Legal Avenues to "Multilateralizing Regionalism": Beyond article XXIV[1]

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LEGAL AVENUES TO "MULTILATERALIZE REGIONALISM": BEYOND ARTICLE XXIV

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I. INTRODUCTION

Most legal analyses of the WTO and regionalism focus on GATT Article XXIV.[2] GATT Article XXIV (like GATS Article V) explains when the WTO permits the creation of inherently discriminatory customs unions (CU) and free trade agreements (FTAs). A focus on Article XXIV puts the WTO and its rules at the center of the universe. It presumes that the WTO effectively decides on when and how regional agreements are concluded.

This paper takes a different approach. It is grounded in general international law. Its starting point is that Article XXIV is inoperative as a discipline or brake on the creation and continued existence of regional agreements: Politically, WTO members consistently fail to check regional agreements[3]; in dispute settlement, WTO members shy away from challenging regional agreements[4] and where Article XXIV is raised as a

[2] For recent examples see the chapters in LORAND BARTELS AND FEDERICO ORTINO, REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM (Oxford, 2006). For a notable exception in that volume, see Isabelle Van Damme, *What Role is there for Regional International Law in the Interpretation of the WTO Agreements?*, at 553.

[3] The only exception being the Czech Republic-Slovakia customs union, see Roberto Fiorentino, Luis Verdeja and Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements: 2006 Update*, footnote 60, at p. 27.

[4] See Petros Mavroidis, *If I don't do it, somebody else will (or won't): Testing the compliance of preferential trade agreements with the multilateral rules*, 40 JOURNAL OF WORLD TRADE (2006) 187 ("WTO Members have only on very few occasions challenged the consistency of a PTA with the multilateral rules before a panel"). Three possible reasons for why WTO members refrain from challenging regional agreements before a panel are: (i) all WTO members (but for Mongolia) have now concluded regional agreements and no one sees an interest in clarifying or tightening the rules under Article XXIV as this might work against one's own regional programs; (ii) WTO members may not trust panels to make binding decisions on the economically complex question of Article XXIV compliance, (iii) if a regional agreement does not liberalize "substantially all trade" within the region and thereby violates Article XXIV, third parties may not have an incentive to challenge this inconsistency as the most logical result would be more discrimination (i.e. more regional liberalization and preferences) rather than less discrimination.

defense, panels and the Appellate Body do everything to avoid it.[5] The political *and* legal reality is, therefore, that regional agreements are here to stay, whether or not they comply with WTO rules. Rather than lament their inconsistency with WTO principles or be exasperated by the "spaghetti bowl" of overlapping agreements that results, it may be more fruitful to think of how the web of WTO and co-existing regional agreements can be untangled so as to give maximum effect to both.

Consequently, the central question that this paper addresses is this: Given that Article XXIV is inoperative and, as a result, regional agreements continue to exist and proliferate (whether or not they comply with Article XXIV), how do WTO rules and regional agreements interact and what happens in the event of overlap or conflict? How can negotiators regulate this overlap and what should adjudicators do when they face it?

The "maze of regulatory regimes"[6] or "continued splintering of trading arrangements"[7] that results from the proliferation of regional agreements is often referred to as one of the principal drawbacks of regionalism. Any progress toward untangling this maze – the principal objective of this paper -- has multiple benefits: It would reduce the cost of business, facilitate the work of policy-makers and adjudicators and, most importantly, unlock the welfare benefits of trade liberalization in both the WTO and regional agreements.[8]

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[5] See, for example, the Panel and Appellate Body in *Turkey – Textiles* which simply presumed (without further analysis) that the EC-Turkey customs union meets GATT Article XXIV. See also WTO case law under the Safeguards Agreement where panels and the Appellate Body have managed to avoid any ruling under Article XXIV on the question of non-application of a safeguard to imports from within a regional arrangement (discussed in Joost Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2004) 109. Most recently, the panel in *Brazil – Tyres* equally avoided any examination of a carve-out for MERCOSUR imports under GATT Article XXIV.

[6] *Changing Landscape*, *supra* note 3, p. 26.

[7] Conference Program, p. 1.

[8] A more cynical view is that one should not untangle the maze or spaghetti bowl of WTO and regional agreements but rather let it fester in the hope that "the political and economic costs of increasing fragmentation [will] lead to a reversal of regionalism" (Conference Program, p. 1).

To shift the focus from the WTO's (unsuccessful) claim to hierarchy and supremacy over regional agreements (e.g. in Article XXIV), to a situation of mutual recognition, accommodation and respect, this paper advocates in particular:

(1) that the WTO stop focusing on regional agreements as its nemesis which it ought to control (e.g. pursuant to Article XXIV) and instead integrate regional developments into WTO activities by, for example, allowing WTO dispute settlement panels to interpret and apply WTO rules with reference to regional arrangements agreed to by both parties ("multilateralize regionalism" at the WTO); and

(2) instead of relying solely on Article XXIV as an interface, that negotiators of regional agreements themselves carefully regulate interactions with WTO agreements so as to preserve the integrity of both systems ("multilateralize regionalism" in regional agreements).

From this perspective, untangling the maze of WTO and regional agreements so as to enhance mutual recognition and respect at both levels is but a legal avenue for "multilateralizing regionalism" (the WTO considers regional developments; regional fora consider the WTO).

The paper proceeds as follows. First, we set out the different scenarios of overlap between WTO and regional agreements so as to facilitate and sharpen the analysis. Second, the paper describes the basic rules on overlap and conflict of multiple agreements under general international law. Third, the paper applies these basic rules to specific questions of overlap/conflict under recently concluded FTAs (such as the TRIPS-plus debate and competing dispute settlement procedures). The paper focuses in particular on how FTAs recently concluded by the US and the EC regulate overlap, and the lessons that can be drawn from these FTAs for other WTO members when they negotiate or litigate regional agreements. Finally, the paper concludes with a number of

policy guidelines on how to facilitate the interaction between WTO and regional agreements.

II. DIFFERENT SCENARIOS

To start our analysis of how the WTO and regional agreements interact outside the existential limits of Article XXIV, let us first lay out a number of scenarios where such interactions can occur. At least four distinctions with important legal consequences can be made:

1. Overlaps of substantive trade rules *versus* overlaps in dispute settlement procedures

A procedural overlap arises, for example, where a country challenges another country first under a regional agreement (such as MERCOSUR or NAFTA) and, thereafter, the dispute is sent a second time before the WTO (*Brazil – Poultry* and *Mexico – Soft Drinks* offer related examples). One of the case studies in Section IV below focuses on this type of overlap. A substantive overlap, in contrast, arises, for example, where the WTO permits a safeguard or health measure but a regional agreement prohibits such measure within the region (see *US – Steel* and *Brazil – Tyres* for related examples).

Importantly, an overlap of substantive rules can occur in a specific dispute settlement procedure (e.g. before a NAFTA or WTO panel) where special rules on applicable law and conflict may exist[9], or in the abstract, that is outside any dispute settlement mechanism (e.g. where governments or businesses ask which rule prevails under public international law outside a specific dispute).

[9] See Section III, Rule 8 below.

2. Overlaps between WTO and regional agreements *versus* overlaps amongst different regional agreements

In most debates the question is how, for example, WTO rules on tariffication of agricultural quotas relate to NAFTA rules on a tariff stand-still (see the NAFTA dispute on *Canada – Agricultural Products*). In other situations, however, different regional agreements may overlap amongst themselves: for example, how do the US-Chile and the EC-Chile FTAs interact; how does SACU affect US-South Africa FTA negotiations; how does the EC-Turkey customs union interact with FTAs concluded by the EC and third parties such as Mexico or Korea; or how would NAFTA interact with a future FTAA? In Section IV.5 below ("Case studies") we address some of these overlaps.

3. Overlaps where the rules are substantively equivalent *versus* overlaps where one agreement may prevent breach of the other

In some overlap scenarios the two regimes impose substantially equivalent rules such as national treatment under the WTO and NAFTA, or SPS disciplines under the WTO and US FTAs. In such cases one of the core questions is where a dispute under such substantially equivalent rules can or should be brought (the WTO, NAFTA or potentially both?).[10] Complicating this scenario is that, for example, national treatment can be committed under the WTO and NAFTA or FTA provisions on both trade and investment. In *Mexico – Soft Drinks*, for example, the US brought a national treatment claim to the WTO. At the same time, US investors in Mexico brought a similar investment claim before a NAFTA Chapter 11 tribunal.

In other scenarios the overlapping rules are not substantively equivalent but potentially contradictory. Here one can distinguish between two types of cases:

(1) a regional agreement may prevent or excuse what would otherwise be a breach of WTO law. In *Mexico – Soft Drinks*, for example, Mexico tried

[10] Discussed in Section IV.2 below.

(unsuccessfully) to excuse its breach of WTO national treatment with reference to NAFTA. In *Brazil – Tyres*, Brazil referred to a MERCOSUR ruling to excuse a carve-out for MERCOSUR imports which the EC claimed to be inconsistent with GATT.

(2) a WTO rule may prevent or excuse what would otherwise be a breach of a regional agreement. In *Canada – Agricultural Products* (a NAFTA Chapter 20 panel) Canada successfully justified new tariffs that were on their face inconsistent with a NAFTA stand-still clause, with reference to Canada's WTO tariffication obligations under the WTO Agreement on Agriculture. A similar question may arise in the context of the TRIPS and public health debate: could WTO decisions offering flexibility on compulsory licensing be used to overcome claims of IP violations under a regional (TRIPS-plus) agreement?[11]

4. Overlaps where the two agreements are binding on *both* parties *versus* overlaps that involve an agreement that is binding on only *one* of the parties

An overlap situation must always be judged as between two specific countries. In most cases, the overlapping agreements will be binding on both countries. This is the case, for example, when in a dispute between the US and Mexico, WTO rules and NAFTA rules overlap: WTO and NAFTA rules are binding on both the US and Mexico. In other situations, one of the overlapping agreements may be binding on only one of the two countries. In *EC – Bananas*, for example, where there were overlaps between WTO rules and the Lomé Convention, the US was not a party to the Lomé Convention. Similarly, in *Brazil – Tyres*, where there were overlaps between WTO and MERCOSUR rules, the EC was obviously not bound by MERCOSUR.

[11] Discussed in Section IV.1 below.

III. BASIC RULES

With the above scenarios of overlap in mind, we can now turn to some of the basic rules of international law that apply to overlapping or conflicting agreements. This section develops eight such rules.[12]

Rule 1: All treaties are, in principle, of equal value

Unlike domestic law where there is a hierarchy between, for example, the constitution, statutes and communal decrees, in international law there is no inherent hierarchy.[13] All treaties are, in principle, created equal.

Thus, the fact that, for example, the WTO has 151 members and NAFTA only 3, or that the WTO is a multilateral treaty and an FTA is a bilateral treaty, does not mean that the WTO by definition prevails over other trade agreements. Both the WTO and NAFTA are treaties and, as such, they have, in principle, the same legal value. If there is to be a hierarchy between treaties it is, as explained below, to be found in either (1) specific treaty provisions which put one treaty above the other (Rule 4), or (2) general principles such as the later in time rule (Rule 6) or the rule that a more specific treaty prevails over a more general one (Rule 7).

Rule 2: A treaty can only affect those countries that agreed to it

A treaty is binding upon the parties to it.[14] As between parties that are bound by two treaties that are contradictory (say, the WTO and NAFTA as between the US and Canada), that is the rule that creates the legal situation of conflict. At the same time, a treaty "does not create either obligations or rights for a third State without its consent".[15]

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[12] For a full discussion see JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW - HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge University Press, 2003).
[13] The only exception is so-called peremptory norms or rules that have the status of *jus cogens*. According to the Vienna Convention on the Law of Treaties any treaty that violates *jus cogens* is or becomes void.
[14] Article 26 of the Vienna Convention on the Law of Treaties entitled "Pacta sunt servanda".
[15] Article 34 of the Vienna Convention on the Law of Treaties.

In other words, NAFTA cannot create obligations or rights for Australia, nor can MERCOSUR affect the WTO rights of the EC.[16]

Thus, in one of the scenarios described earlier – namely, overlaps that involve an agreement that is binding on only one of the parties – the solution is simple: the agreement that binds both parties prevails.[17] In other words, in *EC – Bananas* where the Lomé Convention was only binding on the EC (not the US) the WTO agreement prevailed. It was only because WTO members (including the US) granted a waiver to give effect to the Lomé Convention notwithstanding GATT Article I, that some of the US claims were rejected. Similarly, in *Brazil – Tyres* where Brazil tried to justify certain GATT violations with reference to MERCOSUR, WTO rules prevailed as the claimant in the dispute (the EC) did not agree to MERCOSUR. Only WTO rules themselves (such as GATT Article XXIV or XX) can then justify Brazil's breach of the WTO treaty, not MERCOSUR. Finally, where questions of overlap between, for example, the US-Chile and EC-Chile FTA arise, for the US only the US-Chile agreement applies; for the EC only the EC-Chile agreement applies. The US cannot see its rights affected by the EC-Chile FTA; nor can the EC see its rights affected by the US-Chile FTA.

Rule 3: Where treaties overlap there is a presumption against conflict

Treaties are an expression of state consent. Where a state expresses its consent through different treaties, the starting point is that these different treaties confirm or supplement each other. A contradiction or conflict should only be found in case it is impossible to interpret the two treaties in a harmonious fashion. This presumption against conflict -- or principle of "systemic integration" -- is confirmed, for example, in Article 31.3(c) of the Vienna Convention on the Law of Treaties. Article 31.3(c) instructs that a treaty must be interpreted in a way that takes account of "any relevant

[16] Article 41.1(b)(i) 1 of the Vienna Convention on the Law of Treaties prohibits any bilateral or regional contracting-out from a multilateral agreement if it "affect[s] the enjoyment by the other parties of their rights under the treaty or the performance of their obligations".

[17] See Article 30 of the Vienna Convention on the Law of Treaties entitled "Application of successive treaties relating to the same subject matter": "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".

rules of international law applicable in the relations between the parties". Article 31.3(c) can be seen as the "gene-therapy" against excessive fragmentation of international law (e.g. between the WTO and regional agreements) and promotes a coherent view of international arrangements.[18]

Rule 4: One treaty can provide that it is subject to or prevails over another treaty

Although there is no inherent hierarchy between treaties (Rule 1), one treaty can prohibit the conclusion of another, e.g. a multilateral agreement can prohibit the conclusion of subsequent regional agreements (discussed in Rule 5 below). In addition, one treaty can provide that in the event of conflict (i.e. in case "systemic integration" is impossible pursuant to Rule 3) the treaty is subject to, or prevails over, another. NAFTA Article 103.2, for example, provides that unless otherwise provided NAFTA prevails over the GATT.[19] Conversely, Article 1.2.2 of the US-Korea FTA provides that the FTA remains subject to "any international legal obligation between the Parties that provides for more favorable treatment … than that provided for under this Agreement".

Rule 5: A treaty is valid and legal unless it is declared otherwise

A multilateral treaty can provide that bilateral or regional contracting-out by some of the parties is, in certain conditions, prohibited.[20] That is what, for example, GATT

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[18] See most prominently in the UN International Law Commission (ILC) Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (29 July 2005), UN Doc. A/CN.4/L.676.

[19] NAFTA Article 103.2: "In the event of any inconsistency between the provisions of this Agreement [NAFTA] and such other agreements [e.g. GATT], the provisions of this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement".

[20] See Article 41.1 of the Vienna Convention on the Law of Treaties: "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

Article XXIV does. However, even where "illegal" contracting-out occurs, it will be presumed "legal" (i.e. consistent with the multilateral treaty) unless it is decided otherwise.

In other words, GATT Article XXIV -- in combination with the WTO's MFN principle -- prohibits the conclusion of discriminatory CUs or FTAs that do not meet the conditions in GATT Article XXIV. Yet, even if such "illegal" CUs or FTAs are concluded, international law presumes that they are "legal" (i.e. consistent with Article XXIV) unless WTO members or a WTO panel or Appellate Body declare otherwise. Given the above explained absence of either political or judicial rulings on the consistency of regional agreements with Article XXIV[21], all regional agreements are, therefore, presumed to be WTO consistent and continue to operate, even those that are not consistent with Article XXIV.

This legal reality is crucial as it means that even if the critics are right and many regional agreements violate Article XXIV, these agreements remain legal and continue to affect trade flows. Dispute settlement panels, as well, are likely to accept or at least presume the legality of such regional agreements whenever they are raised in a trade dispute (unless the dispute is one on the very question of legality of the agreement under GATT Article XXIV). This principle obviously means that the possibility for overlaps increases as even regional agreements that are inconsistent with Article XXIV can continue to affect the outcome of trade flows and trade disputes.

Rule 6: Unless otherwise provided, a later treaty prevails over an earlier one

Subject to the rule that an earlier multilateral treaty may prohibit the conclusion of a later regional agreement (see Rule 5), in the event overlapping agreements are silent on what to do in the event of conflict (see Rule 4), the fall-back rule is that the most recent

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(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

[21] See *supra* notes 3 and 4.

treaty prevails.[22] The reason for this "later in time" rule is that all treaties are based on state consent. It is this state consent that gives treaties their binding value. As a result, a later expression of state consent must be presumed to prevail over an earlier expression of state consent. Thus, in the event of conflict between a treaty concluded by two states in 1947 and a treaty concluded by the same states in 1990, the 1990 treaty prevails (unless, of course, the 1990 treaty explicitly states that it remains subject to the 1947 treaty).

Rule 7: A specific treaty provision normally prevails over a more general treaty provision

According to the so-called *lex specialis* principle, a more specific treaty rule prevails over a more general one. This rule is, once again, based on the principle of state consent: a more specific expression of state consent must be presumed to prevail over a more general expression of state consent.

The *lex specialis* principle can operate to resolve overlaps between provisions within the same treaty (say, two GATT provisions) or between different treaties that were concluded at the same time (say, between two WTO agreements, all of which were concluded on the same date, in April 1994). In both situations we are not dealing with successive treaties (but rather with simultaneous treaties) and, as a result, the "later in time rule" (Rule 6) does not apply.

Yet, what to do in the event of successive treaties where the earlier treaty provision is more specific than the later one? In other words, what to do if Rule 6 (later in time rule prevails) conflicts with Rule 7 (more specific rule prevails)? International law does not offer a clear response to this question. One way to deal with it is to find that there is no genuine conflict between two rules in case the (later) general rule does not

[22] Article 30 of the Vienna Convention on the Law of Treaties provides that "as between States Parties to both treaties", "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

specifically address the (earlier) specific rule.[23] In *Brazil – Cotton*, for example, the Appellate Body found that the specific prohibition in the Subsidies Agreement for subsidies contingent on domestic inputs does not conflict with the general permission in the Agreement on Agriculture to provide domestic support up to each country's agreed aggregate level of support. According to the Appellate Body, the Agreement on Agriculture does not specifically address the question of subsidies contingent on domestic inputs. Therefore, there is no conflict and the more specific rule (here, the prohibition in the Subsidies Agreement) prevails.

Another way to give preference to a more specific rule, even if it is earlier in time, is to revert to the principle of state consent and ask the question: which of the two rules does most accurately express current state consent of the two parties? If the earlier treaty is a bilateral treaty that specifically deals with the subject matter at hand (such as the 1992 EC-US agreement on aircraft subsidies), one could argue that it remains the most accurate expression of state consent, even if there is a later multilateral treaty that includes more general rules that seem to contradict the earlier bilateral agreement (such as the 1994 WTO agreement on subsidies generally, not specific to the aircraft industry). The argument could then go as follows: As the later multilateral agreement was negotiated as between over 100 parties, addressing the much broader subject matter of subsidies in all possible sectors, that was not the place to either confirm or overrule the earlier bilaterally agreed, specific rule on aircraft subsidies. This very issue is currently debated before the ongoing panel on *EC – Aircraft Subsidies*.

In sum, any conflict between Rule 6 (later in time rule) and Rule 7 (*lex specialis*) will need to be decided on a case-by-case basis. The fact that regional agreements regulate the more specific trade relations between two countries is, however, an argument in support of giving preference to regional agreements over WTO rules, irrespective of the timing of the two treaties (unless, of course, either treaty explicitly provides that the WTO treaty prevails). Indeed, applied to the trade relations between, for example,

[23] Article 30 of the Vienna Convention on the Law of Treaties which sets out the later in time rule is specifically limited to successive treaties on "the same subject matter".

France and Belgium, would it not be odd to find that from 1947 to 1994, the later EC Treaties (concluded in the 1950s) prevailed over the earlier (1947) GATT agreement, whereas from 1994 onwards, the WTO agreements prevailed, and when the later Treaty of Amsterdam (1997) was concluded, EC treaties once again prevailed. In this context, one could find that EC treaties, as the more specific rules in the relation between France and Belgium, prevail over the more general GATT/WTO rules, irrespective of timing.

Rule 8: Dispute panels can only find violations under their respective treaties, but that does not mean that other treaties are irrelevant

WTO panels can only find violations under WTO covered agreements.[24] That is their restricted mandate or jurisdiction. Yet, the fact that they are only asked to decide on claims of WTO violation does not mean that in their examination of these WTO claims they must restrict themselves to the four corners of the WTO treaty. In international law, this is known as the distinction between "jurisdiction" (which claims can be brought?) and "applicable law" or "relevant law" (what law can be referred to in the examination of WTO claims?).

When interpreting and applying WTO treaties so as to come to a conclusion on whether or not there is WTO breach, panels should, in certain circumstances, refer to non-WTO treaties including regional agreements (see Rule 3 above and the principle of "systemic integration" confirmed in Article 31.3(c) of the Vienna Convention). This is one of the major proposals of this paper, a proposal that would "multilateralize regionalism" by elevating regional agreements to the attention of WTO panels.[25] Such elevation or multilateralization is a core element in achieving mutual recognition and respect between the WTO and regional agreements. As one prominent observer (and adjudicator) of WTO-NAFTA relations stated:

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[24] See Article 1 of the DSU.

[25] For further elaboration see Joost Pauwelyn, *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, JOURNAL OF WORLD TRADE (2003) 997.

> "there is a serious anomaly resulting from the fact that WTO law is central to the interpretation of an FTA, while the WTO dispute settlement procedure is blind to the fact of an increasing body of FTA law and practice around the world".[26]

At the same time, there are some positive developments in WTO case law. In *Mexico – Soft Drinks*, for example, the Appellate Body refused to make findings on claims of violation of NAFTA (as those claims were rightly decided to be outside the panel's jurisdiction), but it left the door open for NAFTA to be referred to so as to interpret WTO provisions, or as a defence against WTO breach, as between NAFTA parties. In *Brazil – Tyres* the panel referred to a MERCOSUR ruling in support of its finding that Brazil's carve-out for MERCOSUR imports is not "arbitrary" in the sense of the chapeau of GATT Article XX.

Yet, those WTO developments remain a far cry from, for example, NAFTA dispute settlement where, as one author put it, "NAFTA arbitrators … have made a strong case for accommodation or, at least, [for] the awareness of accommodation, because of their concern with normative coherence and system integrity".[27] In *Canada – Agricultural Products*, for example, a NAFTA Chapter 20 panel extensively referred to WTO agreements in its interpretation and application of NAFTA provisions as between Canada and the US. The panel essentially internalized the underlying WTO logic of preference of tariffs over non-tariff barriers into the NAFTA legal system, and rejected a US claim that new tariffs imposed by Canada as a result of its WTO obligations under the Agreement on Agriculture violated Canada's early obligations under the NAFTA tariff stand-still clause.

What this paper proposes – reference to regional agreements by WTO panels and vice versa – is not generally accepted. Based on present WTO rules some authors are in

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[26] Armand de Mestral, *NAFTA Dispute Settlement: Creative Experiment or Confusion?* in Regional Trade Agreements, *supra* note 2, 359 at 366.

[27] N'Gunu N. Tiny, *Judicial Accomodation: NAFTA, the EU and the WTO*, Jean Monnet Working Paper 04/05 (2005) at 1 (referring, in contrast, to Appellate Body decision in *Turkey – Textiles* as "a strong claim made by the Appellate Body in favour of normative supremacy of the world trading system over regional trade systems").

favour[28], others against.[29] If not only the "jurisdiction" but also the "relevant law" were limited to the specific treaty of the adjudicating forum (say, in the WTO, only WTO law; in NAFTA, only NAFTA law) questions of overlap are easily resolved: The law of the forum prevails as it is the only relevant one. Yet, such solution is far from satisfactory and would obviously increase the fragmentation between different trade arrangements: in the WTO, a dispute could be decided one way under WTO law only; at the NAFTA, the same dispute could be decided another way under NAFTA law only. Thus, in the end, there would still be overlap or even conflict. A better solution, that integrates different trading arrangements, is for both WTO and regional dispute panels to recognize each others rules and rulings. As Isabelle Van Damme points out:

> "The recognition by panels and the Appellate Body of the relevance of these regional agreements for the interpretation of WTO law is only one means to counter the problems arising from the proliferation of RTAs for the 'security and predictability of the multilateral trading system'".[30]

Such mutual recognition and respect must, however, be subject to certain limits, in particular:

(i) only WTO panels can find violations of WTO law, as much as only FTA panels can find violations of FTA law (the question of "jurisdiction", to be distinguished from "relevant law"), and

(ii) no WTO member can be held against an FTA -- or an interpretation or application of WTO rules with reference to an FTA -- to which it did not agree (Rule 2 above).

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[28] See, for example, Isabelle Van Damme, *supra* note 2 and, in terms of FTAs referring to WTO law, Ignacio Garcia Bercero, *Dispute Settlement in European Union FTAs: Lessons Learned?* in Regional Trade Agreements, *supra* note 2, 383, at 402 ("bilateral panels should always be able to use WTO law as a tool to interpret FTA provisions").

[29] Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the WTO and RTAs* in Regional Trade Agreements, *supra* note 2, 465 at 484.

[30] *Supra* note 2, at 567.

The WTO treaty does not include an explicit provision on applicable or relevant law (although it refers to the rules of interpretation of the Vienna Convention which, in turn, refer to non-WTO treaties, see Rule 3). The same is true under NAFTA's trade chapters.[31] One way to improve the integration between WTO and regional agreements would be to explicitly expand the "applicable law" before both WTO and FTA panels to all relevant international law consented to by the disputing parties (with the *caveat*, of course, that panels cannot decide on claims of violation under outside agreements, i.e., that "jurisdiction" remains limited to the forum's treaty only).

A good example in this direction is NAFTA Chapter 11 on investment protection. Articles 1116 and 1117 restrict the jurisdiction of NAFTA investment arbitration panels to certain claims of violation of NAFTA Chapter 11 only. Yet, NAFTA Article 1130 entitled "governing law" provides that:

> "A Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this Agreement [NAFTA] and applicable rules of international law".

In other words, the "jurisdiction" of NAFTA Chapter 11 tribunals is limited to certain claims under NAFTA Chapter 11 only; the "governing law" to resolve those claims includes the whole of NAFTA and all other applicable rules of international law. A similar provision was included in the EFTA-Bulgaria FTA of 1993:

> "The arbitral tribunal shall settle the dispute in accordance with the provisions of this Agreement and applicable rules and principles of international law".

[31] Yet, as de Mestral points out (*supra* note 26 at 376), "Virtually every chapter of NAFTA asserts the compatibility of the agreement with the law of the WTO. In the same vein, NAFTA is replete with interpretative provisions requiring interpretations of words and concepts in a manner compatible with the law of the GATT 1947 and successor agreements, unless the contrary is required".

IV. CASE STUDIES

Let us now apply the eight Rules set out in Section III to a number of specific overlaps between WTO and regional agreements. Obviously, many more overlaps exist, as the different scenarios set out in Section II illustrate.

1. The TRIPS Agreement *versus* TRIPS-plus FTAs

The TRIPS-plus debate is a perfect example of how the interaction between the WTO and regional agreements goes beyond Article XXIV. Unlike GATT and GATS, the TRIPS agreement does not include an exception for regional arrangements. As a result, when WTO members commit to higher intellectual property (IP) standards in regional agreements (so-called TRIPS-plus agreements), the MFN principle in the TRIPS Agreement (Article 4) continues to apply. Thus, any IP benefit conferred regionally as between, for example, the US and Chile, must be extended automatically to all WTO members.[32] In other words, regionalism in IP is automatically "multilateralized" and the core problem of how to "multilateralize regionalism" is resolved.

Another consequence of the absence of an Article XXIV-type provision in TRIPS is that the regionalism debate in the field of IP has nothing to do with regional deals *discriminating against third parties* (the main objection against regional liberalization in goods and services). Critics of IP regionalism do not fear that regional partners will increase IP protection only as between themselves; rather, they fear that TRIPS-plus agreements impose IP standards *as between the regional partners* that are too high and/or undo flexibilities guaranteed under TRIPS. Put differently, whereas in goods and services, regionalism focuses on third parties and discrimination, in IP, regionalism focuses on the regional parties themselves and whether they (in particular, developing countries) went too far with IP protection.[33]

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[32] See Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends* in Regional Trade Agreements, *supra* note 2, 215, at 223.
[33] See R. Mayne, *Regionalism, Bilateralism, and "TRIPS Plus" Agreements: The Threat to Developing Countries* (2005) UNDP Human Development Report Office Occasional Paper.

This is obviously not the place to discuss optimal protection of IP rights in developing countries. However, the peculiarity of the regionalism debate as it concerns IP has important legal consequences under the Rules developed in Section II:

(i) if, for example, Panama or Korea agree in an FTA with the US to increase IP protection, such agreement is, in principle, of equal value as the TRIPS agreement (Rule 1);

(ii) given the consent rule in international law, once Panama or Korea freely agree to such an FTA, the higher IP protection agreed therein is binding upon them, albeit, of course, not binding on other WTO members that did not agree to the FTA (Rule 2). Given the MFN rule that continues to operate under TRIPS, no one is being discriminated. The only question is: should Panama or Korea have agreed to higher IP protection in the FTA? (e.g. are developing countries pushed into higher IP standards because of unequal bargaining power in FTA negotiations; or, rather, are they making a deliberate choice accepting, for example, stronger copyright protections, which they see as almost costless, in exchange for valuable market access to, say, the lucrative US or EC markets)?

(iii) Pursuant to Rule 3 -- the presumption against conflict and principle of "systemic integration" -- any TRIPS-plus FTA must be read together and, to the extent possible, harmoniously, with TRIPS including TRIPS flexibilities for public health. When an FTA panel would be asked, for example, to examine whether a compulsory license issued by an FTA partner violates the FTA, the panel must interpret and apply FTA rules on IP in a way that takes account of the TRIPS flexibilities confirmed in the Doha Declaration on TRIPS and public health and subsequent instruments (see Rule 8). Given this principle of "systemic

integration", fears that US FTAs take away TRIPS flexibility are often exaggerated.[34]

(iv) In case there is nonetheless a genuine conflict between the FTA and TRIPS (e.g. the FTA explicitly excludes compulsory licensing where TRIPS permits it), in the absence of specific treaty provisions, the FTA is likely to prevail either as the later in time (Rule 6) or as the more specific provision (Rule 7). Even so, only an FTA panel would then have "jurisdiction" to find the compulsory license in violation of the FTA; a WTO panel does not have jurisdiction to enforce the stricter FTA rule (Rule 8). To protect TRIPS, however, many FTAs explicitly provide that the FTA leaves intact, or is subject to, TRIPS flexibilities offered for the protection of public health and access to essential medicines (pursuant to Rule 4).[35] Such explicit provision putting TRIPS above the FTA must be respected both before a WTO and an FTA panel (see Rule 8).

2. WTO dispute settlement *versus* dispute settlement under FTAs

When it comes to the overlap of dispute settlement procedures in the WTO and FTAs, two core questions arise[36]:

- First, if a measure can be challenged under either procedure -- albeit, of course, under WTO rules before the WTO, and under FTA rules before the FTA -- where should it be brought? This is the so-called "choice of forum" question.
- Second, can a measure be challenged first under an FTA and then a second time to the WTO, or vice versa? This raises the question of whether there should be a so-called "forum exclusion" clause.

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[34] Mercurio, *supra* note 32, at 226 and 229 is, for example, of the view that rules on market approval and data exclusivity in US FTAs would effectively prevent the use of compulsory licenses. All of these FTA rules must, however, be interpreted with reference to TRIPS flexibilities.

[35] See, for example, Article 18.11 of the US-Korea FTA entitled "Understanding regarding certain public health measures".

[36] See Kwak and Marceau, *supra* note 29 and 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 MINNESOTA JOURNAL OF GLOBAL TRADE (2004) 231.

It is important that both questions be explicitly addressed in FTAs (as permitted under Rule 4). Even more importantly, if, for example, Mexico and the US agree in NAFTA that a dispute must be sent to NAFTA (and not the WTO), a WTO panel must give effect to this Mexico-US agreement (see Rule 8). Similarly, if Mexico and the US agreed that once a dispute is brought to NAFTA, it cannot be brought a second time to the WTO, a WTO panel should be given the authority to refer to this NAFTA provision and decline jurisdiction. For WTO panels to keep a blind eye on FTA forum provisions (and vice versa) would seriously endanger the project of coordination and coherence between the WTO and regional agreements and thereby obstruct the goal of "multilateralizing regionalism".

As regards "forum exclusion clauses", there is no doubt that they are generally desirable.[37] Especially for developing countries with scarce legal resources, it would be very hard to first defend a measure in one forum, only to find out later that the case is brought a second time to another forum. As Peter Drahos has pointed out:

> "The most obvious consequence of a trade regime that has many trade courts is that it will favour States that have the capacity to analyze its complex pathways and pick those that best suit their purposes".[38]

Forum exclusion clauses also limit the scope of conflicting rulings and thereby facilitate mutual integration of WTO and regional agreements. Most FTAs have therefore included a provision stating that once dispute settlement procedures have been initiated in one forum, it shall be to the exclusion of the other. Article 2005.6 of NAFTA provides for example:

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[37] In the absence of an explicit "forum exclusion clause", the fall-back principle of *res judicata* (according to which the same dispute cannot be tried twice) is, indeed, unlikely to apply. *Res judicata* only stops a second proceeding if the first proceeding was (1) regarding the same matter, (2) between the same parties, and (3) regarding the same legal claims. Since, in our situation, a first proceeding under an FTA would deal with different claims as compared to those brought in a second, WTO proceeding (FTA claims *versus* WTO claims), the principle of *res judicata* is unlikely to apply.

[38] Peter Drahos, *Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution*, 41 JOURNAL OF WORLD TRADE (2007) 191, at 199.

> "[o]nce dispute settlement procedures have been initiated under [NAFTA] Article 2007 … the forum selected shall be used to the exclusion of the other [e.g. the WTO]".[39]

Turning now to the logically preceding question of "choice of forum" (i.e. where to file proceedings the first time around?), FTAs can regulate three ways:

(i) *leave the choice of forum up to the complainant*

This is what most US FTAs provide for as well as, for example, Article 1(2) of the Olivos Protocol in respect of WTO-MERCOSUR dispute settlement proceedings.[40] The advantage of this option is that it allows the complainant to choose what it regards as the most appropriate and probably most beneficial forum for its case. Some have argued against this solution as, in their view, it is likely to attract almost all cases to the WTO[41] (which is, of course, a good thing if one is trying to "multilateralize regionalism").

Others have criticized the solution of leaving the choice of forum up to the complainant because it allows the more powerful FTA partner (e.g. the US) to bring cases under the FTA where it (the US) has more political cloud, instead of at the WTO where "the third party procedures of the DSU create the possibility of coalition building by a weak actor involved in a dispute with a strong actor".[42] For that reason, especially developing countries in their FTAs with, for example, the EC or the US may want to

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[39] This has obviously not prevented overlapping dispute settlement procedures between the WTO and NAFTA. Article 2005.6 only applies in respect of NAFTA Chapter 20 trade disputes. NAFTA Chapter 19 antidumping or counterveiling duties disputes have, in practice, overlapped with WTO procedures (see, for example, the *US – Softwood Lumber* disputes). The same is true for NAFTA Chapter 11 investment disputes. For a discussion, see Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW (2006) 1.

[40] NAFTA Article 2005.1, for example, states that "disputes regarding any matter arising under both [NAFTA] and [GATT/WTO], may be settled in either forum at the discretion of the complaining party". See also, most recently, Article 22.6 of the Korea-US FTA.

[41] Ignacio Garcia Bercero, *Dispute Settlement in European Union FTAs: Lessons Learned?* in Regional Trade Agreements, *supra* note 2, 383, at 403.

[42] Drahos, *supra* note 38 at 201.

exclude FTA procedures, for certain matters, in favour of the WTO (as discussed in (ii) below).

(ii) *oblige the complainant to submit the dispute to the WTO*

Such preference for WTO dispute settlement is, of course, in line with the objective of "multilateralizing regionalism" (or, at least, avoids that FTA dispute settlement attracts disputes that would otherwise be sent to the WTO). It can be obtained in several ways.

First, some FTAs include, for example, a chapter on SPS disciplines or antidumping which largely confirms WTO rules and at the end of that chapter state that disputes under this specific chapter cannot be brought under the dispute settlement procedures of the FTA. Articles 8.4 and 10.7.2 of the Korea-US FTA offer examples. As a result, SPS, antidumping and counterveiling duties disputes between Korea and the US must be brought to the WTO, and cannot be brought under the FTA.

A second way to give preference to WTO dispute settlement can be found in the EC-Chile FTA. Article 189.4(c) provides that "[u]nless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to … the WTO Agreement …". In other words, if Chile, for example, wants to challenge an EC measure for violation of national treatment, Chile must bring its case to the WTO, not the FTA (as the national treatment obligation in the FTA is equivalent in substance to that in the WTO). Given the uncertainty as to when an obligation is "equivalent in substance", Ignacio Bercero (an EC commission official) has stated that "the consequence is likely to be a much greater reluctance by the parties to have recourse to bilateral dispute settlement".[43]

[43] Bercero, *supra* note 41, at 403.

In certain instances it may, indeed, be useful to exclude FTA dispute settlement, for example, for matters where the FTA does not really add to the WTO or, more generally, for weaker FTA partners who may favour the multilateral setting of the WTO over settlement in an FTA with asymmetric power relations.[44] In the IP context, Drahos submits that "[o]ne priority that developing countries should be thinking about is to argue for provisions in … [FTA] dispute settlement chapters that require the parties in the case of double breach to take the matter to the WTO".[45] As noted earlier, that is exactly what was done in the EC-Chile FTA.

At the same time, in most cases where WTO and FTA rules are broadly equivalent, the advantages of WTO dispute settlement (even for the more powerful countries) are likely to anyhow push the dispute to the WTO. As advantages of WTO dispute settlement, William Davey points to (i) the expertise of the WTO secretariat support staff, (ii) more effective enforcement through greater informal (multilateral) pressures to comply in the WTO as compared to bilateral FTAs and, most importantly, (iii) the fact that WTO decisions are viewed as more legitimate (panellists are normally not nationals of the disputing parties; there is the possibility to appeal; the WTO system is generally less power-based than bilateral FTAs, especially those with asymmetric power relations).[46]

Davey goes as far as stating that the WTO dispute settlement mechanism alone will ensure the survival of the multilateral trading system:

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[44] See Drahos, *supra* note 38 at 193.
[45] Ibid., at 209.
[46] William Davey, *Dispute Settlement in the WTO and RTAs: A Comment* in Regional Trade Agreements, *supra* note 2, 343, at 354-6. In support, de Mestral, *supra* note 26, at 379 (referring to "the multilateral remedy" at the WTO, which "provide[s] strength to a weaker party against more powerful partners that a regional agreement cannot provide") as well as Bercero, *supra* note 41, at 405 (after confirming the advantages related to WTO dispute settlement, concluding that "it is likely that if a certain trade dispute can be addressed under either bilateral or WTO dispute settlement, there will still be a clear preference to have recourse to WTO procedures. So, in all likelihood while bilateral dispute settlement will become a more important part of EU toolbox, it will not eclipse the priority given to WTO dispute settlement").

> "the apparent superiority of the WTO dispute settlement system is a significant reason why regional trade agreements do not ultimately threaten to supplant or even burden the operation of the WTO system".[47]

In other words, one of the main engines for "multilateralizing regionalism" may well be the WTO dispute settlement system. This is confirmed in Davey's statistics which demonstrate that WTO dispute settlement is used much more frequently than FTA dispute settlement, where in many cases only a few disputes (as under NAFTA Chapter 20) or not even a single dispute (as in most EC FTAs) have been filed.

(iii) oblige the complainant to submit the dispute under the FTA

A third option for "choice of forum" clauses in respect of WTO and FTA procedures is to give preference to FTA procedures. FTA procedures will automatically be relied on to enforce FTA obligations that are WTO-plus, as such WTO-plus obligations cannot possibly be enforced before a WTO panel. Yet, as Bercero has pointed out in respect of WTO-plus disputes before FTAs, even there "in order to enhance the predictability and coherence of international trade law, it would be highly desirable if bilateral [FTA] panels were to consider relevant WTO rulings".

As Mexico experienced in its sugar dispute with the US, for such WTO-plus obligations to stick it is crucially important to have a workable FTA dispute settlement mechanism; if not, WTO-plus elements cannot be enforced.[48]

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[47] Davey, *supra* note 46, at 344. Similarly, de Mestral, *supra* note 26, at 381 ("can an FTA prevail over the multilateral rules and thus undermine the global system? Here the experience of NAFTA may suggest that the multilateral trade system is more resilient than many have thought. Experience of the various NAFTA dispute settlement procedures seems to point squarely to the paramountcy of the multilateral order …").

[48] In the US-Mexico sugar dispute, Mexico attempted to enforce certain WTO-plus quota rights it had negotiated under NAFTA, but failed, essentially because the US refused to agree on a roster of NAFTA Chapter 20 panelists. If NAFTA had included a procedure where panelists would be automatically appointed in the absence of a roster, the subsequent *Mexico – Soft Drinks* dispute before the WTO could have been avoided. In that case, the US successfully challenged, at the WTO this time, a Mexican tax on sweeteners which Mexico had enacted when it realized that its request for a NAFTA panel was not going anywhere. See Pauwelyn, *Adding Sweeteners*, *supra* note 39.

Where a dispute could genuinely be brought before either the WTO or the FTA (because both treaties cover the matter), the FTA can specify that the dispute must be brought under the FTA (not the WTO). NAFTA Article 2005.4 provides, for example, that where a dispute relates to SPS or standards, the respondent has a right to insist that the dispute be brought under NAFTA (as it was apparently considered that NAFTA rules may be more lenient for the defendant than WTO rules). Article 292 of the EC Treaty reserves more generally any "dispute concerning the interpretation or application of this Treaty" to the exclusive jurisdiction of EC courts. Article 42.1 of the Cartagena Agreement Creating the Court of Justice of the Andean Community sets out a similar exclusive jurisdiction clause.

If, notwithstanding such exclusive jurisdiction clause, the complainant would anyhow submit the dispute to the WTO, a WTO panel should, in this author's view, give effect to the "choice of forum" clause (be it in NAFTA, the EC Treaty or the Cartagena Agreement) and decline jurisdiction in favour of the regional agreement (Rule 8 above).

To reserve exclusive jurisdiction under the regional agreement is most appropriate for closely integrated regional arrangements such as customs unions and common markets. That is also where one finds such exclusive jurisdiction clauses.[49] In those settings the argument can be made that trade disputes are best and most appropriately settled within the integrated, regional community. In most FTA settings, however, the presumption should be against exclusive jurisdiction under the FTA. As pointed out earlier, in particular for FTAs with asymmetric power relations it may be more appropriate to direct cases where WTO and FTA rules are substantially equivalent to the WTO. Moreover, where the FTA includes WTO-plus elements, disputes under those elements can anyhow only be brought to the FTA. As a result, there is no need to make the FTA jurisdiction exclusive.

[49] For an overview, see Pauwelyn, *Going Global, Regional or Both?*, *supra* note 36 at 285.

3. WTO safeguards *versus* regional safeguards

Another area of overlap that FTA negotiators must keep in mind is safeguards. Whereas WTO antidumping and counterveiling duty rules are normally left untouched in regional agreements, many regional agreements do provide for "safeguards", that is, the re-introduction of trade barriers as against regional partners in special emergency situations. Such regional safeguards (often with special mechanisms for agriculture and/or textiles[50]) can obviously overlap with multilateral, WTO safeguards.

To limit such overlaps, the US-Korea FTA provides, for example, that no FTA safeguard (be it a general one under Chapter 10 or a special one for agriculture or textiles) can be combined, for the same good, with a WTO safeguard.[51] FTA safeguards cannot either lead to customs duties on regional imports that exceed the most-favoured-nation (MFN) applied rate on the good in question (thereby protecting FTA partners against higher duties than those that other WTO members face under MFN).[52] Many US FTAs also provide that FTA partners "may" exclude each other from a global, WTO safeguard in case

> "imports [from the FTA partner] are not a substantial cause of serious injury or threat thereof".[53]

[50] The EC-Chile FTA only provides for a special safeguard for agriculture (Article 73). It does not have a bilateral safeguard mechanism in place for other products. Instead, the FTA confirms the continued application, as between the EC and Chile, of WTO safeguard rules, with some additional guarantees in case the affected FTA party has "a substantial interest as exporter of the product concerned" (Article 92).

[51] See Article 3.3.4 (Agricultural Safeguard Measures) and Article 10.5.2 (Trade Remedies). The EC-Chile FTA, in contrast, does not exclude the combination of an FTA safeguard with a WTO safeguard. For FTA agricultural safeguards the EC-Chile FTA may even permit safeguards more easily as compared to the special safeguard mechanism under Article 5 of the Agreement on Agriculture. Article 73 of the EC-Chile FTA provides that its emergency clause for agricultural products is "[n]othwithstanding … Article 5 of the WTO Agreement on Agriculture".

[52] See Article 10.1(b)(i) of the Korea-US FTA.

[53] Article 10.5.1 of the Korea-US FTA. The EC-Chile FTA does not refer to any bilateral exclusion from WTO safeguards. Instead, it confirms WTO safeguard rules and offers additional guarantees in the context of WTO safeguards to the FTA partner whenever it has "a substantial interest as an exporter of the product concerned" (Article 92).

Where FTA partners do exclude one another from a WTO safeguard (say, the US excludes Korea from a global safeguard on semiconductors), obviously, no intra-FTA dispute will arise. What may happen, however, is that another WTO member (say, the EC, which is not a party to the FTA) complains about the FTA exclusion as a violation of the WTO Safeguards Agreement which provides that WTO safeguards must, in principle, apply to all countries. Pursuant to Rule 2 above, the EC can, in our example, not be held by the US-Korea FTA rule that permits the US' exclusion of Korean imports (the EC never agreed to this rule). Yet, before a WTO panel, the US may be able to justify Korea's exclusion from the safeguard based on GATT Article XXIV.[54]

4. Subsequent changes to the WTO and how they affect pre-existing regional agreements

Where a regional agreement refers to or incorporates WTO rules is this reference or incorporation static or dynamic? In other words, is it limited to WTO rules as they existed at the time of conclusion of the regional agreement, or does it include subsequent changes to the WTO? This is another question of interaction or overlap that FTA negotiators are strongly advised to regulate explicitly.

An example of dynamic incorporation can be found in NAFTA, as interpreted by the panel in *Canada – Agricultural Products*. In that case, the panel interpreted NAFTA rules on a tariff stand-still with reference to post-NAFTA rules agreed to in the new WTO agreement on agriculture that permitted Canada to transpose agricultural quotas into new tariffs. An example of static incorporation is the Korea-US FTA.[55]

The *disadvantage* of dynamic incorporation is that FTA parties lose control over which WTO changes they want to incorporate into the FTA. The *advantage* of dynamic

[54] For a full discussion in support of such carve-outs pursuant to GATT Article XXIV, see Joost Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2004) 109.

[55] Article 24.3: "If any provision of the WTO Agreement that the Parties have incorporated into this Agreement is amended, the Parties shall consult to consider amending the relevant provision of this Agreement, as appropriate …".

incorporation is that there is no need to update regional agreements every time the WTO treaty changes. In addition, if references to WTO rules in FTAs are different from current, updated WTO rules, the process of coordination and mutual recognition between WTO and regional agreements can be seriously undermined. As FTA partners anyhow retain a veto power in the WTO to block WTO amendments, there should be a presumption in favour of dynamic incorporation (only, of course, if both FTA parties have agreed and ratified the WTO amendment). At the very least, when WTO jurisprudence evolves subsequent to the conclusion of an FTA, such new jurisprudence should be allowed to influence and permeate the interpretation of WTO rules as referred to or incorporated in the earlier FTA.

In closely integrated customs unions like the EU, where certain incorporated rules can be directly relied on by private parties before domestic courts, dynamic incorporation may pose greater problems. There, incorporation of new WTO rules (and even new WTO jurisprudence under existing rules) into the regional (EU) system could also give rights to private parties. This, of course, does change the depth of a WTO member's commitment to new WTO rules. Sara Dillon has pointed out, for example, that the core reason for the EC courts' scepticism toward WTO law and their refusal to give "direct effect" to WTO obligations, is the "unpredictable outcomes" of the GATT/WTO legal system and the "unexpected ways" in which the WTO can challenge EC law and measures.[56] These considerations should, however, not affect the presumption in favour of dynamic incorporation of WTO rules into FTAs where, in the majority of cases, FTA rules remain purely state-to-state and cannot be relied on directly by private parties.

5. How do new regional agreements interact with pre-existing regional agreements?

As discussed under Rule 2 above, overlapping agreements must always be evaluated as between two countries. If one of the countries is not bound by one of the overlapping agreements, it cannot be held by that agreement. Take the EC and Chile as

[56] SARAH DILLON, INTERNATIONAL TRADE AND ECONOMIC LAW AND THE EUROPEAN UNION (2002) at 384.

an example. They have concluded an FTA. Yet, before that, the EC concluded a customs union with Turkey. When it comes to the overlap of the FTA (with Chile) and the CU (with Turkey), only the EC is bound by both agreements, as against different parties. Thus, any inconsistencies between the FTA and the CU are the EC's problem alone. Turkey cannot be held by the FTA; Chile cannot be held by the CU.

At the same, the EC can, of course, give certain directions to, for example, Chile so as to make it easier for the EC to comply with both the FTA and the CU. In an EC Declaration attached to the Chile-EC FTA, the EC did, for example, "invite Chile to enter into negotiations with Turkey as soon as possible", given that pursuant to the EC-Turkey CU, all members of the CU must have substantially the same external trade policies.[57] Indeed, this obligation makes negotiating an FTA with only one member of a CU most difficult. It explains why, for example, the US insisted on expanding FTA negotiations with South Africa to include all members of the Southern African Customs Union (SACU).[58]

A different problem is: What happens if an FTA partner confers even more preferential treatment to a third party in a subsequent FTA? For example, Chile gives a better deal to the US in the US-Chile FTA as compared to the earlier EC-Chile FTA. Can the EC in these circumstances claim the more favourable treatment? The answer would be yes if the EC-Chile FTA were to include an unconditional MFN obligation: In that case, any benefit subsequently conferred by either party to any other country (here, the US) would automatically be granted also to the FTA counterpart (here, the EC). Yet, FTAs normally do *not* include such MFN obligation[59], and the EC-Chile FTA is no

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[57] In the EC-Turkey CU, the EC foresaw this problem and included an obligation on Turkey "to align itself on the Common Customs Tariff and, progressively, with the preferential customs regime of the Community". Turkey thereby agreed to conduct its own negotiations each time the EC has concluded an FTA with a third party.

[58] Conversely, the EC-Chile FTA also includes a provision relating to MERCOSUR, to which only Chile is an associate member. Article 49 "Regional cooperation and regional integration": "Both Parties should use all existing cooperation instruments to promote activities aimed at developing an active and reciprocal cooperation between the Parties and the Mercado Comun del Sur (Mercosur) as a whole".

[59] See, on the contrary, Article 2.3.3 of the US-Columbia FTA: "For greater certainty, paragraph 2 [on progressive tariff elimination] shall not prevent Columbia from granting identical or more favorable tariff treatment to a good as provided for under the legal instruments of the Andean integration …".

exception to this rule.[60] The reason for doing so is obviously to tailor-make FTA concessions depending, in particular, on what the counterpart is willing to reciprocate in turn. If a later FTA partner is willing to "give more", it may "get more", but that does not mean that an earlier FTA partner now gets the same deal. For that, new reciprocal negotiations would have to start.

The absence of an MFN clause in FTAs means that FTA concessions remain within the FTA and are not multilateralized to other, previous or later, FTA partners. To include such MFN obligation in FTAs would, of course, be a major boost to "multilateralizing regionalism": it would multilateralize any new FTA concessions to all other FTA partners of the country concerned and, thereby, dramatically simplify FTA relations as every given country would only have one preferential FTA standard, namely: the most beneficial treatment it has ever awarded in any FTA.

The absence of an MFN clause in FTAs stands in contrast to the traditional MFN clause that is normally included in bilateral investment agreements or the investment chapter of FTAs.[61] Pursuant to this MFN clause for investment, if, for example, Chile offers better investment protection to any other country, this higher level of protection must automatically be extended also to the US (the same is true pursuant to MFN under TRIPS which, as discussed earlier, continues to apply to FTAs). Negotiators might want to consider including an MFN clause in FTAs albeit one limited to trade concessions

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[60] The Chile-EC FTA does not include an MFN clause and, on the contrary, states in Article 56 "Customs unions and free trade areas":

> "Nothing in this Agreement shall preclude the maintenance or establishment of customs unions, free trade areas or other arrangements between either of the Parties and third countries, insofar as they do not alter the rights and obligations provided for in this Agreement".

The Chile-EC FTA does, however, include one specific MFN obligation imposed on Chile, namely in Article 61.2 which obliges Chile to ensure that its price band system for certain imports "does not afford more favourable treatment to imports of any third country, including countries with which Chile has concluded or will conclude in the future an agreement notified under Article XXIV of the GATT 1994". Thus, any benefit Chile would to give to third parties (e.g. the US or MERCOSUR members) under its price band system must pursuant to this MFN clause automatically be extended also to the EC.

[61] See, for example, Article 10.3 "Most-Favored-Nation Treatment" of the US-Chile FTA: "1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party …".

under other FTAs (and excluding preferential treatment under CUs and unilateral concessions to developing countries).

6. Would trade sanctions authorized by the WTO violate an FTA and vice versa?

Imagine that Korea wins a WTO dispute against the US. The US fails to implement the WTO ruling and Korea obtains WTO authorization to suspend concessions, e.g., to introduce 100% tariffs on US semiconductor exports to Korea. Are such sanctions permitted under the bilateral Korea-US FTA? Article 2.3.4(b) of the Korea-US FTA answers in the affirmative. In the FTA's section on "Elimination of Customs Duties", it states that:

> "For greater certainty, a Party may: … (b) maintain or increase a customs duty as authorized by the Dispute Settlement Body of the WTO".

Pursuant to Rule 4 above, an FTA can, indeed, give preference to certain action under the WTO treaty (here, WTO retaliation). However, even without such explicit provision, a WTO authorization to impose sanctions should anyhow prevail over an earlier FTA: (i) because the WTO authorization, pursuant to a system that both Korea and the US agreed to, is later in time (Rule 6); (ii) because the WTO authorization is arguably also the more specific rule (Rule 7).

The same would be true if bilateral sanctions were authorized under the FTA (e.g. because the US failed to implement an FTA ruling): as the later in time rule and, arguably, the more specific rule, such FTA authorization should prevail over any WTO obligation that Korea, the FTA retaliator, may have. Crucially, if the US were to nonetheless challenge Korea's FTA retaliation before a WTO panel, the WTO panel should give effect to the FTA authorization to retaliate and recognize it as a defence that Korea can rely on against the US claim of WTO breach.

Equally, any WTO authorization to retaliate by suspending IP protections under TRIPS may contradict the retaliator's obligations under WIPO conventions outside the WTO. Yet, in this scenario as well, the WTO authorization should prevail over WIPO as both the later in time rule and the more specific rule.

V. POLICY CONCLUSIONS

The ultimate goal of this paper is to shift the debate on regionalism from one that focuses on hierarchy and supremacy of the WTO (through, in particular, GATT Article XXIV) to a debate that centres on mutual recognition, accommodation and respect between the WTO and regional agreements.

Law and legal analyses, in and of themselves, will not resolve the problems of regionalism or how to "multilateralize" it. Yet, at the edges, legal provisions and legal rules on overlap and conflict (as developed in the eight Rules set out in Section III) offer tools to untangle the maze of WTO and regional agreements. By doing so, law and lawyers can contribute to the process of "multilateralizing regionalism".

The policy proposals that can be deduced from this paper are:

1. The WTO must embrace regional agreements both in its research and negotiating activities and, in particular, WTO dispute settlement. Interaction and dialogue are more likely to untangle the "spaghetti bowl" of WTO and regional agreements than unilateral claims to hierarchy and supremacy. Reference by the WTO to regional agreements is but one form of "multilateralizing regionalism".

2. One specific way to improve the integration between WTO and regional agreements would be to explicitly expand the "applicable" or "relevant law" before both WTO and FTA panels to all relevant international law consented to by the disputing parties. This would not mean that WTO panels must enforce WTO-plus concessions. It only means that WTO claims must be read and applied in the

context of what the parties agreed to elsewhere (e.g. forum exclusion clauses in an FTA; retaliation or safeguards approved by an FTA).

3. From their side, negotiators of regional agreements must be aware of overlaps with the WTO and other regional agreements. To avoid conflicts, they must explicitly regulate questions of overlap. Specific areas of concern are: TRIPS-plus and the WTO decisions on access to medicines, overlapping dispute settlement procedures, WTO *versus* regional safeguards, the impact of changes at the WTO on pre-existing FTAs and the relationship amongst different regional agreements.

4. If FTA negotiators do not regulate these overlaps, FTA and WTO dispute settlement panels will do it for them (pursuant to the eight Rules developed in Section III), with possibly surprising results. Reference by FTA negotiators and FTA dispute panels to WTO provisions and jurisprudence (e.g. when it comes to an FTA dispute over TRIPS-plus provisions) is but another form of "multilateralizing regionalism".

5. To avoid repeat proceedings and protect scarce resources especially of developing countries, regional agreements should include a "forum exclusion clause" which states that once a matter is brought to the WTO or to an FTA panel, the same matter cannot be litigated a second time in the other forum.

6. To avoid conflicts and protect especially weaker parties, where FTA and WTO provisions are substantially equivalent (say, in respect of national treatment), regional agreements should direct complainants to bring the dispute to the WTO (not the FTA).

7. Only in deeply integrated customs unions should there be exclusive jurisdiction for the regional courts. That said, WTO-plus obligations will obviously need to be enforced before an FTA panel as, in that case, there is no overlap with the WTO.

8. For the enforcement of WTO-plus concessions in FTAs it is crucially important that FTA dispute settlement mechanisms are carefully designed and work automatically (unlike Chapter 20 of NAFTA, as Mexico experienced in its sweeteners dispute with the US).

9. WTO members must carefully guard the success of the WTO dispute settlement mechanism. As others have pointed out, one of the features that regional agreements are unlikely to match is the effectiveness and legitimacy of WTO dispute settlement. That mechanism alone is likely to preserve the survival of the multilateral trading system.

10. To enhance consistency between regimes, cross-references in regional agreements to WTO rules must be presumed to be dynamic, that is, automatically include WTO updates, unless otherwise provided.

11. FTA negotiators should consider including an MFN clause in FTAs which would automatically extend any subsequent FTA concessions to all previous and future FTA partners. Such MFN clause would be an important step toward "multilateralizing regionalism" and could be limited to FTAs only (and exclude, for example, preferential treatment under CUs and unilateral concessions to developing countries).