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## Articles

# Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions

By Joost Pauwelyn\*

### INTRODUCTION

The Southern African Development Co-ordination Conference (SADCC), the predecessor to the Southern African Development Community (SADC), was established in April 1980 by the Governments of nine Southern African countries.<sup>1</sup> At that time, one of SADCC's principal objectives was to reduce member States' dependence on apartheid South Africa.<sup>2</sup> Since then, four other Southern African countries, including South Africa, have joined the Community.<sup>3</sup> SADC now covers broad economic and

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1. Rosalind H. Thomas, *Introductory Note to Treaty of the Southern African Development Community*, Aug. 17, 1992, 32 I.L.M. 116, 117. The nine countries included: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. *Id.*

2. *Id.*

3. See Amended Treaty of the Southern African Development Community, Aug. 14, 2001, at [http://www.sadc.int/index.php?lang=english&path=legal/treaties/&page=amended\\_declaration\\_and\\_treaty\\_of\\_sadc](http://www.sadc.int/index.php?lang=english&path=legal/treaties/&page=amended_declaration_and_treaty_of_sadc) (last visited Jan. 30, 2004) [hereinafter Amended SADC Treaty]. The original SADC Treaty was signed by all nine SADCC member States, as well as Namibia. Treaty of the Southern African

social sectors, ranging from energy to employment, culture to trade, and human resource development to food.<sup>4</sup> The SADC Treaty has twenty-two protocols attached to it,<sup>5</sup> one of which is the Protocol on Trade, signed by twelve of the fourteen SADC members on August 24, 1996.<sup>6</sup> The Protocol on Trade aims to establish a free trade area in the SADC region within eight years from its entry into force.<sup>7</sup> In particular, this Article examines Annex VI to the SADC Protocol on Trade (Annex VI), which concerns dispute settlement between SADC member States.<sup>8</sup> Annex VI sets forth a trade dispute settlement mechanism between SADC members that is based largely on the World Trade Organization (WTO) dispute settlement mechanism.<sup>9</sup>

This Article consists of four parts. Part I examines the potential for overlap between the SADC dispute settlement mechanism on trade and other international dispute settlement regimes. It examines both regimes within the African region,<sup>10</sup> as well as global regimes.<sup>11</sup> Part I essentially asks whether it is conceivable that a single dispute between SADC members falls under the jurisdiction of both the SADC dispute settlement mechanism on trade and the jurisdiction of another international court or tribunal.

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Development Community, Aug. 17, 1992, 32 I.L.M. 116, 135. The Democratic Republic of Congo, Seychelles, Mauritius and South Africa subsequently joined the SADC. Amended SADC Treaty, *supra*.

4. SADC, *Background: History, Evolution and Current Status*, at <http://www.sadc.int/index.php?lang=english&path=about/background&page=history> (last visited Feb. 11, 2004).

5. SADC, *Protocols*, at <http://www.sadc.int/index.php?lang=english&path=legal/protocols&page=index> (last visited Feb. 11, 2004).

6. See Southern African Development Community Protocol on Trade, Aug. 24, 1996, at [http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p\\_trade](http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_trade) (last visited Nov. 21, 2003), amended by the Amendment Protocol on Trade in the Southern African Development Community, at [http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p\\_trade](http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_trade) (last visited March 1, 2004) [hereinafter SADC Protocol on Trade]. Each of the fourteen SADC member States has signed the Amendment Protocol on Trade. *Id.*

7. *Id.* art. 3(1)(b).

8. Southern African Development Community Protocol on Trade, Annex VI, at <http://www.sadc.int/documents/trade/annex6.doc> (last visited Jan. 25, 2004) [hereinafter Annex VI].

9. Compare *id.*, with Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU].

10. Examples include the Southern African Customs Union (SACU), the Common Market for Eastern and Southern Africa (COMESA), and the African Union.

11. Examples include the World Trade Organization (WTO), the International Court of Justice (ICJ), and the UN Convention on the Law of the Sea (UNCLOS).

Part II continues on the assumption that there indeed may be several international fora that have jurisdiction to deal with a particular trade dispute between SADC members. It identifies the different factors that may influence SADC members to bring a dispute either to SADC or to another international forum. Part II focuses in particular on the relative advantages and disadvantages of bringing a complaint before the WTO as compared to SADC.

Part III provides a comparative analysis of how other international regimes have addressed the problem of overlapping fora. It examines the explicit conflict clauses set out in other regional and bilateral trade regimes, such as the European Union (EU), the Southern Common Market Agreement (MERCOSUR), the North American Free Trade Agreement (NAFTA), and the South Africa-European Community Free Trade Agreement. In addition, Part III describes treaty provisions in global regimes such as the WTO and the Energy Charter Treaty. Lastly, this part elaborates on the general principles of law that international courts and tribunals may apply to resolve problems of jurisdictional overlap in situations where the relevant treaties/agreements have no explicit conflict clauses.

Finally, Part IV provides concrete proposals to amend Annex VI so as to (1) avoid duplication of dispute settlement proceedings, and (2) steer parties to the forum that is, according to a decision made by SADC members, best suited to resolve a particular dispute. Part IV offers several options and leaves it to SADC members to select the option that is most appropriate to meet their needs, and Part V offers some concluding remarks.

## I. POTENTIAL OVERLAPS

Under the current international framework, a situation most certainly could arise in which a dispute between two SADC Member States is brought before a trade panel under the SADC Protocol on Trade and another international court or tribunal. This overlap of jurisdiction could occur with reference to another international court or tribunal that is either (1) dealing mainly with trade-related disputes, or (2) not specifically dealing with trade, but possessing a more general jurisdiction or another specialized jurisdiction other than trade. In both instances, such other court or tribunal could exist either (1) within the African region, or (2) beyond Africa, having a more global membership. Perhaps obvious, any jurisdictional overlap with the SADC Pro-

tocol on Trade can arise only with another international regime that is binding on at least two SADC member States. The enumeration of potential overlaps in this section is illustrative only. Especially when it comes to other non-trade related courts or tribunals, this Article makes no attempt to be exhaustive.<sup>12</sup>

Before summing up other fora and the scope of their jurisdiction, it is important first to recall the jurisdiction of panels under the SADC Protocol on Trade. The amended SADC Protocol on Trade provides that “[t]he rules and procedures of Annex VI shall apply to the settlement of *disputes between Member States concerning their rights and obligations under this Protocol.*”<sup>13</sup>

## A. OTHER TRADE-RELATED DISPUTE SETTLEMENT MECHANISMS

### 1. *Global Mechanisms: The WTO*

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) governs dispute settlements between WTO members.<sup>14</sup> The DSU applies to “disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1” to the DSU, that is, the so-called “covered agreements,” which in practice covers almost all WTO agreements.<sup>15</sup> Since all SADC members—with the exception of Seychelles—are also WTO members, and since many provisions in the SADC Protocol on Trade import WTO provisions, there is a large overlap between the SADC Protocol on Trade and WTO agreements as applied to SADC members.<sup>16</sup> As

12. On the general question of overlapping jurisdictions, see YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

13. SADC Protocol on Trade, *supra* note 6, art. 32 (emphasis added); see also Annex VI, *supra* note 8, art. 1.

14. DSU, *supra* note 9, art. 1.

15. *Id.*

16. Compare SADC Protocol on Trade, *supra* note 6, art. 11, with General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. III, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]; compare SADC Protocol on Trade, *supra* note 6, art. 10, with GATT 1994, *supra*, art. XXI; compare SADC Protocol on Trade, *supra* note 6, arts. 18, 19, with GATT 1994, *supra*, art. VI; compare SADC Protocol on Trade, *supra* note 6, art. 20, with Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994) [hereinafter Agreement on Safeguards]; compare SADC Protocol on Trade, *supra* note 6, art. 23, with General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organiza-

a result, many trade disputes between SADC members can be brought to the trade dispute settlement mechanism of either SADC or the WTO.

For example, if Malawi were to impose new quantitative import restrictions on leather products from South Africa, then South Africa could bring a claim to SADC under Article 7 of the Protocol on Trade<sup>17</sup> or to the WTO under Article XI of GATT 1994.<sup>18</sup> Similarly, if South Africa were to impose internal taxes or regulations that favor national tobacco products as against tobacco products imported from, for example, Tanzania, then Tanzania could bring a complaint to SADC under Article 11 of the SADC Protocol on Trade or to the WTO under Article III of GATT 1994. This is so because both provisions impose an obligation to provide national treatment, or rather an obligation not to treat imports differently from domestic products once inside the country.<sup>19</sup>

However, from the outset one should note that African nations have hardly been involved in WTO dispute settlement. In fact, not a single African WTO Member has initiated a formal complaint under the DSU. Moreover, only four official complaints have ever been initiated against African WTO Members.<sup>20</sup> Thus far, none of these four complaints has led to the establishment of a WTO Panel. Consequently, of the ninety-eight WTO Panel Reports completed at present, none has involved an African WTO member, as complainant or defendant.<sup>21</sup>

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tion, Annex 1B, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 325, 33 I.L.M. 1168 (1994); compare SADC Protocol on Trade, *supra* note 6, art. 24, with Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

17. SADC Protocol on Trade, *supra* note 6, art. 7.

18. GATT 1994, *supra* note 16, art. XI.

19. Compare SADC Protocol on Trade, *supra* note 6, art. 11, with GATT 1994, *supra* note 16, art. III.

20. Two of these complaints were against South Africa. WTO Dispute Panel Report, *Request for Consultations by India, South Africa—Anti-dumping Duties on Certain Pharmaceutical Products from India*, WT/DS168/1 (Apr. 13, 1999), <http://www.wto.org>; WTO Dispute Panel Report, *Request for Consultations by Turkey, South Africa—Definitive Anti-Dumping Measures on Blanketing from Turkey*, WT/DS288/1 (Apr. 15, 2003), <http://www.wto.org>. The other two complaints were against Egypt. WTO Dispute Panel Report, *Request for Consultations by Turkey, Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/1 (Nov. 7, 2000), <http://www.wto.org>; WTO Dispute Panel Report, *Request for Consultations by Thailand, Egypt—Import Prohibition on Canned Tuna with Soybean Oil*, WT/DS205/1 (Sept. 27, 2000), <http://www.wto.org>.

21. However, two African nations, Mauritius and Zimbabwe, have been third parties before a WTO Panel. Mauritius was a third party before three WTO Dispute

## 2. Mechanisms within Africa

### a. Southern African Customs Union (SACU)

Five SADC members also constitute SACU. They are Botswana, Lesotho, Namibia, South Africa, and Swaziland.<sup>22</sup> SACU was recently re-negotiated in October 2002,<sup>23</sup> and the agreement (not yet in force) envisions the creation of an *ad hoc* SACU Tribunal established to settle “[a]ny dispute regarding the interpretation or application of this [SACU] Agreement, or any dispute arising thereunder at the request of the Council.”<sup>24</sup> As a result, an overlap with SADC exists, as certain trade disputes between Member States of both SACU and SADC could be brought to either the SACU Tribunal or an SADC trade panel.

### b. Common Market for Eastern and Southern Africa (COMESA)

Nine of the fourteen SADC members also belong to COMESA.<sup>25</sup> The COMESA Treaty of 1994 foresees the creation of a COMESA Court of Justice.<sup>26</sup> The Court “shall ensure the

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Panels. See WTO Dispute Panel Report, *European Communities—Conditions for Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, para. 1.7 (Dec. 1, 2003), <http://www.wto.org>; WTO Dispute Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/RW, para. 1.6 (June 22, 2001), <http://www.wto.org>; WTO Dispute Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 by the European Communities*, WT/DS276/RW/EEC, para. 1.4 (Apr. 12, 1999), <http://www.wto.org> [hereinafter *Bananas*]. Zimbabwe has been a third party to one WTO Dispute Panel. See WTO Dispute Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, para. 1.5 (Sept. 18, 2000), <http://www.wto.org>. For more statistics on WTO dispute settlement, see the subscription website <http://www.wordtradelaw.net> (last visited Dec. 2, 2003).

22. Southern African Customs Union Agreement, Oct. 21, 2002, *at* <http://www.tralac.org/scripts/content.php?id=961> (last visited Feb. 11, 2004).

23. *Id.*

24. *Id.* art. 13(1).

25. Compare COMESA, *Member States*, available at <http://www.comesa.int/countries> (last visited Jan. 28, 2004), with *supra* notes 1, 3. The five SADC member countries that do not belong to COMESA are Botswana, Lesotho, Mozambique, Tanzania, and South Africa. Compare COMESA, *Member States*, available at <http://www.comesa.int/countries> (last visited Jan. 28, 2004), with *supra* notes 1, 3.

26. Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, art. 7(1)(c), 33 I.L.M. 1067, 1076 (1994), available at <http://www.comesa.int/about/treaty/> (last visited Nov. 21, 2003) [hereinafter COMESA Treaty].

adherence to law in the interpretation and application” of the COMESA Treaty.<sup>27</sup> The Court can hear disputes under the COMESA Treaty as between member states, as well as disputes referred to it by the COMESA Secretary-General or private parties.<sup>28</sup> In 1998, the Rules of the Court of Justice were adopted, and the Court is now in operation,<sup>29</sup> although it has yet to hear a dispute. A trade dispute between SADC members that are also COMESA members could be brought to either the COMESA Court of Justice or an SADC trade panel.

c. Economic Community of Central African States (ECCAS) and the East African Community (EAC)

Two SADC members, Angola and the Democratic Republic of Congo, are also members of ECCAS.<sup>30</sup> ECCAS was established in 1983, and its structure includes a Court of Justice.<sup>31</sup> ECCAS has been largely inactive since 1992.<sup>32</sup> However, in case it is made operational again, an overlap with SADC could arise, in that Angola and the Democratic Republic of Congo could submit a trade dispute to either ECCAS or an SADC trade panel.

One SADC member, Tanzania, is also a member of the EAC.<sup>33</sup> EAC provides for an East African Court of Justice.<sup>34</sup> However, since Tanzania is the only country that belongs both to the SADC and the EAC, a dispute between two SADC members could not be brought to the EAC.<sup>35</sup> Thus, at present, no risk of overlap exists.

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27. *Id.* art. 19, 33 I.L.M. at 1080.

28. *Id.* arts. 24–26, 33 I.L.M. at 1080-81.

29. *See* The Rules of Court of the Court of Justice of the Common Market for Eastern and Southern Africa, May 1, 2003, at [http://www.comesa.int/institutions/court\\_of\\_justice/rules/Rules%20of%20Court/en](http://www.comesa.int/institutions/court_of_justice/rules/Rules%20of%20Court/en) (last visited Feb. 11, 2004).

30. *See* ECCAS, *About Us*, at <http://www.ceeac-eccas.org/about/index.htm> (last visited Nov. 21, 2003).

31. *Id.*

32. *Id.*

33. East African Community Treaty, Nov. 30, 1999, at <http://66.110.17.178/documents/EAC%20Treaty.pdf> (last visited Feb. 11, 2004) [hereinafter EAC Treaty].

34. *Id.* art. 9.

35. *See id.* art. 27(1). The EAC Court of Justice would not have jurisdiction because it can only hear cases between EAC members. *Id.*



d. African Economic Community

In 1991, the Abuja Treaty established the African Economic Community as an integral part of what is now the African Union (then the Organization for African Unity).<sup>36</sup> It also created a Court of Justice.<sup>37</sup> This Court “shall ensure the adherence to law in the interpretation and application of this Treaty and shall decide on disputes submitted thereto pursuant to this Treaty.”<sup>38</sup> Member States of the African Economic Community can bring actions against each other before this Court in respect to “any dispute regarding the interpretation or the application of the provisions of this Treaty.”<sup>39</sup>

Since all SADC members are also parties to the Abuja Treaty—a treaty that, like the SADC Protocol on Trade, deals largely with trade matters—many trade disputes as between SADC members could be brought either before an SADC trade panel or the Court of Justice of the African Economic Community.

Nonetheless, the Abuja Treaty recognizes the importance of smaller regional economic communities within parts of the African Union, such as SADC and COMESA. The Abuja Treaty provides that “[d]uring the first stage, Member States undertake to strengthen the existing regional economic communities and to establish new communities where they do not exist in order to ensure the gradual establishment of the Community.”<sup>40</sup> The Treaty also states that the African Economic Community “shall be established mainly through the coordination, harmonization and progressive integration of the activities of regional economic communities.”<sup>41</sup> To this effect, the Treaty provides that “Member States may conclude economic, technical or cultural agreements with one or several Member States, and with Third States, regional and sub-regional organizations or any other international organization, provided that such agreements are not incompatible with the provisions of this Treaty.”<sup>42</sup> As a result, although there is an overlap between SADC and the Af-

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36. Treaty Establishing the African Economic Community, June 3, 1991, art. 1(c), 30 I.L.M. 1241, 1251 available at <http://www.africa-union.org> (last visited Nov. 21, 2003) [hereinafter Abuja Treaty].

37. *Id.* art. 18, 30 I.L.M. at 1259.

38. *Id.* art. 18(2), 30 I.L.M. at 1259.

39. *Id.* art. 87, 30 I.L.M. at 1279.

40. *Id.* art. 28(1), 30 I.L.M. at 1261.

41. *Id.* art. 88(1), 30 I.L.M. at 1279.

42. Abuja Treaty, *supra* note 36, art. 93(1), 30 I.L.M. at 1280.

rican Economic Community, it would seem that the Abuja Treaty favors the resolution of disputes at the sub-regional level (such as at the SADC or COMESA level).

## B. OTHER DISPUTE SETTLEMENT MECHANISMS NOT SPECIFICALLY DEALING WITH TRADE

### 1. *Mechanisms within Africa*

#### a. SADC Tribunal

The amended SADC Treaty establishes the SADC Tribunal.<sup>43</sup> Article 32 of the amended SADC Treaty states: “Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.”<sup>44</sup> The first question that arises in respect of the SADC Tribunal is whether disputes under the SADC Protocol on Trade could also be decided by the SADC Tribunal (that is, in addition to the trade panel system set out in Annex VI). The SADC Treaty, as amended, explicitly states that the Tribunal is competent also to hear disputes arising from “the interpretation, application or validity of Protocols . . . made under this Treaty.”<sup>45</sup> This competence of the Tribunal to deal with disputes under SADC protocols, seemingly including the Protocol on Trade, is not explicitly carved out by the Protocol on Trade, nor by Annex VI, which creates the specific mechanism to deal with SADC trade disputes.<sup>46</sup> This means that it is possible for the same dispute under the Protocol on Trade between two SADC members to be brought by one of them to a trade panel under Annex VI and to the SADC Tribunal by the other member. In that case, an overlap may occur since SADC rules do not explicitly delineate the respective competences of the SADC Tribunal and SADC trade panels.

In addition, another risk of overlap arises: Although a trade panel under Annex VI initially may decide a trade dispute, the SADC member that loses before this panel may want to “appeal”

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43. Amended SADC Treaty, *supra* note 3, art. 9(g).

44. *Id.* art. 32.

45. *Id.*

46. Annex VI, *supra* note 8.

or re-litigate that dispute before the SADC Tribunal, based on Article 32 of the SADC Treaty.<sup>47</sup>

A third problem that may arise in respect of the SADC Tribunal is a situation in which one SADC member thinks that its dispute with another SADC member falls under the general SADC Treaty and/or one of its protocols other than the one on trade, while the opposing SADC member in the dispute insists that the dispute falls under the SADC Protocol on Trade. As a result, the first member would bring the dispute to the SADC Tribunal, and the second member would bring it to a trade panel under Annex VI.

This potential for overlap is particularly serious when it pertains to the Memorandum of Understanding on Standardization, Quality Assurance, Accreditation and Metrology (SQAM), on the one hand, and the Protocol on Trade, especially Article 17 thereof on "Standards and Technical Regulations on Trade," on the other.<sup>48</sup> Not only is there a risk of substantive overlap in terms of the subject matters that are covered by these two protocols, in addition, both the Memorandum of Understanding on SQAM and the SADC Protocol on Trade have their own panel systems for the settlement of disputes. The Memorandum of Understanding on SQAM provides:

4. In case of disagreement, the Member States may take recourse to a panel of experts in the SQAM area concerned.
5. The appointment, composition, powers and functions of the panels of SQAM experts shall be determined by the CMT.
6. As a last resort, disputes regarding the implementation and application of this MOU shall be settled in accordance with Article 32 of the SADC Treaty.<sup>49</sup>

Hence, a dispute regarding a technical barrier to trade as between two SADC members may fall within the competence of both a trade panel and a SQAM panel, the latter being subject, in turn, to review "as a last resort" by the SADC Tribunal.

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47. Amended SADC Treaty, *supra* note 3, art. 32. On the appeal question, see *infra* note 155.

48. Compare SADC Memorandum of Understanding on SQAM, art. 13(4)–(6), at [http://www.sadc.int/index.php?lang=english&path=legal/moa/&page=moa\\_sqam](http://www.sadc.int/index.php?lang=english&path=legal/moa/&page=moa_sqam) (last visited Feb. 11, 2004), with SADC Protocol on Trade, *supra* note 6, art. 17 (setting out the provisions for the determination of standards in trade).

49. SADC Memorandum of Understanding on SQAM, *supra* note 48, art. 13(4)–(6).

b. Court of Justice of the African Union

All SADC members are also members of the African Union.<sup>50</sup> The Constitutive Act of the African Union, adopted on July 11, 2000, provides: "(1) A Court of Justice of the Union shall be established; (2) The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto."<sup>51</sup> At present, this Court has yet to be established. However, there is potential for overlap, in that one dispute between SADC members could be referred to either, or both, the Court of Justice of the African Union and an SADC trade panel.

2. *Global mechanisms*

a. International Court of Justice (ICJ)

There may also be disputes between SADC members for which the ICJ has jurisdiction, so that a single dispute could be brought to either, or both an SADC trade panel and the ICJ. The ICJ is the principal judicial organ of the United Nations (UN), and its jurisdictional reach is delineated by Article 36 of the ICJ Statute.<sup>52</sup> States may refer cases to the ICJ *ex ante* in treaties or *ex post* in specific agreements related to the settlement of a particular dispute.<sup>53</sup> States may also make *ex ante* declarations in which they "recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court" in all, or a certain type, of legal disputes.<sup>54</sup>

Such declarations, pursuant to Article 36 of the ICJ Statute, were made by six of the fourteen SADC members, namely Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauri-

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50. African Union, *Member States*, at <http://www.africa-union.org/home/Welcome.htm> (last visited Nov. 21, 2003).

51. Constitutive Act of the African Union, art. 18, 8 AFR. Y.B. INT'L L. 479, 490 (2000), available at <http://www.africa-union.org> (last visited Nov. 21, 2003).

52. Statute of the International Court of Justice, art. 36, 59 Stat. 1055, 1060 (1954), available at <http://www.un.org> (last visited Nov. 21, 2003) [hereinafter ICJ Statute].

53. *Id.* art. 36(1), 59 Stat. at 1060.

54. *Id.* art. 36(2), 59 Stat. at 1060.

tius, and Swaziland.<sup>55</sup> However, in all but the Democratic Republic of Congo's declaration, the jurisdiction thus conferred on the ICJ does not extend to disputes in which the parties have agreed or shall agree to recourse through the use of some other method of peaceful settlement.<sup>56</sup>

As a result, since all SADC members agreed on "some other method of peaceful settlement" when it comes to disputes between SADC members under Annex VI, the ICJ's compulsory jurisdiction does not extend to disputes under the SADC Protocol on Trade. Thus, the risk of overlap with ICJ jurisdiction is limited, and in practice would only materialize where both disputing SADC Member State parties specifically agree to send a particular trade dispute to the ICJ.<sup>57</sup>

An ongoing trade dispute involving Nicaragua, Colombia, and Honduras illustrates the possibility of overlaps between a specialized trade entity and the more general ICJ. In 1999, Honduras and Colombia ratified a bilateral treaty on maritime delimitation in the Caribbean Sea.<sup>58</sup> Nicaragua, however, considered that this treaty infringed its territorial rights in the Caribbean Sea.<sup>59</sup> In response, and allegedly to safeguard its security, it imposed additional taxes on goods imported from Honduras and Columbia and cancelled fishing licenses for vessels under the Honduran or the Colombian flag.<sup>60</sup> In turn, both Honduras and Columbia challenged these trade-related Nicaraguan measures before the WTO.<sup>61</sup> Later, Nicaragua referred the dispute to the ICJ, requesting the Court to determine the course of the single maritime boundary appertaining respectively to Nicaragua and Honduras.<sup>62</sup> This case is still pending

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55. See International Court of Justice, *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm> (last visited Feb. 16, 2004).

56. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 13, 19-21, 25-26, U.N. Doc. ST/LEG/Ser.E/21, U.N. Sales No. E.03.V.3 (2003).

57. See Annex VI, *supra* note 8.

58. See Application by Nicaragua, Instituting Proceedings in Case Concerning Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) (Dec. 8, 1999), at <http://www.icj-cij.org/icjwww/idocket/iNH/iNHframe.htm> (last visited Dec. 2, 2003).

59. *Id.*

60. See WTO Dispute Panel Report, *Request for the Establishment of a Panel by Colombia, Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2 (Mar. 28, 2000), <http://www.wto.org>.

61. See *id.*; WTO Dispute Panel Report, *Request for Consultations by Colombia, Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WT/DS188/1 (Jan. 20, 2000), <http://www.wto.org>.

62. See Maritime Delimitation Between Nicaragua and Honduras in the Carib-

before the ICJ; the WTO panel on the trade aspect of the dispute, though not officially suspended, has been inactive for more than three years, and in fact, the panel has never been composed.<sup>63</sup>

b. Multilateral Environmental Agreements (MEAs) and the UN Convention on the Law of the Sea (UNCLOS)

The SADC trade regime may also overlap with other specialized global regimes not related to trade, such as enforcement regimes under MEAs or the UNCLOS. For example, one dispute between SADC members may have a trade component falling under the Protocol on Trade and an environmental component subject to an MEA that is binding on both SADC members. MEAs are most commonly enforced through so-called non-compliance regimes.<sup>64</sup> Such non-compliance regimes are not contentious in nature and do not involve adjudication.<sup>65</sup> They rely instead on committee reports and reviews.<sup>66</sup> Since these proceedings do not constitute adjudication, it is difficult to speak of jurisdictional overlap. Nonetheless, many MEAs also include provisions on the settlement of disputes by third-party adjudication.<sup>67</sup> Disagreements arising from the interpretation or application of an MEA can then be referred to the ICJ or arbitration. In most cases, such adjudication will necessitate a specific *ex post* agreement.<sup>68</sup> This in part explains why MEAs have not been enforced through adjudication. Consequently, the risk of overlap of MEA adjudication mechanisms with the SADC panel

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bean Sea (Nicar. v. Hond.), Application Instituting Proceedings (Dec. 8, 1999), at [http://www.icj-cij.org/icjwww/idocket/iNH/iNH\\_orders/Inh\\_iapplication\\_19991208.pdf](http://www.icj-cij.org/icjwww/idocket/iNH/iNH_orders/Inh_iapplication_19991208.pdf).

63. See Update of WTO Dispute Settlement Cases, WT/DS/OV/17, 36 (Nov. 28, 2003), <http://www.wto.org>.

64. See, e.g., OZONE SECRETARIAT, U.N. ENVIRONMENT PROGRAMME, HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 295 (6th ed. 2003), available at <http://www.unep.org/ozone/publications/Handbook-2003.pdf>.

65. See Alan E. Boyle, *Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions*, 3 J. ENVTL. L. 229, 233-44 (1991).

66. See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, arts. 7-8, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3, 35 available at <http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf>.

67. See, e.g., Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 11(3), T.I.A.S. No. 11,097, 1513 U.N.T.S. 293, 331, 26 I.L.M. 1516, 1534 available at <http://www.unep.org/ozone/viennaconvention2002.pdf>; Convention on Biological Diversity, June 5, 1992, art. 27(3), 31 I.L.M. 818, 834.

68. See ICJ Statute, *supra* note 52, art. 36(1).

regime for trade disputes is, for practical purposes, very limited.

In contrast, most provisions of UNCLOS can be enforced through compulsory adjudication.<sup>69</sup> Pursuant to UNCLOS, contracting parties are free to choose one or more of the following means for the settlement of disputes concerning the interpretation or application of UNCLOS:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.<sup>70</sup>

All of these jurisdictional grounds may overlap with the SADC trade panel mechanism in case a particular dispute between SADC members has both trade and law of the sea components. That disputes may have both trade and law of the sea components was confirmed recently in a dispute between Chile and the European Communities (EC).<sup>71</sup> In 2000, the EC obtained the establishment of a WTO panel to examine a Chilean prohibition on unloading of swordfish in Chilean ports and certain Chilean measures of conservation and management relating to the population of swordfish including that of the high seas.<sup>72</sup> The EC alleged violations of Articles V and XI of GATT 1994 (respectively, on freedom of transit and the general elimination on quantitative restrictions).<sup>73</sup> Subsequently, however, Chile referred the same dispute to arbitration under UNCLOS, focusing this time on EC obligations of conservation of swordfish under UNCLOS.<sup>74</sup> Later, both parties agreed to have the dis-

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69. See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 287, 1833 U.N.T.S. 3, 509-10, 21 I.L.M. 1261, 1322-23, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS].

70. *Id.*

71. See WTO Dispute Panel Report, *Request for Consultations by the European Communities, Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 (Apr. 26, 2000), <http://www.wto.org>.

72. See WTO Dispute Panel Report, *Request for the Establishment of a Panel by the European Communities, Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/2 (Nov. 7, 2000), <http://www.wto.org>.

73. *Id.*

74. Case 7, Order 2000/3, *Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur.*

pute settled by a special Chamber of the International Tribunal of the Law of the Sea (ITLOS).<sup>75</sup> However, in March 2001, they reached a provisional arrangement concerning the dispute and suspended both the ITLOS and WTO proceedings.<sup>76</sup>

### C. CONCLUSION OF PART I

There is no doubt that overlaps exist between the SADC dispute settlement mechanism on trade and other dispute settlement mechanisms. Some of these other mechanisms are also trade-related (WTO, SACU, COMESA, or the African Economic Community), others have a more general jurisdiction (SADC Tribunal, Court of Justice of the African Union, or ICJ) and still others have a non-trade related specialized jurisdiction (MEAs or ITLOS). Some of these other mechanisms are within the African region; others are more universal. The table on the next page illustrates this rather wide potential for overlap.

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Cmty.), (Dec. 20, 2000), 40 I.L.M. 475, 476, available at [http://www.itlos.org/case\\_documents/2001/document\\_en\\_100.doc](http://www.itlos.org/case_documents/2001/document_en_100.doc) (last visited Feb. 11, 2004).

75. See Case 7, Order 2001/1, Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Cmty.), (Mar. 15, 2001), at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Feb. 11, 2004).

76. See *id.*; WTO Dispute Panel Report, *Communication from the European Communities, Chile—Measures Affecting the Transit and Importation of Swordfish—Arrangement Between the European Communities and Chile*, WT/DS193/3 (Apr. 6, 2001), <http://www.wto.org>.



**Table 1**  
**Other International Courts or Tribunals that May**  
**Overlap with the Mandate of SADC Trade Panels**

	WITHIN AFRICA	GLOBAL
<b>TRADE RELATED</b>	*Southern African Customs Union (SACU) Tribunal  *Common Market for Eastern and Southern Africa (COMESA) Court of Justice  *Economic Community of Central African States (ECCAS) Court of Justice  *African Economic Community Court of Justice	*WTO panels/Appellate Body
<b>NOT TRADE RELATED</b>	*SADC Tribunal  *Court of Justice of the African Union	*International Court of Justice (ICJ)  *UN Convention on the Law of the Sea (UNCLOS)

## II. FACTORS AT PLAY IN "FORUM SHOPPING": THE SADC REGIME COMPARED TO THE WTO

Forum shopping has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."<sup>77</sup> Now that it has been demonstrated that jurisdictional

77. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting BLACK'S LAW DICTIONARY 590 (5th ed. 1979)).

overlaps exist for the settlement of trade-related disputes as between SADC members, Part II examines why a disputing SADC member may prefer the SADC trade mechanism as opposed to another forum, or vice versa. Particular attention will be paid to how the SADC mechanism compares to the dispute settlement mechanism in the WTO. Without claiming to be exhaustive, the following factors will be examined: (1) cost of litigation; (2) the organizational context in which the dispute would be decided; (3) who decides the dispute; (4) any advantages in the applicable law; (5) who can initiate a complaint and against whom; (6) any procedural advantages; (7) any special procedures for least-developed countries; (8) the possibility of appeal; (9) what remedies can be obtained; (10) who is bound by the eventual ruling; and (11) what happens in the event of non-compliance.

## A. COST OF LITIGATION

### 1. *Expenses of the Adjudicator*

Annex VI states: “[t]he remuneration of panelists and experts, their travel and lodging expenses and all other general expenses of panels shall be borne in equal parts by the disputing Member States or in a proportion as determined by a panel.”<sup>78</sup> Annex VI also provides that SADC’s Committee of Ministers responsible for Trade Matters (CMT) “shall determine the amounts of remuneration and expenses that will be paid to panelists and experts appointed in terms of this Annex.”<sup>79</sup> So far, no such determination has been made.

In contrast, the DSU provides that “[p]anelists’ expenses, including travel and subsistence allowance, shall be met from the WTO budget . . . .”<sup>80</sup> Pursuant to the DSU, the expenses of Appellate Body members are also met from the WTO budget.<sup>81</sup> Moreover, practice shows that experts who were appointed by WTO panels are paid not by the parties themselves, but from the regular WTO budget.<sup>82</sup> Consequently, regarding expenses of persons involved in adjudications, the WTO regime offers a clear advantage: At the WTO, disputing parties do not have to

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78. Annex VI, *supra* note 8, art. 19(2).

79. *Id.* art. 19(1).

80. DSU, *supra* note 9, art. 8(11).

81. *Id.* art. 17(8).

82. See *id.* app. 4; Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INT’L & COMP. L.Q. 325, 325-64 (2002).

pay any of these expenses, while at SADC these expenses must be paid by the disputing parties themselves (“in equal parts” or “in a proportion as determined by a panel”<sup>83</sup>). Note, however, that WTO panelists who are government officials only get a travel and subsistence allowance from the WTO budget;<sup>84</sup> the cost of the actual work continues to be borne by the government employing the panelist.<sup>85</sup> It may be a heavy burden for developing WTO member States with limited resources to replace officials spending official time on a WTO Panel, especially if that Panel does not involve the country’s trade interests. To that extent, to require that the disputing parties pay for all panelists, as Annex VI does, may be preferable for developing countries.<sup>86</sup> WTO panelists who are non-governmental, in contrast, receive 600 CHF per day of work, in addition to their travel and subsistence allowances (all of this coming exclusively from the WTO budget).<sup>87</sup> Again, in SADC, however, all costs of all panelists are borne by the disputing parties themselves.<sup>88</sup>

## 2. *Litigation expenses*

Other expenses—such as those related to government officials working on the case on behalf of their government, as well as any outside counsel that may be hired to assist the government—are borne by the disputing parties themselves in both the SADC and WTO systems. However, the WTO system does have one advantage, which is that the WTO Secretariat must “make available a qualified legal expert from the WTO technical cooperation services to any developing country member which so requests.”<sup>89</sup> In addition, when litigating a dispute before the WTO, SADC members also may take advantage of the newly established Advisory Centre on WTO Law in Geneva.<sup>90</sup> This center offers free legal advice to its developing country members

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83. Annex VI, *supra* note 8, art. 19(2).

84. DSU, *supra* note 9, art. 8(11).

85. *Id.* art. 8(8) (stating, “[m]embers shall undertake, as a general rule, to permit their officials to serve as panelists.”).

86. This is only true up to the point that they, in turn, become disputing parties.

87. See Dispute Settlement Body, *Communication from Canada—Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/41, 14 (Jan. 24, 2003), <http://www.wto.org>.

88. Annex VI, *supra* note 8, art. 19(2).

89. DSU, *supra* note 9, art. 27(2).

90. See Advisory Centre on WTO Law, *Homepage*, at <http://www.acwl.ch> (last visited Nov. 21, 2003).

and all least developed countries that are WTO members (even those that are not members of the Center),<sup>91</sup> up to a certain number of hours.<sup>92</sup> Beyond that, the Centre charges an hourly fee that is set below market value and that depends on the stage of development of each member.<sup>93</sup> To note, SADC members are currently discussing the idea of a similar "Dispute Resolution Center."<sup>94</sup>

In contrast, a potential disadvantage of bringing a case to the WTO instead of to SADC is that the place of litigation is further away (Geneva, Switzerland versus Gaborone, Botswana). This may increase travel and communication expenses. In addition, given the complexity of WTO agreements and the highly developed GATT/WTO jurisprudence that has developed over the years, litigating a WTO case may be more complicated—and hence more expensive—than litigating an SADC dispute.

#### B. ORGANIZATIONAL CONTEXT IN WHICH THE DISPUTE WOULD BE DECIDED

SADC is a regional organization; the WTO is a worldwide organization. As the following demonstrates, each of these contexts has its own advantages, depending on the particular interests involved.

On the one hand, it may be seen as a sign of African unity, or at least coordination, to settle a dispute that is solely between two African nations under the SADC umbrella. After all, one of the tasks of SADC is to "promote the coordination and harmonization of the international relations of Member States."<sup>95</sup> The Protocol on Trade also calls for Member States to "coordinate their trade policies and negotiating positions in respect of rela-

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91. SADC members that are least-developed countries include: Angola, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, and Zambia. See U.N. Comm. on Trade and Dev., *Least Developed Countries*, at <http://www.unctad.org/templates/countries.asp?intItemID=1676> (last visited Nov. 21, 2003).

92. See Advisory Centre on WTO Law, *Services and Fees*, at <http://www.acwl.ch/services/SubmenuServ.htm> (last visited Nov. 21, 2003). The precise number of hours the Advisory Centre will provide free-of-charge to developing country members is determined by the stage of the proceedings when assistance is requested. *Id.*

93. *Id.*

94. Proposed Amendments by Mozambique to SADC Protocol on Trade Annex VI, art. 21 [hereinafter Proposed Amendments] (on file with the Minnesota Journal of Global Trade).

95. SADC Treaty, *supra* note 3, art. 5(2)(h), 32 I.L.M. at 125.

tions with third countries.”<sup>96</sup> Settling a dispute between SADC members under the SADC umbrella may be particularly important where the dispute involves sensitivities or complexities that are unique to the SADC region.

On the other hand, SADC members may also see benefits in bringing a dispute with another SADC member to the worldwide level of the WTO. To do so may exert more pressure on the defendant country since more countries would then be notified of an alleged violation. This could be particularly helpful for an SADC complainant that does not have much influence in the SADC context. Moreover, when the disputed measure not only affects SADC members but also other members of the WTO, the complainant may find valuable support with other nations that it would not otherwise have under the SADC mechanism. In those cases where the dispute also affects non-SADC members of the WTO, it may also be of interest to the *defendant* to have the case decided finally at the WTO. This may avoid having to go through a series of proceedings, first at SADC (where the measure may be found legal), then at the WTO (at the request of a WTO member that was not involved in the SADC dispute). Note, however, that this risk of duplication to the detriment of the defendant is mitigated by the fact that if a defendant wins under SADC—where rules are likely to be stricter (given that SADC is to become a free trade area)—it is likely to win also at the WTO.

### C. WHO DECIDES THE DISPUTE?

The required qualifications of the panelists that decide the dispute are generally the same under both the SADC mechanism and the DSU. Annex VI is partly copied from the DSU.<sup>97</sup> In both systems, the independence of panelists is vital. However, under the SADC regime, parties have greater influence in selecting panelists than they do under the DSU. In the WTO, nominations for all panelists (including the chair) are proposed by the WTO Secretariat.<sup>98</sup> If there is no agreement on all panelists within twenty days, then the Director-General of the WTO appoints the panelists, based on substantive criteria, not by lot.<sup>99</sup>

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96. SADC Protocol on Trade, *supra* note 6, art. 29.

97. Compare Annex VI, *supra* note 8, art. 7, with DSU, *supra* note 9, art. 8.

98. See DSU, *supra* note 9, art. 8(6).

99. See *id.* art. 8(7).

In contrast, in SADC the parties themselves first agree on a chair.<sup>100</sup> If they cannot agree within fifteen days, the Executive Secretary of SADC appoints the chair by lot.<sup>101</sup> Once the chair is appointed—and here is the major difference with the selection of WTO panelists—each party then appoints one panelist for which neither prior Secretariat nominations nor the agreement of the opposing party is required.<sup>102</sup> This procedure resembles the selection procedure that is often followed in commercial arbitrations, and it may create the impression that each party has its own panelist, which, in turn, may put pressure on party-elected panelists to vote in favor of the party that selected him or her. Thus, SADC may be attractive to litigants because it offers more control to the disputing parties in the selection of panelists, but may undermine the legitimacy of the process and put too much pressure or decision-making authority on the chair of the panel, the only panelist not appointed by a single party.

On the other hand, a potential advantage of bringing a complaint to SADC instead of the WTO is that SADC panelists come from Africa. Therefore, they may be more apprehensive of the facts and sensitivities involved in the case. In contrast, very few WTO panelists are nationals of African nations: of the ninety-eight completed WTO panel reports so far, only nineteen panels had a panel member with an African nationality.<sup>103</sup> None of these nineteen panels involved a WTO Member from Africa.<sup>104</sup> Moreover, none of the complainants or defendants of the panels were African nations.<sup>105</sup> With regard to the WTO Appellate Body, only one of the seven members has been an Af-

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100. See Annex VI, *supra* note 8, art. 8(2)(a). This is done without any prior nominations by the SADC Secretariat. *Id.*

101. *Id.* art. 8(3).

102. See *id.* art. 8(2)(b).

103. One national of Mauritius served on two panels, five nationals of South Africa served on a total of nine panels, and two nationals of Egypt served on a total of eight panels. See WorldTradeLaw.net, *WTO Panelists, by Country*, at <http://www.worldtradelaw.net/dsc/database/panelistcountry1.asp> (subscription site) (last visited Dec. 3, 2003) (on file with the Minnesota Journal of Global Trade) [hereinafter *WTO Panelists*]; WorldTradeLaw.net, *Count of WTO Panelists, by Country*, at <http://www.worldtradelaw.net/dsc/database/panelistcountrycount.asp> (subscription site) (last visited Dec. 3, 2003) (on file with the Minnesota Journal of Global Trade) [hereinafter *Count of WTO Panelists*].

104. *WTO Panelists, supra* note 103; *Count of WTO Panelists, supra* note 103.

105. *WTO Panelists, supra* note 103; *Count of WTO Panelists, supra* note 103.

rican national, more particularly a national of Egypt.<sup>106</sup>

Leaving aside the comparison between SADC and the WTO (which are both trade mechanisms), when the jurisdictional overlap is one between SADC and another tribunal having a more general jurisdiction, the expertise of the panelists/judges involved may be an important factor in selecting the most appropriate forum. Because of the specialized nature of the forum, it can be expected that most WTO trade panelists will be trade experts. On the other hand, no such expertise is expected from, for example, ICJ or SADC Tribunal Judges, for both of these fora have more general jurisdiction. If the dispute involves complex trade issues, this factor may militate in favor of the SADC trade mechanism.

When it comes to overlaps between the SADC trade mechanism and other, non-trade related specialized mechanisms, such as those under MEAs or UNCLOS, the question of expertise becomes even more important. If a dispute has, for example, a trade and an environmental component, it may be crucial (even in terms of the outcome of the dispute) to send the dispute to trade experts and not to environmental experts, or vice versa. In those cases, in addition to expertise, the claim may be raised that trade experts are inherently biased against trade restrictions, whereas environmental experts could be accused of bias in favor of all measures aimed at protecting the environment.

Finally, a difference also exists between tribunals that are constituted on an *ad hoc* basis, for a particular dispute only (such as SADC trade panels and WTO panels),<sup>107</sup> and standing courts or tribunals whose members are selected for a number of years and hence exercise their judicial function for a longer period of time (such as the WTO Appellate Body, the SADC Tribunal, or the ICJ). For example, such standing tribunals could be expected to be more experienced as well as more open to scrutiny and, therefore, potentially more objective.

#### D. ADVANTAGES IN THE APPLICABLE LAW

The applicable law in resolving a dispute may also influence forum selection. This factor is important for a complainant, as

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106. From 1995–2000, Said El-Naggar; from 2000–present, Georges Abi-Saab. WorldTradeLaw.net, *Individual Appellate Body Members: Background Information and Cases Served On*, at <http://www.worldtradelaw.net/dsc/database/abmembers.htm> (subscription site) (last visited Nov. 21, 2003) (on file with the Minnesota Journal of Global Trade).

107. See DSU, *supra* note 9, art. 6; Annex VI, *supra* note 8, art. 5.

it asks under what treaty its claim stands the best chance. It is also important for a defendant, as it asks itself, what defenses are available under the respective treaties/agreements?

As noted earlier, SADC trade panels have jurisdiction only to examine claims under the SADC Protocol on Trade.<sup>108</sup> In turn, WTO panels can entertain claims only under WTO covered agreements.<sup>109</sup> Considering that one of SADC's goals is to become a free trade area within eight years,<sup>110</sup> coupled with the fact that the WTO is not a free trade area,<sup>111</sup> in most cases SADC rules will be stricter. As a result, complainants will often have an incentive to bring their case to SADC, not to the WTO.

An SADC panel is instructed to examine disputes "in the light of the relevant provisions of this Protocol [on trade]."<sup>112</sup> A WTO panel must "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."<sup>113</sup> Thus, with regard to defendants, they can invoke at least all defenses enumerated, respectively, in the SADC Protocol on Trade or WTO covered agreements. Although in principle, given the free trade area features of SADC, the defenses available under SADC will be more limited than those available at the WTO, exceptions may exist that are written only in the SADC Treaty and not present under WTO rules. In those cases, where a defense is available at SADC but not at the WTO, complainants may want to bring their case to the WTO instead of SADC.<sup>114</sup>

However, when it comes to the availability of defenses as a

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108. See Annex VI, *supra* note 8, art. 1.

109. See DSU, *supra* note 9, art. 1.

110. See *supra* note 7 and accompanying text (noting where trade restrictions as between SADC members will, in principle, be outlawed).

111. As such, under WTO rules, many trade restrictions between WTO members remain. Cf. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA] and the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 13 (1994) [hereinafter WTO Agreement].

112. Annex VI, *supra* note 8, art. 9(a).

113. DSU, *supra* note 9, art. 7(2).

114. See, e.g., WTO Dispute Panel Report, *Request for the Establishment of a Panel by the United States, Canada—Certain Measures Concerning Periodicals*, WT/DS31/2 (May 24, 1996), <http://www.wto.org>. The United States brought this complaint to the WTO rather than NAFTA allegedly because, under NAFTA, Canada could have invoked a "cultural exception" that is unavailable under WTO rules. See WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997), <http://www.wto.org>; WTO Dispute Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997), <http://www.wto.org>.



forum selection criterion, much depends on whether a defendant can invoke an SADC defense only before an SADC panel, or whether a defendant also could invoke the SADC defense before a WTO panel as between two SADC members. This question has not yet been answered in WTO jurisprudence. Some commentators state categorically that WTO panels only apply WTO law and no other rules of international law.<sup>115</sup> Other commentators, including this author, have argued that, although WTO panels only have jurisdiction to examine WTO claims, in resolving such claims, they may apply laws other than those set forth in the WTO Agreement, which potentially includes all rules of international law binding on the disputing parties.<sup>116</sup> The SADC Tribunal has explicitly adopted the latter position.<sup>117</sup>

Therefore, this author would permit WTO panels to rely on a defense set out, for example, in SADC, as long as (1) both disputing parties have agreed to the SADC norm in question, (2) this SADC norm prevails over the WTO provision pursuant to conflict rules set out in the relevant treaties<sup>118</sup> or general international law,<sup>119</sup> and (3) this SADC derogation from WTO norms as between SADC members does not affect other non-SADC WTO members.<sup>120</sup> As a result, under this line of reasoning,

115. See, e.g., Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999); cf. Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35 J. WORLD TRADE 1081 (2001) (implying, at times, that non-WTO provisions can overrule the WTO Agreement).

116. See, e.g., Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. WORLD TRADE 499 (2001); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

117. Southern African Development Community Protocol on Tribunal and the Rules of Procedure Thereof, art. 21(2), at [http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p\\_tribunal\\_and\\_rules\\_of\\_procedure](http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_tribunal_and_rules_of_procedure) (last visited Feb. 11, 2004) [hereinafter SADC Protocol on Tribunal] (stating that the Tribunal shall "develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States").

118. The SADC Protocol on Trade, though concluded after the WTO treaty in April 1995, does not explicitly regulate its relationship to the WTO agreements. In its preamble, the Protocol states the following: "Mindful of the results of the Uruguay Round of Multilateral Trade Negotiations on global trade liberalization." SADC Protocol on Trade, *supra* note 6, pmbl.

119. Such as Article 30 of the Vienna Convention on the Law of Treaties, setting out the *lex posterior* rule, that is, the general principle that a later treaty prevails over an earlier one; or the *lex specialis* principle, pursuant to which a more specific provision prevails over a more general one. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 30, 1155 U.N.T.S. 332, 339-40 [hereinafter Vienna Convention].

120. Put differently, the SADC modification to WTO rights and obligations as

trade restrictions could only be justified under non-WTO rules (e.g. SADC rules), in case these restrictions apply only to the countries that have agreed to these (SADC) rules. If an SADC country would impose the restrictions on non-SADC WTO Members, the restrictions would continue to conflict with WTO rules.<sup>121</sup>

Conversely, this author also favors SADC panels taking cognizance of potential defenses only available under WTO rules in case both disputing parties are bound by those WTO rules. However, in such a case, it is nonetheless likely that the SADC provision would prevail over the WTO defense because the SADC trade rules were concluded later in time, or *lex posterior*, and may also be seen as more specific, or *lex specialis*, as compared to the more general WTO provisions. If so, the SADC violation stands, and the WTO defense would not be available to the defendant.

If this view were to prevail, all international law potentially would apply both before SADC and WTO panels, and any conflict of norms then would be decided by explicit treaty provisions or rules of general international law. Consequently, even if the claims brought before an SADC panel and a WTO panel differed (since based on different treaty provisions), the applicable law would remain the same. Indeed, in that case, before the SADC panel, the applicable law would be the SADC Protocol on Trade to the extent it is not overruled by WTO provisions; before the WTO panel, it would be WTO covered agreements to the extent they have not been validly overruled by SADC provisions.

In contrast, if the view were upheld that WTO panels could apply only WTO law and SADC panels only the SADC Protocol on Trade, irrespective of what the disputing parties have agreed to elsewhere, then the question of applicable law in terms of available defenses may become a crucial factor in forum selection. For example, if the SADC Protocol on Trade offers more possibilities to impose trade restrictions or safeguards than does the WTO treaty, then a complainant may have a clear incentive to bring its dispute to the WTO, where there are fewer exceptions, rather than to SADC, where the defendant may have a better chance of justifying its trade restriction. One potential

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between SADC members must meet the conditions set out in Article 41 of the Vienna Convention on the Law of Treaties for such modification to be permissible. *Id.* art. 41, 1155 U.N.T.S. at 342.

121. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 87 (2003).

example where the SADC Protocol on Trade may excuse more trade restrictions than WTO provisions is in the area of the general exceptions set out in Article 9.<sup>122</sup> Article 9 permits measures "necessary to ensure compliance with existing obligations under international agreements."<sup>123</sup> The general exceptions in GATT Article XX do not include this authorization.<sup>124</sup> Another area where SADC potentially may permit more trade restrictions than the WTO agreements is the safeguards regime currently proposed by Mozambique.<sup>125</sup> If SADC were to permit safeguards that do not meet normal WTO rules, SADC members wanting to complain about such safeguards would have a clear incentive to bring their case before the WTO, not before SADC.

Again, however, if the opposing view, defended by this author, were adopted, and SADC rules offered a defense also before a WTO panel, then bringing this type of safeguards complaint to the WTO, rather than SADC, would not provide the means to circumvent more lenient SADC safeguard rules that may exist. In that case, WTO panels would acknowledge and apply the more lenient SADC safeguard rules and could find that the trade restriction is justified.<sup>126</sup>

#### E. WHO CAN INITIATE A COMPLAINT AND AGAINST WHOM?

Only member countries may initiate and defend against a complaint before both SADC trade panels and WTO panels.<sup>127</sup> Private actors, whether individuals, companies, or non-governmental organizations, cannot initiate or be forced to de-

122. SADC Protocol on Trade, *supra* note 6, art. 9.

123. *Id.* art. 9(i). This provision could justify, for example, trade restrictions imposed to comply with MEAs. It could also justify measures required by WTO provisions that would otherwise be inconsistent with SADC, although it is difficult to think of trade restrictions that WTO members must apply pursuant to the WTO treaty, let alone trade restrictions that WTO members must apply and that would otherwise breach SADC rules.

124. GATT 1994, *supra* note 16, art. XX.

125. Proposed Amendments, *supra* note 94, art. 61.

126. However, WTO panels could do so only in case the SADC Treaty does not qualify as an agreement explicitly prohibited in Article 11(1)(b) of the WTO Safeguards Agreement, which provides:

[A] Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single member as well as actions under agreements, arrangements and understandings entered into by two or more Members.

Agreement on Safeguards, *supra* note 16, art. 11(1)(b).

127. DSU, *supra* note 9, arts. 1, 3; Annex VI, *supra* note 8, arts. 1, 3.

fend against complaints.<sup>128</sup>

Yet, private actors may play a role in choosing between the SADC Tribunal and an SADC trade panel. The SADC Tribunal not only has jurisdiction over disputes between SADC members, but also over disputes between (1) "natural or legal persons and States,"<sup>129</sup> and (2) "natural or legal persons and the [SADC] Community."<sup>130</sup> The SADC Tribunal is also competent to (1) "give advisory opinions on such matters as the Summit or the Council may refer to it;"<sup>131</sup> (2) "give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of States;"<sup>132</sup> and (3) take interim measures, including "the suspension of an act challenged before the Tribunal."<sup>133</sup> Neither WTO panels nor SADC trade panels have this authority to give advisory opinions, preliminary rulings, or to take interim measures. All of these features may lead a complainant to prefer the SADC Tribunal to WTO and SADC trade panels.

#### F. PROCEDURAL ADVANTAGES

Another reason to prefer a certain forum to another may be the rules of procedure applied by the respective tribunals. SADC panel procedures are largely based on those of WTO panels.<sup>134</sup> Nonetheless, some differences can be found. First, before a WTO panel, parties have a right to at least two hearings,<sup>135</sup> before an SADC panel, parties have a right to at least one hearing.<sup>136</sup> Second, in order to be a third party before a WTO panel, a "substantial interest" is required, which in practice has included a systemic interest, not necessarily based on trade flows;<sup>137</sup> in order to be a third party before an SADC panel, a "substantial trade interest" is required.<sup>138</sup> Third, a third party before a WTO panel only receives the first submissions of the disputing parties, not the rebuttal submissions; in addition, there is a special session for the third party to present its views after the first meeting, but it is not allowed to attend either the

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128. DSU, *supra* note 9, arts. 1, 3; Annex VI, *supra* note 8, arts. 1, 3.

129. SADC Protocol on Tribunal, *supra* note 117, art. 15(1).

130. *Id.* art. 18.

131. SADC Treaty, *supra* note 3, art. 16(4), 32 I.L.M. at 129.

132. SADC Protocol on Tribunal, *supra* note 117, art. 16(1).

133. *Id.* art. 28.

134. Compare DSU, *supra* note 9, with Annex VI, *supra* note 8.

135. DSU, *supra* note 9, app. 3, para. 7.

136. Annex VI, *supra* note 8, art. 10(a).

137. DSU, *supra* note 9, art. 10(2).

138. Annex VI, *supra* note 8, art. 12.

first or the second meetings.<sup>139</sup> In contrast, third parties before an SADC panel have more rights: they “shall have an opportunity to attend all hearings, to make written and oral submissions to the panel and to receive the written submissions of the disputing Member States.”<sup>140</sup> Fourth, an SADC panel is given only 120 days to submit its final report to the disputing parties, counting from the date of selection of the last panelist, unless the parties agree otherwise;<sup>141</sup> a WTO panel is given more time, namely six months.<sup>142</sup> The WTO panel’s deadline is only a “general rule.”<sup>143</sup> The only strict deadline is set at nine months between the establishment of the panel (a date that may come well before the panel selection) and the circulation of the report to all WTO Members (a date that usually falls one month after the issuance of the report to the disputing parties).<sup>144</sup> Finally, an SADC panel report is to be adopted within fifteen days after its circulation to the CMT;<sup>145</sup> a WTO panel is to be adopted within sixty days after its circulation to all WTO Members.<sup>146</sup>

In sum, SADC procedures are likely to be faster than those at the WTO. Initially, this may seem like an advantage, especially to the complainant. Nonetheless, WTO experience has shown that even the longer WTO deadlines are very difficult to meet if one expects high quality rulings.<sup>147</sup> Moreover, developing countries are more likely to request more, rather than less, time to prepare and plead their cases. Therefore, the very strict timelines in SADC may be more of a disadvantage than an advantage, even for complainants, and especially for least developed member countries.

#### G. SPECIAL PROCEDURES FOR LEAST-DEVELOPED COUNTRIES

In addition to special provisions for developing countries, the WTO dispute settlement mechanism also includes preferen-

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139. DSU, *supra* note 9, arts. 10(2)–(3), app. 3, para. 6.

140. Annex VI, *supra* note 8, art. 12.

141. *Id.* arts. 14(2), 15(1).

142. DSU, *supra* note 9, art. 12(8).

143. *Id.*

144. *Id.* art. 12(9).

145. Annex VI, *supra* note 8, art. 15(4).

146. DSU, *supra* note 9, art. 16(4).

147. See WorldTradeLaw.net, *Time Between Panel Establishment and Adoption of Panel/Appellate Body Reports*, at <http://www.worldtradelaw.net/dsc/database/adoptiontiming1.asp> (subscription site) (last visited Nov. 21, 2003) (on file with the Minnesota Journal of Global Trade).

tial treatment for least-developed countries.<sup>148</sup> The SADC mechanism offers no such preferential treatment. This may provide an incentive for SADC members that are not least-developed to submit their complaint against least-developed SADC members to an SADC panel, instead of a WTO panel. In turn, this feature may influence least developed SADC members to bring their disputes to the WTO instead of SADC.

The special treatment given to least-developed WTO members is set out in Article 24 of the DSU. It takes the following four forms: (1) at all stages, "particular consideration shall be given to the special situation of least-developed country Members;"<sup>149</sup> (2) when considering a complaint against a least-developed country member, "due restraint" must be exercised;<sup>150</sup> (3) in case a least-developed country is found to be in breach, complainants must exercise "due restraint in asking for compensation or seeking authorization to suspend" concessions;<sup>151</sup> (4) in all disputes involving a least-developed country, the least-developed country has a right to obtain the good offices, conciliation, and mediation of the Director-General of the WTO or the Chairman of the Dispute Settlement Body (in other disputes this can be obtained only when both parties agree).<sup>152</sup>

So far, not a single WTO complaint has been filed against a least-developed WTO Member. Nor has a least-developed country ever filed a DSU complaint. However, some least-developed countries, such as Haiti and Senegal, have been involved in WTO dispute settlements as third parties.<sup>153</sup>

#### H. POSSIBILITY TO APPEAL

An important, systemic difference between a WTO panel and an SADC panel is that a WTO panel report is appealable to the WTO Appellate Body.<sup>154</sup> In contrast, SADC panel reports are not subject to appeal.<sup>155</sup> The creation of the WTO Appellate

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148. DSU, *supra* note 9, art. 24.

149. *Id.* art. 24(1).

150. *Id.*

151. *Id.*

152. *Id.* art. 24(2).

153. For instance, Haiti was a third party in the WTO Dispute Panel on Bananas. See *Bananas*, *supra* note 21. Senegal was also a third party in the Bananas Dispute Panel, as well as the Shrimp Dispute Panel. *Id.*; WTO Dispute Settlement Body Constitution of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/9 (Apr. 17, 1997), <http://www.wto.org>.

154. DSU, *supra* note 9, art. 17.

155. Uncertainty remains as to whether the SADC Tribunal could entertain an

Body in 1995 has made the WTO mechanism more formal, detailed, and legally rigorous.<sup>156</sup> When panels know that their findings are appealable, they tend to rule more carefully and in more detail, and they tend to rely more heavily on the treaties/agreements at issue. Such characteristics benefit the system as better reasoned rulings based closely on the parties' intentions as expressed in the treaty text are likely to carry greater legitimacy, and are likely to make the outcome in future cases more predictable. Nevertheless, the downside with an appeals process is that the procedure takes more time. However, at the aggregate level, the WTO's appeals process is likely to be seen as an advantage and may prompt SADC members to bring their case to the WTO instead of SADC.

#### I. WHAT ARE THE AVAILABLE REMEDIES?

If a measure is found to be inconsistent with WTO rules, the wrongdoing WTO member must bring its measure into conformity at some future time, but normally it does not have to compensate for damage caused in the past.<sup>157</sup> This is the so-called prospective nature of WTO remedies.<sup>158</sup> In contrast, the SADC Protocol on Trade seems to imply that SADC panels may also award damages for past harm.<sup>159</sup> It includes within the terms of reference of SADC panels the competence to "make findings, as and when appropriate, on the degree of adverse trade effects on any Member State of any measure found not to conform with the provisions of this Protocol or to have caused nullification or impairment of the complaining Member State."<sup>160</sup> If this difference were reality, the availability of ret-

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appeal against an SADC trade panel. However, given the silence of the SADC Treaty, the Protocol on Trade, including Annex VI, and the Protocol on Tribunal, on this subject, it is unlikely that the drafters of these SADC texts intended the SADC Tribunal to be an appellate organ where panel reports could be challenged. After all, SADC panel reports must be formally adopted by the CMT within fifteen days, unless there is a consensus not to adopt them. Annex VI, *supra* note 8, art. 15(4). At the same time, the argument could be made that thereby the panel report becomes a CMT decision, and thus a "Community act" subject to challenge before the SADC Tribunal pursuant to Article 14(b) of the Protocol on Tribunal. SADC Protocol on Tribunal, *supra* note 117, art. 14(b).

156. James Bacchus, *Table Talk: Around the Table of the Appellate Body of the WTO*, 35 VAND. J. TRANSNAT'L L. 1021, 1033 (2002).

157. DSU, *supra* note 9, arts. 19, 22(1).

158. *Id.*

159. Annex VI, *supra* note 8, art. 9(c).

160. *Id.* Note also that this panel's competence to make a finding on the degree of adverse trade effects not only applies in respect of damage caused to the com-

roactive remedies in SADC, and not in the WTO, would offer a significant incentive to SADC complainants to bring their case to SADC instead of the WTO.

#### J. WHO IS BOUND BY THE EVENTUAL RULING?

In principle, WTO panel and Appellate Body reports are binding only on the disputing parties.<sup>161</sup> They do not bind any other WTO members, not even those that were third parties in the dispute.<sup>162</sup> SADC rules are less explicit, but the general principle of international law that adjudication as between two countries binds only those two countries would seem to apply in respect of SADC panel reports as well.<sup>163</sup>

That being said, it is clear from practice that WTO panels and the Appellate Body cite to earlier reports, which have been adopted by the WTO Dispute Settlement Body (albeit by so-called negative consensus).<sup>164</sup> The rulings of the Appellate Body in particular carry a certain precedential value because, unlike panels, which are constituted *ad hoc* for each dispute, members of the Appellate Body serve for at least four, and normally eight, years.<sup>165</sup> Therefore, the Appellate Body is unlikely to change its mind, and at present has never explicitly overruled one of its earlier decisions. As a result—although WTO reports are binding only on the disputing parties—in practice they can be relied upon also by other WTO members in future complaints. The same likely would be true in SADC, although its absence of an Appellate Body might make the precedential value of adopted SADC panel reports less predictable.

The added importance of this precedential value given to WTO Appellate Body reports as amongst the wider pool of WTO members is that it may make the WTO system more attractive, especially for SADC defendants. Indeed, if they could convince

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plainant but to “any Member State” of SADC. *Id.*

161. DSU, *supra* note 9, arts. 3(2), 3(4), 19(2).

162. *Id.* art. 3(2), 19(2) (stating, “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”); *see also* WTO Agreement, *supra* note 111, art. IX(2) (stating, “[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements”).

163. As expressed in Article 59 of the I.C.J. Statute, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” I.C.J. Statute, *supra* note 52, art. 59, 55 Stat. at 1062.

164. *See* Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT’L L. REV. 873, 879 (2001).

165. DSU, *supra* note 9, art. 17(2).



a WTO panel, and even more so the Appellate Body, that their measures were consistent with WTO rules, such convincing, practically speaking, would affect all WTO members. In contrast, if they could convince an SADC panel of the legality of their measure, nothing would stop a non-SADC WTO member from challenging the same measure before the WTO. This risk of procedural duplication would exist even if one were to make SADC the exclusive forum to settle trade disputes as between SADC members. Indeed, the duplication would be caused not by SADC members, but by non-SADC WTO members.

Finally, the broader precedential value of WTO Appellate Body reports may also be attractive to *complainants*, at least in the event they win their case. If this happens, the Appellate Body ruling becomes precedent not only against fellow SADC members, but also more broadly against all WTO members, including the world's leading non-SADC trading nations.

#### K. WHAT HAPPENS IN THE EVENT OF NON-COMPLIANCE?

Both SADC and WTO procedures require a non-compliant measure to be brought into conformity within a reasonable time.<sup>166</sup> If the wrongdoing party fails to comply, the parties can agree on compensation, and, if this fails as well, the complaining party can be authorized to retaliate.<sup>167</sup> The advantage of such procedures at the WTO is that because of the broader membership of the WTO, more pressure may be exerted on the wrongdoing SADC state to bring its measure into compliance with WTO rules. For instance, WTO members exerting such pressure may include developed countries that are major donors to the defendant SADC member. This feature may convince an SADC member to bring its complaint against another SADC member to the WTO instead of SADC.

On the other hand, an SADC member may choose to bring its dispute to an SADC panel because SADC's maximum "reasonable period of time" for implementation of a measure is six months.<sup>168</sup> In contrast, compliance with a WTO measure "should" not exceed fifteen months, but it may be shorter or longer, depending on the circumstances.<sup>169</sup> This stricter deadline could make the SADC regime attractive to complainants

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166. *Id.* art. 21; Annex VI, *supra* note 8, art. 17.

167. DSU, *supra* note 9, art. 22; Annex VI, *supra* note 8, art. 18.

168. Annex VI, *supra* note 8, art. 17.

169. DSU, *supra* note 9, art. 21(4).

who are eager to obtain implementation as quickly as possible.

#### L. CONCLUSION OF PART II

It is difficult to make a general conclusion as to whether the WTO or the SADC is the better, or more appropriate, forum to resolve trade disputes as between SADC members. Some factors weigh in favor of the WTO, others in favor of SADC, and even one factor may militate in favor of SADC or the WTO depending on the perspective one takes. The table below summarizes the discussion in Part II.

**Table 2**

***SADC Dispute Settlement Compared to WTO Dispute Settlement***

	<b>SADC</b>	<b>WTO</b>
<b>Cost of litigation</b>	Borne by the disputing parties	Borne by the WTO budget (adjudication) and the disputing parties (litigation) Advisory Center on WTO Law
<b>Organizational context</b>	Regional (local resolution, among like-minded states)	Global (more pressure on defendant; defendant may avoid repeat litigation)
<b>Who decides?</b>	Panelists: local and selected by the parties	Panelists: few Africans; nominated by Secretariat; Standing Appellate Body
<b>Applicable law</b>	Since SADC is to become free trade area, SADC rules are likely to be stricter (with possible exceptions such as broader safeguards under negotiation)	In cases where SADC rules are more lenient, an open question remains whether a SADC defense can be invoked before a WTO panel

<b>Who can initiate/be sued?</b>	Member countries only Note: SADC Tribunal has wider jurisdiction, including standing for private parties, and against SADC acts	Member countries only
<b>Procedures</b>	Faster (fewer hearings; shorter panel time and implementation period); third parties have more rights	
<b>Least-developed countries</b>	No special treatment	Preferential treatment for least-developed WTO members
<b>Possibility to appeal</b>	No appeal	Appeal before the WTO Appellate Body
<b>Remedies</b>	Potentially also retroactive remedies	Prospective remedies only
<b>Binding effect</b>	Binding only on the disputing parties	Binding only on the disputing parties; but with standing Appellate Body <i>de facto</i> rule of precedent, as between larger number of countries than at SADC
<b>Non-compliance</b>	Voluntary compensation, plus retaliation	Same as SADC; however, given broader WTO membership, more political pressure to comply

Leaving aside the specific provisions in SADC and WTO treaties, a good case can be made that trade disputes between SADC members ought to be resolved at the SADC level, as it

seems unnecessary to globalize a regional dispute. Moreover, since SADC is to become a free trade area, SADC rights and obligations are likely to be stricter and more specific, which arguably suggests that disputes should be resolved at SADC.<sup>170</sup> Nonetheless, a number of factors favor the WTO, including (1) cost of litigation, which is borne largely by the WTO budget and the Advisory Center on WTO Law; (2) the more neutral selection of panelists and the possibility to appeal; (3) preferential treatment for least-developed countries; and (4) the larger WTO membership, a feature that may put more political pressure on the parties to resolve the dispute, create broader precedents, and avoid duplication of litigation against a single measure. However, this risk of duplication is mitigated by the facts that (1) if a defendant wins under SADC, where rules are likely to be stricter, it is likely to win also at the WTO; and (2) if a defendant loses under SADC, then it must change its regime and it may as well do so in a way that complies with both its SADC and its WTO obligations.

### III. COMPARATIVE ANALYSIS AND GENERAL PRINCIPLES OF LAW

Part I explained the potential overlap between different international courts or tribunals that decide trade-related disputes between SADC members. Part II summarized the factors that parties may consider relevant in selecting one court or tribunal over another. Part III will survey how other international regimes have regulated the problem of jurisdictional overlap.

Section A addresses other regional treaties that established a customs union or other form of relatively closely integrated regional community. Section B looks at a selection of more loosely integrated free trade agreements (FTAs), be they regional or bilateral. Section C offers some examples set out in universal treaties. The objective in mind is not to offer an exhaustive treatment of this topic, but rather to mention the major regional arrangements and some bilateral trade agreements that contain explicit provisions on jurisdictional overlap. It is interesting to note that none of the treaties concluded on the African continent discussed *supra*—SACU, COMESA, ECCAS, EAC, African Economic Community, or African Union—explicitly address the issue of overlap.

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170. See *supra* note 7 and accompanying text.

Part III concludes in Section D with an elaboration of the general principles of law that international courts and tribunals may apply to resolve problems of jurisdictional overlap in case no explicit conflict clauses are set out in the relevant treaties.

#### A. TREATY PROVISIONS IN CUSTOMS UNIONS AND REGIONAL "COMMUNITIES"

##### 1. *Treaty Establishing the European Community (EC Treaty) (1957)*

The EC Treaty deals with the question of jurisdictional overlap as follows: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein."<sup>171</sup> The EC Treaty provides for a Court of First Instance and a European Court of Justice.<sup>172</sup> To some extent, the SADC Tribunal is based on the model of the European Court of Justice. SADC trade panels and WTO panels, on the other hand, are based on a different model: they are exclusively inter-governmental in nature, *ad hoc*, and have jurisdiction only over disputes as between States. The EC Treaty reserves exclusive jurisdiction to the EC courts for the settlement of all disputes as between EU members falling under EC treaties including all of their trade disputes.<sup>173</sup>

The tension between EC courts and other international tribunals materialized most recently in the *MOX Plant* case.<sup>174</sup> In that dispute, Ireland submitted claims of violation under UNCLOS concerning discharges into the Irish sea of radioactive waste by a new processing plant (the MOX plant) set up by the United Kingdom close to the Irish border.<sup>175</sup> In an Order on Provisional Measures dated December 3, 2001, the ITLOS found that there was *prima facie* jurisdiction under Article 288(1) of

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171. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 292, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

172. *Id.* arts. 220, 225.

173. *Id.* art. 292.

174. See Case 10, Request for Provisional Measures and Statement of the Case of Ireland in the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, (Ir. v. U.K) (Nov. 9, 2001), at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Feb. 11, 2004).

175. *Id.* paras. 5-8.

UNCLOS.<sup>176</sup> In contrast, the Arbitral Tribunal constituted subsequently under Annex VII of UNCLOS decided, on the merits of the case, to suspend its proceedings by Order of June 24, 2003.<sup>177</sup> It did so in response mainly to arguments by the United Kingdom that the dispute falls within the exclusive jurisdiction of EC courts pursuant to Article 292 of the EC Treaty.<sup>178</sup> The Arbitral Tribunal was of the view that the question of whether and what aspects of the UNCLOS dispute fall under the exclusive jurisdiction and competence of the EC is a question “to be decided within the institutions of the European Communities, and particularly by the European Court of Justice”.<sup>179</sup> Hence, the Arbitral Tribunal considered it inappropriate to continue its proceedings “in the absence of a resolution of the problems referred to” within the context of the EC.<sup>180</sup> Interestingly, the Order did so “bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States,” and noted that “a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.”<sup>181</sup>

## 2. *Treaty Creating the Court of Justice of the Andean Community (Cartagena Agreement) (1996)*

The Cartagena Agreement, which established the Andean Community, provides that “[m]ember countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding whatsoever except for

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176. Case 10, Order 3/2001, The MOX Plant Case, Request for Provisional Measures (Ir. v. U.K.) (Dec. 3, 2001), 41 I.L.M. 405, 411 at <http://www.itlos.org> (last visited Dec. 2, 2003).

177. The MOX Plant Case (Ir. v. U.K.), 42 I.L.M. 1187, 1191 (ITLOS Permanent Court of Arbitration), available at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf> (last visited Dec. 2 2003).

178. *Id.* at 1190-91.

179. *Id.* at 1191. The European Commission actually initiated infringement procedures under the EC Treaty against Ireland claiming that Ireland's initiation of the MOX Plant case under UNCLOS (as well as the OSPAR Convention) violates Ireland's obligations under the EC Treaty. See Severin Carrell, *Ireland Threatened over Sellafield Row*, INDEP. (London), June 29, 2003, at 1.

180. The MOX Plant Case, 42 I.L.M. at 1191.

181. *Id.*

those stipulated in this Treaty.”<sup>182</sup> This provision is similar to Article 292 of the EC Treaty.<sup>183</sup> The Court of Justice of the Andean Community is comparable to the European Court of Justice and the SADC Tribunal.

### 3. *SADC Tribunal*

The SADC Tribunal provides for “exclusive jurisdiction over all disputes between the States and the Community,”<sup>184</sup> “exclusive jurisdiction over disputes between natural or legal persons and the Community,”<sup>185</sup> and “exclusive jurisdiction over all disputes between the Community and its staff.”<sup>186</sup> The Tribunal’s jurisdiction “over disputes between States, and between natural or legal persons and States” is not stated to be exclusive.<sup>187</sup>

### 4. *Caribbean Court of Justice*

In 1999, the members of the Caribbean Community (CARICOM), which includes fifteen Caribbean countries from the Bahamas to Suriname, signed the Agreement Establishing the Caribbean Court of Justice.<sup>188</sup> This Agreement provides:

Subject to the Treaty, the Court shall have exclusive jurisdiction to hear and deliver judgment on:

- (a) disputes between Contracting Parties to this Agreement;
- (b) disputes between any Contracting Parties to this Agreement and the Community;
- (c) referrals from national courts or tribunals of Contracting Parties to this Agreement;
- (d) applications by nationals in accordance with Article XXIV, concern-

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182. Treaty Creating the Court of Justice of the Andean Community, May 28, 1996, art. 42(1), available at [http://www.comunidadandina.org/ingles/treaties/trea/ande\\_trie2.htm](http://www.comunidadandina.org/ingles/treaties/trea/ande_trie2.htm) (last visited Nov. 22, 2003) [hereinafter Cartagena Agreement]. The Andean Community is made up of Bolivia, Colombia, Ecuador, Peru and Venezuela. *Id.* pmb1.

183. See *supra* note 171 and accompanying text.

184. SADC Protocol on Tribunal, *supra* note 117, art. 17.

185. *Id.* art. 18.

186. *Id.* art. 19.

187. *Id.* art. 15(1).

188. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, available at <http://www.caricom.org> (last visited Nov. 22, 2003).

ing the interpretation and application of the Treaty.<sup>189</sup>

### 5. *European Economic Area (EEA)*

The EEA Agreement is a free trade agreement concluded between the member States of the European Community and the member States of the European Free Trade Association (EFTA), excluding Switzerland.<sup>190</sup> The original EEA Agreement envisaged the creation of an EEA Court.<sup>191</sup> However, in a 1991 opinion, the European Court of Justice (ECJ) found that the creation of an independent EEA Court would be incompatible with the EC Treaty and its own competencies.<sup>192</sup> In response to this opinion, in February 1992, the EFTA Court was created, having jurisdiction only over EFTA States, and additional provisions were added to the EEA Agreement to ensure further legal homogeneity between the EFTA Court and the ECJ.<sup>193</sup>

For present purposes, the EEA Agreement's provisions on homogeneity are particularly important. In the EEA Agreement, which incorporates many EC provisions, the objective is to "arrive at as uniform an interpretation as possible of the provisions of the [EEA] Agreement and those provisions of Community legislation which are substantially reproduced in the [EEA] Agreement."<sup>194</sup> A similar problem of consistency may arise as between interpretations of WTO rules by WTO panels and the Appellate Body, on the one hand, and interpretations of WTO rules as incorporated in the SADC Protocol on Trade by SADC trade panels, on the other.

To achieve homogeneity between interpretations by the ECJ and the EFTA Court, the following provisions are made:

The EEA Joint Committee shall keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court. To this end judgments of these Courts shall be transmitted to the EEA Joint Committee which shall act so as

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189. *Id.* art. XII(1).

190. See generally Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3 [hereinafter EEA Agreement].

191. See John Forman, *The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts*, COMMON MKT. L. R. 751, 752 (1999).

192. Opinion 1/91, Opinion Delivered Pursuant to the Second Paragraph of Article 228(1) of the Treaty, 1991 E.C.R. I-6079 (1991).

193. See Forman, *supra* note 191, at 752.

194. EEA Agreement, *supra* note 190, art. 105(1).



to preserve the homogeneous interpretation of the Agreement.<sup>195</sup>

In order to ensure as uniform an interpretation as possible of this Agreement, in full deference to the independence of courts, a system of exchange of information concerning judgments by the EFTA Court, the Court of Justice of the European Communities and the Court of First Instance of the European Communities and the Courts of last instance of the EFTA States shall be set up by the EEA Joint Committee.<sup>196</sup>

In respect of disputes between the EC and EFTA States, the EEA Joint Committee first shall try to resolve the dispute.<sup>197</sup> However, in those cases as well, the ECJ can get involved:

If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.<sup>198</sup>

## 6. *Olivos Protocol (MERCOSUR)*

The Olivos Protocol<sup>199</sup> is the dispute settlement mechanism set up within MERCOSUR, a customs union formed by Argentina, Brazil, Paraguay, and Uruguay.<sup>200</sup> Dispute settlement in MERCOSUR, like the SADC trade panel system, is based on WTO dispute settlement.<sup>201</sup> MERCOSUR panels, or “Ad Hoc Arbitration Courts,” can be reviewed by the Permanent Review Court.<sup>202</sup> Parties can also “agree expressly to submit directly and in a single instance to the Permanent Review Court. In that case, the Court shall have the same jurisdiction as the Ad Hoc Arbitration Court”.<sup>203</sup>

Concerning the relationship between MERCOSUR and

195. *Id.* art. 105(2).

196. *Id.* art. 106(1).

197. *See id.* arts. 92-94.

198. *Id.* art. 111(3).

199. Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 18, 2002, art. 1(2), available at <http://www.mercosul.gov.br/textos/default.asp?Key=232> (last visited Nov. 21, 2003) (emphasis added) [hereinafter Olivos Protocol].

200. *See generally* Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041.

201. *See supra* Part I.A.1.

202. Olivos Protocol, *supra* note 199, art. 17(1).

203. *Id.* art. 23(1).

WTO dispute settlement, Article 1(2) of the Olivos Protocol provides as follows:

Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, *may be referred to one forum or the other, as decided by the requesting party*. Provided, however, that the parties to the dispute may jointly agree on a forum.

Once a dispute settlement procedure pursuant to the preceding paragraph has begun, *none of the parties may request the use of the mechanisms established in the other fora*, as defined by Article 14 of this Protocol.<sup>204</sup>

In other words, the complainant chooses the choice of forum, but once it makes a choice, it is to the exclusion of the other forum. For present purposes, the question arises, for example, what a WTO panel should do in case a WTO member first pursues its complaint under MERCOSUR and thereafter re-submits it to the WTO, in violation of the MERCOSUR exclusion provision referred to above. This type of situation arose recently before the WTO Dispute Panel on Anti-Dumping Duties on Poultry from Brazil.<sup>205</sup> In that dispute, Brazil invoked WTO dispute settlement procedures after it had unsuccessfully relied on MERCOSUR arbitration.<sup>206</sup>

## B. TREATY PROVISIONS IN FREE TRADE AGREEMENTS

### 1. NAFTA

Chapter 20 of NAFTA includes provisions relating to the avoidance or settlement of all disputes regarding the interpretation or application of the NAFTA agreement, except for matters covered in Chapter 11 (Investment), Chapter 14 (Financial Services) and Chapter 19 (Antidumping and Countervailing Duty final determinations).<sup>207</sup>

Article 2005 of NAFTA explicitly regulates the relation-

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204. *Id.* art. 1(2) (emphasis added).

205. WTO Dispute Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003), <http://www.wto.org> [hereinafter *Brazil Poultry*]. This decision was not appealed.

206. *Id.* para. 2.10. A MERCOSUR arbitration panel had rejected Brazil's claims of violation in respect of the very same anti-dumping measure imposed by Argentina. *Id.*; see also *infra* Part III.D.

207. See generally NAFTA, *supra* note 111.

ship between NAFTA and WTO dispute settlement.<sup>208</sup> In sum-

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208. *Id.* art. 2005, 32 I.L.M. at 694. That Article provides:

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement (GATT), *may be settled in either forum at the discretion of the complaining Party.*

2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. *If those Parties cannot agree, the dispute normally shall be settled under this Agreement.*

3. In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

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

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

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

5. The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or 4 to the other Parties and to its Section of the Secretariat. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.

6. Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, *the forum selected shall be used to the exclusion of the other*, unless a Party makes a request pursuant to paragraph 3 or 4.

7. For purposes of this Article, dispute settlement proceedings under the GATT are deemed to be initiated by a Party's request for a panel, such as under Article XXIII:2 of the *General Agreement on Tariffs and Trade 1947*, or for a committee investigation, such as under Article 20.1 of the Customs Valuation Code.

mary, where a dispute regards a matter arising under both NAFTA and the WTO, in principle, the choice of forum is left to the discretion of the complaining party.<sup>209</sup> However, for certain types of disputes, such as those related to environmental or health protection, the defendant can insist that the dispute be decided under NAFTA.<sup>210</sup> However, once a forum is chosen, it must be used to the exclusion of all others.<sup>211</sup> Many free trade agreements have established similar rules on the relationship with WTO dispute settlement.<sup>212</sup>

## 2. *Protocol on Dispute Settlement Mechanism of the Association of South East Asian Nations (ASEAN)*

Dispute settlement in ASEAN, like the SADC trade panel system, is based on WTO dispute settlement.<sup>213</sup> ASEAN panel reports are to be adopted by the Senior Economic Officials Meeting (SEOM) by simple majority.<sup>214</sup> However, this ruling is appealable to the ASEAN Economic Ministers (AEM),<sup>215</sup> and “[t]he decision of the AEM on the appeal shall be final and binding on all parties to the dispute.”<sup>216</sup> The ASEAN Protocol on dispute

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*Id.* (emphasis added).

209. *Id.* art. 2005, para. 1, 32 I.L.M. at 694.

210. *Id.* art. 2005, paras. 3-5, 32 I.L.M. at 694.

211. *Id.* art. 2005, para. 6, 32 I.L.M. at 694.

212. See, e.g., Can.-Chile Free Trade Agreement, June 2, 1997, Can.-Chile, art. N-18, at <http://www.sice.oas.org>; Can.-Costa Rica Free Trade Agreement, Apr. 23, 2001, Can.-Costa Rica, art. XIII(6), at [www.dfait-maeci.gc.ca](http://www.dfait-maeci.gc.ca); Chile-Mex. Free Trade Agreement, Apr. 17, 1998, Chile-Mex., art. 18-03, at <http://www.sice.oas.org>; Mex.-Northern Triangle Free Trade Agreement, June 29, 2000, art. 19-03, at <http://www.sice.oas.org>. For examples of dispute settlement provisions similar to NAFTA art. 2005, see U.S.-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, ch. 22, at <http://www.sice.oas.org>; U.S.-Sing. Free Trade Agreement, May 6, 2003, U.S.-Sing., at <http://www.sice.oas.org>. See also, e.g. *Compania de Aguas del Aconquija S.A. & Compagnie Generale des Eaux v. Argentine Republic*, 40 I.L.M. 426 (Int'l Ctr. for Settlement of Inv. Disputes 2001); *In re Annulment Proceeding in the Arbitration between Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, paras. 55, 60, 113, 41 I.L.M. 1135 (Int'l Ctr. for Settlement of Inv. Disputes 2002) (illustrating the so-called “fork in the road” provision in many bilateral investment treaties, offering a choice to investors either to submit disputes to the domestic courts of the host State or international arbitration, but stating explicitly that once an avenue is chosen, it is to the exclusion of the other). See *infra* note 273.

213. See *generally* Protocol on Dispute Settlement Mechanism, Nov. 20, 1996, available at <http://www.aseansec.org/12814.htm> (last visited Nov. 21, 2003) [hereinafter ASEAN Protocol].

214. *Id.* art. 7.

215. *Id.* art. 8.

216. *Id.* art. 8(2).

settlement addresses overlaps as follows:

The provisions of this Protocol are *without prejudice to the rights of Member States to seek recourse to other fora* for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at *any stage before* the Senior Economic Officials Meeting (“SEOM”) has made a ruling on the panel report.<sup>217</sup>

### 3. *Free Trade Agreement of the Americas (FTAA)*

The third draft agreement on an FTAA, dated November 21, 2003, includes the following Article 8, entitled “Choice of Forum” (bracketed text is still under negotiation):<sup>218</sup>

8.1. Disputes within the scope of application of this Chapter that are also eligible for submission to the dispute settlement system of the World Trade Organization [or that of a regional agreement to which the Parties to the dispute are Party,] *may be submitted to any of these fora, at the discretion of the complaining Party.*

8.2. Once a Party has initiated dispute settlement proceedings under this Agreement or the Understanding [or a regional agreement], that Party *shall not initiate dispute settlement proceedings in any other fora* with respect to the same [claim on] [actual or proposed] [measure] [or] [matter].<sup>219</sup>

217. *Id.* art. 3(3) (emphasis added).

218. See Third Draft Free Trade Area of the Americas Agreement, Nov. 21, 2003, available at [http://ftaa-alca.org/FTAADraft03/Index\\_e.asp](http://ftaa-alca.org/FTAADraft03/Index_e.asp) (last visited Dec. 3, 2003).

219. *Id.* art. 8 (emphasis added). Draft Article 8 continues as follows:

8.3. [Before a Party initiates a dispute settlement proceeding under the WTO Agreement [or any regional agreement to which the Parties to the dispute are Party] against another Party, [involving a matter which could also be filed in accordance with the FTAA’s dispute settlement procedure,] the following rules shall apply:

a) the complaining Party shall notify the Parties to this Agreement of its intention to do so; and

[b) if there are multiple complainants regarding the same matter, they shall endeavor to agree on a single forum] .]

8.4. For the purposes of this Article, dispute settlement proceedings are deemed to be initiated:

a) under the WTO Agreement, when [a Party requests the establishment of a panel] [a panel is established] under Article 6 of the Understanding;

b) under this Agreement, when [a Party requests the establishment of a neutral panel] [a neutral panel is established] under Article 11 (Establishment of a Neutral Panel);

#### 4. *US-Israel Free Trade Agreement*

The US-Israel FTA provides that "if the conciliation panel under this Agreement or any other applicable international dispute settlement mechanism has been invoked by either Party with respect to any matter, the mechanism invoked shall have exclusive jurisdiction over that matter."<sup>220</sup>

#### 5. *Free Trade Agreement between the European Community and South Africa*

The Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa aims at the creation of a free trade area between the two parties.<sup>221</sup> The Agreement provides for dispute settlement by means of *ad hoc* arbitration.<sup>222</sup> Article 104(10) of the Agreement addresses the relationship between this bilateral arbitration mechanism and the WTO dispute settlement as follows:

Without prejudice to their right to have recourse to WTO dispute settlement procedures, the Community and South Africa *shall endeavour to settle disputes* relating to specific obligations arising under Titles II [on Trade] and III [on Trade-related Issues] of this Agreement *through recourse to the specific dispute settlement provisions of this Agreement*. Arbitration proceedings established under this Agreement will not consider issues relating to each Party's WTO rights and obligations, unless the Parties agree to refer any such issues to the arbitration.<sup>223</sup>

#### 6. *Agreement between New Zealand and Singapore on a Closer Economic Relationship (ANZSCEP)*

Disputes under ANZSCEP are to be resolved by arbitral tribunals.<sup>224</sup> The agreement provides that the rules and proce-

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[c] under a regional agreement, when the requirements provided for a panel or similar adjudicative body under such agreement are met.]

*Id.*

220. U.S.-Isr. Free Trade Agreement, Apr. 22, 1985, art. 19(f), 24 I.L.M. 653, 665.

221. Agreement on Trade, Development and Cooperation between the European Community and Its Member States, on the One Part, and the Republic of South Africa on the Other, Dec. 4, 1999, 1999 O.J. (L 311) 3.

222. *Id.* art. 104, 1999 O.J. (L 311) at 44.

223. *Id.* art. 104(10), 1999 O.J. (L 311) at 44 (emphasis added).

224. See Agreement between New Zealand and Singapore on a Closer Economic Partnership, Nov. 14, 2000, N.Z.-Sing., at <http://www.mfat.govt.nz/foreign/regions/sea/cepsingdocs/singcepccontent.html> [hereinafter ANZSCEP].

dures on dispute settlement in ANZSCEP “are without prejudice to the rights of the Parties to have recourse to dispute settlement

procedures available under other agreements to which they are party.”<sup>225</sup>

### 7. *EC–Mexico Free Trade Agreement*

The EC–Mexico free trade agreement provides that:

3. Arbitration proceedings established under this Title will not consider issues relating to each Party’s rights and obligations under the Agreement establishing the [WTO].

4. Recourse to the dispute settlement provisions of this Title shall be *without prejudice to any possible action in the WTO framework*, including dispute settlement action. However, where a Party has, with regard to a particular matter, instituted a dispute settlement proceeding under either Article 43(1) of this Title or the WTO Agreement, it shall not institute a dispute settlement proceeding regarding the same matter under the other forum until such time as the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party’s request for a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.<sup>226</sup>

### 8. *European Free Trade Association (EFTA)–Mexico Free Trade Agreement*

The EFTA–Mexico FTA deals with jurisdictional overlap in the following terms:

Choice of forum

1. Subject to paragraph 2, any dispute regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, *may be settled in either forum at the discretion of the complaining Party.*

2. Before an EFTA State initiates a dispute settlement proceeding against Mexico or Mexico initiates a dispute settlement proceeding against any EFTA State in the WTO on grounds that are substantially equivalent to those available to the Party concerned under this

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225. *Id.* art. 58(1).

226. Decision 2/2000 of the EC-Mexico Joint Council, March 23, 2000, art. 47, 2000 O.J. (L 157) 10, 27.

Agreement, that Party shall notify the other Parties of its intention. If another Party wishes also to have recourse to dispute settlement procedures as a complainant under this Agreement regarding the same matter, it shall inform promptly the notifying Party and those Parties

shall consult with a view to agreement on a single forum. *If those Parties cannot agree, the dispute shall be settled under this Agreement.*

3. Once dispute settlement procedures have been initiated under this Agreement pursuant to Article 73 or dispute settlement proceedings have been initiated under the WTO Agreement, *the forum selected shall be used to the exclusion of the other.*

4. For the purposes of this Article, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel, such as under Article 6 of the Dispute Settlement Understanding.<sup>227</sup>

### 9. *Japan–Singapore Economic Partnership Agreement (JSEPA)*

The Japan–Singapore FTA sets out the following dispute settlement rules:

This Chapter shall apply with respect to the avoidance and settlement of disputes between the Parties concerning the interpretation or application of this Agreement or the Implementing Agreement.

*Nothing in this Chapter shall prejudice any rights of the Parties to have recourse to dispute settlement procedures available under any other international agreement to which they are parties.*

Notwithstanding paragraph 2 above, once a dispute settlement procedure has been initiated under this Chapter or under any other international agreement to which the Parties are parties with respect to a particular dispute, *that procedure shall be used to the exclusion of any other procedure for that particular dispute.* However, *this does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute.*

Paragraph 3 above shall not apply where the Parties expressly agree to the use of more than one dispute settlement procedure in respect of a particular dispute.<sup>228</sup>

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227. Free Trade Agreement between the European Free Trade Association States and the United Mexican States, Nov. 27, 2000, art. 77, available at [http://secretariat.fta.int/Web/ExternalRelations/PartnerCountries/Mexico/MX/MX\\_FTA.pdf](http://secretariat.fta.int/Web/ExternalRelations/PartnerCountries/Mexico/MX/MX_FTA.pdf) (last visited Jan. 27, 2003) (emphasis added).

228. Agreement between Japan and the Republic of Singapore for a New-Age



## C. TREATY PROVISIONS IN GLOBAL TREATIES

### 1. *Dispute Settlement Understanding of the World Trade Organization*

The WTO Dispute Settlement Understanding provides 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.*”<sup>229</sup>

As one WTO panel noted,

Article 23 of the DSU deals, as its title indicates, with the “Strengthening of the Multilateral System.” Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU.<sup>230</sup>

The panel added that Article 23 of the DSU

imposes on all Members to “have recourse to” the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call “exclusive dispute resolution clause,” is an important new element of Members’ rights and obligations under the DSU.<sup>231</sup>

In another dispute, the WTO Appellate Body stated:

Article 23(1) of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. . . . [All provisions in Article 23] concern the obligation of Members of the WTO not to have recourse to unilateral action.<sup>232</sup>

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Economic Partnership, Jan. 13, 2002, Japan-Sing., art. 77, available at <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html> [hereinafter JSEPA] (emphasis added).

229. DSU, *supra* note 9, art. 23 (emphasis added).

230. WTO Dispute Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.35, (Jan. 27, 2000), <http://www.wto.org>.

231. *Id.* para. 7.43.

232. WTO Appellate Body Report, *United States-Import Measures on Certain Imports from the European Communities*, WT/DS165/AB/R, para. 111 (Jan. 10, 2001), <http://www.wto.org> [hereinafter *US-Certain EC Products*].

## 2. *Energy Charter Treaty (ECT)*

The ECT<sup>233</sup> provides the broadest multilateral framework of rules in existence under international law governing energy cooperation. It is focused on cooperation between Western European countries and countries formerly belonging to the Soviet Union. The treaty has important provisions aimed at liberalizing trade in energy.<sup>234</sup> Like the SADC Protocol on Trade, it incorporates large parts of WTO agreements.<sup>235</sup> However, the trade provisions of the ECT apply only “between Contracting Parties at least one of which is not a member [of the WTO]”<sup>236</sup> and only for as long as “any Contracting Party is not a member [of the WTO].”<sup>237</sup> The treaty also provides that “[n]othing in this Treaty shall derogate, as between particular [ECT] Contracting Parties which are [WTO members], from the provisions of [WTO agreements] as they are applied between those contracting parties.”<sup>238</sup>

The ECT establishes dispute settlement procedures for cases of investment-related disputes between an investor and a Contracting Party,<sup>239</sup> and for state-to-state disputes concerning the application or interpretation of the ECT between Contracting Parties.<sup>240</sup> In addition, there is a more specific mechanism under the treaty for trade-related disputes between Contracting Parties, envisaging the application of a panel system along the lines of WTO dispute settlement procedures.<sup>241</sup> The treaty specifies that ECT trade panels

shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a [member] to the [WTO] to other [members of the WTO] to which it applies the [WTO Agreement] and which have not been taken by those other [members] to dispute resolution under the [WTO Agreement].<sup>242</sup>

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233. European Energy Charter Treaty, Feb. 1, 1995, 34 I.L.M. 360, available at <http://www.encharter.org/upload/1/TreatyBook-en.pdf> (last visited Nov. 21, 2003) [hereinafter *Energy Charter Treaty*].

234. See, e.g., *id.* art. 6, 34 I.L.M. at 386.

235. See *id.* art. 29, 34 I.L.M. at 402-03.

236. See *id.* art. 29(2)(a), 34 I.L.M. at 402.

237. *Id.* art. 29(1), 34 I.L.M. at 402.

238. *Id.* art. 4, 34 I.L.M. at 385.

239. See *Energy Charter Treaty*, *supra* note 233, art. 26, 34 I.L.M. at 399-400.

240. See *id.* art. 27, 34 I.L.M. at 401-02.

241. See *id.* ann. D, 34 I.L.M. at 420-24.

242. See *id.* ann. D, para. 3(a), 34 I.L.M. at 421-22.

The general state-to-state dispute settlement system<sup>243</sup> is delineated from the specific one on trade by Article 28, which states that “[a] dispute between Contracting Parties with respect to the application or interpretation of Article 5 [on investment] or 29 [relating to trade] shall not be settled under Article 27 unless the Contracting Parties to the dispute so agree.”<sup>244</sup>

The ECT trade mechanism does not apply as between two ECT parties that are also WTO members. Since ECT trade provisions incorporate a number of WTO provisions, the ECT treaty provides that ECT trade “[p]anel[s] shall be guided by the interpretations given to the [WTO Agreement] within the framework of the WTO Agreement.”<sup>245</sup> The Draft Rules of Procedure for ECT Panel Proceedings also provides that “[i]n respect of legal and procedural aspects, the Secretariat may decide to seek the advice of the Secretariat of the WTO.”<sup>246</sup>

### 3. *UN Convention on the Law of the Sea (UNCLOS)*

UNCLOS states the following with respect to the “[s]ettlement of disputes by any peaceful means chosen by the parties”: “Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.”<sup>247</sup>

UNCLOS also provides that:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that *procedure shall apply in lieu of the procedures provided for in this Part*, unless the parties to the dispute otherwise agree.<sup>248</sup>

As noted earlier, UNCLOS provides that state parties are free to choose, by means of a written declaration, between four methods for the settlement of disputes concerning the interpretation or

243. See *id.* art. 27, 34 I.L.M. at 401-02.

244. *Id.* art. 28, 34 I.L.M. at 402.

245. Energy Charter Treaty, *supra* note 233, ann. D, para. 3(a), 34 I.L.M. at 421-22.

246. Draft Rules of Procedure for Panel Proceedings Related to Article 5 or Article 29 of the Energy Charter Treaty, Rule 11(1), available at <http://www.encharter.org/index.jsp?ptp=tDetail.jsp&pci=21&pti=16> (last visited Feb. 11, 2004).

247. UNCLOS, *supra* note 69, art. 280, 1833 U.N.T.S. at 508, 21 I.L.M. at 1322.

248. *Id.* art. 282 (emphasis added).

application of UNCLOS: (1) ITLOS; (2) ICJ; (3) arbitration under Annex VII of UNCLOS; or (4) special (expert) arbitration under Annex VIII of UNCLOS.<sup>249</sup> To decide which of these four methods applies in a particular dispute, the following rules apply:

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.<sup>250</sup>

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.<sup>251</sup>

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.<sup>252</sup>

**Table 3**

***The Regulation of Jurisdictional Overlaps in Other International Regimes***

MECHANISM	EXCLUSIVE JURISDICTION?	RELATIONSHIP WITH OTHER FORA
<b>1. CUSTOMS UNIONS/ "COMMUNITIES"</b>		
European Community	Yes (Art. 292)	None
Andean Community	Yes (Art. 42.1)	None
SADC Tribunal	<b>Some</b> jurisdiction exclusive; other not (such as that for state-to-state disputes, Art. 15.1)	None

249. *Id.* art. 287, 1833 U.N.T.S. at 509-10, 21 I.L.M. at 1322-1323.

250. *Id.* art. 287(3), 1833 U.N.T.S. at 510, 21 I.L.M. at 1323.

251. *Id.* art. 287(4), 1833 U.N.T.S. at 510, 21 I.L.M. at 1323.

252. *Id.* art. 287(5), 1833 U.N.T.S. at 510, 21 I.L.M. at 1323.

MECHANISM	EXCLUSIVE JURISDICTION?	RELATIONSHIP WITH OTHER FORA
Caribbean Court of Justice	Yes (Art. IX(a))	None
European Economic Area	Both ECJ and EFTA Court have distinct jurisdiction	*EFTA Court deals with EEA EFTA members; ECJ with EU members and EC-EFTA disputes; *Case law of both EFTA Court and ECJ kept under review; *System of exchange of information
MERCOSUR	No	*Complainant can select forum; <b>*Duplication precluded:</b> once one procedure begun, neither party can go to other forum (Art. 1)
<b>2. FREE TRADE AGREEMENTS</b>		
NAFTA	No	*NAFTA or WTO upon discretion of the complainant; *Third party can insist on NAFTA; *Defendant can insist on NAFTA for certain environmental, health and standard-related disputes (Art. 2005) <b>*Duplication precluded:</b> once either system invoked, other excluded (with exceptions mentioned earlier)

MECHANISM (cont.)	EXCLUSIVE JURISDICTION?	RELATIONSHIP WITH OTHER FORA
ASEAN	No	*Complainant can choose between ASEAN and other fora such as WTO <b>*Duplication precluded:</b> once there is a ruling on ASEAN panel report, other fora excluded (Art. 3)
FTAA	No	*FTAA, WTO [or other FTA mechanism] upon discretion of the complainant; <b>* Duplication precluded:</b> once procedure initiated, other fora precluded
US-Israel FTA	No	<b>Duplication precluded:</b> once a forum invoked, other fora excluded (Art. 19(f))
South Africa- EC FTA	No	*Parties "shall endeavour" to settle under FTA, *but right to go to WTO mechanism maintained; *FTA arbitration shall not consider WTO rights and obligations unless parties agree (Art. 104.10)

MECHANISM	EXCLUSIVE JURISDICTION?	OTHER PROVISIONS ON RELATIONSHIP WITH OTHER FORA
New Zealand-Singapore FTA	No	FTA mechanism without prejudice to other fora (Art. 58.1)
EC-Mexico FTA	No	<p>*choice between FTA and WTO mechanism;</p> <p>*once a forum selected, cannot go to other forum <i>until the first procedure has ended</i>;</p> <p>*FTA arbitration shall not consider WTO rights and obligations (Art. 47.4)</p>
EFTA-Mexico FTA	No	<p>*FTA or WTO upon discretion of the complainant;</p> <p>*Third party can insist on FTA;</p> <p><b>*Duplication precluded:</b> once either system invoked, other excluded (Art. 77)</p>
Japan-Singapore FTA	No	<p>*FTA mechanism without prejudice to other fora;</p> <p>*once procedure initiated, other fora precluded unless "substantially separate and distinct rights or obligations under different international agreements are in dispute" or parties agree to resort to several for a.</p>

MECHANISM (cont.)	EXCLUSIVE JURISDICTION?	RELATIONSHIP WITH OTHER FORA
<b>3.GLOBAL TREATIES</b>		
WTO	Yes: When redress sought for WTO violations, must go to DSU (Art. 23)	None
Energy Charter Treaty	ECT trade mecha- nism only applies if at least one dis- puting party is <i>not</i> WTO member	*WTO agreements prevail over ECT *ECT trade panels "shall be guided by" interpreta- tions by WTO pan- els/Appellate Body *ECT Secretariat may seek advice of WTO secretariat
UN Conven- tion on the Law of the Sea	No	*parties can select "any peaceful means of their choice" at any time; *if method agreed upon that "entails binding deci- sion," then it applies in lieu of UNCLOS

Based on the analysis above, the following conclusions may be drawn.

First, in treaties setting up a customs union or other relatively closely integrated regional "community," the regional mechanism for dispute settlements is most often "exclusive." Members of the union or community have to bring their disputes with other members to the regional forum. They are precluded from bringing them to more universal fora such as the WTO.<sup>253</sup> The only exception is MERCOSUR, where parties continue to have a choice between the MERCOSUR mechanism and, for example, that of the WTO.<sup>254</sup> Second, the more loosely integrated FTAs examined above leave it to the complainant to decide

253. See *supra* tbl.3: pt.1.

254. See *id.*



where to bring a particular trade dispute.<sup>255</sup> Only the South Africa–EC FTA includes a best endeavors clause to the effect that disputes ought to be settled under the FTA rather than at the WTO.<sup>256</sup> In addition, some FTAs, such as NAFTA, provide for exceptions where particular types of disputes must be settled at the regional level if the defendant so wants or in case a third party insists on bringing the same case to the regional mechanism.<sup>257</sup> Crucially, many of these FTAs also include a provision precluding parties from bringing the same case a second time to another forum.<sup>258</sup>

#### D. WOULD WTO PANELS AND THE APPELLATE BODY RECOGNIZE EXPLICIT CONFLICT CLAUSES IN A NON-WTO AGREEMENT?

Before we enter the discussion of what a judge can or should do when there are no explicit conflict clauses dealing with jurisdictional overlap, the question could be asked whether the WTO judiciary would ever recognize and apply such conflict clauses set out in other non-WTO agreements, say, an exclusive jurisdiction clause in Annex VI or an SADC clause stating that once a party invokes the SADC mechanism it is precluded from relying thereafter on the WTO mechanism. This question goes to the heart of what can be part of the applicable law before WTO panels.<sup>259</sup> Some scholars argue that WTO panels can apply only WTO rules.<sup>260</sup> If that is correct, then panels should never decline jurisdiction based on a conflict clause set out in another non-WTO treaty. Even if this other treaty reserves, for example, exclusive jurisdiction to the regional mechanism for the settlement of disputes,<sup>261</sup> the WTO cannot then apply this exclusivity clause and must continue, in all circumstances, with its examination of whether WTO law is violated. In contrast, if WTO panels, in the examination of WTO claims, can take cognizance also of provisions in non-WTO agreements—a position that this author defends<sup>262</sup>—then a defendant should be permitted to rely on an exclusive jurisdiction clause. When the condi-

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255. See *supra* tbl.3: pt.2.

256. See *id.*

257. See *supra* Part III.B.1.

258. See *supra* tbl.3: pt.2. NAFTA, ASEAN, the U.S.-Isr. FTA, and the EFTA-Mex. FTA all contain non-duplication provisions. *Id.*

259. See *supra* Part II.

260. See *supra* note 115 and accompanying text.

261. As does Article 292 of the EC Treaty. See *supra* note 171.

262. See *supra* note 116 and accompanying text.

tions in this clause are met, a WTO panel should then give effect to this clause and decline to exercise jurisdiction.

So far, no WTO panel has been asked to decide on the effect of a conflict clause in a non-WTO treaty that would preclude the exercise of WTO jurisdiction. Nonetheless, in a recent panel report in which Brazil invoked WTO dispute settlement after it had unsuccessfully relied on MERCOSUR arbitration, the panel seemed to imply that it would give effect to jurisdictional conflict rules in non-WTO agreements.<sup>263</sup> However, in that case the new Olivos Protocol on MERCOSUR dispute settlement, which includes such conflict rules, was not yet applicable.<sup>264</sup> In particular, Article 1(2) of the Olivos Protocol states that once a procedure has begun in one forum, none of the parties may rely on any other forum.<sup>265</sup> The panel noted that the earlier Protocol of Brasilia, which still applied to the case at hand, "imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure."<sup>266</sup> However, the panel also went on to note the following:

We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia.<sup>267</sup> Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.<sup>268</sup>

These considerations indicate a willingness on behalf of the WTO panel to apply exclusion clauses in other non-WTO treaties. Indeed, if such non-WTO rules could never play a role before a WTO panel, then surely the panel would not have bothered explaining and assessing their impact.

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263. *Brazil Poultry*, *supra* note 205, paras. 7.17-7.42.

264. Olivos Protocol, *supra* note 199.

265. *Id.* art. 1(2).

266. *Brazil Poultry*, *supra* note 205, para. 7.38.

267. Olivos Protocol, *supra* note 199, art. 50 (providing that "disputes underway initiated in accordance with the Protocol of Brasilia will continue to be exclusively governed by that Protocol until the dispute has been concluded").

268. *Brazil Poultry*, *supra* note 205, para. 7.38.

If the MERCOSUR dispute were resolved under the Olivos Protocol, thus triggering the MERCOSUR exclusion clause, a WTO panel, in this author's view, should give effect to this exclusion clause. A WTO panel must examine its own jurisdiction. MERCOSUR parties agreed to take away this jurisdiction when two conditions are fulfilled: (1) the dispute is one "falling within the scope of application of [the Olivos] Protocol that may also be referred to the dispute settlement system of the [WTO]"; and (2) the dispute is, or has been examined already by a MERCOSUR panel.<sup>269</sup> Consequently, if both of these conditions are met, any WTO panel must conclude that—*by agreement of the disputing parties*—it does not have jurisdiction to re-examine the dispute.

An example of an international tribunal applying and giving deference to an exclusive jurisdiction clause in another treaty under which it had not itself jurisdiction is the recent Order of the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *MOX Plant* case.<sup>270</sup> In that case, the Tribunal, acting under UNCLOS, suspended its proceedings based, *inter alia*, on an exclusive jurisdiction clause in the EC Treaty.<sup>271</sup> Another confirmation that international tribunals must take cognisance of jurisdiction clauses in legal instruments other than those for which they have been granted jurisdiction is the Decision on Annulment in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*.<sup>272</sup> Faced with a situation that gave rise to claims under both a bilateral investment treaty, for which the Tribunal had jurisdiction, and a domestic concession contract, for which domestic courts had exclusive jurisdiction, the Annulment Committee, reviewing the original Tribunal, found as follows:

In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the [international] tribunal will give effect to any valid choice of forum clause in the contract . . . .  
On the other hand, where "the fundamental basis of the claim" is a

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269. Olivos Protocol, *supra* note 199, art. 1. Interestingly, the JSEPA adds a third condition precedent before one procedure may exclude another (*not* present under either NAFTA or MERCOSUR). Namely, the exclusion does not apply "if substantially separate and distinct rights or obligations under different international agreements are in dispute." JSEPA, *supra* note 228, art. 139(3). This may be a wise addition in order to avoid exclusion in case the substantive claims under both procedures are markedly different. At the same time, it adds a complexity in that the second panel or tribunal must decide whether the procedure before it raises "substantially separate and distinct rights or obligations." *Id.*

270. The *MOX Plant* Case, 42 I.L.M. at 1187.

271. *Id.* at 1191.

272. See *supra* note 212 and accompanying text.

treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state . . . cannot operate as a bar to the application of the treaty standard.<sup>273</sup>

## E. GENERAL PRINCIPLES OF LAW TO BE APPLIED IN THE ABSENCE OF EXPLICIT TREATY PROVISIONS

### 1. *To Decide Which Court or Tribunal Has Jurisdiction: Lex Specialis, Lex Posterior, and Forum Non-Conveniens.*

As Gabrielle Marceau states, “in the absence of any other specific treaty prescription, the rules and principles of treaty interpretation and on conflicts applicable to the substantive provisions of treaties . . . are also applicable to the issue of the overlap or conflict of their respective dispute settlement mechanisms.”<sup>274</sup> In determining jurisdictional issues, in the absence of conflict clauses in the relevant treaties, an international court or tribunal may decide that the more specific treaty provision that confers jurisdiction prevails over the more general one. As one commentator has noted:

In circumstances where the parties have made special provision for a certain category of disputes, in the absence of any indication to the contrary it must be supposed that they intended that it is this special provision, and not some more general acceptance of the jurisdiction of another tribunal, that they intended should be applied to disputes in that category.<sup>275</sup>

One might use this principle of *lex specialis*<sup>276</sup> as an argument in favor of an SADC panel having jurisdiction over a particular dispute, rather than a WTO panel, in the absence of any new treaty provisions that would regulate their relationship. Moreover, the fact that the SADC mechanism was created later in time than the WTO mechanism could provide further support for this claim, especially since the Vienna Convention expressly adopts the *lex posterior* principle.<sup>277</sup>

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273. *In re Annulment Proceeding in the Arbitration between Compania de Aguas del Aconquija*, 41 I.L.M. at 1155-56.

274. Marceau, *supra* note 115, at 1110.

275. Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191, 195 (1999).

276. *See supra* note 119 and accompanying text.

277. Vienna Convention, *supra* note 119, art. 30, 1155 U.N.T.S. at 339-40.

Nonetheless, under current law, it is unlikely that a WTO panel would refuse to examine claims under WTO rules, even if the dispute involved two SADC members, simply because the SADC dispute settlement mechanism is more specific and/or more recent.<sup>278</sup> The SADC panel mechanism does not reserve exclusive jurisdiction to SADC trade panels to examine all trade disputes as between SADC members. It grants only automatic jurisdiction to SADC trade panels for disputes "between Member States concerning their rights and obligations *under this [SADC] Protocol on Trade.*"<sup>279</sup> As a result, disputes between SADC members concerning their rights and obligations *under WTO agreements* can still be decided elsewhere. Moreover, the DSU grants exclusive jurisdiction to WTO panels to examine such WTO claims.<sup>280</sup> Consequently, the jurisdiction conferred to WTO panels to examine WTO claims between SADC members in the 1995 WTO agreements does not seem to have lost its force to the more specific SADC Protocol on Trade. In this sense, no jurisdictional conflict exists between the two, and thus there is no need to apply the principle of *lex specialis*. As a result, both jurisdictions continue to operate concurrently in their own sphere of operation (SADC panels dealing with SADC claims; WTO panels dealing with WTO claims), with the risk, discussed earlier, of divergent outcomes and/or duplication of proceedings on the same subject matter.

Moreover, some have asked whether the domestic law doctrine of *forum non conveniens*<sup>281</sup> can be applied to the international legal system. This doctrine could lead an international court or tribunal to decline to exercise jurisdiction on the ground that some other forum is more "appropriate," in the sense of being more suitable for the ends of justice.<sup>282</sup> In domestic legal

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278. A recent WTO panel confirmed this when making rulings on a particular measure even though that measure had previously been dealt with under MERCOSUR arbitration. *Brazil Poultry*, *supra* note 205, paras. 7.17-7.42. However, the panel made clear that the Olivos Protocol, with its exclusive jurisdiction clause quoted above, had not yet entered into force and therefore did not apply to the present dispute. *Id.* The panel thereby seemed to imply that in the event that the exclusive jurisdiction clause had applied, a WTO panel may have to decline to exercise jurisdiction.

279. SADC Protocol on Trade, *supra* note 6, art. 32 (emphasis added).

280. DSU, *supra* note 9, art. 23.

281. *Forum non conveniens* "refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

282. *Id.*

systems, criteria at play in deciding on the appropriate forum commonly include nexus factors, expenses, availability of witnesses, the law governing the transaction, the place where the parties reside or carry on business, the interest of the parties, and the general interest of justice.<sup>283</sup> However, commentators have argued that, at present, it would be difficult to transpose this doctrine to the international law. For example, Lowe argues “criteria developed in the context of a proper concern for the interest of private litigants make little sense in the context of inter-state proceedings.”<sup>284</sup> In turn, Marceau states that “the WTO forum is always a ‘convenient forum’ for any WTO grievance; in fact it seems to be the exclusive forum for WTO matters.”<sup>285</sup>

## 2. To Avoid Duplication: Res Judicata, Abuse of Process, and Lis Alibi Pendens

The potential for jurisdictional overlap described in Part I not only raises the question of which court or tribunal to select, but it also raises the risk of duplicating the proceedings. For example, can an SADC member that first initiated a dispute at SADC subsequently bring the same dispute to the WTO, or vice-versa? The principle of *res judicata* militates against such an outcome. The general principle behind *res judicata* is “that a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”<sup>286</sup> Nonetheless, three conditions must be met in order for the principle of *res judicata* to apply. They are: (1) identity of parties; (2) identity of object or subject matter (it must be the very same issue that is in question); and (3) identity of the legal cause of action.<sup>287</sup>

The WTO Appellate Body recently confirmed these conditions in respect of the *res judicata* effect of WTO panel reports when it stated as follows:

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283. See, e.g., 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS 385-451 (Lawrence Collins ed., 13th ed. 2000).

284. Lowe, *supra* note 275, at 201.

285. Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs*, Apr. 26, 2002, at 8, at [http://www.wto.org/english/tratop\\_e/region\\_e/sem\\_april02\\_e/marceau.pdf](http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf) (last visited Nov. 21, 2003).

286. *Amco Asia Corp. v. Indonesia*, 89 I.L.R. 368, 552, 560 (Int'l Ctr. For the Settlement of Inv. Disputes 1988).

287. Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT'L & COMP. L. 38, 40 (1996).

[I]n our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim.<sup>288</sup>

Thus, a court or tribunal is precluded only from examining a dispute, or that part of a dispute, which has been litigated beforehand as between the exact same parties, over the identical issue and under the identical legal cause of action.<sup>289</sup> The fact that one SADC member has sued another before SADC does not preclude a third SADC member from challenging the same measure at the WTO or even at a second SADC proceeding. In such cases, *res judicata* does not apply because there is no identity of parties. More importantly, in principle, a legal finding by an SADC panel under an SADC claim does not have binding or *res judicata* force before a WTO panel examining a claim under WTO provisions. In that case, although the parties and subject matter may be the same, the legal cause of action is different as it arises under a different treaty/agreement.

Nonetheless, when the SADC and the WTO provisions under which the respective claims are made are in substance the same (for instance, both raise a violation of the national treatment principle), one could argue that the doctrine of issue estoppel or collateral estoppel applies. Under English law, the following three requirements must be met for issue estoppel to apply:

- (1) That the same question has been decided; (2) that the judicial decision which is said to create the estoppel is final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.<sup>290</sup>

In other words, under English law, the requirements for issue estoppel are identical to the requirements for traditional *res judicata* to apply, minus the requirement of identity of cause.

288. WTO Appellate Body Report, *EC—Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India—Recourse to Article 21.5 of the DSU by India*, para. 93, WT/DS141/AB/RW (Apr. 8, 2003), <http://www.wto.org> (emphasis added). The principle of *res judicata* was also confirmed in respect of Appellate Body reports. WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, paras. 92-96, WT/DS58/AB/RW (Oct. 22, 2001), <http://www.wto.org>.

289. See Lowe, *supra* note 287, at 40.

290. *Stiftung v. Rayner & Keeler Ltd.*, 1 A.C. 853, 935 (H.L. 1966) (opinion of Lord Guest).

Under United States law, a similar doctrine is known as collateral estoppel. "*Collateral estoppel* extends the *res judicata* effect of a judgment to encompass the same issues arising in a different action ("*issue preclusion*") and even to different parties where the issue has been determined in prior litigation with adequate opportunity to be heard for the party to be precluded."<sup>291</sup>

As a result, if issue estoppel were to apply before a WTO panel, then a WTO panel could preclude an SADC member from bringing a claim previously decided by an SADC panel between the same parties. A WTO panel also could apply issue estoppel to the determination of facts and to the legal characterizations of facts by the previous SADC panel, or vice versa. The American doctrine of collateral estoppel could go even further and give *res judicata* effect to a previous SADC panel finding on the same issue. This is true even if that panel was constituted at the request of a different SADC member challenging the measure at the WTO, in the event the former SADC member had "adequate opportunity to be heard" before the original SADC panel.<sup>292</sup>

However, a panel recently refused to apply the basic principle of estoppel in respect of a claim defended against by Argentina.<sup>293</sup> Argentina argued that the fact that Brazil had challenged the same measure previously before MERCOSUR estopped Brazil from bringing the case again before the WTO.<sup>294</sup> Argentina explicitly refused to invoke the principle of *res judicata*.<sup>295</sup> Although the panel refused to decide on whether or not the principle of estoppel can apply before a WTO panel,<sup>296</sup> it used the following three conditions for estoppel to be activated: "(i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith."<sup>297</sup> When applying the first condition, the panel did not consider "that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute

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291. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1141 (2000) (emphasis added).

292. *Id.*

293. *Brazil Poultry*, *supra* note 205, paras. 7.17-7.42.

294. *Id.* para. 7.37.

295. *Id.* para. 7.33 n.53.

296. *Id.* para. 7.38 n.58.

297. *Id.* para. 7.20.



settlement proceedings . . .”<sup>298</sup> This is especially because the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil’s right to bring subsequent WTO dispute settlement proceedings in respect of the same measure.<sup>299</sup> On these grounds, the panel refused to apply the principle of estoppel and continued to examine Brazil’s claims.<sup>300</sup>

A second principle, distinct from *res judicata*, that may prevent needless and costly duplication of proceedings on the same matter, as between the same parties, is the doctrine of abuse of process. This doctrine

indicates that a tribunal should decline to exercise jurisdiction in a range of circumstances where the action is rendered vexatious. These include cases where the purpose of the litigation is to harass the defendant, or the claim is frivolous or manifestly groundless, or the claim is one which could and should have been raised in earlier proceedings.<sup>301</sup>

Third, in the event duplication arises before the initial tribunal has finalized its ruling, the second tribunal could make an end to the duplication by applying the doctrine of *lis alibi pendens*.<sup>302</sup> The principle of *lis alibi pendens* could be invoked by an SADC panel to decline jurisdiction in a case that is substantially identical to one that has already been referred to the WTO, or vice versa. At the same time, the doctrine of *lis alibi pendens* should not result in a general rule that the initial tribunal decides a dispute.<sup>303</sup> Before proceeding with the case, this

298. *Id.* para. 7.38.

299. *Brazil Poultry*, *supra* note 205, para. 7.38.

300. *Id.*

301. Lowe, *supra* note 275, at 202-03. However, a recent WTO panel rejected the argument that bringing a WTO dispute after having submitted the same measure to another dispute settlement mechanism, *in casu* MERCOSUR, amounts to a failure “to act in good faith.” *Brazil Poultry*, *supra* note 205, para. 7.36. The panel did so on the ground that Argentina, which invoked breach of the principle of good faith, did not point to any substantive WTO provision that Brazil could have violated. *Id.* para. 7.38.

302. As one scholar has noted,

*Lis alibi pendens* was said by the Permanent Court of International Justice in the *Polish Upper Silesia Case* to have as its object the prevention of the possibility of conflicting judgments. It might have added that it also avoids the danger of a race to judgment between two tribunals, which is itself inimical to good order in judicial proceedings. The doctrine indicates that if a substantially identical case is already pending before a competent tribunal, the forum may decline to exercise its own jurisdiction.

Lowe, *supra* note 275, at 202.

303. If such a rule were adopted, one would have a senseless “race to court,” the

first tribunal should examine whether relevant treaty provisions on jurisdictional overlap preclude its jurisdiction or grant jurisdiction to another court or tribunal, even if this other court or tribunal was yet to hear the matter.

Finally, adjudicating the same dispute before two different tribunals does not necessarily amount to wasteful duplication. In case each of the two tribunals deals with clearly distinct matters—such as a WTO or SADC panel dealing with trade-related claims and ITLOS with matters related to the law of the sea or conservation—multiple proceedings may actually be helpful as long as each tribunal stays within the limits of its jurisdiction and defers to the other tribunal when it comes to deciding matters falling within that tribunal's jurisdiction.

#### IV: CONCRETE PROPOSALS TO AMEND SADC RULES

Amendments to Annex VI disputes could (1) avoid the duplication of dispute settlement proceedings and (2) steer parties to the forum that is best suited to resolve a particular dispute, be it the SADC mechanism or another mechanism.<sup>304</sup>

This Part first addresses the relationship between the SADC trade mechanism and the SADC Tribunal, and then offers several options to regulate the interaction between the SADC trade mechanism and other, non-SADC dispute settlement mechanisms, be they of a sub-regional nature or of a global nature.

##### A. RELATIONSHIP TO THE SADC TRIBUNAL

Part I explained the potential for overlap with the SADC Tribunal. It addressed a number of questions, including whether parties may bring disputes under the Protocol on Trade to the SADC Tribunal, whether SADC trade panel decisions can be "appealed" to the SADC Tribunal, and what happens if a dispute is covered under both the Protocol on Trade and another SADC agreement. There seems to be a need to provide legal predictability and to avoid duplication of proceedings. The overlap could be regulated in one of three ways.

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first tribunal seized necessarily having jurisdiction to the exclusion of all others. Besides the fact that other rules regulate jurisdictional overlaps, as explained above, such a rule based purely on timing would be completely arbitrary.

304. See *supra* Part II (discussing Annex VI). Accordingly, SADC members would decide which forum is best suited to resolve particular disputes.

### *1. The SADC Tribunal Has No Competence for Disputes Arising under the Protocol on Trade*

To ensure that the SADC Tribunal would not face any dispute under the Protocol on Trade, the following provision could be added either to Article 32 of the Protocol on Trade or to Article 1 of Annex VI: "A dispute between Member States concerning their rights and obligations under this Protocol [the Protocol on Trade] shall not be settled under Article 32 of the Treaty [unless the Member States parties to the dispute so agree]."

A similar delineation between the specific trade mechanism and the more general provisions on dispute settlement is found in the Energy Charter Treaty.<sup>305</sup> With these additions, even disputes falling under both the Protocol on Trade and any other SADC agreement or protocol would fall within the exclusive mandate of SADC trade panels. To mitigate that effect, one could add the following:

However, in the event a dispute between Member States concerns rights and obligations both under this Protocol and under any other SADC provision, the parties shall consult with a view to agreement on a single forum. If the parties cannot agree, the dispute shall be settled [under this Protocol] [by the SADC Tribunal].

### *2. Rulings by SADC Trade Panels Can Be Appealed to the SADC Tribunal*

To provide for appellate review of SADC trade panel reports, a new Article 15 *bis* could be added in Annex VI providing for appellate review of panel reports by the SADC Tribunal. Consequential changes should be made throughout Annex VI. Also, the Protocol on Tribunal, in particular Article 14 on "Basis of Jurisdiction," then should be modified to expand the jurisdiction of the Tribunal to include appeals to panel reports. In this respect, it should be recalled that a growing number of trade dispute settlement mechanisms (including WTO, MERCOSUR and ASEAN) provide for the opportunity to appeal trade panels before a standing appeals body.<sup>306</sup> This may increase the predictability, objectivity, and legitimacy of the system.

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305. Energy Charter Treaty, *supra* note 233, art. 28, 34 I.L.M. at 402.

306. See *Olivos Protocol*, *supra* note 199, art. 17; *ASEAN Protocol*, *supra* note 213, art. 8; *DSU*, *supra* note 9, art. 17.

### 3. *The SADC Tribunal Should Be Given Jurisdiction to Deal with Trade Disputes and the Panel System Should Be Abolished*

In order to give the SADC Tribunal Jurisdiction over trade disputes, the first paragraph in Article 32 of the Protocol on Trade, which refers to Annex VI, should be abolished, as well as Annex VI in its entirety. Article 32 of the Protocol should then read: "Any disputes regarding the interpretation and application of this Protocol shall be settled in accordance with Article 32 of the SADC Treaty."

Having one uniform SADC dispute settlement mechanism, namely under the SADC Tribunal, would have clear advantages. It would provide legal predictability, avoid overlaps, and provide homogeneity. Most customs unions and more developed regional communities—including the EC, the Andean Community, and CARICOM—have this type of uniform mechanism and do not distinguish between trade disputes and other disputes, the former being subject to *ad hoc* panels, the latter to a standing regional court.<sup>307</sup> Also, the African Economic Community<sup>308</sup> and the African Union<sup>309</sup> provide for a Court of Justice and do not have a WTO-like panel system to settle trade disputes.

## B. RELATIONSHIP TO NON-SADC DISPUTE SETTLEMENT MECHANISMS

The overlap between SADC trade panels and any non-SADC international dispute settlement mechanism between SADC members, in turn, can be regulated in several ways.

### 1. *SADC Trade Panels Have Exclusive Jurisdiction to Deal with Trade Disputes as Between SADC Members*

To grant SADC Trade Panels Exclusive Jurisdiction to Deal with Trade Disputes between SADC members, the following provision should become Article 1 of Annex VI: "[Unless the disputing parties agree otherwise,] Member States undertake not to submit a dispute concerning the interpretation or application of this Protocol to any method of settlement other than those provided in this Annex." Or, in the event it is regarded as preferable to specify other agreements: "Disputes regarding any

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307. See *supra* Part III.A (discussing EC, ANDEAN and CARICOM treaties).

308. See Abuja Treaty, *supra* note 36, art. 18, 30 I.L.M. at 1259.

309. See *supra* note 51.

matter arising under both this Protocol and [any other international agreement binding on the disputing parties] [the Agreement Establishing the World Trade Organization or any successor agreement to it] shall be settled only pursuant to the provisions in this Annex.” This would follow the examples of the European Community and the Andean Community, discussed earlier,<sup>310</sup> where member states agreed not to bring disputes under community rules to other fora, be it the broader WTO system or smaller sub-regional mechanisms. As noted earlier, most customs unions and more developed regional communities reserve exclusive jurisdiction to the regional mechanism.<sup>311</sup>

Part II discussed the advantages of settling disputes at the regional SADC level. Nonetheless, this Article also identifies some benefits related to bringing disputes to, for example, the WTO. Moreover, SADC aims at a free trade area rather than a customs union, and as we saw earlier, FTAs generally do not reserve exclusive jurisdiction to the FTA dispute settlement mechanism.<sup>312</sup> As a result, to deny to SADC members the right to settle their trade disputes elsewhere, be it at the WTO or at a smaller regional entity, such as SACU, may go too far. However, this option of reserving exclusive jurisdiction to SADC trade panels may become more attractive once SADC becomes a customs union or a more closely integrated community.

## *2. SADC Trade Panels Do Not Have Exclusive Jurisdiction; Choice of Forum Is Left to the Complainant (with Possible Exceptions); Duplication Is Precluded (with Possible Exceptions)*

To address the problems of duplication, the following should also be included in Article 1 of Annex VI, entitled “Choice of Forum”:

1. The provisions of this Annex are without prejudice to the rights of Member States to have recourse to dispute settlement procedures available under other agreements to which they are party.
2. However, once dispute settlement procedures have been initiated at one forum, the forum selected shall be used to the exclusion of all others.

In addition, Member States could add precision as to when dispute settlement procedures are deemed to be initiated. For

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310. See *supra* Parts III.A.1, III.A.2.

311. See *supra* tbl.3: pt.1.

312. *Id.*

instance, at ASEAN, a second procedure can be initiated up to the point that a ruling is made on the ASEAN panel report.<sup>313</sup> This leaves the possibility that ASEAN members may go through an entire procedure, up to the final panel report, and thereafter have to go through another procedure before the WTO, as long as the WTO procedure is initiated before a ruling is made on the ASEAN panel report. This approach risks duplication of proceedings that, in turn, may result in a waste of scarce resources. At the same time, to consider a request for consultations as "initiating dispute settlement procedures" may go too far in the other direction. For example, there may be situations where initial consultations at the WTO are more appropriate or helpful, but where, after such consultations are held, the complainant, or even both parties, decides to settle the dispute at SADC. Thus, one could add the following sentence, based on Article 2005(7) of NAFTA, to paragraph 2 above: "For purposes of this Article, a request for consultations or negotiations alone is not deemed to initiate dispute settlement proceedings."

This solution to the problem of overlap, leaving the choice of forum up to the complainant, is the solution adopted in NAFTA, ASEAN, MERCOSUR, and most free trade arrangements.<sup>314</sup> Since SADC is supposed to be a free trade area, rather than a customs union, it may also be the most appropriate approach. This approach then could be further fine-tuned in three ways.

First, although one could have the general principle of choice of forum depending on the complainant, one could grant a right to defendants to have a particular type of dispute settled at SADC. This is done, for instance, in NAFTA for certain environmental, health, and standard-related disputes.<sup>315</sup> In SADC, this right could be reserved, for example, for disputes regarding safeguards where, depending on the negotiations, SADC safeguards may be easier to impose than WTO safeguards. Such a right to have a dispute heard at SADC to the exclusion of all other fora could be given for any type of dispute that SADC members would prefer to see handled in SADC rather than, for example, the WTO, be it because the dispute is too sensitive, better regulated in SADC, etc. To give such preferential treatment to the SADC dispute settlement mechanism, the following could be added to Article 1 *bis* above:

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313. See *supra* note 217 and accompanying text.

314. See *supra* notes 204, 209, 217 and accompanying text.

315. NAFTA, *supra* note 207, art. 2005, 32 I.L.M. at 694.

3. Notwithstanding paragraphs 1 and 2 of this Article, in any dispute where the responding Member State claims that its action is subject to [provisions on special safeguards . . .] and requests in writing that the matter be considered under this Protocol, the complaining Member State may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Protocol.

Second, disputes may arise between two SADC members that are of interest to other SADC members. One complainant may want to bring the dispute to SADC, the other to the WTO. Since the complainant decides where to bring the dispute, a risk of conflicting reports from SADC and the WTO arises. To avoid this, one could add the following to Article 1 *bis* above:

Before a Member State initiates a dispute settlement proceeding under any agreement other than this Protocol, that Member State shall notify all other Member States of its intention. If any third Member State wishes to have recourse to dispute settlement procedures under this Protocol regarding the same matter, it shall inform promptly the notifying Member State and those Member States shall consult with a view to agreement on a single forum. If those Member States cannot agree, the dispute [normally] shall be settled under this Protocol.<sup>316</sup>

Third, although duplication of procedures should be avoided, there may be instances where a second procedure on the same dispute addresses claims not yet dealt with in the first procedure. For example, the first procedure under the SADC Protocol on Trade may deal with the trade aspects of a dispute, while a second procedure before the ICJ or ITLOS addresses questions of border delimitation or conservation. To allow for two proceedings in those cases, one could add the following to Article 1 *bis*, paragraph 2, above: "This provision shall not apply when, in respect of the same matter, a Member State bases its complaint on a [substantially] different legal basis than that available under the agreement that was first invoked."<sup>317</sup>

### *3. Settlement under Smaller Arrangements (Such as SACU, COMESA and ECCAS) Is Preferred over Settlement at SADC*

If the preferred approach is that settlements under smaller agreements are favored over settlements at SADC, meaning that in choice of forum instances the sub-regional arrangement prevails over SADC, then the first two paragraphs of Article 1 *bis* suggested above could be included in Annex VI, while adding

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316. This provision is based on art. 2005(2) of NAFTA.

317. This provision is based on art. 77 of JSEPA.

the following paragraph 3:

3. Notwithstanding paragraphs 1 and 2 of this Article, disputes arising between Members States that are party also to a sub-regional integration agreement on matters governed by such agreement shall be subject to the dispute settlement procedures of that other agreement to the exclusion of the dispute settlement procedures in this Protocol.

To allow for two proceedings in case both cover substantially different legal claims, the following could be added to paragraph 3: "This provision shall not apply when, in respect of the same matter, a Member State bases its complaint under this Protocol on a [substantially] different legal basis than that available under the sub-regional integration agreement."

In case SADC members would always want to give preference to WTO procedures over SADC procedures, a similar provision could be included referring to a "WTO agreement" instead of "a sub-regional integration agreement."

#### *4. Settlement at SADC Is Preferred over Settlement at Broader Mechanisms Such as the African Economic Community or the WTO*

If one prefers settlements at SADC rather than settlements at global regimes, the first two paragraphs of Article 1 *bis* suggested above could be included in Annex VI, while adding the following paragraph 3:

3. Notwithstanding paragraphs 1 and 2 of this Article, Member States undertake not to submit a dispute concerning the interpretation or application of this Protocol to dispute settlement procedures [under the African Economic Community/African Union] [at the World Trade Organization] [unless such complaint would be made on a [substantially] different legal basis than that available under this Protocol].

In this respect, recall that the Abuja Treaty encourages sub-regional economic integration and seems generally to prefer the settlement of matters at a sub-regional level, such as that of SADC.<sup>318</sup>

## CONCLUSION

This Article examines the potential for overlap between the SADC dispute settlement mechanism on trade and other international dispute settlement regimes. Many overlaps are identi-

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318. See *supra* Part I.



fied. Some of the other systems that overlap with the SADC mechanism are also trade-related, such as the WTO, SACU, COMESA, ECCAS, or the African Economic Community, while others have a more general jurisdiction, such as the SADC Tribunal, the Court of Justice of the African Union or the International Court of Justice, or another, non-trade related specialized jurisdiction—e.g., under MEAs or UNCLOS. Some of these other mechanisms are within the African region; others are more universal in nature.

Acknowledging that there is a serious potential for overlap, Part II of the Article identifies the different factors that may influence SADC members to bring a dispute to either SADC or another international forum. The following factors are examined: the cost of litigation, the organizational context in which the dispute would be decided, the entity which would decide the dispute, the advantages in the applicable law, who can initiate a complaint and against whom, procedural advantages, special procedures for least-developed countries, the possibility of appeal, the remedies that can be obtained, the parties who are bound by any eventual ruling, and the consequences of non-compliance.

Upon reflection, it is difficult to make a general conclusion as to which of the two regimes examined, that of the WTO or that of SADC, is the better or more appropriate forum to resolve trade disputes as between SADC members. Some factors plead in favor of the WTO, others in favor of SADC, and even one factor may militate in favor of SADC and the WTO, depending on the perspective one takes. Systemically, however, a good case can be made that trade disputes as between SADC members ought to be resolved at the SADC level. It makes little sense to “globalize” a dispute that can be resolved regionally (factors of “organizational context” and “who decides the dispute”). Moreover, given that SADC is to become a “free trade area,” SADC rights and obligations are likely to be stricter and more specific than those at the WTO, so arguably that is where disputes ought to be resolved (factor of the “applicable law”).

At the same time, as the rules now stand, a number of factors plead in favor of the WTO: (1) Cost of litigation that is borne largely by the WTO budget and the Advisory Centre on WTO Law; (2) the more neutral selection of panelists and the possibility to appeal; (3) preferential treatment for least-developed countries; and (4) the larger WTO membership, a feature that may put more political pressure on the parties to re-

solve the dispute, create broader precedents, and avoid duplication of litigation against the same measure.

Part III of the Article provided a comparative analysis. It explained how the problem of overlapping fora has been addressed in other international regimes. It noted that none of the treaties concluded on the African continent discussed in this Article, SACU, COMESA, ECCAS, African Economic Community or African Union, explicitly addresses the issue of overlap. Part III concluded that, in treaties setting up a customs union or other relatively closely integrated regional community, the regional dispute settlement mechanism is most often exclusive. Members of the union or community are required to bring their disputes with other members to the regional forum. They are precluded from bringing them to more universal fora such as the WTO. The only exception discussed is MERCOSUR, where parties continue to have a choice between the MERCOSUR mechanism and, for example, that of the WTO. In contrast, the more loosely integrated free trade agreements normally leave it to the complainant to decide where to bring a particular trade dispute. The complainant can bring it either under the FTA mechanism or to the WTO. Only the South Africa–EC FTA includes a best endeavors clause to the effect that disputes ought to be settled under the FTA rather than at the WTO. In addition, some FTAs, such as NAFTA, provide for exceptions where particular types of disputes must be settled at the regional level if the defendant desires, or in case a third party insists on bringing the same case to the regional mechanism. Crucially, most of these FTAs also include a provision precluding parties from bringing the same case a second time to another forum.

Part III also examined whether the WTO judiciary ever would apply jurisdictional conflict rules set out in other treaties. This Article argues that it should. Lastly, Part III elaborated on the general principles of law that international courts and tribunals may apply to resolve problems of jurisdictional overlap in case no explicit conflict clauses are set out in the relevant treaties. Part III addressed principles that may be used to decide which court or tribunal has jurisdiction, such as the *lex specialis* and *lex posterior* principles, as well as principles that may be useful to avoid duplication of proceedings, such as *res judicata*, abuse of process, and *lis alibi pendens*.

Finally, Part IV offered concrete proposals to amend Annex VI in order to (1) avoid duplicating dispute settlement proceedings, and (2) steer parties to the forum that is, according to a de-

cision to be made by SADC members, best suited to resolve a particular dispute, be it the SADC mechanism or another mechanism. Part IV offered several options and leaves it to SADC members to select the option that is most appropriate to meet their needs. It addressed, first, the relationship between the SADC trade mechanism and the SADC Tribunal, and second, the relationship between the SADC trade mechanism and other dispute settlement mechanisms, be they sub-regional, such as SACU, or global, such as the WTO.

The broader lesson to draw from the above exercise is that overlaps between international courts and tribunals are manifold, complex, and likely to increase in the future. Moreover, no one-forum-fits-all solution is available. By far the best approach is for treaty negotiators to regulate explicitly the question of overlap and choice of forum. If not, one must resort to general principles of international law. Crucially, international courts and tribunals can no longer close their eyes on the problem of competing jurisdictions. Each of them has the inherent obligation first to establish its jurisdiction and in doing so to take cognizance of the jurisdiction of other tribunals, including conflict clauses set out in other treaties. If so, the problem of overlapping jurisdictions can be contained and resolved in a uniform manner, reaping the benefits of specialization and healthy competition, as well as unity and strong cooperation between international courts and tribunals.