

# Overlapping Jurisdictions between the World Trade Organization and Preferential Trade Agreements

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Tiivistelmä/Referat – Abstract <p>The proliferation of preferential trade agreements has been significant since the establishment of the WTO. These agreements and regional integrations schemes provide for rights and obligations that are often identical to those agreed upon in the WTO. Preferential trade agreements also provide for their own dispute settlement mechanism. Due to the parallelism of rights and obligations, trade disputes between members can often be settled under both the WTO dispute settlement mechanism as well as under the dispute settlement mechanism established by the preferential trade agreement. This overlap of jurisdictions may cause parallel or subsequent litigation concerning the same dispute. Members have attempted to solve this issue by including jurisdiction clauses in preferential trade agreements, which prohibit parties to the preferential agreement from initiating the WTO dispute settlement under certain conditions.</p> <p>This thesis examines whether the jurisdiction of a preferential trade agreement can override the jurisdiction of the WTO, and whether the WTO tribunals have the powers to decline to exercise jurisdiction on the basis of the jurisdiction of a preferential trade agreement. I will examine what effects such jurisdiction clauses included in preferential trade agreements could be considered to have on the jurisdiction of the WTO, and other possible ways to solve jurisdictional conflicts. This thesis argues that it is indeed possible for WTO panels to decline to exercise jurisdiction based on the jurisdiction of a tribunal established under a preferential trade agreement. To make this point, alternative solutions to overcome the conflicts are examined.</p> <p>The topic is divided into three main sections. These overlaps are first examined as a normative issue, concentrating on jurisdictional clauses and their potential effects. In this section the overall hierarchy of the two systems and the question of applicable law in the WTO dispute settlement system are studied. The question in this section is, can a PTA jurisdiction clause modify WTO member's rights and obligations arising from the covered agreements.</p> <p>The second part concentrates on the procedural aspects of the overlaps. Here the focus is on rules of general international law established to govern the procedural issues in international adjudication. The question here is whether a parallel proceeding can by itself prevent WTO litigation.</p> <p>The third part focuses on the powers of the WTO tribunals and their abilities to decline to exercise jurisdiction. In this part the relevant WTO case law regarding this issue is also studied more carefully. The last part of this paper gives a brief outlook of the issue from a policy perspective while also addressing the challenges the situation causes to the whole system.</p>		
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## Abbreviations

CRTA	WTO Committee on Regional Trade Arrangements
DSB	Dispute Settlement Body
DSU	Dispute settlement understanding
EC	European Communities
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
ICJ	International Court of Justice
ILC	International Law Commission
MERCOSUR	Mercado Común del Sur, Southern Common Market
NAFTA	North American Free Trade Agreement
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

## 1. Introduction

### 1.1. Multilateral versus preferential trade – Where are we now?

The proliferation of preferential trade agreements<sup>1</sup> (PTAs) has been significant since the establishment of the World Trade Organization (WTO) in 1995; as of 1 February 2016 there were 454 notifications of physical PTAs received by the WTO, and overall 419 PTAs were in force.<sup>2</sup> This seems somewhat antithetical to the objectives of the WTO, as its purpose is to promote globalisation and multilateral trade liberalisation, and to ensure the same trading possibilities to all its members.<sup>3</sup> However, it must be kept in mind that different types of PTAs have existed in the international trading system well before the WTO was established, and therefore they must not be regarded as a recent phenomenon.<sup>4</sup> In fact, already in 1996 Bhagwati stressed that the WTO will have to face the phenomenon of proliferation of PTAs and that equilibrium must be found between the two systems.<sup>5</sup> These agreements used to be mostly agreed upon at a regional level, which is why many authors still refer to them as regional trade agreements (RTAs).<sup>6</sup> However, the number of PTAs among members that are not in geographic proximity is constantly growing.<sup>7</sup>

PTAs are inherently contradicting the non-discrimination goals of the WTO, as they specifically give preferential treatment to PTA members as opposed to other WTO members, with the aim of reaching a deeper level of integration. Preferential trade has been argued to be both a building block and a stumbling block to multilateral trade liberalisation, in other words to either increase or decrease trade liberalisation at a multilateral level between all WTO members.<sup>8</sup> Reasons for members to seek preferential

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<sup>1</sup> The WTO system recognises several types of PTAs: the GATT refers to free trade areas and customs unions while the GATS only refers to economic integration and trade liberalisation in general. In this paper I will use the term preferential trade agreement (PTA) to refer to all these agreements and integration schemes.

<sup>2</sup> World Trade Organization, *Regional Trade Agreements Gateway*,

<[www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)> accessed 26. August 2015.

<sup>3</sup> Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2<sup>nd</sup> edition, Oxford University press: Oxford, 2006) at 594-550.

<sup>4</sup> According to the world trade report of 2011, the first wave of regionalism began in the late 1950s and 1960s, with the establishment of the European Economic Community (EEC) in 1957 and the European Free Trade Agreement (EFTA) in 1960. World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011) at 52.

<sup>5</sup> Jagdish Bhagwati, 'The Agenda of the WTO' in Pitou van Dijck and Gerrit Faber (eds.), *Challenges to the New World Trade Organization* (Kluwer Law International: The Hague, 1996) at 27.

<sup>6</sup> Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', 1 *Journal of International Dispute Settlement* (2010) 67–95 at 68.

<sup>7</sup> Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization*, *supra* note 3 at 594.

<sup>8</sup> For a discussion about the benefits and negative aspects of PTAs see for example Chad Damro, 'The Political Economy of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds.), *Regional*

trade instead of investing their time and efforts in deeper multilateral liberalisation are numerous: PTAs are often seen as more beneficial as they involve key trading partners, offer better chances of success as the number of members involved is smaller, and also because multilateral trade negotiations often fail or take up significantly longer.<sup>9</sup> For example, the current Doha round was launched in November 2001, but the negotiations still continue to fail.<sup>10</sup> Deeper integration is therefore easier to achieve through preferential than multilateral trade. This paper does not focus on the politics or economics behind preferential trade, and therefore it suffices to say that by evaluating the current situation, the relevance of PTAs seems to be growing and the effects of preferential trade agreements to the WTO and multilateral trade in general must be taken seriously.

## 1.2. Overlapping jurisdictions – Is there a problem?

Jurisdiction refers to the limits of the legal competence of a regulatory authority to create, apply or enforce rules.<sup>11</sup> Overlaps of jurisdictions in dispute settlement refer to situations where the same dispute could be initiated under two distinct dispute settlement systems.<sup>12</sup> Conflicts arise when two tribunals actually provide jurisdiction over the same dispute.<sup>13</sup> As the number of different international regimes and tribunals has multiplied over the past years,<sup>14</sup> overlaps of jurisdictions have become commonplace in the international arena.<sup>15</sup> The phenomenon is part of the fragmentation of international law, which is a result of the rise of specialised regimes that have different interests and biases.<sup>16</sup> The arbitral tribunal

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*Trade Agreements and the WTO Legal System* (Oxford University Press: Oxford, 2006) 23-42; David A. Gantz, 'Regional Trade Agreements' in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford University Press: Oxford, 2009) 237-267.

<sup>9</sup> John Whalley, 'Why Do Countries Seek Regional Trade Agreements?' in Jeffrey A. Frankel (ed.), *The Regionalization of the World Economy* (University of Chicago Press, 1998) 63-90 at 71.

<sup>10</sup> Tilman Krüger, 'Moving Ahead While Standing Still: Dynamics of Institutional Evolution in a Gridlocked WTO', *5 European Yearbook of International Economic Law* (2014) 115-140 at 118.

<sup>11</sup> Christopher Staker, 'Jurisdiction' in International Law' in Malcom D. Evans (ed.), *International Law* (4<sup>th</sup> edition, Oxford University Press: New York, 2014) 309-335 at 309.

<sup>12</sup> Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press: Oxford, 2006), 465-523 at 467.

<sup>13</sup> Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Bethlehem, McRae, Neufeld and Van Damme (eds.), *The Oxford Handbook*, *supra* note 8, 298-342 at 303.

<sup>14</sup> See for example Cesare P.R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', *31 N.Y.U. Journal of International Law and Politics* (1999) 709-751 at 710.

<sup>15</sup> Luiz Eduardo Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (Cambridge University Press, 2014) at 20-21.

<sup>16</sup> These specialisations refer to different fields of international law such as international human rights law, international environmental law and international investment law. See for example Martti Koskeniemi 'The Fate of Public International Law: Between Technique and Politics' *70(1) The Modern Law Review* (2007) 1-30.

established under the United Nations Convention the Law of the Sea (UNCLOS)<sup>17</sup> stated in the *Southern Bluefin Tuna* case that

*“But the Tribunal recognizes as well that it is a commonplace of International law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.”*<sup>18</sup>

Overlapping jurisdictions cause availability of multiple fora, which in turn often makes multiple litigations possible.<sup>19</sup> Kwak and Marceau have defined three different types of overlaps that might occur: firstly, two fora might claim to have exclusive jurisdiction over the same matter; secondly, one of the fora might claim to have exclusive jurisdiction while the other offers jurisdiction on a permissive basis for the same matter; thirdly, two fora might offer non-mandatory jurisdiction for the same dispute.<sup>20</sup> International tribunals are independent from one another, and therefore the fact that one tribunal has jurisdiction over a specific issue does not mean that other tribunals are deprived from jurisdiction over the same or similar issues.<sup>21</sup>

This phenomenon can be seen as a positive thing, ensuring that all aspects of complex and multifaceted disputes are resolved, and also bringing security to those who have suffered from a breach of another state.<sup>22</sup> It is also possible that competition among different tribunals prompts better quality decisions and less time-consuming proceedings.<sup>23</sup> It has been argued that the emergence of multiple tribunals indirectly enhances the overall legitimacy as tribunals keep a critical eye over one another.<sup>24</sup> It can also strengthen the rule of law and prompt the development of international law.<sup>25</sup> However, as jurisdiction is most often no longer established at an ad-hoc basis but tribunals have automatic jurisdiction,

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<sup>17</sup> The United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, Montego Bay Jamaica, in force 16 November 1994, 1833 UNTS 397, SopS 50/1996 (UNCLOS).

<sup>18</sup> *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Award of 4. August 2000 (*Jurisdiction and admissibility*) *United Nations Reports on International Arbitral Awards*, vol. XXIII (2004) at 40, para. 52 (*Southern Bluefin Tuna*).

<sup>19</sup> Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press: Oxford, 2003) at 154.

<sup>20</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 468.

<sup>21</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 156.

<sup>22</sup> *ibid* at 20.

<sup>23</sup> *ibid* at 20.

<sup>24</sup> *ibid* at 20.

<sup>25</sup> Nikolaos Lavranos, ‘Regulating Competing Jurisdictions Among International Courts and Tribunals’, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 575-621 at 576.

based on an “inbuilt consent”, forum shopping and other problems relating to the overlap of jurisdictions are also likely to arise.<sup>26</sup> In establishing tribunals, their compatibility with already existing ones is not considered, which increases the risks associated with overlapping jurisdictions.<sup>27</sup>

There are several issues that may be caused by the availability of multiple fora in the same dispute. Forum shopping strategies may be inconsistent with what the parties have actually agreed on about forum selection in dispute settlement.<sup>28</sup> Parallel litigation, subsequent or even simultaneous, uses up scarce judicial resources and raises litigation costs to all parties.<sup>29</sup> The biggest issue is the loss of predictability, as multiple litigations may lead to two conflicting decisions, which do not settle the dispute between the parties.<sup>30</sup> There is also unpredictability in multiple proceedings with regard to the finality of decisions, as relitigation threatens the authority of the first judgement.<sup>31</sup> As there is no “supreme court” in the international law arena that would settle the inconsistency, conflicting decisions may lead to a continuing dispute between the parties, despite the efforts and resources used for settling it.<sup>32</sup> However, it must be noted that the problems mostly arise when different proceedings are truly competing with one another in terms of identical parties, identical fact patterns and similar legal claims.<sup>33</sup> If two tribunals decide on different aspects of the dispute, the overlap might not be problematic.<sup>34</sup>

One prime example of the availability of multiple fora and the possibilities it offers for forum shopping is the *MOX Plant Case*,<sup>35</sup> where Ireland initiated a dispute concerning a MOX facility in Sellafield before the arbitral tribunals established under the UNCLOS and under the Convention for the Protection of the Marine Environment of the North-East

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<sup>26</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 21-23.

<sup>27</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 8.

<sup>28</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 30. Parties may have for example agreed not to initiate the WTO dispute settlement system. This issue is at the core of this thesis and will be addressed in depth below.

<sup>29</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 155.

<sup>30</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 30-31.

<sup>31</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 80.

<sup>32</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 44.

<sup>33</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 155.

<sup>34</sup> Joost Pauwelyn and Luiz Eduardo Salles ‘Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible solutions’, 42 *Cornell International Law Journal* (2009) 77-119 at 84. The authors give an example of a situation where the ICJ decides issues of territorial delimitation while the WTO rules on trade issues.

<sup>35</sup> UNCLOS Arbitral tribunal, *MOX Plant Case, Order No. 3 (Ireland v. the United Kingdom), Award of 24 June 2003, International Legal Materials, vol. 42 (2003) (the MOX Plant Case)*.

Atlantic (OSPAR).<sup>36</sup> The case was also brought before the European Court of Justice (ECJ).<sup>37</sup> The OSPAR tribunal gave its ruling without consideration of the other proceedings,<sup>38</sup> whereas the arbitral tribunal established under the UNCLOS requested that the parties would first find out whether or not the ECJ had jurisdiction in the matter. The UNCLOS tribunal stated that it would be inappropriate to proceed further under such circumstances as the possibility of conflicting decisions would not help the parties to resolve the dispute.<sup>39</sup>

In the WTO context, the issue of overlapping jurisdictions was most obviously present in the *Softwood Lumber* disputes between the United States and Canada. The disputes focused on Canada's alleged subsidies and anti-dumping duties issued by the United States on softwood lumber products, which created several GATT/WTO and NAFTA procedures.<sup>40</sup> Finally in 2006 the members settled the dispute, although the issue was later on raised again in international arbitration.<sup>41</sup> The WTO tribunals did not address the parallel litigation once during the dispute settlement, and no coordination took place between the tribunals.<sup>42</sup>

The WTO dispute settlement system appears to be compulsory and exclusive to disputes regarding WTO rights and obligations, and it has been referred to be a "quasi-automatic" system.<sup>43</sup> The jurisdiction of the WTO is exclusive but not general, meaning that only the WTO tribunals have jurisdiction to assess breaches of WTO obligations, but also that only breaches of WTO obligations can be assessed in the WTO dispute settlement proceedings.<sup>44</sup> Article 23 of the Dispute Settlement Understanding (DSU)<sup>45</sup> obliges members to abide by the rules of the agreement in case they consider their rights arising from the covered agreements to be nullified or impaired. Initiating the dispute settlement

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<sup>36</sup> The Convention on the Protection of the Marine Environment of the North-East Atlantic, Paris 1992, open for signature on 22 September 1992, in force 25 March 1988, replaces the Oslo and Paris Conventions, SopS 51/1998 (OSPAR Convention).

<sup>37</sup> Case C-459/03, *Commission of the European Communities v. Ireland*, Judgment of 30 May 2006, ECR I-4635.

<sup>38</sup> *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, Final Award of 2 July 2003, *International Law Reports*, vol. 126 (2005) at 59-151.

<sup>39</sup> *The MOX Plant Case*, *supra* note 35, para. 28.

<sup>40</sup> Brooks E. Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration', 30(1) *The Journal of the London Court of International Arbitration* (2014) 1-58 at 33.

<sup>41</sup> *ibid* at 33.

<sup>42</sup> Allen and Soave, 'Jurisdictional Overlap', *supra* note 40 at 33.

<sup>43</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 469.

<sup>44</sup> Van Damme, 'Jurisdiction, Applicable Law, and Interpretation', *supra* note 13 at 299-300.

<sup>45</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Marrakesh 15 April 1994, in force 1 January 1995, 1869 U.N.T.S. 401, SopS 5/1995, Article 23.

mechanism of the WTO requires only an allegation that a measure of another member impairs its trade benefits.<sup>46</sup> The Appellate Body has affirmed that the member challenging a measure does not even have to prove to be an actual exporter of the product, as every WTO member is a potential exporter.<sup>47</sup> Also, for a measure to be declared WTO inconsistent, the member challenging a measure does not have to prove that the measure has caused any actual trade effects.<sup>48</sup> The WTO dispute settlement system therefore appears to be available for the members under any circumstances regarding any dispute relating to their WTO rights.

However, it may well be that the same dispute can also be brought to the dispute settlement system of a PTA. PTAs usually include substantive rights and obligations that are parallel to those included in the WTO covered agreements.<sup>49</sup> They usually also provide for their own dispute settlement mechanisms which, due to these parallel rights and obligations, are overlapping with the dispute settlement mechanism of the WTO.<sup>50</sup> Many PTAs even attempt to exclude the jurisdiction of the WTO in certain situations. This evidently creates an overlap of jurisdictions, where two different fora are available for the settlement of the same dispute. There are many instances in which the issue of multiple litigations could have been contested in the WTO proceedings<sup>51</sup> and the WTO tribunals have indeed had to address the issue in the past.<sup>52</sup>

### 1.3. Thesis plan

By applying the method of legal dogmatics, I will examine whether the jurisdiction of a PTA can override the jurisdiction of the WTO, and whether the WTO tribunals have the powers to decline to exercise jurisdiction on the basis of the jurisdiction of a PTA. I will

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<sup>46</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 467.

<sup>47</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale And Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, para. 136 (*EC-Bananas*).

<sup>48</sup> Article 3.8 of the DSU states that "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

<sup>49</sup> Kwak and Marceau 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 466.

<sup>50</sup> *ibid* at 466.

<sup>51</sup> For example in *Canada – Periodicals* and in *US – Tuna II* the issue could have been raised but was not. Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997 (*Canada – Periodicals*); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 16 May 2012 (*US – Tuna II*).

<sup>52</sup> Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry From Brazil*, WT/DS241/R, adopted 22 April 2003 (*Argentina – Poultry*); Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006 (*Mexico – Soft Drinks*).



examine the effects that jurisdiction clauses included in PTAs could be considered to have on the jurisdiction of the WTO, and other possible ways to solve jurisdictional conflicts. This paper concentrates strictly on these preliminary questions of jurisdiction and admissibility, and I will not address other issues which might arise from the overlaps of jurisdictions between the WTO and PTAs.<sup>53</sup>

The topic is divided into three main sections. I will first examine these overlaps as a normative issue, concentrating on jurisdictional clauses included in the WTO agreements and in PTAs. I will study the overall hierarchy of the two systems and the question of applicable law in the WTO dispute settlement system. The question in this section is, can a PTA jurisdiction clause modify WTO member's rights and obligations arising from the covered agreements. I will then move on to consider the overlaps as a procedural question, setting aside the treaties and concentrating on rules of general international law established to govern the procedural issues in international adjudication. The question here is whether a parallel proceeding can by itself prevent WTO litigation. Lastly, I will study the powers of the WTO tribunals and their abilities to decline to exercise jurisdiction. Here I will also examine more closely the relevant WTO case law regarding this issue. I will finish the paper by giving a brief outlook of the issue from a policy perspective while also addressing the challenges the situation causes to the whole system.

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<sup>53</sup> There are also other potential problems that can arise from the overlaps of jurisdictions between the WTO and PTAs. It is for example possible that by acting consistently with its PTA rights and obligations, or even aiming to fulfil the obligations stated in a ruling of a PTA tribunal, a member is found to be breaching its WTO obligations. See Appellate Body Report, *Brazil – Measures Affecting Imports Of Retreaded Tyres*, WT/DS332/AB/R, adopted 3 December 2007.

## **2. Jurisdictional conflicts between the WTO and PTAs as a normative issue**

In international law, jurisdiction of a tribunal derives from the consent of the states. A state cannot therefore be subjected to the jurisdiction of a tribunal unless it has consented to it.<sup>54</sup> It is also normal that states make subsequent agreements that might affect the jurisdiction of different tribunals. In such cases it must be determined whether the later treaty has modified the prior treaty, and if it has, how.<sup>55</sup> This analysis is relevant also in the WTO context, as members have signed a number of PTAs that contain provisions which exclude under certain conditions the seemingly mandatory jurisdiction of the WTO. This raises the question of the validity of these jurisdiction clauses. If such a dispute settlement provision is found valid and legal, it would mean that the parties can contract out of the jurisdiction of the WTO.

Can the WTO members agree that the provisions of the DSU are not applicable in their trade disputes? Can the jurisdiction of the WTO be excluded in the first place? These are the questions to which I will try to find a solution in this first section. The main question is, whether a norm included in a non-WTO agreement can affect the WTO and its jurisdiction. I will address the issue of jurisdictional overlaps from normative perspective, determining the effects of these jurisdiction clauses to the jurisdiction of the WTO. I will first present the different types of jurisdiction clauses found in PTAs and explain why a conflict may arise. I will also assess whether there can truly be a conflict between different fora by analysing the concept of a conflict. I will then move on to addressing the conflicts first by studying the inherent conflict between the two systems, and then by examining the conflicts of applicable law and the conflict-solving principles of public international law.

### **2.1. Jurisdiction clauses and their conflict-causing potential**

The jurisdiction of the WTO is stated in Article 23 of the DSU, which reads as follows: “When WTO members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of the Dispute Settlement Understanding.”<sup>56</sup> Each WTO member has agreed to be bound by the jurisdiction of the WTO when becoming a member.

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<sup>54</sup> Vaughan Lowe, ‘Overlapping Jurisdiction in International Tribunals’, 20 *Australian Year Book of International Law* (1999) 191-204 at 193.

<sup>55</sup> *ibid* at 193.

<sup>56</sup> Article 23.1 of the DSU.

The dispute settlement system is one of the cornerstones of the WTO, and it easily attracts jurisdiction over disputes with potential trade effects.<sup>57</sup> No other court or tribunal is entitled to assess breaches of WTO obligations and members cannot even determine that a breach has occurred without first initiating a dispute in the WTO dispute settlement system.<sup>58</sup>

However, PTAs often include jurisdiction clauses as well. There are different types of jurisdiction clauses, and one PTA might include several forms of them.<sup>59</sup> For example the North American Free Trade Agreement (NAFTA)<sup>60</sup> and the Olivos Protocol for the Settlement of Disputes in Mercado Común del Sur (MERCOSUR)<sup>61</sup> include so called fork-in-the-road clauses which state that the first forum selected has exclusive jurisdiction in the matter. The choice of forum is irreversible, and the possibility to initiate the dispute under another forum is precluded.<sup>62</sup> The purpose of such clauses is not to deem one forum more preferable than the other, but merely to avoid multiple litigations in the same matter.<sup>63</sup>

Another type of jurisdiction clause is an anti-concurrent clause which prohibits parallel proceedings but allows subsequent proceedings on the same issue.<sup>64</sup> An anti-concurrent type of clause can be found in the EU–Mexico FTA.<sup>65</sup> By contrast, a preferential jurisdiction clause either gives exclusive jurisdiction to one forum or leaves the choice of forum to the respondent.<sup>66</sup> PTAs include PTA-first clauses, which give the dispute settlement system of the PTA exclusive jurisdiction over certain types of disputes, but also WTO-first clauses, which favour the WTO dispute settlement. For example the NAFTA includes a PTA-first provision in relation to disputes concerning certain sanitary and

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<sup>57</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 467.

<sup>58</sup> Article 23.2(a) of the DSU.

<sup>59</sup> Son Tan Nguyen, 'The Applicability of RTA Jurisdiction Clauses in WTO Dispute Settlement', 16 *International Trade and Business Law Review* (2013) 254-294 at 256.

<sup>60</sup> North American Free trade Agreement, signed 17 December 1992, in force 1 January 1994, 32 I.L.M. 289 (1993), (NAFTA), Articles 2005(1) and 2005(6).

<sup>61</sup> Olivos Protocol for the Settlement of Disputes in MERCOSUR, signed 18 February 2002, in force 10 February 2004, 2251 UNTS 288 (Olivos Protocol) Article 1(2).

<sup>62</sup> Salles, 'Forum Shopping in International Adjudication', *supra* note 15 at 245.

<sup>63</sup> *ibid* at 245.

<sup>64</sup> Nguyen, 'The Applicability of RTA Jurisdiction Clauses', *supra* note 59 at 256.

<sup>65</sup> 2001/153/EC: Decision No 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement Economic Partnership, Article 43(4). Official Journal of the European Communities L 070, 12/03/2001.

<sup>66</sup> Nguyen, 'The Applicability of RTA Jurisdiction Clauses', *supra* note 59 at 265.

phytosanitary measures<sup>67</sup> and the EU–Chile Free Trade Agreement gives preference to the WTO dispute settlement in disputes relating to obligations that are equivalent under the two systems.<sup>68</sup> It is also possible for a PTA to contain a provision excluding the possibility to appeal WTO panel reports.<sup>69</sup>

There seems to be a conflict between the provisions establishing the jurisdiction of the WTO and the jurisdiction clauses included in PTAs. What happens if a member initiates a dispute in the WTO dispute settlement system, while at the same time being member to a PTA that includes a preferential jurisdiction clause? Or when a member brings a case in the WTO system after having already initiated the same dispute under a PTA that includes a fork-in-the-road clause? I will now study the elements of a conflict of norms.

## 2.2. Normative conflict in the context of the WTO and PTAs

The problems arising from the overlap of jurisdictions between the WTO and PTAs could be avoided by merely stating that the matter raised in the WTO context and in the PTA system are not the same, as the law governing the two proceedings is not the same.<sup>70</sup> The WTO tribunal assesses the alleged breach of WTO obligations and the PTA tribunal assesses the situation in the light of PTA norms. Even if the provisions of the two treaties governing the dispute would be nearly identical, the applicable law would still be different.<sup>71</sup> It was already noted that the problems of overlaps of jurisdictions are present only when the jurisdictions are truly competing, and the identity of legal claims was one of the aspects mentioned in this regard.

However, after studying the concept of a conflict, this argument does not seem as persuasive. According to Pauwelyn, in order for a conflict of norms to exist there must be an overlap *ratio materiae, personae* and *temporis*.<sup>72</sup> In this context, the overlap *ratio personae* is fulfilled as the legal subjects of the conflict are parties that are members to

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<sup>67</sup> NAFTA Article 2005(4), also Article 2005(3).

<sup>68</sup> Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, in force February 2003, Article 189(4)(c).

<sup>69</sup> Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits', 37(6) *Journal of World Trade* (2003) 997-1030 at 1007.

<sup>70</sup> Kwak and Marceau 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 469.

<sup>71</sup> *ibid* at 482.

<sup>72</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003) at 165.

both the WTO and a PTA including a jurisdiction clause.<sup>73</sup> One of these members has to also act inconsistently with a PTA jurisdiction clause in order for a conflict to actualise. Regarding the overlap *ratione temporis*, the conflicting norms must exist at the same time so that a conflict can actualise.<sup>74</sup> Conflict of norms in this context arises when there is a jurisdiction clause in a PTA that is in force.

The argument of different matters relates to the subject-matter, the *ratio materiae* requirement. Too strict reading of the same subject-matter requirement has been cautioned and considered to be unsuitable at least in situations as these under examination.<sup>75</sup> Also, defined narrowly, a conflict arises only when a member to two treaties cannot act consistently with obligations arising from these different treaties.<sup>76</sup> However, it is also possible to find a conflict in a situation where one rule prohibits a certain type of action that another one permits.<sup>77</sup> In some circumstances the permission to act might overrule the prohibition to act, or the other way around. Pauwelyn concludes that there is a conflict of two norms if “one constitutes, has led to, or may lead to, a breach of the other” (emphasis original).<sup>78</sup> In the same token a Study Group of the International Law Commission (ILC) has argued that the requirement of the same subject-matter can be said to be fulfilled if “two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party”.<sup>79</sup>

As WTO panels have jurisdiction over legal claims founded on WTO norms and PTA tribunals have jurisdiction over legal claims founded on the given PTA, there is by default a formal difference between the matters raised in these two systems.<sup>80</sup> Especially in situations where the PTA includes a jurisdiction clause, a substantive assessment of the

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<sup>73</sup> In this context it is important to note that the WTO obligations relevant to this assessment are considered to be a series of bilateral obligations, and are not of *erga omnes* nature. See more in section 2.3.2.

<sup>74</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 165.

<sup>75</sup> Report of the ILC Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, A/CN.4/L.682 (Publications of the Erik Castrén Institute of International Law and Human Rights, University of Helsinki, Research Reports 21/2007) (The Fragmentation Report) at 17, para. 21; Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 246; Pauwelyn, *Conflict of Norms*, *supra* note 72 at 171.

<sup>76</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 167.

<sup>77</sup> *ibid* at 170.

<sup>78</sup> *ibid* at 176.

<sup>79</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 18, para. 23.

<sup>80</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 246.

identity in two sets of proceedings would be more appropriate.<sup>81</sup> One could also consider the statement made by the arbitral tribunal established under the UNCLOS in the *Southern Bluefin Tuna* case, in which the tribunal stated that “*the Parties to this dispute . . . are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial*”.<sup>82</sup> It can be concluded that at least the issue cannot be immediately dismissed solely on the basis of formally different law.

A jurisdiction clause in a PTA, such as a PTA-first clause, prohibits a state that is a member of both agreements to bring a certain type of a case before a WTO panel. The DSU, on the other hand, allows, or even mandates, any member to initiate a WTO-related dispute in the WTO dispute settlement mechanism. The member raising the claim is not even required to be an actual exporter in order to be considered to have an interest in the matter and hence to be eligible to bring the case to the panel.<sup>83</sup> There is a conflict between a prohibition to act and a permission to act. Of course the DSU norms can also be interpreted to mandate the panel to address an issue brought before it,<sup>84</sup> creating thus a prohibition for non-action. In this reading, there is a prohibition conflicting with a prohibition, even though the subjects of the two norms are different, one addressing the action of a panel and the other addressing the action of a member.

Normative conflicts can be either inherent conflicts, where one norm in itself breaches another norm, or conflicts in the applicable law, where the reliance on one norm leads to a conflict with another norm. I will now proceed to addressing the possible ways to analyse these conflicts. I will first discuss the hierarchy between the two systems, and then continue by analysing the ways of solving the conflicts of applicable law.

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<sup>81</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 247.

<sup>82</sup> *Southern Bluefin Tuna*, *supra* note 18 at 95, para. 54.

<sup>83</sup> *EC – Bananas*, *supra* note 47, para. 136.

<sup>84</sup> Articles 19.2 and 3.2 of the DSU state that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”. This has been interpreted by some to mean that the panel cannot decline jurisdiction in any matter relevant to the WTO.

## 2.3. The hierarchical structure of the WTO and PTAs

### 2.3.1. *The hierarchy of norms in public international law*

The recognised sources of international law are identified in Article 38 of the Statute of the International Court of Justice (ICJ).<sup>85</sup> In addition to treaties and conventions, the relations between countries are governed by customary international law and general principles of law as well as by certain subsidiary sources.<sup>86</sup> In addition to the sources mentioned in Article 38 of the ICJ statute, there are also less official and continuously emerging sources such as soft law.<sup>87</sup> The ICJ statute does not define any normative hierarchy between the sources mentioned in Article 38, except for defining certain of them subsidiary, and therefore also secondary.<sup>88</sup>

In domestic law, there is a constitution that determines the hierarchy between different laws and other norms. This is not the case in international law, and especially not in international economic law.<sup>89</sup> Some authors have argued that there is no hierarchy and also that there cannot be any hierarchy due to the fact that all norms of international law derive from the will of the states.<sup>90</sup> The only generally accepted norms to be higher in hierarchy and also to bind every country are *jus cogens* norms, although the question of which norms are *just cogens* is far from being solved.<sup>91</sup> For all other treaty or other norms, there is no general hierarchical structure defining their relationship that would stem from public international law. For example one area of international law can be governed by a multilateral treaty and at the same time also on a regional or bilateral level, and the treaties are as a principle equivalent with each other.<sup>92</sup>

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<sup>85</sup> United Nations, Statute of the International Court of Justice, United Nations, *Statute of the International Court of Justice*, 18 April 1946, annexed to *Charter of the United Nations*, San Francisco 26 June 1945, in force 24 October 1945, 1 UNTS XVI.

<sup>86</sup> Article 38 of the ICJ mentions judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary sources.

<sup>87</sup> There is no generally accepted definition of soft law and there is also no consensus on its statute in international law. Some authors even argue that there is no soft law, but only law and non-law. However the ICJ has interpreted soft law in its decision. See for example *Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay)* I.C.J. Reports 2010 at 14.

<sup>88</sup> Dinah Shelton, 'International Law and 'Relative Normativity'' in Malcom D. Evans (ed.), *International Law* (4<sup>th</sup> edition, Oxford University Press: New York, 2014) 137-165 at 138.

<sup>89</sup> *ibid* at 142-152.

<sup>90</sup> Pierre-Marie Dupuy, *Droit International Public* (4th edition, Dalloz: Paris, 1998) at 14-16.

<sup>91</sup> Article 52 of the VCLT regulates the primacy of *jus cogens* norms. For a discussion on *jus cogens* and a hierarchy of norms see Dinah Shelton, 'Normative Hierarchy in International Law', 100 *American Journal of International Law* (2006) 291-323.

<sup>92</sup> Shelton, 'International Law', *supra* note 88 at 138.

According to Article 26 of the Vienna Convention on the Law of Treaties (VCLT)<sup>93</sup>, every treaty in force is binding upon the parties to it and must be performed by them in good faith. This article states the rule of *pacta sunt servanda*, which means that states must respect their agreements.<sup>94</sup> States are usually members to several treaties at the same time, and all of them should be respected equally. As the WTO and PTAs are all treaty-based systems, it seems that they are equal sources of norms. Jurisdiction clauses included in PTAs bind their members as all norms in international agreements do. It has to be kept in mind that the members of a PTA are bound by their PTA obligations regardless of whether they are considered to be applicable in the WTO system or not.<sup>95</sup> But because PTAs between WTO members are subject to the acceptance of the WTO, it has been argued the WTO takes precedence. The question then is, is there a hierarchy of norms between the two systems? I will now examine the question of the normative hierarchy between the WTO and PTAs; is there one and if there is, what are the effects of this hierarchy?

### **2.3.2. The inherent conflict between the WTO and PTA norms**

The first type of conflict to be studied is the inherent normative conflict between the two systems. As the WTO is a multilateral treaty creating obligations that bind all its members, a PTA norm derogating from its rules is inherently in conflict with it, and hence also illegal.<sup>96</sup> For example a free trade agreement derogating from the Most Favoured Nation (MFN) principle is inherently in conflict with the WTO obligations. However, the WTO specifically accepts PTAs with certain conditions. The question is what the relationship between the two regimes is, and what the position of PTAs is in the WTO system.

It has been suggested that PTAs are *inter se* modifications to the WTO agreements.<sup>97</sup> The ILC has defined *inter se* modifications as modifications to a multilateral treaty that take

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<sup>93</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; 8 International Legal Materials (1969) 679, SopS 32 - 33/80 (VCLT).

<sup>94</sup> The principle has been presupposed by every treaty well before the VCLT was established, and its original roots are almost impossible to trace. See more in Lord McNair, *The Law of Treaties*, (Oxford University Press: Oxford, 1961) at 493. The importance of *pacta sunt servanda* in international law was confirmed by the ICJ in the *Gabčíkovo–Nagymaros* case, where the ICJ stated that the wrongful conduct of both countries “did not bring the treaty to an end nor justify its termination”. *Case concerning the Gabčíkovo–Nagymaros Project (Hungary v. Slovakia) I.C.J. Reports 1997*, para. 114.

<sup>95</sup> Members can therefore face sanctions or other consequences in the PTA system when acting against those obligations. See Kwak and Marceau, ‘Overlaps and conflicts of jurisdiction’, *supra* note 12 at 483.

<sup>96</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 311. It is important to note that the PTA derogating from WTO rules would not be invalid, as the parties are not legally incompetent to enter into the WTO-inconsistent PTA.

<sup>97</sup> Thomas Cottier and Marina Foltea, ‘Constitutional Functions of the WTO and Regional Trade Agreements’, in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press: Oxford, 2006) 43-75 at 55.



place only between certain of the members to that treaty.<sup>98</sup> In the context of the WTO and PTAs, this means that a PTA modifies the WTO covered agreements, but only between the members of the PTA. In order for an *inter se* modification to be possible within a multilateral system, the obligations stemming from that agreement have to be of bilateral nature.<sup>99</sup> This means that the obligations are not *erga omnes partes*, owed to all the members to a treaty as a whole, but a series of bilateral obligations “made” to each member separately. In the case of *erga omnes partes* obligations, *inter se* modifications would not be possible as the modifications would affect members not participating to the agreement. Those WTO obligations that are relevant to this discussion are considered to be a series of bilateral obligations.<sup>100</sup> Also, *inter se* modifications are to be distinguished from treaty amendments, which revise the original treaty and bind all the members.<sup>101</sup>

The possibility for treaty modifications is defined in Article 41(1) of the VCLT, which states that two or more of the members to a multilateral treaty may modify the treaty as between themselves if such modification is either explicitly allowed (Article 41(1)(a)) or not prohibited by the multilateral agreement (Article 41(1)(b)).<sup>102</sup> Modifications can therefore be either explicitly permitted or prohibited by a multilateral treaty. The idea behind Article 41(1)(a) is that the drafters of a multilateral treaty have given the members an option to contract out of the agreement if they so wish.<sup>103</sup> If the treaty however remains silent about the possibility of modifications, strict conditions stated in Article 41(1)(b) VCLT have to be fulfilled. Firstly, a modification is possible on the condition that it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations”<sup>104</sup> and secondly, if it “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and

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<sup>98</sup> Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission* 1966 vol. II. at 235.

<sup>99</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 52-53. A different alternative would be that the obligations would be obligation *erga omnes partes*, owed to all the members to a treaty as a whole. In this case *inter se* modifications would not be possible as the modifications would affect members not participating to the agreement.

<sup>100</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 69-70. Pauwelyn argues that some WTO obligations are however integral and not reciprocal. In his view, such obligations are those that relate to the operation of the WTO bodies, for example procedures on voting. See more in Pauwelyn, *Conflict of Norms*, *supra* note 72 at 70.

<sup>101</sup> Provisions for amending multilateral treaties are found in Article 40 of the VCLT.

<sup>102</sup> The requirements under the provisions of Articles 41(1)(a) and (b) of the VCLT differ, as the subparagraph (b) has additional requirements.

<sup>103</sup> Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edition, Manchester University Press: Manchester, 1984) at 108.

<sup>104</sup> Article 41(1)(b)(i) of the VCLT

purpose of the treaty as a whole”.<sup>105</sup> According to Article 41(2) VCLT, states entering into *inter se* treaties have to notify other members of the multilateral treaty about their intention and of the modification, unless in a case falling under paragraph 1(a) the treaty provides otherwise.<sup>106</sup>

*Inter se* modifications bring about two different types of relations. The legal relationship between a state that is a member to an *inter se* agreement and states not members to that agreement remain intact and are governed solely by the multilateral treaty. The legal relations between states that are both members to the *inter se* agreement are altered by the agreement.<sup>107</sup> The purpose of an *inter se* modification is not to revise the multilateral treaty, but is intended to modify its application in the legal relations between the members of the *inter se* treaty.<sup>108</sup> The requirement set for modifications not to alter the “effective execution of the object and purpose” of the multilateral treaty<sup>109</sup> means that *inter se* treaties cannot be completely in contradiction with the original treaty.

Article 41 VCLT creates a structure that appears as a hierarchy, no matter which subparagraph is considered as the basis for the *inter se* modification. An *inter se* treaty is legal only if it is either explicitly accepted by the multilateral treaty or if it is not prohibited by it and fulfils the conditions set in Article 41(1)(b). If neither of these requirements is fulfilled, the *inter se* modifying treaty is illegal, even as for between the members to it.<sup>110</sup> The multilateral treaty thus determines the legality of a later treaty, and not only its own priority over it.<sup>111</sup> In this sense, the multilateral treaty can be seen to be higher in hierarchy than the later modifying treaty. Article 41 can be argued to create an exception to the rule of contractual freedom of states.<sup>112</sup>

PTAs modify the WTO covered agreements as between the members to the PTA, and are therefore *inter se* modifications in the meaning of Article 41 of the VCLT. WTO explicitly allows its members to enter into PTAs provided that certain conditions are met. I will now

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<sup>105</sup> Article 41(1)(b)(ii) of the VCLT.

<sup>106</sup> Article 41(2) of the VCLT.

<sup>107</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 155.

<sup>108</sup> *ibid* at 156.

<sup>109</sup> Article 41(1)(b)(ii) of the VCLT.

<sup>110</sup> Pauwelyn stresses the fact that the question is about illegality, not invalidity. The multilateral treaty does not make the later treaty invalid, even if it is prohibited by it. Pauwelyn, *Conflict of Norms*, *supra* note 72 at 310–311. Koskenniemi is of the view that it is up to the multilateral treaty to define the consequences of a non-VCLT consistent *inter se* treaty. See more in Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 164.

<sup>111</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 310.

<sup>112</sup> *ibid* at 313.

present these requirements set for the establishment for PTAs, and then discuss the structure they create for the relationship between the WTO and PTAs.

### ***2.3.2.1 The right of WTO members to enter into PTAs***

WTO allows its members to enter into PTAs. The General Agreement on Tariffs and Trade (GATT)<sup>113</sup> and the General Agreement on Trade in Services (GATS)<sup>114</sup> address the issue somewhat differently. Article XXIV of the GATT distinguishes between customs unions and free trade areas, whereas Article V of the GATS addresses economic integration as a whole. In addition to the provisions of the GATT and the GATS, special rules have been granted to developing countries. The so-called enabling clause allows developed country members to grant differential and more favourable treatment to developing countries as opposed to other members on a non-reciprocal basis.<sup>115</sup> These WTO provisions make it clear that the WTO is not indeed objecting regional integration, but that it accepts PTAs. The right to enter into a PTA is however conditional as PTAs must fulfil certain requirements set out in the GATT and in the GATS.

Firstly, the members are required to notify the PTAs to the relevant WTO organs.<sup>116</sup> The WTO Committee on Regional Trade Agreements (CRTA) will examine the GATT consistency of the PTA.<sup>117</sup> In the context of the GATS, the notification shall be made to the Council for Trade in Services,<sup>118</sup> but it is again the CRTA that will evaluate the WTO consistency of the agreement.<sup>119</sup> The notification about the PTA should be made “promptly”.<sup>120</sup> However, the Panel in *US – Line Pipe* stated that even if the CRTA has not yet given its final decision on a matter, the PTA in question can still be found to be

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<sup>113</sup> GATT 1994: General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Marrakesh 15 April 1994, in force 1 January 1995, 1869 U.N.T.S. 401, SopS 5/1995 (GATT).

<sup>114</sup> GATS: General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Marrakesh 15 April 1994, in force 1 January 1995, 1869 U.N.T.S. 401, SopS 5/1995 (GATS).

<sup>115</sup> Differential and more favourable treatment reciprocity and fuller participation of developing countries, WTO legal texts, decision of 28 November 1979 (L/4903).

<sup>116</sup> Article XXIV.7(a) of the GATT and Article V.7(a) of the GATS.

<sup>117</sup> The CRTA was established by a WTO General Council decision on 7 February 1996, WTO document WT/L/127.

<sup>118</sup> Article V.7(a) of the GATS.

<sup>119</sup> Committee on Regional Trade Agreements, Decision of 6 February 1996, WTO document WT/L/127, para. 1(a).

<sup>120</sup> Article XXIV.7 (a) of the GATT and Article V.8 (a) of the GATS. It would be logical to assume the members of the PTA would have to wait for the CRTA to give its approval before the Agreement could enter into force, but this is often not the case. In many cases PTAs have been notified after their establishment, probably the most significant example of this is the notification of the NAFTA. See more in Matsushita, Shoenbaum and Mavroidis, *The World Trade Organization*, *supra* note 3 at 561.

consistent with the GATT and a member to that PTA can base its defence on Article XXIV.<sup>121</sup>

The second condition is the prohibition to raise the level of barriers to trade for other members from what they were prior to the formation of the PTA.<sup>122</sup> The Appellate Body defined this obligation in *Turkey – Textiles* saying that “[a] customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries” (emphasis original).<sup>123</sup> This means that PTAs are not allowed to make trade between members and non-members to the PTA more onerous than it was before the PTA was in force. Otherwise the main objective of the WTO, multilateral trade liberalisation, would be jeopardised.

The last requirement is to open substantially all trade between the parties to the PTA.<sup>124</sup> This means that members to a PTA must liberalise practically all trade between them for the agreement to be WTO-consistent. However, the substance and coverage of the provisions governing these requirements in the GATT and in the GATS have not been fully clarified in WTO jurisprudence.<sup>125</sup>

The Appellate Body has clarified in *Turkey – Textiles* that in order for a member to base its defence about a WTO-inconsistent measure on a PTA justification two requirements have to be fulfilled. First, the defendant must demonstrate that the PTA fully meets the requirements set out above. Secondly, the member must demonstrate that the formation of that PTA would have been prevented if it was not allowed to introduce the challenged measure.<sup>126</sup> This is the so-called necessity test introduced by the Appellate Body in the context of Article XXIV. Provided that both of the requirements are fulfilled, members can

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<sup>121</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 29 October 2001, paras. 7.142 and 7.144 (*US – Line Pipe*). In 2006 the General Council established a Transparency Mechanism for Regional Trade Agreements to further transparency in trade negotiations. This mechanism requires members who are negotiating a PTA to inform the WTO about the agreement already when it is under negotiations or at the latest after it has been signed and become public. Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WTO document WT/L/671, para. 1 (a) and (b).

<sup>122</sup> Article XXIV.5 of the GATT and Article V.4 of the GATS.

<sup>123</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 22 October 1999, para. 57 (*Turkey – Textiles*).

<sup>124</sup> Article XXIV.8 of the GATT and Article V.1 of the GATS.

<sup>125</sup> Matsushita, Schoenbaum, Mavroidis, *The World Trade Organization*, *supra* note 3 at 568. See Appellate Body Report, *Turkey – Textiles* *supra* note 123, para. 48 for an analysis regarding the requirement under the GATT.

<sup>126</sup> Appellate Body Report, *Turkey – Textiles*, *supra* note 123, para. 58.

justify derogations from their WTO obligations on the basis of a PTA. However, what modifications members can base on Article XXIV justification remains unclear.

The Appellate Body stated in *Peru – Agricultural Products* that the references to “facilitating trade” and “closer integration” found in Article XXIV.4 are not consistent with a reading that would offer a “broad” defence for PTA measures that “roll-back on Members’ rights and obligations under the WTO covered agreements”.<sup>127</sup> This could mean that measures restricting trade between PTA members may not fulfil the requirements. In fact, the finding may significantly limit the possibilities to include WTO-minus provisions in PTAs.<sup>128</sup>

### 2.3.3. *Solving the inherent conflict*

The question raised here is what modifications to the WTO agreements are legal. Cottier and Foltea argue that the relationship between the WTO and PTAs is to be determined through Article 41(1)(a) of the VCLT because the GATT and the GATS specifically allow members to enter into PTAs. The trade relations between WTO members are lawfully modified only if the modifying treaty fulfils the abovementioned conditions, and therefore PTAs are necessarily lower in hierarchy.<sup>129</sup> Cottier and Foltea argue that there is a constitutional hierarchy between the WTO and PTAs that stems from Article 41(1)(a) of the VCLT, and if a PTA is in conflict with the requirements of the GATT and the GATS, the PTA cedes.<sup>130</sup>

Pauwelyn considers Articles XXIV of the GATT and V of the GATS as prohibitions to conclude PTAs that are inconsistent with the conditions set out in those articles.<sup>131</sup> Pauwelyn thus argues that the legal basis to determine the relationship between the WTO and PTA norms is found in Article 41(1)(b) of the VCLT. If a PTA is found to be inconsistent with the requirements of Articles XXIV of the GATT and V of the GATS, members cannot enforce the PTA, not even between themselves. This prohibition is about a prior treaty prohibiting certain types of *inter se* modifications to it, and therefore making such modifications illegal. In this case the WTO norms determine the obligations between

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<sup>127</sup> Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 20 July 2015, para. 5.116 (*Peru – Agricultural Products*).

<sup>128</sup> Joost Pauwelyn, ‘Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence’ (10. February 2016), available at SSRN: <http://ssrn.com/abstract=2731144> or <http://dx.doi.org/10.2139/ssrn.2731144> at 22. I use the term WTO-minus to refer to provisions that reduce members’ WTO rights.

<sup>129</sup> Cottier and Foltea, ‘Constitutional Functions of the WTO’, *supra* note 97 at 56.

<sup>130</sup> *ibid* at 57.

<sup>131</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 303.

members.<sup>132</sup> If the treaty that *inter se* modifies the relationship between its members is however WTO-consistent, the WTO agreement does not prohibit it, and the norms of that *inter se* agreement determine the legal relationship between its members.<sup>133</sup> According to Pauwelyn's theory, there is a structure where firstly Article XXIV of the GATT and Article V of the GATS work as an exception that regulates the legal relationship of PTA members and third countries, and secondly the *inter se* relations of the PTA members are governed by Article 41(1)(b) of the VCLT.<sup>134</sup> It must be kept in mind that also Article 41(1)(b) protects third countries, as the modifications cannot nullify their rights.

For Cottier and Foltea as well as for Pauwelyn the WTO norms are higher in hierarchy at the time of forming a PTA as they create the conditions which the latter have to fulfil in order to be legal. However, after the PTA has been accepted to be WTO consistent, this seems to no longer be the case. As a PTA modifies the WTO covered agreements as between the parties to it, the trade relations of the PTA members are governed by both agreements, and potentially primarily by the PTA norms.

The difference between the two views is in the scope of the modification. If we adopt a strict reading of what is proposed by Cottier and Foltea, it could be argued that the modifications can only be made to the GATT and the GATS, as the provisions have a limited scope of application that does not necessarily cover other covered agreements. It could be argued that modifications are only allowed to be made to those agreements, as only those agreements are mentioned in the provisions allowing the modifications. However, this would mean that modifications to all other agreements are illegal. It is undisputed that PTAs must fulfil the requirements of Article XXIV of the GATT and V of the GATS to be WTO-consistent, but the position of modifications made to other agreements remains unclear under this interpretation. A strict reading would prohibit all other modifications, or at least make all modifications subject to the requirements and tests created for the provisions.

Pauwelyn's interpretation would lead to a wider application, as potentially all agreements and provisions could be subjected to modifications, provided that there was no prohibition to undertake them. Only in case such a prohibition was found would a modification be

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<sup>132</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 310.

<sup>133</sup> *ibid* at 321.

<sup>134</sup> Pauwelyn, 'Interplay Between the WTO and Other International Legal Instruments and Tribunals', *supra* note 128 at 21 footnote 82.

illegal. As Articles XXIV of the GATT and V of the GATS regulate the relationship between PTA members and third countries, they do not affect the *inter se* relations of PTA members. Also, even if those provisions were to be considered as applicable between PTA members, they do not regulate modifications made to other covered agreements, meaning that such modifications are covered by Article 41(1)(b) of the VCLT.<sup>135</sup> The difference between the views is mainly whether Articles XXIV of the GATT and V of the GATS and the tests established under those provisions regulate the WTO-consistency of the PTA in general or whether each and every modification must fulfil their requirements.

In *Peru – Agricultural Products* the Appellate Body addressed the WTO compatibility of *inter se* modifications in a PTA, stating that their legality is not to be analysed through Article 41 of the VCLT, but the findings are to be based on Articles XXIV of the GATT, V of the GATS and the enabling clause.<sup>136</sup> The Appellate Body also reminded that the purpose of PTAs is to further liberalise trade between the members, not to create additional restrictions to their WTO rights and obligations.<sup>137</sup> While it is clear that the assessment of the legality of PTAs is based on the relevant WTO provisions, I do not consider that this limits the applicability of Article 41 of the VCLT when analysing *inter se* modifications. The reading of the Appellate Body seems to explicitly follow the route of Article 41(1)(a), as it states that a modification is to be analysed on the basis of the criteria developed for Article XXIV justification. However, based on this analysis, it could be understood that only such modifications that are specifically allowed by the covered agreements are accepted, and therefore that the position suggested by Cottier and Foltea is to be followed.

The *Peru – Agricultural Products* report leaves a few questions unanswered. Articles XXIV of the GATT and V of the GATS only refer to “this agreement”, which leaves the question of *inter se* modifications made in other covered agreements unclear. It could be argued that those provisions only set a general framework for PTAs, and provided that the conditions are fulfilled, *inter se* modifications to agreements other than the GATT and the GATS are legal as long as they are not prohibited in the texts of other covered agreements and do not affect the rights of third parties. However, even though the analysis in *Peru – Agricultural Products* was made in relation to the Agreement on Agriculture, the Appellate Body considered that the analysis was to be based on Article XXIV of the GATT. This

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<sup>135</sup> Pauwelyn, ‘Interplay Between the WTO and Other International Legal Instruments and Tribunals’, *supra* note 128 at 21.

<sup>136</sup> Appellate Body Report, *Peru – Agricultural Products*, *supra* note 127, para. 5.113.

<sup>137</sup> *ibid*, para. 5.116.

raises the question whether all modifications need to also fulfil the requirements developed for Article XXIV justification, mainly the necessity test created in *Turkey – Textiles*.

If the statement of the Appellate Body is considered to mean that all PTA measures derogating from the WTO covered agreements are to be analysed through the necessity test established in *Turkey – Textiles*, it is likely that no WTO-minus obligations would ever be found legal. It is difficult to imagine how any limitation would be considered to be so fundamental that in the absence of that measure the formation of the PTA would have been prevented. For example it is likely that modifications to the DSU would not be found to fulfil the test. Following Pauwelyn's argumentation, the test in *Turkey – Textiles* only applies to measures affecting the rights of third parties and not to the *inter se* relations of PTA members. However, this does not seem to be the interpretation of the Appellate Body based on its analysis in *Peru – Agricultural Products*.

In any case, the reasoning of the Appellate Body still leaves open the question whether modifications to other covered agreements are to be analysed through Article XXIV or whether modifications in cases that do not fall in its scope are governed by Article 41(1)(b) of the VCLT. Pauwelyn has noted that if the statement made by the Appellate Body in *Peru – Agricultural Products* meant that no modifications except for those falling in the scope of Articles XXIV of the GATT and V of the GATS were allowed, it would effectively put the WTO covered agreements above all other international agreements.<sup>138</sup> It is true that in case all *inter se* modifications were analysed through Article XXIV, members would have very limited scope to undertake WTO-inconsistent measures even if they did not have any effects on third parties.

As Article XXIV of the GATT and V of the GATS have only a limited scope, modifications to other covered agreements ought to be analysed through Article 41(1)(b) of the VCLT.<sup>139</sup> If this view is accepted, modifications to the other covered agreements would be allowed if there is no prohibition to undertake them, the rights of third parties would not be affected and it is not found to be incompatible with the effective execution of the object and purpose of the agreement in question as a whole.

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<sup>138</sup> Pauwelyn, 'Interplay Between the WTO and Other International Legal Instruments and Tribunals', *supra* note 128 at 21-22.

<sup>139</sup> *ibid* at 21.



If we find that a PTA fulfils the conditions set out in Articles XXIV of the GATT and V of the GATS, the inherent normative conflict is avoided and there is no overall primacy of WTO norms, meaning that PTA norms are both legal and bind the members of the PTA. Whether the test for PTAs applies to all individual PTA norms depends on the reading of the Appellate Body's findings in *Peru – Agricultural Products*. I would suggest that norms that fall outside the scope of Article XXIV of the GATT and V of the GATS are subject to the rules of Article 41(1)(b) of the VCLT. If the requirements of the VCLT are fulfilled, the provisions are legal. Different question then is whether such modifications can be taken into consideration in the WTO dispute settlement system, regardless of their validity and legality between the parties.

The next problem arises with the effectiveness of such modification. In order for such *inter se* modifications to be taken into consideration in the WTO dispute settlement proceedings, the panel would have to apply the PTA norm or interpret the relevant WTO norm in the light of the PTA provision. The Appellate Body has stated that such interpretations based on subsequent agreements that would completely diminish the “common intention” of the WTO parties are not supported by the general rules of treaty interpretation of Article 31 of the VCLT.<sup>140</sup> With regard to derogations from clear WTO norms the possibility to solve the conflict by using the PTA norms as tools for interpretation seems unlikely. For example in relation to the DSU there is practically no room for interpretation in the relevant norms. This might not however be the case in the context of using jurisdiction clauses as a means of interpretation when basing a claim on a procedural principle, such as *estoppel* or procedural good faith. I will address these issues separately in section 3.

The issue of the effects of PTAs as *inter se* modifications to the WTO agreements essentially boils down to the question of applicable law in the WTO system. Many scholars are of the view that such changes to the WTO agreements that are meant to bind the WTO tribunals should be done through the amendment process.<sup>141</sup> This would make the changes applicable to all members. Following this logic, even if PTA members can legally *inter se*

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<sup>140</sup> Appellate Body Report, *Peru – Agricultural Products*, *supra* note 127, para 5.94.

<sup>141</sup> See for example Joel Trachtman, 'Book Review: Conflict of Norms in Public International Law by Joost Pauwelyn', 98 *American Journal of International Law* (2004), 855-861 at 859.

modify their rights and obligations, these modifications are not applicable in the WTO dispute settlement.<sup>142</sup>

The issue of applicable law in the WTO is one of the most controversial issues of the WTO norms system. The approaches taken in this regard are quite opposite and lead to different conclusions. One end accepts the applicability of these jurisdiction norms and solves the problem by applying conflict rules, while the other end stresses the specific nature of the WTO and excludes the possibility of applying PTA jurisdiction norms in the WTO system completely. I will now move on to addressing the issue of conflicts of applicable law in the WTO.

#### **2.4. Conflicts of applicable law and how to solve them**

After the issue of inherent conflict has been resolved, the focus turns to the conflict of the applicable law. In order for a jurisdiction clause included in a PTA to affect the jurisdiction of the WTO, the panel has to take it into account when deciding upon its own jurisdiction. The panel has to therefore either apply the norm or apply a relevant WTO norm in the light of that jurisdiction clause, in other words use it as a means of interpretation. The assessment of the effects of jurisdiction clauses included in PTAs has to therefore begin from the question of the sources of law in the WTO system. Can non-WTO norms be taken into consideration when assessing the jurisdiction of the WTO in a certain matter? As PTAs are not WTO law, the answer to their applicability is far from clear. In fact the question of whether non-WTO agreements can be used as a source of law in the WTO is an extremely controversial issue.<sup>143</sup>

The WTO covered agreements do not state any conflict rules for the possible situations of conflict of norms. There is no clear guidance as to how the relationship between the WTO and PTA norms is to be settled, as the covered agreements merely state that members are entitled to enter into such agreements. The conditions set out for PTAs do not clarify the issue either. Are there any norms in the covered agreements that could be interpreted to either allow or prohibit the application of a jurisdiction clause excluding the jurisdiction of the WTO? Can jurisdiction clauses included in PTAs exclude the jurisdiction of the WTO?

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<sup>142</sup> Henry Gao and C. L. Lim, 'Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism As A 'Common Good' For RTA Disputes', 11(4) *Journal of International Economic Law* (2008) 899-925 at 919.

<sup>143</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2005) at 59.

In this section, I will first present the status of the WTO as a special regime of international law. I will then analyse the applicability of non-WTO norms in the WTO system, and the conclusions drawn from this discussion to the issues of conflicting PTA jurisdiction clauses. Lastly I shall present the conflict rules created to solve normative conflicts in public international law.

#### ***2.4.1. The WTO – A self-contained or merely a special regime?***

International trade law has always been considered to exist somewhat outside the mainstream of international law.<sup>144</sup> Also the WTO is often referred to as a self-contained regime, or at least as a specific subsystem of international law.<sup>145</sup> The concept of a self-contained regime was first established by the Permanent Court of International Justice in the *S.S. Wimbledon* case, where the Court had to decide whether the status of the Kiel Canal should be analysed through general law on international waterways or through special rules of the Treaty of Versailles. In that case, the Court established that the provisions of the Treaty of Versailles were substantially different from other rules regulating international watercourses and were therefore self-contained.<sup>146</sup> The concept was further developed by the ICJ in the *Teheran Hostages* case, where the court stated that the rules of international diplomatic law create a self-contained regime, meaning that they provide the necessary means of defence and sanctions, and exclude the use of the general rules of state responsibility.<sup>147</sup> The idea of self-contained regimes has been applied also in the *Nicaragua* case in the context of human rights treaties, although the ICJ did not specifically refer to the concept as such.<sup>148</sup>

The notion of self-contained regime constitutes a strong form of *lex specialis*, and it is generally used to refer to the exclusion of the application of general rules on state responsibility.<sup>149</sup> The Commentary of Article 55 of the ILC Draft Articles on the responsibilities of States for internationally wrongful acts also refers to “strong” forms of

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<sup>144</sup> Van den Bossche, *The Law and Policy of the WTO*, *supra* note 143 at 61.

<sup>145</sup> For example Gabrielle Marceau refers to the WTO as a specific subsystem, see Gabrielle Marceau, ‘WTO dispute Settlement and Human Rights’, 13 *The European Journal of International Law* (2002) 753-814 at 755.

<sup>146</sup> *Case of the S.S. “Wimbledon”*, P.C.I.J. Series A, No.1 (1923) at 23–24.

<sup>147</sup> *Case Concerning the United States Diplomatic and Consular Staff in Teheran* (United States of America v. Iran) I.C.J. Reports 1980 at 40, para. 86.

<sup>148</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) I.C.J. Reports 1986 (Merits), paras. 267-268.

<sup>149</sup> Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’, 17(3) *The European Journal of International Law* (2006) 483–529 at 490.

*lex specialis* in the context of self-contained regime.<sup>150</sup> After the ICJ report in the *Teheran Hostages* case, the concept has been applied in the context of secondary, not primary rules.<sup>151</sup> The term has been said to refer to “a particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules.”<sup>152</sup>

The mandatory nature of the WTO’s dispute settlement system is governed by Article 23 of the DSU, which excludes the members’ possibilities to “make a determination to the effect that a violation has occurred”<sup>153</sup> or to undertake unilateral countermeasures against another member without having initiated the WTO dispute settlement system.<sup>154</sup> All WTO-related conflicts are to be settled in the WTO system, and all measures taken outside its dispute settlement mechanism are forbidden. Even though the question of whether general rules of state responsibility could still be applied in the WTO context is not completely clear,<sup>155</sup> it is safe to say that at least in this narrow reading of the term, the WTO is a self-contained regime.

The concept of self-contained regime is however also used more broadly than merely to exclude the general rules of state responsibility. It is often used to refer to whole fields of specialised legal systems, to explain the use of specialised rules and techniques of interpretation.<sup>156</sup> This is also the case in the context of the WTO. For example Gabrielle Marceau defines the WTO as a “specific subsystem on international law with specific rights and obligations, specific claims and causes of action, specific violations, specific enforcement mechanisms and specific remedies in case of their violation”.<sup>157</sup> A very strict reading of a self-contained regime does not allow sources of law other than those created within its own system to be applied.<sup>158</sup> This specific nature of the WTO and its alleged autonomy are often argued to exclude the application of non-WTO law in the WTO legal system. Pauwelyn has cautioned not to give too much emphasis on the self-contained or

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<sup>150</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission* 2001 vol. II.

<sup>151</sup> Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 491–492. The ILC Draft Articles on State Responsibility also states that “[s]tates cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law”. ILC Draft Articles on State Responsibility, *supra* note 150 at 140.

<sup>152</sup> Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 495.

<sup>153</sup> Article 23.2(a) of the DSU.

<sup>154</sup> Article 23.2(c) of the DSU.

<sup>155</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 218-236.

<sup>156</sup> Koskeniemi, *The Fragmentation Report*, *supra* note 75 at 68.

<sup>157</sup> Marceau, ‘WTO dispute Settlement and Human Rights’, *supra* note 145 at 755.

<sup>158</sup> Wolfgang Weiss, ‘Security and Predictability under WTO Law’, 2(2) *World Trade Review* (2003) 183-219 at 201.

special nature of the WTO, as it is one thing to be self-contained in terms of state responsibility, and a whole other thing to be self-contained in terms of other aspects of international law, such as the law of treaties or the judicial settlement of disputes.<sup>159</sup>

It is important to note that self-contained or special regimes do not exist in complete isolation from public international law, as has been accepted also by the Appellate Body.<sup>160</sup> Therefore, even the WTO cannot be considered as a closed system.<sup>161</sup> The WTO treaty was created and now exists in the “wider body of international law”.<sup>162</sup> Self-contained regimes are therefore not to be seen as fully autonomous subsystems existing outside the reach of public international law.<sup>163</sup> The WTO panels and the Appellate Body have on several occasions applied the rules of general international law in their decision making process.<sup>164</sup> The interpretative effect of public international law is rather clearly stated in the DSU, as Article 3.2 of the DSU states that WTO rules are to be clarified in accordance with customary rules of interpretation of public international law. The panel has gone as far as to say that customary international law applies in the WTO to the extent that the WTO agreements do not “contract out” from it.<sup>165</sup>

As a special regime of international law, the WTO does not have to justify the non-application of general international law in every turn, and it can operate on the basis of the special rules created in the covered agreements.<sup>166</sup> It operates as a *lex specialis* with its own sanction mechanism. The effects of this “speciality” are however unclear and the direct applicability of non-WTO law remains disputed. It has been argued that on the basis of the WTO existing in the sphere of international law, the rules of public international law would apply in its functions, at least to the extent that the WTO has not contracted out from it.<sup>167</sup> The liberal side on the applicability of non-WTO law views the WTO as merely

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<sup>159</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 39.

<sup>160</sup> Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 29 April 1996 at 17 (*US – Gasoline*).

<sup>161</sup> Van den Bossche, *The Law and Policy of the WTO*, *supra* note 143 at 63.

<sup>162</sup> Anja Lindroos and Michael Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO’, 16(5) *The European Journal of International Law* (2005) 857-877 at 861.

<sup>163</sup> Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 492.

<sup>164</sup> See for example Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB7R, adopted 25 April 1997 at 14 (*US – Wool, Shirts and Blouses*); Appellate Body Report, *EC – Bananas*, *supra* note 47, para. 133; Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R, adopted 28 August 2000 (*US – 1916 Act*).

<sup>165</sup> Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 January 2000, para. 7.96 (*Korea – Procurement*).

<sup>166</sup> Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 488.

<sup>167</sup> Lindroos and Mehling, ‘Dispelling the Chimera’, *supra* note 162 at 861.

a branch of the “wider corpus of international law.”<sup>168</sup> On the other hand, the opposing side considers the panel’s mandate to be limited to applying only WTO law, and underlines the fact that the WTO is a specific, and also self-contained, system of international law. But what are the sources of law in the WTO?

#### ***2.4.2. The sources of law in the WTO legal system – Opposing approaches and conflicting conclusions***

As stated in section 2.3.1., the formal sources of international law are identified in Article 38 of the Statute of the ICJ. The sources include international conventions, custom and general principles of law as well as judicial decisions and teachings of highly qualified publicists. However, not all international tribunals apply the same law and sources, and as was noted in the context of specific subsystems, the level of application of general international law is a regime-specific issue as a regime may decide to contract out of certain aspects of it.<sup>169</sup>

There is no list of sources of law equivalent to Art 38 of the ICJ statute in the WTO covered agreements, and therefore the question of applicable law in the WTO has raised a significant amount of academic discussion. It has been suggested that some guidance as to the sources of law can be found in Articles 3.2 and 7 of the DSU.<sup>170</sup> Article 3.2 states that the WTO dispute settlement system serves to clarify the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. Article 7 refers to the covered agreements in defining the panel’s terms of reference. Article 7.2 of the DSU also states that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” Palmetier and Mavroidis have interpreted these provisions as a substitute for Article 38 of the ICJ statute, and in practice incorporate the same content to the WTO system.<sup>171</sup> However this view has not been widely accepted.<sup>172</sup>

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<sup>168</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 26.

<sup>169</sup> Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization*, *supra* note 3 at 23.

<sup>170</sup> David Palmetier and Petros C. Mavroidis, ‘The WTO legal system: Sources of Law’, *92 American Journal of International Law* (1998) 392-413 at 398.

<sup>171</sup> *ibid* at 399.

<sup>172</sup> See for example Gabrielle Marceau ‘A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement’, *33(5) Journal of World Trade* (1999) 87-152 at 109-110.

The fundamental sources of law in the WTO are the WTO legal texts, the covered agreements.<sup>173</sup> Art. 1.1 of the DSU states that “[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding”. Therefore only those agreements listed in Appendix 1 of the DSU are WTO covered agreements.<sup>174</sup> The jurisdiction of the panels is clearly limited to deciding on claims under the covered agreements. It could be easily concluded from this that the applicable law before the panel is found solely in the covered agreements.<sup>175</sup> Jurisdiction of the WTO and the scope of the applicable law before the panel are however two separate issues that have to be distinguished from one another.<sup>176</sup>

The problems arise when the panel is requested to take into consideration non-WTO law. As presented above, the WTO is a specific subsystem of international law that creates its own obligations and rights. The WTO is therefore mainly interested in the content of its own “special” law.<sup>177</sup> As these rights and obligations however overlap with other norms of international law, as is the case with PTA jurisdiction clauses, the extent of this specific nature of the WTO has to be studied in order to find out how much relevance can be given to norms created outside the WTO system. The Appellate Body has stated that the WTO agreements are not to be read in clinical isolation of public international law.<sup>178</sup> The question is, how far we can go with non-WTO law.

The “universalists” and “particularists”<sup>179</sup> have taken very different approaches on the applicability of non-WTO law, and somewhat heated discussion on this topic has taken place over the years. The restrictive camp views that the mandate of the WTO tribunals is

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<sup>173</sup> Covered agreements are those agreements listed in the Appendix 1 of the DSU.

<sup>174</sup> Article 1.1. of the DSU reads as follows: “[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”).

<sup>175</sup> Some scholars base their argument on the non-applicability of non-WTO norms on this limited jurisdiction. See for example Debra P. Steger, ‘The Jurisdiction of the World Trade Organization: Remarks by Debra P. Steger’, 98 *The American Society of International Law Proceedings* (2004) 135-146 at 143, where the author states that the WTO is not a court of general jurisdiction and that it therefore cannot enforce all international obligations.

<sup>176</sup> See for example Lorand Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’, 35(3) *Journal of World Trade* (2001) 499-519 at 503; Pauwelyn, ‘How to Win a WTO Dispute’, *supra* note 69 at 1000.

<sup>177</sup> Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 488.

<sup>178</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 29 April 1996, at 17.

<sup>179</sup> Definitions used by Simma and Pulkowski, in Simma and Pulkowski, ‘Of Planets and the Universe’, *supra* note 149 at 505.

clear: they can only apply WTO law.<sup>180</sup> WTO panels and the Appellate Body are not entitled to directly apply other than substantive WTO law.<sup>181</sup> This approach is mostly based on the wording of the DSU. The mandate of the panel and its possibilities to take non-WTO law into consideration is argued to be limited due to Articles 3.2 and 19.2 of the DSU. Article 3.2 DSU states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” The same is repeated in Article 19.2 DSU which states that “[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

According to this view, the prohibition to add to or diminish the rights and obligations provided by the covered agreements is seen as specifically significant. As the recommendations and rulings of the panel cannot add to or diminish the rights and obligations provided by the covered agreements,<sup>182</sup> and the terms of reference of the panel can only consist of WTO law,<sup>183</sup> and as the function of the panel is to assess the applicability of and conformity of the measure with the relevant covered agreements,<sup>184</sup> it would be “absurd” to suggest that non-WTO law could be applied.<sup>185</sup> The application of non-WTO rules would always lead to adding or diminishing the rights or obligations of members, and therefore the panels and the Appellate Body do not have the mandate to apply such norms.<sup>186</sup> As WTO panels or the Appellate Body cannot apply or enforce other treaties, these may only be examined when interpreting WTO law.<sup>187</sup> The supporters of this approach note also that had the members wished to grant a broader scope of applicable law in the WTO system, it would have been stated more clearly in the text of the DSU.<sup>188</sup>

Another approach suggests that all international law could be applied in the WTO, but in case there is an inconsistency between a WTO norm and a non-WTO norm, the former

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<sup>180</sup> Joel P. Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* (1999) 333-377 at 342.

<sup>181</sup> *ibid* at 347.

<sup>182</sup> Article 3(2) of the DSU.

<sup>183</sup> Article 7(1) of the DSU.

<sup>184</sup> Article 11 of the DSU.

<sup>185</sup> Trachtman, ‘The Domain of WTO’ *supra* note 180 at 342; Marceau, ‘A Call for Coherence’ *supra* note 172 at 109-110.

<sup>186</sup> Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’, 35(6) *Journal of World Trade* (2001) 1081-1131 at 1103.

<sup>187</sup> Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 *The European Journal of International Law* (2002) 753-814 at 753.

<sup>188</sup> Joel P. Trachtman ‘The Jurisdiction of the World Trade Organization: Remarks by Joel P. Trachtman’, 98 *The American Society of International Law Proceedings* (2004) 135-146 at 141.



applies and the latter cedes.<sup>189</sup> Bartels argues that the prohibition to add to or diminish the rights and obligations leads to a certain priority of WTO norms. The requirement of not to add to or diminish the rights and obligations provided by the covered agreements thus works as a limitation on the applicability of non-WTO norms in WTO dispute settlement. According to this approach, Articles 3.2 and 19.2 provide a rule that acts as a conflict rule.<sup>190</sup> Matsushita, Schoenbaum and Mavroidis seem to agree with this approach. Their view is that in case there is a conflict between a WTO norm and a non-WTO norm, the panel has to adhere to the WTO norm and reject any rule that is conflicting with it, supporting this approach by the prohibition to add to or diminish the rights and obligations provided in the WTO agreements.<sup>191</sup> The DSU does not restrict the possible sources of international law that could be applied in the dispute, but it does nevertheless create boundaries on the use of non-WTO law in dispute settlement.<sup>192</sup>

The liberal camp is of completely different view and specifically underlines the status of the WTO as a branch of international law, not giving too much emphasis on its self-contained nature.<sup>193</sup> Even without the explicit reference of Art 3.2 of the DSU to customary international law on treaty interpretation, those rules would have applied to the WTO treaty.<sup>194</sup> Attention is drawn to the fact that even though states can in their treaty relations contract out of certain or even all rules of international law,<sup>195</sup> they cannot contract out of the whole system of public international law.<sup>196</sup> The establishment of treaty relations happens automatically within the system of international law.<sup>197</sup> The issue of applicable law, from this point of view, boils down to the question of how much has the WTO contracted out of international law.<sup>198</sup> This contracting out may be explicitly stated in the text of the treaty, but it may also be implicit, and evidenced through treaty interpretation.<sup>199</sup>

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<sup>189</sup> This approach is adopted by Lorand Bartels, see for example Bartels, 'Applicable Law', *supra* note 176, and evidently also by Matsushita, Schoenbaum and Mavroidis, although they do not address this issue in great depth. See Matsushita, Schoenbaum and Mavroidis, 'The World Trade Organization', *supra* note 3 at 110.

<sup>190</sup> Lorand Bartels, 'Jurisdiction and Applicable Law in the WTO', Paper NO. 59/2014, *Legal Studies Research Paper Series*, University of Cambridge (2014) at 10.

<sup>191</sup> Matsushita, Schoenbaum and Mavroidis, 'The World Trade Organization', *supra* note 3 at 110.

<sup>192</sup> Bartels, 'Applicable Law', *supra* note 176 at 506.

<sup>193</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 26.

<sup>194</sup> *ibid* at 215.

<sup>195</sup> Except of course those rules that are considered as *jus cogens*.

<sup>196</sup> Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *The American Journal of International Law* (2001) at 539.

<sup>197</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 37.

<sup>198</sup> *ibid* at 38. This is one of the aspects of this discussion where the approaches differ the most. For example Trachtman argues that because the WTO is a court of limited jurisdiction, it does not have to explicitly

The liberal approach accepts the use of non-WTO law if it is applicable law between the parties, meaning that it binds both of the parties and is both valid and legal, and if it prevails over the conflicting WTO norm.<sup>200</sup> The fact that the jurisdiction of the panel is limited to claims under the covered agreements does not mean that the WTO agreements are the only applicable law available for them.<sup>201</sup> Non-WTO law is to be applied if it is relevant to the dispute and binds the parties, and the conflicts between the non-WTO norms and the WTO norms are to be resolved through conflict rules of international law.<sup>202</sup> As the WTO has not contracted out of the general rules of *lex posterior*, *lex specialis* or *inter se* modifications, these rules apply in the WTO system and have to be considered in the dispute settlement.<sup>203</sup> This approach has also been backed up by previous WTO jurisprudence. The panels and the Appellate Body have applied non-WTO rules in their jurisprudence, most often to fill the gaps left open by the covered agreements.<sup>204</sup> They have for example applied rules on burden of proof<sup>205</sup>, the right to use private counsel<sup>206</sup>, la compétence de la compétence<sup>207</sup> and non-retroactivity of treaties<sup>208</sup> which do not derive from the WTO covered agreements.

Perhaps the most prominent argument against the possibility to accept all international law as potentially applicable in the WTO system is that the WTO panels do not have the mandate to enforce non-WTO rules.<sup>209</sup> However, the enforceability of non-WTO rules is not at issue here. The limited jurisdiction of the WTO is undisputed; panels can only

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exclude the non-WTO law for it to become not-applicable. This exclusion stems automatically from the fact that the WTO's mandate only covers the application of the covered agreements. See Trachtman, 'The Jurisdiction of the World Trade Organization', *supra* note 188 at 139.

<sup>199</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 215.

<sup>200</sup> Pauwelyn, 'How to Win a WTO Dispute', *supra* note 69 at 1003-1005.

<sup>201</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 460.

<sup>202</sup> *ibid* at 473.

<sup>203</sup> *ibid* at 475.

<sup>204</sup> Joost Pauwelyn, 'The Jurisdiction of the World Trade Organization: Remarks by Joost Pauwelyn', 98 *The American Society of International Law Proceedings* (2004), 135-146 at 136. Some authors have however noted that Pauwelyn can only give examples on procedural rules of international law, and that he cannot show that the Appellate Body or the panels would have applied substantial non-WTO rules. See for example Nguyen, 'The Applicability of RTA Jurisdiction Clauses', *supra* note 59 at 267. Also Mitchell and Heaton have noted that "it is important to identify those principles of international law that are applied under inherent jurisdiction (as opposed to otherwise as applicable law) because the basis of their application is different." Andrew D. Mitchell and David Heaton 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function', 31 *Michigan Journal of International Law* (2010), 561-621 at 566.

<sup>205</sup> Appellate Body Report, *US – Shirts and Blouses*, *supra* note 164 at 14.

<sup>206</sup> Appellate Body Report, *EC – Bananas III*, *supra* note 47, para. 133.

<sup>207</sup> Appellate Body Report, *US – 1916 Act*, *supra* note 164. Also Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52.

<sup>208</sup> See for example Appellate Body Report, *EC – Bananas III*, *supra* note 47, para. 235.

<sup>209</sup> See for example Steger, 'The Jurisdiction of the World Trade Organization', *supra* note 175 at 143.

decide upon disputes regarding the covered agreements and their jurisdiction is therefore limited to deciding on whether or not a WTO obligation has been breached.<sup>210</sup> But when deciding whether a provision of a covered agreement has been breached, or in this case deciding whether the panel has jurisdiction to hear the matter, non-WTO law can create a legitimate defence, affecting the outcome of the panel's decision.<sup>211</sup> Koskenniemi has also stated that there is no provision in the WTO defining the scope of applicable law and that "[a] limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties".<sup>212</sup> Gao and Lim have clarified this difference by explaining that jurisdiction deals with the basis of a claim in a dispute, while the question of applicable law is concerned with the arguments that can be used to support the claim.<sup>213</sup> Limitation to the jurisdiction of the WTO tribunals is not the same thing as the applicable law in a dispute.<sup>214</sup>

The panel can never make a finding about a breach of a norm in another treaty, but according to this approach, it has to assess whether there is a non-WTO norm overruling a WTO norm that affects the matter at hand. Stating that a breach of a WTO norm is justifiable based on a non-WTO norm is not enforcing the non-WTO norm; it is merely stating that the WTO breach is acceptable. Also, finding that a non-WTO jurisdiction norm overrules the jurisdiction of the DSU based on the *lex specialis* or *lex posterior* rules is merely stating that the DSU norm is overruled, and therefore not applicable.

#### ***2.4.2.1. The direct applicability of PTA jurisdiction clauses***

How does the discussion on applicable law reflect to the issue of jurisdiction norms included in PTAs and their effects on the WTO's jurisdiction? As already stated, there are no clear provisions in the WTO covered agreements that would determine the relationship between WTO and PTA norms. The applicability of jurisdiction clauses included in PTAs is extremely controversial and has been analysed from different perspectives. PTAs are not listed in Appendix 1 of the DSU, and hence are not WTO law, even though they are explicitly allowed and governed by the WTO covered agreements. Could the DSU Articles on the jurisdiction of the WTO and the prohibition to add to or diminish the rights and obligations provided by the covered agreements be seen as a limitation to effective

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<sup>210</sup> Pauwelyn, 'The Jurisdiction of the World Trade Organization', *supra* note 204 at 135.

<sup>211</sup> Pauwelyn, 'How to Win a WTO Dispute', *supra* note 69 at 1003-1005

<sup>212</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75, para. 45.

<sup>213</sup> Gao and Lim, 'Saving the WTO from the Risk of Irrelevance', *supra* note 142 at 912.

<sup>214</sup> Bartels, 'Applicable Law', *supra* note 176 at 503.

modifications of the agreements? The question here is can the panel take the valid and legal PTA jurisdiction clause in the consideration.

The WTO member states' right to initiate a dispute in the WTO dispute settlement proceedings is stated in Art 23.1 of the DSU, which reads as follows: "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." Does the prohibition to diminish the rights provided by Articles 3.2 and 19.2 of the DSU mean that the members' rights to have their case heard in the WTO dispute settlement cannot be excluded, even if there is a rule binding the parties to the dispute restricting the panel's jurisdiction on the matter? If this was the case, it would mean that the PTA cannot modify the WTO's jurisdiction in a truly effective way in the *inter se* relations between the parties. The right to initiate the dispute settlement in the WTO would remain untouched notwithstanding the PTA norm stating the opposite.

Jurisdiction norms are effective as modifications only if norms other than those stemming from the covered agreements are taken into consideration in WTO dispute settlement. This would require the WTO to acknowledge the *inter se* modifications made by the members and also to allow them to affect its own functions. If, however, the WTO considers that it is a completely separate system and that norms stemming from other treaties cannot be applied, jurisdiction clauses could not overrule the jurisdiction of the WTO since such norms would be disregarded in the WTO context. The different approaches on the applicable law in the WTO system naturally lead to different conclusions on this matter.

The simplest conclusion comes from the restrictive camp. If non-WTO law cannot be applied, jurisdiction clauses in PTAs cannot be applied either. Special consideration is given to the wording of the DSU, especially to the prohibition stated in Articles 3.2 and 19.2.<sup>215</sup> Trachtman argues that the wording of the relevant DSU articles would be absurd if they could be overruled.<sup>216</sup> Marceau and Kwak consider Article 23 of the DSU to be a statement of compulsory and mandatory jurisdiction. If a member considers that its WTO rights are affected by a measure taken by another member, it has the right to initiate a dispute in the WTO dispute settlement mechanism, regardless of any non-WTO norm

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<sup>215</sup> Steger, 'The Jurisdiction of the World Trade Organization', *supra* note 175 at 143.

<sup>216</sup> Trachtman, 'The Jurisdiction of the World Trade Organization', *supra* note 188 at 140.

stating otherwise.<sup>217</sup> The panel thus has no right not to address the issue if a case is brought before it, even if there was a jurisdiction clause in another *inter se* treaty excluding its jurisdiction. This would diminish the members' right to initiate a dispute in the WTO dispute settlement system. Article 23 of the DSU provides a mandatory jurisdiction that a PTA cannot overrule, and thus such *inter se* modifications affecting its jurisdiction are not valid from the point of view of the WTO.<sup>218</sup>

Following the logic of the “middle-approach”, even if the parties to the dispute had agreed upon a valid jurisdiction clause, it could not affect the panel's jurisdiction. As Article 23 of the DSU offers all WTO members the right to access the dispute settlement of the WTO when they consider that their WTO rights have been nullified or impaired, a jurisdiction clause in a PTA could not be applied, as it would be in conflict with Article 23 and therefore it would diminish the dispute settlement rights granted by the WTO.<sup>219</sup> A jurisdiction clause cannot exclude the WTO's jurisdiction if one of the members to a PTA decided to trigger the WTO dispute settlement mechanism. The norm would not bind the panel as it cannot be applied, even if it was legal and binds the parties.

The liberal approach views nothing in the WTO covered agreements that would limit the members' possibilities to include an effective jurisdiction clause in a PTA. This means that the WTO might have to decline jurisdiction in a situation where the conflict rules lead to a PTA norm to be the prevailing norm in a specific situation. Pauwelyn argues that Arts 3.2 and 19.2 of the DSU do not proclaim that WTO law should always prevail or that the panel has jurisdiction in each and every case brought before it. Not only do they not have an effect on the jurisdiction of the panel but they also do not affect the applicable law before the panel.<sup>220</sup> The prohibition to add to or diminish the parties' WTO rights and obligations is not relevant here, since the parties have both agreed to these non-WTO norms that have to be applied.<sup>221</sup> In his view these articles serve as an interpretative tool for the panels and for the Appellate Body when interpreting the covered agreements. The panels and the Appellate Body “may not create new rights and obligations, they must apply those that

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<sup>217</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 466–467.

<sup>218</sup> *ibid* at 466-467,

<sup>219</sup> Bartels, ‘Jurisdiction and Applicable law’, *supra* note 190 at 10.

<sup>220</sup> Pauwelyn, *Conflicts of Norms*, *supra* note 72 at 353.

<sup>221</sup> Pauwelyn also notes that when interpreting WTO norms in the light of non-WTO law, which is widely accepted by the proponents of the restrictive approach, also adds to or diminishes from WTO provisions. See Pauwelyn, ‘The Jurisdiction of the World Trade Organization’, *supra* note 204 at 138.

WTO members agreed to.”<sup>222</sup> This does not mean that the members cannot decide to *inter se* agree that the provisions do not apply as for between themselves.

The different approaches thus lead to completely different conclusions. There are two alternative conclusions to the issue. If the *inter se* nature of PTA jurisdiction clauses and their applicability is accepted in the WTO system, it leads to the possible exclusion of the WTO’s jurisdiction in certain matters. The conflict of norms between the WTO and PTAs should in this scenario be resolved through determining which norms are applicable in a given situation, and this would be done by applying the conflict rules of international law.<sup>223</sup> For this to happen, the WTO panel would have to accept the applicability of the PTA jurisdiction norm in the relations between the parties. If, however, the applicability of PTA jurisdiction clauses is not accepted in the WTO due to them being non-WTO law or because of the mandatory nature of the WTO’s jurisdiction, then the conflict of jurisdictions cannot be solved at a normative level. The normative conflict would remain irrelevant from the point of view of the WTO dispute settlement proceedings.

It seems impossible to find a definite answer to the question of direct applicability of PTA jurisdiction clauses in the WTO system under the current state of law. Going back to the *inter se* modifications addressed in section 2.3.3, article 41 of the VCLT offered two alternative requirements under which a treaty could be modified; first if the modification is specifically accepted by the original treaty (Article 41(1)(a)) or secondly if the modification is not prohibited by the original treaty (Article 41(1)(b)). As I have noted, PTAs are specifically accepted by the WTO and members are entitled to modify their WTO obligations with these agreements, even though they are in conflict with the WTO provisions. The biggest issue is that, whereas the GATT and the GATS offer specific provisions for modifications, the DSU remains silent on this possibility, and even includes a provision prohibiting the panels from adding or diminishing rights provided in the covered agreements. The question therefore is, can the panel take the modification into consideration regardless of the limitations in Articles 3.2 and 19.2 of the DSU.

There seems to be nothing in the covered agreements that would suggest that members cannot restrict trade between themselves by establishing a PTA., with the exception of the

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<sup>222</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 353.

<sup>223</sup> *ibid* at 321.

requirement to open substantially all trade between the PTA members.<sup>224</sup> The only possibility could arise from Article 23 DSU, and if it is indeed considered to establish such a limitation, it means that the PTA jurisdiction clauses are illegal the same way that PTAs not fulfilling the requirements set in GATT Article XXIV and GATS Article V are illegal. However, it seems unlikely that a provision granting a right to a member would create a prohibition to that member to depart from it. At most it could act as a prohibition for panels when read together with Article 3.2 and 19.2 of the DSU, as argued by Trachtmann and Marceau. Following the reasoning of Pauwelyn, even this interpretation does not limit the applicability of the PTA norm, since the members have themselves agreed to give up their rights under Article 23.

When a WTO member bases its justification about a deviation from the MFN principle on a PTA, the panel is obliged to accept the measure that would otherwise be considered as a breach of that member's WTO obligations.<sup>225</sup> If the PTA defence is accepted, it factually means that the obligations of that PTA member are different towards other PTA members and non-members, and that its WTO obligations have been modified. For example the MFN principle is not applicable under those circumstances. For example for the question of necessity of the measure to the formation of the PTA, the panel must look at the measure, meaning the PTA provision. Based on this provision, the panel then accepts that it overrules the WTO norm. Could this "setting aside" of a WTO provision apply in the context of jurisdiction clauses as well? If this was to be accepted, the defendant could base its argument of the non-application of Article 23 of the DSU on a PTA modification the same way it can now justify its deviation from substantial WTO obligations on a modification, and claim that regardless of DSU articles, the panel does not have jurisdiction or at least that it should not exercise its jurisdiction<sup>226</sup> due to a jurisdiction clause.

Salles suggests that Articles XXIV of the GATT and V of the GATS should be accepted to mandate recognition of both substantive and procedural norms included in PTAs.<sup>227</sup> This would lead to PTA jurisdiction clauses being applicable the same way as substantive PTA norms excluding the MFN or other WTO rights towards non-PTA members, or even

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<sup>224</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 158, para. 306. Although the report only refers to the provisions of the GATT in this context. Also the requirement of Article XXIV:8 of the GATT to open substantially all trade between the PTA members has to be remembered. This requirement does create an obstacle to *inter se* restrict trade between members of a PTA.

<sup>225</sup> This of course derives from the direct wording of Articles XXIV GATT and V GATS.

<sup>226</sup> I will address the difference between these two concepts in section 4.2.

<sup>227</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 238.

derogations from WTO obligations towards PTA members in the form of retaliation basing on PTA norms are accepted.<sup>228</sup> This means that if the PTA which jurisdiction clause is invoked is WTO-consistent, all its norms can potentially override WTO norms as between the members of the agreement, including the procedural jurisdiction norm excluding the jurisdiction of the WTO. Salles also suggests a second route, through which PTA jurisdiction clauses can overrule the jurisdiction of the WTO because Article 23 of the DSU can be *inter se* modified, meaning that its modification has not been prohibited by the covered agreements.

Both of these views are in line with the argumentation explained in section 2.3.3 in relation to *inter se* modifications. In my opinion the only difference between the two approaches Salles suggests is the VCLT article applied. The first suggestion, even if he does not explicitly spell it out, bases on Art 41(1)(a) of the VCLT and the fact that the GATT and the GATS specifically accept *inter se* modifications. The second suggestion takes the route of the VCLT 41(1)(b) and argues that as it is not prohibited to *inter se* modify Article 23 of the DSU, it can indeed be done, and based on this the DSU Article cannot prevent the application of the PTA jurisdiction clause.

A counterargument for the first approach supported by Salles to accept the applicability of PTA jurisdiction norms based on application of Article 41(1)(a) of the VCLT can be found from the texts of the WTO agreements. The wording of Articles XXIV of the GATT and V of the GATS might create restrictions on their applicability in regard of other WTO agreements, as they state that “[t]his Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement”<sup>229</sup> and “the provisions of *this* Agreement shall not prevent . . . the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area” (emphasis added).<sup>230</sup> These articles thus specifically refer to the provisions of those agreements and not to all of the covered agreements. The jurisdiction of the WTO is established by the DSU, to which the modification is to be made in order to exclude the jurisdiction of the WTO. Another aspect to be considered in the

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<sup>228</sup> Kwak and Marceau acknowledge the fact that if a member of a PTA initiates the WTO dispute settlement system despite of a jurisdiction clause excluding such right, the defending PTA member has the right to retaliate on the basis of the PTA derogation, even if such retaliation is not WTO consistent. See more in Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 469-470.

<sup>229</sup> Article V.1 of the GATS.

<sup>230</sup> Article XXIV.5 of the GATT.



context of Article 41(1)(a) is the necessity-test created for Article XXIV of the GATT in *Turkey – Textiles*. If the test was applied in the context of DSU modifications, it is unlikely that the provision would be justified under Article XXIV.

The fact is that PTAs are specifically allowed, and the question of whether Articles XXIV of the GATT and V of the GATS offer exemptions to other WTO rules than the MFN principle is still controversial.<sup>231</sup> The WTO agreement is a single undertaking<sup>232</sup> and therefore all rules are to be followed simultaneously unless there is a conflict between them. As Salles has noted, “it would be very awkward if developments under a permitted preferential agreement . . . were suddenly prohibited by or blocked at the WTO”.<sup>233</sup> If a PTA is WTO-compatible, the trade relations of PTA members are governed by the PTA and not solely by the WTO. If the necessary conditions are fulfilled, the deviation from WTO norms is explicitly accepted. The question is whether the panel would allow such deviation from WTO norms to extent to the DSU provisions concerning its jurisdiction and not just substance GATT and GATS norms.

The argument based on the application of Article 41(1)(b) of the VCLT offers an easier route as modifications to the DSU are not prohibited. It can indeed be argued that as this relationship between the WTO and PTAs is not further clarified in the covered agreements, members can *inter se* modify any rules they wish to, as long as it does not affect other members. It seems logical to think that as WTO members have agreed to explicitly allow PTAs and because they have also agreed to limit the powers of the WTO as for between themselves by these PTAs, often with a fork-in-the-road or other type of jurisdiction provisions, that these agreements would also be effective in the WTO system. These conflicts can only arise between WTO members that are both members to an agreement including a jurisdiction clause. If WTO members would want PTAs to be subordinate to WTO norms in every situation, this position could easily be stated in the relevant WTO provisions.

Indeed the possibilities of members to contract out from their procedural rights have been accepted in the past. The possibility to waive the rights arising from the DSU was

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<sup>231</sup> Gao and Lim, ‘Saving the WTO from the Risk of Irrelevance’, *supra* note 142 at 910

<sup>232</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 21 February 1997, at 12.

<sup>233</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 240.

addressed in *EC – Bananas III (2nd Recourse to Art. 21.5)*.<sup>234</sup> In that case the question was whether a member could waive its rights to have recourse to the DSU Article 21.5 procedures. In this context the Appellate Body stated that “there must be a clear indication in the agreement between the parties of a relinquishment of the right to have recourse to Article 21.5.”<sup>235</sup> The Appellate Body noted that it cannot be “lightly assumed” that a member would have waived its rights under the DSU, and that such finding could only be made when there is an explicit agreement to waive to have recourse to the DSU 21.5 procedures.<sup>236</sup>

The question in *EC – Bananas III (2nd Recourse to Art. 21.5)* is obviously not identical to the question of jurisdictional conflicts, but it can be argued that it is indeed possible to waive and modify permanently the rights arising from the DSU so that it is also recognised in WTO dispute settlement. Even though such possibility is clearly interpreted narrowly, in the context of PTA jurisdiction clauses there is an explicit agreement to waive the members’ DSU rights. Therefore, if this right is available to other provisions of the DSU, such as Article 23, even these strict requirements can easily be argued to be fulfilled. This suggests that the route of Article 41(1)(b) might allow members to contract out and to modify more permanently their rights arising from Article 23 of the DSU by a jurisdiction clause. In the light of *EC – Bananas III (2nd Recourse to Art. 21.5)*, it can be argued that the panel does indeed also have the power to take such modifications into consideration regardless of the limitations in Articles 3.2 and 19.2 of the DSU. As the PTA members have explicitly agreed to contract out of Article 23 of the DSU, there is no prohibition in the DSU for modifications, and these modifications do not affect the rights of third parties, it seems logical to assume that provisions in the DSU addressing the rights of the panel cannot nullify these modifications. Following this logic, the whole issue of applicable law should not render legal modifications ineffective, but the panel should take the jurisdiction clause in a PTA into consideration when considering its ability to hear the case.

Whilst it may be difficult for WTO tribunals to accept deviation from WTO norms or jurisdiction on the basis of issues such as environmental law or human rights, this should not be the case in the context of PTA jurisdiction and norms. PTAs have a special standing

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<sup>234</sup> Appellate Body Report, *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, WT/DS27/AB/RW/USA, adopted 26 November 2008 (*EC – Bananas III (Second Recourse to Art. 21.5)*).

<sup>235</sup> Appellate Body Report, *EC – Bananas III (Second Recourse to Art. 21.5)*, *supra* note 234, para. 212.

<sup>236</sup> *ibid.*, para. 217.

in the WTO system, and the WTO specifically accepts deviations from WTO norms based on PTA norms. PTAs are express *inter se* modifications to WTO rules and the purpose of these agreements is to contract out of the obligations established in the WTO system. Of course, the main purpose is to give preference to the other PTA members, but if the members wish to also create more stringent rules, as is the case with jurisdiction clauses regulating the possibilities to initiate a dispute in the WTO system, should this not be accepted the same way as the provisions aiming to open trade are accepted? In my opinion, the special standing of PTAs in the WTO system should be taken into consideration when the panel assesses its jurisdiction in a matter brought before it. However, so far the WTO tribunals have not assessed normative conflicts between WTO and PTA norms any differently than conflicts between WTO and other non-WTO norms.<sup>237</sup>

#### **2.4.3. Conflict rules of international law**

Conflict rules of international law provide a method of interpreting the legislative intention.<sup>238</sup> If a PTA is found to be legal and valid in the light of Articles XXIV of the GATT and V of the GATS, it fulfils the conditions of Article 41(1)(b) of the VCLT, and the applicability of PTA norms is accepted, the conflicts between them and the WTO norms are to be solved through the conflict rules of international law. The conflict is to be solved by finding one norm that expresses the most “closest, detailed, precise or strongest” expression of the intention and will of the states.<sup>239</sup> This analysis is obviously only relevant if the panel takes these jurisdiction clauses into consideration in the first place.

I will now briefly introduce the conflict rules that are relevant in assessing which norm is to be applied in a given situation in case the PTA rule is accepted as applicable law. I will first analyse the conflict between PTA jurisdiction norms and the WTO DSU norms in the light of *lex posterior* and *lex specialis* rules. I will finish this chapter by analysing the conclusions that can be drawn from the question of jurisdictional overlaps as a normative issue.

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<sup>237</sup> Donald McRae, ‘The Place of the WTO in the International System’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford University Press: Oxford, 2009) at 65.

<sup>238</sup> Hugh Thirlway, ‘The Sources of International Law’ in Malcom D. Evans (ed.), *International Law* (4<sup>th</sup> edition, Oxford University Press: New York, 2014) 91-117 at 109.

<sup>239</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 327 and 388.

### 2.4.3.1. *Lex posterior*

The doctrine of *lex posterior* establishes the principle of later law superseding earlier law. This principle is the opposite of the maxim of *lex prior*, which states the superiority of the earlier treaty.<sup>240</sup> The *lex posterior* rule has long roots<sup>241</sup> and it is recognised as one of the conflict-resolution principles of international law.<sup>242</sup> In the context of treaties, the principle has also codified in the VCLT.

Article 30 of the VCLT states the temporal rule of *lex posterior derogate legi priori* for defining the relationship between two subsequent treaties. According to Article 30(3) VCLT, when all members to a treaty are also members to a later treaty, the earlier treaty applies only when its provisions are compatible with those of the later treaty. According to Article 30(4), when the members to the later treaty do not include all those of the earlier treaty, the application of the treaties depends on the parties in question. As between such WTO members that are members to both treaties, the rule of Article 30(3) applies, in other words the later treaty supersedes the earlier one.<sup>243</sup> But when one is a member of both treaties and the other is only member to one of them, the treaty to which both are members determines their rights and obligations.<sup>244</sup> According to Article 30(5) Paragraph 4 is without prejudice to Article 41 VCLT.

Article 30(4) VCLT supports the *inter se* modifications, and reflects in that way the contractual freedom on countries.<sup>245</sup> The rule seems to be accepted to be applicable in cases where treaty *inter se* modifies an earlier one, as can be argued to be the case here with the PTA and WTO provisions.<sup>246</sup> According to the requirements of Article 30 of the VCLT, the treaties must relate to the same-subject matter for the later, successive treaty to override the earlier one. The issue of the same subject-matter was addressed in section 2.2 above. According to Koskenniemi, two treaties address the same subject-matter if the fulfilment of the obligations deriving from one of the treaties affects the fulfilment of the

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<sup>240</sup> According to Jenks, the principle of *lex prior* is derived from contract law, which includes prohibition to break a contract with another contract, and has an important application in assessing conflicts between agreements conferring inconsistent rights on different parties. Wilfred Jenks, 'The Conflict of Law-Making Treaties', 30 *British Yearbook of International Law* (1953) 401-453 at 442.

<sup>241</sup> The *lex posterior* principle has roots in Roman law, see more in Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 116, para. 225.

<sup>242</sup> The principle is recognised by various authors, for example see Jenks, 'The Conflict', *supra* note 240 at 445-446; Sinclair, *The Vienna Convention*, *supra* note 103 at 95-98; and in the context of the WTO, Pauwelyn, *Conflict of Norms*, *supra* note 72 at 335-363.

<sup>243</sup> Article 30(4)(a) of the VCLT.

<sup>244</sup> Article 30(4)(b) of the VCLT.

<sup>245</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 362.

<sup>246</sup> Jenks, 'The Conflict', *supra* note 240 at 445.

obligations arising from the other treaty.<sup>247</sup> As I have already noted, the rights and obligations provided in the WTO covered agreement as well as by the PTAs overlap, which is the reason for a possibility of a conflict in the first place. Hence, the requirement for same subject-matter is fulfilled in this context. The subsequent PTA norm shall override the earlier WTO norm in case the requirements of Article 30 of the VCLT are fulfilled. It must be noted that not all current PTAs were established after the WTO covered agreements, one of the most notable example of a prior PTA being NAFTA. In this case the doctrine of *lex specialis* might come into play. Nevertheless, in case a later PTA treaty has successfully *inter se* modified the WTO norms, the DSU provisions are applicable only to the extent that they are compatible with the PTA jurisdiction clause.

Article 30 of the VCLT and the *lex posterior* principle is however residuary and gives way to any treaty provision regulating priority.<sup>248</sup> A specific priority rule therefore supersedes the rules of Article 30 of the VCLT. In case the prohibition not to add to or diminish the rights and obligations of WTO members stated in Articles 3.2 and 19.2 of the DSU is seen as a priority rule, the *lex posterior* rule is not applicable. By the same token, if PTA jurisdiction clauses including a specific choice of forum provision or a provision stating exclusive jurisdiction are applicable and seen as valid priority rules, the doctrine of *lex posterior* is not even necessary to override the jurisdiction of the WTO. The *lex posterior* rule would probably therefore not find much relevance in this context.

#### **2.4.3.2. *Lex specialis***

According to a general principle of law, a norm that is more detailed and goes in more depth in the same subject-matter than another norm overrides that other, more general norm. The principle of *lex specialis* is not codified in the VCLT, but has a long history and is recognised as a general principle in legal doctrine.<sup>249</sup> The justification behind the principle can be traced to the will of the states, as more specific rules clarify the intentions of the contracting parties more clearly than general rules.<sup>250</sup>

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<sup>247</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 129, para. 254.

<sup>248</sup> Sinclair, *The Vienna Convention*, *supra* note 103 at 97.

<sup>249</sup> See for example Jenks, 'The Conflict', *supra* note 240 at 446; Sinclair, *The Vienna Convention*, *supra* note 103 at 96; and Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 34–35. In jurisprudence, the principle was referred to in for example in the *Gabčíkovo–Nagymaros* case, *supra* note 94, para. 132. The position of *lex specialis* in international law is however not clear and might be given different meanings depending on the context. See more in Pauwelyn, *Conflict of Norms*, *supra* note 72 at 385.

<sup>250</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 37.

The rule of *lex specialis derogat legi generali* means that treaties would have to be compared in terms of their “normative density<sup>251</sup>”. According to Koskenniemi, the issue of generality and speciality can be viewed in two somewhat different ways. Firstly, a more specific rule can be seen as a specification or an update to the more general rule, and in this regard it should be read together with the more general rule and not as incompatible with it.<sup>252</sup> The alternative way to apply the principle is to see it purely as a conflict rule. Read in this light, the principle clarifies the relationship between two non-hierarchical rules that are in conflict with each other. In this scenario the *lex specialis* is an exception to the general rule and not merely an update.<sup>253</sup> In this respect it is important to note that the special rules derogating from more general rules must have at least the same “legal rank” in terms of their validity.<sup>254</sup> Therefore a rule that is more binding on the parties, even if more general in nature, cannot be overruled by a more specific but less binding rule.

The principle can be applied in various different contexts. It might for example come into play firstly when interpreting two different treaties, secondly when there is a conflict between a treaty and non-treaty instrument, such as custom, and thirdly also when interpreting norms that stem from the same treaty.<sup>255</sup> In the WTO context, the principle has been applied within the WTO framework<sup>256</sup> but not between WTO agreement and a non-WTO agreement. The panel has stated that the rule of *lex specialis* is in any case subsidiary.<sup>257</sup>

In the context of WTO DSU provisions and PTA jurisdiction clauses the principle of *lex specialis* would be applied as a conflict rule as the PTA norms dealing with jurisdiction are derogations of the WTO norms. There is an actual inconsistency between the two norms if a matter is initiated in the WTO dispute settlement proceedings despite a jurisdiction clause stating the primacy of the PTA dispute settlement system in that specific situation.

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<sup>251</sup> Cottier and Foltea, ‘Constitutional Functions of the WTO’, *supra* note 97 at 54.

<sup>252</sup> Although in this situation it can be said that there is no application of genuine *lex specialis* at all since there is no actual conflict. However the principle has been used in this sense by the European Court of Human Rights in *Djavit An v. Turkey*, *Judgement of 20 February 2003*, *ECHR 2003-III* at 251, para. 39. See more in Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 49 and 52.

<sup>253</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 35.

<sup>254</sup> *ibid* at 38. See also Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session 2001, *Yearbook of the International Law Commission* (2001) at 140, para. 2.

<sup>255</sup> Koskenniemi, *The Fragmentation Report*, *supra* note 75 at 40.

<sup>256</sup> For example in Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 31 May 1999, paras. 9.92–9.192 the Panel analysed the principle of *lex specialis* when assessing the relationship between Articles XXIV, XI and XIII of GATT (*Turkey – Textiles*).

<sup>257</sup> Panel Report, *India – Quantitative restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 6 April 1999, para. 4.20 (*India – Quantitative Restrictions*).

The matter of legal validity of the norms goes back to the discussion of Articles XXIV of the GATT and V of the GATS and the possibility to apply non-WTO norms in the dispute settlement of the WTO.

#### 2.4.3.2.1. *Specific jurisdiction clauses as lex specialis*

The ILC has stated in its draft articles on the Law of Treaties that if a treaty contains a provision determining its relationship towards another treaty, no matter whether it is later or prior in time, such provisions are to be taken into account in determining the relevant norm in a conflict situation between successive treaties relating to the same subject-matter.<sup>258</sup> As Vaughan Lowe put it, “*In circumstances where the parties have made special provision for a certain category of disputes, in the absence of any indication to the contrary it must be supposed that they intended that it is this special provision, and not some more general acceptance of the jurisdiction of another tribunal, that they intended should be applied to disputes in that category.*”<sup>259</sup>

Also Shany has argued in favour of forum selection clauses, rationalising this by the expression of the will and the consent of the parties that can be observed in the clause.<sup>260</sup> This view is shared by Pauwelyn, who has stated that a conflict clause should be accepted and taken into consideration unless it conflicts with *jus cogens* norms, goes against Art 41 VCLT or is overruled by a later expression of state intent.<sup>261</sup> The priority rules included in a treaty cannot affect the rights of third parties, as is determined by the rule of *pacta tertiis non nocent*.<sup>262</sup> Such clauses can therefore only affect the relationship between countries that are both members to both agreements. The relationship between a country that is a member to only one of two agreements and a country that is member to both of them is governed by the treaty to which both of them are members. With such a norm, contracting states can determine also the future priority of a treaty, making it illegal for later treaties to overrule its norms. This obviously alters the *lex posterior* rule. However, Article 30(5) VCLT specifically states that the article is without prejudice to Article 41 VCLT, and therefore there is no contradiction with such a priority norm and Article 30 VCLT. In the light of Article 41 VCLT, a prior norm stating its primacy to later treaties makes it illegal

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<sup>258</sup> ILC Draft Articles on the Law of Treaties, *supra* note 98.

<sup>259</sup> Lowe, ‘Overlapping Jurisdiction’, *supra* note 54 at 195.

<sup>260</sup> Shany, *Competing Jurisdictions*, *supra* note 19 at 154.

<sup>261</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 328–329.

<sup>262</sup> ILC Draft Articles on the Law of Treaties, *supra* note 98 at 215. The rule of *pacta tertiis* is also included in Article 34 of the VCLT. It is a well-established rule that a treaty cannot impose obligations upon a third state. See more in McNair, *Law of Treaties*, *supra* note 94 at 310.

for later treaties to *inter se* modify such norms in the prior treaty, and thus such contradictory provisions could not be included in the later treaty in the first place.

There is no specific priority rule in the DSU determining its primacy over later treaties, unless Articles 3.2 and 19.2 are considered as such. Specific jurisdiction clauses are however common in PTAs. If the applicability of PTA norms is accepted, jurisdiction clauses included in PTAs should always be taken into consideration in a conflict situation, and the WTO panel should consider its jurisdiction in the light of such a provision. Such provisions do not affect the rights of third parties, as the conflict affects only WTO members that are members to both agreements.<sup>263</sup> PTA norms are often both *lex specialis* and *lex posterior*, which should clarify the conflict situation even further. In the light of these conflict rules, each situation should be looked individually to determine the dominant law. If there is a valid jurisdiction clause in a PTA that *inter se* modifies the WTO covered agreements as for between its members, the PTA norm prevails pursuant to the *lex specialis* rule<sup>264</sup> and can overrule the jurisdiction of the WTO in that matter.

## **2.5 Concluding remarks on the normative conflict**

When analysing the overlaps of jurisdiction between the WTO and PTAs as a normative matter, there are three questions to be asked. First, is the PTA WTO-consistent in the sense of Article XXIV of the GATT and V of the GATS? If it is not, the PTA is not legal and the jurisdiction clause also has no effects to the jurisdiction of the WTO. The question of legality of specific jurisdiction clauses ought to be analysed through the application of Article 41(1)(b) of the VCLT. If the conditions are fulfilled, the provision is legal. Second question is, is the PTA norm applicable in the WTO dispute. In this regard I have concluded that the WTO panels should accept the *inter se* modifications made by the members on their procedural rights arising from the DSU as the covered agreements do not prevent members from making such modifications. These modifying norms should then be considered in the WTO dispute as applicable law when considering the jurisdiction of the panel. The limitations on the panel's jurisdiction in Articles 3.2 and 19.2 of the DSU do not affect the specific agreement to contract out of the DSU provisions and therefore the

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<sup>263</sup> Although it can be argued that the decisions of WTO tribunals are relevant for all members. Davey and Sapir are of the view that “[a]llowing or encouraging Members to take WTO-related disputes to other fora, where the rest of the WTO Membership has no right to be heard seems unwise. Indeed, to give effect to a WTO Member’s waiver of its right to invoke WTO dispute settlement also deprives other WTO Members of the third-party rights that they would otherwise enjoy.” William J. Davey and André Sapir, ‘The Soft Drinks Case: The WTO and Regional Agreements’, 8 *World Trade Review* (2009) at 116.

<sup>264</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 355.



panel is not banned from considering them. Last question is which norm overrules the other, the WTO or the PTA norm. The answer to this is found by applying the conflict rules of public international law. As jurisdiction clauses in PTAs are clear conflict clauses and therefore *lex specialis*, they should overrule WTO jurisdiction norms in the case the requirements of the PTA norm are fulfilled.

We now know the possible alternative ways to address the issue of jurisdictional conflicts at a normative level. What remains to be done is to find an answer to the question asked in the beginning of this chapter. Can a jurisdictional clause included in a PTA exclude the WTO's jurisdiction? Is it possible for members to contract out of the DSU provisions? Under the current state of law the questions remains without a definite answer. Based on the structure suggested above, I argue that there is a valid legal basis for an argument based on a PTA norm, and that the Appellate Body report in *Peru – Agricultural Products* did not close this door. However, because there seems to be significant opposition for such an interpretation, other ways to overcome the possible overlaps must be analysed as well.

### 3. Jurisdictional conflicts between the WTO and PTAs as a procedural issue

#### 3.1. General principles of international law – A Solution to the problem?

If jurisdictional conflicts cannot be solved at a normative level, or if a PTA does not include a jurisdiction clause in the first place, solutions to the issues of overlapping jurisdictions have to be found elsewhere. General rules of international law have been suggested to offer a solution to this problem. These principles have been established to prevent simultaneous or subsequent proceedings which endanger predictability and coherence, and for this purpose they create limits for the procedural rights of states.

General principles of law are one of the sources of international law found in Article 38 of the ICJ Statute. They are considered as secondary sources of law, meaning that they are hierarchically at a lower rank than norms deriving from treaties and custom.<sup>265</sup> These principles are mostly used to fill the gaps in treaties and customary rules, and they therefore offer “fall-back” when a solution cannot otherwise be found.<sup>266</sup> For this reason, and because these principles were not created to address a specific situation but are intended to have a broad scope of application, they are open-textured and can be applied in various different situations.<sup>267</sup>

General principles of international law are often derived from domestic legal systems, and therefore their applicability is not always clear in the field of international law. Already in 1927 H. Lauterpacht examined the issue of these private law principles as analogously applicable as a source of law in the international law context.<sup>268</sup> According to Lauterpacht, the question is whether the principle is universally adopted, and if it is, it must be analogously applicable also as a general principle of international law.<sup>269</sup> When treaties and custom do not provide an answer or rules in a specific situation, recourse must be had to the general principles of international law.<sup>270</sup> This is the fall-back purpose of these

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<sup>265</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 127. This might not be the case in all situations, since some general principles of international law can be considered as “necessary” principles, some of which might even have a *jus cogens* status. If a general principle of law is a *jus cogens* norm, the situation is of course reversed, and the *jus cogens* norm is hierarchically higher and overrules the treaty or customary norm.

<sup>266</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 205.

<sup>267</sup> Andrew D. Mitchell, ‘The Legal Basis for Using Principles in WTO disputes’, 10(4) *Journal of International Economic Law* (2007), 795-835 at 797.

<sup>268</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co. Ltd, 1927).

<sup>269</sup> Lauterpacht, *Private Law Sources and Analogies*, *supra* note 268 at 176-177.

<sup>270</sup> *ibid* at 203.

principles. Without recourse to these principles, the work of international tribunals would become impossible.<sup>271</sup>

The importance of general principles of international law has been supported by jurisprudence from early on. It has been confirmed that when a treaty remains silent on or does not regulate a certain issue, and also does not contract out of pre-existing law, these general principles addressing the issue are to be applied.<sup>272</sup> The Permanent Court of International Law (PCIJ) confirmed this in the *Chorzów Factory* case<sup>273</sup> in relation to obligations to make reparations. The ICJ has addressed the issue in respect of rules on treaty termination in the *South West Africa*<sup>274</sup> and *Gabcíkovo-Nagymaros Project*<sup>275</sup> cases, and on exhaustion of local remedies in the *ELSI* case.<sup>276</sup> These principles are not WTO norms, which again poses the problem of sources of law before the WTO tribunals. WTO tribunals have however applied general principles of international law as a fall-back in the past when fulfilling the gaps left in the covered agreements, especially in relation to procedural questions such as these at hand.<sup>277</sup>

Many of the general principles under consideration are legal principles derived from domestic legal orders.<sup>278</sup> In this section, I will first address the possibility to prevent subsequent and simultaneous proceedings over the same matter through applying the principles of *res judicata*, *lis pendens* and *estoppel*. Secondly, I will focus on cooperation between tribunals and the good faith aspects of the conduct of states by analysing comity and the doctrines of good faith and the abuse of process. I will finish with a brief analysis on the question of the most convenient forum by studying the applicability of the doctrine of forum conveniens on the issue of conflicting jurisdictions between the WTO and PTAs.

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<sup>271</sup> Lauterpacht, *Private Law Sources and Analogies*, *supra* note 268 at 211.

<sup>272</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 205.

<sup>273</sup> *Case concerning the Factory at Chorzów (Merits)*, P.C.I.J. Series A, No. 17 (1928).

<sup>274</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Advisory Opinion*, I.C.J. Reports 1971 at 16.

<sup>275</sup> *Gabcíkovo-Nagymaros Project*, *supra* note 94.

<sup>276</sup> *Eletronica Sicula SpA (ELSI) (United States of America v. Italy)* I.C.J. Reports 1989 at 42.

<sup>277</sup> The Appellate Body has applied for example the principles of burden of proof, private counsel, la compétence de la compétence and non-retroactivity of treaties, which do not derive from the WTO covered agreements. See *supra* notes 205, 206 and 207 for references.

<sup>278</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 125.

### 3.1.1. *Res judicata*

The doctrine of *res judicata* promotes the finality of judgements.<sup>279</sup> The main purpose of the principle is to prevent situations where the same dispute between the same parties is initiated a second time after it has already been settled by one tribunal.<sup>280</sup> Salles has identified three functions for the principle: firstly it “preserves the stability of individual legal relationships by ensuring that disputes will come to an end”,<sup>281</sup> secondly it “preserves the stability of legal systems, guaranteeing that identical cases will not be decided differently”,<sup>282</sup> and thirdly, it “protects the respondent in the second proceeding, avoiding relitigation”.<sup>283</sup> The PCIJ noted in the *Société Commerciale De Belgique* case that “[r]ecognition of an awards *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory”.<sup>284</sup> As Lowe has pointed out, conflicting findings by different tribunals over the issues and facts threaten predictability, but also undermine the rule of law.<sup>285</sup> The doctrine has also the incentivising effect for the countries to carry out judgements.<sup>286</sup>

The notion of *res judicata* has been specifically included in some international agreements,<sup>287</sup> but it has been accepted as a general principle of law and therefore it can be applied even without a specific reference in the constitutive text.<sup>288</sup> The scope of *res judicata* is usually seen to include the points expressly determined in the dispositive part of a judgement,<sup>289</sup> or such that are addressed and determined by the tribunal.<sup>290</sup>

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<sup>279</sup> Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International: The Hague, 2003) at 426.

<sup>280</sup> Vaughan Lowe, ‘Res Judicata and the Rule of Law in International Arbitration’, 8 *African Journal of International and Comparative Law* (1996) 38-50 at 38-39.

<sup>281</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 268.

<sup>282</sup> *ibid* at 268.

<sup>283</sup> *ibid* at 268.

<sup>284</sup> *The Société Commerciale de Belgique (Belgique v. Greece) P.C.I.J. Series A/B, No. 78 (1939)* at 175.

<sup>285</sup> Lowe, ‘Res Judicata’, *supra* note 280 at 48.

<sup>286</sup> Shany, *Competing Jurisdictions*, *supra* note 19 at 170-171.

<sup>287</sup> One example can be found from the ICJ statute. Article 60 of the statute states that the judgements of the ICJ are “final and without appeal”.

<sup>288</sup> The Permanent Court of Arbitration referred to the principle already in the *Pious Found* case. D. Anzelotti stated in his dissenting opinion in the *Chorzów Factory* case that *res judicata* is a general principle of law. Both Salles and Shany have even argued that *res judicata* could be considered as customary law as states have traditionally accepted the finality of decisions by international tribunals; see more in Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 267; and Shany, *Competing Jurisdictions*, *supra* note 19 at 245.

<sup>289</sup> *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) I.C.J. Reports 2007*, para. 126.

<sup>290</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 269; and Lowe, ‘Res Judicata’, *supra* note 280 at 39. This has been confirmed for example by the PCIJ in *Société Commerciale de Belgique*,

For the principle of *res judicata* to be applicable, three conditions must be fulfilled simultaneously. Firstly, the parties to the dispute must be the same; secondly, the request must be the same and thirdly, the cause of action, or the grounds of the claim must be the same.<sup>291</sup> If the conditions are fulfilled, the case can be found inadmissible before the second court.<sup>292</sup> The requirements for the identity of parties and grounds of the claim are self-evident; the intention is to ensure that it is indeed the same issue that arises in both cases between the same parties.<sup>293</sup> The identity of request is more complex, as it might not preclude legally different causes of action, meaning different legal reasoning, even if they are based on the same facts.<sup>294</sup> The question of how far these requirements are to be taken in international law is not settled.<sup>295</sup> Due to the differences in views taken as to the requirements of *res judicata*, no common standard can be established.

If absolute identity of form and substance is required, the applicability of *res judicata* is substantially limited.<sup>296</sup> Formal sources of law will in almost all cases be different in two disputes initiated under two different dispute settlement mechanisms. If this would lead to the inapplicability of the *res judicata* principle, it would serve of little use in the coordination of international tribunals.<sup>297</sup> This is the reason why the *res judicata* effect is difficult to apply to relations between different international tribunals established by different treaties. Some authors have stated that there is no valid principle of *res judicata* applicable between international tribunals, at least not yet.<sup>298</sup> Even if the parties and the grounds are the same, the law would be different, and also specific defences available might differ in addition to the two mechanism having different procedural rights.<sup>299</sup>

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*supra* note 284; *Polish Postal Service in Danzing case, Advisory opinion, P.C.I.J. Series B, No. 11 (1925)* at 30; *Chorzów Factory case, supra* note 273 at 20.

<sup>291</sup> Judge Anzilotti, *Chorzów Factory case, supra* note 273 at 23-27, referred to in Amerasinghe, *Jurisdiction of International Tribunals, supra* note 279 at 428. Some authors however argue for more flexible requirements, which include firstly the same parties and secondly subject-matter of the dispute. See more in Salles, *Forum Shopping in International Adjudication, supra* note 15 at 271.

<sup>292</sup> Salles, *Forum Shopping in International Adjudication, supra* note 15 at 268. The question of *res judicata* leads to inadmissibility of the case and it does not exclude the jurisdiction of the tribunal as such. In the context of the WTO, this differentiation between the two concepts is not widely used, but is still extremely important in the sphere of international law. I will address this issue in section 4.2.

<sup>293</sup> Lowe, 'Res Judicata', *supra* note 280 at 40.

<sup>294</sup> *ibid* at 40.

<sup>295</sup> Salles, *Forum Shopping in International Adjudication, supra* note 15 at 271.

<sup>296</sup> *ibid* at 273.

<sup>297</sup> Salles, *Forum Shopping in International Adjudication, supra* note 15 at 273.

<sup>298</sup> Gabrielle Marceau and Anastasios Tomazos, 'Comments on "Joost Pauwelyn's" paper : "How to win a WTO dispute based on non-WTO law ?" in: Griller, Stefan (ed.), *At the crossroads : the world trading system and the Doha Round* (Springer: Wien, 2008.) 55-81 at 63.

<sup>299</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 9.

However, if international tribunals were to adopt a more flexible application of the doctrine, it could be more useful in the field of international adjudication.

The *res judicata* effect of judgements has been accepted to be applicable within the WTO system.<sup>300</sup> However, so far no WTO tribunal has faced the issue of *res judicata* effect of awards issued by different international tribunals. In order for non-WTO decisions to have *res judicata* effect on the jurisdiction of the WTO, the tribunals would have to first accept the position of *res judicata* as a binding principle of international law, and secondly establish that the ruling of the first tribunal fulfils the three requirements set out above.<sup>301</sup>

If complete identity of form and substance is required for the application of *res judicata*, it would not be useful in settling the conflicts between the jurisdictions of the WTO and PTAs. Even if a specific dispute had been already settled under the dispute settlement mechanism of a PTA, it would not prevent the WTO from exercising its jurisdiction over the same factual situation as the law governing the two disputes would not be same. Pauwelyn sees this as an obvious limitation to the applicability of the principle,<sup>302</sup> and Kwak and Marceau are also of the view that it would be difficult for WTO tribunals to decline from exercising jurisdiction based on a *res judicata* effect of a PTA ruling.<sup>303</sup> It seems that the *res judicata* principle does not offer much help in solving the conflicts arising from the overlapping jurisdictions between the WTO and PTAs, although no definite answer to its applicability can be given.

### 3.1.2. Estoppel

Estoppel “prevents one party from taking advantage of another when the former by his actions has let the latter to act in a certain manner detrimental to the latter’s own interests”.<sup>304</sup> The Panel in *Guatemala – Cement II* stated that “[e]stoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded”.<sup>305</sup> The principle of

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<sup>300</sup> The binding *res judicata* nature of adopted panel and Appellate Body reports to the parties of the dispute was confirmed in Appellate Body Report, *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996 at 14.

<sup>301</sup> Pauwelyn, ‘How to win a WTO Dispute’, *supra* note 69 at 1018.

<sup>302</sup> *ibid* at 1018.

<sup>303</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12.

<sup>304</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 305.

<sup>305</sup> Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 24 October 2000, para. 8.23 (*Guatemala – Cement*).

estoppel has indeed been considered to be based on the idea of preclusion,<sup>306</sup> which even those domestic systems that do not recognise estoppel as such apply.<sup>307</sup> The principle of *estoppel* is closely linked to the principle of good faith<sup>308</sup> and has been considered to be a general principle of international law.<sup>309</sup> The scope of the doctrine is unclear, but it has been applied in international adjudication.<sup>310</sup> Mitchell has argued that WTO tribunals have inherent jurisdiction to rule on claims of estoppel.<sup>311</sup> However, the case law regarding the applicability of the estoppel principle does not appear to be coherent.<sup>312</sup>

The doctrine has different variations under national laws. Although their relevance in the context of international law can be questioned, they might offer some insight to the principle.<sup>313</sup> In the English legal system, there is an “issue estoppel” rule which requires “(i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”<sup>314</sup> The only difference with the *res judicata* principle and the English issue estoppel doctrine is the absence of the requirement for identity of legal cause of action. It has therefore broader application than *res judicata*.<sup>315</sup> Under the US law there is another version of the principle called collateral estoppel, which differs from the *res judicata* principle by extending the *res judicata* effect of a judgement to same issues which however arise in different context and in some cases even to different parties.<sup>316</sup> It seems therefore that by adopting either the principle of issue estoppel or collateral estoppel, a

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<sup>306</sup> Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing: Oxford, 2006) at 25.

<sup>307</sup> Lauterpacht, *Private Law Sources and Analogies*, *supra* note 268 at 204.

<sup>308</sup> For a very thorough analyse of the principle of good faith in the WTO system see Panizzon, *Good Faith in the Jurisprudence of the WTO*, *supra* note 306.

<sup>309</sup> McNair, *Law of Treaties*, *supra* note 94 at 485.

<sup>310</sup> Already McNair noted that it is difficult to define the elements and limits of estoppel. See McNair, *Law of Treaties*, *supra* note 94 at 485.

<sup>311</sup> Andrew D. Mitchell, ‘Good Faith in WTO Dispute Settlement’, 7 *Melbourne Journal of International Law* (2006) 339-373 at 361.

<sup>312</sup> Joel P. Trachtman, ‘No Outsourcing of WTO Law? WTO Law as Practised by WTO Courts’, 102(3) *The American Journal of International Law* (2008), 421-474 at 440. Several WTO tribunals have addressed the estoppel principle, and even in the GATT era the discussed the principle in *United States – Measures Affecting Imports of Softwood Lumber from Canada* (BISD 40S/358, report adopted on 27 October 1993), for reference to WTO jurisprudence see for example the Panel report in *Guatemala –Cement*, *supra* note 305.

<sup>313</sup> For example McNair has questioned the relevance of the common law conception of estoppel in the international law context, see McNair, *Law of Treaties*, *supra* note 94 at 487.

<sup>314</sup> *Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd.* (No. 2) 1967, A.C. 853 at 935.

<sup>315</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 272.

<sup>316</sup> Pauwelyn, ‘How to Win a WTO Dispute’, *supra* note 69 at 1019.

prior decision by a PTA tribunal concerning the same issue could be given *res judicata* effect.<sup>317</sup>

WTO panels have not been inclined to adopt such reading of the principle. In *Argentina – Poultry*, the Panel was faced with the question of estoppel and subsequent proceedings. In that case, Brazil had already challenged the measure before an ad hoc arbitral tribunal established under the MERCOSUR agreement prior to initiating the dispute for the second time in the WTO dispute settlement system.<sup>318</sup> Argentina raised a preliminary issue and requested that the Panel would refrain from ruling on the basis of the prior MERCOSUR proceedings.<sup>319</sup> Argentina based its claim on the principle of estoppel, and argued that it is applicable when “(i) a statement of fact which is clear and unambiguous, and which (ii) is voluntary, unconditional, and authorized, is (iii) relied on in good faith”.<sup>320</sup> The Panel considered that the suggested requirements were not fulfilled in that specific case, which is why the principle was not applicable at least under those circumstances. The Panel found “no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR.”<sup>321</sup> As reference to the third requirement proposed by Argentina, the Panel stated that “[i]n our view, merely being inconvenienced by alleged statements by Brazil is not sufficient for Argentina to demonstrate that it was induced to act in reliance of such alleged statements.”<sup>322</sup>

Mitchell and Heaton have studied the possibility to apply the estoppel principle in the presence of a jurisdiction clause included in a PTA. They first point out that jurisdiction clauses make “clear and unambiguous” representations on which both parties rely.<sup>323</sup> This is the essence of the estoppel principle, and it therefore seems that a jurisdiction clause would call for its application if one of the parties acted inconsistently with such clause in bringing the case before a WTO panel.<sup>324</sup> However, Mitchell and Heaton also note that the in *EC – Sugar*<sup>325</sup> the Appellate Body was reluctant to apply the estoppel principle to limit

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<sup>317</sup> Pauwelyn, ‘How to Win a WTO Dispute’, *supra* note 69 at 1019.

<sup>318</sup> Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry From Brazil*, WT/DS241/R22, adopted 22 April 2003 (*Argentina – Poultry*).

<sup>319</sup> *ibid*, para. 7.17.

<sup>320</sup> *ibid*, para. 7.37.

<sup>321</sup> *ibid*, para. 7.38.

<sup>322</sup> *ibid*, para. 7.39.

<sup>323</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of the WTO’, *supra* note 204 at 614.

<sup>324</sup> *ibid* at 614.

<sup>325</sup> Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 28 April 2005 (*EC – Sugar*).



the possibility to initiate the WTO dispute settlement system.<sup>326</sup> In that case the Appellate Body stated that the principle has never been applied in the WTO, and that “it is far from clear that the estoppel principle applies in the context of WTO dispute settlement”.<sup>327</sup> The Appellate Body also stated that if the principle were to be applied, its application would have to fall within the narrow parameters of Article 3.7 of the DSU, which obliges members to consider whether action under the WTO procedures would be fruitful, and also of Article 3.10 of the DSU, which mandates the members to engage in WTO dispute settlement procedures in good faith.<sup>328</sup>

Mitchell and Heaton do not however see this as a complete exclusion of the principle of estoppel, and state that “if Members must act in good faith from the point of initiation of a dispute onwards, which obviously includes the *actual initiation* of a dispute, there is no reason why estoppel could not operate to prevent a claim being brought, even if the estoppel was based on representations that had occurred prior to initiation.”<sup>329</sup> The authors thus conclude the estoppel principle is capable of creating a legal impediment to the exercise of the jurisdiction of the panel.<sup>330</sup>

It appears that at least without a specific promise from the other party not to invoke a second proceeding in the WTO system, and without real actions taken by the other party based on this promise, the principle of estoppel is not applicable. The Panel in *Argentina – Poultry* did not determine whether it considered the conditions proposed by Argentina sufficient for the application of estoppel, or even whether it had the authority to apply the principle in the first place.<sup>331</sup> The requirement of clear and unambiguous promise was however also made in *EC – Aircraft*,<sup>332</sup> which would suggest that it is considered as a condition to create estoppel. It could be argued that a jurisdiction clause creates such a promise that could be enforced through application of the estoppel principle. This approach would allow giving effect to a jurisdiction clause without the problem of direct conflict of

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<sup>326</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of the WTO’, *supra* note 204 at 614.

<sup>327</sup> Appellate Body Report, *EC – Sugar*, *supra* note 325, para. 310.

<sup>328</sup> *ibid*, para. 312.

<sup>329</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of the WTO’, *supra* note 204 at 615.

<sup>330</sup> *ibid* at 616.

<sup>331</sup> Panel Report, *Argentina – Poultry*, *supra* note 318 footnote 58.

<sup>332</sup> Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 30 June 2010 (*EC – Aircraft*).

norms. No WTO tribunal has excluded the possibility to apply the estoppel principle, which is why its position in the WTO system remains open.<sup>333</sup>

### 3.1.3. *Lis alibi pendens*

*Lis alibi pendens* is another procedural principle derived from domestic law that aims to prevent multiple proceedings. The core of the principle prohibits a court from accepting a case which is already pending before another competent court.<sup>334</sup> The other court has not in this situation given its judgement yet, but the case is being processed or is pending when the case is brought before the second forum. The object of *lis alibi pendens* is the prevention of the possibility of conflicting judgements and the avoidance of a race to judgment between two tribunals.<sup>335</sup> The *lis alibi pendens* doctrine also requires the parallel actions to be substantially identical.<sup>336</sup>

*Lis alibi pendens* has a strong footing in domestic legal orders, but its standing in the context of international tribunals is far from clear.<sup>337</sup> The jurisprudence concerning the principle has been inconclusive.<sup>338</sup> Some tribunals have rejected the possibility to apply the rule altogether whilst other decisions have cautioned that the interests of the parties and the overreaching goals of the competing treaty regimes must be taken into consideration.<sup>339</sup> The usefulness of the doctrine has faced criticism and some argue that the “first forum decides” outcome of the rule only makes sense between hierarchically equal courts, whereas different international tribunals might vary in hierarchy, procedural efficiency, legitimacy and experience.<sup>340</sup> These differences have been said to be characteristic to international courts and tribunals, as it is difficult to find that two international proceedings are the same or even comparable.<sup>341</sup> The position of *lis alibi pendens* as a general principle of law is controversial, and some authors conclude that it is merely a civil law doctrine.<sup>342</sup>

There is a risk in applying *lis alibi pendens* in conflict situations between the WTO and PTA tribunals. For example in the context of NAFTA, if a case that has already been

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<sup>333</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of the WTO’, *supra* note 204 at 612.

<sup>334</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 157.

<sup>335</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 202.

<sup>336</sup> *ibid* at 203.

<sup>337</sup> Shany, *The Competing jurisdictions*, *supra* note 19 at 157-162.

<sup>338</sup> *ibid* at 241.

<sup>339</sup> *ibid* at 242.

<sup>340</sup> Gilles Cuniberti, ‘Parallel Litigation and Foreign Investment Dispute Settlement’, 21 *ICSID Review Foreign Investment Law Journal* 3 (2006) 381-429 at 383-384.

<sup>341</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 106.

<sup>342</sup> Cuniberti, ‘Parallel Litigation’, *supra* note 340 at 383.

initiated under its dispute settlement mechanism is brought before the WTO panel, and the WTO applies the *lis alibi pendens* rule and decides that it cannot exercise jurisdiction over the case, the whole dispute might be left in limbo if one of the parties refuses to appoint a panellist in the NAFTA proceedings. This situation could have arisen in the *Mexico – Soft Drinks* case had the WTO Panel applied the doctrine and refused to exercise its jurisdiction.<sup>343</sup> However, it is difficult to find a difference between these types of situations and a situation where a PTA includes a jurisdiction clause that has a *lis pendens* effect, meaning that it prohibits parallel proceedings after the dispute has been initiated under one forum.

Traditionally, the first court is required to have a full competence to determine the issue in order for the *lis alibi pendens* rule to apply, which is almost never the case in international adjudication, as different courts only have limited jurisdiction.<sup>344</sup> A non-WTO tribunal cannot assess alleged breaches of WTO norms. Therefore the same contra-argument that was applied for *res judicata* has been said to be valid in this context as well; the applicable law, specific defences, procedural rights and remedies differ in different systems, and therefore the requirements cannot be fulfilled in the WTO-PTA relationship.<sup>345</sup> The outcome seems to turn against the application of *lis alibi pendens*, as it does not seem to have a lot of room in international adjudication and definitely not in the WTO context. The requirements set for its application preclude most of the situations *lis alibi pendens* could be used in.

### **3.1.4. Comity**

It has been suggested that WTO tribunals should decline to exercise jurisdiction under certain circumstances on the basis of the doctrine of comity. Leaning on the doctrine of comity, a tribunal can decline to exercise jurisdiction firstly when it considers that the matter would be overall more conveniently settled under another forum,<sup>346</sup> or only until the case has been first solved in another forum.<sup>347</sup> It is also possible for a tribunal to apply the principle when a dispute is pending before or has already been decided by another tribunal

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<sup>343</sup> See Pauwelyn and Salles, 'Forum Shopping', *supra* note 34 at 107; and Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 278-279.

<sup>344</sup> Pauwelyn and Salles, 'Forum Shopping', *supra* note 34 at 110.

<sup>345</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 9.

<sup>346</sup> Caroline Henckels, 'Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO', 19 *The European Journal of International Law* (2008) 571-599 at 584.

<sup>347</sup> Mitchell and Heaton, 'The Inherent Jurisdiction of WTO Tribunals', *supra* note 323 at 599.

in cases where the conditions of *res judicata* or *lis pendens* are not fulfilled.<sup>348</sup> Comity can be relied on only when it is obvious that no serious injustice is inflicted upon either of the parties by declining to exercise jurisdiction.<sup>349</sup>

Comity does not limit the possibilities of tribunals to exercise jurisdiction the same way other principles addressed here do, as it does not create legal obligations and therefore does not bind courts and tribunals.<sup>350</sup> Comity forwards co-operation between courts and operates in a flexible manner, offering a tool for international tribunals when they consider that it would be unreasonable or inappropriate under certain circumstances to exercise jurisdiction.<sup>351</sup> It is a method of improving international harmonisation.<sup>352</sup> Shany argues that exercising comity in addition to the rules of *res judicata* and *lis pendens* would solve many of the problems arising from overlapping jurisdictions.<sup>353</sup> However, the doctrine seems overall rather ambiguous.<sup>354</sup> Its position in international law is unclear and it has been applied mostly in domestic legal systems.<sup>355</sup>

The arbitral tribunal established under UNCLOS referred to comity in the *MOX Plant Case*, which was already addressed in section 1.2. The case raised the question of jurisdiction to determine a dispute about a discharge of radioactive waste into the Irish Sea by a processing plant that belonged to the United Kingdom. The dispute raised issues under three different instruments, and the arbitral tribunal underlined “mutual respect” and the doctrine of comity in stating that it would be inappropriate to proceed further in the proceedings under those circumstances. The arbitral tribunal stated that the possibility of two conflicting decisions would not help the parties to resolve the dispute.<sup>356</sup>

Comity has not been widely studied in the WTO context. Mitchell and Heaton point out that in *Mexico – Soft Drinks*<sup>357</sup> Mexico attempted to prevent the WTO proceedings on the basis of a comity approach, even though it did not per se refer to the principle.<sup>358</sup> The

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<sup>348</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 278-279.

<sup>349</sup> *ibid* at 279.

<sup>350</sup> Henckels, ‘Overcoming Jurisdictional Isolationism’, *supra* note 346 at 584.

<sup>351</sup> *ibid* at 584.

<sup>352</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 279.

<sup>353</sup> *ibid* at 279.

<sup>354</sup> Joel R. Paul, ‘Comity in International Law’, 32 *Harvard International Law Journal* (1991) 1-79 at 8.

<sup>355</sup> *ibid* at 3.

<sup>356</sup> *MOX Plant case*, *supra* note 35.

<sup>357</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52.

<sup>358</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of WTO Tribunals’, *supra* note 323 at 601. Mexico argued that the claims of the United States are linked to a broader dispute initiated already under the NAFTA, and because of this the dispute could be resolved only by a NAFTA panel.

Appellate Body did not accept this argument, and stated that it did not have the discretion to decline to exercise jurisdiction, except in situations that involve a legal impediment.<sup>359</sup> Such an obstacle was not considered to exist in that case. Gao and Lim have also disputed the application of comity, arguing that it has no textual basis in the DSU, also referring to the prohibition to ‘add to or diminish the rights and obligations’ of Article 3.2 of the DSU.<sup>360</sup> However, none of the procedural principles used to avoid conflicting judgements have textual basis in the DSU, so if this argument is accepted the use of all general principles in the WTO context is precluded. It has to be also noted that the WTO tribunals have applied principles that have no textual basis in the covered agreements in the past.<sup>361</sup> However, other authors have questioned the applicability of comity as well, and for example Michell and Heaton argue that it is incompatible with the requirements of the DSU and therefore cannot be applied.<sup>362</sup>

It seems unlikely that WTO tribunals would decline to exercise jurisdiction merely based on a comity approach. Perhaps in circumstances where there is also a valid PTA jurisdiction clause binding both parties the panel could find assistance in applying the principle. Nevertheless, based on the Appellate Body’s statement in *Mexico – Soft Drinks*, the current state of law offers little support as to the possibilities to apply comity in the WTO–PTA context.

### **3.1.5. Abuse of rights and good faith**

The principle of abuse of rights governs situations in which a country exercises its rights in a way that affects the rights of another country negatively, in which a right is exercised intentionally to reach a different end than was provided for when creating the right, and in which a state acts arbitrarily.<sup>363</sup> It could be argued that by initiating a second proceeding on the same matter, a state is acting in bad faith. This sort of act could be seen as harassment of the other party, and a state bringing the same case before a second tribunal can be argued to abuse its procedural rights.<sup>364</sup>

Abuse of process could also be found in situations where a claim is “frivolous or manifestly groundless” or the dispute is based on a claim that should have been raised in

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<sup>359</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52, paras. 53 and 54.

<sup>360</sup> Gao and Lim, ‘Saving the WTO From the Risk of Irrelevance’, *supra* note 142 at 909.

<sup>361</sup> See *supra* note 164 for references.

<sup>362</sup> Mitchell and Heaton ‘The Inherent Jurisdiction of WTO Tribunals’, *supra* note 323 at 601.

<sup>363</sup> Panizzon, *Good Faith in the Jurisprudence of the WTO*, *supra* note 306 at 30-31.

<sup>364</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 7.

earlier proceedings.<sup>365</sup> Under such circumstances, the panel could decline to exercise jurisdiction not due to the multiple proceedings, but on the basis of the “inherently vexatious nature of the proceedings”.<sup>366</sup> A prohibition against the abuse of rights has been argued to be a general principle of law.<sup>367</sup> At least the doctrine is seen as a well-established principle, but it has been said there are not many occasions in which it could be used.<sup>368</sup> It has however been referred to by the PCIJ<sup>369</sup> and also in the ICJ<sup>370</sup> jurisprudence, and therefore cannot be regarded as a completely theoretical question.

As for the principle of good faith, in *Argentina – Poultry*, Argentina asserted that Brazil failed to act in good faith when initiating the WTO dispute settlement system after losing the case in the MERCOSUR proceedings.<sup>371</sup> The Panel rejected this claim, but accepted that it is possible for a panel to find that a member has acted in bad faith.<sup>372</sup> The threshold was set quite high, as the Panel stated that in order for a panel to find that a member has failed to act in good faith, that member must have violated a substantive provision of the WTO covered agreements, and there must also be something “more than a mere violation”.<sup>373</sup> As Argentina had not even claimed that Brazil had violated a substantive provision of one of the covered agreements, the requirements were not met and Brazil could not have been found to be acting in bad faith in initiating the dispute in the WTO dispute settlement.<sup>374</sup>

In *Peru – Agricultural Products* Peru claimed that Guatemala had acted contrary to its good faith –obligation by challenging the disputed measure in WTO litigation. The Appellate Body stated that any waiver limiting members’ procedural rights under the WTO agreements must be made clearly for it to be a basis for a good faith –argument.<sup>375</sup> The Appellate Body also stated that “Member’s compliance with its good faith obligations ...

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<sup>365</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 202-203.

<sup>366</sup> *ibid* at 203.

<sup>367</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 7.

<sup>368</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 202.

<sup>369</sup> See *Case Concerning Certain German Interests in Upper Silesia (Poland v. Germany) P.C.I.J. Series A, No. 6 (1925)*, at 30.; *Oscar Chinn case P.C.I.J. Series A/B, No. 63 (1934)* at 86.

<sup>370</sup> See for example the individual opinion of Judge Alvarez in *Corfu Channel case (the United Kingdom v. Albania) (Merits) I.C.J. Reports 1949*, 46 in which he stresses the importance of the principle of abuse of rights.

<sup>371</sup> Panel Report, *Argentina – Poultry*, *supra* note 318.

<sup>372</sup> *ibid*, para. 7.35.

<sup>373</sup> *ibid*, para. 7.36. See also 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, para. 298.

<sup>374</sup> Panel Report, *Argentina – Poultry*, *supra* note 318, para. 7.36.

<sup>375</sup> Appellate Body Report, *Peru – Agricultural Products*, *supra* note 127, para. 5.25.

should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU.”<sup>376</sup> The Appellate Body also stated that it considers that members may not relinquish their rights and obligations under the DSU beyond the settlement of specific disputes.<sup>377</sup>

In *Peru – Agricultural Products* the Appellate Body did not find anything that would have prohibited the respondent Guatemala from initiating the WTO dispute settlement system, and as both members even agreed that Guatemala was not procedurally barred from initiating the dispute, no breach of a good faith was found.<sup>378</sup> The Appellate Body’s reasoning seems to follow the *Argentina – Poultry* Panel’s reasoning about a violation of a substantive WTO provision. The requirement of limiting the waiver to a specific dispute seems to narrow the scope of provisions that could be found to create such an agreement that could be relied upon on the basis of a good faith –argument. However, clearly stipulated jurisdiction clauses that make specific reference to the DSU may be found to fulfil the requirements.<sup>379</sup>

In line with this argument, one suggestion on the possibility to allege a violation of a substantive DSU provision is to base the claim on a breach of Article 3.10 of the DSU. Article 3.10 of the DSU states that members are to engage into WTO dispute settlement procedures in good faith. According to this approach, when a member acts inconsistently with a clear statement, such as a fork-in-the-road jurisdiction clause, it breaches its procedural good faith obligations arising from Article 3.10 of the DSU.<sup>380</sup> This breach of the good faith obligation creates a legal impediment for the panel to exercise its jurisdiction.<sup>381</sup> The claim in this respect is that the jurisdiction of the panel is not validly established, as the Article 3.10 of the DSU is breached.<sup>382</sup> A breach of procedural good faith could be found when the principle of good faith is specifically invoked as a breach of Article 3.10 of the DSU, referring to a specific statement made by the other member.<sup>383</sup>

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<sup>376</sup> Appellate Body Report, *Peru – Agricultural Products*, *supra* note 127, para. 5.25.

<sup>377</sup> *ibid*, footnote 106.

<sup>378</sup> *ibid* at 5.27.

<sup>379</sup> Pauwelyn, ‘Interplay Between the WTO and Other International Legal Instruments and Tribunals’, *supra* note 128 at 19.

<sup>380</sup> Bregt Natens and Sidonie Descheemaeker, ‘Say it Loud, Say it Clear – Article 3.10 DSU’s Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction’, forthcoming, 49:5 *Journal of World Trade*. Available at SSRN: <http://ssrn.com/abstract=2497368> or <http://dx.doi.org/10.2139/ssrn.2497368>.

<sup>381</sup> *ibid* at 12.

<sup>382</sup> *ibid* at 12.

<sup>383</sup> *ibid* at 18.

Nates and Descheemaeker suggest that in case the specific statement is based on a fork-in-the-road jurisdiction clause, the clause has to be exercised before it can be used as a basis for the inadmissibility claim.<sup>384</sup> This approach would allow the recognition of the jurisdiction clauses in PTAs, as well as give significance to the acts of members. It is also in line with the Panel's statements in *Argentina – Poultry* and the Appellate Body's findings in *Peru – Agricultural Products*, as a substantive provision of the DSU would be alleged to be violated. This approach would also avoid the question of applicable law, as the PTA jurisdiction clause would only be used as a means of interpretation of Article 3.10 of the DSU.

It would not seem unreasonable to assert that a country that initiates the WTO dispute settlement mechanism after for example losing a case in a PTA dispute settlement is acting in bad faith and also abusing its procedural rights. Mitchell and Heaton point out that such finding would not mean that the member would be considered to be acting in bad faith in the sense of *mala fides*, “entering into an agreement with no intention to uphold it”, but merely that a member has restricted its ability to invoke its right to enter into WTO proceedings, and is now acting against this restriction.<sup>385</sup> Mitchell and Heaton consider that the principle of abuse of process creates a legal impediment for the WTO tribunal, because it prevents the exercise of the right to initiate WTO dispute settlement altogether.<sup>386</sup>

In the light of awards in *Argentina – Poultry* and *Peru – Agricultural Products*, it seems unlikely that the doctrines of bad faith and abuse of process would offer a tool for assessing the problem of multiple proceedings without the existence of PTA jurisdiction clause. Kwak and Marceau are of the view that it is very unlikely that a WTO tribunal would decline to exercise jurisdiction based on a claim of bad faith or abuse of process.<sup>387</sup> They argue that states are often bound by several overlapping jurisdictions, and if they have negotiated the possibility of referring a dispute to various fora, it must be assumed that they have also intended to “retain the possibility of using such fora on separate and distinct occasions”.<sup>388</sup> However, the suggestion based on Article 3.10 could offer a solid argument based on good faith –obligation for the respondent in case the claimant has violated a clear and unambiguous PTA jurisdiction clause, especially if it has already been

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<sup>384</sup> Natens and Descheemaeker, ‘Say it Loud, Say it Clear’, *supra* note 380 at 18.

<sup>385</sup> Mitchell and Heaton, ‘The Inherent Jurisdiction of WTO Tribunals’, *supra* note 323 at 619.

<sup>386</sup> *ibid* at 618.

<sup>387</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 7.

<sup>388</sup> *ibid* at 7.



exercised. The possibility of basing a claim on this argument is still unresolved in WTO jurisprudence.

### 3.1.6. *Forum non-conveniens*

*Forum non-conveniens* provides a possibility to decline from exercising jurisdiction when there is another forum which is “clearly or distinctly more appropriate” than that forum, in other words, which is, “a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”<sup>389</sup> The *forum non-conveniens* doctrine has a lot in common with the estoppel doctrine, as it also based on the vexatious and oppressive nature of the actions of the claimant.<sup>390</sup> As all the other principles outlined in this section, the *forum non-conveniens* is also rooted in domestic legal systems, and was used to refer cases to foreign proceedings.<sup>391</sup> *Forum non-conveniens* is mostly used in common law systems and therefore it is not as clearly accepted as a general principle of law.<sup>392</sup>

In municipal systems, the principle could have been used for several reasons, one example of which is a situation where better understanding of foreign law or a need for experts in certain aspects of the dispute was needed to solve a case.<sup>393</sup> The requirements vary from state to state, but things that are considered include issues such as expenses, availability of witnesses, the place where the parties reside, and so on.<sup>394</sup> Such issues of venue do not however truly arise in the context of international litigation, at least not in the same way as between domestic systems.<sup>395</sup>

Another argument against the use of the doctrine in the context of international litigation is the fact that states have agreed to be bound by the jurisdiction of international tribunals. In the domestic context, no agreement is made as domestic courts have mandatory jurisdiction over disputes that are within their personal jurisdiction. Therefore, in the international law context, the respondent does not need the same level of protection, as it has willingly agreed to multiple, potentially overlapping jurisdictions.<sup>396</sup> Lowe argues that there is no need to maintain as close a level of harmony between international tribunals as

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<sup>389</sup> Lowe, ‘Overlapping jurisdictions’, *supra* note 54 at 200.

<sup>390</sup> *ibid* at 200.

<sup>391</sup> *ibid* at 200 where Lowe discusses the doctrine in the light of British legal system.

<sup>392</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 110.

<sup>393</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 200.

<sup>394</sup> Kwak and Marceau, ‘Overlaps and Conflicts of Jurisdiction’, *supra* note 12 at 8.

<sup>395</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 201.

<sup>396</sup> *ibid* at 201.

there is between national courts.<sup>397</sup> The doctrine could be applied when demands of efficiency in the administration of justice indicate that the court should decline to exercise jurisdiction, but Lowe argues that the required level of permanence, predictable bases of personal jurisdiction, plenary subject-matter jurisdiction, among other requirements, are not yet fulfilled in international litigation.<sup>398</sup>

It has been argued that the doctrine could never find basis in the WTO context, as the WTO forum is always a convenient, even exclusive forum for addressing breaches of the covered agreements.<sup>399</sup> This of course does not change the issue that the same matter could be dealt with under the dispute settlement mechanism of a PTA, as the rights and obligations are often almost identical under the two systems, even though the PTA tribunal could not address breaches of the covered agreements. The convenient forum for addressing breaches of WTO agreements is of course the WTO itself, but the question is whether a PTA tribunal could be more convenient for solving the same matter under its own constitutive agreement.

Pauwelyn and Salles seem to be of the view that as a PTA tribunal could not address the breaches of WTO obligations, the *forum non-conveniens* doctrine cannot find application in this context.<sup>400</sup> They point out that after a tribunal has been found to have jurisdiction, it would be difficult for it to decline to exercise this jurisdiction without a clearly established legal impediment.<sup>401</sup> Therefore, it would be difficult for a WTO tribunal to decline to exercise its validly established jurisdiction based on a claim that a non-WTO tribunal would be a more convenient forum, as this does not create a legal impediment for exercising otherwise validly established jurisdiction.

Pauwelyn and Salles however note that the doctrine could be very useful in international adjudication, as it does not include the requirement for same legal cause of action found in *res judicata* and *lis alibi pendens* principles.<sup>402</sup> This means that the more convenient forum does not have to settle the dispute under the law the less convenient forum would have applied. *Forum non-conveniens* could be a very useful tool especially in determining the

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<sup>397</sup> Lowe, 'Overlapping Jurisdictions', *supra* note 54 at 201.

<sup>398</sup> *ibid* at 201.

<sup>399</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 8.

<sup>400</sup> Pauwelyn and Salles, 'Forum Shopping', *supra* note 34 at 111.

<sup>401</sup> *ibid* at 112.

<sup>402</sup> *ibid* at 114.

conflicting jurisdictions between the WTO and PTAs. Nevertheless, the doctrine does not appear to enjoy a great support for application in the context of international litigation.

### **3.2. Concluding remarks on the use of general principles as tools to solve the conflict**

It seems unlikely that general principles of international law can directly solve the issue of competing jurisdictions in the context of the WTO and PTAs. At least when considered individually, the WTO tribunals seem to be rather unwilling to apply the principles in this context. Many of the principles are also rather ambiguous and do not have an established position in international adjudication. It has been noted that, as these principles derived from domestic legal systems do not resolve the issues of forum shopping, the best way to avoid the problems would be regulate these overlaps in the constitutive treaties by forum selection clauses.<sup>403</sup> This brings us back to the question of the applicability of jurisdiction clauses included in PTAs.

General principles of international could offer guidance at least in cases where there is a jurisdiction clause in a PTA limiting the jurisdiction of the WTO. The principles could be very useful in this regard, and also following this application the question of PTA norms as applicable law could be avoided. For example Shany has argued that if the doctrine of abuse of rights is accepted, it would be applicable in cases where a dispute is brought before a tribunal in violation of a jurisdiction clause excluding such right.<sup>404</sup> In such situations, the tribunal should decline jurisdiction based on the abusive exercise of a right that has been precluded by a treaty binding that party.<sup>405</sup> One concrete solution of was presented in section 3.1.5, where it was suggested that the respondent could base its claim on a violation of Article 3.10 of the DSU when the complainant has violated a fork-in-the-road clause in a PTA.

The same could be said about the estoppel principle, in which case the jurisdiction clause in a PTA could be considered to establish a binding promise, excluding the possibility to initiate the WTO dispute settlement. Also the doctrine of comity could be found useful in situations where a jurisdiction clause indicates that the dispute should be settled in a PTA forum and not in the WTO system. It is unclear whether the WTO would be willing to apply the principles in this way or not. It can be concluded that these principles do not

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<sup>403</sup> Pauwelyn and Salles, 'Forum Shopping', *supra* note 34 at 117.

<sup>404</sup> Shany, *The Competing Jurisdictions*, *supra* note 19 at 258.

<sup>405</sup> *ibid* at 258.

seem to solve the conflicts or the problem of multiple litigations as such, but if applied together with a PTA jurisdiction clause they could, and in my opinion should, offer a way for the WTO tribunals to decline to exercise jurisdiction without having to directly apply non-WTO jurisdiction clauses as sources of law in WTO litigation.

## 4. The jurisdiction of the WTO – What can the WTO tribunals do?

### 4.1. The inherent powers of WTO tribunals

International tribunals have jurisdiction only when it is explicitly granted to them by the parties.<sup>406</sup> Jurisdiction can be divided into three different elements, which have different functions: the subject-matter jurisdiction, the applicable law before the tribunal, and the inherent jurisdiction of the tribunal.<sup>407</sup> The difference between the subject-matter jurisdiction and the applicable law before a tribunal was addressed already in section 2.4.2. In this section it is especially important to clarify the division between the subject-matter jurisdiction and the inherent jurisdiction of a tribunal.<sup>408</sup>

The subject-matter jurisdiction of the WTO is limited to disputes under WTO covered agreements and to the terms of reference of the specific WTO panel.<sup>409</sup> In contrast, inherent jurisdiction “is asserted when an international tribunal faces a question that affects its ability to exercise the judicial function assigned to it.”<sup>410</sup> This means that the powers of WTO tribunals extend outside the WTO covered agreements, as these powers inherent to all international tribunals do not derive from these agreements.<sup>411</sup> I will now examine the scope of the inherent jurisdiction in more depth.

When a tribunal is seized to settle a dispute, it has certain inherent powers that are rooted in its judicial functions.<sup>412</sup> When discussing the inherent jurisdiction of the Court in the *Nuclear Case Test*, the ICJ stated that “such inherent jurisdiction . . . derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.”<sup>413</sup> The WTO members have agreed to the jurisdiction of the WTO through DSU provisions.<sup>414</sup> WTO tribunals are international judicial bodies, and they therefore have these inherent

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<sup>406</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 193.

<sup>407</sup> Andrew D. Mitchell, ‘The Legal Basis for Using Principles in WTO Disputes’, 10(4) *Journal of International Economic Law* (2007) at 821.

<sup>408</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 98.

<sup>409</sup> *ibid* at 98.

<sup>410</sup> *ibid* at 99.

<sup>411</sup> *ibid* at 100.

<sup>412</sup> Mitchell and Heaton ‘The Inherent Jurisdiction of WTO Tribunals’, *supra* note 323 at 562.

<sup>413</sup> *Nuclear Tests Case (Australia v France) I.C.J. Report 1974* at 259-260. The ICJ addressed the issue also in *Northern Cameroons Case (Cameroon v. the United Kingdom) I.C.J. Reports 1963*.

<sup>414</sup> This means that the parties do not have to accept the jurisdiction of the WTO when a case is initiated. See Van den Bossche, *The Law and Policy of the WTO*, *supra* note 143 at 189.

jurisdictional powers.<sup>415</sup> The scope of the inherent powers of the WTO tribunals is not however clear, although, as mentioned in section 2.4.2., the WTO tribunals have applied general principles of international law not included in the covered agreements. The fact that WTO tribunals have these inherent powers means that their judicial powers are not limited to the texts of the covered agreements. Pauwelyn and Salles argue that the confusion between the inherent jurisdiction of WTO tribunals and the subject-matter jurisdiction arising from the covered agreements is the reason why many argue that the WTO tribunals could never decline to exercise jurisdiction.

The constitutive document of a tribunal can limit these powers exercised under inherent jurisdiction,<sup>416</sup> and in this case the focus is to be tuned to the covered agreements. However, it must be kept in mind that even if the constitutive agreement does not say anything about a specific power, it does not mean that the tribunal established under that treaty is devoid of it, as international tribunals possess inherent powers even without a specific treaty text. It has been argued that the WTO tribunals have powers to apply general principles of international law under their inherent jurisdiction only if such principles are not in conflict with the covered agreements. Trachtman has stated that the WTO tribunals should exercise these powers only in relation to certain procedural issues, and not extent their application to substantive rights and obligations.<sup>417</sup>

Such inherent powers that the WTO tribunals are considered to have include the competence and also the obligation to determine whether they have jurisdiction to decide the matter before turning to rule on issues on the merits.<sup>418</sup> This competence to decide one's own competence, often referred to as *la compétence de la compétence*, is considered to be invested in every international tribunal's powers and should be exercised even without a claim from the parties.<sup>419</sup> WTO tribunals have also the powers to determine whether they should refrain from exercising their validly established jurisdiction, a power governing the issue of admissibility.<sup>420</sup> The Appellate Body has confirmed that a "legal

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<sup>415</sup> Pauwelyn, *Conflicts of Norms*, *supra* note 72 at 447 and Mitchell and Heaton 'The Inherent Jurisdiction of WTO Tribunals', *supra* note 323 at 568. This has also been confirmed by the Appellate Body several times, see for example *US – 1916 Act*, *supra* note 164 and *Mexico – Soft Drinks*, *supra* note 52.

<sup>416</sup> Trachtman, 'No Outsourcing of WTO Law', *supra* note 312 at 424-425

<sup>417</sup> *ibid* at 424

<sup>418</sup> Appellate Body Report, *US – 1916 Act*, *supra* note 164.

<sup>419</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 155.

<sup>420</sup> Pauwelyn, *Conflicts of Norms*, *supra* note 72 at 448.

impediment” could lead to a situation where the panel would refrain from exercising jurisdiction.<sup>421</sup>

In this section, I will first cover the question of the competence of the WTO tribunals to determine their jurisdiction. Secondly, I shall address the distinction between jurisdiction and admissibility, and the possible approaches it offers to this issue. I will finish by analysing the WTO case law on this issue and the conclusions that can be drawn therefrom.

#### ***4.1.2. La compétence de la compétence***

The principle of *la compétence de la compétence* has long roots and has been recognised by several courts in the history of international adjudication.<sup>422</sup> It is considered to be a general principle of international law, and therefore the right and the obligation to determine one’s own jurisdiction does not require an express provision in the constitutive documents of the court or tribunal.<sup>423</sup> This *compétence* is also not based on the acceptance of the parties to the dispute, but is an inherent part of the exercise of judicial powers of validly established tribunals.<sup>424</sup> The ICJ stated in the *Nottebohm case* that the competence to decide as to its own jurisdiction and the ability to interpret for this purpose the instruments which govern that jurisdiction are powers that every international tribunal has.<sup>425</sup> The court underlined the importance of this examination in the context of international courts that are of more permanent character. The court stated that:

*“This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation.”*<sup>426</sup>

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<sup>421</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, *supra* note 52, para. 54.

<sup>422</sup> See Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 121-135 for a history of the principle.

<sup>423</sup> *ibid* at 141. The ICJ confirmed that the *compétence* does not need to be stated in the text of the constitutional treaty of a tribunal in the *Arbitral Award of 31 July 1989* case, I.C.J. Reports 1991 at 68-69. See also *Nottebohm Case* (Liechtenstein v. Guatemala) I.C.J. Reports 1953. It is noteworthy that several tribunals, such as ICJ and ECHR have included this in their constitutive treaties, whereas other such as ICTY and ICTR have not.

<sup>424</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 141.

<sup>425</sup> *Nottebohm case*, *supra* note 423 at 19.

<sup>426</sup> *ibid* at 19.

The Appellate Body has accepted this obligation in the *US – Anti-Dumping Act of 1916* case, which regarded a United States Act allowing civil actions and criminal proceedings against importers who had sold foreign-produced goods at prices which were much lower than the prices at which they were sold in a relevant foreign market. There the European Union argued that the objection to the jurisdiction of the Panel done by the United States must be rejected because it was not raised before the Panel in a timely manner.<sup>427</sup> The Appellate Body then noted that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it”.<sup>428</sup> The Appellate Body also stated that “[t]he vesting of jurisdiction in a Panel is a fundamental prerequisite for lawful panel proceedings”<sup>429</sup> and that “some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time”.<sup>430</sup> This obligation was further clarified by the Appellate Body in the *Mexico – Corn Syrup (21.5 – US)* case, which was about Mexico's imposition of anti-dumping duties on imports of high fructose corn syrup from the United States.<sup>431</sup> There the Appellate Body stated that “panels cannot simply ignore issues which go to the root of their jurisdiction” but that they “must deal with such issues . . . in order to satisfy themselves that they have authority to proceed”.<sup>432</sup>

In the case of overlapping jurisdictions, a tribunal must ask itself whether it has jurisdiction notwithstanding the jurisdiction vested in the other tribunal or whether its jurisdiction has been modified by the treaty establishing the jurisdiction of that other tribunal.<sup>433</sup> If the jurisdiction of an earlier tribunal has indeed been modified by a treaty later in time, the constitutive text of the earlier tribunal continues to apply only to the extent that it is compatible with the later one.<sup>434</sup> The tribunal faced with this question when assessing its jurisdiction is to solve the conflict by applying the conflict rules of international law presented in section 2.4.3., or when there is an explicit conflict rule in one of the treaties, by applying that provision.<sup>435</sup> If the jurisdiction of the tribunal is overruled by the

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<sup>427</sup> Appellate Body Report, *US – 1916 Act*, *supra* note 164.

<sup>428</sup> *ibid*, para. 54 note 30.

<sup>429</sup> *ibid*, para. 54.

<sup>430</sup> *ibid*, para. 54.

<sup>431</sup> Appellate Body Report, *Mexico – Anti-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 22 October 2001 (*Mexico – HFCS*).

<sup>432</sup> *ibid*, para. 36.

<sup>433</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 194.

<sup>434</sup> *ibid* at 194.

<sup>435</sup> *ibid* at 194.



jurisdiction of another tribunal, it must refuse jurisdiction on the basis of the legal bound created by the agreement establishing the jurisdiction of that other tribunal.<sup>436</sup>

It is undisputed that the WTO panels have *la compétence de la compétence*, and that they must exercise this obligation even without a specific claim made on the issue. However, Marceau and Wyatt have argued that it is merely an operational rule, and therefore only applies as part of “incidental jurisdiction”, by which they mean that the panel would only have competence to examine whether it has jurisdiction to carry out the judicial functions, and it cannot refuse substantive jurisdiction in any case.<sup>437</sup> The extent of the *compétence* of the WTO tribunals is therefore not completely settled. The WTO tribunal has to examine if there is something that could exclude its jurisdiction in a matter brought before it. Does the jurisdiction provided by the DSU stay intact regardless of an agreement aiming to contract out of it or a parallel litigation in the same matter?

## **4.2. Excluding jurisdiction or objecting admissibility?**

### ***4.2.1. General remarks about jurisdiction and admissibility***

The principle of *la compétence de la compétence* deals with the jurisdiction of an international tribunal. International tribunals have however also the inherent power to determine whether they should exercise their validly established jurisdiction, which refers to the admissibility of a case. This leads to the question of whether jurisdictional overlaps between the WTO and PTAs should be dealt with through the concept of jurisdiction or admissibility. Jurisdiction and admissibility are both preliminary questions that prevent or at least postpone a tribunal from ruling on the merits of the dispute.<sup>438</sup> As Pauwelyn and Salles have put it: “[t]he distinction between matters of jurisdiction and admissibility stems from the distinction between the scope of a tribunal's decisional authority and the conditions governing the exercise of the specific action or process before the tribunal”.<sup>439</sup> The distinction between these two concepts has not been widely recognised in the WTO system.

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<sup>436</sup> Lowe, ‘Overlapping Jurisdictions’, *supra* note 54 at 195.

<sup>437</sup> Marceau and Wyatt, ‘Dispute Settlement Regimes Intermingled’, *supra* note 6 at 71.

<sup>438</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 93.

<sup>439</sup> *ibid* at 94.

Jurisdiction is the basic legal qualification of a tribunal, which allows it to examine complaints submitted to it and adjudicate on the merits of the claims.<sup>440</sup> The requirements for the existence of jurisdiction must be fulfilled in order for the tribunal to exercise jurisdiction, and if they are not, the defect cannot be overcome.<sup>441</sup> Objections to jurisdiction dispute the authority and the existence of the adjudicative power of the tribunal as such.<sup>442</sup> Questions of admissibility do not concern such fundamental matters, and an objection to the admissibility of a claim can be waived and also precluded.<sup>443</sup> Issues of admissibility do not diminish the jurisdiction of the tribunal and in deciding that the case is inadmissible, the tribunal is in fact exercising its jurisdiction.<sup>444</sup> Objections to admissibility are related to rules that bind the disputing parties and are not necessarily included in the treaty establishing the jurisdiction of the tribunal that is assessing the matter.<sup>445</sup> Objections to admissibility take aim at the specific request or claim in question, and dispute the exercise of adjudicative power of the tribunal under those specific circumstances.<sup>446</sup>

The difference between jurisdiction and admissibility can also be analysed through consent.<sup>447</sup> Under this approach, if a party to a dispute makes an objection to the jurisdiction of the tribunal, it essentially claims that it has not consented to the jurisdiction of the tribunal to settle that particular dispute.<sup>448</sup> Other procedural requirements relate to admissibility, and objections in this regard are made in cases where there is claimed to be a legal reason why the tribunal should decline to hear the case notwithstanding its jurisdiction.<sup>449</sup> The jurisdiction of a tribunal must be examined by the tribunal itself, *proprio motu*, without a claim from the parties, whereas a claim of inadmissibility must be raised by one of the parties for the tribunal to examine its grounds.<sup>450</sup> The latter is reflected

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<sup>440</sup> Judgments Of The Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, Advisory opinion of October 23<sup>rd</sup>, 1956 ICJ Reports at 87 and 189.

<sup>441</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 189.

<sup>442</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 164. This is a simplified explanation of the issue, as there are different schools that view the difference between jurisdiction and admissibility differently. The approach presented here is the objectivist approach.

<sup>443</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 191.

<sup>444</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 156.

<sup>445</sup> Pauwelyn and Salles, 'Forum Shopping', *supra* note 34 at 95.

<sup>446</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 164.

<sup>447</sup> This is the "Conventionalist-residualist" approach. See more in Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 168-173.

<sup>448</sup> *ibid* at 169, assessing the *Genocide Case*, *supra* note 289 para. 120.

<sup>449</sup> *ibid* at 168-169.

<sup>450</sup> *ibid* at 150-152.

also in WTO jurisprudence, as the panels or the Appellate Body have not assessed the potential conflicts of jurisdictions when the parties have not raised such claims.<sup>451</sup>

The jurisdiction versus admissibility categorisation was originally developed in the jurisprudence of the PCIJ<sup>452</sup> and further by the ICJ<sup>453</sup>, and is now a recognised feature of international adjudication.<sup>454</sup> To distinct these two concepts is not always an easy task, and also does not have practical importance in every situation.<sup>455</sup> For example the ICJ stated in its *Interhandel* case that the objection made by the respondent on the jurisdiction of the Court on the basis of the claimant not having exhausted local remedies is in fact a question of admissibility, not jurisdiction.<sup>456</sup> However, in the *Northern Cameroons Case (Preliminary Objections)* the ICJ stated that it does not find it necessary to determine which objections were objections to jurisdiction and which were objections to admissibility, when the parties to the dispute did not make a distinction between the two concepts.<sup>457</sup> The WTO tribunals have not explicitly referred to the distinction, but it could be argued that the Appellate Body has recognised it in its jurisprudence. For example in *Mexico – Soft Drinks* the Appellate Body, quoting the Panel report, noted that Mexico did not claim that the Panel has no jurisdiction on the matter, but merely that it should not exercise it, thus referring to admissibility.<sup>458</sup> In the same case the Appellate Body also referred to “legal impediments” which could render a case inadmissible in the WTO dispute settlement mechanism even when the panel has jurisdiction in the matter.<sup>459</sup>

#### **4.2.2. Alternative solutions derived from the differentiation**

Are jurisdictional overlaps between the WTO and PTAs issues of jurisdiction or admissibility? According to Salles, jurisdictional issues arise when “the jurisdictional instruments or clauses of the forum that is examining the question expressly regulate the

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<sup>451</sup> In issue could have been raised, but was not addressed in cases *Mexico – Soft Drinks*, *supra* note 52; *Canada – Periodicals*, *supra* note 51; *US – Tuna II*, *supra* note 51.

<sup>452</sup> See *German Interests in Upper Silesia*, *supra* note 369 at 18, where the Court addressed the distinction between the two issues for the first time; and *The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, *P.C.I.J. Series A/B, No 76 (1939)*, where the Court first upheld a preliminary objection to admissibility.

<sup>453</sup> See for example *Interhandel Case (Switzerland v. the United States of America) I.C.J. Reports 1959* and *Nottebohm*, *supra* note 423.

<sup>454</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 143.

<sup>455</sup> *ibid* at 145-146.

<sup>456</sup> *Interhandel case*, *supra* note 453 at 26.

<sup>457</sup> *Northern Cameroons Case*, *supra* note 413 at 27. Also in the *Nicaragua Case* the Court did not find it necessary to clarify the confusion between the two issues. See the *Nicaragua Case*, *supra* note 148.

<sup>458</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52, para. 44. The vocabulary used in this regard can be confusing if the differentiation is factually made, but the same term is used for both issues. See more in Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 194-195 where the author discusses this problem in the context of ECHR.

<sup>459</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52, para. 54.

procedural relationship between the forums at stake (as an issue of jurisdiction).”<sup>460</sup> The objection would be based on the jurisdictional clauses upon which the jurisdiction of the tribunal is founded on.<sup>461</sup> In contrast, Salles states that questions of admissibility are present where “procedural organization is indirect – the result of the application of a written procedure regulating norm unrelated to the authority of the tribunal examining the question, or of a general principle of law”.<sup>462</sup>

Already based on this it can be concluded that claims based solely on the application of general principles of law, such as *res judicata* or *lis pendens*, are to be assessed as objections on admissibility also in the WTO system, as the WTO tribunals have, although implicitly, done so far.<sup>463</sup> But what about cases where a defence is based on a PTA that includes a jurisdiction clause? This type of situations can be analysed from two perspectives. Firstly, the discussion on the *inter se* modifications to the WTO covered agreements can be analysed through the concept of jurisdiction, meaning that the disputing parties can contract out of the jurisdiction of the WTO by *inter se* modifying the DSU provisions.<sup>464</sup> It could be argued that by contracting out of the jurisdiction of the WTO, the parties do not give their consent to the jurisdiction of the WTO as it is offered by the DSU if certain conditions, defined in the PTA clauses, are present.

Following this route, the question would come down to conflict of norms, and the outcome of the conflict determines which tribunal has jurisdiction on the matter.<sup>465</sup> The source of jurisdiction of an international tribunal stems from its constitutional instrument, through which the parties have granted their consent.<sup>466</sup> A tribunal has therefore valid jurisdiction as long as the provisions establishing jurisdiction are valid, in other words as long as the treaty provisions are in force as for between the parties to the dispute.<sup>467</sup> If *inter se* modifications were accepted to bind the WTO, it would mean that members are capable of eliminating the jurisdiction of the WTO tribunals as for between themselves through proper jurisdiction clauses included in PTAs, as the DSU provisions would not be applicable in the circumstances defined in the PTA jurisdiction clause. Therefore, it could be argued that, if the liberal view is correct and the applicability of PTA jurisdiction norms

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<sup>460</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 174.

<sup>461</sup> *ibid* at 174.

<sup>462</sup> *ibid* at 174.

<sup>463</sup> This is also confirmed in Pauwelyn, *Conflict of Norms*, *supra* note 72 at 455.

<sup>464</sup> *ibid* at 451.

<sup>465</sup> *ibid* at 455.

<sup>466</sup> Amerasinghe, *Jurisdiction of International Tribunals*, *supra* note 279 at 207.

<sup>467</sup> *ibid* at 209.

is accepted, the jurisdiction of the WTO tribunal can be excluded. Following this reasoning, if the PTA norm “wins” the conflict and is deemed as the applicable norm in that situation by applying the conflict rules of international law, the WTO jurisdiction norms have to be set aside and therefore the WTO might have to decline jurisdiction altogether when the PTA clause so demands.<sup>468</sup>

Another approach is to view this overlap as a question of admissibility. According to Salles, in situations where the objection is based on a norm “outside the purview of the principal jurisdiction of the tribunal facing the question”, the question is one of admissibility.<sup>469</sup> From this viewpoint all jurisdiction clauses raise questions of admissibility and not jurisdiction before the WTO tribunals.<sup>470</sup> The argument is that because action and process are independent of the jurisdiction of the tribunal, there might be legal circumstances which create a legal impediment for the exercise of jurisdiction, even though the tribunal has jurisdiction over the matter.<sup>471</sup> This approach focuses on the procedural relationship of the parties and their ability to initiate a dispute in a specific forum, and not on the authority of the tribunal itself.<sup>472</sup> Jurisdictional clauses included in PTAs prohibit the parties from initiating a dispute in the WTO dispute settlement, leading to the inadmissibility of the claim. The jurisdiction of the WTO is not questioned and it does not compete with the jurisdiction of the PTA. Following this approach, the DSU provisions and the jurisdiction clauses in PTAs are not considered to be in conflict, but the PTA norms are viewed as prohibitions for the parties.<sup>473</sup> The panel can then exercise its inherent jurisdiction and decide not to rule on the merits due to the jurisdiction clause binding the parties.

Because international tribunals are independent from each other and are established under different treaty regimes, they might not be too willing to decline jurisdiction in order to give way for the jurisdiction of other tribunals, as this might signal that one of the tribunals is a “supreme arbiter”.<sup>474</sup> Therefore, making objections to the jurisdiction of a tribunal might not be the easiest route for excluding the possibilities for multiple litigation and

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<sup>468</sup> This seems to be the approach adopted by Pawelyn in his earlier works, see for example Pauwelyn, *Conflict of Norms*, *supra* note 72, especially at 454-455 and Pauwelyn, ‘How to Win a WTO Dispute’, *supra* note 69 at 1005-1017.

<sup>469</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 177.

<sup>470</sup> *ibid* at 177.

<sup>471</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 94.

<sup>472</sup> *ibid* at 94.

<sup>473</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 99.

<sup>474</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 158.

conflicting judgements. Salles argues that recognition of coordination between tribunals as procedural issues of admissibility would move the debate away from perspectives on conflicts of jurisdictions or even “clash of legal regimes”.<sup>475</sup> Concentrating on questions of admissibility, more focus can be put on the actions and the conduct of the parties.<sup>476</sup> It also enables coordination between tribunals more effectively while at the same time leaving the jurisdiction of the tribunals untouched and putting them on the “same footing”.<sup>477</sup> The question of depriving a tribunal of jurisdiction would not arise, as the jurisdiction would remain intact, and the tribunal would just refrain from exercising it.<sup>478</sup> Viewing the overlaps as issues of admissibility, the conditions for exercising jurisdiction are made on a case-by-case basis taking all aspects of the dispute and the conduct of the parties into consideration.<sup>479</sup> This type of analysis underlines the logic of the doctrines of good faith and the abuse of process, which could be of use in this context.<sup>480</sup>

This approach could also help the WTO tribunals to take jurisdiction invested in a PTA better under considerations when they risk multiple litigations or when a PTA includes a jurisdiction clause limiting the jurisdiction of the WTO. Under these circumstances, the jurisdiction clause or a previous ruling of a PTA tribunal on the same matter could be seen as a legal impediment, in which case the tribunal should decline to exercise jurisdiction on the basis of inadmissibility. This would prevent the whole dispute on conflict of norms and mandatory jurisdiction of the WTO, and also allow the panels to assess each situation on a case-by-case basis, making sure that the parties will have their chance to adjudicate at least in one forum. It would also mean that the WTO would not have to accept the jurisdiction of PTAs to overrule its own. Following this approach, the parties would have to make an objection to the admissibility, and the WTO would not have to address the issue on its own initiative.<sup>481</sup>

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<sup>475</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 158.

<sup>476</sup> *ibid* at 158.

<sup>477</sup> *ibid* at 158.

<sup>478</sup> Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 96.

<sup>479</sup> Salles, *Forum Shopping in International Adjudication*, *supra* note 15 at 158.

<sup>480</sup> *ibid* at 159.

<sup>481</sup> Pauwelyn and Salles point out that the approach of the Appellate Body in *Mexico – Soft Drinks* could be explained and accepted through this application, as the Appellate Body did not examine the jurisdiction clause included in the NAFTA. The authors point out that “[h]ad the Appellate Body considered this clause to be a matter of its own jurisdiction, it could have examined the clause even if Mexico did not invoke it.” See more in Pauwelyn and Salles, ‘Forum Shopping’, *supra* note 34 at 97.

### **4.3. Case law regarding the jurisdiction of the WTO tribunals – Any lessons learned?**

From the ongoing discussion and conflicting views on the issue of the overlapping jurisdictions between the WTO and PTAs, it is evident that the problems arising from these potential conflicts have not been settled in the jurisprudence of the WTO. Some conclusions can however be made based on the statements of the panels and the Appellate Body. WTO panels and the Appellate Body have addressed the applicability of general principles of law to the jurisdiction of the WTO in their jurisprudence, but they have not been directly faced with the question of jurisdictional clauses and their effects in the WTO system.

I will now turn to examining case law regarding the issue of overlapping jurisdictions between the WTO and PTAs. I will start with the most referred case in this context, *Mexico – Soft Drinks*, where the question of panel's competence to decline jurisdiction was addressed. Second, I will move on to study *Argentina – Poultry*, where the complainant initiated the WTO dispute settlement system with a case already settled in the PTA dispute settlement system. I will then follow up with *EC – Aircraft* and analyse the panel's capabilities to consider procedural waivers. Lastly, I will study the most recent case relevant to this issue, *Peru – Agricultural Products*, where Peru alleged that the complainant breached its good faith obligations by bringing the case to the WTO dispute settlement system.

#### **4.3.1. Mexico – Soft Drinks**

*Mexico – Soft Drinks* was about measures imposed by Mexico on soft drinks and other beverages using non-cane sugar sweeteners.<sup>482</sup> The dispute was part of a larger dispute between the United States and Mexico concerning the market for sweeteners in North America.<sup>483</sup> Mexico attempted to initiate a dispute against the United States under the NAFTA already in 2000, but the United States prevented the establishment of the NAFTA panel and thereby blocked the proceedings altogether.<sup>484</sup> The actions taken by both parties finally lead to the proceedings in question under the WTO dispute settlement system.<sup>485</sup> It has to be noted however, that neither the subject-matter nor the positions of the parties

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<sup>482</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52.

<sup>483</sup> The case *Mexico – Corn Syrup* referred to above in section 4.1.2. was also part of this dispute.

<sup>484</sup> At the time a NAFTA member could block the proceedings by not co-operating in the panel selection process. See more in Davey and Sapir, 'The Soft Drinks Case', *supra* note 263 at 5-23.

<sup>485</sup> The whole 'sugar war' was mostly concluded in 2006 by a so called sweeteners agreement between the disputing countries.

were the same under the NAFTA proceedings and the WTO dispute settlement mechanism. Under the NAFTA proceedings, the complainant was Mexico and the disputed measure was an import ban imposed by the United States, whereas in the WTO proceedings the complainant was the United States and the dispute concerned a tax measure imposed by the Mexico on US products.<sup>486</sup> In the WTO proceedings, Mexico requested that the Panel would decline to exercise jurisdiction, basing its claim on the pending NAFTA proceedings.<sup>487</sup>

In the case, the Appellate Body examined its powers to exercise jurisdiction by referring to several articles of the DSU.<sup>488</sup> It stated that it had no discretion to decide whether it could exercise validly established jurisdiction in the absence of a legal impediment.<sup>489</sup> What such a legal impediment could be was left undetermined, but it was clearly stated that it did not exist under the circumstances at hand. The Appellate Body referred to the prohibition of adding to or diminishing the rights and obligations of members by stating that “[a] decision by a panel to decline to exercise validly established jurisdiction would seem to “diminish” the right of a complaining member to “seek the redress of a violation of obligations” within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU”.<sup>490</sup>

The ruling could be seen as detrimental to the whole question of preventing multiple litigations or excluding the jurisdiction of the WTO. In my opinion this is however not the case. The Appellate Body took good care of spelling out the fact that firstly, Mexico did not claim that the WTO had no jurisdiction on the matter<sup>491</sup> and secondly, that Mexico did not claim that there were legal obligations under the NAFTA or any other international agreement which might raise legal impediments for the Panel to hear the case.<sup>492</sup> Mexico only submitted that the Panel should refrain from exercising its jurisdiction due to the case

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<sup>486</sup> See a thorough analysis of the whole dispute in Davey and Sapir, ‘The Soft Drinks Case’, *supra* note 263.

<sup>487</sup> Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 7 October 2005, para. 4.101(b) (*Mexico – Soft Drinks*).

<sup>488</sup> Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU, see Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52, para. 47.

<sup>489</sup> *ibid*, paras. 53 and 54.

<sup>490</sup> *ibid*, para. 53

<sup>491</sup> Although the evaluation of jurisdiction is something that the Appellate Body should do on its own initiative, as mentioned above.

<sup>492</sup> Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 52, para. 40.



being part of a broader dispute already initiated under the NAFTA dispute settlement system.<sup>493</sup>

Firstly, no conclusions can be drawn to questions of jurisdiction based on this ruling because the possibility to exclude the jurisdiction of the WTO was not addressed at all. As all the parties, Mexico included, agreed that the Panel did indeed have jurisdiction on the matter, the Panel and the Appellate Body only addressed the issue of exercising this jurisdiction. Secondly, regarding admissibility, both the Panel and the Appellate Body stated that they “express 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”.<sup>494</sup> This means that they did not exclude the possibility of objecting admissibility of a case, but merely that the circumstances of this specific case did not render the case inadmissible. What is more, the Appellate Body explicitly stated that the relevance of Article 2005:6 of the NAFTA, which contains the jurisdiction clauses limiting the jurisdiction of the WTO under certain circumstances, was not at issue and that it did not express any view as to whether it might have changed the assessment.<sup>495</sup> Neither the Panel nor the Appellate Body took any stand in determining whether the question would be of jurisdiction or admissibility if such jurisdiction clauses were considered.<sup>496</sup>

As noted above, the measure was not the same under the NAFTA and the WTO proceedings, and also the NAFTA proceedings were blocked by the USA. What can be concluded from the case is that in order for a party to object to the admissibility of a case, there has to be a specific legal impediment that would make it inappropriate for the panel to exercise jurisdiction. Basing such objection on a jurisdiction clause included in a PTA, perhaps combined with a claim based on a general principle of international law could well be considered to establish such legal impediment. Even authors in support of the more conservative approach as to the non-WTO law penetrating into the decision-making of WTO tribunals show some support to this approach. Marceau and Wyatt have stated that in

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<sup>493</sup> Appellate Body Report, *Mexico –Soft Drinks*, *supra* note 52, para. 44.

<sup>494</sup> *ibid*, para. 54. The Panel made almost identical statement in saying that “the Panel would point out that it makes no findings about whether there may be other cases where a panel’s jurisdiction might be legally constrained, notwithstanding its approved terms of reference.” Panel Report, *Mexico –Soft Drinks*, *supra* note 487, para. 7.10.

<sup>495</sup> The Appellate Body stated that: “Finally, we note that Mexico has expressly stated that the so-called “exclusion clause” of Article 2005.6 of the NAFTA had not been “exercised”. We do not express any view on whether a legal impediment to the exercise of a panel’s jurisdiction would exist in the event that features such as those mentioned above were present.” Appellate Body Report, *Mexico –Soft Drinks*, *supra* note 52, para. 54.

<sup>496</sup> McRae, ‘The Place of the WTO in the International System’, *supra* note 237 at 64.

the light of the *Mexico – Soft Drinks* case, an exclusive forum selection clause might bring clarity to the issue, and also that the applicability of such clause was not excluded in the case.<sup>497</sup> Van Damme is also of the view that the Appellate Body hinted that the panels could have the inherent power to decline to exercise jurisdiction, although it did not in fact confirm this either.<sup>498</sup>

#### **4.3.2. Argentina – Poultry**

*Argentina – Poultry* concerned anti-dumping duties imposed by Argentina against the importation of poultry from Brazil.<sup>499</sup> Prior to initiating the dispute in the WTO dispute settlement system, Brazil had already challenged the measure before an ad hoc arbitral tribunal established under the MERCOSUR agreement. Argentina disputed the jurisdiction of the Panel on the basis that Brazil had not acted in good faith in bringing the case before two different fora. Argentina based its claim on the principle of estoppel, which was already examined above in 3.1.2., and therefore I will not return to the issue here. It will suffice to say that based on this ruling, the position of estoppel in the WTO system is unclear, but the Panel did not exclude the possibility to its application.

As for the possible effects of jurisdictional clauses included in PTAs, the Panel did make a statement that is somewhat relevant to this issue, even though it did not have to evaluate their relevance directly. The Panel stated that especially because the Protocol of Brasilia, which was the agreement regulating the disputes under the MERCOSUR agreement at the time the first dispute was settled, did not include any restrictions for the parties to initiate the same dispute under the WTO dispute settlement, Brazil had not waived its rights arising from the DSU.<sup>500</sup> The Protocol of Brasilia had been replaced by the Protocol of Olivos, but did not yet bind the members during the procedures.<sup>501</sup> The Protocol of Olivos, which is still in force, included a fork-in-the-road clause, specifically excluding the right to initiate a subsequent case either in the WTO or MERCOSUR dispute settlement system if the same case had already been brought in the other forum.<sup>502</sup> Basing its assessment on this, the Panel stated that “[i]ndeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of

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<sup>497</sup> Marceau and Wyatt, ‘Dispute Settlement Regimes Intermingled’, *supra* note 6 at 71.

<sup>498</sup> Van Damme, ‘Jurisdiction, Applicable Law, and Interpretation’, *supra* note 13 at 313.

<sup>499</sup> Panel Report, *Argentina – Poultry*, *supra* note 52.

<sup>500</sup> *ibid*, para. 7.38.

<sup>501</sup> *ibid*, para. 7.38.

<sup>502</sup> Article 1 of the Protocol of Olivos, *supra* note 61.

such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure”.<sup>503</sup>

The assessment regarded the question of whether Brazil had waived its right to bring a subsequent case to the WTO dispute settlement. Under those circumstances the answer was that it had not. Following the logic of the Panel, had the Protocol included such a jurisdiction clause, it might have affected the assessment of the issue. The ruling did not address the applicability of jurisdiction clauses, so no direct conclusions can be made. However, even though the decision does not contain any clear guidance as to the possible effects such a jurisdiction clause could have on the jurisdiction of the WTO, the Panel left the door open for later claims on such clauses.<sup>504</sup> This ruling has been interpreted to indicate the Panel’s willingness to apply jurisdiction clauses in PTAs.<sup>505</sup>

It also seems that Argentina’s claim was based on and was also analysed from the point of view of admissibility and not jurisdiction. The question was whether *Brazil* had *waived its right* to initiate the dispute settlement of the WTO and was therefore estopped from bringing the case there, and not whether the WTO had jurisdiction to rule on the merits. This is in line with the abovementioned discussion, which concluded that issues of general principles of law raise objections to admissibility, not to jurisdiction of a tribunal.

#### **4.3.3. EC – Aircraft**

The question of the effects of a mutually agreed solution and a waiver was addressed in *EC – Aircraft* in relation to a claim based on the *estoppel* principle. The case was about subsidies granted by the European Communities and certain of its member countries to Airbus large civil aircraft.<sup>506</sup> The European Communities based its response on an agreement concluded between the parties in 1992 regarding large civil aircraft programmes which, among other things, included a provision where the parties agreed to avoid conflicts

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<sup>503</sup> Panel Report, *Argentina – Poultry* *supra* note 52, para. 7.38.

<sup>504</sup> The statement made by the US as a third party goes more in the root of the normative matter in this issue. The US stated that “Article 7.1 of the DSU makes quite clear that a Panel’s role in a dispute is to make findings in light of the relevant provisions of the “covered agreements” at issue. The Protocol of Brasilia is not a covered agreement, and Argentina has not claimed that Brazil’s actions with respect to the Protocol breach any provision of a covered agreement. Rather, Argentina’s claim appears to be that Brazil’s actions could be considered to be inconsistent with the terms of the Protocol. A claim of a breach of the Protocol is not within this Panel’s terms of reference, and there are no grounds for the Panel to consider this matter.” The position of the US is therefore quite obviously against the application of PTA jurisdiction clauses in the WTO system. See *Argentina – Poultry*, *supra* note 52, para. 7.30.

<sup>505</sup> Pauwelyn, ‘How to Win a WTO Dispute’, *supra* note 69 at 1013.

<sup>506</sup> Panel Report, *EC – Aircraft*, *supra* note 332 and Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 18 May 2011 (*EC – Aircraft*).

and litigation. The European Communities argued that the provisions of the agreement were directly applicable in the case.<sup>507</sup> It also argued that the agreement created an estoppel against the United States, because the parties had reached a mutually agreed solution to avoid trade conflicts on matters covered by it.<sup>508</sup> According to the European Communities, the United States should not have been permitted to challenge subsidies which were part of an agreement which the United States had itself contributed to and in which the legality of support to large civil aircraft was determined.<sup>509</sup>

The Panel noted that the European Communities effectively stated that the United States had waived its rights to challenge certain measures in WTO dispute settlement proceedings.<sup>510</sup> According to the Panel, the question therefore came down to “whether it is possible for a Member to have waived its rights under the WTO Agreements in an agreement which it entered into prior to entering into the WTO Agreements, and if so, whether and on what basis a WTO panel could enforce such a waiver.”<sup>511</sup> The Panel then recalled the Article 23 of the DSU and the right of every member to initiate the WTO dispute settlement mechanism. The Panel went on to saying that “[a]ssuming, for the sake of argument, that a Member can waive its rights under the WTO Agreements pursuant to a non-WTO Agreement, we cannot conceive that a Member can be considered to have waived such rights by means of an agreement which it entered into prior to entering into the WTO Agreements.”<sup>512</sup> It also stated that “[e]ven if it were somehow possible to find that a Member had prospectively waived certain of its rights under the WTO Agreements in a prior Agreement in the manner contended for by the European Communities (a contention which we reject), and assuming such waiver were enforceable in WTO dispute settlement (an issue which we need not and do not decide), any such waiver would need to be clear and unambiguous.”<sup>513</sup> The Panel did not consider that the provision to “seek to avoid conflicts and litigation” related to the WTO dispute settlement at all, but merely concerned domestic trade laws. The Panel therefore concluded that it did not find any basis

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<sup>507</sup> Panel Report, *EC – Aircraft*, *supra* note 332, para. 7.71.

<sup>508</sup> *ibid*, para. 7.74.

<sup>509</sup> *ibid*, para. 7.76.

<sup>510</sup> *ibid*, para. 7.91.

<sup>511</sup> *ibid*, para. 7.92.

<sup>512</sup> *ibid*, para. 7.92.

<sup>513</sup> *ibid* para. 7.94.

for the claim that the United States had waived its rights to challenge the measure in the WTO dispute settlement proceedings.<sup>514</sup>

The statement of the Panel regarding the possibility to enforce a waiver can be criticised. If the Panel would have found that the United States did not have the right to challenge the measures in the WTO dispute settlement and the Panel would have declined to exercise jurisdiction based on this, it would not have been enforcing the non-WTO agreement, but it would have decided not to rule on the merits due to the complainant's obligations arising from that agreement. This is the issue of the distinction between the applicable law and jurisdiction, which was addressed above at 2.4.2. The question is therefore not about the enforceability of a non-WTO agreement, but of the applicable law before the WTO tribunal.

However, two things can be concluded here. Firstly, the Panel found that at least agreements established prior to the founding of the WTO cannot waive the rights provided by the covered agreements. Taking into consideration the fact that some PTAs, for example the NAFTA, came into force before the WTO was established, this could create obstacles for the jurisdiction clauses included in them. Secondly, the Panel found that if members' rights arising from the covered agreements can be effectively waived, the agreement by which the waiver is based on has to be clear and unambiguous. This is effectively the same criterion that was presented already in *Argentina – Poultry* in relation to the estoppel principle. Such jurisdiction clauses that are aimed to regulate the allocation of jurisdiction between the WTO and PTAs are likely to be drafted in such a way that fulfils these criteria.

However, the wording of the Panel's decision shows that the question was again purposely left open. Also, the European Union did not attempt to dispute the jurisdiction of the Panel, and also did not claim that the Panel should decline from exercising jurisdiction. The purpose of the claim was to request the Panel to find that based on the agreement and the mutually agreed solution regarding large civil aircraft, the subsidies granted would not be found to violate the relevant WTO provisions. When comparing jurisdiction clauses found in PTAs and the wording of the 1992 agreement aiming to avoid conflicts and litigation, it can easily be seen that the two are not comparable in terms of showing the purpose behind the provisions and the will of the members. The Panel did not make any clear findings on

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<sup>514</sup> Panel Report, *EC – Aircraft*, *supra* note 332, para.7.98.

whether the 1992 agreement could have been directly applicable and also on whether a non-WTO agreement could be found to create an estoppel to the claimant to initiate the WTO dispute settlement proceedings.

#### **4.3.4. Peru – Agricultural Products**

In *Peru – Agricultural Products* Peru argued that the respondent Guatemala had waived its right to challenge Peru's Price Range System (PRS) in WTO dispute settlement proceedings. Guatemala claimed that the PRS system resulted to the imposition of an additional duty on imports of certain agricultural products, such as rice, sugar, maize, milk and certain dairy products.<sup>515</sup> The parties had signed a PTA, which allegedly allowed Peru to maintain its WTO-inconsistent PRS. Peru had however not ratified the PTA at the time of the dispute. Peru argued that Guatemala had not initiated the dispute settlement proceedings in good faith as it had accepted the maintenance of the PRS in the PTA between the parties, and therefore acted contrary to its obligations under Articles 3.7 and 3.10 of the DSU.<sup>516</sup>

The Appellate Body did not exclude the possibility of waiving DSU rights, but it did note that such waivers must be made clearly.<sup>517</sup> Peru based its claim on Articles 3.7 and 3.10 of the DSU and argued that the PTA text provided a mutually agreed solution not to initiate the WTO dispute settlement system with regard to the PRS. The Appellate Body firstly stated that the PTA text could not constitute a mutually agreed solution as it was inconsistent with the Agreement on Agriculture, and Article 3.7 calls for the solution to be WTO consistent.<sup>518</sup> The Appellate Body also noted that there was ambiguity between the parties as to what was actually agreed in the PTA with regard to the PRS, and therefore there seemed to be no mutually agreed solution in the first place.<sup>519</sup> Secondly, the Appellate Body stated that Peru had not even claimed that Guatemala was “procedurally barred” from challenging the PRS in the WTO dispute settlement.<sup>520</sup> Furthermore, the PTA included a jurisdiction clause that allowed the complainant to choose the forum for disputes.<sup>521</sup>

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<sup>515</sup> Appellate Body Report, *Peru – Agricultural Products*, *supra* note 127, para. 5.1.

<sup>516</sup> *ibid*, para. 5.5.

<sup>517</sup> *ibid*, para. 5.25.

<sup>518</sup> *ibid*, para. 5.26.

<sup>519</sup> *ibid*, para. 5.26.

<sup>520</sup> *ibid*, para. 5.27.

<sup>521</sup> *ibid*, para. 5.27.

The Appellate Body did not consider that Guatemala had breached its good faith -obligations under Articles 3.7 and 3.10 of the DSU. However, the claim was based on a substantial modification to the WTO covered agreements, and Peru alleged that Guatemala had waived its right to initiate the WTO dispute settlement system based on this modification to the Agreement on Agriculture. The parties had not made a specific agreement to modify their DSU rights and obligations. I agree with the Appellate Body on its conclusions, and I also do not consider that the case creates any limitations to the effectiveness of jurisdiction clauses in PTAs. As the alleged modification was made with regard to the Agreement on Agriculture, I see no reason why the PRS could not be challenged in the WTO system. The question whether the Appellate Body should consider this modification as applicable law and allow the PRS regardless of its WTO inconsistency is a separate question.

The Appellate Body's statement regarding the WTO-consistency of a mutually agreed solution might raise issues, but in my opinion this refers to solutions made in individual cases with regard to substantial norms, and should not create limitations to general procedural agreements between members. Therefore, nothing in the Appellate Body's reasoning creates any limitations to the use of jurisdiction clauses in PTAs. A fork-in-the-road clause that has been exercised by the complainant before the initiation of the WTO procedures would create a clear statement not to initiate the dispute settlement procedures. It could therefore create a basis for example for an argument based on a breach of a member's good faith obligations under Article 3.10 of the DSU, creating a legal impediment to the exercise of panel's jurisdiction, and therefore rendering the case inadmissible.

#### **4.4. Concluding remarks on the scope of the jurisdiction of WTO tribunals**

It can be concluded that for the moment the powers of the WTO panels to decline jurisdiction or to determine that a case is inadmissible are neither confirmed nor excluded.<sup>522</sup> I argue that jurisdiction clauses included in PTAs can create such legal impediments required by the Appellate Body in *Mexico – Soft Drinks*. Jurisdiction clauses create clear and unambiguous statements of intent, they bind the members and if the PTA is WTO-consistent, it is also legal. The legal impediment could be the jurisdiction clause

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<sup>522</sup> Van Damme, 'Jurisdiction, Applicable Law, and Interpretation', *supra* note 13 at 313.

itself in a case of a preferential clause excluding the jurisdiction of the WTO tribunal altogether, such as Articles 2005(4) and (3) of NAFTA.

These clauses are however rare, and more relevant would be to accept the effects of clauses prohibiting simultaneous or parallel proceedings. In this respect perhaps the most compelling approach is to challenge the WTO proceedings on the basis of members' good faith obligation under Article 3.10 of the DSU after the complainant has already exercised its rights granted by PTA jurisdiction clause in accordance with the approach suggested by Nantes and Descheemaeker. The legal impediment would not in this case be the jurisdiction clause itself, but the fact that the claimant breaches a substantive provision of the WTO by bringing a claim after already exercising its rights under the PTA clause. The jurisdiction clause would be used as a means of interpreting Article 3.10 of the DSU.<sup>523</sup> This approach is consistent with the panels' findings in *Argentina – Poultry* and *EC – Aircraft* as well as with the Appellate Body's views in *Mexico – Soft Drink* and *Peru – Agricultural Products*.

In the interest of preventing multiple simultaneous or subsequent proceedings over the same dispute, I suggest that the WTO panels should decline to exercise jurisdiction at least when (1) there is a clear and unambiguous jurisdiction clause in a PTA which has been exercised (2) which is used as a basis for a claim based on a general principle of law such as estoppel, comity or good faith, and (3) the jurisdiction of the WTO is not disputed, but the respondent bases its claim on the inadmissibility of the case.

As the claim would be based on the inadmissibility of the case, the WTO tribunal would not have to accept that its jurisdiction can be excluded, and also it would not have to accept that a PTA norm could overrule a WTO norm. The biggest issues could therefore be avoided. Even if PTA jurisdiction clauses would not be found to exclude the jurisdiction of the WTO as such, read together with general principles of international law creating procedural limits for multiple litigations, they could indeed be considered to prevent the WTO proceedings and in that way also be effective in the relations between the PTA members. The willingness of the WTO tribunals to accept this approach remains to be seen.

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<sup>523</sup> Nantes and Descheemaeker, 'Say it Loud, Say it Clear', *supra* note 380 at 12.



## 5. Open questions and growing concerns – What should the WTO do?

What can be concluded from all of the aspects studied above is that currently there is no definite answer to the question asked in the beginning of this paper; in other words the current state of law does not inform us whether the jurisdiction of the WTO can be excluded for the benefit of PTA jurisdiction, or whether the WTO tribunals can decline to exercise jurisdiction. It is obvious that the WTO panels would not decline jurisdiction (or the exercise of jurisdiction) lightly, so in case the question ever arises again in WTO litigation, the claim (or, as it would be the respondent who disputes the jurisdiction, the respondent) has to be well grounded and reasoned.

Kwak and Marceau have drawn a clear picture of what is possible to happen, at least under current state of the law, as a result of overlapping WTO and PTA jurisdictions: if a WTO panel accepts jurisdiction notwithstanding the jurisdiction vested in a PTA tribunal, the PTA member initiating the WTO dispute may be violating its PTA obligations regarding dispute settlement between the PTA members. In these circumstances, the other party may claim that the WTO dispute is violating its rights under the PTA, and quite likely also win the dispute in the PTA dispute settlement. At least theoretically, that PTA member would be entitled to retaliation,<sup>524</sup> the value of which could even amount to the benefits the other party has possibly received in the WTO proceedings.<sup>525</sup> This can hardly be considered as a desirable course of events, and one can only imagine how much the parties would have invested in those parallel proceedings. As has already been noted, it is also very possible that the different tribunals come to different conclusions and make incompatible decisions on the same dispute.

The biggest issue is where to draw the line between the right of members to have their case heard and the abuse of rights in parallel litigation. It is practically impossible for members to block proceedings in the WTO,<sup>526</sup> but in the PTA dispute settlement systems this might be possible. If the WTO declined jurisdiction, the member might not get access to court at

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<sup>524</sup> This is of course only if the PTA offers a possibility to retaliation.

<sup>525</sup> Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction', *supra* note 12 at 483. See also Marceau and Wyatt, 'Dispute Settlement Regimes Intermingled', *supra* note 6, where the authors discuss how trade countermeasures taken in the context of a PTA should be addressed when such retaliatory action can be considered to be breaching a WTO rule.

<sup>526</sup> The WTO system operates "automatically", meaning that there are specific time periods for different phases of dispute settlement, regulated in Articles 4.7, 6.1, 8.7, 12.9, 16.4, 17.5, 17.14, 21.3, 22.2 and 22.6 of the DSU. See more in William J. Davey, 'Dispute Settlement in the WTO and RTAs', in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press: Oxford, 2006) at 345.

all, as could have been the case in the “sugar wars” that took place between Mexico and the United States under the NAFTA. WTO dispute settlement has been argued to be more effective in many ways than PTA dispute settlement systems<sup>527</sup> and this may well be true. In fact, the dispute settlement mechanism of the WTO is generally considered to be a success.<sup>528</sup> The WTO system has been considered to be in many cases more “sophisticated” in terms of superior rules, to have a better enforcement mechanism and to be more legitimate than PTA dispute settlement due to the neutrality of panellists and the appellate review function. Also, the WTO system is rule-based and not power-based as PTA systems usually are, meaning that the “size” of the opponent should not affect the result in WTO litigation.<sup>529</sup> At least so far many PTAs have preferred diplomatically oriented dispute settlement systems as opposed to rule-based systems.<sup>530</sup>

Whatever the conclusion is in terms of what the relationship between the dispute settlement systems ought to be, the issue of overlapping jurisdictions should be clarified in order to avoid uncertainty and to promote coherence. Many authors have stated that the issue should be clarified, preferably by the members. It has been suggested that members could use the ongoing Doha negotiating mandate to resolve this issue and create clear rules for addressing the potential conflict situations.<sup>531</sup> Marceau and Wyatt have stated that the best alternatives to tackle the problem would be to either amend the relevant WTO provisions or adopt a General Council decision on the issue.<sup>532</sup> Pauwelyn has mentioned the possibility to use authoritative interpretations and waivers in clarifying the relationship between WTO and non-WTO norms.<sup>533</sup> Marceau and Wyatt however also stress that clarifying the situation for the benefit of PTA dispute settlement mechanisms might not be

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<sup>527</sup> Davey has presented some key features of the WTO system, including for example consultations, which enables the dispute to be settled either on a formal or informal basis; the inclusion of neutral experts and the appellate review function; and detailed rules for monitoring the implementation of the rulings, not forgetting the automatic nature of WTO dispute settlement. See more in Davey, ‘Dispute Settlement in the WTO and RTAs’, *supra* note 526 at 345-347.

<sup>528</sup> John H. Jackson ‘The Legal and Institutional Context’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford University Press: Oxford, 2009) at 51.

<sup>529</sup> See Davey, ‘Dispute Settlement in the WTO and RTAs’, *supra* note 526, where the author compares the dispute settlement systems of the WTO and different PTAs.

<sup>530</sup> Gantz, ‘Regional Trade Agreements’, *supra* note 8 at 260.

<sup>531</sup> Jennifer Hillman, ‘Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?’, 42 *Cornell International Law Journal* (2009), 193-208 at 205. The Doha mandate authorizes members to negotiate about “clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements” while taking into account “the developmental aspects of regional trade agreements.” Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1 20 November 2001, adopted on 14 November 2001 para. 29.

<sup>532</sup> Marceau and Wyatt, ‘Dispute Settlement Regimes Intermingled’, *supra* note 6 at 72.

<sup>533</sup> Pauwelyn, *Conflict of Norms*, *supra* note 72 at 344.

an easy task, as some smaller, especially developing countries, might not be willing to transfer that much jurisdiction to PTA dispute settlement bodies, as it could be detrimental especially to smaller states.<sup>534</sup>

As for the opposite direction, Cottier and Foltea have noted that nothing in public international law would prevent the WTO members from stating the primacy of WTO norms over PTA rules.<sup>535</sup> This would probably be applicable in the context of dispute settlement as well. Whatever the result is, it would be best if the members themselves would decide how the issue should be clarified, as international tribunals in general cannot exceed their jurisdiction and they especially cannot legislate.<sup>536</sup> The WTO tribunal declining to exercise jurisdiction on the basis of jurisdiction of a PTA could even be seen as guilty of judicial activism.<sup>537</sup> As the PTAs continue to proliferate and grow in significance, it is important to finally resolve the relationship between the two systems.

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<sup>534</sup> Marceau and Wyatt, 'Dispute Settlement Regimes Intermingled', *supra* note 6 at 72. To understand this, one has to keep in mind that the WTO mostly operates by consensus decision-making, although in some cases also voting occurs. The provisions regarding decision-making are in the Marrakesh Agreement Establishing the World Trade Organization Article IX.

<sup>535</sup> Cottier and Foltea, 'Constitutional Functions of the WTO', *supra* note 97 at 67.

<sup>536</sup> Van Damme, 'Jurisdiction, Applicable Law, and Interpretation', *supra* note 13 at 301.

<sup>537</sup> See William J. Davey, 'The Limits of Judicial Processes' in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford University Press: Oxford, 2009), at 473-477 for an analysis of judicial overreaching and judicial activism.