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The Luxury of Forum Shopping in International Trade Disputes: Problems and Solutions

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Introduction

The General Agreement on Tariffs and Trade (GATT), reformulated and institutionalised as the World Trade Organisation (WTO) in 1994, has provided much of the framework through which international trade has flourished for over 50 years. With the WTO came a restructured Dispute Settlement Mechanism (DSM), the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which sought to deal with the ineffectiveness of the previous GATT DSM.

The post-War philosophy of trade liberalisation has also paved the way for the creation of Regional Trade Agreements (RTAs) or Free Trade Agreement (FTAs). These RTAs, typically, contain a chapter on dispute settlement that establishes committees and detailed procedures for handling disputes between the parties to the agreement. The growing number of these agreements is creating, in effect, a web of bilateral dispute resolution fora.

These RTAs and the WTO Agreements cover overlapping subjects relating to trade, Intellectual Property Rights (IPRs), etc; at least partially, and this may result, and even results, in an overlap in the jurisdictions between the dispute settlement procedure under an RTA and the one under the WTO, to deal with a particular trade dispute between the parties to the RTA, both of which are WTO members. Hence, forum shopping between the WTO, on the one hand, and RTAs, on the other, has become quite common.

The purpose of this paper is to address questions like: On what basis do countries decide to go to a forum – global or regional or both? How do RTAs regulate their relationship *vis-à-vis* the WTO dispute settlement procedure? What is the effect of dispute settlement under RTAs before a WTO panel? Are principles such as *res judicata* and estoppel relevant? Finally, which forums have the parties to RTAs chosen more frequently, regional, or global? And why is it so?

The paper determines the arguments for choosing a regional DSM or multilateral DSM. It analyses the problems that arise, and may arise in future because of the overlapping jurisdictions of the WTO and the RTA dispute settlement system, including the solutions and to the extent the principles of *res judicata* and estoppel are relevant in the DSM in the cases of multiple choice of forums.

Forum Shopping in Trade Disputes Settlement

While there are many reasons for the overlapping jurisdictions and forum shopping in Public International Trade Law, one good reason seems to be the overlapping subject matter in the RTAs and the WTO.

Forum shopping has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favourable judgment or verdict". David A Gantz, in one of his papers, '*Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties'*, in late 90's, has indicated that disputes between RTA parties may be characterised into one of three types: (1) there is no effective choice of forum, i.e. the nature of the dispute raises legal issues under only one agreement; (2) there is an apparent choice of forum, with legal and/or political factors "in some instances dictating one forum over the other"; and (3) parallel fora are available, i.e. where the same subject-matter raises slightly different legal issues, allowing one complainant to go to the RTA and another to the WTO.

Gantz suggests that in making a choice of a forum, "such decisions will be made on a case-by-case basis and influenced by legal, political, and practical considerations, as well as which RTA party is the complainant. Gantz has categorised the factors influencing the forum choice between the WTO and the RTA as follows: (a) legal requirements controlling choice of a forum, i.e. given the subject matter or the wording of a treaty, some disputes must be brought under either the RTA or the WTO; (b) substantive law advantages for bringing a complaint under either the WTO or RTA; (c) different inter-state procedures in the WTO DSU and RTA DSM may influence the complainant to choose one or the other in a particular case; and (d) political considerations.

In a similar kind of study, Marc L Busch provides a two-dimensional spatial model for showing the influencing variables in making a choice of a forum. For him, the decision depends on two variables: (1) the

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complainant's preference concerning the outcome of the dispute, which he defines as being more or less "liberal," or free-trade-oriented, than the *status quo* policies of the defendant, other trade partners, and the likely verdicts of the regional and multilateral institutions; and (2) the complainant's expectation concerning the future value of the precedent set, by which he means the likelihood that the complainant will use the resulting case law in future litigation against others members, more than other members will use it against the complainant.

Similarly, in a comparative analysis of the Southern African Development Community (SADC) and the WTO DSM, Joost Pauwelyn examines 11 factors that may influence an SADC party in choosing a forum.[1] These are: (1) the cost of litigation; (2) the organisational context in which the dispute would be decided; (3) who decides the dispute; (4) any advantages in the applicable law; (5) who can initiate a complaint and against whom; (6) any procedural advantages; (7) any special procedures for the least-developed countries (LDCs); (8) the possibility of appeal; (9) what remedies can be obtained; (10) who is bound by the eventual ruling; and (11) what happens in the event of non-compliance.

Broadly speaking, all these elements of Gantz, Marc L Busch and Joost Pauwelyn can be combined into three main features. These are: (1) better outcome, based on substantive and applicable law, i.e., where a party will have more advantages for having a better outcome, based on substantive and applicable law; (2) better remedies, i.e. in which forum the party will be able to secure better remedies, based on compliance and enforcement mechanisms, and, in case of non-compliance, the non-compliance mechanisms; and (3) institutional structure, which includes cost of litigation, selection of panellists, procedural advantages, including the possibility of appeal and the selection of appellate panellists, the value of the precedent for the future disputes and better bargaining power of the complainant.

Though it is not possible here to discuss all the cases wherein a member, party of both WTO and RTA, has exercised the luxury of forum shopping, this paper discusses the Canada Periodicals case decided by the WTO. Here in this case, the US had the option to bring the matter either at the North American Free Trade Agreement (NAFTA) Dispute Settlement Body (DSB), under Chapter 20 or under the WTO DSB, but opted for WTO preferring over NAFTA.

In March 1996, the US asked Canada for consultations under the DSU on: (i) Canadian measures that prohibited the importation into Canada of periodicals that contained advertising directed at the Canadian market that was not contained in issues distributed in the country of origin; (ii) Canadian assessment of an 80-percent excise tax on such "split-run" periodicals, when more than 20 percent of the editorial content is the same as in issues distributed in the country of origin; and (iii) postal rates applicable to the Canadian-owned and controlled periodicals for distribution in Canada, but not to imported periodicals.[2] After consultations failed to resolve the dispute, the parties submitted the dispute to the panel and subsequently to the Appellate Body review.

The reviewing panel, composed of the citizens of Sweden, Brazil and Austria, determined that the import ban was a violation of GATT Article XI and the excise tax a violation of Article III:4. However, the panel rejected the US challenge to the preferential postal rates, on the grounds that the rates were a permitted subsidy under GATT Article III:8(b). Both Canada and the US cross-appealed. The Appellate Body effectively affirmed the appealed aspects of the panel decision on the import ban and excise tax issues, however the Body reversed the panel's decision on the issue of preferential postal rates, determining that the latter were also a violation of Article III of the GATT. The Appellate Body also confirmed the panel's determination that the GATT 1994 was applicable to periodicals, rejecting again the Canadian argument that the excise tax was a service measure.

In this case, the US reason for choosing the WTO forum over the NAFTA Chapter 20 forum was obvious. Firstly, the better outcome was only possible at the WTO, as the US had substantive law advantages under the WTO over the NAFTA. In the WTO, the US had easily argued that the Canadian restrictions violated the "national treatment" requirement and provisions prohibiting quantitative restraints. Under the NAFTA, in contrast, the Canadian discrimination against foreign-owned or produced periodicals was explicitly permitted.

Secondly, the US even had the institutional advantages of bringing the case at the WTO DSB as, by winning the case at this multilateral forum, the US had set a global precedent and now can easily use the same as a lever to alter similar policies of both Canada and other countries, such as France and Australia. Moreover, the US even utilised the appealing procedure in the matter which was also only possible at the WTO and not at the NAFTA. All these factors illustrate that the US enjoyed the luxury of forum shopping effectively in the Canada Periodicals case.

Problems and Solutions

In Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil, Brazil invoked WTO dispute settlement procedure, after it had unsuccessfully relied on the Southern Common Market (MERCOSUR) Arbitration (a MERCOSUR arbitration panel had rejected Brazil's claims of violation in respect of the very same anti-dumping measure imposed by Argentina) appointed under the old protocol of Brasilia. Argentina requested the panel to refrain from ruling on any claim of Brazil, as it had already exhausted the MERCOSUR Arbitral forum for the settlement of the dispute and the same has given rise to an estoppel situation to bring any claim under the DSU.

In this case, the panel applied those three conditions stressed by Argentina for the application of the principle of estoppel: (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement. Based on the

above three conditions, the WTO panel held that the Brazil has not made a clear and unambiguous statement to the effect that, having brought a case under a MERCOSUR dispute settlement framework, it would not substantially resort WTO dispute settlement proceedings.This is especially because the protocol of Brasilia imposes a restriction on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure.

In another case, Mexico received a sugar quota for export to the US under the NAFTA. However, for over five years, Mexico has tried to enforce those quota rights without success, as the US continued to block the appointment of panel members on a NAFTA Chapter 20 panel (which Mexico got established to examine the US restrictions on Mexican sugar). Because of this blockage, Mexico decided to retaliate unilaterally with the tax that later became the object of the soft drinks dispute procedures at the WTO.

Ironically, Mexico did exactly what the US used to do in the old GATT days: when the US was faced with obstructions by the EC or Japan to the establishment of GATT panels, the US imposed unilateral sanctions under Section 301. When Mexico did the same thing, in response to the blockage at NAFTA (this time by the US), the US vehemently objected with a WTO complaint giving rise to Mexico – Tax Measures on Soft Drinks and Other beverages Case.[3]

However, Mexico requested the panel, as well as the Appellate Body to decline to exercise its jurisdiction and recommend to the parties that they submit their respective grievances to an Arbitral Panel, under Chapter 20 of the NAFTA, which addresses both Mexico's concern with respect to market access for Mexican cane sugar in the US, under the NAFTA, and the US concern with respect to Mexico's tax measures. On the contrary, the panel decided to reject Mexico's request to decline to exercise its jurisdiction in the case in favour of an Arbitral Panel under Chapter 20 of NAFTA.

The Panel concluded that, under the DSU, it has no discretion to decide whether or not to exercise its jurisdiction in a case placed before it. Furthermore, it held that even if it had such discretion, the Panel did not consider that there were facts on the record that would justify the Panel declining to exercise its jurisdiction in the present case. The Appellate Body upheld the decision of the panel.

The above two disputes show the overlap in the jurisdictions of the WTO DSB and the RTA DSB and the challenges and problems that can be faced because of such conflicts. Firstly, as noted earlier, it gives complainants the opportunity to engage in forum shopping, as the US already did in the *Canada-Periodicals* case. Secondly, the overlaps and the complexity also make lawyers happy, in particular law firms: witness the multi-layered *Softwood Lumber* dispute litigated repeatedly under the NAFTA Chapter 19, NAFTA Chapter 11, the WTO and a variety of domestic US courts. Thirdly, focusing on developing countries, a major concern is resources.

Thus, the threat of multiple and repeated litigation can be a huge burden on the limited developing country budgets. Fourthly, overlap brings with it the risk of conflicting rulings and reduces predictability, not only for the governments but also for the producers and traders, as illustrated by the *Argentina-Poultry Case.* And, above all, it brings a new debate, Dispute Settlement under the RTA vs Dispute Settlement under the WTO, adding to the debate of Regionalism vs Multilateralism.

Now, how to overcome this conflict of overlapping jurisdictions in international trade disputes? To resolve the conflict, the solutions can be: (1) an exclusive choice of forum; (2) the application of the principle of *res judicata*; and (3) the application of the principle of issue estoppel or collateral estoppel.

Exclusive Choice of Forum

The best solution of the conflict can be an exclusive choice of forum, i.e. the matter can only be initiated in one of the available choices and after initiation of the procedure none of the parties can use the mechanism available under a different forum. Such exclusion clauses are now being found in the RTAs DSM. For instance, the NAFTA provides that, once dispute settlement procedures have been initiated under Article 2007, or the dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the others.

Application of the Principle of Res Judicata

One traditional way to overcome or avoid duplication is the principle of *res judicata*, which is that, between the same parties, on the same subject matter and the same legal claims, a case cannot be brought twice. Thus, a WTO panel may decline jurisdiction, based on an earlier ruling by another court or tribunal on the same matter, which does not have an exclusion clause similar to that of the NAFTA or the Olivos Protocol. There are, however, three conditions that need to be satisfied, in order to apply the principle of *res judicata*. These are:

1. identities of the parties;
2. identity of the object or the subject matter; and
3. identity of the legal cause of action.[4]

Moreover, two hurdles must be overcome in this respect. First, the WTO panel and the RTA panel must recognise that *res judicata* is a principle of general international law that panels must apply, irrespective of whether the earlier ruling in question comes from within or outside. It is to be noted here that the Appellate Body of WTO has confirmed the principle of *res judicata* in respect of its own report.[5] Secondly, the ruling of or report by the other court or tribunal must meet the three conditions stated above.

Thus, if the DSB of RTA and WTO recognise the applicability of *res judicata* in respect of the decisions of other Courts or Tribunals or Panels, this may effectively address the problem of overlapping jurisdictions.

Application of the Principle of Estoppel

Another approach to resolve the problem of overlapping jurisdiction can be the application of the principle of estoppel. The English law requires that three conditions have to be satisfied for the application of the issue estoppel. These are:

1. the same question has been decided;
2. the judicial decision which is said to create the estoppel is final; and
3. the parties to the judicial decision or their privies were the same persons as the parties as the parties to the proceedings in which the estoppel is raised or their privies.[6]

In the US law, a similar doctrine is known as the collateral estoppel, which extends the *res judicata* effect of a judgement to encompass the same issues arising in a different action ("*issue preclusion"*) and even to different parties, where the issue has been determined in prior litigation with adequate opportunity to be heard for the party to be precluded.[7] Thus, if the principle of the issue estoppel applied before a panel of either RTA or WTO (say WTO), then the WTO panel could preclude a member from bringing, for example, a safeguard claim at the WTO, as between the same parties. The WTO panel can also apply the principle of the issue estoppel to the determination of specific facts or the legal characterisation of facts by the previous RTA panel.

The US doctrine of collateral estoppel could even go further and give rise to either an RTA or a WTO panel finding (say WTO) on the same issue, even if that panel was constituted on the request of an another RTA member, different from the one challenging the same measure at the WTO. Only condition ensured is that the former RTA member had "adequate opportunity to be heard" before the original RTA panel.

It is to be noted here that in the *Argentina-Poultry Case*, Argentina argued for the application of collateral estoppel which was rejected by the WTO panel. However, it is felt that the panel erred in rejecting the Argentina claim and thus should have refrained itself from ruling in the matter.

Thus, if the principle of the issue estoppel or collateral estoppel were allowed to be applied before the RTA or the WTO panel, then the same could be used to dissolve the conflict of overlapping jurisdictions.

Thus, the above principles can help in closing the conflict of overlapping jurisdictions in international trade disputes and the problems associated with forum shopping and, hence, can help in a better way to secure a positive solution to a dispute by providing security and predictability to the multilateral trading system.

Concluding Remarks

The analysis conducted in this paper presents the problem associated with the overlapping jurisdictions under the WTO DSM and the RTAs DSM. Since all the RTAs basically deal with matters of trade and service, there is bound to be overlapping with the WTO agreements and hence with the dispute settlement mechanisms under both the systems. This overlapping often results, and will result, in the luxury of forum shopping in international trade disputes. This should be a cause of concern for jurists and scholars, as it may cause various problems, like multiple ruling on a same dispute between the same parties. The following solutions can be adopted to resolve the conflict: (1) an exclusive choice of forum; (2) the application of the principle of *res judicata*; and (3) the application of the principle of the issue estoppel or collateral estoppel. Thus, if the above solutions can be implemented, they may help resolve the problems associated with overlapping jurisdictions like forum shopping.

Endnotes

1 *See* Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions*, 13 Minn. J. Global Trade 231.

2 *See* Report of the WTO Panel, *Canada-Certain Measures Concerning Periodicals*, March 14, 1997, WTO Doc. No. WT/DS31/R, at 1-4.

3 See Report of the Panel, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R; *See also* Report of the AB, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R.

4 Blacks Law Dictionary, pp1312.

5 *See AB Report on EC-Anti Dumping Duties on Imports of Cotton-Type bed Linen from India*, Recourse to Article 21.5 of DSU by India, WT/DS141/AB/RW, April 08, 2003, para 93. *See also India Autos Case*, WT/DS146/R and Corr. 1 WT/DS175/R and Corr. 1, adopted on April 05, 2002, paras 92-96.

6 *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*(No.3) (1967) A.C. 853 at 935 (per Lord Guest)

7 *See* E.Scoles *et.al., Conflict of Laws* (3rd ed., Westgroup, 2000), pp1141.