

The WTO's Exclusive and Compulsory Jurisdiction v. Dispute Resolution Mechanisms in Regional Trade Agreements: A Clash of Jurisdiction?

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Recently, the number of regional trade agreements (RTAs) has flourished and at the same time, trade disputes are increasing. The dispute settlement mechanisms (DSMs) in those RTAs may be potentially at odds with the DSM of the World Trade Organization (WTO), the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The interaction between the DSMs of the WTO and in RTAs raise various concerns, including forum shopping and conflicts of jurisdiction. The key question is: which DSM should prevail? The relationship between the DSU and the default DSM in the North American Free Trade Agreement (NAFTA) provides an example of such an interaction and illustrates the potential fragmentation in case of overlapping jurisdiction. In the Mexico – Tax Measures on Soft Drinks and Other Beverages case, the WTO's Appellate Body was reluctant to adopt a straightforward position on such overlaps. Thus, at least for now, there are many open questions, but no clear-cut answers. After providing an overview of the legal framework and discussing this important case, the authors propose solutions as to how to deal with jurisdictional overlaps in trade disputes.

Keywords: World Trade Organization (WTO), Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Mexico – Soft Drinks, regional trade agreements (RTA), North American Free Trade Agreement (NAFTA), dispute settlement mechanisms, jurisdiction, proliferation, multiplication, international courts and tribunals

I INTRODUCTION

These days, one can observe a rapid growth in the number of regional trade agreements (RTAs, or RTA in the singular),¹ each of which often includes a sophisticated dispute settlement mechanism (DSM). Against this backdrop, the question arises as to what implications this has for the World Trade Organization's (WTO's) DSM, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)²: how does the DSU systemically interact with the DSMs in RTAs? Are DSMs in

RTAs 'friends or rivals'³ of the DSU and the WTO's multilateral trading system? Is the DSU weakened in light of those recent developments? Or does the WTO enjoy a 'monopoly'⁴ over the settlement of trade disputes because of the 'unique'⁵ features of the DSU?

These and many more questions deserve answers. Key concerns behind the growing proliferation of RTAs are the risks of forum shopping⁶ and the potential conflicts of jurisdiction,⁷ which are relevant to the broader debate about the multiplication of international DSMs generally.⁸ If disputes are simultaneously brought to two different fora,

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¹ Pamela Apaza Lanyi & Armin Steinbach, *Limiting Jurisdictional Fragmentation in International Trade Disputes*, 5(2) J. Int'l Disp. Resol. 372 (2014).

² Marrakesh Agreement Establishing the World Trade Organization, adopted 15 Apr. 1994, 1867 UNTS 154, 33 ILM 1144 (1994) (WTO Agreement), Annex 2.

³ *Understanding the WTO: Cross Cutting and New Issues – Regionalism: Friends or Rivals?*, WTO (1 Oct. 2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm.

⁴ Makane Moïse Mbengue, *The Settlement of Trade Disputes – Is there a Monopoly for the WTO?*, 15 LPICT 207 (2016).

⁵ Gabrielle Marceau, *The Primacy of the WTO Dispute Settlement System*, 23 QIL 3, 5 (2015).

⁶ Malebakeng Agnes Forere, *The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement* 74 (Wolters Kluwer 2015); Chien-huei Wu, *In Search of Coherence: Navigating the WTO in the Universe of International Law*, in *Essays in Honour of Mitsuo Matsushita* 258, 277 (Julien Chaisse & Tsai-Yu Lin eds, OUP 2016); Céline Todeschini-Marthe, *Dispute Settlement Mechanisms Under Free Trade Agreements and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice*, 13 GTCJ 387 (2018).

⁷ Mbengue, *supra* n. 4, at 230; Stephanie Hartmann, *Recognizing the Limitations of WTO Dispute Settlement – The Peru – Price Band Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes*, 48 G. Wash. Int'l L. Rev. 617, 618 (2016).

⁸ For sources on multiplication generally, see e.g. Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions*, 5 Max Planck Y.B. U. N. L. 67 (2001); Nikolaos Lavranos, *Regulating Competing Jurisdiction Among International Courts and Tribunals*, 68 HJIL 575 (2008); Karen J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, in *The Oxford Handbook of International Adjudication* 63 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds, OUP 2013); Laurence Boisson de Chazourmes, *Interactions Between Regional and Universal Organizations* (Brill 2016).

the question arises whether WTO adjudicators could, or should, refrain from exercising their powers.⁹ The DSU is silent as regards a WTO panel's capacity to reject jurisdiction in favour of an RTA forum¹⁰; thus, there is a gap in the WTO DSM.

This contribution begins with an overview of the unique characteristics of the DSU (II), then proceeds to examine DSMs in RTAs, with an emphasis on the default DSM in the North American Free Trade Agreement (NAFTA)¹¹ (Chapter 20). To illustrate the interaction between the DSU and NAFTA Chapter 20, a special focus will then be cast on the case of Mexico – Tax Measures on Soft Drinks and Other Beverages (*Mexico – Soft Drinks*)¹² (III). The final section concludes that there are possible jurisdictional clashes between the DSU and RTA DSMs (IV) and proposes solutions to address such overlaps (V).

2 THE DSU IN A NUTSHELL

The WTO's jurisdiction is compulsory and exclusive as it stems from the wording of DSU Article 23.1, which provides that '[w]henever Members seek redress [...] they shall have recourse to, and abide by, the rules and procedures of this [DSU]' (emphasis added). In other words, whenever a trade-related dispute under the covered agreements arises between two Members, they are obliged to have recourse to the DSU. They cannot derogate from this obligation, since they consented to this DSM when becoming WTO Members.¹³

Furthermore, the WTO DSM is quasi-automatic in nature.¹⁴ As such, a panel will always be established unless 'the [Dispute Settlement Body] decides by consensus not to establish a panel' (DSU Article 6.1). Non-establishment is impossible as at least one party, i.e. the complaining party, will always support the formation of a

panel for the resolution of a dispute.¹⁵ The negative consensus rule also applies to reports rendered by a panel (DSU Article 16.4) and by the Appellate Body (AB) in case of an appeal (DSU Article 17.14), as well as to decisions of the Dispute Settlement Body (DSB) regarding retaliatory measures (DSU Article 22.6).

Lastly, the DSU has a specialized mandate. By DSU Article 3.2, the DSU's purpose is to preserve the rights and obligations of its Members only in respect of the covered agreements.¹⁶ The latter clause makes clear that WTO law is the only law applicable to the covered agreements, but does not suggest that, when interpreting the DSU, inspiration cannot be drawn from non-WTO sources.¹⁷ In the same vein, pursuant to DSU Article 19.1, the panel or the AB shall recommend that a Member bring the respective measures into conformity with the covered agreements in case of a violation.

3 RTAs: ALTERNATIVES TO WTO DISPUTE SETTLEMENT

Whereas the WTO Agreement attaches exclusivity to its jurisdiction, it simultaneously grants to its Members the right to conclude regional agreements. Specifically, General Agreement on Tariffs and Trade¹⁸ (GATT) Article XXIV and General Agreement on Trade in Services¹⁹ (GATS) Article V permit Members to form customs unions or free trade agreements, provided that specific conditions are fulfilled.²⁰ Up to this point, no conflict arises. However, each of these RTAs encompasses not only rights and obligations in parallel to those granted under the WTO Agreement, but also, a DSM which may be potentially at odds with the DSU.²¹ There is a plethora of DSMs that confirm this status quo. The authors consider the relationship between NAFTA

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⁹ Marceau, *supra* n. 5, at 6.

¹⁰ Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1(1) J. Int'l Disp. Resol. 67, 71 (2010).

¹¹ 32 ILM 289, 605 (1993) (adopted 17 Dec. 1992, entered into force 1 Jan. 1994).

¹² Panel Report on *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 7 Oct. 2005 (*Mexico – Soft Drinks*, Panel Report); Appellate Body Report on *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 6 Mar. 2006 (*Mexico – Soft Drinks*, AB Report).

¹³ Pieter Jan Kuijper, *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO*, ICTSD Issue Paper No. 10, 26 (10 Sept. 2010).

¹⁴ Peter Van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, in *The WTO at Ten: The Contribution of the Dispute Settlement System* 289 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, CUP 2006).

¹⁵ *Ibid.*

¹⁶ Kuijper, *supra* n. 13, at 3.

¹⁷ *Ibid.*

¹⁸ General Agreement on Tariffs and Trade 1947, adopted 30 Oct. 1947, provisionally entered into force 1 Jan. 1948, 55 UNTS 187 (1954), superseded by the WTO Agreement on 1 Jan. 1995, 1867 UNTS 14, 33 ILM 1143; General Agreement on Tariffs and Trade 1994, adopted 15 Apr. 1994, entered into force 1 Jan. 1995, 1867 UNTS 190, 33 ILM 1153 (1994).

¹⁹ General Agreement on Trade in Services, WTO Agreement, Annex 1B.

²⁰ Appellate Body Report on *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/ABR, adopted 22 Oct. 1999 (*Turkey – Textile and Clothing Products*, AB Report), para. 45.

²¹ Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflict of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, in *Regional Trade Agreements and the WTO Legal System* 465, 466 (Lorand Bartels & Federico Ortino eds, OUP 2006).

Chapter 20²² and the DSU to be the most interesting interaction, but acknowledge further examples of overlapping jurisdiction in the fork in the road clauses in other DSMs.²³

Fork in the road clauses were designed to ensure exclusivity in forum selection.²⁴ In the context of international trade disputes, an effective fork in the road clause in an RTA DSM has a twofold effect. First, the clause gives parties a choice between having all or certain disputes arising under the GATT/WTO resolved either under the RTA DSM or the DSU. Second, once a dispute settlement procedure has been initiated in one forum, the dispute cannot be brought before another DSM.²⁵

The effectiveness of a fork in the road clause depends on its wording; particularly, how the initiating act by which one road is chosen to the exclusion of the other is drafted.²⁶ Although efforts could be made to reword or standardize such clauses, it has been questioned as to whether they could be made clearer than they are.²⁷ An alternative way of dealing with dual jurisdiction is through a positive decision taken by the WTO membership itself – e.g. an amendment to the DSU and dispute settlement procedures in order to clarify, expressly, how the WTO is to proceed in the face of overlapping jurisdiction.²⁸

The authors are not aware of any such decision from the WTO membership. As such, the question arises: what happens if the wording of a fork in the road clause allows, on its face, a dispute that has been initiated first in an RTA forum to also be presented before a WTO panel? This issue will be analysed by reference to NAFTA Chapter 20 (A) and the AB's treatment of its jurisdictional overlap with the DSU in the *Mexico – Soft Drinks* case (B).

3.1 Case Study: NAFTA Chapter 20

Chapter 20 permits the NAFTA parties to use it as a substitute DSM for the resolution of their GATT/WTO disputes²⁹; therefore it coexists, in theory, alongside the DSU. However, architectural differences in NAFTA Chapter 20 vis-à-vis the DSU have given rise to a possible conflict of jurisdiction. Accordingly, NAFTA Chapter 20 is an important vehicle for the broader consideration of jurisdictional clashes between the DSU and RTAs.

NAFTA Chapter 20 provides a default³⁰ DSM for all disputes between the NAFTA parties regarding the interpretation or application, alleged violations of, and the nullification or impairment of benefits reasonably expected to accrue under, the NAFTA.³¹

NAFTA Chapter 20 contains an exclusive jurisdiction clause with a limited choice of forum allowing parties, at the complaining party's discretion, to choose NAFTA Chapter 20 or the DSU to resolve their GATT/WTO disputes, but, importantly, accords NAFTA Chapter 20 preference or exclusive priority over the DSU for disputes involving certain environmental agreements, sanitary and phytosanitary measures, and standards-related measures.³² This reflects the parties' affirmation or incorporation of their GATT/WTO rights and obligations in the NAFTA.³³ Against this backdrop, NAFTA Article 2005(1) allows the complaining party to make a choice either in favour of the NAFTA or the WTO in case of a dispute arising under both the NAFTA and the GATT.³⁴ The latter clause together with NAFTA Article 2005(6) has, like other fork in the road clauses, the objective of avoiding the multiplication of disputes.³⁵

Once dispute settlement procedures have been initiated, the forum selected shall be used to the exclusion of the other forum.³⁶ Dispute settlement proceedings

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²² NAFTA, Art. 2005.

²³ Canada – Costa Rica Free Trade Agreement, in force since Nov. 2002, Art. XIII.6; Free Trade Agreement between the EFTA States Iceland, Liechtenstein, Norway and Switzerland and Singapore, entered into force 1 Jan. 2003, Art. 56(2); Protocol of Olivos for the Settlement of Disputes in Southern Common Market, entered into force 10 Feb. 2004, Art. 1(2); Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, (not in force, but provisionally applied since 21 Sept. 2017), Art. 29(3).

²⁴ Fork in the road clauses are expressed by the Latin maxim of 'una via electa tior datur recursus ad alteram' ('once one road is chosen, there is no recourse to the other'): Christoph Schreuer, *Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) JWIT 231, 240 (2004).

²⁵ Luiz Eduardo Salles, *Forum Shopping in International Adjudication* 245 (CUP 2014).

²⁶ Armand C. M. de Mestral, *Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship*, 16(4) JIEL 777, 815 (2013).

²⁷ *Ibid.*, at 815.

²⁸ As the WTO is 'member-driven', a decision could be taken by the WTO membership: *Understanding the WTO: The Organisation: Whose WTO Is It Anyway?*, WTO (1 Oct. 2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council.

²⁹ NAFTA, Art. 2005.

³⁰ Cf. the NAFTA's DSMs regulating investor-state disputes (Ch. 11) and review of final determinations on anti-dumping and countervailing duties cases (Ch. 19); NAFTA, Arts 2003–2005.

³¹ The precise scope of which is set out in Annex 2004.

³² NAFTA, Arts 2004–2005.

³³ NAFTA, Arts 101, 103; David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process* 11 Am. Rev. Int'l Arb. 481, 489 (2000).

³⁴ Salles, *supra* n. 25, at 257.

³⁵ *Ibid.*, at 245.

³⁶ NAFTA, Art. 2005(6).

under the DSU are deemed to be initiated by a party's request for a panel or for a committee investigation.³⁷ Contrastingly, dispute settlement proceedings under NAFTA Chapter 20 are deemed to be initiated by a party's request for meeting of the Free Trade Commission.³⁸

Despite the existence of discrete DSMs in RTAs, WTO jurisprudence reveals that there is scope for jurisdictional overlap with the DSU.

3.2 Mexico – Soft Drinks: A Clash of Jurisdiction?

The *Mexico – Soft Drinks* case illustrates the potential fragmentation that can arise where NAFTA Chapter 20 and the WTO's exclusive and compulsory jurisdiction overlap.³⁹

3.2.1 Main Facts of the Case

A dispute arose between the United States of America (US) and Mexico by reason of Mexico's imposition of certain tax measures and bookkeeping requirements on soft drinks and other beverages that use any sweetener other than cane sugar.⁴⁰ The US considered the measures to be inconsistent with GATT Article III.⁴¹ Following unsuccessful consultations, the US requested the establishment of a WTO panel.⁴² Mexico had previously sought to bring the case before a NAFTA Chapter 20 panel as it considered its own cane sugar industry at risk after imports of high fructose corn syrup from the US into Mexico were displacing its cane sugar in the soft drinks industry.⁴³ Following unsuccessful negotiations and Mexico's subsequent request for the establishment of a NAFTA Chapter 20 panel, the US did not appoint its panelist, thereby blocking further proceedings under Chapter 20.⁴⁴

3.2.2 Panel and AB Report

Mexico considered NAFTA Chapter 20 to be the more suitable DSM in this case as the panel could address both the US's concern as regards Mexico's tax measures, and Mexico's concern relating to market access for Mexican cane sugar in the US at the same time.⁴⁵ Thus, by arguing that a broader dispute was at stake, Mexico requested the panel to decline jurisdiction in favour of a NAFTA Chapter 20 panel.⁴⁶ Mexico took the view that, like other international courts and tribunals, a WTO panel 'has certain implied jurisdictional powers that derive from its nature as adjudicative body' and that these powers include 'the jurisdiction to decide whether it should refrain from exercising substantive jurisdiction that has been validly established'.⁴⁷

The WTO panel rejected Mexico's request by finding that 'it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it'.⁴⁸ In this respect, it referred to DSU Article 11, clarifying that 'the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes'.⁴⁹ Moreover, the WTO panel referred to DSU Articles 3.2, 19.2 and 23, recalling that WTO panels 'may not add to or diminish the rights and obligations of WTO Members' and that Members 'shall have recourse to, and abide by, the rules and procedures of the DSU'.⁵⁰ This position is based on the fact that, as elaborated above, the jurisdiction under the WTO DSM is compulsory and exclusive.

As regards the potential overlap of jurisdiction, the WTO panel concluded that, even if it had the discretion to decide whether or not to exercise jurisdiction, there was no direct link with the dispute under the NAFTA as the subject matter and the parties' positions were different.⁵¹ On appeal, Mexico challenged the WTO panel's decision. However, the AB upheld the WTO panel's finding and further elaborated that:

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³⁷ NAFTA, Art. 2005(7).

³⁸ NAFTA, Art. 2007(1).

³⁹ Caroline Henckels, *Overcoming Jurisdictional Isolation at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19(3) EJIL 571, 598 (2008).

⁴⁰ *Mexico – Soft Drinks*, AB Report, *supra* n. 12, at para. 1.

⁴¹ *Ibid.*, para. 1.2.

⁴² *Ibid.*, para. 1.4.

⁴³ *Ibid.*, para. 4.78 *et seq.*

⁴⁴ *Ibid.*, para. 4.91.

⁴⁵ *Ibid.*, para. 3.2.

⁴⁶ *Ibid.*, para. 7.1.

⁴⁷ *Ibid.*, para. 4.103.

⁴⁸ *Ibid.*, paras 7.1, 7.18.

⁴⁹ *Ibid.*, para. 7.8.

⁵⁰ *Ibid.*, para. 7.9.

⁵¹ *Ibid.*, para. 7.14.

it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute.⁵²

The AB further expressed that it has:

no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.⁵³

The AB indicated several situations that might qualify as such 'legal impediments', including circumstances in which disputes pending before two different fora have the same subject matter, or where the respective positions of the parties are identical, or where a prior decision by another forum on a broader dispute already exists, or where a fork in the road clause has been validly triggered.⁵⁴ However, none of these legal obstacles was relevant in the present case since the NAFTA Chapter 20 panel had not yet been established and thus, not decided the 'broader dispute' at stake.⁵⁵

3.2.3 Analysis

Although the AB circumvented expressing a clear view on the issue of competing jurisdiction,⁵⁶ its reference to 'legal impediments' appears to be a loophole. Specifically, the AB did not entirely exclude that WTO panels may decline jurisdiction under specific circumstances.⁵⁷ Although none of the abovementioned 'legal impediments' was relevant in *Mexico – Soft Drinks*, those circumstances should be carefully considered by WTO adjudicative bodies. The DSU sets out a clear framework which has proven to be quite successful in the past. However, when drafting the DSU and opting

for compulsory and exclusive jurisdiction, the DSU drafters most likely did not foresee the imminent proliferation of RTAs.⁵⁸ Thus, it remains to be seen whether WTO adjudicative bodies will recognize 'legal impediments' in future cases.

Given the growing number of RTAs, sooner or later cases will arise in which those legal obstacles will most certainly play a role. Until then, it remains unclear whether clauses on jurisdiction in RTAs (such as a fork in the road clause) could create a 'legal impediment'.⁵⁹ In *Mexico – Soft Drinks*, Mexico did not invoke the fork in the road clause. However, neither in *Mexico – Soft Drinks* nor in *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)* did the panel or the AB exclude the possibility of applying, or taking into consideration, RTA clauses on forum selection. In the latter case, the AB acknowledged that, when referring DSU Article 3.7, the Members enjoy a 'self-regulating discretion' when exercising their judgment as to whether an action under the DSU would be fruitful.⁶⁰ However, according to the AB, this right is not 'unbounded'.⁶¹ Following its previous jurisprudence, the AB acknowledged that a waiver of the DSU can be included in RTAs only if it is expressed in a clear and explicit manner,⁶² since 'the relinquishment of rights granted by the DSU cannot be lightly assumed'.⁶³ Moreover, the AB noted that:

the references in paragraph 4 of Article XXIV [of the GATT] to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the covered agreements.⁶⁴

It follows that the Members' right to initiate a WTO dispute is a fundamental one which cannot be modified or restrained in an RTA, but rather, within the DSU, and thus, in the WTO forum.⁶⁵ Finally, the AB in

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⁵² *Ibid.*, para. 53.

⁵³ *Ibid.*, para. 54.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Lavranos, *supra* n. 8, at 592.

⁵⁷ Mbengue, *supra* n. 4, at 238.

⁵⁸ Kuijper, *supra* n. 13, at 35.

⁵⁹ Lanyi & Steinbach, *supra* n. 1, at 389.

⁶⁰ Appellate Body Report on *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 20 July 2015 (*Peru – Agricultural Products*, AB Report), para. 5.18.

⁶¹ *Ibid.*, para. 5.19.

⁶² *Ibid.*, para. 5.25.

⁶³ *Ibid.*, citing Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III (Art. 21.5 – Ecuador II/Art. 21.5 – US))*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, adopted 26 Nov. 2008, para. 217.

⁶⁴ *Ibid.*, para. 5.116.

⁶⁵ Marceau, *supra* n. 5, at 7.

Peru – Agricultural Products denied the application of customary international law to resolve this matter by rejecting that the initiation of proceedings under the DSU (rather than the relevant RTA DSM) constituted a violation of the good faith principle, and holding that an RTA cannot be considered as a subsequent agreement to the WTO DSM within the meaning of Vienna Convention on the Law of Treaties⁶⁶ Article 31(3)(a).⁶⁷

4 JURISDICTIONAL IMPLICATIONS FOR RTAs

As seen above, NAFTA Chapter 20s exclusive jurisdiction clause with a limited choice of the WTO as a forum exists alongside a number of exclusive and compulsory rules in the DSU. Under the latter, the WTO must, in effect, decide cases validly brought to it. Furthermore, Members' unilateral actions to enforce a WTO panel or AB report finding GATT/WTO violations is not lawfully possible outside of the DSB's authorization and regulation. As such, it is unclear how the DSU's exclusive and compulsory rules can be reconciled with the parties' preference or exclusive priority given to NAFTA Chapter 20 for certain actions.⁶⁸ Thus, there exists an unavoidable clash of jurisdiction between the two fora.⁶⁹

This status quo may be attributed to a lack of prescriptive rules to resolve conflicts of jurisdiction in international trade disputes specifically pertaining to the WTO Agreement and RTAs⁷⁰; the WTO's reluctance to delve into issues of jurisdiction and admissibility⁷¹; or the architectural weaknesses of NAFTA Chapter 20 vis-à-vis the DSU. Consequently, it falls to the adjudicative bodies to answer the overriding question: do WTO panels and the AB have the power to consider DSMs in RTAs and then act in consequence, or, must they give precedence to the WTO in cases where measures are challengeable in either forum?⁷²

The AB's position, in the context of NAFTA Chapter 20, is that, where a WTO panel and a NAFTA Chapter 20 panel both have jurisdiction to adjudicate a dispute,

and the DSU has been triggered by a valid legal complaint, the WTO panel has, in principle, no inherent power to decline jurisdiction in favour of the NAFTA Chapter 20 panel.⁷³

In addition to *Mexico – Soft Drinks* and *Peru – Agricultural Products*, other cases illustrate the tensions that exist between RTA DSMs and the WTO DSU. One such case is *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*.⁷⁴ In that case, Mexico initiated consultations under the DSU with the US because of the latter's measures concerning the labelling of tuna as 'dolphin-safe'.⁷⁵ By invoking NAFTA Article 2005(4), the US requested that the dispute be moved from the WTO to the NAFTA.⁷⁶ However, Mexico considered the WTO to be the most appropriate forum to decide this dispute as it 'dealt with issues that had important multilateral implications that had to be resolved in the WTO'.⁷⁷ It therefore disregarded the US's request and instead, initiated panel proceedings under the DSU. Despite being concerned about Mexico's decision,⁷⁸ the US later refrained from raising the NAFTA issue before the WTO panel; as a result, it was not dealt with in the panel or AB reports.⁷⁹

Although the panel and the AB in *US – Tuna II* had no opportunity to express their opinion on the interaction between RTAs and the WTO, the AB subsequently refrained from providing a clear-cut answer to this issue in *Peru – Agricultural Products*, as elaborated above. Consequently, WTO jurisprudence leaves open the question as to what would happen if a WTO panel is presented with a dispute in the face of a 'legal impediment' or a clear and explicit waiver of parties' rights granted by the DSU.

5 CONCLUSION AND PROPOSED SOLUTIONS

A gap in conflicts rules in international trade disputes, coupled with the AB's inflexible interpretation of the

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⁶⁶ 1155 UNTS 331, 8 ILM 679 (1969) (adopted 23 May 1969, entered into force 27 Jan. 1980).

⁶⁷ *Peru – Agricultural Products*, AB Report, *supra* n. 60, at paras 5.28, 5.104.

⁶⁸ NAFTA, Arts 2004–2005.

⁶⁹ Kwak & Marceau, *supra* n. 21, at 465–468; Kuijper, *supra* n. 13, at 3–4, 41.

⁷⁰ Kwak & Marceau, *supra* n. 21, at 465–468; Kuijper, *supra* n. 13, at 3–4, 41; de Mestral, *supra* n. 26, at 777.

⁷¹ Kuijper, *supra* n. 13, at 41.

⁷² Kwak & Marceau, *supra* n. 21, at 465, 470–471; de Mestral, *supra* n. 26, at 781.

⁷³ *Mexico – Soft Drinks*, AB Report, *supra* n. 12, at para. 85(a).

⁷⁴ de Mestral, *supra* n. 26, at 802.

⁷⁵ Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 15 Sept. 2011, para. 1.1.

⁷⁶ See *United States Initiates NAFTA Dispute with Mexico over Mexico's Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA*, Office of the United States Trade Representative (1 Oct. 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over>.

⁷⁷ WTO Dispute Settlement Body, *Minutes of Meeting Held on 20 April 2019*, WT/DSB/M/267, para. 79.

⁷⁸ *Ibid.*, para. 77.

⁷⁹ de Mestral, *supra* n. 26, at 803.

DSU's reach and its reluctance to clarify its approach to overlaps of jurisdiction, have resulted in the WTO having more jurisdictional appeal than DSMs in RTAs. There are four possible solutions to this issue.

First, the application of international commercial law principles as a means of dealing with the overlaps and conflicts has been proposed, however their transfer 'lock stock and barrel to the domain of public international law', in particular, to this specific area of conflict, is unclear.⁸⁰ It has even been opined that this solution is unworkable.⁸¹

Second, good faith and interpretation principles call for adjudicators to not only be aware of, but also, to give deference to, other bodies' jurisdictions.⁸² It is for the WTO to exercise judicial creativity and restraint where appropriate.

Third, fork in the road clauses could address dual jurisdiction if properly drafted. Ensuring such clauses are watertight, and addressing structural weaknesses in existing RTA DSMs⁸³ – e.g. panel constitution and compliance shortcomings in NAFTA Chapter 20 – may return strength to them, thereby enhancing their 'gravitational pull', and thus, attractiveness to parties, in resolving their GATT/WTO disputes compared to the DSU.⁸⁴ Alternatively, a decision could be taken by the WTO Members with respect to overlaps of jurisdiction.

Fourth, there should be a shift in the AB's mentality towards recognition of the role of RTA DSMs in the international trading system. Despite parties' preferred recourse to the DSU over DSMs in RTAs,⁸⁵ the creation and retention of RTAs, and consequently, choice of forum clauses in DSMs, are valued by trading partners as they

give states the freedom of a more diplomatic, non-WTO forum option for settling their trade disputes.⁸⁶ Implicit in the AB's current approach to this parallel universe is that, in the WTO's view, the only relevant perspective on overlapping jurisdictions is the one of the WTO.⁸⁷ Indeed, the role of the WTO is still evolving, and there is an ongoing debate as to how activist a role the DSB should play.⁸⁸ However, a WTO panel's recent endorsement of the AB's approach in *Mexico – Soft Drinks* suggests that this judicial rigidity is here to stay, at least for now.⁸⁹

Notwithstanding, the WTO cannot lose sight of the fact that RTAs are permitted under the GATT/WTO framework,⁹⁰ and a hierarchy of international courts and tribunals is a foreign concept to the structure of the international legal order.⁹¹ Nor can the WTO be blind to the equities of a situation where two States have agreed on a DSM under an RTA.⁹² In this light, the subject matter of the dispute should be taken into account. If the dispute refers solely to local issues, then the appropriate forum should be the forum of an RTA.⁹³ Nevertheless, if the dispute has systemic implications that involve more than one party, then it may be preferable to resolve the dispute in the WTO, which allows for the participation of third parties.⁹⁴ Moreover, WTO panelists and the AB should explore judicial methods – e.g. by staying the proceedings pending the outcome of the other decision⁹⁵ – to address the problems posed by the relationship between RTAs and the WTO from the broader perspective of the unity of international trade law, rather than forcing them all through the prism of the DSU.⁹⁶

Notes

⁸⁰ Kwak & Marceau, *supra* n. 21, at 465–468; Kuijper, *supra* n. 13, at 32–35.

⁸¹ See Kwak & Marceau, *supra* n. 21, at 484.

⁸² *Ibid.*, 485.

⁸³ Marceau & Wyatt, *supra* n. 10, at 72.

⁸⁴ See John C. Thomure Jr., *Star Chamber Accountability: Appellate Review of NAFTA Chapter 20 Panel Decisions*, 28 U. Miami Inter-Am. L. Rev. 629 (1996–1997); Sidney Picker Jr., *The NAFTA Chapter 20 Dispute Process: A View from the Inside*, 23 Can-US L.J. 525 (1997); Gantz, *supra* n. 33, at 481.

⁸⁵ Marceau, *supra* n. 5, at 11; Mbengue, *supra* n. 4, at 247.

⁸⁶ Hyeran Jo & Hyun Namgung, *Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime*, 56(6) J. Confl. Resol. 1041, 1049–1050 (2012).

⁸⁷ Alberto Alvarez Jimenez, *The WTO AB Report on Mexico – Soft Drinks, and the Limits of the WTO Dispute Settlement System*, 33(3) LIEI 319, 326, 328 (2006).

⁸⁸ Giovanni Maggi & Robert W. Staiger, *The Role of Dispute Settlement Procedures in International Trade Agreements*, 126(1) TQJE 475 (2011).

⁸⁹ See Panel Report on *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 5 Apr. 2019, para. 7.103.

⁹⁰ *Turkey – Textile and Clothing Products*, AB Report, *supra* n. 20.

⁹¹ Arnett, *supra* n. 84, at 573; Kuijper, *supra* n. 13, at 6.

⁹² de Mestral, *supra* n. 26, at 777.

⁹³ Marceau, *supra* n. 5, at 7.

⁹⁴ *Ibid.*

⁹⁵ Lavranos, *supra* n. 8, at 592.

⁹⁶ de Mestral, *supra* n. 26, at 784; Kuijper, *supra* n. 13, at 35; cf. Jimenez, *supra* n. 87, at 333.