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Fork-in-the-Road Clauses in the New EU FTAs: Addressing Conflicts of Jurisdictions with the WTO Dispute Settlement Mechanism

Cornelia Furculiță

CLEER PAPERS **2019/1**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

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CORNELIA FURCULIȚĂ

CLEER PAPERS **2019/1**

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CONTENTS

Abstract 5

About the Author 6

Introduction 7

1. Conflicting Jurisdictions and Jurisdictional Clauses Addressing Potential Conflicts 8
   - 1.1 Conflicting Jurisdictions: Definition and Reasons for Concern 8
   - 1.2 Jurisdictional Clauses in FTAs 11

2. EU FTAs and Conflicting Jurisdictions 12
   - 2.1 The Proliferation of EU FTAs 12
   - 2.2 The Proliferation and the Importance of EU FTAs DSMs 14
   - 2.3 The EU Commitment to the Multilateral Trading System 15
   - 2.4 Jurisdictional Clauses Contained in the New EU FTAs 16

3. Jurisdictional Issues in WTO DSMs 21
   - 3.1 Jurisdiction of WTO panels and AB 21
   - 3.2 Possibility to Decline Jurisdiction 23
   - 3.3 Members Prevented from Initiating WTO Proceedings by Breaching Good Faith Obligations 26
     - 3.3.1 *Argentina – Poultry* 26
     - 3.3.2 *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* 27
     - 3.3.3 *Peru – Agricultural Products*: Clarity or More Confusion 29
     - 3.3.4 Possible Requirements for FTAs Jurisdictional Clauses Preventing Parties to Initiate Subsequent WTO Proceedings 32

4. The Compliance of the Fork-in-the-Road Clauses from the New EU FTAs with the Requirements Set by the WTO Case Law 33
   - 4.1 The Clarity and Unambiguity of the Jurisdictional Clauses from the New EU FTAs 33
     - 4.1.1 The Prohibition to Initiate Subsequent and Parallel Proceedings 33
     - 4.1.2 The Meaning of Expression “Substantially Equivalent Obligation” 34
   - 4.2 Reference to the DSU provisions 36
   - 4.3 Not Going ‘Beyond the Settlement of Specific Disputes’ 37
   - 4.4 Consistent with the Covered Agreements 37
   - 4.5 The Assessment of the new EU FTAs Fork-in-the-Road Clauses 39

Conclusion 39

ABSTRACT

The paper investigates whether the jurisdictional clauses contained in the new EU FTAs, that are fork-in-the-road clauses, could prevent and solve conflicting jurisdictions with the WTO. The main question that it answers is: could jurisdictional clauses contained in these new EU FTAs prevent and resolve conflicting jurisdictions with the WTO Dispute Settlement Mechanism ('DSM'), so that the EU's multilateral and bilateral endeavors can coexist without jeopardizing the DSMs contained therein? The paper will deal with conflicts of jurisdictions between FTA and WTO DSMs and will argue that these conflicts could be addressed by using jurisdictional clauses. It will analyze the fork-in-the-road clauses contained in the new EU FTAs and whether they could be given consideration under WTO rules. It will be shown that jurisdictional clauses could achieve their aim if invoked in WTO proceedings only on a very limited basis – that of establishing the violation of good faith obligation in case of a relinquishment of the right to initiate proceedings expressed through these clauses. The paper will perform an analysis of the fork-in-the-road clauses contained in the new EU FTAs and will show that with respect to obligations that are 'equivalent in substance' they could comply with the conditions that have a legal basis or are narrowly interpreted and were established by the case law for a relinquishment of the right to initiate proceedings.

ABOUT THE AUTHOR

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INTRODUCTION

The EU bilateral trade agenda sets the aim to negotiate and renegotiate an impressive number of FTAs with multiple countries.[1] Even though the proliferation of FTAs entails the increase of trade between the EU and its parties and bolsters the growth of economical benefits, it has also the ability to cause fragmentation of the international multilateral trading system.

FTAs and the WTO share a common purpose, that of trade liberalization. However, having different substantive frameworks and different state-to-state DSMs can lead to conflicting outcomes. The same dispute could be brought both to the WTO and to EU FTAs DSMs and could be solved differently. This paper addresses the issue of conflicting jurisdictions between the DSMs contained in the newest FTAs on the EU trade agenda (specifically: EU – Vietnam,[2] CETA,[3] JEEPA,[4] EU – Mexico FTA,[5] EU proposals for EU – Australia[6] and EU – New Zeeland FTAs[7]) and the WTO DSM. The aim of the paper is to investigate whether the jurisdictional clauses contained in these new EU FTAs could prevent and resolve conflicting jurisdictions with the WTO DSM, so that the EU's multilateral and bilateral endeavors can coexist without jeopardizing the DSMs contained therein.

The first part of the paper introduces the notion of conflicting jurisdictions and lists the reasons for concerns associated with it. It then argues that conflicts of jurisdictions are to be solved and avoided according to the international law and identifies the tools that can deal with such conflicts – jurisdictional clauses. The second part justifies the choice in favor of jurisdictional clauses contained in the new EU FTAs as the object of study of the paper. It shows that the EU has to balance its bilateral and multilateral endeavors, as well as, preserve the DSMs in its trade agreements and is, therefore, interested in avoiding conflicting jurisdictions, this making jurisdictional clauses from the EU FTAs of particular importance. This part continues with the description of these jurisdictional clauses and points the relevant aspects that help answering the

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[1] European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (European Union 2015) 9 <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 16 December 2018

[2] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 16 December 2018

[3] Comprehensive Economic and Trade Agreement ('CETA') between Canada, of the One Part, and the European Union and its Member States <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 16 December 2018

[4] Agreement between Japan and the European Union for an Economic Partnership ('JEEPA') <http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156423.pdf> accessed 16 December 2018

[5] New EU – Mexico Agreement, Text of the Agreement in Principle <http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf> accessed 16 December 2018

[6] EU – Australia FTA, EU Textual Proposal <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1865> accessed 18 December 2018

[7] EU – New Zeeland FTA, EU Textual Proposal <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1867> accessed 18 December 2018

main question of the paper. As jurisdictional clauses from the new EU FTAs could achieve their aim to address potential conflicting jurisdictions with the WTO DSM only if they would be given effect during WTO proceedings, the third part analyzes the pertinent WTO law and jurisprudence for this issue. It identifies the possible requirements that would apply to the FTA jurisdictional clauses. The last part assesses whether the jurisdictional clauses found in the EU FTAs under analysis have a chance to qualify with the identified requirements and achieve their aim of preventing and resolving conflicting jurisdictions.

1. CONFLICTING JURISDICTIONS AND JURISDICTIONAL CLAUSES ADDRESSING POTENTIAL CONFLICTS

1.1 **Conflicting Jurisdictions: Definition and Reasons for Concern**

Both FTAs and the WTO cover such aspects as trade in goods, services and intellectual property, meaning that the same measure could be regulated by two different frameworks. Therefore, the same measure of FTA partners could be potentially adjudicated in two different *fora*, the multilateral one at the WTO level and the bilateral one at the FTA level, thereby raising the risk of conflicting jurisdictions.

A conflict of jurisdictions appears 'if a dispute can be brought entirely or partly before two or more different courts or tribunals'.[8] It results from the clashes or overlaps between the clauses contained in relevant international treaties that create and establish the jurisdictions of the international tribunals.[9] Conflicts of jurisdictions between FTAs and the WTO DSMs can occur in parallel, when the two types of DSMs are triggered with respect to the same subject before any of them issues a definite decision, or subsequently – when there is already a definite decision issued by one DSM and the party that is not content with the decision brings the same dispute to another forum.[10] Moreover, the issue of conflicting jurisdictions comes also into play when only one DSM is triggered, multilateral or bilateral, but the respondent invokes the jurisdiction of the other as being the appropriate one.[11]

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[8] Tim Graewert, 'Conflicting Laws and Jurisdictions in the Dispute Settlement Process of the Regional Trade Agreements and the WTO' (2008) 287(1) Contemporary Asia Arbitration Journal 288, 290

[9] Pieter Jan Kuijper, *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO* (Issue Paper No. 10, ICTSD 2010) 25

[10] Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35(6) Journal of World Trade 1081, 1109

[11] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (*Mexico – Soft Drinks)*, WT/DS308/R, 7 October 2005, [4.71] ('Viewed in the light of all relevant facts, this is a dispute arising under a regional free trade agreement and it would be inappropriate for this Panel to hear it. Mexico maintains that the Panel should decline to exercise its jurisdiction to resolve the present dispute and should recommend that the parties resort to the NAFTA dispute settlement mechanism to resolve in an integral manner the broader sweeteners trade dispute.')

Though the chapters on state-to-state DSMs did not raise controversies during the negotiations of the new EU FTAs, in contrast to the ISDS provisions,[12] the possible occurrence of conflicts of jurisdictions with the WTO DSM should not be overlooked. The issue of conflicts of jurisdictions between WTO and FTA DSMs is not only theoretical, it also occurred in practice, even though only exceptionally. In *Argentina – Poultry*[13] Brazil initiated a WTO case after an unsuccessful claim brought to the MERCOSUR DSM,[14] while in *Mexico – Soft Drinks*,[15] the US brought a dispute against Mexico's retaliatory measures to the WTO, after blocking the NAFTA DSM triggered initially by Mexico that resulted in retaliation.[16] The constant increase of the number of FTAs containing DSMs leaves open the possibility of having new cases of conflicting jurisdictions. Moreover, an increase in the use of the FTA DSMs by the EU has been recently noted,[17] including in the case of a dispute that concerns an FTA obligation that replicates a WTO norm and could have been brought under WTO DSM rules.[18] Therefore, with the rise in use of bilateral DSMs, the risk of conflicting jurisdictions is also becoming more imminent.

Conflicting jurisdictions pose concerns especially with respect to possible inconsistent rulings for the same dispute that can leave the dispute unresolved and can threaten the stability and legitimacy of the multilateral and bilateral systems within which the two *fora* operate.[19] For example, Art. 2.15:2(a) of JEEPA provides that if a Party intends to adopt prohibitions and restrictions on the exportation or sales for export of goods listed in Annex 2-B to JEEPA[20] in accordance with Art. XX GATT[21] it shall 'seek to limit that prohibition or restriction to the extent necessary'. Thus, this article introduces an obligation to respect the 'necessity' requirement with respect to all paragraphs of Art. XX GATT, while

[12] Simon Lester, 'The ISDS Controversy: How We Got Here and Where Next' (ICTSD 2016) <https://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next> accessed 14 February 2019

[13] DS241, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil (Argentina – Poultry)*

[14] Panel Report, *Argentina – Poultry*, WT/DS241/R, 22 April 2003, [7.17]

[15] DS308, *Mexico – Soft Drinks* (n 11)

[16] Panel Report, *Mexico – Soft Drinks*, [4.72]

[17] European Commission, 'EU Team in Korea for Government Consultations over Labour Commitments under the Trade Agreement' (Brussels 21 January 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1973> accessed 24 January 2019; European Commission, 'EU Requests Bilateral Dispute Settlement Consultations with Ukraine over Wood Export Ban' (Brussels 16 January 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1968> accessed 24 January 2019

[18] The EU requested consultations with Ukraine under EU – Ukraine Association Agreement on Ukraine's export ban on unprocessed wood. The EU considers this measure to be in violation of Art. 35 of the FTA, providing with a prohibition to impose export restrictions on goods that replicates Art. XI:1 of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) ('GATT')

[19] Joost Pauwelyn, Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns (Im)Possible Solutions' (2009) 77(42) Cornell International Law Journal 77, 83

[20] Annex 2-B to JEEPA, 'List of Goods Referred in Art. 2.15 and 2.17'

[21] Art. XX GATT provides general exceptions applicable in GATT context and the requirements for them.

in GATT Art. XX the 'necessity' requirement is mentioned only in some of them. Therefore, if a measure was taken by one of the JEEPA parties under the paragraphs of Art. XX GATT that did not contain such a requirement,[22] the same measure could be considered legal under the WTO while being a violation of JEEPA that provides stricter conditions. Thus, if a claim involving such a measure would be brought to both the WTO and JEEPA DSMs, the same dispute could be solved differently. The issue of conflicting jurisdictions would be still relevant if the blockage of the appointment of AB members continues,[23] and the AB becomes dysfunctional. If states initiate parallel or subsequent WTO and FTA proceedings with respect to the same dispute, there could be an appealed panel report and no AB to hear the appeal. A conflict of jurisdictions involving a dysfunctional AB could lead to having an unsolved dispute for an indefinite period of time, regardless of the fact that the dispute is solved under FTA DSMs. Thus, the role of the FTA DSMs would be undermined, as the dispute would still remain unsolved.

Art. 3.2 of the Dispute Settlement Understanding[24] ('DSU') that governs the WTO DSM expressly provides that the DSM of the WTO should provide security and predictability. Conflicting rulings and unsolved disputes fail to offer the expected security and predictability that states are expecting when initiating proceedings to solve a dispute. This could cause the FTA parties to lose their trust in the institutions issuing these rulings[25] and in the multilateral and bilateral systems to which they belong. Also, their trust could suffer, because the intention present when signing an agreement with respect to the competent body to adjudicate a case could be completely disregarded. Moreover, conflicting outcomes undermine the authority of both multilateral and regional DSMs, by impairing their aim to provide a solution to disputes. Besides the systemic threats, conflicting rulings also raise practical concerns, such as difficulty of implementation of the rulings,[26] lengthy multiple procedures, and additional costs.[27]

Regardless of the potential negative consequences of conflicting jurisdictions, they are to be addressed only according to the international law. Hence, this author considers that jurisdictional conflicts on international trade arena should be avoided and resolved, provided that the established legal framework

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[22] For example Art. XX (e) (f) (g) (i) (j) GATT

[23] Third World Network, 'US Continues Blockage of AB Appointments' (Info Service on WTO and Trade Issues, 5 November 2018) <https://www.twn.my/title2/wto.info/2018/ti181103.htm> accessed 3 January 2019

[24] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994) ('DSU')

[25] Kyung Kwak, Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels, Federico Ortino (eds) *Regional Trade Areements and the WTO Legal System* (Oxford University Press 2006) 465, 474

[26] Songling Yang, 'The Solution for Jurisdictional Conflicts between the WTO and RTAs: the Forum Choice Clause' (2014) 23(1) Michigan State International Law Review 107, 111

[27] Meredith Kolsky Lewis, Peter Van den Bossche, 'What to Do when Disagreement Strikes? The Complexity of Dispute Settlement under Trade Agreements' in Susy Frankel, Meredith Kolsky Lewis (eds) *Trade Agreements at the Crossroads* (Routledge 2014) 7, 14

reflecting the will of the states offers the necessary tools. The signatory states of agreements can recognize the potential adverse effects of conflicting jurisdictions by including jurisdictional clauses that provide a legal basis for avoiding and dealing with these conflicts.

1.2 **Jurisdictional Clauses in FTAs**

This section introduces jurisdictional clauses as a tool to avoid and resolve conflicting jurisdictions. It also describes the types of these clauses that can be found in FTAs, as well as, their effects. When drafting their FTAs, parties are aware of the potential issues that could appear because of the availability of different *fora* to adjudicate the same dispute.[28] Therefore, FTAs can contain jurisdictional clauses that expressly establish what to do in case more than one adjudicative body has jurisdiction and, specifically, what to do in case both the WTO and FTA DSMs have jurisdiction.

The first type of jurisdictional clauses is the one that offers exclusive jurisdiction to a specific forum, either to the FTA or to the WTO DSM.[29] The exclusivity of the forum could cover all disputes arising under that agreement, or only some types of disputes.[30] NAFTA, for example, provides that the parties shall have recourse to dispute settlement only under it, when disputes concern measure taken to protect human, animal or plant life or health, or to protect the environment of a party and the responding party requests the matter to be considered under NAFTA.[31] Another type of jurisdictional clauses is the one that allows parties to choose on a case-by-case basis where to bring their disputes. When there is such a choice, some FTAs allow resort to consecutive use of FTA and WTO DSMs. For example, the EU – Cariforum FTA provides that a party 'may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended.'[32] Therefore, it prohibits, only parallel proceedings, but it allows subsequent proceedings. Other jurisdictional clauses that allow a choice to be made between different DSMs are "fork-in-the-road" clauses, meaning that once a forum is selected, it is exclusive and resort to another forum is not permitted.[33]

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[28] Ibid.

[29] Example of this type of jurisdictional clause can be found in case of the EU, Art. 344 TFEU

[30] Lewis & Van den Bossche (n 27) 14-15

[31] North American Free Trade Agreement Among the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States ('NAFTA'), 1 January 1994, Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures Art. 2005(4)(a)

[32] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part ('EU – Cariforum FTA'), Official Journal of the European Union, 30 October 2008, L 289/I/3, Art. 222(2)

[33] Jennifer Hillman, 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?' (2009) 42 Cornell International Law Journal 193, 195; Lewis & Van den Bossche (n 27) 15; Piergiuseppe Pusceddu, 'State-to-State Dispute Settlement Provisions in the EU-Canada Comprehensive Economic and Trade Agreement' (2016) 13(1) Transatlantic Dispute Management 1, 6. For example Art. 22.6 of the KORUS (US – Korea FTA) provides that '[o]nce the complaining Party has requested the establishment of,

Jurisdictional clauses that provide exclusive jurisdiction or those that are fork-in-the road clauses aim to ensure that there will be cases that will be adjudicated only by the FTA DSM or only by the WTO DSM. In case the first triggered DSM is the WTO one and then the FTA one, the FTA adjudicative body will apply the jurisdictional clause contained in the FTA and therefore, there will be no risk of conflicting outcomes for the same case. In case an FTA party brings proceedings to the FTA and then initiates WTO proceedings for the same claims, the FTA fork-in-the-road clauses would be violated. Therefore, the FTA party against which these claims are brought could, in its turn, bring claims on the violation of the fork-in-the-road clauses before an FTA panel and follow the FTA procedures that would entitle it to retaliation comparable in value to the benefits gained by the other party by initiating WTO procedures.[34] Even though by claiming the violation of the fork-in-the-road clauses in front of an FTA panel, the defending party would reduce its material losses, this would not solve the problem of still having two conflicting rulings for the same dispute and would not reduce the concerns associated with them. The dispute would still remain unsolved, as it would remain unclear which solution is to be followed by the parties in the future. This, consequently, would bring no predictability and stability to the system, nor would this avoid having lengthy procedures in multiple *fora*. Thus, claiming a violation of FTA jurisdictional clauses in front of FTA panels does not solve the issue of conflicting jurisdictions. Hence, whether FTA fork-in-the-road clauses achieve their goal to prevent and resolve conflicts of jurisdictions when the WTO DSM is triggered after an FTA one with respect to the same claims, depends on whether the WTO panels and AB would give them effect if they are raised during WTO proceedings.

This paper, particularly, analyzes whether the jurisdictional clauses contained in the new EU FTAs would be able to achieve their aim to prevent and resolve conflicts of jurisdiction. The following sections justify the choice in favor of the jurisdictional clauses found in the new EU FTAs as the object of study of this paper and describe the jurisdictional clauses contained therein.

2. EU FTAS AND CONFLICTING JURISDICTIONS

2.1 **The Proliferation of EU FTAs**

The EU has an ambitious bilateral trade agenda, having concluded and planning to conclude multiple FTAs with important trading partners around the world. This section presents the phenomenon of proliferation of EU FTAs. It shows that the EU is an international trading actor that gives tremendous importance to and has immense experience in concluding trade agreements, making the

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or referred a matter to, a dispute settlement panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora'.

[34] Gabrielle Marceau, Anastasios Tomazos, 'Comments on "Joost Pauwelyn's" Paper: "How to win a WTO dispute based on non-WTO law?' in Stefan Griller (ed) *At the Crossroads: the World Trading System and the Doha Round* (Springer 2008) 55, 60

newest agreements that embody the EU's most recent approaches interesting cases of study for the present paper.

The EU traditionally concluded only FTAs with neighboring and developing countries until 2006, when an important shift in the EU trade agenda occurred with the communication by the European Commission of its strategy called 'Global Europe'.[35] It marked the intention to start negotiations with new FTA parties based on their market potential, level of protection against the EU export interests and potential partners' negotiations with EU competitors.[36] Moreover, not only did the European Commission extend its bilateral trade agenda in respect to other parties in 2006, but it also established that the future FTAs will be more comprehensive and ambitious.[37] Since then, the EU repeatedly reaffirmed its intention to conclude more bilateral trade agreements.

In 2010 the European Commission published a new Communication: 'Trade, Growth and World Affairs', in which it confirmed that it would continue implementing the agenda set by 'Global Europe' strategy from 2006.[38] The European Commission's strategy from 2015 'Trade for All' advanced a new bilateral agenda, the most ambitious one in the world, referring to such FTAs as CETA, TTIP, JEEPA, EU – MERCOSUR, etc.[39] Even though negotiations on TTIP are currently stalled, there are other main goals from the European Commission's agenda that were accomplished and that can already be mentioned as achievements. As of February 2019, CETA and JEEPA already entered provisionally into force, EU – Singapore FTA was approved by the EU Parliament, EU – Vietnam is awaiting approval, EU – Mexico FTA is being modernized, while new negotiations have been launched for EU – Australia and EU – New Zeeland FTAs.[40] Total EU trade in goods under FTAs in 2017 amounted to 32% of EU total trade with third countries,[41] once the trade agreements with Japan, Singapore and Vietnam come into effect, set for 2019, the share will reach nearly 40%.[42]

The number of EU FTAs has been continuously increasing and they became a defining feature of the EU external trade policy, making the EU an experienced actor in drafting trade agreements. This paper, specifically, focuses on the following newest available texts of the EU FTAs: EU – Vietnam FTA, CETA,

[35] Gabriel Siles-Brügge, 'The Power of Economic Ideas: A Constructivist Political Economy of EU Trade Policy' (2013) 9(4) Journal of Contemporary European Research 597, 598

[36] European Commission, 'Global Europe: Competing in the World' (European Union 2006) 11 <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf> accessed 19 December 2018

[37] Ibid.

[38] European Commission, 'Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy' (2010) 9 <http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf > accessed 19 December 2018

[39] European Commission, 'Trade for All' (n 1) 30-34

[40] European Commission, 'Negotiations and Agreements' <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 16 December 2018

[41] The reference is made only to trade in goods, since there is lack of disaggregated data making difficult to measure the impact of FTAs on trade in services and foreign direct investment.

[42] European Commission, 'Report on Implementation of EU Free Trade Agreements: 1 January 2017 – 31 December 2017' <http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157468.pdf> accessed 16 December 2018

JEEPA, EU – Mexico FTA, EU proposals for EU – Australia and EU – New Zeeland FTAs, as the embodiment of EU's most recent approaches, including for drafting jurisdictional clauses.

2.2 **The Proliferation and the Importance of EU FTAs DSMs**

The proliferation of EU FTAs entails also the proliferation of DSMs contained therein. Till 2000, with the exception of EEA, all EU FTAs had only diplomatic DSMs that were based on consultations and negotiations.[43] Since 2000, however the European Union has included DSMs in *all* of its FTAs based on the WTO model.[44]

International trade agreements need enforcement so that parties deliver what they agreed to in the first place. Without enforcement treaties could fall down or would have not be concluded in the first place.[45] Enforcement can be done by a third-party or by the aggrieved party itself and it can be binding or non-binding. Governments often choose binding third-party enforcement and include dispute settlement procedures so that escalations of disagreements and trade conflicts are avoided.[46] Moreover, dispute settlement procedures bring more predictability, stability and confidence into the system.[47] This explains the inclusion of binding DSMs in WTO and most recent EU FTAs.

Dispute settlement is one of the functions of the WTO.[48] Even though, currently the WTO DSM is in danger because of the blockage of the appointment of AB Members, it is often referred to as the 'crown jewel of the WTO System' because of its frequent usage by the Member States and productive activity.[49] The WTO DSM is one of the most active international dispute settlement mechanisms in the world, with over 500 disputes brought to the WTO and over 350 rulings issued since 1995.[50] The fact that the EU is introducing in its FTAs, DSMs modeled after the WTO one is also proof of the international recognition of the success of the WTO DSM.

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[43] Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned' in Lorand Bartels, Federico Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 383, 389

[44] European Commission, 'Dispute Settlement' <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/> accessed 9 January 2019

[45] WTO Secretariat, 'WTO Report 2007: Six Decades of Multilateral Co-operation – What Have We Learned?' (WTO 2007) 1, 155 <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf> accessed 18 December 2018

[46] Amy Porges, 'Designing Common but Differentiated Rules for Regional Trade Disputes' (RTA Exchange, ICTSD 2018) 1, 1 <https://www.ictsd.org/sites/default/files/research/common_and_differentiated_dispute_settlement-amy_porges-rta_exchange-final.pdf> accessed 18 December 2918

[47] WTO Secretariat (n 45) 159

[48] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) Art. III:3

[49] Tetyana Payosova, Gary Clyde Hufbauer, Jeffrey J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) 18-5 Policy Brief, Peterson Institute for International Economics 1, 1

[50] WTO, 'Dispute Settlement' <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 16 December 2018

If the WTO DSM is important for the enforcement of the multilateral rules, the EU FTAs DSMs are important in the bilateral context. The European Commission emphasizes the importance of implementation and enforcement of norms, in order to fully benefit from the concluded FTAs.[51] Effective implementation of EU's trade policy is the second out of four strategic specific objectives of the European Commission for 2016-2020.[52] It reflects the actual impacts and reaping of benefits from the trade agreements. FTA norms that remain only on paper, without being implemented in practice do not achieve their purpose to benefit people and companies in the FTA parties. In case the parties do not respect their undertaken obligations, the implementation can be secured through enforcement that is done through dispute settlement.[53] Thus, the inclusion of DSMs in every EU FTA is an essential aspect of the EU trade strategy.

This section described the proliferation of EU FTA DSMs and showed their importance for the achievement of the EU's bilateral trade policy goals. Yet, the EU FTAs and the WTO DSMs both cover trade related issue and could have conflicting jurisdictions. The following section will argue that the bilateral ambitious of the EU, are to be balanced with its multilateral aspirations.

2.3 **The EU Commitment to the Multilateral Trading System**

Even though the EU has an ambitious bilateral agenda that is prone to causing conflicts of jurisdictions between FTAs and WTO DSMs, it is still committed to the multilateral trading system created by the WTO.

The commitment to multilateralism and the observance of international law is, first of all, enshrined in the EU Treaties. According to Art. 21(2)(h) of the Treaty on European Union ('TEU')[54] the EU shall 'promote an international system based on stronger multilateral cooperation and good global governance', while Art. 3(5) provides that the Union shall contribute to 'to the strict observance and the development of international law'. Moreover, in Art. 216(2) of the Treaty on the Functioning of the European Union ('TFEU')[55] it is provided that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'. Therefore, these provisions cover the WTO, as a multilateral organization and the international agreements that it encom-

[51] Trade for All (n 1) 15, para 2.2.1

[52] European Commission, DG Trade, 'Strategic Plan 2016-2020' 12 <https://ec.europa.eu/info/sites/info/files/trade_sp_2016_2020_revised_en.pdf> accessed 17 December 2018

[53] Ibid. 9, 12, 13

[54] European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01

[55] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01

passes.[56] The Marrakesh Agreement establishing the WTO[57] provides in Art. II:2 that Multilateral Trade Agreements are 'binding on all Members' and in Art. XVI:4 that '[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'. Thus, considering that the EU is a Member of the WTO, according to the TEU and TFEU, the EU is committed to the WTO agreements.

The commitment to the multilateral trading system enshrined in the EU constitutional treaties is also reflected in the EU Trade strategies mentioned above.[58] Every time the European Commission announced an ambitious trade agenda for the conclusion of FTAs, it made sure to reaffirm its commitment to the WTO obligations.[59] In the context of the recent trade restrictive measures imposed by the US and the threat posed to the multilateral trading system, in her speech from May 2018, Trade Commissioner Cecilia Malmström stated that: 'we still believe that the WTO is the fairest and best system for trade' and that 'we need to stand up for it.'[60]

The EU is consistent in expressing its intention to support the international multilateral trading system and to follow multilateral trading rules along with developing fruitful bilateral preferential trading relations in both its constitutional treaties and trade agenda. Hence, the EU as a global trading actor that wishes to have a successful bilateral trade agenda and is willing to further support the multilateral trading system, being aware of the risk of clashes between the bilateral and multilateral DSMs, seeks efficient ways of dealing with it. In view of this need to balance the EU's multilateral and bilateral endeavors, the analysis of jurisdictional clauses included in the new EU FTAs, as a way of avoiding and solving conflicting jurisdictions, presents particular interest.

2.4 **Jurisdictional Clauses Contained in the New EU FTAs**

This section describes the jurisdictional clauses contained in the new EU FTAs under analysis. Looking at the texts of the new EU FTAs under analysis, we

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[56] WTO, 'Legal texts: Uruguay Round Final Act' <https://www.wto.org/english/docs_e/legal_e/ldc2_512.htm> accessed 10 July 2018 ('The World Trade Organization (WTO) is a single institutional framework encompassing the GATT and all the agreements and legal instruments negotiated in the Uruguay Round: the General Agreement on Tariffs and Trade or GATT 1994 and other agreements covering trade in goods; the General Agreement on Trade in Services or GATS; the Agreement on Trade-Related Aspects of Intellectual Property Protection or TRIPs; the Understanding on the Dispute Settlement (DSU); and the Trade Policy Review Mechanism (TPRM)')

[57] Marrakesh Agreement (n 48)

[58] See *supra* (n 1, 36, 38)

[59] Global Europe (n 36) 2 ('The WTO remains the most effective way of expanding and managing trade in a rules-based system, and a cornerstone of the multilateral system.'); Trade, Growth and World Affairs (n 38) 9, para 3.1 ('Despite the slow progress, completing the Doha Round remains our top priority. The potential benefits are simply too important to ignore.'); Trade for All (n 1) 25, para 5.1('The multilateral system must remain the cornerstone of EU trade policy. The WTO rulebook is the foundation of the world trading order')

[60] European Commission, 'Speech by European Commissioner for Trade Cecilia Malmström' (Brussels, 28 May 2018) <http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156894.pdf> accessed 14 February 2019

can easily detect the clauses aimed at addressing conflicts of jurisdictions. They can be found in these agreements in the articles entitled "Choice of Forum".[61] The use of this expression, itself, already anticipates that these jurisdictional clauses fall under the category of choice of forum clauses.

CETA provides that:

> [I]f an obligation is equivalent in substance under this Agreement and under the WTO Agreement, or under any other agreement to which the Parties are party, a Party may not seek redress for the breach of such an obligation in the two fora. In such case, once a dispute settlement proceeding has been initiated under one agreement, the Party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement, unless the forum selected fails, for procedural or jurisdictional reasons, other than termination under paragraph 20 of Annex 29-A, to make findings on that claim.[62]

The EU – Vietnam FTA choice of forum clause has a very similar wording with that of CETA; however it makes use only of the expression "substantially equivalent obligation" without mentioning the expression "obligation equivalent in substance".[63] As the choice of forum clauses provide that once proceedings have been initiated under one agreement, redress under other agreement shall not be sought, these are fork-in-the-road clauses.[64] For the purpose of the present discussion it is also necessary to mention paragraph 1 from the choice of forum articles contained in CETA and EU – Vietnam FTA,[65] that explicitly provide that '[r]ecourse to the dispute settlement provisions' of the FTA Dispute Settlement Chapter shall be 'without prejudice' to recourse to dispute settlement under the WTO agreement or under any other agreement to which Parties are party. The fork-in-the-road clauses are later introduced in paragraphs 2 of these articles by the expressions '[n]otwithstanding paragraph 1' in CETA and '[b]y way of derogation from paragraph 1' in EU – Vietnam FTA, showing that these clauses are exceptions from the first paragraphs. Thus, there is a general rule applying with respect to the redress of breach of all obligations provided in the first paragraphs and a fork-in-the-road clause introduced by the second paragraphs, which is the exception that has only a limited scope of application.

JEEPA, EU – Mexico, and the EU textual proposals for the EU – Australia, and EU – New Zeeland FTAs,[66] which are the newer FTAs on the EU trade agenda, have no paragraph establishing that recourse to DSMs under the FTA is without prejudice to actions under other agreements. Instead, these newer FTAs explicitly regulate in the first paragraphs the choice between different *fora* for dispute settlement. The text of JEEPA expressly states that 'the complain-

[61] CETA, Art. 29.3; EU – Vietnam FTA, Dispute Settlement Chapter, Art. 24; JEEPA, Art. 21.27; EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 3, Dispute Settlement Chapter; EU – Australia, EU Textual Proposal, Art. X.24, Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24, Dispute Settlement Chapter

[62] CETA, Art. 29.3(2)

[63] EU – Vietnam FTA, Dispute Settlement Chapter, Art. 24(2)

[64] See the definition *supra* (n 33)

[65] CETA, Art. 29.3(1); EU – Vietnam, Dispute Settlement Chapter, Art. 24(1)

[66] JEEPA, Art. 21.27(1)

ing party may select the forum',[67] while the EU – Mexico FTA and the proposals for EU – Australia and EU – New Zeeland FTAs use a more mandatory language: 'the Party seeking redress shall select the forum'[68] when there is a dispute regarding a measure in alleged breach of 'an obligation under this agreement and a substantially equivalent obligation' under another international agreement.[69] CETA and EU – Vietnam FTA, however, do not provide *expressly* anything about the choice between different fora, except the title used for the jurisdictional clause. However, the possibility to choose can be deducted from the prohibition to seek redress in another forum once a dispute has been already initiated in another one, without mentioning which forum needs to be initiated first.[70]

JEEPA, EU – Mexico, EU textual proposal for the EU – Australia and EU – New Zeeland FTAs in the second paragraphs of their Choice of Forum articles make clear that a choice made in favor of a forum by a party precludes it to initiate procedure on the same matter in another forum. JEEPA provides that:

> Once a Party has selected the forum and initiated dispute settlement proceedings under this Chapter or under the other international agreement with respect to the particular measure referred to in paragraph 1, that Party shall not initiate dispute settlement proceedings in another forum with respect to that particular measure unless the forum selected first fails to make findings on the issues in dispute for jurisdictional or procedural reasons.[71]

EU – Mexico, and the EU textual proposals for the EU – Australia, and EU – New Zeeland FTAs provide with almost identical texts, with the only difference that they make reference to the measures from first paragraphs – in alleged breach of an obligation under FTAs and a 'substantially equivalent obligation' under another agreement – only once.[72] Thus, if the JEEPA text mentions these measures in the context of both the first selected forum and the prohibition to initiate disputes on those particular measures, EU – Mexico, and the EU textual proposal for the EU – Australia, and EU – New Zeeland FTAs make this reference only with respect to the prohibition to initiate proceedings in another forum. This difference however will not affect the way in which these clauses operate in practice.

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[67] JEEPA, Art. 21.27(1)

[68] EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 3(1); EU – Australia, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter

[69] JEEPA, Art. 21.27(1); EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 3(1); EU – Australia, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter

[70] EU – Vietnam FTA, Dispute Settlement Chapter, Art. 24.2, second sentence; CETA, Art. 29.3(2), second sentence

[71] JEEPA, Art. 21.27(2)

[72] EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 3(2); EU – Australia, EU Textual Proposal, Art. X.24(2), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(2), Dispute Settlement Chapter

Based on the provisions described above, it can be concluded that all choice of forum clauses from the analyzed new EU FTAs that apply in case of "substantially equivalent obligations"[73] (besides this expression CETA also uses: "obligation equivalent in substance") are fork-in-the-road clauses, because they further provide that once a forum was selected and the party has initiated dispute settlement procedures within a forum, another procedure in another forum with respect to that particular measure cannot be initiated. The fork-in-the-road clauses in all analyzed EU FTAs are followed by paragraphs containing the definition of the initiation of procedures under FTAs, the WTO, and other agreements,[74] making them less ambiguous.

As shown, all these new EU FTAs enable EU FTA parties that seek redress for a claim, to choose between the WTO DSM or EU FTA DSMs for matters that concern substantially equivalent obligations.[75] The fact that the EU FTAs leave the possibility to use WTO DSM is not surprising, since EU FTAs often explicitly refer to and incorporate WTO norms or replicate them. For example, Art. 7 from the Chapter on Trade in Goods from JEEPA provides that Art. III GATT on National Treatment ('NT') is incorporated and made part of the agreement. Therefore, JEEPA parties could seek redress for a measure that is violating the NT obligation under either Art. 7 JEEPA that incorporates Art. III GATT or under Art. III GATT itself, within the WTO. It could be perceived as useful by FTA parties to refer disputes on the interpretation and application of these direct incorporations to the WTO DSM.[76] This provides coherence to the international trading system and lets the parties of EU FTAs to benefit from the expertise and practice of the WTO panels and of the AB. At the same time, parties are allowed to choose to bring disputes on these norms to the FTA DSMs, because even though they have the same substance, they are still different due to the fact that they are located in different contexts that influence the way these norms are interpreted.[77]

However, besides WTO incorporated norms in the FTAs there are also WTO-plus, WTO-X, and WTO-minus norms in FTAs that are different from the WTO ones. This paper adopts the notion of WTO-plus and WTO-X norms as proposed by Horn, Mavroidis and Sapir.[78] Thus, WTO-plus norms are to be

[73] The expression "substantially equivalent obligations" is used in CETA, Art. 29.3(2), second sentence; EU – Vietnam, Dispute Settlement Chapter, Art. 24(2); JEEPA, Art. 21.27(1); EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 3(1); EU – Australia, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(1), Dispute Settlement Chapter.

[74] CETA, Art. 29.3 (3); EU – Vietnam, Dispute Settlement Chapter, Art. 24(3); JEEPA, Chapter Art. 21.27(3); EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 24(3); EU – Australia, EU Textual Proposal, Art. X.24(3), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(3), Dispute Settlement Chapter

[75] See *supra* (n 69, 70)

[76] Pieter Jan Kuijper (n 9) 28

[77] Tomer Broude, Yuval Shany 'The International Law and Policy of Multi-Sourced Equivalent Norms' in Tomer Broudy, Yuval Shany (eds) *Multi-Sourced Equivalent Norms in International Law* (Bloomsbury Publishing PLC 2011) 1, 7

[78] Henrik Horn, Petros C. Mavroidis, André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (Bruegel Blueprint Series 2009)

considered FTA norms 'which come under the current mandate of the WTO, where the parties undertake bilateral commitments going beyond those they have accepted at the multilateral level'.[79] Examples of WTO-plus norms included in EU FTAs are the extensive provisions on regionalization from Art. 6, Annex II of CETA that provide a list of animal diseases to which the principles of zoning apply.[80] WTO-X norms, on the other hand are FTA norms that 'deal with issues lying outside the current WTO mandate',[81] such as norms on competition.[82] Finally, WTO-minus are those norms that allow measures between parties that would otherwise be illegal under the WTO.[83] The inclusion of WTO-minus in FTAs cannot be justified by Art. XXIV GATT on the creation of FTAs. The AB's report from *Turkey – Textiles* establishes that according to Art. XXIV:4 GATT, the purpose of an FTA is to 'facilitate trade'[84] between the parties and the report from *Peru – Agricultural Products*, that 'the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements'.[85] These reports lead to the conclusion that WTO-minus norms cannot be justified by Art. XXIV GATT. FTA norms that seem WTO-minus at the first sight, but could be justified under other GATT provisions, such as Art. XX of the GATT, would be WTO consistent and thus, should not be considered WTO-minus. In CETA, for example, Art. 2.11:4(a) permits export restrictions with respect to logs of all species, which goes against Art. XI:1 GATT that expressly prohibits imposing restrictions on exports and does not contain any special exception in the case of logs. This provision, unless justified under other GATT provisions, should be considered WTO-minus.

Disputes on WTO-X norms can be brought only to the FTA DSMs, as they are not covered by WTO agreements, therefore there is no risk of conflicting jurisdiction. Disputes involving issues regulated by WTO-plus and WTO-minus norms, on the other hand, could be brought to both WTO and FTA DSMs, as they are also covered by WTO agreements. In order for the WTO-plus and WTO-minus norms to be enforced, they need to be applied to the dispute instead of a WTO norm that relates to the same subject and, as it will be shown

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[79] Ibid. 4

[80] Gonzalo Villalta Puig, Eric D. Dalke, 'Nature and Enforceability of WTO-plus SPS and TBT Provisions in Canada's PTAs: From NAFTA to CETA' (2016) 15(1) World Trade Review 51, 66

[81] Ibid.

[82] See for example Chapter 17 CETA and Chapter 11 JEEPA

[83] James Flett, 'Referring PTA Disputes to the WTO Dispute Settlement System' (2015) in Andreas Dür, Manfred Elsig (eds) *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements, World Trade Forum* (Cambridge University Press 2015) 555, 557; Joost Pauwelyn, Wolfgang Alschner, 'Forget about the WTO: The Network of Relations between PTAs and 'Double PTAs'' in Andreas Dür, Manfred Elsig (eds) *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements, World Trade Forum* (Cambridge University Press 2015) 497, 502

[84] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, WT/DS34/AB/R**,** 22 October 1999, [57]

[85] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, WT/DS457/AB/R**,** 20 July 2015, [5.116]

bellow in the section on WTO jurisdiction,[86] the WTO DSM cannot enforce these norms because of lack of jurisdiction over them. Therefore, if the enforcement of WTO-plus or WTO-minus is sought, these norms are to be brought to EU FTAs. If however, disputes related to these norms are brought to both multilateral and bilateral DSMs, there is a risk of having conflicting outcome, as WTO panels and AB will apply the corresponding WTO norms. It needs to be accentuated that the fork-in-the-road clauses from the new EU FTAs apply only to cases of "substantially equivalent obligations" contained in the FTAs and WTO, posing the question as to what are these obligations, do they cover WTO-plus and WTO-minus norms, and what happens in case of those obligations that are substantially not equivalent. The implications of the possible meanings and clarity of the expression "substantially equivalent obligations" will be discussed below.[87]

This section described the jurisdictional clauses contained in the new EU FTAs under analysis and pointed out relevant aspects for the present paper. The provided description and specific aspects will serve as a basis for the analysis conducted under the sections analyzing whether these clauses could be given consideration if raised in WTO proceedings.

3. JURISDICTIONAL ISSUES IN WTO DSMS

3.1 **Jurisdiction of WTO panels and AB**

After describing the jurisdictional clauses contained in the new EU FTAs, it is necessary to see whether they could achieve their aim of resolving conflicting jurisdictions and preventing the risks these conflicts are associated with, in case such clauses would be raised during WTO proceedings. In order to see whether jurisdictional clauses contained in the new EU FTAs could be enforced within the WTO to achieve their aim, this section investigates whether WTO panels and the AB have jurisdiction on non-WTO law, such as FTA norms.

If WTO panels and AB have no jurisdiction on non-WTO law, they cannot enforce FTA fork-in-the-road clauses. This meaning that if a case is brought first to the EU FTAs DSMs and afterwards to the WTO one, the WTO panels and AB cannot say that a fork-in-the-road clause from an EU FTA was violated and that because of that it has no jurisdiction over a dispute on WTO law. Art. 1.1 of the DSU establishes that the rules and procedures of the Understanding shall apply to 'disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")'. Since there is nothing in the text of this article that would indicate otherwise, this author will

[86] See *infra* para 3.1
[87] See *infra* para 4.1.2

agree with *Bartels*[88] and *Pauwelyn*[89] that Art. 1.1 of the DSU clearly establishes that WTO panels have jurisdiction to decide only on claims brought under the covered agreements. This interpretation of Art. 1.1 is also supported by Art. 4.2 of the DSU that provides that 'request for consultations is made pursuant to a covered agreement'.

Besides the fact that the WTO Panels and the AB have jurisdiction only on claims related to covered agreements, this jurisdiction is also exclusive. Art. 23.1 establishes that:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

The AB confirmed that: 'Article 23.1 establishes the WTO dispute settlement system as the *exclusive* forum for the resolution of such disputes and requires adherence to the rules of the DSU'[90] (emphasis added). Art. 23.2(a) further specifies that no determination of a violation or nullification of benefits under covered agreements can be made 'except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding'. This could be interpreted as a prohibition to bring WTO related disputes to any other forum and adjudication of such a dispute by the FTA DSM would be, thus, a violation of Art. 23 of the DSU.[91] The WTO panel in *EC – Commercial Vessels* also confirmed that Art. 23 would be violated when 'Members submit a dispute concerning rights and obligations under the WTO Agreement to an international dispute settlement body outside the WTO framework'.[92] However, this would not preclude EU FTA DSMs to adjudicate on FTA norms that are incorporating or reproducing WTO norms, because these claims would no longer be claims under covered agreements,[93] but would already be claims based on EU FTAs norms.

It is clear that the WTO DSM has jurisdictions to make determinations only under the covered agreements and it is the only body empowered to do that. Therefore, it cannot make a determination on the violation of a jurisdictional clause contained in the new EU FTAs.

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[88] Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) Journal of World Trade 499, 502-503

[89] Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits' (2003) 37(6) 997, 1000

[90] Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Canada – Continued Suspension)*, WT/DS321/AB/R, 16 October 2008 [371]

[91] Marceau (n 10) 1101; Kwak & Marceau (n 25) 466; Marceau & Tomazos (n 34) 61

[92] Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels (EC – Commercial Vessels)*, WT/DS301/R, 22 April 2005, [7.195]

[93] Pamela Apaza Lanyi, Armin Steinbach, 'Limiting Jurisdictional Fragmentation in International Trade Disputes' (2014) 5 Journal of International Dispute Settlement 372, 397; Flett (n 83) 557-558

3.2 **Possibility to Decline Jurisdiction**

Even though WTO panels and AB have no jurisdiction to rule on a possible violation of EU FTAs fork-in-the-Road clauses, another way for these clauses to operate and reach their aim could be if WTO panels and AB would decline their jurisdiction because of them. This section investigates if WTO panels and AB could decline their jurisdictions in case a jurisdictional clause would be invoked.

The possibility to decline the jurisdiction of WTO panels and AB is not found in any article of the DSU. It could be argued, however, that even without being expressly conferred the right to decline their validly established jurisdiction, WTO panels and AB, similar to other international courts,[94] enjoy some inherent powers. 'A tribunal has inherent powers to make and exercise rules that are reasonably necessary for the administration of justice or to ensure the orderly conduct of the judicial system within the scope of its jurisdiction.'[95] It has been recognized both in the doctrine,[96] as well as, in the case law[97] that the WTO panels and AB have inherent powers. However, their power to decide on their own jurisdiction (*la competence de la competence*) is subject to the condition that it should not contravene to the WTO Covered Agreements.[98] Even though some authors say that the DSU does not limit the power of WTO

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[94] ICJ explained what are its inherent powers in the *Northern Cameroons (Cameroon v United Kingdom, Preliminary Objections, Judgment, [1963] ICJ Rep 15, ICGJ 153 (ICJ 1963), 2nd December 1963, International Court of Justice); Nuclear Tests (Australia v France, Interim Protection, Order, [1973] ICJ Rep 99, ICGJ 130 (ICJ 1973), 22nd June 1973, International Court of Justice);* and *Legality of Use of Force, Yugoslavia v Belgium, Order, provisional measures, ICJ GL No 105, [1999] ICJ Rep 124, ICGJ 32 (ICJ 1999), 2nd June 1999, International Court of Justice*)

[95] Caroline Henckels, 'Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO' (2008) 19(3) The European Journal of International Law 571, 583; Andrew D. Mitchell, David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31(3) 559, 566; Michigan Journal of International Law Songling Yang, 'The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs' (2012) 11 Chinese Journal of International Law 281, 314

[96] Henckels (n 95) 594

[97] Appellate Body Report, *United States – Anti-Dumping Act of 1916 (US – 1916 Act)*, WT/DS136/AB/R, WT/DS162/AB/R, 28 August 2000, [54] footnote 30 ('We note 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); Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States Recourse to Article 21.5 of the DSU by The United States (Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/AB/RW, 22 October 2001 ('For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.')

[98] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (*India – Patents)*, WT/DS50/AB/R, 19 December 1997 [92] ('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 other explicit provisions of the DSU.'); Appellate Body Report, *US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (*US – Lead and Bismuth II)*, WT/DS138/AB/R, 7 June 2000, [39] ('The Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements.'); Henckels

panels and AB to decline their jurisdictions,[99] Art. 3.2 and 19.2 of the DSU could be perceived as limiting this power. They provide that recommendations and rulings of the DSB 'cannot add to or diminish the rights and obligations provided in the covered agreements.' By declining their jurisdiction, WTO panels and AB would diminish the obligation and the right of Members to bring WTO claims to the WTO DSM provided in Art. 23 of the DSU.

Some scholars interpret Art. 3.2 and 19.2 in a literal way, saying that they are unambiguous and generally prohibit WTO panels and AB to 'add to or diminish' the rights and obligations provided in WTO Agreements.[100] Pauwelyn interprets these articles as being only statements against judicial activism in the process of interpretation, since the phrase follows the previous sentence of Art. 3.2 of the DSU that provides that the aim of the WTO DSM is 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.[101] However, the same preceding phrase from Art. 3.2 establishes that another aim of the WTO DSM is 'to preserve the rights and obligations of Members under the covered agreements', therefore there is no reason to consider that the prohibition 'to add to or diminish' WTO rights is only a statement against activism during interpretation. Moreover, Art. 19.2 repeats once again the same prohibition, making it applicable to panel and AB findings and recommendations, in general, without specifying that it should be respected exclusively in the process of interpretation. Accordingly, it is submitted that Art. 3.2 and 19.2 of the DSU clearly establish that adding to and diminishing WTO rights and obligations by WTO panels and AB is prohibited and it is not only a statement against judicial activism. Therefore, it is considered that Art. 3.2 and 19.2 present a limitation to the inherent power of WTO panels and AB to decline their jurisdiction contained in the covered agreements.

In *Mexico – Soft Drinks*[102] the respondent asked the panel to decline its jurisdiction in favor of the NAFTA DSM, because the US claims were 'inextricably linked to a broader dispute' under NAFTA.[103] The AB reached the conclusion that a WTO panel is not in a position to 'choose freely whether or not to exercise its jurisdiction'.[104] According to the AB a decision to decline jurisdiction 'would seam to diminish' the right of WTO Members, to seek redress for a violation under Art. 23 DSU, which would be inconsistent with Art. 3.2 and 19.2 of the DSU.[105] Therefore the AB reached a decision similar to the one supported by this article.

(n 95) 594; Yang, 'The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs' (n 95) 316

[99] Henckels (n 95) 594; Yang, 'The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs' (n 95) 316

[100] Joel P. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard International Law Journal 333, 342; Marceau (n 10) 1102

[101] Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits' (n 89) 1003

[102] Appellate Body Report, *Mexico – Soft Drinks*, WT/DS308/AB/R, 6 March 2006

[103] Ibid. [42]

[104] Ibid. [53]

[105] Ibid.

Even though the AB established that WTO panels cannot generally decline their jurisdiction, it seems that it opened a door for FTA clauses to be a 'legal impediment' for the exercise of jurisdiction.[106] It stated that it expressed 'no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.'[107] Even though the AB mentioned that it did not express a view on whether such circumstances are legal impediments, it still specified that 'no NAFTA panel as yet has decided the "broader dispute"' and that 'the so-called "exclusion clause" of Article 2005.6 of the NAFTA, had not been "exercised"'.[108] Art. 2005.6 of NAFTA is a fork-in-the-road clause that provides: '[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other'. Therefore, if the clause had been 'exercised' the outcome of the case could have been different.

The WTO panel and AB in *Mexico – Soft Drinks* did not detail more on the so-called 'legal impediments' and requirements that would apply to them. However, in footnote 101 the AB cited its statement from *EC – Export Subsidies on Sugar*[109] according to which 'there is little in the DSU that explicitly limits the rights of WTO Members to bring an action'. This statement was followed by references to Art. 3.7 of the DSU by virtue of which WTO Members must exercise their 'judgment as to whether action under these procedures would be fruitful' and Art. 3.10, according to which 'all Members will engage in these procedures in good faith'.[110] Thus, these articles expressly provide requirements that have to be followed by a Member when bringing a WTO dispute, otherwise they could be limiting the right of Members to bring an action. Art. 3.7 and 3.10 of the DSU embody the general principle of good faith that has to be respected by WTO Members when engaging in dispute settlement. The AB stated in the *US –FSC* case that Art. 3.10 is a 'specific manifestation of the principle of good faith which [...] is at once a general principle of law and a principle of general international law'.[111] Even though, Art. 3.7 does not specifically use the expression 'good faith', it can be interpreted as being a reflection of the basic principle of good faith contained in Art. 3.10 of the DSU. Thus, the AB established that Art. 3.7 'reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU'.[112]

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[106] Gabrielle Marceau, Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1(1) Journal of International Dispute Settlement 67, 71; Makane Moïse Mbengue, 'The Settlement of Trade Disputes: Is There a Monopoly for the WTO?' (2016) 15 The Law and Practice of International Courts and Tribunals 207, 236

[107] Appellate Body Report, *Mexico – Soft Drinks*, [54]

[108] Ibid.

[109] Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005

[110] Appellate Body Report, *Mexico – Soft Drinks*, footnote 101 to [52]

[111] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" (US – FSC)*, WT/DS108/AB/R, 24 February 2000, [166]

[112] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, [73]

Since the failure of a Member to initiate disputes in good faith could present a situation in which there is a legal impediment to rule on a case, because the right of a Member to bring a dispute is limited, the following section will analyze such possibility in more detail.

3.3 **Members Prevented from Initiating WTO Proceedings by Breaching Good Faith Obligations**

Without having to decline their jurisdiction, WTO panels and AB had to rule in several cases on whether Members were prevented from initiating WTO proceedings because of their own actions. By initiating proceedings in a forum and seeking redress for the same claims in another one, especially after they explicitly undertook not to do so by signing an agreement containing a fork-in-the-road clause, WTO Members could be in violation of the principle of good faith.

3.3.1 *Argentina – Poultry*

In *Argentina – Poultry* the panel dealt with a claim of violation of the principle of good faith by Brazil (the complainant) that allegedly also warranted the invocation of the principle of estoppel, in a case that was previously unsuccessfully brought to MERCOSUR.[113] Argentina did not claim a violation of Art. 3.7 and 3.10 of the DSU, but seemed to invoke good faith and estoppel as general principles of public international law.

Citing *US – Offset Act (Byrd Amendment)*[114] the panel established two conditions for a violation of good faith to be found: (1) a violation of a substantive WTO norm; (2) 'more than a mere violation'.[115] Since Argentina did not invoke any violation of a WTO norm as a basis for its good faith claim, the panel rejected it. When analyzing the estoppel argument, without confirming its application as a principle of public international law within the WTO or that of the criteria proposed by Argentina,[116] the panel went on with the analysis and considered that Brazil did not make a 'clear and unambiguous statement' that it would not subsequently resort to the WTO dispute settlement proceedings after having brought a case under MERCOSUR.[117] One of the reasons for reaching this conclusion was that the Protocol of Brasilia, that was in force at that time contained a non-exclusive choice of forum clause that was interpreted as imposing 'no restrictions on Brazil's right to bring subsequent WTO

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[113] Panel Report, *Argentina – Poultry*, [7.18]

[114] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* (*US – Offset Act (Byrd Amendment)*), WT/DS217/AB/R, WT/DS234/AB/R, 27 January 2003, [297]

[115] Panel Report, *Argentina – Poultry,* [7.36]

[116] Ibid. [7.37] ('Argentina asserts that the principle of estoppel applies in circumstances where (i) a statement of fact which is clear and unambiguous, and which (ii) is voluntary, unconditional, and authorized, is (iii) relied on in good faith.')

[117] Ibid. [7.38]

dispute settlement proceedings in respect of the same measure'.[118] The new Protocol of Olivos did provide a fork-in-the-road clause, but it had not entered into force yet and was interpreted as showing that parties recognized that without it, parallel proceedings could take place.[119] The panel did not exclude the possibility of refraining from ruling on the raised claims and finding a breach of the estoppel principle had the Protocol of Olivos with its fork-in-the road clause been in force.[120]

Therefore, even though the AB has not established whether the international principle of estoppel is applicable within WTO, it did leave open the possibility to refrain from ruling on a dispute, because of a 'clear and unambiguous statement' of the complainant that it would not resort to the WTO DSM – a statement that potentially could be found in an FTA fork-in-the-road clause.

3.3.2 *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*

The issue in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*[121] was whether the two Understandings on Bananas signed by the EC with the US and Ecuador, providing means for solving the long-standing dispute on EC's banana regime, 'prevented the complainants from initiating compliance proceedings pursuant to Article 21.5 of the DSU with respect to the European Communities' regime for the importation of bananas'.[122] Art. 21.5 of the DSU provides that in case of disagreement regarding the implementation of a WTO existing ruling, recourse is to be had to the dispute settlement proceedings. Since the US and Ecuador claimed that the EC bananas import regime was against the DSB recommendations and rulings, they initiated compliance proceedings.

The EC argued that the Understandings on Bananas were mutually agreed solutions ('MAS') between the parties through which they settled the dispute.[123] The term solution was interpreted as referring to an 'act of solving a problem'.[124] According to the AB 'a mutually agreed solution pursuant to Article 3.7 may encompass an agreement to forego the right to initiate compliance proceedings' but 'this need not always be so'.[125] Therefore, the mere presence of a MAS does not imply that the parties agreed not to initiate compliance proceedings. The AB concluded that the Understandings would preclude parties from initiat-

[118] Ibid.
[119] Ibid.
[120] Yang, 'The Solution for Jurisdictional Conflicts between the WTO and RTAs: the Forum Choice Clause' (n 26) 140
[121] Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas Second Recourse to Article 21.5 of the DSU by Ecuador, European Communities – Regime for the Importation, Sale and Distribution of Bananas Recourse to Article 21.5 of the DSU by the United States* (*EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*) WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW2/USA, 26 November 2008
[122] Ibid. [199]
[123] Ibid. [34]
[124] Ibid. [212]
[125] Ibid.

ing Art. 21.5 compliance proceedings only if they 'explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5' and the Understandings would 'reveal clearly that the parties intended to relinquish their rights', a relinquishment which 'cannot be lightly assumed'.[126] Even though the AB concluded that the parties did not relinquish their right to have recourse to Art. 21.5 proceedings in the Understandings,[127] the case is, first of all, instructive in showing that, at least, when a dispute concerns a MAS the AB could decide that a party relinquished its right to have recourse to compliance procedures in WTO DSM. It was unclear whether this conclusion could have a more general effect and extend to a possible relinquishment of the right to initiate proceedings or was limited to compliance proceedings in the context of a MAS.[128]

The AB continued by addressing the claim of breach of the good faith obligation prescribed in Art. 3.10 of the DSU. The AB established that in that case, a breach of good faith was a procedural impediment for a WTO Member to start Art. 21.5 proceedings and not a substantive one as in *US – Offset Act (Byrd Amendment)*.[129] Thus, the test established in that case would not be applicable in cases of procedural good faith. This statement contradicts and corrects the panel reasoning from *Argentina – Poultry*,[130] by refining the test used for procedural good faith.[131] It concluded that there is no need to establish that there was 'more than a mere violation'.[132] It considered that EC's claim was an estoppel argument and, by citing the AB report from *EC – Export Subsidies on Sugar,* said that the applicable standard to this case is that there is 'little in the DSU that explicitly limits the rights of WTO Members to bring an action' except than the cases of Art. 3.7 and 3.10 of the DSU and 'even assuming arguendo that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.'[133]

Therefore, the AB in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* re-affirmed the requirement of 'clarity' necessary for a relinquishment of the right to use the WTO DSM. Moreover, even though the panel in *Argentina – Poultry* left open the possibility to apply good faith obligations as general principles of public international law, the AB in this case made clear that even if there could be found a violation of good faith obligations that would prevent WTO Members from initiating disputes, this would be only based on Art. 3.7 and 3.10 of the DSU.

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[126] Ibid. [217]

[127] Ibid. [220]

[128] Lukasz Gruszczynski, 'The WTO and FCTC Dispute Settlement Systems: Friends or Foes' (2017) 12 Asian Journal of WTO and International Health Law and Policy 105, 129, footnote 58

[129] See *supra* (n 114)

[130] See *supra* (n 115)

[131] Bregt Natens, Sidonie Descheemaeker, '*Say it Loud, Say it Clear* – Article 3.10 DSU's Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction' (2015) 49(5) Journal of World Trade 873, 880

[132] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* [228]

[133] Ibid. [227-228]

3.3.3 *Peru – Agricultural Products: Clarity or More Confusion*

In *Peru – Agricultural Products* the AB detailed what are the conditions that a 'relinquishment of the right to initiate WTO dispute settlement proceedings' expressed in an FTA needs to respect in order for the obligations prescribed by Art. 3.7 and Art. 3.10 of the DSU to be infringed.[134] These requirements are necessary in our analysis, because they would be used as a benchmark, if a party to the EU FTAs would invoke a fork-in-the-road clause from the FTAs and they would be analyzed by the WTO panels and AB as a relinquishment of the parties to make use of the WTO DSM.

Peru and Guatemala signed an FTA that did not enter into force, in which Guatemala had allegedly agreed to a WTO inconsistent measure applied by Peru, the legality of which Guatemala was contesting in the dispute. Therefore, the AB analyzed whether the complainant acted in good faith under Art. 3.7 and 3.10 of the DSU on account of an alleged relinquishment of the right to challenge the contested measure.[135] The AB concluded that Members enjoy discretion in deciding whether bringing a case would be fruitful, as prescribed in Art. 3.7 of the DSU, however the 'considerable deference' that a Member enjoys 'is not entirely unbounded'.[136] Thus, the AB confirmed that the presumption of good faith could be rebutted.

In *Peru – Agricultural Products*, the defendant contended that parties had already reached a 'positive solution' within the meaning of Art. 3.7 of the DSU when they agreed in the FTA on the contested measure.[137] Analyzing whether Guatemala relinquished its right through a MAS to use the WTO DSM, the AB concluded that while it did not 'exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution [...] any such relinquishment must be made clearly'.[138] Thus, the AB left the door open for a relinquishment of the right to initiate disputes to be found in other forms too, if they were clear enough.[139] However, it did not specify what those other forms could be and whether a fork-in-the-road clause from an FTA could be considered such a relinquishment. Taking into consideration the invocation of the argument by the claimant itself that the parties already reached a MAS, the AB conducted an analysis on whether the requirements for a relinquishment in such a form were complied with. Art. 3.7 requires Members to exercise their judgment with respect to the fruitfulness of the action under the DSU *procedures* and Art. 3.10 expressly mandates that all Members shall engage in these *procedures* in good faith. Thus, neither of these articles suggests that a breach of

[134] Appellate Body Report, *Peru – Agricultural Products*, [5.25]
[135] Ibid.
[136] Ibid. [5.18-5.19]
[137] Ibid. [5.26] footnote 103
[138] Ibid. [5.25]
[139] James Mathis, 'WTO Appellate Body, Peru – Additional Duty on Imports of Certain Agriculture Products, WT/DS457/AB/R, 20 July 2015' (2016) 43(1) Legal Issues of Economic Integration 97, 104; Gregory Shaffer, Alan Winters, 'FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law' (2017) 16(2) World Trade Review 303, 321

good faith could be ascertained only in cases in which a MAS was first reached. In *EC – Export Subsidies on Sugar* the AB confirmed that the good faith obligation covers 'the entire spectrum of dispute settlement, from the point of initiation of a case through implementation'.[140] Therefore, the AB's possible openness to other forms is to be praised. It would makes less sense to analyze whether a jurisdictional clause constitutes a waiver in form of a MAS,[141] because it substantively does not provide with a solution for a case and because it is negotiated before there is even a dispute to be solved.[142]

Based on the reasoning provided in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)* the AB stated in *Peru – Agricultural Products* that while relinquishments in other forms than MAS are not excluded, 'any such relinquishment must be made clearly'.[143] Since the FTA provision at stake only provided that Peru 'may maintain' its PRS, the relinquishment was not found to be clear enough. Therefore, the AB set a high burden of proof for the requirement of 'clarity'. The Peru – Guatemala FTA had a choice of forum clause that was not exclusive and according to the AB did not procedurally bar Guatemala from bringing a case. In the analysis of this clause it said that 'even from the perspective of the FTA, parties to the FTA have the right to bring claims under the WTO covered agreements to the WTO dispute settlement system.'[144] It is certainly, therefore, that a simple choice of forum clause in an FTA would not qualify as a relinquishment of the right to initiate disputes, as it does not clearly relinquish the right to subsequently use the WTO DSM. Still, it is not yet discernable whether a fork-in-the-road one would, as those from EU FTAs, provided that they are clear enough.

After stating that it did not exclude the possibility to relinquish the right to initiate WTO dispute settlement procedures in other forms than through a MAS, the AB said that '[i]n any event, [...], a Member's compliance with its good faith obligations under Articles 3.7 and 3.10 of the DSU should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU.'[145] According to Pauwelyn this means that a relinquishment should make explicit reference to the DSU provision,[146] while Shadikhodjaev concludes that it means that a DSU waiver should be 'operationalized during WTO dispute settlement procedures'.[147] While the AB suggests that

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[140] Appellate Body Report, *EC – Export Subsidies on Sugar* [312]

[141] Stephanie Hartmann, 'Recognizing the Limitations of WTO Dispute Settlement: The Peru-Price Bands Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes' (2016) 48 George Washington International Law Review 617, 649

[142] The AB itself suggests that a MAS should be concluded after the initiation of the dispute (Appellate Body Report, *Peru – Agricultural Products*, [5.26])

[143] Appellate Body Report, *Peru – Agricultural Products*, [5.25]

[144] Ibid. [5.27]

[145] Ibid. [5.25]

[146] Joost Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' (2017) 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731144> accessed 9 January 2019

[147] Sherzod Shadikhodjaev, 'The "Regionalism vs Multilateralism" Issue in International Trade Law: Revisiting the Peru–Agricultural Products Case' (2017) Chinese Journal of International Law 109, 117

there could be other forms, such forms have to be *related to or within the context of* DSU rules and procedures. The waiver does not have to take place only within the DSU procedures, it can also be *related to* a DSU rule. Therefore, a jurisdictional clause should expressly *relate to* the right to initiate proceedings under the DSU in order to comply with this requirement.

Another requirement for a relinquishment of the rights and obligations under the DSU set by the AB was that it cannot go 'beyond the settlement of specific disputes'.[148] The mentioning of this requirement is problematic, because it seems to go beyond the textual requirements.[149] The AB recalled in this respect Art. 23.1 of the DSU that mandates recourse to and respect of the DSU proceedings.[150] It did not explain how and based on what it extracted this requirement from the text of Art. 23. In the opinion of this author, there is nothing in Art. 23 that would suggest that states can relinquish their rights and obligations under the DSU only with respect to specific disputes. Art. 23 is silent on this issue and the AB failed to explain the legal basis of the requirement that a relinquishment of rights and obligations under the DSU cannot go 'beyond the settlement of specific disputes'. It is also hard to determine what exactly the AB was implying when making this statement. It could be argued that relinquishing the right with respect to a certain category of disputes could be enough, at the same time it could be that the AB would consider only relinquishments that relate to single particular disputes.[151] If the latter is the case, no jurisdictional clause would comply with this requirement.[152] First of all, there is a temporal issue, jurisdictional clauses are drafted and signed together with the entire agreement, while specific disputes on FTA norms arise only afterwards. Jurisdictional clauses cannot relinquish the right to use WTO DSM in relation to single specific disputes that will only materialize later. According to this narrow interpretation, only clauses signed between parties after the dispute appears can relinquish the rights under the DSU. It might as well be that this condition was enunciated by the AB only for the purpose of a waiver embodied in a MAS that has the aim to solve only a particular dispute, condition which would not be applicable to other forms.

According to the AB, another condition that applies to a 'waiver embodied in a mutually agreed solution', based on Art. 3.7 DSU is that it has to be 'consistent with the covered agreements'.[153] This condition would imply that WTO panels would need to first analyze the substance of the contested measure and only if it is WTO consistent, they could continue the analysis of the relinquishment of the right to use the DSM contained in the MAS.[154] In other words,

[148] Appellate Body Report, *Peru – Agricultural Products*, footnote 106

[149] Shaffer & Winters (n 139) 318 ('For example, why must a waiver apply to a specific dispute rather than a general obligation, so long as no other WTO party is harmed?')

[150] Appellate Body Report, *Peru – Agricultural Products*, footnote 106

[151] Shaffer & Winters (n 139) 318, footnote 30

[152] Gruszczynski (n 128) 123 ('Although it may be argued that a decision of the parties to use a specific dispute settlement system is always individualized (as this type of provision only provides for an option), such a consent will not be expressed by both parties')

[153] Appellate Body Report, *Peru – Agricultural Products* [5.26]

[154] Gruszczynski (n 128) 123

this would lead to the in paradoxical result that the WTO panels and AB would be entitled to review a measure and only then to reach the conclusion that the complainant was prevented from initiating proceedings on this particular measure.[155] Even though this might seem absurd, as this would mean that the WTO panels and AB could not decide on the substance of the claims, this still has textual support in the context of and was used by the AB, specifically, in relation to a MAS.[156] Art. 3.7 of the DSU, clearly provides that: '[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements' is to be preferred. This requirement should not be applicable to a relinquishment that is embodied in another form than a MAS, as there is no textual basis for that. It could be applicable, however, when a jurisdictional clause would be considered within the broader context of a case that involves a substantive FTA norm analyzed as MAS, as was the case of *Peru – Agricultural Products*. Nevertheless, this would refer to that substantive FTA norm that purports to solve a case and not to the jurisdictional clause. In a potential case where a fork-in-the-road clause, as those from EU FTAs, would be the main focus of the claim and the relinquishment of the right to initiate procedures would be in another form than a MAS, this condition should not be enunciated by the AB.

Peru – Agricultural Products established very strict conditions for a relinquishment of the right to use the WTO DSM embodied in a MAS. The AB report in this case raised more questions than answers. It is not clear whether the enunciated conditions are cumulative or sequential,[157] they do not always have a textual basis in the DSU,[158] it is uncertain whether the same conditions would be applicable if the relinquishment of the right to use the WTO DSM was in another form than a MAS, and what such other form could be. However, *Peru – Agricultural Products* AB report is informative in respect to what the WTO panels and AB could require from EU FTA fork-in-the-road clauses, if they were invoked.

3.3.4 *Possible Requirements for FTAs Jurisdictional Clauses Preventing Parties to Initiate Subsequent WTO Proceedings*

The analyzed cases are instructive with respect to how the fork-in-the-road clauses from the new EU FTAs could be treated if raised within the WTO DSM. It is clear that the WTO panels and AB would not decline their jurisdiction, but they might rule that EU FTA parties are breaching their good faith obligations

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[155] Ibid.

[156] Appellate Body Report, *Peru – Agricultural Products*, [5.25, 5.26] footnote 102 ('Thus, we proceed to examine in this dispute whether the participants clearly stipulated the relinquishment of their right to have recourse to WTO dispute settlement by means of a "solution mutually acceptable to the parties" that is consistent with the covered agreements.'; 'the DSU emphasizes that "[a] solution mutually acceptable to the parties to a dispute" must be "consistent with the covered agreements"'; 'The third sentence of Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."')

[157] Mathis (n 139) 99

[158] See *supra* (n 149)

prescribed in Art. 3.7 and 3.10 of the DSU. This, accordingly, would preclude the parties to commence WTO proceedings. It is promising that even if the AB never found that a WTO Member was precluded from brining a case to the WTO DSM, none of these cases concerned an in force fork-in-the-road clause invoked by the parties. Moreover, in all the cases the WTO panels and the AB seemed to leave open the possibility that has there been a fork-in-the-road, the conclusion would have been different. Yet, there are still several conditions that according to WTO panels and the AB the fork-in-the-road clauses from EU FTAs analyzed as waivers need to respect: (i) to be clear and unambiguous; (ii) to make reference to DSU provisions; (iii) not to go beyond the settlement of specific disputes; (iv) to be consistent with covered agreements (in relation to waivers in form of an MAS).

Even though the AB might change its position in a case that involves an FTA in force with a fork-in-the-road clause that will not be analyzed as an MAS, the EU should consider these requirements and try to comply with them, as far as possible, if it wishes its FTA fork-in-the-road clauses to achieve their aim. As long as these cases are the only indication, the following section will analyze whether the fork-in-the-road clauses from the new EU FTAs would comply with these requirements, were they invoked in a WTO dispute.

4. THE COMPLIANCE OF THE FORK-IN-THE-ROAD CLAUSES FROM THE NEW EU FTAS WITH THE REQUIREMENTS SET BY THE WTO CASE LAW

This paper proceeds with a detailed analysis of whether the fork-in-the-road clauses from CETA, as well as EU – Vietnam, JEEPA, EU – Mexico FTA, and EU proposals for EU – Australia and EU – New Zeeland FTAs comply with the four identified requirements and would be effective in preventing the WTO panels and the AB from ruling on a dispute already brought to an EU FTA arbitration panel.

4.1 **The Clarity and Unambiguity of the Jurisdictional Clauses from the New EU FTAs**

4.1.1 *The Prohibition to Initiate Subsequent and Parallel Proceedings*

All fork-in-the-road clauses from the new EU FTAs under analysis, with slightly different language, provide that once a dispute settlement proceeding has been initiated under one agreement for the breach of a "substantially equivalent obligation"[159] under the FTAs and under the WTO Agreement or another agreement, the party *shall not* initiate procedures under other agreements, unless the first forum fails for jurisdictional or procedural reasons.[160] Therefore in a clear language, by using the mandatory expression *shall not*, these clauses

[159] See *supra* (n 73)
[160] See *supra* (n 62, 71)

explicitly prohibit initiation of other procedures under other DSMs. It prohibits both parallel and subsequent cases, because the moment that determines the prohibition is the initiation of the proceedings. It is not necessary for a case to be finalized under the FTA proceedings, it is enough for the proceedings to be initiated. Moreover, these FTAs provide a further degree of clarity by defining when disputes under the FTA, WTO, and other DSMs are initiated in the paragraphs following the ones that contain the fork-in-the-road clauses.[161] Thus, there is no room for ambiguity with respect to whether the choice is definite and what is the exact moment when it becomes so.

The text of the EU – Mexico FTA and the textual proposals for EU – Australia and EU – New Zeeland add to the certainty that parallel and subsequent proceedings are to be precluded by providing the obligation to select a forum for the settlement of a dispute regarding a "substantially equivalent obligations".[162] It is to be praised the change in wording of these paragraphs from "may select" in JEEPA to "shall select" in EU – Mexico FTA and the proposals for EU – Australia and EU – New Zeeland FTAs. This mandatory language only emphasizes that a choice needs to be made and it is not only a right of a party to choose or not a single forum, but an obligation to do so.

The EU choice in favor of fork-in-the-road clauses for jurisdictional clauses in its FTAs is to be appreciated, especially in light of the WTO case law that analyzed only non-exclusive forum clauses and has not yet excluded the possibility that panels and AB would refrain from ruling on a case that involved a fork-in-the-road clause.[163] Therefore, the incorporation of fork-in-the-road clauses is showing the intention of the parties, openly expressed in the new EU FTAs, to relinquish their right to initiate WTO proceedings when they already brought a dispute before an EU FTA arbitration panel with respect to the claims that concern "substantially equivalent obligations".

4.1.2 *The Meaning of Expression "Substantially Equivalent Obligation"*

In order to establish the clarity and unambiguity of the fork-in-the-road clauses contained in the new EU FTAs, it is essential to delineate the category of disputes that the fork-in-the-roads contained in these FTAs cover. The meaning of the expression "substantially equivalent obligations" settles the limits of the scope of application of the clauses, however neither of the analyzed EU FTAs defines this expression, leaving room for interpretation.

First, it is necessary to establish when two obligations are equivalent. According to Oxford dictionary equivalent means 'equal in value, amount, function, meaning, etc.' or 'having the same or a similar effect'.[164] Lanyi and Steinbach interpreted the expression "equivalent in substance" as referring to WTO pro-

[161] See *supra* (n 74)

[162] See *supra* (n 68)

[163] See *supra* (n 119, 144) referring to the Panel Report from *Argentina – Poultry*, [7.38] and the Appellate Body Report from *Peru – Agricultural Products*, [5.27]

[164] Oxford Dictionaries <https://en.oxforddictionaries.com/definition/equivalent> accessed 24 January 2019

visions incorporated by reference or reproduced in the FTAs and those that 'while not identical, are equivalent in substance to WTO rules.'[165]The authors of this interpretation, themselves, consider that it could be difficult to establish what equivalent in substance means.[166] In a similar fashion, Broude and Shany identify norms provided in different sources of international law as being equivalent when they are 'similar or identical in their normative content'.[167] According to all these interpretations the term "equivalent" can refer to both equal or similar things. If with norms that have identical content, such as FTA norms that reproduce or incorporate WTO norms, there should be no problems in establishing their equivalence, the difficulty would arise with norms that are similar, but not identical. Establishing the similarity of norms from different sources involves a process of comparison of their normative contents.[168]

The concept of similarity is not an extraneous one for the WTO panels and AB. The term "similar" was defined by the AB as 'having a resemblance or likeness', 'of the same nature or kind', and 'having characteristics in common'.[169] In the context of taxation the AB established that similarity is to be determined on a 'case by case basis'.[170] Similarity cannot be established without having to compare two things, such as a WTO and an FTA norm. Whether two norms are equivalent for the purpose of the fork-in-the-road clauses contained in the new EU FTAs will be established when a dispute materializes and the two norms to be compared are identified. As WTO-plus and WTO-minus norms are, by definition, norms that go beyond and, respectively, against WTO norms, they are not to be considered as being equivalent to the corresponding WTO norms. Establishing whether a norm is WTO-equivalent, rather than WTO-plus or WTO-minus, remains a task to be performed on a case by case basis. Therefore, the scope of application of the new EU FTAs fork-in-the road clauses is contingent on the assessment of whether a claim brought to both the WTO and EU FTAs DSMs concerns a specific obligation that is equivalent to a WTO one.

It is to be remarked that the expression interpreted by Lanyi in Steinbach contains the term "in substance", while the new EU FTAs under analysis use the term "substantially", except CETA that uses both terms. The terms "substantially" and "in substance" seem to be used interchangeable in CETA as referring to the same type of obligations.[171] However, according to their ordinary meaning these terms have different definitions. While "substance" refers to the 'subject matter' of a norm, "substantially" means 'to a great or significant extent'

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[165] Lanyi & Steinbach (n 93) 392

[166] Ibid.

[167] Broude & Shany (n 77) 5

[168] Erik Denters, Tarcisio Gazzini 'Multi-Sourced Equivalent Norms from the Standpoint of Governments' in Tomer Broudy, Yuval Shany (eds) *Multi-Sourced Equivalent Norms in International Law* (Bloomsbury Publishing PLC 2011) 69, 80

[169] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System),* WT/DS207/AB/R, 23 September 2002, [226] with respect to Footnote 1 to Art. 4(2) of the Agreement on Agriculture

[170] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)* WT/DS8/AB/R, 4 October 1996, p 26-27

[171] See *supra* (n 62)

or 'for the most part'.[172]The choice in favor of a term or another could have implications for the scope of application of the fork-in-the-road clauses contained in the new EU FTAs.

The term "substantially" created uncertainty and debates around it within WTO. The most demonstrative case for the indeterminate character of the term "substantially" is its use in the context of Art. XXIV:8 GATT that establishes what the requirements for Customs Unions and FTAs are. It provides that duties and other restrictive regulations of commerce are to be eliminated with respect to 'substantially all trade'. In *Turkey – Textiles* the AB addressed the meaning of the term and concluded that '[n]either the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision'. The AB further continued 'that "substantially all the trade" is not the same as all the trade, and also that "substantially all the trade" is something considerably more than merely some of the trade',[173] but it never established what is the exact extent required by the term "substantially" in Art. XXIV:8 GATT. This interpretation of the term "substantially", even though in a different context, is showing that it refers to a degree or an extent, the size of which is difficult to establish. Therefore, was it for the term "substantially" to have the same meaning in the context of the fork-in-the-road clauses from the new EU FTAs, it would refer to the degree and extent of equivalence between norms. Requiring an extent of equivalence between obligations would only bring ambiguity to these clauses, because of the indeterminacy associated with it.

The interchangeable use of the terms "in substance" and "substantially" used in CETA and the fact that the parties to CETA in the Questions and Replies within the WTO Committee on Regional Trade Agreements used the expression 'obligation that is equivalent in substance', when referring to the fork-in-the-road clause, shows that the EU refers to the substance of the obligations, rather than to the degree of equivalence between the norms. Therefore, for the clarity and unambiguity of these clauses and in order to avoid possible confusions related to the term "substantially" as used within the WTO, it is advisable for the EU to use the expression "obligations equivalent in substance" when drafting its fork-in-the-road clauses.

4.2 **Reference to the DSU provisions**

The reasoning of the AB from the *Peru – Agricultural Products* seems to require reference to the DSU rules and procedures for any other form that embodies a relinquishment of the right to initiate WTO procedures.[174] CETA, as well as other EU FTAs analyzed in this article, do not expressly refer to DSU rules and procedures in the paragraphs that contain the fork-in-the-road clauses. How-

[172] Oxford Dictionaries <https://en.oxforddictionaries.com/definition/substance> and <https://en.oxforddictionaries.com/definition/substantially> accessed 24 January 2019

[173] Appellate Body Report, *Turkey – Textiles*, [48]

[174] See *supra* (n 145)

ever, as stated above,[175] the subsequent paragraphs define the moment different procedures are to be considered initiated. They establish that dispute settlement procedures under the WTO are deemed to be initiated when there is a request of a Party for the establishment of a panel under Art. 6 of the DSU.[176] Hence, the jurisdictional clauses of the EU FTAs under analysis, taken as a whole, expressly refer to a specific rule of the DSU. When reading the fork-in-the road clauses together with their subsequent paragraphs, it becomes clear that the right that is relinquished in these clauses is the one prescribed by Art. 6 of the DSU – the right to initiate WTO proceedings. Accordingly, the fork-in-the-road clauses from the new EU FTAs should be considered in compliance with the requirement set by the AB in *Peru – Agricultural Products*.

4.3 **Not Going 'Beyond the Settlement of Specific Disputes'**

As argued, the requirement for a relinquishment of the right to initiate WTO proceedings not to go 'beyond the settlement of specific dispute' does not seem to have textual basis in the DSU.[177] However, this section will consider whether the new EU FTAs fork-in-the-road clauses would comply with it, if the WTO panels and AB do not depart from the case law and, instead, reiterate it. If the requirement not to go 'beyond the settlement of specific disputes' is interpreted narrowly as requesting application to single disputes that already arose, then there is no fork-in-the-road clause that would qualify under it.[178] Drafters of fork-in-the-road clauses could, at least, try to comply with the broad interpretation that requires mentioning a category of disputes to which the clause applies. Indeed, all the new EU FTAs under this study do refer in their fork-in-the-road clauses to a specific category, that of breaches of "substantially equivalent obligations" under the FTA and other agreements. "Specific" means 'clearly defined or identified'.[179] Since new EU FTAs define and identify a category of disputes that cannot be initiated in two *fora*, this author agrees with Pauwelyn[180] that EU FTAs would comply with the broad interpretation of the requirement not to go 'beyond the settlement of specific disputes'.

4.4 **Consistent with the Covered Agreements**

If jurisdictional clauses are invoked in a case in which WTO panels and AB decide to perform an analysis of a waiver in form of a MAS, the solution needs

[175] See *supra* (n 74)

[176] CETA, Art. 29.3 (3)(a); EU – Vietnam, Dispute Settlement Chapter, Art. 24(3)9a); JEEPA, Chapter Art. 21.27(3)(b); EU – Mexico FTA, Text of the Agreement in Principle, Art. X. 24(3)(b); EU – Australia, EU Textual Proposal, Art. X.24(3)(b), Dispute Settlement Chapter; EU – New Zeeland, EU Textual Proposal, Art. X.24(3)(b), Dispute Settlement Chapter

[177] See *supra* para 3.3.3

[178] See *supra* (n 152)

[179] Oxford Dictionaries, <https://en.oxforddictionaries.com/definition/specific> accessed 21 December 2018

[180] Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' (n 146) 19, footnote 68

to be 'consistent with the covered agreements'.[181] The framework of the MAS could, logically, be applied only if the FTA in question contained a substantive provision that purported to resolve the dispute between the parties and a jurisdictional clause would be considered as an additional element of analysis for showing that the intention of the parties was, clearly, to waive their right to bring disputes through this substantive norm, as it happened in *Peru – Agricultural Products*. It makes less sense to consider applying this requirement specific for a MAS in a case where the analysis is focused on a fork-in-the-road clause that is not intended to solve a dispute.[182] Still, taking into consideration the established case law by *Peru – Agricultural Products*, this section will analyze what could be the implications of such requirement for the new EU FTAs fork-in-the-road clauses that could be considered as part of the analysis of a relinquishment of the right to initiate WTO procedures in the form of a MAS.

This requirement would be, especially, relevant in case of WTO-minus norms included in FTAs, that are, by definition, inconsistent with WTO obligations. Since, the fork-in-the-road clauses from the new EU FTAs cover only obligations that are equivalent in substance and the WTO-minus norms do not fall under this category, parties to these FTAs evidently did not relinquish their right to initiate WTO subsequent or parallel proceedings with respect to these WTO inconsistent norms. Hence, parties to the new EU FTAs are not precluded from bringing claims on WTO-minus norms even after initiating proceedings under the FTA DSM. The first paragraphs from CETA and EU – Vietnam FTA that establish the general rule that 'recourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party'[183] seem to confirm that parallel or subsequent proceedings are permitted with respect to non-equivalent obligations. The expression "without prejudice" means 'without detriment to any existing right or claim'.[184] Accordingly, the general rule is that the right to have recourse to the WTO dispute settlement is unaffected. Since the fork-in-the-road clauses are only an exception from the general rule, in case of non-equivalent obligations, such as WTO-minus norms, the general rule remains applicable.

As parties to the new EU FTAs seem to have recognized the right to make use of the WTO dispute settlement subsequently or in parallel to bilateral dispute settlement in case of WTO-minus, the question of compliance with the WTO covered agreements should not arise with respect to disputes covered by the fork-in-the-road clauses from the new EU FTAs. The fork-in-the-road clauses concern only obligations that are equivalent to the WTO ones. Hence, the last requirement on the consistency with covered agreement should not affect the qualification of the new EU FTAs fork-in-the-road clauses as a relinquishment of the right to initiate WTO proceedings.

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[181] See *supra* para 3.3.3; 3.3.4

[182] Hartmann (n 141) 649

[183] See *supra* (n 65)

[184] Oxford Dictionaries <https://en.oxforddictionaries.com/definition/without_prejudice> accessed 11 January 2019

4.5 **The Assessment of the new EU FTAs Fork-in-the-Road Clauses**

The final sections of this paper analyzed whether jurisdictional clauses from the new EU FTAs would qualify under the requirements established by the case law for a relinquishment of the right to initiate WTO proceedings.

The fork-in-the-road clauses from the new EU FTAs proved to establish quite clear that subsequent and parallel proceedings are prohibited when they concern "substantially equivalent obligations". However, to fully comply with the clarity and unambiguity requirement it is advisable to use the term "in substance" instead of "substantially". The fork-in-the-road clauses also comply with the condition of reference to the DSU provisions and covering only norms consistent with the WTO covered agreements, as required. The requirement "not to go beyond the settlement of specific disputes" has no legal basis and if interpreted narrowly – no jurisdictional clause could comply with it. Under a broad interpretation, the jurisdictional clauses from the new EU FTAs are to be considered in compliance, even with this requirement that the author considers the WTO panels and AB should renounce at in the future cases.

Therefore, with the suggested modifications and a jurisprudence that would reflect the law, the new EU FTAs fork-in-the-Road clauses could be considered good candidates to qualify as relinquishments of the right to initiate procedures under the WTO and, consequently, for solving jurisdictional conflicts.

CONCLUSION

FTAs and WTO cover the same issues and have different DSMs for the enforcement of their norms, posing the risk of having conflicting jurisdictions. The aim of the paper was to analyze whether the jurisdictional clauses from the new EU FTAs could resolve and prevent conflicting jurisdictions, if they were invoked in WTO proceedings.

This paper presented in its first part the issue of conflicting jurisdictions and the risk associated with them for the multilateral and regional trading regimes. The second part justified the choice in favor of jurisdictional clauses contained in the new EU FTAs as the object of study of the paper. It showed that the EU has an ambitious bilateral agenda that requires having functional DSMs in trade agreements, at the same time being a declared supporter of multilateralism. The fork-in-the-road clauses from the new EU FTAs are of particular interest, because they should address the issue of conflicting jurisdictions and help balance the EU's multilateral and bilateral endeavors and preserve the important role of the FTA DSMs. For the jurisdictional clauses from the new EU FTAs to achieve this aim, the question was whether they could be considered by WTO panels and AB when invoked within the WTO DSM.

As shown in the third part of the paper, WTO panels and the AB have jurisdiction to rule only on WTO law and cannot decide on alleged violations of FTA norms. However, while retaining their jurisdiction, the WTO panels and AB could still reach the conclusion that they would not rule on the merits of the case because of a breach by the complainant of the good faith obligation enshrined

in the DSU. The possibility was left open that a WTO Member initiating proceedings under both the DSU and an FTA DSM, containing a jurisdictional clause in which the right to initiate subsequent or parallel WTO proceedings was relinquished, would be prevented from bringing WTO procedures because of the lack of good faith. The paper screened the relevant WTO case law from which it extracted and assessed the meaning and the legal basis of the conditions that the WTO panels and AB could establish for a fork-in-the-road clause for it to qualify as a relinquishment of the right to initiate WTO proceeding. In light of these requirements the paper assessed in its last part the fork-in-the road clauses from the new EU FTAs. It determined that with minor changes, they could have a good chance to qualify with the requirements that have a legal basis or are narrowly interpreted.

To conclude, unless the WTO legal framework will change in the future, jurisdictional clauses could potentially solve the issue of conflicting jurisdiction only on the very limited basis of violation of good faith obligation. Moreover, the WTO panels and AB in their case law established strict requirements for these clauses to be given consideration, sometimes with no legal reasons for them. When it comes to disputes that concern obligations that are 'equivalent in substance', the new EU FTAs fork-in-the-road clauses could prevent and resolve conflicting jurisdictions with the WTO DSM, so that the EU's multilateral and bilateral endeavors can coexist without jeopardizing the DSMs contained therein.