

The primacy of the WTO dispute settlement system

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1. Introduction

The world trading system has seen a proliferation of Regional Trade Agreements (RTAs) since the early 1990s. Many of the RTAs negotiated in the recent times are equipped with a sophisticated dispute settlement mechanism (DSMs) clause. There is a belief that these RTA-DSMs have the potential of interfering with the integrity of the WTO-DSM. This short note comments on this belief. For this purpose, my comments will proceed to examine: 1) the nature of the jurisdiction of the WTO-DSM; 2) the issue of ‘choice of appropriate forum’ for resolving a trade dispute given the potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM;¹ 3) the legal value of the RTA-DSMs decisions in the WTO-DSM; 4) principles of private international law which could be used to deal with potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM ; and 5) the provisions within the WTO which could be used to coordinate RTA’s and WTO’s DSMs. This note suggests that there is no thumb rule to

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¹ This issue has been explored in my earlier scholarship entitled K Kwak, G Marceau, ‘Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements’, in L Bartels, F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 465. But it needs to be revisited in light of the current WTO jurisprudence, particularly *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, Report of the Appellate Body (31 August 2015) WT/DS/457/AB/R.

answer the complex question of allocation of jurisdiction, and that each overlap or conflict of jurisdiction between RTA-DSMs and WTO-DSMs merits consideration on a case-by-case basis. However, the integrity of the WTO should never be undermined in any given scenario.

2. *The nature of the jurisdiction of the WTO-DSM*

The nature of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is quite unique.² Article 23 of the DSU prescribes that the WTO-DSM has exclusive jurisdiction to resolve disputes arising from the violations of the WTO covered agreements (covered agreements). In addition, Article 3.8 provides that the jurisdiction of the WTO-DSM is compulsory and quasi-automatic, i.e. when bringing a claim to the WTO-DSM, the challenging Member in a dispute is not required to prove any specific economic or legal interest in that dispute, or evidence of any negative trade impacts caused by the challenged measure. Furthermore, the responding Member cannot refuse to participate in the dispute process. The issue of ‘choice of appropriate forum’ surfaces in case of overlaps or conflicts of jurisdiction. For instance, jurisdictional overlap can happen when a dispute between two parties can be brought to two distinct fora or two different DSMs.³ When trade disputes arise between RTA parties, who are also WTO Members, such overlaps of jurisdiction could occur if an obligation included in an RTA is the same as or similar to that of a covered agreement.⁴

² G Marceau, ‘Consultations and the Panel Process in the WTO Dispute Settlement System’, in R Yerxa, B Wilson (eds.), *Key Issues in WTO Dispute Settlement: the First Ten Years* (CUP 2005) 30. Also, see in general, W Davey, ‘Dispute Settlement in the WTO and RTAs: A Comment’, in *Regional Trade Agreements and the WTO Legal System* (n 1) 343.

³ Kwak, Marceau (n 1) 467. We shall see that in private international law principles of *lispendence* and *res judicata* have stricter requirements for those specific overlaps.

⁴ This is only one such scenarios of overlap of jurisdictions between the RTAs-DSM and the WTO-DSM. Note that there is an overlap even if the ‘applicable law’ between WTO and RTA are strictly speaking not the same: for example, WTO law on remedies is different from most RTA law on remedies.

3. The ‘choice of appropriate forum’ for trade disputes in case of overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM

In that context, it should be recalled that Article XXIV of the General Agreement on Trade and Tariff 1994 (GATT) and Article V of the General Agreement on Trade in Services (GATS) authorize Members to form RTAs. The WTO jurisprudence confirms that Members have a ‘right’ to form RTAs,⁵ but this right is conditional upon fulfilling the specific conditions set forth in GATT Article XXIV.⁶ Therefore, there is no doubt that a Member would be justified in invoking the RTA’s DSM in order to enforce norms pursuant to an RTA, even if the concerned RTA violation could also constitute a WTO violation. As noted earlier, many RTAs have substantive provisions that are parallel to provisions of the covered agreements and, generally, these RTAs provide for their own dispute settlement mechanism, thereby making it possible for a Member to resort to parallel DSMs for the same set of rights and obligations. A large number of RTAs have built-in mechanisms such as ‘choice of forum’ clauses, ‘exclusive forum’ clauses or ‘fork in the road’ provisions to deal with such overlaps of jurisdiction.⁷ These clauses or provisions may nonetheless lead to an apparent and temporary jurisdictional conflict since, in principle, as further discussed below, the WTO-DSM cannot be restrained from exercising its jurisdiction given the quasi-automatic ac-

⁵ *Peru – Agricultural Products* (n 1) fn 276; WTO, *Turkey – Restrictions on Imports of Textile and Clothing Product (Turkey – Textiles)*, Report of the Appellate Body (19 November 1999) WT/DS34/AB/R, para 58. Presently, Article XXIV and WTO jurisprudence clearly establish that it is for the parties to the RTA to prove that the concerned free-trade area or customs union is compatible with Article XXIV of GATT (and/or Article IV of GATS).

⁶ See Kwak, Marceau (n 1) 466: ‘In case of an RTA, Article XXIV may justify a measure, which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this RTA “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both of these conditions must be met to have the benefit of the defence under Article XXIV of GATT’.

⁷ See in general C Chase, A Yanovich, J-A Crawford, P Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Staff Working Paper ERSD-2013-07 (2013).

cess and compulsory nature of the WTO's DSM, even if the governments concerned are using or have used the parallel RTA-DSM.

In light of such conflicts and overlaps of jurisdiction, the question that arises is whether the WTO adjudicative bodies should refrain from exercising their powers to resolve such disputes in case such disputes (or part thereof) are initiated concomitantly at two distinct fora. To answer this question, it may be appropriate to recall that in the *Mexico – Soft Drinks* dispute, the Appellate Body (AB) had ruled that the DSU obliged WTO panels (panels) to exercise their jurisdiction unless a legal impediment precluded them from ruling on the merits of a claim.⁸ In this context, the AB noted that for 'a panel to decline to exercise validly established jurisdiction would seem to "diminish" the rights of a complaining Member to "seek the redress of a violation of obligations" ...'.⁹ Once murky, the issue seems to have been clarified with the AB Report on *Peru – Agricultural Products* where the AB noted that '...the relinquishment of rights granted by the DSU cannot be lightly assumed', and that

'the language in the Understandings must clearly reveal that the parties intended to relinquish their rights... Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III* (Article 21.5 – Ecuador II / Article 21.5 – US), any such relinquishment must be made clearly...'.¹⁰

In that dispute, the AB concluded 'we do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case in relation to, or within the context of, the DSU'.¹¹ Thus, the WTO adjudicative bodies cannot refrain from exercising jurisdiction unless this right to access the WTO-DSM's jurisdiction has been clearly relinquished by the parties to a dispute. The AB went further to note that 'the references in paragraph 4 of Article XXIV to facilitating trade and closer integration are not

⁸ WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, Report of the Appellate Body (24 March 2006) WT/DS308/AB/R, paras 48-54.

⁹ Ibid para 53.

¹⁰ *Peru – Agricultural Products* (n 1) para 5.25.

¹¹ Ibid para 5.28.

consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the covered agreements'.¹² This statement reinforces the principle that the right of Members to initiate a WTO dispute is a fundamental one, which could be modified or restrained in the context of the DSU and therefore in the WTO forum.

The choice of an appropriate forum is ultimately that of the challenging Member. For instance, in the *Peru – Agricultural Products* dispute, the AB noted that

‘Members enjoy discretion in deciding whether to bring a case, and are thus expected to be “largely self-regulating” in deciding whether any such action would be “fruitful”. The “largely self-regulating” nature of a Member’s decision to bring a dispute is “borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, *in its own judgement*, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO’.¹³

Therefore, there is no absolute response as to what is the best forum to settle a dispute – the RTA or the WTO? In this regard, certain factors contribute to the decision of challenging Members, which include assessing the impact of the dispute. For instance, if a dispute is largely local with negligible ramifications for the global trade then the RTAs may serve as the most suitable choice. However, if the dispute involves systemic issues with multilateral implications, the challenging Member may consider the WTO-DSM to be the most appropriate forum for handling such a dispute, as was done by Mexico when accessing the WTO for resolving the *US-Tuna II (Mexico)* dispute. If a dispute is adjudicated at the WTO, other WTO-Members that have a substantial interest in the matter may also participate in the proceedings as third parties but such participation is not possible at an RTA-DSM. Indeed, the existence of such a bilateral RTA dispute may encourage a parallel dispute by a Member, who is not party to that RTA but is concerned with that dispute. Thus, in order to avoid multiplicity of disputes, the chal-

¹² Ibid para 5.116.

¹³ Ibid para 5.18.

lenging Member may prefer the WTO when dealing with a dispute that has multilateral implications. Another deciding factor for the challenging Member could be the subject of the dispute. For example, if the subject of the dispute is only covered by an RTA and does not find a parallel coverage in the covered agreements, the RTA-DSM would serve as the obvious choice for the challenging Members. Other relevant factors may also range from costs of bringing a dispute to the efficacy of the forum.¹⁴

If there is an allegation of a WTO violation, it would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure that is inconsistent with the WTO.¹⁵ In this regard, in order to avoid duplication of disputes, RTA parties can either make the RTA-DSM provisions more appealing, for example by providing interim-relief, and/or by penalizing RTA parties, through liquidated damages in the RTAs, which would subsequently bring the dispute to the WTO.

4. The legal value of the RTA-DSMs decisions in the WTO-DSM

What is clear is that the choice of an appropriate dispute forum cannot undermine the integrity of the WTO-DSM. At the same time, the importance that the WTO-DSM attaches to RTA decisions or the lack thereof, may affect the legitimacy and integrity of the WTO-DSM. The WTO adjudicating bodies must refrain from ruling on provisions, which are exclusive to an RTA, in case such provisions are raised as substantive claims by the disputing parties. However, if a trade dispute has already been addressed at an RTA-DSM, Article 13 of the DSU allows any WTO panel to request from the parties, or from any source, any relevant information, and panels can take such proceedings and decisions into consideration. If the decision of an RTA-DSM is submitted as evidence by one of the parties to a WTO dispute, then in such cases, panels can ascribe evidentiary value to the decision rendered by an RTA-DSM. It is to be noted that the assessment of the relevance of the decision of an RTA-DSM would be made like any other evidence received by panels, which can enjoy a considerable margin of discretion in

¹⁴ See in general C Chase et al (n 7).

¹⁵ Kwak, Marceau (n 1) 469

performing this task¹⁶. Even if the decision of an RTA-DSM is intertwined with questions of law, the WTO adjudicating body can read such decision as a ‘fact’ – as it can read an article of doctrine – and the WTO panel can simply be ‘inspired’ for the assessment requested to do so under WTO law. In the *Brazil – Retreaded Tyres* dispute, the AB had to decide whether the exemption from Brazil’s import restriction benefitting tyre imports from MERCOSUR countries, in view of a decision by a MERCOSUR arbitral tribunal, could be justified under Article XX of the GATT. The AB held that Brazil’s MERCOSUR exemption, introduced as a result of the MERCOSUR tribunal’s ruling, had no relationship with the objective of the ban on tyres, and the exemption even went against that objective¹⁷.

5. *Principles of private international law which could be used to deal with potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM*

It has been ascertained that in some scenarios, overlaps of jurisdiction between RTAs and the WTO are unavoidable. For such scenarios, it may be worthwhile to examine the principles and rules of private international law on overlaps and repetitions of disputes. Such principles may provide guidance for dealing with unavoidable overlaps but legally speaking, for the reasons discussed below, none of these principles can be used to tackle formally a WTO/RTA jurisdictional overlap. In this regard, I will be limiting my comments to four principles or doctrines, namely: *Forum Conveniens*, *Forum non Conveniens*, *Lis Alibi Pendens*, and *Res Judicata*.

¹⁶ WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (EC – Hormones), Report of the Appellate Body (13 February 1998) WT/DS26/AB/R WT/DS48/AB/R, para 132; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, Report of the Appellate Body (5 April 2001) WT/DS135/AB/R, para 161; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea – Dairy)*, Report of the Appellate Body (12 January 2000) WT/DS98/AB/R, para 137; and *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, Report of the Appellate Body (17 December 2007) WT/DS332/AB/R, para 202.

¹⁷ Ibid para 228.

The doctrine of *forum conveniens* is defined as

'a court taking jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate. It is said to be a positive doctrine, unlike *forum non conveniens* which is a negative doctrine defined as a general discretionary power for a court to decline jurisdiction'.¹⁸

The objective of the first two principles is to identify the most convenient forum. Domestic courts in certain jurisdictions rely on the doctrine of *forum conveniens* as one of the discretionary criteria for assessing their jurisdiction over a particular dispute. However, the doctrine of *forum non conveniens*, or of *forum conveniens*, in the absence of an agreement among states, seems to be inapplicable to overlaps of jurisdictions in the current state of international jurisdictional law notably because Article 23 of the DSU explicitly provides that the WTO-DSM shall be the most appropriate forum for any dispute arising from a claim made subsequent to any of the covered agreements and as discussed earlier. As noted, formally, the WTO-DSM shall have the exclusive jurisdiction to deal with WTO-related claims until Members introduce amendments to Article 23. The principle of *lis alibi pendens* provides that no other parallel proceedings may be pursued once proceedings involving the same parties and the same cause of action have begun in another forum. The objective of the rule of *lis alibi pendens* is to avoid such proceedings, which may result in irreconcilable judgments.¹⁹ However, it is difficult to use this rule as the disputes which can be dealt at an RTA-DSM and the WTO-DSM usually arise from claims arising from two different treaties and, thus, involve a different cause of action. Finally, another principle worth considering is the *res judicata* doctrine which provides that the final judgment rendered by a court of competent jurisdiction, conclusively adjudging the rights of the disputing parties, shall constitute an absolute bar to a subsequent action involving the same parties, same claim or cause of action. In the case of RTAs and the WTO DSMs, the parties may be the same and the subject matter might be related, but formally the rights of the parties and the applica-

¹⁸ JJ Fawcett, *Deciding Jurisdiction in Private International Law* (OUP 1995) 5–6 and 10.

¹⁹ Ibid 26.

ble law between RTA and WTO are different and foreclose the invocation of *res judicata*.

6. *The provisions within the WTO law which could be used to coordinate RTA's and WTO's DSMs*

An examination of these principles reinforces my conclusion that RTA's need to 'attract' the challenging Member by making its provisions more appealing and by 'discouraging' Members from using the WTO-DSM. There are some good-faith provisions within WTO law which could be used to coordinate RTAs and WTO's DSM. Article 3.7 of the DSU reads, in the relevant part:

'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.'

Article 3.10 of the DSU reads, in the relevant part:

'It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or 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.'

Article 3.10 of the DSU is one of the explicit limitations on the right of Members to bring a dispute to the WTO-DSM based on WTO law claims. In several cases, the responding party has claimed that the challenging Member has not exercised its right to access the WTO-DSM in good faith.²⁰ However, such claims have never been successful. In the

²⁰ See for example *Peru – Agricultural Products* (n 1); *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (*Korea – Certain Paper*), Panel Report (28 November 2005) WT/DS312/R; *China – Measures Affecting Imports of Automobile Parts* (*China – Auto Parts*), Panel Reports (12 January 2009) WT/DS339/R, Add.1 and Add.2, WT/DS340/R, Add.1 and Add.2, and WT/DS342/R, Add.1 and Add.2, upheld (WT/DS339/R) and as modified (WT/DS340/R WT/DS342/R) by the Reports of the

Korea – Certain Paper dispute, the Panel found that ‘we have to assume that WTO Members engage in dispute settlement in good faith, as required under Article 3.10 of the DSU’.²¹ In the *Peru – Agricultural Products* dispute, both the Panel and the AB concluded that Guatemala had not acted against its WTO good faith obligations in challenging Peru’s use of variable levies, arguably permitted under the FTA but prohibited under WTO law.²² At the time of writing, the WTO adjudicating bodies have not found an instance wherein the challenging Member has not acted in good faith by accessing the WTO-DSM as provided for in Article 23 of the DSU. It seems nearly impossible to rebut the assumption that WTO Members engage in dispute settlements in good faith. The threshold for proving that the challenging Member has not acted in good faith is extremely high. In the *EC-Export Subsidies on Sugar* case, the AB stated that

‘...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. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation...’.²³

7. Conclusion

An increase in RTAs with built-in DSMs has given Members an opportunity to access different fora for resolving their disputes, but the choice of selecting one forum over another remains that of the challenging Member. Reasons for the Members’ choice of forum range from the conflicts or overlaps of jurisdiction between the WTO and an RTA, the

Appellate Body (12 January 2009) WT/DS339/AB/R WT/DS340/AB/R
WT/DS342/AB/R.

²¹ *Korea – Certain Paper*, Panel Report (n 20) para 6.97.

²² *Peru – Agricultural Product* (n 1) para 5.28.

²³ WTO, *European Communities – Export Subsidies on Sugar (EC – Export Subsidies on Sugar)*, Report of the Appellate Body (19 May 2005) WT/DS265/AB/R WT/DS266/AB/R WT/DS283/AB/R, para 312.

cost-benefit analysis which is carried out in terms of economic as well as political costs, to the efficacy of a specific DSM. Ultimately, it is the legitimacy of a mechanism that drives the choice-making process of a challenging Member. The ever-increasing number of disputes at the WTO, in which almost 25% of the cases could have been handled in the RTA-DSM, show that the Members continue to place more reliance on WTO's DSM rather than resorting to RTA-DSMs. The proliferation of RTAs has not yet interfered with the integrity of the WTO-DSM and is unlikely to impact it even in the future. It seems difficult to conceive whether and how an RTA can possibly foreclose the use of the WTO-DSM for the violation of WTO provisions, unless WTO Members decide to do so in the context of the DSU.

