Examining the Overlapping Jurisdictions between the WTO and AfCFTA Dispute Settlement Mechanisms: Whose Jurisdiction Is It Anyway?

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Abstract

Under the World Trade Organization (hereinafter referred to as WTO) legal framework, at least in principle, there should not be discrimination between and among member states. This principle is further reinforced by the two core non-discriminatory provisions: national treatment and most-favored-nation treatment. This principle is not without exception, however. The different enabling clauses and specifically Article XXIV allows regional trade agreements to deviate from and provide preferential treatment. WTO system, however, lacks clarity and nowhere does it specify how to regulate the competency of the jurisdiction between the WTO and regional trade agreements dispute settlement mechanisms. This will in turn pose the greatest danger of assumption of jurisdiction by both forums and leads to forum shopping and irreconcilable decisions. Therefore, this piece of reflection tries to unpack one of the lingering questions of whether AfCFTA dispute settlement or the WTO dispute settlement body will have the competency to examine and provide valid judgement.

Keywords: AfCFTA, WTO, Dispute Settlement Body, Overlapping, Jurisdiction, Rule of Interpretation

Introduction

The mastermind behind the formation of WTO contemplates the pyramidal shape of international trade system which places multilateral agreement at the top, RTAs in the middle and national legal systems at the bottom. With

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the proliferation of RTAs, the jurisdictional conflict between the WTO and RTAs is ever increasing.[1]

In the era of GATT, only 123 RTAs were notified.[2] However, since the formation of the WTO, more than 300 additional RTAs notifications have been notified to the WTO Secretariat and as of 1 September 2019, 302 RTAs were enforced.[3] This in turn leads to double membership of a state in WTO and RTAs.[4] There are instances whereby both RTAs and WTO have the capability to entertain and pass a valid judgement over a dispute. As a result, there is a potential conflict of horizontal jurisdiction[5] between RTAs and the WTO dispute settlement mechanisms. Such type of jurisdictional overlap is well manifested in the Peru-Agriculture Product case[6], the Soft Drink case[7] and the Argentina-Poultry case.[8]

Sadly enough, under WTO system there is no forum choice clause and RTAs usually provide a forum clause to resolve the dispute.[9] In this piece, overlapping of jurisdiction can be defined as "situations where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems."[10] The very existence of overlap of jurisdiction can lead to duplication of cost, possibility

[1] Rafael Leal-Arcal, Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism? Queen Mary University of London Legal Studies Research Paper No. 78/2011, (2011), p. 597.

[2] Ibid.

[3] See Regional Trade Agreements available at: https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts last accessed on 19 November 2019.

[4] This is what Professor Jagdish Bhagwati called spaghetti bowl see Jagdish Bhagwati, Preferential Trade Agreements: the Wrong Road, *Law and Policy International Business*, Vol. 27, (1996), p. 866.

[5] Jurisdiction can be either horizontal or vertical. Horizontal jurisdiction is the allocation of jurisdiction between and among states and international organization. On the other hand, vertical jurisdiction means the allocation of jurisdiction between states and international organization see K Kwak and G Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, The Canadian Yearbook of International Law, (2003), pp. 83-84.

[6] For more detailed discussion please see G Shaffer and L Winters, FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law, *World Trade Review*, Vol. 16, No. 2., (2016).

[7] For more detailed discussion on this point please see J. Davey, The Soft Drinks Case: The WTO and Regional Agreement, *World Trade Review*, Vol. 8, Issue 1, (2009).

[8] For more discussion on this point please see R Howse and J Langile, Spheres of Commerce: The WTO Legal System and Regional Trading Blocs- A Reconsideration, *Georgia Journal of International and Comparative Law*, Vol, 46, (2018), pp. 680-683.

[9] See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (1994). [hereinafter Understanding on Rules and Procedures Governing the Settlement of Disputes].

[10] R. Howse and J Langile, *supra* note 8, p. 86.

of res judicata,[11] irreconcilable decisions[12] and more importantly, uncertainty of international trade. Therefore, this reflection discusses the allocation of jurisdiction between these two competing and conflicting jurisdictions of the WTO DSM and AfCFTA Dispute Settlement Mechanism (hereinafter referred to as AfCFTA DSM).

1. Dispute Settlement under the WTO and the AfCFTA Regimes: Searching the nexus

Before examining the relationship between dispute settlement mechanisms under the WTO and Regional Trade Agreements (hereinafter RTAs), it is imperative to deal with how RTAs are dealt within WTO in general.

As developing countries constitute 75% of the WTO membership, the big concern from the very start was how to reconcile the interests of the developed and developing countries in one legal system.[13] One of the core touchstones of the WTO's system is the principle of non-discrimination which is enforced by two tools: national treatment[14] and most-favoured nation standard of treatment.[1516] Article 1 of the GATT states "… any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.''[17] This being the principle, there are exceptions for every established norm. Likewise, the GATT/WTO comes up with exceptions for this rule by way of an enabling clause[18] and RTAs.[19]

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[11] For more discussion on this please see S Sternberg, Res Judicata and Forum Non-Convenience in International Litigation, *Cornell International Law Journal*, Vol. 46, (2013).

[12] G. Kaufumann-Kohler, How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-suit Injunctions, *Dispute Resolution International*, Vol. 2, No. 1, (2008), p.110.

[13] L Stamberger, The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause, *Chicago Journal of International Law*, Vol. 4, No.2 (2003), p. 607.

[14] General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (1994) [hereinafter GATT/WTO], Article 3.

[15] Article 1 of the GATT/WTO.

[16] For more enlightened discussion on this point please see K Bagwell and W Staiger, *Reciprocity, Non-discrimination and Preferential Agreement in the Multilateral Trade System*, Working Paper No. 5932, National Bureau of Economic Research, (1997).

[17] Article 1 of the GATT/WTO.

[18] WTO/GATT Differential and More Favoured Treatment, Reciprocity and Full Participation of Developing Countries, (1979), Article 1

Enabling clauses can be applied for both between developing countries and between developing and developed countries.[20] Paragraph two of the enabling clause allows developed countries to provide special and differential treatment for least developing countries. Under Paragraph 2(a) of the enabling clause, the presence of two blocks of the countries is contemplated: preference-granting countries, i.e. developed countries and preference-receiving countries, i.e. developing countries.[21] Generally, the type of preference given by developed countries to the developing world under enabling clauses should be generalized, non-reciprocal and non-discriminatory in nature.[22] Whereas, under Paragraph 2(c) it is indicated that "Regional[23] or global arrangements[24] entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs, and in accordance with criteria or conditions which may be prescribed by the Contracting Parties." Moreover, Paragraph 2(d) provided for "[s]pecial treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.''

The other exception is Article XXIV of GATT/WTO that also has become the single most controversial provision for which all negative adjectives has been employed: extremely elastic, unusually complex, full of holes, full of ambiguity, vague absurdity, contradictory even mysterious.[25] GATT tolerates formation of customs union and free-trade areas in spite of MFN principles.[26]

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[19] Article 24 of the GATT/WTO

[20] WTO/GATT Differential and More Favoured Treatment, Reciprocity and Full Participation of Developing Countries, WTO 28 November 1979, Paragraph two

[21] E Patterson, Rethinking the Enabling Clause, *Journal of World Investment and Trade*, Vol. 6, No. 5, (2005), p.739.

[22] This came from the 1971 waiver decision see K Moss, The Consequences of the WTO Appellate Body Decision in EC-Tariff preference, for the African Growth Opportunity Act and Sub-Saharan Africa, *New York University Journal of International Law and Politics*, Vol. 38, No. 3, (2006), p.688.

[23] This means those RTAs formed between member countries of the same geographical location as AfCFTA.

[24] This means those RTAs formed between member countries of different geographical region like EU-China.

[25] K Chase, Multilateralism Compromised: the Mysterious Origins of GATT Article XXIV, *World Trade Review*, Vol. 5, No. 1, (2006), p. 1.

[26] Y Devuyst and A Serdarvic, The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap, *Duke Journal of Comparative and International Law*, Vol. 18, (2007), p. 17.

The close reading of Article XXIV of GATT reveals that RTAs can be customs union, free trade areas and interim agreement. Customs union is when two or more independent countries adopt a common external tariff to third parties and substantially reduce the tariff between and among themselves.[27] Free trade areas, on the other hand, emerge when two or more countries come together and substantially reduce the tariff between and among themselves with the view to facilitate trade; however, each country is allowed to retain their tariff rate to third parties.[28] These two arrangements assume that after the conclusion of the agreement they will enter into force immediately.[29] However, under Article XXIV, members of GATT envisage the possibility of a gap between the conclusion of the agreement and entry into force of the same agreement and this is called interim agreement.[30]

WTO, the youngest but the most influential economic globalization institution,[31] is the largest multilateral arrangement which encompasses 164 countries as member states[32] with complicated rules and regulations where the possibility of dispute as to the interpretation and application of the rules is inevitable. Recognizing this fact, from the very inception there was dispute settlement body intended to clarify the provisions of GATT/WTO. This has been an evidently well proven assumption since 1995 more than 300 disputes are brought before WTO.[33]

If not all, most RTAs which were established either under the enabling clause or Article XXIV exception have dispute settlement mechanisms that

[27] Article XXIV 8(a)(i) and (ii) of the GATT/WTO. For more detailed and enlighten discussion please see P Steve, Living in Sin: Legal Integration under the EC-Turkey Customs Union, *European Journal of International Law*, Vol. 7, No. 3, (1996).

[28] Article XXIV 8(b) of GATT/WTO. For more detail discussion please see P Hilpold, *Regional Integration According to Article XXIV GATT-between Law and Politics*, Max Planck Yearbook of United Nations Law, (2003).

[29] Z Hafez, Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs, *North Dakoto Law Review*, Vol. 79, (2003), p. 886.

[30] Article XXIV 8 of GATT/WTO..

[31] D Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, (2005), p.78.

[32] World Trade Organization, Members and Observers, (29 July, 2016), available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm last accessed on 19 August 2019.

[33] World Trade Organization, Dispute Settlement System Training Module, Preface, (November 2003), available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/intro1_e.htm, last accessed on 19 August 2019.

resolve any dispute arising between and among the signatory members.[34] This leads to the potential conflict of interest between the WTO dispute settlement body (hereinafter referred as WTO DSM) and Regional Trade Agreements dispute settlement mechanisms(hereinafter referred as RTAs DSM).[35]

With the view to avoid jurisdictional overlap between the WTO and RTAs DSM, many RTAs stipulate dispute settlement clause.[36] The general assessment of comparative analysis exhibits that three types of modality are employed to resolve the issue of overlapping jurisdiction between the WTO and RTAs DSM.

In some types of RTAs, the dispute settlement mechanism is provided, however, without mentioning anything about the possibility of resorting to the WTO or other international dispute settlement mechanisms. For instance, under Central European Free Trade Agreement (CEFTA) any dispute arising out of interpretation and application of the treaty should be resolved through consultation and exchange of information.[37] If the dispute is not resolved through this mechanism, then it is possible to refer to the Joint Committee.[38] In this RTA, nothing is mentioned about the possibility of resorting to the WTO DSM.[39] The same method is adopted under the EU and Andora RAT. The compliant before resorting to arbitration should refer the matter to the Joint Committee.[40] However, there is nothing said about the possibility of resorting to the WTO DSM.

Other RTAs provides discretion of choice of forum to the compliant. NAFTA in Chapter 20 provides a mechanism to resolve dispute arising

[34] C Chase and others, Mapping of Dispute Settlement Mechanism in Regional Trade Agreements-Innovative or Variations on a theme?, Staff Working Paper ERSD as quoted in R Acharya, Regional Trade Agreements and the Multilateral Trading System, Cambridge University Press, (2016), p. 608.

[35] Ibid.

[36] S Yang, The Settlement of Jurisdictional Conflicts between the WTO and RTAs: The Forum Non-Convenience Principle, *Willamette Journal of International Law and Dispute Resolution*, Vol. 23, No. 1, (2015), p. 235.

[37] Central European Free Trade Agreement (1992) [hereinafter CEFTA], Article 34(3) available at https://wits.worldbank.org/GPTAD/PDF/archive/CEFTA.pdf last accessed on 25 November 2019.

[38] Article 34(4) of the CEFTA.

[39] For more discussion please see L Biukovic, The New Face of CEFTA and Its Dispute Resolution Mechanism, *Review of Central and East European Law*, Vol. 33, (2008).

[40] Agreement on Free Trade between the European Economic Community and the Principality of Andorra, (1990), Article 18. Available at https://wits.worldbank.org/GPTAD/PDF/archive/EC-Andorra.pdf last accessed on 25 November 25, 2019.

between member states over the application and interpretation of NAFTA's provisions. The jurisdiction of NAFTA is provided under Article 2004 of the NAFTA and it is indicated that:[41]

> Except for the matter covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Measures) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance of settlement of all disputes between the Parties regarding the interpretation of application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

This chapter states that the disputing states should strive to resolve disputes through conciliation. In this process, the negotiating parties should exert maximum effort to reach mutually aggregable result[42] before resorting to Free Trade Commission arbitration, and ultimately before implementing the award.[43]

Under NAFTA dispute settlement mechanisms, the complaining party may choose the appropriate forum to resolve the dispute either by the forum established by agreement or by the WTO DSM. This choice of forum clause is provided which otherwise is not available for other WTO member states.[44] However, this approach in some cases leads to parallel proceedings in the NAFTA and the WTO DSMs.[45]

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[41] See The North American Free Trade Agreement (1994), Article 2004

[42] See The North American Free Trade Agreement(1994), Article 2006

[43] Available at https://idatd.cepal.org/Normativas/TLCAN/Ingles/North_American_Free_Trade_Agreement-NAFTA.pdf last accessed on 20 November 2019.

[44] The close reading of Article 23 and Article 3.8 of the WTO DSM reveals that it has compulsory and exclusive jurisdiction. See A Gantz, Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties, *America University Law Review,* Vol. 14, (1999), p. 1027.

[45] This happened in the case of *Mexico-Anti-Dumping Investigation of High- Fructose Corn Syrup (HFCS) from United State, DS132* (22 October 2001). For more information on this see Ibid.

The same type of method of choice of forum is adopted under the MERCOSUR dispute settlement. Article 1(2) of the Protocol of Olivos for dispute settlement in MERCOSUR states that:[46]

> [d]isputes within the scope of application of this Protocol that may also be subject to the dispute settlement system of the World Organization of Trade or other preferential trading schemes that are part of the individual member states of MERCOSUR may be subject to one or other jurisdiction, the choice of the complainant...

Therefore, it will be completely the discretion of the complainant by mutual agreement[47] to choose the right and appropriate forum.[48] In Argentina-Poultry case, the WTO panel confirmed that it was completely up to the discretion of the complainant to choose the forum. In this case, Argentina argued that Brazil had to be stopped from bringing the action under the WTO DSM before resorting to MERCOSUR dispute settlement.[49] However, the WTO panel rejected the objection by saying:[50]

> In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean Brazil, implicitly waived its rights under DSU. This is especially because the Protocol of Brasillia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. We note Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet

[46] The full version of this protocol is available at https://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf last accessed on 20 November 2019.

[47] Article 1(2) of the Protocol Olivos for dispute settlement in MERCOSUR.

[48] For more enlighten discussion please see A O'keefe, Dispute Resolution in MERRCOSUR, *World Investment*, Vol. 3, (2002).

[49] A. Appeletion, Forum Selection in Trade Litigation, ICTSD Programme on International Trade Law, Issue Paper No. 12 (2013), p. 31.

[50] Argentina- Definitive Anti- Dumping Duties on Poultry from Brazil, WTO, DS241(19 May 2003) Para. 7. 38. available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds241_e.htm last accessed on 22 November 2019.

> entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR saw the need to introduce the Protocol of Olivos (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect to the same measure.

Finally, there are few RTAs which provide exclusive dispute settlement mechanisms. For instance, under the EU-Mexico RTA, the contracting parties to the extent possible should resolve the dispute arising out of interpretation and application of the treaty in consultation and cooperation to arrive mutually agreed solution.[51] If they failed to resolve the dispute through conciliation, they might seek the assistance of the Joint Committee before resorting to arbitration.[52] Under the treaty, it is indicated that if the party instituted a dispute settlement proceeding or the WTO dispute settlement, it shall not institute proceedings in the same matter in another forum.[53] The same method is provided under the US-Israel RTA. Although the treaty failed to invoke the WTO DSM directly, it indicates that once the dispute is brought before the panel under this agreement or any other international dispute settlement mechanisms are invoked, that forum shall have exclusive jurisdiction over the issue in exclusion to other forums. The same holds true for European Economic Area (EEA).[54]

The treaty establishing AfCFTA under Article 20(1) declares that "[a] Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties." Therefore, any disputes arising out of member states of AfCFTA are resolved by the AfCFTA dispute settlement mechanism. This overlapping jurisdiction over a given dispute between AfCFTA DSM and the WTO DSB will potentially lead to parallel proceedings which involve the same parties and the same issue. This in turn produces forum shopping and contradictory decision on the same exact matter and makes the whole international legal framework become

[51] Decision No. 2/2000 of the EC-Mexico Joint Council, Article 42. The full version is available at http://www.sice.oas.org/Trade/mex_eu/english/Decisions_Council/2_2000_e.asp last accessed on 25 November 2019.

[52] Ibid. p. 101.

[53] For more discussion on this point see K Kawk and G Marceau, *supra* note 5, p. 89.

[54] For detailed discussion please see L Sevon, The EEA Judicial System and the Supreme Courts of the EFTA States, *European Journal of International Law*, Vol.3, (1992).

unpredictable and volatile. This problem is well noted by the then president of ICJ when he said:[55]

> …proliferation of judicial bodies was a response to the need to subject expanding inter-state relations and cross-frontier transactions to the rule of law. Among the unfortunate consequences from the proliferation, though, where the risk of overlapping jurisdictions, which could lead to forum shopping, the rendering of conflicting judgements and inconsistency in case law.

Therefore, the next necessary question will be, who should assume jurisdiction to resolve disputes arising between member states of both WTO and AfCFTA?

2. Why AfCFTA DSM is the Right Forum to Resolve the Dispute

For the following basic reasons, the writer of this reflection believes that the WTO DSB doesn't stand any chance to examine the case arising out of AfCFTA rather it is only AfCFTA DSM that has the competency to examine the disputes.

1. As provided under Article 23.1 of the understanding on dispute settlement, the WTO dispute settlement body has exclusive jurisdiction to entertain any claim related to "... a violation of obligations or other nullification or impairment of benefits under the covered agreement..."[56] The notion of 'covered agreement' is well clarified under Article 1.1 of the same document which is understood to encompass the WTO establishment agreement and other agreements under its umbrella.[57] To it put differently, the WTO DSB shall not have any jurisdiction to entertain a case emanating from non-WTO agreement. In support of this Professor Trachtman argues that the WTO DSB is priori precluded from being applied outside WTO agreement.[58]

[55] UN Press Release, President of world court warns of 'overlapping jurisdictions' in proliferation of international judicial bodies, (2000) available at https://www.un.org/press/en/2000/20001027.gal3157.doc.html last accessed on 19 August 2019.

[56] Please see Understanding on Rules and Procedure Governing the Settlement of Dispute, GATT/WTO (1994)

[57] Ibid.

[58] J Trachtmann, Recent Books on International Law, *America Journal of International Law*, Vol. 98, No. 4, (2004), p. 855. The reviewing work was J Pauwlyn, Conflict of Norms in Public International Law: How WTO Law Related to other Rules of International Law.

The appellate body in searching for the true meaning of 'covered agreement,' in the case of United States-Standards for Reformulated and Conventional Gasoline, mentioned that "… direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.''[59] It is true, as per Article 31(3) (c) of VCLT, WTO agreement should be interpreted in line with the rule of customary international rule of interpretation.[60] However, this in any way doesn't mean that member states will invoke non-WTO agreements before the WTO DSB. In clarifying this issue Joust Pauwelyn made it clear that "WTO members cannot base a claim before a WTO Panel on the violation of the rights and obligations set out in a non-WTO agreement."[61]

Furthermore, as stated under Article 3(2) of dispute settlement understanding, the panel and the appellate body while rendering their decision shouldn't extend or narrow the rights and obligations of the member states. If the WTO DSB assume jurisdiction for the conflict arising out of AfCFTA, there is a high possibility the rights or obligations of members might be either outspread or diminished since the terms and conditions of AfCFTA rules are not one and the same with the WTO rules. Moreover, as per the principle of privity which is reflected under Article 4 of VCLT[62] a treaty binds only contracting parties and hence the WTO members are only bound by WTO agreements nothing else, which makes it a self-contained treaty.[63] Therefore, it will be the violation of Article 1 of the WTO dispute settlement understanding if the WTO DSB extends jurisdiction based on other agreements. Although AfCFTA is formed in compliance with the WTO requirements, establishing agreement of AfCFTA is quite different from WTO agreements, and, hence, it is a non-WTO agreement. The AfCFTA is not a 'common

[59] United States-Standards for Reformulate and Conventional Gasoline, WTO, WT/DS2/9, (29 April 1996)

[60] T Graewert, Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO, *Contemporary Asia Arbitration Journal*, Vol. 1, (2008), p. 294.

[61] D Bossche, *supra* note 31, p. 59.

[62] Please see Vienna Convention on the Law of Treaty (VCLT), United Nations, Treaty Series, Vol. 1155.

[63] J Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go?, *The American Journal of International Law*, Vol. 95, (2001), p.535.

intention'[64] which is accepted by all member states of the WTO and enables the WTO DSB to assume jurisdiction.[65] Therefore, the WTO DSB shall not have the jurisdiction to resolve disputes arising out of AfCFTA even if the dispute is between member states of the WTO.

2. One of the cardinal rules of interpretation is that when two laws contradict each other, the special law prevails over the general law.[66] The applicability of this principle to international law is well supported by scholars.[67] Under WTO arrangements too, this general rule of interpretation is well recognized which states: [68]

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization … the provision of the other agreement shall prevail to the extent of the conflict.

This relationship between GATT and other Annex 1A agreements is well reflected in the appellate panel decision which states: "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures.''[69] WTO is an arrangement which governs the issue of trade in goods, in services, agriculture, intellectual property and other plurilateral

[64] Such possibility can be imagined only in environmental and human rights since this two are global issues. However, for RTAs it is downright impossible.

[65] Professor Pauwelyn argue that if the non-WTO agreement reflect a common intent all member states of WTO, then Dispute Settlement Body can extend apply the interpretation to the dispute brought before it. For more enlightened counterargument on this point please see J Meltzer, Interpreting the WTO Agreements- A Commentary on Professor Pauwelyn's Approach, *Michigan Journal of International Law*, Vol. 25, Vol. 4, (2004).

[66] W Brugger, Concretization of Law and Statutory Interpretation, *Tulane European and Civil Law Forum*, Vol. 11, (1996), p.247.

[67] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press (2003) p. 385.

[68] World Trade Organization, Multilateral Agreements on Trade in Goods: General Interpretative Note to Annex 1A available at https://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htmlast accessed on 16 July 2019.

[69] *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WTO, WT/DS27/AR/R(8 November 2012) Para.204 available at http://www.sice.oas.org/DISPUTE/wto/banab6.asp last accessed on 16 July 2019.

agreements[70] including 164 countries[71] as member states. Even some scholars have characterized this organization as Cosmopolites.[72] Whereas, RTAs like AfCFTA is region specific, catered for some specific situations on top of being detailed and precise.[73] Unlike WTO objective of bringing trade liberalization, the main objective of AfCFTA is to integrate African markets.[74] Moreover, unlike WTO, which focuses on globalization of economy and law, AfCFTA is characterized as a regional agreement, regionalization of economy, and regionalization of law.[75] Thus, the DSM embodied in the AfCFTA is *lex specialis* that prevails and overrides the WTO DSB embodied under WTO.

3. One of the most accepted rules of interpretation is '*lex posterior derogate legi priori,'* which means the latter treaty prevails over the former. The basic policy justification behind this is that member states by coming up with a new rule which contradicts the pre-existing norm implicitly shows their intent to repeal the former law.[76] The date of conclusion of the treaty serves as the benchmark in identifying the intention of the contracting states.[77]This is well reflected under Article 30(2) of the VCLT which states: "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[78] Article 30(1) made it clear that the two conflicting treaties should deal with the same subject matter. In comparison to the AfCFTA DSM which comes into force on May 30, 2019, prevails over the WTO/GATT-DSM coming into existence in 1948/1995. Moreover, both of these treaties deal with the same subject

[70] Unlike single undertaking whereby by being the member state of WTO, the country agrees to be bind by the whole full gamut of agreement, plurilateral agreements are optional in a sense a member state of WTO have full right and liberty to ratify or not.

[71] This information is accessed from the official website of WTO which is available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm last accessed on 16 July 2019.

[72] See S Chamoritz, WTO cosmpolitics, *Journal of International Law and Politics*, Vol. 34, (2002).

[73] S Yang, The Solution for Jurisdictional Conflicts between the WTO and RTAs: the Forum Choice Clause, *Michigan State International Law Review*, Vol. 23, (2014), p.137.

[74] African Continental Free Trade Area, African Union, (2018). The full version of this document is available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf last accessed on 16 July 2019.

[75] For more detailed discussion please see L Xue, Differentiation and Analysis on the RTAs, the WTO and other relevant concepts-the relationship between the RTAs and the WTOUS, *China Law Review*, Vol. 3, No. 6, (2006).

[76] T Abate, Introduction to Law and the Ethiopia Legal System: Teaching material, (unpublished), p. 102.

[77] J Pauwelyn, *supra* note 67, p. 371.

[78] Please see Vienna Convention on the Law of Treaty (VCLT), United Nations, Treaty Series, Vol. 1155.

matter within the meaning of Article 30(1) of the VCLT. Then, it naturally follows that AfCFTA, which came into existence under Article XXIV or the enabling clause is getting the go-ahead from either the Committee on Trade and Development (CTD)[79] or the Committee on Regional Trade Agreement (CRTA),[80] then it can be considered as an approval of its content including the dispute settlement clause. This is well-noted by an authoritative writer in this field when he said "… the RTAs (the likes of AfCFTA) including their forum choice clauses, have priority over the WTO legal texts according to the *lex posterior* principle.''[81]

4. One of the arguments forwarded to give the WTO DSB jurisdiction for disputes emanating from RTAs is that the effect on RTAs DSM will have spill over effects and negatively affect the whole set up of WTO. One may speculate, for instance, the RTAs DSM might contradict, in the course interpretation, the principles of WTO such as the principles of most favoured nations and national treatments. However, such a possibility is unrealistic to arise because provision of RTAs like AfCFTA, which come into existence either through enabling clauses or Article XXIV exceptions, will be examined for their compliance by CRTA or CTD. Therefore, the possibility that AfCFTA DSM will come up with a decision which contradicts the WTO provisions is next to zero.

5. One of the cardinal rules of interpretation is the *efficace*[82] principle, which states that a term of the treaty should be interpreted in a manner that gives an effect rather than rendering it ineffective and meaningless.[83] In support of this the titan judge states that:[84]

[79] This is the committee which oversee the compliance for those RTAs notified under enabling clause

[80] This is the committee which oversee the compliance of those RTAs notified under Article XXIV exception.

[81] S Yang, *supra* note 73, p.133.

[82] This is a French word which means effective. Maria Dictionary available at https://www.merriam-webster.com/dictionary/efficacy last accessed on 29 February 2020.

[83] This rule of interpretation is coined by WTO appellate body when it said:' one of the corollaries of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty.' See *United States-Standard for Reformulated and Convention Gasoline*, WTO, WT/DS2/AR/R (25 September 1996), Para. 23. The full version of this decision is available at https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf last accessed on 25 July 2019.

[84] Justice A.K Srivastera, Interpretation of Statutes, *Institute's Journal*, (1995), p. 4.

> Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the statute and to make the whole of it effective and operative.

As per Article 20 of the agreement establishing AfCFTA dispute settlement bodies are formed to entertain any conflict arising thereof. If we give jurisdiction to the WTO DSM for disputes arising out of AfCFTA, we are making the dispute settlement clause under AfCFTA meaningless and ineffective.

6. From a pragmatic point of view, it is not visible for the WTO DSB to entertain disputes arising out of RTAs like AfCFTA. With the creation of WTO in 1995 a pyramidal proposal in which the multilateralism at the top of the pyramid, then RTAs in the middle and finally domestic trade law and policy at the bottom was formed.[85] Today RTAs account for half of the international trade.[86] In almost all instances there is a dispute settlement clause.[87] Diametrically opposite to GATT, which entertains only 200 cases, the WTO DSB in its first three years of establishment entertained 118 cases and the number of cases brought before the WTO DSB is ever increasing.[88] Thus, if we extend the jurisdiction of RTAs disputes, including AfCFTA, to the WTO DSB, it will be overwhelmed by cases, and it will not be able to decide each case in a very efficient, constructive and speedy manner. Therefore, AfCFTA DSM should assume jurisdiction for any dispute arising out of AfCFTA.

7. Even if by overextended interpretation, we confer jurisdiction upon the WTO DSB, it should decline its jurisdiction in favour of the AfCFTA DSM because of forum non-convenience. Forum non-convenience allows the court which otherwise has jurisdiction to entertain the case, decline its competency "whenever it appears that the case before it may be more

[85] R Leal-Arcal, Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?, *Chicago Journal of International Law*, Vol. 11, No. 2 (2011), p. 598.

[86] OECD Regional Trade Agreements available at http://www.oecd.org/trade/topics/regional-trade-agreements/last accessed on 17 July 2019.

[87] S Yang, The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs, *Chinese Journal of International Law*, Vol. 11, (2012), p. 284.

[88] The International Economic Study, Chapter Two: The Dispute Resolution Mechanism (September 04,1998), available at http://internationalecon.com/wto/ch2.php last accessed on 17 July 2019.

appropriately tried elsewhere."[89] The tribunal in AfCFTA is more familiar within its own region in a sense it has easy access to sources of evidence and proof.[90] Regional interests in having regional controversy should be addressed by home tribunal. The evidence may lose its intrinsic value in transportation and it doesn't take more than common sense that bringing evidence to the nearby place, Africa, is less dangerous than other parts of the continent, i.e. Geneva, Switzerland. Moreover, in terms of forum convenience for witnesses because of cultural similarity, language, similar of way of life and other factors, African witnesses prefer African set-ups. In comparison to an African forum, the WTO DSB has huge cost implications for both claimant and respondent. Therefore, the WTO DSB should decline jurisdiction if the AfCFTA exercises its jurisdiction based on principle of forum non-convenience. However, if AfCFTA DSM declines to exercise its jurisdiction to determine and settle the matter then the WTO DSB will have the right to reopen the case.[91] As one author perfectly noted, "this will not only keep the efficiency of dispute settlement proceedings, but also avoid circumstances where there are no appropriate tribunals to deal with a particular dispute."[92]

Concluding remarks

As a rule of thumb, under WTO legal system, making discrimination is prohibited and each member should treat other members in the same way. Any preference given to third parties will immediately and unconditionally be extended to all other member states. With a view to enhancing economic development of developing countries and encouraging regional integration, the WTO rule permits formation of RTAs by way of enabling clauses or Article XXIV exceptions. As a result of this, there is a proliferation of RTAs across the globe and this, incidentally, leads to proliferation of RTA DSM. By the same token, the AfCFTA has envisaged the possibility of dispute between and among member countries and provide a mechanism to handle

[89] J Gaddard, The Doctrine of Forum Non-Convenience in Illinois, *University of IIlinois Law Journal*, (1964), p. 646

[90] S Yang, The Settlement of Jurisdictional Conflict between the WTO and RTAs: the Forum Non-Convenience Principle, *Willamette Journal of International Law and Dispute Resolution*, Vol. 23, (2015), p. 251.

[91] S Sternberg, Res Judicata and Forum Non-Conveniences in International Litigation*, Cornell International Law Journal*, Vol. 46, No. 1, (2013), p.197.

[92] Ibid. p. 253.