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Conflict of Laws, Trade Liberalization and the WTO Judge: the Multilateral Trading System versus PTAs

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Co`nflit de normes, libéralisation du commerce et le juge de l'OMC: le cas particulier du rapport entre le système commercial multilatéral et les ACP

El juez de la OMC frente al conflicto de normas y la liberalización del comercio: la confrontación del sistema multilateral de comercio y los ACP

Conflito de Leis, Liberalização do Comércio e o Juiz da OMC: O Sistema Multilateral de Comércio e os ACPs

法律冲突、贸易自由化与WTO法官：多边贸易体系对战特惠贸易协定

Résumé

Cet article aborde la problématique des conflits de normes induits par la libéralisation du commerce sous l'angle du juge de l'OMC. Ces conflits de normes appartiennent à trois catégories : les conflits normatifs verticaux entre l'ordre juridique interne et le système commercial

Abstract

This paper addresses the conflicts of laws induced by trade liberalization from the perspective of the WTO judge. Those conflicts of laws fall within three categories: vertical normative conflicts between the domestic legal order and the multilateral trading system or a Preferential Trade

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multilatéral ou un accord commercial préférentiel (ACP), les conflits horizontaux entre ordres juridiques internes résultant de la concurrence normative associée à la libéralisation du commerce, et les conflits dans l'ordre juridique international entre l'OMC, les ACP ou d'autres régimes du droit international. Classiquement, les réponses à ces conflits de normes sont structurées de trois façons : l'évitement des conflits, l'harmonisation des normes en amont et la préséance, cette dernière approche étant mise en œuvre par des techniques juridiques permettant de déterminer l'existence d'un conflit, puis d'établir quelle norme devrait prévaloir.

C'est à travers ce prisme conceptuel que l'auteur examine une catégorie particulière de conflits de normes, soit ceux résultant de la confrontation entre le système commercial multilatéral et les ACP. Sur la base de la jurisprudence de l'OMC et de développements doctrinaux, l'auteur souligne la réticence du juge de l'OMC à recourir à des techniques d'évitement des conflits axées sur la compétence ou la recevabilité, ce qui contraste avec la prédominance d'une dialectique de préséance attribuant aux groupes spéciaux et à l'Organe d'appel de l'OMC une fonction de juge «quasi constitutionnel». Cette dialectique engendre un dangereux déséquilibre entre, d'une part, le vaste pouvoir d'interprétation du juge de l'OMC résultant du degré élevé d'indétermination des textes des Accords de l'OMC et, d'autre part, l'indigence du capital de légitimité à la disposition du juge de l'OMC pour justifier la manière dont ce pouvoir est exercé.

Agreement (PTA), horizontal conflicts between domestic legal orders arising from normative competition associated with trade liberalization, and conflicts in the international legal order between the WTO, PTAs or other regimes of international law. Responses to those conflicts of laws are typically structured around three main approaches: conflict-avoidance, upstream harmonization and precedence, the latter implying legal techniques to determine the existence of a conflict and sort out which rule should prevail.

Through this conceptual prism, the author examines the type of conflict of laws resulting from the confrontation between the multilateral trading system and PTAs. On the basis of WTO case law and doctrinal developments, the author highlights the reluctance of the WTO judge to resort to conflict-avoidance techniques focusing on jurisdiction or admissibility, which contrasts with the predominance of a precedence-based dialectic placing the WTO judge in the position of a "quasi-constitutional" judge. That dialectic generates a dangerous unbalance between, on the one hand, the WTO judge's huge interpretative power flowing from the high level of indeterminacy in the texts of the WTO Agreements and, on the other hand, the indigence of the capital of legitimacy at the disposal of the WTO judge to justify how this power is exercised.

Resumen

Este artículo aborda la problemática de los conflictos de normas provocados por la liberalización del comercio bajo la perspectiva del juez de la OMC. Estos conflictos de normas se dividen en tres categorías: los conflictos normativos verticales entre el ordenamiento jurídico interno y el sistema multilateral de comercio o un acuerdo comercial preferencial (ACP), los conflictos horizontales entre ordenamientos jurídicos internos resultantes de la competencia normativa asociada con la liberalización del comercio, y los conflictos en el ordenamiento jurídico internacional entre la OMC, los ACP u otros regímenes de derecho internacional. Tradicionalmente, las respuestas a estos conflictos normativos se estructuran de tres maneras: prevención de conflictos, armonización de normas anteriores y precedencia, este último enfoque se implementa a través de técnicas jurídicas que permitan determinar la existencia de un conflicto y entonces establecer qué norma deberá prevalecer.

Es a través de este prisma conceptual que el autor examina una categoría particular de conflicto de normas, aquellas que resultan de la confrontación entre el sistema multilateral de comercio y los ACP. Con base en la jurisprudencia de la OMC y los desarrollos doctrinales, el autor destaca la reticencia del juez de la OMC a recurrir a técnicas de prevención de conflictos basadas en la competencia o la admisibilidad, lo cual contrasta con el predominio de una dialéctica de precedencia que otorga a los grupos especiales y al Órgano de Apelación de la OMC una función de juez «cuasi constitucional».

Resumo

Este trabalho trata do conflito de leis induzidos pela liberalização do comércio segundo perspectiva do juiz da OMC. Estes conflitos de leis são de três categorias: conflitos verticais normativos entre a ordem legal nacional e o sistema multilateral de comercio ou um Acordo Comercial Preferencial (ACP); conflito horizontal entre duas ordens jurídicas nacionais decorrentes de uma competição normativa associada à liberalização do comércio; e conflitos na ordem legal internacional entre a OMC e os ACPs ou outros regimes de direito internacional. As respostas a esses conflitos de leis são estruturadas tipicamente em torno de três abordagens principais: evitar conflitos, harmonização a montante e precedência, implicando a última em técnicas legais para determinar a existência de conflito e determinar a regra que deve prevalecer.

O autor examina por este prisma conceitual o tipo de conflito de leis resultante da confrontação entre o sistema multilateral de comércio e os ACPs. Com base na jurisprudência da OMC e nos desenvolvimentos da doutrina, o autor destaca a relutância do juiz da OMC a recorrer as técnicas para evitar conflitos focando em jurisdição ou admissibilidade, o que contrasta com a predominância da dialética baseada em precedentes colocando o juiz da OMC na posição de um juiz "quase constitucional". Esta dialética gera um desequilíbrio perigoso entre, de um lado o grande poder interpretativo do juiz da OMC emanado do alto nível de indeterminação dos textos dos acordos da OMC e, de outro, a indigência de

Esta dialéctica crea un peligroso desequilibrio entre, por una parte, el amplio poder interpretativo del juez de la OMC que resulta del alto grado de indeterminación de los textos de los acuerdos de la OMC y, por otra parte, la indigencia del capital de legitimidad a disposición del juez de la OMC para justificar la forma como se ejerce este poder.

capital de legitimidade à disposição do juiz da OMC para justificar o poder exercido.

摘要

本文从世界贸易组织法官的视角探讨贸易自由化引出的规范冲突。这些冲突可归为三类：内部法律秩序与多边贸易体系或特惠贸易协定之间的纵向冲突规范、与贸易自由化有关的规范竞合造成的内部法律秩序之间的横向冲突、以及国际私法秩序与WTO、特惠贸易协定或其他国际法制度之间的冲突。传统上，对这些规范冲突的回应有三种方式：规避冲突、上游协调和准据法。准据法是利用法律技术来实施的一种方法，先确定冲突的存在，然后再确定应以哪条规范为准。

作者正是从这一概念出发，对一类特殊的规范冲突——因多边贸易体系与特惠贸易协定的交锋造成的冲突规范进行了检视。作者以WTO的判例和法律学说的发展为基础，强调WTO法官在关于管辖权或可受理性的冲突上求助于规避技术持保留态度，而是更倾向于准据法，赋予特殊团体和WTO上诉机构“准宪法”法官的职能。这种方式会造成一种危险的失衡，即因WTO协议文本的高度不确定性造成的WTO法官广泛的解释权与WTO法官缺乏正当化该权力行使的合法性资本之间的失衡。

Table of Contents

The trade liberalization dynamics that was initiated after World War II with the conclusion of GATT 1947 and that have accelerated over the past decades in correlation with the globalization of the economy rest principally upon two types of legal infrastructure: on the one hand, the multilateral trading system that has been, since 1995, organised around the World Trade Organization (WTO) and the multilateral agreements that it supervises (the WTO Agreements); on the other hand, a growing number of preferential trade agreements (PTAs)[1] that have been compared to a spaghetti bowl or a "normative jungle" by scholars.[2]

It is trite to say that the WTO Agreements and PTAs have over the last three decades transformed structurally the economic landscape in which nations and firms evolve, allowing to a large extent the globalization or the regionalization of supply chains. Less noted but as interesting is the reverse dynamics, that is to say the impact that trade liberalization may have had on the evolution of the law. One aspect of this multifaceted phenomenon is the emergence of new conflicts of laws that are collateral to the operation of the multilateral trading system and PTAs, and the responses that are brought to these conflicts.

This topic is addressed in the current paper in two parts. The first part presents a conceptual framework for mapping out conflicts of laws that derive from the institutionalization of trade liberalization. In the second part, we will use that conceptual framework to discuss from a WTO law perspective a specific category of conflicts of laws, the conflicts of laws that may result from the confrontation between the multilateral trading system and PTAs.

The emphasis is put on the work of the WTO judge. In this paper, the term "WTO judge" refers to the adjudicatory bodies of the WTO dispute

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1 The term "preferential trade agreement" or PTA seems to us to be more appropriate and accurate than "regional trade agreement" or RTA, since the agreements at issue are by nature preferential but do not necessarily have a regional dimension.

2 The term "spaghetti bowl" was initially used by Jagdish N. Bhagwati, "US Trade Policy: The Infatuation with Free Trade Agreements" in Jagdish N. Bhagwati & Anne O. Krueger, *The Dangerous Drift to Preferential Trade Agreements* (Washington D.C.: AEI Press, 1995). In a broader context, Anja Lindroos uses the term "normative jungle" to describe the coexistence, overlapping, and interactions between the various specialized regimes and systems which compose modern international law: Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis" (2005) 74 Nordic Journal of International Law 27 at 31.

settlement system – panels and the Appellate Body – considered as a whole. We are well aware that this is an abuse of language as great care was taken in the drafting of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*[3] in particular and in the WTO Agreements in general to avoid a terminology that would suggest that panellists and Appellate Body Members participate as "judges" in a judiciary internal to the WTO. Like its predecessor – the GATT 1947 dispute settlement system –, the WTO dispute settlement system is a hybrid creature: it has both diplomatic and judicial features. The introduction of the negative consensus rule by the WTO Agreements in 1995 with respect to the establishment of panels, the adoption of the decisions and the imposition of retaliatory measures[4] changed however the paradigm as the enforceability of the rulings issued by panels and the Appellate Body was *de facto* no longer subject to diplomatic endorsement and has become, practically, automatic, in contrast to the situation that prevailed under the GATT 1947. With negative consensus, the adjudicators of the multilateral trading system have broken out of the grasp of the WTO political branch. The institutional emancipation of the adjudicatory bodies of the WTO – that resulted from the introduction of a modest technical rule – has allowed the development of a culture in which the latter represent themselves as judicial actors and operate in accordance with functional logics that are those of the judiciary.[5] Thus, the

[3] *Dispute Settlement Understanding*, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter referred to as the DSU].

[4] The negative or reverse consensus rule implies, in particular, that a panel will ultimately be established and that reports issued by panels or the Appellate Body will be adopted unless there is a consensus against the establishment of the panel or the adoption of the reports. In practice, negative consensus results in the automatic establishment of a panel and automatic adoption of reports. See Articles 6.1, 16.4 and 17.14 DSU, as well as Article 22.6 DSU with respect to the imposition of retaliatory measures, *supra* note 3.

[5] Georges Abi-Saab, "The Appellate Body and Treaty Interpretation" in Giorgio Sacerdoti, Alan Yanovitch & Jan Bohanes, eds, *The WTO at Ten, The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 453 for whom "the Appellate Body conducts itself as a judicial organ, regardless of the denomination" and "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" (at 456). For an illustration of a functional logic in the WTO dispute settlement system that is judiciary in character, see the statements of the Appellate Body on the "duty of obedience" of panels in Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II at 513, paras 158-162. The Appellate Body seems to view this duty of obedience

negative consensus rule has structurally reshaped the dispute settlement system of the multilateral trading system by redefining the underlying balance of power between lawyering and diplomacy, to the benefit of the former. In particular, the jurisprudence generated by panels and the Appellate Body has progressively emerged as a major vector of the evolution of the multilateral trading system, to the detriment of the political organs of the WTO which suffer paralysis as a result of the difficulty to reach consensus in the wide, diverse WTO membership. The contribution of panels and the Appellate Body to the evolution of the multilateral trading system has been made through exercises of interpretation of the WTO Agreements in the context of dispute review, and is driven by dialectics, processes, discourses and representations that characterize the judicial model. Therefore, referring in this paper to the WTO judge might be an abuse of terminology, but it is certainly not an abuse of concept.[6]

The objective of the first part of this paper is to present a conceptual framework for grasping conflicts of laws that derive from the institutionalization of trade liberalization. In the second part, we will use that conceptual framework to discuss from a WTO law perspective a specific category of conflicts of laws, those that may result from the confrontation between the multilateral trading system and PTAs.

as a surrogate for *stare decisis* in the WTO dispute settlement system. For the Appellate Body, while its reports are not binding – except with respect to resolving the particular dispute between the parties – legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB constitute an important part of the *WTO acquis* and create legitimate expectations. Accordingly, panels are expected to follow prior Appellate Body findings dealing with the same issue (paras 158-162). On the WTO dispute settlement system viewed as a court (a *juridiction*), see Hélène Ruiz Fabri, "Le règlement des différends au sein de l'OMC: naissance d'une juridiction, consolidation d'un droit" in Charles Leben, Eric Loquin, Mahmoud Salem, eds, *Souveraineté étatique et marchés internationaux à la fin du 20e siècle. Mélanges en l'honneur de Philippe Kahn* (Dijon: CREDIMI, 2000) at 303. Hélène Ruiz Fabri captures the judicial dimension of the WTO dispute settlement system in a well-inspired formula: "[l]a conception initiale porte en germe la juridiction et le fonctionnement fait naître la juridiction" (at 305).

6 Likewise, the term "PTA judge" in this paper is another abuse of language that refers to the adjudicatory body of a PTA dispute settlement system.

I. Conflicts of Laws Arising out of Trade Liberalization

First, we propose a typology of conflicts of laws that might be viewed as by-products of trade liberalization. Then, we will attempt to identify how the legal system responds or may respond to those conflicts of laws, putting emphasis on the multilateral trading system and the work of the WTO judge.

A. A Typology of Conflicts of Laws

Conflicts of laws presuppose the existence of an interaction or overlapping between rules belonging to distinct normative frameworks. A conflict of laws arises if this interaction or overlapping leads to an absurdity, a contradiction, an inconsistency, a dissonance, a tension. In the light of this definition, it seems to us that the potentiality for conflicts of laws arising from the multilateral trading system and PTAs is attached to three categories of situations.

The first of these categories refers to conflicts between a rule emanating from the domestic legal order and the normative framework inherent to the multilateral trading system or a PTA. The WTO Agreements and PTAs have resulted in additional layers of regulation that densify the restrictions upon regulatory autonomy, that is to say the capacity of a nation to implement collective preferences reflecting legitimate values or interests through regulatory action. Indeed, irrespective of the legitimacy of the pursued objective, to the extent that the exercise of regulatory autonomy has an impact or is likely to have an impact on international trade, it is likely to collide with the WTO Agreements or PTAs, thus resulting in what me be viewed as a vertical conflict of laws.[7]

[7] Thus, an illustration of the tension between regulatory autonomy and the national treatment principle as stated in Article 2.1 of the *Agreement on Technical Barriers to Trade* (1868 U.N.T.S. 120 [hereinafter referred to as the *TBT Agreement*]), and as interpreted and applied by the WTO judge, is to be found in the *US – Clove Cigarettes case*: Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI at 5751; Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI at 5865. For its part, the *EC – Seal Products Case* shows a conflict between regulatory autonomy and the most-favoured-nation principle as stated in Article I:1 of the *General Agreement on Tariffs and Trade 1994* (1867 U.N.T.S. 190, 33

Secondly, horizontal conflicts between domestic normative orders may emerge from the international competition between domestic legal orders that are being pitted against each other as a result of trade liberalization. Over the last three decades, the trade liberalization engendered by the WTO Agreements and PTAs has increased the competition between nations with respect to the goods and services they produce or provide. Furthermore, the WTO Agreements and PTAs have contributed to create a legal environment that allows firms to organize supply chains on regional and global scales, with the implication that nations also compete to attract direct investments as well as strategic factors of production such as capital and highly-skilled labour. This competition takes place on multiple front lines, including standards and regulation. To the extent that the economic space between two or more countries is open as a result of trade liberalization, differentials in standards or regulation – for instance, in the fields of labour standards, environmental standards, sanitary and phytosanitary measures, technical regulation, intellectual property or taxation – is likely to lead to competition on these counts. Competition on standards or regulation may be viewed as unfair for the trade partner that imposes the highest standards or apply the most stringent regulation. Such a competition may also be resented because, so the argument goes, it entails a race to the bottom that shrinks the regulatory autonomy of the nations and imposes an ideological model – a ruthless neo-liberalism – as a matter of fact. Competition on standards and regulation may lead to what is often tagged dumping: social dumping, wage dumping, environmental dumping, tax dumping, to mention the most common expressions. Conflicts of laws underpin these types of dumping as dumping reflects a tension – political in nature rather than legal – that results from interactions between distinct legal orders that would not have taken place but for trade liberalization.

Thirdly, additional layers of regulation that are associated to the multilateral trading system and PTAs may intermingle between themselves or with other sub-systems of international law, and thus lead to conflicts of

I.L.M. 1153 (1994) [hereinafter referred to as GATT 1994]): Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I at 7; Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014:II at 365.

laws.[8] To a large extent, this type of conflict of laws is a by-product of the fragmentation of international law that has been witnessed over the last decades, as well as a factor that magnifies a phenomenon that has multiple causes. To name a few of them: the decentralized nature of the law-making processes in international law and their contractual nature;[9] the absence of hierarchy in the sources of international law;[10] the multiplicity, diversity and bureaucratization of the institutional actors of the international sphere; the egocentricity of some of them; the complexification of the subjects with which international law has to deal; the specific, specialized goals

[8] Panagiotis Delimatsis suggests that this type of normative conflict finds its roots in the DNA of international law: it "is a phenomenon inextricably associated with international law; it has shaped it and influenced its evolution through the years" (Panagiotis Delimatsis, "The Fragmentation of International Trade Law" (2011) 45 J. World Trade 87 at 88). On conflicts of substantive rules between the multilateral trading system and PTAs, and more broadly, on conflicts of substantive rules between sub-systems of international law, there is a rich literature. See among others: Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003); Joel P. Trachtman & Joost Pauwelyn, "Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law" (2004) 98 American Journal of International Law 855; Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory" (2006) 17 EJIL 395. On conflicts of laws between two PTAs to which a country could be a party, see Chang-fa Lo, "Coordinative Approach to Resolve Normative and Operational Conflicts between Inner and Outer-FTAs" (2016) 50 J. World Trade 147.

[9] Professor Charles Rousseau wrote in 1932 that international law is "un droit de coordination et non de subordination", adding that "[l]'accord des sujets de droit y est la seule source de droit et les normes qui résultent de cet accord de volontés sont d'égale valeur juridique". This has not fundamentally changed since (Charles Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", (1932) 39 Revue générale de droit international public 133 at 150-151). As Eve-Lyne Comtois-Dinel puts it, in the absence of a central authoritative law-creating organ, "il existe... sur la scène internationale autant de producteurs de droit qu'il existe d'États et d'organisations internationales" (Eve-Lyne Comtois-Dinel, "La fragmentation du droit international: vers un changement de paradigme?" (2006) 11:2 Lex Electronica, online: <http://www.lexelectronica.org/articles/v11-2/comtoisdinel.htm>).

[10] "Le principe est que *pour les sources, il n'existe pas de hiérarchie* en droit international": Nguyen Quoc Dinh, Patrick Dailler, Mathias Forteau, Alain Pellet, with the collaboration of Daniel Müller, *Droit international public*, 8th ed. (Paris: L.G.D.J, 2009) at 127, para 60. On normative hierarchy in international law, see Dinah Shelton, "Normative Hierarchy in International Law" (2006) 100 American Journal of International Law 291.

pursued by the various sub-systems of international law;[11] the emergence of interest-driven entities and lobbies in the international society that seek to influence the zones of the legal system in which they have concerns;[12] the connections that international law develops with other disciplines; the intrinsic limits of the few cross-cutting principles, instruments and institutions that are geared to ensure the unity and the coherence of international law as an overarching system.[13]

[11] The fragments of international law would be associated to sectoral systems, each of them having its "own preferred idiom, special ethos" and being "dedicated to maximize a particular rationality", that behavior being viewed as "an epiphenomenon of the real-world multidimensional fragmentation of world society": Delimatsis, *supra* note 8 at 88 and 92, referring to Martti Koskenniemi, "The Politics of International Law – 20 Years Later"(2009) 20 EJIL 7 at 9, and to Andreas Fischer-Lescano & Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 Michigan Journal of International Law 999 at 1017. Panagiotis Delimatsis suggests that the multiplication of international tribunals over the last decades would have also contributed to the fragmentation of international law: "every tribunal is a self-contained regime, which jeopardizes the systemic coherence of international law. Tribunals become the missionaries conveying the message of autonomy of such regimes, which typically tend to apply a presumption in favour of complete and exhaustive regulation within the respective regime" (Delimatsis, *supra* note 8 at 89, footnotes omitted).

[12] Panagiotis Delimatsis refers to "the proliferation of non-state actors seeking to regulate their private affairs through self-regulation and soft law rules that that have a transnational effect" and highlights the "rise of private government and transnational networks": Delimatsis, *supra* note 8 at 90-91.

[13] "[B]eing essentially an inter-subjective system without central authoritative law-creating and law-applying organs international law inherently enjoys low levels of coherence": Yuval Shany, *The Competing Jurisdiction of International Courts and Tribunal* (Oxford: Oxford University Press, 2003) at 114. The fragmentation of modern international law is a phenomenon that has given rise to a plethoric literature. See among others the seminal report prepared by the United Nations International Law Commission: Study Group of the International Law Commission (finalized by Martti Koskenniemi), *Difficulties Arising From The Diversification And Expansion Of International Law*, International law Commission, Fifty-eighth session, A/CN.4/L.682, 13 April 2006. The International Law Commission explains that the fragmentation of international law flows from the fact that international law develops through issue-oriented areas of law-making driven by "specialized and relatively autonomous spheres of social action and structure" (*ibid*. at paras 5 and 7). See also Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law" (2004) 25 Michigan Journal of International Law 849; Margaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012). On fragmentation in the specific area of international trade law, see Thomas Cottier, Panagiotis Delimatsis, Katja Gehne & Tetyana Payosova, "Introduction: Fragmentation and

B. Responses to Conflicts of Laws

Typically, responses to conflicts of laws hinge around three main approaches: conflict-avoidance, harmonization and precedence.

Conflict-avoidance is an approach that is prevalent in private international law. A factual situation has connections with a plurality of substantive laws and jurisdictions: conflicts of laws are pre-empted through the application of a set of rules that designate the competent jurisdiction and the applicable substantive law. *Res judicata*, *lis pendens* as well as the common law doctrine of *forum non conveniens*, that are discussed below, are associated to this approach. In the European Union as well as in certain federations, it may be argued that the principle of subsidiarity is not only driven by a search for efficiency, but also pursues an objective of conflict-avoidance between the levels of government and normative production.[14]

Coherence in International Trade Regulation: Analysis and Conceptual Foundations" in Thomas Cottier & Panagiotis Delimatsis, eds, *The Prospects of International Trade Regulation, From Fragmentation to Coherence* (Cambridge: Cambridge University Press, 2011) at 1; Delimatsis, *supra* note 8, the latter author considering that fragmentation of international law is not an absolute evil as it may reflect a pluralist evolution of the international legal system as well as "the social richness of a globalizing world, of the international system's liveness and dynamics, so that "under certain circumstances, fragmentation may be the optimal solution to a given issue" (*ibid.* at 88, 91-92 and 116). Panagiotis Delimatsis distinguishes good and bad fragmentation of international law, arguing that the forty or so active institutionalized international adjudicating bodies at the regional and global levels "strengthen[...] the rule of law at the international level and shape[...] a more egalitarian and pluralistic vista of international law". He adds that "in some trade areas, fragmentation may entail inherently coherent solutions that ultimately lead to more efficient regulation of these areas from an economic viewpoint (*ibid.* at 116). As it is highlighted by Cottier, Delimatsis, Gehne and Payosova, fragmentation of international law is not a new phenomenon (*ibid.* at 11-12). It has however intensified over the last decades, in particular in the field of international trade law, in part as the result of the "proliferation of preferential trade agreements (PTAs) and the growing number of international legal instruments impinging on trade flows" and, more fundamentally, of the fact that "[t]he post-war propensity towards accelerated cooperation has led to intensive interstate treaty-making and the emergence of autonomous legal orders beyond the Nation State model" (Delimatsis, *supra* note 8 at 88).

14 The principle of subsidiarity rules out the intervention of the central authority when the task can be performed by a level of government that is closer to the citizens. Thus, the central authority exercises a subsidiary function. See the definition of *subsidiarité* (in the context of the European Union) in Gérard Cornu, *Vocabulaire juridique*, 9th ed. (Paris: PUF/Quadrige, 2011).

Interpretation techniques may be used to avoid conflicts of laws. For instance, if alternative interpretations of overlapping treaty provisions exist – one leading to a conflict and the other not – the latter solution might be favoured on the grounds that it provides "effectiveness" or "*effet utile*" to both treaties: *ut res magis valeat quam pereat* (*règle de l'effet utile* or principle of effectiveness).[15]

In the field of international trade law, the technique of conflict-avoidance is marginally used. Rules of origin that determine among others whether the preferential tariff of a PTA or of a Generalised System of Preferences to the benefit of developing countries shall apply instead of the most favoured nation tariff that otherwise applies to goods originating in WTO Members is an illustration of the conflict-avoidance approach in the field of international trade law. Another example of this approach is choice of forum clauses such as Article 2005 of the *North American Free Trade Agreement*[16] that deals with disputes on a matter that falls within the scope of both NAFTA and the WTO Agreements. In this hypothesis, apart from disputes on specific environmental matters, sanitary and phytosanitary measures, or technical standards, the complainant enjoys discretion and may either resort to the NAFTA dispute settlement procedures or bring the matter before the WTO dispute settlement system.[17] However, once dispute settlement proceedings have been initiated, the selected forum shall be used to the exclusion of the other.[18]

Harmonization of the norms is a preventive approach to conflicts of laws, the underlying theory being that no conflict should arise if the interacting norms are the same or similar. Harmonization of the rules typically implies an upstream effort of coordination between the rule-makers. Harmonization is the conventional response to horizontal conflicts between domestic normative orders as it neutralizes the international competition with respect to the subject-matter that it covers.

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15 Panagiotis Delimatsis alludes to the conflict-avoidance approach by referring to norm-fragmenting techniques used by the judiciary to avoid inter-institutional conflicts: Delimatsis, *supra* note 8 at 108-111.

16 *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entry into force 1 January 1994) [hereinafter referred to as NAFTA].

17 *Ibid.* at article 2005(1).

18 *Ibid.* at article 2005(6).

In the multilateral trading system, significant harmonization has been achieved in the field of intellectual property, essentially by referring to pre-existing intellectual property international conventions. Harmonization is also an objective in the area of sanitary and phytosanitary measures as well as that of technical regulations and standards. In these two areas, the harmonization process is based on international standards. When they exist, WTO Members are encouraged to use them as a basis for technical regulations as well as sanitary and phytosanitary measures.[19] The reward for following international standards is in the form of an enhanced presumption of validity of the domestic measure and a correlated protection from challenge within the WTO dispute settlement system. Thus, a technical regulation that pursues a legitimate objective that is explicitly stated in article 2.2 of the *TBT Agreement* and that is in accordance with relevant international standards enjoys a relative immunity from challenge in the WTO dispute settlement system as it "shall be rebuttably presumed not to create an unnecessary obstacle to international trade".[20] A sanitary or phytosanitary measure that conforms to international standards benefits from a more protective shield: it is deemed to be necessary to protect human, animal or plant life within the meaning of article XX(b) of GATT 1994 and presumed to be consistent with the relevant provisions of the SPS agreement and of GATT 1994.[21]

The WTO Agreements do not set out harmonized labour standards, environmental standards or tax standards. There are however international initiatives outside the multilateral trading system that pursue harmonization or coordination objectives in these areas. The frameworks in which those initiatives take place may relate to international trade or not. With respect to the former category, it is noteworthy that coordination efforts in labour and environment have been pursued in so-called "new generation" PTAs such as the *Trans-Pacific Partnership Agreement* (TPP, Chapter 19 on labour and Chapter 20 on environment)[22] or the *Comprehensive Economic*

19 Article 2.4 *TBT Agreement*, *supra* note 7; Article 3.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, 1867 U.N.T.S. 493 [hereinafter referred to as the *SPS Agreement*].

20 Article 2.5 *TBT Agreement*, *supra* note 7.

21 Articles 3.2 and 2.4 *SPS* Agreement, *supra* note 19.

22 Online: <http//www.international.gc.ca/trade-commerce/trade-agreeements-accords-commereciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng> (consulted on December 6th 2017; signed but not in force at that date).

and Trade Agreement between Canada and the European Union (CETA, Chapter 23 on labor and Chapter 24 on environment).[23] Even more interestingly, the rules and disciplines on labor and environment in TPP and CETA are enforceable through dispute settlement proceedings. TPP and CETA are clearly ahead of the multilateral trading system – at least with respect to the relationship between trade, environment and labor – and the issue arises of the coordination between "new generation" PTAs and the multilateral trading system in those areas. Another critical but still unsettled debate is whether a domestic measure aiming to enforce an international initiative of harmonization or coordination of societal standards through restrictions on trade would be viewed as entering into conflict with the WTO normative framework. For instance, a carbon tax imposed at the border on imports originating in countries that fail to comply with their international commitments to reduce carbon dioxide emissions; or a prohibition to import products manufactured in factories employing children in violation of *International Labour Organization Conventions*.

In contrast with the harmonization technique, settling a conflict of laws by precedence is a downstream, remedial approach. Conceptually, it involves two steps: firstly, assessing whether there is a conflict or not between the interacting rules; secondly, determining the relationship of precedence between the conflicting rules.

In the multilateral trading system, the principle of precedence constitutes the main approach for resolving conflicts of laws. This principle is implemented through the WTO dispute settlement system, which deals principally with complaints that rest upon allegations of conflict between a measure that is part of the internal legal order of a WTO Member and the WTO normative framework.

In this respect, it might be useful to recall at this stage that rules, norms and disciplines set out in the WTO Agreements are not only binding upon the WTO Members; they are also enforceable through a dispute settlement mechanism built in the WTO system. This institutional singularity distinguishes the WTO in the international legal order. The enforceability of the

[23] Online: <http//www.international.gc.ca/trade-commerce/trade-agreeements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> (consulted on December 6th 2017; in force at that date).

WTO Agreements derive fundamentally from Articles XXII and XXIII of the GATT 1994, as well as similar provisions in the other WTO Agreements[24], these provisions recognizing the right of a WTO Member to challenge within the WTO dispute settlement system, in accordance with the procedural rules mainly set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), a measure taken by another WTO Member that nullifies or impairs a benefit to which the former is entitled under the WTO Agreements. The violation of a provision on the WTO Agreements is presumed to be a case of nullification or impairment.[25]

Technically and formally, the WTO dispute settlement system does not handle conflicts between the WTO normative framework and another sub-system of international law, such as a PTA. This kind of conflict will usually show up in the context of WTO dispute settlement because a domestic measure that is grounded in or legitimized by international law is alleged to be inconsistent with the WTO agreements.

Thus, this is in the context of a dispute between WTO Members that the adjudicatory bodies of the WTO – panels and ultimately the Appellate Body – might find and declare *ex post* the existence of a conflict between an element of the domestic legal order of a WTO Member and the WTO normative framework. In the event of such a conflict, the WTO judge will determine the relationship of precedence between the conflicting rules and resolve the conflict in favor of either. The language used by panels or the Appellate Body in their reports does not refer to conflicts of laws but

[24] Article 19 of the *Agreement on Agriculture*, 1867 U.N.T.S. 410; Article 11 *SPS Agreement*, *supra* note 19; Article 14 *TBT Agreement*, *supra* note 7; Article 8 *Agreement on Trade-Related Investment Measures* (TRIMs), 1868 U.N.T.S. 186; Article 17 of the *Agreement on the Implementation of Article VI of GATT 1994* (Anti-Dumping Agreement), 1868 U.N.T.S. 201; Article 19 of the *Agreement on the Implementation of Article VII of GATT 1994* (Customs Valuation Agreement), 1868 U.N.T.S. 279; Article 8 of the *Agreement on Pre-shipment Inspection*, 1868 U.N.T.S. 368; Article 8 of the *Agreement on Rules of Origin*, 1868 U.N.T.S. 397; Article 6 of the *Agreement on Import Licensing Procedures*, 1869 U.N.T.S. 436; Articles 4 and 30 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) 1869 U.N.T.S. 14; Article 14 of the *Agreement on Safeguards*, 1869 U.N.T.S. 154; article XXIII *General Agreement on Trade in Services* (GATS), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); Article 64 of the *General Agreement on Trade-Related Aspects of Intellectual Property* (TRIPs), 1869 U.N.T.S. 299, 33 I.L.M. 1197.

[25] Article 3.8 DSU, *supra* note 3.

rather to measures that are found to be consistent or not with one or many provisions of the WTO Agreements. If a panel or the Appellate Body concludes that a domestic measure is inconsistent with a WTO norm set out in a WTO Agreement and the latter prevails, it shall recommend that the Member concerned "bring the measure into conformity with that agreement".[26] The Member concerned is liable to trade retaliation by the complainant in the event of failure to comply.[27] The value of the retaliatory measures shall not exceed that of the injury suffered by the complainant as a result of the failure to comply.[28]

The WTO judge assesses the existence of a conflict of laws through a dialectic taking the form of a legal reasoning that is ideologically-neutral on the surface and hinges around an exegesis of the WTO Agreements.

There is a high level of indetermination in the texts of the WTO Agreements, which in turn results in a high degree of subjectivity in the interpretation of the WTO Agreements.

The high level of indetermination in the texts of the WTO Agreements is mainly attributable to two factors. Firstly, the strategic provisions of the WTO Agreements from the perspective of dispute settlement – such as the most-favored-nation clause, national treatment or the prohibition of quantitative restrictions and "other measures" – set out general, abstract principles. General, abstract principles are by essence indeterminate *ex-ante*; their operational scope depends ultimately on the manner they are interpreted and applied *ex-post*. Secondly, the WTO Agreements were not drafted as a code of law. They are not the result of a thorough drafting exercise conducted by a group of respected, neutral scholars driven by the search of internal coherence, but rather by the improbable outcome of diplomatic hard bargaining centered on selfish commercial interests, covering a wide array of heterogeneous topics and conducted in multiple autonomous committees, each having its own dynamics and agenda. The flaws in terms of internal coherence resulting from the genesis of the WTO Agreements generate legal indetermination too.

The legal indetermination that pervades the WTO Agreements gives room for subjective interpretation and expands the discretion of the WTO

[26] *Ibid.* at article 19.1.
[27] *Ibid.* at article 22.
[28] *Ibid.* at article 22.4.

judge, which is exercised in the context of specific disputes. The interpretative power of the WTO judge is subject to two textual checks. First, the exegesis of the WTO Agreements is supposed to be conducted in accordance with "customary rules of interpretation of public international law",[29] which are, according to the predominant view, codified in articles 31 and 32 of the *Vienna Convention on the Law of treaties*.[30] Secondly, the WTO judge is not authorized to "add to or diminish the rights and obligations" provided in the WTO Agreements under the guise of interpretative exercise.[31] These two textual restrictions have however not proved effective in setting bounds or in guiding the WTO judge in interpretative exercises. Thus, the WTO judge has given a variable geometry to the general rule of treaty interpretation set out in article 31(1) of the VCLT, using it to justify interpretations ranging from dictionary-based textualism[32] to expansive law-making and judicial activism.[33] The principles set out in Articles 31 and 32 of the VCLT have been used more as cosmetic arguments to justify subjective stands *a posteriori* rather than as a positive law tool for elucidating the meaning of a legal provision. With respect to the prohibition to add or diminish the rights and obligations of the WTO Members, it has remained in the realm of rhetoric or theoretical thought,[34]and has not been incorporated by the

[29] *Ibid.* at article 3.2.

[30] 1155 U.N.T.S. 331 (entry into force: 27 January 1980) [hereinafter referred to as "VCLT"].

[31] Article 3.2 *in fine* and 19.2 DSU, *supra* note 3.

[32] Dongsheng Zang, "Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate" (2006) 33 Syracuse J.Int'l.L. & Com. 393 at 394-395. See also Abi-Saab, *supra* note 5 at 460-462, suggesting that "the judicial policy of the Appellate Body on interpretation [...] appears, at first glance, as belonging to the strict constructionist school that interprets texts literally and narrowly". This judicial policy would fit in with "the description coined by Professor René-Jean Dupuy of '*obsédé textuel*'" (at 461).

[33] Donald M. McRae, "Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body" in Giorgio Sacerdoti, Alan Yanovitch & Jan Bohanes, eds, *The WTO at Ten, The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 360 at 362; John Greenwald, "WTO Dispute Settlement: an exercise in Trade Law Legislation?" (2003) 6 J Int Economic Law 113. For thoughtful criticisms of Appellate Body judicial activism, see also, among others: Michel Cartland, Gérard Depayre & Jan Woznowski, "Is Something Going Wrong in the WTO Dispute Settlement?" (2012) 46 J. World Trade 979, as well as the powerful and insightful article of Bradly J. Condon, "Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA" (2018) 52 J. World Trade 535.

[34] See for instance Joel P. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 Harv.Int'l L.J. 333 and, in the same vein, Gabrielle Marceau, "WTO Dispute Settlement

WTO judge to operational approaches regarding the interpretation of the WTO Agreements, or the bounds of this exercise.

The subjectivity that characterizes the interpretation of the WTO Agreements is fueled by two factors. Firstly, the WTO Agreements do not rest upon an identifiable set of values that would reflect common views of the WTO Members on the central issue of determining where the cursor should be placed between regulatory autonomy and trade liberalization.[35] Neither does it exist in the multilateral trading system some kind of credible and legitimate political process that would allow for tracing back something that could be viewed as a distant relative of the "intent of the legislator". Therefore, the WTO judge can hardly justify an interpretation by a discourse on values, unless the WTO judge puts forward its own subjective views on the mix of values underpinning the multilateral trading system. Secondly, as it was underscored above, the WTO Agreements set up a legal system that is weak in terms of internal coherence. While filling the gaps in the normative framework of the multilateral trading system by referring to a preexisting systemic logic would clearly inject objectivity in the interpretative process, it is likely to be a no go for the WTO judge as one may seriously doubt that such logic has ever existed.

The general, abstract principles underpinning the multilateral trading system have been given a wide scope, as a result of the manner they have been interpreted by the WTO judge. Generally speaking, the interpretative approach applied by the WTO judge focuses on the effects of the measure at issue on the flows of international trade as opposed to elucidating its pith and substance. For instance, in *Canada – Autos*, the Appellate Body, agreeing with the Panel, held that origin-neutral measures that are not driven by protectionist purposes may nevertheless result in "*de facto* discrimination" breaching the most-favored-nation clause (Article I:1 of GATT 1994). However, the Appellate Body failed to provide clear guidance

and Human Rights" (2002) 13 EJIL 753. According to these commentators, the prohibition to add or diminish rights and obligations under Articles 3.2 and 19.2 DSU isolates to a certain extent the WTO legal system from other regimes of international law and from general international law, apart from interpretive principles. The prohibition would thus limit the perimeter of the law applicable by the WTO judge.

35 On the tension between trade liberalization and regulatory autonomy in the WTO legal system and the European Union, and a comparison regarding the role that plays proportionality review in each legal order, see Emily Reid, "Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits" (2010) 44 J. World Trade 877.

as to the bounds of that concept of *de facto* discrimination.[36] It appears from the WTO case law that in most cases, it is not necessary to establish that a measure has been structured and designed to protect domestic producers to find a breach of national treatment. In particular, the WTO judge has made clear that a measure modifying the conditions of competition between imported products and like domestic products to the detriment of the former is inconsistent with the national treatment principle as set out in Article III:4 of GATT 1994, even though that competition issue is incidental to the pursuit of legitimate policy interests unrelated to protectionism.[37] Article XI:1 of GATT 1994 prohibits quantitative restrictions on the importation or the exportation of products as well as "other measures". In *Colombia – Ports of Entry* (DS 366), the Panel considered in a sweeping statement that because the term "other measures" in Article XI:1 of GATT 1994 is meant to encompass a broad residual category, the discipline set out therein extends to a broad universe of measures that includes "measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer".[38]

[36] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI at 2985, in particular para 78; Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII at 3043.

[37] The appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI at 5751, at footnote 372 to para 179. Interestingly enough, the Appellate Body rejects a principle that it set out in a previous report (Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV at 7367, para 96) in stating that a measure that has a detrimental effect on competitive opportunities for imports breaches Article III:4 of GATT 1994 even though the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product. See also along the same lines the Appellate Body Report in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV at 1837; the Appellate Body Reports in *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V at 2449.

[38] Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009: VI at 2535, para 7.240. For an interesting comment on this report, see Alberto Alvarez-Jiménez, "Drug Trafficking, Money Laundering and International Trade Restrictions after the WTO Panel Report

Thus, the threshold for the WTO judge to find a conflict between an element of the domestic legal order of a WTO Member and the WTO normative framework is very low.

The precedence approach to conflicts of laws implies that once a conflict has been found, the relationship of precedence between the conflicting rules must be found. In the international legal order, treaties obviously prevail over domestic law: "le droit international ne peut exister sans que soit affirmée sa primauté par rapport aux droits nationaux".[39] The WTO judge being an actor of the international legal order applying provisions of treaties, it will normally give precedence to the WTO Agreements over domestic law in the event of a conflict. What seems to be at first glance a truism must be nuanced as the precedence of the WTO Agreements is not absolute but relative, in four ways.

First, the precedence of the WTO provision does not render the impugned domestic measure void, invalid or of no force and effect. The enforceability of the WTO judge's decision consists essentially in inviting the WTO Member concerned to bring the impugned measure into conformity with the WTO Agreement and allowing the complainant to take retaliatory measures in the event of a failure to comply.

Secondly, the legal status of the impugned measure is not impaired in the domestic legal order of the WTO Member concerned by reason of the WTO judge's decision. This is self-evident in countries that articulate the relationship between international law and the domestic legal order according to the dualist system. The same can however be said in monist systems since the conventional wisdom in these jurisdictions holds that reports issued by panels or the Appellate Body are not self-executory.[40]

in *Colombia – Ports of Entry*: How to Align WTO Law with International Law" (2011) 45 J. World Trade 117.

39 Quoc Dinh et al., *supra* note 10 at 109, para 49.

40 In particular, this is the case in the European Union. A string of decisions of the *Court of Justice of the European Union* (formerly the *Court of Justice of the European Communities*) has confirmed that Appellate Body and panel reports are not self-executory in the European Union: *International Fruit Company NV and others* v. *Produktschap voor Groenten en Fruit*, CJEC, 12 December 1972, 21-24/72, *European Court reports* 1972 at 01219; *Portuguese Republic* v. *Council of the European Union*, CJEC, 23 December 1999, case C-149/96, *European Court reports 1999 I-08395; Léon Van Parys NV* v. *Belgisch Interventie- en Restitutiebureau (BIRB)*, CJEC, 1 March 2005, case C-377/02, *European Court Reports 2005 I-01465; Fabbrica italiana accumulatori motocarri Montecchio SpA*

Thirdly, the WTO Agreements contain a set of so-called "exceptions" or "defenses" that reverses the relationship of precedence between the WTO Agreements and domestic law. This set of exceptions constitutes a key component of the WTO normative framework. A conflict between a domestic measure and a WTO discipline will be settled in favor of the former if the WTO judge is satisfied that the requirements of an available exception are met. The more notable exceptions are listed in Article XX of GATT 1994 and give precedence over the disciplines of GATT 1994 to domestic measures that, for instance, are "necessary to protect public morals"[41], "necessary to protect human, animal or plant life or health"[42] or "relating to the conservation of exhaustible natural resources"[43], provided that the domestic measure at issue does not constitute "a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".[44]

Fourth, the relationship of precedence between the WTO Agreements and domestic law may be reversed through the application of general principles regulating conflicts of rules in the international legal order.

(FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v. *Council of the European Union and Commission of the European Communities*, CJEC, 9 September 2008, joined cases C-120/06 P and C-121/06 P, *European Court Reports 2008 I-06513*. See also Hélène Ruiz-Fabri, "Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?" (2014) 25 European.Journal of International Law. 151; Nanette Neuwahl, "Le droit des particuliers d'invoquer les accords internationaux de la Communauté Européenne devant les Cours nationales" (2002) 15 R.Q.D.I. 39. Judgment of the Court (Grand Chamber) of 9 September 2008. Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council of the European Union and Commission of the European Communities. Appeals – Recommendations and rulings of the World Trade Organisation (WTO) Dispute Settlement Body – Determination of the Dispute Settlement Body that the Community regime governing the import of bananas was incompatible with WTO rules – Imposition by the United States of America of retaliatory measures in the form of increased customs duty levied on imports of certain products from various Member States – Retaliatory measures authorised by the WTO – No non-contractual Community liability – Duration of the proceedings before the Court of First Instance – Reasonable period – Claim for fair compensation. Joined cases C-120/06 P and C-121/06 P.

41 Article XX(a) GATT 1994, *supra* note 7.

42 *Ibid.* at article XX(b).

43 *Ibid.* at article XX(g).

44 *Ibid.* at chapeau of Article XX.

Although such a basis for reversal of precedence between the WTO Agreements and domestic law has never been explicitly endorsed in the practice of the WTO judge, it rests upon solid theoretical foundations. It is now widely accepted that the WTO agreements constitute a branch of international law and that the WTO judge is not in "clinical isolation from public international law", as the colorful rhetoric of the Appellate Body reminds us.[45] The sphere of public international law is marked by a high degree of horizontality with respect to both sources of law and norms. Thus, there is no hierarchy in the sources of law that are strongly decentralized and operate, over a large segment, under a contractual logic. The same can be said for the norms that are produced, with the caveat of *jus cogens*.[46] Given the absence of hierarchy in sources of law and norms (with the caveat of *jus cogens*), the response brought by international law to conflicts of rules is modest. It may happen that conflicts of rules be resolved by a treaty provision that would establish the precedence of a treaty over another one[47]. Absent such a treaty provision, a conflict of rules might be settled by the application of the principles *lex specialis derogate legi generali* (in case of a conflict, the specific rule prevails over the general rule) *or lex posterior derogate priori* (in case of conflict, the later rule prevails over the earlier one). Given that the WTO Agreements do not set out norms of *jus cogens* and have not been attributed an hierarchical superiority over the rest of international law, the WTO judge, who is after all an actor of the international legal order, should, at least in theory, apply these principles in order to settle a conflict between the WTO Agreements and a domestic measure alleged to rest upon another instrument of international law, to the extent that there are relevant.[48]

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45 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I at 3, para 17.

46 On *jus cogens* and the WTO Agreements, see Vilaysoun Loungnarath, "Les normes impératives et le droit de l'OMC" in Vincent Tomkiewicz, ed., *Les sources et les normes dans le droit de l'OMC, Colloque de Nice des 24 et 25 juin 2010* (Paris: Pedone, 2012) at 269-305.

47 An example of such a treaty provision is Article 103(2) NAFTA, *supra* note 16, which gives precedence to NAFTA over the WTO Agreements in case of conflict.

48 Legitimately, Panagiotis Delimatsis is sceptical about the ability of both principles of *lex specialis* and *lex posterior* to provide adequate solutions allowing for the settlement of conflicts of rules and defragmentation of international trade regulation. He underlines the difficulties of identifying the prevailing *lex specialis* in an international legal system that is increasingly driven by the functionalist needs of contemporary society and, accordingly, governed by a growing number of specialized laws. As to *lex posterior*,

II. Conflicts of Laws Between the Multilateral Trading System and Regional Trade Agreements

In the second part of the paper, the focus is on one category of conflicts of laws as we address, in the light of the concepts presented in the first part, conflicts of laws that may result from interactions between the multilateral trading system and PTAs. Two topics are discussed: 1) conflict-avoidance techniques as a response to overlapping in dispute settlement (Section A); 2) in the event of a substantive law conflict between a domestic measure based on an PTA and the WTO normative framework, whether the PTA may be invoked for reversing precedence, that is to say giving precedence to the domestic measure over the WTO norm (Section B). The review will build upon the WTO case law and focus on the stands taken by the WTO judge.

A. WTO and PTAs: Apportioning Jurisdiction as a Way to Avoid Conflicts of Laws Resulting From Jurisdictional Intermingling?

1. The Issue

A domestic measure is subject to the standards and disciplines of both the WTO Agreements and applicable PTAs. Most PTAs have their own dispute settlement mechanisms, which operate in parallel with that of the WTO. Tasks and jurisdictions of the WTO judge and the PTA judge are different: the WTO judge assesses whether a domestic measure conflicts with the WTO normative framework, and if so, identifies the prevailing rule; generally speaking, the PTA judge performs a similar task, but in relation with the PTA.

The mere fact that two different, unsubordinated judges in two different sets of legal proceedings be called upon to examine the same measure is not in and of itself problematic. A situation of plural judicial reviews becomes sensitive in terms of judicial policy and turns into a jurisdictional

he doubts the feasibility of substantiating a claim that later commitments shall prevail over earlier ones, in particular in the absence of identity of parties. See Delimatsis, *supra* note 8 at 112-113. On *lex specialis* and the ability of this principle to cope with conflicts of substantive rules, see Lindroos, *supra* note 2.

conflict if there is an overlapping in the respective missions pursued by the judges, because this overlapping engenders a risk of contradictory or incoherent rulings, which are specific types of conflict of substantive laws. Thus, a narrow link exists between conflict of jurisdictions and conflict of laws.[49] There is a conflict of jurisdictions only to the extent that a situation of plural jurisdictions entails a risk of conflict of laws. Setting a rule that would apportion jurisdiction is a way to avoid conflicts of laws that might result from competing judicial reviews.

As a result of commonalities and differences between the normative frameworks they oversee, the WTO judge and the PTA judge exercise competing jurisdictions that have the potential to overlap and generate conflicts of substantive laws. *Commonalities*. The WTO Agreements and PTAs have overlapping coverages. They share a common structure and rest upon common general, abstract principles such as MFN, national treatment, the prohibition of quantitative restrictions or the system of general exceptions. The application of general, abstract principles of international trade law to the same situation by both the WTO judge and the PTA judge might lead to different results, given the high level of indetermination attached to these principles and the subjectivity that pervades interpretative exercises in relation to them. *Differences*. Although the multilateral trading system and PTAs are underpinned by the same policy concern of striking a balance between trade liberalization and regulatory autonomy, the legal regimes they set up reflect different points of equilibrium between the two interests. With the implication that what is allowed by the PTA judge in the light of the PTA normative framework might be forbidden by the WTO judge performing an analysis under the WTO Agreements, and vice-versa[50]. The downstream risk that substantive law conflicts resulting

[49] The connection between allocation of jurisdiction and conflict of substantive rules or fragmentation of substantive norms has been discussed in the literature: Delimatsis, *supra* note 8 at 87; Tomer Broude, "Fragmentation of International Law: On Normative Integration as Authority Allocation" in Tomer Broude & Yuval Shany, eds, *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (London: Hart Publishing, 2008) at 99; Joel P. Trachtman, *The Economic Structure of International Law*, (Cambridge: Harvard University Press, 2008) in particular chapter seven.

[50] The tension between the WTO judge and the PTA judge appears from various cases that were brought within the WTO dispute settlement system such as *Peru – Agricultural Products*, discussed below (Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July

from contradictory or incoherent rulings occur would be lessened by upstream rules that apportion jurisdiction between the WTO judge and the PTA judge. Whether such rules exist is the thematic upon which we will now focus.

2. Treaty Provisions as a Basis for Apportioning Jurisdiction?

Many PTAs contain forum choice clauses that allow the complainant to initiate proceedings under either the PTA or the WTO Agreements, but attach exclusivity to the forum that was selected. For instance, Article 2005 NAFTA allows a party to initiate proceedings within the WTO dispute settlement system as an alternative to dispute settlement proceedings under Chapter 20 of NAFTA when the claim is based "on grounds that are substantially equivalent to those available" to the complainant under NAFTA.[51] However, once a forum has been selected, it shall be used at the exclusion of the other.[52] The option to the benefit of the complainant is tempered in disputes involving multiple complainants[53] as well as in disputes on measures alleged by the defendant to implement certain international conventions, sanitary and phytosanitary measures or standards-related measures.[54] In the latter areas, the NAFTA Chapter 20 dispute resolution system shall be used if the defendant so requests. When a measure is challenged by two parties and the complainants cannot agree on a single forum, the dispute normally shall be settled under NAFTA Chapter 20.[55]

There is no forum choice clause in the DSU. However, regarding disputes on sanitary or phytosanitary measures, Article 11.3 of the SPS

2015; Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R); *Brazil – Retreaded Tyres*, discussed below (Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV at 1527; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V at 1649); or *Argentina – Poultry Anti-Dumping Duties*, discussed below (Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V at 1727).

51 Article 2005(2) NAFTA, *supra* note 16.

52 *Ibid.* at article 2005(6).

53 *Ibid.* at article 2005(2)

54 *Ibid.* at articles 2005(3) and 2005(4).

55 *Ibid.* at article 2005(2).

Agreement provides that nothing in the SPS Agreement – and in the DSU, as reference to the DSU is made in Article 11.1 of the SPS Agreement – shall impair the right of a WTO Member to resort to the dispute settlement mechanism established under a PTA to which it is a party. It can be argued that in the event a sanitary or phytosanitary measure is challenged in both the WTO dispute settlement system and a PTA dispute settlement system, Article 11.1 of the SPS Agreement would compel the WTO judge to defer its decision until the closing of the PTA proceedings and to show deference to the outcome of the latter. Otherwise, the right of the complainant to resort to the PTA dispute settlement would be deprived of effectiveness, and therefore impaired in violation of Article 11.1 of the SPS Agreement.

An interesting question is whether PTA forum choice clauses such as NAFTA Article 2005 are enforceable within the WTO dispute settlement system. As it will be further detailed, the WTO judge has not handled this issue yet.[56] The stand of the WTO judge on PTA forum choice clauses might bear a relationship to the way it conceives its own role. To the extent that the WTO judge views itself as a pragmatic arbitrator called upon to find a principle-based solution to a specific dispute, with the implication that it considers the consent of the parties to the dispute as the meta-legal foundation of its legitimacy to decide, it is likely to show deference to the will of the parties as reflected in the PTA and enforce the PTA forum choice clause. Conversely, if the figure that prevails in the psyche of the WTO judge is that of a guardian of a legal order – the equivalent in the multilateral trading system of the domestic constitutional judge – vested with the mission of checking the compliance of State action with superior and inescapable principles of "ordre public", and finding legitimacy in the assumed quasi constitutional nature of those rules, the WTO judge might be reluctant to enforce PTA forum choice clauses.[57]

Enforcement of PTA forum choice clauses by the WTO judge might lead to an entropic paradox. On the one hand, such a line would reduce tensions between competing jurisdictional forums and thus contribute to

[56] *Infra* Section II.A.5.

[57] Thus, Gabrielle Marceau seems to suggest that within the WTO dispute settlement system, the WTO norms are located at a highest hierarchical level than other norms of international law, including those that protect human rights: Marceau, *supra* note 34, in particular at 767, 795-802 and 813. This is a bold and heroic position, to say the least.

a better harmony at the jurisdictional level. On the other hand, it would increase the complexity of the substantive law governing the multilateral trading system as well as the level of disorder (or entropy) that substantive legal complexity generates inevitably, by allowing WTO Members to opt out of certain aspects of the WTO legal regime, which amounts to introduce as a matter of fact a dose of variable geometry in the application of the substantive multilateral rules.[58]

3. General Principles of International Law as a Basis for Apportioning Jurisdiction?

An avenue that has been explored for allocating jurisdiction between the WTO judge and the PTA judge – and thus lessening the risk of conflicts in substantive law in the form of contradictory or incoherent rulings – is reliance on principles built on analogies with domestic law that would have acquired, so the theory goes, the status of general principles of international law. These principles include *res judicata*, *lis pendens* and *forum non conveniens*.

Clearly, the scope of the review performed by the WTO judge or the PTA judge is narrow: generally speaking, limited to assessing the consistency of a given domestic measure with the WTO normative framework or the PTA. However, in achieving those missions, the WTO judge and the PTA judge may apply or refer to public international law, in particular to those customary or general principles of international law that have a grammatical value and thus percolate all sub-systems of the international

[58] An illustration of the WTO judge's reluctance to introduce variable geometry in the application of the WTO rules and of its bias in favor of uniform application of the WTO law across WTO membership is to be found in the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* (Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III at 847, paras 7.67-7.71), that discarded *the Cartogena Biosafety Protocol* as a "relevant rule in international law applicable in the relation between the parties" and an interpretative tool under Article 31:3(c) VCLT. According to the panel, an international instrument will qualify under Article 31:3(c) VCLT only if all WTO Members are parties to it. Neither broad participation of the WTO Members nor adherence by the parties to the dispute are sufficient. On this issue, see Margaret A. Young, "The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case" (2007) 56 Int Comp Law Q 907.

legal order, including the WTO normative framework and PTAs.[59] In other words, a distinction must be made between, on the one hand, the narrow task performed by the WTO judge or the PTA judge (the scope of the review, which is limited to deciding whether the measure under scrutiny breaches provisions of the WTO Agreements or the PTA), and on the other hand, the law that is applied in performing that task (the applicable law, which is broader than the WTO Agreements or the PTA, and "potentially includes all rules of international law").[60] To the extent that principles such as *res judicata*, *lis pendens* and *forum non conveniens* are recognized as general principles of law within the meaning of Article 38(1)(c) of the *Statute of the International Court of justice*, they are part of the law that is applicable by the WTO judge or the PTA judge.

Therefore, the first step of the analysis is to figure out whether principles such as *res judicata*, *lis pendens* or *forum non conveniens* are general

[59] Joost Pauwelyn, "The role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 A.J.I.L. 535 at 577: "although the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements (combined with elements of implied jurisdiction), the international law they may apply in resolving these claims is not limited. It potentially includes all rules of international law". See also along the same lines, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, (Cambridge: Cambridge University Press, 2003), contending in particular that non-WTO norms might prevail over WTO norms in certain circumstances; David Palmeter & Petros C. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 A.J.I.L. 398 at 398-399. *Contra*: Joel P. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 Harv.Int'l L.J. 333; Joel P. Trachtman, "Jurisdiction in WTO Dispute Settlement" in Rufus H. Yerxa & Bruce Wilson, eds, *Key Issues in WTO Dispute Settlement – The First Ten Years*, Cambridge University Press, 2005 at 132; Marceau, *supra* note 34, in particular at 755, 767, 775 and 779-789. Seeming to assume that the WTO legal system is a self-contained regime, these authors argue in essence that the substantive law available to the WTO judge is delineated by the WTO Agreements and that other rules of international law may come into play only as tools for interpreting the provisions of the WTO Agreements. Lorand Barthels takes an intermediate stance on the issue. In the construction he develops, WTO norms override other norms of international law not by reason of an hierarchical principle that would give priority to the former over the latter in the event of a substantive law conflict, but rather indirectly through limits to the jurisdiction of the WTO judge arising out of the rule under Articles 3.2 and 19.2 DSU according to which the action of the WTO judge "cannot add to or diminish the rights or obligations" of the WTO Members provided in the WTO Agreements. See Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" (2001) 35 J. World Trade 499 at 507-508.

[60] Pauwelyn, *ibid.*

principles of international law. If they are, then the question is whether the application of such principles would be effective in apportioning jurisdiction between the WTO judge and the PTA judge.

The *res judicata* doctrine precludes the review of a dispute by a court when that dispute was already decided by another court. *Res judicata* is what Pauwelyn and Salles categorize as a preclusion doctrine (as opposed to abstention doctrines) that deals with admissibility, not jurisdiction.[61] It is generally considered that *res judicata* is applicable to international tribunals,[62] including the WTO judge and the PTA judge. R*es judicata* will bar judicial examination only if a triple identity of parties, object (*petitum*) and cause of action (*causa petendi*) exists in sequential proceedings.[63]

The doctrine of *res judicata* is of little use for responding to jurisdiction overlapping between the WTO judge and the PTA judge. Indeed, both the WTO judge and the PTA judge enjoy a treaty-based jurisdiction. Although complaints brought sequentially before the PTA judge and the WTO judge might address the same matter or be based on the same substantive disciplines, they are necessarily framed in relation to different treaties. As a result, causes of action in the WTO and the PTA fora are not the same. If the requirement of identity of causes of action is not met, the doctrine of *res judicata* may not be applied to disqualify the subsequent complaint.[64]

Like *res judicata*, *lis pendens* is a preclusion doctrine dealing with admissibility.[65] However, while *res judicata* concerns sequential judicial proceedings, *lis pendens* applies to parallel proceedings before two courts with jurisdiction. *Lis pendens* implies that a court shall decline to examine the claims before it when the same dispute is already pending before another court. Under *lis pendens*, the second court to be seized may also stay its proceedings until the court that has been first seized issues its decision.

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61 Joost Pauwelyn & Luiz Eduardo Salles, "Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions" (2009) 42 Cornell Int'l L.J. 77 at 86 and 102.

62 *Ibid.* at 102 and authorities cited at footnote 100.

63 *Ibid.* at 103.

64 *Ibid.* at 103.

65 *Ibid.* at 86 and 106.

Whether *lis pendens* applies to international tribunals is a controversial issue in the doctrine.[66] Professor Cuniberti considers that because *lis pendens* is essentially a civil law doctrine, it does not have the universal character to qualify as a general principle of law within the meaning of Article 38 of the *Statute of the International Court of Justice* (ICJ Statute). More fundamentally, he argues that the policy rationale underlying *lis pendens* is the use of a neutral, mechanical test (an elementary time factor: the court first seized decides the dispute) to distinguish before adjudicators that are equally legitimate and comparable in most respects. This rationale would not be present in an international setting where "neither the equality nor the legitimacy of all adjudicators should be assumed",[67] where international tribunals are not "necessarily comparable ... for reasons of hierarchy, procedural efficiency, legitimacy, or expertise,[68] so that "the policy decisions behind the *lis pendens* doctrine have no legitimacy to regulate parallel litigation in an international setting".[69] Professor Reinisch advocates the opposite view. *Lis pendens* would be a general principle of law within the meaning of Article 38 of the ICJ Statute because it is widely used in national procedural laws of States of all legal traditions, it is included in many international agreements and has been applied in international court cases.[70] Furthermore, he points out that as a matter of legal logic, it would be inconsistent and lead to absurd results for international tribunals to accept *res judicata* while rejecting *lis pendens*, as these two doctrines are narrowly related.[71]

In any event, even if international tribunals were to recognize *lis pendens* as a general principle of international law, the doctrine would hardly ever apply to the relationship between the WTO judge and the PTA judge. Indeed, as Pauwelyn and Salles note, *lis pendens* operates only if the first seized judge is able to resolve the cause of action (*causa petendi*) brought before the second seized one.[72] As it has been underscored above in the

66 *Ibid.* at 106.

67 Gilles Cuniberti, "Parallel Litigation and Foreign Investment Dispute Settlement" (2006) 21 ICSID Review – Foreign Investment Law Journal 381 at 383.

68 Pauwelyn & Salles, *supra* note 61 at 106.

69 Cuniberti, *supra* note 67 at 383-384.

70 August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute settlement Outcomes" (2004) 3 The Law & Practice of International Courts and Tribunals 37 at 48-50.

71 *Ibid.* at 50.

72 Pauwelyn & Salles, *supra* note 61 at 110.

context of *res judicata*, causes of action in those fora might raise the same substantive issue, they are nevertheless distinct because they are structured around different treaties. Thus, in case of parallel proceedings, the second seized WTO judge has no jurisdiction to decide the dispute brought before the first seized PTA judge and vice-versa, with the implication that in both time sequence, none of them may invoke *lis pendens*. Regarding the nexus WTO-PTAs, it is difficult to disagree with Pauwelyn and Salles when they write that *lis pendens* "is at best a fig leaf designed to cover cracks in the international system; at worst it is false judicial deference or comity".[73]

Categorized by Pauwelyn and Salles as an abstention doctrine (as opposed to preclusion doctrines)[74], f*orum non conveniens* allows a court with jurisdiction to refrain from exercising its powers to review the claims following a discretionary judicial evaluation leading to the conclusion that another court has jurisdiction on the matter and is better suited to decide. The *forum non conveniens* doctrine is almost exclusively found in common law systems, although it could be argued that some civil law countries have statutory rules regarding related actions that present commonalities with *forum non conveniens*.[75] Pauwelyn and Salles maintains that *forum non conveniens* lacks the universal acceptance necessary to qualify as a general principle of law within the meaning of Article 38 of the ICJ Statute because the idea that a court with jurisdiction may enjoy a discretion to exercise or not its jurisdiction is alien to most civil law systems, in the absence of a statutory basis for such a discretionary power.[76] Moreover, a domestic court will usually declares itself *forum non conveniens* for "arguments of "convenience to the parties" such as practical claims of hardship to the defendant, not arguments as to the appropriateness of the court or its proceedings as such".[77] Pauwelyn and Salles highlight that one of the difficulty associated to the use of *forum non conveniens* by international tribunals is that "convenience to the parties" does not mean much in that context.[78] Transposing *forum non conveniens* to the relationship between the WTO judge and the PTA judge has another critical flaw. In most common law jurisdictions,

73 *Ibid*.
74 *Ibid.* at 86.
75 *Ibid.* at footnotes 34 and 116.
76 *Ibid.* at 110.
77 *Ibid.* at 111. Practical claims of hardship for the defendant would be for instance physical distance or lack of connection between the defendant and the forum.
78 *Ibid.*

a court will not declare itself *forum non conveniens* unless the alternative court has jurisdiction to decide the entire dispute. Otherwise, there is a risk of "denial of justice", as Professor Cuniberti puts it.[79] As stated above, the jurisdictions of both the WTO judge and the PTA judge are treaty-based. The WTO judge has no jurisdiction to decide claims of breaches of the PTA agreement and vice-versa. In the absence of an alternative forum that has the ability to review both the WTO and PTA aspects of the dispute, the *forum non conveniens* doctrine may hardly be invoked for declining to exercise jurisdiction.[80]

In sum, we agree with Marceau and Wyatt that general principles of international law based on domestic analogies may hardly operate in the WTO-PTA context to avoid overlapping of jurisdiction: those principles are either too narrow or ill-suited to cope with the jurisdictional tension between the multilateral trading system and PTAs.[81]

4. The Inherent Powers of the WTO Judge as a Basis for Apportioning Jurisdiction?

International tribunals possess inherent powers that "exist by virtue of general principles of international law and jurisdictional norms",[82] independently of their constitutive instruments. Thus, Professor Mitchell describes the inherent powers of the International Court of Justice (ICJ) as the power of the Court "to take such action as might be required to ensure that the exercise of its subject-matter jurisdiction is not frustrated".[83] Judge Higgins, in her separate opinion in the *Legality of the Use of Force* case, explains that "the Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with

79 Cuniberti, *supra* note 67 at 421.

80 Pauwelyn & Salles, *supra* note 61 at 111-112.

81 Gabrielle Marceau & Julian Wyatt, "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO" (2010) 1 Journal of International Dispute Settlement 67 at 70, although the approach sketched by the authors to deal with the narrow issue of the consistency of trade countermeasures taken under the umbrella of a PTA with WTO rules is puzzling in many respects and seems to blend indistinctly the two distinct notions of jurisdictional conflicts and substantive law conflicts.

82 Caroline Henckels, "Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO" (2008) 19 EJIL 571 at 583.

83 Andrew D. Mitchell, "The Legal Basis for Using Principles in WTO Disputes" (2007) 10 Journal of International Economic Law 795 at 830.

administration of justice, not every aspect of which may have been foreseen in the Rules".[84] Although the inherent or incidental jurisdiction[85] of international tribunals "cannot be precisely delineated"[86], they would "include the tribunal's power to find that it does not have jurisdiction at the outset and the power to decline to exercise jurisdiction once it has been established".[87]

Like other international tribunals, the WTO judge possesses inherent or incidental powers.[88] Within the parameters set out in the DSU and due process requirements, it enjoys a margin of discretion, as it has been recognized by the Appellate Body.[89] That margin of discretion can only be grounded in inherent or incidental jurisdiction. According to Caroline Henckels, the inherent powers of panels and the Appellate Body are evidenced by "their ability to regulate their own procedures, consider claims of estoppel, exercise judicial economy, and admits *amicus* briefs, as well as the Appellate Body's practice of 'completing the analysis' of panels".[90] The ability of panels and the Appellate Body to determine whether they have jurisdiction based on their own initiative also derives from inherent powers.[91]

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84 *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*) *Preliminary Objections*, Judgement of 15 December 2004, International Court of Justice [2004] ICJ Rep 279, Separate opinion of Judge Higgins, at para 10.

85 Pauwelyn & Sales prefer the term "incidental jurisdiction" over that of "inherent jurisdiction". They thus distinguish between field-jurisdiction and incidental jurisdiction. See Pauwelyn & Sales, *supra* note 61 at 98-99.

86 Mitchell, *supra* note 83 at 831.

87 Henckels, *supra* note 82 at 584-585.

88 On the inherent powers of the WTO judge, see, generally, Andrew D. Mitchell & David Heaton, "The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function" (2010) 31 Michigan Journal of International Law 559.

89 Henckels, *supra* note 82 at 593; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I at 135, para 152, footnote 138; Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I at 9, para 92.

90 Henckel, *supra* note 82 at 592-593 (footnote omitted).

91 Henckel, *supra* note 82 at 593; 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 at 479, para 54, footnote 30; 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 at 375, paras 206-208; Appellate Body Report, *Mexico – Anti-*

Domestic courts may decline jurisdiction on the basis of comity. Comity is a flexible doctrine of judicial restraint that addresses issues of overlapping jurisdiction by allowing a tribunal to decline to exercise jurisdiction or to declare a claim inadmissible when there is a more appropriate venue. It has been argued that a doctrine of comity is emerging as a tool to organize horizontally the "global community of courts"[92] on the basis of "mutual respect for the integrity and competence of tribunals".[93] Comity is presented as a means of enabling the cooperation of tribunals in the international legal order[94], with several "normative bases of maintaining amicable relationships between sovereign states, expediency and courtesy"[95], and as allowing the rationalization of "the tension between an international dispute settlement forum's jurisdiction and the non-hierarchical nature of such fora".[96] Relying on that thesis, Caroline Henckels argues that comity is part of the inherent powers of international tribunals in general, and of the WTO judge in particular.[97]

Caroline Henckels explains that the WTO judge should use its inherent powers to apply comity in cases of overlapping jurisdictions between the WTO and PTA fora by suspending proceedings or declining to exercise jurisdiction. For Henckels, the margin of discretion enjoyed by the WTO judge "extends to the inherent power to exercise judicial restraint and apply comity where this is the most appropriate course of action".[98] She points out that applying comity in situations of overlapping jurisdictions between the WTO and PTA fora "is likely to lessen the risk of contradictory or inconsistent judgements being promulgated, therefore assisting in maintaining the viability, security and predictability of the multilateral trading

Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII at 6675, para 36.

92 Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv.Int'l L.J. 191 at 205-210.

93 *Ibid.* at 193-194; Henckels, *supra* note 82 at 583.

94 Slaughter, *supra* note 92 at 206: "[j]udicial comity provides the framework and the ground-rules for a global dialogue in the context of specific cases".

95 Henckels, *supra* note 82 at 584, citing Joel R. Paul, "Comity in International Law" (1991) 32 Harv.Int'l L.J. 1 at 6.

96 *Ibid.*

97 *Ibid.* at 593.

98 *Ibid.* at 594.

system through effective use of judicial processes".[99] Noting that such an approach would be consistent with the practice of other international tribunals,[100] Henckels suggests that applying comity in WTO dispute settlement is also in line with the "broader teleology" of the WTO legal regime because it reflects cognizance of the interconnectedness between the jurisdiction of the WTO judge and that of other fora, and is a tool for overcoming the risk of both fragmented jurisprudence and injustice for actors in the system.[101] Henckels warns however that "the power to exercise comity should be used sparingly, and only in cases of inextricable connection to another trade dispute, in order to maintain the legitimacy of the WTO's judicial organ and avoid allegations of improper use of such powers".[102]

Pauwelyn and Salles seem to go along the same lines as Henckels' thesis when they plead in favor of developing a general principle to regulate overlaps among international tribunals that would consist in "searching for le *juge naturel* or the "natural forum" to decide a particular dispute".[103] The determination of the *juge naturel*, that is to say the adjudicator with which the dispute has the most real and substantial connection,[104] would be made essentially on the basis of the subject-matter of the dispute.[105] They suggest to apply in that quest material criteria such as "connections of the case with a tribunal's jurisdiction, the history, prior procedures, substantive content, or core issues in dispute as well as the institutional context, expertise, and legitimacy of the respective tribunals".[106] Although Pauwelyn and Salles view their proposal as an adaptation of the *forum non conveniens* doctrine to the specificities and requirements of international law, they anchor it to doctrines asserting inherent powers of international tribunals.[107]

99 *Ibid.* at 599.
100 *Ibid.* at 599.
101 *Ibid.* at 598.
102 *Ibid.* at 599.
103 Pauwelyn & Salles, *supra* note 61 at 115.
104 *Ibid.*
105 *Ibid.*
106 *Ibid.* at 118.
107 *Ibid.* at 117. Delimatsis also maintains that "the inherent powers vested with the WTO adjudicating organs should allow the latter to deny jurisdiction based on subsidiarity [...] concerns, if necessary, for example, in cases where an attempt for manipulation of justice and judicial systems is manifested": Delimatsis, *supr*a note 8 at 112.

While these approaches have the merit of being idealist by betting on judicial wisdom, by the same token, they may be criticized for underestimating egocentricity and self-interest of the international institutional structures, including the international judiciary, and their natural inclination to strive for expanding the scope of the enjoyed authority, like any other bureaucracy.[108]

5. The WTO Case Law

Three WTO cases provide insight as to how the WTO judge might handle jurisdictional tensions between PTAs and the multilateral trading system: *Argentina- Poultry Anti-Dumping Duties*, *Mexico – Taxes on Soft Drinks* and *Peru – Agricultural Products*.

Argentina – Poultry Anti-Dumping Duties

In *Argentina – Poultry Anti-Dumping Duties*,[109] Brazil challenged within the WTO dispute settlement system definitive anti-dumping duties imposed by Argentina on imports of poultry. Argentina made a preliminary request relating to the fact that the same measure had been attacked by Brazil before a Mercosur Ad Hoc Arbitral Tribunal. Having lost that case, Brazil initiated WTO dispute settlement proceedings. Argentina asserted that in so doing, Brazil failed to act in good faith so that the WTO Panel should refrain from ruling on Brazil's claims. Argentina's stand also rests upon the principle of estoppel: Brazil would be estopped from pursuing the WTO dispute settlement proceedings because Argentina relied in good faith on

[108] International courts and tribunals are institutions that cooperate, but also compete for regulatory authority: Trachman, *supra* note 49 at 206. Koskenniemi argues that international institutions are increasingly affected by structural biases that manifest themselves by strategic practices of defining international situations and problems in expert languages so as to gain control over them: Koskenniemi, *supra* note 11. Slaugther for her part emphasizes the cooperative dimension, arguing that international courts and tribunals see themselves as sub-elements of a broader judiciary system, of a community of courts sharing transcending values (Slaughter, *supra* note 92). Along the same vein, see Delimatsis, *supra* note 8 at 93 and 108, less lyrical though, suggesting the existence of loose and uncoordinated communicative channels between international courts and tribunals, and contending that legal discourses that support each other and promote coherence of the whole enhance individual legitimacy of those courts or tribunals, and therefore, are ultimately in their own individual interest.

[109] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003: V at 1727.

clear, unambiguous, voluntary, unconditional and authorized statements by Brazil that it accepts and commits to comply with arbitral awards issued within the Mercosur dispute settlement system. In the alternative, Argentina argued that the WTO Panel was bound by the ruling of the Mercosur Tribunal because such a ruling is a "relevant rule[...] of international law applicable in the relations between the parties" within the meaning of Article 31.3(c) VCLT that the WTO Panel should follow in interpreting the applicable provisions of the WTO Agreements.[110]

The WTO Panel rejected Argentina's preliminary request. Relying on the Appellate Body Report in *US – Offset Act (Byrd Amendment)*, the Panel reasoned that there is no basis to find that Brazil violated the principle of good faith because Brazil did not breach any substantive provision of the WTO Agreements in bringing proceedings before the WTO.[111] Noting that estoppel can only "result from the express, or in exceptional cases implied consent of the complaining parties", the Panel found that the conditions for the application of the principle of estoppel had not been met in the instant case. In particular, Brazil did not make an express statement that it would not bring WTO dispute settlement proceedings, "[n]or does the record indicate exceptional circumstances requiring ... [the Panel] to imply any such statement".[112] The Mercosur case had been brought under the *Protocol of Brasilia*. The Panel noted that the latter does not contain a choice of forum clause, contrary to the *Protocol of Olivos* that was signed a few months before the establishment of the Panel.[113] That remark may suggest that had Brazil been bound by such a clause, the Panel might have ruled differently.

Regarding the alternative arguments hinged on Article 31.3(c) VCLT, the Panel underscored that Argentina's request concerned the application, not the interpretation of provisions of the WTO Agreements. The Panel explained that whereas Article 31.3(c) VCLT sets out rules regarding the interpretation of treaties, there is no basis in that provision that would

110 *Ibid.* at paras 7.18-7.21.

111 *Supra* note 109 at para 7.36; Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US – Offset Act (Byrd Amendment)*"), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I at 375, paras 297-298.

112 *Ibid.* at note 109 at para 7.38, referring to the GATT 1947 Panel report in EEC – Member States' Import Regimes for Bananas ("EEC (Member States) – Bananas I"), 3 June 1993, unadopted, DS32/R at para 361.

113 *Ibid.* at para 7.38.

suggest that the Panel was "bound to rule in a particular way, or apply the relevant WTO provisions in a particular way".[114]

On the merits, the Panel found that the anti-dumping duties imposed by Argentina on imports of poultry were inconsistent with various provisions of the Anti-dumping Agreement.

Mexico – Taxes on Soft Drinks

In *Mexico – Taxes on Soft Drinks*,[115] the United States contested a 20 per cent tax applied by Mexico on the transfer or importation of soft drinks using non-cane sugar sweeteners and on specific services peripheral to such transfer or importation. The United States also challenged bookkeeping requirements imposed on taxpayers subject to that tax. The United States claimed that those measures were inconsistent with the national treatment principle as set out in articles III: 2 and III: 4 of GATT 1994.

Before the Panel, Mexico argued that the measures at issue were part of a broader dispute on the conditions provided under NAFTA for access of Mexican sugar to the United States market that only an Arbitral Panel under Chapter 20 of NAFTA could resolve. Accordingly, Mexico requested the Panel to decide, as a preliminary matter, to decline to exercise jurisdiction to the benefit of the NAFTA dispute settlement system. The Panel issued a preliminary ruling rejecting Mexico's request. The Panel considered that "it had no discretion to decide whether or not to exercise jurisdiction in a case properly before it".[116]

On appeal, Mexico attacked the preliminary ruling of the Panel. According to Mexico, WTO panels have certain implied jurisdictional powers deriving from their nature as adjudicative bodies. The implied jurisdiction of WTO panels would include the power to refrain from exercising jurisdiction when another forum is more appropriate to deal with the dispute at issue and one of the parties refuses to take the matter to that forum.[117]

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114 *Ibid.* at para 7.41.

115 Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I at 3; Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I at 43.

116 Panel Report, *ibid.* at para 7.1.

117 Appellate Body Report, *supra* note 115 at paras 10-11.

The Appellate Body agreed with Mexico that WTO panels "have certain powers that are inherent in their adjudicative function", such as determining the scope of their jurisdiction or exercising judicial economy.[118] The Appellate Body rejected however Mexico's thesis that the authority to decline to exercise jurisdiction is embodied in the inherent powers of WTO panels. Like the Panel, the Appellate Body attached the obligation to exercise validly established jurisdiction to the DSU. Inferring from the standard terms of reference set out in Article 7 of the DSU and from the language of Article 11 of the DSU an obligation upon panels to assist the Dispute Settlement Body in making recommendations or in giving rulings, the Appellate Body stated that a panel declining to exercise validly established jurisdiction would breach such an obligation. Furthermore, the Appellate Body noted that under the DSU, a WTO Member is entitled to "seek the redress of a violation of obligations" under the WTO Agreements. According to the Appellate Body, a decision by a panel to decline to exercise validly established jurisdiction would diminish that right and thus be inconsistent with Articles 3.2 and 19.2 of the DSU.[119]

The Appellate Body tailored its decision to the specifics of Mexico's case, emphasizing that Mexico did not question the Panel's jurisdiction to examine the United States' claims.[120] Interestingly enough, the Appellate Body did not rule out that in other circumstances, "legal impediments" might preclude a panel from ruling on the merits of the complaint brought before it.[121] The cryptic remark of the Appellate Body is crafted in artistic vagueness. In particular, it is not clear whether the "legal impediments" mentioned by the Appellate Body only refers to situations of absence of jurisdiction or might have a broader scope including, for instance, objections on the admissibility of the claims before the panel. Nevertheless, the Appellate Body took care to note that in the instant dispute, the NAFTA forum of choice clause had not been exercised.[122] Thus, the Appellate Body left for another day the question of whether such a clause is enforceable in WTO dispute settlement proceedings and constitutes a "legal impediment" precluding panel review on the merits.

118 *Ibid.* at para 45.
119 *Ibid.* at paras 46-53.
120 *Ibid.* at para 44.
121 *Ibid.* at para 54.
122 *Ibid.*

On the merits, the Panel found that the impugned measures were discriminatory, and, therefore, in breach of the national treatment principle. On appeal, the Appellate Body upheld the finding of the Panel that the measures at issue were not justified under the exception of Article XX (d) of GATT 1994.

Peru – Agricultural Products

In *Peru – Agricultural Products*,[123] Guatemala challenged additional duties imposed by Peru on imports of certain types of milk, maize, rice and sugar resulting from the use of a mechanism aiming to attenuate the impact of the fluctuations of international prices on domestic market and producers. Under that mechanism known as the Price Range System (PRS, *Sistema de franja de precios*), a floor price and a ceiling price were calculated on the basis of the average of international prices over a recent past period of 60 months and a measure of standard deviation from the average. A reference price was also established, reflecting the average international price over a recent past period of two weeks. An additional duty was charged if the reference price was below the floor price. Conversely, if the reference price was higher than the ceiling price, a tariff rebate was granted. When the reference price laid between the two limits, neither variable additional duties nor tariff rebates were applied. Guatemala claimed that the additional duties imposed as a result of Peru's PRS was WTO-inconsistent.

Peru and Guatemala signed a free trade agreement (Peru-Guatemala FTA) on 6 December 2011.[124] A central element of the dispute was paragraph 9 of Annex 2.3 to the Peru-Guatemala FTA which provides that "Peru may maintain its Price Range System". Although the Peru-Guatemala FTA was signed before the initiation of the WTO dispute settlement proceedings by Guatemala, it was not yet in force at the time of Panel and Appellate Body reviews.

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123 Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015; Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R.

124 Free Trade Agreement between the Republic of Peru and the Republic of Guatemala (*Tratado de librecomercio entre la República del Perú y la República de Guatemala*), 6 December 2011.

Before the Panel and the Appellate Body, Peru argued that through paragraph 9 of Annex 2.3 of the Peru-Guatemala FTA, Guatemala waived its right to challenge the PRS and additional duties resulting from it within the WTO dispute settlement system. Guatemala would have acted inconsistently with its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated WTO dispute settlement proceedings to challenge the PRS and additional duties resulting from it,[125] while it had accepted the PRS by signing the Peru-Guatemala FTA. Peru claimed that the breach of good faith obligations by Guatemala implies that the Panel was barred from engaging in a review of Guatemala's complaint on the merits.[126] In the appellate proceedings, Peru clarified that it was not questioning the jurisdiction of the Panel to hear the case, its thesis being rather that Articles 3.7 and 3.10 of the DSU set out requirements that need to be met before a case may be considered on the merits.[127]

The Appellate Body endorsed the Panel's conclusion that there was "no evidence that Guatemala brought these proceedings in a manner contrary to good faith" under Articles 3.7 and 3.10 of the DSU. Relying on certain positions it took in *EC-Bananas III (article 21.5 Ecuador II/Article 21.5 US)*[128] with respect to the recourse to compliance proceedings under Article 21.5 of the DSU, the Appellate Body recognized that WTO Members may relinquish the right to initiate WTO proceedings through a waiver embodied in a "solution mutually acceptable to the parties" within the meaning of Articles 3.5 and 3.7 of the DSU, which means, among others, that the agreed solution is consistent with the WTO Agreements.[129] The Appellate Body emphasized that "any such relinquishment must be made

125 Article 3.7 of the DSU, *supra* note 3, in relevant part: "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful"; Article 3.10 of the DSU in relevant part: "... if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute".

126 See for instance the Appellate Body Report, *supra* note 123 at para 5.21.

127 *Ibid.* at paras 5.6-5.7.

128 Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII at 7165, paras 217 and 228.

129 Appellate Body Report, *supra* note 123 at para 5.25.

clearly".[130] According to the Appellate Body, "the relinquishment of rights granted by the DSU cannot be lightly assumed" and the language that is used must clearly reveal the intent to relinquish rights.[131] Furthermore, the analysis of compliance with good faith obligations under Articles 3.7 and 3.10 of the DSU should be conducted "on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU".[132] While the Appellate Body did "not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, it restricted that avenue by stating that it did "not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes".[133]

Applying this analytical grid, the Appellate Body went on to assess whether paragraph 9 of Annex 2.3 of the Peru-Guatemala FTA could be viewed as a "solution mutually acceptable to the parties". The Appellate Body rejected that characterization, essentially on the grounds that its subsequent analysis of the case on the merits leads it to find that the additional duties resulting from the PRS are WTO-inconsistent.[134] Accordingly, the Appellate Body did not consider that "a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case in relation to, or within the context of, the DSU".[135] The Appellate Body reached that conclusion "irrespective of the status of the ...[Peru – Guatemala FTA] as not being ratified by both parties".[136]

On the merits, the Appellate Body upheld the Panel's findings that the additional duties resulting from the PRS were in the nature of "variable import levies" within the meaning of footnote 1 of Article 4.2 of the *Agreement on Agriculture* and therefore, by maintaining the PRS, Peru acted inconsistently with its obligations under Article 4.2 of the *Agreement on Agriculture*. Under the latter provision, WTO Members are required not to maintain, resort to or revert to certain types of measures including "variable

130 *Ibid.*
131 *Ibid.*
132 *Ibid.*
133 *Ibid.* at para 5.25 and footnote 106 to para 5.26.
134 *Ibid. at* para 5.26.
135 *Ibid.* at paragrap 5.28.
136 *Ibid.*

import levies". The Appellate Body also agreed with the Panel that the additional duties resulting from the PRS constitute "other duties or charges" within the meaning of the second sentence of Article II: 1(b) of the GATT 1994, and that Peru breached the rule set out in that sentence by applying the PRS without having recorded it in its Schedule of Concessions.

Interestingly enough, the Appellate Body and the Panel did not decide whether the PRS was allowed to depart from the WTO rules on the basis of Article XXIV of the GATT 1994, which permits the formation of PTAs. In this respect, the Appellate Body pointed out that Peru did not invoke that GATT 1994 provision to justify the PRS. Moreover, the Appellate Body considered that the Peru-Guatemala FTA was not in force, and therefore could not benefit from the defence of Article XXIV.[137] The Appellate Body nevertheless ventured to express *ex cathedra* views on the issue, suggesting on the basis of a creative reading of paragraph 4 of Article XXIV that it would reject "an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements".[138] This is a puzzling statement. If the impugned measure does not affect adversely in one way or the other Members' rights and obligations, there is no reason to bring a dispute and no point to raise a defence or an exception such as Article XXIV. The statement of the Appellate Body could be understood to mean that the PTA defence is available only when it is pointless to invoke it...

In Summary

Although the Appellate body recognizes that panels possess inherent or incidental jurisdiction, it considers that a panel is under the duty to exercise validly established jurisdiction. The inherent powers of panels do not include the authority to decline the review of a complaint over which the panel has jurisdiction on the grounds that another dispute settlement forum would be better placed to deal with the matter. This being said, the Appellate Body in *Mexico – Taxes on Soft Drinks* conceded that "legal impediments" might preclude a panel from ruling on the merits of a complaint. While the Appellate Body did not identify those legal impediments or

137 *Ibid.* at para 5.117.
138 *Ibid.* at para 5.116.

detail the nature of what could be a "legal impediment",[139] its statement seems to imply that a panel vested with jurisdiction would properly exercise its jurisdiction by rejecting a complaint without proceeding with a review on the merits if the complaint is declared inadmissible on the basis of an admitted "legal impediment". In other words, certainly, a panel vested with jurisdiction has the duty to exercise its jurisdiction, but that duty would be fulfilled if the panel declares the complaint before it inadmissible as a result of a "legal impediment" and, accordingly, refrains from deciding on the merits.[140]

Argentina – Poultry Anti-Dumping Duties and *Peru – Agricultural Products* set a very high threshold for concluding that a case has been brought before the WTO judge in breach of good faith. Clearly, these cases show reluctance on the part of the WTO judge to consider breach of good faith as a legal basis for precluding review on the merits of a complaint.

The WTO judge has not enforced yet in the context of WTO dispute settlement a PTA choice of forum clause such as Article 2005 of NAFTA. If a complaint is brought within the WTO dispute settlement system while the complainant exercised a PTA choice of forum clause in favor of the PTA dispute settlement system, will the WTO judge view the exercise of

[139] Bregt Natens and Sidonie Descheemaeker argues, on the basis of the Appellate Body Report in *EC – Export Subsidies on Sugar* (*European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005), that breaches of Article 3.7 of the DSU (WTO Members must exercise judgment as to the fruitfulness of proceedings) and Article 3.10 of the DSU (WTO Members must engage in dispute settlement procedures in good faith) are "legal impediments". In particular, breach of "procedural good faith" would qualify as "legal impediment". See Bregt Natens & Sidonie Descheemaeker, "Say It Loud,Say It Clear: Article 3.10 DSU's Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction" (2015) 49 J. World Trade 873.

[140] In this vein, in the Third-Party Oral Statement it made on 25 January 2018 in the pending panel proceedings in *Russia – Measures Concerning Traffic in Transit*, DS 512**,** the United States makes a subtle distinction between jurisdiction and justiciability, defining jurisdiction as the extent of power of a panel under the DSU to make legal decisions in a dispute, while justiciability would refer to whether an issue is subject to findings by a panel under the DSU. See the *Third-Party Oral Statement of the United States of America*, 25 January 2018, in *Russia – Measures Concerning Traffic in Transit (DS 512)*, online: <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf> at 1-2, para 3.

the PTA choice of forum clause as a "legal impediment" or the WTO complaint as a breach of good faith, both characterizations entailing the inadmissibility of the WTO complaint? That question is still open.[141] The Appellate Body explained however in its report in *Peru – Agricultural Products* that the right to initiate WTO dispute settlement proceedings may be relinquished by techniques other than a waiver embodied in a mutually agreed solution, to the extent that the relinquishment is made clearly and relates to the settlement of a specific dispute. That would suggest that the right to bring a WTO complaint might be relinquished by the exercise of a PTA choice of forum clause in favor of the PTA dispute settlement system because, first, relinquishment in this form is made clearly, and second, by essence, the exercise of a PTA choice of forum clause takes place in the context of the settlement of a specific dispute. Accordingly, in a situation in which a complaint is brought within the WTO dispute settlement system by a country that exercised a PTA choice of forum clause in favor of the PTA dispute settlement system, a WTO panel might consider that the PTA choice of forum clause is a "legal impediment" barring review on the merits; or that by bringing the dispute within the WTO dispute settlement system, the complainant breaches its good faith obligations.[142]

B. Substantive Law Conflicts Between PTAs and the WTO

The hypothesis under discussion in this Section is that of a conflict in terms of substantive law between, on the one hand, a domestic measure based on a PTA and on the other hand a norm arising out of the WTO

[141] Delimatsis for his part does not exclude that PTA choice of forum clauses be viewed by the WTO judge as "legal impediments" precluding a WTO panel from hearing the case or making findings: Delimatsis, *supra* note 8 at 107. This is also the opinion of Bregt Natens and Sidonie Descheemaeker (*supra* note 139 at 889):

> ... [T]ake the situation in which a Member agrees on a clear and unambiguous fork-in-the-road provision in a bilateral agreement (which it voluntarily concluded), subsequently exercises the fork-in-the-road provision to the detriment of bringing a case to the WTO and finally decides to bring the case to the WTO anyway. We feel that in such a case, there is indeed a violation of the good faith obligation in Article 3.10 DSU, and the responding Member in the WTO proceedings should be able to invoke it as such.

[142] The absence of good faith might be viewed either as an autonomous legal impediment grounded in the general principles of public international law or as deriving from the good faith obligations under articles 3.7 and 3.10 of the DSU, and therefore, intrinsic to the WTO legal system.

Agreements.[143] The conflict is handled within the WTO dispute settlement system. We assume that the PTA at issue contains a clause that provides that in the event of a conflict between the PTA and the WTO Agreements, the PTA shall prevail to the extent of the inconsistency. Article 103.2 of NAFTA is an example of such a clause. The question that is addressed is whether the PTA may be invoked by the defendant to give precedence to the domestic measure over the WTO norm. Two situations are contemplated: 1) the domestic measure that is challenged adversely affects third party rights deriving from a WTO norm; 2) the WTO dispute exclusively concerns parties to the PTA, such as in *Peru – Agricultural Products*.

1. The Third-Party Challenge: PTA as a Defense?

Under Article XXIV of the GATT 1994 and Article 5 of the GATS, WTO Members are allowed to enter into free trade agreements or to create customs unions that would otherwise depart from certain WTO rules. Furthermore, developing countries may set up PTAs in respect of trade in goods under the special regime dedicated to developing countries of the Enabling Clause. In a nutshell, for a PTA to qualify under the PTA provisions[144], it must meet some substantive conditions[145] – the most critical one being

[143] On this issue, see, generally: Tegan Brink, "Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres" (2010) 44 J. World Trade 813; Lorand Bartels & Federico Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006); Robert E. Hudec & James D. Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly" in Michel Rodriguez Mendoza et al., eds, *Trade Rules in the Making* (Washington D.C.: Brookings Institution Press, 1999) at 47; James H. Mathis, *Regional Trade Agreements in the GATT/WTO: Art. XXIV and the Internal Trade Requirement* (The Hague: T.M.C. Asser Press, 2002); WTO Committee on Regional Trade Agreements, Synopsis of "Systemic" Issues Related To Regional Trade Agreements, Note by the Secretariat, WT/REG/W/37, 2 March 2000 at para 8.

[144] Article XXIV of the GATT 1994, Article 5 of the GATS and the provisions of the Enabling Clause relating to the formation of PTAs are collectively referred to as the "PTAs provisions". Article XXIV of the GATT 1994 must be read in conjunction with the *Understanding on the Interpretation of Article XXIV of the GATT 1994* (1867 U.N.T.S. 190, 33 I.L.M. 1153 (1994)), which forms an integral part of the GATT 1994, as it results from the definition of GATT 1994. On the exception of Article XXIV of the GATT 1994, see Nicolas J.S. Lockhart & Andrew D. Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits" in Andrew D. Mitchell, ed., *Challenges and Prospects for the WTO* (London: Cameron May, 2005) at 217.

[145] Those conditions may be summarized as follows. The PTA parties must notify the PTA that shall be reviewed by a WTO Committee. The PTA must liberalize substantially all

that customs duties and "other restrictive regulations of commerce" are to be eliminated on "substantially all the trade" between PTA parties[146] – and must go through a review process by a WTO Committee.[147] The latter has the authority, after completion of its review, to approve or reject the PTA. WTO Committees have however been reluctant to express judgments on the WTO-consistency of the notified and reviewed PTAs: as a matter of practice, they have not blocked any of them up to now.[148] Since the entry in force of the WTO Agreements in 1995, the review process – which has been refined and further formalized in 2006 by a Decision of the WTO General Council[149] – has been operating more as a forum aiming to generate transparency on PTAs than as an authority conducting a substantive assessment of the reviewed PTA in light of the WTO principles.[150]

trade between the PTA parties (the "internal trade requirement") while not raising barriers to trade vis-à-vis other WTO Members. In addition, as regards customs unions, a common external trade tariff must also be set up (Brink, *supra* note 143 at 819).

146 Apart from some Appellate Body *lapalissades* in *Turkey – Textiles* (*infra* note 151 at para 48), there is no useful guidance in the WTO case law on the meaning and the application of the requirement of eliminating obstacles on "substantially all the trade" between PTA parties (Brink, *supra* note 143 at 825-826). In terms of state practice, there is no consensus either on the meaning of that term "substantially all the trade" as it has been highlighted by the WTO Secretariat: WTO Committee on Regional Trade Agreements, Synopsis of "Systemic" Issues Related to Regional Trade Agreements, Note by the Secretariat, *supra* note 143 at para 54-55.

147 Brink, *supra* note 143 at 819.

148 Brink notes that:

> Since the establishment of the WTO in 1995, 150 PTAs have been notified but no examinations by the CPTA [Committee on Regional Trade Agreements] have led to any conclusions either way as to their WTO consistency. During the GATT years, it was little better, with only one PTA explicitly found to be GATT-consistent. This is not surprising. Decisions in the CPTA are by consensus, and it would be highly improbable for PTA members to accept that a PTA they had negotiated was WTO-inconsistent. While the mechanism exists for the CPTA to refer disagreements to the Council on Trade in Goods or the General Council, this has never happened. This can be explained, in part, by the conflicting legal and economic rationales for the PTAs exception, discussed below, but also by a concern that challenging one PTA might result in tit-for-tat challenges to other PTAs. (*Ibid.* at 827, footnotes omitted)

This situation would also be attributable to the lack of consensus on the meaning of the requirement to eliminate obstacles on "substantially all trade" within the PTA (*Ibid.*)

149 *Transparency Mechanism for Regional Trade Agreements*, Decision of 14 December 2006 (General Council), WT/L/671, 18 December 2006.

150 Brink, *supra* note 143 at 827.

Besides allowing the WTO-consistent formation of PTAs, the PTA provisions constitute "exceptions" or "defenses" – to use the concepts and the terminology prevalent in WTO law – on the basis of which a WTO member may justify and maintain a measure that would be otherwise inconsistent with certain WTO rules. Indeed, in *Peru – Agricultural Products*, the Appellate Body confirmed its position in *Turkey – Textiles*[151] by recalling that the PTA provisions permit departures from certain WTO rules.[152] Another way to look at it is to conceptualize PTA provisions as rules that reverse the order of precedence in case of conflict between a domestic measure and a WTO norm, in favor of the former. A PTA provision may be used as a "defense" or an "exception" to shelter a domestic measure deriving from the PTA from a WTO dispute settlement challenge by a third party unrelated to the PTA.

Having stated that, it appears from the Appellate Body Report in *Turkey – Textiles* that the requirements to be met for the defendant to prevail under a PTA provision are quite stringent. In *Turkey – Textiles*, India challenged quantitative restrictions on textile and clothing that Turkey imposed as a result from the establishment of a customs union between Turkey and the European Communities. Turkey alleged that these quantitative restrictions were derived from a valid PTA under Article XXIV of GATT 1994. Accordingly, the impugned measure was justified under that provision. The Appellate Body and the Panel discarded the defense of

151 Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI at 2345; 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 at 2363.

152 *Peru – Agricultural Products*, *supra* note 123 at paras 5.112-5.115. In *Turkey – Textiles*, the panel rejected Turkey's argument that Article XXIV was not an exception but an autonomous right. The Appellate Body implicitly endorsed the Panel position, assuming that Article XXIV is a "defense": Appellate Body Report, *supra* note 151 in particular at paras 45 and 58. An issue is whether the scope of the exceptions set out in the PTA provisions is limited to MFN obligations or extends beyond them. The Appellate Body Reports in *Turkey – Textiles* (more specifically at paras 45 and 58) and in *Peru – Agricultural Products* would suggest that the PTA provisions allow departure from MFN obligations as well as other provisions of the WTO Agreements. Tegan Brink is less categorical as she considers that the Appellate Body in *Turkey – Textiles* alluded to a theoretical possibility discussed in scholar circles but did not "make any direct finding on the issue of to which specific GATT provisions Article XXIV was an exception:" Brink, *supra* note 143 at 820, 832-833 and 839.

Turkey. While the Appellate Body admitted that Article XXIV of GATT 1994 is a defense or an exception in the WTO legal system, it subjected the application of the defense to two cumulative conditions.

First, to qualify under Article XXIV of GATT 1994 and override a WTO discipline, a domestic measure must be introduced upon the formation of a PTA that fully meets the requirements of Article XXIV, including the internal elimination of duties and other restrictive regulations of commerce with respect to "substantially all the trade". Surprisingly, the Appellate Body considers that the conditions of Article XXIV are justiciable: they are subject to review by the WTO judge.[153] Thus, in the context of a dispute, the panel may not imply from the fact that the PTA was reviewed and not blocked by a WTO Committee that the PTA at issue meets the requirements of Article XXIV. Instead, the defendant must provide a parallel demonstration of the validity of the PTA under Article XXIV of GATT 1994 in order to allow the panel to make its own assessment. With the implication that the panel's assessment might lead to a conclusion that is in contradiction with that of the WTO Committee that initially reviewed the PTA...[154]

The second condition is formulated as a necessity test. The defendant must establish that the impugned measure is *necessary* for the formation of the PTA. In other words, the defendant must demonstrate that the formation of the PTA "would be prevented if it were not allowed to introduce the measure at issue".[155]

The restrictiveness of the requirements that the Appellate Body set out in *Turkey – Textiles* and confirmed more recently in *Peru – Agricultural Pro-*

153 Here, the Appellate Body expresses justiciability in the form of an obligation upon panels to exercise jurisdiction and to proceed to an examination of the consistency of the PTA at issue with Article XXIV: Appellate Body Report, *supra* note 151 at paras 58-59.

154 Appellate Body Report, *ibid.* at paras 58-60. On this issue, see Petros C. Mavroidis, "If I Don't Do It, Somebody Else Will (or Won't): Testing the Compliance of PTAs with the Multilateral Rules" (2006) 40 J. World Trade 187 at 194. Non-justiciability of the requirements set out in the PTA provisions, so the alternative theory goes, would derive from a principle of separation of powers between the judicial and the political organs of the WTO, the latter being vested with the task of reviewing the PTA and of making a judgement on the compatibility of the PTA's consistency with the multilateral rules to which the former must show deference. Clearly, this approach was rejected by the Appellate Body.

155 *Ibid.* at para 58.

ducts[156] reflects its wariness about the "exceptions" or "defenses" embodied in the PTA provisions. The approach of the Appellate Body to the latter is subject to criticism. First, requesting the defendant to demonstrate again that the PTA has been validly constituted to the satisfaction of the panel while this analysis has already been performed through an official diplomatic process that is part of the WTO legal and institutional frameworks may be viewed as an usurpation of authority by the WTO judge to the detriment of the WTO diplomatic branch, at odds with the institutional logic of allocation of power and responsibilities among the various WTO bodies. Secondly, in practice, the WTO judge – as well as the parties appearing before it – does not have the tools to conduct such burdensome, complex analysis. It is even doubtful that it is practically feasible to perform this analysis in the limited time period the WTO judge is called upon to complete the review of the dispute before it. Thirdly, it is far from being clear what the Appellate Body means by a measure "introduced upon the formation" of the PTA (first requirement) and "necessary to the formation" of the PTA (second requirement). Should such a measure be strictly defined as a measure that achieves greater economic integration by contributing to eliminate customs duties and "other restrictive regulations of commerce" on "substantially all the trade" within the PTA?[157] Or should the notion be approached more subtly so that it covers a broader spectrum of measures? Take the following hypothesis. Country A entered into a PTA with country B. The PTA sets out minimal environmental and labor standards. If a party breaches the minimal standards in the making of goods exported to the other party, the latter may initiate proceedings within the PTA dispute settlement system and eventually be authorized to restrict the importation of the goods at issue. Country A made clear from the outset that it would not sign the PTA unless it includes minimal environmental and labor standards, and a mechanism to enforce them as well. A trade-restrictive measure X is taken by A against B to enforce PTA minimal standards, in conformity with the PTA. The measure X has an adverse impact not only on country B, but also on country C, which is not a party to the PTA. Country C challenges the measure X within the WTO dispute settlement system. Does the measure X benefit from the "exceptions" or "defenses" embodied in the PTA provisions so that it prevails over the WTO disciplines? After all, the measure X derives from a scheme that is composed of

156 *Peru – Agricultural Products*, *supra* note 123 at para 5.115.

157 Articles XXIV:8(a)(i) and XXIV:8(b) GATT 1994, *supra* note 7.

the PTA minimal standards and the PTA mechanism enforcing them. That scheme was introduced upon the formation of the PTA. It does not go against common sense to consider that the scheme was "necessary to the formation of the PTA" given country A's strong stand on enforcement of minimal labor and environmental standards. Thus, it could be argued that such a measure meets the two requirements set out by the Appellate Body in *Turkey – Textiles* (DS 34), with the implication that it is justified and prevails over conflicting WTO disciplines.[158]

The *Brazil – Retreaded Tyres* case[159] is an illustration of a substantive law collision between the multilateral trading system and a PTA. In this case, the European Communities challenged an import ban on retreaded tyres taken by Brazil. Retreaded tyres are used tyres that have been reconditioned for further use by, typically, stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread. Retreaded tyres from MERCOSUR countries were exempted from the application of the import ban (the MERCOSUR exemption). By carving out this exception, Brazil was implementing a ruling issued by a MERCOSUR arbitral tribunal further to proceedings initiated by Uruguay. The MER-

158 *Contra*: Brink, *supra* note 143 at 838-841, who supports a restrictive analysis of the exceptions embodied in the PTA provisions. Tegan Brink notes that Article XXIV of the GATT 1994 exempts from the internal liberalization requirement quantitative restrictions tariffs and other measures that address certain policy objectives, including health, environmental or labor standards goals, to the extent they meet the requirements of one of the bracketed GATT 1994 exceptions listed in Articles XXIV:8(a)(i) and XXIV:8(b). By the same token, so Brink's argument goes, such measures could not be viewed as necessary for the formation of a PTA and independently justified under PTA provisions. They should therefore be applied on an MFN basis, unless they could be independently justified by other exceptions. Brink's reasoning would mean, for instance, that trade exemptions from tariffs derived from the Canadian supply management system applying to specific agricultural products, to the benefit of PTA partners, could not be justified under Article XXIV of the GATT 1994 and would be viewed as discriminatory and WTO-inconsistent. Brink's approach does not address the case of measures that do not meet the requirements of the bracketed exceptions but are nevertheless alleged to pursue policy objectives falling within their scope, such as in the *Brazil – Retreaded Tyres* case, *infra* note 159.

159 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV at 1527; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V at 1649.

COSUR arbitral tribunal found the import ban inconsistent with Mercosur disciplines as far as it applied to Mercosur imports of retreaded tyres.

Most of the debate before the Panel and the Appellate Body was structured around the exception of Article XX(b) of the GATT 1994 which provides that measures necessary to protect "human, animal or plant life or health" prevail over the GATT 1994 disciplines. Brazil put forward that the policy underlying the measure was the protection against environmental and health risks arising from the accumulation of waste tyres in dumps. These risks include the transmission of dengue, yellow fever and malaria since waste tyres filled with rainwater serve as breeding grounds for mosquitoes. Brazil also pointed out the risk of toxic emissions caused by tyre fires. According to Brazil, because retreaded tyres have a shorter life-span than new tyres, using retreaded tyres instead of brand-new tyres results mechanically in greater volumes of waste tyres in dumps, and therefore in greater risks.

The Panel admitted the Article XX(b) defense of Brazil. Regarding the application of the requirement set out in the chapeau of Article XX that the scrutinized measure should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination", the Panel opined that the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."[160] The Panel underlined that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries".[161] Accordingly, the Panel found that the discrimination resulting from the MERCOSUR exemption was not "arbitrary" within the meaning of the chapeau of Article XX. It added however that if imports of retreaded tyres from MERCOSUR countries "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable

[160] Panel Report, *ibid.* at para 7.272.
[161] *Ibid*. at para 7.273.

discrimination."[162] The Panel noted that as of the time of its examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant"[163] so that the discrimination resulting from the MERCOSUR exemption could not be viewed as unjustifiable.

The Appellate Body agreed with the Panel that the measure was "necessary" to protect public health and the environment.[164] However, contrary to the Panel, the Appellate Body found that the MERCOSUR exemption entailed a discrimination that was "arbitrary or unjustifiable". To reach that conclusion, the Panel reasoned that the rationale put forward by Brazil to explain the discrimination – the ruling of the MERCOSUR arbitral tribunal – bore no connection with the public health and environmental goals pursued by the import ban on retreaded tyres. Consequently, that discrimination was "arbitrary or unjustifiable". Thus, the Appellate Body considers that compliance with a legitimate ruling issued by a legitimate PTA dispute settlement system does not constitute a proper basis for justifying trade discrimination under the chapeau of Article XX of GATT 1994.[165]

Brazil argued before the Panel that the MERCOSUR exemption could also be justified by the PTA exception of Article XXIV of GATT 1994.[166] Both the Panel and the Appellate Body did not however address that issue, essentially for technical reasons.[167] One may wonder what would have been the direction taken by following that line of reasoning. In light of the requirements set out by the Appellate Body in *Turkey-Textiles*, the PTA exception of Article XXIV of GATT 1994 could be successfully invoked only to the extent that an indissoluble link between the MERCOSUR exemption and a measure introduced upon and necessary to the formation of the MERCOSUR is established. It could be argued that the MERCOSUR dispute settlement system constitutes such a measure: it was introduced upon the formation of the MERCOSUR; compliance with the decisions it delivers could be viewed not only as a legitimate expectation of the parties, but also as a core value and a key assumption upon which the consent to

162 *Ibid*. at para 7.287.

163 *Ibid*. at para 7.288.

164 Appellate Body Report, *supra* note 159 at paras 133-183.

165 *Ibid.* at paras 224-233.

166 Panel Report, *supra* note 159 at paras 4.378, 7.270 and 7.449.

167 *Ibid.* at para 7.274, footnote 1448 to paras 7.274, 7.284-7.285 and 7.456; Appellate Body Report, *supra* note 159 at para 256. See also Brink, *supra* note 143 at 814.

form the MERCOSUR was built. The MERCOSUR exemption being a by-product of the operation of the MERCOSUR dispute settlement system, it should benefit from the protection of the Article XXIV defense.[168] The Achilles heel of this argument is that the MERCOSUR exemption was not the only avenue to ensure compliance with the ruling of the MERCOSUR arbitral tribunal. Brazil had other options, such as repealing the import ban and go for another approach for pursuing its public health and environmental objectives. That weakens the thesis of a narrow connection between the MERCOSUR exemption and the MERCOSUR dispute settlement system, and, in our view, renders implausible the use of the PTA exception of Article XXIV to shield the MERCOSUR exemption, at least on the basis of the requirements identified by the Appellate Body in *Turkey-Textiles*.[169]

2. A WTO Challenge that Exclusively Concerns the Parties to the PTA

That situation is exemplified by the dispute between Peru and Guatemala in *Peru – Agricultural Products*. We work with the following hypothesis. Country A and country B are parties to a PTA. Country A brings a case against country B before a WTO panel. Country B counters the claims of country A based on WTO Agreement norms by raising a defense enshrined in a PTA norm. Would such a defense be recognized and enforced within the context of WTO dispute settlement?

In *Peru – Agricultural Products*, the Appellate Body explained that the proper routes to analyze this type of situation are the exceptions embodied in the PTA provisions, suggesting that if the requirements set out in *Turkey-Textiles* for the application of those exceptions are met, the PTA defense might be recognized and enforced.[170]

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168 Nicolas Lockhart and Andrew Mitchell distinguish between "general framework provisions introduced upon formation" and "specific implementing measures adopted subsequently pursuant to the framework provisions". They maintain that both categories of measures are covered by the exceptions inherent to the PTA provisions. See Lockhart & Mitchell, *supra* note 144 at 225. The MERCOSUR exemption could be viewed as falling within the second category. Along these lines, Tegan Brink opines that "the fact that Brazil's measure was not instituted at the formation of MERCOSUR, should not, *ipso facto*, prevent Brazil from seeking recourse to the Article XXIV exception (Brink, *supra* note 143 at 835).

169 For a similar conclusion, but based on other grounds, see Brink, *supra* note 143, especially at 832-839.

170 Appellate Body Report, *supra* note 123 at paras 5.113-5.117.

Yet, the remark of the Appellate Body in *Peru – Agricultural Products* does not exhaust the subject.

As it was underlined above, the task that the WTO judge fulfils is to be distinguished from the law it applies in fulfilling that task. Technically, the task of a panel is circumscribed by its terms of reference, which usually refers to the allegations set out in the complainant's request for the establishment of a panel filed by the complainant. Typically, a panel is vested with the well-delineated task of deciding whether a given measure is consistent or not with certain provisions of the WTO Agreements. It is uncontroversial that the WTO judge has no jurisdiction to make findings on claims of breach of rules of international law other than those arising out of the WTO Agreements. These limitations apply however to jurisdiction. They do not confine the legal corpus that the WTO judge applies in exercising its jurisdiction and assessing whether a given measure is consistent with certain provisions of the WTO Agreements. That legal corpus extends beyond the WTO Agreements. Public international law constitutes the legal background of the WTO Agreements as well as the legal grammar in accordance with which those agreements were drafted. Moreover, there is no explicit limitation in the DSU or other WTO Agreements regarding the law applicable by the WTO judge in carrying out its task. Accordingly, the entire spectrum of public international law is available to the WTO judge for deciding a case, at least theoretically. There is no reason why the legal corpus that the WTO judge takes into account should be limited to the WTO Agreements, or why the WTO judge should be forbidden to develop legal reasoning that draw upon public international law paradigms. Jurisdiction and applicable law are two distinct concepts that must not be confused.

The legal rules arising out of a PTA are part of public international law. Therefore, in the above-described hypothesis, these rules are part of the legal corpus that the WTO judge must take into account in the task of assessing the complaint before it. The WTO judge should not disregard or ignore norms arising out of the PTA, if they are relevant to the accomplishment of its task. Irrespective of the question of whether the requirements for the application of the exceptions embodied in the PTA provisions are met or not, the norms set out in the PTA are part of the legal corpus that the WTO judge should take into account in performing the task of reviewing the complaint.

Our hypothesis implies friction between a WTO norm and a PTA norm. For the reasons above-explained, both norms are part of the legal corpus the WTO judge must take into account. They are in conflict because the WTO norm prohibits the measure at issue while the PTA norm authorizes it. Country B contends that the PTA provides a valid defense that the WTO judge should enforce. In other words, country B maintains that the conflict between the WTO norm and the PTA norm should be settled in favor of the latter. Does it make sense?

As it was stated above, public international law is a system in which there is no hierarchy among the sources of law as well as the legal norms, with the caveat of *jus cogens*. No rules of *jus cogens* apply to the relationship between the WTO Agreements and PTAs. Thus, both the WTO norm and the PTA norm are equal in terms of hierarchical value. Furthermore, there is no general provision in the WTO Agreements that – either explicitly or implicitly – gives precedence to WTO norms over other norms of international law in case of conflict, including PTA norms. Public international law deals with conflicts between two equal norms through two general principles: *lex specialis derogat legi generali* (the rule governing a specific subject-matter prevails over the rule that governs general matters); *lex posterior derogate legi priori* (the later rule overrides the earlier rule). These two general principles are part of the legal corpus in which the WTO judge may draw on, so that there is no reason why it should not apply these principles to determine the prevailing norm. In particular, nothing suggests that these principles have been neutralized or displaced by the exceptions embodied in the PTA provisions, which would thus operate in parallel with *lex specialis derogat legi generali* and *lex posterior derogate legi priori*.

One can certainly make an argument that the PTA is *lex specialis* vis-à-vis the WTO Agreements, which can be view, as regards trade relations between States, as constituting the common or default regime. With the implication that in the above-described hypothesis, the conflict of law would be sorted out in favor of the PTA norm.

More interesting is the hypothesis in which the PTA contains a clause that states the primacy of the PTA over the WTO Agreements in case of conflict of substantive norms, such as Article 103(2) of NAFTA. This clause being clearly part of the legal corpus that the WTO judge is supposed to apply, one may wonder by what kind of tortuous reasoning the WTO

judge might refuse to take it into account and give precedence to the PTA norm over the conflicting WTO norm.[171]

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The dispute settlement system of the multilateral trading system has evolved. Originally conceived under GATT 1947 as an alternative mechanism dedicated to the search for peaceful solutions to sporadic trade disputes – the continuation of diplomacy by other means, to paraphrase Carl Von Clausewitz[172] –, it has turned into a process centered around the project of reviewing domestic norms and measures against treaty provisions. The substance of the dialectic underpinning that process is driven by the search for the existence of conflicts between the former and the latter. Determining whether a conflict exists or not depends ultimately on how the provisions of the WTO Agreements are interpreted and applied by the WTO judge, which gives him a considerable amount of power all the more so that the more crucial of those provisions set out general, abstract principles that provide a wide leeway to the WTO judge in terms of interpretation and application. While the original paradigm underlying the dispute

[171] This reasoning assumes that there is no hierarchy of sources of international law with the caveat of *jus cogens*, so that the WTO norm and the PTA norm are on equal footing. Some commentators, while recognizing the absence of a formal hierarchy between the sources of international law, have nevertheless argued that there is a kind of informal hierarchy between them. To the extent that the "general law" does not have the status of *jus cogens*, treaties would generally speaking prevail over custom, and particular treaties over general treaties. Similarly, local customs (if proven) would override general customary law, and, perhaps, the body of customary law would have primacy over the general principles of law under Article 38(1)(c) of the *Statute of the International Court of Justice*. This informal hierarchy would "emerge as a "forensic" or a "natural" aspect of legal reasoning". See International Law Commission, *supra* note 13 at 47, footnotes omitted. In the light of this model, the PTA norm should *a fortiori* prevail over the WTO norm in the event of conflict. Indeed, the PTA is a particular treaty vis-à-vis the WTO Agreements, the latter constituting the general, default regulatory regime of international trade. In this respect, the International Law Commission cites Serge Sur: "Empirically,... the Court has given precedence to rules that have the highest degree of specialty, and the clearest and most objective manifestation" (International Law Commission, *ibid.* at 47-48, referring to Serge Sur, *L'interprétation en droit international public* (Paris: LGDJ, 1974) at 164).

[172] Carl von Clausewitz, *De la guerre* (édition abrégée), translation (to French) by Laurent Murawiec, collection Tempus (Paris: Librairie Académique Perrin, 2006).

settlement system of the multilateral trading system was that of the diplomat who turns exceptionally into an arbitrator and uses the internal rules of the GATT 1947 Club as a tool to find a pragmatic solution to a particular dispute between two members of the Club so that the dispute does not degenerate and spoil the ambiance in the Club, the position of the WTO judge in the current configuration is more similar to that of the constitutional judge, supreme guardian of founding texts vested with the mission of carrying out a legality check on the basis of treaty provisions. This is the reform of the dispute settlement system of the multilateral trading system achieved by the WTO Agreements that made the transformation possible. A transformation that was probably neither planned nor intended. Thus, the entry into force of the WTO Agreements in 1995 is a turning point as it resulted in a qualitative leap for the dispute settlement system of the multilateral trading system. The way the latter has operated since then has enhanced the evolution initiated by the WTO Agreements. When seeking to grasp the impact of the development of the legal frameworks underlying trade liberalization on the evolution of the law, the check of national norms by the WTO judge against the provisions of the WTO Agreements, and the type of conflicts of laws upon which this exercise is articulated, appear as an emblematic aspect of the phenomenon.

The transformation undergone by the dispute settlement system of the multilateral trading system raises the question of whether the WTO judge has a sufficient capital of legitimacy to conduct that mission of a "quasi constitutional" judge. Given the high level of indetermination that exists in the text of the WTO Agreements, carrying out a legality check of domestic norms on the basis of the provisions of the WTO Agreements places the WTO judge in a position of weakness in terms of legitimacy. The WTO judge enjoys broad latitude in interpreting and applying treaties, in finding ultimately whether there is a vertical conflict between a domestic norm and a WTO norm, and in deciding in favor of which norm the conflict should be settled. But, paradoxically, the means at the disposal of the WTO judge to justify the choices it makes in these respects and thus construct legitimacy are modest. As explained above, contrary to the constitutional judge, the WTO judge can hardly connect its choices to the logic of a system or to a broadly accepted set of meta-legal values or principles that could legitimate them. The unbalance between, on the one hand, the great amount of power enjoyed by the WTO judge in interpreting and applying general, abstract provisions of the WTO Agreements as a result

of the high level of indetermination that exists therein, and on the other hand, the indigence of the capital of legitimacy at the disposal of the WTO judge to justify how this power is exercised is not good news, as it fuels the criticism that the WTO judge seeks to impose its own subjective views in the guise of objective legal reasoning, and eventually weaken the credibility of the WTO dispute settlement system.[173]

Surprisingly enough, the concept of conflict of laws is alien to the legal discourse that permeates the WTO dispute settlement system. That discourse is rather organized around a dichotomy between basic principles, rules and disciplines that foster international trade (the "good cop"), on the one hand, and a set of so-called "exceptions" or "defenses" (the "bad cop") on the other hand. While the former category is interpreted and applied liberally, "exceptions" or "defenses" receives a narrow interpretation and their application, sometimes, is subject to byzantine requirements that simply reflect the reluctance of the WTO judge to apply them.[174] One may wonder about the wisdom of this bipolarity. For instance, how can it be justified in the world in which we live today that measures aiming to protect public health, to preserve the environment or to promote the development of the poorest countries be characterized as "exceptions" (Article XX(b) of GATT 1994 and the Enabling Clause) vis-à-vis abstract principles geared toward the enhancement of fluidity of international trade? That dichotomy incorporates a pre-established hierarchy of values that mechanically builds a bias on the part of the WTO judge in favor of trade liberalization against societal values when the former and the latter compete. With this kind of model, the WTO judge, to paraphrase a former Quebec politician, is like the Tower of Pisa: it always leans toward the same

[173] On the quest for legitimacy by the WTO judge, see, among others: Sivan Shlomo-Agon, "Clearing the Smoke: The Legitimation of Judicial Power at the WTO" (2015) 49 J. World Trade 539; Robert Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law – The Early Years of WTO Jurisprudence", in J.H.H Weiler, ed, *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford: Oxford University Press, 2000) at 35.

[174] For an illustration of legal byzantinism, see Gabrielle Marceau & Joel P. Trachtman "A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade" (2014) 48 J. World Trade 351. It is an interesting framework from a conceptual standpoint, but it produces unpredictable outcomes, generates legal instability and is simply impossible to apply in practice by a policy maker of good faith.

side. Furthermore, some WTO Agreements ignore such a dichotomy. For instance, the *Agreement on Technical Barriers to Trade* comprises no equivalent to the general exceptions of Article XX of GATT 1994, as the Appellate Body noted in *US – Clove Cigarettes* in the context of a discussion on the application of the national treatment principle as set out in Article 2.1 of the *Agreement on Technical Barriers to Trade*.[175] Finally, conceiving the WTO Agreements as a black and white picture in which legal provisions are either basic disciplines or exceptions appears to be a simplistic approach that does not take the full measure of the complexity of the WTO Agreements and, in some occasions, leads to artificial characterizations of a given provision as either a basic discipline or an exception. Approaching the WTO law from the perspective of the conflict of laws would imply a different segmentation of the rules: substantive rules – against which the existence or not of vertical conflicts is determined – would be distinguished from rules aiming to settle those conflicts. Furthermore, from the moment that the WTO Agreements shall not be "isolated clinically" from public international law, there is no rationale for decreeing that the rules of the second type cannot be found beyond the perimeter of the WTO Agreements. That alternative approach would ensure more neutrality in dealing with competition between trade liberalization and the exercise of regulatory autonomy driven by societal values, and might, structurally, achieve a better balance between those interests when they conflict with each other.

While the WTO judge seems to be in its element in dealing with vertical conflicts of laws, it is reluctant to get involved in horizontal conflicts of laws. The hypertrophy of the action of the WTO judge with respect to vertical conflicts of laws is to be contrasted with the atrophy of its attitude vis-à-vis horizontal conflicts of laws. In its defense, it must be said that the current legal framework of the multilateral trading system does not provide effective tools that the WTO judge might employ for responding in one way or the other to social, environmental or tax dumping, for instance. Unfortunately, this unbalance is all grist for the mill of those that contend that the WTO judge is not ideologically neutral and serves – consciously or unconsciously – a neo-liberal conception of the international society putting the business interests of globalized firms first. Concerning horizontal conflicts of laws, the crucial test for the WTO judge is still to come:

[175] Appellate Body Report, *supra* note 7 at para 101.

how will it coordinate the relationship between "new generation" PTAs and the multilateral trading system regarding the enforcement of societal standards as those PTAs are ahead of the WTO Agreements in these respects?

With regard to vertical conflicts of laws between PTAs and the multilateral trading system, one may first note the reluctance of the WTO judge to resolve them by conflict-avoidance techniques focusing on jurisdiction or admissibility, although statements of the Appellate Body suggest that rejecting claims based on WTO law without deciding on the merits on the basis of a "legal impediment" would amount to a proper exercise of jurisdiction by the WTO judge. Regarding substantive law conflicts between PTAs and the WTO Agreements, the Appellate Body has set a high threshold for the application of the exceptions set out in the PTA provisions in *Turkey – Textiles* and *Peru – Agricultural Products*. Both cases send a strong signal that the WTO judge should resolve those conflicts by giving precedence to the system of law it oversees. Entrenching egocentricity in the law may certainly have virtues, but it also generates the risk of pitting PTAs and the multilateral trading system against each other. Furthermore, to the extent that the WTO judge acts as it was vested with the mission to carry out legality checks, conducting a review of this nature turned towards itself and through the prism of a unidimensional set of values geared towards trade liberalization may ultimately roll back the idea of international legality. That would be a pity.[176]

[176] Thus, we agree with Panagiotis Delimatsis when he states that "coherence in interpreting the obligations of a state at the international arena vis-à-vis other states is more important than guaranteeing the internal coherence of a given international regime. Settling a dispute within a given system only without taking into account the broader picture reflects an outwardly short-sighted judicial thinking" (Delimatsis, *supra* note 8 at 113).