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To:

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Regional Trade Agreement Choice-of-forum-clause as a Procedural Defence before the WTO Dispute Settlement in *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*[*]

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[*] This memorandum is a research paper prepared on a pro bono basis by students of the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law, not professional legal advice. As a result, this memorandum cannot in any way bind or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade law clinic or the Graduate Institute.

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LIST OF ABBREVIATIONS

DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT	*General Agreement on Tariffs and Trade*
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
MERCOSUR	*Southern Common Market Agreement*
MFN	Most-Favoured-Nation Treatment Clause
NAFTA	*North American Free Trade Agreement*
p.	Page
Para.	Paragraph
RTA	Regional Trade Agreement
SPS	*Agreement on the application of sanitary and phytosanitary measures*
TBT	*Agreement on technical barriers to trade*
US — Tuna II	*United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*
UNCLOS	*United Nations Convention on the Law of the Sea*
VCLT	*Vienna Convention on the Law of Treaties*
Washington Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*
WTO Agreement	*Marrakech Agreement Establishing the WTO*

I. EXECUTIVE SUMMARY

This memorandum addresses the question of whether and how the panel or the Appellate Body (hereinafter, the "Panel") in *US — Tuna II* could address a possible defence of the United States based on Article 2005.4 of the NAFTA.[1] According to Article 2005.4 of the NAFTA the responding party may under certain circumstances request that a dispute be settled in the NAFTA instead of the WTO.

Three main possible outcomes have been identified. The most likely outcome would be that the Panel decides that it has jurisdiction on the case and cannot decline to exercise it (Section B.1). This would be consistent with the prevailing conservative interpretation of the WTO jurisprudence: WTO panels are bound by the DSU procedures that embody a system of compulsory jurisdiction where WTO panels cannot decline to exercise jurisdiction on the merits of cases and can only apply WTO covered agreements (which means, *in casu*, that they cannot consider Article 2005.4 of the NAFTA).

Nevertheless, it cannot be excluded *a priori* that the Panel, confronted with a defence based on Article 2005.4 of the NAFTA, would decide that the Panel has jurisdiction but that there are "legal impediments" to reach the merits (Section B.2). Among several preliminary questions that the Panel may address in order to analyze this defence, the most noteworthy one is the interpretation of harmony of the NAFTA and the WTO agreements (Section A.5.a). As for the substantial questions, besides Article 2005.4 of the NAFTA itself, there are some legal grounds on the basis of which the Panel may reach this conclusion: the principles of *res judicata*, estoppel, good faith, *lis pendens* and comity. Among these general principles, comity appears to be the most significant legal ground. Finally, reference is also made to a rather less likely outcome in which the Panel decides that it has no jurisdiction because such jurisdiction was carved out through the NAFTA (Section B.3).

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

> In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
> (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
> (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,
> where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

II. BACKGROUND

On 24 October 2008, Mexico requested consultations with the United States in accordance with Article 4 of the DSU, Article XXII of GATT and Article 14 of the TBT with regard to certain measures adopted by the government of the United States concerning the labelling of tuna and tuna products as "dolphin-safe". Mexico claims that the US labelling regime prevents tuna and tuna products from Mexico as being labelled as "dolphin-safe" even when the tuna has been harvested in accordance with an international "dolphin-safe" standard established by the Inter American Tropical Tuna Commission.[2] The consultations failed to settle the dispute and on 9 March 2009 Mexico requested the constitution of a panel in accordance with Articles 4 and 6 of the DSU, Article XXIII of the GATT and Article 14 of the TBT. Mexico is claiming a violation of Article 2 of the TBT and Articles I and III of the GATT. The Panel was finally established on 20 April 2009, in compliance with Article 6 of the DSU.

On 5 November 2009 the United States Trade Representative announced that the United States requested consultations under the NAFTA claiming that Mexico failed to bring the dispute to the NAFTA DSM as provided under Article 2005.4 of the NAFTA. The government of the United States had invoked the exclusive choice-of-forum clause enshrined in Article 2005.4 of the NAFTA, whereby, according to the United States, the government of Mexico was obliged to move the dispute to the NAFTA DSM. The United States claims that the dispute at issue concerned measures related to the protection of human, animal or plant life or health or the environment and raised factual issues in these fields, in the sense of Article 2005.4 of the NAFTA.

III. QUESTION PRESENTED

This memorandum examines the following question concerning the pending WTO case *US — Tuna II* initiated by Mexico: Could a WTO Panel or Appellate Body address a possible defence based on Article 2005.4 of the NAFTA?

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[2] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Request for the Establishment of a Panel by Mexico, WT/DS381/4, adopted 10 March 2009.

IV. DISCUSSION

A. PRELIMINARY QUESTIONS

In order to answer the question presented, it is necessary to deal with the possible issues that the Panel may have to address in order to analyse a defence based on Article 2005.4 of the NAFTA in the context of the WTO DSM. These issues are: the inherent jurisdiction of WTO panels, the distinction between jurisdiction and admissibility, the distinction between jurisdiction and applicable law, the applicability of non-WTO law binding on the parties to the dispute only and the conflict of treaties analysis.

1. The inherent jurisdiction of the Panel

According to the theory of incidental or inherent jurisdiction, WTO panels may decide on incidental issues that are not strictly prescribed in their internal rules or mandate, as part of the inherent powers required to maintain and exercise their judicial function.

This view may be supported by several WTO rulings. In *US — Lead and Bismuth II,* the Appellate Body asserted that Article 17.9 of the DSU "*makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements*."[3] In *EC — Hormones*, the Appellate Body expressed its view that "*the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated*"[4] In *Mexico — Soft Drinks*, the Appellate Body stated that there are certain inherent powers to the adjudicative function of WTO panels, in particular "*panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction.*"[5] In *United States — Anti-Dumping Act of 1916*, the Appellate Body noted that "*it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it*"[6]. Furthermore, the Appellate Body in

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[3] Appellate Body Report, *US — Lead and Bismuth II*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601, para. 39.

[4] Appellate Body Report, *EC — Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 152, footnote 138.

[5] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 45.

[6] Appellate Body Report, *United States — Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para. 54, footnote n. 30.

Mexico — Corn Syrup considered the vesting of jurisdiction an issue of fundamental nature that panels have to address and dispose of.[7]

These inherent powers include the authority of WTO panels to consider the existence of their jurisdiction and to satisfy themselves that they have jurisdiction to hear a case. Following this approach, it can be argued that WTO panels have the authority to find whether they have jurisdiction or not.

2. The distinction between issues of jurisdiction and admissibility

Another relevant question that could be analysed (if raised) by the Panel is the distinction between issues of jurisdiction and admissibility. Admissibility is a preliminary objection whereby it is asserted that even if a judicial body has jurisdiction on a matter, there are reasons other than the merits of the complaint why it should not proceed to hear the merits of a case.

The distinction between preliminary objections to jurisdiction and to admissibility of a claim is generally accepted in international law. For instance, in the *SGS v. Philippines* case,[8] an ICSID arbitral tribunal established under the Washington Convention concluded that it had jurisdiction on the contract claim at issue. Nevertheless, the arbitral tribunal declined to exercise jurisdiction finding that the claim was not admissible due to a *forum* clause in the contract, somewhat similar to Article 2005.4 of the NAFTA, according to which contractual claims had to be brought before national courts.[9]

The differentiation between issues of jurisdiction and admissibility is not expressly stipulated under the DSU. There are authors that favour the application of this distinction within the WTO dispute settlement system.[10] In the context of the WTO, the distinction between jurisdiction and admissibility would find its roots in the differentiation between the scope of the authority of a panel to decide and the existence of the conditions related to the exercise of a given action or process.[11]

The Appellate Body in *Mexico — Soft Drinks* appears to have left open the possibility of a distinction between issues of jurisdiction and admissibility of a claim also within the WTO system. In this case the Appellate Body has not taken any position on whether in certain circumstances the invocation of a choice-of-forum provision incorporated in a RTA that stipulates the exclusive jurisdiction of a third

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[7] Appellate Body Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States — Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 36.
[8] *SGS Société Generale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paras. 113-124.
[9] J. Pauwelyn and L. E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), p. 93.
[10] *Ibid*.
[11] *Ibid*.

forum (namely Article 2005.6 of the NAFTA)[12] might be *"a legal impediment to the exercise of a panel's jurisdiction*". The Appellate Body seems to have implicitly recognized that certain legal impediments (which are different from issues of jurisdiction) may bar the concrete exercise of jurisdiction.

Such a legal impediment may be grounded on the consent given by the NAFTA members to a waiver of WTO rights under the DSU. According to Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts,[13] a valid consent by a State to the commission of a particular act by another State may preclude the wrongfulness of such an act if this act remains within the limits of the consent. This would mean that Article 2005.4 of the NAFTA, once its conditions are met, would reflect a valid consent of the NAFTA members to exclude the WTO DSM. According to Article 45 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the responsibility of a State may not be invoked in case the damaged State has validly waived its claim.[14] The NAFTA members could be considered as having waived their right to bring claims under Article 2005.4 of the NAFTA to the WTO DSM.

The distinction between issues of jurisdiction and admissibility is pertinent in *casu* because, if the Panel decides to introduce this distinction at the WTO, the existence of causes of inadmissibility of a claim (on the basis of specific grounds, such as, for example, a choice-of-forum provision in an external treaty like Art. 2005.4 of the NAFTA) may bring it to declare Mexico's claim as inadmissible.

3. The distinction between jurisdiction and applicable law

To refer to article 2005.4 of the NAFTA, the Panel would have to determine that it can apply law outside the "covered agreements" (*in casu* Article 2005.4 of the NAFTA). It could do so by introducing the distinction between jurisdiction and applicable law. This differentiation is made by a number of international courts and tribunals, notably the ICJ, but so far it is unprecedented at the WTO.[15] In view of the uninterrupted reference to the "covered agreements" in the DSU,[16] the majority of scholars sustain that a WTO panel cannot apply any law other than the covered agreements. Some scholars believe that

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[12] Article 2005.6 of the NAFTA reads as follows: "*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*".
[13] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Adopted by the Drafting Committee on Second Reading, 26 July 2001, UN Doc. A/CN.4/L.602/Rev.1.
[14] *Ibid.*
[15] See for instance Article 38 of the Statute of the ICJ and Article 293 of the UNCLOS. The United Nations Convention on the Law of the Sea, entered into force on 16 November 1994.
[16] See Articles 1, 2, 3, 4, 8, 11, 12, 17, 19, 22 and 23 of the DSU.

absent an explicit exclusion, a panel may also apply non-WTO law.[17] Following this last interpretation of the DSU, WTO panels in deciding on their own jurisdiction may rely on non-WTO provisions.[18]

According to this approach, the provisions of the DSU do not limit the applicable law. Article 3.2 of the DSU provides *ex abundante cautela* for Panels to rely on *"customary rules of interpretation of public international law*", and does not exclude that non-WTO law in general also applies. This may be supported by *Korea — Measures Affecting Government Procurement*, in which a WTO panel stated that the reference to customary rules of treaty interpretation in Article 3.2 of the DSU was introduced to ensure compliance with these rules and not to limit the applicable law of WTO panels.[19] This willingness to apply non-WTO law may be further supported by *Mexico — Corn Syrup*, where the Appellate Body stated that WTO panels have the obligation to examine "issues" (*in casu* possibly including non-WTO law) that could prevent them from exercising jurisdiction.[20] Moreover, as stated by the Appellate Body in *US — Gasoline*, the GATT *"is not to be read in clinical isolation from public international law*"[21] and also non-WTO provisions (including provisions embodied in RTAs such as the NAFTA) have to be looked at and applied by WTO panels when interpreting WTO provisions. Most importantly, WTO panels and the Appellate Body have already made reference to non-WTO law when determining their own jurisdiction in: *India — Autos*[22] (where the non-WTO law was a bilateral agreement); *Argentina — Poultry*[23] (where the non-WTO law was the Protocol of Brasilia and the Protocol of Olivos in the frame of the MERCOSUR);[24] and *Mexico — Soft Drinks*[25] (where the non-WTO law was the NAFTA).

Even though in all these cases the consideration of non-WTO law did not lead the panel or Appellate Body to decline jurisdiction, in *Mexico — Soft Drinks* the Appellate Body clarified that there could be "*legal impediments*" to the exercise of jurisdiction and left the possibility open that a choice-of-

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[17] See for instance J. Pauwelyn, *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, Journal Of World Trade (2003), p. 1002; C. Henckels*, Overcoming Jurisdictional Isolationism at the WTO FTA Nexus: A Potential Approach for the WTO,* 19 European Journal of International Law 571 (2008), p. 581.

[18] J. Pauwelyn, *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, Journal Of World Trade (2003), p. 1001; C. Henckels*, Overcoming Jurisdictional Isolationism at the WTO FTA Nexus: A Potential Approach for the WTO,* 19 European Journal of International Law 571 (2008), p. 581.

[19] Panel Report, *Korea — Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000, para. 7.96, footnote 753.

[20] Appellate Body Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States* (*Recourse to Article 21.5 of the DSU by the United States*), WT/DS132/AB/RW, adopted 21 November 2001, para. 36.

[21] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 17.

[22] Appellate Body Report, *India — Measures affecting the Automotive Sector*, WT/DS146/R and Corr.1 WT/DS175/AB/R, adopted 5 April 2002, para. 4.30.

[23] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.38.

[24] Southern Common Market Agreement, entered into force 29 November 1991.

[25] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 55.

forum provision contained in a RTA envisaging the exclusive jurisdiction of a third *forum* (namely Article 2005.6 of the NAFTA)[26] could be a reason not to proceed to the merits of a case.[27]

4. The applicability of non-WTO law binding on the parties to the dispute only

Another point that should be addressed is whether the non-WTO law must be binding on all WTO members or if it is sufficient that it is binding on the parties to the dispute. The VCLT[28] offers different possibilities for how a WTO panel may apply non-WTO law binding not on all WTO parties (*in casu* the choice-of-forum clause enshrined in Article 2005.4 of the NAFTA). Either the Panel could consider this a question of interpretation of Article 10 and Article 23 of the DSU and apply Article 31.3 (c) or Article 31.2 (a) and/or (b) of the VCLT, or it could consider this a question of modification of the DSU and apply Article 30 and Article 41.1 (a) or (b) of the VCLT.

Under Article 31.3 (c) of the VCLT, the NAFTA could be interpreted as a *"relevant rule (s) of international law applicable in the relations between the parties*". This approach would require that the meaning of "the parties" is "parties to a dispute", and not all WTO members. Although the wording of this article leaves this possibility open, in *EC — Approval and Marketing of Biotech Products* the Panel implied that the rules of international law to be taken into consideration by means of Article 31.3 (c) of the VCLT when interpreting WTO agreements are those applicable between all WTO members.[29] This decision in *EC — Approval and Marketing of Biotech Products* has been firmly criticized in the Report of the Study Group on the Fragmentation of International Law of the International Law Commission. According to this report, the reference to "the parties" in Article 31.3 (c) should be interpreted instead as referring to "*the parties in dispute*" only.[30]

Under Article 31.2 (a) of the VCLT, the Panel could take into consideration, as comprised into

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[26] Article 2005.6 of the NAFTA reads as follows: "*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*".

[27] The Appellate Body in *Mexico — Soft Drinks* stated as follows:

> Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been "exercised". We do not express any view on 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.

Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 54:

[28] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

[29] Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, para 7.68.

[30] International Law Commission, 58th Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group on the International Law Commission, finalized by Martti Koskenniemi, U.N. Doc.A/CN.4/L.682, paras. 471-472.

the context, the NAFTA as an "*agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty*". In fact, the NAFTA could arguably be deemed as an agreement: (i) made between all the parties in dispute; (ii) in connection with the conclusion of the WTO Agreement. With regard to the first requirement (i), as it was clarified by the Appellate Body in *EC — Chicken Cuts,* the terms "*all the parties*" in Article 31.2 (a) do not signify that all the WTO members have to be parties to the agreement at issue.[31] "All the parties" would be interpreted as referring to all the parties in dispute, namely Mexico and the United States. Focusing on the second requirement (ii), the NAFTA could be considered as an agreement made in connection with the conclusion of the WTO Agreement. The NAFTA refers to the GATT in various provisions (see, *inter alia*, Articles 2005.1, 2005.4 and 2005.6) and it was negotiated and entered into force during the Uruguay Round which brought to the signature of the WTO agreement.

Under Article 31.2 (b) of the VCLT, the Panel could take the NAFTA into consideration as an "*instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*". The NAFTA would be the "instrument" which was made between Canada, Mexico and the United States, being "one or more members" of the WTO Agreement. One could argue that by virtue of Article XXIV of the GATT and Article V of the GATS, all other WTO members "accepted" a RTA, such as the NAFTA, as long as the requirements of these provisions are met. This could be argued on the basis that Article XXIV of the GATT and Article V of the GATS provide for RTAs and this implies the possibility of independent DSMs.

It is worth referring to Article 30.3 of the VCLT, whereby when the parties of an earlier treaty are also parties of a later treaty, and the earlier one is not terminated or suspended, "*the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*". The Panel could consider the NAFTA applicable in the framework of the WTO to the extent that its provisions are compatible with those of the WTO Agreement, which is the later in time. In particular, the Panel could conclude that the exclusive choice of forum provision embodied in Article 2005.4 of the NAFTA is not applicable, being incompatible with the exclusive jurisdiction clause envisaged in Article 23 of the DSU.

Under Article 41.1 (a) and (b) of the VCLT, a similar argument could be made. Article 41.1 (a) stipulates that parties to a treaty (*in casu* the WTO Agreement) have the possibility to modify such a

[31] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, paras. 195-199.

treaty if the treaty itself provides for this modification.[32] The Panel could conclude that NAFTA is such a modification and that this modification is explicitly envisaged in the WTO Agreement by virtue of Article XXIV GATT and Article V of GATS. This is supported by the International Law Commission, which concludes that, in order to avoid the fragmentation of international law, States should apply conflict clauses: "*When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses*."[33] Alternatively, Article 41.1 (b) of the VCLT provides that a modification may also take place where it is not expressly excluded by the treaty, but Article 41.1 (b) further requires that the modification does not affect the rights of third parties and is not incompatible with the object and purpose of the treaty.

5. The conflict of treaties analysis

The interplay between the NAFTA and the GATT/WTO can be interpreted either in harmony or in conflict, as shown below. The possible interpretations of Article 2005.4 of the NAFTA and the GATT/WTO would be: (a) interpretation of harmony; (b) interpretation of conflict - *lex posterior derogat legi priori* (c) interpretation of conflict - *lex specialis derogat lex generalis*; and (d) temporary failure of the NAFTA.

(a) Interpretation of harmony

According to this interpretation, there is no conflict between the NAFTA and the WTO agreements, because no provision in WTO law regulates the choice of members when there are overlapping jurisdictions between two international DSMs.[34] Under this approach, Article 2005.4 of the NAFTA would not conflict with the GATT/WTO and therefore a WTO Panel could find it applicable in the frame of general international law.

(b) Interpretation of conflict: *lex posterior derogat legi priori*

Because the NAFTA entered into force on January 1, 1994, while the WTO Agreements did so in January 1, 1995, it could be argued that the WTO is *lex posteriori* in relation to the NAFTA. As mentioned above, Article 30.3 of the VCLT states that when the parties of an earlier treaty are also parties

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[32] Cf. L. Bartels, *Applicable law in WTO dispute settlement proceedings*, Journal of World Trade, 35(5), 499-519, p. 514, see Panel Report, *Turkey — Restrictions on importation of Textiles and Clothing Products*, WT/DS34/R, adopted 31 May 1999, para. 9.181.

[33] See Conclusions of the work of the Study Group on the Fragmentation of International Law*: Difficulties arising from the Diversification and Expansion of International Law* (A/61/10, para. 251), International Law Commission, Yearbook of the International Law Commission, 2006, vol. II, Part Two, Conclusion 30.

[34] See F. M. Abbott, *The North American Integration Regime and its implications for the World Trading System*, in The EU, the WTO and the NAFTA, by J. H. H. Weiler (2000), p. 189.

of a later treaty, and the earlier one is not terminated or suspended, "*the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*". Therefore, if the Panel applied the *lex posteriori* argument, it would find that Article 2005.4 of the NAFTA would not be applicable because it would be incompatible with the exclusive forum clause incorporated in Article 23 of the DSU.

Consequently, if the Panel accepts the *lex posteriori* argument, Mexico would be not able to rely on Article 2005.4 of the NAFTA in future cases.

(c) Interpretation of conflict: *lex specialis derogat lex generalis*

In applying this principle, it could be argued that the NAFTA is a *lex specialis* in relation to the WTO agreements. In order to do so, it would be necessary to show that the NAFTA, although a previous agreement, is specific (*lex specialis*) as opposed to the WTO agreements (*lex generalis*). A possible argument to support this view is that GATT Article XXIV contemplates RTAs as an exception and therefore the NAFTA choice-of-forum clause would be valid. The consequence would be that Article 2005.4 of the NAFTA prevails over the WTO DSM and the NAFTA has exclusive jurisdiction, regardless of the DSU.

(d) Alternative Strategy for Mexico: temporary failure of the NAFTA

Mexico could argue that the Panel shall not decline jurisdiction in the present case due to the (temporary) "failure" of the NAFTA Chapter 20 DSM.[35] According to the International Law Commission's Conclusions on the Fragmentation of International Law, general international law applies when there is a "failure" of the special regime. Mexico could argue that given that the NAFTA Chapter 20 rosters have not been established yet, and the United States has already blocked in the past the selection of panelists (i.e. in the NAFTA dispute related to *Mexico — Soft Drinks*), the NAFTA Chapter 20 DSM "has failed". Mexico could sustain that, in this particular case, the Panel should not decline to reach the merits, because of the failure of the NAFTA Chapter 20 DSM as a special regime.

To conclude, in view of the possible interactions between the WTO agreements and the NAFTA, there is no clear solution to solve a conflict between these two treaties. Furthermore, the interpretation of these agreements is complex, and the NAFTA's terminology is not uniform or consistent.[36]

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[35] See Conclusions of the Work of the Study Group on the Fragmentation of International Law*: Difficulties arising from the Diversification and Expansion of International Law* (A/61/10, para. 251), International Law Commission, Yearbook of the International Law Commission, 2006, vol. II, Part Two, Conclusion 16.
[36] NAFTA Panel Final Report in the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, 1997 BDIEL AD Lexis 24, p. 123.

B. OUTCOMES

This section analyses the potential outcomes resulting from a possible defence of the United States based on Article 2005.4 of the NAFTA.

1. The Panel has jurisdiction and cannot decline to exercise it

The following section analyses the most realistic outcome in which the Panel, faced with a defence based on the Article 2005.4 of the NAFTA, would find that it has jurisdiction to hear the case and cannot decline to exercise it. The Panel would reach this conclusion on the basis of the compulsory jurisdiction approach under Article 23 of the DSU. According to this position the DSU enshrines a system of compulsory jurisdiction of the WTO DSM where WTO panels can only apply the WTO covered agreements. When a WTO member seeks to restore normal WTO-compliant trade relations from a violation of an obligation under WTO law by another member, it *shall* resort to the exclusive and compulsory jurisdiction of the WTO DSM[37] and comply with its rules and procedures.[38]

Under this approach, WTO panels cannot refrain from exercising their "statutory function" to assist the DSB in the settlement of disputes (Articles 7 and 11 of the DSU). Should they decline to exercise their jurisdiction, they could create legal uncertainty to the detriment of the entire WTO system. Such a situation would also contradict Article 3.2 of the DSU, since it would harm the security and predictability of the international trading system. A member State would witness the diminution of its rights under the DSU in infringement of Article 19 of the DSU and, in particular, of its right according to which "*panels are required to address issues that are put before them by the parties to a dispute*".[39]

According to the approach at hand, the exclusion of international treaties foreign to the WTO system is grounded on Article 3.2 of the DSU, which prescribes that "*recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*", as well as on Article 11 of the DSU, which establishes that the function of the panels "*is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements*." Following this approach, the law applicable in the WTO dispute settlement system is the covered agreements only, and the Panel cannot take into consideration other international treaties which are not part of the WTO

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[37] K. Kwak, G. Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements* in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006), pp. 466-467.

[38] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 52.

[39] Appellate Body Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States — Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 36.

system. The compulsory jurisdiction approach also claims that, taking into account Articles 3.2 and 11 of the DSU, "*this language would be absurd if rights and obligations arising from other international law could be applied by the DSB*".[40]

The compulsory jurisdiction approach can be considered as supported by the Appellate Body's position in Mexico — *Soft Drinks* in which it held that:

> A decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem (…) not to be in a position to choose freely whether or not to exercise its jurisdiction." (footnotes omitted, emphasis added)

This strict interpretation of the applicable law before the WTO DSM is said to be endorsed by further rulings. According to Trachtman, in *EC — Poultry*[41] the Appellate Body found that "*a tariff agreement settling a matter between two WTO members does not constitute WTO law applicable by a panel"*.[42] Trachtman maintains that the Appellate Body in *Argentina — Footwear (EC)*[43], expressed that "*a purported agreement between Argentina and the IMF would not modify WTO obligations*."[44] In *Argentina — Poultry Anti-Dumping Duties*, the Panel clarified that Article 3.2 of the DSU, when making reference to customary rules, covers international rules of treaty interpretation rather than treaty application.[45]

The Appellate Body report in *Mexico — Soft Drinks* expressed that there is no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes, and that the WTO dispute settlement system cannot be used to determine rights and obligations outside the covered agreements.[46] The Appellate Body Report in *Mexico — Soft Drinks* stated that the function of panels and of the Appellate Body, as intended by the DSU, is not to determine rights and obligations outside the covered

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[40] J. P. Trachtman, *The Domaine of WTO Dispute Resolution*, 40 Harv. Int'l. L. J. 334 (1999), pp. 342-343.
[41] Appellate Body Report, *European Communities — Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031.
[42] J. P. Trachtman, *The Domaine of WTO Dispute Resolution*, 40 Harv. Int'l. L. J. 334 (1999), p. 343.
[43] Appellate Body Report, *Argentina — Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
[44] J. P. Trachtman, *The Domaine of WTO Dispute Resolution*, 40 Harv. Int'l. L. J. 334 (1999), p. 343.
[45] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.41.
[46] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 56.

agreements.[47] In the case at hand, if the WTO DSM were to adjudicate on Article 2005.4 of the NAFTA, it would also have to interpret and analyse whether Article 2005.4 of the NAFTA is applicable to the facts, that is, if the measures at stake are subject or not to such rule (see p. 16 ff. below for a detailed analysis of Article 2005.4 of the NAFTA). It would mean that the Panel would determine rights and obligations outside the covered agreements, which would be contrary to WTO jurisprudence. Therefore, according to the compulsory jurisdiction approach, Article 2005.4 of the NAFTA cannot be taken into consideration before the WTO DSM because potential NAFTA obligations are outside the WTO covered agreements.

In *Mexico — Soft Drinks*, the Appellate Body decided not to express any view on *"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"*.[48] The United States would need to prove that Article 2005.4 of the NAFTA constitutes a "legal impediment" to the WTO adjudicative bodies to rule on the merits of the complaint filed by Mexico. However, under this approach, this is not possible as NAFTA rules are rights and obligations outside the WTO covered agreements.

To conclude, in light of the discussion above, it is likely that in case the United States raises Article 2005.4 of the NAFTA as a defence to challenge the WTO Panel's jurisdiction, the Panel will refuse to analyse this choice-of-forum clause because the NAFTA is not within the WTO covered agreements.

2. The Panel has jurisdiction and may decline to exercise it

The following section analyses a somewhat less likely alternative whereby the Panel may find that it has jurisdiction to hear the case and the ability to decline to exercise it.[49] The main possible legal grounds under which the Panel may reach this conclusion are Article 2005.4 of the NAFTA and the principles of: *res judicata*, estoppel, good faith, *lis pendens* and comity.

(a) The applicability of Article 2005.4 of the NAFTA to the facts in *US — Tuna II*

According to Paragraph 4 of Article 2005 of the NAFTA the responding party has the right to request that certain kinds of disputes be settled before the NAFTA DSM instead of the GATT/WTO.

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[47] *Ibid.*, para. 78.

[48] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 54.

[49] Article 2005.4 of the NAFTA raises doubts whether it applies to the GATT/WTO after 1994 because Paragraph 1 however includes *"any agreement negotiated [under GATT], or any successor agreement*". This suggests that the provision was meant to include also the GATT/WTO. See G. Marceau, *Conflicts of Norms and conflicts of jurisdictions: The relationship between the WTO Agreement and MEAs and other Treaties*, Journal of World Trade, 1081-1131 (2001), p. 1117, footnote 94.

Paragraph 5 of Article 2005 further clarifies that if the responding party makes such a request, the complaining party has the obligation to withdraw from participation in the GATT/WTO proceedings and may initiate NAFTA procedures. Articles 2005.1 and 4 of the NAFTA reads as follows:

> Article 2005: GATT Dispute Settlement
>
> 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.
>
> (…)
>
> 4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
>
> a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
>
> b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,
>
> where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

Article 2005.4 of the NAFTA spells out five distinct requirements, which the Panel would have to analyze in turn, namely that there should be a dispute: (i) regarding any matter arising under both the NAFTA and the GATT/WTO; (ii) that arises under Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures); (iii) "*concerning a measure adopted or maintained by a Party to protect its (…) animal (…) life or health, or to protect its environment*"; (iv) "*that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters*"; (v) "*where the responding Party requests in writing that the matter be considered under this Agreement* [the NAFTA]."

(i) Disputes regarding any matter arising under both the NAFTA and the GATT/WTO

Article 2005.4 of the NAFTA concerns disputes regarding any matter arising under both the NAFTA and the GATT/WTO. The choice of the word "matter" suggests that this provision applies where one or several measures could be a violation of both the NAFTA and the GATT/WTO. This would require that the NAFTA and the GATT/WTO regulate thematically similar issues. According to this interpretation the term "matter" would not require that the provisions in the NAFTA and the GATT/WTO are entirely identical. Another possible interpretation would be that the substantive legal obligations should be equal, that is, exactly the same obligations should be assessed under both NAFTA and WTO. Nevertheless, the broad language of Article 2005.1 of the NAFTA may show that the legal obligations

should not be the same. It would suffice that the matter arises under both the NAFTA and the GATT/WTO Agreements.

In the case at hand, Mexico argues that the labelling regime imposed by the United States violates Articles I:1 and III:4 of the GATT as well as Articles 2.1, 2.2, 2.3 and 2.4 of the TBT Agreement.[50] The NAFTA explicitly mentions the MFN principle in certain provisions,[51] contains a general national treatment obligation under Article 301, and regulates "Technical Barriers to Trade" in Part III.

In conclusion, the GATT/WTO provisions invoked by Mexico deal with issues that are also regulated by the NAFTA. Therefore, the dispute regarding the United States labeling regime and the relevance of international standards could be considered as a matter that arises under both GATT/WTO and TBT.

(ii) A dispute that arises under Chapter Nine (Standards-Related Measures)

Article 2005.4 of the NAFTA prescribes that a party may rely on the NAFTA DSM as the exclusive forum in a dispute that "arises under" the SPS and TBT Chapters. Given that the TBT Chapter of the NAFTA is the core of the dispute, this requirement seems to be fulfilled. It should also be noted that this requirement does not necessitate that the NAFTA and GATT/WTO provisions similarly regulates the same issues.

Another possibility would be that the WTO Panel "divides" the case into its GATT and TBT "components". On the one hand, the Panel could decide that it has jurisdiction on the GATT Articles I and III issues, and, on the other hand, find that it has no jurisdiction on the TBT parts of the case. This would be theoretically possible because (according to Article 2005.4 of the NAFTA) the right to remove a case from the WTO to the NAFTA DSM concerns the disputes that "arise under" the TBT Chapter of the NAFTA. As a consequence, in light of the chapeau of Article 2005.4 of the NAFTA there would not be a removal of the entire dispute from the WTO in favour of the NAFTA, but only the "TBT part" of the dispute.

(iii) "concerning a measure adopted or maintained by a Party to protect its (…) animal (…) life or health"

Pursuant to letter (a) of Article 2005.4 of the NAFTA, the aim of the measure must be "*to protect its human, animal or plant life or health*". The United States must therefore have adopted the measures in question to protect **"its"** dolphin life. In the first submission by the United States in *US — Tuna II* the United States describes the purpose of the measures as follows:

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[50] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Request for the Establishment of a Panel by Mexico, WT/DS381/4, 10 March 2009.
[51] NAFTA, Article 308 (automatic data processing goods), Article 1103 (investments), and Article 1203 (services).

> The purpose of the U.S. measures is twofold: to ensure consumers are not misled about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and to ensure that the U.S. market is not used to encourage fishing fleets to use fishing techniques that adversely affect dolphins and in this way contribute to protecting dolphins.[52]

To give *effet utile* to letter (a) of Article 2005.4 of the NAFTA, the party that adopts or maintains the measure in question must do so in order to protect "**its**" human, animal or plant life or health. In the case at hand, the United States must have adopted the measures in order to protect the life of animals of the United States. As mentioned above, dolphins associate with tuna in the Eastern Tropical Pacific, and tuna fishery between Hawaii, Mexico and Peru exploits this association.[53] Under U.S. law, the Eastern Tropical Pacific "*extends from the West Coast of the America's central coastline westward to include most of the tropical Pacific east of the Hawaiian Islands and includes high seas areas as well as the Exclusive Economic Zones (EEZs) and territorial seas of the United States, Mexico*"[54] among other countries.

In *US — Shrimp*, the Appellate Body considered that there was a sufficient nexus between the United States and the turtles in question on the grounds that the turtles were known to occur in the waters over which the United States exercised jurisdiction.[55] Applying this approach, the fact that the dolphins occur in the United States Exclusive Economic Zone (EEZ) would be sufficient to consider the dolphins as part of the United States' animal life. However, it should be noted that in *US — Shrimp*, the Appellate Body applied a provision relating to "exhaustible natural resources" (Article XX (g) of the GATT) and not the provision relating to the protection of "animal life" (Article XX (b) GATT). Furthermore, unlike Article 2005.4 of the NAFTA, the GATT provision on "animal life" does not include the word "its".

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[52] *United States — Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381), U.S. First Written Submission, April 16, 2010, para. 60, p. 20.

[53] J. S. Fromeyer, *The Spinner Dolphin*, available at http://www.ms-starship.com/sciencenew/spinner_dolphin.htm (accessed on 25 May 2010).

[54] *United States — Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381), U.S. First Written Submission, 16 April 2010, para. 35, p. 11.

[55] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 133.

(iv)"that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters"

According to Article 2005.4 (b) of the NAFTA, the dispute must raise "*factual issues*". The requirements in Article 2005.4 (a) and (b) of the NAFTA could either be seen as alternatives or as two conditions that must be cumulatively. The conditions (a) and (b) are connected with the word "and" which suggests that both conditions must be fulfilled at the same time. Otherwise the drafters could have used the term "or" instead of "and". This analysis therefore assumes that Article 2005.4 (a) and (b) of the NAFTA are not alternatives.

"Factual issues" can be contrasted to "legal issues". This means that the reference to "factual issues" excludes cases in which no "*factual*" issues were raised. Given the wide range of "*factual issues*" which could come up in connection to the case it appears rather difficult to argue that this requirement is not met. Nonetheless, Mexico could argue that the dispute does not raise any "*factual*" issues and that it only concerns "*legal*" issues. However, if one party maintains that the dispute raises "*factual*" issues and the other maintains that the dispute does not raise "*factual*" issues, this disagreement as such could lead a panel to conclude that there must be some "*factual*" issues.

In any case, WTO panels may assess for themselves whether a dispute raises factual issues concerning the environment or conservation. This approach has been explicitly applied by the ICJ in the Case concerning Fisheries Jurisdiction (Spain v. Canada)[56]. In this case, the ICJ held that, when each party characterizes the dispute differently, it is for the Court to determine the subject of a dispute on an objective basis, grounded in the parties' submissions, diplomatic exchanges, public statements and other pertinent evidence.[57]

(v) "where the responding Party requests in writing that the matter be considered under this Agreement [the NAFTA]"

According to the last part of Article 2005.4 of the NAFTA, the responding party (*in casu* the United States) must have requested in writing that the matter be considered under the NAFTA. In case no such request is made, the United States could not rely on Article 2005.4 of the NAFTA.

In conclusion, bearing in mind that there is no jurisprudence on Article 2005.4 of the NAFTA and the little guidance case law from other DSMs provides on this particular NAFTA choice-of-forum provision, the tentative conclusion is that Article 2005.4 of the NAFTA applies to the facts underlying *US*

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[56] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction fo the Court, Judgment, I.C.J. Reports 1998*, p. 432.
[57] *Ibid.*, p. 448.

— *Tuna II*, and that the United States has a right under the NAFTA to have the dispute removed from the WTO to the NAFTA.

However, it should be pointed out that the United States has always shown a strong opposition against the possibility for WTO panels to decide that they have no jurisdiction or the authority to apply non-WTO law.[58] It is therefore unlikely that the United States would risk holding a position favourable to creating such a scenario by arguing that a WTO Panel could directly apply Article 2005.4 of the NAFTA. In any case, if the United States would fail to prove that Article 2005.4 of the NAFTA applied on a factual basis, Mexico could rely on Article 2005.6 of the NAFTA which states that once a proceeding has started in one forum (*in casu* the WTO) the other forum is excluded. In this case, the WTO Panel would not decline to exercise jurisdiction and the NAFTA Panel requested by the United States arguably should limit itself to the question of whether Mexico should have removed the case from the WTO DSM to the NAFTA one. Therefore, the NAFTA panel should evaluate only the Mexican state responsibility, if any, before the NAFTA, and not the merits of the dispute.

(b) The principle of *Res Judicata*

Res judicata is a domestic law principle that applies to sequential proceedings and stipulates that a previous decision on a given issue prevents the ruling on the same issue by the same or another court. In the domestic law context this principle will prevent the same court from ruling twice on the same issue. It will also prevent a court from ruling on an issue that has already been dealt with by another court, when these courts are considered to be comparable or "the same". However, since *res judicata* applies only once a final judgment was rendered, *res judicata* does not prevent that the same dispute may be pending before different courts at the same time. For *res judicata* to apply the following three criteria must be met in sequential proceedings: first, the parties must be the same; second, the object or subject matter must be the same (*petitum*); and third, the cause of action must be the same (*causa petendi*).[59]

It is generally assumed that *res judicata* is a general principle of international law.[60] Nevertheless, in *India — Autos*, the Panel stated on the applicability of the principle: "*many important interpretative issues would thus need to be considered in determining whether the doctrine of* res judicata *applies in*

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[58] See, *inter alia*, *Mexico — Soft Drinks*, in which the United States held that WTO panels do not have the power and discretion to decline to exercise jurisdiction. *A fortiori*, the United States is clearly contrary to the possibility for WTO panels to decide that they do not have jurisdiction. Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 45.

[59] J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009) p. 103, footnote n. 103. Pauwelyn and Salles interpret *EC — Bed Linen (Article 21.5 — India)* as confirming these three conditions. *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Lines from India*, *Recourse to Article 21.5 of the DSU by India*, p. 93, WT/DS141/AB/RW, adopted 8 April 2003.

[60] J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), p. 102.

WTO dispute settlement".[61] Moreover, in *Mexico — Soft Drinks* the Appellate Body appears to have left the possibility open to apply *res judicata* in the WTO DSM, by asserting that "*it is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded*".[62]

The differences between international courts and tribunals suggest that *res judicata* should not be applied as far as jurisdictional conflicts between courts are concerned.[63] Especially the DSMs of the WTO and the NAFTA show major differences when it comes to their procedural rules, their scope, their applicable law and their legitimacy. As it was already pointed out, in the domestic legal contexts *res judicata* applies to courts that are "equal" or "the same". Even under the assumption that *res judicata* is a principle to which a WTO panel could resort to in order to solve issues of conflicting jurisdictions, the third criteria, "the same cause of action" would hardly ever be met. This is due to the fact that this requirement is often interpreted very narrowly.

If a NAFTA panel decided, for instance, on the legality of a measure and afterwards a WTO panel was requested to address the same measure, the cause of action would differ. The NAFTA panel would have considered the conformity of the measure with the NAFTA, whereas a WTO panel would consider the consistency with WTO law. As a consequence, the *res judicata* principle would not apply and the NAFTA panel could rule on the case. This could even be the case, when the WTO and the NAFTA provide for similar obligations, such as the national treatment obligations, which exists in both the WTO and the NAFTA provisions.[64]

In the case at hand, Mexico requested the establishment of a panel after unsuccessful consultations with the United States and the Panel was accordingly established. In the meantime the United States requested consultations before the NAFTA. Neither before the NAFTA nor before the WTO a panel report has been adopted. Since there are no sequential proceedings, *res judicata* is rather unlikely applicable *in casu*.

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[61] Panel Report, *India — Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted 21 December 2001, paras. 7.57-7.59.
[62] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 54.
[63] However, it can be assumed that *res judicata* should prevent one court or tribunal from ruling twice on the same issue. In this regard, *res judicata* in fact can be said to apply at the international level. See for instance Article 26.1 of Olivos Protocol in the frame of MERCOSUR. See also *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Lines from India*, Recourse to Article 21.5 of the DSU by India, p. 93, WT/DS141/AB/RW, adopted 8 April 2003. According to Pauwelyn and Salles this is an (at least implicit) confirmation of the *res judicata* effect of unappealed panel reports adopted by the DSU, see J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), para. 103, note 103.
[64] See J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), p. 103.

To sum up, if the United States raised the *res judicata* principle, the Panel would probably come to the conclusion that it does not apply to the facts at hand. Consequently, the consideration of *res judicata* by the Panel would not prevent it from exercising jurisdiction.

(c) The principle of Estoppel

Estoppel is a legal doctrine (expressed by the Latin maxim *venire contra factum proprium non valet*) according to which one is prevented from affirming a claim or a right that conflicts with what it has asserted or done previously, or with what it has legally recognized as true.[65]

At the international law level, estoppel has the effect of precluding State "A" from disowning a representation made to State "B", in case: (1) State "A" has made a representation in an unmistakable and unequivocal manner; (2) State "B" has trusted in this representation of State "A"; and (3) State "B" would be damaged or State "A" would be advantaged if such a representation was ungrounded or taken away.[66]

WTO panels have never declined to exercise jurisdiction on the basis of the doctrine of estoppel.[67] In *EC—Export Subsidies on Sugar*, the Appellate Body stated that there is little room for estoppel in the WTO system given that *"it would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding*".[68] For the sake of argument, the Appellate Body noted that in case the doctrine of estoppel could be applied in the WTO proceedings, it would fall within the narrow parameters of DSU Articles 3.7 and 3.10,[69] which prescribe, respectively, that WTO members exercise their *"judgement as to whether action under these procedures would be fruitful*" and that they *"engage in these procedures in good faith*."

Nevertheless, certain scholars stated that WTO panels in the exercise of their inherent powers could resort to estoppel, so that it is ensured that the WTO DSM would not be used abusively.[70] A "statement" of a WTO member not to bring a dispute before the WTO DSM could be a basis for estoppel.[71]

According to this position, the existence of a choice-of-forum provision in a RTA (such as Article 2005.4 of the NAFTA) whereby in certain circumstances the member States are obliged not to bring a

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[65] Black's Law Dictionary (2001), Westgroup.
[66] A. D. Mitchell, D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, Legal Studies Research Paper Series, Paper n. 416, University of Melbourne Law School (2009), p. 39.
[67] Appellate Body Report, *EC — Export Subsidies on Sugar,* WT/DS265/AB/R, adopted 19 May 2005, para. 312.
[68] *Ibid*.
[69] *Ibid*.
[70] A. D. Mitchell, D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, Legal Studies Research Paper Series, Paper n. 416, University of Melbourne Law School (2009).
[71] *Ibid.*, pp. 41-42.

case before the WTO DSM may be considered as a "statement" which can be a ground for estoppel.[72] *In casu*, the fact that the WTO Agreement entered into force in 1995 and the NAFTA in 1994 certainly plays a role with regard to the legal value of possible "statements" incorporated in the NAFTA. The DSU and in particular Article 23, even though not incorporating any reference to possible overlaps with third DSMs, stipulate that WTO Members shall have recourse to the WTO DSM for WTO law infringements. This could be considered as a "new statement" made between the United States, Mexico and all other WTO members, which overrides the previous NAFTA "statement(s)" on choice-of-forum clauses. Consequently, Article 2005.4 of the NAFTA seems not to be a possible ground for estoppel.

In any case, it is worth referring to the position expressed by the United States in *EC — Export Subsidies on Sugar* according to which *"'[e]stoppel' is not a defence that Members have agreed on, and it therefore should not be considered by the Appellate Body*".[73] In is worth noting that also in *Argentina — Poultry Anti-Dumping Duties* the United States, as a third party, expressed a position against the possible applicability of the principle of estoppel within the WTO system.[74]

Although is rather unlikely that the United States raises estoppel as a defence, it could argue that Mexico is estopped from bringing the claim before the WTO DSM in light of what has been legally established as a rule between Mexico and the United States (Article 2005.4 of the NAFTA) and/or the previous behaviour of Mexico (namely, Mexico's request in *Mexico — Soft Drinks* that the WTO Panel and Appellate Body decline to exercise jurisdiction in favour of the NAFTA DSM). In other words, the United States could argue that Mexico's commitments and actions outside the WTO framework could prevent Mexico from asserting its right to have recourse to the WTO DSM.

To conclude, in light of the above, it is unlikely that the United States raises a defence based on the doctrine of estoppel. In case the United States does so, the Panel would most likely not decline to exercise jurisdiction.

(d) The principle of Good Faith

As stated in the preamble of the VCLT, good faith is a universally recognized principle of international law. Article 18 of the VCLT further explains that *"a State is obliged to refrain from acts which would defeat the object and purpose of a treaty*".[75]

As envisaged in Article 3.10 of the DSU, WTO members must engage in the DSU procedures in good faith. In *US — Offset Act (Byrd Amendment)*, the Appellate Body found that the fact that a WTO

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[72] *Ibid*., p. 42.
[73] Appellate Body Report, *EC — Export Subsidies on Sugar,* WT/DS265/AB/R, adopted 19 May 2005, para. 312.
[74] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.31.
[75] Article 18 of the VCLT; see also W. Goode, *Dictionary of Trade Policy Terms*, Cambridge (2007), p. 202.

member has violated a treaty provision does not imply that such member has not acted in good faith.[76] Based on this finding, the Panel in *Argentina — Poultry* noted that there are two conditions before a WTO member can be considered not to have acted in good faith: (1) the member must have violated a substantive provision of the WTO agreements; and (2) something "*more than a mere violation*" is necessary.[77]

In *US — Shrimp*, the Appellate Body affirmed that the principle of good faith controls the exercise of rights by States.[78] It clarified that a form of application of the principle of good faith is the doctrine of *abus de droit*, which impedes a State from abusively exercising its rights. These rights must be exercised reasonably.[79] Consequently, it could be argued that a WTO member, which resorts to the DSU procedures to circumvent procedural obligations under international treaties outside the WTO, could be said to be misusing the WTO system in an abusive way. Therefore, the Panel could decline jurisdiction so that the proper forum (NAFTA) may decide the dispute which was abusively brought before the WTO.

It should be noted however that in *Argentina —Poultry* the panel decided that there was no basis to find a violation of the principle of good faith. The reason was that Brazil challenged Argentina's anti-dumping measure before the WTO when there was a prior dispute settlement proceeding against the same measure before a MERCOSUR *Ad Hoc* Arbitral Tribunal.[80] As a matter of fact, *"so far, no WTO case law has suggested that a member may have acted in bad faith*".[81]

The United States could present an argument that the failure of Mexico to withdraw the *US — Tuna II* dispute from the WTO DSM, as requested by the United States before the NAFTA DSM, would constitute a violation of the good faith principle prescribed in Article 3.10 of the DSU. The United States could argue that Mexico's conduct amounts to an abuse or misuse of its rights to resort to WTO DSM when, per Article 2005.4 of the NAFTA, Mexico is obliged to follow the NAFTA procedures. In order to do so, the United States would have to make the case that (1) the good faith principle is a substantive provision of the WTO agreements, and (2) that intention to circumvent NAFTA obligations by using the WTO system constitutes something more than a mere violation. Mexico could argue that (1) the use of the WTO DSM is a right that all members can resort to, which cannot be impaired or affected outside the

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[76] Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000,* WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 298.
[77] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.36.
[78] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, para. 158.
[79] *Ibid*.
[80] Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.42.
[81] P. C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 Am. J. Int'l L. 421, p. 442.

WTO agreements, and (2) even if a WTO panel would find a misuse of the right to resort to the WTO DSM, there is not anything more than a mere violation to justify a breach of the good faith principle.

In conclusion, based on the case law of the WTO, it seems very unlikely that the Panel would establish that Mexico has not acted in good faith for bringing a dispute before the WTO and not the NAFTA DSM. In any case Mexico should sustain that framing the facts to the applicable legal provisions is a matter of legal interpretation, and not a question of using the WTO DSM in bad faith. Therefore, the Panel would find that it could not decline jurisdiction because the dispute was not abusively brought before the WTO.

(e) The principle of *Lis Pendens*

In the domestic law context, the *lis pendens* principle applies to parallel proceedings. According to this principle a first court seized of a case will decide on it. Therefore, once a proceeding has started before a court another court is barred from exercising jurisdiction on the same issue. *Lis pendens* applies domestically to "equal" courts and serves as a neutral criterion (simple time factor) to decide which court has jurisdiction. The criteria for *lis pendens* in domestic legal systems are the same as for *res judicata*: (1) the parties; (2) the object or subject matter (*petitum*); and (3) the cause of action (*causa petendi*) must be the same.

It is disputed whether *lis pendens* applies to international courts and tribunals and whether it constitutes a general principle of international law.[82] Major arguments against the applicability of *lis pendens* are, first, the fact that *lis pendens* is sometimes seen as a principle of civil law tradition and, second, the fact that domestically *lis pendens* applies to "equal" courts whereas at the international level courts may differ widely in various aspects (institutional and historical context, equality, legitimacy, applicable law, remedies and expertise, etc.).[83] Especially the WTO DSM and the NAFTA (Chapter 20) show significant differences in these regards. Furthermore, if *lis pendens* applied, disputes could be left unresolved, when one party blocks the proceedings before one court and the other party cannot resort to another court.[84]

Some argue, however, that *lis pendens* is a general principle of international law. One of the main arguments for the application of *lis pendens* is that when *res judicata* applies, *lis pendens* should apply likewise.[85] A possible response to this argument is that encouraging a race to a ruling (applying *res*

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[82] See J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), p. 106.
[83] *Ibid.*, p. 107.
[84] This could have happened after the United States refused to appoint panellists in the NAFTA dispute related to *Mexico — Soft Drinks*. However, Mexico did not initiate a parallel proceeding before the WTO.
[85] See J. Pauwelyn, L. E. Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, 42 Cornell International Law Journal 77 (2009), p. 108.

judicata and not *lis pendens*) nevertheless will be more effective than a race to court (applying both *res judicata* and *lis pendens*).[86]

Under the assumption that *lis pendens* was a general principle of international law, the criteria for the application, especially the criteria of the same cause of action, will most likely never be met.

In the case at hand, there are parallel proceedings: one before the WTO DSM filed by Mexico (*US — Tuna II*) against the United States, and another before the NAFTA DSM filed by the United States against Mexico. Although the parties are the same, the positions of the complainant and the respondent are reversed before the WTO and the NAFTA DSMs. In addition, the subject matter before the WTO concerns "*measures taken by* [the United States] *concerning the importation, marketing and sale of tuna and tuna products*"[87] whereas the subject matter at the NAFTA concerns Mexico's "*failure to move its "*dolphin-safe*" labelling dispute from WTO to NAFTA*".[88] Furthermore, at the WTO the cause of action is Articles 2, 5, 6 and 8 of the TBT and Articles I and III of the GATT, whereas the cause of action in the NAFTA dispute Article 2005.4 of the NAFTA.

Assuming *arguendo* that the NAFTA panel would evolve to a finding that Mexico should have moved the *US — Tuna II* case from WTO to NAFTA, this decision would be limited to the lack of compliance with Article 2005.4 of the NAFTA, and not on the merits of the dispute. Finally, even under the assumption that Mexico filed a claim before the NAFTA and, at the same time, continued its litigation before the WTO, this new hypothetical NAFTA Panel would then need to analyse whether the "cause of action" of the dispute before NAFTA would be the same as the "cause of action" before WTO DSM.[89]

In conclusion, at the current stage, the *lis pendens* principle will probably be of no relevance in *US — Tuna II* before the WTO DSM for mainly two reasons. First, in light of the differences between international tribunals it is reasonable to assume that *lis pendens* does not apply in the Panel proceedings. Second, even if it was a principle that the Panel could apply the criteria of the same subject matter and the same cause of action would not be met. In consequence, the consideration of *lis pendens* by the Panel would not prevent it from exercising jurisdiction.

(f) The principle of Comity

Comity is a principle of "*judicial restraint*" which can be found in domestic judicial systems of

[86] *Ibid*., p. 109.
[87] *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*; Request for Consultations by Mexico, WT/DS381/1, G/L/858, G/TBT/D/32, adopted 28 October 2008.
[88] Press Release, Office of the United States Trade Representative, 5 November 2009, available online: <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over> (accessed on 7 May 2010).
[89] This question essentially deals with the jurisdiction of a (hypothetical) NAFTA panel and therefore goes beyond the purpose of this paper.

common law tradition, according to which courts should not exercise jurisdiction on certain matters whenever another tribunal would deal with these matters more appropriately.[90]

The principle of comity finds its legal basis in the theory of "inherent powers". Comity is one of the circumstances in which, in light of its inherent powers, an international tribunal may discretionarily decline to exercise jurisdiction,[91] even though it is established, or suspend proceedings, on the ground that another tribunal would more appropriately deal with these matters.[92]

In the WTO system, the Appellate Body refused a comity-like argument which was raised by Mexico in *Mexico — Soft Drinks*.[93] The Government of Mexico implicitly invoked the principle of comity asking the Appellate Body to decline to exercise jurisdiction on the dispute that was, according to Mexico, related to a broader dispute that only a NAFTA panel could have resolved exhaustively.[94] The Appellate Body maintained that WTO panels have certain inherent powers related to their adjudicative function. Nevertheless, it concluded that, unless a legal impediment can be found, they are obliged to exercise substantive jurisdiction due to: (1) the obligations under the DSU;[95] (2) the lack of any provisions under the DSU which allows panels to decline jurisdiction in favour of third *fora;* and (3) the exclusive jurisdiction of the DSU for WTO violations which is embodied in Article 23 of the DSU.[96] In addition, it should be noted that the United States argued that a WTO panel does not have the power and discretion to decline to exercise jurisdiction.[97]

Furthermore, the power to suspend the proceedings by WTO panels in application of the principle of comity appears *prima facie* to be prevented by the very strict time frame stipulated under the DSU. According to Article 20 of the DSU a dispute shall as a rule not exceed 9 months (12 months in case of appeal). In addition, Article 12.8 of the DSU provides that panels shall as a rule deliver their report within 6 months, while Article 12.9 of the DSU stipulates that in no case the period from the establishment of a

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[90] C. Henckels, *Overcoming Jurisdictional Isolationism at the WTO FTA Nexus: A Potential Approach for the WTO,* 19 European Journal of International Law 571 (2008), p. 584.

[91] The principle of comity has been applied in the *Mox Plant case (Ireland v. United Kingdom)*, ITLOS Order dated 3 December 2001.

[92] A. D. Mitchell, D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: the Select Application of Public International Law Required by the Judicial Function***,** University of Melbourne, Law School Legal Studies Research Paper Series Paper No. 416, p. 31.

[93] G. Marceau, J. Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), p. 71; Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 42.

[94] G. Marceau, J. Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, *Journal of International Dispute Settlement,* Vol. 1, No. 1 (2010), p. 71; Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3, para. 54.

[95] These relevant provisions include Articles 3.2, 7.1, 7.2, 11, 19.2 and 23 of the DSU.

[96] G. Marceau, J. Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), p. 71.

[97] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 4 March 2006, DSR 2006:I, 3, paras. 21-24.

panel and the circulation of the report should exceed 9 months.[98] If a WTO panel suspended the proceedings in favour of an external *forum* in application of the principle of comity, this would result in an infringement of the above mentioned time frame stipulated under the DSU.[99]

On the other hand, it is worth noting that in practice this time frame is often not fulfilled in WTO proceedings. In *EC — Approval and Marketing of Biotech Products* the proceeding lasted for even more than 3 years.[100] In addition, generally, the time frame is often extended by the DSB. For instance, in *Canada — Continued Suspension* both the Panel and the Appellate Body asked and obtained various extensions in time of the deadlines, in light of the difficulties faced with the scientific issues examined by the experts. The Panel was established in February 2005 and the Panel and Appellate Body reports were adopted only in November 2008.[101] It follows that the time frame envisaged under the DSU may not be considered as a bar to the application of the principle of comity in WTO proceedings.

In case the Panel applies the principle of comity, it will suspend the WTO proceedings pending the NAFTA ones. In particular, the Panel could consider not to directly apply Article 2005.4 of the NAFTA and therefore suspend the proceeding in favour of the NAFTA DSM for the interpretation of Article 2005.4 of the NAFTA. Afterwards, the Panel would resume the proceedings, taking into consideration the NAFTA ruling.

If the Panel analyses the interpretation of Article 2005.4 of the NAFTA, the United States could maintain that it is the NAFTA's authority to "interpret" the exact meaning of Article 2005.4 of the NAFTA. The United States could submit that a WTO panel can only apply a non-WTO clause when its meaning is clear and when the WTO panel can move straight to the application without interpreting the meaning and identifying the exact requirements of the provision.

It is also worth noting that scholars suggest that WTO members could suggest a WTO Panel to ask for "expert advice" under Article 13 of the DSU, which in this case would be given as far as the meaning of Article 2005.4 of the NAFTA is concerned.[102] To this end, the Panel could suspend its proceedings. In such a case, the Panel would modify the timetable for its work included in the working

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[98] A. D. Mitchell, D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: the Select Application of Public International Law Required by the Judicial Function*, University of Melbourne, Law School Legal Studies Research Paper Series Paper No. 416, p. 32.
[99] *Ibid.*
[100] Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847; P. Van Den Bossche, *The Law and Policy of the World Trade Organization*, Second Edition, Cambridge University Press, 2008, p. 288.
[101] Appellate Body Report, *Canada — Continued Suspension of Obligations in the EC — Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008.
[102] See J. Pauwelyn, *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, Journal Of World Trade (2003), p. 1030 and J. Pauwelyn, *The Use of Experts in the WTO Dispute Settlement*, 51 I.C.J.C. (2002) p. 325.

procedures after consulting the parties in compliance with Article 12.1 of the DSU, delaying the entire panel procedures.

In conclusion, it appears unlikely that a WTO panel would suspend the proceedings by invoking the principle of comity, particularly in light of the position held by the Appellate Body in *Mexico — Soft Drinks*. Nevertheless, it cannot be completely excluded that the United States may invoke this principle, or that the Panel may asks for "expert advice".

3. The Panel does not have jurisdiction

A rather less possible outcome would be that the Panel finds that it has no jurisdiction to hear the case. The rationale would be that the NAFTA prevails over the WTO agreements on the basis of the principle of *lex specialis derogat lex generalis* or the interpretation of harmony, which were discussed above (see pp. 12-13 ff.).

V. CONCLUSION

If confronted with Article 2005.4 of the NAFTA defence, the Panel would most likely decide to conform to the majority conservative interpretation of WTO jurisprudence, namely, to conclude that it has jurisdiction and does not have the power to decline to exercise jurisdiction to hear the case. This scenario would be favourable to Mexico in the sense that the dispute would not be removed from the WTO DSM. Nevertheless, this outcome might prevent Mexico from raising a defence based on Article 2005.4 of the NAFTA before the WTO DSM in the future. The systemic consequences of this scenario would be to maintain the current design of the WTO system and the strengthening of the WTO DSM. In contrast, this would weaken the NAFTA DSM and make all choice-of-forum provisions in all other RTAs irrelevant before the WTO.

In a less likely alternative, the Panel would find that it may decline to exercise jurisdiction. The Panel would reach this conclusion either considering Article 2005.4 of the NAFTA as a legal impediment to the exercise of its jurisdiction under an interpretation of harmony of NAFTA and the DSU, or in light of the principle of comity. This scenario would not be favourable to Mexico in the case at issue, but it might enable Mexico to raise NAFTA defences before the WTO DSM in the future (e.g. in a case like *Mexico — Soft Drinks*). In the even less likely alternative, the Panel would decide that it has no jurisdiction in the present case based on a finding whereby the NAFTA prevails over the WTO agreements as *lex specialis* or based on the interpretation of harmony of Article 2005.4 of the NAFTA and the WTO agreements.

The systemic consequences of these last two scenarios (the Panel decides to decline jurisdiction on the case or that it has no jurisdiction on it) would be a complete change in jurisprudence of the WTO

and it might affect the current shape of the WTO system. In particular, this would mean "opening" the WTO system to the interference of RTAs. The advantage of this approach would be the prevention of overlaps between different international adjudicatory bodies as well as the avoidance of costly and lengthy duplicate proceedings. Preventing duplicate proceedings and conflicting rulings would bring certainty and predictability of the interaction between the DSMs of RTAs and the WTO. Furthermore, this approach would strengthen the right of States to create specialized DSMs within their RTAs and enforce their rights enshrined in choice-of-forum provisions. Giving effect to other DSMs would also give incentives to States to improve and further develop DSMs contained in RTAs.

A disadvantage of this approach would be that RTAs could affect the rights and obligations of WTO members under the DSU and the WTO members would consequently have different sets of rights and obligations. In addition, the problem of overlapping jurisdictions cannot be avoided completely because third parties cannot be prevented from filing a claim by the means of a RTA they are not party to. If, for instance, the Panel decided that it has no jurisdiction to hear the present case on the basis of Article 2005.4 of the NAFTA and, subsequently, this very same dispute were brought by a non-NAFTA member (e.g. Honduras) before the WTO against the United States, there still would be duplicative proceedings (one before NAFTA, and another before WTO) with potential for contradictory rulings.[103]

[103] J. Hillman, *Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO – what should the WTO do?* Cornell Int'l L.J. 193 (2009), pp. 202-203.

VI. EXPLANATORY TABLES [104]

Table 1

Legal basis	Possible arguments of the United States	Possible defence of Mexico
Inherent Jurisdiction	WTO panels have inherent powers in their adjudicative function to decline to exercise jurisdiction in a given case	WTO panels do not have the power to refuse the mandate of the DSB to settle disputes
Admissibility	The Appellate Body in *Mexico — Soft Drinks* has left open the possibility of a distinction between issues of jurisdiction and admissibility of a claim within the WTO system	The distinction between issues of jurisdiction and admissibility is not applicable within the WTO system
Applicability of non-WTO law	The application of non-WTO law is not expressly excluded	The DSU only refers to the WTO covered agreements
The applicability of non-WTO law binding on the parties to the dispute only	"*The parties*" in Article 31.3 (c) of the VCLT should be interpreted as referring to "*the parties in dispute*" only (Report on the Fragmentation of International Law - ILC)	The rules applicable by a panel by means of Article 31.3 (c) of the VCLT must be binding on all WTO members (Panel report in *EC — Approval and Marketing of Biotech Products*)
Conflict of treaties	NAFTA and WTO Agreements are in harmony The NAFTA prevails over the WTO because it is a *lex specialis* in relation to GATT/WTO	The DSU enshrines an exclusive system of compulsory jurisdiction The WTO prevails over the NAFTA because: - The WTO is a *lex posteriori* in relation to the NAFTA (Art. 30.3 VCLT) - Temporary "failure" of the NAFTA Ch. 20 DSM

[104] The purpose of the Table 1 and Table 2 is to illustrate synthetically the most relevant legal arguments that the United States may resort to, when raising an hypothetical defence based on Article 2005.4 of the NAFTA. Additionally, reference is made to the possible defences of Mexico.

Table 2

Legal basis	**Possible arguments of the United States**	**Possible defence of Mexico**
Applicability of Article 2005.4 of the NAFTA *in casu*	Article 2005.4 of the NAFTA applies to the facts of the case	Article 2005.4 of the NAFTA does not apply to the facts of the case
Res Judicata	Since there are no sequential proceedings, *res judicata* is not applicable	No panel report has been adopted either before the NAFTA or before the WTO. Since there are no sequential proceedings, *res judicata* is not applicable
Estoppel	Mexico is estopped from bringing the claim before the WTO DSM in light of what has been legally established between Mexico and the US (Article 2005.4 of the NAFTA)	Estoppel is not applicable within the WTO. In any case, the DSU can be considered as a "new statement" made between the US and Mexico, which overrides the previous NAFTA "statement(s)"
Good Faith	The failure of Mexico to withdraw the *US — Tuna II* dispute from the WTO DSM, as requested by the US, would constitute a violation of the good faith principle (Article 3.10 of the DSU)	The WTO DSM is a right that all members can resort to, and even if a WTO panel would find a misuse of this right, there is nothing "*more than mere a violation*" at stake
Lis Pendens	*Lis pendens* does not apply to international courts and tribunals	*Lis pendens* does not apply to international courts and tribunals. Even if it was a principle applicable by the Panel, the criteria of the same subject matter and the same cause of action would not be met
Comity	The Panel should suspend the proceedings, while pending the NAFTA dispute. The DSU timeframe is not an obstacle	Suspension of the proceedings by WTO panels is prevented by the strict time frame stipulated under the DSU