

RESOLVING POTENTIAL JURISDICTION CONFLICTS IN ACFTA: THE PRINCIPLE OF *RES JUDICATA*

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RESOLVING POTENTIAL JURISDICTION CONFLICTS IN ACFTA: THE PRINCIPLE OF *RES JUDICATA*

YANG Songling*

Abstract

The article discusses potential jurisdiction conflicts of the newly created ACFTA and its possible resolution method, the Res Judicata principle. The article points out that jurisdiction conflicts have the possibility to break out in ACFTA based on theoretical analysis and case study in other similar RTA(Regional Trade Agreement)'s, such as NAFTA and MERCOSUR. According to the opinion of this article, principles of Forum non Conveniens, Lis Alibi Pendens, Lex Posterior and Lex Specialis, and Comity are not suitable for resolving the problem at the current stage. The article concludes that the Res Judicata doctrine is more suitable to settle potential jurisdiction conflicts in ACFTA. However, the Res Judicata principle is just able to partially resolve the potential jurisdiction conflicts of ACFTA even with help of the Asian legal culture. It will come across difficulty if jurisdiction conflicts are between ACFTA and the WTO. The article finally indicates that the full resolution of this matter requires the WTO to integrate the principle of Res Judicata into its DSU (Dispute Settlement Understanding) and to put more attention on the "operating" stage of RTAs, which needs support from the development of a uniform legal system for international trade.

I. INTRODUCTION

In 2010, the negotiation on economic co-operation between China and the Association of Southeast Asian Nations ("ASEAN") came to an end. As a result, the ASEAN-China Free Trade Area ("ACFTA") was established. The ACFTA covers eleven countries, mainly China and ten other ASEAN member states. The negotiation, formulation, and finally the establishment of the ACFTA have drawn the attention of legal academia. Among others, the dispute settlement mechanism of ACFTA is one of the key issues of academic research.

For a regional arrangement like ACFTA, where member states are concurrent members of other international organizations like ASEAN and the WTO, jurisdictions occasionally overlap and conflicts resulting from a multiplicity of memberships have always been a concern of academic research. The Mexico Soft Drink case¹ between the World Trade Organization ("WTO") and the North America Free Trade Area ("NAFTA"), the Argentina Poultry case² between the WTO and *Mercado Común del Sur*, (Southern Common

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¹ Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005).

² Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003).

Market in English, “MERCOSUR”) and the Brazil Tyres case³ between the WTO and MERCOSUR, as discussed below, will explore jurisdictional conflicts between the WTO and the Regional Trade Agreements (“RTA’s”). Besides ACFTA and ASEAN, Brunei Darussalam, China, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam are also member states of the WTO.⁴ There are more complicated potential jurisdictional conflicts covering three regional and international arrangements in this region, namely the ACFTA, the ASEAN, and the WTO. As a result, there will be a conflict of jurisdictions if the disputants bring their claims under different jurisdictions.

The *Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN* (“ACFTA DSM Agreement”) touches briefly on the possibility of overlapping jurisdictions. Article 2 of the ACFTA DSM Agreement stipulates the horizontal allocation of jurisdiction between the DSM of ACFTA and those under any other treaties. According to the Agreement, the DSM of the ACFTA does not require compulsory jurisdiction if another jurisdiction is available.⁵ However, the ACFTA’s DSM jurisdiction is exclusive once the dispute settlement proceeding is initiated under the DSM according to the disputant’s choice under the ACFTA DSM Agreement.⁶ The Agreement also brings the possibility for the co-existence of more than one DSM for a particular dispute if the parties consent.⁷ Similarly, the ASEAN framework also accommodates the possible co-existence of multiple dispute settlement fora among member states.⁸

³ Panel Report, *Brazil--Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (Jun. 20, 2005).

⁴ WTO (July 23, 2008), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁵ Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, para. 5, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan. 1, 2005) (“Subject to paragraph 6, nothing in this Agreement shall prejudice any right of the Parties to have recourse to dispute settlement procedures available under any other treaty to which they are parties.”).

⁶ *See id.* art. 2, para. 6 (“Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”).

⁷ *See id.* art. 2, para. 7 (“Paragraphs 5 and 6 above shall not apply where the parties to a dispute expressly agree to the use of more than one dispute settlement forum in respect of that particular dispute.”).

⁸ Protocol on Enhanced Dispute Settlement Mechanism, Nov. 20, 1996, ASEAN.T.S [hereinafter ASEAN Protocol] (“The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a

It appears that the ACFTA and ASEAN frameworks are adequate to deal with the issue of conflicting jurisdiction. However, problems arise when they overlap with the jurisdiction of the WTO. The Panels of the WTO usually use indirect stipulation, such as Article 11 Function of Panels, to clarify the matter of jurisdiction conflict.⁹ The WTO Panel would not concede their jurisdiction whether the case is undergoing proceedings or is adjudicated. Therefore, the absence of relevant regulations in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") may cause jurisdiction conflicts between the WTO and ACFTA in the future. This will be deduced through comparative analysis with other similar RTAs, such as NAFTA and MERCOSUR.

These problems will be illustrated through the utilization of cases and by conducting theoretical analysis in the following four sections. The first section discusses the issue of potential jurisdiction conflicts in ACFTA. The second section explains the non-applicability of four legal doctrines, namely *Forum non Conveniens*, *Lis Alibi Pendens*, *Lex Posterier* and *Lex Specialis*, and the Comity doctrine, which are often used to deal with jurisdiction conflicts. Subsequently, the third section points out that the principle of *Res Judicata* is more suitable in settling the jurisdiction conflicts of ACFTA based on its practice in the international community and its legal environment in East and Southeast Asia. The article tries to apply this principle in three distinguished stages, the initial, ongoing and afterward stages respectively. However, the *Res Judicata* principle is unable to be used to fully resolve the problem of jurisdiction conflicts; a further solution is needed to enhance the consummation of international legal systems, that is, a uniform legal system for international trade as discussed in the fifth section. This research paper aims at providing a solution to potential jurisdiction conflicts involving ACFTA. This will be tremendously beneficial to the field if this solution proves viable.

II. POTENTIAL JURISDICITON CONFLICTS IN ACFTA

Since ACFTA is a relatively new free trade area, there is no dispute arising under the DSM of ACFTA. Therefore, there is no specific case that illustrates the problem of jurisdiction conflicts under this specific context. However, it can be found that the

request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.").

⁹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

jurisdiction conflicts are likely to occur based on the comparative study between relative experiences of other similar Regional Trade Agreements.

A. Jurisdiction Conflicts in the International Level

The problem of overlapping jurisdictions between RTAs and the WTO is exacerbating because of the prominence of RTAs around the world. “Overlap or conflict of jurisdictions in dispute settlement can be defined as situations where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems.”¹⁰ The conflicts of jurisdiction exist in the following forms: “(1) when two fora claim to have exclusive jurisdiction over the matter; (2) when one forum claims to have exclusive jurisdiction and the other one “offers” jurisdiction, on a permissive basis, for dealing with the same matter or a related one; or (3) when the dispute settlement mechanisms of two different fora are available (on a non-mandatory basis) to examine the same or similar matters.”¹¹

There are some differences between overlapping jurisdictions in the international level and the domestic level. The primary distinction is that there is a uniform system in domestic legal systems to handle matters involving jurisdiction conflicts, which provides fora legal hierarchy to harmonize such conflicts and an efficient legislation body compared to those at the international community. The rulings of higher courts will take precedence over lower courts decisions notwithstanding the absence of a forum choice clause. The Permanent Court of International Justice (thereafter PCIJ) stated that:

“The Court’s position, in regard to jurisdiction, cannot be compared to the position of municipal courts, amongst which jurisdiction is apportioned by the state, either *ratione materiae* or in accordance with a hierarchical system.”¹²

Take the Chinese legal system as an example. There is a particular Chapter in its Civil Procedure Law to regulate the jurisdiction among its courts.¹³ For example, there are chapters on

¹⁰ Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs*, Executive Summary, Conference On Regional Trade Agreements World Trade Organization, Apr. 26, 2002, para. 7, available at http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf.

¹¹ See *id.*

¹² Rights of Minorities in Upper Silesia (Minority Schools), 1928 P.C.I.J. (ser. A) No 15, para. 23 (Apr. 26).

¹³ See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Apr 1, 2008) 2008 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112, ch. 2 (China).

the 'Jurisdiction by Levels of Courts', 'Territorial Jurisdiction' and 'Jurisdiction by Transfer and Jurisdiction by Designation' to deal with a variety of related issues.¹⁴ Such detailed regulations will avoid jurisdiction conflicts at large and it will also be more convenient to solve disputes should they arise. For instance, 'if there is a dispute over a jurisdiction among people's courts, it shall be resolved by the disputing parties through consultation; if the dispute cannot be resolved through consultation, the disputing courts shall ask their superior people's court to designate the jurisdiction.'¹⁵ With regard to international jurisdiction, similar rules do exist to regulate their own tribunals or courts under the stipulated international agreement or international organization. However, there are no such rules to regulate the relationship between different courts and tribunals since the legal source for international tribunals is derived from consensus.¹⁶ This special characteristic of international courts or tribunals is also the difficulty for resolving their jurisdiction conflicts.

B. The Causation of Jurisdiction Conflicts in Other Similar RTAs

The occurrence of jurisdiction conflicts will vary according to different stipulations about jurisdiction and the organizational structure of RTAs. Exclusive forum clauses on jurisdiction often exist in the legal texts of Customs unions and closely integrated RTAs which preclude members of RTA from triggering the Dispute Settlement Mechanism ("DSM") of the WTO.¹⁷ Agreements of this type will seldom face overlapping jurisdiction since members of these closely integrated RTA will usually have a designated DSM in their agreement. The parties' choice of DSM is often easier to implement. For instance, the European Union has exclusive competence to deal with Common Commercial policies since it is more closely integrated. As a result, no member will trigger the DSM of other forums, such as the WTO. Conversely, the WTO will not interfere with the internal affairs of closely integrated RTA since it acknowledges its status in Article XXIV of GATT 1947.

The problem of jurisdiction conflict will most likely occur in FTAs (Free Trade Area). Members of FTAs are usually able to choose their preferred forum. However, disputants cannot initiate a

¹⁴ *Id.* ch. 2.

¹⁵ See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) 2008 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112, art. 37, para. 2 (China).

¹⁶ CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 57 (2003).

¹⁷ Joost Pauwelyn, *Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231 (2004).

second claim in another tribunal according to the regulations of many FTAs agreements.¹⁸ For example, Article 2 of ACFTA Framework Agreement on Goods¹⁹ explicitly requires the compliance of Article III of GATT 1994 on national treatment. In this situation, if the domestic regulation of an ACFTA member violates both Article 2 of ACFTA Framework Agreement on Goods and Article III of GATT 1994, there will be a conflict of jurisdiction since disputants are also members of the WTO. For instance, the complaining party may prefer to settle their dispute under the DSM of ACFTA because of its advantages, and the defending party, on the other hand, would prefer the DSM of WTO since there is a valid excuse under WTO system. Their preference will be reversed if the advantage that each disputants hold has been readjusted. Since ACFTA is a newly established mechanism, there is no case law to prove this argument in practice. However, this situation does happen in other similar free trade areas, such as Canada – Certain Measures Concerning Periodicals cases in NAFTA.²⁰ The situation in ACFTA now is more complicated than that of NAFTA because this region involves ACFTA, WTO and ASEAN, each with overlapping jurisdiction. Different considerations of disputants will easily influence their preference of jurisdiction, which will easily lead to overlapping jurisdictions.

The world consists of individual and social diversity, where rational egoism and confined altruism of individuals will operate to shape demand. Consequently, conflicts of interest will be inevitable where infinite needs compete for limited resources and market.²¹ If the jurisdictions of both the ACFTA and the WTO are applicable to a dispute, some disputants may prefer to initiate WTO proceedings because other members could participate as third parties. Hence, the disputes seem more commercial rather than political. The review process of the appellate body at the WTO is another advantage to FTA members since it makes the WTO's compliance mechanism more legitimate compared to the power-based aspects of DSM in FTAs where there is potential influence of power disparities

¹⁸ *Id.* at 285.

¹⁹ Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation, China-ASEAN, art. 2, Nov. 4, 2002, available at <http://www.worldtradelaw.net/fta/agreements/aseanchinafta.pdf> ("Each Party shall accord national treatment to the products of all the other Parties covered by this Agreement and the Framework Agreement in accordance with Article III of the GATT 1994. To this end, the provisions of Article III of the GATT 1994 shall, mutatis mutandis, be incorporated into and form an integral part of this Agreement.").

²⁰ Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, WT/DS31/AB/R (Jun. 30, 2007).

²¹ See generally JOHN B. DAVIS, *THE THEORY OF THE INDIVIDUAL IN ECONOMICS: IDENTITY AND VALUE* (2003).

among parties of FTAs.²² ASEAN countries with stronger bargaining power will most likely adopt this, since they have sufficient resources and abundant experience to support the litigation. While other weaker ASEAN countries may prefer the DSM of ASEAN, since it puts more emphasis on consultation and they are able to handle this situation in their “ASEAN Way”.²³ Therefore, the jurisdiction conflicts do occur.

C. Current Measures for Jurisdiction Conflicts in RTAs

As mentioned before, ACFTA already has its own regulation for resolving the problem of jurisdiction conflict. That is only one method of resolving the problem in today’s world and other RTAs also have their own measures. Westbrook stated that “courts in various countries are increasingly dissatisfied with traditional rules (for resolving conflicts of jurisdiction and norms), considering them to be inadequate in a modern, globalizing world.”²⁴ Thus, different RTAs attempt to resolve the matter of jurisdiction conflicts by using a different approach.

Some RTAs provide non-compulsory regulations for jurisdiction, such as South Pacific Regional Trade and Economic Agreement. Several RTAs, however, contain regulations on compulsory jurisdiction. For example in MERCOSUR, where “the state parties declare that they recognize as obligatory, ipso facto and without the need of a special agreement, the jurisdiction of the Arbitral Tribunal which in each case is established in order to hear and resolve all controversies which are referred to in the present Protocol.”²⁵ There are many forms of compulsory regulations. For instance, some RTAs contain forum selection clauses, which allow the resolution of a dispute either in the RTA forum or in any other forum at the discretion of the complaining party, such as NAFTA, Chile-Mexico Free Trade Agreement and so on. In order to avoid overlapping jurisdiction, some RTAs further provides for exclusive forum clauses, in addition to the choice of forum clause. For instance, the US-Israel Free Trade Agreement stipulates that “if the dispute settlement panel under the agreement or any other international dispute settlement mechanism is invoked with respect to any matter, the mechanism shall have exclusive jurisdiction over

²² William J. Davey, *Dispute Settlement in the WTO and RTAs*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 356 (Lorand Bartels & Federico Ortino, eds., 2006).

²³ Joel Vander Kooi, *The Asean Enhanced Dispute Settlement Mechanism: Doing It the “Asean Way”*, 20 N.Y. INT’L L. REV. 1 (2007).

²⁴ Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 TEX. INT’L L.J. 567, 586 (SPECIAL ISSUE, 2003).

²⁵ Protocol de Brasilia for the Solution of Controversies in Mercosur, art. 8, Dec.17, 1991, available at <http://www.sice.oas.org/trade/mrcsr/mrcsrdoc.asp>.

that matter.”²⁶ NAFTA even goes further by stipulating that, “in any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

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

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.”²⁷ The purpose for these exclusive clauses is to avoid potential jurisdiction conflicts.

D. A Case Study on the Deficiencies of Current Measures on Jurisdiction Conflicts

Although there are different measures for jurisdiction conflicts and they are seemingly adequate to resolve this matter, the following cases will illustrate the deficiencies of this regulation. Taking into account their own benefits, the disputants will try their best to find the most suitable DSM which is sometimes not in full compliance with the forum choice clauses of RTAs. This phenomenon proves that the current clauses on jurisdiction conflict in the ACFTA agreement are insufficient and it is necessary to improve the measures for the settlement of jurisdiction conflicts in ACFTA.

1. Mexico—Soft Drink

This case has firstly been triggered under the jurisdiction of NAFTA’s DSM because the United States restricted the importation of Mexican sugar due to Mexico’s violation of its national treatment obligations under GATT in certain Mexican trade measures. Employing the regulation on the composition of arbitral panel in Chapter 20 of NAFTA, the US obstructed Mexico’s decision to resolve this dispute in NAFTA by refusing to the formation of an arbitral panel.²⁸ According to Article 2011 of the NAFTA which stipulates that “Panelists shall normally be selected from the roster”²⁹

²⁶ Agreement on the Establishment of a Free Trade Area, Isr.-U.S., art. 19, para. 1(f), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp (last visited Apr. 24, 2011).

²⁷ North America Free Trade Agreement, U.S.-Can.-Mex., art. 2005, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

²⁸ See Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 1.2, WT/DS241/R (Apr. 22, 2003).

²⁹ NAFTA, *supra* note 27, art. 2011.

and Article 2009 of NAFTA regulates that “the Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists.”³⁰ However, the agreement on a roster has never been established because panelists comprising the arbitral panel are decided on a case-by-case basis by the parties in dispute.³¹ Thus, in order to compel the United States to agree to the group of panelists under the NAFTA, the government of Mexico then levied an import tax on soft drinks sweetened with non-cane sugar. The act of levying an import tax is followed by a complaint by the United States lodged through the DSM of the WTO.³² The WTO Panel received this claim under the circumstance that this dispute is undergoing proceedings in another DSM. This case illustrates that there will be parallel proceedings between the WTO and RTAs because each forum has its own advantages.

During the course of the WTO proceedings, Mexico did not invoke the forum exclusion clause of NAFTA³³ to argue that there is an impediment to the WTO’s jurisdiction in preliminary stages of the proceedings.³⁴ Mexico argued that the WTO Panel should refuse to exercise jurisdiction because the WTO dispute would eventually be linked to the NAFTA dispute.³⁵ The legal basis for Mexico’s argument was that the WTO Panel has ‘the power to refrain from exercising jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as NAFTA provisions’.³⁶ Consequently, Mexico tried to put forward the principle of “judicial economic”, which is also objected by the Panel.³⁷ “In Mexico’s opinion, it would be not appropriate under the circumstances of this case for the Panel to exercise its substantive jurisdiction.”³⁸

The WTO Panel was of the opinion that “under the DSU, it has no discretion to decide whether or not to exercise its jurisdiction in a

³⁰ NAFTA, *supra* note 27, art. 2009.

³¹ See DAVIS, *supra* note 21, at 351.

³² NAFTA, *supra* note 27, art. 2005(6).

³³ Appellate Body Report, *Tax Measures on Soft Drinks and Other Beverages*, para. 44, WT/DS308/AB/R (Mar. 6, 2006)..

³⁴ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005), para. 182.

³⁵ *Id.* para. 4.103.

³⁶ *Id.* para. 4.189.

³⁷ *Id.* para.4.189. “Judicial economic” means that “WTO panels do not need to rule on every single claim made by complaining parties, only on those required to settle the dispute in question.” See Alberto Alvarez-Jiménez, *The WTO Appellate Body’s Exercise of Judicial Economy*, *Journal of International Economic Law*, 393 (June, 2009)

³⁸ *Id.* para. 4.194.

case properly before it.”³⁹ “Furthermore, even if it had such discretion, the Panel did not consider that there were facts on the record that would justify the Panel declining to exercise its jurisdiction in the present case.”⁴⁰ According to Article 11 of the DSU, “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”⁴¹ In order to strengthen its argument, WTO panel refer to the statement of Appellate Body in *Australia—Measures Affecting Importation of Salmon* case, which pointed out that the purpose of the DSM of WTO is to settle the dispute in particular case positively.⁴² The WTO Panel therefore considered the refusal to exercise jurisdiction to be a violation of Articles 3.2 and 19.2 of the DSU, which will cause the non-performance of the Panel’s duties and breach the rights of the United States.⁴³

In order to support the Panel’s finding, the Appellate Body used its previous statement and pointed out that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.”⁴⁴ Then, the Appellate Body mentioned that “it is difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it”.⁴⁵ It is obvious that the Appellate Body interpreted the language of the DSU on jurisdiction by a strict textual methodology and formed the opinion that the language of Article 7 and 11 of DSU was imperative. The Appellate Body was of the opinion that the panel should consider the principle of judicial economy as its inherent power. It further clarified that settling an established dispute under its jurisdiction is part of the panel’s obligations according to the relevant provisions of the DSU.⁴⁶ A disputant who triggers a procedure under the DSM of the WTO has the right to be “entitled to a ruling by a WTO panel”.⁴⁷ The ruling mentioned here should refer to the substantive issue of the complaint

³⁹ *Id.* para. 7.18.

⁴⁰ *Id.*

⁴¹ DSU, *supra* note 9, art. 11.

⁴² Appellate Body Report, *Australia -- Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998).

⁴³ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005), para. 7.4-7.9.

⁴⁴ Appellate Body Report, *Tax Measures on Soft Drinks and Other Beverages*, para. 45, WT/DS308/AB/R (Mar. 6, 2006).

⁴⁵ *Id.* para. 47.

⁴⁶ *Id.* para. para. 45, 48-53.

⁴⁷ *Id.* para. 52.

and not a just procedural one.⁴⁸ The reason behind the Appellate Body's decision is that it will "disregard or modify" the Panel's obligation by refusing to exercise its jurisdiction. This reasoning is also reflected in the previous decision. "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. Nothing in the DSU gives a panel the authority either to disregard or to modify. explicit provisions of the DSU."⁴⁹ Appellate Body further explained that "It is difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it."⁵⁰

Although it seems logical to state that the rights of the United States will be encroached upon if the WTO Panel refuses to exercise its jurisdiction on the issue, one important issue has been overlooked. The DSM of NAFTA has jurisdiction over this problem, which means that the United States have access to justice. The rights of United States will be impaired if there are no other methods of settling the dispute except by resorting to the DSM of WTO.

The Soft Drinks case demonstrates that forum exclusion provisions are obsolete in preventing disputing parties in initiating other dispute mechanisms. Other tribunals, especially the WTO, will take over the case since it considers that it is their right to decide matters within their own jurisdiction.⁵¹ The provisions in ACFTA and NAFTA on jurisdiction are similar. Therefore, it is reasonable to deduce that the responding party will choose a different forum for dispute resolution if it confers more benefits when disputes break out under the DSM of ACFTA. This phenomenon demonstrates that current provisions on forum choice provided in the DSM of ACFTA are inadequate to avoid jurisdiction conflicts.

2. Argentina—Poultry

The dispute concerns the imposition by Argentina of anti-dumping measures on imports of poultry from Brazil. Brazil re-litigated the same dispute in the DSM of the WTO since the award by the MERCOSUR tribunal is undesirable. Argentina, of course, opposed the WTO Panel's exercise of jurisdiction in its preliminary

⁴⁸ Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO--FTA Nexus: A Potential Approach for The WTO*, 19 EUR. INT'L L.J. 571, 578 (2008).

⁴⁹ Appellate Body Report, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Jul. 2, 1996).

⁵⁰ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, para. 51, WT/DS308/R (Oct. 7, 2005).

⁵¹ Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R (Aug. 28, 2000).

argument and requested that “in light of the prior MERCOSUR proceedings, the Panel refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings.”⁵² In Argentina’s perspective, this is a breach of the obligation of good faith, estoppel, and the general rule of interpretation stipulated in the Vienna Convention on the Law of Treaties. Argentina argued that in resolving the current dispute, the Panel should take into account the ruling of MERCOSUR tribunal since “it was a relevant rule of international law applicable in the relations between parties.”⁵³ The Panel of WTO dismissed Argentina’s suggestions, the reasons of which will be analyzed as follows. The facts of this case illustrate that there are various ways which will lead to overlapping jurisdictions. A disputant can seek refuge from the DSM in another forum to achieve its desired outcome if the former decision of the tribunal is unfavorable.

Paraguay, as a third party, was of the same opinion as Argentina, and considered that, “in accordance with the general principles of public international law, this case is *res judicata* because it has already been brought under the dispute settlement procedure established within the framework of MERCOSUR, and under the Brasilia Protocol in particular.”⁵⁴ Paraguay further mentioned that: “the MERCOSUR Protocol of Olivos which, although not yet in force, allows MERCOSUR members to choose the forum in which they wish disputes to be settled, with the restriction constituted by the exclusion clause once a procedure has been initiated in one forum, this precludes resorting to other forums provided in the Protocol.”⁵⁵ Notwithstanding their arguments, the Panel held that “the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the DSU.”⁵⁶ The Panel agreed with the argument of US and held that “there is no basis for a WTO panel to apply the principle of estoppel.”⁵⁷ It found that “there is no evidence on the record that Brazil made an express statement that it would not bring WTO

⁵² See Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.17, WT/DS241/R (Apr. 22, 2003).

⁵³ Vienna Convention on the Law of Treaties art.31, para. 3, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

⁵⁴ See Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.28, WT/DS241/R (Apr. 22, 2003).

⁵⁵ See *id.* para. 7.29.

⁵⁶ See *id.* para. 7.38.

⁵⁷ See Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.28, WT/DS241/R (Apr. 22, 2003); Olivos Protocol for the Settlement of Disputes in Mercosur art. 1, Feb. 18, 2002, 42 I.L.M. 2

dispute settlement proceedings in respect of measures previously challenged through MERCOSUR” since estoppel can only “result from the express, or in exceptional cases implied consent of the complaining parties” based on the award of EEC (Member States) – Bananas case.⁵⁸

In order to substantiate its argument, the WTO Panel compared the previous and current dispute settlement protocols of MERCOSUR. The former one, called MERCOSUR’s Brasilia Protocol, states that a complaining party has the right to choose a forum indicating that its clause is not exclusive. By contrast, the new dispute settlement protocol contains an exclusive forum clause which comes into effect when dispute resolution has been initiated within the WTO system.⁵⁹ The Panel decided that the old mechanism should be given precedence in these circumstances whereas the new DSM should still be applicable in the future. According to the Panel’s reasoning, the new DSM agreed by MERCOSUR members indicated that the old mechanism was currently workable.⁶⁰ Although the reasoning is correct, the Panel of WTO did not take into account whether the decision is appropriate under the current circumstances.

Since some members of ACFTA face the option of choosing the DSM of the WTO and the Protocol DSM of ASEAN, it is possible that they will pursue another DSM procedure if it guarantees a better outcome. Some may find that the WTO Panel’s insistence to receive the claim can find support from the legal text of the old mechanism of MERCOSUR, ACFTA agreement does not have the similar provision as those of MERCOSUR. Although there may be no excuse or even so-call coincidence such as those found in the Argentina-Poultry case, the Panel of WTO, for instance, will still be able to receive the dispute depending on other arguments such as the Argentina-Poultry case or the argument that it had to fulfill its obligations in the *Mexico-Soft Drink* cases.⁶¹ Although the DSMs of ACFTA and ASEAN both contain a forum choice clause, they are insufficient to exclude the possibility of jurisdiction conflicts. This also explores the shortcomings of current forum choice clauses in ACFTA, which only regulates the initial stages of a dispute but not the after award stage.

⁵⁸ See *supra* note 2, para. 7.38.

⁵⁹ Olivos Protocol for the Settlement of Disputes in Mercosur art. 1, Feb. 18, 2002, 42 I.L.M. 2.

⁶⁰ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005), para. 51.

⁶¹ See Panel Report, *Brazil--Measures Affecting Imports of Retreaded Tyres*, para. 2.5(e), WT/DS332/R (Jun. 20, 2005).

3. The Brazil Tires Dispute

In this case, Uruguay challenged the Brazil import ban on retreaded tires under the MERCOSUR⁶² (Southern Common Market) and claimed that the ban of Brazil “was incompatible with Brazil’s obligations under MERCOSUR.”⁶³ The MERCOSUR tribunal affirmed Uruguay’s claim and Brazil subsequently reenacted a new ban, which excluded remolded tires of MERCOSUR countries.⁶⁴ The European Communities then claimed that Brazil’s actions violated Article XI of GATT on the prohibition on quantitative restriction.⁶⁵ This case shows that the action of disputants following the award from a particular RTA can be subject to challenge by other states from another DSM if they consider it disadvantageous. The new proceedings will lead to the problem of jurisdiction conflicts.

The key issue here on jurisdiction conflict is whether Brazil’s actions constituted “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”⁶⁶ as European Communities claimed. The WTO Panel explained that the exemption by Brazil did “not seem to be motivated by capricious or unpredictable reasons.”⁶⁷ “It was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR.”⁶⁸ Although the Appellate Body was of the same opinion as the panel that compliance with the MERCOSUR ruling is not capricious or random, it criticized the Panel’s rationale, as bearing “no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.”⁶⁹ Since the exemption resulted in more tires being imported into Brazil, the Appellate Body discovered that “it bore no relationship to the legitimate objective pursued by the Import Ban that fell within the purview of Article XX(b), and even went against this objective.”⁷⁰ As a result, the

⁶² *Id.*

⁶³ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007).

⁶⁴ See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, para. 2.14, WT/DS332/R (Jun. 20, 2005).

⁶⁵ See Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, para. 123, WT/DS332/AB/R (Dec. 3, 2007).

⁶⁶ See *id.*

⁶⁷ See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, para. 7.272, WT/DS332/R (Jun. 20, 2005).

⁶⁸ See *id.*

⁶⁹ See Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, para. 232, WT/DS332/AB/R (Dec. 3, 2007).

⁷⁰ *Id.* para. 228.

exemption that Brazil enacted still constitutes an arbitrary or unjustifiable discrimination in the Appellate Body's opinion.⁷¹

This case explores the issue whether the judgment awarded by one jurisdiction will be recognized by another jurisdiction and how such a judgment reconciles with the laws of other jurisdictions. The Appellate Body also noticed the potential conflict of jurisdictions and explained that: "In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all the trade' within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union."⁷² The different opinions of Panels and the Appellate Body reveal that this is still a matter subject to debate among experts and scholars of international law.

Another issue emerged as to whether the disputant should be responsible for its actions according to the judgment awarded by one DSM if such action violates its obligation under another DSM and defining the extent of responsibility the disputing party holds. The European Communities in this case claimed that Brazil should bear at least partial responsibility for the MERCOSUR exemption since Brazil did not include human health and safety as its defense in the MERCOSUR proceedings.⁷³ The Panel pointed out that it is not suitable "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."⁷⁴ The Appellate Body concurred.⁷⁵ The problems mentioned above will seriously undermine the authority of any RTA. Based on the analysis of this case, even if the action is consistent with the award of RATs, it will still possibly be charged with the violation of its obligation under the WTO covered agreements.

Article XXIV of GATT 1994 does not have the same regulations as the DSU, which allows for third-party participation. A RTA or its dispute settlement mechanism does not have the obligation to

⁷¹ *Id.* para. 228.

⁷² *Id.* n. 445.

⁷³ See Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, para. 7.275, WT/DS332/AB/R (Dec. 3, 2007).

⁷⁴ See *id.*, para. 7.276.

⁷⁵ See *id.*, para. 234.

consider the opinions of third parties.⁷⁶ However, the decisions made by the RTA tribunal may influence the rights of third parties. This problem will become more apparent as the number of RTAs is increasing. Article 10 of Framework Agreement on DSM of ACFTA stipulates that third parties may refer to “a dispute and the remaining Parties”,⁷⁷ which in this case means the Party of ACFTA member states except the disputing parties. Parties outside of ACFTA are not mentioned. Article 11 of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism also has a similar regulation that refers to “Member States” only.⁷⁸ This regulation leaves space for third parties to challenge the decision of ACFTA DSM if its award is disadvantageous.

III. POSSIBLE SOLUTIONS TO JURISDICTION CONFLICTS IN INTERNATIONAL DOMAIN

There are numerous solutions to jurisdiction conflict as explored in the aforementioned cases. However, this chapter reveals that these solutions are currently unsuitable in resolving potential jurisdiction conflicts involving ACFTA.

A. *Forum Non Conveniens*

The principle of *Forum Non Conveniens* permits a court with reasonable jurisdiction to stay or dismiss a litigation when there is a more appropriate dispute settlement forum.⁷⁹ The *Forum Non Conveniens* doctrine is embedded in most domestic legal systems and has been widely recognized by domestic courts. However, this principle has not received warm reception in the international law arena. International tribunals in particular public international law, seldom apply it. *Interim text of Hague Convention on Jurisdiction and Judgments* recognized the importance of the *Forum Non Conveniens* doctrine. Therefore, Article 22 of the Interim text is designated to “exceptional circumstances for declining jurisdiction”, containing a separate *Forum Non Conveniens* element.⁸⁰ This is a

⁷⁶ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 15, available at http://www.wto.org/english/docs_e/legal_e/10-24_e.htm (last visited Apr. 24, 2011).

⁷⁷ Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation, China-ASEAN, art. 10, Nov. 4, 2002, available at <http://www.worldtradelaw.net/fta/agreements/aseanchinafta.pdf>.

⁷⁸ See ASEAN Protocol, *supra* note 8, art. 11.

⁷⁹ See J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, ATHENS, AUGUST 1994, at 10 (1995).

⁸⁰ Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, available at <http://www.hcch.net/e/conventions/draft36e.html> (last visited Jan.

preliminary step for the doctrine to be accepted in the international arena.

This doctrine encounters a lot of difficulties when it is applied in public international law. One of its main criticisms is its unpredictability in application due to the wide discretion afforded to courts and tribunals. Many jurists and scholars criticize the doctrine as unnecessary, redundant, and outcome-determinative.⁸¹ “The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.”⁸² Many countries follow the civil law system and they expect the dispute resolution mechanism to be more predictable and systematic. As the *international community increasingly accepts the Forum Non Conveniens doctrine*, clarification on its application will be imminent. As a result, the principle of *Forum Non Conveniens* is currently not the most suitable method in resolving jurisdiction conflicts involving ACFTA.

B. *Lis Alibi Pendens*

This doctrine provides that proceedings on the same facts cannot be commenced if there are parallel proceedings pending in another court of law. The *LisAlibi Pendens* doctrine is designed to avoid the possibility of irreconcilable judgments rendered by parallel proceedings, where disputes involve the same parties and the same cause of action.⁸³ Paragraph 5 of Article 2 of the DSM of ACFTA⁸⁴ contains a similar provision, whereas the DSM of WTO and DSM of ASEAN do not. However, many commentators argue that the principle of *lis alibi pendens* as a private international law principle is difficult in the public international law sense, WTO context since private international law usually has the uniform domestic legal system as a background.⁸⁵ Under these circumstances, jurisdiction

31, 2004), reprinted in A.L.I., International Jurisdiction and Judgments Project: Report (Apr. 14, 2000) [hereinafter Hague Convention].

⁸¹ See Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 210-15 (1987); see also Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 843 (1985); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 72-73, (1991).

⁸² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

⁸³ See FAWCETT, *supra* note 79, at 26.

⁸⁴ See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, ¶ 5, opened for signature Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

⁸⁵ See Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Sources of Conflict between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 844 (2005).

conflicts between the WTO and RTAs may arise since different trade unites have political bias and will accordingly choose their preferred dispute settlement forum.⁸⁶ International law is responsible to provide a solid foundation for these kinds of conflicts, including a uniform legal system for international trade and the treaty-making enterprise as a whole.⁸⁷ At this stage, it will be difficult for the doctrine of *Lis Alibi Pendens* to increase its role on the resolution of jurisdiction conflicts among ACFTA, ASEAN and WTO.

C. *Lex posterior* and *Lexspecialis*

Pauwelyn suggests that both *lex posterior* and *lex pecialis* can be applicable when the issue of jurisdiction conflict appears before the WTO and RTAs but both lack an explicit conflict settlement clause. However, the preconditions for its application are very strict, which require the same subject matter, scope, and substance.⁸⁸ Some scholars have criticized this approach. Koskeniemmi, for instance, notes that the doctrine of *lex specialis* “may be offset by normative hierarchies or informal views about “relevance” or “importance”” since its application has to be weighed against other relevant international principles and what is ‘general’ and what is ‘particular’ are hard to distinguish.⁸⁹ There is no unified definitive set of rules in international law. The WTO, ACFTA and ASEAN each have their own legal framework. Many scholars have tried to develop a “hierarchy of norms” among the WTO and the RTAs according to the requisite provisions of GATT and GATS.⁹⁰ However, the “hierarchy of norms” has not been realized yet. *Lex posterior* and *lex specialis* doctrines are only available under a uniform legal system. Therefore, the doctrines of *lex posterior* and *lex specialis* are only applicable in the three respective legal systems. It is unreasonable to say that the *force and effect* of the regulation of ACFTA is superior in the legal sense to that of the WTO according to the doctrine of *lex posterior*. Thus, these doctrines are unsuitable to settle jurisdiction conflicts.

⁸⁶ See generally FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM (1995).

⁸⁷ Cf. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 551 (1993).

⁸⁸ Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands*, 25 MICH. J. INT’L L. 903, 912-1015 (2004).

⁸⁹ Martti Koskeniemmi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 58, U.N. Doc. A/CN.4/L.682, (Apr.13 2006).

⁹⁰ Isabelle Van Damme, *What Role is there for Regional International Law in the Interpretation of the WTO Agreements?*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 553, 564 (Lorand Bartels & Federico Ortino eds., 2006).

D. Comity

Comity is a principal rule in settling conflicts of jurisdiction in the domestic level.⁹¹ According to this principle, a court may refuse to exercise jurisdiction if there is a more appropriate venue. However, this principle can be described as ‘a concept with almost as many meanings as sovereignty’.⁹² This means that the principle has no definite status or contours in international law. Its purpose is to maintain amicable relationships between sovereign states. This however, is not the tribunal’s obligation. This *MOX Plant*⁹³ case reflects the application of the principal of comity in public international law. This case shows that the comity principle represents respect for the sovereignty and competence of another legal institution.⁹⁴ In order for the ECJ to continue its proceeding on the same dispute, the tribunal of the U.N. Convention on the Law of the Sea suspended its proceedings on the MOX Plant case. This is because the ECJ might be a more suitable tribunal to settle this dispute.⁹⁵ It seems that the tribunal places much attention on the “mutual respect and comity that should [exist] between judicial institutions” in order to reach a peaceful resolution of disputes.⁹⁶

The main reason for the non-application of the comity doctrine in some potential jurisdiction conflicts is due to its difference from international law. International law, such as a particular agreement or treaty and customary international law, usually create direct obligations for its member states.⁹⁷ Justice Gray points out in *Hilton*: “The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is...”⁹⁸ The principle of comity lacks a compulsory element for its application in international law. There is no obligation on public international tribunals to apply the principle of comity. For instance, Paul required to “avoid any explicit statement that comity is binding as a rule of international law”.⁹⁹

The East and Southeast Asia has a suitable legal and cultural back

⁹¹ See Anne-Marie Slaughter, *Global Community of Courts*, 44 HARV. INT’L L.J. 191, 205 (2003).

⁹² Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708, 708 (1998).

⁹³ See The MOX Plant Case, No.3 (P.C.Arb. Jun.24, 2003), available at <http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf> (order granting suspension of proceedings on jurisdiction and merits, and request for further provisional measures).

⁹⁴ *Id.* para. 28.

⁹⁵ *Id.* para. 29.

⁹⁶ *Id.* para. 28.

⁹⁷ See Restatement (Third) of Foreign Relations Law § 111 cmt. b (1986).

⁹⁸ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

⁹⁹ See also Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 48 (1991).

ground for the application of the comity doctrine. Confucianism is deeply embedded in the Southeast Asian psyche. The core concept of Confucianism is harmony.¹⁰⁰ This ideology will no doubt influence the tribunal of ACFTA, thereby it is more likely to avoid litigation by not exercising its discretionary power. The comity doctrine appears to satisfy the legal culture of harmonization in this region. However, the Panel of WTO will insist on exercising its inherent power since this is part of its obligation. The Panel of WTO will violate its obligation if it gives up its jurisdiction for the acceptance of the comity doctrine. It is unfair for one forum to accept the doctrine of comity while the other is not subject to the same obligation. The threshold in employing this doctrine is very important. If the criterion for applying the comity doctrine is too high, tribunals can exercise its discretion to refuse to give up their jurisdiction and thus the conflict of jurisdictions will continue to exist. On the other hand, it will be more complicated if both tribunals refuse to hear the same dispute by relying on the comity doctrine. It therefore will be hard for disputants to have access to justice. Hence, there are many hardships in adopting the doctrine of Comity.

IV. THE PRINCIPLE OF *RES JUDICATA* TOWARDS THE MATTER OF JURISDICTION CONFLICTS IN ACFTA

Although not all aforementioned measures are able to deal adequately with the problem of jurisdiction conflicts in ACFTA, the principle of *Res Judicata*, in the opinion of the author, is a more appropriate solution to the problem. This doctrine is a recognized legal principle.¹⁰¹ It stipulates that disputants should not initiate the same litigation involving the same claim or cause of action after a court with competent jurisdiction has adjudicated upon the issue.

The doctrine of *Res judicata* is also well-recognized norm of international law¹⁰² especially in the area of public international law.¹⁰³ International societies such as international courts or tribunals tend to follow the decisions of international tribunals, or, at

¹⁰⁰ See generally MARTIN STUART-FOX, A SHORT HISTORY OF CHINA AND SOUTHEAST ASIA: TRIBUTE, TRADE AND INFLUENCE (2003).

¹⁰¹ JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 693-94 (4th ed. 2005); see also KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 302 (2d ed. 2009).

¹⁰² SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4), at 1655-61 (2006).

¹⁰³ YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 245 (2003).

least, refrain from openly criticizing it.¹⁰⁴ According to the ICSID Tribunal in *Waste Management v. Mexico* (2002), “there is no doubt that *Res Judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.”¹⁰⁵ This case has reaffirmed the status of the principle, which is the legal basis for the argument that it has more binding effect towards both WTO and RTAs.

A The Application of Res Judicata Doctrine in the International Level

There are four preconditions to the doctrine of *Res Judicata* that have to be satisfied to ensure its application in international law. “Proceedings must: (i) have been conducted before courts or tribunals in the international legal order; (ii) involve the same relief; (iii) involve the same grounds; and (iv) be between the same parties.”¹⁰⁶

The case of *CME Czech Republic BV v The Czech Republic* examines the requirements in detail. The second requirement is clarified to mean the same relief, where the “object” or “petitum” of two claims should be identical.¹⁰⁷ In theory, claims triggered under different agreements constitute different “grounds”. “In some cases, however, this might be an artificial distinction, for example if the legal obligation (e.g. not to expropriate an investment) is the same.”¹⁰⁸ In the *Southern Bluefin Tuna* case, United Nations Convention on the Law of the Sea (UNCLOS) tribunal stated:

‘[T]he Parties to this dispute ... are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.’¹⁰⁹

¹⁰⁴ Mohamed Ramadan Hassanien, *Bilateralism and Multilateralism: Can Public International Law Reconcile between Them? Real Options for Further Developments in WTO Jurisprudence*, 8 ASPER 51, 77 (2008).

¹⁰⁵ *Waste Management, Inc. v. United Mexican States*, Arbitral Award of Jun. 2, 2000, 40 I.L.M. 56 (2001), available at <http://www.state.gov/documents/organization/12244.pdf>.

¹⁰⁶ THE INTERNATIONAL LAW ASSOCIATION, RES JUDICATA AND ARBITRATION, INTERIM REPORT OF THE SEVENTY-FIRST CONF., BERLIN 19 (2004).

¹⁰⁷ See BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 340 (Cambridge Univ. Press 1953).

¹⁰⁸ See THE INTERNATIONAL LAW ASSOCIATION, *supra* note 106, at 20.

¹⁰⁹ *In re Southern Bluefin Tuna Case*, 39 I.L.M. 1359, 1372 (2000).

Indeed, a disputant can avoid the application of *Res Judicata* by claiming a different kind of relief or relying on new ground to support his relief in a prior decision. Consequently, this type of claim, as evidenced in the statement of UNCLOS tribunals, is usually rejected by arbitral tribunals because of its closely related nature.¹¹⁰ Many scholars and experts prefer examining the underlying nature of a dispute rather than abiding by its formal classification.¹¹¹ This avoids practical problems created by formal classification. As a result, many bilateral and multilateral treaties have adopted the same method.

Jurisdiction conflicts between WTO and RTAs satisfy the four preconditions for the application of the *Res Judicata* principle. Firstly, the dispute is already settled by an international tribunal, such as the *Argentina—Poultry* case discussed in Chapter II. Secondly, they all pursue the same relief, such as termination of the impairment and compensation. Thirdly, according to international practice, they share the same legal basis, such as national treatment. Lastly, the same parties are in dispute. Claims by third parties, such as *Brazil Tyres* case,¹¹² were obviously not within the realm of the *Res Judicata* doctrine. This kind of jurisdiction conflict will be analyzed in the next chapter, which focuses on a uniform legal system for international trade.

B. Jurisdiction Conflicts between ACFTA and other RTAs

The other RTAs currently refer only to ASEAN, since member states of ACFTA are also members of ASEAN except China. Both ACFTA and ASEAN have their own DSMs. Based on the application of the *Res Judicata* doctrine and its reception from both DSMs, one can say that it is more suitable in handling the problem of jurisdiction conflicts between ACFTA and ASEAN.

Both the DSM of ACFTA and ASEAN have regulations on refusing jurisdiction when proceedings have been initiated in either DSM. For example, the Framework Agreement on DSM of ACFTA stipulates that:

“Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or

¹¹⁰ See THE INTERNATIONAL LAW ASSOCIATION, *supra* note 106.

¹¹¹ See August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW & PRAC. INT'L CTS. & TRIBUNALS 37, 57-77 (2004).

¹¹² Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 20, 2005).

obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”¹¹³

Paragraph 3 of Article 1 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism stipulates that:

“The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting (“SEOM”) to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.”¹¹⁴

It means that the principle of *Res Judicata* is accepted in the coverage agreements of both ACFTA and ASEAN. Jurisdiction conflicts can be easily resolved between the ACFTA and ASEAN. This approach has been widely used in numerous cases that it is already an international norm. For instance, in the case of the *Compagnie Générale de l’Orénoque*, the arbitrator held that, “the general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed.”¹¹⁵

This principle is inapplicable where a third party is involved like the *Brazil Tires Case*.¹¹⁶ The fourth requirement for the application of the *Res Judicata* principle requiring the same parties will be inapplicable if third parties are involved. In *Brazil Tires* case, the new dispute is triggered by EC and not just the original disputants, Uruguay and Brazil. Therefore, it is logical to state the non-applicability of the principle of *Res Judicata* in this case. By contrast, the DSU of WTO has a similar regulation. It provides that “if a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal

¹¹³ Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, para. 6, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan. 1, 2005).

¹¹⁴ ASEAN Protocol, *supra* note 8, art. 1.

¹¹⁵ *Compagnie Générale de l’Orénoque* (quoting *Southern Pacific Railroad Co. v. United States*, 168 Sup. Ct. Rep. 355 (1897)).

¹¹⁶ See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 20, 2005).

dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel whenever possible.¹¹⁷ This rule does not violate the principle of *Res Judicata* since the parties in dispute are different. As a result, third parties now have the right to trigger another proceeding if their rights have been impaired by the decision of DSM of ACFTA.

In addition to the "general principle"¹¹⁸ in international law, current provisions in RTA and WTO on the *Res Judicata* principle are sufficient to deal with the jurisdiction conflicts between ACFTA and ASEAN. However, problems will arise when other RTAs established in the future do not recognize the principle of *Res Judicata*, thus resulting in an overlap of jurisdictions between their DSM and that of ACFTA's. This matter is similar to the jurisdiction conflict between ACFTA and WTO, which will be discussed below.

C. Jurisdiction Conflicts between ACFTA and the WTO

The problem becomes very complicated when the WTO is involved. The main reason is that "it is difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it".¹¹⁹ There is a dilemma where the WTO Panel or Appellate Body is bound by its obligation, but this practice will violate the principle of *Res Judicata*, which is considered a norm of international law.¹²⁰ It will experience a similar outcome as the *Argentina-Poultry* case or the *Mexico-Soft Drink* case if WTO Panel or Appellate Body faces this dilemma since they would abide by their obligations under the WTO. The principle of "*pactasuntservanda*" considers the treaty as the most important source of international law. The WTO covered agreements are in essence multilateral treaties so they should be respected with primary importance. Although Article 38(1) of the Statute of the International Court of Justice does not explicitly form a hierarchy of different sources of international law, it provides a quasi-hierarchy which contains a list of treaty preferences.¹²¹ The WTO is a treaty and an international convention with numerous member states. As a result, Panels or Appellate bodies will give precedence to the WTO

¹¹⁷ DSU, *supra* note 9, art. 10.

¹¹⁸ See *Waste Management, Inc. v. United Mexican States*, Arbitral Award of Jun. 2, 2000, para. 39, 40 I.L.M. 56 (2001), available at <http://www.state.gov/documents/organization/12244.pdf>.

¹¹⁹ See Appellate Body Report, *Tax Measures on Soft Drinks and Other Beverages*, para. 47, WT/DS308/AB/R (Mar. 6, 2006).

¹²⁰ See ROSENNE, *supra* note 101.

¹²¹ Juliana Murray, Comment, *Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals*, 10 CHI. J. INT'L L. 769, 771 (2010).

rather than a “general principle” of international law. The WTO panel and its Appellate Body formed the opinion that “an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it”.¹²² Thus, the Panel or Appellate Body will not violate their obligation by opting for the *Res Judicata* principle.

Appellate Body recognized that the WTO law could not exist in isolation from public international law. “An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹²³ By following this principle, the Panel or the Appellate Body however cannot act in violation of its obligation. They can interpret and apply principles of international law in absence of specific WTO regulations. Although “there seems little, if indeed any question as to *Res Judicata* being a general principle of law or as to its applicability in international judicial proceedings,”¹²⁴ the panel or appellate body will give precedence to the WTO stipulation first as mentioned before. In order to resolve this matter in ACFTA, the analysis must be conducted in the following three stages.

1. Jurisdiction Conflicts in the Initial Stage

When the member states of ACFTA plan to settle their dispute through DSM, they will usually choose between the DSMs of ACFTA and WTO. There are regulations in current RTAs on the issue of exhausting the DSM of RTA or the WTO process first. For example, paragraph 4 of the GATS Annex on Air Transport Service provides that: “The dispute settlement procedures of the Agreement may be invoked only ... where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.” This measure is not always prevalent. Not every agreement contains such regulation and instead parties are allowed to provide for their choice of jurisdiction. ACFTA also holds the same position. “Nothing in this Agreement shall prejudice any rights of the parties to have recourse to dispute settlement procedures available under any other treaty to which they

¹²² Appellate Body Report, *United States — Anti-Dumping Act of 1916*, para.5 4, WT/DS136/AB/R (Sep. 26, 2000).

¹²³ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, para. 17, WT/DS2/AB/R (Apr.29, 1996).

¹²⁴ See CHENG, *supra* note 106, at 336.

are parties.”¹²⁵ Therefore, parties are able to choose between the DSM of ACFTA or WTO.

Member states of ACTA will violate their obligations under ACFTA if they initiate proceedings in ACFTA’s DSM while WTO DSM proceedings are in progress.” Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”¹²⁶ Therefore, the DSMs of ACFTA will not receive this case. Under normal circumstances, this should be sufficient to prevent the conflict of jurisdictions from taking place. There will be a problem if member states of ACFTA choose the DSMs of WTO after they have initiated proceedings under the DSM of ACFTA, Although the regulations on the DSM in ACFTA are able to regulate a dispute that is triggered in different DSMs, it cannot prevent the WTO from hearing the same case. Under WTO jurisprudence, there is no doubt that any WTO Member who is a “potential exporter”¹²⁷ has the adequate legal basis to initiate a WTO DSM hearing. Therefore, any WTO Member whose rights have been impaired has the absolute right to initiate a hearing under the DSM of WTO, even if the same parties are involved in parallel proceedings with the DSM of RTA.¹²⁸

Due to existing exclusive forum clauses in ACFTA, parties under the ACFTA agreement will violate its obligations if they re-litigate the same dispute through the DSM of WTO. As a result, the ACFTA party who opposes parallel WTO proceedings is able to claim compensation from the other party who initiated WTO proceedings according to paragraph 6 of Article 2 of the Framework Agreement on DSM of ACFTA.¹²⁹ This clause aims to prevent the same dispute from being adjudicated outside of ACFTA if disputants have initiated the DSM proceedings under ACFTA. However, there are no relevant regulations on how much compensation should

¹²⁵ See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, para. 5, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

¹²⁶ See *id.* art. 2, para. 6.

¹²⁷ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, para. 136, WT/DS27/AB/R (Feb. 5, 1996).

¹²⁸ Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, para.13, WT/DS33/AB/R (Mar. 14, 1996).

¹²⁹ See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, ¶ 5, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

be rewarded in each individual case. It may be possible to prevent a disputing party from bringing proceedings under the DSM of WTO if there is a clear rationale behind the award of compensation. In addition to satisfying the doctrine of *Res Judicata*, this method is also particularly suitable in East and Southeast Asia. Settling a trade police dispute is costly¹³⁰ and most of the ACFTA member states are developing countries or in some scenarios least developed countries, thus they do not have sufficient resources to support parallel dispute settlement proceedings.

2. Jurisdiction Conflicts during a Dispute Settlement Proceeding

How can an issue be handled if the DSMs of ACFTA and WTO are initiated at the same time. This issue once appeared in the NAFTA Poultry case. WTO provisions were applied directly in this case because the NAFTA treaty explicitly refers to GATT commitments. The same issue was subsequently raised in the WTO.¹³¹ So is it necessary to suspend the DSM of RTA or WTO dispute process. The dispute satisfies the requirement of applying the principle of *Res Judicata*. "It is a well established rule of law that the doctrine of *Res Judicata* applies only where there is identity of the parties and of the question at issue."¹³² The parties and issue at stake are both identical. In order to uphold the principle of *Res Judicata*, the party may withdraw from the DSM of ACFTA or WTO. This method can also help disputants avoid the violation of the forum choice clause in DSM of ACFTA.¹³³

The Framework Agreement on DSM of ACFTA stipulates that "the parties to a dispute may agree to terminate the proceedings of an arbitral tribunal established under this Agreement before the release of the final report to them, in the event that a mutually satisfactory solution to the dispute has been found."¹³⁴ This is a preferred method for dispute resolution in this region, which can be reflected in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Protocol on DSM). Although the ASEAN Protocol on DSM does not contain similar regulations on the termination of proceedings like the counterpart of ACFTA, it provides a similar regulation. "The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the

¹³⁰ Ji Li, *From 'See You in Court!' to 'See You in Geneva!': An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L., 494 (2007), available at <http://ssrn.com/abstract=1169459>.

¹³¹ See Panel Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R (May 17, 1999).

¹³² *In re S.S. Newchwang* (Gr.Brit. v. U.S.), 16 AM. J. INT'L L. 323, 324 (1921).

¹³³ See *supra* note 6.

¹³⁴ See *supra* note 5, art. 11, para. 2.

settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol."¹³⁵ "Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time."¹³⁶ Therefore ASEAN members will be able to terminate proceedings at any stage of the panel proceedings. The regulation of DSU of WTO also contains a similar regulation to the ASEAN protocol on DSM.¹³⁷ It appears that this type of provision is accepted by RTAs and WTO DSMs. The agreement to withdraw from the DSM of either ACFTA or WTO fulfills its obligations under the treaty and upholds the doctrine of *Res Judicata*.

The unique culture in East and Southeast Asia facilitates the operation of this dispute settlement measure. This measure is closer to the "ASEAN Way", which places more emphasis on the consultation process to reach a mutual understanding.¹³⁸ It is well known that regional ideology here is Confucianism,¹³⁹ the central value of which is harmony.¹⁴⁰ This ideology encourages parties in dispute to reach mutual compromise in order to maintain natural harmony (*li*).¹⁴¹ This voluntary and consultative approach to dispute resolution is suitable to the traditional and current legal culture in Asia. It is predicted that there will be no fundamental changes to this approach in the near future, despite the fact that this region has been under increasing Western influence.¹⁴² For instance, reconciliation has always been preferred in Chinese culture.¹⁴³ This is also one of the reasons why there are fewer complaints from East and Southeast Asia lodged through the DSM of WTO. Some countries in this region are developing countries, thus they do not have sufficient resources to support parallel proceedings. So, it is reasonable for them to choose one forum to resolve the

¹³⁵ ASEAN Protocol, *supra* note 8, art. 1, para. 3.

¹³⁶ ASEAN Protocol, *supra* note 8, art.4, para.1.

¹³⁷ DSU, *supra* note 9, art. 3-5.

¹³⁸ Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 36 (2010).

¹³⁹ See generally STUART-FOX, *supra* note 99.

¹⁴⁰ See Robert F.Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 383-91 (1987).

¹⁴¹ *Id.* at 384, n 2.

¹⁴² See Carl J. Green, *APEC and Trans-Pacific Dispute Management*, 26 LAW & POL'Y INT'L BUS. 730 (1995).

¹⁴³ See *supra* note 139.

dispute through consultation. Litigation is considered as “time-consuming, degrading and costly” in Confucian society.¹⁴⁴

By reaching an agreement to withdraw, the risk of re-litigation will be minimized as witnessed in the *Argentina – Poultry* case. This can also aid the adherence to the principle of *Res Judicata*. The forum is chosen voluntarily by disputants therefore the chances of re-litigation are very unlikely. Disputing parties can also reach an understanding on the preconditions and the operation process for forum election thereby ensuring the recognition of such decision.

However, the DSMs of many non-Asian international organizations believe that it is their power to decide their own jurisdiction. This choice belongs to the tribunal rather than the parties in dispute. Therefore, the parties should not be free to make the choice of jurisdiction for DSMs. This is particularly troublesome when it involves both the ACFTA and the WTO. The WTO Appellate body suggested that the Panel should be able to determine jurisdiction by themselves.¹⁴⁵ Similarly, the majority opinion of the ICJ on the Legality of the Use of Force in the case of *Serbia and Montenegro v. Belgium* commented that the Court should determine the issue of jurisdiction irrespective of the parties’ pleadings.¹⁴⁶

The agreement to withdraw is one of the many rights that WTO members enjoy and they are able to exercise freely. It could be the result of consultation, good office and mediation. This right is only subject to one restriction, which provides that “all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.”¹⁴⁷ This ensures that the rights of the member states of the WTO will not be encroached upon. Another evidence that supports this measure is the argument in *Japan Alcoholic Beverages* case, where the WTO Appellate Body accurately described the role that the WTO dispute settlement mechanism plays with in the global trading system. “WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will

¹⁴⁴ MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* 70 (2d ed., Waterside Press 1996).

¹⁴⁵ Appellate Body Report, *Mexico- Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, para. 36, WT/DS132/AB/RW (Oct. 22, 2001).

¹⁴⁶ JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 447-48 (2003).

¹⁴⁷ DSU, *supra* note 9, art.3, para. 3.

serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability sought for the multilateral trading system'."¹⁴⁸ This is equivalent to stating that the judgments given by the DSM of ACFTA will be recognized by the WTO if they do not impair the interests of other WTO members. Thus, the disputing parties have sufficient legal basis to choose a more appropriate forum to settle their dispute.

This measure appears to be the most suitable method in resolving the problem of overlapping jurisdictions between ACFTA and WTO at current stage. This measure can prevent double awards, which in turn upholds the essence of the principle of *Jus Redicata*. However, the legal text of ACFTA should be further clarified to include a provision on the enforcement of the withdrawal from one of the agreements so as to enhance its binding nature. The current provisions in the Framework Agreement on the DSM of ACFTA contain only one provision on how the award of arbitration should be enforced.¹⁴⁹ It can be seen that the application of the principle of *Res Judicata* in the context of the East and Southeast Asia legal culture is unclear because of its abstract nature. Substantive regulations will be necessary to improve enforcement of this principle and how they can be relied in this regional legal culture.

3. Jurisdiction Conflicts after Awarding Judgment

The implications of re-litigation of a dispute presented to the DSM of the WTO after adjudicated in the DSM of ACFTA has been explored in the *Argentina-Poultry* case¹⁵⁰ and *Brazil Tires* case.¹⁵¹ Paragraph 6 of Article 2 of the Framework Agreement on the DSM of ACFTA prohibits the relitigation of cases where member states of ACFTA have received a judgment from the WTO. Therefore, the re-litigation of a case in the DSM of ACFTA after a judgment has been awarded by the WTO is not possible.¹⁵²

For example, the CACM (Central American Common Market) RTA resolves this problem by applying the *Res Judicata* doctrine to all contracting parties. This is only relevant to the interpretation

¹⁴⁸ Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct.4, 1996).

¹⁴⁹ See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 13, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

¹⁵⁰ See Panel Report, *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003).

¹⁵¹ See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (Jun. 20, 2005).

¹⁵² See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, para. 6, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

and application of the doctrine of *Res Judicata* to one particular RTA. It does not refer to the relationship between the rulings of the DSMs in different trade unites. There is still confusion as to the binding effect of conflicting rulings of the same dispute around the globe. Although the principle of *Res Judicata* is widely recognized as a norm of international law,¹⁵³ it is still subject to many challenges in the WTO as illustrated in the previous cases. “The effect of such a judgment would not be limited to the present proceedings, preventing the pursuance of those proceedings before the Court. As a judgment on the merits, it would produce the effect of *Res Judicata* in the material sense. The judgment would be binding upon the parties and upon any tribunals (the Court itself or any other tribunal) which might be called upon to give a decision on the same subject between the same parties..”¹⁵⁴ The principle of *Res Judicata* has the capacity to deal with the problem of jurisdiction conflicts; however, they are not stipulated in the WTO domain. As a result, the application of the principle of *Res Judicata* will occasionally prevent the WTO panel or its Appellate Body from fulfilling its obligations.¹⁵⁵

Improvements can be made to refine the application of the *Res Judicata* doctrine in this stage. Initiating proceedings under the DSM of WTO after a judgment has been awarded by the DSM of ACFTA obviously violates the principle encapsulated in Paragraph 6 of Article 2 of the Framework Agreement on the DSM of ACFTA.¹⁵⁶ Although a penalty can be awarded to the injured party for the damage caused by re-litigation, the method of quantifying compensation remains unclear. This article suggests that the forum choice article in the Framework Agreement of the DSM of ACFTA should place more emphasis on the post-award stage in addition to the initial dispute stage. With regards to the DSU of WTO, further stipulation is needed for the “operating” and not just “formation” stage.¹⁵⁷ The rules of the WTO place most of its emphasis on the formation of RTAs, which is insufficient to deal the increasing use of RTAs. More attention should be directed to how these RTAs can operate harmoniously with the WTO system. It should include the

¹⁵³ See ROSENNE, *supra* note 102.

¹⁵⁴ *In re Barcelona Traction, Light and Power Company, Ltd (Belg. v. Spain)*, Judgement, 1970 I.C.J. 3 (Feb. 5), available at <http://www.icj-cij.org/docket/files/50/5387.pdf>.

¹⁵⁵ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005), para. 7.4-7.9.

¹⁵⁶ See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation, ASEAN-China, art. 2, para. 6, *opened for signature* Nov. 4, 2002, ASEAN.T.S (entered into force Jan.1, 2005).

¹⁵⁷ Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 452 (2001).

principle of *Res Judicata* as part of its practice and provision as there is an increasing use of RTAs in the international community. The subsequent section will focus on the reform and future expectations of the interrelationship between the WTO and RTAs, especially in the area of jurisdiction conflicts.

V. FUTURE DEVELOPMENT OF THE *RES JUDICATA* PRINCIPLE: A
UNIFORM LEGAL SYSTEM FOR INTERNATIONAL TRADE

The proposed solution to the problem of jurisdiction conflicts between ACFTA and other trade units can be partially resolved by employing the principle of *Res Judicata*. However, the doctrine still suffers from uncertainty thus it will be unable to resolve the issue fully. Under a uniform legal system for international trade, the principle of *Res Judicata* can be borrowed as a principle of international law¹⁵⁸ to influence the interpretation of regulations found in the DSU of the WTO. The laws of the WTO, EEC, and NAFTA are independent because they each have their respective institutional structures. Hence, these fragmented and isolated trade organizations and agreements are incapable of solving complicated legal difficulties. These difficulties come from the distinction between international jurisdiction and domestic jurisdiction. 'International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labor among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.'¹⁵⁹ The creation of a uniform legal system for international trade has become a popular trend for resolving the jurisdiction conflicts recently. A unified system can ensure stability and solidarity within the system which minimizes potential jurisdiction conflicts and confusion.¹⁶⁰

Legal principles upheld by different organizations will be easily reconciled under a uniform legal system for international trade. Under the current system, the discretion that the WTO Panels exercise on whether it should apply provisions contained in RTAs is crucial. Many RTAs provide for its own forum choice clauses in addition to recognizing the principle of *Res Judicata*. If the WTO Panel and the Appellate Body have the right to be recognized and to apply the forum choice clauses of RTAs, this problem can be easily resolved whilst maintaining a harmonious relationship between the

¹⁵⁸ See ROSENNE, *supra* note 102.

¹⁵⁹ AMERASINGHE, *supra* note 16, at 53.

¹⁶⁰ See Cho, *supra* note 157, at 459.

WTO and RTAs.¹⁶¹ The application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties remains unclear.¹⁶² There are regulations which require the Panel to “clarify the existing provisions of those agreements” and that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”¹⁶³ This however, does not limit the WTO Panel’s power to decide jurisdictional issues depending on the interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.¹⁶⁴ Some scholars argue “the fact that substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements”.¹⁶⁵ However, the WTO Panel in the recent *European Communities Measures Affecting the Approval and Marketing of Biotech Products* case argued that the interpretation of WTO law through exogenous rules of international law is only applicable when all WTO members, not just disputing parties such as members of FTAs, are bound by those rules of international law.¹⁶⁶ Controversy exists where scholars argue that: “the best solution would be for WTO members to use the Doha negotiating mandate regarding RTAs to resolve the legal relationship between these agreements and the WTO, and to establish clear rules for addressing conflicts and overlaps between the dispute settlement mechanisms of the two.”¹⁶⁷ As a result, the measure for resolving the issue of overlapping jurisdiction depends on the evolution and consummation of the uniform legal system for international trade.

Although there are hundreds of RTAs, the relationship between the RTAs and the WTO cannot be determined by the RTAs themselves. The WTO is the only organization that can represent the interests of all the RTAs since its decisions have to be passed by the majority of its members. The Appellate Body in the *Turkey*

¹⁶¹ See *supra* note 11, at 231, 254-55.

¹⁶² Vienna Convention on the Law of Treaties art.31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“General rule of interpretation . . . 3. There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.”).

¹⁶³ DSU, *supra* note 9, art. 2, para. 3.

¹⁶⁴ Pauwelyn Joost, *How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits*, 37 J. WORLD TRADE 1003 (2003), available at <http://ssrn.com/abstract=478021>.

¹⁶⁵ Joost Pauwelyn, ‘The Role Of Public International Law in the WTO: How Far can We Go?’, 95 (3) American Journal of International Law 560 (2001), at 554; see also *supra* note 135 at 460.

¹⁶⁶ Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293 (13 May 2003).

¹⁶⁷ Jennifer Hillman, *Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and The WTO--What Should the WTO Do?*, 42 CORNELL INT’L L.J. 205 (2009).

Textile case stated that it is within the Panel's necessary jurisdiction to determine whether provisions of a RTA are consistent with GATT Article XXIV.¹⁶⁸ Although the Appellate Body's decision caused distress to the institutional balance between the WTO's political and judicial organs,¹⁶⁹ it seems to be the only practical solution and it is passed by the DSB of the WTO. It can be extracted from the judgment that the authority of a WTO judgment is superior to those of RTAs since it has jurisdiction to determine whether activities of the RTAs comply with the requirements in Article XXIV of GATT. Some scholars proposed that it would be invaluable to modify the WTO's role to become a body similar to the "common law" system, which is designed to adapt quickly to changes. This is consistent to the saying that the law should "adapts itself to the needs of a new day".¹⁷⁰ However, this ideal goal is remarkably different from the current situation. The construction of Article XXIV of GATT, 1994 is too narrow because it just focuses on the formation stage of RTAs and it is unable to accommodate the current situation where many RTAs are already in the "operating" stage and not the "formation" stage.¹⁷¹ The WTO also acknowledges this problem, and they "agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."¹⁷² This is the preliminary step that the WTO has to achieve before it advances to become a uniform legal system for international trade.

A uniform legal system for international trade is also beneficial for other measures such as those mentioned in part 4, which relates to the settlement of potential jurisdiction conflicts in ACFTA. Since the principle of *Res Judicata* is widely accepted as a norm of international law,¹⁷³ it is suitable to consider using this principle first in resolving the problem of jurisdiction conflicts. This doctrine also has more advantages than its alternatives. ACFTA, on one hand, should make improvements on its forum choice clause by

¹⁶⁸ See also C.L. Lim, *Free Trade Agreements in Asia and Some Common Legal Problems*, in THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA 434 (Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes eds., 2007).

¹⁶⁹ Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 325, 325-46 (Marco Bronckers & Reinhard Quick eds., 2000).

¹⁷⁰ LON FULLER, *THE LAW IN QUEST OF ITSELF* 140 (Beacon Press, 1st ed. 1999).

¹⁷¹ See Cho, *supra* note 157.

¹⁷² World Trade Organization, Ministerial Declaration of 14 November 2001, at 29, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

¹⁷³ See *supra* note 101.

substantiating its after award provisions. The WTO, on the other hand, should focus on incorporating the principle of *Res Judicata* into its system. The successful incorporation of the *Res Judicata* doctrine in the context of the settlement of jurisdiction conflicts will enrich the practical experience in the development of a uniform legal system for international trade.

VI. CONCLUSION

The cases discussed in this article exposed the limitations of ACFTA legal text in relation to the issue of jurisdiction conflicts. When involved in a dispute, member countries of ACFTA have the tendency to choose the DSMs of the WTO or ASEAN if they are also members of these organizations. Parties in dispute are usually motivated by the benefits that each DSM can offer, which will in turn influence their choice of dispute settlement forum. Based on the experience of other similar FTAs, the forum choice clause in ACFTA is insufficient to deal with the settlement of jurisdiction conflicts and international principles, such as *Forum Non Conveniens*, *Lis Alibi Pendens*, *Lex Posterior* and *Lex Specialis*, and *Comity*, are incapable of resolving the matter of potential jurisdiction conflicts.

As a recognized doctrine in public international law,¹⁷⁴ the principle of *Res judicata* is a more suitable choice in resolving the matter of jurisdiction conflicts in this particular region, whether in the present or in the future. Taking advantage of the forum choice clause in DSM of ACFTA in the context of the legal culture in East and Southeast Asia, the principle of *Res Judicata* is able to resolve ACFTA jurisdiction conflicts to some extent. The impact of the *Res Judicata* doctrine is limited when it involves the DSM of the WTO. It will be unlikely that the Panel or the Appellate Body will violate their obligations by declining “to exercise validly established jurisdiction”¹⁷⁵ in order to apply the principle of *Res Judicata*. The first and foremost solution at present is to substantiate the forum choice clause in the Framework Agreement on the DSM of ACFTA. Details on compensation should be included for its member states who violated the forum choice clause. Clarification is also necessary for the parties to ensure reliance on the method of withdrawal from either one of the conflicting DSMs to avoid jurisdiction conflicts. In addition, the WTO should be encouraged to incorporate the principle of *Res Judicata* into its DSU and place

¹⁷⁴ See ROSENNE, *supra* note 102.

¹⁷⁵ See Panel Report, *Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005)

more emphasis on the “operating” stage of RTAs.¹⁷⁶ Altogether, the satisfactory settlement of jurisdiction conflicts in ACFTA necessitates the future development of a uniform legal system for international trade.

¹⁷⁶ Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 2 (2001).