another. Does the date of adoption, or entry into force, or entry into force for the relevant parties determine the timing of a treaty for the purpose of Article 30? States become parties to multilateral treaties at different times: is it possible that the same treaty may be an earlier treaty for one state and a later one for another?") (citation omitted). For further treatment of this timing issue, see, for example, PAUWELYN (2003), at 368-81.

[593] *See* VCLT art. 30(1) ("Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties *relating to the same subject matter* shall be determined in accordance with the following paragraphs.") (emphasis added). For relevant discussions, see, for example, BOYLE & CHINKIN (2007), at 251-52; PAUWELYN (2003), at 364-67; ILC Report on Fragmentation of International Law, ¶¶ 253-66.

Turning next to the maxim *lex specialis derogare lege generali* (or *lex specialis*),[594] it is first noted that *lex specialis* is both a principle of treaty interpretation as well as a technique for the resolution of conflicts in the sense that if a matter is regulated by a general rule as well as by a more specific rule, the latter, which can be considered "special" given its more precisely delimited scope of application, should take precedence.[595] Though not codified alongside *lex posterior* in the VCLT, the principle of *lex specialis* seems well-established in international jurisprudence[596] and is indeed supported by quite strong rationales; as the ILC pointed out[597]:

> A special rule is more to the point . . . than a general one and it regulates the matter more effectively . . . than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances . . . . The have greater clarity and definiteness . . . . Moreover, lex specialis may also seem useful as it may provide better access to what the parties may have willed.

Simply put, the force of *lex specialis* is "entirely dependent on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity [and] definiteness."[598]

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[594] For relevant discussions, see, for example, ILC Report on Fragmentation of International Law, ¶¶ 46-222; PAUWELYN (2003), at 385-416; BOYLE & CHINKIN (2007), at 252-53.

[595] *See, e.g.*, ILC Report on Fragmentation of International Law, ¶¶ 56-57.

[596] For relevant case law, see, for example, ILC Report on Fragmentation of International Law, ¶¶ 68-84. *See also* Lennard (2002), at 70-72 (noting that although *lex specialis* is not codified in the VCLT, it is used in repeated occasions by the WTO Tribunal).

[597] ILC Report on Fragmentation of International Law, ¶ 60 (citation omitted).

[598] ILC Report on Fragmentation of International Law, ¶ 119.

In the case scenarios addressed in this thesis, it seems reasonable to argue that in relation to Article 23.1 of the DSU (generally entitling WTO Members to initiate WTO litigation), priority should be given to Type 3/Type 5 RTA jurisdictional clauses (specifically excluding WTO litigation in defined circumstances) because such RTA jurisdictional clauses, in the words of the ILC, "are better able to take account of particular circumstances," "have greater clarity and definiteness" and "provide better access to what the parties may have willed."

Turning finally to the relationship between *lex specialis* and *lex posterior*, it is first noted that when the RTA jurisdictional clause in question is both a *special* and *later* norm in relation to Article 23.1 of the DSU, one could argue, without raising too many questions, that the RTA jurisdictional clause would prevail over the DSU provision.[599] However, when an RTA jurisdictional clause (such as Article 2005 of the NAFTA) is *special* but *prior*[600] norm in relation to Article 23.1 of the DSU, the relationship between *lex specialis* and *lex posterior* would beg problems. Some commentators seem to place more weight upon *lex specialis*.[601] However, this approach would seem overly simplistic. In fact, sometimes States conclude a subsequent general law with the specific intention to set aside the prior law, even if the prior law is in some sense more "special"; thus, "it seems inadvisable to lay down any general rule"[602] in this regard. Neither the speciality/generality nor the earlier/later relationships would be decisive; the priority to

[599] *See, e.g.*, Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 31 (Aug. 30) ("[I]n case of doubt, the Protocol, being a *special and more recent* agreement, should prevail.").

[600] Again, this is said in an inconclusive manner, leaving open the legal issues pertaining to the determination of temporal sequence between conflicting norms in the sense of Article 30 of the VCLT.

[601] *See, e.g.*, Cottier & Foltea (2006), at 54 ("A RTA concluded *prior to the establishment of the WTO* in 1995 (or successive treaty amendments) would need to give way to WTO rules, *except when they can be considered of a more specialized nature*.") (emphasis added).

[602] ILC Report on Fragmentation of International Law, ¶ 223.

be given to any certain rule should be determined on a case-by-case basis, taking full account of the "will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system."[603]

That said, in the specific context of RTA/WTO jurisdictional conflicts, it seems reasonable to argue that in light of the relevant parties' specific intention to preclude, by way of Type 3/Type 5 RTA jurisdictional clauses, the initiation of WTO litigation in certain circumstances, such RTA jurisdictional clauses would prevail over Article 23.1 of the DSU whether the RTA in question is earlier-in-time or later-in-time in relation to the WTO legal system.

3. Immediate legal implications: complaining Member lacks the right to initiate WTO litigation

Following the foregoing analysis, generally speaking Type 3/Type 5 RTA jurisdictional clauses would prevail over Article 23.1 of the DSU. This will result in the complaining Member's right to initiate WTO litigation, otherwise provided for under Article 23.1 of the DSU, being taken away. Simply put, the complaining Member would lack the right to litigate WTO claims before the WTO Tribunal. Further legal implications – concerning whether this lack of the right to sue takes away the WTO Tribunal's jurisdiction or simply makes the claim inadmissible – will be further examined below.

[603] *Id.* ¶ 410. *See also* PAUWELYN (2003), at 408 ("In sum, the *lex posterior* rule in Art. 30 is and should remain the rule of first resort. It is for the party making the claim to prove that, although it could be said that one of the norms is, from certain viewpoints, later in time, this norm should nonetheless give way, essentially because Art. 30 does not apply. To give wider credence to the *lex specialis* principle (without further codification) would threaten legal security and predictability in the field of conflict of norms.").

In this connection, it is interesting to that Marceau, being one of the advocates of the Restrictive Approach, once made the following observations[604]:

> Thus the WTO adjudicating bodies, although they have to perform all the necessary reasoning to establish the state of international law and the applicable law between the two WTO Members, do not seem to have the constitutional capacity to reach any standard recommendations in situations where another treaty provision has superseded (and thus added to or diminished) a WTO provision. Since there would be no applicable WTO provision, the panel would be faced with a form of WTO *non-liquet*, if this concept is defined a situation where there is no law on the matter.

Simply put, Marceau believes that where a non-WTO norm is in genuine conflict with a WTO norm and where the non-WTO norm prevails over the WTO norm, the WTO Tribunal would have to declare that there is no law to be applied (*non liquet*) in light of the non-applicability of non-WTO norms in WTO litigation. Such line of argumentation, however, seems problematic in terms of logic. As mentioned above, for a conflict to arise between two norms, the legal premise is that both norms in question must be equally *applicable*. Thus, if one believes that non-WTO norms are not part of the applicable law in WTO dispute settlement, there is simply no way that such *inapplicable* non-WTO norm would ever conflict with any WTO norm; thus, the possibility of *non liquet* suggested by Marceau does not seem to be a real one.

[604] Marceau (2001), at 1104.

Having made the foregoing analysis under the first track (Law of Treaties Approach), this thesis will now turn to the second track, *viz.* assessing the jurisdictional conflicts issues from the Institutional Approach.

III. SECOND TRACK: INSTITUTIONAL APPROACH

A. Application of Jurisdiction-Regulating Norms

It is recalled (i) that under the Institutional Approach, a jurisdictional "conflict" should be defined broadly (as requiring similarity, as opposed to sameness, of disputing parties and claims), so as to minimize fragmentation and promote coherence in international law; (ii) that under such broad definition, identification of jurisdictional conflicts serves only descriptive purposes, without entailing any legal implications; (iii) the relevant jurisdiction-regulating norms should be analyzed by their individual merits; (iv) that the relevant jurisdiction-regulating norms have been identified as the principle of good faith, the doctrine of abuse of rights/process and the principle of estoppel, whereas other jurisdiction-regulating norms (such as *res judicata*) have been ruled out as inapplicable to jurisdictional conflicts between the WTO Tribunal and RTA Tribunals.

B. Immediate Legal Implications: Complaining Member Lacks the Right to Initiate WTO Litigation

Without repeating the legal status and constituent elements of the principle of good faith, the doctrine of abuse of rights/process and the principle of estoppel, here it

suffices to say that where a jurisdictional conflict arises between the WTO Tribunal and an RTA Tribunal because of the similarity of the disputing parties and claims, and where the complaining party is specifically barred by a Type 3/Type 5 RTA jurisdictional clause from initiating WTO litigation, the complaining party's institution of WTO proceedings notwithstanding such procedural bar could be considered an genuinely abusive exercise of its right under Article 23.1 of the DSU, and, accordingly, the complaining party would be precluded from exercising this right. Again, this interim conclusion begs upon another question: whether the complaining party's lack of procedural right to initiate WTO litigation leads to the lack of jurisdiction on the part of the WTO Tribunal, or, alternatively, to the inadmissibility of the WTO claim of which the WTO Tribunal is seized. This will be substantiated immediately below.

IV. FURTHER LEGAL IMPLICATIONS

A. Revisiting the Distinction between Jurisdiction and Admissibility

It is recalled that it is a well established practice for international tribunals to maintain a distinction between two types of preliminary challenges: challenges to jurisdiction of the tribunal, and challenges to the admissibility of the case. Both types of preliminary challenges, if sustained, would preclude the tribunal in question from entering into the merits of the case. Challenges to jurisdiction essentially concern the lack of consent from the responding State. Challenges to admissibility traditionally concern the standing of the claimant State, the exhaustion of local remedies and a number of other grounds.

Where a tribunal enjoys exclusive jurisdiction over a dispute, it seems that concerning the same dispute, that tribunal's jurisdiction would exclude any other tribunal from exercising permissive jurisdiction, if any. In the case where two tribunals both assert exclusive jurisdiction, the Law of Treaties Approach would help determine which of the two sets of jurisdictional clauses would prevail, and thereby making only one of them the exclusive forum. In either case, the tribunal that enjoys exclusive jurisdiction would reasonably be taken to mean that any other tribunal would lack jurisdiction over the same dispute. This seems to be supported by the PCIJ when it opined that "[the principle that the jurisdiction of the Court comprises all cases which the Parties refer to it] only becomes inoperative in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority."[605]

However, the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals could not be determined in such a simply way. Arguably, the WTO Tribunal asserts exclusive jurisdiction over all claims based upon WTO law; on the other hand, certain RTA Tribunals, with Type 3/Type 4/Type 5 RTA jurisdictional clauses, would claim exclusive jurisdiction over all claims based upon RTA law, even when the RTA provisions in question are identical to relevant WTO provisions. Although both the WTO Tribunal and RTA Tribunals would seem to claim exclusive jurisdiction over one single measure, strictly speaking, their respective jurisdictions do not seem to cancel out each other, and this is essentially because the cause of action before the WTO Tribunal is different from that before RTA Tribunals. Thus, such WTO/RTA jurisdictional

[605] Rights of Minorities in Upper Silesia (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15, at 23 (Apr. 26).

conflicts do not get to be resolved by simply saying that one of them enjoys exclusive jurisdiction.

The more pertinent question is this: where Type 3/Type 5 RTA jurisdictional clauses preclude a complaining party from initiating WTO litigation, what are the legal implications for the jurisdiction of the WTO Tribunal? Does the WTO Tribunal lack jurisdiction altogether, or, does the WTO Tribunal enjoys jurisdiction that it cannot exercise because of inadmissibility of the case?

In this connection, the practice of international tribunals does not seem to provide a clear answer as to whether the claimant State's lack of procedural right to sue is concerned with jurisdiction or inadmissibility. This seems to remain an open question.[606]

Shany, one of the leading commentators on the question of jurisdictional conflicts between international tribunals, makes the following observations[607]:

> [T]here could be certain situations where a specific exercise of choice of forum was deemed illegal. This is arguably the case where *proceedings were initiated in breach of a valid jurisdictional arrangement* (e.g. one investing exclusive competence with a different judicial body). In these circumstances the act in question would be precluded both by the law of treaties and by the

[606] Lowe (1999), at 195 & n.7 (arguing that by virtue of *lex specialis generalibus derogat*, the parties' special agreement to refer a specific type of cases to one designated tribunal would override the same parties' acceptance of the jurisdiction of another tribunal, stating that in this case that other tribunal "must decline to accept the case, because the parties are legally bound to refer the case to another tribunal," and noting that "*[t]his leaves open the question whether the tribunal has jurisdiction which it may not exercise, or does not have jurisdiction at all*") (emphasis added).

[607] SHANY (2004), at 269-70 (emphasis added).

international theory of abuse of rights. As a result, the improperly seized court or tribunal *should decline jurisdiction* over the dispute.

In other words, Shany suggests that where the claimant party is lacks the right to initiate litigation, the tribunal is improperly seized and should thus "decline jurisdiction." By "decline jurisdiction," Shany seems to suggest that the improperly seized tribunal "lacks jurisdiction," as Shany does not place particular emphasis on the distinction between jurisdiction and admissibility.

Pauwelyn has clearly suggested that in the event where a Type 3 RTA jurisdictional clause bars the complaining Member from initiating WTO litigation (because the complaining party has already initiated RTA litigation and thus shall use RTA proceedings to the exclusion of the WTO proceedings), the WTO Tribunal "must come to the conclusion that – by agreement of the disputing parties – it does not have jurisdiction to re-examine the dispute."[608] At the same time, it is noted that Pauwelyn uses the phrase "ought to decline jurisdiction" in a way that means that the tribunal in question (the WTO Tribunal) would "lack jurisdiction."[609] Thus, two things are noted. First, Pauwelyn believed that the complainant Member's lack of the right to initiate WTO proceedings would lead to the WTO Tribunal's lack of jurisdiction. Second, Pauwelyn seems to use "decline jurisdiction" in the same way as Shany does.

At this point, it is noted that whatever is truly in the minds of Shany and Pauwelyn, they did not seem to provide detailed analysis as to whether or why the WTO Tribunal

[608] Pauwelyn (2003), at 1012-13.

[609] *Id.* at 1011 (suggesting that in the event where an (Type 4) RTA jurisdictional clause provides for exclusive jurisdiction to an RTA Tribunal, that RTA clause would conflict with Article 23.1 of the DSU, that in such event, the RTA jurisdictional clause would prevail, and that, consequently, the WTO Tribunal "ought, in those circumstances, to decline jurisdiction" in the sense that the WTO Tribunal lacks jurisdiction).

would lack jurisdiction in the event the complaining Member lacks the right to institute WTO proceedings.

That being so, in his co-authorship in a recent writing, Pauwelyn seems to have changed this position in arguing instead that if the complaining Member lacks the right to initiate WTO litigation, the WTO Tribunal would still have jurisdiction, but the complaining Member's lack of right to action serves as "legal impediments" precluding the WTO Tribunal from exercising its established jurisdiction; in other words, the WTO Tribunal, although having jurisdiction, has to find the case inadmissible.[610] In support of this argument, the *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* case is cited.[611]

In contrast – and this is one of the major points to be made here – this thesis submits that where the complaining Member lacks the right to initiate WTO litigation because of the operation of Type 3/Type 5 RTA jurisdictional clauses, the WTO Tribunal simply lacks jurisdiction. The underlying reasons for this position are set forth below.

First, the complaining Member fails to validly give consent to the jurisdiction of the WTO Tribunal. It is recalled that in international law, for an international tribunal to enjoy jurisdiction, it is necessary that both parties to the proceedings before the tribunal have consented to its jurisdiction. As such, while a claimant State typically has consented to the jurisdiction of an international tribunal by its initiation of litigation, it remains a possibility that such consent may be held to be *invalidly given* in situations where the claimant State does not even possess the right to sue or is prohibited from initiating the litigation. Indeed, even where consent is given, the establishment of

[610] Pauwelyn & Salles (2009), at 93-94.

[611] *Id.* at 93 (citing SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ¶¶ 113-29, ICSID (W. Bank) Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004)).

jurisdiction nevertheless requires that the consent "remains, as a matter of law, effective."[612] Thus, where a claimant State does not possess the right to initiate litigation or is prohibited from initiating litigation but somehow initiates litigation notwithstanding such lack of right to sue or such prohibition, the consent expressed through the initiation of litigation would be considered invalidly given; lacking the validly given consent from the claimant State, the international tribunal would have to declare lack of jurisdiction.

In the WTO context, although in a given case, the responding Member's consent has been said to be given *ex ante*, it remains true that the complaining Member must *validly* give its consent to the jurisdiction of the WTO Tribunal. As examined above, either under the Law of Treaties Approach or the Institutional Approach, in circumstances involving Type 3/Type 5 RTA jurisdictional clauses, the complaining Member may have lost its right to initiate WTO litigation. That being so, the complaining Member's expression of its consent through the initiation of WTO litigation is *invalidly* given. Without any validly given consent from the complaining Member, the WTO Tribunal simply lacks jurisdiction.

Second, not only that the complaining Member's consent has been *invalidly* given, arguably the responding Member has *not* consented to the WTO Tribunal's jurisdiction. It is noted that in normal circumstances, it could be said that the responding Member has given its consent to the jurisdiction of the WTO Tribunal in an *ex ante* manner, that is, before any concrete dispute arises. True, such consent having been given *ex ante* through the multilateral system (as opposed to unilateral declarations made by States to

[612] *See, e.g.*, Lowe (1999), at 193 ("It is almost axiomatic that the jurisdiction of international tribunals derives from the consent of each state party; or, to put it another way, no state can be obliged to submit to the jurisdiction of an international tribunal unless that state has at some point consented so to submit *and its consent remains, as a matter of law, effective*.") (emphasis added).

accept the ICJ's jurisdiction), it would not be free for any WTO Member to *unilaterally withdraw* that consent (by contrast, generally speaking, even after making a declaration accepting the ICJ's compulsory jurisdiction, a State can freely withdraw such declaration[613]). That said, it is also recalled that RTAs are *inter se* modifications of the application of WTO rights/obligations between RTA parties *inter se*, in the sense of Article 41 of the VCLT. This means that if an RTA passes the conditions set forth in Article XXIV of the GATT and/or Article V of the GATS, the RTA would modify the application of the WTO covered agreements as between the parties to the RTA *inter se*. Thus, when an RTA contains a Type 3/Type 5 RTA jurisdictional clause, it could be taken as an *inter se* modifications of Article 23.1 of the DSU; put differently, as between the RTA parties *inter se*, for any trade dispute that falls into the ambit of such Type 3/Type 5 RTA jurisdictional clause, the RTA parties have *agreed* to withdraw consent to the WTO Tribunal's jurisdiction (instead of unilaterally deciding to withdraw consent to the WTO Tribunal's jurisdiction). In this connection, it is recalled that pursuant to the foregoing analysis, such *inter se* modification would prevail over Article 23.1 of the DSU by virtue of *lex specialis* and/or *lex posterior*. Notably, it seems that Lowe would be supportive of such position when he opined that Article 292 of the E.C. Treaty, by barring its parties from submitting any dispute concerning the E.C. Treaty to any tribunal other than the E.C. tribunal "operates so as to limit the jurisdiction of the 'other' (non-EC) tribunal. It does so by modifying the effect of, in this example, the acceptances of the jurisdiction of the ICJ, in what is the second way in which

[613] *See, e.g.*, COLLIER & LOWE (1999), at 152.

modifications may operate: by the application of the principle *lex specialis generalibus derogat*."[614]

Third, the WTO Tribunal's treaty-based jurisdiction is set aside. It is recalled that as other international tribunals, the jurisdictional basis of the WTO Tribunal is not only consent-based but also treaty-based. Among the various DSU provisions, Article 23.1 of the DSU stands as the single most prominent provision that arguably establishes exclusive jurisdiction of the WTO Tribunal over disputes based on WTO covered agreements. That being so, in the specific case scenarios addressed in this thesis, Type 3/Type 5 RTA jurisdictional clauses would prevail over Article 23.1 of the DSU by virtue of *lex specialis* and/or *lex posterior*. Article 23.1 of the DSU being thus set aside, the jurisdiction of the WTO Tribunal would find no basis in the DSU, and, accordingly, shall find a lack of jurisdiction.

In this connection, it is noted that the *Southern Bluefin Tuna* case could lend support to the position advocated in this thesis. In that case, the ITLOS was facing the issue of whether it had jurisdiction over the dispute. The ITLOS observed: (i) its treaty-based jurisdiction would exist if Part XV of the UNCLOS was applicable; (ii) in the event where the parties have agreed to seek settlement of UNCLOS disputes "by a peaceful means of their own choice" (as was the case there), Part XV of the UNCLOS would be applicable only where no settlement has been reached by recourse to such means and the agreement between the parties "does not exclude any further procedure";[615] (iii) no settlement was reached between the parties,[616] and the agreement between the parties

[614] Lowe (1999), at 195.

[615] Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, ¶ 53, 39 I.L.M. 1359 (Arb. Trib. under Annex VII of UNCLOS 2000).

[616] *Id.* ¶ 55.

implicitly "excludes any further procedure";[617] and (iv) ultimately, "[i]t follows from the foregoing analysis that this Tribunal *lacks jurisdiction* to entertain the merits of the dispute."[618] Simply put, in the view of the ITLOS, its treaty-based jurisdiction does not cover the dispute as the relevant jurisdictional clause is not operative. Notably, the ITLOS opined that to hold otherwise "would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice."[619] Such a statement would arguably be equally applicable to the case scenarios addressed in this thesis.

Finally, the case law cited in support of the alternative view (i.e. that the complaining Member's lack of right to initiate WTO litigation leads to inadmissibility, not lack of jurisdiction) appears *inconclusive*. Arguably, the *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* case, as cited in support of finding inadmissibility instead of lack of jurisdiction, is *not* analogous for the purpose of addressing the jurisdictional conflicts between the WTO Tribunal and RTA Tribunals. This is essentially because of one fundamental factor that distinguishes the *SGS* case from the case scenarios addressed in this thesis. In the *SGS* case, the jurisdictional clause in question that mandated the parties to submit disputes exclusively to another forum (other than ICSID) is contained in a *private contract*, whereas the ICSID Tribunal's jurisdiction is treaty-based, and thus the ICSID Tribunal held that such a *private contract* does not affect the ICSID Tribunal's treaty-based jurisdiction. On the other hand, in the context of WTO/RTA jurisdictional conflicts, both the jurisdiction of the WTO Tribunal and that of RTA Tribunals are based on treaties. When the RTA

[617] *Id.* ¶¶ 56-59.

[618] *Id.* ¶ 65 (emphasis added).

[619] *Id.* ¶ 63.

jurisdictional clause in question supersedes the DSU provision, it is inconceivable how the reasoning of the *SGS* case can be analogously applicable. In addition, in the *SGS* case, the ICSID Tribunal makes analogy between the failure to comply with the private contract clause to submit disputes exclusively to *domestic* tribunals, on the one hand, and the exhaustion of local remedies rule (being pertaining to admissibility rather than jurisdiction), on the other.[620] Even though such comparison may be justified in the *SGS* case in light of the fact that the contract provision mandates submission of disputes to *domestic* tribunals, both being concerned with *domestic* remedies, such a comparison would simply lose force in the context of WTO/RTA jurisdictional conflicts: both the WTO Tribunal and RTA Tribunals are situated in the international legal system.

Apart from the inconclusiveness as exhibited by the reasoning of the *SGS* case, it is also noted that the ICSID Tribunal itself seems to have adopted a different approach in other occasions. For instance, in the *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* case, the ICSID Tribunal observed[621]:

> Article 16.4 of the Concession Contract does not divest this Tribunal of *jurisdiction* to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine.

[620] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ¶ 154 & n.84, ICSID (W. Bank) Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004).

[621] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ¶ 53, ICSID (W. Bank) Case No. ARB/97/3, Award of the Tribunal (Nov. 21, 2000) (emphasis added).

By implication, the ICSID Tribunal seems to be suggesting that *if* CGE had effective waived its right to initiate proceedings against Argentina, the ICSID Tribunal *would have lacked jurisdiction*.

In light of the foregoing, it seems that the proper legal consequences to be placed upon the complaining Member's lack of the procedural right to initiate WTO litigation would be the WTO Tribunal's lack of jurisdiction, instead of inadmissibility of the case. That said, this remains an open question, and while this thesis adopts the foregoing position, it does not proclaim to be conclusive, either. And this is exactly the reason for retaining this alternative possibility (i.e. inadmissibility) in the framework presented in this thesis.

B. Negative Jurisdictional Conflict?

Following the foregoing analysis, most likely the WTO Tribunal would have to dismiss the WTO litigation, either for lack of jurisdiction or on the ground of inadmissibility. This may trigger the question of "negative conflict" of jurisdiction. In this connection, the PCIJ in the *Factory at Chorzow* case made the following observations[622]:

> [T]he Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competence to give way unless confronted with a [jurisdictional] clause which it considers sufficiently clear to prevent the

[622] Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 30 (July 26).

possibility of a *negative conflict of jurisdiction* involving the danger of a *denial of justice*.

In other words, the PCIJ would not decline (to exercise) jurisdiction unless it is "sufficiently clear" that there exists another tribunal with jurisdiction over the matter; the crucial question here is whether there will be a "denial of justice," which, as used in this context, refers to situations where the complaining State will be left with no avenue of redress.[623]

Turning back to the context of WTO/RTA jurisdictional conflicts, as previously stated, Article 23.1 of the DSU seems to have been taken as suggesting that the WTO Tribunal enjoys exclusive jurisdiction over all WTO claims. Thus, the WTO Tribunal's dismissing a WTO complaint (either for lack of jurisdiction or on grounds of inadmissibility), as is required in the case scenarios addressed in this thesis, could be taking to mean that there is a negative conflict of jurisdiction in the sense that the WTO Tribunal, being the one and only forum available to the complaining party, is not available anymore. However, this should not be the case here. Notably, suggesting that the WTO Tribunal dismisses the case for lack of jurisdiction or on grounds of inadmissibility is essentially predicated upon the premise that the RTA Tribunal is question enjoys jurisdiction over the same case (although the cause of action is different). Thus, as far as the jurisdictional conflict between the WTO Tribunal and RTA Tribunals is concerned, the complaining party will not be left without any avenue for redress; hence, the negative jurisdictional conflict, as envisaged by the PCIJ, does not seem to exist here.

[623] Lowe (1999), at 197.

V. CONCLUSION ON CHAPTER FOUR

In this Chapter Four, a two-track framework that integrates both the Law of Treaties Approach and the Institutional Approach has been presented and explained. Once again, it bears noting that this framework has been implicitly used by certain commentators. What this Chapter Four does is merely to develop this framework and apply it into the specific context of WTO/RTA jurisdictional conflicts.

As the foregoing analysis reveals, if applied to the case scenarios addressed in this thesis, this framework most likely leads to the conclusion that the complaining Member would lack the right to institute WTO proceedings, even though such right is provided for under Article 23.1 of the DSU. What follows touches upon the distinction between jurisdiction and admissibility. While it has been advocated that the complaining Member's lack of right to action entails inadmissibility of the WTO case, this thesis has set forth a number of reasons to suggest that such a lack of right, as arising from Type 3/Type 5 RTA jurisdictional clauses in the case scenarios addressed here, would render the WTO Tribunal being without jurisdiction to hear the case. In reaching this conclusion, this thesis has addressed the issue from the perspective of the complainant (invalidly giving consent), the perspective of the respondent (having withdrawn its consent by way of *inter se* modifications (as opposed to unilaterally)), as well as the perspective of the WTO Tribunal's treaty-based jurisdiction.

In addition, the WTO Tribunal's decline to entertain such a case (either for lack of jurisdiction or inadmissibility) would not produce the undesirable result of negative conflict of jurisdiction, because the RTA Tribunal has proper jurisdiction to address the dispute.

CHAPTER FIVE

CONCLUSION

The phenomenon of fragmentation of international law, both in the normative aspect and the institutional aspect, has posed considerable challenges to the coherence of the international legal system. Nevertheless, the lack of any constitutional hierarchy between norms of international law could not be seen as evidence of a total lack of coherence between norms of international law; indeed, there is a meaningful relationship of interaction between norms of international law, be they customary international law, general principles of law or treaty law; be they generally applicable or specialized in terms of subject or regionalized in geographical coverage. Two norms of international law that bear upon the same question may cross-fertilize by informing each other in the course of treaty interpretation. In particular, Article 31(3)(c) of the VCLT ensures systemic integration in the universe of international law. Even if they conflict, conflict-resolution techniques, notably conflict clauses, *lex specialis* and *lex posterior*, help to justify a choice of priority.

The institutional dimension of this phenomenon of fragmentation, in particular the potential jurisdictional conflicts between international tribunals, generates the real concern of inconsistent/conflicting judgments. Such jurisdictional conflicts prove even more difficult in the context of the WTO/RTA relationship. Because of the controversial issue concerning the applicable law in the WTO dispute settlement system, efforts made by WTO Members in inserting jurisdictional clauses in RTAs for the purpose of reducing the risk of jurisdictional conflicts could prove futile if the WTO

Tribunal should refuse to take into due consideration these RTA jurisdictional clauses as well as other jurisdiction-regulating norms.

Nevertheless, the WTO Tribunal is fully equipped to minimize the risk of jurisdictional conflicts with RTA Tribunals under the current legal system. The most crucial weapon that the WTO Tribunal could wield is its inherent jurisdiction, through which RTA jurisdictional clauses and other jurisdiction-regulating norms can be applied in the WTO legal system for the purpose of resolving procedural issues, such as jurisdiction, that go directly to the root of the WTO Tribunal's judicial functions. Under the framework presented in this thesis, the WTO Tribunal can seek to avoid and resolve jurisdictional conflicts through a number of techniques, all of which are at the convenient disposal of the WTO Tribunal.

Thus, in certain circumstances where a WTO complaint is filed in a genuinely abusive manner, the WTO Tribunal could and should dismiss the complaint for lack of jurisdiction or on the ground of inadmissibility. This does not suggest a general attitude of deference to be espoused by the WTO Tribunal towards regional mechanisms. Rather, it is important to note that such circumstances would be quite limited, and that by declining (the exercise of) jurisdiction, the WTO Tribunal is giving full effect to the intentions of the parties, as enshrined in specific types of RTA jurisdictional clauses. After all, it is the RTA/WTO Members themselves that decide to give preference to either the WTO Tribunal or the relevant RTA Tribunals. The WTO Tribunal, in turn, would be expected to enforce the WTO Members' free choice, both in terms of the structural design of RTA jurisdictional clauses as well as the choice of forum. By confronting this systemic issue, enforcing relevant WTO Members' intentions and reducing unnecessary and abusive multiplication of proceedings, the WTO Tribunal will help ensure the jurisdictional harmonization in the WTO/RTA relationship, strengthen

the security and predictability in the overall multilateral trading system, and promote the coherence in the international legal system.

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