Bond University

Bond Law Review

Volume 30 Issue 2

2018

Resolving Jurisdictional Conflicts between WTO and RTA Dispute Settlement: Toward an Interpretative Approach

Son Tan Nguyen
RMIT International University Vietnam

Resolving Jurisdictional Conflicts Between WTO and RTA Dispute Settlement: Toward an Interpretative Approach

SON TAN NGUYEN*

ABSTRACT

In the last several decades there has been an exponential growth in the number of Regional Trade Agreements ('RTA's). In addition to creating a wide overlap of substantive rights and obligations with the World Trade Organization ('WTO'), many RTAs are also equipped with legalized dispute settlement mechanisms, which operate independently from the compulsory, automatic and exclusive system of WTO dispute settlement. This parallel operation of substantive commitments and legalized mechanisms may potentially result in conflicts of jurisdiction where a single dispute is submitted simultaneously or consecutively to both fora. It has been well addressed in various studies that if such conflicts arise, there is currently no legal rule that can satisfactorily determine which forum should have jurisdiction. As a result, multiple proceedings appear unavoidable. This article seeks to offer a new way to look into the jurisdictional tension between the WTO and RTAs. It will be argued that in the absence of effective rules to determine jurisdictional priority, principles of treaty interpretation — particularly art 31(3)(c) of the Vienna Convention on the Law of Treaties *— provide a practical and useful technique to minimize the negative consequences of multiple proceedings, namely inconsistent interpretations and findings over essentially the same disputes.*

I Introduction

The number of regional trade agreements ('RTA's) has grown exponentially in the last several decades.[1] They create a wide overlap of substantive rights and obligations with the World Trade Organisation ('WTO').[2] Many of them also include legalized dispute settlement

* PhD, Law Lecturer at RMIT International University Vietnam. Email: son.nguyentan@rmit.edu.vn. This research was done under the supervision of Professor Jeffrey Waincymer, Monash Law School, Australia. I would like to thank him for his useful comments. All errors are mine.

1 As of 1 May 2018, 287 RTAs were in force: World Trade Organization, *Regional Trade Agreements Gateway* <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

2 See, eg, Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade*

mechanisms,[3] operating in parallel to the compulsory and exclusive system of dispute settlement under the WTO.[4] Previous studies have found that the parallel operation of substantive commitments and legalized dispute settlement mechanisms may result in conflicts of jurisdiction, where a single dispute is submitted simultaneously or consecutively to both fora.[5] Indeed, what happened in *Mexico — Tax Measures on Soft Drinks and Other Beverages,*[6] *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*,[7] *United States — Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*,[8] and *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,*[9] suggests that multiple proceedings over the same dispute

---

Agreements and the WTO Legal System (Oxford University Press, 2006) 383, 400–1; World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO, 2011) 128–33; Henrik Horn, Petros C Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) *The World Economy* 1565, 1565–88.

3 See, eg, Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development* (World Bank, 2011) 467; David Morgan, 'Dispute Settlement under PTAs: Political or Legal?' in Ross P Buckley et al (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer Law International, 2008) 241, 241–4; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465, 486–524.

4 See, eg, Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 119–208; David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge, 2nd ed, 2004) 17–48.

5 Peter Drahos, 'Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution' (2007) 41(1) *Journal of World Trade* 191, 198; Kwak and Marceau, above n 3, 465; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) 8; Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197–206; Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 44 *Cornell International Law Journal* 77, 77–85; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081.

6 Panel Report, WTO Doc WT/DS308/R (7 October 2005) ('*Mexico — Taxes on Soft Drinks*'); Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R (6 March 2006). In this case, for many years the US had been blocking the establishment of a NAFTA panel to examine Mexico's claim under NAFTA concerning the market access of its cane sugar to the US market. In response, Mexico imposed a tax on US soft drinks and other beverages, and this, in turn, led the US to initiating a dispute before the WTO to challenge the tax measures.

7 Panel Report, WTO Doc WT/DS241/R (22 April 2003) ('*Argentina — Poultry Anti-Dumping Duties*'). In this case, Brazil requested the WTO panel to find Argentina's antidumping measures inconsistent with the WTO Anti-Dumping Agreement. However, prior to this WTO dispute, Brazil had already challenged the measures before a Mercosur tribunal.

8 WTO Doc WT/DS144/1 (29 September 1998) (Request for Consultations from Canada) ('*US — Cattle, Swine and Grain*'). In this instance, Canada filed parallel requests for consultations under both the NAFTA and WTO procedures involving exactly the same US measures and similar WTO and NAFTA provisions. However, neither of these proceedings escalated to an adjudicative phase.

9 WTO Doc WT/DS381/1(28 October 2008) (Request for Consultations by Mexico) ('*US — Tuna II*'); Panel Report, *US — Tuna II,* WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *US — Tuna II,* WTO Doc WT/DS381/AB/R (16 May 2012). In this

may possibly occur before the WTO and RTA fora.[10] If this is the case, it is possible that judicial bodies at different fora may provide different, even conflicting, findings over the same dispute,[11] undermining the predictability and consistency of international law. The inconsistent findings produced by a North American Free Trade Agreement ('NAFTA')[12] Chapter 19 panel and a WTO panel in *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* ('*Lumber IV*') exemplify the risk of incompatible judicial findings resulting from multiple proceedings.[13] In *Lumber IV*, the US International Trade Commission ('USITC') determined that Canadian softwood lumber exports to the United States were threatening to injure the domestic industry.[14] Canada challenged that determination by filing three requests for panel review under NAFTA Chapter 19.[15] The NAFTA

---

case, Mexico initiated a WTO dispute to challenge the measures imposed by the US concerning the importation, marketing and sale of tuna and tuna products. However, the US strongly disagreed with Mexico's decision to bring the dispute to the WTO because, in the US's view, the dispute must be adjudicated at NAFTA under NAFTA art 2005.4. The US then filed a NAFTA dispute concerning Mexico's failure to move the tuna-dolphin dispute from the WTO to the NAFTA forum.

10 Andrew D Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 135–8.

11 Two disputes are the same if they involve the same parties, the same object, and the same grounds (legal claims). Strictly speaking, in multiple proceedings, the WTO and RTA disputes are not *exactly the same* because they are *formally* framed and adjudicated based on different bodies of law, namely, WTO law and RTA law respectively. However, the parties to these disputes may be the same as there is a wide overlap of membership between two regimes (an RTA is generally formed by a subset of WTO Members). The object or relief may also be the same or similar because identical or similar trade retaliatory measures are often included under both regimes, and parties may pursue these forms of relief in both proceedings. Most importantly, the legal rights and obligations on which the WTO and RTA claims are framed may be similar or identical because there is also a wide overlap of substantial rights and obligations between the WTO and RTAs. As a result, in multiple proceedings, WTO and RTA disputes might be viewed as *essentially the same* or related. It is well-established that multiple proceedings over essentially the same or related disputes should be regulated. Kwak and Marceau, for example, pointed out that 'contrary findings based on similar rules […] would have unfortunate consequences for the trust that the states are to place in their international institutions', undermining legal certainty and predictability of international law: above n 3, 474. See, eg, Campbell McLachlan, '*Lis Pendens* in International Litigation' (2008) 336 *Rescueil Des Cours* 199, 217; Yuval Shany, 'The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 *Leiden Journal of International Law* 815, 825.

12 Signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) art 301.1.

13 Appellate Body Report, WTO Doc WT/DS257/AB/R (19 January 2004).
For an excellent summary and discussion of these conflicting findings, see, eg, Sarah E Lysons, 'Resolving the Softwood Lumber Dispute' (2008) 32 *Seattle University Law Review* 407, 422–8; Maureen Irish, 'Regional Trade, the WTO and the NAFTA Model', in Ross P Buckley, Vai Io Lo, Laurence Boulle (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Wolters Kluwer, 2008) 87, 105–7.

14 Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada,* WTO Doc WT/DS277/R (22 March 2004) [II.7–II.13].

15 See *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination),* USA-CDA-2002-1904-03 (13 August 2003); *Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less Than Fair Value),* USA-CDA-2002-1904-02 (17 July 2003); *Certain Softwood Lumber Products*

Chapter 19 panel decided that the evidence did not support a finding of threat of injury.[16] In parallel to these NAFTA requests, Canada also made three similar challenges before the WTO, alleging that the US violated its WTO obligations.[17] The WTO panel found in favour of Canada.[18] To implement this panel ruling, USITC made a new determination of threat of injury. Canada continued to challenge the consistency of this redetermination with the WTO original ruling. This time, the WTO compliance panel found in favour of the US, stating that the USITC redetermination was not inconsistent with the United States' obligations under the WTO Agreement on Anti-Dumping Measures (the 'AD Agreement') and the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement').[19] Even though this decision by the WTO compliance panel was then reversed by the Appellate Body, at least for a time it was directly inconsistent with the ruling of the NAFTA Chapter 19 panel.[20]

At the WTO, the *General Agreement on Tariffs and Trade* ('GATT)' art XXIV does not refer to RTA adjudicative mechanisms,[21] nor does the *Dispute Settlement Understanding* ('DSU') regulate relations between the two systems.[22] As a result, there is no WTO mechanism that can effectively prevent parties from submitting a single dispute to more than one forum. Outside the WTO, there are some norms that may potentially regulate multiple proceedings. These include the choice of forum clauses included in various RTAs, and common jurisdiction-regulating norms such as *res judicata, lis pendens, forum non conveniens*, comity, abuse of rights, and estoppel.[23] However, it is well-established that these norms may not be applied in WTO disputes.[24] The main barrier is DSU art 23, which states

---

from Canada (USITC Final Injury Determination), USA-CDA-2002-1904-07 (5 September 2003).

16 See Panel Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada,* WTO Doc WT/DS257/R (29 August 2003); Panel Report, *United States — Final Dumping Determination on Softwood Lumber from Canada,* WTO Doc WT/DS264//R (13 April 2004); Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277//R (22 March 2004).

17 Irish, above n 13, 105.

18 Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277//R (22 March 2004) [VIII.646–653].

19 Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada — Recourse to Article 21.5 of the DSU by Canada* WTO Doc WT/DS277/RW (15 November 2005) [2.5]–[2.6].

20 Irish, above n 13, 106.

21 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A art XXIV.

22 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*').

23 See, eg, Shany, *The Competing Jurisdictions*, above n 5; Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: Selected Application of Public International Law Required by Judicial Function' (2010) 31 *Michigan Journal of International Law* 559, 607–15.

24 See, eg, Kwak and Marceau, above n 3; Son Tan Nguyen, 'The Applicability of RTA Jurisdictional Clauses in WTO Dispute Settlement' (2013) 16 *International Trade and*

clearly that, in resolving WTO disputes, Members have 'recourse to, and abide by, the rules and procedures' of the DSU.[25] It is unrealistic to expect that WTO adjudicators, who are ordinarily extremely mindful of their limited mandate, would go against this explicit treaty language and apply norms that would override the WTO jurisdiction. Inherent powers, though they may exist,[26] might not be a sufficiently concrete basis to enable WTO tribunals to proceed so far.[27] Therefore, WTO tribunals will retain jurisdiction, regardless of any non-WTO norm that may point in the opposite direction. Obviously, there may be no legal solution that can satisfactorily establish jurisdictional priority between the WTO and RTA.[28] Multiple proceedings might thus be unavoidable.

This article suggests that in the absence of effective rules determining jurisdictional priority, principles of treaty interpretation, particularly, art 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('VCLT'), might provide a practical and useful alternative to minimize negative consequences of multiple proceedings. To address these issues, this article will first analyse the main features of art 31(3)(c) of the VCLT. It will then discuss how art 31(3)(c) might constitute a useful framework for a mutual integration of WTO and RTA equivalent rules in multiple proceedings.

II Article 31(3)(c) of the VCLT

A *Article 31(3)(c) as an Anti-Fragmentation Tool*

Article 31(3)(c) requires that, in interpreting a treaty, '[t]here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties'.[29] For many years, regardless of being explicitly codified as an integral part of art 31 VCLT,

---

Business Law Review 254; Son Tan Nguyen, 'The Applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization Dispute Settlement' (2013) 25(2) *Bond Law Review* 123; Son Tan Nguyen, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35(1) *University of Tasmania Law Review* 95. As to estoppel, Mitchell and Heaton argued that WTO tribunals can use their inherent powers to apply this principle in WTO disputes to resolve a jurisdictional conflict. However, to the current author, it is doubtful that estoppel can be applied in this manner because if WTO tribunals apply this principle to refuse ruling on a dispute, the WTO tribunals would place themselves in a plain violation of DSU art 23, which clearly requires that in resolving WTO disputes, Members have to 'recourse to, and abide by, the rules and procedures' of the DSU. The fact is that, as acknowledged by Mitchell and Heaton themselves, WTO tribunals have 'studiously avoided deciding whether or not it will apply estoppel'. See Mitchell and Heaton, above n 23, 607–15, particularly 609.

25 DSU, art 23.

26 Mitchell and Heaton, above n 23; Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R (6 March 2006) [45] (stating that WTO tribunals 'have certain powers that are inherent in their adjudicative function').

27 Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 78 (emphasizing that 'international courts cannot simply assert the existence of inherent powers as a type of carte blanche to do whatever they want').

28 Kwak and Marceau, above n 3, 484.

29 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c).

which has been traditionally considered as customary international law,[30] art 31(3)(c) remained as 'one of the most neglected corners' in 'the general rule of interpretation'.[31] In the words of Sands, there seemed to be a 'general reluctance to refer to art 31(3)(c)' in both judicial practice and academic circles.[32] However, given the growing concerns over the fragmentation of international law,[33] scholars and the International Law Commission ('ILC') have '(re)discovered the usefulness of ... Article 31(3)(c)'.[34] It is now considered to be an 'anti-fragmentation tool'[35] to reduce the negative effects of the fragmentation of international law.[36]

This expectation upon art 31(3)(c) seems to be well-grounded. Article 31(3)(c), as Van Damme observes, is not the only basis upon which to interpret treaties in international law.[37] In the WTO, for example, relevant rules of international law have been taken into account in treaty interpretation as context, special meaning, a circumstance of the conclusion of the treaty, subsequent practice, a means to ensure the effectiveness of the treaty regime, a fall-back when the treaty is incomplete, an aid in understanding the object and purpose of the covered agreements, or even 'without any basis in principles of treaty interpretation'.[38] Nevertheless, art 31(3)(c) might be the most transparent and legitimate tool, or in the words

---

30 Jean D'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Courts as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012) 141, 151; Vassilis P Tzevlekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 *Michigan Journal of International Law* 621, 631. The WTO Appellate Body confirmed that art 31 VCLT 'has attained the status of a rule of customary or general international law'. See Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline, WTO Doc* WT/DS2/AB/R (29 April 1996) 17.

31 Campbell McLachlan, 'The Principle of Systematic Integration and Article 31(3)(*c*) of the Vienna Convention' (2005) 54(2) *International and Comparative Law Quarterly* 279.

32 Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights and Development Law Journal* 85, 95; Philippe Sands and Jeffery Commission, 'Treaty, Custom and Time: Interpretation/Application?' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 39, 39–40.

33 International Law Commission, *Report of the Study Group of the International Law Commission on the Fragmentation of International Law, Finalized by Martti Koskenniemi*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) [5]–[26] ('*Report on the Fragmentation of International Law*'); Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15(3) *Leiden Journal of International Law* 553; Wilfred C Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401; Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, 2009); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

34 Tzevlekos, above n 30, 629.

35 Ibid.

36 Jorg Kammerhofer, 'Systemic Integration, Legal Theory and the International Law Commission' (2008) 19 *Finish Yearbook of International Law* 157, 160.

37 Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009) 375.

38 Ibid.

of Aanken, the 'correct' means, to justify treaty interpretation in the light of international law.[39] This is because art 31(3)(c) is, as pointed out by French, 'one of the only provisions — if not the only one — that has the facility to integrate *all* the various sources of international law'.[40] The language of art 31(3)(c) suggests that treaty interpreters are required to situate the rules under interpretation 'in the context of other rules and principles that might have bearing upon a case. In this process, the more concrete or immediately available sources are read against one another with the general law 'in the background'.[41] Crucially, the utilization of art 31(3)(c), as confirmed in *European Communities — Measures Affecting the Approval and Marketing of Biotech Products,*[42] may not be optional but mandatory. Article 31(3)(c) is an integral part of the 'general rule of treaty interpretation' incorporated in art 31. The use of the term 'rule' in the singular rather than plural form in the header of this provision suggests that a 'holistic and comprehensive approach' is required in applying article 31.[43] Therefore, where relevant, art 31(3)(c), like any other part of art 31, *'must'* be employed.[44] Even though art 31(3)(c), as examined later, has its own interpretative difficulties, either 'ignoring', dismissing 'as a mere truism', or reducing the importance of this article 'can hardly be seen as compatible with the holistic approach that stands behind the [Vienna] Convention'.[45] Properly, as McGrady has explained, art 31(3)(c) 'should be viewed as a basic procedural obligation to consider relevant rules of international law where the issues in dispute fall within the scope of those extraneous rules'.[46] In this sense, art 31(3)(c) is undoubtedly a potential tool by which 'some greater degree of fragmentation might be avoided'.[47]

The discussion on the nature and operation of art 31(3)(c) took a prominent place in the Final Report of the ILC Study Group on the Fragmentation of International Law ('ILC Study Group').[48] The ILC Study

---

39 Anne Van Aaken, 'Defragmentation of Public International Law through Interpretation: A Methodological Proposal' (2009) 16(2) *Indiana Journal of Global Legal Studies* 483, 497.

40 Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55(2) *International and Comparative Law Quarterly* 281, 301 (emphasis in original).

41 *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682 [479] (13 April 2006).

42 WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006) [7.69] ('*EC — Biotech Products*').

43 French, above n 40, 301.

44 Ibid (emphasis in original).

45 French, above n 40, 301; McLachlan, 'The Principle of Systematic Integration', above n 31, 280; Lukasz Gruszcynski, 'Customary Rules in WTO Practice' in Ole Kristian Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012) 35, 41.

46 Benn McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: *EC — Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaty' (2008) 42(4) *Journal of World Trade* 589, 589. See also Gabrielle Marceau, 'A Call for Coherence in International Law: Praise for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33(5) *Journal of World Trade* 87, 128 (pointing out that 'Article 31(3)(c) imposes an "obligation to take into account" those other rules of international law').

47 Sands, above n 32, 105.

48 *Report on the Fragmentation of International Law* , UN Doc A/CN.4/L. 682, [410]–[480].

Group not only called for attention to art 31(3)(c) but also went further to employ it in the service of the principle of systemic integration.[49] Particularly, art 31(3)(c) is seen by the ILC Study Group as an expression of the principle of systemic integration which 'goes further than merely restate[ing] the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely'.[50] However, the ILC Study Group did not seem to go far enough to prove that systemic integration has indeed emerged as a principle of international law.[51] The ILC Study Group repeatedly asserted in the abstract that 'the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind',[52] but it performed no examination as to, for example, whether state practice actually supports such a general principle of law. To some scholars, there might be little evidence pointing in this direction. Conforti, for instance, observed that the principle of systemic integration is not reflected in international reality.[53] Likewise, Ragnar noted that, in practice, international tribunals generally 'focus upon an exploration of the nature and boundaries of VCLT art 31(3)(c) rather than explicitly referring to a general principle of systemic integration'.[54] The existence of these contrary views based on the practice of international law indicates that the status of 'systemic integration' may be less clear than the Study Group suggested.

Moreover, the content of the principle of systemic integration — that is, that the normative environment needs to be taken into account[55] — is also too ambiguous. It 'does not by itself clarify the essence of the process, in terms of what is integrated, how and on what conditions'.[56] Even when the Study Group further specified that art 31(3)(c), as an expression of the

---

49 Ibid. See also Tzevlekos, above n 30, 631–2.

50 *Report on the Fragmentation of International Law* , UN Doc A/CN.4/L.682, [415]. The idea of systemic integration has also been resorted to by some scholars. McLachlan argued that 'Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. … [T]hey are predicated for their existence and operation on being part of the international law system. As such they must be "applied and interpreted against background of general principles of international law" … [The principle] flows so inevitably from the nature of a treaty as an agreement "governed by international law"': 'The Principle of Systematic Integration', above n 31, 280 (emphasis in original) (citations omitted). Similarly, Sands asserted that 'Article 31(3)(c) reflects a "principle of integration"': above n 32, 95.

51 Karel Wellens, 'Quelques réflexions d'introduction' in Rosario Huesa Vinaixa and Karel Wellens (eds), *L'influence Des Sources Sur L'unité Et La Fragmentation Du Droit International* (Bruylant, 2006) 1, 20–1, cited in Tzevlekos, above n 30, 632.

52 See, eg, *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [413], [415], [419].

53 Benedetto Conforti, 'Uniti et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"' (2007) 111 *Revue Générale De Droit International Public* 5, 16, cited in Tzevlekos, above n 30, 632.

54 See Ragnar Nordeide, 'Fragmentation and the Leeway of the VCLT: Interpreting the ECHR in Light of Other International Law' (2009) 20 *Finish Yearbook of International Law* 189, 192.

55 *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [415].

56 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) 367.

principle of systemic integration, 'requires … the integration into the process of legal reasoning— including reasoning by courts and tribunals — of a sense of coherence and meaningfulness',[57] the ambiguity still remains. If this phrase simply aims to emphasize that the principle of systemic integration should be present in every instance of treaty interpretation, its elucidation as 'a sense of coherence and meaningfulness' is proper.[58] Nevertheless, if the reference to 'the process of legal reasoning' is implied to be broader than the interpretation process, the Study Group seems to grant art 31(3)(c) a role that 'goes beyond its legitimate function as an interpretative aid'.[59] In fact, even if such a general principle of systemic integration exists, it could not legitimately move beyond the specific questions raised by art 31(3)(c) itself, such as, for example, which specific conditions are required to take into account other rules of international law and, consequently, how these requirements are properly applied in individual cases.[60]

Thus, whether there exists a general principle of systemic integration may not really change the ways in which extraneous rules are taken into account pursuant to art 31(3)(c). This does not mean that the notion of systemic integration is entirely irrelevant. Given that 'integration relates to a result, while interpretation methods definitionally relate to methods and means',[61] it might be better to view systemic integration as an 'objective marked by rules of interpretation',[62] especially art 31(3)(c), rather than the working mechanism of the interpretation process.

It may therefore suffice to ground the mutual integration of WTO and RTA norms on art 31(3)(c), instead of employing a more general principle of systemic integration, which may add little clarity to, if not unnecessarily complicate,[63] the ways in which integration should take place.

B *Elements of Article 31(3)(c)*

According to art 31(3)(c), there are three requirements for an external rule to be taken into account in treaty interpretation: the external rule must be qualified as a 'rule of international law', 'relevant', and 'applicable in the relations between the parties'.[64] The first[65] and the second rules[66] are easily

---

57 *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [419].

58 Bruno Simma and Theodore Kill, 'Harmonizing Investment Protections and International Human Rights: First Steps towards a Methodology' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 678, 695.

59 Ibid.

60 Orakhelashvili, above n 56, 367.

61 Ibid.

62 Armin Von Bogdandy and Ingo Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking' (2011) 12(5) *German Law Journal* 1341, 1354.

63 Orakhelashvili, above n 56, 382.

64 Simma and Kill, above n 58, 695.

65 McLachlan, 'The Principle of Systematic Integration', above n 31, 290; Simma and Kill, above n 58, 695; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), 262–3; *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [460].

66 French, above n 40, 304–5; Simma and Kill, above n 58, 695–7; McGrady, above n 46, 591.

satisfied in the WTO-RTA context. The real hurdle is the term 'parties'. The critical question is whether the relevant rules are required to be applicable between *all of the parties to the principal treaty under interpretation*, or only *between the parties to the dispute*. If the term 'parties' indeed refers to all of the parties to the treaty under interpretation, the usefulness of art 31(3)(c) is significantly circumscribed in the context of the WTO and RTAs. Indeed, while WTO rules can be used in the interpretation of RTA rules, since by definition parties to an RTA are generally parties to the WTO, there would be no RTA to which all WTO Members are also parties.

Research has found that neither the ordinary meaning, the context and drafting history, nor the practice of international courts and tribunals can effectively resolve the ambiguity of the term 'parties'.[67] However, the difficulties in the interpretation of art 31(3)(c) 'hardly constitute a drama'; and art 31(3)(c) should be employed where necessary for the purpose of interpretation.[68] The question is how tribunals could overcome the ambiguity. It has been accepted in doctrine that tribunals might use inherent powers to decide whether the term means parties to the treaty under interpretation or parties to the dispute.[69] This is necessary for tribunals to properly discharge their adjudicatory function, and enables them to fulfil a procedural obligation enshrined in art 31(3)(c), namely, consideration of relevant rules that may provide 'operational guidance' on the rules under interpretation.[70]

The use of inherent powers in this manner has generally received support in doctrine. Fauchald and Nollkaemper emphasised that, since art 31(3)(c) 'remains fairly open-textured, international tribunals would be left with considerable discretion'.[71] In the same way, French pointed out that judicial discretion is always present in the area of dispute settlement and it should not be ignored or marginalized, but recognized as 'a key element of the interpretative process'.[72]

Theoretically, if tribunals have inherent powers to determine the meaning of the term 'parties', they could decide that the term means either (1) parties to the treaty under interpretation or (2) parties to the dispute. Nevertheless, in the WTO-RTA context, there seem to be a number of factors that lend support to a flexible interpretation, rather than a strict one

---

67 Panagiotis Merkouris, *Article 31(3)(c) of the* VCLT *and the Principle of Systemic Integration* (PhD Thesis, Queen Mary University of London School of Law, 2010) 15 ('*Article 31(3)(c) of the* VCLT') <https://qmro.qmul.ac.uk/jspui/bitstream/123456789/477/1/MERKOURIS Article%2031%283%29%28c%292010.pdf>; McGrady, above n 46, 594–6; Gardiner, above n 65, 263–5

68 Van Damme, above n 37, 307.

69 Ole Kristian Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012) 345.

70 Mitchell and Heaton, above n 23.

71 Fauchald and Nollkaemper, above n 69.

72 French, above n 40, 307.

as adopted in *EC — Biotech Products*, which requires all WTO Members to be the parties to the treaty containing the relevant rules.[73]

Firstly, the requirement of duality of membership between the WTO and an RTA is by definition 'unrealistic' and 'an almost impossible criterion' to be satisfied.[74] This strict interpretation would completely remove the possibility of using RTA rules to interpret WTO rules, rendering ineffective art 31(3)(c) in this particular area.[75] In this regard, it would be better to require only the identity of parties to the dispute because, as correctly observed by McGrady, it would 'preserve the realistic possibility that Article 31(3)(c) will be used in the reconciliation of obligations under multilateral treaty regimes', and enable states 'to organize their relations at a bilateral level even where the source of those relations is multilateral in character'.[76] McGrady's comments are especially relevant in the context of the WTO and RTAs because it would be unreasonable to allow RTAs to be established under the WTO to further liberalise trade between certain WTO Members, and then deny any connection between them, even as a matter of interpretation rather than applicable law. On this point, Orakhelashvili remarks that '[i]t must be accepted that every WTO party may be in a different bilateral treaty relation with another WTO party and this has to be considered if these two parties happen to be parties in the WTO dispute settlement'.[77] Orakhelashvili does not explain why it should be so but his comment obviously implies what McGrady already emphasizes, that is, the need to recognise the ability of states to organise their multilateral and bilateral obligations.

Secondly, the strict interpretation of the term 'parties' would have a fragmentation effect because it transforms WTO law into an 'island' by limiting the possibility of taking into account other relevant rules of international law.[78] Specifically, the strict interpretation 'would lead to the paradoxical result that the WTO would, at least in theory, become more isolated from other international systems of law as its membership grows'.[79] In this respect, even though the WTO signals that its law should not be read 'in clinical isolation' from public international law, its narrow reading of Article 31(3)(c) in *EC — Biotech Products* 'effectively guarantees such clinical isolation'.[80] The flexible interpretation is thus

---

73 Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006) [7.68].

74 Margaret Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case' (2007) 56 *International and Comparative Law Quarterly* 907, 916; French, above n 40, 307.

75 Young, above n 74, 915.

76 McGrady, above n 46, 613.

77 Orakhelashvili, above n 56, 368.

78 Gruszcynski, above n 45, 55; Young, above n 74, 916; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753, 781.

79 Marceau, 'WTO Dispute Settlement and Human Rights', above n 78, 781.

80 Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizaro (ed), *The Law of Treaties Beyond The Vienna Convention* (Oxford University Press, 2011) 192, 205.

obviously more desirable since it could enable the decision makers to interpret one treaty in light of other rules in 'a greater range of circumstances'.[81] Some commentators are concerned that this may give rise to the risk of divergent interpretations depending on which parties to the treaty are parties to a particular dispute.[82] However, as French points out, while the idea of uniformity of interpretation across all treaty parties is undoubtedly desirable, 'the intensive use of bilateral commitments, even within the multilateral context, ensures that in most cases, such uniform interpretations are not required'.[83] Indeed, the fact that GATT art XXIV and GATS art V allow RTA parties to go further than the WTO in liberalising trade means that it might be impossible to maintain a completely unified set of WTO obligations for all WTO Members in the first place. While it is unlikely that the flexible interpretation of the term 'parties' would further intensify divergent interpretations, a collection of isolated and fragmented relations between the WTO and RTA obligations would undoubtedly result in the fragmentation of international trade law.

Obviously, while the use of WTO rules in interpreting RTA rules under the framework of art 31(3)(c) is almost uncontroversial, the reverse scenario — that is, the use of RTA rules in interpreting WTO rules, as discussed above — *could, and should,* be possible where necessary. The real question is *how* that could be done.

III Integration of WTO and RTA Norms on the Basis of Article 31(3)(c)

A *How WTO and RTA Tribunals Could Take into Account the Equivalent Norms from the Other Regime?*

Article 31(3)(c) provides 'little guidance', if any, as to 'what to do about overlapping obligations'.[84] It tells us that 'relevant rules' must be taken into account, but it says nothing about how to do so. The ILC Study Group was fully aware of this silence but did not provide any elucidation since it considered that the question 'must be left to the interpreters to decide in view of the situation'.[85] In this regard, Broude and Shany suggest that 'all relevant norms should be construed in light of the parallel norms coming from the other branches of law'.[86] This is a useful starting point since it proposes a general methodology to interpret equivalent norms, but still sheds little light on the way in which this could be done.

---

81 McGrady, above n 46, 613.

82 Robert Howse, 'The Use and Abuse of International Law in WTO Trade/Environment Litigation' in Merit E Janow, Victoria Donaldson, and Alan Yanovich (eds), *The WTO: Governance, Dispute Settlement and Developing Countries* (Juris Publishing, 2008) 635, 670.

83 French, above n 40, 306–7.

84 McLachlan, 'The Principle of Systematic Integration', above n 31, 281.

85 *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [419].

86 Tomer Broude and Yuval Shany, 'The International Law and the Policy of Multi-Sourced Equivalent Norms' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 1, 14.

It is further suggested in this article that tribunals can use the equivalent rules from the other regime to *clarify* the meaning of the rules under interpretation. In fact, such use of extraneous rules has been discussed and supported in doctrine. Orakhelashvili considers that relevant rules within the meaning of art 31(3)(c) can be used for the purpose of clarifying the 'meaning of the terms employed in the treaty'.[87] Similarly, French, Simma, and Tzevlekos have emphasised that tribunals could utilise extraneous rules to 'seek clarification of what a treaty provision actually means',[88] 'provide meaning for a specific treaty term',[89] or 'complement "incomplete" text'.[90] Dorr recently added that 'the terms of a treaty can … be interpreted in the light of those of another treaty, especially where the latter deals with a similar object or addresses the same legal situation'.[91]

International adjudicative bodies have frequently employed extraneous rules to clarify the meaning of the rules under interpretation. The European Court of Human Rights ('ECtHR'), whose 'case law offers a remarkable illustration of explicit reference' to art 31(3)(c),[92] perhaps offers the most prominent example in this respect.[93] In *Selmouni v France*,[94] the ECtHR referred to the 1984 *UN Convention against Torture* to clarify the meaning of the term 'torture' used in art 3 of the *European Convention on Human Rights* ('*ECHR*').[95] Similarly, in *Golder v United Kingdom*,[96] the ECtHR examined whether the right to access the court, which is not expressively mentioned in art 6 of the *ECHR*, falls within the scope of protection provided by this provision.[97] In ascertaining the scope of art 6, the Court employed various means of interpretation, including text, context, object, purpose, and relevant rules of international law within the meaning of art 31(3)(c).[98] In relation to art 31(3)(c), the Court explained that

> [t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. *Article 6 para.1… must be read in the light of these principles*.[99]

This reference to relevant rules of international law, in conjunction with the employment of other means of interpretation, had enabled the ECtHR to ascertain that 'the right of access [to the court] constitutes an element

---

87 Orakhelashvili, above n 56, 371.
88 French, above n 40, 282.
89 Simma and Kill, above n 58, 703–4.
90 Tzevlekos, above n 30, 648.
91 Oliver Dorr, 'General Rule of Interpretation' in Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521, 562.
92 Ibid 624.
93 For a discussion on these cases, see Tzevlekos, above n 30, 371–2.
94 (2000) 29 EHRR 403.
95 Ibid 441.
96 (1979–80) 1 EHRR 524.
97 Ibid 532.
98 Ibid 532–6.
99 Ibid 535–6 (emphasis added).

which is inherent in the right stated by Article 6'.[100] Similarly, in *Soering v United Kingdom*,[101] even though the ECtHR did not rely explicitly on art 31(3)(c), it referred to relevant rules of international law to decide whether the extradition of a person to a state where he risked the death penalty fell within the scope of art 3 of the *ECHR*.[102] The court emphasized that the absolute prohibition on torture enshrined in art 3 of the *ECHR* can also be 'found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard'.[103] The court observed that the inclusion in other specialized international instruments of the right not to be extradited to a state where a person might be tortured does not 'mean that *an essentially similar obligation* is not already inherent in the general terms of Article 3'.[104] In the same manner, in *Rantsev v Cyprus and Russia*,[105] the ECtHR, after explicitly invoking art 31(3)(c), referred to a UN Protocol and the Anti-Trafficking Convention, to establish that trafficking in persons falls within the scope of art 4 *ECHR*.[106]

Analogous use of extraneous rules to clarify the meaning of the rules under interpretation could also be found in the jurisprudence of the Inter-American Court of Human Rights ('ICHR').[107] Specifically, the ICHR has systematically used art 29 of the *American Convention on Human Rights* which 'has essentially the same effects as Article 31(3)(c) VCLT' to interpret the Convention in light of other instruments.[108] For example, in *Street Children*, the Court stated clearly that

> [b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should *help this Court establish the content and scope of the general provision established in Art 19* of the American Convention.[109]

Importantly, as found by Merkouris, in the pre-VCLT jurisprudence on the customary law equivalent of art 31(3)(c), international courts and tribunals had also frequently referred to other relevant treaties to 'shed light [on] obscure and/or dubious provisions of a treaty'.[110] For example, in its Advisory Opinion on the *Treatment of Polish Nationals and other Persons*

---

100 Ibid 536.
101 (1989) 11 EHRR 439.
102 Ibid 472.
103 Ibid 467.
104 Ibid (emphasis added).
105 (2010) 51 EHRR 1.
106 Ibid 60–1.
107 See Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) *European Journal of International Law* 585.
108 Ibid 588, 603.
109 *'Street Children' (Villagran-Morales et al) v Guatemala* (Inter-American Court of Human Rights, 19 November 1999) [194] (emphasis added) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf>.
110 Merkouris, *Article 31(3)(c) of the* VCLT, above n 67, 40.

of Polish Origin or Speech in the Danzig Territory, the Permanent Court of International Justice ('PCIJ') found that

> [a]s between Danzig and Poland, the Convention of Paris is the instrument which is directly binding on Danzig; but in case of doubt as to the meaning of its provisions, recourse may be had to the Treaty of Versailles, *not for the purpose of discarding the terms of the Convention, but with a view to elucidating their meaning*.[111]

Evidently, there has been a growing acceptance in both doctrine and practice that extraneous rules could be utilized to clarify the meaning of the rules under interpretation on the basis of art 31(3)(c). It is, therefore, arguable that the same technique might also be employed by WTO and RTA tribunals to interpret equivalent norms in multiple proceedings. Particularly, the well-developed body of WTO norms supported by a rich body of case law, and the widespread incorporation of WTO rules into RTA texts, either by reference[112] or paraphrasing,[113] suggest that recourse to the equivalent WTO rules might be a particularly fruitful technique for RTA tribunals to clarify the meaning of certain RTA rules. Indeed, in interpreting RTA provisions that incorporate WTO provisions by reference,[114] recourse to the relevant WTO provisions may be vital because some concepts and terms necessary for the function of the incorporative RTA provisions may not be expressly specified in RTAs, but defined in the equivalent WTO provisions. For example, art 13 of the *Japan — Singapore FTA* provides that '[e]ach party shall accord national treatment to the goods of the other Party in accordance with the art III of GATT 1994'.[115] In cases of incorporation by reference like this, regional tribunals may refer to the relevant WTO provisions in order to clarify the meaning of the incorporative RTA provisions. In the same vein, the use of WTO provisions as an interpretative aid may also be useful where RTAs incorporate WTO provisions by paraphrasing. For example, art 13 of the *Second EU —*

---

111 [1932] PCIJ (ser A/B) No 44, 32, cited in Merkouris, *Article 31(3)(c) of the* VCLT, above n 67, 45 (emphasis added). Other similar cases studied by Merkouris include, for example, *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland) (Judgment)* [1928] PCIJ (ser A) No 15, 3, 40; *Japanese House Tax (France, Germany and Great Britain v Japan) (Award)* (Permanent Court of Arbitration, 22 May 1905), reproduced in George Grafton Wilson, *The Hague Arbitration Cases* (Ginn and Company Publishers, 1915) 47, 47–61; *Affaire de la Compagnie d'Electricite de la Ville de Varsovie (France v Poland) (Jurisdiction)* [1949] 3 RIAA 1669–78.

112 For example, art 13 of the Japan — Singapore FTA and art 301.1 of NAFTA incorporate by reference to GATT art III:2.

113 See, eg, art 13.1 of *the EU —Second Mexico FTA*, reproduces GATT Article III:2. See *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States*, [2000] OJ L 276/45 ('*First EU — Mexico FTA* '), *Decision No 2/2000 of the EC — Mexico Joint Council* [2000] OJ L 157/10, art 13.1 ('*Second EU — Mexico FTA* ').

114 See, eg, *Japan — Singapore Economic Partnership Agreement*, signed 13 January 2002 (entered into force 30 November 2002) art 13 ('Japan — Singapore FTA'); NAFTA art 301.1.

115 *Japan — Singapore FTA*, art 13. Similarly, NAFTA art 301.1 states that '[e]ach Party shall accord national treatment to the goods of another Party in accordance with Article III of the [GATT], including its interpretative notes'.

Mexico FTA uses similar treaty language to reproduce GATT art III:2.[116] In this situation, the similarity in wording and especially in the underlying substantive obligations suggests that WTO provisions may assist by guiding RTA tribunals to the ordinary meaning of the incorporative RTA provisions.

Even where it is unclear whether the terminological similarity is a product of an incorporation of WTO provisions in RTAs, it might still be relevant to refer to WTO rules to 'flesh out'[117] the meaning and constituents of an RTA rule. Certainly, regardless of whether RTA parties intend to replicate WTO law, their knowledge about WTO law may play a role in the drafting of RTA law.[118] As succinctly explained by McLachlan,

> [e]ach state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.[119]

To some extent, the technique proposed here, that is, the use of the equivalent WTO rules to clarify the meaning of the RTA rules under interpretation, has in fact been utilized by some tribunals when they seek guidance in WTO rules and jurisprudence, even though they generally do not specify the legal basis for doing so. Indeed, as found by Marceau et al, when judges and arbitrators examine the ordinary meaning of the terms of the applicable law and find that WTO-covered agreements also contain 'parallel language', they normally refer to WTO rules to clarify the meaning of the terms under interpretation.[120] For example, in *Imports of Flat Coated Steel Products from the United States,*[121] the NAFTA Chapter 19 tribunal had to interpret the relevance of the dumping margin for injury determination.[122] In clarifying this issue, the panel had sought guidance from WTO provisions. Specifically, it noted that

> the relevance of the magnitude of dumping margins has been explicitly recognized in Article 3.4 of the [WTO Anti-Dumping Agreement]. *This WTO*

---

116 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A art III:2; *Second EU — Mexico FTA* art 13.

117 To borrow the term used in Gabrielle Marceau et al, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation' (2013) 47(3) *Journal of World Trade* 481, 513.

118 McLachlan, 'The Principle of Systematic Integration', above n 31, 283.

119 Ibid.

120 Marceau et al, above n 117, 490.

121 *Imports of Flat Coated Steel Products from the United States (Mexico v US) (Opinion and Order of the Panel*) (Article 1904 Binational Panel, Secretariat File No MEX-94-1904-01, 27 September 1996) [364]–[365].

122 It is worth noting that applicable law under ch 19 is not NAFTA but the domestic law of the defending country. See NAFTA art 1904.2.

> *agreement is not of course, controlling in this case but the inclusion of this concept supports the Panel's conclusion in this respect.*[123]

The last sentence in this quote is telling. Evidently, even though the NAFTA panel did not directly apply art 3.4 of the Anti-Dumping Agreement as such, it did utilize that provision as an interpretative aid to clarify the law applicable before it. Notably, reference to WTO rules can also be found in the context of Mercosur. For example, in *Stimulus Regime for Wool Industrialization,* the Mercosur tribunal referred to the definition of export subsidy included in art 1 of the SCM Agreement, and used this definition to determine the ordinary meaning to be given to its applicable law.[124]

In general, it might be suggested that in multiple proceedings where WTO and RTA tribunals have to adjudicate on equivalent rules, they may refer to the similar rules of the other regime to clarify the meaning of the rules under interpretation on the basis of art 31(3)(c). Given the well-established body of WTO norms, and the widespread incorporation of WTO norms in RTAs, it seems particularly useful for RTA tribunals to seek interpretative guidance from the equivalent WTO norms.

B *Interpretative Weight of Extraneous Equivalent Norms*

The key issue in invoking relevant rules of international law is the interpretative weight that tribunals should give to extraneous equivalent rules. It seems plausible to suggest that identical or similar provisions in different treaties may generally have the same meaning unless a different meaning can be gathered from the circumstances.[125] There is a widely accepted presumption against conflicts in international law according to which 'every party to a treaty must in principle be presumed to intend to keep its treaty obligation in conformity with its other obligations under international law'.[126] Indeed, as pointed out by the PCIJ in *River Order,* 'unless the contrary be clearly shown by the terms of that article, it must be considered that reference was made to a Convention made effective in

---

123 *Imports of Flat Coated Steel Products from the United States (Mexico v US) (Opinion and Order of the Panel*) (Article 1904 Binational Panel, Secretariat File No MEX-94-1904-01, 27 September 1996) [364] (emphasis added).

124 *Compatibility of the Stimulus Regime for Wool Industrialization Granted by Uruguay through Law 13.695/68 and Complementary Decrees with the Mercosur Legislation Regulating the Application of Incentives within the Trade Area (Uruguay v Argentina)* (Mercosur Ad Hoc Tribunal, 4 April 2003) [50] (available in Spanish), cited in Marceau et al, above n 117, 523.

125 Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 129, 136.

126 Dorr, above n 91, 561. For a discussion on the rationality of this presumption, see Jenks, above n 33, 427–9; *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [37]–[43]; Pauwelyn, *Conflict of Norms*, above n 33, 240–4; Simma and Kill, above n 58, 686–91; L Oppenheim and H Lauterpacht (ed), *International Law: A Treatise. Vol 1 — Peace* (Longman, Green and Company, 7th ed, 1948) 858–9.

accordance with the ordinary rules of international law'.[127] Similarly, in *Right of Passage*, the Court stated that '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it'.[128] Therefore, as emphasized by Simma, 'it cannot be lightly presumed that a State would conclude a bilateral treaty that […] would place the State in breach of obligations owed to multiple other States'.[129]

Thus, when states choose to include similar provisions in different treaties, it might be a strong indication that they intend to confirm existing rules. Therefore, *absent any clear intention to deviate from the existing law* which may manifest in the terms, context, object, purpose, subsequent agreements and practice, preparatory work, and the circumstances of conclusion of a treaty,[130] it might be reasonable to suggest that similar provisions in different treaties should be interpreted to bear the same meaning. The tribunal in *Enron v Argentina*[131] stated clearly that

> the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law ... There is no evidence in this case that the intention of the parties to the Argentina — United States Bilateral Treaty might be different from that expressed in other investment treaties invoked.[132]

Similarly, in the *IMCO* case, the International Court espoused the presumption that the meaning of the term used in the treaty reflects, unless the contrary is stated, the meaning of the same term used in other treaties.[133] The Court was unable to support

> the view that when the Article was first drafted in 1946 and referred to "ship-owning nations" in the same context in which it referred to "nations owning substantial amounts of merchant shipping", the draftsmen were not speaking of merchant shipping belonging to a country in the sense used in international conventions concerned with safety at sea and cognate matters from 1910 onwards. It would, in its view, be quite unlikely, if the words "ship-owning nations" were intended to have any different meaning, that no attempt would have been made to indicate this. The absence of any discussion on their

---

127 *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ (ser A) No 23, [50].

128 *Right of Passage over Indian Territory (Preliminary Objections) (Judgment)* [1957] ICJ Rep 125, 142.

129 Simma and Kill, above n 58, 706.

130 See, eg, Oliver Dorr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521–604; Van Damme, above n 37; Gardiner, above n 65; Orakhelashvili, above n 56.

131 *Enron Corporation and Ponderosa Assets, LP v Argentina (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 14 January 2004).

132 Ibid [47].

133 Orakhelashvili, above n 56, 372.

> meaning as the draft Article developed strongly suggests that there was no doubt as to their meaning; that they referred to registered ship tonnage.[134]

Clearly, at the simplest level, it might be presumed that similarly worded provisions would have the same normative content. However, *'[t]aken out of its specific context a seemingly similar provision can assume an entirely different meaning'*.[135] This point is widely supported in doctrine. Van Damme and Gardiner suggest that '[a]ll interpretation is contextual'[136] and the ordinary meaning is 'immediately and intimately linked with context and then to be taken in conjunction with all other relevant elements of the Vienna rules'.[137] Thus, difference in context 'explains *why different courts and tribunals can interpret identical or similar treaty language differently*'.[138] Similarly, objects and purposes may also have an impact on the interpretative outcome of similar or identical provisions. Slotboom, by carefully comparing provisions dealing with discriminatory internal taxes in EC and WTO law, proved that interpretative outcomes of similarly worded obligations may be different as a result of differences in objectives and purposes of the two agreements.[139] Most importantly, the role of factors such as context, object and purpose of a treaty in defining the interpretative result of similarly worded provisions has also been firmly recognized in the jurisprudence of international courts and tribunals. The ITLOS tribunal famously captured that:

> *the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results*, having regard to, *inter alia,* differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.[140]

It is also to this effect, in interpreting national treatment clauses such as NAFTA art 1102 or similar provisions in BITs, tribunals have refused to simply adopt the practice of GATT/WTO.[141] In *Methanex v United States*, even though the Tribunal recognized that the language of NAFTA art 1102 and that of GATT art III:4 may be similar, it stated clearly that 'the term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose'.[142] It is worth noting that

---

134 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO) (Advisory Opinion)* [1960] ICJ Rep 150, 170.

135 Schreuer, above n 125, 136 (emphasis added).

136 Van Damme, above n 37, 213.

137 Gardiner, above n 65, 162.

138 Van Damme, above n 37, 213 (emphasis added).

139 Marco M Slotboom, 'Do Different Treaty Purposes Matter for Treaty Interpretation?: The Elimination of Discriminatory Internal Taxes in EC and WTO Law' (2001) 4(3) *Journal of International Economic Law* 557. See also Asif H Qureshi, Interpreting WTO Agreements: Problems and Perspectives (Cambridge University Press, 2006) 121.

140 *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3)* (2003) 42 ILM 1187, 1196 (emphasis added).

141 Schreuer, above n 125, 136.

142 *Methanex Corp v United States (Final Award of the Tribunal on Jurisdiction and Merits)* (2005) 44 ILM 1345, 1355 [16], citing *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3)* (2003) 42 ILM 1187, 1196 [51].

even within a single treaty regime like the WTO, identical language in different provisions may still not yield the same meaning if there are 'contextual differences'.[143] Indeed, in *European Communities — Measures Affecting Asbestos and Products Containing Asbestos,* in interpreting the term 'like products' in GATT art III:4, the Appellate Body noted that this term appears in many different provisions of the covered agreements such as GATT arts I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1.[144] Nevertheless, it emphasized that the term could have different meanings in different provisions.[145] The Appellate Body then considered that its interpretation of the term 'like products' in GATT art III:4 should be informed by GATT art III:1 which is 'a relevant context' of art III:4.[146]

Obviously, in absence of clear intention, similarly worded provisions should be interpreted similarly. The assumption appears reasonable because it reflects the task of interpretation as an integrated process whose outcome is jointly defined by various factors described in arts 31 and 32 of the VCLT. Moreover, the assumption can also balance between, on the one hand, the need for *unity* expressed in the requirement that identical or similar norms should be interpreted to have the same meaning, and on the other hand, the need for *reasonable differences* where a different interpretation of similar norms may still be correct if it is backed by concrete reasons.[147]

In the WTO–RTA context, the similarities between WTO and RTA provisions are *not accidental,* but result from the fact that RTAs are established under the framework of the WTO to further liberalize trade among certain WTO Members, which become parties to the relevant RTAs. In creating many RTA obligations, RTAs generally do not start from scratch but incorporate WTO obligations into their texts. It means that WTO-like provisions in RTAs generally originate in the relevant WTO provisions. Therefore, even though many WTO and RTA provisions are similar or even identical to each other, RTA rules should *generally* be interpreted in conformity with WTO rules, not the other way around. In national law, there is a presumption that if the legislature intended to make domestic law conform to the treaty, 'the court should...read an incorporative statute to conform to the borrowed treaty text unless it finds compelling evidence that Congress intended a different result'.[148]

The same intention to uphold existing WTO obligations also appears to exist where RTA parties incorporate WTO rules into RTAs. This is

---

143 Van Damme, above n 37, 242.

144 WTO Doc WT/DS135/AB/R (12 March 200) [88] ('*EC — Asbestos*').

145 Ibid [89].

146 Ibid [93].

147 Robert Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds), *Reasonableness and Law* (Springer London, 2009) 5, 12–3; Alberto Artosi, 'Reasonableness Common Sense and Science' in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds), *Reasonableness and Law* (Springer London, 2009) 69, 70.

148 John F Coyl, 'Incorporative Statutes and the Borrowed Treaty Rule' (2010) 50 *Virginia Journal of International Law* 655, 691. See also, Andre Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011) 149.

apparently clear where RTAs contain explicit provisions to this effect.[149] In the absence of such provisions,[150] the intention can still be assumed because the knowledge about WTO law would be undoubtedly the basis for the creation of the equivalent norms in RTAs. If RTA parties wish to create different commitments, they would simply use different treaty language rather than incorporate WTO provisions into RTA texts. Therefore, unless the opposite is stated, it seems consistent with the intention of RTA parties to read the incorporative RTA rules in conformity to the equivalent WTO rules.[151]

The interpretation of RTA rules in conformity with the equivalent WTO rules could also be based on the persuasiveness of the latter.[152] The WTO generally consists of well-developed rules which have also been intensively clarified by a rich body of case law. Thus, RTA tribunals, in interpreting incorporative RTA rules, may feel compelled by the persuasiveness of the equivalent WTO norms. In these cases, it seems natural and legitimate for RTA tribunals to read the RTA rules to conform to the equivalent WTO rules. Perhaps RTA tribunals do not need to go so far as to prove that the relevant WTO rules have evolved into customary international law in order to rely on them as an interpretative aid.[153] The reliance on extraneous rules in this manner 'focus[es] on the substance of an authority rather than on its sources'.[154] It is worth emphasizing that, in practice, persuasiveness has been frequently used as a basis for national courts to perform an interpretation that is consistent with international law.[155] For example, in *Sabally v Inspector General of Police,* the Gambian Supreme Court stated that while the Charter is not directly applicable to Gambian courts, the principles laid down in it 'were pertinent and relevant to the instant case'.[156] It would seem reasonable for international judicial bodies, including RTA tribunals to read the rules under interpretation in conformity to relevant rules of international law that they finds persuasive.

The discussion in the last several paragraphs raises an important and related question as to what happens if there is a clear intention to depart from the existing WTO law. This could be situations, for example, where RTAs incorporate obligations which reconfirm the existing WTO

---

149 See, eg, NAFTA art 903 (stating clearly that 'the Parties affirm with respect to each other their existing rights and obligations relating to standards-related measures under the GATT Agreement on Technical Barriers to Trade'); *EU — Second Mexico FTA* art 20.1; *EU — First Mexico FTA* art 2; *EU — Chile FTA* annex IV.

150 NAFTA art 903; *EU — Second Mexico FTA* art 20.1; *Australia — United States Free Trade Agreement*, signed 18 May 2004 [2005] ATS 1 (entered into force 1 January 2005) art 1.1.2 ('*Australia — US FTA*').

151 Coyl, above n 148, 691.

152 This idea is inspired by the arguments of Nollkaemper, above n 148, 155–7.

153 It is so argued by Locknie Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreement and the WTO Legal System* (Oxford University Press, 2006) 525, 543.

154 Nollkaemper, above n 148, 155.

155 Ibid 156.

156 *Sabally v Inspector General of Police and Others* [2002] AHRLR 87, [13] (Supreme Court of The Gambia), cited in Nollkaemper, above n 148, 144. Another case studied by Nollkaemper is *Obbo and Another v Attorney-General* [2004] AHRLR 256 (Supreme Court of Uganda).

commitments but provide for additional obligations (WTO-plus obligations) such as those relating to SPS measures, TRIPS measures, or trade remedies.[157] Thus, the relevant WTO and RTA provisions may no longer be equivalent, but diverging with each other in normative content. It seems irrational to automatically interpret WTO-plus obligations to mean the same normative content with the relevant WTO provisions because, where the departure is lawful, as discussed below, this would defeat the very objective of RTAs, that is, to further liberalize trade among subsets of WTO Members. Even though this article is primarily concerned with the interpretation of equivalent norms, a brief discussion on WTO and RTA diverging norms is necessary because in the interpretation process, tribunals may discover that the seemingly equivalent norms are indeed diverging norms.

In this regard, the approach suggested by the ILC Study Group on the Fragmentation of International Law appears useful. Specifically, it proposed that '*when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations*'.[158] In this direction, Voon further argues that there may be a rational way to read diverging WTO and RTA norms on trade remedies to create a single set of rights and obligations for the parties concerned.[159] Particularly, Voon suggests that it is permissible for RTA parties to modify WTO provisions on trade remedies, specifically to ban intra-regional trade remedies such as safeguards or anti-dumping measures, provided that they do so in accordance with the conditions specified in GATT arts XXIV:5 and 8,[160] and art 41(1)(b) of the VCLT[161] to ensure that (i) impact of the modification on other WTO Members is minimized, and

---

157 Bercero, above n 2, 400–1; World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO, 2011) 128–33; Horn, Mavroidis and Sapir, above n 2, 1565–88.

158 International Law Commission, *Conclusions of the Work of the Study Group*, *Fifty-Eighth Session*, UN Doc A/CN.4/L.702 (18 July 2006) Conclusion No 4 (emphasis added).

159 Tania Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' (2010) 59(3) *International and Comparative Law Quarterly* 625.

160 GATT art XXIV:5 is concerned with restricting impact on non-RTA Members, whereas the objective of art XXIV:8 is to lower intra-RTA barriers. See ibid 654–6.

161 Article 41(1) VCLT specifies that

> [t]wo 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;
> (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.

Voon suggests that since *inter se* modification is not regulated in WTO agreements, guidance may be sought from art 41(1) of the VCLT. As convincingly pointed out in her writing, reliance on art 41(1) is consistent with practice of the WTO where tribunals rely on not only arts 31–33 but also many other provisions of the VCLT. Moreover, her view here is also consistent with that of authorative scholars such as Koskenniemi and Pauwelyn. See Voon, above n 159, 648–54; *Report on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, [306]; Pauwelyn, *Conflict of Norms*, above n 33, 315.

(ii) sufficient intra-regional trade is liberalized.[162] This framework is originally presented by Voon to analyse the legality of diverging RTA provisions on trade remedies, but it seems also relevant to other diverging RTA provisions. This is because it addresses a question faced by diverging RTA norms generally, that is, when they can lawfully depart from WTO law. Even though the interpretation of the requirements in GATT arts XXIV:5 and 8 may be a difficult task given the ambiguities in these provisions,[163] This may not change the nature of Voon's conclusion that it is possible to interpret diverging WTO and RTA norms to create a single set of compatible obligations for the Members concerned.

In this logic, it might be further suggested that if diverging RTA provisions constitute a lawful modification of the relevant WTO provisions under GATT arts XXIV:5 and 8, and art 41(1)(b) of the VCLT, they should be enforceable. The lawfulness of the modification self-explains why this should be so. Conversely, even though RTA rules that illegally modify the corresponding WTO norms may still be valid,[164] they 'cannot … be enforced'.[165] This is because, as explained by Pauwelyn,

> to allow one of the parties to enforce the *inter se* agreement as against another party to the *inter se* agreement would not only giving effect to an illegal instrument from the point of view of both parties … it would constitute, moreover, confirmation of breach vis-à-vis third parties, given that the implementation of the *inter se* agreement necessarily breaches the rights of third parties. [166]

As a result, conflicts between WTO and RTA norms in this case should be decided in favour of the WTO rules. It can be seen that diverging WTO and RTA norms appear to be apparent conflicts, rather than inherent ones,[167] and thus they may be resolved by interpretation, without invoking of a third norm, such as a conflict clause, *lex posterior,* or *lex specialis*,

---

[162] Voon, above n 159, 648–63. See also Joost Pauwelyn, 'The Puzzle of WTO Safeguards and Regional Trade Agreements' (2004) 7(1) *Journal of International Economic Law* 109; Mitsuo Matsushita, 'Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of the GATT 1994' in Mitsuo Matsushita and Dukgeun Ahn (eds), *WTO and East Asia: New Perspectives* (Cameron May, 2004) 497, 513–4.

[163] Andrew D Mitchell and Nicolas J S Lockhart, 'Legal Requirements for PTAs under the WTO' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 217.

[164] It seems widely accepted in international law that unless the unlawful modification violates *jus cogens* norms, it is not automatically invalid. See, eg, 'Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' [1966] II *Yearbook of the International Law Commission* 51, 76; Wolframe Karl, 'Conflicts between Treaties' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law, Volume VII* (North-Holland, 1984) 468, 471.

[165] Pauwelyn, *Conflict of Norms,* above n 33, 313.

[166] Ibid.

[167] Apparent conflicts are those ones that can be solved by interpretation, whereas genuine conflicts are those ones that are established by clear language or clear evidence of intention, and thus can only be solved by a third norm. See generally Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 573, 605–6; Pauwelyn, *Conflict of Norms*, above n 33, 242–3; Jenks, above n 33, 429.

which seeks to give priority to one of the conflicting norms over the other.[168]

Returning to the interpretation of equivalent norms, it seems that the interpretation of incorporative RTA rules in a consistent manner with the equivalent WTO rules, where no intention to depart from WTO law exists, would have a significant impact on coherence of international trade law. It might help to eliminate situations in which similar or identical rules between the multilateral and regional trade regimes are interpreted differently without any concrete reasons for doing so. This role of consistent interpretation was already discussed in doctrine. Cho wrote in his 2006 article that

> *[r]egional trade tribunals can also help avoid fragmentation of global trade by interpreting RTA provisions coherently with the WTO rules*. By doing so, regional trade tribunals operate in the same normative force field as the WTO tribunal because both tribunals use the common grammar and syntax of free trade. [169]

Consistent interpretation by RTA tribunals might also be a potential channel by which RTA rules can, in the long run, exert effect on WTO law. Certainly, if there is a process of 'customarisation' of WTO law,[170] the widespread consistent interpretation performed by various RTA tribunals would speed up this process since it is evidence of the confirmation and reception of WTO law by various tribunals. [171] Moreover, consistent interpretation by RTA tribunals would contribute to an emergence of a common law of international trade.[172] Such a normative unity would in turn promote jurisdictional coherence because regardless of the forum in which a dispute is decided, it would be resolved based on an integrated body of norms, lowering the chance for inconsistencies to arise.

As a basic principle, RTA tribunals should interpret incorporative RTA rules to bear the same meaning with that of the relevant WTO rules. However, if there is compelling evidence, the presumption may be rebutted. The evidence could be found in the contexts, or objectives and purposes. If the divergent interpretation can be justified on such bases, it can be seen as *reasonable*.[173] It is also equally important that where there is no concrete reason to depart from the equivalent WTO norms, a divergent interpretation

---

168 For a discussion on these rules, see Mitchell and Voon, above n 10, 131–5; Klabbers, above n 80, 201–5; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *Nordic Journal of International Law* 27.

169 Sungjoon Cho, 'Defragmenting World Trade' (2006) 27 *Northwestern Journal of International Law and Business* 39, 86–8 (emphasis added).

170 Hsu, above n 153, 531–5. The term 'customarisation' refers to a process in which WTO law becomes customary law.

171 See Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 6 (finding that international judicial decisions could be seen as a source of *state practice*). See also Mitchell and Voon, above n 10, 120–4 (arguing that 'the development of PTA rules and PTA jurisprudence could affect the content or status of the customary rule').

172 See J H H Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000); Sungjoon Cho, 'Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism' (2001) 42(2) *Harvard International Law Journal* 419, 452–65.

173 See generally Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds), *Reasonableness and Law* (Springer London, 2009).

may be regarded as creating *unreasonable inconsistency.* The role of art 31(3)(c) is to specifically target this particular kind of inconsistency, rather than all differences.

Consistent interpretation by RTA tribunals is thus different from a 'blind or slavish reference' to WTO rules.[174] An interpretation in accordance with art 31(3)(c) does not mean that the whole interpretation process under arts 31 and 32 VCLT should be abandoned.[175] In contrast, an RTA tribunal would have to interpret RTA rules in accordance with these interpretation rules and might therefore, in light of that RTA's text, context, object and purpose, come to an interpretation that differs from the relevant WTO rules.[176] The latest development in WTO jurisprudence strongly confirms this point. In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* the panel pointed out that

> the various citations to the Draft Articles have been as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements. ... [T]he exercise undertaken by these panels and the Appellate Body has been to interpret the WTO Agreement on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.[177]

McLachlan is thus correct to remind that 'Article 31(3)(c) is only part of a larger interpretation process in which the interpreter must first consider the plain meaning of the words in their context and in light of the object and purpose of the provision'.[178] These factors explain 'why different courts and tribunals can interpret identical or similar treaty language differently'.[179] In general, the proper role for art 31(3)(c) might be to eliminate unreasonably inconsistent interpretations between WTO and RTA tribunals. Article 31(3)(c) should be granted neither a lesser nor a greater role.

III Conclusion

Currently, there seem to be no international legal rules that can satisfactorily eliminate the risks of multiple proceedings over essentially the same disputes before the WTO and RTA fora. In this context, art 31(3)(c) might provide a useful alternative. This is not magic tool, but it can to some

---

174 Hsu, above n 153, 541.

175 It should be noted that arts 31 and 32 VCLT do not *exhaustively* codify all interpretation means. See Waincymer, above n 4, 373–528; Van Damme, above n 37; Gardiner, above n 65.

176 Hsu, above n 153, 541.

177 WTO Doc WT/DS379/R (22 October 2010) [8.87]. For an analysis of this point, see Ronnie R F Yearwood, *Interaction between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness* of *WTO Law (A Prologue to a Theory)* (Routledge, 2012) 208.

178 McLachlan, 'The Principle of Systematic Integration', above n 31, 311.

179 Van Damme, above n 37, 213.

extent minimize the risks of inconsistent interpretations and rulings over similar or identical rules.

Indeed, in multiple proceedings before the two fora, both WTO and RTA rules might be qualified as 'relevant rules of international law applicable in the relations between the parties' within the meaning of art 31(3)(c) VCLT. Accordingly, RTA rules could be taken into account in interpreting WTO rules; and vice versa. As far as the equivalent WTO and RTA norms are concerned, RTA tribunals should take into account the equivalent WTO rules to *clarify* the meaning of the rules under interpretation. In doing so, RTA tribunals should *generally* read the incorporative RTA rules in *conformity* with the relevant WTO rules on which these RTA rules are based. However, if there is compelling evidence emerging from the full interpretative process, a divergent interpretation can still be reasonable. This consistent interpretation principle could help to avoid situations in which similar or identical rules between the multilateral and regional trade regimes are interpreted differently without any justifiable reasons for doing so.