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MASTER THESIS

MILE 6

**THE INTERACTION BETWEEN THE DISPUTE SETTLEMENT MECHANISMS OF
THE AMERICAN REGIONAL TRADE AGREEMENTS
AND THE WTO**

Student: Pamela Apaza

Supervisor: Fernando Pierola

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Abstract

Over the past years, the number of free trade agreements and customs unions has increased notably around the world. The proliferation of these regional trade agreements may be due to many causes, to guarantee preferential access to the market of a strategic trading partner, to accelerate the process of liberalization, to lock in domestic reforms. This phenomenon has diverse legal and economic repercussions for the Parties and other actors involved; including legal repercussions in terms of dispute settlement.

One consequence of the proliferation of regional trade agreements is the possibility that they make it possible for the preferential Parties to *forum shop* or to choose the most convenient forum for a particular dispute among the different fora available. This new possibility makes it crucial for the Parties and private entities to identify which are the factors at play in forum shopping in order to understand the *pros* and *cons* of each forum.

A second repercussion of the proliferation of regional trade agreements in dispute settlement, are the *conflicts of law* and *conflicts of jurisdiction* that might appear before adjudicating bodies. In this regard, it is important to know which are the rules and principles that those in charge of handling the disputes should apply in case of conflict. Until now, this issue has not been further discussed; although, this analysis is important in order to reduce the costs of these conflicts in terms of lack of predictability, fragmentation of international law and waste of resources.

The analysis of forum shopping and conflicts of law and jurisdiction will be limited to some American regional trade agreements and the WTO. As we will see, all these agreements and their dispute settlement mechanisms differ in various aspects, including their nature, scope and reach. This analysis is an opportunity to identify the advantages of each mechanism, which I consider will be useful in future negotiations or reviews of these mechanisms. Similarly, the analysis of the conflicts of law and jurisdiction derived from the interaction of these agreements may be useful for future discussions regarding the inclusion of provisions at the multilateral level necessary to prevent or reduce such conflicts. I consider that the tendency towards a proliferation of regional trade agreements renders this analysis important.

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List of Abbreviations

AB	Appellate Body
AC	Andean Community
DGC	Developing Countries
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
ICJ	International Court of Justice
ILC	International Law Commission
MERCOSUR	Mercado Común del Sur
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
NGO	Non Governmental Organization
NGA	NAFTA Generation Agreement
RTA	Regional Trade Agreement
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
US	United States
WTO	World Trade Organization

Add: NT, MFN, SPS, TBT, AC

Introduction

This thesis addresses two consequences of the proliferation of American Regional Trade Agreements (RTAs): forum shopping and conflicts of law and jurisdiction between American RTAs and the WTO.

The object of study is geographically delimited to some American RTAs which are among the most representative agreements in this hemisphere: the Andean Community, the MERCOSUR, the NAFTA and four other new agreements that follow the model of the latter (NAFTA Generation Agreements). The main reasons for selecting these agreements are their different levels of integration and diverse composition: while the Andean Community and MERCOSUR constitute South–South Agreements; the NAFTA and NAFTA Generation Agreements constitute North– South Agreements.

In Chapter 1, I present an overview of the nature and scope of the RTAs, including their dispute settlement mechanisms. In Chapter 2, I focus on selected features of the American RTAs and the WTO, which I consider the most relevant at play in forum shopping. The objective of this Chapter is not to analyze the pros and cons of forum shopping itself, but instead to determine the advantages and disadvantages it provides to the parties with respect to the RTAs and the WTO. In Chapter 3, I will address the problems of conflict of law and conflict of jurisdiction according to the provisions and principles applicable to the resolution of these conflicts.

In the last part, I will present my conclusions. In this regard, although there seems not to be *per se* a better mechanism for the resolution of disputes; it is possible to identify important differences between the RTAs and the WTO mainly in terms of timeframes, nature of the decisions and remedies available. On the other hand, the customary rules of interpretation of treaties seem to allow WTO panels to apply RTA provisions in case of conflicts of law and jurisdiction within the scope of the WTO covered Agreements. In addition, I will refer to some elements found in my analysis, which could be considered in future discussions and negotiations of the dispute settlement mechanisms, including the review of the DSU of the WTO.

Chapter 1

General Overview of the RTAs in the Americas

The following Chapter presents an overview of the RTAs under study, including their type of regional integration, institutional structure and dispute settlement mechanisms. This overview is important in order to understand the different nature and scope of the RTAs, which influence the design of their dispute settlement mechanisms. They appear in chronological order, according to their date of entry into force.

1.1 Andean Community

The Andean Community is one of the oldest regional schemes. Its foundation goes back to the Treaty of Cartagena of 1969, signed by Bolivia, Colombia, Ecuador and Peru¹. In its early years, the Andean Community experienced troubles with the harmonization of policies and effective implementation of a common external tariff, which so far, has delayed the initial objective of a customs union.

The Andean Community is a sub-regional organization with international legal capacity and a relatively high level of institutionalization². It has supranational organs, like the General Secretariat and the Andean Court of Justice³. The community legislation is of supranational nature. The norms and regulations adopted by the organs of the community are binding and have direct effect in the territory of its Members since they are published in the Official Gazette of the Andean Community⁴.

The areas covered by the community legal system include market access in goods (NT & MFN), intellectual property, services, competition and, to a lesser degree, investment and environment. In many of these areas the community legislation is based on the Agreements of the WTO,

¹ Venezuela was a Member of the Andean Community until April 2006. On September 2006, Chile became an Associated Member of the Andean Community. In 2005, the average of intra regional trade share was 11%. See Andean Community web page: <http://www.ccomunidadandina.org/>

² The main organs of the AC are: i) Andean Presidential Council; ii) Council of Foreign Ministers; iii) Andean Community Commission; iv) General Secretariat; and, v) Andean Court of Justice. Cartagena Agreement, Article 26.

³ The Secretariat not only has administrative, but also surveillance functions, like to ensure the application and compliance of the community laws. Cartagena Agreement, Article 30.

⁴ Statute of the Court, Article 3.

particularly in the areas of trade remedies (antidumping⁵ and safeguards⁶), sanitary and phytosanitary measures (SPS)⁷, technical barriers to trade (TBT)⁸, customs valuation⁹ and intellectual property¹⁰.

The bodies in charge of solving the disputes regarding the violation and the interpretation of the rules of the Andean system are the Secretariat, which is in charge of the initial actions on violations of Andean Community law and burdens and restrictions to trade¹¹; and in the last instance, the Andean Community Court of Justice, created in 1979¹². The permanent Court has jurisdiction over five types of legal actions: i) breaches of community law, ii) preliminary ruling¹³, iii) nullity action of a community act¹⁴, iv) action for inactivity¹⁵, and v) labor actions; which are fairly similar to the proceedings of the European Court of Justice. I am going to refer mainly to the action for breaches of community law, due to its similarities with the disputes brought under the Dispute Settlement Understanding - DSU under the covered Agreements, including Article XXIII (b) of the GATT of 1947 (nullification of benefits with violation of obligations). In the other four cases, there is no equivalent proceeding within the WTO. Eventually, I am also going to refer to the action against burdens and restrictions to trade initiated by the Secretariat, which may be regarded to a certain extent as similar to the WTO disputes on nullification and impairment without violation.

⁵ Decision 283, which ratifies the rights and obligations of the Members under the WTO Agreements.

⁶ Decision 452, Safeguards Applicable to Third Countries.

⁷ Decision 515.

⁸ Decisions 376, 419, 562 and 506.

⁹ Decision 378.

¹⁰ Decisions 486, 345, 351 and 391.

¹¹ Cartagena Agreement, Articles 73 and 74.

¹² Treaty establishing the Court of Justice of the Andean Community, adopted on May 28th 1979. The Protocol of Cochabamba, which modified the Treaty of the Court and established the actual functions and competence of the Court, has been in effect since 1999.

¹³ The Preliminary Rulings allow the Court to ensure the uniform application of the Andean legal system by domestic judges within the Member Countries. The interpretations made by the Court are binding. The Court's interpretation must be limited to specifying the contents and scope of the provisions comprising the Andean Community norms. The national judge shall apply the interpretation to the concrete case. Treaty establishing the Court, Articles 32 to 36.

¹⁴ The Nullity Action declares the nullity of any decision, resolutions and agreements- secondary norms- if enacted or agreed upon in violation of the main provisions comprising the AC legal system –primary norms-. Treaty establishing the Court, Articles 17 to 22. Primary norms are the constitutive Treaties, its protocols and modifications. Secondary norms are the Decisions of the organs, Resolutions of the Secretariat and the agreements adopted by the Members which do not constitute primary norms.

¹⁵ The Action for Inactivity proceeds against the organs of the Andean Community in case they abstain from carrying out their functions. Treaty establishing the Court, Article 37.

The procedure on breaches of the community law has two stages, a preliminary stage before the Secretariat and a judicial stage in strict sense, before the Court. The preliminary stage may be initiated ex officio by the Secretariat or by a claim presented by the Member Countries or private persons whose rights are affected by the violation of the community law. The community rules recognize expressly to the disputing parties, among others, the right to due process¹⁶.

1.2 MERCOSUR

In 1991, Argentina, Brazil, Paraguay and Uruguay founded MERCOSUR (Mercado Comun del Sur)¹⁷. In comparison to the Andean Community, MERCOSUR has a lower level of institutionalization, which contrasts with its higher level of economic development. The size of its combined national markets makes MERCOSUR one of the heavyweights of regional integration. Its objective is the creation of a common market; however until now, it can be classified as a “*free trade area and an as yet incomplete customs union*”¹⁸.

The institutional structure of MERCOSUR is based on inter-governmental organs¹⁹, which have no competence to adopt supranational legislation with direct effect²⁰. Members have to incorporate MERCOSUR norms into their domestic legislation before they become binding²¹. All the decisions of its organs are adopted by consensus of the Member Countries. The areas covered by the MERCOSUR system include market access in goods, rules of origin, trade remedies, labor and environment.

The settlement of disputes is regulated by the Protocol of Olivos²², which replaced the Protocol of Brasilia in 2004. The Protocol is applicable to the disputes that may arise between the Members regarding the interpretation, application and violation of the MERCOSUR legal

¹⁶ Statute of the Court, Article 35.

¹⁷ Founded with the subscription of the Protocol of Asuncion.

¹⁸ Lehmann, Julia (2005): Regional Economic Integration and Dispute Settlement Outside Europe: A Comparative Analysis, in: *International Law Forum du droit international* vol 7, pp. 54-62.

¹⁹ The main organs of MERCOSUR are: i) Committee of the Common Market; ii) Common Market Group; iii) the Trade Commission; and iv) the Secretary. Protocol of Ouro Preto, Article 1.

²⁰ Protocol of Ouro Preto, Article 42. The juridical sources of MERCOSUR are the Treaty of Asuncion, its protocols and additional instruments; the Treaties celebrated in the framework of the Treaty of Asuncion; and the Decisions, Resolutions and Directives adopted by the organs of MERCOSUR. Protocol of Ouro Preto, Article 41

²¹ Protocol of Ouro Preto, Article 40. According to the information provided by officials of MERCOSUR, until August 2006 only 68 % of MERCOSUR laws has been incorporated by the Members.

²² Also see the “Regulation of the Protocol of Olivos applicable to the disputes in MERCOSUR” (Decision 3702). This regime has a transitory nature. The Parties are supposed to review it in order to adopt a permanent dispute settlement mechanism, before completing the convergence of their common external tariff in 2006.

system; which is fairly similar to the procedures brought to the DSU of the WTO. The bodies in charge of applying the Protocol are the panels ad hoc and the Tribunal of Review. As in the WTO, the procedure has five stages: i) direct negotiations; ii) intervention of the “Common Market Group” (political stage - optional); iii) panels ad hoc; iv) Court of Review; and, v) implementation.

1.3 NAFTA

The North American Free Trade Agreement –NAFTA- between Canada, Mexico and the United States (US) was concluded in 1992 and came into force on January 1994. The percentage of intra-regional trade within the NAFTA and inter-regional trade makes it one of the most important free trade areas in the world. In 2004, the trade in goods within the free trade area represented 56% of all trade by NAFTA Countries²³.

The NAFTA does not have an institutional structure in a strict sense. It has a Free Trade Commission, compound by cabinet level officials, who meet at least once a year. The Commission’s main functions are to supervise the implementation of the Agreement, resolve disputes regarding its interpretation or application and consider “any other matter” that may affect the operation of the Agreement. All the decisions of the Commission are taken by consensus, except as otherwise it may agree²⁴. The NAFTA also has a Secretariat, composed of National Sections (permanent offices designated by each Party in their territory), whose functions are mainly administrative.

The NAFTA covers all the areas included in the WTO Agreement, e.g. market access in goods, services and intellectual property, but goes further, covering other areas that are not regulated by the WTO, e.g. competition policy, environment and labor. Many of the provisions of the NAFTA are similar or incorporate WTO provisions, e.g. trade remedies, SPS, TBT and intellectual property.

Contrary to the WTO Agreements, the NAFTA system includes various dispute settlement mechanisms: i) a general inter-governmental dispute settlement mechanism for matters affecting

²³ WTO (2004), International Statistics, Trade by Region, Geneva, p.9. See: http://www.wto.org/english/res_e/statis_e/its2005_e/its05_byregion_e.pdf

²⁴ NAFTA, Article 2001.

the operation of the Agreement (Chapter 20); ii) a binational panel to review domestic antidumping and countervailing duty determinations (Chapter 19); iii) an Investor – State arbitration mechanism for investment obligations (Chapter 11)²⁵ – with the possibility for a Party to start a procedure under Chapter 20 in case of failure to comply with the final award; iv) a specific mechanism for financial services disputes (Chapter 14)²⁶; and, v) dispute resolution systems for environmental and labor disputes (Side Letters)²⁷. In addition, the Agreement includes special provisions for dispute resolution (as for example more specific consultations –is the case of SPS and TBT). There are also certain provisions applicable to domestic judicial and administrative procedures for the enforcement of NAFTA obligations²⁸.

Of all the procedures, the intergovernmental mechanism provided in Chapter 20 is the most similar to the WTO dispute settlement system²⁹. Therefore, I am going to refer mainly to this procedure; although sometimes I will also refer to the binational panels composed under Chapter 19 and the Investor – State mechanism of Chapter 11.

Chapter 20 provides a general state-state mechanism for the avoidance or settlement of all disputes between Parties regarding the interpretation or application of the Agreement. It applies whenever a Party considers that an actual or proposed measure is or would be inconsistent with the NAFTA rules; and in case of nullification or impairment without violation under the provisions of the covered chapters³⁰.

²⁵ Chapter 11 (Investment) provides for binding arbitration in favor of private investors against a Party in the Agreement, under ICSID (International Center for the Settlement of Investment Disputes) or the arbitration rules of UNCITRAL (United Nations Commission on International Trade Law). Diverse remedies are applicable like: monetary damages, applicable interests, restitution of property (among others).

²⁶ Provides a special List of experts in financial services. There is no possibility of cross retaliation in financial disputes, unless another sector is also involved in the dispute.

²⁷ Provide specific rules in case of persistent patterns of failing to enforce effectively and constantly their environmental or labor laws. It provides the possibility to apply fines that can go up to US\$ 20 million. In case of not paying the fine, trade sanctions may be applied.

²⁸ In the areas of customs (Chapter 5), government procurement (Chapter 10), intellectual property (Chapter 17), and technical regulations and standards (Chapters 7 and 9).

²⁹ Chapters 20 and 19 of NAFTA (intergovernmental and binational panels, respectively), are based on the Canada – US FTA (CFTA), which was replaced by the NAFTA.

³⁰ NAFTA, Article 2004. Annex 4 includes the following (covered chapters): Trade in goods (except for those provisions of Annex 300-A -Automotive Sector- or Chapter Six -Energy- relating to investment), TBT, Cross Border Trade in Services, and Intellectual Property.

The procedure is composed of five stages (Consultations, Intervention of the Free Trade Commission – political stage-, Panel ad hoc, and Non Implementation-Suspension of Benefits). The NAFTA procedure guarantees basic legal rights according to the principle of due process.

1.4 NAFTA Generation Agreements

By “NAFTA generation agreements” -NGAs, I refer to some agreements which were negotiated under the NAFTA model: Chile – US FTA³¹; Central American Trade Agreement (CAFTA) subscribed between Costa Rica, Republica Dominicana, El Salvador, Guatemala, Honduras, Nicaragua and the US³²; Peru - US TPA and Colombia – US TPA³³. As mentioned before, due to their diverse composition all these NGAs can be characterized as “*North - South*” free trade agreements; as opposed to “*South – South*” agreements (e.g. Andean Community and MERCOSUR).

All NGAs provide the creation of a Commission and a Secretariat whose functions resemble those provided in the NAFTA. The NGAs cover essentially the same substantive areas included in the NAFTA; although in some specific areas, they establish obligations that go beyond NAFTA, e.g. environment and labor. As in the NAFTA, the NGAs incorporate by reference many substantive provisions of the WTO Agreements, including in SPS, trade remedies, services and intellectual property rights.

The dispute settlement mechanisms of all NGAs are almost the same. These agreements concentrate the rules for the resolution of disputes mainly in one inter –state mechanism³⁴, which is similar to the procedure of Chapter 20 of the NAFTA; although there are some important differences as we will see in the next Chapter.

³¹ Entered into force on January 1st 2004.

³² Entered into force on January 1st 2005.

³³ Not in force yet. In both cases, it is pending the approval of the US Congress.

³⁴ Except for the Investor – State and Financial Services mechanisms that still could be find in the NGASs.

Chapter 2

Forum Shopping

The American RTAs provide to their Parties the possibility of forum selection or forum shopping; in other words the possibility of choosing, between the WTO and the RTAs as the most convenient forum for the settlement of their disputes. The selection of forum is often an expression of the importance that Parties give to the system of norms that may be enforced by the related dispute settlement mechanism³⁵. While some commentators have been highly critical of forum shopping; others have seen it as a legitimate manifestation of a party's autonomy that contributes to greater utilization of the judicial legal systems³⁶. After presenting the conditions for forum shopping, I will identify and compare the factors at play in forum selection in order to determine the *pros* and *cons* of each forum. The factors are divided in two categories, according to the possibility the agreements offer to choose between the substantive law (*choice of law*) and the forum (*choice of forum*). In addition, the factors related to the choice of forum are classified into institutional, procedural and political factors.

2.1 Conditions for Forum Shopping

In order for forum shopping to be possible, certain conditions must be met. Firstly, *ratione personae*, both disputing parties must be bound by more than one international trade regime. Secondly, the issue matter of dispute must be regulated under the substantive provisions of both of those legal regimes; or, in other words, there must be an identity *ratione materiae*. Thirdly, there must be an overlap *ratione temporis* or both norms have to exist or interact at the same time³⁷.

³⁵ Kwak, Kyung and Marceau, Gabrielle, *Overlaps and Conflicts of Jurisdiction between the WTO and RTAs* (2003), *Overlaps and Conflicts of Jurisdiction between the WTO and RTAs.*, in: *Canadian Yearbook of International Law*, Vol. XLI (Canada, CYL), pp. 83 – 152.

³⁶ Shany, Yuval (2004): *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, pp. 332.

³⁷ Pierola, Fernando and Horlick, Gary (Not published yet): *Solución de Diferencias de los Acuerdos Norte – Sur en las Américas y en el Acuerdo sobre la OMC: Consideraciones para la elección del foro mas conveniente*. See also Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*; and, Pauwelyn, Joost: *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions Paper prepared for a Southern African Development Community (SADC) Round Table held in Stellenbosch, South Africa, on March 19th 2003.*

The first and third conditions are self explanatory. All the parties to the RTAs under analysis are also bound by the WTO Agreements, which interact at the same time. The second requirement requires more attention. As mentioned before, all the RTAs considered here regulate areas which are also covered at the multilateral level. Moreover, in many cases the RTAs incorporate or include similar provisions to those contemplated in the WTO Agreements. Therefore, the possibility of an overlap is very high. However, it must be noted that even when certain areas are regulated by both, the RTA and the WTO Agreements; this sole fact does not mean that there is an overlap *ratione materiae*. Furthermore, there may be certain areas which are regulated in a totally different manner or are excluded of the jurisdiction of one of the dispute settlement mechanisms³⁸. Basing on a review of the RTAs and the WTO Agreement, the following chart summarizes the substantive areas covered by the chosen RTAs and the WTO Agreements, showing the areas of potential overlap:

Title: Comparison between the Substantive Areas Covered by the RTAs and the WTO.

	AC	MERCOSUR	NAFTA	NGAs	WTO
Agriculture	x		x	x	x
Market Access in goods NT & MFN	x	x	x	x	x
R. Origin	x	x	x	x	x
Customs Procedures	x		x	x	x
SPS	x	x	x	x	x
TBT	x	x	x	x	x
Antidumping	x	x	x	x	x
Countervailing Duties	x	x	x	x	x
Safeguards	x	x	x	x	x
Government * Procurement	x	x	x	x	x

³⁸ This is the case of Antidumping and Subsidies under the NAFTA, where both matters are subject only to the review of binational panels according to the domestic laws on antidumping and countervailing duties. Chapter 20 of the NAFTA has no jurisdiction over these matters. NAFTA, Chapter 20, Article 2004. In addition, in the NGAs, the regional dispute mechanism is not applicable to the SPS Chapter.

Investment	X		X	X	X
Services	X	X	X	X	X
Competition	X		X	X	
Intellectual Property	X		X	X	X
Labor	X	X	X	X	
Environment	X	X	X	X	

Source: Own design.

* In the case of the Andean Community, is basically limited to national treatment. In the WTO, the provisions on government procurement are included in the Plurilateral Agreement on Government Procurement, which is binding only for those Members that accepted the obligations contained in it.

In addition to the requirements mentioned before, it is necessary to analyze if the Agreements include specific clauses on choice of forum, which eventually might limit the possibility of forum shopping. For example, the Andean Community Treaty establishes exclusive jurisdiction in favor of its Court: “*Member Countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding, except for those stipulated in this Treaty*³⁹”. Chapter 20 of the NAFTA also establishes preferential jurisdiction *ratione materia* in disputes related to the environment or health protection, when the respondent asserts the NAFTA jurisdiction⁴⁰. These clauses raise the question of whether a panel or the AB within the WTO would accept the alleged prevalence of the RTAs by the defendant, when the matter of dispute is also subject to WTO provisions⁴¹. Until now, this question has not been answered in WTO jurisprudence⁴². In this regard, it would be necessary to see first if there is a legal basis for such analysis under WTO law. Chapter 3 will delve further into this issue.

2.2 Factors at Play in Forum Selection

2.2.1 Choice of Law

³⁹ Treaty establishing the Court, Article 42.

⁴⁰ NAFTA, Chapter 20, Articles 2005.3 and 2005.4.

⁴¹ Marceau, Gabrielle (1997): Dispute Settlement Mechanisms, Regional or Multilateral: Which One is Better ?, in: *World Trade Journal*, pp. 25-81.

⁴² See Marceau, Gabrielle, Dispute Settlement Mechanisms Regional or Multilateral; and Pauwelyn, Joost: Going Global, Regional, or Both?

When analyzing the possibility of forum shopping between any of the RTAs and the WTO according to *ratione materia* criteria, the following situations may appear: (i) the provisions of the RTA are the same as the provisions of the WTO Agreements; (ii) the provisions of the RTA are more liberal than the provision of the WTO (establish rules that support trade liberalization more strictly); or, (iii) the provisions of the RTA differ from the provisions of the WTO or regulate the matter from a different point of view⁴³. The possibility of forum shopping appears clearly in (i) (same provisions). Moreover, forum shopping may be possible in certain cases under (ii), where the RTA provisions based on WTO provisions go further than the WTO only in certain aspects (“WTO plus”)⁴⁴. In addition, a situation may occur in **iii**, in which a conflict of law might appear. I will refer to the latter in more detail below.

Due to the substantive overlap between RTA and WTO Agreements and the consequent possibility for forum shopping, the issue of choice of law becomes crucial. One may assume that the complainant usually chooses the forum by analyzing “*under what treaty its claims stand the best chance*”⁴⁵. According to Pauwelyn, in most cases the provisions under the free trade areas will be stricter; therefore, complainants will often have an incentive to bring their case to the FTA and not the WTO⁴⁶. This may be true to some extent, considering that the requirements established in Article XXIV of the GATT for the formation of free trade areas and customs unions establish conditions towards a deeper level of liberalization⁴⁷. However, it is not necessarily true for all cases. For example, the NAFTA and the NGAs recognize expressly, as an additional general exception, the right of the Parties to apply measures to protect the environment⁴⁸. Even when Article XX of the GATT includes provisions related to the protection of the environment (literals b and g), some may argue that they are not as explicit as the environmental exception provided in the NAFTA. A NAFTA party might invoke this exception and attempt to dissuade the complainant from pursuing a WTO dispute.

⁴³ Pierola Fernando and Horlick Gary, *Supra* 37.

⁴⁴ It must be noted that a WTO plus provision is based on a WTO provision; although it goes beyond or is more liberal than the latter (has a plus). Thus, it is possible to find an overlap with respect to the WTO provision used as a basis for the RTA provision.

⁴⁵ Pauwelyn, Joost, *Going Global, Regional, or Both?*, p. 253.

⁴⁶ Pauwelyn, Joost, *Supra* 45.

⁴⁷ Requires that the duties and other regulations of commerce shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing prior the constitution of the FTA or CU – Article XXIV Paragraph 5 a) and b)-; and duties and other restrictive regulations of commerce are eliminated – Article XXIV Paragraph 8 a) and b).

⁴⁸ NAFTA, Article 2101.

Therefore, for analyzing the consequences of forum shopping it is necessary to take into account not only the legal basis of the claim, extension of coverage and possible interpretations; but also the possible defenses or exceptions available for the violating party under the respective agreements. In any case, the convenience of one forum over the other will depend on the particular circumstances of each case.

2.2.2 Choice of Forum

2.2.2.1 Institutional features

The RTAs under analysis have different nature and institutional structures among themselves and when compared to the WTO. While the WTO is a formal multilateral organization with a high level of institutionalization; the NAFTA and NGAs do not constitute international organizations, nor do they have an institutional structure in the real sense. On the other side, the Andean Community and MERCOSUR have a high level of institutionalization, but constitute regional organizations.

Firstly, the multilateral nature of the WTO, as opposed to the regional or bilateral nature of the RTAs, offers the benefit of “*exposure*”⁴⁹. The WTO acts as an “international magnifying glass” of countries trade practices⁵⁰. The risk of exposure induces compliance due to the reputation costs derived from violations of trade commitments. In addition, the multilateral nature of the WTO offers the possibility to obtain a broad support of other Members in a dispute, as parties or third parties. I will refer more extensively to this support later, when discussing the procedural and political considerations for forum shopping.

Secondly, another advantage of the WTO derived from its institutional structure is the support offered by the Dispute Settlement Body (DSB) to the Members. The DSB (integrated by all the Members) has the authority, among others, to maintain surveillance of implementation of rulings and recommendations⁵¹. It intervenes directly in different stages of the procedure such as the

⁴⁹ Term used by Tussie, Diana and Delich, Valentina, *The Political Economy of Dispute Settlement: A case from Argentina*, http://www.wto.org/english/res_e/booksp_e/casestudies_e/casel_e.htm. The term “exposure” refers to the advantages that the multilateral forum offers for the publicity of country’s trade practices.

⁵⁰ Supra 49.

⁵¹ DSU, Articles 2.

implementation of the reports of the panel and Appellate Body (AB)⁵². The institutional support of the DSB may be more advantageous in certain cases when compared to the North – South Agreements (NAFTA and NGAs) due to the lack of institutional structure that characterizes these agreements and the economic asymmetries among the Parties⁵³.

In the case of the South –South agreements, especially the Andean Community, the Secretariat also has surveillance functions, as to ensure the application and compliance of the community laws. Furthermore, while the WTO Agreement has not provided any organ with any power to initiate investigations or disputes against Members⁵⁴; in the Andean Community, the Secretariat has legal standing to initiate procedures against the countries in case of violation of the community norms. Interestingly, from the 83 cases presented before the Court, 73 have been initiated by the Secretariat. The possibility of the Secretariat to act ex officio is also exercised actively through the action against burdens and restrictions to trade, 70 actions initiated until now⁵⁵. The power given to the Secretariat to act ex officio constitutes an advantage for the Andean Countries, who can join the claims presented by the Secretariat.

In sum, the multinational nature of the WTO constitutes an advantage in forum shopping, as compared to the RTAs due to the benefits of exposure. The institutional support of the DSB also constitutes an advantage as compared to the North – South agreements; but not as compared to the Andean Community mainly due to the powers conferred to the Secretariat to initiate investigations ex officio against the Andean Countries. The possibility for these countries to join the procedures initiated by the Secretariat might play in favor of the Andean Community in forum shopping.

2.2.2.2 Procedural Aspects

2.2.2.2.1 Timeframes

⁵² DSU 21.6 and 22.8.

⁵³ Mc Call Smith, James (2000): The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts, in: *International Organizations*, 54, 1, pp. 137-180.

⁵⁴ Marceau, Gabrielle (1997), The Dispute Settlement Rules of the North American Free Trade Agreement: A thematic Comparison with the Dispute Settlement Rules of the World Trade Organization, in: Ernst- Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System, Studies in International Economic Law*, Volume 11.

⁵⁵ See <http://www.comunidadandina.org/canprocedimientosinternet/ListaExpedientes11.aspx?CodProc=2&TipoProc='S'>.

The timeframe of a dispute is a crucial factor to take into consideration when selecting the most appropriate forum: the faster the procedure, the faster the trade barriers are likely to be eliminated. Longer procedures go along with higher costs for the complaining party due to the maintenance of the restrictions. The timeframes of the procedures among all the agreements and the DSU varies considerably through all the stages of the mechanism. As we will see, in general, all the procedures include consultations, political, judicial and implementation stages.

The different timeframes of the consultations and political stages among the agreements might not seem significant, viewed within the total timeframe of these processes. However, the different timeframes allocated to these stages together with the nature of the political stage (optional vs. mandatory) give us a hint of the importance allocated by the countries to this part of the procedure. While in MERCOSUR the consultations take only 15 days and the intervention of the Commission is optional; in the NAFTA⁵⁶ and NGAs the consultations take 60 and 80 days respectively and the intervention of the Commission (political stage) is mandatory. In both cases, the Commission may have recourse to good offices, mediation or such other dispute resolution procedures. To the contrary, the Andean Community does not provide for consultations and a political stage. In the WTO the period of consultations is 60 days and good offices are voluntary.

On the other hand, the judicial stage in the Andean Community is composed by a preliminary stage before the Secretariat and the Court of Review that take on average 60 days and 1 year respectively⁵⁷. In MERCOSUR the panel selection shall take 30 days and the resolution stage 90 days. In case of review, the Court has no more than 45 days to resolve. Interestingly, in the Andean Community and MERCOSUR it is possible to request the adoption of precautionary measures in cases of irreparable or serious damage at the beginning of the procedure⁵⁸. In the NAFTA the selection of the panel should take in theory 20 days; however, in practice this period

⁵⁶ If the dispute includes perishable goods, 15 days. In case another party joins the consultations latter, this shall not exceed 45 days. NAFTA, Article 2007. The Commission has 10 days to convene and 30 to offer its good offices and try to solve the dispute. NAFTA, Articles 2007 and 2008.

⁵⁷ In procedures started by Members, if the Secretariat rules that there is no violation or fails to issue its ruling within 60 days after the claim was filed, the Member may appeal directly to the Court. Treaty establishing the Court, Article 24. The information regarding the timeframe of a procedure before the Court was provided by officials of the Andean Community.

⁵⁸ Treaty establishing the Court, Article, 28 (Andean Community); and Protocol of Olivos, Article 15 (MERCOSUR).

has proved to be much longer mainly due to the lack of consensus on the list of panelists⁵⁹. The final report must be issued within 120 days⁶⁰. In the NGAs the selection of the panel should not exceed 36 days and the issue of the final report 150 days⁶¹. A particularity of the NAFTA and NGAs is that all the timeframes up to the issuance of the final report may be extended by agreement of the parties. In the WTO the period of establishment and composition of the panel takes 30 days⁶². Since its composition, the panel has no more than 9 months to issue its report⁶³; however it usually takes longer. In practice the period between the establishment of the panel and the adoption of the report by the DSB takes 420 days⁶⁴. In case of appeal, the Appellate Body shall issue its report within 90 days⁶⁵.

The implementation period among the RTAs and the WTO is significantly different. In the Andean Community the party in violation has 90 days to comply with the decision; while in MERCOSUR, if the panel or Court does not establish the period of implementation, this should be 30 days. In case of non-compliance, the Court has 30 days to issue its determination⁶⁶. In the NAFTA and NGAs, the parties have 30 and 45 days respectively to agree on the resolution of the dispute after the final report is issued⁶⁷. If there is no agreement within that period under the NAFTA, the complaining party is automatically authorized to suspend benefits. The panel has 60 days to determine the level of suspension of benefits, if requested. In the NGAs, the party in violation has 30 days to negotiate the payment of compensation; if no agreement is reached, the

⁵⁹ Grantz, David A. (1999): Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties, in: *American University International Law Review*, vol, 14, p. 17 and 23; and Steger, Debra (2004): Dispute Settlement under the North American Free Trade Agreement, in: Lacarte, Julio and Granados, Jaime, *Inter Governmental Trade Dispute Settlement*, Cameron May, p. 296. At the present, the list of panelists is completed.

⁶⁰ NAFTA, Articles 2016 and 2017. The NAFTA provides for the emission of a preliminary and a final report. The preliminary report shall no take longer than 90 days. Then, the panel has 30 days to issue its final report.

⁶¹ As in the case of the NAFTA, the NGAs include the presentation of a preliminary and a final report. The difference in terms of timing with the NAFTA is due to the extension of the period for the emission of the preliminary report, while in the NAFTA is 90 days in the NGAs is 120 days (plus 30 days for the final report).

⁶² DSU, Article 8.7. If the parties are unable to agree on the composition of the panel within 20 days, either party may request the Director General of the WTO to determine its composition. The Director General shall appoint the panelists within 10 days, after consulting the parties.

⁶³ Initially this period is of 6 months, with the possibility to extend it for 3 months more. DSU, Article 12.8.

⁶⁴ See www.worldtradelaw.net/dsc/database/adoptontiming1.asp.

⁶⁵ DSU, Article 17.5. The initial period is 60; but it may be extended for 30 days more (in the practice it is usually extended). In any case it can take longer than 90 days.

⁶⁶ Protocol of Olivos, Article 30. The complaining party may suspend benefits prior notification of 15 days in advance. In case of controversy regarding the level of suspension of benefits, the Court has 30 days to issue its determination and the party 10 days to comply it. Protocol of Olivos, Article 32.

⁶⁷ NAFTA, 2019.1.

other party is authorized to suspend benefits. In case of controversy regarding the compliance and the level of benefits suspended, the panel has 120 days to make its determinations⁶⁸.

In the WTO, if there is disagreement regarding the reasonable period for implementation, it must be determined within 90 days⁶⁹. As a general rule, the reasonable period is 15 months. In case of controversy regarding the compliance after the 15 months, the panel may reconvene again to resolve the matter in 90 days; however, this procedure takes, in practice, 170 days⁷⁰. In case of non-compliance, the complaining party may suspend benefits. The procedure to determine the level of suspension of benefits, if requested, takes 60 days⁷¹.

Based on the provisions of the RTAs and the WTO Agreement, the following chart summarizes the different timeframes of the RTAs as compared to the WTO:

Title: Comparison of Timeframes between the RTAs and the WTO⁷²

	AC	MERCOSUR	NAFTA	NGAs	WTO
Diplomatic Stage (Consultations & Commission)	--	15	60	80	60
Panel*	60	120	140	186	420 days
Review (Court/ AB)	365	45	--	--	90 days
Implementation**	90	15	90	165	15 months and 260 days
Total	515 days	195 days	290 days	431 days	15 months and 830 days

Source: Own calculations.

- * In the case of the Andean Community, instead of panel, it is the Secretariat which is involved. Includes the period of composition of the panel, resolution and adoption of the reports by the DSB (WTO).

⁶⁸ See NGAs, e.g. Colombia – US, Article 21.16.3.

⁶⁹ DSU, Article 21.3.

⁷⁰ DSU, Article 21.5. See: www.worldtradelaw.net/dsc/database/paneltiming1.asp. It is not possible for the DSB to authorize the suspension of benefits in case of disagreement on the compliance. This is known as the “sequencing issue”.

⁷¹ DSU, Article 22.6. Benefits shall not be suspended during the arbitration, and only after the authorization of the DSB.

⁷² This chart is referential and does not take into consideration possible delays that might appear, e.g. for the selection of panelists or the lack of implementation of the report.

** Includes timeframe for agreed solution (applicable to NAFTA and NGAs) and procedure for the determination of the level of suspension of benefits. Additionally, includes the reasonable time for implementation (WTO).

The differences in timing among the RTAs and the WTO are notable, principally in the stage of implementation. In the consultations, political and judicial stages, the differences are less dramatic. Regarding the consultations, the lack of this stage in the Andean Community constitutes a disadvantage of this agreement as compared to the WTO, where it has proven to be cost-effective in order to solve disputes⁷³ and useful for the parties in order to gather information for the judicial stage. On the other side, the mandatory nature of the political stage (Commission) and the possibility to extend this stage in the NAFTA and NGAs may constitute a disadvantage of these agreements hence they may allow the complaining party to delay the procedure.

The judicial stage under the NAFTA has been subject to significant delays (about 1 year) in two cases – *Agricultural Products* and *Brooms* - mainly due to the lack of consensus on the roster of panelists⁷⁴. On the other side, it must be noted that in the NGAs, the timeframes for resolution are slightly longer than those provided in the NAFTA. The reason might be, in part, that these periods were too short for the panel to issue its reports on compliance and suspension of benefits. Moreover, the short timelines of the RTAs (particularly MERCOSUR and NAFTA) may be a disadvantage even for the complainants, when preparing their submissions.

In the stage of implementation, the differences among the RTAs and the WTO are mainly due to the 15 months given in many cases by the WTO as a reasonable period to comply. In most disputes, countries have complied before 15 months; although, it still remains possible for a violating country to take advantage of such period –as has actually happened in many cases-, without consequences or sanctions (during this period is not possible to suspend benefits). Moreover, in a significant number of disputes, the violating party has not complied with the panel and AB reports, even after this period⁷⁵. On the contrary, in the case of most RTAs, the

⁷³ From the 344 requests for consultations presented between 1995 and June -2006 (including those that ended in panel and AB reports) 51 constituted mutually agreed solutions and 29 disputes were otherwise amicably solved; while 98 disputes ended in panel and AB reports adopted. Update of WTO Dispute Settlement Cases, WT/DS/OV/27. Any mutually agreed solution reached through consultations has to be consistent with the WTO Agreements. DSU, Articles 3.5 and 3.7.

⁷⁴ *Tariffs Applied by Canada to Certain US- Origin Agricultural Products* and *US Safeguard Action taken on Broomcorn Brooms from Mexico* (Brooms). Grantz, David A., Dispute Settlement Under the NAFTA and the WTO.

⁷⁵ Update of WTO Dispute Settlement Cases, WT/DS/OV/27.

application of sanctions (including the suspension of benefits) proceeds automatically. Even when the application of sanctions is not always an available option⁷⁶ and does not guarantee immediate compliance⁷⁷, it may accelerate the process of implementation. Therefore, the RTAs offer an important advantage for the complainant in terms of timing during the implementation stage. Moreover, the possibility that South – South agreements give to the party affected with the violating measure to request the adoption of precautionary measures may constitute a decisive factor in favor of these fora in certain disputes.

2.2.2.2.2 Standing

While the WTO does not recognize standing to natural or legal persons to submit claims in case of a violation of the WTO Agreements⁷⁸; certain RTAs recognize full or limited standing to private persons and even organs of the agreement.

In the Andean Community, besides the Secretariat and the Member Countries, also natural and legal persons whose rights are affected have standing to present claims⁷⁹. In MERCOSUR, natural and legal persons have limited access to the mechanism of experts in case a Party applies measures with restrictive effect that result in discriminatory practices or in unfair competition, only if the political organ decides the initiation of a dispute⁸⁰. Until now, there have been 6 disputes in the Andean Community and 3 in MERCOSUR initiated at request of private persons⁸¹. The NAFTA and NGAs do not provide access for natural or legal persons to the procedure for matters affecting the operation of the agreement⁸²; although, Chapter 19 of the

⁷⁶ The suspension of benefits usually goes against the country that applies it or is affected with the violating measure (the complainant). These measures often affect other economic sectors, including producers and consumers. This situation gets worse when the dispute involves a small developing country against a developed country.

⁷⁷ In *US Safeguard Action taken on Broomcorn Brooms from Mexico* (Brooms) the violating party (US) complied after 9 months. During this period, the complainant (Mexico) maintained in force trade sanctions in accordance to Chapters 8 and 20 of the NAFTA.

⁷⁸ Under the DSU, only a Member of the WTO can bring a complaint against another Member of the WTO. DSU, Articles 3.2.

⁷⁹ In addition, the direct effect of the community norms (self –executing nature) allows private persons to present claims based on violations of the Andean norms before the local courts. In such cases, domestic courts shall request a “preliminary ruling” to the Court (See Chapter I, Supra 13). Since 1988, there have been 1080 requests of preliminary ruling. See: http://comunidadandina.org/canprocedimiento_sinternet/interpretacion_prejudicial.htm.

⁸⁰ The National Authority and then the Common Market Group, decide the continuation of the particular’s claim. In such case, a group of experts must be composed to pronounce about it.

⁸¹ Information provided by officials of the Andean Community and MERCOSUR.

⁸² However, the NAFTA and NGAS contain some provisions regarding direct effect in domestic judicial review. Article 20.20 (CAFTA) “*Referral of Matters from Judicial or Administrative Proceedings: 1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a*

NAFTA (binational panels to review domestic antidumping and countervailing duty determinations) and Chapter 11 (State – Investment mechanism) recognize full standing to private persons. However, the review of Chapter 19 is based on domestic law⁸³, not on the NAFTA agreement⁸⁴.

The possibility provided for private persons to present a claim directly in case of violations of the agreements definitely constitutes an advantage in favor of some RTAs as compared to the WTO⁸⁵; where private persons necessarily require the support of their government to protect their interests at the multilateral level. This requirement leaves them in a weak position due to the diverse political interests at stake in these disputes. Due to the lack of access for private persons to the multilateral level, the possibilities for forum shopping for these persons are limited. Thus, private persons only have the possibility to present their claims before RTA dispute organs, according to the subject of the dispute and the provisions set in each agreement.

2.2.2.2.3 Selection of Panelists

The systems for the selection of panelists are similar among most RTAs, but different compared to the WTO. Except in the case of the Andean Community, which has a permanent Court, all the RTAs provide the establishment of panels ad hoc. Regarding the qualifications of the panelists, they are almost the same in all the agreements (relevant expertise, objectivity and impartiality)⁸⁶.

In the Andean Community all the judges of the Court are appointed by consensus and must be nationals of the Members. In MERCOSUR, the selection of panelists relies on a list formed by consensus of the Parties. Each party has to select one panelist and his or her substitute from a list. The third panelist and his or her substitute, who can not be nationals of the parties in the dispute,

Party (...), than Party shall notify the other Parties. The Commission shall endeavor to agree on an appropriate response (...).

⁸³ NAFTA, Article 1904.

⁸⁴ Under Chapter 19, the possibility of forum shopping only appears if a Party requests to determine the consistency of a Party's antidumping or countervailing duty proposed law with the WTO (Articles VI or XVI of GATT or the WTO Agreements on Antidumping or Subsidies and Countervailing Measures) or NAFTA provisions. NAFTA, Article, 1903.

⁸⁵ Only the Agreement on General Procurement of the WTO recognizes direct effect with respect to judicial review. There, the WTO does make precise and unconditional WTO rules directly applicable by domestic courts. Lacarte, Julio (1997): *The Future of the GATT/WTO Dispute Settlement System*, in: Petersmann, Ernst, Ulrich, *The GATT/WTO Dispute Settlement System, International Law, International Organizations and Dispute Settlement*, Kluwer Law International, pp.244-245.

⁸⁶ Additionally, in all cases, the panelists are also subject to rules or codes of conduct.

shall be selected by consensus⁸⁷. In case a Member fails to choose a panelist or in case of disagreement regarding the third one, the panelist is selected by lot from the list⁸⁸.

In the NAFTA, the selection of the panel (composed by 5 members) is based on a system of “*reverse- selection*”. Firstly, both parties shall agree on the chairman. If no agreement is reached, the disputing Party chosen by lot shall select a chair who is not a citizen of that Party’s country. Then, each Party shall select two panelists who are citizens of the other disputing Party’s country⁸⁹. The panelists shall “normally” be selected from an indicative roster agreed by consensus⁹⁰. Panelists not selected from the Roster may be challenged⁹¹. The system of the NGAs resembles the system used in commercial arbitrations. Each party selects a candidate and then both parties appoint the chairman by consensus. In case of disagreement the chairman is selected by lot from a list, among those candidates who are not nationals of any of the parties in dispute. Like in the NAFTA and MERCOSUR, the indicative list is set up by consensus⁹². The NAFTA and NGAs require that arbitrators for environmental and labor disputes shall have expertise or experience on these matters⁹³.

Contrary to the MERCOSUR, NAFTA and NGAs, in the case of the WTO there is no attribution by “lot” and the panelists cannot be nationals of the parties or third parties in the dispute, unless the parties agree so. According to the DSU, the parties must agree on the panelists, who are suggested by the Secretariat. In case of disagreement, the Director General, in consultation with the parties, determines the composition of the panel.

Certainly, a selection by lot does not guarantee the selection of the panelist with more *expertise* for a dispute. This situation turns worse if we consider that usually in the RTAs the third panelist

⁸⁷ The arbitrators shall be jurists of recognized competence in the matters objects of dispute and have knowledge of the MERCOSUR legal system. They shall be impartial, independent, and shall not have any interest in the controversy.

⁸⁸ In MERCOSUR, the selection of the panelists is conformed by two Lists (one for the panelists selected by the parties and another for the third panelists). For the conformation of the Lists, each Party presents its own candidates. The Parties may present justified challenges; which prevail in case of no agreement. Protocol of Olivos, Article 11. Currently, the Lists of panelists are available in: <http://.mercosur.int/msweb/principal/contenido.asp>

⁸⁹ If the party fails to choose on time, the panelists are selected by lot from the Roster among those who are citizens of the other Party. NAFTA, Article 2011.

⁹⁰ The List is conformed by 30 individuals. NAFTA, Article 2009.

⁹¹ NAFTA, Article 2011.3.

⁹² For the conformation of the List, each Party shall present a certain number of candidates (which varies depending on the Agreements).

⁹³ See NGAs, e.g. Colombia – US, Article 21.9. If there is no agreement for the designation of these arbitrators, they will be selected by lot from the list.

("the chairman") will be selected by lot. On the other hand, except for the third panelist, the parties will always choose the panelists, who usually will be nationals of the parties in dispute. Even when the appointment by the parties offers them more control in the selection of the panelists, it may undermine the perception of independence of the panelists and thus, the legitimacy of the process due to concerns about possible *bias* of the panelists⁹⁴.

On the other hand, there is a big risk of delay or even blocking of the dispute, due to the requirement of consensus for the composition of the lists, as it happened in the NAFTA – *Agricultural Products* and *Brooms* cases⁹⁵. Even when the selection of panelists has also caused delays at the multilateral level, these are not comparable to the risk of blocking the dispute in the NAFTA⁹⁶.

Thus, for the reasons mentioned above (possible lack of expertise, perception of impartiality and possible delays), in some cases, the parties may prefer to rely on the criteria and experience of the Director General of the WTO to choose the panelists in case of disagreement⁹⁷.

Finally, for the selection of panelists, the particular subject of the dispute must be considered. If the issue requires knowledge of the GATT, directly or indirectly (e.g. criteria for the analysis of the likeness of the products under Article III of the GATT), a WTO panel would be more likely to have expertise on the matter⁹⁸. In contrast, if certain aspects of a dispute require a particular knowledge of the countries Parties of the RTA, it might preferably be dealt with in the RTA. In addition, the requirement for the panelists to have a particular expertise on a matter, e.g. NAFTA and NGAs for environment disputes, may constitute an advantage of these agreements.

⁹⁴ See Loungnaratii, Vilaysoun and Stehly, Celine (2000): *The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organization System: Is North American Regionalism really preferable to Multilateralism?*, in: *Journal of World Trade*, 34 (1): 39-71, p. 46; and Pauwelyn, Joost, *Going Global, Regional, or Both?*, p.251.

⁹⁵ Note that if the panelists are not chosen from the Roster, they may be challenged by the Parties. The requirement of consensus may be more difficult to fulfill in the case of the CAFTA, due to its plurilateral nature. It is important to mention that the RTAs of Colombia – US and Peru – US, solve this problem partially by establishing that the parties may have recourse to the Roster even if it is not complete. Article 21.7.2

⁹⁶ Interestingly, in the process of reform of the DSU there have been proposals directed to reform the WTO system, including some proposals in favor of a permanent adjudicating body. However, there are certain concerns regarding this possibility, mainly related to the costs that such permanent body would represent for the Members.

⁹⁷ Even when many competent panelists find themselves disqualified because of their nationality. See Marceau, Gabrielle, *The Dispute Settlement Rules of the North American Free Trade Agreement*.

⁹⁸ Grantz, David A., *Dispute Settlement Under the NAFTA and the WTO*.

2.2.2.2.4 Possibility to Appeal

An important difference between the North - South RTAs and the WTO is that the former do not include a mechanism of appeal. In contrast, the Andean Community and MERCOSUR provide the possibility of review⁹⁹.

The Appellate Body (AB) of the WTO is limited to issues of law and legal interpretations developed in the panel report¹⁰⁰. The AB may uphold, modify or reverse the legal findings and conclusions of the panel. Although the reports of the AB have binding effect only between the parties to the dispute; in practice, they are used as reference by the WTO panels and by the AB itself in cases related to the same or similar matters. Moreover, some panels of the RTAs with no mechanism of review have cited GATT decisions¹⁰¹. Even when the NAFTA and NGAs provide a provisional report, which may be observed by the parties; it cannot be considered an appeal hence it is the same panel that issued the report the one that addresses the observations. However, under Chapter 19 of the NAFTA (binational panels), it is possible to request an “extraordinary challenge” before a Committee in case of gross misconduct of the panel, bias or serious conflict of interests or violations to the principle of due process¹⁰².

Even when a mechanism of appeal may extend the time of the procedure; from a systemic point of view, it is considered positive in terms of predictability and consistency because it gives more certainty to the parties on how certain disputes would be solved¹⁰³. Therefore, the possibility to appeal can be considered an advantage of the WTO, compared to the North – South agreements.

On the other hand, the spread of a new precedent (which will be applied in all similar cases at the multilateral *fora*), must be carefully considered in the choice of forum¹⁰⁴. For example, in case

⁹⁹ In the Andean Community, the Court decides only after the ruling of the Secretary, which may be considered a first instance. Additionally, there is a petition of review before the Court that is limited to exceptional cases, matters of fact that may have decisively influenced the result of the procedure, providing that the party was not aware of that fact. Treaty establishing the Court, Article 29. In the case of MERCOSUR, as in the WTO, it is limited to matters of law. Protocol of Olivos, Article 17.

¹⁰⁰ The AB is composed of seven persons; three of them serve in the cases, in rotation.

¹⁰¹ *Tariffs Applied by Canada to Certain US- Origin Agricultural Products and US Safeguard Action taken on Broomcorn Brooms from Mexico* (Brooms). See: Grantz, David A., *Dispute Settlement Under the NAFTA and the WTO*.

¹⁰² NAFTA, Article 1904.13

¹⁰³ Pauwelyn, Joost, *Going Global, Regional, or Both?* p.260.

¹⁰⁴ Busch, Marc L., *Overlapping Institutions and Global Commerce: Forum Shopping for Dispute Settlement in International Trade*, School of Foreign Service Georgetown University.

the complainant wants to set a more liberal precedent, probably it will prefer to go to the WTO; on the contrary, if it is not the case, it may prefer to present its claim under the RTAs. The latter seems to have happened in the case *Brooms* (Safeguards), where apparently Mexico chose to go to the NAFTA against US (instead of going to the WTO) to avoid the settlement of a (more liberal) precedent that might be relied on by a WTO panel in the future¹⁰⁵.

2.2.2.2.5 Nature and Effects of the Reports

There are notable differences between the nature and effects of the decisions among the reports of panels and courts among the same RTAs and as compared to the WTO.

In the Andean Community, the decisions of the Court are mandatory for the parties and have “direct effect” on them¹⁰⁶. Thus, they do not require official approval or *exequatur* for their enforcement. Similarly, in the case of MERCOSUR, the decisions of the panel and Court of Review are mandatory. However, they do not have direct effect on the parties. In the NAFTA and NGAs, to the contrary, the report of the panel is not strictly binding and does not have direct effects over the parties¹⁰⁷. After the final report is issued, the disputing parties “shall agree” on the resolution of the dispute which “normally” shall conform to the recommendations of the panel¹⁰⁸. Therefore, in these mechanisms, the disputing parties have more control over the procedure¹⁰⁹.

Among commentators, there is controversy regarding the real nature of NAFTA reports. For Horlick and Loungnaratii¹¹⁰, under NAFTA, it is clear that the parties are not bound by the

¹⁰⁵ See David A. Grantz, *Supra* Dispute Settlement Under the NAFTA and the WTO; and Busch, Marc L., *Supra* 104. On the contrary, the preference for a “more liberal precedent” seemed to be the reason for the US to choose the WTO instead of the NAFTA in the case *Periodicals*, related to the “cultural industrial exception”.

¹⁰⁶ In the Andean Community, besides the norms of the community system, also the decisions of the Court have direct effect over the Parties. Treaty of the Court, Article 3.

¹⁰⁷ Even when the reports of the panels do not have direct effect, the NAFTA and NGAs contain some provisions regarding direct effect in domestic judicial review. NAFTA, Article 20.20.

¹⁰⁸ NAFTA, Article 20.18.1.

¹⁰⁹ This is one of the main characteristics of the NAFTA and NGAs mechanisms. In addition, in the NAFTA and NGAs, the panel shall perform its functions in accordance to the dispute settlement chapter, unless the disputing parties otherwise agree. NAFTA, Article, 2008.5

¹¹⁰ See Horlick, Gary and Debusk Amanda (2003): *Dispute Resolution under NAFTA: Building on the US-Canada FTA, GATT and ICSID*, in: Horlick, Gary, *WTO and NAFTA rules and dispute Resolution: Selected Essays on Antidumping, Subsidies and other Measures*, London, pp. 309-351; and Loungnaratii, Vilaysoun and Stehly, Celine, *The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organization System*, p. 45.

reports of the panels because they always can agree to another resolution. Contrarily, for Marceau and Grantz¹¹¹, in practice, the panel decisions are binding because in case of no agreement, the complaining party may unilaterally suspend benefits. Even when the reports are not expressly “binding”, there is no doubt that – when there is a lack of agreement between the parties – the complainant is authorized to suspend benefits, like in the WTO. However, contrary to the WTO, in the North – South RTAs there is no “institutional support” or “risk to exposure”, to exert pressure on the violating party. Furthermore, the asymmetries among the Parties might in some cases favor “diplomatic solutions”; which may not always benefit the smaller country, putting the private sector affected by the measure at a disadvantage¹¹².

In the case of the WTO, the reports of the panels and AB are expressly binding after they are adopted by the DSB through “*negative consensus*”. However, the Agreements do not confer to the reports of the panels and AB direct effect over the Members¹¹³; like in the Andean Community. In the US- Section 301 case, the panel stated that “*Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect*”¹¹⁴.

It is possible to distinguish three different types of decisions in the regional and multilateral context. Firstly, those decisions which are *per se* binding and have direct effect on the parties; this is the case of the decisions of the Andean Community. Secondly, those reports which are binding or *quasi*-automatically binding, but do not have direct effect on the Members like in the case of MERCOSUR and the WTO, respectively. Finally, there are those that are not automatically binding; like the reports issued under the NAFTA and the NGAs. The explicit binding nature of the decisions in the South – South agreements and the lack of such effects in

¹¹¹ See Marceau, Gabrielle, *Supra* 54; and Grantz, David A., *Supra* 59.

¹¹² Davey, William (1996): *Pine & Swine, Canada – United States trade dispute settlement: The FTA experience and NAFTA perspectives*, The Center for Trade Policy and Law, Ottawa; and, Granados, Jaime and Casanova, Ann (2004): *Treatment of Asymmetries in Size and Development in International Trade Agreements: Some Suggestions for North – South Dispute Settlement Negotiations*, in: Lacarte, Julio and Granados, Jaime, *Inter Governmental Trade Dispute Settlement, Multilateral and Regional Approaches*, Cameron May, pp. 367-410.

¹¹³ In the WTO, the norms and reports depend on their domestic implementation. Even when the direct effect of norms is usually decided by the courts according to constitutional norms, some treaties impose directly such effects. Cottier, Thomas and Oesch, Mathias (2005): *International Trade Regulation, Law and Policy in the WTO, The European Union and Switzerland*, pp 209 - 232. On domestic implementation of DSB decisions see pp. 227 -231.

¹¹⁴ *US- Section 301, WT/DS152/R*.

the South – North agreements; or, in other words, the different levels of legalism between these RTAs, might be explained by the different levels of integration and composition among them¹¹⁵.

The nature of the decision plays a fundamental role in forum shopping. The complaining party will usually prefer the forum which recognizes automatic binding effects of the decisions. Probably the countries that are Parties of the Andean Community will privilege this forum before the WTO. On the contrary, in the case of the NAFTA and NGAs, the Parties may view the WTO as more advantageous.

2.2.2.2.6 Implementation and Remedies

In the WTO, if no satisfactory compensation has been agreed on and the violating party does not put into conformity the measure within a reasonable period of time, the complaining party may suspend the application of benefits, with prior authorization of the DSB. The DSU establishes an order for the suspension, according to which the complaining party shall first seek to suspend benefits in the same sector and only in case it is not practicable or effective it may suspend benefits in other sectors or, if this is not possible, under another covered agreement¹¹⁶. Although the stage of implementation of the RTAs is similar to the WTO, they differ in substantial aspects. Besides the differences in timing; there are also differences in terms of compliance and the margin of movement given to the panels or courts for their recommendations, as well as the nature and types of remedies available to the parties.

Contrary to the DSU, which is the only body that expressly allows the panels to make recommendations on how to put into conformity the measure¹¹⁷; the NAFTA and NGAs allow the panels to make findings on the “*degree of adverse trade effects*” of the measure and “*recommendations for the resolution of the dispute*” if the parties so request. According to Marceau, the NAFTA leaves more space to the panels in order to recommend other remedies

¹¹⁵ Mc Call Smith, James, *Supra* 53. According to this author, the level of integration (customs union or free trade area) has an influence in the level of legalism of the dispute settlement mechanism. Often, higher levels of integration will go together with more legal (e.g. directly binding) dispute settlement mechanisms. The level of composition is referred to the costs of eliminating a violating measure, which might be much higher for the economically stronger party than to the smaller country (circumstance that may benefit not binding dispute mechanisms).

¹¹⁶ DSU, Article 22.3

¹¹⁷ DSU, Article 19.1. For example, the panel report *EC –General System or Preferences* (WT/DS246/R), contains recommendations for the implementation.

instead of the implementation of the violating measure¹¹⁸, as for example the payment of compensations; this seems to be true, considering that only “*whenever possible*” the resolution shall be to eliminate the non conformity. In addition, the determination of the panel on the level of adverse trade effect may also facilitate an agreement on the resolution of the dispute based on a mutually agreed compensation. If this is not possible, such determination may allow the complainant to accelerate the determination on the level of suspension; and thus, the suspension of benefits. The possibility to accelerate the suspension of benefits may be useful in certain cases to induce compliance; although, such suspension is usually not the preferred solution due to the costs it generates to consumers and producers or services providers from the same country applying the suspension of benefits¹¹⁹.

Although the NAFTA does not provide a procedure for the determination of non-compliance¹²⁰; it includes a procedure for the determination whether the level of suspension of benefits is “*manifestly excessive*”¹²¹. The term manifestly excessive in the NAFTA Agreement, as opposed to the term “*equivalent*” used in WTO law when referred to the level of suspension of benefits authorized by the DSB¹²², is not arbitrary and has two effects. Firstly, to give more flexibility to the parties in terms of retaliatory measures available (it is easier for the complaining party to prove that a measure is not manifestly excessive, than to show that it is equivalent). Secondly, to constitute a real deterrent against violations of the agreements (similarly to a sanction)¹²³.

The MERCOSUR also gives the parties more flexibility than the WTO in terms of remedies. In case the complaining party considers that the non-compliance continues, it is automatically authorized (as in the NAFTA) to apply temporary compensatory measures, like the suspension of benefits¹²⁴. In determining if the measures are “*excessive*”, the court shall take into consideration, among other elements, “*the volume or value of trade in the affected sector, as well*

¹¹⁸ Gabrielle Marceau, The Dispute Settlement Rules of the North American Free Trade Agreement.

¹¹⁹ Usually the suspension of benefits implies that certain goods imported from the violating country will enter to the territory of the complaining party paying higher tariffs. The increase of prices of these goods due to higher tariffs would affect not only consumers, but also producers or services providers who purchase them in order to incorporate them in other goods or their activities.

¹²⁰ In contrast, the Andean Community, MERCOSUR and NGAs provide a specific procedure applicable in case of non-compliance, as in the WTO. Andean Community, Statue of the Court, Article 112. MERCOSUR, Protocol of Olivos, Article 30. NGAs, e.g. CAFTA, 20.16.3. WTO, DSU, Article 21.5.

¹²¹ NAFTA, Article 2019. As in the DSU, the NAFTA and the NGAs (except the US- Chile), establish an order for the suspension of benefits.

¹²² DSU, Article 22.4.

¹²³ Even when the NAFTA establishes that the complaining party may suspend “*benefits of equivalent effect*”; the panel will only consider if the level is manifestly excessive.

¹²⁴ Protocol of Olivos, Article 31. As in the SCU, the Protocol establishes an order for the suspension of benefits.

as any other prejudice or factor that may have been taken into account for the determination of the compensatory measures”¹²⁵. This criterion for determining the appropriate level of suspension gives more flexibility in terms of the remedies available. Interestingly, in MERCOSUR the procedure for the determination of compliance and level of suspension of benefits does not suspend the adoption of retaliatory measure; in other words, it is possible to suspend benefits before the panel makes such determinations.

In the Andean Community, the Court is authorized to order the adoption of “*other measures*” in case the suspension of benefits is not effective; which may be available also to the “other Parties” of the agreement, besides the complaining party¹²⁶. Furthermore, natural and legal persons are allowed to ask the national judge “*for compensation for any damages or loss that may be due*”¹²⁷. Contrarily to the WTO, in the Andean Community it seems possible to request not only prospective, but also retroactive compensations, in certain cases¹²⁸. Furthermore, the possibility to request such compensations to the national judge makes them feasible. In addition, as mentioned before, in the Andean Community and MERCOSUR it is possible to request the adoption of precautionary measures in cases of irreparable or serious damage at the beginning of the procedure¹²⁹.

The NGAs include an innovation in relation to the remedies in case of non compliance, the possibility for the respondent to pay an “*annual monetary assessment*” as an alternative to the suspension of benefits. Note that the complaining party cannot suspend benefits if the other party offers the payment of such monetary assessment. In case of no agreement regarding its amount, it will be equal to 50% of the level of benefits the panel has determined or that was notified by the complaining party. More interesting, when circumstances warrant, the Commission may decide that this amount shall be paid into a fund for appropriate initiatives to facilitate trade between the Parties including “*reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement*”¹³⁰. In addition, they include a formula for the calculation of

¹²⁵ Protocol of Olivos, Article 32.

¹²⁶ Treaty establishing the Court, Article 27.

¹²⁷ Treaty establishing the Court, Article 30.

¹²⁸ Treaty establishing the Court, Article 27; and, Statute of the Court, Article 119.

¹²⁹ Treaty establishing the Court, Article, 28 (Andean Community); and Protocol of Olivos, Article 15 (MERCOSUR).

¹³⁰ Chile – US FTA, Article 22.15.5.

interests¹³¹. Contrary to the NAFTA, all the NGAs expressly provide that the monetary assessment and the suspension of benefits are temporary measures pending the elimination of the non conformity or the nullification or impairment (as in the WTO¹³²).

The higher flexibility provided by the RTAs as compared to the WTO in this stage will definitely be an important factor at play in favor of the former in forum selection; particularly, when the measure matter on the dispute results domestically in an extremely political sensitive issue. In other words, when the costs of eliminating or modifying the violating measure are higher than the benefits of maintaining it¹³³. In such cases, it may be better for the complaining party to have a mechanism that offers a commercial or monetary compensation to alleviate the cost derived from the imposition of trade barriers, at least temporarily. This may constitute an advantage particularly in the case of the North – South agreements, considering that the suspension of benefits has proven to be ineffective for developing countries in such circumstances¹³⁴. Moreover, in the case of the South – South agreements, the possibility to request precautionary measures (Andean Community and MERCOSUR) and to request compensation for damages for private parties (Andean Community) constitutes an important advantage of these forums. It is important to mention that under the process of review of the DSU there are several proposals directed to include more remedies, including a monetary compensation and the request of precautionary measures¹³⁵.

Finally, the record of compliance of the WTO and the RTAs should also be considered in forum selection. While in the WTO, from 98 panel and AB reports adopted since 1995, there have been 17 non-compliance reports under Article 21.5 of the DSU¹³⁶; in the Andean Community from 163

¹³¹ See in all NGAs (last Annex of the Dispute Settlement Chapter), Inflation Adjustment Formula for monetary assessment.

¹³² DSU, Article, 22.1.

¹³³ As mentioned above, this situation may usually appear in North – South agreements due to economic asymmetries that exist between the countries. Furthermore, the costs of eliminating a violating measure seems be much higher for the economically stronger party than to the smaller country. This may explain why the North –South agreements do not include binding decisions and give more flexibility in terms of remedies available as an alternative to the implementation of the reports, at least temporally. See: Mc Call Smith, James, *Supra* 53.

¹³⁴ As in actually happened to Ecuador in *EC –Bananas*, WT/DS27/ARB/ECU. Although, the suspension of benefits has proven to be ineffective also in South – South agreements or between developing countries. See: Tussie, Diana and Delich, Valentina, *Supra* 49.

¹³⁵ See proposal from Mexico, TN/DS/W/23.

¹³⁶ There have been 15 requests for suspension of benefits. Update of WTO Dispute Settlement Cases, WT/DS/OV/27.

disputes, there have been only 20 cases of non-compliance¹³⁷. In MERCOSUR, from 10 disputes, the violating party did not comply with the panel report in 2 cases¹³⁸; while in NAFTA, the reports resulting from the 3 only disputes held until now, have been complied, although in 1 case the implementation took 9 months¹³⁹.

2.2.2.2.7 Costs of the Process

This is a factor that is particularly sensitive for developing countries, not only in terms of budget constraints, but also in terms of human resources. Here I will not refer to the costs related to the maintenance of the violating measure, which are linked with the different timeframe and remedies available mentioned above.

The NAFTA and the NGAs establish that all the costs of the panels (including remuneration and travel costs) shall be distributed proportionally among the parties¹⁴⁰. MERCOSUR provides the same rule with the possibility for the Court to distribute them in a different way¹⁴¹. In the case of the Andean Community, the costs of the permanent Court are distributed among all the Andean Countries¹⁴². With respect to the WTO, the DSU establishes that the expenses of the panelists and Appellate Body (AB), including travel and subsistence allowance, shall be met from the WTO budget¹⁴³.

The costs of litigation (lawyers, officials and travel expenses) are usually afforded by each government. The private sector may also afford, partially or totally, the costs of lawyers and travel expenses; however, this is less common in developing countries.

Regarding the costs of lawyers, an important advantage of the WTO is the Advisory Center on WTO Law (ACWL), which gives legal assistance to developing countries at discounted rates¹⁴⁴.

¹³⁷ From these 163 disputes, 103 (63.58%) were solved after the preliminary stage before the Secretariat. In addition, in 14 disputes the Court has authorized the suspension of benefits. Andean Community, Informe de la Unidad de Asesoría Jurídica en Materia de Incumplimientos 2006.

¹³⁸ Information provided by officials of MERCOSUR.

¹³⁹ *US Safeguard Action taken on Broomcorn Brooms from Mexico* (Brooms).

¹⁴⁰ NAFTA, Annex 2002.2. NGAS, Rules of Procedure (Remuneration and Payment of Expenses).

¹⁴¹ Protocol of Olivos, Article 36.

¹⁴² Statute establishing the Court, Article 26.

¹⁴³ DSU, Article 8.11 and 17.8.

¹⁴⁴ See web page: <http://www.acwl.ch>

This is particularly useful, considering the high level of complexity of the WTO cases¹⁴⁵. The ACWL replaces the hiring of specialized law firms, whose cost is very high; although, it must be considered that sometimes law firms provide pro – bono work as cheap as the ACWL, which may also be available for regional disputes. On the other side, WTO cases are usually more time consuming and thus, more costly in terms of human resources for the governmental entities involved in the disputes. This is a disadvantage particularly for developing countries, where human resources are scarce. The costs of traveling are also higher in the case of the WTO, especially as compared with the Andean Community and MERCOSUR¹⁴⁶; but also as compared with the NAFTA and NGAs, where the consultations and oral hearings usually take place in one of the countries¹⁴⁷. There are other related costs, as for example handling the case in a foreign language¹⁴⁸. This is an additional disadvantage as compared with the Andean Community and MERCOSUR; but also with some NGAs¹⁴⁹.

Therefore, there seems not to be a fora which offers more benefits in terms of costs. The WTO could be more advantageous in terms of panelists and AB costs because they are not afforded directly by the parties; except for the Andean Community, where these costs are afforded by all the countries. In addition, developing countries have the possibility to reduce the costs of lawyers due to the legal assistance provided by the ACWL; although in regional disputes the support of private firms which work pro – bono is occasionally available. In terms of human resources and travel costs of officials; the RTA provisions may lead to lower costs for the parties to a dispute.

2.2.2.2.8 Special Treatment

Contrary to the RTAs, the DSU includes explicit provisions on special treatment in favor of developing countries (DGC): i) Article 4.10 (establishes that developed countries should give particular attention to DGC's particular problems during consultations); ii) Article 8.10 (allows the inclusion of a panelist from a DGC, if requested); iii) Article 12.10 (gives DGC extension of timeframes for the presentation of submissions); iv) Article 12.11 (request the panels to indicate

¹⁴⁵ See Pawelyn, Joost, *Going Global, Regional, or Both?*.

¹⁴⁶ Article 21.10.1(f).

¹⁴⁷ See Rules of Procedure.

¹⁴⁸ Even when Spanish and French are also official languages in the WTO, in most cases disputes are handled in English. Tussie, Diana and Delich, Valentina, *Supra* 49.

¹⁴⁹ In the RTAs between US – Colombia and US – Peru, the parties have the right to submit their written and oral arguments, either in English or Spanish. Chapter 20, Article 21.10.f

the form in which provision on special treatment raised by the DGC have been taken into account); v) Article 21.8 (DSB shall take into account the economic impact of the measure in the DGC); and, vi) Article 24 (includes special provisions in favor of least developed countries); and, vi) Article 27 (offers legal advice and assistance of the WTO Secretariat)¹⁵⁰.

The explicit recognition of special treatment in favor of DGC in the WTO may, in certain cases, influence the DGC countries to bring their claim before the WTO, compared to the North – South RTAs. This special treatment would not be a factor at play in forum shopping, when compared to the South –South agreements; hence these provisions are not applicable to the disputes between DGC. Although South – South Agreements provide special treatment in favor of the less favored parties for trade liberalization¹⁵¹; there are no special provisions applicable to disputes.

However, it must be noted that the WTO dispute settlement provisions on special treatment have been rarely invoked by DGC in WTO disputes¹⁵². The reason may be that developing Members perceived most of them as not useful. For this reason, there have been proposals directed to include effective provisions for DGC in the process of review of the DSU¹⁵³. Therefore, even when the special treatment may in some cases constitute a factor at play, the provisions currently included in the DSU may not necessarily favor the WTO.

2.2.2.2.8 Third Parties Rights

The participation of other Parties in a dispute as third parties is important mainly because it allows other Parties to the agreement to express their concerns with regard to a particular dispute and keep informed of it, without participating as a party. On the other side, it allows the disputing parties to obtain the support of other countries.

The Andean Community, NAFTA and the plurilateral NGAs, provide the possibility for the Parties to participate in a dispute as third party, as in the WTO. Contrarily to the WTO, in the

¹⁵⁰ Additionally, Article 3.12 gives to developing countries the possibility to apply Decision 1966 (which includes similar provisions as those included in the DSU).

¹⁵¹ In the case of the MERCOSUR, Paraguay and Uruguay receive special treatment only with regard to the implementation of the liberalization program; as Bolivia and Ecuador in the Andean Community.

¹⁵² Van den Bossche, Peter (2005): *The Law and Policy of the World Trade Organization*, Cambridge University Press, pp. 172 - 306.

¹⁵³ On this regard see Davey, William (2004): *Reforming WTO Dispute Settlement*, University of Illinois, College of Law, Research Paper No. 40-01.

RTAs the participation of third parties is limited to the judicial stage. While in the Andean Community, only third parties with a substantial interest that could be negatively affected by the decision can participate before the Court; in the other RTAs third parties do not require a substantial interest in order to participate before a panel. In the WTO third parties are required to have a “substantial interest”, which includes a systemic interest. This requirement may be beneficial for the disputing parties in order to avoid delays due to the participation of third parties that do not have a real interest in the dispute¹⁵⁴. On the other hand, the participation of third parties when limited only to the judicial stage, as in the RTAs, may constitute an advantage in case a negotiated solution is possible during consultations or the political stage.

The DSU provides that third parties shall receive a copy only of the parties’ submissions to the first meeting of the panel, have the right to present their views in writing and to appear at a session of the first meeting set aside for that purpose¹⁵⁵. Before the AB, third parties may make written submissions and have an opportunity to be heard¹⁵⁶. On the other hand, the North -South RTAs establish that third parties shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive all written submissions of the disputing parties¹⁵⁷. Thus, the RTAs recognize to third parties more extensive rights, as compared to the WTO DSU; although, in practice the WTO panels and AB recognize additional rights to third parties, as it happened in the *EC – Bananas* case¹⁵⁸. It is also important to mention that the provisions on third parties rights included in the RTAs are similar to those included in some of the proposals presented for the review of the DSU.

The extension of third parties’ rights allows a disputing party to receive more support from other Parties when they share the same position. This constitutes an advantage of the RTAs, especially considering their North – South composition. For example, in the CAFTA, the extension of third rights implies that a Central American country would be able to receive the support of other Central American countries in a dispute against the United States. Contrarily, the extension of rights may constitute a disadvantage for the disputing party not benefiting from such support, as

¹⁵⁴ There is no exam of this requirement by the WTO panels, at the point that any country raising its hand in order to participate as third party might end participating. However, in many cases, such requirement is used as a basis for the panels and disputing parties to request third parties to explain their interest on a particular dispute.

¹⁵⁵ DSU, Article 10 and Appendix 3.

¹⁵⁶ DSU, Article 17.4.

¹⁵⁷ NAFTA, Article 3013.

¹⁵⁸ *EC – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R., para. 7.4 – 7.9.

in the example the US. There may be cases in which the arguments of third parties do not necessarily support those of the disputing parties; although, in the WTO it is a common practice that panels only make findings on those issues raised by the disputing parties¹⁵⁹. The potentially high number of third parties at the multilateral level has to be considered carefully. The advantages provided by the extension of third parties' rights would depend on the particular circumstances of each case.

2.2.2.2.10 Transparency Provisions and Non – Governmental Organizations

The implications of transparency provisions and the participation of non governmental organizations (NGOs) have to be carefully analyzed considering that the differences between some RTAs and the WTO are significant.

The Andean Community provides that all the public hearings before the Court shall be open to the public, unless the Court decides the contrary. In addition, the Court's decisions are made public¹⁶⁰. In MERCOSUR, only the decisions are public. While the NAFTA does not include major provisions on transparency, except for the publication of the final report; the NGAs provide that the oral hearings shall be open to the public and all written submissions, written versions of oral statements and written responses to requests from the panel shall be public, subject to the protection of confidential information¹⁶¹. Furthermore, the NGAs expressly allow the panel to consider requests from non governmental entities (*amicus curiae* briefs¹⁶²) to provide written views that may assist the panel in evaluating the arguments of the disputing parties¹⁶³.

In the WTO the submissions of the parties and reports are confidential, unless the parties agree to disclose them¹⁶⁴; while the hearings are reserved only to the disputing parties and exceptionally third parties. The WTO does not allow expressly the presentation of *amicus curiae* briefs; an issue that has been subject to extensive debate. However, there have been cases in which the

¹⁵⁹ Steger, Debra (2004): Peace Through Trade: Building the World Trade Organization, Cameron May Ltd, p. 209.

¹⁶⁰ Statue of the Court, Articles 82 and 94.

¹⁶¹ See Article on Rules of Procedure.

¹⁶² The term “amicus curiae” or “friends of the court” was used first in England in order to refer to the information presented for better solving a dispute.

¹⁶³ See Article on Rules of Procedure in the RTAs. All NGAs are fairly similar, e.g. Article 21.10 of the Colombia – US agreement. Additionally, the NGAs and the NAFTA provide the possibility to present amicus briefs in the investment disputes (Investment – State mechanism).

¹⁶⁴ DSU, Appendix 3.

presentation of *amicus* briefs has been accepted¹⁶⁵. In *US – Shrimp* the AB stated that, according to Article 11 of the DSU, panels have authority not only to request but also to receive, accept and reject any information submitted which may be needed in a specific case. Moreover, in *EC – Asbestos* the AB decided to adopt an Additional Procedure to deal with *amicus* briefs, applicable only to that case. The Procedure was discussed in a WTO special meeting¹⁶⁶, where most Members of the WTO objected to it. Apparently for this reason, such briefs have been rejected in all other cases, except in one *Australia – Salmon*.

According to Steger, there is an urgent need for WTO Members to negotiate procedural rules to deal with this situation¹⁶⁷. In this regard, the Rules of Procedure of the NGAs establish requirements for the submission of *amicus curiae* briefs, as the necessity to inform about the nature and location of the entity; explain how the entity's written views will contribute to resolving the dispute and; disclose any relationship, direct or indirect with any party, as well as whether it has received any assistance or financial contribution from any other entity in the preparation of its written views. The panel shall consider the request after consulting the disputing parties, who shall have an adequate opportunity to respond to them¹⁶⁸. It is important to mention that some of these requirements are similar to those established by the WTO AB in the Additional Procedure for *EC - Asbestos*.

The inclusion of transparency provisions and permission of *amicus* briefs may be an advantage of the RTAs, as compared to the WTO, when a disputing party has the internal support of a representative part of the private sector and NGOs. Moreover, it may be useful in order to give the dispute mechanism a more democratic face, especially when the dispute involves public interests, e.g. environmental disputes. In fact, the objective of allowing *amicus curiae* is to let the panel hear arguments from persons and organizations, different than the parties, particularly when a dispute involves a significant public interest; as well as, to obtain more information or evidence for better solution of a case. Contrarily, the lack of provision for the admission of *amicus* briefs in the WTO sends a negative message to civil society that the WTO tribunals are

¹⁶⁵ Among others, United States – Shrimp, WT/DS58/R; European Communities – Asbestos, AB Report WT/DS135; Australia – Salmon, WT/DS18/RW.

¹⁶⁶ General Council Meeting held on 22 November 2000.

¹⁶⁷ Steger, Debra, *Peace through Trade*, p. 209.

¹⁶⁸ See Rules of Procedure of the NGAs. In the Chile – US FTA, paragraphs 41 – 50. The written views can not exceed 20 pages and shall be in English and Spanish.

not interested in hearing other arguments apart from those of WTO Members¹⁶⁹. On the other side, when there is a risk of big opposition from these entities or when it is considered that the permission of amicus briefs would produce unnecessary delays, it may be not recommendable to choose the RTAs dispute mechanisms.

2.2.3 Political considerations

The political considerations play an important role particularly in regional trade agreements, where these considerations constitute a key factor for the negotiation of preferential agreements. Therefore, the political repercussions of selecting the WTO instead of the RTA should be considered, especially when the dispute involves a close or strategic trade partner.

The Andean Community, MERCOSUR, NAFTA and plurilateral NGAs, provide the possibility for the Parties to join an action initiated by a party as co-complainants and third parties¹⁷⁰. However, none of these agreements give the same opportunities in terms of broad support from other countries, as the WTO. Therefore, when the measure also affects other Members, the WTO may be more attractive particularly, but not exclusively, in comparison with the North – South Agreements due to the asymmetries that characterize these agreements.

On the other hand, in those cases where a negotiated solution seems an available option, it may be more advantageous for a country to present its claim under the RTAs; since the attraction of third countries in the WTO will tend to make (pre or post verdict) concessions more difficult or costly¹⁷¹. The NAFTA and the NGAs put big emphasis on diplomatic resolution. As mentioned before, the political stage is mandatory. Unfortunately, there is little reliable information on how many disputes have been successfully resolved in this stage within the NAFTA¹⁷². Therefore, in those cases where a negotiated solution does not seem more beneficial, the WTO may be more

¹⁶⁹ Steger, Debra, Supra 159.

¹⁷⁰ All the RTAs provide the possibility to join as third party, except MERCOSUR.

¹⁷¹ See Grantz, David A. Supra 629; and Busch, Marc L., Supra 104.

¹⁷² Steger, Debra, Dispute Settlement under the North American Free Trade Agreement. p. 295. For Loungnaratti Vilaysoum and Stehly Celine, Supra 94, the failure of consultations would already have shown the impossibility of reaching a negotiated solution between the parties.

advantageous than the North-South RTAs in order to avoid unnecessary delays and political pressures from the politically stronger Party¹⁷³.

2.3 Record of Disputes

Despite the considerable number of disputes presented to the Andean Community dispute settlement mechanism, 197 disputes on breaches of community law between 1996 and 2005, no Andean Country has presented a claim against another Andean Country before the WTO, until now¹⁷⁴. The main reason may be the inclusion of the exclusive jurisdictional clause in favor of the Andean Court. I will refer to the effects of this clause within the WTO in the next chapter. In MERCOSUR, there have been 10 disputes¹⁷⁵, two of them, *Argentina - Safeguards on Cotton* and *Argentina - Antidumping duties on Poultry*, were also brought to the WTO. Only *Argentina - Antidumping duties on Poultry* involved the same matter that was previously discussed by the MERCOSUR panel, as we will see later.

Under the NAFTA Chapter 20, the number of disputes that have led to panel reports is significantly lower, only 3 cases¹⁷⁶. However, not surprisingly, under NAFTA Chapter 19 (Binational panels for Antidumping and Countervailing duties) there have been 58 disputes. Since the WTO was established until 2004, there have been 26 cases between the NAFTA

¹⁷³ According to Davey where political power is more or less evenly balanced, negotiations might lead to reasonably balanced results; while where there is an imbalance in power between the parties, the stronger party would likely prevail ("power oriented" vs. "rule oriented"). Davey, William, Pine & Swine, Canada – United States trade dispute settlement, p. 12. On the distinction between power and rule oriented see Jackson, Jhon (2000): *The World Trading System*, Massachusetts Institute of Technology, p 111. Jackson divides the various techniques for the peaceful settlement of international disputes into two types: settlement by negotiation and agreement with reference – explicitly or implicitly- to relative power status of the parties ("*power oriented*"); or settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed ("*rule oriented*"). According to this author, in practice, international institution and legal systems involve a mixture of both.

¹⁷⁴ Even when not all the disputes within the Andean Community may include matters which are similarly regulated within the WTO, the possibilities of overlap are very high considering the amount of disputes. From 78 disputes, at least 26 have been identified as related to subject matters in which the Andean Community bases its regulations on the WTO Agreements: Intellectual Property (8), Customs (15), Trade Remedies(3). See: <http://www.comunidadandina.org/canprocedimientosinternet/ListaExpedientes11.aspx?CodProc=7&TipoProc='T'>

¹⁷⁵ In MERCOSUR: Brasil - Comunicados DECEX (1999), Brasil - Carne de Cerdo (1999), Argentina – Productos Textiles (2000), Argentina – Pollos (2001), Argentina – Bicicletas (2001), Brasil – Neumáticos (2002), Brasil – Fitosanitarios (2002), Uruguay – IMESI (2002), Uruguay – Lana (2003), Brasil – Tabaco (2005). See : <http://www.mercosur.int/msweb/principal/contenido.asp>.

¹⁷⁶ NAFTA (Chapter 20): CDA -95-2008-01, Tariffs Applied by Canada to Certain US – Origin Agricultural Products (12/1996); USA -97-2008-01, US Safeguards Action taken on Broomcorn Brooms from Mexico (01/98), USA -98-2008-01 Cross – Border Services and Investment in the Trucking Sector (02/2001). See: http://www.nafta-secalena.org/DefaultSite/index_e.aspx

Parties. The big majority of them involved antidumping or countervailing duties. Only in two cases, *US - Soft wood Lumber* disputes and *Mexico – Corn Syrup*, related aspects of a same dispute have been brought to the NAFTA and the WTO¹⁷⁷. However, as mentioned before, there is no possibility of overlapping with the panels established under Chapter 19 hence the review of antidumping and countervailing duty determinations are requested by individuals and based on domestic law, not the NAFTA. None of the three disputes under Chapter 20 of the NAFTA has been brought to the WTO¹⁷⁸.

¹⁷⁷ Both cases involved antidumping duties. See Steger, Debra, *Dispute Settlement under the North American Free Trade Agreement*, p. 289 -290. According to Steger, of the 26 cases brought (until 2004), only 10 involved disputes under agreements other than antidumping or subsidies, and the overwhelming majority (8 of 10) could only have been brought under the NAFTA.

¹⁷⁸ Contrarily, in the case of the FTA between Canada and US (which dispute mechanism served as model for Chapter 20 of the NAFTA), one dispute was brought both before the GATT and the FTA, *Canada – Measures affecting exports unprocessed Herrings and Salmon*. Although, the measures subject of the dispute were not the same. See, Marceau, Gabrielle, *Supra* 54.

Chapter 3

Conflict of Law and Conflict of Jurisdiction

Besides forum shopping, other consequences of the proliferation of RTAs which are related to forum shopping; are the conflicts of law that may arise between provisions of the RTAs and the WTO Agreements and the conflicts of jurisdiction that may appear between the adjudicating bodies of these agreements. Even when both situations are independent of each other, they could also appear simultaneously. This Chapter focuses on the legal basis within the WTO for the analysis of such conflicts as well as the rules and principles that should be applied in case of conflict of law and jurisdiction between the RTAs and the WTO. I also present some cases related to conflicts of law and jurisdiction that appeared within the WTO and the RTAs. The objective is to give some guidelines on how to address these conflicts in order to reduce the costs derived from them.

3.1 Conflict of Law

A conflict of norms appears when two or more provisions applicable to the same matter point to contradictory decisions, so that a choice must be made between them¹⁷⁹. A situation of conflict of norms could only appear when there is an overlap *ratione materiae, ratione temporis and ratione personae* between the norms¹⁸⁰. In other words, both norms must cover the same matter or facts of which the situation consists, and have binding effects at the same time in respect to the legal subjects involved in the dispute. The costs of the conflicts of law are related to the lack of certainty on how these conflicts will be addressed by the respective adjudicating bodies.

3.1.1 Determination of a Conflict of Law: Apparent vs. Real Conflict

Before examining the rules applicable to conflict of norms, an adjudicating body must distinguish a situation of “*divergence or apparent conflict*” from a situation of “*real or irreconcilable*”

¹⁷⁹ Report of the Study Group of the International Law Commission- ILC (2006): Fragmentation of International Law, Difficulties arising from the diversification and expansion of International Law, United Nations pp. 25.

¹⁸⁰ Pauwelyn, Joost (2003): Conflicts of Norms in Public International Law How WTO Law relates to other Rules of International Law, Cambridge, 2003, pp. 165-166. Shany, Yuval, The Competing Jurisdictions of International Courts and Tribunals.

conflict”¹⁸¹. It is a generally accepted principle of public international law, that adjudicating bodies should try to reduce the situations of conflict of norms to the extent possible¹⁸². In public international law there is a presumption against conflict, mainly in cases where separate agreements are concluded between the same parties¹⁸³. Thus, adjudicating bodies shall interpret the term “*conflict*” narrowly in order to preserve the agreements of the parties¹⁸⁴.

For the determination of a situation of real conflict, the principle of “*harmonization*” or “*effective interpretation*” is key. According to this principle, when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations¹⁸⁵. The principle of effective interpretation could be applied between provisions of different treaties or within one treaty. This principle is recognized in Article 1.2 of the DSU with respect to conflicts between norms and procedures of covered Agreements¹⁸⁶. According to it, the rules of the DSU shall be used to the extent necessary to avoid conflicts. In *Guatemala - Cement*, the AB applied the principle of effective interpretation in order to restrict a situation of conflict “*A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision that is in a case of conflict between them*”¹⁸⁷.

3.1.2 Differentiating Situations of Apparent Conflict and Real Conflict

As explained above, due to the substantive overlap between the RTAs and the WTO, the following situations might appear: i) the RTA regulates a matter similarly as the WTO (RTA = WTO); ii) the RTA is stricter or more liberal than the WTO (RTA > WTO); iii) the RTA regulates the matter in a different manner compared to the WTO. It is very unlikely that a situation of conflict appears between similar WTO and RTA provisions or provisions from the WTO incorporated by reference to the RTA. In addition, a conflict may not necessarily result because the RTA is more liberal or regulates a same matter in a different manner or from a

¹⁸¹ For example, there is no conflict when a norm adds rights or obligations to another norm. In this case, instead of a conflict, there is a complementary or accumulative relationship. See Marceau, Gabrielle, (2001): Conflicts of Norms and Conflicts of Jurisdictions Relationship between the WTO Agreement and MEAs and other Treaties, in: *Journal of World Trade*, pp. 1081-1131; and, Pauwelyn, Joost, Conflicts of Norms in Public International Law, Supra 180.

¹⁸² Report of the Study Group of the ILC, Supra 179.

¹⁸³ Panel report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, 64/R.

¹⁸⁴ Marceau Gabrielle, Supra 181.

¹⁸⁵ Report of the Study Group of the ILC, Fragmentation of International Law, p. 8.

¹⁸⁶ The covered Agreements are listed in Appendix 1 of the DSU.

¹⁸⁷ AB Report, WT/DS60/AB/R.

different point of view¹⁸⁸, compared to the WTO. The following examples may be useful to distinguish a situation of apparent conflict from a real conflict of norms between RTA and WTO provisions.

An apparent conflict might appear when a Member brings before a WTO panel an RTA provision which is more liberal than a WTO provision (WTO plus). In this case, the complaining party would usually choose the regional forum. However, if the alleged violating measure goes against both WTO and RTA provisions, the complaining party might in certain cases prefer to bring the dispute to the WTO, e.g. because it considers that this forum offers institutional or procedural advantages. In this case, the panel may find that there is no conflict between the RTA and WTO provisions hence they could be complied simultaneously¹⁸⁹. Consequently, there would be no obstacle to apply the WTO provision in order to determine the rights and obligations of the parties in dispute. The complaining party would still be able to go to present its claim before an RTA panel with respect to the *plus*, provided that it does not go against the rules on conflict of jurisdiction.

On the other hand, a potential situation of conflict of norms might appear if the complaining party brings to a dispute an exception to the RTA obligations, which is not contemplated as an exception to similar obligations under the WTO. This is the case where the RTA and the WTO regulate a matter differently, in a manner that leads to a conflict. The use of the RTA exception as a mechanism of defense could inevitably result in a conflict of norms due to the impossibility to comply with both norms at the same time¹⁹⁰. As we will see, a similar situation of conflict of norms could have appeared before a WTO panel in *Canada – Periodicals*. It must be noted that the situations of conflict between WTO and RTA provisions should be, in principle, exceptional; considering the conditions established for these agreements. I will refer to these conditions in more detail later.

3.1.3 Case Law

¹⁸⁸ Jenks, Wilfred (1953): *The Conflict of Law- Making Treaties*, *The British Yearbook of International Law*, p. 425.

¹⁸⁹ As mentioned before, a WTO plus provision is based on a WTO provision; although it goes beyond or is more liberal than the latter (has a plus). For this reason, it could be stated that the WTO provision included in a RTA and the WTO are not incompatible, unless the opposite is shown.

¹⁹⁰ However, it must be taken into account that, in several occasions, the AB has interpreted the exception contained in Article XX. b) as applicable to disputes related to environment.

A situation of apparent conflict of laws appeared in *Agricultural Products*, before a NAFTA panel with respect to the implementation of the tariffication requirements of the Agreement on Agriculture of the WTO. The US claimed that, while legal under the WTO, such action was in conflict with Canada's NAFTA obligations on tariff reductions. The panel found that Canada was not in violation, based on a provision of the NAFTA which established that the Parties retain their rights and obligations with respect to agricultural goods under the GATT; including Article XI, which prohibits quantitative restrictions but provides certain exceptions to agricultural products¹⁹¹. An interesting feature of this case is that the panel applied the provisions of the WTO Agreements which resulted of the negotiations of the Uruguay Round, adopted after the NAFTA entered into force. The panel stated that later modifications of the GATT should be considered incorporated in the NAFTA¹⁹². In this case, the panel applied indirectly the principles of evolutionary and effective interpretation in order to avoid a conflict of norms¹⁹³.

In *Canada – Periodicals*, the US argued that the Canadian restrictions to the importation of periodicals violated the principle of national treatment. In the NAFTA, the Canadian discrimination against foreign owned periodicals was permitted under the exception of “cultural industry”; subject to the right of the other Party to take measures of equivalent effect¹⁹⁴. Canada did not use the exception included in the NAFTA as a mechanism of defense before the WTO panel. If Canada had used it as a defense of its WTO obligations in the WTO, the panel might have faced a situation of real conflict of norms.

3.1.4 Dealing with a Real Conflict of Law in the WTO

3.1.5 Legal Basis for Analyzing RTA Provisions within the WTO

According to Articles 1.1, 4.2, 4.4, 7 and 11 of the DSU, it seem that WTO panels and AB can not apply provisions outside the WTO covered Agreements to solve a dispute; in other words, they cannot apply RTA provisions. Article 7 of the DSU, *Terms of Reference of Panels*, instructs

¹⁹¹ This provision was an incorporation of Article 710 of the Canada – US FTA.

¹⁹² For more details on this case see Grantz, David A. Supra 59.

¹⁹³ This interpretation may be the reason why the NGAS establish that any amendment of a provision of the WTO Agreements incorporated in the NGA shall be agreed between the parties before incorporating it in the NGA, eg. CAFTA, Chapter of Final Dispositions, Article 22.3, *Amendment of the WTO Agreement*. The other NGAs include a similar provision. This requirement may increase the possibilities of conflict of norms between the WTO and NGAS provisions in the future.

¹⁹⁴ For more details on this case David A. Grantz, Supra 59.

the panels to “*examine, in the light of the relevant provisions in (name of the covered agreement (s) cited by the parties to the dispute), the matter referred to the DSB (...)*”; although, the second paragraph of Article 7 states that panels shall address “*the relevant provisions in any covered agreement or agreements cited by the parties in a dispute*”. Article 11 of the DSU, *Functions of Panels*, states that the panels “*should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*”.

For Pauwelyn, the WTO panels should be able to apply not only public international law, as a tool for interpretation, but also provisions outside the WTO in order to adjudicate rights and obligations in a dispute¹⁹⁵. Contrarily, for Trachtman, the powers of the DSU tribunals are limited to apply WTO rules hence that was the intension of the Members when negotiating the Agreements. According to this commentator, it is not possible for these tribunals to apply rules outside the WTO as a defense in relation to alleged violations of WTO obligations¹⁹⁶. Thus, for Pauwelyn a WTO panel would be able to solve a dispute on the basis of a RTA provision, in case of conflict with the WTO provisions; while for Trachtman a WTO panel could not do so.

The fundamental source of law in the WTO is the text of the agreements themselves. However, they do not exhaust the sources of potentially relevant law¹⁹⁷. According to Article 3.2, WTO panels and the AB may apply customary rules of interpretation of public international law in resolving a dispute¹⁹⁸; without adding or diminishing the rights and obligations of the Members. This provision is crucial because it explicitly allows WTO panels and AB to apply the rules of interpretation of public international law for the resolution of disputes.

Therefore, in order to deal with a situation of conflict of norms, the customary rules of interpretation of treaties should be applied. These customary rules are contained in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. According to Article 31.1 “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the*

¹⁹⁵ Pauwelyn, Joost (2004): The role of Public International Law Where can we go?, in: *The American Journal of International Law*, Vol. 95, pp. 535-578.

¹⁹⁶ Trachtman, Joel (2004): Conflict of Norms in Public International Law: How WTO Law relates to other Rules of International Law, in: *The American Journal of International Law*, Vol. 98, No. 4, pp. 855 - 861.

¹⁹⁷ Palmetier, David and Mavroidis (1999): Dispute Settlement in the World Trade Organization, Practice and Procedure, Kluwer Law International, pp. 36. See also Japan – Taxes to Alcoholic Beverages, the AB stated that “*the proper interpretation of the Article is, first of all, a textual interpretation.*” (WT/DS10/AB/R, WT/DS/11/AB/R, WT/DS8/AB/R).

¹⁹⁸ Article 38 of the Statute of the International Court of Justice (ICJ).

terms of the treaty in their context and in the light of its objective and purpose.” The most relevant customary rule of interpretation for effects of this analysis is Article 31.3 c) of the Vienna Convention, which establishes that for the interpretation of treaties should be taken into account “*any relevant rules of international law applicable in the relations between the parties*”, which include “*other treaties*”, as well as principles and customary international law¹⁹⁹. Article 31.3 c) recognizes the principle of “*systemic integration*”. According to this principle, even when tribunals may only have jurisdiction in regard to a particular instrument, as in the case of WTO panels with respect to WTO Agreements; they must always interpret and apply such instrument in its relationship to its normative environment, that is to say “*other*” international treaties²⁰⁰. Therefore, according to Article 31.3 c) of the Vienna Convention, RTA provisions should be used as a rule of interpretation of WTO provisions, when RTA provisions are brought by a disputing party as a defense of an alleged violation of WTO obligations.

In addition to the rules of interpretation, Article 41 of the Vienna Convention is relevant in order to understand the relationship between WTO and RTA provisions. Article 41 regulates the modification of multilateral agreements by certain parties only (*inter se agreements*)²⁰¹. *Inter se agreements* are often used for a more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more far-reaching measures or assume deeper obligations for the realization of the object and purpose the original treaty²⁰²; like in the case of the RTAs with respect to the WTO Agreements. Thus, Article 41 is very important when referring to conflicts of norms between RTAs and the WTO provisions. According to it, two or more parties may modify a multilateral treaty between themselves alone only if the possibility of such modification is provided by the treaty; or, it is not prohibited by the treaty, and “*i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; ii) such derogation is not incompatible with the objective and purpose of the treaty as a whole*”²⁰³.

¹⁹⁹ Koskenniemi, Martti, International Law Commission of United Nations: Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission. (A/CN.4/L.682.), 4 April 2006, pp. 216. According to the International Law Commission, Article 31.3 c) includes other treaties, customary rules and general principles of law (*systemic integration*).

²⁰⁰ Koskenniemi, Martti, International Law Commission of United Nations: Fragmentation of International Law, p. 179.

²⁰¹ Article 41 is related to Article 30 of the Vienna Convention (Application of successive treaties relating to the same subject – matter).

²⁰² Report of the Study Group of the ILC, Supra 179.

²⁰³ In addition, the violation of these conditions by the parties could lead in international responsibility.

Within the WTO, the possibility to form RTAs between some of the Members alone is provided by Article XXIV of the GATT²⁰⁴. This Article expressly allows the formation of free trade agreements and customs unions under certain conditions in order to assume deeper obligations on trade liberalization between the Parties, which is the objective of the WTO Agreements²⁰⁵. This explains why many RTA provisions are similar or based on WTO provisions. Thus, RTAs should meet the conditions established in Article XXIV of the GATT, and in Article 41 of the Vienna Convention; firstly, not to relate to a provision which is incompatible with the object and purpose of the WTO Agreements and, secondly, not to affect the enjoyment by other parties of their rights and obligations under the treaty. In this regard, it must be noted that paragraph 9 of Article XXIV establishes that the preferences contained in the Schedule of Concessions, according to Article I of the GATT “*shall not be affected by the formation of a customs union or free trade area, but may be eliminated or adjusted by means of negotiations with contracting parties affected.*” Furthermore, according to Article XXIV, RTAs shall be notified to the WTO Members.

3.1.6 Explicit Clauses on Conflict of Law

Even when both sets of rules, conventional clauses and principles of general international law, have the same hierarchy in international law²⁰⁶, the International Court of Justice (ICJ) has stated that conventional clauses are preferred to the relevant customary and principles of international

²⁰⁴ Paragraph 4 of Article XXIV establishes that “*The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories*”. Article V of the GATT allows Members to be party into an agreement liberalizing trade in services between or among the parties to such an agreement, under certain conditions.

²⁰⁵ GATT, Article XXIV, requires that the duties and other regulations of commerce shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing prior the constitution of the FTA or CU – Article XXIV Paragraph 5 a) and b); and duties and other restrictive regulations of commerce are eliminated – Article XXIV, paragraph 8 a) and b). Also Article V of the GATS allows such agreements for Services.

²⁰⁶ See sources of PIL in Article 38 of the Statute of the International Court of Justice (ICJ): “*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (...)*”. The Statute of the ICJ does not provides any hierarchy between the sources of international law. In international law, only norms of *ius cogens* and norms *erga omnes* are considered to have a higher hierarchy as compared to the other norms. A norm of *ius cogens* is a norm accepted and recognized by the international community of States as a whole, from which no derogation is permitted (Article 53 of Vienna Convention); while a norm *erga omnes* is a norm that impose an obligations towards all and shall be applied by all states within their territory.

law²⁰⁷. These conflict clauses and principles of international law could be applied by WTO panels according to Article 3.2 of the DSU and Article 31.3 c) of the Vienna Convention, according to what was mentioned above.

The conflict clauses are supposed to regulate the relationship with other agreements, particularly between multilateral and *inter se* agreements. According to the International Law Commission (ILC), it should be borne in mind that: “ *i) they may not affect the rights of third parties; ii) they should be as clear and specific as possible, in particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty*²⁰⁸; and, *iii) they should, as appropriate, be linked with means of dispute settlement*”²⁰⁹.

From all the RTAs under analysis, only the NAFTA includes clauses on conflict of norms. Article 103 of the NAFTA establishes “*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.*” However, in case of conflict, the second paragraph provides “*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.*” Thus, according to the NAFTA conflict clause, in case of conflict between a WTO and a NAFTA provisions, the latter should have priority. The NGAs include a disposition similar to the first provision; but no provision equivalent to the second one. The MERCOSUR and Andean Community do not include a provision similar to the NAFTA provisions.

3.1.7 Relevance of RTA Provisions in a Conflict of Law in the WTO

According to the NAFTA conflict clause, in case of conflict between WTO and RTA provision, the latter should have priority. The question is if WTO panels would recognize the priority of RTA provisions in a dispute, when such provisions are alleged as a defense of WTO obligations. Considering that RTA provisions should be applied to interpret WTO covered Agreements when

²⁰⁷ In *Military and Paramilitary Activities in and against Nicaragua*, ICJ Report 1986, para. 274, the Court stated “*In general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary law if it has by treaty already provided means for settlement of such a claim.*”.

²⁰⁸ According to Article 31.1 of the Vienna Convention: “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”

²⁰⁹ Report of the Study Group of the ILC, *Supra* 179.

such RTA provisions are brought to a WTO dispute, according to Article 3.2 of the DSU and Article 31.3.c) of the Vienna Convention; it could be inferred that WTO panels are able to apply RTA provisions which modify WTO provisions between the disputing parties. In such case, the application of the RTA provision could not affect the enjoyment by the other parties of their rights under the treaty according to Article 41 of the Vienna Convention.

In addition, it must be considered that the WTO and the RTAs, contrary to other treaties e.g. environment or human rights treaties, constitute part of a “*special trade regime*”. According to the ILC, sometimes a set of rules and principles that regulate a particular subject matter or problem are collected together so as to express a “*special regime*”; e.g. “law of the sea”, “environmental law”, “trade law”²¹⁰. When the conflict concerns provisions within a same regime, then its resolution may be appropriate in the regime mechanism(s)²¹¹; preferable the general one²¹², in this case the WTO.

Therefore, it would be possible for a WTO panel or the AB to apply RTA provisions alleged as a defense of WTO obligations in order to adjudicate rights and obligations in a dispute within the scope of the WTO Agreements. In such case, the RTA provision brought as a mechanism of defense by the respondent would be used for the interpretation of the WTO provision as modifying the latter in the relationship between the disputing parties; provided that it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. In this regard, it is important to mention that the WTO provision that will be set aside will continue to influence the interpretation and application of the RTA provision to which priority has been given²¹³.

If we assume that WTO panels are not able to apply RTA provisions, an alternative for the panel would be to decline jurisdiction in favor of the regional mechanism; situation which I will address later in conflict of jurisdiction. Another possibility would be to apply the WTO provision. However, it could be interpreted that such application of the WTO provision in violation of the

²¹⁰Report of the Study Group of the ILC, p. 12. For interpretative purposes, such regimes may often be considered in their entirety.

²¹¹Report of the Study Group of the ILC, p. 19.

²¹² Koskenniemi, Martti, International Law Commission of United Nations: Fragmentation of International Law, Supra 199.

²¹³ Koskenniemi, Martti, International Law Commission of United Nations: Fragmentation of International Law, p. 174.

RTA provision is favoring the circumvention of the RTA. It is important to notice that a decline of jurisdiction would not be possible if the dispute involves other parties which are not Party of the RTA due to the requirement not to affect the enjoyment of third parties' rights under the WTO Agreements. In case there are other co-complaints, a possibility for the panel would be to solve the dispute only with respect to the non RTA Parties²¹⁴. If the dispute involves third parties who are non RTA Parties, these may initiate a case on its own merit based on WTO provisions.

If there is no conflict clause to determine which provision shall prevail, as in the other RTAs (Andean Community, MERCOSUR and NGAs), or if they do not solve the conflict of norms; it would be necessary to apply the principles of interpretation of international law in order to determine which norm prevails.

3.1.8 Rules of Public International Law

One of the most important principles of interpretation and conflict resolution in international law is *lex specialis derogate legi generali*. According to it, whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. For example, in application of *lex specialis*, an exception would have priority before a general rule²¹⁵. The rationale behind the principle is that special law has priority over general norms because it is more concrete. Thus, it is considered to create a more equitable result and better reflect the intent of a legal subject. The relationship between *lex specialis* and other norms of interpretation of international law depends on each case²¹⁶.

Another principle is *lex posterioris*, which is recognized in Article 30.3 of the Vienna Convention, *Application of successive treaties relating to the same subject matter*. According to it, “when all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended (...), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”. When the later treaty does not include all the parties of the earlier one, the same principle applies between the parties to both treaties²¹⁷.

²¹⁴ In those situations where panels and the AB are not able to reconcile the provisions of the WTO Agreements with those of other treaties, they may not be capable of making any recommendation under the WTO, thus faced with a situation of *non liquet*. Marceau, Gabrielle, *Conflicts of Norms and Conflicts of Jurisdictions*, Supra 181.

²¹⁵ Pauwely, Joost, *Conflicts of Norms in Public International Law*, Supra 180.

²¹⁶ Report of the Study Group of the ILC, Supra 179.

²¹⁷ Vienna Convention, Article 30.4. a).

However, the application of *lex posterioris* is limited to conflicting or overlapping provisions which are part of treaties that are institutionalized linked or form part of the same regime, e.g. trade law or environmental law²¹⁸. According to this principle, the provision of the treaty later in time should prevail.

Therefore, in case of conflict between a RTA provision and WTO provision, it would be possible for a WTO panel to determine which norm prevails by applying the principles of *lex posterioris* or *lex specialis*. The application of one or the other would depend of the particular circumstances of each case. If these principles determine that the RTA provision prevails a WTO panel would be able to apply the RTA provision according to Article 3.2 of the SDU and Article 31.3.c) of the Vienna Convention for the interpretation of a WTO provision.

3.2 Conflict of Jurisdiction

A conflict of jurisdiction appears when the same dispute or related aspects of the same dispute are brought before two different adjudicating bodies. These conflicts result of the possibility of forum shopping and the lack of hierarchy between international tribunals²¹⁹. The possibility of conflicts of jurisdiction causes concerns in terms of predictability due to the risk of different or even opposite conclusions. In addition, it may lead to fragmentation of international law and waste of resources²²⁰. As in the case of conflict of laws, there are also costs associated to the lack of certainty on how these conflicts are going to be addressed, mainly in the WTO.

3.2.1 Explicit Clauses on Conflict of Jurisdiction

As in conflict of norms, in a situation of conflict of jurisdiction, firstly it is necessary to examine if the agreement(s) provide for explicit conflict clauses. In other words, it is necessary to see if the parties involved in the dispute expressly agreed on particular rules for the election of

²¹⁸ Report of the Study Group of the ILC, Supra 179.

²¹⁹ Boisson de Chazournes, Laurence (1998): The Competing Jurisdiction of International Courts and Tribunals, *The American Journal of International Law*, Vol. 98, No. 3, pp. 622 -625; and, Shany Juval, Supra 36.

²²⁰ Marceau, Gabrielle, Conflicts of Norms and Conflicts of Jurisdictions, p. 108.

forum²²¹. Contrary to conflict of norms, all the RTAs include explicit jurisdictional conflict clauses.

In the Andean Community, the parties are not allowed to choose another forum in disputes that involve matters of the community system “*Member Countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding, except for those stipulated in this Treaty.*”²²². Contrarily, MERCOSUR leaves to the complaining party the option to choose the forum, including in disputes arising under MERCOSUR and the WTO “*Disputes within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organization or other preferential trade systems (...) may be referred to one forum or the other, as deciding by the requesting party*”²²³. Although, the Protocol of Olivos establishes that once a party has chosen a forum, it is to the exclusion of other forums²²⁴. The election of the forum under the Protocol is considered chosen with the initiation of consultation; and in the case of the WTO, with a panel request²²⁵.

On the other hand, the NAFTA uses a mixed formula. In general, it provides to the complaining party the possibility to choose the forum²²⁶; however, it establishes a preference in favor of the NAFTA mechanism in certain cases. Before a complaining Party initiates a dispute in the GATT “*on grounds that are substantially equivalent to those available to that Party under this Agreement [NAFTA]*”, if a third party prefers to have resource on the NAFTA and the Parties cannot agree “*the dispute normally should be settled in this Agreement*”²²⁷. Similarly, in cases

²²¹ Statute of the Court of Justice, Article 38; and, Vienna Convention on the Law of Treaties, Article 30.2: “*When a Treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provision of that other treaty prevail.*”

²²² Treaty establishing the Court of Justice of the Andean Community, Article 42.

²²³ Protocol of Olivos, Article 1.2.

²²⁴ Protocol of Olivos, Article 1.2 (paragraph 2): “*Once a dispute settlement procedure pursuant to the preceding paragraphs has begun, none of the parties may request the use of the mechanisms established in other fora, as defined by Article 14 of this Protocol.*”

²²⁵ Regulation of the Protocol of Olivos (Decision 3703), Article 1.

²²⁶ NAFTA, Chapter 20, Article 2005.1: “*1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.*”

²²⁷ NAFTA, Chapter 20, Article 2005.2: “*2. Before a Party initiates a dispute (...) in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have resource (...) under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those parties can not agree, the dispute normally shall be settled under this Agreement.*” If a third party does not join as a complaining party, it normally shall refrain of initiating or continuing

related to the protection of environment²²⁸, and disputes raised under the SPS and Standard-Related Measures Chapters when related to human, animal, plant life, health protection, or the protection of the environment; if the responding Party requests to consider the matter under the NAFTA, the complaining party may have resource “*solely under this Agreement*”²²⁹. Once a party has chosen a forum, it is to the exclusion of the other²³⁰. A proceeding under the NAFTA is considered initiated by a request for a meeting of the Commission; while in the GATT by a Party’s request for a panel²³¹. Nothing in the NAFTA impedes a NAFTA Party to start consultations under both agreements.

The NGAs provide rules for the choice of forum which are similar to those established in MERCOSUR²³². The NGAs establish that a proceeding in a forum is considered initiated, after the complaining party has requested a panel. Interestingly, the Colombia – US and Peru – US RTAs exclude from the scope of application of the dispute mechanisms any dispute between Andean Members concerning violations of the community system²³³.

In the WTO, Article 23 of the DSU establishes that Members, when seeking the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, “*shall have resource to, and abide by, the rules and procedures of this*

other procedure under the NAFTA, or the GATT if the grounds are “*substantially equivalent*” to those available under the NAFTA. The CAFTA – US, Colombia – US and Peru – US also contain a similar provision.

²²⁸ NAFTA, Chapter 20, Article 2005.3: “3. *In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environment and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have resource to dispute settlement procedures solely under this Agreement.*”

²²⁹ NAFTA, Chapter 20, Article 2005.4.

²³⁰ NAFTA, Chapter 20, Article 2005.6: “*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.*”

²³¹ See NAFTA, Articles 2007 (Commission – Good Offices, and 2005.7. NAFTA, Chapter 20, Article 2005.7: “*For purposes of this Article, dispute settlement proceedings under the GATT are deemed to be initiated by a Party’s request for a panel, such as under Article XXIII:2 of the General Agreement on Tariffs and Trade 1947, or for a committee investigation, such as under Article 20.1 of the Customs Valuation Code.*”

²³² “1. *Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing Parties are party or 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.*” (Articles XX).

²³³ Colombia – US and Peru – US RTAs, Chapter 21, Article 21.2.2: “*For greater certainty, this Chapter does not apply to disputes between Andean Community concerning breaches of Andean Community Law.*” The reason seems to be that the preferential trade relations between Peru, Colombia and the US are supposed to be ruled by a single free trade agreement in the future. Therefore, even when this provision is related to the scope of application of the RTAs, indirectly, it recognizes exclusive jurisdiction to the Andean Court in disputes arising between Colombia and Peru on matters that are regulated under both agreements.

Understanding”²³⁴. Furthermore, it establishes that “*Members shall not 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*”²³⁵. In *US –Section 301*, the panel stated that according to Article 23, Members shall have recourse to the multilateral process of the DSU “*to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations*”²³⁶. Additionally, in *US – Import Measures*, the AB established that Article 23 imposes on the Members the obligation “*not to have recourse to unilateral action*”²³⁷. Thus, Article 23 of the DSU has two objectives, firstly, to prohibit Members from applying unilateral actions and, secondly, to provide exclusive jurisdiction to the WTO panels and AB in disputes raised under covered agreements. The exclusive jurisdiction of the WTO would not apply to provisions of the RTA which are similar or incorporate WTO provisions.

In sum, it is possible to distinguish three types of clauses in the agreements mentioned above: i) clauses that give to the parties or one of them, freedom to choose the forum, this is the case of MERCOSUR, the NGAs and, in general, the NAFTA; ii) clauses that provide a preference for a particular forum, as in the NAFTA, when referred to third parties and dispute related to environmental and health matters; and, iii) clauses that confer exclusive jurisdiction, as in the WTO and the Andean Community. In addition, in case of subsequent disputes, the MERCOSUR, NAFTA and NGAs, provide exclusive jurisdiction once a forum has been chosen. In principle, these clauses are supposed to resolve the eventual conflicts of jurisdiction among the different adjudicating bodies.

3.2.2 Relevance of RTA Clauses on Conflict of Jurisdiction in the WTO

A situation of conflict of jurisdiction in disputes that involve matters covered under the WTO Agreements and RTAs would appear when the complaining party requests to have recourse to the WTO dispute mechanism, while the responding party requests a panel under the RTA, because it considers it has a better defense under this forum; or the contrary²³⁸. As we saw before, in

²³⁴ DSU, Article 23.1.

²³⁵ DSU, Article 23.2 a).

²³⁶ *US –Section 301*, WT/DS152/R, para. 7.43.

²³⁷ *US – Import Measures*, WT/DS1/AB/R, para. 11.

²³⁸ The former happened before a WTO panel in *Mexico – Soft Drinks*; while the latter occurred before a NAFTA panel in *US – Brooms*. In *US – Safeguards on Brooms*, Mexico argued the US safeguard violated both the NAFTA

MERCOSUR and NGAs, the conflict clauses would determine that the complaining party decides. In the NAFTA, this rule would apply, unless a third party request to activate the regional mechanism or the matter is versed on environment and health protection. According to these clauses, if no agreement is reached, the NAFTA mechanism should be preferred.

An international tribunal or adjudicating body has certain implied jurisdictional powers, which derive directly from their nature as judicial body; including, the jurisdiction to determine whether it has substantive jurisdiction to decide a matter (principle of *competence de la competence*), or to decide whether one should refrain from exercising substantive jurisdiction that has been validly established²³⁹. In *US – Anti Dumping Act of 1916*, the AB stated that an international tribunal “*is entitled to consider the issue of its own jurisdiction on its own initiative*”²⁴⁰. However, it does not mean that a WTO panel or the AB would recognize the jurisdiction conferred to a RTA adjudicating body; particularly, the exclusive or preferential jurisdiction provided in the Andean Community and the NAFTA when concerned to environment and health protection.

Article 7 of the DSU, *Terms of Reference of Panels*, instructs the panels to “*examine (...) the matter referred to the DSB*” and “*to make findings*”. The second paragraph of Article 7, states that panels “*shall address*” the relevant provisions in any covered agreement or agreements cited by the parties in a dispute. Moreover, Article 11 of the DSU, *Functions of Panels*, states that the panels “*should make an objective assessment of the matter before it*”. As mentioned before, Article 23 establishes that WTO Members shall have resource to the rules and procedures of the DSU when they seek the redress of a violation of obligations under the covered agreements. In addition, Articles 3.2 and 19.2 impose the limit to the panels and AB “*not to add or diminish the rights and obligations provided in the covered agreements*”.

For Marceau, it is extremely doubtful that a WTO panel would give any consideration to a party’s request to halt the procedures simply because it has a more appropriate defense in the regional forum. Thus, according to this author, panels would not be able to decline or suspend jurisdiction since it would constitute a violation of Article 23²⁴¹. Contrarily, for Pauwelyn, WTO panels

and the GATT; while the US argued that the NAFTA panel lacked jurisdiction to adjudicate the validity of “global safeguards” under the WTO. See Grantz, David, *Supra* 59.

²³⁹ Pauwelyn, Joost, *Conflicts of Norms in Public International Law*, pp. 147 – 149.

²⁴⁰ AB report on *US – Antidumping Act of 1916*, WT/DS136/AB/R.

²⁴¹ Marceau Gabrielle, *Conflicts of Norms and Conflicts of Jurisdictions*, *Supra* 181.

should give effect to jurisdictional conflict clauses included in other agreements; hence they constitute part of their applicable law²⁴².

In my opinion, WTO panels could not deny the jurisdiction of regional adjudicating bodies under Article 23, considering that Article XXIV of the GATT expressly allows, under certain conditions, the formation of free trade agreements and customs unions, and thus, of regional dispute mechanisms to solve the disputes derived from those agreements. Thus, WTO panels should be able to consider explicit conflict jurisdictional clauses to determine their own jurisdiction. This will not constitute a violation of Articles 3.2, 7, 11 and 19.2 of the DSU; hence they result applicable according to Article 3.2 of the DSU as a general rule of interpretation, according to Article 31.3 c) of the Vienna Convention. I referred to this same issue in dealing with conflict of norms. However, this does not mean necessarily that they would decline jurisdiction in favor of the regional forum. The decision of the panel to decline or suspend jurisdiction would depend on the particular circumstances of each case. For example, it is doubtful that a WTO panel would deny jurisdiction to a party which is still affected by a supposed violation, even when this party has already obtained a pronouncement under a RTA dispute mechanism. On the contrary, in a case where there is already a pronouncement of the RTA adjudicating body, the WTO could decide to decline jurisdiction when it is notorious that the intention of the violating party behind starting a new process is to delay or avoid the compliance of a prior decision²⁴³.

3.2.3 Situations on Conflict of Jurisdiction: Parallel vs. Subsequent Disputes

It is important to distinguish two situations that might appear before a panel: The conflicts of jurisdiction that appear in *parallel* – when two adjudicating bodies take knowledge of the same matter at the same time-; or *subsequently* – when an adjudicating body knows of a matter, after another one solved the same or equivalent matter. Additionally, the first one –*parallel* conflict of jurisdiction- can be divided into two situations, depending on if there is a conflict of norms or

²⁴² Joost Pauwelyn, *Conflicts of Norms in Public International Law*, p. 114 – 116 and 459 – 460. Pauwelyn differentiates between “applicable law” and “substantive jurisdiction”. According to this author, the determination of its own jurisdiction (*competence de la competence*) is based on the “applicable law”; while, the analysis of the substantive rights and obligations of the parties within a dispute is based on the “substantive jurisdiction”, e.g. WTO covered agreements.

²⁴³ Some of these cases may constitute a violation of the rules on international responsibility.

not. In both situations the requirements provided in Article 41 of the Vienna Convention apply, as appropriate.

In case of *parallel* disputes, if there is a conflict of norms and the RTA provision prevails; the WTO panel could decline jurisdiction in favor of the regional forum, provided that it does not affect the rights of third parties; unless it decides to apply the RTA provision. If there is no conflict of norms, nothing impedes the WTO panel to solve the dispute based on the WTO provision. However, if there is a conflict clause that gives preference or recognizes exclusive jurisdiction to the regional forum, the panel would have to decide if it declines jurisdiction or not, based on such conflict clause. If there are no explicit clauses on conflict of jurisdiction, the panel would have to apply the principles of *lex specialis*, *lex posterioris*, abuse of rights and *lis alibi pendens*.

On the other hand, in case of *subsequent* disputes, again the conflict clauses on election of forum should be applicable. If there are no clauses or they do not solve the problem, the rules of international law for the avoidance of duplication of proceedings (*res judicata* and *estoppel*) should be applied. In any case, the WTO panel would have to decide if it corresponds to decline jurisdiction, according to the particular circumstances of the case; provided that it does not affect the rights of other Members.

3.2.4 Case Law

In *Argentina – Antidumping duties on Poultry*, Brazil initiated a dispute settlement procedure under the WTO, after obtaining an unsatisfactory award under a MERCOSUR panel²⁴⁴. At the moment of the dispute, there were no jurisdictional conflict clauses in MERCOSUR, as the Protocol of Olivos was not yet into force²⁴⁵. Even though, the panel referred to it and stated that “*the Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force. (...) Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognized that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement*”

²⁴⁴ *Argentina – Antidumping duties on Poultry*, WT/DS241/R (November 7th 2001).

²⁴⁵ As mentioned before, the Protocol of Olivos entered into force on 2003. To the dispute it was applicable the Brasilia Protocol, which did not include conflict jurisdictional clauses.

proceeding in respect of the same measure”²⁴⁶. The panel seemed to imply that, contrary *sensu*, in the presence of explicit conflict clauses, these clauses would be taken into account.

In *Mexico – Soft Drinks*, Mexico requested the panel to decide, as a preliminary matter, to decline jurisdiction in favor of an arbitral panel under Chapter 20 of the NAFTA. The panel rejected Mexico’s request and found that under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case brought properly before it. The AB agreed with the panel that Mexico did not claim “*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*”²⁴⁷. According to Mexico, the dispute was inextricably linked to a previous NAFTA dispute and thus, that only a NAFTA panel could resolve the dispute as a whole. However, the AB noted that no NAFTA panel as yet has decided the “broader dispute” to which Mexico was alluding. Furthermore, the AB noted that “*Mexico has expressly stated that the so – called “exclusion clause” of Article 2005.6 of the NAFTA [which provides exclusive jurisdiction once a forum has been chosen] had not been exercised*”. Thus, the AB concluded that it could not “*express any view as to whether a legal impediment to the exercise of a panel’s jurisdiction would exist in the event that features such as those mentioned above were present*”²⁴⁸.

In the disputes mentioned above, neither the panel nor the AB exclude the possibility to apply conflict clauses. Moreover, they did not state that the application of such clauses would constitute *per se* a violation of the DSU. While in *Argentina – Antidumping duties on Poultry*, there were no applicable conflict clauses between the disputing parties, at the moment of the dispute; in *Mexico – Soft Drinks*, the conditions for the application of the conflict clauses were not met. The consideration of the AB of such conditions in *Mexico – Soft Drinks*, seems to demonstrate the willingness to take them into account and maybe, eventually, to apply them as an impediment to the exercise of jurisdiction if the conditions for their application are fulfilled and according to the particular circumstances of each case.

3.2.5 Rules of International Law on Conflicts of Jurisdiction

²⁴⁶ *Argentina – Antidumping duties on Poultry*, para 7.38.

²⁴⁷ *Mexico – Soft Drink*, WT/DS308/AB/R, para. 44.

²⁴⁸ *Mexico – Soft Drink*, para. 54.

As mentioned before, in case of parallel conflicts, if explicit jurisdictional clauses do not solve the conflict²⁴⁹ or there are no conflict clauses; an adjudicating body could decline or suspend jurisdiction in a specific case according to the rules of public international law.²⁵⁰ The following rules of public international law result applicable: i) *forum non convenient*; ii) *lex specialis*; iii) *lex posterioris*; iv) *li alibi pendens*; and v) *abuse of right*.²⁵¹

The *forum non convenient* doctrine is defined as a general discretionary power for a court to decline jurisdiction²⁵² according to criteria such as availability of witnesses, expenses and the place of residence of the parties. However, according to commentators, the possibilities for a tribunal to decline jurisdiction based on this doctrine are very low.

The principles of *lex specialis* and *lex posterioris* are relevant in dealing with conflicts of jurisdiction. According to Shany, these principles are applicable where the selection of a forum has been made in violation of a conflict clause, e.g. clause recognizing exclusive jurisdiction²⁵³. As mentioned above, the principle of *lex specialis* gives prevalence to the specific provision over the general one. Thus, special jurisdictional clauses for certain category of disputes shall prevail over a more general jurisdiction conferred to another tribunal²⁵⁴; e.g. the preferential jurisdiction provided in the NAFTA in environmental and health protection matters in principle should prevail over the general jurisdiction of the WTO. On the other hand, according to the principle of *lex posterioris* recognized in Article 30.3 of the Vienna Convention, the conflict clauses of the later treaty should prevail.

Lis alibi pendens arises from international comity and it permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in another state²⁵⁵. For Shany this doctrine may be applicable in disputes arising from different systems as well as disputes arising between regional agreements. On the other hand, the principle of *abuse of rights*, which is derived from

²⁴⁹ For Pauwelyn, in most cases where there is overlapping jurisdiction in two international tribunals, the risk of conflicting judgments can be avoided by applying the rules on conflict of norms of public international law. I will refer to them latter. Joost Pauwelyn, *Conflicts of Norms in Public International Law*, p. 114.

²⁵⁰ Except for the norms of *ius cogens* and norms *erga omnes*, See Supra 206. Vienna Convention, Article 53.

²⁵¹ Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*.

²⁵² JJ Faucett, *Deciding Jurisdiction in Private International Law*, in: Marceau Gabrielle, Supra 181.

²⁵³ Shany, Yuval, Supra 36.

²⁵⁴ Vaughan, Lowe, (2001) *Overlapping Jurisdictions in International Law*, in: Joost Pauwelyn, *Conflicts of Norms in Public International Law*, p. 115.

²⁵⁵ This author uses as example the *Swordfish dispute* which was submitted simultaneously to both the International Tribunal for the Law of the Sea (ITLOS) and a panel of the WTO. Shany, Yuval, Supra 36.

the principles on state responsibility, may also support a prohibition on parallel disputes²⁵⁶. However, the precise manner of application is not still settled and there are differences as to what constitutes the same dispute²⁵⁷.

If the purpose is to avoid the duplication of proceedings in the case of subsequent disputes, which may lead in contradictory decisions, the following rules of international law might be applied: i) *res judicata*; and ii) *estoppel*.

In cases where the legal claims have already been decided in a forum, it is applicable the general principle of *res judicata*. Once a dispute has been finally decided, subsequent judges who are confronted with a dispute that involves identical or substantially the same matters, would apply *res judicata* to preserve the first one. Three conditions must be met for *res judicata* to apply: i) identity of parties; ii) identity of subject matter; ii) identity of the legal cause of action (legal basis). The principle of *res judicata* would not be applicable if the legal basis or treaty for the claim is not the same. Thus, if a RTA adjudicating body solves a dispute based on provisions of the regional agreement and later, one of the parties presents a claim before a WTO panel based on the WTO Agreements, the principle of *res judicata* would not be applicable. Consequently, this principle may result too narrow in certain cases²⁵⁸.

An alternative may be to apply the principle of *estoppel*. The principle of *estoppel* is based on the principles of good faith²⁵⁹. As the principle of *res judicata*, it results applicable once a dispute has been finally decided. However, the condition of identity of legal cause is not required in the *estoppel*²⁶⁰. For the principle of *estoppel*, the similarity is based on the matter or facts instead of the law. Until now, it is not clear what should be understood by same matter or facts. Although in *Argentina – Antidumping duties on Poultry*, the panel did not apply the principle of *estoppel*, it pointed out the following conditions for its application: i) a statement of fact, which is clear and ambiguous; ii) this statement must be voluntarily, unconditional and authorized; iii) there must be reliance on good faith²⁶¹. In *US – Softwood Lumber from Canada*, the panel did apply the

²⁵⁶ Byers, Michael (2002), Abuse of Rights: An Old Principle a New Age, in: *Mc Gill Law Journal*, 47, 389.

²⁵⁷ Shany, Yuval, *Supra* 36.

²⁵⁸ However, it must be considered that the principle of *res judicata* in common law systems is not as narrow as the one applied in civil law systems.

²⁵⁹ Brownlie, Ian (2003), *Principles of Public International Law*, Sixth Edition, Oxford, p. 615- 616.

²⁶⁰ Pauwelyn, Joost, *Supra* 44. Vienna Convention, Article 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

²⁶¹ Para. 7.17 - 7.42. See also Brownlie, *Supra* 259.

principle of *estoppel*²⁶²; however, it was with regard to a previous dispute known by a GATT panel.

3.2.6 Lack of Clauses for the Coordination between RTAs and the WTO

It must be noted that, besides the conflict clauses, none of the agreements mentioned before provides clauses regarding the coordination or consistency with other dispute settlement mechanisms. In the case of the Andean Community and MERCOSUR, there have been some initiatives towards a major judicial cooperation, coordination and exchange of information only at the regional level, among the Andean and MERCOSUR Courts²⁶³. In the WTO, the DSU provides the possibility to request advisory opinions to other international bodies; which are not binding for the panels. These opinions have been requested in some cases. At the moment, it seems unlikely that a WTO panel requests an opinion from an RTA panel; although, some commentators have suggested that Article 13 of the DSU may provide to WTO panels a basis to require expert information from RTA organs²⁶⁴. The opposite situation seems more likely, a RTA panel requiring an opinion to the WTO AB; considering that it is a common practice among the RTA adjudicating bodies to rely on WTO precedents. However, the AB seems not to have competence to provide such an opinion at the moment²⁶⁵.

In *US- Safeguards on Brooms*, Mexico argued that the US violated both the NAFTA and the GATT, before a panel established under Chapter 20 of the NAFTA. The US argued that the NAFTA panel did not have jurisdiction to examine global safeguards measures, because the GATT Article XIX and the Safeguards Agreement were not explicitly incorporated to the NAFTA. The panel did not consider if it had jurisdiction to know the matter. Instead, it decided to dispose the issue under the NAFTA. Both parties agreed to accept a decision based solely in the NAFTA. However, the panel relied on previous GATT panel decisions in its report²⁶⁶.

²⁶² BISD 40S/358. See Palmente, David and Mavroidis, Petros, *Dispute Settlement in the World Trade Organization*, p.51.

²⁶³ Primer Encuentro de Magistrados de las Cortes Supremas de los Países de la CAN y del MERCOSUR, del Tribunal de Justicia de la Comunidad Andina y del Tribunal Permanente de Revisión del MERCOSUR, October 2005. Also see, *Convergencia Comercial de los Países de America del Sur hacia la Comunidad Sudamericana de Naciones "Solucion de Controversias"*. See Andean Community web page: <http://www.ccomunidadandina.org/>

²⁶⁴ Kwak, Kyung and Marceau, Gabrielle, *Overlaps and Conflicts of Jurisdiction between the WTO and RTAs*. Such evidence would be treated as part of the facts of the case.

²⁶⁵ Article 17 of the DSU.

²⁶⁶ Grantz, David, *Supra* 62.

Agreeing with Howse, NAFTA panels should take into account interpretations of WTO law that have been developed by the AB in disputes where the matter involves criteria of analysis set in the multilateral forum²⁶⁷, e.g. criteria for determining the likeness of the products; particularly when a WTO provision is incorporated by reference to the RTA. Furthermore, according to this author, it would be necessary to make GATT – consistency a condition precedent to justification of a defendant’s measures under the NAFTA. This determination of whether the condition of consistency has been met would be made by the NAFTA panel itself²⁶⁸. As mentioned before, no agreement includes provisions for the consideration of previous precedents of the WTO; such as the one proposed by this author. Moreover, none of the RTAs includes provisions directed to promote the coordination between the regional and multilateral forums, e.g. the possibility to require an advisory opinion to the WTO in disputes that involve provisions based on the multilateral Agreements or to request information regarding a previous case. The reason may be that there is no requirement in such sense within the WTO at the moment. Agreeing with Shany, it seems that more work on coordination and cross–fertilization between the different dispute settlements needs to be done²⁶⁹.

²⁶⁷ Robert, Howse (Not Published yet): Choice of Forum and Choice of law in WTO and NAFTA: A Legal Perspective.

²⁶⁸ Supra 263.

²⁶⁹ Shany, Yuval, The Competing Jurisdictions of International Courts and Tribunals, p. 287 – 288.

Conclusions

The American RTAs give to their Parties the possibility of *forum shopping* or to choose the most convenient forum for the settlement of a dispute. The comparison of the factors at play in forum shopping between the RTAs and WTO allows us to identify the *pros* and *cons* of each forum, which have to be carefully considered at the moment of selecting a forum. Although, some of these factors have to be analyzed on a case by case basis, it is possible to obtain some general conclusions regarding the strengths and weaknesses of the RTAs compared to the WTO.

Forum shopping or forum selection gives the possibility to choose the law or agreement that offers the best possibility to win a dispute. Even when an RTA seems to be more liberal than the WTO in certain areas, it does not mean that the former will be more advantageous. In choosing the law it is important to take into consideration not only the coverage of each agreement, but also possible interpretations and available defenses for the other party. The *pros* of an agreement will depend on the particular circumstances of each case.

Forum shopping also gives the possibility to choose the most convenient forum, according to the *pros* of institutional and procedural factors. Regarding the institutional factors, the WTO is the only one that provides the benefit of exposure and potential broad support from other Members derived from its unique multilateral nature. On the other hand, the institutional support provided by the Andean Community Secretariat, which is allowed to present claims *ex officio*, definitely constitutes an advantage for the Andean Parties who can join these claims.

The procedural advantages of the WTO vary depending on each RTA. The WTO seems to be a better option in comparison to the North – South agreements in factors such as the binding nature of the decisions and possibility to appeal. The explicit binding nature of the reports after their adoption by the DSB and the possibility to review the panel report is perceived as an important advantage in favor of the WTO in terms of security and predictability. These advantages of the WTO over the North – South agreements seem to be linked to the tendency of these agreements to give to the disputing parties more control over the procedure, which may constitute a disadvantage particularly for the smaller countries. In addition, the WTO system for the selection of panelists is more advantageous in terms of expertise and perception of independency of the

panelists. Furthermore, it eliminates the risk of blocking the dispute due to a lack of consensus on the list of panelists, which constitutes an important advantage compared to the North – South agreements. In comparison to the Andean Community, the WTO gives the advantage of a stage of consultations, which has proved to be cost-effective for the resolution of disputes.

The RTAs (South- South and North- South) seem to provide more advantages compared to the WTO, in procedural aspects such as timeframes, implementation and remedies. Compared to the WTO, the RTA procedures seem to be more expeditious, mainly in the stage of implementation; as well as more flexible in terms of remedies available, which may result useful particularly when the costs of eliminating the violating measure are very high. In addition, the record of compliance in the Andean Community seems to benefit this forum. In addition, each RTA has particular advantages in comparison to the WTO.

The Andean Community is the only one that provides to the complainant the benefit of explicitly binding decisions with direct effects over the parties; which seems to be related to its higher level of integration and more homogenous composition, compared to the other RTAs, particularly the North – South agreements. In addition, the Andean Community is the only one that recognizes full standing to private persons to present claims against the parties in case of violation of the agreements; although the MERCOSUR and NAFTA recognize access to private persons in certain cases. The recognition of standing to private persons represents an important advantage compared to the WTO, where private persons depend on the willingness of their governments to protect their interests.

The NAFTA and NGAs offer the advantage of the explicit recognition of extensive rights to third parties; issue which currently is subject to review in the DSU. The new NGAs are the only ones that provide full transparency in disputes and the possibility to receive briefs from non governmental entities, under certain conditions. The permission of these briefs may represent an advantage in order to give the RTAs and their dispute mechanisms a more democratic image, considering the increasing interest of civil society in disputes involving sensitive public issues; although, the pertinence of such briefs should be considered on a case by cases basis.

The political considerations in forum selection play an important role mainly in RTAs and should be taken into account especially when the dispute involves a close or strategic partner. The

benefits of reaching a negotiated solution, as well as the costs of delays and possible political pressures from the politically stronger party in North- South agreements should also be carefully considered.

The comparison of the factors at play in forum shopping shows that there is not *per se* a better dispute mechanism for the resolution of trade disputes between the WTO and the RTAs. The selection of one forum or the other will depend on the analysis of the costs and benefits or *pros* and *cons* of all the substantive, institutional, procedural and political factors at play in forum selection and the particular circumstances of each case. This comparison between the agreements allows us to identify the advantages of each mechanism at the moment of forum shopping in order to create positive synergies between these mechanisms in the future. Furthermore, I consider it will be useful for future reviews and negotiations of these and other dispute mechanisms, particularly the review of the DSU of the WTO.

Other consequences of the American RTAs in dispute settlement are the *conflicts of law* and *conflicts of jurisdiction* that might appear before the adjudicating bodies of these agreements and the WTO. Until now it is not clear how these conflicts would be solved by the WTO panels and AB. Moreover, this issue has not been further discussed yet; although it is important in order to reduce the costs derived of these conflicts in terms of lack of predictability and fragmentation.

A conflict of law appears when two or more provisions applicable to the same matter point to contradictory decisions, so that a choice must be made between them. In such case, firstly it is necessary to distinguish between a situation of apparent and real conflict. In this regard, the principle of harmonization or effective interpretation is key in order to reduce the situations of conflict to the extent possible.

In case of real conflict between WTO and RTA provisions, a panel would have to apply the customary rules of interpretation of public international law according to Article 3.2 of the DSU. The most relevant rule of interpretation of treaties in this case is contained in Article 31.3 c) of the Vienna Convention, which establishes that for the interpretation of treaties “other treaties” should be taken into account. According to this rule of interpretation, RTA provisions should be used for the interpretation of WTO provisions, when such RTA provisions are brought to a WTO dispute by a disputing party. In addition, must be considered Article 41 of the Vienna Convention

which regulates the modification of multilateral agreements by certain parties only, such as the RTAs with respect to the WTO Agreements; and Article XXIV of the GATT which explicitly allows the formation of RTAs, under certain conditions. If the RTA includes explicit conflict clauses, these would have to be taken into consideration in order to solve the conflict. From all the RTAs, only the NAFTA includes such clauses, which establish the prevalence of NAFTA provisions in case of conflict with the WTO Agreements.

It is doubtful if a WTO panel would recognize the priority of RTA provisions, when such provisions are presented in a WTO dispute as a defense of alleged WTO obligations under the covered Agreements. However, Article 3.2 of the DSU and Article 31.3 c) seem to allow WTO panels to apply RTA provisions in order to interpret WTO provision as modifying the latter in the relationship between the disputing parties on that specific matter; provided that it does not add or diminish the other Members' rights and obligations. Articles XXIV of the GATT and 41 of the Vienna Convention seem to support the recognition of RTA provisions and their application by WTO panels in case of conflict of law provided that it does not affect the enjoyment of third parties' rights and the other conditions for their application are met. In addition, the fact that WTO Agreements and the RTAs form part of a "special trade regime" supports the application of RTA provisions by WTO panels. Finally, if there is no conflict clause or this does not solve the conflict, the panel may apply the general principles of *lex specialis* and *lex posterioris* to solve the conflict.

A conflict of jurisdiction appears when the same dispute or related aspects of the same dispute are brought before two adjudicating bodies. These conflicts result of the possibility to choose between the dispute settlement mechanisms of the RTA and the WTO as the most convenient forum for the settlement of their disputes. In case of conflict of jurisdiction, it is necessary to see if the parties agreed on explicit clauses to solve these conflicts. All American RTAs and the WTO include explicit clauses, which differ from each other. Some of them give freedom to the parties to choose the forum (MERCOSUR and NGAs); while others provide preferential (NAFTA) or exclusive jurisdiction (WTO and Andean Community). In addition, most RTAs provide exclusive jurisdiction after a forum is chosen.

It is recognized that adjudicating bodies have the power to analyze their jurisdiction before solving a dispute. In this regard, Article 3.2 of the DSU and Article 31.3 c) seem to allow WTO

panels to recognize RTA clauses on conflict of jurisdiction. In addition, Article XXIV of the GATT supports the recognition of such clauses, considering that it expressly allows the subscription of RTAs, and thus, of regional dispute mechanisms to solve the disputes derived from these agreements. However, the recognition of RTA conflict clauses does not mean that the panels will necessarily decline jurisdiction according to such clauses whenever a dispute involves matters covered under both, the WTO Agreements and the RTA. The decision to decline or suspend jurisdiction would depend on the particular circumstances of each case.

It is important to distinguish between situations of parallel and subsequent conflicts of jurisdiction; hence the rules for solving these conflicts differ in each situation. If the conflict clauses do not solve the problem, adjudicating bodies are able to apply the principles of international law applicable to conflicts of jurisdiction. In a situation of parallel conflicts, the principles applicable are *forum non convenient*, *lex specialis*, *lex posterioris*, *lis alibi pendens* and abuse of right; while in case of subsequent disputes, the principle and doctrine of *res judicata* and *estoppel* are pertinent.

The analysis on conflicts of law and jurisdiction between the RTAs and the WTO may give some guidance on the WTO legal basis for the analysis of these conflicts and the rules and principles of international law applicable to them. Currently, there are no initiatives for the coordination between RTAs and the WTO dispute mechanisms, which might help adjudicating bodies to address these conflicts. The potential conflicts of law and jurisdiction that might appear in the future due to increasing proliferation of RTAs make it necessary to start thinking about the inclusion of effective tools which make the coordination between the RTAs and the WTO possible in the future.

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