

The Jurisdictional Conflict Between Regional Trade Agreements and the World Trade Organization

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Abstract

The number of regional trade agreements (RTAs) between countries has significantly increased over the past few decades. RTAs may include rights and obligations that are parallel to those of the Agreement Establishing the World Trade Organization 1994 (Marrakesh Agreement). They may also provide for their own dispute settlement mechanism that is different from the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This forum clause allows parties to both RTAs and the WTO to litigate their dispute outside the DSU. This article addresses the issue of jurisdictional conflict between the RTAs and the WTO dispute mechanism over a claim that is violative of both the WTO's and RTA's obligations.

The main question this article answers is whether it is possible for the forum clause incorporated in RTAs to divest the jurisdiction of the WTO if invoked during the proceeding. This article analyses several cases and RTAs involving a choice of forum clause before the WTO panel. This paper examines different legal principles to find a legal justification to reconcile the jurisdictional scope of both RTAs and the WTO agreements. As current international legal principles do not offer an effective solution, this paper suggests that the DSU should be amended to provide a set of rules governing the conflict between the RTAs and WTO jurisdictions.

1. Introduction

It is not unique for states to be bound by many treaties that provide for a specific dispute settlement mechanism. The General Agreement on Tariffs and Trade 1947 (GATT 1947) allows WTO members to engage in regional trade agreements to enhance the international trade system. The WTO covers certain types of agreements, like trade of goods, services, and intellectual property. RTAs mostly reframe these aspects of trade. In this case, the rights and obligations of RTAs may be like those of the WTO. Alternatively, the parties of RTAs may go further and agree to incorporate an exclusive dispute settlement clause to their agreement to settle their dispute during the implementation of the treaty. However, the DSU in Article 23 claims to be the exclusive and compulsory jurisdiction over claims concerning violation of WTO obligations. The issue of jurisdictional conflict, then, arises when a violation occurs involving a common obligation between the RTA and the WTO. The question becomes which adjudicative body should settle the matter. The conflict between the WTO jurisdiction and the dispute mechanism of RTAs is foreseeable as the number of RTAs is growing, since many WTO members are also members of multiple RTAs (DSU, Article 23) Therefore, these states have commitments to perform their obligations under both agreements.

The DSU would also be competent to review the RTA's claims if the rights infringed under the RTA are identical to those of the WTO. How would the DSU or RTA's Dispute Settlement Body react if the forum selection clause were invoked during the proceeding? Could international and national legal principles offer a solution to resolve this problem?

To avoid WTO jurisdiction over overlapping disputes, some RTA agreements intentionally deprive the parties of the right to resort to the DSU either entirely or partially. This raises the issue of the legal effect of these types of clauses, and whether they divest the jurisdiction of the WTO. This instance has materialised in many international cases.

Jurisdictional conflict between the WTO and the RTA will result in many negative impacts to the growth of commerce internationally. It is understandable that RTA agreements represent the interests of the parties, therefore, the disputing parties have a legitimate right to choose the dispute settlement forum to resolve their disputes. However, if both WTO and RTA tribunals decide the same matter, the parties would encounter difficulties enforcing the rulings in the case where the outcomes of each award are different.

Section 2 of this article articulates the current dispute settlement mechanisms under both the WTO and RTAs and how they operate. It explains the legal framework of these entities and the scope of their jurisdiction. Section 3 is an analysis of the issue of jurisdictional conflict between the WTO and RTAs. It introduces the problem and explains the potential conflict based on the current legal text and the language of forum selection clauses used by many RTAs. It then attempts to assess the problem to identify the issue. Section 4 discusses several cases where an overlap of jurisdiction between the WTO and RTAs has materialised. Section 5 evaluates many solutions that have been suggested. This section also explores different arguments that either strive to rectify the shortcomings of the DSU rules by applying international legal principles or insist on the validity of the DSU rules to resolve the issue. Section 6 presents a recommendation to help overcome the potential obstacle of overlapping jurisdiction.

2. Background

2.1 WTO dispute settlement mechanism

The jurisdiction of WTO dispute settlement is restricted to claims arising under agreements covered by the WTO (Pauwelyn, 2001, pp. 535–554). Article 23 of the DSU states, “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.”

The dispute mechanism under the WTO involves three phases. First, the offending party makes a request for consultation with the other party, and the other party must reply to the request within 10 days. Both parties must enter, in good faith, into consultation within thirty days after the other party replies to the request.

The second phase assumes, within 60 days (DSU, Article 4.7, 4.8), the disputing parties did not reach a solution. In that instance, parties proceed to the panel, which is composed of three panelists, unless parties agreed otherwise (DSU, Article 8.4, 8.5). Finally, the panel issues the conclusion and its report. The decision of the panel will be adopted by the WTO Dispute Settlement Body (DSB) unless a party to the dispute notifies the DSB of its intention to appeal (DSU, Article 16.4). The recommendations and conclusions of the Appellate Body, which generally must be issued within 60 days starting from the notification to appeal by a party (DSU, Article 17.5), should be unconditionally adopted by the parties unless the Appellate Body, by consensus, decides not to adopt them (DSU, Article 17.14).

An RTA dispute cannot be brought before the WTO unless some requirements related to the formation of the RTA are satisfied. The RTA must meet many requirements, some of which are the “substantially all trade” (GATT 1947, Article XXIV.8.b), or the “substantial sectoral coverage” requirement (GATT 1947, Article V), whether certain trade policy instruments are considered “other restrictive regulations of commerce” (GATT 1947, Article XXIV.8.a.i), and whether the interim agreements contain a schedule of the free trade area in a reasonable time (GATT, 1947, Article XXIV 5.c). Most of these requirements are pre-conditions that an RTA must fulfill for the RTA’s members to invoke the WTO jurisdiction over disputes arising from the free trade agreement, and to justify their deviation from Most Favoured Nation (MFN) obligations (Gao & Lim, 2008).

2.2 Dispute settlement mechanisms in RTAs

A total of 711 RTAs have been signed between 1948 and 2020 (WTO, 2021). Most address the same issues as WTO agreements, such as trade in goods and services, intellectual property, customs and valuation provisions, sanitary and phytosanitary provisions.

Almost all these agreements contain dispute settlement clauses to ensure effective implementation of the parties’ obligations. Dispute settlement mechanism provisions incorporated in the RTAs vary in terms of the language and forum selection clause. Some might be a choice of forum agreement, which adds another forum in addition to the DSU where disputes arising under RTAs can be resolved through many fora. For instance, this method is adopted in Article 56 (2) of the European Free Trade Association-Singapore Free Trade Agreement (EFTA-Singapore FTA). Most of the RTAs notified to GATT can be classified under this category as they contain a provision permitting the complaining party to bring its claim either under the dispute settlement mechanism specified in the RTA agreement or under the WTO’s dispute settlement (EFTA-Singapore FTA, 2002). For example, the North American Free Trade Agreement (NAFTA) Article 2005 (1) states: “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.”

The second category is the exclusive jurisdiction clause, under which only one tribunal or panel will be competent to adjudicate the matter resulting from RTA agreement. Thus, parties must bring their claims under the specified dispute settlement mechanism agreed on. For instance, NAFTA restricts the parties to litigate their disputes under NAFTA dispute settlement mechanisms when the claim involves measures taken to protect human, animal, plant life, or health or environment protection and the defendant requests the claim be adjudicated under NAFTA (NAFTA, Article 2005 (4) a).

Last, the preferred forum states that any dispute should be brought within the RTA’s dispute settlement procedure as an exclusive method if the dispute is first submitted under that procedure. Similarly, if the dispute is filed before the WTO settlement, this would prevent the dispute from being brought under the RTA. An example of that would be Article 2005 (6) of the NAFTA, which provides that:

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.

In this type, the parties agree on more than one forum in advance. However, it can be changed if the parties collectively agree so (Hillman, 2009, pp. 195–196).

3. Analysis

3.1 Overview

The jurisdictional conflict stems from the clashes between the forum clauses incorporated in relevant international treaties that provide for additional jurisdictions. This conflict occurs in the situation where one claim can be brought to different dispute settlement systems for various reasons. Under some circumstances, the possibility of having two distinct competent jurisdictions to decide the claim may lead to difficulties if they are invoked in parallel or in sequence. These two or more adjudicative bodies may claim final jurisdiction, which prevents the parties from seeking redress through another tribunal. It is also possible that these jurisdictions will reach a different conclusion which can lead to different outcomes (Marceau & Kwak, 2003, pp. 84–86).

Even though settlement provisions in many RTAs may be compatible with the WTO rules, the forum clauses in these agreements may give rise to a conflict with respect to the applicable law over the matter as well. Particularly, the overlap can be expected when the RTA has substantive obligations that are parallel to the WTO's obligations and the forum clause in the RTA obliges or gives the opportunity to the parties to recourse to the RTA's dispute settlement mechanism agreed on, exclusively or in addition to DSU. The immediate question here is that is it possible for the DSU to seize its jurisdiction in favour of RTA dispute settlement if the forum clause is invoked during the proceeding? DSU mandates the Panel to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" and conduct "an objective assessment of . . . the applicability of and conformity with the relevant covered agreements" (DSU, Article 11). It seems that the Panel could be in breach of its obligations under the DSU if it fails to address the consistency of the forum selection clause of the RTA if it is invoked and cited by the defendant, with the requirements of GATT Article XXIV.

Moreover, the Marrakesh Agreement states that multilateral trade agreements are "binding on all Members" (Marrakesh Agreement, Articles I; II 2) and "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" (Marrakesh Agreement, Article XVI 4). Therefore, if the parties of the RTA-containing forum clause are also parties of the WTO, they should be committed to the RTA agreement signed.

3.2 DSU versus RTA

A number of scholars hold the view that the DSU will have exclusive jurisdiction over WTO violations claims relying on Article 23, which states that "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding" (Steger, 2004, pp. 142–147).

They claim that Article 23 cannot be read in a vacuum, and the meaning of this article is that the DSU has "not only compulsory jurisdiction over matters arising under the covered agreements, but that it also has exclusive jurisdiction over such matters" (Steger, 2004, pp. 142–147). By interpreting that Article, they insist that it imposes on the WTO member seeking redress for violations under covered agreements an obligation to use DSU procedures. Therefore, once the complaining party submits a request for a panel, the panel is automatically established. (Steger, 2004, pp. 142–147). This opinion moves on to confirm that final decision of that panel or the Appellate Body is binding on all parties (Steger, 2004, pp. 142–147).

From a different angle, some scholars tend to believe that it is possible for a DSU panel to apply the RTA rules. Article 7.1 of the DSU articulates the relevant rules to be applied by the WTO's panel, and the mission of the panel, which is "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 will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).” Also, the panel has an obligation to further “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute” (DSU, Article 7.2). Therefore, according to this opinion, RTA rules should be applied through Article 7 of the DSU when these rules are cited by either party to the dispute during the proceeding before the WTO’s panel.

3.3 Assessment

The reliance on the language of Article 23 raises the question of the possibility of the RTA to prevail if it has similar provisions as the WTO and requires the parties to bring any dispute arising under this agreement to the RTA’s dispute settlement. Would that language deprive parties of their right to access the WTO dispute settlement mechanism since the RTA imposes the same obligations? (Hillman, 2009, p. 197).

The boundary between the RTA and the DSU dispute settlement is vague. Even though GATT recognizes the validity of a RTA as part of the GATT and the WTO legal system, the distinction between these dispute settlement mechanisms needs to be drawn as this ambiguity might hamper the effectiveness of the WTO dispute mechanism.

The overlap between the substantive obligations and multiple dispute fora requires clarification of the relationship between these international agreements if the WTO members are allowed to initiate WTO proceedings seeking redress of a violation of RTA obligations (Hillman, 2009, p. 197). There are several cases that have triggered the problem.

The exclusivity of the WTO in respect of violation of WTO obligations may be called into question when the RTA provides for a forum selection clause in addition to the WTO. In this situation, we should distinguish between two examples. First, if the forum selection clause elects the RTA as an alternative dispute mechanism, in this situation, the WTO can adjudicate the matter as the RTA does not deny the WTO’s competency. Note that allowing the WTO to hear the claim, in the presence of an alternative forum clause, does not preclude the RTA’s jurisdiction. The question then becomes: what if the rulings of these two different mechanisms are contradictory? In fact, there is an example of these conflicting rulings between the WTO and the RTA. Canada brought actions against the US over softwood lumber countervailing and antidumping measures, initiating three NAFTA proceedings in addition to four claims in the DSU. The WTO panel ruled in favour of the US¹ while the NAFTA panel rejected the US claim on the ground that the injury determination was not supported by sufficient evidence. Now, each party has a ruling from a binding and competent panel (Lan, 2007).

Indeed, this is not the only problem that occurs; DSU has been precluded in many RTA agreements, as we will see. Some RTAs stipulate that parties cannot invoke their right of the WTO dispute settlement. When issue comes up while performing their obligations, the complaining party should only submit their claim to the forum listed in the RTA. The question here is: what if the party initiates a DSU proceeding? Will this provision divest the DSU’s jurisdiction?

4. Paradigms of jurisdictional conflict between the WTO and the RTA

4.1 Treaties providing for another forum in addition to the WTO

In this method, the approach of some RTAs provides a lenient interaction with parties' obligations under another international agreement in terms of a competent forum. As an example, the EU-Japan Economic Partnership Agreement (EPA) was signed between the EU and Japan on 1 February 2019. Article 2.15 of this agreement allows parties to adopt restrictions on exportation or sale for export of any good listed in Annex 2-B in accordance with GATT Article XI.2 (exceptions to quantitative restrictions). However, parties should "seek to limit that prohibition or restriction to the extent necessary, giving due consideration to its possible negative effects on the other Party" (EPA, Article 2.15 (2) [b]). This provision expands the party's ability to impose restrictions if these measures are necessary. There is nothing in the treaty defining the term 'necessar' in relation to these restrictions, which means parties have the discretion to assess necessity. In contrast, GATT Article XI.2 opines that the necessary circumstances, where a party may impose restriction on exportation, must be narrowly tailored to certain situations. Article 21.7 of the EPA agreement provides: "Where a dispute arises with regard to the alleged inconsistency of a particular measure with an obligation under this Agreement and a substantially equivalent obligation under any other international agreement to which both Parties are party, including the Marrakesh Agreement, the complaining Party may select the forum in which to settle the dispute."

Let's assume that Japan, as it is party to both the EPA agreement and the WTO, arbitrarily imposes restrictions on exportation to the EU and these measures are inconsistent with Article XI.2 of GATT. Japan can justify these measures as necessary; it cannot be held liable since there is no definition on what is necessary under Article 2.15 (2) (b) of the EPA. Assume further that the EU resorted to dispute settlement under that agreement and the claim was denied. The EU is still able to bring the same matter to the WTO despite the forum clause incorporated in the EPA agreement as there is an obligation imposed on the WTO DSB that its ruling "cannot add to or diminish the rights and obligations provided in the covered agreements" (DSU, Article 3.2).

This provision prohibits the DSB from declining to exercise jurisdiction if the matter falls under THE WTO obligations.

The panel will encounter difficult questions. One is whether the ruling issued by the EPA tribunal is binding; second is whether the DSU has jurisdiction, if the clause is invoked by Japan; third is whether the assessment will be based on the EPA treaty or the GATT; and finally, if the DSU ruled in favour of the EU there will be two different rulings.

Another example is the United States-Mexico-Canada Agreement (USMCA), which came into effect on 1 July 2020. That agreement contains a dispute settlement section, Chapter 30. Article 31.3 of that Chapter provides:

1. If a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.
2. Once a complaining Party has requested the establishment of, or referred a matter to, a panel under this Chapter or a panel or tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora.

Based on this language, the party has the right to recourse to either forum only when a dispute arises under the USMCA agreement and another international agreement. Once the proceeding is initiated, the tribunal will be exclusively competent.

In the same vein, in 2002 party States of MERCOSUR², the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, agreed to sign the Olivos Protocol for the Settlement of Disputes in MERCOSUR (Olivos Protocol). This protocol provides for a permanent dispute settlement mechanism, which aims to establish a unifying jurisprudence on matters derived from the MERCOSUR.

Article 1.2 of the 2002 Olivos Protocol, which is the most recent dispute settlement mechanism set up within MERCOSUR, contains a choice of forum clause regarding disputes that fall within both the WTO and MERCOSUR's jurisdiction:

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, may be referred to one forum or the other, as decided by the requesting party. Provided, however, that the parties to the dispute may jointly agree on a forum.

However, once the complaint has been submitted to one tribunal, that will prevent the parties resorting to any other tribunal, as Article 1.2 provides:

Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora...

The question here is what would the WTO do if one party, in violation of USMCA or MERCOSUR obligations that are like those of the WTO, resorts to the DSU after submitting its claim to the RTA tribunal? Would the WTO respect the exclusion provision and decline to decide the case?

This situation has previously materialised before the WTO panel on Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil. Brazil complained and lost its claim to MERCOSUR. Then, it decided to resort to the WTO dispute settlement. The panel, notably, found that the old Brasilia Protocol was still applicable and had no prohibition with respect to bringing subsequent cases before the WTO. The panel, in its reasoning, stated that:

We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure. (WTO, 2003, 7.38)

It can be concluded from the panel explanation that the exclusion clause had a legal effect before the panel and if the Protocol was effective the panel would have been willing to enforce it, otherwise the panel would not have addressed this defense (Pauwelyn, 2003, p. 1013).

4.2 Treaties precluding WTO jurisdiction

In this paradigm the situation is more complicated. The RTA sometimes includes an explicit provision to preclude the DSU from hearing future disputes. India, for example, signed a bilateral agreement

with the European Commission (EC) on 12 November 1997 to reach a solution and not to invoke the WTO dispute settlement. The agreement was notified to the DSB in accordance with Article 3.6 of the DSB, containing the following provision:

... the European Communities will refrain from action under GATT Article XXII or Article XXIII as regards those restrictions [maintained by India on import of industrial, agricultural and textile products] during the phasing-out period as defined below, if India complies with its obligations under this exchange of letters. (WTO, 1998)

After the agreement, the EC brought action before the DSU related to India-Auto. India argued that the DSU lacked jurisdiction over the dispute as the parties had agreed not to invoke the WTO dispute settlement, also contending that the bilateral agreement removed the EC's right to resort to the DSB (WTO, 2002, para. 4.30). The panel did not address the question of whether the bilateral agreement divests the jurisdiction from the WTO dispute settlement and whether the forum selection clause was binding by finding that the matter was not covered by the settlement provision (WTO, 2002, para. 4.30).

This paradigm might come in different wording. For instance, Article 19.5 of the Closer Economic Partnership Arrangement (CEPA), which was signed by Mainland China and Hong Kong, stipulates that "any problems arising from the interpretation or implementation of the CEPA" shall be settled "through consultation in the spirit of friendship and cooperation" (CEPA, 2003, Article 19.5).

It has been argued that if the dispute results under an agreement containing a clause that denies the jurisdiction of the WTO over the dispute, the DSU's panel has an obligation to decline to decide the matter by virtue of the agreement (Pauwelyn, 2004, p. 998–1008). However, this opinion contradicts with Article 23 of the DSU, which, as a general principle, subjects all WTO matters to be resolved under the DSU.

4.3 Treaties providing for an exclusive jurisdiction

NAFTA, in Chapter 20, adopted the exclusive forum regime. If the dispute relates to environmental or health protection, the adverse party can insist that the dispute be adjudicated under NAFTA. In an international context, the idea of exclusive jurisdiction also poses a risk to other tribunals' jurisdiction. Article 292 of the Treaty on the Functioning of the European Union (TFEU), for instance, states that:

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaties to any method of settlement other than those provided for therein. (Consolidated version of the Treaty on the Functioning of the European Union, 1957)

Does this text prevent EU members from recourse at any EU international tribunal other than the European Court of Justice? Based on the plain language of the text, the answer seems to be no, EU members can resort to any other international tribunals unless the dispute concerns interpretation of the TFEU. The difficult question is what happens when one party raises an issue involving the TFEU and WTO obligations during the proceeding?

This conflict between the TFEU and another international tribunal, in fact, occurred recently in *Ireland v. United Kingdom*. In that case, Ireland filed claims regarding violations under the United Nations Convention for the Law of the Sea (UNCLOS). Ireland accused a MOX (mixed oxide fuel) plant of discharging radioactive waste into the Irish Sea. This plant was managed by the United Kingdom. The International Tribunal for the Law of the Sea (ITLOS) found that there was *prima facie* jurisdiction according to Article 288.1 of the UNCLOS, which states: "A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part" (ITLOS, Order of 3 December 2001). The tribunal constituted to decide the case. In contrast, the panel decided to suspend the proceeding

in response to UK arguments that the dispute fell, exclusively, within the scope of TFEU jurisdiction in pursuance of Article 292 of the TFEU. The arbitration panel refused to answer the question as to whether the dispute fell, partially, under the TFEU's exclusive jurisdiction and decided that the question is "to be decided within the institutions of the European Communities, and particularly by the European Court of Justice" (Permanent Court of Arbitration, Order No. 3 of 24 June 2003). Therefore, the tribunal refrained from continuing the proceeding upon the existence of the exclusive jurisdiction provision. The immediate question is what would be the decision of the WTO's panel if a case submitted to it involved overlapping substantive obligations between the WTO and TFEU?

Some scholars tend to follow the UNCLOS's rules and call for them to be applied even by the DSB. In justifying that, they list a number of reasons: the first, according to Article 133 of the TFEU, states that the TFEU's common commercial policy falls within the exclusive competence of the EC. EU members have no legal capacity to exercise their right to resort to the WTO dispute settlement, because they relinquished that right (Pauwelyn, 2004, p. 1010), at least not when the matter involves multiple issues concerning both the WTO and TFEU obligations. Furthermore, the dispute between EU members and non-EU members should also be adjudicated by the EC. Therefore, the lack of competence resulting from the TFEU Treaty applies beyond the EU.

There are two observations from this opinion. First, it weighs on the side of the TFEU, and not the WTO, without reasonable justification. Why should the WTO rules not apply since the language of Article 23 DSU has the same legal strength? We can assume EU members relinquished their right to bring their claims under the TFEU in favour of the WTO as this opinion alludes to the autonomy of the states.

5. Solutions suggested to resolve the jurisdictional conflict

5.1 Res judicata

Bin Cheng states that "recognition of an award as res judicata means nothing else more than recognition of the fact that the terms of that award are definitive and obligatory." (Cheng, 1987, pp. 336–7) In the same vein, Barnett has described res judicata as:

[a]... judicial decision of special character because, being pronounced by a court or tribunal having jurisdiction over the subject-matter and the parties, it disposes finally and conclusively of the matters in controversy, such that – other than on appeal – that subject-matter cannot be relitigated between the same parties or their privies. Instead, the subject-matter becomes – as the Latin reveals – 'a thing adjudicated', with res judicata thereafter standing as the final and conclusive resolution of the parties' dispute. (Barnett, 2001, pp. 92–98)

The concept of res judicata has been recognised by international courts and tribunals such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), and arbitration tribunals, as a legally binding principle. (Barnett, 2001, p. 143)

The applicability of res judicata is one of the most controversial issues in the WTO law. The principle of res judicata is a non-WTO norm and not included in any WTO covered agreement in the DSU. The DSU tribunal relies on Articles 1.1, 3.2, 7, 11 and 19.2 to decide any case.³ To determine whether a WTO member has violated the rights of another member, the DSU would use the agreement signed by these members as substantive law to determine the rights and obligations of each party.

Even though the DSU is bound by the articles set forth above as applicable law, once the jurisdiction of the DSU is properly established, it is not clear what the applicable law panels and the Appellate Body would apply (Pauwelyn, 2003, p. 1001). Scholars claim that award rendered by the RTA's

dispute settlement mechanism has a *res judicata* effect, therefore, the DSU should decline to exercise jurisdiction (Hillman, 2009, p. 203). The motive behind this view may be based on the characterisation of the RTA rules as general international law. However, most laws of international agreements, such as those related to the environment and human rights, have not been applied by the DSU tribunal. Rather, they are taken into consideration to determine rights and obligations of the WTO covered agreement (Son, 2008, p. 130).

The basis of applying *res judicata* to the DSU is debatable. It has been suggested that this doctrine be applied through the inherent power of the WTO tribunal. Inherent power can be defined as “powers that the judge enjoys by the mere fact of his or her status as a judge. They are functional powers, only to be exercised when necessary for the purpose of fulfilling the judicial function” (Nguyen, 2013, p. 154).

It is undisputed that because the WTO tribunal acts in many regards as a court, it can be classified as a judicial body. Hence, it should recognise the concept of inherent power since this concept is adopted by all international judicial bodies and there is no prohibition for the WTO to do so (Son, 2008, p. 131). Particularly, as there is no treaty or explicit language that specifies whether the non-WTO rules or norms of international law can be extended to the WTO disputes, inherent power can be the only basis for *res judicata* (Son, 2008, p. 131).

In the author’s view, the applicability of *res judicata* in the WTO’s disputes, based on inherent power doctrine, might face an obstacle of the lack of state consent. Simply put, the WTO members should agree explicitly to the application of *res judicata* in the WTO’s disputes. Such consensus is nonetheless unlikely to happen as this might be inconsistent with the WTO’s obligations to designate the DSU as a dispute settlement mechanism to adjudicate the WTO’s disputes. Otherwise, that means the WTO encourages its members to settle their disputes in an outside forum. This would be incompatible with the fundamental principle of Article 23 of the DSU. The only way to accept *res judicata* is for the concept to be recognised explicitly in the DSU.

However, adopting *res judicata* by the panel does not settle the problem. Assuming *res judicata* can be applied by the DSU somehow to avoid subsequent proceeding on the same matter before the WTO’s panel, it does not offer a decisive solution for the concurrent proceedings before both DSU and RTA panels.

5.2 RTA rules are the substantive applicable law

There is no doubt that WTO panels have jurisdiction over disputes arising from the WTO’s obligations. Under Article 1.1 of the DSU, Article 23 only applies 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 question is whether this Article gives the parties the ability to use the RTA’s obligation as a defense before the WTO’s panel if it is similar to that of the WTO. To put it differently, Article XX of the GATT prohibits any “arbitrary or unjustifiable discrimination” between parties. According to these three Articles, as they are integrated, can a party to the RTA justify that the violation is justifiable discrimination?

In fact, the problem here is related to the applicable law, which differs from jurisdiction. Articles 7.1 and 7.2 of the DSU establish an obligation of the panel, “in the light of the relevant provisions” (DSU, Article 7.1) to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute” (DSU, Article 7.2). It can be deduced that the applicable law in the DSU encompasses the rules of the RTA if they are cited by the disputing parties, and the RTA agreement contains the WTO obligations. Therefore, for the RTA to be the applicable law, as non-WTO rules, in the WTO dispute, there are two conditions to be met; first there must be an RTA involved in the

dispute; second the RTA should be cited to the panel by at least one party to the dispute. Then the RTA becomes non-WTO rules and can be applied by the DSB. The problem, therefore, occurs when the RTA, which becomes applicable, contains a provision precluding the jurisdiction of the DSU, how the panel would deal with it?

Some scholars have emphasised that these provisions in the DSU should be read to allow the WTO's panel to apply non-WTO law to the dispute even if that precludes the WTO's rules, and their reasons are as follows.

First, the WTO panels have not limited themselves to the four corners of the WTO covered agreements. They have referred, multiple times, to the general public international law principles, namely customary international law (Pauwelyn, 2004, pp. 1002–4). Second, the DSU, in Article 3.2, clearly states that WTO covered agreements must be clarified “in accordance with customary rules of interpretation of public international law”. Based on that, the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) stipulates in Article 31(3) that a treaty must be interpreted in light of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (Vienna Convention, Article 31.3 ‘a’). Therefore, the WTO treaty “explicitly frames itself in the wider context of public international law, including other non-WTO treaties” (Pauwelyn, 2004, p. 1001).

The author agrees with part of this opinion, as it is undisputable that the DSU may use other international agreements and bilateral treaties as a tool to clarify parties' obligations under the Marrakesh Agreement, such as the Vienna Convention, for example. However, neither Article 3(2) of the DSU nor Articles 31 and 32 of the Vienna Convention provide that all relevant treaties between the disputing parties must be applied by the WTO's panel while determining whether a defendant has performed their obligation under the WTO covered agreement (Steger, 2004, pp. 8–9).

Another argument is that the Marrakesh Agreement is, in fact, a treaty, which means it is part of public international law, and the Marrakesh Agreement cannot be applied in a vacuum from other international law rules. In other words, Article 7 of the DSU does not need to set out all other rules of international law to be applied by the WTO's panels (Pauwelyn, 2004, p. 1001).

The crux of this analysis is that based on the characterisation of the WTO as an international agreement, there is no justification to isolate non-WTO rules. This is because non-WTO agreements create international law obligations, and these treaties serve as an applicable law, therefore, they cannot be ignored by the panel (Pauwelyn, 2003, p. 1001).

The Marrakesh Agreement has no provision that imposes an obligation on the panel to examine the covered treaties between the disputing parties and assess their satisfaction of their obligation. The function of the DSU is to control the trade between the WTO members. Thus, the attempt to give the RTA legal value to be applied by the WTO panel as part of public international law is baseless. Further, the WTO's members did not grant a jurisdiction to the DSB panel to hear any issue arising from other agreements (Steger, 2004, p. 5).

5.3 WTO jurisdiction prevails

Article 23 of the DSU may prevail and preclude other jurisdictions from deciding the WTO law matters as Vienna Convention Article 30.2 states: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”. Evidently, forum selection in the RTA cannot divest the jurisdiction of other tribunals established by other agreements: such bodies may still adjudicate claims arising under their agreements having provisions that operate in parallel to, or overlap with, the WTO provisions. Therefore, there is a need for WTO's members to address the issue of conflicting jurisdiction of both the WTO-RTA dispute settlement mechanisms.

Based on the Vienna Convention Article 30.2, it is possible that either the RTA or the WTO jurisdiction be seized, at the same time or in sequence, from adjudicating a very similar issue since the obligations under the RTA and the WTO are similar. In the absence of a treaty that addresses this issue, the principles of treaty interpretation appear to be the only reliable rules to resolve the issue of overlap or conflict of dispute settlement mechanisms. The issue is whether these conflicting rules can exclude the WTO dispute settlement mechanism or nullify its access; it is unlikely.

5.4 Abuse of process

It may be argued that in public international law, a State, by bringing the same claim to a second tribunal, is abusing its process or procedural rights. A tribunal may decline to exercise jurisdiction if it believes that the motive behind this proceeding is to harass the defendant, or the allegations are frivolous or baseless. Realistically, it is rare that any judicial body, including the DSU, would find the allegations frivolous (Kwak & Marceau, 2002, p. 7).

6. Solution

It would be difficult to deny the WTO members' access to the DSU if the dispute is subject to the RTA dispute settlement mechanism, as Article 23 of the DSU imposes on members to resort only to the DSU if they seek redress of a violation of the WTO obligations. The risk of having parallel proceedings does negate the fact that Article 23 of the DSU would prevail over the RTA rules, and the WTO's panel would not hesitate to adjudicate any violation of the WTO's obligations submitted to it. The only solution, in the author's view, would be for the WTO's members to negotiate an amendment to the DSU rules and incorporate a set of rules governing the allocation of jurisdiction between the WTO and the RTA. The amendment of DSU rules should consider the recognition of the dispute settlement mechanism provision contained in the RTA, whether this provision is formulated to designate the WTO as an additional forum or to exclude its capacity to decide the issue.

Suggesting that RTA members draft the forum clause in the RTA consistently with DSU jurisdictional scope is unlikely to happen for two reasons. First, for this suggestion to be binding it must be incorporated in DSU rules which would require an amendment to the DSU rules. Second, some countries intend to preclude the jurisdiction of the WTO when drafting their free trade agreement. In addition, all states have the right to bind themselves with any obligation and their freedom in this regard cannot be seized.

In conclusion, this article has provided an analysis on the viability of the forum selection clause incorporated in the RTA when: 1) all parties are WTO members, and 2) the dispute concerns the WTO obligations. Given the significant growth of RTAs, particularly when most of these agreements contain forum selection clause, it seems the conflict of jurisdiction between the DSU and RTA dispute settlement mechanism is inevitable. This article, therefore, argues that this problem should be resolved for a consistent relationship between these two regimes. As discussed above, in light of the clear language of Article 23 of the DSU, all of the solutions suggested seem to be impractical. Negotiation between WTO members is urgently needed in the absence of any international rules that might govern this issue. Also, there should be a set of interpretation rules to help avoid any potential conflict in the future between the RTAs and the WTO in terms of obligations or jurisdiction.

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Notes

- 1 The appellate body overturned the DSU decision; however, that does not negate the fact there is a potential jurisdictional conflict. See WTO (2006).
- 2 MERCOSUR is a union of States obtaining legal personality under International Law, whose origin is the Asuncion Treaty of March 26, 1991. The treaty was executed by the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay.
- 3 DSU, Articles 1.1, 3.2, 7, 11, 19.2 are substantially procedural and instruct the panel to apply the rules of covered agreement underlying the dispute as substantive law.

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