A Critical Assessment of the Relationship between the AfCFTA and World Trade Organisation Dispute Settlement Mechanisms, in light of the Conflict of Jurisdiction.

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Abstract

This thesis interrogates the relationship between the Dispute Settlement Understanding and Africa Continental Free Trade Area dispute settlement mechanism, in light of the conflict of jurisdiction. The conflict of jurisdiction is an adverse effect of the fragmentation of international law. The uncoordinated proliferation of international treaties has increased occurrences of overlapping memberships and overlapping subject matter regulation amongst treaties. Whenever the overlaps mentioned above exist, and a dispute arises concerning matters of overlap, that dispute can be heard in more than one tribunal, giving rise to a conflict of jurisdiction. Jurisdictional conflicts are a problem because they breed uncertainty in the adjudication of disputes; they increase the risk of forum shopping, conflict of rulings, protracted litigation, and waste resources. There is a significant risk for jurisdictional conflicts between the World Trade Organisation and Africa Continental Free Trade Area agreements, because of membership and subject matter overlaps.

To mitigate the problems caused by jurisdictional conflicts, the Africa Continental Free Trade Area agreement has incorporated a fork-in-the-road clause. Fork-in-the-road provisions allow parties to choose their preferred forum, and once the forum is chosen, the parties are prohibited from bringing the same dispute to another tribunal. Unfortunately, fork-in-the-road clauses are insufficient in resolving jurisdictional conflicts because they do not bind the Dispute Settlement Understanding. It is only bound to enforce World Trade Organisation obligations and not non-World Trade Organisation obligations. The extent to which non-World Trade Organisation norms apply in the Dispute Settlement Understanding is unsettled, making it difficult to conclude whether a fork-in-the-road provision will be effective an effective solution to potential jurisdictional conflicts.

In this thesis, the researcher investigates the prospects of the World Trade Organisation applying the AfCFTA fork-in-the-road clause, directly, as a potential solution to the conflict of jurisdiction. In addition, the researcher will also investigate an alternative means of applying the AfCFTA fork-in-the-road provision, indirectly, using the World Trade Organisation procedural good faith provisions.

In conclusion, the researcher provides recommendations on how the World Trade Organisation and the AfCFTA agreement can facilitate the application of fork-in-the-road clauses in the Dispute Settlement Understanding to resolve the conflict of jurisdiction.

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Declarations

I Tichakunda Charles Nhemachena declare that the work presented in this thesis is my own and has not been presented for a degree or examination purposes at any other University. Where other people's works have been used, complete references have been provided.

Signed……..

Date……..

Supervisor: Professor L. Juma

Signed……...

Date…….

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The North Atlantic Free Trade Area Agreement.

The Protocol of Olivos for Dispute Settlement in MERCOSUR.

The Understanding on Rules and Procedures Governing the Settlement of Disputes.

The United Nations Convention on the Law of the Sea.

The Vienna Convention on the Law of Treaties.

List of Abbreviations

AfCFTA	Africa Continental Free Trade Area
Art	Article
ABR	Appellate Body Report
CETA	Comprehensive Economic Trade Agreement
CU	Customs Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
IMF	International Monetary Fund
LOS	Law of the Sea
PR	Panel Report
Para	Paragraph
RTA	Regional Trade Agreement
TRIPS	Agreement on Trade-Related Aspects on Intellectual Property Rights

TRIM	Agreement on Trade-Related Investment Measures
UNCLOS	United Nations Agreement on the Law of the Sea
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

CHAPTER I: GENERAL INTRODUCTION

1. Description and Context

A conflict of jurisdiction/ jurisdictional conflict arises when a single dispute can be heard in full or in part by more than one tribunal.[1] In some instances, scholars refer to the conflict of jurisdiction as the procedural overlap.[2] Jurisdictional conflicts are a product of the fragmentation of international law.[3] Over the years, the spread of international agreements has facilitated the breakdown of general international law into more specialised subsystems of international law such as trade law, human rights law, maritime law, and environmental law. Within each subsystem, specialisation is intensified further at multilateral, regional, and bilateral levels.[4] Despite efforts to create these specialised subsystems of international law, it is impossible to create a separate international law system that is entirely divorced from international law's general principles.[5] All subsystems of international law are interconnected; there are substantive overlaps amongst the subsystems of international law. In many instances, international trade matters can have international human rights, maritime law, and environmental law implications.[6] Substantive overlaps between international agreements are even more common when they happen within a specific subsystem of international law at a regional and multilateral levels. By virtue of the World Trade Organisation (WTO) and the Regional Trade Agreements (RTAs) belonging to the same subsystem of international law (international trade), there is a greater risk of substantive overlap. Whenever a dispute concerning matters of substantive overlaps arises, that matter can be heard under two or more dispute settlement mechanisms,

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[1] T Graewert "Conflicting laws and Jurisdiction in the Dispute Settlement Processes of Regional Trade Agreements and the WTO" (2008) 1 (2) *CONTEMP.ASIA.ARB* 287 at 290. See also, J Pauwelyn "Legal Avenues to Multilateralizing Regionalism Beyond" https://www.wto.org/english/tratop_e/region_e/con_sep07_e/pauwelyn_e.pdf (accessed 10 October 2019).

[2] Pauwelyn "*Legal Avenues*"

[3] G Hafner "Pros and Cons Ensuing from Fragmentation of International Law" (2004) 25 (4) *Michigan Journal of International Law* 849 *at* 857.

[4] M Koskenniemi "The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006) A/CN.4/L.682 *International Law Commission Report* 1 at 11.

[5] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 82.

[6] Hafner 2006 *Michigan Journal of International law* 851-854.

especially if the regimes in question have incorporated their own dispute settlement mechanisms. Unfortunately, in many instances where such jurisdictional conflicts arise, many international agreements do not contain enough information on coordinating the adjudication of such disputes.[7] This lack of coordination amongst international agreements creates room for forum shopping, conflict of rulings and double jeopardy, which breeds uncertainty in the adjudication of disputes.[8] As the number of international agreements continue to increase, so does the number of international tribunals, creating an increased risk of jurisdiction conflicts. This thesis seeks to examine the conflict of jurisdiction in relation to the WTO and the Africa Continental Free Trade Area (AfCFTA) agreements.

1.1. The World Trade Organisation

The WTO is a multilateral trading organisation that came into existence on 1 January 1995, at the end of the Uruguay Round of negotiations.[9] Its primary functions are to facilitate the implementation, administration, and operation of WTO agreements, provide a forum for negotiations amongst Members, administer the system of dispute settlement, administer the Trade Policy Review Mechanism, and to cooperate as needed with the International Monetary Fund (the IMF), the World Bank and its affiliated agencies.[10] The WTO consists of a multilateral package of agreements annexed to a single document, namely the Marrakesh Agreement Establishing the World Trade Organisation (WTO agreements).[11] These agreements regulate several trade-related issues, including trade in goods and services, intellectual property rights, and many other trade-related aspects.[12] All WTO agreements are binding on all

[7] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 12.
[8] Hafner 2006 *Michigan Journal of International law* 856-85.
[9] M Matsushita *et al The World Trade Organization, Law Practice and Policy* 3 ed (2015) 9.
[10] Art III of the Agreement Establishing the World Trade Organisation.
[11] Matsushita *et al* The *World Trade Organisation* 10.
[12] Agreement Establishing the World Trade Organisation, Annex 1 of the World Trade Organisation agreement is divided into three parts, Annex 1 A, Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), Agreement on Reshipment Inspection, Agreement on Rules of Origin Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures Agreement on Safeguards. Annex 1 A also includes a general interpretive note that states that where there is conflict between provisions of the GATT 1994 and another Annex 1 A agreement,

Members as a single body of law. To date, the WTO is the most extensive international trade regime, which consists of 164 Members; of these, 46 are African states; the remaining 9 African states are acceding countries.[13]

In addition, the WTO has incorporated its own dispute settlement mechanism (the Dispute Settlement Understanding / DSU), to resolve the disputes that arise under all WTO agreements.[14] The DSU is referred to by many as the crown jewel of the WTO.[15] It has compulsory and exclusive jurisdiction over all disputes that arise from WTO agreements.[16] The WTO has a monopoly over disputes that arise out of its respective agreements. It prohibits its Members from settling disputes outside the framework of the DSU. The DSU encourages its Members to solve their disputes diplomatically through conciliation and mediation whenever possible. However, in instances where the diplomatic route fails, members can seek more formal means of adjudication through the WTO's panels.[17]

Since its inception, the WTO has provided a unitary regulatory system of international trade law at a multilateral level. However, international trade law, like all other international law regimes, is undergoing its own fragmentation phase.[18] States are beginning to favour smaller trade regimes such as RTAs in advance of the WTO.[19] The transition towards RTAs is, to a greater extent, motivated by the need to achieve trade liberalisation goals faster.[20] The large membership of the WTO makes it very

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the provision of the later controls. Annex 1 B consists of the General Agreement on Trade in Services and its annexures. Annex 1 C consists of the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPs Agreement), Annex 2 consists of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding), which establishes a dispute settlement mechanism to resolve disputes under World Trade Organisation agreements. Annex 3 consists of the Trade Policy Review Mechanism. And Annex 4 consists of: Agreement on Trade in Aircraft, Agreement on Government Procurement, International Dairy Agreement and the International Bovine Meat Agreement.

[13] Anonymous "The World Trade Organisation, Members and Observers https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm (accessed 1 September 2020).

[14] Art 1 (1) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.

[15] Matsushita *et al The World Trade Organisation* 83.

[16] Art 23 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes. See also, Matsushita *et al The World Trade Organisation* 83.

[17] Art 5 and Art 6 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes. See also, Matsushita *et al The World Trade Organisation* 91.

[18] P Delimatsis "TILEC Discussion Paper, The Fragmentation of International Trade Law" (2019) 45 (1) *SSRN Electronic Journal* 1 at 9.

[19] S Gupta "The Changing Faces of International Trade: Multilateralism to Regionalism" (2008) 4 (3) *Journal of Commercial Law and Technology* 260 at 260.

[20] According to Gupta 2008 *Journal of Commercial Law and Technology* 261, the most obvious reason why states are turning to RTAs is because they provide a faster vehicle towards trade liberalisation,

difficult to negotiate trade liberalisation; as evidenced by the Doha round of negotiations' stagnation. RTAs, by nature, are constituted by smaller units, making negotiations much more manageable, providing a much faster way to achieving trade liberalisation. The WTO supports states' efforts to create RTAs; through Art 24 of the General Agreement on Tariffs and Trade (the GATT).[21] Art 24 of the GATT allows Members of the WTO to enter into Free Trade Areas (FTAs) and Customs Unions (CUs), provided that the formation of these arrangements does not create additional trade barriers.[22] States have progressively exercised their rights to enter into RTAs. By February 2016, the WTO registered 454 RTA notifications, and this number vastly increased to 480 notifications by September 2019.[23] Many scholars consider the growth of RTAs as a threat to the WTO's hegemony for many reasons.[24] Firstly, RTAs allow states to deviate from the WTO's founding principle of non-discrimination by offering RTA Members more favourable trading conditions than those available to non-members. Further, many of these RTAs seem to address matters which are already addressed by WTO agreements. These duplications or substantive overlaps can undermine the authority of WTO institutions such as the DSU. Whenever a dispute concerning a matter of substantive overlap between the WTO and an RTA occurs, Members have the option to forego the DSU's mandatory and exclusive jurisdiction in favour of RTA dispute settlement mechanisms, confirming the notion of competition amongst the two.

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however, there are more reasons to explain this phenomenon. First, states may hope to maximize their benefits through so-called first-mover advantages, i.e., they focus on the gains they could obtain from signing an agreement with a large trading partner before competing countries do so. States may also seek to pre-empt other countries, by denying them first-mover advantages. Second, states may seek to guarantee permanent access to specific markets. Signing an agreement bilaterally or regionally may be the quickest and easiest way of achieving that goal. Third, a bilateral agreement may be used to facilitate domestic reforms, in areas that are not dealt with multilaterally, such as investment, competition, environmental and labour standards.

[21] Art 24 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.

[22] Matsushita *et al The World Trade Organisation* 513.

[23] R Kuoppamaki *Overlapping Jurisdictions between the World Trade Organization and Preferential Trade Agreements* (LLM thesis, University of Helsinki, 2016) 1. See also, Anonymous "Regional Trade Agreeements"https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 30 October 2019).

[24] Gupta 2008 *Journal of Commercial Law and Technology* 260. See also, C Taifeng "Regional Trade Agreements v Multilateral Trading System" https://www.files.ethz.ch/isn/103573/WP-762-Taifeng.pdf (accessed 20 October 2020). See also, C Brown "Mega-Regional Trade Agreements and the WTO" (2017) 8 (1) *Global Policy Volume* 107 at 109.

1.2. The Africa Continental Free Trade Area

The AfCFTA is an RTA which came into force on 30 May 2019.[25] This agreement establishes the legal framework for an FTA, which seeks to boost intra-African trade, by progressively removing tariff and non-tariff barriers to trade. The AfCFTA seeks to create a single integrated market for the movement of goods, services, and people across the African continent.[26] To date, the AfCFTA has 36 ratifications and if all 55 African states manage to ratify the agreement, the AfCFTA will become the world's largest FTA.[27] The implementation of the AfCFTA is split into two phases; phase 1 covers trade in goods and services while Phase 2 covers areas of investment, intellectual property rights, and competition policy.[28] Currently, the AfCFTA is in the process of completing phase one as it has enacted its legislative framework by now.[29] Much of the subject matter dealt with under AfCFTA is also addressed in WTO agreements. The AfCFTA and the WTO agreements contain many substantive overlaps; both agreements regulate trade in goods, trade in services and rules relating to intellectual property rights. Both the AfCFTA and WTO agreements incorporate

[25] Anonymous "Status of AfCFTA Ratification" https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (accessed 2 September 2020).

[26] S Karingi "Deepening Regional Integration in Africa. A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Customs Union" https://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Deepening%20Regional%20Integration%20in%20Africa%20A%20Computable%20General%20Equilibrium%20Assessment%20of%20the%20Establishment%20of%20a%20Continental%20Free%20Trade%20Area%20followed%20by%20a%20Continental%20Customs%20Union.pdf (accessed 17 February 2019).

[27] Anonymous "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents"https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html (accessed 20 October 2019).

[28] P Lunenborg Phase 1B of the Africa Continental Free Trade Area AfCFTA negotiations https://www.southcentre.int/wp-content/uploads/2019/06/PB63_Phase-1B-of-the-AfCFTA-negotiations_EN-1.pdf (accessed 30 October 2019).

[29] First, the Protocol on Trade in Goods with its attached Annexures: Annex 1 on Schedules of Tariff Concessions, Annex 2 on Rules of Origin, Annex 3 on Customs Cooperation and Mutual Administrative Assistance, Annex 4 on Trade Facilitation, Annex 5 on Non-Tariff Barriers, Annex 6 on Technical Barriers to Trade, Annex 7 on Sanitary and Phytosanitary Measures, Annex 8 on Transit; and the Annex 9 on Trade Remedies. Second, the Protocol on Trade in Services. Third, The Protocol on Rules and Procedures on the Settlement of Disputes with its attached Annexures: Annex I on Schedule Working Procedures of the Panel, Annex 2 on Expert Review, Annex 3 on Code of Conduct for Arbitrators and Panellists. The AfCFTA Protocol on Dispute Settlement Procedures. See also, Annex 1 on Working Procedures of the Panel. See also, Annex 2 on Expert Review, Annex 3 on Code of Conduct for Arbitrators and Panellists.

provisions relating to the Most Favoured Nation, National Treatment, quantitative restrictions, subsidies, and countervailing measures.[30]

Art 20 of the AfCFTA agreement incorporates the AfCFTA dispute settlement mechanism which is regulated by the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes.[31] The AfCFTA dispute settlement mechanism borrows many of its structural and procedural norms from the DSU.[32] The AfCFTA dispute

[30] The first example of substantive overlaps between the WTO and the AfCFTA agreements relates to the rules on the non-discriminatory treatment of goods and services (the Most Favoured Nation and National Treatment principles). Consider the National Treatment Principle.
Art 5 of the AfCFTA Protocol on Trade in Goods says; "A State Party shall accord to products imported from other State Parties treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by customs. This treatment covers all measures affecting the sale and conditions for sale of such products in accordance with Article III of GATT 1994." Art 5 of the AfCFTA Protocol on Trade in goods incorporates the National Treatment principle established in Art 3 of the General Agreement on Tariffs and Trade. Likewise, Art 20 of the AfCFTA Protocol on Trade in Services incorporates the National Treatment Principle in Art 17 of the General Agreement on Trade in Services). The National Treatment Principle dictates that once a good/service has entered the domestic market of an importing Member, that Member is prohibited from implementing internal duties/ regulation measures which give a competitive advantage to its own domestic products/ service at the expense of the imported like products/service from other Members. The adoption of the National Treatment Principle into the AfCFTA agreement means that African States which are signatory to both the WTO and AfCFTA agreements have an option to choose either the AfCFTA, or the WTO dispute settlement mechanism, whenever a National Treatment dispute arises.
In addition to the non-discriminatory principles, the AfCFTA has gone further to incorporate the WTO's provisions on the liberalization of trade. These include provisions regulating import duties, schedules of tariff concessions, the general elimination of quantitative restrictions and antidumping and countervailing measures to mention some of them. For illustrative purposes, the researcher has singled out Art 9 of the AfCFTA Protocol on Trade in Goods says; "The State Parties shall not impose quantitative restrictions on the imports from or exports to another State Party except as provided for in this Protocol its Annexes and Article XI of the GATT 1994 and other relevant WTO agreements." Art 9 speaks to the rules relating to quantitative restrictions established in terms of Art 11 of the General Agreement on Tariffs and Trade. Member states may not impose quotas or any rules that limit the quantity of products that may be imported to or exported from their territories unless this is done in terms of the Annex to the Protocol on Trade in Goods and the General Agreement on Tariffs and Trade. It is clear from the wording in Art 9 that the AfCFTA's rules on quantitative restrictions are guided by the WTO's standards. Once again, a breach of quantitative restrictions may potentially stimulate dispute settlement procedures under the AfCFTA dispute settlement mechanism or the DSU.
Moreover, Art 17 of the AfCFTA Protocol on Trade in Goods which references the rules relating to antidumping and countervailing measures established in terms of Art 6 of the General Agreement on Tariffs and Trade and the Agreement on Subsidies and Countervailing Measures. Art 17.2 which states; "In applying this Article States shall be guided by the provisions on Annex 9 on Trade Remedies and AfCFTA guidelines on Implementation of Trade Remedies in Accordance with relevant WTO agreements." Art 17 of the AfCFTA Protocol on Trade in Goods is there to provide remedies for states that suffer adverse effects from the dumping of goods in their respective territories. The rules used to mitigate the adverse effects of dumping in the AfCFTA agreement are guided by the standards set in WTO agreements. Consequently, it is also reasonable to infer that a breach of dumping standards will trigger the jurisdiction of both the Dispute Settlement Understanding and the AfCFTA Dispute Settlement Mechanisms.
[31] Art 20 of the Agreement Establishing the AfCFTA. See also, The AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes.
[32] The Understanding on Rules and Procedures Governing the Settlement of Disputes. See also, The AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes. See also, O Akinkugbe

settlement mechanism is designed to resolve disputes that arise out of AfCFTA agreements only. In instances where the subject matter of a dispute can be heard by more than one dispute settlement mechanism, the AfCFTA allows a complainant to choose an appropriate forum for adjudicating such a dispute. However, once that forum is chosen, the complainant may not bring that dispute to any other forum.[33]

Looking at both the DSU and the AfCFTA dispute settlement mechanism, one may be tempted to conclude that there is no conflict of jurisdiction because the former exclusively deals with matters arising under WTO agreements. The latter only deals with matters under AfCFTA agreements.[34] However, this would be a relatively narrow

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"Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment." (2019) 28 *African Journal of International Comparative Law* 138 at 145 - 150.

Both dispute settlement mechanisms are initiated by good offices, conciliation and mediation in a process referred to as consultations. Where a dispute remains unresolved after consultations, a complaining party may request for a panel to be established by the Dispute Settlement Body. During the panel process, litigants and third parties must submit written and oral argumentation. After considering the various submissions and the evidence presented, the panel will draft an interim report of its findings. The report is then presented to the parties respectively, and after taking comments from the parties involved, a final report is drafted by the panel. The final draft is presented before the DSB, the report is adopted, unless there is consensus not to adopt it (reverse consensus).

If one of the litigants is unhappy with the panel's findings, that party may refer the dispute to the Appellate Body, which is the highest court of appeal for both the World Trade Organization and AfCFTA. The Appellate Body in both the DSU and the AfCFTA comprises of seven members, three members who adjudicate over a dispute when it arises. Members of the Appellate Body are appointed for four-year terms, in both instances. The Appellate Body has the power to; uphold, modify or reverse the findings by the panel. After the Appellate Body has made its recommendations, the recommendations are adopted by reverse consensus.

Where a panel or Appellate Body concludes that a measure is inconsistent with either AfCFTA or the World Trade Organization covered agreements, it shall recommend that the state party concerned bring the measure into conformity with the Agreement. In addition to its recommendations, a panel or Appellate Body may suggest ways in which the state concerned should implement the recommendations. Compensation and the suspension of concessions are temporary measures available to the aggrieved party in the event that the accepted recommendations and rulings of the DSB are not implemented within a reasonable period of time.

In terms of the allocation of jurisdiction, the structure of international tribunals differs significantly from that of domestic courts. In domestic courts, jurisdiction is more easily defined by statute and geographical location, in a vertical hierarchical structure. In the international arena, the jurisdiction of international tribunals like the AfCFTA and the World Trade Organization, jurisdiction is afforded by their own respective governing instruments. There is no statute defining the authority of international tribunals in relation to one another, the AfCFTA and the World Trade Organization dispute settlement mechanisms have a horizontal allocation of Jurisdiction. In simpler terms, in the international arena there is no hierarchical structure to determine which court should exercise jurisdiction, in an instance where both courts have concurrent jurisdiction over a matter. The absence of this hierarchical structure, coupled with the fact that both the AfCFTA and the World Trade Organization agreements seek to regulate similar issues, it is anticipated that there will be disputes where both the AfCTFA and the World Trade Organization dispute settlement mechanisms have concurrent jurisdiction to adjudicate over a matter, of which both courts can lay claim to have exclusive jurisdiction over that same matter.

[33] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

[34] Art 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. See also, Art 3 (1) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

approach considering the number of substantive overlaps between both the WTO and AfCFTA agreements. A violation of any of these overlapping obligations may trigger a conflict of jurisdiction between the DSU and the AfCFTA dispute settlement mechanism. Therefore, there is potential for jurisdictional conflicts between the WTO and AfCFTA agreements.

2. Problem Statement

Drafters of the AfCFTA agreement realise the potential for jurisdiction conflicts and have chosen to incorporate a fork-in-the-road jurisdiction clause to resolve this issue.[35] Fork-in-the-road provisions prohibit parties from engaging in parallel/subsequent litigation on the same matter once a dispute has been imitated in a specific forum.[36] The AfCFTA fork-in-the-road provision is codified in Art 3 (4) of the AfCFTA Protocol on Dispute Settlement.[37]

Art 3 (4) states that;

> "A state party which has invoked the rules and procedures of this Protocol with regards to a specific matter shall not invoke another forum for dispute settlement on the same matter."[38]

Unfortunately, fork-in-the-road provisions, on their own, are insufficient to resolve the conflict of jurisdiction, because they do not bind the DSU. The DSU is only allowed to enforce the law under WTO provisions and not the law under non-WTO law.[39] The only way a fork-in-the-road clause can resolve the conflict of jurisdiction is if a WTO panel chooses to apply it in dispute settlement proceedings.[40] Applying fork-in-the-road provisions to WTO disputes addresses a dark spot in WTO law, regarding the

[35] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[36] C Furculita "Fork-in-the-road clauses in the New EU FTAs: Addressing Conflicts of Jurisdiction with the WTO Dispute Settlement Mechanism" (2019) 1 *Clear Papers, TMC Asser Institute for International & European Law* 1 at 12.
[37] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[38] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[39] Art 1 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[40] Applying a fork-in-the- road clause, will allow the Dispute Settlement Understanding to decline to hear the merits of a matter that has already been brought before a Regional Trade Agreement.

scope of applicable law before WTO panels.[41] Issues concerning the scope of applicable law before WTO panels are very ambivalent because the DSU does not contain an applicable law clause.[42] Applicable law issues in the WTO context remain issues of interpretation, to which there are varying opinions amongst academics, and no consensus. Some academics argue that non-WTO rules should not apply to WTO disputes while others argue that non-WTO rules should apply to the extent that such rules do not conflict with WTO principles.[43] Other academics also argue that all non-WTO rules should apply as long as they are relevant, to the extent that WTO agreements have not contracted out of the application of such rules.[44] Each of these opinions leads to different conclusions concerning the applicability of Art 3 (4) before the DSU.[45]

The differences raised concerning issues of applicable law before WTO panels make it difficult to conclude with certainty, whether a fork-in-the-road provision like Art 3 (4) will receive any recognition from WTO panels.[46] So far, no party has ever successfully convinced the DSU to apply a fork-in-the-road provision. In previous cases, the WTO panels have bypassed this issue. In the case of *Mexico - Taxes on Soft Drinks,* the Appellate Body declined to determine whether a fork-in-the-road clause would constitute a legal impediment to the exercise of the WTO's jurisdiction.[47] In *Argentina – Poultry Anti-Dumping Duties,* the panel dismissed arguments for it to decline jurisdiction based on the fork-in-the-road provision raised by Argentina, on a technical point.[48] In spite of these adverse decisions against the application of fork-in-the-road provisions, the DSU did not completely shut its door to their consideration.[49] Ultimately,

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[41] J Pauwelyn "How to Win a WTO Dispute on Non-WTO law Question of Jurisdiction and Merits" (2003) 37 (6) *Journal of World Trade* 997 at 1000.
[42] Understanding on the Rules and Procedures Governing the Settlement of Disputes.
[43] P Tratchtman "The Domain of World Trade Organisation Law" (1999) 40 *Harvard International Law Journal* 1 at 5. See also, L Bartels "Jurisdiction and Applicable law in the World Trade Organisation Dispute Settlement Proceedings" (2001) 35 (3) *Journal of World Trade* 499 at 519. See also Matsushita *et al The World Trade Organisation* 88.
[44] J Pauwelyn *Conflict of Norms in Public International Law* (2003) 461.
[45] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[46] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[47] ABR, *Mexico - Tax Measures on Soft Drinks and other Beverages* WT/DS308/AB/R (March 6, 2006) para 54.
[48] PR, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil WT*/DS241/R (May 19, 2003) para 7.38.
[49] *PR Argentina Poultry Anti-Dumping Duties para 7.38* last sentence says "Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed

the DSU has a discretion to apply fork-in-the-road provisions. It can choose to ignore an RTA fork-in-the-road provision without consequence, because there is no *prima facie* obligation on the DSU to uphold non-WTO norms.[50] Fork-in-the-road clauses can only guarantee an innocent party with a retaliatory claim before an RTA dispute settlement mechanism.[51] Therefore, an RTA fork-in-the-road provision cannot be considered a comprehensive solution to all problems caused by the conflict of jurisdiction such as forum shopping, duplication of proceedings, conflict of rulings and resource wastage.

3. Goals of Research

1. To investigate the conflict of jurisdiction as it relates to the WTO and AfCFTA agreements.

2. To examine the viability of Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes as a solution to the conflict of jurisdiction.

3. To propose potential measures to mitigate the conflict of jurisdiction.

4. Limitations of Research

In the past, researchers have looked at the conflict of jurisdiction between the WTO and RTAs from a general perspective. This perspective has allowed researchers to investigate the viability of a much broader range of potential solutions to resolve the conflict of jurisdiction, such as treaty-based solutions (fork-in-the-road jurisdiction clauses) and non-treaty based solutions from the general principle of international law

by a WTO dispute settlement proceeding in respect of the same measure." This paragraph suggests an openness on the part of the DSU to consider fork-in the road provisions, however, these were comments made in passing, the Protocol of Olivos was never factored into the reasons for the decision in that case. Therefore, the case of *Argentina – Poultry Anti-Dumping* does not definitively confirm that RTA fork-in-the-road provisions will apply in the DSU.

[50]PR *Argentina - Poultry Anti-Dumping Duties* para 7.41.

[51] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.

(*res judicata*, *lis pendens*, comity, *forum non-conveniens* and estoppel).[52] In this thesis, the researcher adopts a precise approach towards understanding the conflict of jurisdiction, from the WTO and AfCFTA agreements perspective. Since the conflict of jurisdiction between the WTO and AfCFTA agreements is regulated by a fork-in-the-road provision, the researcher will not address the general principles of international law as isolated solutions to the conflict of jurisdiction.[53] Any references made to the general principles of international law in this thesis will complement the application of the AfCFTA fork-in-the-road clause as a potential solution to the conflict of jurisdiction.

5. Methodology

This thesis focuses on interpreting international treaties and the purpose of this section is to explore the methodological approaches used in analyzing data in this study. The desktop research methodology will be utilised for this study and some of the primary sources of data the researcher intends to refer to include, Protocols and Annexures from both the AfCFTA and the WTO agreements. The interpretation of these two treaties will be pivotal to demonstrate instances of both substantive and procedural overlaps between the WTO and AfCFTA's agreements. Extensive reference will be made to the WTO's panel and Appellate Body review reports. Secondary sources will include textbooks, academic journals, and research articles. Since the research will be library-based involving only public available documents, no ethical concerns will be addressed in this study.

[52] K Kwak and G Marceau "Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements" (2003) 41 *The Canadian Yearbook of International Law* 83 at 103. See also, Kuoppamaki *Overlapping Jurisdictions* 48 – 59.

[53] According to Pauwelyn *Conflict* 130, the general principles of international law are of residual application, they are used to fill in gaps where treaties are silent on a matter. In instances of conflicting jurisdictions, the general principles would apply where there is no fork-in-the-road provision to address such a situation.

6. Structure of Research

The research is divided into four chapters. Chapter 1 contains a general introduction to the thesis. It will introduce the research topic, goals to be achieved, limitations of the research, and methodology.

Chapter 2 will provide an overview of the conflict of jurisdiction as it relates to the WTO and AfCFTA agreements. The chapter will start by tracing the origins of the conflict of jurisdiction. After that, a classification of the nature of potential jurisdictional conflicts between the two agreements will be provided. Thereafter, the researcher will introduce Art 3 (4) of the AfCFTA dispute settlement protocol as a solution to the conflict of jurisdiction.[54] To conclude the chapter, the researcher will discuss previous cases of jurisdiction conflict between the WTO and RTAs.

Chapter 3 will discuss the challenges WTO panels face in applying fork-in-the-road provisions such as Art 3 (4).[55] Here, the researcher will discuss the challenges of applying Art 3 (4), directly, in light of the ambivalence surrounding the application of non-WTO norms in the DSU. Thereafter, the study will investigate an alternative, indirect, means of Applying Art 3 (4).

Chapter 4 will provide a summary which ties all chapters together, as well as a reflection of significant lessons learnt. This chapter will also provide recommendations on measures to be taken for Art 3 (4) to find application in the DSU, to solve the conflict of jurisdiction.[56] Thereafter, the study will draw on the researcher's final conclusions.

[54] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[55] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[56] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

CHAPTER II: THE PROBLEM OF CONFLICTING JURISDICTIONS

1. Introduction

The conflict of jurisdiction between the WTO and RTAs is an area of great debate amongst international trade law scholars.[57] The debate has been fuelled by the growing number of regional tribunals that compete for jurisdiction with the DSU regarding matters of mutual interest. This chapter seeks to provide a detailed overview of the conflict of jurisdiction between the DSU and the AfCFTA dispute settlement mechanism. This chapter will start by tracing the origins of jurisdictional conflicts between international treaties in general. Thereafter, the researcher will classify the conflict of jurisdiction between the DSU and the AfCFTA agreement. More so, the researcher will discuss practical case law examples where jurisdictional conflicts have arisen in the past, between the WTO and other RTAs. This will be followed by a conclusive summary of all issues discussed in this chapter.

2. The Origins of Jurisdictional Conflicts

Jurisdictional conflicts arise when a dispute can be brought entirely or partially before two or more distinct dispute settlement mechanisms.[58] From a normative perspective, the conflict of jurisdiction is a conflict between the jurisdiction clauses of at least two different treaties which regulate the same substance.[59] Jurisdictional conflicts are created by a phenomenon commonly referred to, by scholars as the fragmentation of

[57] Kwak and Marceau 2003 *The Canadian Yearbook of International Law 83*. See also, S Yang "The Solution for Jurisdictional Conflicts between the WTO and RTAS: The Forum Choice Clause" (2014) 23 (1) *Michigan State International Law Review* 108 at 108. See also, Kuoppamaki *Overlapping Jurisdictions* 2. See also, J Hillman "Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO What Should WTO Do?" (2009) 42 (2) *Cornell International Law Journal* 193 at 193.

[58] Graewert 2008 *CONTEMP.ASIA.ARB* 290. See also, Pauwelyn "Legal Avenues."

[59] According to V Golbubev *Inter-State Disputes in International Trade: Normative and Jurisdictional Conflicts between the World Trade Organisation and Regional Trade Agreements* (LLM thesis, University of Turin, 2014) 24, a jurisdiction clause is a provision in a treaty which allows constituent parties to agree to resolve a dispute under an agreement in a specific forum.

international law.[60] The fragmentation of international law speaks to the disintegration of the international law from a unitary system of general international law, into smaller specialised subsystems of law such as international human rights, international trade law, maritime law and environmental law.[61] The proliferation of international agreements has resulted in the formation of specialised subsystems of international law, which contract out of some of the general principles of international law. Despite the formation of these specialised subsystems of law, international law remains interconnected within a single system of law. In many instances, the matter dealt with under international trade agreements significantly overlaps with the matter addressed under environmental law/ international human rights law/maritime law agreements and vice versa.[62] Due to this complicated interconnected relationship between the subsystems of international law and the absence of a centralised international legislature to ensure coherence amongst international agreements, normative conflicts have risen from the proliferation of international agreements.[63] Normative conflicts are an expression of the fragmentation of the international law-making process.

Furthermore, the proliferation of international agreements has also caused the spread of international tribunals. Many international agreements which stem from the various subsystems of international law incorporate their own dispute settlement mechanisms, to resolve disputes that arise from violations of these agreements.[64] Due to the substantive overlaps amongst the various subsystems of international law there is potential for overlap in the dispute settlement procedures amongst some international tribunals. Overlapping dispute settlement procedures will occur when a state's measure violates matter regulated by at least two subsystems of international law. Where both agreements incorporate their own dispute settlement mechanisms, the measure can be heard by tribunals under both subsystems of international law.[65]

[60] Hafner 2004 *Michigan Journal of International Law* 857.
[61] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 11.
[62] Hafner 2004 *Michigan Journal of international law* 851-854.
[63] Delimatsis 2010 *SSRN Electronic Journal* 4.
[64] Hafner 2004 *Michigan Journal of international law* 858.
[65] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 85.

Jurisdictional conflicts have the potential to fragment the application of international law.

The fragmentation of international law is not limited to the relationships between the subsystems of international law. Fragmentation can also occur within a subsystem of international law at multilateral, regional and bilateral levels. When fragmentation occurs within a subsystem, the overlaps between international agreements become more apparent.[66] Using the WTO and the AfCFTA agreements as the primary case study, there are plenty of instances where substantive overlaps occur between these two agreements in matters concerning non-discriminatory provisions, quantitative restrictions, dumping and anti-dumping obligations to mention a few of them.[67] These substantive overlaps plant the seeds for future jurisdictional conflicts between their respective dispute settlement mechanisms, whenever a dispute of mutual interest arises concerning the substantive matters mentioned above.[68]

The fragmentation of international law has brought with it positive and negative implications for the adjudication of international disputes. The multiplication of international dispute settlement mechanisms has empowered states with the agency to choose the most convenient forum to have their disputes heard. Unfortunately, the freedom to choose forums of adjudication can be abused easily by states, when they initiate parallel/ subsequent proceedings concerning the same matter under multiple regimes. Ideally, the proliferation of international tribunals should translate to a better distribution of labour amongst international tribunals, enhancing efficiency.[69] However, the increase of international tribunals has brought the opposite result where disputes of substantive overlap are concerned. Where disputes concerning matters of substantive overlap arise, international tribunals seem to compete because of the lack of coordination amongst international agreements. The conflict of jurisdiction is perhaps the most adverse effect of the proliferation of international tribunals. The

[66] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 85.
[67] Art 5 of the AfCFTA Protocol on Trade in goods. See also, Art 3 of the General Agreement on Tariffs and Trade. See also, Art 8 of the AfCFTA Protocol on Trade in Goods. See also, Art 11 of the General Agreement on Tariffs and Trade. See also, Art 16 of the AfCFTA Protocol on Trade in Goods. See also, Art 6 of the General Agreement on Tariffs and Trade.
[68] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 85.
[69] Kuoppamaki *Overlapping Jurisdictions* 3. See also, Pauwelyn and L Salles "Forum Shopping Before International Tribunals (Real) Concerns (Im) Possible Solutions" (2009) 42 (1) *Cornell International Law Journal* 77 at 80.

conflict of jurisdiction gives rise to a host of problemists such as forum shopping, duplication of proceedings, conflict of rulings, wastage of resources and legal uncertainty.[70] In the researcher's view, the proliferation of international tribunals in an uncoordinated international law system has created more harm than good and it is necessary to develop solutions to mitigate these problems.

3. Classification of Jurisdictional Conflicts between the World Trade Organisation and AfCFTA agreements

Kwak and Marceau have identified different types of jurisdictional conflicts, by looking at how jurisdiction clauses, from two different regimes, interact when they regulate the same matter.[71] And to distinguish between the different types of jurisdiction conflicts, the researcher shall refer to them as type 1, type 2 and type 3. Type 1 jurisdictional conflicts are created, when two fora claim to have exclusive jurisdiction over the same matter. Type 2 jurisdictional conflicts are created, when one forum claims to have exclusive jurisdiction and the other one provides jurisdiction on a permissive basis, for dealing with the same matter. Type 3 jurisdictional conflicts are created, when the dispute settlement mechanisms of two different fora are available on a non-exclusive basis to deal with the same matter.[72] There are many different types of jurisdiction clauses; the researcher will focus on those relevant to the study, which speak to jurisdictional conflicts between the WTO and the AfCFTA agreements; the exclusive, non-exclusive and fork-in-the-road jurisdiction clauses.

3.1. Exclusive Jurisdiction Clauses

The exclusive jurisdiction clauses allow parties to bring specific claims before a single court to the exclusion of all others.[73] The forum's exclusivity may cover all disputes

[70] Kuoppamaki *Overlapping Jurisdictions* 3. See also, Pauwelyn and Salles 2009 *Cornell International Law Journal* 80. See also, Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 86.
[71] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 86.
[72] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 86.
[73] M Keyes and B Marshall "Jurisdiction agreements: exclusive optional and asymmetrical" (2015) 11 (3) *Journal of Private International law* 345 at 356. See also, F Sparka *Jurisdiction and Arbitration Clauses in Maritime Transport Documents A Comparative Analysis* (2009) 63.

arising under that agreement or could cover only certain types of disputes.[74] The purpose of the exclusive jurisdiction clause is to create legal certainty for the parties involved. Exclusive jurisdiction clauses are generally regarded as more effective than non-exclusive jurisdiction clauses to mitigate the effects of forum shopping. An example of an exclusive jurisdiction clause can be found in the North Atlantic Free Trade Area agreement, in the provisions relating to the settlement of disputes concerning Environmental agreements, Conservation agreements, and Sanitary and Phytosanitary Measures.[75] Exclusive jurisdiction clauses have the greatest conflict causing potential because they do not recognise the authority of other tribunals which have jurisdiction on the same subject matter.[76] Whenever a dispute of mutual interest arises between two regimes and both regimes are governed by exclusive jurisdiction clauses, type 1 jurisdictional conflicts occur. The WTO's jurisdiction clauses are exclusive and it can be found in Art 1.1 and Art 23 of the DSU.

Art 1.1 of the DSU states;

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this

[74] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 11.
[75] Art 2005 (3) of the North Atlantic Free Trade Area Agreement says "In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement." See also, Art 2005 (4) of the North Atlantic Free Trade Area agreement which says "In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures): (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters, where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement." Both provisions are examples of exclusive jurisdiction clauses.
[76] Golbubev *Normative and Jurisdictional Conflicts* 35.

Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.[77]

Art 23 (1) of the DSU states that;

"When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."[78]

Art 23 (2) (a) says;

"In such cases, Members shall: not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

Art 23 (2) (b) says;

Follow the procedures set forth in Article 21 to determine the reasonable period for the Member concerned to implement the recommendations and rulings, and

Art 23 (2) (c) says;

Follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorisation in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the

[77] Art 1 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[78] Art 23 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Member concerned to implement the recommendations and rulings within that reasonable period of time."[79]

Art 1 (1) speaks to the substantive jurisdiction of the Dispute Settlement Understanding, which is limited to hearing disputes that arise from violations of the covered agreements only.[80] In addition, there is also Art 23 which exposes the compulsory nature of the WTO's jurisdiction. The word "shall" in the phrases, "Members shall have recourse to abide by the rules and procedures of this Understanding", emphasizes that Members must bring disputes concerning WTO agreements to the DSU. A grammatical interpretation of Art 23 (2) of the DSU reveals the Dispute Settlement Understanding's exclusive nature. Art 23 (2) Prohibits Members from seeking any other forum outside of the Dispute Settlement Understanding to resolve disputes that arise from WTO agreements.[81] Academics such as Marceau and Hillman have also interpreted Art 23 to mean that the DSU has compulsory and exclusive jurisdiction over disputes that arise from WTO agreements.[82] This analysis is corroborated by the WTO Panel Report in *Canada – Aircraft Credits and Guarantees*.[83] The panel pronounced that Article 23 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system to the exclusion of unilateral self-help.[84] It is clear from the compulsory and exclusive way Art 23 of the DSU is drafted that the WTO did not foresee the proliferation of regional tribunals regulating the same subject matter. Had the WTO foreseen the potential for jurisdictional clashes with regional tribunals, it is fair to infer that drafters may have included provisions in the DSU to coordinate this relationship better. The compulsory and exclusive nature of the WTO's jurisdiction clause

[79] Art 23 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[80] The Covered agreements referred to in appendix 1 are as follows: A) Agreement Establishing the World Trade Organization, Multilateral Trade Agreements, Multilateral Agreements on Trade in Goods , General Agreement on Trade in Services, Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes, Plurilateral Trade Agreements, Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and the International Bovine Meat Agreement.
[81] Art 23 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[82] G Marceau "The Primacy of the WTO Dispute Settlement System" (2015) 2 *Questions of International law* 3 at 4. See also, J Hillman 2009 *Cornell International Law Journal* 197.
[83] PR, *Canada - Export Credits and Loan Guarantees for Regional Aircraft* WT/DS222/R (March 18, 2003) para 7.170.
[84] PR *Canada - Aircraft Credits and Guarantees* para 7.170.

increases the potential for conflict, because of its rigidity, which allows the DSU to hear a case that has already been brought to a regional tribunal.

3.2. Non-Exclusive Jurisdiction Clauses

Non-exclusive jurisdiction clauses work on a permissive basis. They do not prevent parties from initiating parallel or subsequent litigations. None of the disputes can be adjudicated without the mutual consent of parties.[85] The effect and purpose of the non-exclusive jurisdiction clause is to give parties the option to choose a forum to initiate proceedings. Here, the litigants have the advantage of choosing the most convenient forum to hear the matter; however, the downside is the reduced legal certainty. An example of a non-exclusive jurisdiction clause can be seen in the Protocol of Brasilia, which previously allowed parties to choose where to settle their disputes either under the MERCOSUR agreement, or the WTO DSU.[86] Determining whether a jurisdiction clause is exclusive or non-exclusive is not easy as some clauses may appear ambiguous because not all jurisdiction clauses will expressly state whether they are exclusive or non-exclusive. Whether a jurisdiction clause is exclusive or non-exclusive will largely depend on the language and the agreement's context. If an RTA contains a non-exclusive jurisdiction clause, the conflict of jurisdiction is technically possible though, not very likely since, in most cases, the dispute will be submitted to the WTO Dispute Settlement Body (the DSB), which exercises compulsory and exclusive jurisdiction.[87] However, a jurisdictional conflict may arise where a party chooses to initiate the dispute in the regional tribunal and again before the DSU.[88] Again, due to the compulsory and exclusive nature of the WTO's jurisdiction, it is unlikely that the DSU will decline to hear the matter. Whenever a dispute of mutual interest arises between two regimes and an exclusive jurisdiction clause governs one, and a non-exclusive jurisdiction clause governs the other, a type 2 jurisdictional conflict arises.

[85] Keyes and Marshall 2015 *Journal of Private International Law* 17.
[86] Art 1 of the Protocol of Brasilia says "The controversies which arise between the State Parties regarding the interpretation, application or noncompliance of the dispositions contained in the Treaty of Asuncion, of the agreements celebrated within its framework, as well as any decisions of the Common Market Council and the resolutions of the Common Market Group, will be submitted to the procedure for resolution established in the present Protocol." The Protocol of Brasilia does not prohibit litigants from seeking redress in other tribunals which exist outside of the MERCOSUR framework.
[87] Golubev *Normative and Jurisdictional Conflicts* 35.
[88] Golubev *Normative and Jurisdictional Conflicts* 35.

Whenever a dispute of mutual interest arises between two regimes and non-exclusive jurisdiction clauses govern both, type 3 jurisdictional conflicts arise.

The AfCFTA agreement has many jurisdiction clauses relating to its different Protocols and Annexures. Many of these jurisdiction clauses are non-exclusive in nature. The researcher has taken specific examples of jurisdiction clauses within the AfCFTA agreements, which include:

Art 30 of the Protocol on Trade in Goods;

> "Except as otherwise provided in this Protocol, the relevant provisions of the Protocol on Rules and Procedures for the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Protocol."[89]

Art 40 of the Protocol on Trade in Goods, Annex 2;

> "Any dispute between the State Parties arising out of or relating to the interpretation or application of any provision of this Annex and its Guidelines, shall be settled in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes."[90]

Art 16 of the Protocol on Trade in Goods, Annex 5;

> "Where States Parties disregard the implementation of any of the provisions of this Annex, and a dispute arises, the matter shall be addressed in accordance with provisions of the Protocol on Rules and Procedures for the Settlement of Disputes."[91]

Art 25 of the Protocol on Trade in Services;

[89] Art 30 of the AfCFTA Protocol on Trade in Goods.
[90] Art 40 of the AfCFTA Protocol on Trade in Goods, Annex 2.
[91] Art 16 if the AfCFTA Protocol on Trade in Goods, Annex 5.

"The provisions of the Protocol on the Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Protocol."[92]

The AfCFTA jurisdiction clauses mentioned above are non-exclusive in nature because they do not expressly limit a party's right to initiate proceedings in other tribunals. Some of these jurisdiction clauses may be interpreted as being compulsory in nature, as confirmed by the word "shall" in the phrase "matters shall be settled in accordance with the Protocol on Rules and Procedures."[93] When these non-exclusive jurisdiction clauses are read with Art 3 (4) of the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes, they can be interpreted as limiting a party's rights to initiate parallel and subsequent proceedings on the same dispute once a particular forum is chosen.[94] After looking at the relationship between the WTO's exclusive jurisdiction clause and the AfCFTA non-exclusive jurisdiction clauses, the researcher submits that there is potential for type 2 jurisdictional conflicts (between an exclusive and a nonexclusive jurisdiction clause) to happen amongst the two agreements.[95]

3.3. Fork-In-The-Road Jurisdiction Clauses

The drafters of the AfCFTA agreement have recognised the potential for jurisdictional conflicts with other agreements. Therefore, they have included a fork-in-the-road provision (Art 3 (4) to try and mitigate some of the negative implications associated with the conflict of jurisdiction.[96] Fork-in-the-road jurisdiction clauses allow parties to choose an appropriate forum for adjudication; once a forum is selected, it is exclusive. Resorting to another forum will not be permitted.[97] Fork-in-the-road clauses and exclusive jurisdiction clauses share a commonality of purpose in that both try to ensure

[92] Art 25 of the AfCFTA Protocol on Trade in Services.
[93] Art 29 of the AfCFTA Protocol on Trade in Goods. See also, Art 40 of the AfCFTA Protocol on Trade in Goods, Annex 6. See also, Art 15 of the AfCFTA Protocol on Trade in Goods, Annex 6. See also, Art 25 of the AfCFTA Protocol on Trade in Services.
[94] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Dispute Settlement.
[95] Art 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. See also, Art 40 of the AfCFTA Protocol on Trade in Goods, Annex 6. See also, Art 15 of the AfCFTA Protocol on Trade in Goods, Annex 6. See also, Art 25 of the AfCFTA Protocol on Trade in Services.
[96] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Dispute Settlement.
[97] Gobulev *Normative and Jurisdictional Conflicts* 36.

that disputes are settled in a single forum. Both the North Atlantic Free Trade Area and MERCOSUR agreements contain fork-in-the road clauses.[98]

Fork-in-the-road jurisdiction clauses are meant to provide a solution to the conflict of jurisdiction; however, the risk of parallel/ subsequent proceedings remains since they only tackle one side of the coin.[99] For parties that submit a matter to the DSU first, and then again to the RTA, the fork-in-the-road is effective because the RTA will refuse to hear the matter accordingly, averting the conflict of jurisdiction. However, the problem arises when a complaining party first chooses the regional forum and then submits the dispute to the DSU. In this instance, the DSU is not bound by the RTA fork-in-the-road provision and may therefore proceed to hear the matter on its merits, which creates fertile ground for a conflict of rulings.[100] Despite this inherent problem, fork-in-the-road provisions are useful in serving as a deterrent for a party hoping to initiate parallel/ subsequent litigation in this manner. If the DSU decides to ignore the RTA fork-in-the-road clause, the innocent party can lodge a retaliatory claim before the RTA dispute settlement mechanism, the value of the benefits gained by the offending party in the DSU. The retaliatory claim does not solve the conflict of jurisdiction itself because it does not prevent a conflict of rulings, however, its negative financial implications on the losing party dissuades both the complainant and respondent parties from considering parallel/ subsequent litigation in another tribunal.

Fork-in-the-road provisions are insufficient in resolving the conflict of jurisdiction because they cannot guarantee that the DSU will decline jurisdiction to prevent a conflict of rulings.[101] This is the major flaw in trying to use fork-in-the-road provisions to solve conflicts of jurisdiction. Some scholars believe that, for a fork-in-the-road clause to solve the conflict of jurisdiction, the DSU has to apply the provision, by declining jurisdiction when confronted with a matter that has already been dealt with before an RTA. The applicability of RTA fork-in-the-road-clauses before the DSU is a matter which is dealt with comprehensively in the next chapter.

[98] Art 1 (2) of the Protocol of Olivos for Dispute Settlement in MERCOSUR. See also, Art 2005 (6) of the North Atlantic Free Trade Area.
[99] Gobulev *Normative and Jurisdictional Conflicts* 37.
[100] Gobulev *Normative and Jurisdictional Conflicts* 37.
[101] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.

The AfCFTA fork-in-the-road clause (Art 3 (4)) confirms that once a complainant has initiated a dispute before the AfCFTA, that same complainant may not bring the same dispute before any other adjudicative body outside the AfCFTA dispute settlement mechanism.[102] Art 3 (4) implicitly acknowledges other tribunals' existence, which may have the authority to exercise jurisdiction over the same subject matter.[103] Art 3 (4), however, does not expressly mention any of these tribunals with concurrent jurisdiction; however, the researcher established in the previous chapter that the DSU is one of them.[104]

Art 3 (4) claims to apply to disputes concerning the "same matter."[105] However, Art 3 (4) and its subsequent provisions do not provide a working definition of how to classify disputes concerning the "same matter." The AfCFTA's failure to provide a working definition of "same matter" creates room for interpretational difficulties, which may have devastating consequences for a defendant hoping to rely on Art 3 (4) to ward off parallel/ subsequent litigation in WTO, depending on the interpretation of "same matter" that is adopted. The ordinary dictionary meaning of "same" relates to two or more things that are identical/ equal / precisely like one another.[106] The definition of "matter" has been interpreted by the Appellate Body in *Guatemala – Cement,* by reading Art 7 (panel's terms of reference) and Art 6 (2) (establishment of panels) of the DSU together. Art 7 states that the panel's task is to examine the "matter referred to the DSB." Art 6 (2) specifies the requirements under which a complainant may refer a "matter" to the DSB. To establish a panel, a Member must make a written panel request. The panel request is also usually identified in the panel's terms of reference as the document setting out "the matter referred to the DSB." Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU must be the "matter" identified in the request for the establishment of a panel under Article 6 (2) of the DSU. Art 6 (2) requires the complaining Member, in a panel request, to "identify the specific measures at issue and provide a summary of the legal basis of the complaint sufficient

[102] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[103] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[104] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[105] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Dispute Settlement.
[106] Anonymous "Cambridge Dictionary" https://dictionary.cambridge.org/dictionary/english/same (accessed 9 May 2020).

to present the problem clearly."[107] In short, the Appellate Body in *Guatemala – Cement I, and US - Carbon Steel* confirms that "matter" consists of two elements: the specific measures at issue and the complaint's legal basis.[108]

The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* defines a specific measure as any act or omission attributable to a WTO Member for purposes of dispute settlement proceedings.[109] A measure consists of two elements. First, the measure must take the form of an act or omission. Acts include; legislative provisions, administrative decisions, judicial rulings, or other types of instruments alleged to be inconsistent with a WTO covered agreement.[110] Omissions take place when a Member fails to adhere to mandatory provisions in WTO agreements, and the aggrieved Member decides to challenge this omission before the DSU. Second, the act/omission must be attributable to a Member of the WTO. The acts/ omission in question must be perpetrated by a WTO Member such as a state or an economic union. The AfCFTA agreement contains many WTO-equivalent obligations; therefore, any measure that violates these WTO-equivalent obligations can also give rise to a simultaneous breach of the AfCFTA and WTO agreements.

The legal basis/ cause of action refers to the conditions under which parties can invoke the provisions of the DSU.[111] Art 1 (1) of the WTO's DSU states that a WTO panel can only hear matters on the violation of WTO agreements in Appendix 1.[112] Therefore, the legal basis for claims brought before DSU should stem from alleged violations of WTO Agreements. Likewise, the AfCFTA has a similar provision in Art 3 (1) of the AfCFTA dispute settlement protocol, clarifying that the legal basis for claims under the AfCFTA dispute settlement mechanism can only be derived from violations under AfCFTA agreements.[113] Consequently, if a measure violates a National

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[107] ABR, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* WT/DS 60/12/AB/R (November 25, 1998) para 72.
[108] ABR *Guatemala – Cement I* para 75-76.
[109] ABR, *US - Sunset Review of Antidumping Duties on Corrosion- Resistant Carbon Steel Flat Products from Japan* WT/DS244/10/AB/R (January 9, 2004) para 81. See also, A Mitchell *Challenges and Prospects for the WTO* (2005) 119.
[110] Mitchell *Challenges* 119.
[111] The World Trade Organisation "Legal basis for a dispute" https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s5p1_e.htm (accessed 11 May 2020).
[112] Art 1 (1) of the Understanding on Rules and Procedures governing the settlement of disputes.
[113] Art 3 (1) of the AfCFTA Protocol on the Rules and Procedures on the Settlement of disputes.

Treatment obligation, and a complainant wants the matter to be heard before the DSU, they will have to cite Art 3 of the GATT as the legal basis. If the same measure is to be brought before the AfCFTA, the complainant will have to cite Art 5 of the AfCFTA Protocol on Trade in goods which speaks to National Treatment. A complainant cannot cite Art 5 of the AfCFTA Protocol on Trade in Goods for a matter that is to be brought to the DSU. Likewise, a complainant before the AfCFTA dispute settlement mechanism may not cite Art 3 of the GATT to address a National Treatment violation even though the substantive content of the provisions (Art 3 of the GATT and Article 5 of the AfCFTA Protocol on Trade in Goods) are the same. This technical distinction between the two dispute sentiment mechanisms means that in a narrow sense, the legal basis for WTO claims can never be the same as that of AfCFTA claims. Kwak and Marceau support this interpretation.[114] Should the WTO favour this technical interpretation of “the same legal basis," which only looks at whether the legal instrument from which the cause of action arises is the same, then such an interpretation would surely render Art 3 (4) obsolete.[115]

For Art 3 (4) to be effective, the DSU will have to interpret the legal basis broadly enough to take into account the similarity in the substantive content of the provisions of the two agreements.[116] Scholars like Yang have realised the dangers of leaving the issue of "same matter" unexplained and have canvassed for tribunals to take an expansive approach towards interpreting the phrase.[117] Yang argues that if a National Treatment violation claim under separate agreements is treated in a strict sense as a different "matter," fork-in-the-road provisions from RTAs become meaningless. Should the DSU be faced with the question of assessing the validity of a fork–in-the-road clause, it should approach the issue of “same matter” by assessing the likeness in the substantive content of the cause of action. The inquiry should be “whether the cause of action brought before the DSU is substantively the same as what was heard in

[114] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 91.
[115] Art 3 (4) of the AfCFTA Protocol on the Rules and Rules and Procedures on the Settlement of disputes.
[116] Art 3 (4) of the AfCFTA Protocol on the Rules and Rules and Procedures on the Settlement of disputes.
[117] Yang 2014 *Michigan State International Law Review* 125.

before the RTA" not "whether the agreement form which the cause of action arises is the same." [118]

Yang's approach to interpreting "the same matter" is supported by the *Southern Bluefin Tuna* case.[119] In this case, Australia and New Zealand brought a claim against Japan for implementing experimental fishing measures that violate Articles; 64, 116 - 119, and 300 of the LOS convention before the United Nations Convention on the Law of the Sea (the UNCLOS) dispute settlement mechanism.[120] In response to this claim, Japan argued that at *primafacie,* the UNCLOS arbitral tribunal lacks the necessary jurisdiction to hear the matter because the matter could be adjudicated more appropriately by the Convention for the Conservation of Southern Bluefin Tuna.[121] In response to Japan's submissions, the tribunal cautioned against an approach that seeks to create artificial differences between a single disputes concerning the same parties arising under two conventions. To interpret the phrase "same matter" in Art 3 (4) in a manner that resolves the conflict of jurisdiction requires an expansive interpretation of the "same matter."[122] It requires an interpretation which transcends merely looking at the agreements from which the cause of action arises to looking at the similarity in the substantive content of the provisions. Unfortunately, this expansive interpretation of the "same matter" has not been confirmed by the DSU. It is still a mystery how the WTO will respond if confronted with a fork-in-the-road clause that presents such an issue. The interpretation of the phrase "same matter" will be critical to the overall effectiveness of Art 3 (4), because a narrow interpretation will render the provision useless.[123] The researcher supports the broad approach raised by Yang and the *Southern Bluefin Tuna* case as this approach gives effect to Art 3 (4), as opposed to the narrow approach, which renders Art 3 (4) redundant.[124]

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[118] Yang 2014 *Michigan State International Law Review* 124.
[119] Arbitral Tribunal United Nations Convention on the Law of the Sea, *Australia and New Zealand v Japan - Southern Bluefin Tuna (August 4,* 2000).
[120] S Marr "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources" (2000) 11 (4) *European Journal of International Law* 815 at 816.
[121] Arbitral Tribunal United Nations Convention on the Law of the Sea, *Australia and New Zealand v Japan-Southern Bluefin Tuna* para 38.
[122] Arbitral Tribunal United Nations Convention on the Law of the Sea, *Australia and New Zealand v Japan-Southern Bluefin Tuna* para 54.
[123] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on Dispute Settlement.
[124] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on Dispute Settlement.

In this section, the researcher has managed to classify the conflict of jurisdiction between the WTO and the AfCFTA agreement as a type 2 jurisdictional conflict (conflict between an exclusive and a nonexclusive jurisdiction clause). This section has also shown that the AfCFTA has incorporated the fork-in-the-road jurisdiction clause to resolve the conflict of jurisdiction. However, the fork-in-the-road clause does not guarantee a resolution to the conflict of jurisdiction because it does not bind the DSU. In the next section, the researcher will explore case law examples of how the conflict of jurisdiction has occurred in the context of international trade law.

4. World Trade Organisation Case Law Examples Depicting Jurisdictional Conflicts

US - Softwood lumber V

One of the most infamous examples of overlapping jurisdiction happened in the case of *US - Softwood Lumber V,* which was a dispute between the United States and Canada.[125] *In US - Softwood Lumber V*, Canada alleged that the subsidies and anti-dumping duties imposed by the United States on Canada's softwood lumber products were in breach of both the WTO and the North Atlantic Free Trade Area's rules on subsidies and countervailing measures.[126] The case of *Softwood Lumber V* is significant in illustrating a type 2 jurisdictional overlap (between a nonexclusive and exclusive jurisdiction clause). The dispute concerned a matter which was brought to both the North Atlantic Free Trade Area Dispute Settlement Mechanism (established in terms of the North Atlantic Free Trade Area Chapter 19). The North Atlantic Free Trade Area Chapter 19 provides mandatory jurisdiction over a matter if parties to the dispute chose the North Atlantic Free Trade Area forum first over the WTO.[127] The same matter was subsequently brought to the DSU, which has mandatory and

[125] ABR, *United States – Final Dumping Determination on Soft Wood Lumber from Canada* WT/DS264/AB/R (August 11, 2004).

[126] ABR *US - Softwood Lumber V* para 1.

[127] Kuoppamaki *Overlapping Jurisdictions* 7. See also, L Guglya "The Interplay of International Dispute Resolution Mechanism: *The Softwood Lumber* Controversy" (2011) 1 (2) *Journal of International Dispute Settlement* 175 at 181.

exclusive jurisdiction over this same dispute. In the *US - Softwood lumber V* dispute, the conflict of jurisdiction was never actually addressed by the relevant tribunals.

Appellate Body Report Argentina - Poultry Anti-Dumping Duties

In this case, Brazil challenged the anti-dumping measures Argentina had imposed on importing poultry from Brazil. In this dispute, Brazil brought the matter to MERCOSUR first, where the tribunal handed down a judgment which favoured Argentina.[128] Due to the overlapping anti-dumping obligations in both the WTO and MERCOSUR agreements, it meant that Brazil could attempt a second bite at the cherry before the DSU. Brazil went on to initiate the dispute again before the DSU. Argentina opposed the claim brought before the WTO by advancing a preliminary plea for the WTO panel to decline jurisdiction because the MERCOSUR had already decided the matter. Argentina raised a defence based on the principles of good faith (estoppel). In Argentina's view, a state is not acting in good faith if that party loses a dispute before one tribunal and then initiates the same dispute before another tribunal without referring to the previous decision.[129] Further, Brazil should be estopped from initiating WTO dispute settlement proceedings because Brazil made a clear and unambiguous statement through the Protocol of Olivos that it would not initiate parallel/ subsequent proceedings on the same matter in another forum.[130] In the alternative, Argentina argued that Art 31 (3) (c) of the Vienna Convention on the Law of Treaties (VCLT) and Art 3 (2) of the DSU, which require panels to take into consideration relevant rules of international law when interpreting treaties binds the WTO to MERCOSUR's previous decision on the matter.[131]

The panel decided to dismiss Argentina's preliminary plea for the following reasons. In response to Argentina's good faith claim, the panel used the test for substantive good faith set in the *US - Offset Act (Byrd Amendment)* case. The aforementioned test requires the defendant to show that (i) the plaintiff violated a substantive provision of a WTO agreement, and (ii) such an infringement must be more than a mere

[128] PR *Argentina - Poultry Anti-Dumping Duties* para 7.17.
[129] PR *Argentina - Poultry Anti-Dumping Duties* para 7.19.
[130] PR *Argentina- Poultry Anti-Dumping Duties* para 7.20.
[131] PR *Argentina- Poultry Anti-Dumping Duties* para 7.19.

violation.[132] In this case, the panel found that Argentina failed to get past the first hurdle of the inquiry because Argentina did not allege that Brazil violated a WTO agreement's substantive provision. Argentina based its claim on the violation of the general international law principle of good faith. The panel did not find it necessary to consider the second leg of the test, which required the defendant to prove more than a mere violation.[133] Critics state that the panel, in this case, was wrong to apply the test for substantive good faith set in *US - Offset Act (Byrd Amendment)*, because the matter speaks to procedural good faith, regulated by Art 3 (7) and 3 (10) of the DSU.[134] In any case, the researcher believes that the duty to bring a claim based on Art 3 (7) and Art 3 (10) rested on Argentina because WTO panels are obligated to limit their inquiry to the terms of reference of the parties.[135] Since Argentina did not bring up Art 3 (7) and Art 3 (10), the panel did not consider these provisions.[136]

In response to the estoppel argument, the panel held that Argentina's submissions were insufficient to establish the three conditions for estoppel because the Protocol of Olivos, which Argentina based its argument on, was not in enforce.[137] The panel held that it was going to rely on the Protocol of Brasilia, which was still in force at the time the dispute arose. Consequently, the panel found that the Protocol of Brasilia does not restrict Brazil's rights to initiate parallel/ subsequent proceedings on the same matter before another panel.[138] It is possible that had the Protocol of Olivos been enforce, the panel may have come to a different conclusion. In passing, the panel praised the prudence of MERCOSUR parties for including the Protocol of Olivos to mitigate potential jurisdictional conflicts. This shows that the DSU is open to be persuaded to consider fork-in-the-road clauses.[139] However, these comments do not provide sufficient authority to confirm the application of fork-in-the-road clauses in the DSU. The panel did not go far enough to provide the legal basis to explain how and why

[132] PR *Argentina- Poultry Anti- Dumping Duties* para 7.36.
[133] PR *Argentina- Poultry Anti- Dumping Duties* para 7.36
[134] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 28.
[135] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[136] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[137] PR *Argentina - Poultry Anti-Dumping Duties* para 7.38. To satisfy the requirements for estoppel, it must be shown that a statement of fact which was clear and unambiguous was made, the statement must be voluntary and unconditional, and that the statement was relied upon in good faith.
[138] PR *Argentina – Poultry Anti-Dumping Duties* para 7.38.
[139] PR *Argentina – Poultry Anti-Dumping Duties* para 7.38.

fork-in-the-road clauses can apply. The Protocol of Olivos was not even a factor in the reasons for the decision in this matter.

Concerning Argentina's alternative submission, the panel concluded that Argentina's reliance on Art 31 (3) (c) and 3 (2) of the VCLT was misdirected. Art 31 (3) (c) and 3 (2) of the VCLT oblige panels to take note of other relevant forms of international law when interpreting treaties only; they do not in any way oblige WTO panels to apply non-WTO provisions in any particular way. There is no basis in the DSU to suggest that its panels are bound by a non-WTO dispute settlement mechanism ruling. The DSU went on to dismiss Argentina's preliminary claim.[140]

The *Argentina - Poultry Anti-Dumping Duties* case is an excellent example of how conflicts of jurisdiction between RTAs and the WTO came into effect. The case confirms just how difficult it is for a party to succeed with a defence based on non-WTO rules. Unfortunately, the case does not provide much clarity on the question of whether a fork-in-the-road clause would provide enough cause for a WTO panel to decline to hear a matter. The panel avoided the issue of whether fork-in-the-road clauses can be used to solve the conflict of jurisdiction because the Protocol of Olivos was not in force.

Both *Softwood Lumber* and *Argentina - Poultry Anti-Dumping Duties* are significant in illustrating the practical nature of jurisdictional conflicts in the realm of international trade.[141] WTO jurisprudence has found convenient ways of avoiding the issue altogether. However, as the number of RTAs continues to grow, it is only a matter of time until another dispute of this nature is brought to the DSU. Should such an issue be raised by an AfCFTA Member before the DSU, the WTO panel in question will be forced to answer whether the fork-in-the-road clause is sufficient to solve the conflict of jurisdiction.

[140] PR *Argentina - Definitive Anti-Dumping Duties* para 7.41.

[141] PR, *United States – Measures Affecting Imports of Softwood Lumber from Canada SCM/162* (October 27, 1993). See also, PR *Argentina - Poultry Anti-Dumping Duties*.

5. Concluding Remarks

In conclusion, this chapter managed to trace the origins of the conflict of jurisdiction to the fragmentation of international law. The uncoordinated spread of international agreements has created substantive overlaps amongst the various regimes of international law. The WTO and the AfCFTA agreement is one of the many case studies where substantive overlaps exist between two international law regimes. Should a dispute concerning matters of substantive overlap arise between these two agreements, it creates room for a conflict of jurisdiction between the DSU and the AfCFTA dispute settlement mechanism. The jurisdictional conflict between the two regimes takes the form of a type 2 jurisdictional conflict, between an exclusive and a non-exclusive jurisdiction clause. The drafters of AfCFTA are aware of the potential for such jurisdictional conflicts, and the problems that may arise; therefore, (Art 3 4) was incorporated to try and resolve these conflicts.[142] However, fork-in-the-road clauses on their own are insufficient to resolve the conflict of jurisdiction, because they do not bind the DSU.[143] The fork-in-the-road clause is only effective if the WTO panel decides to apply it by declining to hear the merits of such a matter.[144] In the previous cases such as *Softwood Lumber* and of *Argentina – Poultry Anti-Dumping Duties,* WTO panels have avoided the problem of conflicting jurisdictions. *In Softwood Lumber* the issue was ignored, despite the adjudicators being aware of this situation. In *Argentina - Poultry Anti - Dumping Duties,* the DSU was indirectly confronted with the issue, whether an RTA fork-in-the-road provision could be applied to solve a conflict of jurisdiction, through Argentina's estoppel argument. The panel showed a willingness to consider fork-in-the-road clauses to mitigate potential conflicts of jurisdiction.[145] However, this willingness cannot be misconstrued as providing authority for the application of fork-in-the-road clauses in the DSU. In Argentina *Poultry Anti –Dumping Duties*, the panel did not provide a legal basis for the application of fork-in-the-road provisions. Further, the panel refused to apply the Protocol of Olivos, which leaves the matter ambivalent and unresolved.[146] In the next chapter, the researcher will unpack the issue of applying RTA fork-in-the-road clauses in WTO proceedings, to determine

[142] Art 3 (4) of the AfCFTA Protocol on the Understanding on the Settlement of Disputes.
[143] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12-13.
[144] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.
[145] PR *Argentina - Poultry Anti-Dumping Duties* para 7.38.
[146] PR *Argentina - Poultry Anti-Dumping Duties* para 7.38.

how Art 3 (4) of the AfCFTA dispute settlement mechanism can be applied to solve the conflict of jurisdiction.[147]

[147] Art 3 (4) of the ACFTA Protocol on Rules and Procedures on the Settlement of Disputes.

CHAPTER III: APPLYING ART 3 (4) TO THE WORLD TRADE ORGANISATION'S DISPUTE SETTLEMENT FRAMEWORK

1. Introduction

In chapter 2, the researcher gave an overview of the conflict of jurisdiction between the DSU and the AfCFTA dispute settlement mechanism. The researcher also outlined that the AfCFTA agreement has chosen the fork-in-the-road clause (Art 3 (4)) as its response to the conflict of jurisdiction.[148] The researcher also indicated that Art 3 (4), on its own, is an insufficient means to resolve the conflict of jurisdiction because it does not bind WTO panels.[149] Ultimately, for Art 3 (4) to solve the conflict of jurisdiction, it needs to be recognised as applicable law within the DSU's framework.[150] Applicable law refers to the scope of public international law norms that can be applied by a WTO panel to resolve a dispute.[151] Before WTO panels, the scope of applicable law is a very controversial topic, considering that academics share varying opinions concerning the extent to which non-WTO norms should apply to WTO disputes.[152] In this chapter, the researcher seeks to assess the prospects of recognition for Art 3 (4) before the WTO panels, in light of these debates. In the first part of this chapter, the researcher assesses the prospects of applying Art 3 (4) directly as a non-WTO norm before the DSU.[153] While the second part assess the prospects of Art 3 (4)'s indirect application to solve the conflict of jurisdiction. The last part of this chapter will give a conclusive summary of issues discussed.

[148] Art 3 (4) of the ACFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[149] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.
[150] Furculita 2019 *Clear Paper, TMC Asser Institute for International & European Law* 12.
[151] Bartels 2001 *Journal of World Trade* 501 – 502.
[152] Tratchtman 1999 *Harvard International Law Journal* 5. See also, Matsushita *et al The World Trade Organisation* 88. See also, Pauwelyn *Conflict* 461.
[153] Art 3 (4) of the ACFTA Protocol on Rules and Procedures on the Settlement of Disputes.

2. The Scope of Applicable law in World Trade Organisation Dispute Settlement Proceedings

Currently, there is no provision in any of the WTO's covered agreements, which speaks directly to the scope of applicable law in the WTO.[154] The WTO is different from other tribunals such as the International Court of Justice (the ICJ), which has an applicable law clause that allows it to determine whether a cited rule is within the range of permissible sources of law.[155] The question of applicable law in the WTO is a matter of interpretation. Scholars have come to different conclusions concerning the extent to which non-WTO norms apply to resolve WTO disputes. Lindroos, Mehling, and, more recently, Kuoppamaki, have broken down the different approaches to the scope of applicable law before WTO panels. There are three different approaches namely, the Conservative, Moderate, and Liberal.[156]

2.1. Conservative Approach

Conservative academics like Tratchtman believe that there is no room to apply non-WTO law in the DSU.[157] To support this argument, he refers to Art 3 (2) and 19 (2) of the DSU, which provides that the recommendations and rulings of the DSB cannot add or diminish the rights and obligations granted under the cover agreements.[158] Tratchtman suggests that it would be absurd to conclude that the DSU can apply any form of non-WTO law without adding or diminishing the rights in the DSU. To

[154] A lindros and M Mehling "Dispelling the Chinemera of Self-contained Regimes International law and the WTO" (2005) 16 (5) *The European Journal of International Law* 857 at 861.
[155] Art 38 (1) and Art 36 of the International Court of Justice Statute.
[156] Kuoppamaki *Overlapping Jurisdictions* 30. See also, Lindroos and Mehling 2006 *The European Journal of International law* 862.
[157] According to Tratchtman 1999 *Harvard International Law Journal* 5, the applicability of non-WTO norms is limited, to those non-WTO norms which are directly/ indirectly permitted by WTO agreements. Examples of instances where the WTO directly allows for non-WTO norms to be permitted include; Art 31 (3) (c) of the Vienna Convention on the law of treaties, which has been directly incorporated by the WTO in Art 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The second example noted involves instances where the TRIPS agreement refers to intellectual property treaties. Non-WTO law may also be indirectly incorporated by reference in provisions such as Art 20 (b) of the GATT, which is an exception provision that may allow the application of an international environmental agreement, that condones certain measures that maybe in breach of certain rights under the GATT, but can be deemed to be necessary to protect human and plant life.
[158] Art 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. See also, Art 19 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

consolidate his argument, Tratchtman cites that, Art 7 of the DSU, outlining the terms of reference for WTO panels, which only refers to WTO agreements.[159] Also, Art 11 of the DSU, which speaks to the function of panels to assess the applicability of and conformity with covered agreements. Tatchtman argues that the continued reference to the covered agreements in Art 3 (2), Art 19 (2), Art 7 and Art 11 of the DSU indicates that the scope of applicable law in the WTO is limited to WTO agreements. According to Tratchtman, it would be odd if one concludes that WTO Members intended for non-World Trade Organisation law to apply to WTO disputes.[160] If Drafters of the WTO agreements had wanted non-WTO law to apply in the DSU, they would have expressed it more clearly in the DSU. If the DSU were to adopt the Conservative approach to applying non-WTO norms, provisions such as Art 3 (4) would not be applicable in the DSU.[161]

The critique of the Conservative approach is that it treats the WTO like a self-contained regime.[162] Self-contained regimes are subsystems of international law that exclude the application of the general principles of international law.[163] Prominent international law scholars such as Koskenniemi and Pauwelyn deny the existence of self-contained regimens in international law.[164] Koskenniemi states that self-contained regimes do not exist because it is impossible to create a specialised international legal regime outside the general international law framework.[165] Koskenniemi claims that the notion of self-contained regimes is misleading. There is no support for the view anywhere that a regime of international law can exclude the application of general international law completely.[166] Pauwelyn states that the notion of self-contained regimes should be approached with caution to avoid a situation where a particular regime of international law, like the WTO, becomes a haven for states to escape obligations

[159] Art 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[160] Trachtman 1999 *Harvard International Law Journal* 5-6.
[161] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[162] According to B Simma and D Pulkowski "Of Planets and the Universe: Self-Contained Regimes in International Law" 17 (3) *The European Journal of International Law* (2006) 483 at 490, traditionally, self-contained regimes have been viewed as a subsystem of international law with their own sets of rules that apply to the exclusion of the general international rules on State Responsibility.
[163] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 68.
[164] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 68.
[165] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 100.
[166] Koskenniemi 2006 A/CN.4/L.682 *International Law Commission Report* 72. See also, Lindroos and Mehling 2006 *The European Journal of International law* 858.

entered into elsewhere.[167] Alternatively, domestic pressure groups can avoid domestic legal constraints by insulating their particular interests in a trade-only WTO cocoon.[168]

2.2. Moderate Approach

The Moderate approach suggests that all relevant non-WTO norms can apply in the DSU as long as they do not conflict with the WTO law.[169] Bartels, Matsushita, Schoenbaum, and Mavovidis argue that the prohibition against adding or diminishing state rights and obligations under covered agreements leads to a situation where priority should be given to WTO norms if a conflict arises.[170] The requirement not to add or diminish the rights and obligations provided for in covered agreements works to limit the application of non-WTO law in dispute settlement proceedings. The moderate approach views the prohibition not to add or diminish rights as a conflict clause, which gives priority to the WTO agreements when conflicts arise with other non-WTO treaties.[171] In addition, Art 7 (2) of the DSU mandates panels to consider the relevant provisions in covered agreements cited by the parties.[172] In considering the relevant provisions mentioned in Art 7 (2) of the DSU, panels should also consider Art 11 of the DSU, which requires them to make an objective assessment of the facts concerning the relevant provisions of covered agreements up for adjudication. After a unitary reading of Art 7 (2) and Art 11 of the DSU, it is arguable that an objective assessment is only possible if adjudicators are allowed to consider all the relevant laws partnering to a dispute, which may include non-WTO law.[173] Ultimately, the DSU does not limit the possible sources of international law that can be applied; it only allows the application of such law to happen as long as it does not conflict with WTO norms.[174] Suppose the DSU adopts a moderate approach towards applying non-WTO law. In that case, it is unlikely that Art 3 (4) will apply to solve the conflict of jurisdiction because the application of Art 3 (4) will conflict with Art 23 of the DSU, which

[167] Pauwelyn *Conflict* 38.
[168] Pauwelyn *Conflict* 38.
[169] Bartels 2001 *Journal of World Trade* 519. See also Matsushita *et al The World Trade Organisation* 88.
[170] Bartels 2001 *Journal of World Trade* 519. See also Matsushita et al *The World Trade Organisation* 88.
[171] Matsushita *et al The World Trade Organisation* 88.
[172] Art 7 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[173] Matsushita *et al The World Trade Organisation* 88.
[174] Matsushita *et al The World Trade Organisation* 88.

guarantees a party's right to have its matter heard before the DSU.[175] The main critique of the moderate approach is elaborated in the Liberal approach.

2.3. Liberal Approach

The Liberal approach calls for a unitary approach in applying international law. Liberals believe that the WTO is part of the much larger system of international law. All relevant principles of general international law must apply to the adjudication of disputes, to the extent that the WTO has not contracted out of the application of such norms.[176] The Liberal approach differs from Conservative and Moderate approaches by rejecting the WTO's idea of hierarchical supremacy over other international law rules. Pauwelyn, however, agrees with the Moderates that Art 7 of the DSU gives WTO panels the authority to apply non-WTO law. Pauwelyn also adopts a broad interpretation of the phrase "relevant provisions" to encamp all relevant WTO and non-WTO law, within the panel's terms of reference.[177] Pauwelyn disagrees with Moderates who view the prohibition to add or diminish rights as a conflict clause. Instead, he argues that Art 3 (2) and Art 19 (2) of the DSU are irrelevant in determining applicable law scope in the WTO context.[178] In Pauwelyn's view, Art 3 (2) and Art 19 (2) of the DSU serve as general interpretative tools which encourage panels to interpret WTO provisions in light of general rules of public international law.[179] Art 3 (2) and Art 19 (2) of the DSU limit the judicial authority of WTO panels not to create new rights and obligations outside of what is in the covered agreements. However, Art 3 (2) and 19 (2) of the DSU do not limit the legislative authority of WTO Members to conclude other treaties that can influence their mutual WTO rights and obligations.[180] Therefore, under the liberal approach, Art 3 (2) and Art 19 (2) of the DSU cannot limit the legislative authority of some WTO Members to conclude RTAs like the AfCFTA, which modify WTO rights amongst the consenting Members themselves. Pauwelyn argues that under the Liberal approach, relevant non-WTO rules that apply to the relationship between

[175] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes. See also, Art 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[176] Pauwelyn *Conflict* 461.
[177] Pauwelyn 2003 *Journal of World Trade* 1001.
[178] Pauwelyn *Conflict* 352.
[179] Pauwelyn *Conflict* 353.
[180] Pauwelyn 2003 *Journal of World Trade* 1003.

parties should be applied even when they conflict with WTO rules. In situations where relevant non-WTO rules conflict with WTO rules, the conflict rules of international law must apply.[181] The conflict rules of general international law consist of the *lex posterior*, *lex specialis,* and *inter se modifications.*[182] If the DSU opts for the Liberal approach, it is possible to apply Art 3 (4) to WTO's dispute settlement proceedings, using the conflict rules as a legal basis. The researcher will now investigate the application of these conflict rules.

2.3.1. *Lex Posterior*

The *Lex posterior* is a general international law rule of treaty interpretation that attempts to resolve conflicts between treaties by establishing the parties' real intention. Under the *Lex posterior*, a later expression of state intention should logically prevail over an earlier one. The later expression of state intention gives effect to the most accurate, up to date reflection of the will of the parties.[183] Art 30 of the VCLT codifies the *lex posterior* principle, which regulates the application of successive treaties relating to the same subject matter.[184] Art 30 of the VCLT sets a preliminary two-stage inquiry that needs to be conducted for the *lex posterior to* apply. First, the treaties need to be successive, and second, they need to regulate the same subject-matter.[185]

The successive time requirement is a matter of timing to determine which of the two is the prior treaty and the later treaty. The relevant date is that of the adoption and not entry into force.[186] The WTO treaty was adopted on 15 April 1994, and the AfCFTA agreement was adopted on 21 March 2018. Therefore, the WTO agreement is the prior treaty, and the AfCFTA agreement is the later agreement.[187]

[181] Pauwelyn 2003 *Journal of World Trade* 1005.
[182] Pauwelyn 2003 *Journal of World Trade* 1005.
[183] Pauwelyn *Conflict* 96. See also, J Klabbers *Treaty Conflict and the European Union* (2008) 63.
[184] Art 30 of the Vienna Convention on the Law of Treaties. See also, A Orakhelashvili "Art 30 of the Vienna Convention on the Law of Treaties: Application of Successive Treaties Relating to the Same Subject- Matter" (2016) 31 (2) *ICSID Review- Foreign Investment Law Journal* 344 at 344.
[185] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 17.
[186] Pauwelyn *Conflict* 371.
[187] Pauwelyn *Conflict* 370.

In terms of the subject matter requirement (*ratione materiae)*, it was concluded in the previous chapters that both the WTO and the AfCFTA agreement regulate the same subject matter.[188] Both agreements are international trade agreements with overlapping considerations. Since both requirements for the preliminary inquiry are met in this instance, we can proceed to the substantive inquiry by applying the relevant VLCT provisions which codify the *lex posterior.*

Art 30 (2) of the VCLT states;

> "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[189]

Art 30 (3) of the VCLT states;

> "When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."[190]

Art 30 (4) of the VCLT says;

> "When the parties to the later treaty do not include all the parties to the earlier
>
> one:
>
> (a) as between the States Parties to both treaties, the same rule applies as in paragraph 3."[191]

Art 30 (2) confirms the residual nature of the *lex posterior* principle. It provides that where a treaty contains priority rules/conflict clauses, these priority rules must apply;

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[188] See Chapter 1, fn 30.
[189] Art 30 (2) of the Vienna Convention on the Law of Treaties.
[190] Art 30 (3) of the Vienna Convention on the Law of Treaties.
[191] Art 30 (4) of the Vienna Convention on the Law of Treaties.

however, where conflicting treaties do not provide priority rules, then the interpreter must move on to utilise the *lex posterior* as specified in Art 30 (3) and 30 (4) (a). Art 30 (3) and 30 (4) (a) of the VCLT should be read together. Art 30 (3) confirms that the latter treaty should take priority in a situation where a conflict arises with a prior treaty that has not been suspended, or terminated.[192] Art 30 (4) (a) of the VCLT confirms that Art 30 (3) of the VCLT also applies in instances where some of the Members of the prior treaty conclude a subsequent agreement. In such a case, the *lex posterior* will only apply between the Members that are party to both treaties.[193]

The *lex posterior* was applied in the DSU, in the arbitration for EC - *Hormones*.[194] In this arbitration, pursuant to Art 22 (6) of the DSU, the European Communities (the EC) challenged the United States' proposal to suspend concessions worth US$202 million per year worth of tariffs.[195] The EC objected to the level of suspension proposed by the United States. In its submissions, the EC alleged that the United States is entitled to US 53,301,675, for the trade impairment caused by the hormone ban on United States bovine meat and meat products.[196]

In this case, the panel of arbitrators had to determine whether the level of suspension of tariff concessions proposed by the United States (the US) is equivalent to the level of nullification or impairment caused to the US by the EC ban on imports of hormone-treated beef and beef products.[197]

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[192] Art 30 (3) of the Vienna Convention on the Law of Treaties.
[193] Art 30 (4) of the Vienna Convention on the Law of Treaties.
[194] ARB, *European Communities - Measures Concerning Meat and Meat Products (Hormones) Original Complaint by the United States Recourse to Arbitration by the European Communities under Art 22.6 of the DSU* WT/DS26/ARB (July 12, 1999) para. 51.
[195] Art 22 (6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes Says "When the situation described in paragraph 2 occurs (if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21), the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed … the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if Members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period. Concessions or other obligations shall not be suspended during the arbitration."
[196] ARB *EC - Hormones* para 1.
[197] ARB *EC - Hormones* para 4.

It appears that the US and the EC used different methods of quantifying the level of impairment caused by the ban. The US's US$202 million per year figure was based on the assumption that it was entitled to export 11 500 tonnes of beef products to the EC, whilst the EC's estimate was based on the idea that the 11 500 tonnes were to be shared by both Canada and the US. The US argued that it has the right to an annual amount of 11 500 tonnes due to bilateral US-EC and US-Austria agreements. The US submitted that 10 000 tons of the 11 500 tons were in terms of the US-EC agreement. The remaining 1500 tons were in respect of a separate agreement signed with Austria, before Austria acceded to the WTO[198] However, the EC contests that the US has such rights because the legal validity of the agreements presented is in question.

The Dispute Settlement Understanding dismissed the US averments stating that the quotas established by both bilateral agreements are no longer in force because the WTO's EC schedule had superseded them. The WTO's EC schedule regulates the same matter and is later in time to the bilateral agreements. The arbitration panel referred to Art 30 of the VCLT in its reasoning, confirming the application of the *lex posterior* principle in the WTO. [199]

In the Arbitration report for *EC - Hormones*, the *lex posterior* was applied in favour of a WTO agreement at the expense of a preferential trade agreement. We are yet to see whether the DSU would apply the *lex posterior* to the WTO agreement's detriment. Should the DSU choose to apply the *lex posterior* principle favouring the AfCFTA agreement to the detriment of WTO law, then Art 3 (4) will apply in terms of Art 30 (4) of the VCLT. In terms of Art 30 (4) of the VCLT, Art 3 (4) will modify DSU rights amongst WTO Members who have also ratified the AfCFTA agreement only. The application of the *lex posterior* will not modify any DSU rights amongst Members who are not party to the AfCFTA agreement.

[198] ARB *EC - Hormones* para 49.
[199] ARB *EC - Hormones* para 51.

2.3.2. *Lex Specialis*

The *lex specialis* is a general principle of international law. It is recognised as a canon of treaty interpretation that attempts to solve conflicts between treaties by establishing the parties' real intention.[200] The doctrine of *lex specialis* suggests that if a matter is regulated by a general standard and a more specific rule, then the more specific principle should prevail.[201] The *lex specialis* applies in two instances, firstly, where a more specific rule represents a specification or an update to the more general rule. In this regard, the more specific rule is read together with the general rule. Alternatively, the *lex specialis* can apply as a conflict rule. Read in this light; the *lex specialis* clarifies the relationship between two non-hierarchical rules that conflict with one another.[202] In both cases, priority falls on the more precise rule.[203] The rationale for the *lex specialis* is that special rules regulate matters more effectively since special rules are more precise than general rules. The *lex specialis* is not part of the VCLT; however, it applies residually as a general international law principle.[204]

There are four different situations in which international law has applied the *lex specialis*. Firstly, amongst provisions in a single instrument, secondly, between two different instruments. Thirdly, between a treaty and a non-treaty standard. Lastly, between non-treaty standards.[205] The WTO has applied the *lex specialis* amongst covered agreements, as seen in the case of *Turkey – Textiles*, but never between the WTO and a non-WTO Treaty.[206] However, some scholars have argued that the *lex specialis* may apply to an earlier agreement and a later *inter se* agreement (agreement to modify the former's treaty provisions amongst some of the Members).[207] In this instance, the latter agreement becomes *lex specialis* amongst the Members who are party to both the earlier and the latter *inter se* agreement. The *inter se* agreement

[200] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 34.
[201] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 34.
[202] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 35. See also, Kuoppamaki *Overlapping Jurisdictions* 44.
[203] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report 35*.
[204] Pauwelyn *Conflict* 212.
[205] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 40.
[206] Koskenniemi 2006 A/CN.4/L.682 *International law Commission Report* 43. See also, ABR, *Turkey - Restrictions on Imports of Textile and Clothing Products* WT/DS34/14/AB/R (October 22, 1999) para 42. See also, PR, *Brazil - Export Financing Programme for Aircraft* WT/DS46/R (April 14, 1999) para 7.40.
[207] Kuoppamaki *Overlapping Jurisdictions* 45.

provisions will not be *lex specialis* when assessing the relationship between Members of the *inter se* agreement and Members who are not part of the *inter se* agreement.[208] If the DSU applies the *lex specialis* principle through *inter se* modifications, then Art 3 (4) of the AfCFTA dispute settlement protocol may be considered as *lex specialis* to Art 23 of the DSU as between AfCFTA Members.[209]

2.3.3. *Inter se* Modifications

Inter se modifications refer to a situation where some of the parties to a multilateral agreement agree to modify the terms of that multilateral treaty as applied amongst themselves alone.[210] *Inter se* modifications provide a faster and more flexible alternative means of altering treaty obligations than the traditional amendment process.[211] Amending a treaty is usually a long and protracted process, which starts with the proposal to amend the treaty, after that, negotiations and conclusion. Amendments conclude with an indication of the states that are entitled to become a party to the amended treaty.[212] General international law recognises the rights of States to *inter se* modify treaties among themselves through Art 41 of the VCLT.[213]

Art 41 (1) of the VCLT Says;

> "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:

[208] Kuoppamaki *Overlapping Jurisdictions* 46.
[209] Klabbers *Treaty Conflicts* 97.
[210] Pauwelyn "The Role of Public International Law in WTO law" (2001) 95 *American Journal of International law* 535 at 547. See also, O Door and K Schmalenbach *Vienna Convention on the Law of Treaties a Commentary* 2 ed (2018) 777.
[211] Dorr and Schmalenbach *The Vienna Convention* 778. See also Art 41 of the Vienna Convention on the Law of Treaties.
[212] Art 40 of the Vienna Convention on the Law of Treaties.
[213] Art 41 of the Vienna Convention on the Law of Treaties.

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."[214]

Art 41 (2) says;

"Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."[215]

Art 41 of the VCLT allows for parties to implement modifications under two circumstances. Firstly, in instances where the *inter se* modification is authorised explicitly by the earlier treaty.[216] Secondly, in cases where the earlier treaty does not prohibit such modification, the modification does not adversely affect other Members' rights not privy to the *inter se* agreement, and the *inter se* modification does not undermine the object and purpose of the earlier treaty.[217] There are essentially two relationships that arise from *inter se* modification. First, the relationship between states who are Members of the *inter se* agreement, to whom such modifications apply. Second, the relationship between states who are Members of the *inter se* agreement and those that are not part of the *inter se* agreement, to which the earlier multilateral agreement rules apply pursuant to the *Pacta tertiis* rule.[218]

Academics are divided on the issue of whether Art 41 of the VCLT applies to the WTO agreements. Trachtman believes that the WTO has contracted out of any possibility of applying *inter se* modifications under Art 41 of the VCLT.[219] To justify this argument, the author has referred to provisions in the Agreement Establishing the WTO.[220] Art

[214] Art 41 (1) of the Vienna Convention on the Law of Treaties.
[215] Art 41 (2) of the Vienna Convention on the Law of Treaties.
[216] Art 41 (1) (a) of the Vienna Convention on the Law of Treaties.
[217] Art 41 (1) (b) of the Vienna Convention on the Law of Treaties.
[218] Kuppamaki *Overlapping Jurisdictions* 16. See also, Dorr K Schmalenbach *The Vienna Convention* 779. The *Pacta tertiis* principle confirms that states can only be held accountable to norms which they consent to.
[219] J Tratchtman *The Future of International Law Global Government* (2013) 232.
[220] Art IX, X and XVI of the Agreement Establishing the World Trade Organisation.

IX addresses the strict conditions a Member must follow if they wish to waiver the WTO agreements' rights and obligations.[221] And, Art X, speaks to the requirement for the amendment of the WTO Agreement. While, Art XVI (4) dictates that each Member of the agreement shall ensure its legislative framework's conformity with the WTO agreements.[222] Trachtman submits that though these provisions do not explicitly prohibit *inter se* modifications, they intend to provide an exclusive pre-emptive means of modifying WTO law.[223] Alternatively, Trachtman argues that, if Art 41 of the VCLT applies to WTO agreements, modifications and waiver of WTO agreements are implicitly prohibited by the provisions mentioned above.[224] Under Tratchtman's reasoning, the WTO cannot apply *inter se* modifications to apply Art 3 (4).[225]

The Appellate Body sheds light on the application of *inter se* modifications in the case of *Peru - Agricultural Products.*[226] In 2001, through an FTA, Peru introduced the price range system through which it imposed additional duties on agricultural products from Guatemala. The FTA was ratified by Guatemala and was still to be ratified by Peru, so the FTA agreement was not in force at the time. The FTA provided that the FTA must prevail in the case of any conflicts with the WTO Provisions.[227] Guatemala went on to challenge Peru's additional duties before the DSU despite the FTA.[228] Guatemala alleged that these duties were inconsistent with both Art 4.2 of the Agreement on Agriculture, and Art 2 (1) (b) and Art 10 (3) of the GATT.[229] Peru tried to justify its WTO inconsistent measures by arguing that the FTA modified the relevant provisions Guatemala was relying on. In this case, one of the issues the Appellate Body had to determine was whether Peru and Guatemala had modified their WTO obligations, between themselves, through the FTA they had signed?[230]

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[221] Art IX of the Agreement Establishing the World Trade Organisation.
[222] Art X of the Agreement Establishing the World Trade Organization. Art XVI (4) of the Agreement Establishing the World Trade Organisation.
[223] Tratchtman *The Future of International* law 232.
[224] Tratchtman *The Future of International law* 233. See also, Art 9 of the Agreement Establishing the World Trade Organisation. See also, Art 10 of the Agreement Establishing the World Trade Organisation. See also, Art 16 (4) of the Agreement Establishing the World Trade Organisation.
[225] Art 3 (4) of the ACFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[226] ABR, *Peru - Additional Duty on Imports of Certain Agricultural Product Items* WT/DS457/18 (July 20, 2015) para 5.112.
[227] ABR *Peru – Agricultural Products* para 5.108.
[228] ABR *Peru – Agricultural Product*s para 1.4.
[229] ABR *Peru – Agricultural Product*s para 3.1.
[230] ABR *Peru – Agricultural Product*s para 4.1.

In the *court a quo*, the panel steered away from deciding whether by concluding an FTA, the parties could validly modify the WTO agreements' obligations.[231] The panel did not see the relevance of entertaining this discussion, considering that the FTA agreement was not yet in force, since Peru was still to ratify the agreement. Considering this and other reasons not relevant to the present discussion, the panel found that Peru's conduct was inconsistent with the provisions of the Agreement on Agriculture and the GATT 1994.[232]

The Appellate Body accepted that parties may be allowed to *inter se* modify WTO agreements as they apply amongst themselves.[233] However, it held that Art 41 of the VCLT does not apply to RTA modifications of WTO agreements because the GATT has more specific provisions (*lex specialis* provisions) that address such amendments, waivers, or exceptions. The Appellate Body argued that Art 24 of the GATT, the Enabling Clauses (amongst developing countries) should apply for *inter se* modifications concerning trade in goods, and Art 5 of the General Agreement on Trade in Services (GATS) for the *inter se* modifications of provisions relating to trade in services.[234] The researcher submits that, the Appellate Body's distinction of *inter se* modifications under Art 41 and *inter se* modifications under Art 24 of the GATT, the Enabling Clause and Art 5 of the GATS is an unnecessary distinction to make. Considering that the application of Art 24 of the DSU merely confirms the approach in Art 41 (1) (a) of the VCLT. The Appellate Body decision in *Peru - Agricultural Products* displays a willingness on the part of the DSU to give effect to *inter se* modifications. However, it also reflects a degree of apprehension on the part of DSU to apply non-WTO law (Art 41 of the VLCT).

Since the *inter se* modifications in *Peru - Agricultural Products* were FTA modifications concerning trade in goods, the Appellate Body saw it fit to apply the test in Art 24 of the GATT, as was done in Turkey's case - *Textiles.* In *Turkey - Textiles* the Appellate Body applied the analysis in Art 24 as follows; first, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the

[231] ABR *Peru – Agricultural Product*s para 1.6.
[232] ABR *Peru – Agricultural Product*s para 1.6.
[233] ABR *Peru – Agricultural Product*s para 5.111.
[234] ABR *Peru – Agricultural Products* para 5.113.

formation of a CU or FTA that fully meets the requirements of Article 24.[235] Second, that party must demonstrate that the establishment of that CU or FTA would be prevented if it were not allowed to introduce the measure at issue.[236] The Appellate Body also took particular notice of paragraph 4 of this provision, which states that the purpose of a CUs or FTAs is to facilitate trade between constituent Members and not to raise barriers of trade with third countries.[237] FTAs / CUs are supposed to promote trade and closer integration between the countries involved. Peru's price regulation system measures have the opposite effect in that they roll back on a Member's rights and obligations under covered agreements.[238]

In this case, Peru did not invoke Art 24 of the GATT to justify its conduct because the FTA was not in force. The Appellate Body was unsure whether the FTA did allow for Peru to maintain a WTO-inconsistent price range system. Therefore, the Appellate Body did not find it necessary to further inquire whether the price regulation system is consistent with the requirements set in Article 24.[239]

The Appellate Body's approach in *Peru - Agricultural Products* reflects that *inter se* modifications to WTO agreements are to be conducted under Art 24 of the GATT, the Enabling Clause and Art 5 of the GATS (modifications under FTAs/ Customs Unions).[240] For Art 3 (4) to be applied as an *inter se* modification in the DSU, the provision must pass the test in *Turkey - Textiles*. The first requirement is easy to prove. Art 3 (4) is being applied in forming an FTA (the AfCFTA agreement). The second part of the test is much harder to prove, considering that an FTA can still be formed without incorporating, let alone applying a fork-in-the-road provision. Following the *Appellate Body ratio* in *Peru - Agricultural Products*, and *Turkey - Textiles,* the researcher believes it is unlikely that Art 3 (4) will be applicable as an *inter se* modification.

The Liberal approach, much like all the approaches to applicable law has its own shortcomings. The Liberal approach's strongest critique is that it is founded upon a fictitious idea of single legislative intent among treaty Drafters. There is no central

[235] Para 58.
[236] ABR *Turkey – Textiles* para 62.
[237] ABR *Peru – Agricultural Products* para 5.116.
[238] ABR *Peru – Agricultural Products* para 5.116.
[239] ABR *Peru – Agricultural Products* para 45.
[240] Para 5.113.

legislative authority in the international legal system, which works with a single intent to promote consistency amongst the different treaties. It may be a stretch to infer that the AfCFTA agreement constitutes a latter/ more specific expression/ modification of the WTO agreement. Although the AfCFTA and the WTO share a commonality in being trade agreements; with overlapping memberships, each of these agreements' political, social, and economic interests differ. Reconciling the two separate agreements with the idea of creating a single legislative intent is problematic.

Also, the Liberal approach seems to undermine the WTO's "single undertaking" as codified in Art II (2) of the Agreement Establishing the WTO, which says;

> "The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members."[241]

Art II (2) of the Agreement Establishing the WTO confirms that all WTO obligations are binding on all Members.[242] This interpretation is supported by Negrescu and Truicia, who confirm that the "single undertaking" designates the obligation of all WTO Members to accept and apply all agreements negotiated under the WTO.[243] The single undertaking is a negotiation method based on the premise "nothing agreed until everything is agreed" WTO members are obliged to agree to WTO agreements holistically, without reservation. The single undertaking is there to discourage free-riding and facilitate trade negotiations by enlarging the area of issues, increasing the scope of potential trade-offs and protecting the Most Favoured Nation principle.[244] Art 23 of the DSU is part of the WTO agreement and is part of the "single undertaking." Any agreement made to alter existing WTO obligations between some of the Members through the *lex posterior*, the *lex specialis* and *inter se* modifications would undermine the single undertaking's essence. To an extent, one can argue that Art 2 (2) of the Agreement Establishing the WTO expressly contracts out of the general international

[241] Art II (2) of the Agreement Establishing The World Trade Organisation.
[242] Art II (2) of the Agreement Establishing The World Trade Organisation.
[243] D Negrescu and G Truica "Can EU's Enhanced Cooperation Mechanism Provide Solutions to the "Single Undertaking" Problems of the WTO" (2006) 6 (2) *Romanian Journal of European Affairs* at 5.
[244] Negrescu and Trucia 2006 *Romainian Journal of European Affairs* 5-7.

law conflict rules, which allow for the modification of WTO obligations by some of the parties amongst each other.

In addition, the ambivalence surrounding matters of applicable law make it difficult to conclude with certainty, whether the DSU will adopt a Liberal approach towards applicable law or not. There is a need for more clarity concerning the extent to which non-WTO law can apply in the DSU. Art 3 (4) will solve the conflict of jurisdiction if a WTO panel adopts a Liberal approach to applicable law.[245] As it stands, it is impossible to tell for sure what avenue the WTO will take if confronted with a question of applying non-WTO law in the DSU.

Altogether, the Liberal approach offers a variety of ways in which a WTO panel may use the conflict rules of international law to apply Art 3 (4).[246] The researcher submits that the *lex posterior*, and the *lex specials* will be the most effective approaches. The option to apply Art 3 (4) as an *inter se* modification will only be available if a panel finds that Art 3 (4) complies with the rules under Art 24 of the GATT.[247]

3. An Alternative Approach to Applying Art 3 (4) as a Legal Impediment to the Dispute Settlement Understanding's Jurisdiction

In the previous section, the researcher discussed the different views concerning applying non-WTO law in the DSU, to establish whether Art 3 (4) can apply as a defence to WTO litigation.[248] The researcher concluded that the WTO has to adopt the Liberal approach to apply Art 3 (4) to solve the conflict of jurisdiction. The researcher also highlighted that due to the various approaches (Conservative, Moderate and Liberal), it is not certain whether the DSU will adopt a purely Liberal approach to applicable law. The uncertainty surrounding the issue of applicable law in the DSU makes it very difficult to conclude whether Art 3 (4) will fall within the scope of applicable law to solve the conflict of jurisdiction. Fortunately, recent case law has

[245] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[246] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[247] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[248] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

shed light on an alternative/ indirect way in which panels can still apply Art 3 (4) without dealing with uncertainties surrounding the applicable law debate. This alternative means of application is possible if the respondent launches a preliminary objection based on the violation of the WTO's procedural good faith provisions in Art 3 (7) and Art 3 (10) of the DSU. This alternative approach speaks to the existence of a legal impediment to the WTO's jurisdictional exercise. Art 3 (7) and Art 3 (10) are violated, when parties agree to waive their rights to the DSU, concerning a specific dispute and one party violates this agreement by initiating such a dispute before a WTO panel.[249] Instead of raising a defence under Art 3 (4) directly, the respondent can use the breach of Art 3 (4) to facilitate a claim for the breach of procedural good faith under Art 3 (7) and 3 (10) of the DSU. In this instance, the respondent is arguing that Art 3 (4) constitutes an agreement to waive the right of parties to bring a dispute concerning the same matter to the WTO, once the dispute has been previously brought before the AfCFTA dispute settlement mechanism.

3.1. General Background to Legal Impediments to the Exercise of the World Trade Organisation's Jurisdiction

The idea of legal impediments to the exercise of the WTO's jurisdiction is discussed in the Appellate Body case in *Mexico - Taxes on Soft Drinks.*[250] In *Mexico - Taxes on Soft Drinks,* the US initiated an action against Mexico for imposing certain tax measures on soft drinks and other beverages that use sweeteners other than cane sugar, from the US.[251] In response to the US' submissions, Mexico launched a preliminary objection to the WTO's jurisdiction. In its submissions, Mexico requested for the panel to exercise its inherent power to decline to exercise jurisdiction in this case, in favour of the matter being brought before the North Atlantic Free Trade Area dispute settlement mechanism.[252] Mexico argued that the North Atlantic Free Trade Area dispute settlement mechanism was the most appropriate forum to hear the matter

[249] ABR *Peru - Agricultural Products* para 5.19.
[250] Para 54.
[251] Para 2.
[252] ABR *Mexico- Tax Measures on Soft Drinks* para 3.

since the broader dispute also involved other North Atlantic Free Trade Area agreement provisions, which would not be considered if the matter was heard before the DSU.[253] The issue, in this case, was whether a WTO panel has the authority to decline jurisdiction.[254]

In response to Mexico's preliminary objection, the Appellate Body confirmed that its panels have inherent jurisdictional powers; however, these powers are limited in some instances by covered agreements.[255] The Appellate Body found that its inherent power to decline to exercise jurisdiction, where jurisdiction has been validly established, is limited by Art 3 (2) and 19 (2) of the DSU.[256] Art 3 (2) and 19 (2) prohibit a WTO panel from making a determination that diminishes Members' rights under covered agreements.[257] The Appellate Body held that WTO Members have a right of access to the DSU under Art 3 (3) and Art 23.[258] If a panel were to decline to exercise validly established jurisdiction, such a decision would surely diminish Members' rights to have their matters settled by the DSU.

Consequently, the Appellate Body found that it was precluded from declining validly established jurisdiction.[259] Although the Appellate Body confirmed that its panels do not have the authority to decline validly established jurisdiction, it did shed light on the existence of certain circumstances, which may allow for panels to decline to hear a matter on its merits. Such a circumstance would arise if a party were to convince the DSU that there is a problem with the actual claims itself, which creates a legal

[253] ABR *Mexico - Tax Measures on Soft Drinks* para 3.
[254] ABR *Mexico - Tax Measures on Soft Drinks* para 39.
[255] ABR *Mexico - Tax Measures on Soft Drinks* para 46.
[256] ABR *Mexico - Tax Measures on Soft Drinks* para 46. See also, Art 3 (2) and Art 19 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which prohibits a World Trade Organisation panel from making a determination which diminishes a Members rights under covered agreements. See also, ABR *Mexico - Tax Measures on Soft Drinks* para46.
[257] Art 3 (2) and Art 19 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,
[258] ABR *Mexico - Tax Measures on Soft Drinks* para 53. See also, Art 3.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes which says "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." See also, Art 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes which says "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."
[259] ABR *Mexico- Tax Measures on Soft Drinks* para 53.

impediment to the exercise of the WTO's jurisdiction.[260] Unfortunately, the case of *Mexico - Taxes on Soft Drinks* did not go into detail to confirm what these legal impediments may be.[261]

The Appellate Body's reluctance to address the exact form of these legal impediments, in *Mexico - Taxes on Soft Drinks* has left many academics to speculate. There is no universal consensus amongst academics on what constitutes a legal impediment to the exercise of the WTO's jurisdiction. Some authors like Van Damme have mentioned, *forum non-conveniens*, *res judicata*, *lis albi pendens* and *absus de droit* while Henckels highlighted forum choice provisions, *lex posterior, lex specialis* and *comity*.[262] There seems to be confusion amongst academics as to what exactly constitutes these legal impediments to the exercise of jurisdiction; however, there is consensus that legal impediments constrain the establishment of valid jurisdiction and consequently impede a ruling on the merits of a matter.[263]

3.2. The Appellate Body's View on Legal Impediments to the Exercise of Jurisdiction

The Appellate Body's reluctance to address the issue of legal impediments in *Mexico - Taxes on Soft Drinks* is not a complete dead end. Academics like Fuculita, have tried to piece together several Appellate Body decisions to formulate a clear picture, on behalf of the Appellate Body, on what constitutes a legal impediment to the exercise of jurisdiction. The first piece of the puzzle can be found in the *Mexico - Taxes on Soft Drinks* case, where the Appellate Body left a small clue in footnote 101 of its judgement, referring to The Appellate Body Report in *EC - Export Subsidies on Sugar*.[264] In *EC - Export Subsidies* the Appellate Body said;

[260] ABR *Mexico - Tax Measures on Soft Drinks* para 54.
[261] Para 54.
[262] C Andres *The Issue of the Admissibility of Disputes Before WTO Panels in Conflicts Related with Free Trade Agreements: Does the WTO's Dispute Settlement Body's Jurisdiction Prevail over the FTA's Dispute Settlement Mechanism* (LLM thesis, Pontificia Universidad Javeriana, 2017) 30.
[263] Andres *Issues of Admissibility* 29.
[264] Para 101.

> "We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3 (7) of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3 (10) of the DSU."[265]

The Appellate Body in this statement above indicates that a Member's right to the DSU can only be limited under exceptional circumstances. Such exceptional circumstances may arise if a party fails to comply with Art 3 (7) and Art 3 (10) of the DSU.[266] This line of reasoning seems to be supported by the Appellate Body Report in the case of *US - Corrosion-Resistant Steel Sunset Review*. In *US - Corrosion Resistant Steel*, the Appellate Body held that;

> "As long as a Member respects the principles set forth in Articles 3 (7) and 3 (10) of the DSU, namely, to exercise their "judgement as to whether action under these procedures would be fruitful" and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits.[267]

The Appellate Body in *US - Corrosion-Resistant Steel Sunset Review*, confirms in clear terms that the right to a panel in the WTO is subject to the party's compliance with Art 3 (7) and Art 3 (10) of the Dispute Settlement Understanding.[268] After piecing together the Appellate Body decisions in *Mexico - Taxes on Soft Drinks*, *EC - Subsidies* and *US - Corrosion-Resistant Steel Sunset Review*, a strong inference can be drawn to infer the Appellate Body's view on the issue of legal impediments. The Appellate Body's view is that legal impediments to the exercise of jurisdiction are created by violations to Art 3 (7) and Art 3 (10) of the DSU.[269]

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[265] ABR, WT/DS265/AB/R WTDS266/AB/R WTDS283/AB/R (April 28, 2005) para 312.
[266] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[267] ABR, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* WT/DS244/AB/R (December 15, 2003) para 89.
[268] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[269] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

3.3. The Interpretation of Art 3 (7) and Art 3 (10) of the Dispute Settlement Understanding.

It has been established that violations to Art 3 (7) and Art 3 (10) of the DSU create legal impediments to the exercise of the WTO's jurisdiction.[270] A detailed analysis of these two provisions will be conducted and the researcher will also discuss previous cases to illustrate how the DSU has treated alleged violations of Art 3 (7) and Art 3 (10) in the past.[271] From these cases, inferences can be drawn to determine how Art 3 (4) can be used to facilitate a successful procedural good faith challenge before the WTO.[272]

Art 3 (7) of the DSU says;

> "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements

[270] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[271] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[272] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures."[273]

The first sentence of Art 3 (7) can be read as prohibiting Members from engaging in frivolous litigation.[274] Art 3 (7) gives WTO Members a broad discretion to bring a matter to the DSU.[275] A Member does not have to prove that it has a legal interest to bring a case to the DSU.[276] A Member is expected to be self-regulating in deciding whether its action will be fruitful. Even though Art 3 (7) does not specifically use the phrase 'good faith,' Art 3 (7) has previously been interpreted to reflect the good faith principle in Art 3 (10).[277] There is a general presumption that, whenever a party brings a dispute to the DSU, that party has done so in good faith.[278] Therefore, a panel is not forced to inquire on its own accord whether a party has acted in good faith, by bringing a dispute to the DSU. For a panel to investigate a procedural good faith infringement, the respondent must allege that the complainant has failed to act in good faith by bringing a matter before the panel.[279]

In addition, Art 3 (7), the second sentence, confirms that the DSU aims to provide a positive solution to a dispute, which is satisfactory to the parties involved, in accordance with the rights and obligations in the DSU.[280] The DSU is committed to providing a solution for all Members seeking its intervention, as highlighted in the

[273] Art 3 (7) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.
[274] According to the case of ABR, *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R (September 9, 1997) para 135, Art 3.7 has been interpreted to mean that Members have a broad discretion in deciding whether to bring a case against another Member before the Dispute Settlement Understanding. However, this broad discretion is limited by good faith restrictions, Members are prohibited from engaging in frivolous litigation.
[275] Art 3 (7) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.
[276] Anonymous "WTO Analytical Index"https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art3_jur.pdf (Accessed 4 January 2021).
[277] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 25. See also, PR, *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States WT/DS132/R* (January 28, 2000) para 73.
[278] According to the PR, *Korea - Anti–Dumping Duties on Imports of Certain Paper from Indonesia* WT/DS312/12 (November 28, 2005) para 6.97, the good faith presumption is confirmed in the Panel Report for *Korea- Certain Paper*, the panel found that it is assumed that World Trade Organisation Members engage in dispute settlement in good faith as required by Art 3.10 of the Dispute Settlement Understanding.
[279] A Mitchell "Good faith in the World Trade Organisation dispute settlement" 2006 7 (2) *Melbourne Journal of International law* 339 at 356.
[280] Art 3 (7) and Art 3 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes must be read together.

Panel Report of *Saudi Arabia - Protection of Intellectual Property rights.*[281] In the case of *Saudi Arabia - Protection of Intellectual property rights*, Saudi Arabia raised a preliminary objection in which it argued that the DSU should decline jurisdiction on the basis that the matter was not a trade dispute. In Saudi Arabia's view, the matter presented to the DSU between itself and Qatar transcends the realm of international trade law, it is a product of much broader political/ geopolitical, security implications, which cannot be addressed by the DSU.[282] Saudi Arabia argued that the DSU was not in a position to provide an objective and satisfactory resolution to the dispute as required by Art 3 (4) Art 3 (7) and Art 11 of the DSU, therefore the WTO should decline to hear the matter on its merits.[283] In light of its submissions, Saudi Arabia accused Qatar of failing to carefully exercise its discretion by bringing this dispute claim before the DSU. In other words, Saudi Arabia accused Qatar of violating the WTO principle of good faith by bringing this matter before the DSU.[284] In response to Saudi Arabia's preliminary objection, the panel relied on the Appellate Body's reasoning in Mexico - *Taxes on Soft Drinks*, stating that the DSU does not have the authority to decline jurisdiction.[285] The panel held further that it has a duty to make findings on a matter within its terms of reference, despite the presence of a broader dispute. In this matter, Qatar accused Saudi Arabia of violating the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement), there was no mention of the broader dispute. The panel found it appropriate to deal with Saudi Arabia's alleged infractions of the TRIPS agreement, which fell within its subject matter jurisdiction.[286] The panel decided to dismiss Saudi Arabia's preliminary objection, and the matter proceeded to its merits.

In the researcher's view, the case of Saudi *Arabia - Intellectual Property rights* shows that the DSU is slow to impute bad faith on the part of a complainant who brings a matter before its panels. Further, the WTO is committed to providing an objective, and satisfactory resolution to all trade-related disputes brought before its adjudicatory panels. In line with this commitment to resolve trade disputes, should a conflict of

[281] PR, *Saudi Arabia - Measures Concerning the Protection of Intellectual Properties* WT/DS567/R (June 16, 2020) para 7.11.
[282] PR S*audi Arabia - Protection of Intellectual* para 7.14.
[283] PR S*audi Arabia - Protection of Intellectual Properties* para 7.8.
[284] PR S*audi Arabia - Protection of Intellectual Properties* para 7.8.
[285] PR S*audi Arabia - Protection of Intellectual Properties* para 7.11.
[286] PR *Saudi Arabia - Protection of Intellectual Properties* para 7.16.

jurisdiction arise, the DSU must make an objective assessment of the matter before it. A truly objective assessment would consider the implications of RTA fork-in-the-road clauses, where they are relevant in governing the relationship between the parties. In conducting this objective assessment, the DSU should consider the negative impacts of ignoring RTA fork-in-the-road clauses. Ignoring RTA fork-in-the-road clauses heightens the risk of exacerbating the dispute between the parties by potentially leaving the primary dispute unresolved, which would frustrate the aim of Art 3 (7), second sentence.

Art 3 (10) of the DSU notes;

> "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints regarding distinct matters should not be linked."[287]

Art 3 (10) expressly codifies the general international law principle of procedural good faith into the WTO agreements.[288] Art 3 (10) of the DSU is an indictment on all Members who participate in WTO dispute settlement procedures, to do so in good faith.[289] The good faith principle mandates the complaining party to accord the responding Members the full measure of protection and the opportunity to defend.[290] The same good faith principle requires the respondent to promptly bring claims of procedural deficiencies to the complaining Member's attention and the panel involved. The good faith obligation covers the entire spectrum of the dispute from initiation of a case throughout implementation.[291]

Arguing that a WTO panel should decline to hear a matter on its merits because the opposing party violated the principle of good faith equates to an objection to a dispute's

[287] Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[288] Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[289] Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[290] ABR, *United States – Tax Treatment for "Foreign Sales Corporations" WT*/DS180/AB/R (February 24, 2000) para 166.
[291] ABR, *European Communities - Export Subsidies on Sugar* WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (April 28, 2005) para 312.

admissibility.[292] Should the respondent succeed in rebutting the good faith presumption, the panel must refuse to hear the matter on its merits, citing the existence of a legal impediment to the exercise of jurisdiction. There are several WTO cases in which respondents have tried arguing *de facto* the existence of legal impediments, in the form of an alleged violation of both Art 3 (7) and Art 3 (10).[293]

EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)

The issue raised by the EC was the question of whether the Understandings on Bananas, prevented the US and Ecuador from initiating compliance proceedings pursuant to Article 21 (5) of the DSU with respect to the EC's regime for the importation of bananas.[294] Art 21 (5) of the DSU provides that in the event of a disagreement regarding the implementation of a WTO existing ruling, recourse is to be had to the dispute settlement proceedings.[295] The US and Ecuador claimed that the EC bananas import regime was against the DSB recommendations and rulings, therefore, it was appropriate for them to initiated proceedings under 21 (5) of the DSU.[296]

In the EC's view, the Understanding on Bananas constituted a mutually agreement solution to solve the longstanding dispute over the EC's controversial banana import regime. The EC alleged that the signatories of the Understanding bananas agreed to forfeit their rights to bring compliance matters under Art 21 (5) DSU.[297] Therefore, the complainants must be *defacto* estopped from bringing such a matter to the WTO because this would violate the good faith provisions in Art 3 (7) and Art 3 (10) of the DSU.[298] Unfortunately, the EC's good faith argument was initially rejected by the Panel, because the EC failed to meet the standard set for good faith in *US - Offset Act*

[292] Andres *Issues of Admissibility* 22.
[293] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[294] ABR *European Communities Regime For the importation sale and distribution of Bananas III Second Recourse to Art 21.5 of the DSU by Ecuador, European Communities – Regime for the Importation and Sale of Bananas Recourse to Art 21. 5 of the DSU by the United States* WT/DS27/AB/RW2/ECU WT/DS27/AB/RW/USA (26 November 2008) *para* 199.
[295] Art 21 (5) of the Understanding on Rules and procedures on the settlement of Disputes.
[296] ABR *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US*) para 5.
[297] ABR *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* para 199.
[298] ABR, *EC - Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* para 38.

(Byrd Amendment), which requires a party to 'prove more than a mere violation.'[299] The EC argued before the Appellate Body, that the panel misdirected itself by applying the wrong test for good faith.[300] It submitted that the panel's test, derived from the *US – Offset Act (Byrd Amendment)* case is the test for substantive good faith as opposed to procedural good faith. The EC argued that, the challenge under Art 3 (10) of the DSU relates to procedural good faith.[301]

The Appellate Body concurred with the EC's submissions concerning the good faith argument. In its view, the test set by *US - Offset Act (Byrd Amendment)* for substantive good faith was taken out of context by the panel because the questions of law dealt with in *US - Offset Act (Byrd Amendment)* and the questions of law dealt with in the present case are very different.[302] Whilst in the *US – Off*set *(Byrd Amendment)* case, the Appellate Body considered the principle of good faith as it relates to a substantive provision of the WTO agreements, the Appellate Body, in this case, is faced with the allegation of a lack of good faith as a procedural impediment for a WTO member to initiate Art 21 (5) proceedings. The procedural aspect of good faith, which limits a party's right to bring a matter before the WTO is dealt with under Art 3 (7) and 3 (10) of the DSU.[303] The application of estoppel also falls under these provisions.

Although the Appellate Body concurred with the EC over the panel's misapplication of the good faith principle, it remained unconvinced with the EC's good faith challenge. This is because it did not see the Understandings of Bananas as providing a clear waiver of their right to have recourse to the DSU. According to the Appellate Body, the relinquishment of the right to the DSU 'cannot be lightly assumed.'[304]

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[299] PR, *European Communities - Regime for the Importation Sale and Distribution of Bananas Second Recourse to Art 21.5 of the DSU by Ecuador* WT/DS 27/ RW2/ECU (7 April 2008) para7.131.
[300] ABR, *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* para 223. See also, ABR, *United States - Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/AB/R WT/DS234/AB/R (January 16, 2003) para 295 - 298, the substantive test for good faith, is a two-step inquiry i) There has to be a breach of a substantive provision in the WTO Agreement 2) the breach has to be something more than a mere violation.
[301] ABR, *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US*) para 227.
[302] ABR, *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US*) para 227.
[303] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[304] ABR, *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* para 228.

It appears that the *EC - Bananas* case overturns the previous decision of the Appellate Body in the *Argentina – Poultry Anti-Dumping Duties* case. In *Argentina - Poultry Anti-Dumping Duties*, the Appellate Body was confronted with a similar issue, relating to whether Brazil had been estopped from commencing proceedings before the DSU. In the *Argentina – Poultry Anti-Dumping Duties* case, the Appellate body also mistakenly applied the test for substantive good faith instead of the procedural test for good faith. The *Argentina - Poultry Anti-Dumping Duties* case was discussed at length in the previous chapter, so the researcher will not repeat the same facts.[305]

Appellate Body Peru - Agricultural Products

In the case of *Peru - Agriculture*, the Appellate Body had to deal with a similar procedural good faith challenge. Peru challenged Guatemala's decision to bring a matter concerning Peru's price range system to the DSU despite the presence of an alleged 'waiver' not to do so.[306] Peru alleged that Guatemala waived its right to the DSU explicitly or by necessary implication when Guatemala ratified an FTA that allowed Peru to maintain a WTO-inconsistent price range system.[307] The issue here was whether Guatemala acted contrary to good faith under Art 3 (7) and Art 3 (10) of the DSU, based on the alleged relinquishment of its right to challenge the price range system before the WTO dispute settlement mechanism.[308]

The Appellate Body confirmed four requirements that the respondent needs to convince the court that a complainant has dishonoured an agreement to waiver its rights to the DSU, in violation of Art 3 (7) and 3 (10) of the DSU. Firstly, the text of the waiver must clearly reveal that the parties intended to relinquish their rights.[309] Here, the Appellate Body confirmed what was said in EC - *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US).* If a WTO Member has not clearly stated that it will not take legal action concerning a specific measure, that Member cannot be held liable for a procedural good faith violation, if challenged before the DSU.[310] Second, it must be

[305] See Chapter 2, Section 4.
[306] ABR *Peru - Agricultural Products* para 5.11.
[307] ABR *Peru - Agricultural Products* para 5.5.
[308] ABR *Peru - Agricultural Products* para 5.20.
[309] ABR *Peru - Agricultural Products* para 5.25.
[310] ABR, *Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US*) para 228.

shown that a Member's compliance with Art 3 (7) and 3 (10) of the DSU has been ascertained based on actions within the context of the DSU. This means the waiver itself should at least refer to the DSU provision which the parties have agreed to forego.[311] Third, the waiver must not go beyond the settlement of specific disputes, meaning the waiver should apply to a distinct category of disputes.[312] Fourth, if the waiver is a mutually agreed solution, it must be consistent with covered agreements.[313] This means that such a waiver can only be in terms of WTO-equivalent obligations. Such a waiver cannot be in terms of WTO-minus obligations.[314]

In *both EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US) and Peru - Agricultural Products*, the respondent ultimately failed to successfully convince the DSU to decline jurisdiction on the account that the complainants infringed Art 3 (7) and Art 3 (10) of the DSU.[315] These cases prove that succeeding with a preliminary challenge based on Art 3 (7) and Art 3 (10) is difficult, but not impossible.[316] In the researcher's view, if a respondent can successfully discharge the requirements set out in *Peru - Agricultural Products*, and prove that the complainant disregarded a valid waiver to the DSU, then it is possible to prove violations to Art 3 (7) and Art 3 (10).[317] If a respondent can successfully allege that Art 3 (4) constitutes such an agreement to waive the rights of parties to initiate a specific type of dispute before the DSU, then it is possible to apply Art 3 (4) indirectly to solve the conflict of jurisdiction.[318] However, the difficulty in trying to apply Art 3 (4) in this indirect manner is that Art 3 (4) will have to comply with the stringent requirements set out in *Peru - Agricultural Products* to

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[311] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 36 and 37. See also, J Pauwelyn "Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence"https://poseidon01.ssrn.com/delivery.php?ID=043105127121025125094072005092092121009036000082061091106021000025111015023081069011120058100122042024053114073112004066109072020090034037034102078120099093068065042046000000079124110092116094091004084003084000125127100001117029125098107089115097006&EXT=pdf (accessed 30 June 2020).

[312] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 37.

[313]Andres *The Issue of Admissibility* 39.

[314] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 37.

[315] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[316] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[317] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[318] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

prove it is a valid waiver to the right to bring a matter to the DSU.[319] However, the researcher believes that Art 3 (4) does not meet the requirement for a clear and unambiguous waiver of the rights of both parties as set in *Peru - Agricultural Products'*.[320] Nevertheless, there are certain textual adjustments the researcher will propose to ensure compliance.

3.4. The Requirement to Clearly Reveal the Intention to Waive the Rights of Both Parties to Bring a Dispute before the Dispute Settlement Understanding

Art 3 (4) does not comply with the first requirement, which compels waivers/ mutually agreed solutions to be drafted clearly and definitely.[321] There are a number of ambiguity issues relating to Art 3 (4).[322] Firstly, it is not clear whether Art 3 (4) waives both the complaint and the respondent parties' rights.[323] A purely grammatical interpretation of Art 3 (4) seems to prohibit the state party which has initiated AfCFTA dispute settlement procedures (the complainant) alone from initiating in parallel/subsequent litigation on the same matter.[324] Art 3 (4) makes specific reference to the phrase "A State party" which means a singular entity as opposed to using the phrase "State Parties" which would bind both the complainant and the respondent.[325] Consequently, it remains ambivalent whether Art 3 (4) waives the respondent's right to initiate parallel/ subsequent proceedings before the DSU.[326] Other agreements such as MERCOSUR and the North Atlantic Free Trade Area have used more explicit language in their fork-in-the-road provisions making it clear that they apply both the complainant and the respondent. The MERCOSUR fork-in-the-road clause expressly states that once a dispute has been initiated in one forum, "neither party" may have recourse to another dispute settlement mechanism on the same matter.[327] The North

[319] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[320] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[321] ABR *Peru – Agricultural Products* para *5.25.*
[322] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[323] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[324] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[325] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[326] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[327] Art 1 (2) of the Protocol of Olivos for Dispute Settlement in MERCOSUR says "Disputes within the scope of application of this Protocol that may also be subject to the dispute settlement system of the

Atlantic Free Trade Area fork-in-the-road provision does not refer to a specific party. It merely states that once a dispute has been initiated in either forum (North Atlantic Free Trade Area or DSU, the forum selected is to the exclusion of all others.[328] The North Atlantic Free Trade Area fork-in-the-road clause is broad enough to infer that it applies to both the complainant and the respondent.

Also, Art 3 (4) is not clear on what is meant by "same matter." The issue of "same matter" was discussed extensively in the previous chapter. Kwak and Marceau argue that the legal basis for WTO disputes and AfCFTA disputes can never be the same, technically.[329] The legal basis for a WTO dispute should stem from the violation of a WTO agreement. In contrast, the legal basis for an AfCFTA dispute should stem from the violation of the AfCFTA agreements. If the DSU adopts Kwak and Marceau's narrow and technical view of the phrase "same matter," Art 3 (4) will be meaningless, because the two will be construed as regulating different subject matter. On the other hand, if a WTO panel can give the phrase "same matter" a broader interpretation, which considers the substance of the matter involved, then it is possible to give effect to Art 3 (4).[330] This broad interpretation is canvassed for in the *Southern Bluefin Tuna Case*. The ambiguities surrounding the phrase "same matter" make it difficult for Art 3 (4) to be considered a clear and unambiguous waiver of rights as contemplated in the case of *Peru - Agricultural Products.*

World Organization of Trade or other preferential trading schemes that are part of the individual Member states of MERCOSUR may be subject to one or other jurisdiction, the choice of the complainant. Notwithstanding the foregoing, the parties to the dispute may, by mutual agreement, set the forum. Once initiated proceedings for settlement of disputes in accordance with the preceding paragraph, neither party may have recourse to dispute settlement mechanisms established in other forums regarding the same object, defined in accordance with Article 14 of this Protocol. Nevertheless, within the framework of establishing this numeral, the Council of the Common Market shall regulate matters concerning the choice of forum."

[328] Art 2005 (6) of the North Atlantic Free Trade Area says "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4."

[329] Kwak and Marceau 2003 *The Canadian Yearbook of International Law* 91.

[330] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

4. Conclusion

In conclusion, the researcher submits that Art 3 (4) on its own is an insufficient response to the conflict of jurisdiction because it does not bind the DSU.[331] The only way for Art 3 (4) to resolve the conflict of jurisdiction, is if the DSU recognises Art 3 (4) as applicable law.[332] Applicable law merely refers to the range of public international law sources a WTO panel can use to resolve a dispute.[333] Unfortunately, it is not easy to determine the scope of applicable law in the DSU. There is no applicable law clause to give guidance as to the role non-WTO norms should play within the DSU. Scholars generally disagree on matters concerning the scope of applicable law in the DSU.[334] There are three different approaches to applicable law; the Conservative, Moderate, and Liberal views, none of which are confirmed by a WTO panel, which creates a stalemate. It is almost impossible to determine the exact approach a WTO panel will take if confronted with the question of applying an RTA fork-in-the-road clause in advance of Art 23 of the Understanding on the Settlement of Disputes. To circumvent the thorny issue of applicable law, litigants may, in the alternative, attempt to apply Art 3 (4) indirectly, by arguing that the breach of Art 3 (4) constitutes the breach of a waiver to a right to bring a matter to the DSU.[335] In this instance, the breach of Art 3 (4) is presented as evidence of a breach of the WTO's procedural good faith obligations in Art 3 (7) and Art 3 (10) of the DSU.[336] Such a violation of Art 3 (7) and Art 3 (10) would constitute a legal impediment to the exercise of jurisdiction, thereby forcing the WTO to decline to hear the merits of such a matter, consequently resolving the conflict of jurisdiction.[337] However, the alternative approach is challenging to dispatch because of the very stringent requirements a party needs to prove to establish a breach of a

[331] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[332] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.
[333] Bartels 2001 *Journal of World Trade* 501 -502.
[334] Tratchtman 1999 *Harvard International Law Journal* 5. See also, Matsushita e*t al The World Trade Organisation* 88. See also, Pauwelyn *Conflict* 461.
[335] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[336] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes. See also, Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[337] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

waiver to the right to bring a matter to the DSU. From the researcher's analysis, Art 3 (4) does not meet the requirement to show a clear and unambiguous waiver.[338]

[338] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

CHAPTER IV: CONCLUSION AND RECOMMENDATIONS

1. Summary of the Study

This study sought to investigate the conflict of jurisdiction as it relates to the WTO and AfCFTA agreements. Since the AfCFTA agreement incorporates a fork-in-the-road provision (Art 3 (4) of the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes) as its solution to the conflict of jurisdiction, a significant part of the study was focused on assessing the viability of Art 3 (4).[339] Chapter 1 established that fork-in-the-road provisions are insufficient to resolve jurisdictional conflicts because they do not bind the DSU.[340] The DSU is tasked with enforcing WTO norms only, not RTA agreement norms, which fall outside its jurisdiction.[341] For a fork-in-the-road provision to acquire recognition before the DSU, it needs to fall within the scope of applicable law. Due to the ambivalence surrounding matters of applicable law in the DSU, it is not clear whether Art 3 (4) will receive such recognition.[342] Therefore, a WTO panel can choose to ignore a fork-in-the-road provision, by proceeding to hear the matter on its merits, leaving the conflict of jurisdiction unresolved.

In Chapter 2, the study traced the origins of jurisdictional conflicts, and the researcher established that such conflicts are a consequence of the fragmentation of international law. In the absence of a central legislative body, the uncoordinated spread of international agreements has created conflicts and contradictions amongst international agreements with overlapping memberships and subject matter. Whenever a dispute arises and such overlaps are present, that dispute can be heard before two or more dispute settlement mechanisms, creating a conflict of jurisdiction.[343]

This chapter further classified the different types of jurisdictional conflicts that are classified according to the different jurisdictional clauses at play between international

[339] See Chapter 3.
[340] See Chapter 1, Section 2.
[341] Art 1 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[342] See Chapter 3, Section 2
[343] See Chapter 2, Section 2.

agreements. According to the researcher, the most relevant jurisdiction clauses at play between the AfCFTA and the WTO include exclusive jurisdiction clauses, non-exclusive jurisdiction clauses, and fork-in-the-road jurisdiction clauses. It was further established that the relationship between AfCFTA and the WTO agreements would give rise to type 2 jurisdictional conflicts, between the WTO's exclusive jurisdiction clause and the AfCFTA's non-exclusive jurisdiction clauses.[344] The remaining section of the Chapter examined practical case law examples of jurisdictional conflicts between the WTO and other RTAs. The case law assessment revealed that WTO panels are reluctant to address conflicts of jurisdiction,[345] up to date no WTO panel has sufficiently dealt with conflicts of jurisdiction.

Chapter 3 dealt with the logistics of applying the AfCFTA's fork-in-the-road clause to solve the conflict of jurisdiction. Part of the findings showed that the WTO does not contain an applicable law clause, which can determine, for sure, the extent to which non-WTO norms apply in the DSU.[346] The researcher unpacked the three theories that explain the extent to which non-WTO norms should apply in the DSU. The first theory was the Conservative approach, which states that non-WTO norms are allowed, to the extent that they are expressly provided for by covered agreements.[347] Secondly, the Moderate approach, states that non-WTO norms are allowed, to the extent that they do not add or diminish rights already provided by covered agreements.[348] Thirdly, the Liberal approach, which states that non-WTO norms should be applied, as long as they are relevant, to the extent that the WTO has not contracted out of the application of such norms.[349] The study found that since the AfCFTA fork-in-the-road clause threatens to diminish a party's rights to access the DSU, it can only apply under the Liberal approach. Unfortunately, none of the approaches mentioned above has been officially adopted by the WTO, making it very difficult to conclude whether the AfCFTA fork-in-the-road clause will find any application before the WTO.[350]

[344] See Chapter 2, Section 3.
[345] See Chapter 3, Section 4.
[346] See Chapter 3, Section 2.
[347] See Chapter 3, Section 2.1.
[348] See Chapter 3, Section 2.2.
[349] See Chapter 3, Section 2.3.
[350] See Chapter 3, Section 2.3.

In addition, this chapter discusses the alternative approach in which Art 3 (4) can be applied before the WTO, albeit indirectly.[351] If a respondent in the WTO can successfully prove that the AfCFTA fork-in-the-road clause constitutes an agreement to waive the rights of parties to bring a particular type of dispute to the DSU, and that the complainant is in breach of such a waiver, then it is possible for that respondent to raise the defence of a violation of the WTO's procedural good faith provisions, under Art 3 (7) and Art 3 (10) of the DSU.[352] This defence equates to alleging that there is a legal impediment to the exercise of jurisdiction by the WTO. Should the respondent manage to prove the existence of such a legal impediment, then the WTO panel will have to decline to hear the matter on its merits, thereby, solving the conflict of jurisdiction.[353]

The downside of the alternative approach is that, the requirements necessary for a party to prove the existence of a waiver of the right to the DSU are onerous. First, in the WTO, the respondent will have to prove that the complainant waived its right clearly and unambiguously. Second, the waiver should refer to a specific right/ obligation under the DSU. Third, the waiver must be in terms of a particular type of dispute. Lastly, if the waiver is in the form of a mutually agreed solution, it must be consistent with covered agreements.[354] The researcher believes that Art 3 (4) does not meet the threshold to constitute a clear and unambiguous wavier to bring a matter to the DSU.[355] There are a number of ambiguity issues with Art 3 (4), mentioned in the previous chapter.[356] Art 3 (4)'s failure to meet this requirement makes it difficult to state that AfCFTA Members will succeed with this alternative approach.[357]

[351] Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.
[352] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[353] See Chapter 3, Section 3.
[354] ABR *Peru – Agricultural Products* para 5.25.
[355] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[356] See Chapter 3, Section 3.
[357] See Chapter 3, Section 3.3.2 - 3.3.3.

2. Lessons Learnt

2.1. There Is No Guarantee That Fork-in-the-road Provisions Can Solve Conflicts of Jurisdiction.

As discussed earlier, many RTAs have resorted to incorporating fork-in-the-road provisions to respond to potential conflicts of jurisdiction. Fork-in-the-road clauses, on their own, are insufficient because they do not bind WTO panels.[358] At best, fork-in-the-road provisions serve as a deterrent for parties hoping to initiate parallel/subsequent litigation, on the same matter.[359] For states that bring a matter to the DSU first, and then subsequently to the AfCFTA dispute settlement mechanism, the latter can easily cite Art 3 (4), as its legal basis to decline to hear such a matter.[360] However, for states that bring a matter before the AfCFTA dispute settlement mechanism first, and then again to the DSU, there is no guarantee that the WTO will recognise an RTA fork-in-the-road clause. If the WTO were to go ahead and ignore Art 3 (4), it would provide the innocent party with a retaliatory claim, before the AfCFTA disputes settlement mechanism, the value of the order given before DSU.[361] The threat of losing whatever benefit gained before the DSU will surely discourage some states from engaging in such parallel/ subsequent litigation, on the same matter. However, if the DSU ignored Art 3 (4) and a conflict of rulings ensued between the AfCFTA and the DSU, the primary dispute between the parties remains unresolved.[362] To resolve the conflict of jurisdiction, the DSU must be open to recognising Art 3 (4) as part of its applicable law.[363]

2.2. Fork-in-the-road Provisions Must be Drafted Carefully

Parties hoping to resolve jurisdictional conflicts using fork-in-the-road type provisions must be very meticulous when drafting such provisions. As stated earlier, there is no

[358] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.
[359] See Chapter 2, Section 3.
[360] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[361] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[362] Furculita 2019 *Clear Papers, TMC Asser Institute for International & European Law* 12.
[363] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.

guarantee that the WTO will give effect to such provisions, if such provisions are raised as independent defences to the conflict of jurisdiction. In Chapter 3, the study introduced an alternative, indirect means of applying fork-in-the-road provisions, through the WTO's good faith provisions (Art 3 (7) and Art 3 10).[364] For this alternative approach to work, drafters must draft fork-in-the-road provisions in such a way that they comply with the requirements for a valid waiver of rights to the DSU, paying close attention to the requirements set by the Appellate Body in *Peru - Agricultural Products*.[365] Fork-in-the-road provisions should be drafted in a manner that communicates in plain language and sufficient detail, the intention of parties to waive their rights to have a specific category of disputes heard in the DSU.

2.3. Coordination and Cooperation Amongst International Regimes are Essential to Mitigate the Adverse Implications of the Fragmentation of International law

As revealed in Chapter 2, the conflict of jurisdiction is a consequence of international law fragmentation. The uncoordinated proliferation of international agreements brings about fragmentation.[366] There is a need to encourage greater coordination between international agreements that exist presently and future agreements. Since there is no central legislative authority to ensure the harmonization of international agreements, the onus is on the states themselves to conduct due diligence checks, before electing to sign and ratify new agreements. Where states conduct due diligence, and potential conflicts are found to exist, states need to bring knowledge of such conflicts to other states' attention, who are also about to sign/ ratify such agreements. This will allow parties the opportunity to harmonise past and future agreements. If states manage to conduct thorough due diligence at this stage, it mitigates the potential for future conflicts of jurisdiction to arise.

Where conflicts of jurisdiction already exist, there is a need for international tribunals to become more flexible, by adopting a Liberal approach towards the application of

[364] See Chapter 3, Section 3.
[365] Para 5.25.
[366] See Chapter 2, Section 2.

international law. International tribunals should adopt a unitary approach towards the adjudication of disputes considering all the relevant and applicable norms that exist within the matrix of general international law. This unitary approach towards applicable law is in line with the doctrine of judicial comity, which encourages cooperation between international tribunals in a flexible manner.[367]

3. Recommendations

3.1. The General Council and the Ministerial Conference Should Exercise Their Powers to Prescribe a Uniform Interpretation of Applicable Law.

The Study revealed that WTO panels must adopt a Liberal approach towards applicable law, for a fork-in-the-road clause to be applied in the DSU.[368] Unfortunately, the extent to which non-WTO norms apply to WTO disputes is still moot. Perhaps the easiest way to know whether a fork-in-the-road provision can apply in the WTO is for the WTO to resolve ambiguity surrounding matters concerning applicable law scope. One way in which the WTO can resolve this issue of ambiguity is by having the General Council or the Ministerial Conference of the World Trade Organisation adopt a standard interpretation of "applicable law," which shall apply to all disputes amongst Members. The General Council and the Ministerial Conference are empowered by Art IX (2) of the WTO Agreement to adopt such standard interpretations.[369]

Art IX (2) of the WTO agreement says;

[367] According to Kuoppamaki *Overlapping Jurisdictions* 58, the doctrine of Judicial Comity is a norm of general international law, which allows a tribunal to decline jurisdiction, where a dispute can be heard more appropriately in another forum. Comity can also apply where a dispute is pending or has already been heard before another tribunal. The Doctrine of Judicial Comity has not been universally embraced by the Dispute Settlement Understanding. However, in the researchers view, it may form a basis for the application of an RTA fork-in-the-road provisions, as it fosters cooperation and coordination amongst different tribunals.

[368] See Chapter 3, Section 2.3.

[369] Art IX (2) of the Agreement Establishing the World Trade Organisation.

> "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three - fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article 10."[370]

Art IX (2) of the WTO agreement confers upon the Ministerial Conference and the General Council, the exclusive authority to adopt multilateral interpretations of the WTO agreements. Under Art IX (2), the General Council and the Ministerial Conference shall exercise their authority to adopt an interpretation of a Multilateral Trade Agreement contained in Annex1 of the WTO, based on a recommendation by the Council for that particular agreement.[371] For agreements contained under Annex 1, the Council's recommendation is an essential element of Art IX (2), which constitutes the legal basis upon which the Ministerial Conference of General Council can adopt authoritative interpretations of the WTO agreement.[372] Authoritative interpretations must be adopted by a three - fourths majority vote. Further, Art IX (2) of the WTO Agreement shall not be used in a manner that undermines the WTO amendment provisions. The Appellate Body in *EC - Bananas iii* added that, Authoritative interpretations should be used to clarify existing WTO provisions and not to make new law.[373]

The power of the General Council and the Ministerial Conference to adopt authoritative interpretations of WTO agreements is also confirmed further in Art 3 (9) of the DSU which says;

> "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered

[370] Art IX (2) of the Agreement Establishing the World Trade Organisation.
[371] Art IX (2) of the Agreement Establishing the World Trade Organisation.
[372] Anonymous "WTO Analytical Index, WTO Agreement - Article IX (2) Jurisprudence"https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf (accessed 18 October 2020).
[373] ABR, *EC - Bananas III* para 393.

agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."[374]

A grammatical interpretation of Art 3 (9) means that no provisions in the DSU should be read as limiting parties' rights to seek authoritative interpretations of WTO agreements from the WTO's decision-making authorities.[375] Art 3 (9) of the DSU should be read together with art IX (2) of the WTO agreement.[376] If both provisions are read together, it is clear that a Member's right to seek an authoritative interpretation of covered agreements is the same right which is being referred to in Art IX (2) of the WTO Agreement.[377] Appellate Body decisions such as *US - Wool Shirts and Blouses* and *US - FSC* also confirm the General Council and the Ministerial Conference's authority to adopt authoritative interpretations of WTO agreement.[378]

Considering the interpretational difficulties in establishing the scope of applicable law, it may be necessary for the General Council and Ministerial Conference to provide an authoritative interpretation of what the scope of applicable law is, in the DSU. Members of the AfCFTA can exercise their rights to request for an authoritative interpretation of what the scope of applicable law is, before the DSU. This authoritative interpretation can be guided by any one of the theories concerning the scope of applicable law (Conservative, Moderate, Liberal approaches). In the researcher's view, for fork-in-the-road clauses to apply directly in the DSU, either the General Council or the Ministerial Conference must adopt an authoritative interpretation of applicable law favouring the Liberal approach.

[374] Art 3 (9) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.
[375] Art 3 (9) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes.
[376] Art 3 (9) of the Understanding on the Rules and Procedures Governing the Settlement of Disputes. See also, Art IX (2) of the Agreement Establishing World Trade Organisation.
[377] Art IX (2) of the Agreement Establishing World Trade Organisation.
[378] ABR, *United States - Wool Shirts and Blouses from India* WT/DS33/5/AB/R (May 23, 1997) 19-20. See also, ABR *US - FSC* fn 127.

3.2. The Understanding of the Rules and Procedures Governing the Settlement of Disputes Should be Amended to incorporate an Applicable law clause.

Alternatively, the DSU can be amended to include an applicable law clause, which states for sure the extent to which non-WTO norms apply in the DSU.[379] Many international tribunals have incorporated applicable law clauses in their treaties, to make it easier for panels to apply the correct sources of international law. Examples of international tribunals which have incorporated applicable law clauses include the International Court of Justice (the ICJ). Art 38 of the ICJ Statutes which says;

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply (a) international conventions (b) international custom (c) the general principles of law recognized by civilized nations (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[380]

Art 38 of the ICJ statute merely confirms the external sources of international law applicable within the court's adjudication. Art 38 of the ICJ does not specify the extent to which the external norms of general international law should apply when there is a conflict with a law in the United Nations Charter.[381] However, the United Nations Charter norms enjoy general hierarchical supremacy over other norms of general international law, so there is no need to state as such in the applicable law clause.[382]

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[379] Art 10 of the Agreement Establishing the World Trade Organisation regulates procedures which need to be conducted in order for the amendment of World Trade Organisation agreement. Any Member of the WTO may initiate a proposal to amend the provisions of WTO agreements. The Councils listed in Art 4 of the Agreement establishing the World Trade Organisation can also propose to amend covered agreements. Proposals to amend WTO agreements are taken to the Ministerial Conference, who submit the proposed amendments to other Members, who vote on these proposed amendments. Amendments are adopted on a consensus basis.

[380] Art 38 of the International Court of Justice Statute.

[381] Art 38 of the International Court of Justice Statute.

[382] Pauwelyn *Conflict* 99.

The UNCLOS also contains an applicable law clause in Art 286 of the UNCLOS.[383] Art 293 of the UNCLOS Says;

> "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."[384]

Art 293 of the UNCLOS confirms that the external rules of international law are applicable in its adjudication. Art 293 of the UNCLOS goes even further to express how such rules of international law should apply, to the extent that they do not conflict with the rules of its convention. It is submitted that the DSU can also gain from incorporating an applicable law clause, similar to Art 293 of the UNCLOS. Such a provision would determine the fate of fork-in-the-road clauses in WTO adjudication. In the researcher's view, fork-in-the-road clauses can only be applied if the WTO opts for an applicable law clause that speaks to the Liberal approach, which allows for non-WTO norms to apply as long as they are relevant and applicable. Such an applicable law clause can be worded as follows;

> "The DSU shall apply the provisions of covered agreements and other rules of a) international conventions (b) international custom (c) the general principles of law recognized by civilized nations and (d) the judicial decisions and the teachings of the most highly qualified publicists of the various nations, to the extent that such norms are relevant and applicable."

Should the WTO incorporate an applicable law clause similar to the one suggested above, it would allow fork-in-the-road provisions to apply directly through the conflict rules of international law. The applicable law clause mentioned above is in line with the Liberal approach. Since the Liberals do not view Art 3 (2) and Art 19 (2) of the DSU as limiting the legislative rights of Members to amend or modify WTO agreements, there is no impediment to adding such an applicable law clause to the DSU.[385] The WTO is not forced to choose an applicable law clause in line with the Liberal approach,

[383] Art 293 of the United Nations Convention on the Law of the Sea.
[384] Art 293 of the United Nations Convention on the Law of the Sea.
[385] Pauwelyn 2003 *Journal of World Trade* 1003.

depending on how the provision is drafted, the WTO can opt for an applicable law clause which reflects the Conservative or Moderate approaches. Whatever approach the WTO chooses, the DSU needs to incorporate an applicable law clause, to resolve the ambiguities surrounding the extent to which non-WTO law can apply in its panels.

3.3. The AfCFTA Agreement Must be Amended, to Make Art 3 (4) Compliant with the Requirements Set for a Valid Waiver of the Right to the Dispute Settlement Understanding

The ambiguity around issues surrounding the scope of applicable law in the DSU presents a significant challenge toward the direct application of fork-in-the-road provisions to WTO disputes. Until such matters of applicable law in the DSU are resolved, AfCFTA Members should look to the indirect approach to applying fork-in-the-road clauses, through WTO's procedural good faith provisions. Here, a defendant is arguing that Art 3 (4) constitutes an agreement to waive the right of Members to bring certain claims to the DSU.[386] The breach of such a waiver is then used to prove the existence of a legal impediment, through Art 3 (7) and Art 3 (10) of the DSU.[387] Unfortunately, this research has concluded that the Art 3 (4) does not comply with some of the requirements set out in *Peru - Agricultural Products,* to be considered a valid waiver to the right to the DSU.[388] Art 3 (4) does not comply with the requirement for waivers to be clear and unambiguous.[389] First, Art 3 (4) is not clear as to whether it relinquishes both the complainant and the respondent's rights from initiating parallel/ subsequent proceedings, on the same matter, in the WTO.[390] Second, Art 3 (4) does not specify what is meant by the phrase "same matter." To resolve these issues of ambiguity, it is necessary to amend Art 3 (4).[391] Drawing from the MERCOSUR fork-

[386] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[387] Art 3 (7) and Art 3 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[388] See Chapter 3, Section 3.
[389] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[390] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.
[391] Art 29 of the Agreement Establishing the AfCFTA. All Members have the right to submit proposals for amendments to the Depository. The Depository must then circulate the proposals for amendment to state parties and the Secretariat. State parties are given an opportunity to comment on the proposed amendments. The Secretariat goes on to circulate the proposal and the comments to the AfCFTA

in-the-road clause, Art 3 (4) can be amended to state that “neither party” may bring the same matter to the DSU, once the dispute has been initiated before the AfCFTA.[392] In addition, Drafters can include a sub provision, which explains what is meant by the phrase “same matter” in Art 3 (4).[393] This sub provision must explain that the phrase “same matter” should be interpreted broadly, taking into account the substance of the provisions involved. This way, a single measure which creates a National Treat violation under the WTO, and a National Treatment violation under the AfCFTA agreement can be viewed as being the “same matter” for the purpose of Art 3 (4).[394]

Taking into consideration all of the amendments suggested above to bring Art 3 (4) in line with the requirements set in *Peru - Agricultural Products*, Art 3(4) can be amended to read as follows;

Art 3 (4) (a);

> “In respect of disputes that can be heard under this Protocol that may also be subject to the DSU or any other preferential trading schemes, a complainant is free to choose where such a dispute can be heard.”

Art 3 (4) (b);

> “Once the dispute has been initiated in the chosen forum, in accordance with the preceding paragraph, neither party may initiate a dispute concerning the same matter in the dispute settlement mechanisms of the fora mentioned in Art 3 (4) (a).”

Art 3 (4) (c);

committees and subcommittees. The sub-committees will go on to present, through the Secretariat, recommendations to the Council of Ministers for consideration. Thereafter, a recommendation is made to the Executive Council. The Assembly will then decide whether to adopt the amendments.

[392] Art 1.2 of the Protocol of Olivos for Dispute Settlement in MERCOSUR.

[393] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.

[394] Art 3 (4) of the AfCFTA Rules and Procedures on the Settlement of Disputes.

> "Disputes of the same matter alluded to in Art 3 (4) (a) and referred to in Art 3 (4) (b) should be interpreted broadly to encompass the similarity in the substance of the actual provisions in question."

Art 3 (4) (d).

> "For the purpose of Art 3 (4) (b), dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a party's request for the establishment of a panel under Article 6 of the DSU."

4. Concluding Remarks

Conflicts of jurisdiction between the WTO and the AfCFTA are an inherent probability because of international law fragmentation. Although the AfCFTA agreement has incorporated a fork-in-the-road provision as its solution to the conflict of jurisdiction, there is no guarantee that such a provision will receive any recognition before DSU. The problem concerning the recognition of RTA fork-in-the-road clauses relates to the broader issue of applicable law before the DSU, which is yet to be resolved. Therefore, it is essential for the WTO to clarify issues concerning the scope of applicable law, before the DSU, to know whether fork-in-the-road provisions will effectively resolve the conflict of jurisdiction. Fortunately, RTAs do not have to wait for the WTO to conduct such reforms. RTAs such as the AfCFTA may still be able to apply fork-in-the-road provisions in the WTO, albeit indirectly, if such provisions are drafted carefully following the principles laid out in *Peru - Agricultural Products*.[395] All the solutions referred to in this thesis will require a great deal of compromise and coordination on the part of the WTO and the AfCFTA regimes to solve jurisdictional conflicts.

[395] ABR *Peru – Agricultural Products Items* para 5.25.

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