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AFFIRMATION AND INCORPORATION OF WTO AGREEMENTS IN PREFERENTIAL TRADE AGREEMENTS: CONGRUENCE OR CONFLICT?

JAMES J. NEDUMPARA*AND ADITYA LADDHA**

The proliferation of preferential trade agreements (PTAs) has already fragmented the World Trade Organisation (WTO) law. Of late, there has been a plethora of scholarly discussions on issues such as conflict of jurisdiction between PTAs and WTO dispute settlement. Scholars have been wary of the consequences of this proliferation, often highlighting the issues caused by the preferential rules such as the increasing uncertainty in law, incoherent jurisprudence and splintering of the multilateral trading system. Several countries have apparently been attempting to avoid the conflict by cross-referencing to the WTO treaty provisions. Incorporation or affirmation of rights and obligations have been the commonly used drafting techniques to avoid this conflict. This article poses the question whether these drafting techniques which are ostensibly carried out to achieve congruence of PTA regimes with the WTO legal regime are, in themselves, spawning more conflict. The incorporation or affirmation provisions can have unintended consequences and can lead to complications unless carefully thought through. The article examines the key differences between incorporation and affirmation and their treatment under public international law. It also undertakes an assessment of these issues under customary international law, especially the rules on treaty interpretation. While examining these issues, the article also highlights the provisions of contemporary treaties which might serve as suitable templates for States desiring to refer to their WTO commitments in PTAs.

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I. INTRODUCTION

International law is not a random assemblage of rules and principles. International legal norms interact with, and should be interpreted, against the background of other international legal norms. There are meaningful relationships between these norms.[1] It is a common practice in international law treaties to refer to the provisions of other international agreements. Perhaps, one clear example of such cross-referencing is Part II of the WTO Agreement on Trade-Related Intellectual Property Rights ("TRIPS") Agreement which has explicitly incorporated Article 1 through 12 of the Paris Convention[2] on Trademarks (1967) and the Berne Convention on Copyrights and related matters[3].

Incorporation or affirmation of already existing rights and obligations has

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[1] *See* Report of Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the diversification and expansion of International law*, Int'l Law Comm'n, U.N. Doc. A/CN.4/L.682 (2006) (by Martti Koskenniemi) [hereinafter Martti Koskenniemi's Report on Fragmentation of International Law].

[2] *See* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

[3] *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

been fairly common in respect of trade agreements. The parties to certain preferential trade agreements (referred to as "PTAs", Free Trade Agreements ("FTAs") or Regional Trade Agreements ("RTAs") interchangeably in this article) are increasingly seen to explicitly affirm or repeat their existing rights and obligations under the WTO Agreements, or specifically refer to the WTO provisions in their preferential trade agreements. For instance, Article 301 of the North American Free Trade Agreement ("NAFTA") expressly refers to Article III of the General Agreement on Tariffs and Trade ("GATT"). Almost all of the PTAs contain some references to substantive WTO obligations.[4] These include, for instance, statements that the PTA is established "consistent with Article XXIV of the GATT" or "Article V of the GATS".[5] It is also fairly commonplace to find statements such as "the PTA shall not diminish or reduce rights and obligations under the covered agreements", or statements confirming the existing rights and obligations of the parties under the WTO Agreement[6] or under specific covered agreements.[7] In certain cases, parties also opt for wholesale incorporation of specific obligations, such as the rules on national treatment set out in Article

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[4] Victoria Donaldson & Simon Lester, *Dispute Settlement* in INTRODUCTION IN BILATERAL AND REGIONAL TRADE AGREEMENTS, COMMENTARY AND ANALYSIS 367, 374 (Simon Lester & Bryan Mercurio eds., 2009) [hereinafter Donaldson and Lester].

[5] Thailand–Australia Free Trade Agreement, Aus.–Thai., art. 101, July 5, 2004 http://dfat.gov.au/trade/agreements/in-force/tafta/fta-text-and-implementation/Pages/fta-text-and-implementation.aspx; and Central America–Dominican Republic–United States Free Trade Agreement; C.A.F.T.A., Dom. Rep.-U.S., art. 1.1, Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta [hereinafter CAFTA–DR–US FTA].

[6] EFTA–Chile Free Trade Agreement, E.F.T.A.-Chile, art. 4 June 26, 2003, http://www.efta.int/media/documents/legal-texts/free-trade-relations/chile/EFTA-Chile%20Free%20Trade%20Agreement.pdf (hereinafter EFTA–Chile FTA) ("The Parties confirm their rights and obligations under the Marrakesh Agreement establishing the World Trade Organization and the other agreements negotiated thereunder . . . to which they are party, and under any international agreement to which they are a party"); Korea–Chile Free Trade Agreement, S. Kor.–Chile FTA, art. 1.3.1, Feb. 15, 2003, http://www.customs.go.kr/kcshome/cmm/fms/FileDown.do;jsessionid=Gtfyh9YGlRbwmVt8MbVJJFwT0yJs2bM32Jf2ypK4TQ3DThZz1Lz3!182291628?atchFileId=FILE_000000000071295&fileSn=1 ("The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other international agreements to which both Parties are party.").

[7] EFTA–Chile FTA, *supra* note 6, art. 43 ("With respect to matters related to this Chapter [III on Trade in Services] the Parties confirm the rights and obligations existing under any bilateral or multilateral agreements to which they are a party.").

III of the GATT 1994 and its interpretative notes,[8] or Article XX of the GATT.[9] The incorporation of WTO rights and obligations relating to the use of safeguards, anti-dumping and countervailing measures is common in many of the PTAs. For instance, the Turkey–Morocco FTA[10] makes extensive reference to the covered agreements as the basis of its obligations with respect to matters such as SPS measures (Article 13.2), anti-dumping and countervailing duty measures (Article 18), safeguards (Article 19.1), balance of payments measures (Article 26), and technical barriers to trade (Article 34.3).

In recent times, several WTO Members have generally taken the position of affirming rights and obligations under a specific WTO covered agreement in a PTA, *mutatis mutandis* (please see our analysis in section I). The incorporation of specific provisions of WTO agreements may have implications not only for the rights and obligations under the concerned PTAs, but also for their WTO commitments. Adherence to the basic disciplines of the WTO Agreement could be a strategic outcome for the PTA parties, because it represents a minimum common denominator which is already in force and need not be separately negotiated. In effect, this is a short-hand way of assuming narrow obligations or even no obligations under the RTA beyond what is already agreed under the WTO. However, the WTO Agreements and PTAs are distinct treaties. They may have similar roles, namely liberalising or harmonising trade; but they are different. Importantly, neither can the WTO provisions be enforced under the dispute settlement provisions of the PTA, nor can the PTA provisions be enforced in the WTO. The shortcut to either affirming or incorporating the PTA provisions can create certain potential conflicts of law and, more seriously, conflict of forums, i.e. dispute settlement under the WTO and the relevant PTA.

The article seeks to explore the legal implications of these negotiating options, viz., incorporation as well as affirmation, in the light of WTO and public international law. It is also pertinent to highlight the provisions of some of the contemporary treaties such as the Comprehensive and

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[8] CAFTA–DR–US FTA, *supra* note 5, art. 3.2.1.

[9] CAFTA–DR–US FTA, *supra* note 5, art. 21.1.

[10] Free Trade Agreement between Turkey and Morocco, Morocco-Tur., April 7, 2004, http://www.wipo.int/edocs/lexdocs/treaties/en/ma-tr/trt_ma_tr.pdf.

Progressive Agreement for Transpacific Partnership ("CPTPP").[11] Article 8.4 of the CPTPP is a very good template for incorporating WTO commitments. Article 8.4 of the CPTPP incorporates certain provisions of the TBT Agreement but to avoid any conflict, it prevents the dispute settlement mechanism of CPTPP to adjudicate upon alleged violations of incorporated provisions of the TBT Agreement. Such incorporations are also seen in relation to chapters dealing with anti-dumping and countervailing measures (Article 6.8).

What are the key differences between incorporation and affirmation? How does public international law treat these two concepts? Section I provides various illustrations of this drafting approach and analyses the public international law jurisprudence on this point. It also provides an examination of the concept of affirmation of rights and obligations under the WTO law. Specifically, this discussion focuses on the incorporation of WTO law in non-WTO agreements. Section II analyses the legal effects arising from the use of such expressions in PTAs. It further discusses the overall challenges these drafting approaches pose to the integrity of the multilateral trading system.

II. AFFIRMATION AND INCORPORATION OF WTO AGREEMENTS IN PTAS

A. Affirmation of Rights and Obligations Under the WTO Covered Agreements

The term 'affirm' in ordinary parlance means to ratify, confirm, reassert or establish.[12] In the context of international trade agreements, it could be said that affirmation of another treaty or agreement implies the reassertion of the rights and obligations of parties under the referenced agreement.[13] The affirmation of rights and obligations under the WTO Agreement could be regarded as a strong indication that the parties embrace their rights and

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[11] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore & Vietnam, Jan. 26, 2016, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng.

[12] *See* BRYAN A. GARNER, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] Raymundo Valdés & Maegan McCann, *Intellectual Property Provisions in Regional Trade Agreements: Revision and Update*, World Trade Organization, Economic Research and Statistics Division: Working Paper Series, Staff Working Paper ERSD-2014-14 ¶ 45 (September 23, 2014) https://www.wto.org/english/res_e/reser_e/ersd201414_e.pdf (hereinafter Valdes & Maegan).

obligations under the WTO Agreement.[14] In other words, it recognises the brooding presence of WTO while admitting co-existence with other treaties. It may be seen as an acceptance of the terms of the WTO Agreement, including substantive obligations, and a recognition that the WTO Agreement serves as a kind of benchmark for the concerned substantive chapter (or the relevant parts or provisions) in the PTA.[15]Affirmation of rights and obligations in the WTO Agreement provides room for the entry of WTO law and practice in PTA dispute settlement as well. It also indicates the intention of parties to observe coherence between the PTA and the WTO Agreement.[16]

It has been noted that parties to PTAs are increasingly referring to the WTO Agreement through affirming their rights and obligations under the WTO Agreement.[17] For example, Article 2.8 of the India – Singapore Comprehensive Economic Cooperation Agreement ("CECA") provides as follows:

> *"ARTICLE 2.8: SUBSIDIES*
> *The Parties reaffirm their commitment to abide by the provisions of the WTO Agreement on Subsidies and Countervailing Measures."*

This is a mere illustration of affirmation. It only reiterates that the WTO disciplines on Subsidies will inform and guide the interpretation of the corresponding provisions of the CECA. Under this approach, although there is treaty overlap, there is a clear focus on consolidation of law.

1. Incorporation of the Agreements, mutatis mutandis

As opposed to affirmation of rights and obligations, certain PTAs also incorporate parts or provisions of WTO Agreement, *mutatis*

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[14] *Id.*
[15] Valdes & Maegan, *supra* note 13.
[16] *Id.*, ¶ 6.
[17] Among 171 RTAs/FTAs with TBT provisions, it was noted that in 34% of the cases, the parties affirmed their rights and obligations under the TBT Agreement. *See* Ana Cristina Molina & Vira Khoroshavina, *TBT Provisions in Regional Trade Agreements*: *To what extent do they go beyond the WTO TBT Agreement?*, World Trade Organization, Economic Research and Statistics Division, Staff Working Paper ERSD-2015-09 (December 1, 2015), https://www.econstor.eu/bitstream/10419/125799/1/845006401.pdf.

mutandis.[18] According to some authors, this has become a recognizable trend.[19] For example, Article 6 of the FTA between New Zealand and the People's Republic of China ("New Zealand – China FTA") incorporates Article III of GATT 1994.[20] Article 6 of the New Zealand – China FTA states the following:

> "*Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994. To this end, the provisions of Article III of GATT 1994 and its interpretative notes are incorporated into and shall form part of this Agreement, mutatis mutandis.*"

Incorporation of a key concept, for example, national treatment, in the above scenario could be interpreted as incorporating the entire discipline of national treatment under the WTO agreement.[21] The term *mutatis mutandis* has been interpreted by the WTO Appellate Body in *US– Carbon Steel*.[22] The WTO Appellate Body interpreted the use of *mutatis mutandis* in Article 22.7 of the Subsidies and Countervailing Measures Agreement so as to imply a "mirror effect" between the expressions incorporated.[23]

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[18] Agreement between the European Union and Japan for an Economic Partnership, E.U.-Japan, art. 7.3, Jul. 17, 2018, http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156423.pdf. Free Trade Agreement between the European Union and Republic of Korea, E.U.-Korea, art. 4.1, Jul. 1, 2009, http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22011A0514%2801%29&rid=1, art. 4.1. Incorporation is also seen in New Zealand' recent FTA with Korea. The China- Singapore FTA (2008), for example, incorporates, mutatis mutandis, the ASEAN- China investment agreement (2009). Again, Article 2(3) of the Japan -Peru FTA (2011) incorporates the Japan-Peru BIT (2008).

[19] Juan David Barbosa Mariño, *Untangling the Mutatis Mutandis Expression in Free Trade Agreements. Using the WTO to Understand FTAs,* 322-323 (2016) http://www.icdt.co/publicaciones/revistas/Revista75/Articulo%2011/PUB_ICDT_ART_BARBOSAM.JuanD._Desentra§arlaexpresionmutatismutandisenlosAcuerdosdeLibreComercio_RevistaICDT75_Bogota_16.pdf (hereinafter Juan Barbosa).

[20] Agreement between New Zealand and People's Republic of China, N.Z.-China, art. 6, Oct. 1, 2008, https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf.

[21] Joost Pauwelyn & Wolfgang Alschner, *Forget about the WTO: The Network of Relations between PTAs and 'Double PTAs'*, 31 (Feb. 5, 2014), http://dx.doi.org/10.2139/ssrn.2391124.

[22] Appellate Body Report, *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶112, WTO Doc. WT/DS213/AB/R (adopted on Dec. 19, 2002).

[23] Juan Barbosa, *supra* note 19, 326 (2016).

> "Article 22.7 applies the provisions of Article 22 'mutatis mutandis to the initiation and completion of reviews pursuant to Article 21'. To us, in the same way that Article 22.1 imposes notification and public notice requirements on investigating authorities that have decided, in accordance with the standards set out in Article 11, to initiate an investigation, Article 22.1 (by virtue of Article 22.7) also operates to impose notification and public notice requirements on investigating authorities that have decided, in accordance with Article 21, to initiate a review. Similarly, in the same way that Article 22.1 does not itself establish evidentiary standards applicable to the initiation of an investigation, it does not itself establish evidentiary standards applicable to the initiation of sunset reviews. Such standards, if they exist, must be found elsewhere".[24] (Emphasis added).

In *United States – Carbon Steel*, the term '*mutatis mutandis*' has been interpreted by the WTO Appellate Body as application of the provisions of the referred clause or agreement, but with necessary changes.[25] This interpretation supports the view that certain coherence or commonality is ensured in relation to the notification and public notice requirements for both countervailing duty initiations and reviews under the Agreement on Subsidies and Countervailing Measures.

It could also be said that *mutatis mutandis* is just one of the drafting tools treaty-makers prefer when they have to incorporate a WTO provision in a PTA. Treaty makers could also achieve the same purpose by either referring to one of the WTO provisions without the use of *mutatis mutandis* or by replicating the wording of a WTO provision or by explicitly including a language evocative of WTO jurisprudence.[26] Whatever the case may be, all these templates indicate that States desire these bilateral or preferential trade agreements to relate to existing multilateral trade agreements in particular, and to international law more generally.

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[24]Appellate Body Report, *United States- Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan,* ¶¶ 106-109, WTO Doc. WT/DS244/AB/R (adopted on Dec. 15, 2003).

[25]*Id.*

[26]Locknie Hsu, *Applicability of WTO in Regional Trade Agreements: Identifying the Links* in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, 540 (Lorand Bartels & Federico Ortino, eds. 2006).

It has been observed that the incorporation of a WTO provision *mutatis mutandis* envisages the inclusion of the text of such provision that is considered to be applicable at the moment of the entry into force of the respective PTA/RTA.[27] Thus, future amendments to the WTO provision will not be as such accepted by the PTA/RTA parties.[28] In order to address this situation, for example, Article 23.3.2 of the *Australia – United States Free Trade Agreement* states "[i]f any provision of the WTO Agreement that the Parties have incorporated into this Agreement is amended, the Parties will consult on whether to amend this Agreement".[29] On this point, Article 6.23 of India – Singapore Comprehensive Economic Cooperation Agreement also serves as a good example. Article 6.23 provides as follows:

> *"ARTICLE 6.23: PROHIBITION OF PERFORMANCE REQUIREMENT*
> *The Parties reaffirm their commitments to WTO Agreement on Trade-Related Investment Measures ("TRIMs") and hereby incorporate the provisions of TRIMs,* ***as may be amended from time to time****, as part of this Agreement (emphasis added)."*

At the same time, there are examples where within the same treaty, other WTO provisions are incorporated without using *mutatis mutandis*.[30] It has been, however, noted that in most of the PTAs, the incorporation *mutatis mutandis* of certain provisions reflects the interests of one or both parties to have coherence and consistency between obligations under multilateral agreements and the concerned PTA.[31]

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[27] Juan Barbosa, *supra* note 19*,* 326.
[28] *Id.*
[29]Australia – United States Free Trade Agreement, Aus.-U.S., art. 23.3.2, May 18., 2004, http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-twenty-three-final-provisions.aspx (hereinafter AUSFTA).
[30]CAFTA–DR–US FTA, *supra* note 5, art. 3.10 ("Each Party shall ensure, in accordance with Article VIII:1 of the GATT 1994 and its interpretive notes, that all fees and charges of whatever character (other than customs duties, charges equivalent to an internal tax or other internal charge applied consistently with Article III:2 of the GATT 1994, and antidumping and countervailing duties) imposed on or in connection with importation or exportation are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes").
[31] Juan Barbosa, *supra* note 19*,* 326.

While incorporation may not envisage normative conflicts, it has significant potential for functional conflict. A specific incorporation of WTO provisions in an PTA or RTA could imply that the multilateral rules can be invoked in bilateral relations as part of the PTA/RTA rights and obligations. Consequently, they can be applied by virtue of their incorporation in the PTA/RTA legal network.[32] However, the same parties can invoke the same provisions before the WTO as well - leaving the possibility that the same set of rules can be interpreted or adjudicated in multiple ways and in multiple fora. The following discussion examines this aspect in greater detail.

B. Inconsistencies or Conflicts Between PTA/RTA and WTO Agreements

The proliferation of PTAs raises questions as to how any potential conflicts between the PTA provisions and WTO Agreements would be resolved under the rules and principles of international law. A conflict arises where the provisions of the earlier and the later treaty, while concerning with the same subject-matter, are incompatible with each other in that they cannot be applied simultaneously.[33] This situation can explicitly arise when certain provisions which are inconsistent with the WTO provisions (as interpreted by a WTO panel or Appellate Body) have been specifically incorporated in the PTA. In most such cases the conflict might be unintended and could be the result of careless drafting. The potential for conflict is especially high if the PTA only partly adopts the WTO rules and provides for additional or more comprehensive terms in itself.

In international law, there is a presumption of the absence of legal hierarchy between treaties.[34] Articles 31 and 32 of the Vienna Convention of the Law of Treaties (VCLT) along with the principles of international treaty interpretation such as *lex specialis* (principle that the law governing the specific subject matter overrides the general) and *lex posterior* (principle that the most recently enacted agreement will govern) could be used to interpret any

[32]Yovana Reyes Tagle and Roberto Claros, *The law of regional trade agreements in the WTO dispute settlement system: lessons from the Peru-Agricultural Products case*, 24, Working Paper No 04/2016, WORLD TRADE INSTITUTE (May, 2016).

[33] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 401-402 (2009).

[34] Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AMERICAN J. OF INT. L. 535, 550 (hereinafter Pauwelyn); Martti Koskenniemi's Report on Fragmentation of International Law, *supra* note 1, ¶37 ("In international law, there is a strong presumption against normative conflict.").

potential conflicts.[35] These principles are founded on the notion of the contractual freedom of states to specify and modify the rights and obligations *inter se*. It would be relevant to note whether there is any explicit wording in the concerned PTA that shows the drafter's intention to deviate from the earlier agreement, in this case the WTO Agreement.[36]

Article 30 of the VCLT is also relevant in the case of any inconsistency or conflict between successive treaties, i.e., an earlier and a later treaty both of which are in force. According to Article 30(2), if a treaty specifies that it is subject to, or that its provisions are not to be considered incompatible with, the provisions of an earlier or later treaty, the provisions of that other treaty shall prevail.[37] For example, Article 103 of NAFTA sets out its 'relation to other agreements' as follows:

> *"1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party.*
> *2. In the event of any inconsistency between this Agreement and such other agreements,* ***this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."*** (emphasis added)

Article 30(2) covers situations where a treaty does not contain a conflict or savings clause.[38] Where a conflict clause is lacking, Article 30 establishes a set of rules differentiating between situations in which successive treaties are concluded between the same parties (Article 30(3)) and situations in which this is not the case (Article 30(4)).[39] If State Parties are identical, then the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[40] If State Parties are not identical, then the treaty to which both States are parties governs their mutual rights and obligations.[41]

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[35] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter VCLT).
[36] Pauwelyn, *supra* note 34, at 550.
[37] VCLT *supra* note 35, art. 30.
[38] OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES -A COMMENTARY 512 (2011) (hereinafter *Dörr & Schmalenbach*).
[39] *Id.* 506.
[40] VCLT, *supra* note 35, art. 30 (3).
[41] *Id.*, art. 30(4)

The WTO dispute settlement body recently addressed a conflict between the provisions of the Agreement on Agriculture under the WTO and the Peru-Guatemala Free Trade Agreement ("Peru-Guatemala FTA") in *Peru – Additional Duty*.[42] In this case, the Peru-Guatemala FTA allowed Peru to maintain a WTO-inconsistent price range system ("PRS"). Notably, paragraph 1 of Article 1.3 of the Peru-Guatemala FTA stated that the parties confirm their existing rights and obligations under the WTO Agreement while paragraph 2 stated that in the event of any inconsistency between the Peru-Guatemala FTA and the WTO covered agreement, the provisions of the Peru-Guatemala FTA shall prevail to the extent of the inconsistency.

Before the Appellate Body, Peru contended that Guatemala had waived its rights to bring a WTO complaint against Peru's PRS after Guatemala accepted the PRS in the FTA. Peru bolstered this defence by citing Articles 20 and 45 of the International Law Commission's Articles on Responsibility of States ("ILC Articles"). Peru maintained that the FTA was a "subsequent agreement between the parties" to the dispute, and that ILC Articles 20 and 45 were "relevant rules of international law" for the interpretation of the covered agreements.

The Appellate Body noted that Peru had implicitly argued that the FTA had "modified" its obligations toward Guatemala and held that it was ambiguous in this case whether Guatemala had consented to modify WTO rules with Peru, and thus waive its WTO rights, especially since Article 1.3 of the FTA confirms the FTA parties' rights under the WTO.[43] The Appellate Body saw "no reason to address further Peru's arguments that ILC Articles 20 and 45 provide additional support for its [waiver] argument".[44]

The Appellate Body however observed that Peru could not modify its WTO commitments even if the RTA provisions allowed Peru to maintain a WTO-inconsistent PRS. The WTO contains its own provisions for the amendment of WTO rules (Article X of the WTO Agreement) and for their interpretation by the membership (Article IX), as well as rules for the formation of an RTA

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[42] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products* (*Peru – Agricultural Products*), WTO Doc. WT/DS/457/AB/R (adopted on Aug. 31, 2015) (hereinafter Peru-Additional Duty).
[43] *Id.* ¶¶5.26-28, 5.97 & 5.110-5.111.
[44] Peru-Additional Duty, *supra* note 42, ¶5.28.

that might be invoked as a defence to a WTO complaint (under Article XXIV of GATT 1994). According to the Appellate Body, the WTO agreement's specific provisions on amendments, waivers and exceptions for RTAs would prevail over general provisions of Article 41 of the VCLT. [45] This approach preserves, on the whole, the integrity of the WTO DSM and accords certain primacy to the WTO legal system. This approach taken by the Appellate Body, however, has been criticised by some authors as failing to recognize the WTO Members' contractual freedom to update and modify the rules that apply between them through FTAs.[46]

Normative conflicts can occur in multiple ways in trade disputes. In *Indonesia – Autos*, a WTO panel has maintained that conflict would only arise if two norms were "mutually exclusive."[47] While the Appellate Body in *Guatemala – Cements (1)* has upheld a similar strict definition[48], in *EC – Bananas III* the Panel also included in its definition of possible conflicts of laws "the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits."[49] In other cases, it may be an express conflict between a explicit obligation against a permissive right, as it happened in the Peru – Guatemala dispute.

An explicit incorporation of the WTO covered agreements means that the substantive provisions of the referred covered agreement will apply between the parties to the RTA. In other words, the provisions of the referred covered agreement are part of the RTA and would be interpreted as the underlying treaty text of the RTA. Per force, the RTA parties can assume additional obligations which are not spelt out in the WTO Covered Agreements.

III. CONFLICT OF NORMS AND DISPUTE SETTLEMENT: AFFIRMATION VERSUS INCORPORATION

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[45] *Id.* ¶5.112.

[46] Shaffer, Gregory & Winters, L. Alan, *FTA law in WTO dispute settlement: Peru–additional duty and the fragmentation of trade law*, 16 WORLD TRADE REV. (2) 303, 320.

[47] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.99, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted on July 2, 1998).

[48] Appellate Body Report, *Guatemala – Anti-dumping Investigations Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/AB/R (adopted on Nov. 2, 1998) (hereinafter Guatemala-Antidumping Appellate Body Report).

[49] Panel Report, *European Communities – Regime for the Importation Sale and Distribution of Bananas III,* ¶ 337, WT/DS27/R/ECU (adopted on May 22, 1997).

A. Jurisdiction of the WTO DSM

Article 3.8 of the Dispute Settlement Understanding ("DSU") provides that the jurisdiction of the WTO Dispute Settlement Mechanism is compulsory and quasi-automatic.[50] Furthermore, the responding Member cannot refuse to participate in the dispute process. The issue of 'choice of appropriate forum' surfaces in the case of an overlap or conflict of jurisdiction. For instance, jurisdictional overlap may occur when a dispute between two parties can be brought before two distinct fora or two different DSMs.[51] When trade disputes arise between FTA/RTA parties which 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.

In this regard, it is important to refer to Article 23 of the WTO DSU. Article 23 of the DSU was intended to reinforce the obligation to use the WTO's multilateral dispute settlement system and prevent Members from taking unilateral action in relation to alleged violations of WTO obligations.[52] It does include a provision that confers an almost exclusive jurisdiction to the WTO dispute settlement mechanism over all disputes arising from the WTO covered agreements.[53] Article 23.1 of the DSU states that "when Members seek the redress of a violation of obligations or other nullification of 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 of procedures of this Understanding".

Furthermore, Article 23.2 prohibits WTO members to "make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding". Article 23.2 of the DSU prohibits Members to

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[50] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.8, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (hereinafter Dispute Settlement Understanding).

[51] *See* K. Kwak & G. Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements* in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, 465, 486-523 (Lorand Bartels & Federico Ortino, eds., 2006).

[52] Simon Lester and Bryan Mercurio, INTRODUCTION IN BILATERAL AND REGIONAL TRADE AGREEMENTS, COMMENTARY AND ANALYSIS, 375 (Lester and Mercurio eds., 2009).

[53] *See* Appellate Body Report, *US – Continued Suspension*, ¶¶371-372, WTO Doc. WT/DS320/AB/R (adopted on Oct. 16, 2008).

unilaterally determine whether a treaty has been breached. Therefore, if Members "seek the redress of a violation" of a WTO-covered agreement, the WTO DSM is compulsory.[54] Although, it has been observed that Article 23 of the DSU does not explicitly preclude referring to disputes about the "interpretation" of the WTO-covered agreements to an external court or tribunal, there is no precedent in this regard.[55]

According to Article 1.1 of the DSU, Panels and the Appellate Body only have jurisdiction to examine "the provisions of the agreements listed in Appendix 1 to this understanding" and the Agreement Establishing the World Trade Organisation ("WTO Agreement").[56] The DSU panels are *a priori* precluded from deriving jurisdiction from laws outside of the WTO agreements.[57] However, a distinction is to be drawn between the concept of jurisdiction and the law applicable to a dispute.[58] The fact that the jurisdiction of the WTO Panels is strictly limited to disputes arising from the WTO agreements does not mean that the applicable law before a WTO Panel has to be always the WTO law.[59] On the other hand the principle of systematic integration requires that while interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties"[60] have to be taken into account. The Appellate Body has explicitly stated that the WTO provisions are "not to be read in clinical isolation from public international law". This view reconfirms the importance of Article 31.3(c) of the VCLT.[61]

It is clear that Article XXIV of the GATT and Article V of the GATS authorize Members to form RTAs. WTO jurisprudence on this issue further

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[54] Tim Graewert, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1(2) CONTEMP. ASIA ARB. J. 287, 295 (hereinafter Tim Graewert).

[55] Yuval Shany, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 184 (2004).

[56] Dispute Settlement Understanding, *supra* note 50, art. 1.1.

[57] *See* Joel P. Trachtmann, *Recent Books on International Law*, 98(4) AM. J. INT'L L. 855, 857 (2004).

[58] *See* Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35(3) J. WORLD TRADE 499, 503 (2001).

[59] Tim Graewert, *supra* note 54, 295.

[60] VCLT, *supra* note 35, art. 31(3)(c).

[61] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/AB/R (adopted on Apr. 29, 1996); *See* Gabrielle Marceau, *A Call for Coherence in International Law – Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement*, 33(5) J. WORLD TRADE 87 (1999).

reiterates that Members have a 'right' to form RTAs, which is only conditional on the fulfilment of specific conditions present in Article XXIV of GATT or Article V of the GATS. [62]

There is no doubt that a Member would be justified in invoking the RTA's DSM in order to enforce norms undertaken pursuant to a 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.

If a WTO member State invokes the DSM of the RTA/FTA and alleges *inter alia* breach of a provision which has incorporated provisions of the WTO Agreement or affirmed commitments under the WTO Agreement, then the DSM of the RTA/FTA would have to effectively interpret the WTO Agreement to that limited extent. The DSM of the RTA/FTA though, in fact, is interpreting the RTA/FTA provisions only as the provisions of WTO Agreement are made part of the RTA/FTA through affirmation or incorporation clause. [63] However, it would not able to make a determination on whether there has been a breach of the WTO Agreement since its jurisdiction is limited to the RTA/FTA. This, leads to an absurd situation where for all practical purposes, the DSM of the RTA/FTA has determined if there has been a violation of the WTO Agreement but would be restricted

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[62] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Product* (*Turkey – Textiles)*, ¶58, WTO Doc. WT/DS34/AB/R (adopted on Nov. 19, 1999) ("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").

[63] Tim Graewert, *supra* note 54, 294-295 ("The NAFTA, for example, has incorporated several WTO provisions and NAFTA panels are frequently interpreting them while adjudicating on disputes between NAFTA members on NAFTA norms. However, in this context the NAFTA panels do not determine whether WTO obligations between the NAFT A members have been violated; since those provisions are incorporated into the NAFTA, they solely decide upon obligations under the NAFTA.").

to conclude that only the affirmation/incorporation clause of the RTA/FTA has been violated. As mentioned earlier, incorporation of WTO provisions is bound to lead to conflicts. For instance, a WTO panel and the RTA/FTA panel could provide conflicting interpretation of the same substantive provisions. There are means to avoid this conflict, but the parties should be aware of this possibility. The next section examines this issue.

1. Resolving the Conflict between RTA/FTA and WTO Dispute Resolution Mechanisms

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.[64] These provisions nevertheless are unable to prevent a conflict in jurisdiction which arises as a result of the compulsory nature of WTO's DSM.

In this regard, it is appropriate to take a look at Chapter 8 of the CPTPP - Agreement on Technical Barriers to Trade. CPTPP has incorporated certain select provisions from the WTO TBT Agreement. The relevant provision of the CPTPP reads as follows:

> *"Article 8.4: Incorporation of Certain Provisions of the TBT Agreement*
> *1. The following provisions of the TBT Agreement are incorporated into and shall be made part of this Agreement, mutatis mutandis:*
> *(a) Articles 2.1, 2.2, 2.4, 2.5, 2.9, 2.10, 2.11, 2.12;*
> *(b) Articles 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 5.9; and*
> *(c) paragraphs D, E, and F of Annex 3*
> *2. No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for a dispute that exclusively alleges a violation of the provisions of the TBT Agreement incorporated under paragraph 1."*

Article 8.4.2 of the CPTPP expressly excludes the opportunity of a Party to approach different forums for the enforcement of same treaty obligations. In other words, in such cases the jurisdiction is reserved only for the WTO. This is a good model for preserving the obligations under the WTO and for

[64] *See* 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) (hereinafter Chase et. al.).

avoiding overlapping jurisdiction of tribunals. The recently signed EU-Japan Economic Partnership Agreement (EU-Japan EPA)[65] also serves as a good example. Chapter 7 of the EU-Japan EPA deals with Technical Barriers to Trade. Article 7.3 of Chapter 7 of the EU-Japan EPA provides as follows:

> "*ARTICLE 7.3*
> *Incorporation of certain provisions of the TBT Agreement*
>
> *1. The Parties affirm their rights and obligations under the TBT Agreement.*
>
> *2. Articles 2 to 9 of the TBT Agreement and Annexes 1 and 3 to the TBT Agreement are incorporated into and made part of this Agreement, mutatis mutandis.*
>
> *3. Where a dispute arises regarding a particular measure of a Party which the other Party alleges to be exclusively in breach of the provisions of the TBT Agreement referred to in paragraph 2, that other Party shall, notwithstanding paragraph 1 of Article 21.27, select the dispute settlement mechanism under the WTO Agreement.*"

To combat the issue of parallel dispute proceedings, Article 21.4 of the Australia – United States Free Trade Agreement (AUSFTA) provides an option of "choice of forum" clause.[66] Article 21.4 reads as follows:

> "*1. Where a dispute regarding, any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.*
> *2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.*"

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[65] EU-Japan Economic Partnership Agreement, E.U.-Japan (signed on Jul. 17, 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1891.

[66] AUSFTA, *supra* note 29, art. 21.4; Unlike AUSFTA, the E.U.-Japan EPA provides choice of forum for dispute regarding the EU-Japan EPA and *"a substantially equivalent obligation under any other international agreement to which both Parties are party, including the WTO Agreement"*. Article 21.27.2 bars the complaining party to approach *"another forum with respect to that particular measure unless the forum selected first fails to make findings on the issues in dispute for jurisdictional or procedural reasons."*

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 or its systemic implications. For instance, if a dispute is largely regional 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.[67]

This approach was adopted by Mexico when accessing the WTO in *US – Tuna II (Mexico)*.[68] The NAFTA DSM had also jurisdiction in this matter under Article 2005.4[69] of the NAFTA. The NAFTA has non-discrimination provisions in Article 301, in addition to having specific provisions on Technical Regulations in Part III. More than the issue of jurisdiction, it was a matter of admissibility of whether the NAFTA panel should hear this matter. Admissibility relates to a preliminary objection where even if a Tribunal has the jurisdiction to try a case, it should not proceed to hear the case on merits for other reasons. Such pleas have been addressed in investment disputes[70], although a similar plea is rather unheard of in the context of a WTO dispute. In short, it made eminent reason for a WTO panel to hear the Tuna dispute. If a dispute is adjudicated at the WTO, other WTO-

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[67] Nguyen Tan Son, *Towards a Compatible Interaction between Dispute Settlement under the WTO and Regional Trade Agreements,* 5 MACQUARIE J. OF INT'L L., 115 (2008).

[68] Carlson, G, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico (US–Tuna II (Mexico) (Article 21.5 – Mexico), DS381)*, 15 (3) WORLD TRADE REV. 523, 525 (2016).

[69] Article 2005.4 of the NAFTA reads as follows:

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.

[70] *See* Société Generale de Surveillance S.A. v. Republic of Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, Jan. 29, 2004, ¶¶. 113-124.

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. 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 challenging 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 of forum for the challenging Members. Other relevant factors may also range from costs of bringing a dispute, to the efficacy of the forum.[71]

IV. CONCLUSION

Affirmation and incorporation of WTO Agreements into FTAs or other preferential trade agreements indicate the intent of parties to harmonise such agreements with the principles set out in the WTO Agreement. While Members have opted for both affirmation and incorporation of the WTO covered agreements in their FTAs, there is a greater tendency to opt for affirmation among the recent agreements. However, this article would like to sum up the following aspects. In the case of affirmation, there could be a potential conflict of norms (i.e. FTA versus WTO) as the norms need not be mirror images. The conflict will not be a direct conflict, but rather an indirect and often unintended one. A case arising from an FTA with affirmation clauses could also go to multiple tribunals (FTA tribunal or the WTO panel) and could therefore result in parallel proceedings. In that case, the PTA provisions control the interpretation of the treaty and, therefore, any conflict will have to be resolved in favour of the PTA regime. Alternatively, if the same matter comes to a WTO panel, the provisions of the WTO treaty shall govern the relationship between the parties, given the almost compulsory nature of WTO DSM. The PTA regime cannot be assumed to modify the WTO legal obligations. Some of these problems were highlighted in the *Peru – Guatemala* case on PRS. The major concern, however, is the conflicts of rights and obligations flowing from different treaties. As argued in this article,

[71] *See* Chase et al., *supra* note 64.

different regimes will be governed by their own controlling laws. To this extent, affirmation is a technique for a soft consolidation of normative frameworks, but it is not a tool to avoid conflicts *per se*. In the case of incorporation, the conflict of norms appears to be less of a problem. There is no normative conflict, as the applicable laws are the WTO laws; however, the issue of overlapping jurisdiction is a clear possibility. This is a case of functional conflict as the same set of provisions can be interpreted in multiple ways by multiple tribunals (i.e, FTA tribunals vis-à-vis WTO panels) leading to incoherence. It would be important to limit the jurisdiction to the parties relying on the same set of obligations to a single or pre-defined remedy, a template of which can be adopted from Article 8.4 of the TBT provisions in the CPTPP Agreement. Several FTAs have put in place various conflict avoidance tools such as 'choice of forum' clauses, 'exclusive forum' clauses or 'fork in the road' provisions to address the issue of overlapping jurisdiction. In conclusion, incorporation and affirmation, while seeking to achieve congruence can spawn dissonance and conflict if not carefully used.