The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes

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The Role of Private International Law Analogies

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1. INTRODUCTION

What is the relationship between the World Trade Organization (WTO) dispute settlement mechanism and the dispute settlement mechanism under a regional trade agreement (RTA)?\footnote{For the sake of consistency and clarity, we use the term “regional trade agreements” in this chapter to refer to both free trade agreements (FTAs) and customs unions (CUs) under GATT Article XXIV, as well as economic integration agreements under GATS (General Agreement on Trade in Services) Article V. The word “regional” carries no geographical connotations, and agreements between parties that are geographically remote from each other (such as the United States and Singapore) are also included.} Even before the WTO was established, the North American Free Trade Agreement (NAFTA) had included a provision dealing explicitly with the relationship between its dispute settlement system and the one under the General Agreement on Tariffs and Trade (GATT), and any successor agreements. The problem is therefore not new, but only in recent years has it become more pronounced.

In the first years of the establishment of the dispute settlement mechanism (DSM), it was touted as an example of how an international dispute settlement system should be. It has compulsory jurisdiction; all WTO members had to accept the DSM as part of a single undertaking when they joined the organization. Moreover, with the newly introduced “negative consensus” rule, any WTO member can bring suit against another WTO member without risk of blockage, either at the point of panel establishment or subsequently in the adoption of panel reports. The WTO has an appeal system, in the form of the Appellate Body, whose reports are also saved from blockage by the Dispute Settlement Body (DSB), the supervisory political body comprising all the

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WTO members, because of the negative consensus rule. It was not long after the establishment of the DSM that a problem that public international lawyers have been increasingly concerned with – the proliferation and fragmentation of international tribunals – started to have an impact on the DSM and its operation. This is a problem derived from the lack of rules ordering the relationship between different tribunals and the norms that they produce, and it is especially acute where such norms also exist in a relationship of conflict.

In this regard, questions have arisen about the proper allocation of jurisdictional authority between the WTO’s DSM and other dispute settlement bodies, such as the International Tribunal for the Law of the Sea. At the same time, there has been much discussion in recent years about how one might define the substantive normative scope of trade law. These questions have led to intense political controversy: Should other “values and policy objectives . . . ‘trump the value of freer trade’” How do we overcome the fact that the “values shared by the current WTO members are not the same as in 1947”? How should one approach the political question that every


4 See “Chile – Measures Affecting the Transit and Importing of Swordfish,” WT/DS1341; G/L/37 (April 26, 2000); “Case between Chile and the European Community Concerning the Conservation of Swordfish Stocks in the South-eastern Pacific Ocean (Chile/European Community),” International Tribunal for the Law of the Sea, Order (December 11, 2008); discussed in C. L. Lim, “Free Trade Agreements in Asia and Some Common Legal Problems,” in Yasuhei Taniguchi, Alan Yanovich, and Jan Bohanes (eds.), The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia (Cambridge: Cambridge University Press, 2007), 434, 453.


linkage “potentially raises strategic problems” because “a participant [i.e., state or WTO member] might perceive that the linkage will lead to a less favorable arrangement”? Finally, different solutions presented by different substantive norms or different tribunals are likely to present particular “dangers and costs,” such as to “tilt too strongly toward the rich or toward the poor countries.”

Apart from the fragmentation and linkage problems, some scholars have noted that there is a correlation between the integration of norms and the integration of authority, thereby connecting issue-area politics with institutional politics. Broude has previously argued that the significance of authority fragmentation and the seriousness of the problems it presents largely depend upon the degree of norm fragmentation, and vice versa. Where substantive norms are integrated or harmonized rather than fragmented, identifying the proper forum for producing them or for making determinations based upon them is of less importance, because the room available to different fora for manoeuvring between different and potentially conflicting decisions is reduced. The normative commonality overcomes institutional differences.

This “interdependent” (i.e., substantive normative and jurisdictional) approach lies in contrast to that of Joel Trachtman, where Trachtman attempts to resolve the normative problem through a jurisdictional perspective instead.

This chapter seeks out a further approach, which looks toward the development of choice-of-law principles. We believe this is different from and potentially superior to placing an undue emphasis on the substantive value differences that define norm fragmentation, an emphasis on a jurisdictional approach, or an emphasis on both. We attempt to seek ways of managing both norm and jurisdictional fragmentation by turning away from questions about both substantive norms and jurisdictional questions. By looking at the development of choice-of-law rules (i.e., second-order norms about the selection of substantive norms), we attempt to circumvent, or at least defuse, the intense political debate that has taken place over substantive values. Our solution

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9 Broude, “Fragmentation(s),” supra note 3 and Broude, “Principles,” supra note 5.

10 Broude, “Fragmentation(s),” op. cit., 105.


12 For example, the connection between trade and environmental, labor, and human rights values in cases in which an RTA might handle these linkages differently from the WTO.
proposes a common set of choice-of-law rules that could be applied by different tribunals. The idea is that such choice-of-law rules—which invite formal, technical analysis—would lead to the application of the same substantive norms in each case in a relatively less politicized manner. This would reduce the risk of different results from different tribunals, which could in turn reduce the political tension inherent in jurisdictional clashes.

We focus here on the specific problem of RTA–WTO jurisdictional conflicts, but similar political problems of issue linkage and norm fragmentation can be found in this area as well. This is because different tribunals could approach the same problem differently even when the same substantive norms are contained in an RTA and a WTO covered agreement, all the more so when different substantive norms and linkages exist in two or more different agreements. Different RTA–WTO interpretations and rulings could also order the hierarchy of values differently, thereby giving different and controversial degrees of protection to free trade against other substantive, politically contested values. Likewise, RTA proliferation contributes to norm fragmentation amidst an increasingly varied and pluralistic WTO membership.

A. WTO–RTA Disputes: The “Allocative Thesis” of Jurisdictional Authority

In a previous article, we addressed a related problem: Can and should panels and the Appellate Body apply RTA law? We argued that the WTO legal framework, at least in its current form, does not envisage the application of non-WTO rules and principles, including RTA rules. Therefore, the Dispute Settlement Understanding (DSU) should be revised to clarify two issues—(a) the jurisdiction of the WTO in the case of jurisdictional conflicts between WTO and RTA dispute settlement, and (b) whether WTO panels and the Appellate Body can apply RTA rules and principles both to the resolution of WTO–RTA jurisdictional conflicts and the substantive dispute between RTA parties.

In this chapter we attempt to take this discussion a step further. If WTO panels and the Appellate Body were to apply RTA rules and principles to resolve jurisdictional conflicts, on what basis would they have the authority to do so? Can it truly be said that because the WTO DSM contemplates the application of some public international law, such as the rules of the Vienna Convention

on the Law of Treaties, it therefore also permits the application of RTA rules because these too are (conventional) public international law? In our previous article, we argued that such a view is simply too artificial. For example, could a WTO panel apply an RTA jurisdictional rule, such as a “fork in the road” or electa una via clause (which says that a dispute resolved or in process before an RTA dispute settlement body can no longer be brought before the WTO)? We would argue that it should, but would this not be the outcome of private international law reasoning, rather than public international law?

In this chapter we discuss an even deeper problem. That problem has to do with the way we think about WTO–RTA conflicts. In particular, it relates to the source of our legal imagination. Much of the problem is brought about by looking at the issue in jurisdictional terms, and the jurisdictional problem is viewed in turn largely in “public international law” terms. Public international law, in the way it addresses the classic problem of competing state and criminal jurisdiction, establishes jurisdictional competence based on a number of principles. These include territorial, nationality, protective, and other principles. However, these principles do not allocate competence exclusively to a particular tribunal. In contrast, private international law has better developed principles that not only furnish the courts with jurisdictional authority in the case of private law disputes with an international element (e.g., involving a foreign party) but also demarcate the authority of the various national courts that potentially have the jurisdiction to deal with the particular dispute. It does this through well-developed notions of judicial comity. The forum non conveniens doctrine is perhaps the prime example, because its salience is felt today both in civil law and common law jurisdictions worldwide.

14 Id., 912–920.
15 This is not to say there are not other, specific rules that do, such as the double jeopardy (ne bis in idem) rule in international criminal law, and under Article 20 of the Rome Statute of the International Criminal Court, or the principle of complementarity under Article 17 of the Rome Statute. See John T. Holmes, “The Principle of Complementarity,” in Roy S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute (Hague: Kluwer, 1999), 41.
Comity does not establish jurisdictional authority. Instead it performs the task of resolving jurisdictional clashes. In contrast, public international law rules and principles – in the form of the *lex specialis*, *lex posterior*, and other rules – are often called upon to allocate jurisdiction. Even here, however, this is not the usual function of these principles in the public international law field. The *lex specialis*, *lex posterior*, and other rules are rules that were originally intended to resolve conflicts between substantive principles of international law (i.e., the problem of fragmented norms, as opposed to fragmented authority). Joost Pauwelyn’s call for public international law to apply these rules to problems involving jurisdictional clashes between WTO and other dispute settlement systems therefore implicitly merges a jurisdictional and a choice-of-law problem.\(^{17}\) To be sure, Pauwelyn does not explicitly address conflicts of jurisdiction between different international tribunals as such in these writings, as opposed to questions concerning the scope of what he calls the WTO’s “substantive jurisdiction” (i.e., under the DSU and covered agreements). However, if true jurisdictional conflicts are not treated as being as important, and deserving of their own unique solutions as questions about the “substantive” jurisdiction of the WTO,\(^{18}\) then there is a danger of a single set of principles being used both to decide what legal rules and principles the WTO panels and the Appellate Body should apply, and to address the problem of jurisdictional conflict between different tribunals.

For example, Pauwelyn’s recent call for “forum exclusion clauses” raises the problem of how such RTA clauses relate to the WTO as, again, a question

\(^{17}\) See Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?,” 95(3) Am. J. Int’l L. (2001) 535, 538 (“no academic author . . . disputes that WTO rules are part of the wider corpus of public international law”), 544 (analyzing conflict rules in non-WTO treaties and the WTO treaty before concluding that “further rules on how to solve normative conflicts must be sought in general [i.e. public] international law”), 554 (“jurisdiction of WTO panels is limited to claims under WTO covered agreements . . . some WTO rules . . . explicitly confirm and incorporate pre-existing non-WTO treaty rules”), 555 (resting the authority of panels to apply “other,” “non-WTO” rules on the notion of “implied jurisdiction”), and most importantly, 556 (“[t]he issue may arise as to whether a WTO panel has jurisdiction to hear WTO claims even though the underlying or predominant element . . . derives from other rules of international law”; emphasis added). See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press 2003), esp. Chapter 8.

\(^{18}\) Joel Trachtman, “Jurisdiction in WTO Dispute Settlement,” in Rufus Yerxa and Bruce Wilson (eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge: Cambridge University Press, 2005), 132, 135 (“[t]he most important jurisdictional question regarding WTO dispute settlement is that of applicable law. The most prominent question here is the extent to which other international law is applicable within WTO dispute settlement”).
of normative conflict. There is, in such solutions, a bias toward viewing jurisdictional conflicts as an extension of normative, treaty conflicts as opposed to the separate problem of how one tribunal should deal with another tribunal in practice. In such a scenario, two tribunals could still produce different outcomes based on conflicting answers given by the *lex posterior* and *lex specialis* rules, precisely because public international law rules that allocate jurisdiction between different tribunals are underdeveloped.

We call this danger of overreliance on public international law principles the “allocative thesis” because it would also decide on the allocation of jurisdiction. This would not be the result of the application of jurisdictional principles as such (general public international law has few such well-developed principles to speak of) but what are essentially certain rule-selection principles (what Pauwelyn calls “conflict rules”) of public international law. Such rule-selection or “conflict” rules have traditionally been used by public international lawyers to resolve conflicts between competing, substantive treaty rules.

We believe the allocative thesis to be imperfect because of the traditional lack of well-developed principles in classical (public) international law that would serve the function of allocating jurisdiction. That is why some commentators have pointed out that WTO panels should instead apply the doctrine of comity, following the recent practice of other international dispute

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21 With the exception of the *non bis in idem* or “double jeopardy” rule, and specific treaty rules; see Ernst-Ulrich Petersmann, “Proliferation and Fragmentation of Dispute Settlement in International Trade: WTO Dispute Settlement Procedures and Alternative Dispute Resolution Mechanisms,” in Julio Lacarte and Jaime Granados (eds.), *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (London: Cameron May, 2004), 417, 474; Yuval Shany, *Competing Jurisdictions*, op. cit., 169 and Chapters 5 and 6, generally.


23 With small exceptions such as the linking point doctrine in Dahm, *Zur Problematik des Voelkerstrafrechts* (1956), cited in *Attorney-General of the Government of Israel v. Eichmann* (1961) 36 I.L.R. 5 (District Court of Jerusalem), paragraph 31. But see also Shany, *Competing Jurisdictions*, op. cit., esp. Chapters 5 and 6. However, Shany’s argument relies on principles that often are as much private international law as they are public international law principles. To that extent, his arguments support the present analysis – which is to draw the link more explicitly with private international law reasoning.
settlement bodies. The argument is well taken here, but there is a major problem. It involves saying that the panels have an inherent authority to apply comity where the explicit provisions of the DSU may preclude doing so. In the Mexico – Soft Drinks case, the Appellate Body has come very close to saying that the DSU precludes the exercise of judicial comity.

Although some people may find the Appellate Body’s ruling too rigid, we take an alternative approach. As we explained earlier, the political and practical significance of the Appellate Body’s ruling would be lessened if both the Appellate Body and an RTA dispute body were to apply the same body of law because of the application of common choice-of-law rules. A correlation between norm and authority fragmentation – such that norm integration results in a reduction of the significance of the fragmentation of authority – means that a solution may be sought either in the integration of norms or in the integration of authority. We believe that a choice-of-law approach works toward norm integration, although it is not the same thing as (and is potentially less politically controversial than) the substantive integration of norms. We also believe that a choice-of-law approach receives some support in what the Appellate Body has said when it has had the occasion to rule on the issue.

In the next section, we turn to two cases which have touched directly on the issue. We believe our approach has some support in the reasoning of the WTO panels and the Appellate Body in these cases.


27 We set aside another line of cases that really have more to do with whether a WTO member can seek unilateral redress notwithstanding Article 23 of the DSU. In EC – Commercial Vessels, the European Communities argued that Article 23 does not preclude unilateral redress but that it is merely an “exclusive jurisdiction” clause. The panel in EC – Commercial Vessels ruled that Article 23 in fact precludes unilateral redress, even if it is also an exclusive jurisdiction clause. Nonetheless, it seems that the panel was only responding to the defense raised by the European Communities in that case and did not consider, before it, a case involving a pending RTA case or RTA tribunal award. Indeed, on the facts of the case, the panel seems to have considered the exclusive jurisdiction rule to be a subset of the nonunilateral redress rule and not the other way round. See “EC – Measures Affecting Trade in Commercial Vessels,” WT/DS308/R (April 22, 2005), paragraph 7.193 and, more generally, paragraphs 7.192–7.196. See also US – Certain EC Products.
2. THE ARGENTINA – POULTRY AND MEXICO – SOFT DRINKS CASES

A. Argentina – Poultry (the “Chicken Case”)

1. “Jurisdictional Arguments”: Estoppel, Res Judicata, and Others

RTA negotiators have specified the mechanism (“forum”) for RTA dispute settlement, believing that they can “control” that question. Most negotiators in today’s existing RTAs probably started out with some belief that they were in control of deciding where an RTA dispute should be heard. For example, NAFTA and the EFTA–Singapore FTA adopt the now common approach of including an electa una via clause, namely a clause that says a dispute can be brought either to the WTO or under the RTA’s dispute system but that, once the choice is made, the party bringing the dispute should stick to that choice.\(^{28}\)

There is a similar clause in MERCOSUR’s Protocol of Olivos.\(^{29}\) Both this and other types of treaty clauses that attempt to preempt jurisdictional conflicts with the WTO and with other dispute settlement bodies may be found in the various RTAs; we have discussed this issue elsewhere.\(^{30}\)

However, that is not always the end of the matter. The Argentina – Poultry case concerned the imposition of Argentinean antidumping duties on poultry imports from Brazil. In Argentina – Poultry, Brazil brought a dispute under the Protocol of Brasilia.\(^{31}\) The Brasilia Protocol precedes the Protocol of Olivos, which had been signed but had not yet entered into force. Unlike the Olivos Protocol, the Brasilia Protocol does not contain an electa una via clause. A jurisdictional conflict arose when Brazil, having brought a dispute under the MERCOSUR dispute system (and lost), now attempted to bring the dispute before the WTO. Argentina argued that Brazil was precluded from doing so,\(^{32}\) claiming that Brazil was acting in breach of the principle of good faith.\(^{33}\)


32 Id., 7.17–7.18.

33 Argentina cited the doctrine in US – Gasoline that the GATT should not be read in clinical isolation from the rules of public international law; id., 7.20. Argentina also argued that
Brazil argued that it had not acted in bad faith as it was not, in the first place, precluded from bringing a second claim.\(^{34}\)

Argentina replied that Brazil, by subsequently signing the Protocol of Olivos, had “consented” not to bring a second claim.\(^{35}\) Brazil responded that the Olivos Protocol did not apply to disputes brought under the Brasilia Protocol.\(^{36}\)

As for the third parties, Paraguay considered that Argentina’s claim was res judicata.\(^{37}\) Both the European Communities and the United States supported Brazil’s case. The European Communities argued that estoppel could not be raised because Brazil had not consented not to bring a second dispute. Nor did Brazil renounce its right to bring a WTO claim by not bringing one earlier.\(^{38}\) The United States argued that the panel can only apply the WTO’s covered agreements, but cannot adjudicate upon an RTA dispute. Estoppel, if made out, would arise under MERCOSUR rules, not the WTO’s rules. In any case, the United States reasoned that the conditions for estoppel had not been satisfied.\(^{39}\)

The panel ruled that Brazil could bring the WTO case. The estoppel claim had not been made out because (1) Brazil had not clearly and unambiguously represented, expressly or by implication, that it would not bring a second dispute before the WTO, and (2) there was no evidence that Argentina actively relied on a representation by Brazil.\(^{40}\) The panel also rejected the argument that Brazil was precluded from bringing a claim on the basis of res judicata. Although the panel acknowledged that the Olivos Protocol contained an *electa una via* clause, it accepted Brazil’s argument that the Protocol of Brasilia applied, and that the Olivos Protocol had not entered into force.\(^{41}\)

MERCOSUR’s legal rules should be taken into account under Article 31.3.c of the Vienna Convention on the Law of Treaties; id., 7.21.

\(^{34}\) Brazil’s argument turned on the construction of the estoppel doctrine, namely on whether there was a need to establish that Brazil expressly or impliedly consented not to bring a second claim. In any event, Brazil argued, the case before the WTO was “based on a different legal basis” and that the “object” of the two cases was different. This last was supported by Chile agreed, acting as third party; id., 7.25.

\(^{35}\) Olivos Protocol, Article 1.2.

\(^{36}\) *Argentina – Poultry*, op. cit., 7.22. That in effect is what the Olivos Protocol’s *electa una via clause* – Article 1(2) – suggests, but it is unclear from the panel report whether the panel was in fact referring to this; cf., however, the EC’s argument, id., paragraph 7.27 and footnote 49.

\(^{37}\) Id., 7.28–7.29. Argentina did not adopt this argument; id., 7.18.

\(^{38}\) Id., 7.27.

\(^{39}\) Id., 7.30.

\(^{40}\) Either to Argentina’s detriment, or to Brazil’s advantage; id., 7.37–7.39.

\(^{41}\) Id., 7.38.
2. Clarifying the Problem: The United States’s Third-Party Arguments

The panel acknowledged that the general international law doctrines of estoppel and res judicata could have applied, and interestingly did apply an RTA treaty rule contained in the Olivos Protocol (i.e., the rule that the Olivos Protocol does not apply to cases arising under the Brasilia Protocol). What rule permits the panel to do so?

One answer is that the WTO DSU treats these principles as WTO rules. Argentina argued that the estoppel doctrine was one such principle. Moreover, there is GATT and WTO precedent discussing the estoppel doctrine.

However, the United States as third party in the Argentina – Poultry case rejected this view, saying that the panel cannot apply the estoppel doctrine, as it is not authorized by the DSU to do so. The United States added that although GATT and WTO panels have on occasion discussed the doctrine of estoppel, it has been described in inconsistent ways and has never actually been applied by a panel. Likewise with res judicata; the United States’s argument was that the res judicata argument would rest on a purported breach of the Brasilia Protocol (i.e., an RTA rule).

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42 The classic authority for the principle in modern international law is the Eastern Greenland case: Legal Status of Eastern Greenland (Denmark v. Norway), (1933) PCIJ Reports, Series A/B, No. 53 (see also Anzilotti diss. op.). During the drafting of the relevant part of what became Article 38(1)(c) of the Statute of the International Court of Justice, the principles of estoppel and res judicata were considered to be general principles of international law; see the statement of Lord Phillimore (Great Britain), Permanent Court of International Justice, Advisory Committee of Jurists, Procès verbaux of the Proceedings of the Committee (June 16–July 24, 1920, L.N. Publication, 1920), 335. Lord Phillimore viewed it as a “maxim of law,” and it was also viewed as necessary for resolving problems of non liquet. This last is a device used by international lawyers in recognition that gaps arise in the law. See Julius Stone, “Non-liquet and the Function of Law in the International Community,” 35 British Year Book of International Law (1935) 124. See also D. W. Bowett, “Estoppel before International Tribunals and Its Relation to Acquiescence,” 33 British Year Book of International Law (1957) 176. For the problem of applying equity generally as a source of international law, see O. A. Elias and C. L. Lim, “‘General Principles of Law’, ‘Soft’ Law and the Identification of International Law,” 28 Netherlands Yearbook of International Law (1997) 39–44.

43 For the argument that RTA rules are public international law rules, see “Saving the WTO”, Gao and Lim, note 13.

44 Id.

45 Argentina – Poultry, op. cit., 7.20.


47 Argentina – Poultry, op. cit., 7.30. Paraguay, in contrast, considered res judicata to be a doctrine of international law contemplated by the DSU; id., 7.28.
To resolve such issues of jurisdictional conflict, we would therefore have to ask what rules and principles a WTO panel or the Appellate Body can apply under the DSU, and whether these are not confined largely to the rules of the covered agreements. A choice has to be made as to the “applicable law.” This question is concealed insofar as a purported rule may be included under one of the WTO agreements or the DSU. Argentina had argued that estoppel is a WTO doctrine; this is an argument that the panel seemed to accept. One could argue, as Paraguay did, that WTO panels can apply public international law.\(^48\) In either case, no question arises about whether the WTO panel can apply RTA rules. It was, at the end of the day, the United States’s arguments which emphasized that what was being faced was really the application of RTA rules instead.

3. The Example of the “Article 3.2” Argument

Even the argument, which Argentina raised, that the WTO panel is bound by an RTA ruling was concealed in a similar way. As with the estoppel and res judicata arguments, there was a natural attempt to bring these arguments within the sources of WTO law and the scope of the DSU or the WTO’s covered agreements. Although this serves an understandable forensic purpose in the context of what is, after all, a WTO panel dispute, such practical lawyering conceals rather than reveals the underlying problem.

In seeking to argue that the panel in Argentina – Poultry is bound by a MERCOSUR ruling, Argentina chose to advance a convoluted argument\(^49\): Article 3.2 of the DSU states the WTO members’ recognition that the DSM should “clarify . . . [provisions in the covered agreements] . . . in accordance with customary rules of interpretation of public international law.” In that regard, Article 31 of the Vienna Convention reflects such customary rules of treaty interpretation. Article 31.3(c) of the Vienna Convention on the Law of Treaties stipulates that, in interpreting an international treaty rule, one should take account of “any relevant rules of international law applicable in the relations between the parties.” According to Argentina, that would include the MERCOSUR tribunal ruling. Therefore, DSU Article 3.2 requires the panel in Argentina – Poultry to take the MERCOSUR tribunal ruling into account.

\(^{48}\) We do not deny the usefulness of these doctrines, and that they should have a place in WTO law. See further Andrew D. Mitchell, “Good Faith in WTO Dispute Settlement,” 7 Melbourne J. Int’l L. (2006) 14.

\(^{49}\) Argentina – Poultry, op. cit., 7.21.
In this way, the source of the purported rule requiring the panel to apply an RTA rule (i.e., the MERCOSUR ruling) is said to lie in the DSU; in other words, it is ultimately a WTO rule, not a RTA rule.

The panel, however, failed to see which WTO provision required interpretation in such a case. Instead, what Argentina seemed to be asking was that the panel should rule in a certain way (i.e., adopt the MERCOSUR tribunal’s ruling). Because panels are not even legally bound by the rulings of previous panels, the panel in Argentina – Poultry failed to see why it should be bound by a ruling of a non-WTO tribunal.

4. The Question of the Application of RTA Rules

The United States’ argument goes to the heart of the problem. Argentina was not only saying that the panel was “bound” by a non-WTO ruling: Argentina was asking for a non-WTO rule, which applied in the relations between Brazil and Argentina to be applied through the funnel of Article 3.2 of the DSU and Article 31.3(c) of the Vienna Convention on the Law of Treaties to a WTO dispute between Brazil and Argentina. The rule applying to Brazil and Argentina arose from their common membership of MERCOSUR. In effect, what Argentina was asking the panel to do was to apply RTA law; in this case, as determined by the MERCOSUR tribunal ruling.

Although the panel did not address the issue in this way, it did consider that had it not been for the nonfulfillment of the conditions for a finding of estoppel, the inapplicability of res judicata, and the inapplicability of the electa una via clause in the Olivos Protocol; it could have applied estoppel, res judicata, or an electa una via rule to resolve the dispute. This would have been on the basis either that the WTO requires the application of these doctrines, or that WTO law chooses a “public international law” rule as the applicable rule. The panel did not actually say that a public international law rule could be “chosen” by WTO law (i.e., a WTO rule), but because these rules are inexplicit in the WTO agreements, such choice would logically have been the result of the operation of a choice-of-law rule.

It might be objected that the phrase “choice-of-law rule” is overly laden with meaning in the present circumstances. It suggests conflict-of-laws thinking (conflicts analysis), and this tends to “overread” the panel report whereas the

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50 See also the U.S. argument; id., 7-32.
51 Id., 7-41.
52 Cf. Mitchell, op. cit. (ultimately treating resort to good faith in Argentina – Poultry as a part of the inherent jurisdiction of the panel).
truth was that the panel did not even accept that a conflict existed. This admittedly is the case, but Argentina clearly saw a conflict. The objection rests ultimately on the doctrine of judicial economy. The better view, however, is that this is not a good example of the principle of judicial economy, which, properly defined, involves the choice by a panel of the contested measures that require solution in order to dispose of the case before it. The problem is one of characterization instead, and we require a better example than the Argentina – Poultry case to view the problem in its proper light.

B. The Mexico – Soft Drinks Case

1. The Parties’ Arguments

In Mexico – Soft Drinks, the Appellate Body took the issue further. It ruled that two clauses – the “no blockage” and “no delay” clauses in the WTO’s DSU – prevented the panel and the Appellate Body from refusing to hear the case.

Mexico had argued that WTO panels have an “inherent” jurisdiction to decline to hear certain cases. According to Mexico’s arguments before the panel, the dispute involved the relationship between Mexico and the United States under NAFTA: “This dispute arises out of a dispute under the NAFTA regarding bilateral trade in sweeteners.” NAFTA presents an “available” forum “to hear all of the parties’ claims together,” and therefore the panel should decline to “exercise” its jurisdiction (i.e., stay its proceedings). Mexico acknowledged that the WTO panel has prima facie jurisdiction, but that it also has the “implied jurisdictional power” to stay proceedings in favor of a tribunal constituted under Chapter 20 of NAFTA.

First, Mexico cited the United States’s own argument in a dispute brought under the GATT of 1947, the US – Sugar Quota case, in which the United States claimed that the dispute did not fall within the ambit of the GATT because the measure in question in that dispute “concerning sugar imports from Nicaragua were only one aspect of a larger State-to-State dispute.”

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55 Id., 4.97.


57 Id., 4.102–4.103.

58 Id., 4.104.
Quoting the United States’s argument in that case, the GATT report makes this statement:\(^59\)

The United States was of the view that attempting to discuss this issue in purely trade terms within the GATT, divorced from the broader context of the dispute, would be disingenuous. The resolution of that dispute was certainly desirable, and would also result in the lifting of the action which Nicaragua had challenged before the Panel, but the United States did not believe that the review and resolution of that broader dispute was within the ambit of the GATT.

Second, NAFTA presented “the more appropriate forum” because “[t]he history, prior procedures, and substantive content of the bilateral sweeteners trade dispute demonstrate that the measures challenged by the United States before the WTO are inseparable from the non-WTO claims over which the Panel has no jurisdiction,” and the United States would suffer no prejudice if the panel were to stay proceedings in favor of a NAFTA tribunal.\(^60\)

The United States, however, adopted a different approach. It argued that Mexico’s request for a preliminary ruling was, in effect, a request for a ruling.\(^61\)

Mexico’s so-called “preliminary ruling” request . . . is not a request for a “preliminary ruling.” If anything, it is a request for a “non-ruling” and there would be nothing “preliminary” about it. Mexico seeks to resolve the entire dispute on a definitive basis in this manner.

If this argument were accepted, it would have the effect of precluding all jurisdictional challenges. In fact, the United States was itself seeking to block the NAFTA proceedings. It was at this juncture that the United States presented an argument that would subsequently take hold in the Appellate Body. This was the theory that what is involved is not a conflicts issue at all, involving a choice of a “more appropriate” forum. Instead, it concerns the right of parties to seek justice before the WTO.\(^62\)

Let the United States present the situation plainly and clearly: Mexico admits that it imposed the . . . measure it does not contest is in breach of [GATT] Article III – to stop the displacement of Mexican cane sugar by imported . . . [high fructose corn syrup] . . . Mexico then claims that it has done so to coerce its desired solution to a bilateral dispute. And now Mexico wishes the Panel


\(^{61}\) Id., 4.150.

\(^{62}\) Id.
to assist it in this WTO-inconsistent action by denying the United States its right to WTO dispute settlement."

The dispute is about the WTO obligations of the parties, and as for Mexico’s "more appropriate forum" argument,

[t]hat WTO Members may choose to settle disputes involving a mixture of WTO and non-WTO rules in other fora, as Mexico observes, hardly justifies a WTO panel refusing to exercise jurisdiction over the dispute for which it was established... One party’s determination that another forum is more "appropriate" similarly does not justify such a refusal to exercise jurisdiction.

In so arguing that it was entitled to a WTO ruling, the United States cited Article 7.2 of the DSU, which stipulates that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties" to a dispute, and Article 11, which requires an "objective assessment of the facts of the case," "an assessment of the applicability of and conformity with the relevant covered agreements" on the part of WTO panels, and the construction of the panel’s own terms of reference. In contrast, the power to stay proceedings is not found expressed anywhere in the WTO DSU. It cited the case of India – Quantitative Restrictions, a case in which a "constitutional" argument concerning the "separation of powers" at the WTO (between the DSB and the Committee on Balance of Payments) was rejected in favor of the jurisdiction of panels and the Appellate Body.

In its counterarguments, Mexico did not address the United States’s argument that what it requested was not a preliminary ruling, arguing instead that the United States’s theory tended to confine the work of the panel within bounds not contemplated by the DSU. The DSU did not require the panel

63 Id., 4.154.
64 Id. 4.156.
65 Id. 4.151.
66 Id. 4.215.
67 Id., 4.156.
68 Canada as third party argued that the issue should be dealt with by way of a preliminary ruling, id., 5.10. It appears that Canada rejected the request for a stay of proceedings as it (mistakenly) considered the Mexican request to rest on an argument about judicial economy where Canada considered that this would constitute a misuse of the concept. However, Canada accepted the United States’ argument that Articles 3.2 and 11 of the DSU, and the panel’s terms of reference, require the panel to rule on the dispute, id. 5.12–5.18. The European Communities also rejected (what it considered to be) Mexico’s judicial economy argument, but it also addressed the “more appropriate forum” argument in passing, pointing out that WTO disputes need not address a dispute between the two states comprehensively. The European Communities cited Argentina–Poultry in support of the argument that the WTO proceedings did not, and could not, resolve the dispute brought under MERCOSUR, id. 5.37. Guatemala also agreed with the
to issue a ruling finding a breach of a WTO obligation. It requires the panel to assist in the resolution of the dispute.\textsuperscript{69} The panel should not therefore reward an attempt on the United States’s part to engage in forum shopping instead.\textsuperscript{70}

Most of these arguments on the part of Mexico and the United States were repeated before the Appellate Body.\textsuperscript{71}

\textbf{2. The Ruling of the Panel}

The panel issued its preliminary ruling according to Mexico’s request, but it rejected the view that it possessed the discretionary power to stay proceedings in favor of a NAFTA tribunal. It cited DSU Articles 3.1, 11, and 19.2. According to Article 3.1, the panel ruled that it was required to make “an objective assessment of . . . the applicability of and conformity with the relevant covered agreements.” According to Articles 3.2 and 19.2, the panel ruled, a stay of proceedings would “diminish the rights and obligations of WTO members provided in the covered agreements.”\textsuperscript{72} Finally, the panel also cited Article 23 of the DSU, noting that the word “shall” where it stipulates that WTO members “shall have recourse” to WTO dispute settlement suggested that WTO members have a right to a WTO panel ruling.\textsuperscript{73}

The panel made two further points. First, that it was ruling simply on whether it has the discretion to stay proceedings. A future panel may be \textit{required} to stay proceedings by an RTA rule. In the present case, it was insufficient to argue that there was a broader dispute that could not comprehensively be handled by the WTO panel as opposed to NAFTA arbitration. Mexico had not argued that a NAFTA rule actually precludes the WTO panel from exercising its jurisdiction in this case or that the United States was legally precluded from bringing the WTO dispute.\textsuperscript{74} In any case, the dispute before NAFTA

\begin{itemize}
\item Id., 4.313–4.321 (second written submission, Mexico), 4.410–4.417 (opening statement, second meeting, Mexico), and 4.470 (closing statement, Mexico).
\item Id. 4.295 (second written submission, Mexico). See also Mexico’s description of the United States’s long-standing attempts to block the establishment of a NAFTA panel, id., 4.388 (opening statement, second meeting, Mexico).
\item Mexico – Soft Drinks, Appellate Body Report, op. cit., 10–12 (Mexico), 21–24 (United States).
\item Id., 7.9.
\item Id., 7.10–7.13.
\end{itemize}
and the dispute before the WTO were not identical. Second, if indeed the panel has the power to stay proceedings, it would nonetheless have refused a stay on these facts. Mexico had not shown that a stay would lead to “better treatment” of the dispute, simply that it would have permitted Mexico to bring “another, albeit related” claim.

In sum, an RTA rule could require a panel to stay its proceedings in favor of another tribunal. Unlike the allocative thesis, which would resolve the jurisdictional issue by invoking a general public international law principle—such as the lex specialis principle (the more specific treaty prevails), the lex posterior principle (the later treaty prevails), estoppel, or res judicata—the panel in Mexico – Soft Drinks considered that a substantive RTA rule could constitute a “legal impediment” to a WTO panel ruling. In doing so, the Mexico – Soft Drinks panel entertained the future possibility of a panel ruling that an RTA tribunal constitutes a more appropriate forum on the basis of an application (i.e., choice) of RTA law.

3. The Appellate Body’s Ruling

The Appellate Body disagreed with Mexico. In particular, it upheld the panel’s mandatory interpretation of the word “shall” in Article 7 of the DSU concerning the panel’s terms of reference—“[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” As for DSU Article 11—“a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”—the Appellate Body considered that too to be mandatory notwithstanding the word “should.” Citing DSU Article 23, which states that WTO members shall have recourse to the WTO dispute settlement system, the Appellate Body in effect took the position that WTO parties cannot block a case brought by a complaining WTO member against another member.

75 Id., 7.14–7.15.
76 Id., 7.18.
77 Id., 7.17 (the panel added that if this could constitute a factor, then there would be no end to the list of factors that could be taken into account).
78 In this case, a rule that would be more “specific” because it was “specific to the parties” (i.e. an inter partes rule).
80 Id., 49.
81 Id., 52.
It seems to suggest that if WTO members approach the WTO for justice, they will get it notwithstanding the fact that a related dispute is also being heard under an RTA dispute system. The Appellate Body also gave a similarly broad reading in relation to DSU Article 3.3 – the “no delay” clause. The Appellate Body appears to treat an RTA dispute as nothing more than an excuse to delay WTO proceedings.\(^{82}\)

Similarly, the Appellate Body reasoned that DSU Article 7 instructs a panel to address the provisions of the WTO’s covered agreements. Again, one might disagree by saying that Articles 7 and 11 can just as easily be read to presuppose the panel’s exercise of its jurisdiction, rather than mandating it to do so.

C. Discussion: Politics and the Need for a Private International Law Approach

Did RTA negotiators anticipate these rulings when they drafted their RTA dispute settlement clauses, which sought to determine the relationship between WTO and RTA dispute settlement beforehand? For a good number of RTAs negotiated before these Appellate Body cases, the answer is “probably not.” Admittedly, in Argentina – Poultry the panel had been correct to ignore the Olivos Protocol’s *electa una via* clause. It had found the Olivos Protocol to be inapplicable to the dispute in the first place. In Mexico – Soft Drinks, however, Mexico itself had failed to invoke NAFTA’s *electa una via* clause, which in any case would probably not have applied to preclude the U.S. attempt to bring the dispute before the WTO according to its strict terms.\(^{83}\) In Argentina – Poultry too the problem was compounded by an omission; the Protocol of Brasilia had failed to provide for WTO–RTA conflicts of jurisdiction (e.g., by way of an *electa una via* clause).\(^{84}\)

The reason Mexico did not invoke NAFTA’s *electa una via* clause in Mexico – Soft Drinks was almost certainly because the United States had sought to block NAFTA proceedings by refusing to appoint its own panelists.\(^{85}\) In the case of MERCOSUR disputes, evidently countries like Argentina did believe – albeit wrongly – that the Olivos Protocol had filled in a lacuna in the MERCOSUR regime. Of the two rulings, the Appellate Body’s Mexico – Soft Drinks is the more far reaching. It suggests that the Appellate Body is likely to ignore RTA dispute settlement even if an *electa una via* clause is invoked. If this is correct, then there is now the real risk of prolonged litigation in cases

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\(^{82}\) Id.

\(^{83}\) NAFTA, Art. 2005.

\(^{84}\) Poultry, op. cit., para. 7.27 and footnote 49.

in which a winning party would otherwise be justified in thinking that such cases should be confined purely to RTA dispute settlement. However, losing complainants will also have a second bite at the cherry. The real question, then, is this: Is this something the RTA negotiators would have welcomed, had they considered it? Disputes involving matters not included under one of the WTO’s covered agreements – such as most investment disputes – are saved from this problem because WTO panels and the Appellate Body can only deal with disputes under one of the WTO’s covered agreements (e.g., goods and services trade disputes).\(^{86}\) However, there is a potentially high degree of overlap between RTA and WTO dispute settlement. It should be noted that to engage in so-called tit-for-tat litigation, WTO members that are also RTA partners do not require two disputes to be exactly identical. The legal character of the dispute may be beside the point, but the number of opportunities that exist to litigate roughly the same dispute, or issues related to the same dispute, is not. Saying, as the Mexico – Soft Drinks panel and Appellate Body did, that the two disputes must be identical, compounds the problem, for it encourages minute differentiations between the two disputes in order to justify the proliferation of trade litigation.\(^{87}\)

The Appellate Body’s ruling therefore encourages, rather than discourages, such litigation. Thus far there has been no case in which a panel or Appellate Body has declined exercise of its jurisdiction in favor of an RTA or other tribunal. In Mexico – Soft Drinks, the Appellate Body indeed ruled against having the authority to do so. The WTO has no response to the general problem of conflicting jurisdiction (i.e., authority fragmentation).

The picture is only slightly more encouraging in relation to the problem of norm fragmentation. The panel in Argentina – Poultry addressed the respective applicability of the Brasilia and Olivos Protocols. Had the Brasilia Protocol contained an electa una via clause, or had the Olivos Protocol applied to that case, things might have been different – the panel could also have declined the exercise of its jurisdiction. As for Mexico – Soft Drinks, the Appellate Body only said that it would not determine an RTA dispute, not that it will never apply an RTA rule.

Nonetheless, fragmentation operating at both the normative and jurisdictional levels could worsen bilateral relations between two countries. This was

\(^{86}\) See further Gao and Lim, “Saving the WTO,” op. cit., 905–906 (on the exception of “mode 3” services disputes), and Lim, “Free Trade Agreements in Asia and Some Common Legal Problems,” op. cit., 445–446 (on the investment/mode 3 services overlap).

Mexico’s view of the successful U.S. attempt to bring a WTO case in the Mexico – Soft Drinks dispute. Both norm and authority fragmentation are “political” because they contribute to international anarchy at the expense of international law. Norm fragmentation diminishes the prospects of a legal settlement by emphasizing the absence of common legal rules. Authority fragmentation erodes the authority of trade dispute settlement bodies by emphasizing their arbitrariness. Attempts at integration at both levels would likewise raise the political stakes. As Broude has also argued, norm integration not only involves “technical, lawyerly methods” but also has a “political meaning” because it not only aims for normative coherence but also represents a move “towards greater centralization and/or harmonization of authority.” This could, in turn, heighten political controversy over jurisdictional authority, because attempts at the centralization or harmonization of norms means that one system is required to recognize and apply the norms of the other, thereby recognizing the existence of overlapping authority while asserting the authority to apply the norms of another system.88

The urgent need for an alternative approach should build on the willingness of panels and the Appellate Body to apply RTA rules while avoiding – that is, circumventing – the political controversy over fragmentation and integration. One approach is to recognize that the public law–private law distinction has proven unhelpful in this,89 and that private international law analogies present the prospect of depoliticization through the application of a more neutral device – namely private international law’s method of choice-of-law analysis. Choice-of-law analysis would avoid norm integration (i.e., a drive toward harmonization or unification) because it seeks agreement not over norms but the rules on the choice of applicable norms. In this regard, it could avoid the politics of norm integration by recalling the metaphor that (private) conflict of laws reasoning often resembles the impartial operation of a machine. Likewise, choice-of-law analysis – which involves a common technique shared by different jurisdictional authorities in selecting between diverse norms – could defuse political tensions over questions of overlapping authority. Simply put, it should matter less who applies a particular norm as long as that same norm is applied by all parties through the use of a common judicial technique.

The Politics of Competing Jurisdictional Claims

3. THE PRIVATE INTERNATIONAL LAW ANALOGY

1. Some Inadequacies of Public International Law Solutions

Public international law solutions to jurisdictional clashes involve the invocation of general principles. Which was the later treaty? If the RTA is the later treaty, then it prevails to determine both jurisdiction and the applicable law. However, if a WTO agreement is the later treaty, then the WTO agreement prevails instead in order to determine both questions.90 Similarly, the more specific treaty (or treaty rule) would prevail and determine both the jurisdictional question and the question of applicable law.91 Alternatively the principle of res judicata may apply, and in the absence of an RTA treaty clause this means that the first award will prevail, or the public international law principle of estoppel. In Mexico – Soft Drinks Mexico had also raised the argument that he who comes to equity must come with clean hands, and because the United States had delayed proceedings by refusing to participate and had attempted to block the NAFTA arbitrator selection process, it cannot now argue that the case should be heard by the WTO.92 As with estoppel, this argument seeks to apply equity to the question of competing jurisdictional authority. In doing so, it imports some of the difficulties concerning resort to equity under international law into the trade law field.93

The lex posterior and lex specialis rules were meant to resolve the problem of conflicting treaty rules in the field of public international law. The estoppel and res judicata doctrines, and indeed the application of equitable principles generally, were private law analogies that were intended to fill in gaps in the law because of the incomprehensive nature of the traditional sources of international law (i.e., custom and treaty). None of these public international law devices, which were meant to resolve public international law problems, were actually designed to meet the challenge of competing jurisdictional

90 Because WTO and RTA rules are continuously being generated and regenerated – i.e. through successive amendments and Rounds of negotiation – the result is arbitrary, “checkerboard justice”; see Gao and Lim, “Saving the WTO,” op. cit., 919; Ronald Dworkin, Law’s Empire (Cambridge, MA: Belknap, 1996), 178–184. For the idea that the relationship between RTAs and WTO norms is “dynamic” in nature (i.e., that WTO norms are continuously being renegotiated and updated), see Pauwelyn, “Legal Avenues”, op. cit., 397.
93 This is not to say that trade law generally, and WTO dispute settlement more specifically, cannot and should not account for equitable doctrines. See Elias and Lim, “General Principles,” op. cit., 39–44 (addressing the “non-consensual,” “subjective” nature of equitable doctrines in international law).
authority. The explanation is partly historical. There were few permanent courts and tribunals, and few organizations with established judicial settlement procedures in the field of public international law.

The attempt to force these public international law solutions has also meant that public international law ways of thinking currently play a dominant role in defining the problem of competing jurisdictional authority in the trade law field. They do so, as we have argued, by conflating two distinct questions. One of these has to do with the near absence of international law rules that properly allocate jurisdictional authority, as opposed to those that seek to prevent or resolve treaty conflicts. The other has to do with the potentially different sources of the applicable rules from the viewpoint of two competing trade law tribunals.

2. Analysis of the Current State of Trade Law Doctrine

In its current state of doctrinal development, trade law has produced a variety of possible solutions. According to the Argentina – Poultry panel, an electa una via rule may be applied, but only if the applicable law is an RTA electa una via clause, such as that which exists in the Olivos Protocol. The Argentinean argument that tribunal awards rendered under the Brasilia Protocol are final, and that the “legislative framework” of the Treaty of Asuncion, the Brasilia Protocol, and the principle of good faith prevent a second dispute from being brought to WTO dispute settlement, was not accepted by the Argentina – Poultry panel. The panel in Mexico – Soft Drinks was faced with a different set of arguments raised by Mexico, which had argued that there is an inherent authority on the part of WTO panels to decline to hear a case while retaining their jurisdiction to do so. The essence of the Mexican argument was that the panel has discretion to choose to stay proceedings. In disagreeing that it has such a discretion, the panel did point out that in future cases another panel may be compelled to send the case to the NAFTA tribunal instead. According to this reasoning, such a future panel would not be able to choose whether to decline jurisdiction in favor of a NAFTA tribunal, but it may face a “legal impediment” in having or exercising jurisdiction in the case before it.

Thus, the two panels in Argentina – Poultry and Mexico – Soft Drinks were in agreement on some essential points. The difference seems to be that whereas the Argentina – Poultry panel was looking toward a RTA rule, the Mexico – Soft Drinks panel focused on the absence of discretion and was looking for

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an overriding mandatory rule regardless of whether it was an RTA rule. The theory that what is required is a mandatory rule received the support of the Appellate Body in the Mexico – Soft Drinks case. However, the Appellate Body, like the panel in that case, expressly left the possible, future exceptions to the Mexico – Soft Drinks ruling broadly undefined.

3. The Private International Law Analogy

These rulings are not necessarily inconsistent. At first glance, there is a difference between saying that there is a choice-of-law process involved (Argentina – Poultry) and that there is a mandatory rule involved (Mexico – Soft Drinks). However, mandatory rules are a commonplace thing in both the conflict of laws and international commercial arbitration. The Convention on the Carriage of Goods by Sea presents a mandatory rule in both fields. Mandate rules are also found in treaty rules such as the Rome Convention on the Law Applicable to Contractual Obligations. The stipulations of the Sherman Act in the United States have been raised unsuccessfully as a mandatory rule in relation to arbitrability, though successfully in relation to the enforcement stage for international arbitral awards in the United States. This is likewise the case with the concepts of lex fori in private international law and lex loci arbitri in international commercial arbitration. Whereas the concept of lex loci arbitri has been said to constitute a wider concept than lex fori (e.g., it comprises not only rules of evidence and judicial assistance but also the rule on the authority of the tribunal to


determine its own jurisdiction),\textsuperscript{98} the principle is similar. Lex fori is mandatory, whereas lex loci arbitri is said to exist alongside the parties’ choice of lex arbitri.\textsuperscript{99}

According to the United States, the Argentina – Poultry panel faced squarely the question of the application of RTA law. If this is correct, then logic would demand to know what further rule permits such a choice to be made. The answer, according to the public international law mindset, is that RTA rules are a part of public international law because treaty rules are also “public international law.” In other words, insofar as the WTO DSU (an international treaty) permits recourse to international law, WTO panels can apply RTA rules. The argument is something of a stretch, and that is why we have argued elsewhere\textsuperscript{100} for (1) an express clause in the DSU authorizing WTO panels and the Appellate Body to apply RTA rules, and (2) a corresponding rule in future RTAs permitting these WTO bodies to do so.\textsuperscript{101} The Mexico – Soft Drinks panel too did not preclude the application of an RTA “forum selection” rule (which would involve the operation of a “hidden” choice-of-law process). Admittedly, this was because NAFTA’s \textit{electa una via} clause was not raised in argument, yet the panel did go on to make this observation:\textsuperscript{102}

Mexico did not argue, nor is there any evidence on record to indicate, that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case or to the United States bringing its complaint to the WTO. Indeed, when specifically questioned on this point by the Panel, Mexico responded that there was nothing in the NAFTA that would prevent the United States from bringing the present case to the WTO dispute settlement system.

This led the panel to conclude that it “makes no findings about whether there may be other cases where a panel’s jurisdiction might be legally constrained.”\textsuperscript{103}

On appeal too, the Appellate Body had pointed out that the two disputes were not identical, precisely because the issues that could be raised before NAFTA


\textsuperscript{100} Gao and Lim, “Saving the WTO,” op. cit.

\textsuperscript{101} Ibid.


\textsuperscript{103} Id., 7.10.
arbitration showed no cause of action at the WTO. 104 Although Mexico had argued that another forum would be more suitable because certain causes of action do not exist at the WTO, the Appellate Body saw no reason that resolution of the dispute could not therefore be divided between two tribunals. This was the “identical dispute” requirement in operation. 105 Second, the Appellate Body left room for a res judicata doctrine, noting that in this case a NAFTA tribunal had not yet handed down an award. Third, Article 2005.6 of Chapter Twenty of NAFTA contains the following clause:

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.

This clause was not invoked. 106 As with the panel ruling, the Appellate Body therefore concluded that “we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.” 107 In other words, Mexico – Soft Drinks could be read so as to allow the application of a non-WTO rule, such as an RTA forum selection rule, so long as such a rule is mandatory.

Where would these legal impediments lie? The res judicata doctrine is consistent with both public and private international law analysis. 108 So is Mexico’s argument that the United States, having prevented the establishment of the NAFTA tribunal, could not now invoke WTO law. Mexico had cited the Chorzow Factory Case (Germany v. Poland) in public international law – that a party cannot take advantage of its own wrong. In public international law, that is a general principle of law “generally accepted in the jurisprudence of international arbitration, as well as by municipal courts.” 109 In private international law, however, it is an appeal to equity such as in a request for an antisuit injunction. 110 The electa una via clause is trickier. Because customary international law generally lacks the operation of the lis alibi pendens doctrine, 111 that

105 Id.
106 Id.
107 Id.
109 Chorzow Factory Case (Germany v. Poland) (Indemnity), PCIJ, Series A No. 9 (1927) at 31. See further, Humphrey Waldock, “General Course on Public International Law,” 106 Recueil des Cours (1962-II) 54.
111 Shany, Competing Jurisdictions, op. cit., 239–244.
and similar doctrines would usually have to be provided for by treaty.\footnote{Id., 218–222.} Many RTAs now include an \textit{electa una via} clause. In one important sense, an \textit{electa una via} clause serves a similar purpose as the \textit{lis pendens} doctrine in private international law – that is, it seeks to prevent a second set of proceedings to be brought where one set of proceedings has already been triggered.\footnote{Id., 23 (\textit{electa una via} encompasses both concepts of \textit{lis alibi pendens} and \textit{res judicata}). For the characterization of \textit{electa una via} as an extension of the abuse of rights doctrine, see Petersmann, \textit{op. cit.}, 474. Part of the difficulty lies in comparative law; the \textit{lis alibi pendens} doctrine may have different meanings in different legal systems; see Michaels, “Two Paradigms,” \textit{op. cit.}, 1052 (explaining that, in U.S. law, the doctrine applies only at the recognition stage). As Michaels points out too, the European concept of \textit{lis alibi pendens} operates ex ante and seeks to prevent parallel proceedings from being brought; id. In that sense, it is difficult to distinguish the doctrine from the intended effect of an \textit{electa una via} clause.} The operation of a \textit{lis pendens} doctrine, say under custom or as a general principle of law recognized by civilized nations,\footnote{Cf. Certain German Interests (1925) PCIJ (Ser. C) No. 9-I, 82 (Germany, oral pleadings); Certain German Interests (1925) PCIJ (Ser. A) No. 6, 19–20. Discussed further, \textit{id.}, 239–240. Whether the broad use of \textit{electa una via} clauses may lead toward the establishment of a firm \textit{litispendence} rule under customary international law is a good question.} is, however, potentially broader in scope because an \textit{electa una via} clause would depend on the specific treaty drafting language. If the NAFTA clause is truly a \textit{lis pendens} clause, then it would be more akin to a creature of private rather than public international law.

However, NAFTA Article 2005.6 is Janus-faced: It is also informed by public international law doctrine. NAFTA’s framers knew that the WTO dispute settlement system would come into existence and had, it seems, sought to preempt jurisdictional clashes with a \textit{lex specialis} rule in the form of a NAFTA treaty rule that would provide for such an eventuality. Nonetheless, that clause presupposes not only that NAFTA tribunals will recognize and apply the clause, but also that WTO panels and the Appellate Body will, or at least might, do so. The framers probably presupposed a choice of an RTA rule in light of the absence of an express WTO rule (i.e., notwithstanding the contrary view in some circles that the WTO \textit{may} contain an exclusive jurisdiction rule).\footnote{Shany, \textit{Competing Jurisdictions}, \textit{op. cit.}, i83–i84. If that is true, then they probably saw the choice as being governed by treaty law, operating under public international law’s \textit{lex specialis} doctrine. The WTO’s covered agreements, however, came into existence after NAFTA. Had NAFTA’s framers also considered that the WTO’s DSU would be the later treaty under another public international law doctrine – that is, the \textit{lex posterior} doctrine? Even if they had not, would the \textit{lex posterior} doctrine not point

\begin{itemize}
\item\footnote{\textit{Id.}, 218–222.}
\item\footnote{\textit{Id.}, 23 (\textit{electa una via} encompasses both concepts of \textit{lis alibi pendens} and \textit{res judicata}). For the characterization of \textit{electa una via} as an extension of the abuse of rights doctrine, see Petersmann, \textit{op. cit.}, 474. Part of the difficulty lies in comparative law; the \textit{lis alibi pendens} doctrine may have different meanings in different legal systems; see Michaels, “Two Paradigms,” \textit{op. cit.}, 1052 (explaining that, in U.S. law, the doctrine applies only at the recognition stage). As Michaels points out too, the European concept of \textit{lis alibi pendens} operates ex ante and seeks to prevent parallel proceedings from being brought; id. In that sense, it is difficult to distinguish the doctrine from the intended effect of an \textit{electa una via} clause.}
\item\footnote{Cf. Certain German Interests (1925) PCIJ (Ser. C) No. 9-I, 82 (Germany, oral pleadings); Certain German Interests (1925) PCIJ (Ser. A) No. 6, 19–20. Discussed further, \textit{id.}, 239–240. Whether the broad use of \textit{electa una via} clauses may lead toward the establishment of a firm \textit{litispendence} rule under customary international law is a good question.}
\item\footnote{Shany, \textit{Competing Jurisdictions}, \textit{op. cit.}, i83–i84.}
\end{itemize}
against the application of RTA law? In other words, public international law doctrines could point in both directions. This tends to suggest that the clause was intended to codify or introduce the lis pendens doctrine so as to fill a gap in international public law and that its source therefore lies as much in private international law thought as in public international law analysis.

Other “impediments” could include the operation of a doctrine of comity.117

All this leaves the Appellate Body’s invocation of the “mandatory” aspects of DSU Articles 7 (terms of reference), 11 (function of panels), 23 (with its “no blockage” aspects), and 3.3 (no delay clause). There is no reason to suppose that they have unlimited scope, and so what we are concerned with here is the precise bounds of these mandatory rules: the precise definition and scope of the exceptions to them.

4. The Private International Law Analogy versus the Allocative Thesis

It is here that the greatest difficulty with the private international law analogy presents itself. In the course of rejecting Mexico’s argument that the United States was seeking to take advantage of its own wrong in bringing a WTO dispute after having “illegally” prevented the NAFTA tribunal from being constituted, the Appellate Body considered that, had it entertained Mexico’s objection, it would be ruling on a “non-WTO” (i.e., NAFTA) dispute. This appears to deny the scenario envisaged in the Argentina – Poultry case, namely the application of an RTA rule by a WTO panel or Appellate Body. However, this objection to the application of an RTA rule may be addressed in a number of ways.

First, one can distinguish between the inability of a WTO panel or Appellate Body to apply a substantive RTA rule, and its inability to apply an RTA “conflicts” rule. A res judicata or electa una via clause in the RTA, such as in the Olivos Protocol, or the electa una via clause in NAFTA, could be applied by a WTO panel or the Appellate Body. The Appellate Body in Mexico – Soft Drinks, although rejecting its own power to decide a NAFTA dispute, nonetheless leaves open the question of the application of an RTA conflicts

116 See Pauwelyn, “Legal Avenues,” op. cit., 378–379 (arguing that international law “does not offer a clear response” and that such conflicts would have to be approached on a case-by-case basis).

117 Henckels, op. cit.


119 Cf. Olivos Protocol, Article 1(2) (electa una via) and Article 26(1) (res judicata).
rule by pointing out that the *electa una via* clause in NAFTA had not been invoked in *Mexico – Soft Drinks*. At best, what the Appellate Body may have ruled out is the power of WTO panels and the Appellate Body to apply a substantive as opposed to a conflicts rule in an RTA.

In other words, the private law analogy would hold even if the *Mexico – Soft Drinks* ruling were to be taken to constitute a bar to the direct application of a substantive RTA rule. After all, a res judicata or *lis pendens* rule in a RTA is also a conflicts rule that both panels in *Argentina – Poultry* and *Mexico – Soft Drinks*, as well as the Appellate Body, have accepted. In theory, it is therefore open to the Appellate Body to find that a RTA rule which operates as a conflicts rule chooses the application of RTA law. We can imagine a clause in an RTA which says that in the case of a jurisdictional conflict, another tribunal may apply the RTA’s substantive rules – thereby leaving it to the WTO panel or the Appellate Body to decide on whether the RTA rule is applicable to the dispute before it. Such a clause may be cumbersome and confusing, but it offers a plausible solution.

The better view may be that the Appellate Body says nothing about whether it can apply a substantive RTA rule, so long as it does not actually rule on the RTA dispute. This is also the logic of the Appellate Body’s pronouncement in *Mexico – Soft Drinks* that the two disputes were not identical. A difficulty arises only in those instances in which the two disputes are identical and the Appellate Body has the option of applying a substantive RTA rule and claiming and exercising the jurisdiction to do so. In effect, it could end up ruling on the RTA dispute. Compare the allocative thesis, which would seek out the *lex specialis*, or a later treaty rule – a WTO or RTA rule – and allocate jurisdiction on the basis of that rule. By doing so it assumes that the one forum that has exclusive jurisdiction will therefore simply apply one set of treaty rules to the exclusion of other treaty rules. The Appellate Body’s refusal to rule on a “non-WTO” dispute is a version of the allocative thesis, which means that it will generally resist deciding points of RTA law because it tends to treat WTO rules as *lex specialis*. Is such a “judicial” policy sound?

Considering that the WTO is threatened by the proliferation of RTAs, the better policy may be that panels and the Appellate Body should revisit their power to apply RTA rules. An RTA “conflicts” clause such as that suggested earlier which points a WTO panel toward the application of a substantive RTA rule, by supplying the express permission of the RTA parties for the panel or Appellate Body to apply RTA law, will also encourage the application of RTA rules. That is one illustration of how private, not public, international law thinking could help to dispel some of the fears about the “politics” of competing jurisdictional claims, a matter that we turn to in our conclusion.
Unfortunately, such a clause is not only cumbersome, it is confusing. The better view should be that the Appellate Body has not (yet) precluded the application of substantive RTA rules. Our argument is that the Appellate Body should push beyond the allocative thesis. In order to do this, what trade law needs is a choice-of-law method of analysis.

Previous approaches would seek to resolve RTA and WTO jurisdic- tional clashes by turning to comity as a jurisdictional doctrine or public international law in the form of the lex specialis and other rules. In the first case, no answer is given to whether a WTO panel or the Appellate Body may apply RTA rules because the question is framed purely as a problem involving the proper allocation of jurisdiction. In the second case, no answer is given either because the method of resolving the problem simply presupposes that one treaty should apply to the exclusion of the other – that is, either the RTA or a WTO agreement, whichever is the later or more precise treaty. What we are proposing is a need to close a fundamental gap in the proposals that currently exist for resolving the problem of WTO and RTA jurisdic- tional clashes.

4. CONCLUSION

In the course of rejecting Mexico’s arguments, the panel in Mexico – Soft Drinks expressed the following view:120

We understand Mexico’s argument to be that the United States’ claims in the present case should be pursued under the NAFTA, not because that would lead to a better treatment of this particular claim, but because it would allow Mexico to pursue another, albeit related, claim against the United States. The Panel fears that if such a matter were to be considered then there would be no practical limit to the factors which could legitimately be taken into account, and the decision to exercise jurisdiction would become political rather than legal in nature.

In this regard, resort to public international law principles already implies a “public” legal dispute requiring a “public” legal solution. There is no doubt that WTO and trade law disputes generally are public international disputes insofar as the legal subjects are oftentimes sovereigns or their “delegates.”121 Nevertheless, there is no reason to think that public international law analysis

121 This is one explanation of Hong Kong’s status as an independent customs territory, and there have also been common law pronouncements to this effect applying the “delegation theory” at common law to other territories (e.g., Chinese Taipei). See further, C. L. Lim, “Non-recognition of Putative Foreign States (Taiwan) under Singapore’s State Immunity Act,” in Asian Yearbook Int’l L. (2003–2004) 3, 4–7.
should have a monopoly over trade law reasoning. Indeed, the panel in *Mexico – Soft Drinks* refused to accept Mexico’s “larger dispute” argument (in this case, between two sovereigns), citing the tendency to thereby “politicize” the jurisdictional issue. This is understandable because jurisdictional disputes, as conceived in the public international law field, concern clashes of penal jurisdiction between states, and state consent is typically the basis for the legal personality of international organizations, as well as their dispute settlement processes. State interests are often, though not always, implicated in WTO and RTA jurisdictional disputes.

At the same time, such treaty-based disputes (i.e., involving the WTO as a treaty-based organization and RTAs) consist of parties that are both governed by WTO and RTA law. It might be objected that such treaty conflicts are not analogous to true conflicts in the private international law sense, where there is a need to choose between entirely different personal laws between the parties.

Nonetheless, it is precisely because RTA disputes are typically “larger,” in that they involve the bilateral relations of the parties, that resort to private international law concepts may prove more suitable to the task of resolving jurisdictional clashes. Our approach seeks to defuse the political tensions surrounding trade disputes generally and WTO–RTA jurisdictional clashes in particular in two related ways.

First, it recognizes that WTO and RTA disputes may operate in slightly different political contexts. Whereas third-party dispute settlement generally is meant to depoliticize bilateral legal disputes between countries and “ringfence” such disputes from crossing into other issues involving the relationship between the two countries, the decision to bring a complaint is political and often implicates the bilateral relationship. Indeed, this can be observed even in the more mature RTA tribunals, such as what happened under NAFTA before the *Mexico – Soft Drinks* case was brought to the WTO. Although disputes in the WTO are not always immune from political influence and ill feeling, the fact that the WTO has almost universal membership and that WTO rulings are formally adopted by all WTO members in the DSB acts as a check against bilateral political spillovers.

Second, turning to private international law devices and analogies, especially rethinking res judicata, estoppel, and other criteria such as the requirement that the two disputes should be identical, mandatory rules, and legal impediments to the exercise of WTO jurisdiction, would mean resorting to rules and principles that, by their nature, are psychologically less “political” than the corresponding rules under international economic law or even public international law. Compared with public international law rules, private international law rules provide a softer, less intrusive model of normative
integration. As Broude argues, normative integration that creates fewer pressures toward authority integration has a much better chance of being adopted by tribunals and thus a better prospect of attaining its normative goals.\footnote{Broude, op. cit.} Hopefully, conflict of laws–based thinking can ultimately point the way through the layers of international agreements and enable us to realize what trade is, ultimately, really about – transactions between private firms and the activities of private individuals who trade in order to improve their lives.

Third, there is a typical consideration that is usually taken to justify the forum non conveniens doctrine that the panel in \textit{Mexico – Soft Drinks} overlooked. There is no reason that, in the absence of express agreement, the claimant should be favored over the defendant in its choice of forum.\footnote{Briggs, \textit{Conflict of Laws}, op. cit., 94} WTO panels and the Appellate Body may need to grapple with such questions in the future concerning the need to do justice between the parties where the circumstances may be such that the issue cannot so easily be evaded by invoking mandatory WTO rules and policies. As the authorities stand at present, the Appellate Body’s position seems to be that the parties have agreed to WTO dispute settlement and such agreement cannot be obviated by pleading that the dispute could be brought elsewhere. Nevertheless, it can be seen how tenuous the Appellate Body’s ruling is. It was no coincidence that Mexico’s arguments were based in large part on equity, and there is no sign that the issue will disappear anytime soon. A deeper engagement with highly developed private international thinking on the matter seems warranted in those cases in which the relevant public international law rules may be too ill developed to handle such questions.

Finally, the allocative thesis as applied by the WTO Appellate Body presently relies on public international law doctrine to determine both jurisdiction and applicable law. In doing so, it will divide up jurisdiction between the two tribunals, or it will allocate (exclusive) jurisdiction to an RTA tribunal on the basis of a \textit{lex specialis} or later treaty rule in the RTA. Neither of these options helps the WTO to address the proliferation of RTAs and the continued politicization of jurisdictional clashes. The WTO as a multilateral body that is not concerned with the overall bilateral relationship between the two parties could seek to defuse this growing political problem by turning toward private international law analogies. There is no reason in either policy or principle that should preclude WTO panels and the WTO Appellate Body from exercising their jurisdiction while applying RTA rules, because a proper law analysis points toward the application of an RTA rule.
It might be asked, by what authority can WTO panels and the Appellate Body resort to such analogies or other private international law devices? One answer is that they can do so on the same basis on which the doctrines of res judicata, *lex specialis*, and other principles have been discussed by panels and the Appellate Body: Not that they are public international law principles per se, but because they are principles of legal reasoning based ultimately on logic, experience, and the developing practice and jurisprudence of WTO dispute settlement.\(^{124}\)