The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement

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Abstract

This article discusses the applicability of comity and abuse of rights in World Trade Organization (WTO) disputes. Since no particular WTO provision explicitly specifies the sources of applicable law in WTO disputes, whether non-WTO principles like comity and abuse of rights can be enforced in WTO disputes might largely depend on WTO tribunals' discretion. From this perspective, this article will first develop a set of criteria against which the applicability of comity and abuse of rights as WTO tribunals' inherent powers could be assessed. It will then use this framework to evaluate closely whether these principles can be applied in WTO disputes to resolve jurisdictional conflicts between the WTO and Regional Trade Agreements (RTAs).

I INTRODUCTION

The number of Regional Trade Agreements (RTAs) has grown exponentially in the last several decades.[1] In addition to creating a wide overlap of substantive rights and obligations with the World Trade Organisation ('WTO'),[2] many RTAs are also equipped with legalized dispute settlement mechanisms,[3] which operate in parallel to the

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1 As of 7 April 2015, 612 notifications of RTAs had been received by the GATT/WTO. Of these, 406 RTAs were in force. World Trade Organization, *Regional Trade Agreements Gateway* <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

2 See, eg, Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 383, 400–1; World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence (Geneva, WTO, 2011)* 128–33; Henrik Horn, Petros C. Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) *The World Economy* 1565, 1565–88.

3 See, eg, Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development* (World Bank, 2011) 467; David Morgan, 'Dispute Settlement under PTAs: Political or Legal?'

compulsory, automatic and exclusive system of dispute settlement under the WTO.[4] Various studies have concretely shown that this parallel of substantive commitments and legalized dispute settlement mechanisms may potentially result in conflicts of jurisdiction where a single dispute is submitted in parallel or consecutively to both the WTO and RTA fora.[5] For example, countries A and B are members of both the WTO and an RTA. Country A imposes an import ban on a product of country B. In terms of principle, country B can submit a dispute to the WTO to challenge the import ban. Since both countries are also parties to an RTA, it is also possible for country B to file a dispute at the RTA forum, either in parallel or consecutively to the WTO dispute. In fact, no such cases have materialized. However, what happened in *Mexico - Taxes on Soft Drinks*,[6] *Argentina - Poultry Anti-Dumping Duties*,[7] *US - Cattle, Swine and Grain*,[8]

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in Ross P. Buckley et al (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) 241, 241–4; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465, 486–524.

4 For a discussion on these key features of WTO dispute settlement, see eg, Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 119–208; David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge, 2nd ed, 2004) 17-48.

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

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

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

8 Request for Consultations from Canada, *United States — Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WTO Doc WT/DS144/1 (29

and *US - Tuna II*[9] suggests that multiple proceedings over the same dispute may possibly occur before the WTO and RTA fora.[10] In the context of the WTO, where the central constituting provision of RTAs, namely, *General Agreement on Tariffs and Trade* ('GATT') Article XXIV,[11] does not refer to RTA mechanisms, nor does the Dispute Settlement Understanding ('DSU') regulate relations between WTO and RTA dispute settlement,[12] there might be no mechanisms inside the WTO that can effectively prevent parties from submitting a single dispute to more than one forum.

In municipal legal systems, multiple proceedings over the same dispute may be regulated by, among others, the principles of comity and abuse of rights.[13] Comity is the principle according to which 'courts in one jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions'.[14] The principle of abuse of rights prevents the exercise of legal rights 'for the sole purpose of harming another, or when there are 'no serious and legitimate interests in the exercise of the right worthy of judicial protection".[15] This ability of comity and abuse of rights in regulating consecutive and parallel proceedings has led many international law scholars to suggesting that these principles may be

September 1998) (*US — Cattle, Swine and Grain*). In this instance, Canada filed parallel requests for consultations under both the NAFTA and WTO procedures involving exactly the same US measures and similar WTO and NAFTA provisions. However, neither of these proceeding escalated to an adjudicative phase.

9 Request for Consultations by Mexico, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/1(28 October 2008) (*US — Tuna II*); Panel Report, *US - Tuna II*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *US — Tuna II*, WTO Doc WT/DS381/AB/R (16 May 2012). In this case, Mexico initiated a WTO dispute to challenge the measures imposed by the US concerning the importation, marketing and sale of tuna and tuna products. However, the US strongly disagreed with Mexico's decision to bring the dispute to the WTO because in the US's view, the dispute must be adjudicated at NAFTA under NAFTA article 2005.4. The US then filed a NAFTA dispute concerning Mexico's failure to move the tuna-dolphin dispute from the WTO to the NAFTA forum.

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

11 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*General Agreement on Tariffs and Trade 1994*) article XXIV ('GATT').

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

13 See, eg, Shany, *The Competing Jurisdictions*, above n 5.

14 Ibid 260.

15 Walter J. Walsh, 'The Elusivity of Rights' in András Sajó (ed), *Abuse the Dark Side of Fundamental Rights* (Eleven International Publishing, 2006) 271, 294 (citation omitted).

borrowed and applied in public international law. For example, Shany, in his comprehensive book discussing jurisdictional conflicts in international law, argued that comity and abuse of rights could, and should, be applied to govern parallel and subsequent proceedings between international courts and tribunals.[16] Similarly, Lim and Gao commented squarely that the potential 'turning towards private international law analogies' of WTO tribunals is justified because these norms are 'principles of legal reasoning based ultimately on logic, experience, and the developing practice and jurisprudence of WTO dispute settlement'.[17]

In light of these scholarly suggestions, this article seeks to analyse whether comity and abuse of rights can satisfactorily apply in WTO disputes to regulate WTO-RTA multiple proceedings.[18] This question might arise when WTO tribunals find these norms potentially useful and wish to apply them to resolve WTO-RTA jurisdictional conflicts. Moreover, it is also possible that disputing parties may invoke these principles to prevent a WTO tribunal from adjudicating a dispute that is being or had been considered by an RTA tribunal. In this case, WTO tribunals might need to address the applicability of these norms in WTO disputes. In the current author's opinion, regardless of how effective comity and abuse of rights may be in municipal legal systems, their functionality in public international law could not be assumed. As far as WTO-RTA jurisdictional conflicts are concerned, it may be essential to verify whether there is any basis to apply comity and abuse of rights in WTO disputes; and crucially, even if there is such a basis, whether these norms are in themselves capable of regulating WTO-RTA jurisdictional conflicts.

Prior research has shed important light on the first question, eg., a basis to apply non-WTO norms in WTO disputes. In terms of principle, a non-WTO norm could be applied in WTO disputes as either applicable law, or tribunals' inherent powers.[19] However, since the scope of applicable law in WTO disputes still remains a highly contested issue,[20] it is virtually

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16 Shany, *The Competing Jurisdictions*, above n 5, 159, 258.

17 C.L. Lim and Henry Gao, 'The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies' in Tomer Broude, Marce L. Busch, and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press, 2011) 282, 282–314, 313–4.

18 This article deals specifically with the applicability of comity and abuse of rights in WTO disputes and does not discuss the applicability of these norms in RTA disputes. The latter issue depends on the texts of individual RTAs; and hence a discussion on this issue would enlarge the scope of this article into an unmanageable extent.

19 Andrew D Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008) 67–104.

20 At one extreme, the restrictive approach considers that the applicable law in WTO dispute settlement is essentially limited to WTO-covered agreements. See, eg, Joel P. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333; Joel Trachtman, 'Jurisdiction in WTO Dispute Settlement' in Rufus

impossible to decisively answer whether a non-WTO norm could be directly used as applicable law in WTO disputes.[21]

In this context, WTO tribunals' inherent powers appear to be a promising alternative legal basis. The concept of inherent powers originated in the practice of national courts,[22] but it has gained relative familiarity in international law and scholars are now convergent on describing these powers. Damme defines inherent power as 'powers that the judge enjoys by the mere fact of his or her status as a judge'. They are functional powers, only to be exercised when necessary for the purpose of fulfilling the judicial function'.[23] Likewise, Brown characterises inherent powers of a

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Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, 2005) 132, 132–43; Joel P. Trachtman, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 139–42; Gabrielle Marceau, 'A Call for Coherence in International Law: Praise for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33(5) *Journal of World Trade* 87; Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', above n 5; Gabrielle Marceau and Anastasio Tomazos, 'Comments on Joost Pauwelyn's Paper*:* '*How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?*' in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* (Springer Wien, New York, 2008) 55, 56–81; Debra P. Steger, 'Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 142–6.

At the other the end of the scale, the liberal approach views that all norms of international law can be potentially applied by WTO tribunals. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003); Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535; Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Question of Jurisdiction and Merit' in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* (Springer Wien, New York, 2008)1, 1–53; Joost Pauwelyn, 'Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 135–9; Lorand Bartels, 'Applicable Law in WTO Dispute Settlement' (2001) 35(30) *Journal of World Trade* 499; David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92(3) *American Journal of International Law* 398.

For a more comprehensive summary of the debate about applicable law in WTO disputes, see Son Tan Nguyen, 'The Applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization Dispute Settlement' (2013) 25(2) *Bond Law Review* 123, 127–33.

21 See Son Tan Nguyen, 'The Applicability of RTA Jurisdiction Clauses in WTO Dispute Settlement' (2013) XVI *International Trade and Business Law Review* 254, 254–94.

22 Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 56 (noting that 'inherent powers appear to have the origin in the practice of English courts'); Georges Abi-Saab, 'Whither the Judicial Function? Concluding Remarks' in Laurence Boisson de Chazournes, Cesare P. R. Romano, and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, 2002) 241, 246.

23 Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), 166.

court as ones that 'derive from its nature as a court of law'.[24] In the same vein, Orakhelashvili finds that 'the judicial nature of international tribunals and inherent powers following therefrom may produce a jurisdictional "supplement" not directly foreseen under a given jurisdictional clause'.[25] Significantly, the existence of inherent powers has also been recognised by international courts and tribunals.[26] Judge Higgins, for example, stated in *Legality of Use of Force* that '[t]he Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice [and] to protect the integrity of the judicial process'.[27] It is observable that inherent powers are mainly concerned with procedural issues. There seems to be no suggestion that international courts and tribunals can use inherent powers to apply substantive rules.

Since the premise that all international judicial bodies have inherent powers has been firmly verified, WTO tribunals can also be considered as possessing such powers because they may also be reasonably classified as judicial bodies.[28] The ruling of the Appellate Body in *Mexico - Taxes on Soft Drinks* forcefully confirmed that 'WTO panels have certain powers that are inherent in their adjudicative function'.[29] The possession of inherent powers by WTO tribunals has an important implication. It implies that where an application of non-WTO norms may be essential for the proper administration of adjudicative function, WTO tribunals might use inherent powers as a basis to apply these norms in WTO disputes.[30]

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24 Chester Brown, above n 22, 56.

25 Alexander Orakhelashvili, 'Questions of International Judicial Jurisdiction in the LaGrand Case' (2002) 15 *Leiden Journal of International Law* 105, 115.

26 In *Nuclear Tests*, the ICJ decisively confirmed that:

> the Court possesses an inherent jurisdiction enabling it to take such action as may be required … to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'. … Such inherent jurisdiction … derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

Nuclear Tests (Australia v France) (Judgment) [1974] ICJ Rep 253, 259–60 [23] ('*Nuclear Tests*'), referring to *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 29.

27 *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279, 338–9 [10], [12] (Judge Higgins).

28 Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: Selected Application of Public International Law Required by Judicial Function' (2010) 31 *Michigan Journal of International Law* 559, 566–71; Van Damme, above n 23, 166; Brown, above n 22, 71.

29 Appellate Body Report, *Mexico - Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R, [45].

30 Mitchell, *Legal Principles in WTO Disputes*, above n 19, 97–103.

This point is where this article proceeds from. The question to be asked in this article is that even if WTO tribunals can use inherent powers to apply certain non-WTO norms to resolve WTO-RTA jurisdictional conflicts, whether comity and abuse of rights would be in themselves the right candidatures. In other words, do they possess the necessary qualities to be applied in WTO dispute settlement as tribunals' inherent powers? In order to address these issues, this article is divided into four parts. Following this introduction, the second part develops a framework against which the applicability of comity and abuse of rights as WTO tribunals' inherent powers could be assessed. The fourth part uses this framework to evaluate whether comity and abuse of rights can be applied in WTO disputes as tribunals' inherent powers to resolve WTO-RTA jurisdictional conflicts. The last part concludes the article. The novelty of this article seems to lie mainly in its analyses which bring together many different views that have considered comity, abuse of rights, and like issues for the last hundred years plus. Also, the article proposes a new framework to assess the applicability of comity and abuse of rights in WTO disputes.

II Toward a Framework to Assess the Applicability of Comity and Abuse of Rights

This section discusses factors that might be relevant in evaluating the applicability of comity and abuse of rights as WTO tribunals' inherent powers. Since these principles of municipal law are non-WTO norms, their applicability in WTO disputes might depend on various factors, particularly their legal status, determinacy, ability to operate in WTO disputes, and consistency with WTO law. The following sections will explain the meaning and the relevance of these factors.

A *The Legal Status*

The first criterion that might assist in assessing the applicability of comity and abuse of rights as WTO tribunals' inherent powers is their legal status. Comity and abuse of rights are non-WTO norms; they are not included in any WTO-covered agreement. Therefore, from the perspective of inherent powers,[31] the minimum requirement for them to be considered in WTO disputes is the qualification as general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute, which has been traditionally considered as providing a 'universal, or at least dominant perception as to

[31] This article looks at the applicability of comity and abuse of rights from the perspective of WTO tribunals' inherent powers, rather than explicit treaty language. It has been pointed out above that it is inconclusive as to whether and to what extent WTO law would allow the application of non-WTO norms in WTO disputes. In addition, the practice of WTO dispute settlement is also inconclusive in this regard.

the sources of international law'.[32] In fact, even scholars who consider that the applicable law in WTO disputes is not limited to WTO-covered agreements do not advocate for an application of sources other than those specified in Article 38(1)(c).[33] Mitchell has pointed out that a principle can only be used as WTO tribunals' inherent powers if, among other conditions, it is recognised as a general principle of law.[34] This is because to him '[i]nherent jurisdiction does not provide a vehicle for applying any rule an international tribunal wishes to apply'.[35] The merit in Mitchell's approach is that it helps draw the boundary of WTO tribunals' inherent powers, which are not explicitly written down in the constitutive instrument. While Damme appears correct in observing that 'the essence of the judicial function lies in its limitations',[36] Mitchell has moved a step further in articulating what may constitute such a limitation.

The limitation that international tribunals can only use their inherent powers to apply rules that have qualified as general principles of law seems to originate in the requirement of legitimacy. Specifically, if legitimacy could be roughly understood as implicating 'an actor's normative belief that a rule or institution ought to be obeyed',[37] then requiring that a rule must achieve the status of general principles of law to be applied as WTO tribunals' inherent power appears to be an optimal choice. This is because if a rule is accepted as a general principle of law, it would gain more 'compliance pull' in the sense that an actor would feel more compelled to obey the rule.[38] To put it simply, as observed by Franck, 'few persons or states wish to be perceived as acting in flagrant violation of a generally recognised rule of conduct'.[39] Analogously, in the WTO-RTA context, if a WTO tribunal decides to apply a norm to resolve jurisdictional conflicts, the persuasiveness of that application may depend on, among others, whether the norm has been widely accepted as a general principle of law within the meaning of Article 38(1)(c).

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32 This is because while Article 38(1) refers explicitly to the ICJ, it lists the sources of law which the Court whose function is to decide disputes 'in accordance with international law' has to apply. See Waincymer, above n 4, 374.

33 See Pauwelyn, *Conflict of Norms*, above n 20; Pauwelyn, 'The Role of Public International Law', above n 20; Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law', above n 20, 1–53; Pauwelyn, 'Jurisdiction of the World Trade Organization', above n 20, 135–9; Bartel, above n 20; Palmeter and Mavroidis, 'The WTO Legal System', above n 20.

34 Mitchell and Heaton, above n 28, 572.

35 Ibid.

36 Van Damme, above n 23, 160.

37 Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press, 2007) 7.

38 Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 24–6 (describing the 'compliance pull').

39 Ibid 54.

Therefore, it would be appropriate to require that, among other conditions specified later, comity and abuse of rights must be qualified as a general principle of law within the meaning of Article 38(1)(c) in order to be applied as WTO tribunals' inherent powers. Even though there may still be difficulties in verifying when a norm can meet this requirement,[40] the wider a norm is accepted as a general principle of law, the greater the legitimacy the norm will arguably have in being applied as WTO tribunals' inherent powers.[41]

B *The Determinacy*

The requirement of determinacy is suggested by Franck's analysis on the legitimacy of international law. To Franck, determinacy reflects the ability of a rule to 'convey a clear message', and is one of the key indicators of a rule's legitimacy.[42] A rule which has a 'readily accessible meaning', and spells out clearly what it expects the addressees to comply with is 'more likely to have real impact on conduct'.[43] Conversely, an ambiguous rule would make 'it harder to know what conformity is expected', and thus potentially providing justification for noncompliance.[44] In a nutshell, '[t]he greater its determinacy, the more legitimacy the rule exhibits and the more it pulls towards compliance'.[45] Observably, determinacy appears to be an internal feature of a rule and 'central to its powers to promote commitment'.[46] Thus, the ability of a norm in fulfilling its intended function might depend largely on whether the meaning, scope, and applicable conditions of that norm are determinable.

In this light, determinacy appears to be a relevant factor in evaluating the applicability of comity and abuse of rights in WTO disputes. Specifically, if a norm is undetermined and controversial, its application in WTO disputes would, in terms of principle, face more obstacles. At the simplest

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40 Christopher A Ford, 'Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"' (1994) 5 *Duke Journal of Comparative and International Law* 35, 66–75; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008).

41 Even though comity and abuse of rights were originally developed in municipal legal systems, in determining the legal status and content of these norms in international law, this article makes reference to not only national law, but also international courts and arbitral tribunals' decisions. This is because decisions of these judicial bodies may reflect the recognition and reception of these norms in international law, and hence can be evidence as to whether these norms have, or have not, achieved the status of general principles of law.

42 Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press-Oxford, 1995) 30.

43 Ibid 31.

44 Ibid.

45 Ibid 32–3.

46 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 53.

level, it would be challenging for adjudicators to determine the exact content, scope and applicable requirements of a norm to apply it in WTO disputes. More importantly, the indeterminacy would 'give rise to different and even contradictory interpretations and the possibility of arbitrariness'.[47] Although WTO tribunals' inherent powers might be a legitimate basis to apply certain general principles of law in WTO disputes, it would be a step too far for these powers to accommodate norms that may be in themselves a major source of contradiction and arbitrariness. Obviously, the determinacy of a jurisdiction-regulating norm may decisively affect its applicability in WTO disputes. Even though determinacy might be a matter of degree as 'all rules of law are by definition to some extent general',[48] and that certain level of indeterminacy may also be useful to provide flexibility to law,[49] it could be still arguable that the more determinate the rule is, the easier it could be applied, and the greater its contribution to the formulation of legitimate expectations as to what rule would be applied.

To different extents, determinacy seems to be an issue with both comity and abuse of rights. Even if WTO tribunals decide to apply these principles, important questions as to their exact content, scope and application requirements may still remain. These issues will be explored in the second part of this article.

C *The Ability to Operate in WTO Dispute Settlement*

The question as to the ability of comity and abuse of rights to operate in WTO disputes is given rise to by the differences between municipal legal systems where these norms are originally developed, and public international law where these norms are intended to be transposed to. It is widely accepted that the international legal system does not possess as high a level of systemic coherence as municipal legal systems may have. In municipal legal systems, there normally exists a complete set of secondary rules of change and adjudication, and a unifying rule of recognition specifying sources of law and providing general criteria for the identification of its rules.[50] In contrast, international law is essentially a non-hierarchical legal system in which except for *jus cogens*, 'the principle of the sovereign equality of states excludes all forms of hierarchical differentiation of norms'.[51] No one today would deny the presence of

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47 Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 *European Journal of International Law* 1, 9.

48 Ibid.

49 Franck, *The Power of Legitimacy*, above n 38, 53.

50 Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 209–10. See also Franck, *The Power of Legitimacy*, above n 38, 183–94.

51 Combacau, 'Le droit international: bric-à-brac ou systeme?' (1986) 31 *Archives de philosophies du droit* 85, 88. See also Ignaz Seidl-Hohenveldern, 'Hierarchy of Treaties'

secondary rules of international law, especially when one looks at the rules that govern the conditions for validity and enforcement of primary rules, or the detailed list of sources of international law found in Article 38 of the ICJ Statute. Nevertheless, it is hard to establish that these secondary rules, especially rules of recognition are complete, or have been sufficiently developed to convert international law into a unified legal system.[52] Therefore, the overall tenet in doctrine is that international law is a loosely structured system with a basic level of systemic unity.[53] It is thus unclear whether jurisdiction-regulating norms which normally have detailed and technical applicable requirements can operate in the loosely connected system of international law.

Moreover, jurisdiction of international courts and tribunals is 'by no means plenary'.[54] Specifically, in the municipal context, 'somewhere within any legal system there will be one court or another' before which a claim can be brought.[55] The risk of denial of justice resulting from declining jurisdiction may thus be significantly minimized. In contrast, this may not be the case in international law. Even though it may be possible in some situations for an international tribunal to redirect a case to another forum without taking away the applicant's 'central cause of action', in some other cases, redirection may be entirely impossible because of the risk of depriving the right to have a full and fair day in court for the parties

in Jan Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998) 7, 7–9; International Law Commission, *Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi*, 58th sess, UN Doc A/CN.4/L.682, [324]–[409].

52 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17(3) *European Journal of International Law* 483, 496.

53 Ibid 499 (considering international law as 'a minimal system, resembling in many respects a *bric-à-brac* rather than an organized whole'); Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *Modern Law Review* 1, 16 (noting that 'here is a battle European jurisprudence seems to have won. … or in the words of the first conclusion made by the ILC Study Group, "International law is a legal system"'); Zemanek, 'Cours général de droit International Public' (1997) 266 *Recueil Des Cours* 9, 61–5 (viewing that 'international law forms one legal order', but its universality is quite limited); Gerhard Hafner, 'Pros and Cons Ensuring from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849, 850 (regarding international law as an 'unorganized system'); Joost Pauwelyn, *Fragmentation of International Law* (September 2006) Max Planck Encyclopaedia of Public International Law <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1406?prd=EPIL> (suggesting that international law forms 'an operating system'); International Law Commission, *Conclusions of the Work of the Study Group*, 58th sess, UN Doc A/CN.4/L.702 (18 July 2006) Conclusion No 1.

54 Lowe, 'Overlapping Jurisdiction', above n 5, 198–9.

55 Ibid 199.

concerned.[56] These sorts of differences give rise to the question as to whether jurisdiction-regulating norms developed in municipal legal systems can operate in the context of WTO dispute settlement.

D *The Consistency with WTO Law*

The requirement as to the consistency with WTO law is comprehensively developed by Mitchell who suggests that an essential condition for a non-WTO norm to be applied as WTO tribunals' inherent powers is its consistency with WTO law, especially, the DSU and Marrakesh Agreement.[57]

The justification for this requirement lies in the fact that even though possessing inherent powers, which in this case may provide a basis to incorporate jurisdiction regulating norms into WTO disputes, these powers, at the very least, must be weighed and balanced against specific provisions in WTO agreements. The basic nature of international dispute settlement is state consent.[58] Therefore, 'international courts cannot simply assert the existence of inherent powers as a type of *carte blanche* to do whatever they want',[59] but they could exercise an inherent power if there is no 'contradictory language in the constitutive document'.[60] In this regard, Alvarez succinctly remarks that 'adjudicative law-making may be barred or limited in some respect by sources of law that are available or authorized to the dispute settlers'.[61] Similarly, Judge Jennings emphasizes that '[e]ven where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate *reasonably and logically* from existing and previously ascertainable law. A court has no purely legislative competence'.[62] In the words of the WTO Appellate Body,

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[56] Ibid. However, it should also be noted that the "right to have a full day in court" is an idea within domestic law applicable to individuals. States are negotiating members of the WTO and otherwise have many other options (eg. withdrawal of membership, renegotiation of relevant treaties) than do individuals in the domestic context.

[57] Mitchell and Heaton, above n 28, 563, 575. Specifically, these authors suggest that '[i]nherent jurisdiction permits WTO Tribunals to apply only international law rules that satisfy three conditions. First, the application of the international law rule must be necessary for the WTO Tribunal to properly exercise its adjudicatory function. Second, the rule in question must have no substantive content of its own. Third, its application must not be inconsistent with the Covered Agreements'. Ibid 563.

[58] Gérardine Meishan Goh, *Dispute Settlement in International Space Law: A Multi-door Courthouse for Outer Space* (Martinus Nijhoff Publishers, 2007) 88. See also J G Merrills, *International Dispute Settlement* (Cambridge University Press, 4th ed, 2005).

[59] Brown, above n 23, 78 (emphasis added).

[60] Van Damme, above n 23, 167.

[61] Jose E Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005) 561.

[62] Sir Robert Jennings, 'The Judicial Function and the Rule of Law' (1987) III *International Law at the Time of its Codification, Essays in Honour of Roberto Ago* 139, 145 (emphasis added).

'[n]othing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU'.[63] Therefore, if WTO tribunals use inherent powers to apply non-WTO norms that are inconsistent with WTO law, they would add to or diminish the rights and obligations of WTO Members. This is plainly contrary to the requirements set out in articles 3.2 and 19.2 of the DSU, and has been forcefully warned against by the Appellate Body in *India – Patent (US)*.[64]

Obviously, it seems now well-established that inherent powers - which exist at the background of judicial powers rather than as a norm of international law - could not be exercised in a manner that is inconsistent with the explicit provisions of the constitutive instrument. It means that if comity and abuse of rights can be proven inconsistent with WTO law by WTO tribunals, they cannot be applied as WTO tribunals' inherent powers to resolve conflicts of jurisdiction between WTO and RTA dispute settlement. This is because, as just mentioned above, the enforcement of non-WTO norms that are inconsistent with WTO law in WTO disputes would amount to adding to or diminishing the rights and obligations of WTO Members. In a nutshell, [t]he provisions of Covered Agreements and their objects and purposes may ... have the effect of rendering inapplicable in the WTO a principle that has been applied elsewhere'.[65]

The most relevant WTO provision in this regard is Article 23 of the DSU which states clearly that in resolving WTO disputes, Members have 'recourse to, and abide by, the rules and procedures' of the DSU.[66] It seems that a refusal to hear a WTO dispute in favour of an RTA tribunal might be inconsistent with this particular requirement in WTO law. This is a real barrier to an application of comity and abuse of rights in WTO disputes. It is also unrealistic to expect that WTO adjudicators who are really mindful of their limited mandate would go against this explicit treaty language and apply norms that would override WTO jurisdiction.

III The Applicability of Comity and Abuse of Rights in WTO Dispute Settlement

A *Comity*

The principle of comity is frequently invoked by courts, but its meaning

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63 Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS50/R (5 September 1997) (*India — Patents (US)*) [92].

64 Ibid [45]–[46]. The Appellate Body warns that panels and the Appellate Body 'must not add to or diminish rights and obligations provided in the *WTO Agreement*'. Ibid [45].

65 Mitchell and Heaton, above n 28, 576.

66 DSU art 23.

and nature still remain highly indeterminate.[67] In the most regularly cited account,[68] that is, the opinion of the US Supreme Court in *Hilton v Guyot*, it is emphasized that:

> [c]omity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws.[69]

This account, albeit being widely relied on, leaves many fundamental questions unresolved, including, for example, under which specific conditions, comity can be applied; to what extent comity is a legally mandatory obligation; and in what form a forum can grant recognition of foreign law.[70] Neither domestic nor international cases, where comity is invoked, have shed sufficient light on these issues.[71] Despite these enduring ambiguities, some international law scholars argue that comity can resolve conflicts of jurisdiction between international courts and tribunals, including those between WTO and RTA dispute settlement. Shany, for example, considers comity as a desirable tool which:

> can authorize international courts to regulate their procedures in ways conducive to the consideration of parallel proceedings […]. Courts may thus stay their proceedings if they deem it to be just and expedient so as to reduce the parties' procedural burdens (eg., the need to conduct two simultaneous litigations) or to facilitate coordination between multiple judicial decisions.[72]

Similarly, Lavranos asserts that 'all international courts and tribunals are

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67 Michael D Ramsey, "Escaping 'International Comity" (1998) 83 *Iowa Law Review* 893, 893; Joel R Paul, 'Comity in International Law' (1991) 32(1) *Harvard International Law Journal* 1, 2–4.

68 Paul, above n 67, 9.

69 *Hilton v Guyot*, 159 (1895) U.S. 113, 163–4. This article contains some discussion of old cases and works (eg., Lauterpacht's works). To some they may be less persuasive given the different world within which we live today. However, these old cases and works might still be useful because they can shed light on the meaning of relevant concepts and principles discussed in this article.

70 Paul, above n 67, 9.

71 For a discussion of the application of comity in the US, see Ramsey, above n 67; Paul, above n 67. For the application of comity in international law, see *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award on the Merits)* (1995) 3 ICSID Rep 45, 129 ('*the Pyramids Case*'); *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187, 1191.

72 Yuval Shany, 'Contract Claims v. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multi-Sourced Investment Claims' (2005) 99 *American Journal of International Law* 835, 849-50.

obliged' to apply comity when 'confronted with competing jurisdictions'.[73] Lavranos contends that in *Mexico - Taxes on Soft Drinks*, the WTO panel could have applied comity to 'force the parties to find a solution within the NAFTA dispute settlement body rather than litigate the dispute again before yet another dispute settlement body'.[74]

Comity has also found its way into the jurisprudence of some international courts and tribunals. In both *Mox Plant*[75] and *SPP v Egypt*,[76] the notion of comity was invoked as a basis for the tribunals to deal with the overlapping jurisdiction. Specifically, the UNCLOS arbitral tribunal in *Mox Plant*[77] decided that the potential threat of the ECJ's competence over the dispute rationalized a suspension of proceeding.[78] The tribunal stated that:

> 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, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, 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.[79]

In *SPP v. Egypt*, the doctrine of comity was even invoked in a more explicit and direct manner.[80] In this case, a dispute was initiated before an ICSID tribunal while related proceedings were already on foot before the French Cour de Cassation. In deciding to suspend the proceeding before it, the ICSID tribunal emphasized that:

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73 Nikolaos Lavranos, 'The *Solange*-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals' (2008) 30 *Loyola of Los Angeles International Law and Comparative Law Review* 275, 328–9.

74 Ibid 330; North American Free Trade Agreement, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA').

75 *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187, 1191.

76 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award on the Merits)* (1995) 3 ICSID Rep 45, 129.

77 The dispute has produced four relevant decisions: i) *Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award)* (2006) 23 RIAA 59; ii) *The MOX Plant case* (*Ireland v United Kingdom) (Request for Provisional Measures)* (International Tribunal of the Law of the Sea, Case No 10, 3 December 2001); iii) *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187; and iv) *European Commission v Ireland* (C-459/03) [2006] ECR I-4635.

78 For a detailed discussion on the MOX Plant dispute, see, eg, Nikolaos Lavranos, 'Protecting Its Exclusive Jurisdiction: the MOX Plant-Judgment of the ECJ' (2006) 5 *The Law and Practice of International Courts and Tribunals* 479, 479–93.

79 *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187, 1191 (emphasis added).

80 Shany, *The Competing Jurisdiction*, above n 5, 263.

> [w]hen the jurisdictions of two unrelated and independent tribunals extend to the same dispute [...] in the interests of international judicial order, either of the tribunals may, in its discretion and as a matter of *comity*, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal. [81]

Given these scholarly opinions and its actual application, it is necessary to clarify whether comity can be applied to mitigate WTO-RTA jurisdictional conflicts. This section, based on the criteria developed in part II, will look at the legal status, determinacy, amenability, WTO-consistency of comity to assess its applicability in WTO disputes.

1 *The Legal Status*

It has been widely accepted that comity is *not a rule of law*, but one of 'practice, convenience and expediency'.[82] Jennings and Watts, for example, remark that:

> [i]n their intercourse with one another, States do observe not only legally binding rules […], but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is *directly the contrast of the Laws of Nations*.[83]

Similarly, in Lauterpacht's views, international law and international comity are two distinct concepts, and the latter means the rule of 'practice followed not as a matter of obligation but of courtesy, convenience, and neighbourly accommodation'.[84] Even when viewed as legally mandatory, comity is seen as an *imperfect* obligation. The US Supreme Court in *Hilton v Guyot* emphasized that '[c]omity, in the legal sense, is neither a matter of absolute obligation nor of mere courtesy and goodwill'.[85] Therefore, at best, comity could be characterised as a mixture of legal policies and international politics,[86] rather than a purely legal rule of international law. It is plainly clear that from what is not considered as a rule of law, or at least not pure law, to a general principle of law under Article 38(3)(c) of the ICJ Statute seems to be an unbridgeable gap. As a matter of logic, to be recognised as a general principle of law, a norm must be able to compel

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81 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award on the Merits)* (1995) 3 ICSID Rep 45, 129 (emphasis added).

82 *Johnston* ***v*** *Compagnie Generale Transatlantique* (1926) NY 381, 387**.**

83 Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law, Volume 1, Peace* (London: Longman, 9th ed, 1992) 25 (emphasis added).

84 Hersch Lauterpacht (ed), *International Law. Collected Papers. I. General Works* (Cambridge University Press, 1970) 43.

85 *Hilton v Guyot* (1895) 159 US 113, 163–4.

86 Iris Canor, 'Exercise in Constitutional Tolerance? When Public International Law Meets Private International Law: Bosphorus Revisited' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiary* (Hart Publishing, 2008) 237, 243.

compliance as a rule of law.

This logical analysis is fully consistent with findings made by prominent scholars. Even though fascinated by the potential desirability of comity in international litigation, Shany has to admit that there is little judicial practice and insufficient international agreements to recognise comity as a rule of customary international law or treaty law.[87] Moreover, to Shany, the fact that many countries do not exercise comity towards foreign judgments means that it is also problematic to treat comity as a general principle of law.[88] Similarly, Joel Paul found that there is little evidence suggesting that comity is a customary international rule or a general principle of law commonly applied in domestic legal systems.[89] Specifically, while comity is generally rejected in civil law countries as it provides excessive discretion to the judges in deciding whether to defer to foreign law,[90] common law countries, except the US, tend to treat comity as an exception rather than a rule.[91] Evidently, it is ill-established to consider comity as a general principle of law. It means that, contrary to what Lavranos forcefully believes in, comity cannot be regarded as a fundamental and legal duty that all international judges and arbitrators have to follow.[92]

It was established in section IIA that in order to be applied under WTO tribunals' inherent powers, a non-WTO rule must be qualified as a general principle of law so that it can recompense the legitimacy deficit in the exercise of WTO tribunals' inherent powers.[93] Given its status, comity does not seem to be able to fulfil this expectation and the result is that it might not be legitimate to apply comity in WTO disputes.

2 *The Determinacy of Comity*

Determinacy is another drawback of comity. It is a highly indeterminate notion and 'can mean anything', from mere courtesy to the foundation of international law, from jurisdictional rules to the discretion to decline a dispute.[94] Paul succinctly noted that:

> [c]omity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a

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87 Shany, *The Competing Jurisdiction*, above n 5, 262.
88 Ibid 263.
89 Paul, above n 67, 27–44.
90 Ibid 33
91 Ibid 43.
92 Lavranos, 'The *Solange*-Method', above n 73, 328–9
93 It seems that no one would dispute the legitimacy of a rule once it is qualified as a general principle of law.
94 William Thomas Worster, 'Competition and Comity' (2008) 34(1) *Brooklyn Journal of International Law* 119, 121.

> necessity, expediency, reciprocity or 'considerations of high international politics…[95]

Therefore, even if Shany can characterise comity as a principle according to which 'courts in one jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions',[96] the clarity may not be much improved. This is because this notion still does not make clearer critical aspects of comity, particularly, the applicable conditions, the legal nature, and the form of deference required. Neither in *MOX Plant*, nor in *SPP v. Egypt*, did the tribunal analyse these issues, except for an abstract assertion that 'bearing in mind considerations of mutual respect and comity', or 'as a matter of comity', one proceeding should continue and the other should not.[97] Ironically, the attempt of the tribunal in *SPP v. Egypt* to justify the stay of proceeding based on comity seems to intensify the principle's ambiguity. Surely, by using comity in exactly the place where the tribunal forcefully believes that no rule of international law exists, the tribunal in *SPP v. Egypt* did not seem to regard comity as a legally mandatory principle.[98] Yet this fails to explain how an international judicial body 'can be obligated if not by international law'.[99] Clearly, the tribunal in *SPP v. Egypt* continued to leave unresolved, if not worsened, the question of where exactly comity lies between a legal obligation, and a 'courtesy' or 'goodwill'.

Rationally, the more ambiguous the rule is, the greater judicial discretion may entail in its application. Certainly, if comity is applied in WTO disputes, adjudicators would have to determine by themselves various issues, particularly which conditions are required to apply comity; whether comity is legally compelled or discretionary; in which forms, that is, a stay of proceedings, a decline of jurisdiction, or a mere interpretative consideration, comity should be exercised. Even if WTO tribunals could be able to resolve these sorts of difficult questions, it would be simply that they are exercising a great amount of judicial discretion, based mainly on what they intuitively feel to be right, rather than a conscious reasoning strictly guided by previously established, well-defined, and clearly articulated rules of law. This is exactly what Ramsey describes as 'intuitive adjudication',[100] contrary to WTO judicial policy where adjudicators are

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95 Paul, above n 67, 4 (citations omitted).

96 Shany, *The Competing Jurisdiction*, above n 5, 260.

97 *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187, 1191 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award on the Merits)* (1995) 3 ICSID Rep 45, 129.

98 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award on the Merits)* (1995) 3 ICSID Rep 45, 129.

99 Paul, above n 67, 46.

100 Ramsey, above n 67, 894.

mandated to apply strict rules and procedures, and 'appear to lack sufficient discretion'[101] to either stay proceedings or decline jurisdiction.[102] Clearly, comity, overshadowed by its serious indeterminacy, represents a real risk that judicial discretion would be excessively utilized, undermining legal certainty and predictability.[103] The doctrine is, therefore, not only unsuitable to the WTO rule-based procedure, but may also be incompatible with the judicial function generally, in which judges are 'required to decide a case according to the rights of the parties', rather than intuition.[104] These analyses suggest that Lauterpacht is entirely convincing to argue that the vagueness of comity is the main reason why it should be abandoned in public international law.[105]

3 *The Ability to Operate in WTO Disputes*

The analyses in the previous section have shown that comity contains no previously established and objective conditions for application. For Shany, this reflects the 'flexibility' of comity and its 'notable advantages over the rigidity of traditional jurisdiction regulating rules such as *lis alibi pendens* or *res judicata'*.[106] Thus, to Shany, comity 'represents a pragmatic way of bypassing the technical difficulties in the application of *res judicata* and *lis pendens*, that is, the rigid requirements of identity of disputes.[107] Theoretically, the absence of applicable conditions might not necessarily mean that tribunals will automatically overlook technical issues such as the identity of disputes. It is still possible that, as a discretionary matter, tribunals might set very high application requirements, similar to those ones traditionally applied to *lis alibi pendens* or *res judicata*. Nevertheless, this is unlikely to happen because when a tribunal invokes comity, it tends to take advantage of the principle's discretionary nature to avoid touching closely on the related technical aspects of the disputes. This has been

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101 Shany, *The Competing Jurisdictions*, above n 5, 265.

102 The Appellate Body held that the declining of jurisdiction by WTO tribunals would violate various provisions of the DSU, in particular, Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU. Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R, [44–57].

103 Paul, above n 67, 41.

104 Geoffrey Chevalier Cheshire and Peter Machin North, *Private International Law* (London: Butterworths, 11th ed, 1987) 4 (citation omitted).

105 Lauterpacht, *International Law*, above n 84, 45.

106 Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP Oxford, 2007) 167. The principle of *res judicata* regulates consecutive proceedings by precluding a party from relitigating a matter that it has already litigated, whereas the principle of *lis pendens* governs parallel proceedings by prescribing that during the pendency of one set of proceeding, it is not permissible to initiate another set of competing proceedings concerning the same dispute.

107 Shany, *Regulating Jurisdictional Relations between National and International Courts*, above n 106, 159 (emphasis added). For the principles of *res judicata* and *lis pendens* to be applied, there must be an identity of parties, identity of the object, and identity of grounds.

observed in the domestic context. Ramsey's detailed study on the application of comity in the US legal system reveals that '[o]nce that phrase [comity] is introduced, the appeal to intuitive judgment that its imprecision promotes leads to an abandonment of analytic evaluation of the disputes'.[108]

The application of comity in the international context may not be an exception to this trend. For example, in *MOX Plant*, the UNCLOS tribunal utilized comity in an abstract manner and performed no formal analysis on crucial issues such as the identity of disputes, or the risk of justice being denied. Specifically, even though the UNCLOS arbitral tribunal seems correct in stating 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',[109] it entirely overlooked whether its proceeding and the potential one before the ECJ would deal with the same issue; whether the stay of proceeding may affect parties' rights of having the dispute fully and fairly resolved. In fact, it is hard to consider the two disputes as involving the same issue. The UNCLOS dispute related to Ireland's claim that the United Kingdom violated its UNCLOS obligations, whereas the proceeding before the ECJ primarily concerned the question of whether, by initiating a dispute outside the EC legal order, Ireland had violated the exclusive jurisdiction of the ECJ.[110] McLachlan, therefore, seems to have a strong case in criticizing that in *Mox Plant*, 'Ireland was left with no proceedings against the United Kingdom at all'.[111] Obviously, the discretionary nature of comity means that the principle would generally be used as a tool to circumvent technical difficulties that would arise if rigid principles such as *res judicata* and *lis pendens* were applied.

Therefore, if comity were invoked in WTO disputes to resolve WTO-RTA jurisdictional conflicts, the principle would not require WTO tribunals to perform any formal analysis on, for examples, whether WTO and RTA disputes are the same, whether it is justified from the perspective of justice and fairness to take away the right of a WTO member to have a WTO dispute decided by a WTO tribunal. If WTO tribunals refuse to hear a WTO dispute in favour of an RTA tribunal, this right of WTO members might be taken away. In other words, a WTO tribunal would virtually encounter no technical difficulties in utilizing the principle of comity to govern WTO-RTA jurisdictional conflicts. Shany and Lavranos are thus both correct in considering that, from the operationality perspective, comity can be easily

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108 Ramsey, above n 67, 894.

109 *The MOX Plant case (Ireland v United Kingdom) (Procedural Order No 3*) (2003) 42 ILM 1187, 1191 (emphasis added).

110 Lavranos, 'The *Solange*-Method', above n 73, 278–85.

111 Campbell McLachlan, 'Lis Pendens in International Litigation' (2008) 336 *Recueil Des Cours* 199, 455.

invoked by international courts and tribunals, including WTO tribunals, even in situations where hard jurisdiction-regulating rules such as *res judicata* and *lis pendens* could not find their way.[112] Nevertheless, while these authors believe that the easy application of comity is desirable because it offers tribunals a flexible tool to regulate jurisdictional conflicts,[113] the current author tends to think differently that the painless operation may represent a defect rather than a merit of comity.

In fact, the easy application of comity might fail to secure parties' rights to have a full and fair day in court where the dispute would be best resolved. Certainly, the absence of formal requirement on the identity of disputes would mean that in certain cases parties may have to end a dispute without any actual litigation for it. This seemed to be, as studied above, the case in *Mox Plant*, where Ireland's claim was left with no forum for litigation. Similarly, if the WTO panel and the Appellate Body in *Mexico - Taxes on Soft Drinks* had applied comity to force parties to settle their disputes under NAFTA,[114] the differences between the WTO and NAFTA disputes mean that the US's claims before the WTO was left unlitigated.[115] Specifically, the NAFTA dispute related specifically to Mexico's claim that it has been denied access to the US sugar market specified the side letters. Therefore, even if the NAFTA panel was established, the US's claim before the WTO that Mexico's tax measures were inconsistent with Article III of GATT[116] would not be resolved by the NAFTA tribunal. This still holds true where hypothetically the US also raised the same national treatment question in the NAFTA proceeding based on Article 301 of NAFTA which explicitly incorporates Article III of GATT.[117] In this case, the NAFTA tribunal still considered the national treatment claim from the NAFTA perspective. Given the difference in the contexts, objects, and purposes between the NAFTA and the WTO, the answers to similar substantive questions might

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[112] Shany, *The Competing Jurisdiction*, above n 5, 278; Shany, *Regulating Jurisdictional Relations between National and International Courts*, above n 106, 159, 167; Nikolaos Lavranos, 'On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals' (Working Paper MWP 2009/14, European University Institute, 12 June 2009).

[113] Shany, *The Competing Jurisdiction*, above n 5, 261, 278–80; Shany, *Regulating Jurisdictional Relations*, above n 106, 166–9; Lavranos, 'The *Solange*-Method', above n 73.

[114] This was forcefully argued by Lavranos. See Lavranos, 'The *Solange*-Method', above n 73, 330.

[115] Both the panel and the Appellate Body pointed out that the two cases are different. See Panel Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/R, [7.14]; Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R, [54]. Mexico also agreed that the two disputes are different so 'it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA'.

[116] Panel Report, *Mexico — Taxes on Soft Drinks*, WTO Doc WT/DS308/R, [3.1].

[117] NAFTA art 301.

not be automatically the same.[118] Hence, neither the NAFTA nor WTO tribunal would *legitimately and adequately* address the question before the other forum.

Moreover, the application of comity tends to '[finesse and submerge] important issues that should merit serious discussion'.[119] It is imaginable that when international courts encounter a conflict of jurisdiction, there are a number of fundamental issues that deserve careful analyses. These include, for example, whether the relevant disputes are the same; how the constitutive instruments regulate the interaction of law and jurisdiction between the two fora; whether there are rules of law capable of resolving the conflict; and importantly, if disputes have to proceed simultaneously or subsequently, whether there are interpretative rules that could mitigate the possibility of contrary findings and conflicting interpretations. If the application of comity is considered as a way to bypass these technical difficulties, the court would supply a ruling that is based largely on the intuition of judges rather than on analytical reasoning guided by previously established and clearly articulated rules of law. The easy operationality thus does not result from the fact that comity naturally fits into the judicial context, but achieved at the cost of 'analytical evaluation of the dispute'.[120] This is undesirable because it may import confusion and arbitrariness into judicial settlement because detailed analyses of the dispute has been replaced by the application of comity. Moreover, the abandonment of proper legal inquiries constitutes in effect a 'concession' or 'compromise' of established rules of international law.[121] Therefore, as accurately observed by Lauterpacht, '[t]here is questionable merit in reducing the rules of international law to the uncertain level of international comity [which] in its ordinary connotation may occasionally be no more than a form of words'.[122]

4 *The Consistency of Comity with WTO Law*

The principle of comity could be utilized in different ways to regulate jurisdictional conflicts between international courts and tribunals. At one extreme, comity could be applied in a roughly comparable way to rigid jurisdiction-regulating norms such as *lis pendens* and *res judicata*, and thus possibly results in a decline of jurisdiction.[123] At the other end of the scale, comity may be used in a soft manner, i.e. not as a basis for refusal of jurisdiction, but as a way for international courts and tribunals to take into

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[118] William J. Davey and André Sapir, 'The *Soft Drinks* Case: The WTO and Regional Agreements' (2009) 8(1) *World Trade Review* 5, 14–5 (footnote omitted).
[119] Ramsey, above n 67, 951.
[120] Ibid 896.
[121] Lauterpacht, *International Law*, above n 84, 45–6.
[122] Ibid.
[123] Shany, *Regulating Jurisdictional Relations*, above n 106, 176.

consideration relevant rules and judicial decisions of the other forum.[124] The WTO-consistency of comity, therefore, depends on the modality in which it has been utilized.

If comity were applied in a rigid manner, leading a WTO tribunal to decline its jurisdiction, its WTO-consistency is similar to that of *res judicata*, and *lis pendens.*[125] The future development of WTO jurisprudence would provide evidence as to whether WTO tribunals will act in this way. From a theoretical perspective, it can be suggested that in the context of the WTO, a decline of jurisdiction will be directly inconsistent with the DSU, especially its Article 23, which requires all WTO disputes to be settled exclusively at the WTO forum.[126] Under the framework developed in part II, this inconsistency would render the principle inapplicable in WTO disputes.

However, if comity is applied in a soft manner, demonstrating a degree of deference to the laws of other jurisdictions,[127] rather than modelling after the rigid jurisdiction-regulating norms such as *res judicata*, and *lis pendens*, it could be arguable that comity is consistent with WTO law. This is because, for example, the WTO Appellate Body explicitly stated that WTO law will not be read in clinical isolation with international law,[128] arguably including RTA law. Similarly, Article 3.2 of the DSU also sets out that WTO dispute settlement will 'clarify the existing provisions of [the WTO-covered agreements] in accordance with customary rules of interpretation of public international law'.[129] Importantly, Article 31(3)(c) of the VCLT requires that in interpreting a treaty, a tribunal is required to take into account 'any relevant rules of international law applicable in the relations between the parties'.[130] Obviously, the soft application of comity seems to be precisely an issue of interpretation because it requires what WTO tribunals are generally asked to do in its interpretative function, that is, not to interpret WTO law in isolation to international law. This

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[124] Shany, *The Competing Jurisdiction*, above n 5, 261. For the purpose of this article, these extremes will be respectively termed as rigid and soft comity.

[125] See Son Tan Nguyen, 'The Applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization', above n 20.

[126] This exclusiveness has been confirmed in various cases. See, eg, Panel Report, *United States — Sections 301–310 of the Trade Act 1974*, WTO Doc WT/DS152/R (22 December 1999) (*US — Section 301 Trade Act*) [7.43]; Appellate Body Report, *United States — Import Measures on Certain Products from the European Communities* WTO Doc WT/DS165/AB/R (11 December 2000) *(US-Certain EC Products)* [111] (emphasis added).

[127] Shany, *The Competing Jurisdiction*, above n 5, 260 (emphasis added).

[128] Appellate Body Report, *United States — Standards of Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (20 May 1996) (*US - Gasoline*) 17.

[129] DSU art 3.2.

[130] *Vienna Convention on the Law of Treaties*, opened for signatures 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c) ('VCLT').

comparability raises a critical question as to why we need to abandon and replace the detailed and well-established rules of interpretation by a highly indeterminate notion of comity. This is obviously, as correctly pointed out by Lauterpacht, a reduction of 'the rules of international law to the uncertain level of international comity'.[131]

Therefore, if the conflict of jurisdiction between WTO and RTA dispute settlement gives rise to the question of interpretation, the issue must be precisely dealt with by the interpretative rules of international law, not an ill-defined notion of comity.

B *The Principle of Abuse of Rights*

The general idea of the principle of abuse of rights is to prevent the exercise of legal rights 'for the sole purpose of harming another, or when there are 'no serious and legitimate interests in the exercise of the right worthy of judicial protection''.[132] The principle is defined by Bin Cheng as follows:

> the exercise of a right - or supposed right, since the right no longer exists - for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law… The principle of good faith […] requires every right to be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated.[133]

Abuse of rights is widely considered by scholars such as Cheng,[134] Shany,[135] Mitchell,[136] and Lenaerts[137] as a particular application of the principle of good faith. Importantly, the relationship between the two principles is also recognised in *US-Shrimp*, in which the Appellate Body explicitly stated that:

> [t]his principle [good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights of states. One application of this general principle, the application widely known as the

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131 Hersch Lauterpacht, *International Law*, above n 84, 45–6.
132 Walter J. Walsh, above, n 15, 271, 294 (citation omitted).
133 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited, London, 1953), 122, 123.
134 Ibid, 121.
135 Yuval Shany, *The Competing Jurisdiction*, above n 5, 256.
136 Andrew D. Mitchell, *Legal Principles in WTO Disputes*, above n 19, 140–1.
137 Annekatrien Lenaerts, 'The General principle of the prohibition of Abuse of Rights: A Critical position on Its Role in a Codified European Contract Law' (2010) 6 *European Review of Private Law* 1121, 1142.

> doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights…[138]

It is commonly accepted that abuse can possibly occur with almost any legal right. In the words of Sajo, 'fundamental rights have their dark side. The darkness results from the abuse of [them]'.[139] Indeed, if there is a possibility that legal rights may be abused, procedural rights, particularly the right to access to justice, might not be an exception.[140] As a result, it has been argued that in certain circumstances an initiation of a parallel or subsequent proceeding could be seen as an abuse of rights. For example, to Shany, '[t]he exercise of the right to initiate proceedings in breach of treaty obligations should […] be considered abusive, and jurisdiction under these circumstances out to be declined'.[141] Similarly, writing in the context of WTO dispute settlement and 'the jurisdictional conflicts that the proliferation of free trade agreements has already brought about',[142] Mitchell and Heaton argued that:

> [a]n analysis of conflicting treaty obligations through the principle of abuse of rights could provide a further basis for declining to exercise jurisdiction when a choice of jurisdiction clause had been invoked. Invoking WTO dispute settlement proceedings despite such a clause would [be seen as an] abuse of rights, i.e., exercising a right unreasonably in disregard of the rights of another Member.[143]

This section discusses whether abuse of rights can be applied to regulate WTO-RTA jurisdictional conflicts. In the light of the framework established in Part II, the applicability of abuse of rights will be assessed against its legal status, determinacy, operationality, and WTO-consistency.

1 *The Legal Status*

The principle of abuse of rights exists in 'a large number of national legal systems', though its content and application 'vary significantly' among countries.[144] In civil law systems, where the principle originated from,[145]

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[138] Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, *WTO Doc* WT/DS58/AB/RW (22 October 2001) (*US - Shrimp*) [158].

[139] Andras Sajo, 'Preface' in Andras Sajo (ed), *Abuse the Dark Side of Fundamental Rights* (Eleven International Publishing, 2006) 1, 1.

[140] For a comprehensive discussion on the abuse of process, see, eg, Michele Taruffo (ed) *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (Kluwer Law International, 1998).

[141] Yuval Shany, *The Competing Jurisdiction*, above n 5, 258.

[142] Andrew D. Mitchell and David Heaton, above n 28, 619.

[143] Ibid 616.

[144] Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389, 391–2.

[145] Yuval Shany, *The Competing Jurisdiction*, above n 5, 255; Antonio Gambaro, 'Abuse of Rights in the Civil Law Tradition' (1995) 3 *European Review of Private Law* 561; James Gordley, 'The Abuse of Rights in the Civil Law Tradition' in Rita de la Feria and

the prohibition on abuse of rights is generally codified in the Civil Code.[146] Even though the principle differs from system to system, 'it remains as an enduring element of the civil law'.[147] In common law countries, the principle is 'not so readily apparent'.[148] Nevertheless, as pointed by Lauterpacht, '[t]he law of torts as crystallized in various systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights'.[149] Indeed, as discovered by Perillo, the principle of abuse of rights exists in the United States, where it is applied under 'such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion, and others'.[150] Similarly, even though in the past the doctrine of abuse of rights was explicitly rejected, English common law has long recognised the idea that abuse of rights 'should be proscribed in specific situations, including the exercise of rights in the framework of the legal process'.[151] Therefore, it seems reasonable to assert that 'all main systems apply or, at least are willing to recognise, some kinds of 'abuse of rights', especially where the exercise of 'procedural rights' is involved.[152] In the words of Taruffo, 'in any legal system there is the tendency to believe that the procedures should be managed in a honest and fair way, according to general standards of good faith and correctness'.[153] Clearly, at the minimum, the prohibition of abuse of procedural rights is possible to be considered as a principle common to most national legal systems.

Abuse of rights has also gained substantially wide support in international law.[154] Some states such as the United Kingdom,[155] Liechtenstein,[156]

Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011) 33, 33–46; Joseph M. Perillo, 'Abuse of Rights: A Pervasive Concept' (1995) 27 *Pacific Law Journal* 38, 38.

146 *New Civil Code* arts 1 and 2 (Netherlands); *Civil Code* art 2 (Switzerland); *German Civil Code* art 226; *Italian Civil Code of 1942* art 833; *Spanish Civil Code* art 7. In France, the doctrine was famously formulated in the decision of the Court of Appeal at Colmar. See Colmar, 2 May 1855, *Recueil Dalloz* 1856.II.9, 10.

147 Michael Byers, above n 144, 395.

148 Ibid.

149 Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011) 297.

150 Joseph M. Perillo, above n 145, 40.

151 Yuval Shany, *The Competing Jurisdiction*, above n 5, 256.

152 Ibid; Michele Taruffo, above n 140, 4.

153 Michele Taruffo, above n 140, 5.

154 For a comprehensive discussion, see Michael Byers, above n 144, 397–404.

155 'Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom' *(United Kingdom v Iceland)* [1975] I ICJ Pleadings 265 [153–54].

156 'Memorial Submitted by the Government of the Principality of Liechtenstein' *(Liechtenstein v Guatemala)*[1955] I ICJ Pleadings 21 [51].

Norway,[157] Belgium,[158] Australia,[159] Liberia and Ethiopia[160] have argued for the application of this principle in international litigation.[161] There is also express reference to abuse of rights in a number of international treaties.[162] Remarkably, Article 294 of UNCLOS explicitly authorizes a competent tribunal to decline jurisdiction if it is satisfied that 'the claim constitutes an abuse of legal process or is *prima facie* unfounded'. [163] Similarly, Article 300 of this Convention also requires that:

> [s]tates Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.

Importantly, the principle has also appeared in the case law of a number of international courts and tribunals.[164] Notably, in *Certain German interests in Polish Upper Silesia (The Merits),* the PCIJ stated that:

> Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.[165]

The ICJ also referred to this principle in its ruling on the right to draw straight baselines in a territorial sea delimitation in the *Fisheries Case*.[166] Similarly, in *US - Shrimp*, the WTO Appellate Body explicitly discussed abuse of rights and its applicability in WTO disputes.[167]

The existence of abuse of rights as a general principle of law has also received wide support in doctrine.[168] In addition to Bing Cheng, as cited above,[169] Lauterpacht also strongly supported an application of this

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157 *Certain Norwegian Loans (France v Norway) (Judgment)* [1957] ICJ Rep 9, 73.
158 *Barcelona Traction (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 17.
159 *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, 362.
160 *South West Africa* (*Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6, 10, 480–3.
161 Michael Byers, above n 144, 397.
162 Yuval Shany, *The Competing Jurisdiction*, above n 5, 256, and citation therein; Michael Byers, above n 144, 398.
163 *United Nations Convention on the Law of the Sea* (*UNCLOS*), opened for signature on 10 December 1982 (entered into force 16 November 1994) (1982) 21 ILM 1261, arts 294, 300.
164 Yuval Shany, *The Competing Jurisdiction*, above n 5, 256–6, and citation therein; Michael Byers, above n 144, 399.
165 *Certain German interests in Polish Upper Silesia (Germany v Poland) (Decision concerning the Joinder of the Two Suits)* [1926] PCIJ (ser A) No 7, 30.
166 *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116, 141–2.
167 The Appellate Body Report, *US - Shrimp,* WTO Doc WT/DS58/AB/R , [158].
168 Byers, above n 144, 404–10.
169 Cheng, above n 133, 121.

principle in international law.[170] To him, abuse of rights occurs 'when a State avails itself of its rights in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage'.[171] Lauterpacht emphasized that 'there is inherent in every system of law the general principle of prohibition of abuse of rights';[172] or in other words, as he put it elsewhere, the power to apply the principle of abuse of rights 'must exist in the background of any system of administration of justice in which courts are not purely mechanical agencies'.[173] International law to him is not an exception in this regard, and he reasoned that only by considering international law as a primitive system, where the exercise of rights could be allowed to be unchecked, 'the principle of the prohibition of anti-social use of rights [can] be regarded as inoperative'.[174] Similar support can also be found in the writing of other leading scholars. Fitzmaurice, for example, wrote that '[t]here is little content in the obligation to exercise a right in good faith unless failure to do so would, in general, constitute an abuse of rights'.[175] Likewise, Jennings and Watts asserted that a state's freedom of action is restrained by 'the prohibition of the abuse by a state of a right enjoyed by it by virtue of international law'.[176]

These analyses suggest that Shany is convincing in observing that abuse of rights 'can probably be viewed as part and parcel of customary international law or as a general principle of law'.[177] This finding has a significant implication because it may, even though partly, reflect the applicability of the principle in WTO disputes to regulate jurisdictional conflicts between WTO and RTA dispute settlement. Apparently, under the framework developed previously, the legal status of abuse of rights lends strong support to its application in WTO dispute settlement on the basis of WTO tribunals' inherent powers.

2 *The Determinacy*

In a comprehensive study conducted in 2000, Byers found that regardless of being widely recognised, the prohibition of abuse of rights varies significantly across legal systems, even within the same legal tradition.[178]

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[170] See generally Sir Hersch Lauterpacht, *The Function of Law*, above n 149, 286–306.
[171] L Oppenheim, *International Law: A Treatise. Vol. 1 — Peace* (Longman, Green and Company, 8th ed, by H. Lauterpacht, 1955) 345.
[172] Lauterpacht, *The Function of Law*, above n 149, 297.
[173] Hersch Lauterpacht, *The Development of International Law by the International Courts* (London: Stevens & Son Limited, 1958) 165.
[174] Lauterpacht, *The Function of Law*, above n 149, 298.
[175] Sir Gerald Fitzmaurice, R.C.M.G., 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law' (1953) 30 *British Yearbook of International Law* 1, 53.
[176] Jennings and Watts, above n 83, 407.
[177] Shany, *The Competing Jurisdiction*, above n 5, 257.
[178] Byers, above n 144, 397.

As a result, it is impossible to define the principle 'in precise terms such that it would encompass all of its various manifestations'.[179] Byers noticed that a general description like ''[t]he excessive or abusive exercise of rights as limited by rights and interest of others' is about the best that one can do'.[180] This is consistent with observations made by other leading scholars. Even though Lauterpacht believed in the binding nature of abuse of rights as a general principle of law, he acknowledged that 'the extent of the application' of this doctrine 'is not at all certain'.[181] Agreeing on this point, Jennings and Watts went further, emphasizing that although the practice of international courts and tribunals, especially the ICJ jurisprudence, has afforded some 'sound guidance as to the underlying principles [of abuse of rights], it is insufficient to regulate increasing complex situations'.[182] In the same vein, Fitzmaurice commented that there are still 'a number of difficulties about the doctrine - particularly as to its exact character and extent and the consequences it give rise to'.[183] Even in the narrower area of procedural rights, Taruffo noticed that it would be 'wrong' to proceed from the widespread acceptance of the principle to 'say that there is a common and deep sensitivity towards the abuse in the administration of justice, or to believe that all systems share uniform and consistent ideas' about abuse of procedural rights.[184] In fact, 'such an idea emerges in very different forms and in various and sometimes fragmented dimensions'.[185]

The detailed variation of the prohibition of abuse of rights, including abuse of procedural rights, between legal systems has been pointed out in various studies,[186] and thus it is unnecessary to be repeated here. The point of emphasis is that there seems to be no universal acceptance as to applicable conditions for abuse of rights, even in the narrow area of procedural rights. Therefore, as observed by Lauterpacht, if abuse of rights were employed in international law, its applicable conditions must be determined by international tribunals themselves, based on specific facts of each individual case rather than an abstract legislative standard.[187] In Lauterpacht's view, the ability to perform this task 'must exist in the background of any system of administration of justice in which courts are

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179 Ibid.
180 Ibid.
181 L Oppenheim, *International Law: A Treatise* (by H. Lauterpacht), above n 171, 347 (citation omitted). Lauterpacht's discussion on abuse of rights in this edition was heavily relied on in Jennings and Watts, above n 83, 407–10.
182 Jennings and Watts, above n 83, 408.
183 Fitzmaurice, above n 175, 12.
184 Taruffo, above n 140, 3.
185 Ibid 5.
186 See, eg, Byers, above n 144; Perillo, above n 145; Rita de la Feria, 'Introducing the Principle of Prohibition of Abuse of Law' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing, 2011) xv, xv–xxv; Lenaerts, above n 137; Taruffo, above n 140.
187 Oppenheim, *International Law: A Treatise*, above n 171, 347.

not purely mechanical agencies'.[188] It is hard to dispute with Lauterpacht about courts' general ability to advance the law. Nevertheless, in this case, where the abuse of rights principle is 'put to the test before international courts and tribunals, [it would] result in a great deal of discretionary power being granted to judges and arbiters'.[189] The actual meaning, scope, and applicable conditions of the principle would be largely matters of judicial discretion rather than determined by specific and well-developed legal criteria.

This obviously does not seem to sit compatibly with the limited mandate of WTO dispute settlement, where tribunals have to decide disputes, as required by, for example, Article 3.2 of the DSU, according to the 'rights and obligations of Members under the covered agreements', and not to 'add to or diminish the rights and obligations provided in [those] agreements'.[190] Moreover, the highly discretionary nature of the principle also appears incompatible with judicial restraint culture at the WTO. It is unlikely that WTO tribunals would use their discretion to formulate the actual meaning, scope, and applicable conditions of abuse of rights for *the particular purpose of utilizing this principle as a legal basis to decline their jurisdiction in favour of an RTA proceeding.* Obviously, the indeterminacy may negatively affect its prospect to be applied in WTO disputes to regulate jurisdictional competitions. This does not mean that abuse of rights, as a general principle of law, will not be relevant to the function of WTO tribunals, especially in their interpretative tasks. In fact, in *US-Shrimp*, as cited above, the Appellate Body acknowledged that its interpretation of the Chapeau of GATT Article XX is informed by 'the doctrine of *abus de droit,* [which] prohibits the abusive exercise of a state's rights'.[191]

Importantly, it seems also reasonable to believe that if a principle grants too much discretion to judicial bodies, there is always a potential that discretion may be misused. If this is the case, the correctness in the finding of an abuse of rights would be affected, resulting in an unreasonable restriction of legal rights. Obviously, the invitation to judicial arbitrariness[192] brought about by the ambiguity in the meaning, scope, and especially applicable conditions makes abuse of rights, as a jurisdiction-

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188 Lauterpacht, *The Development of International Law,* above n 173, 165.
189 Byers, above n 144, 406.
190 DSU art 3.2.
191 Appellate Body Report, *US - Shrimp*, WTO Doc WT/DS58/AB/R, [158].
192 Andras Sajo, ´Abuse of Fundamental Rights or the Difficulties of Purposiveness' in Andras Sajo (ed), *Abuse the Dark Side of Fundamental Rights* (Eleven International Publishing, 2006) 29, 39.

regulating tool, less appealing, if not 'dangerous',[193] in international litigation, including in WTO disputes. This may well explain why Lauterpacht had warned that:

> [t]here is no legal rights, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint.[194]

3 *The Ability to Operate in WTO Disputes*

The most obvious difficulty for abuse of rights to be applied in WTO disputes arises from the absence of commonly accepted applicable conditions. For comity, international courts and tribunals tend to take advantage of its vagueness, and apply the principle in an abstract manner without considering whether relevant disputes are identical. However, this is unlikely the case for the application of abuse of rights because even though both principles are almost equally vague, comity relates mainly to deference to the law and jurisdiction of the competing forum, whereas abuse of rights involves a critical issue, that is, the suppression of a legal right. This explains why in national legal systems, courts often require the satisfaction of specific conditions such as the presence of harm, and in many cases, the intention to cause harm (malicious intent) for a finding of an abuse.[195] Similarly, the PCIJ in *Free Zones of Upper Savoy and the District of Gex* stated firmly that an abuse of legal rights by a state cannot be assumed.[196] This is also the approach of the ECJ. In *Emsland-Starke*, the ECJ specified that:

> [a] finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved [,] … second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.[197]

Evidently, the most important step in applying abuse of rights is to formulate a test with specific conditions to capture an abusive exercise of

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193 Anthony Arnull, 'What is a general principle of EU Law' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New general principle of EU Law ?* (Hart Publishing, 2011) 7, 23.

194 Lauterpacht, *The Development of International Law*, above n 173, 164.

195 Sajo, ´Abuse of Fundamental Rights', above n 192, 39.

196 *Free Zones of Upper Savoy and the District Of Gex (France v Switzerland) (Order)* [1924] PCIJ (ser A) No 24, 12; and *Free Zones of Upper Savoy and the District Of Gex (France v Switzerland) (Judgment)* [1924] PCIJ (ser A/B) No 46, 167.

197 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas Case* (C-110/99) [2000] ECR I-11569, [52–3].

rights. This seems to be particularly challenging because an international court or tribunal has to determine which elements should be included in that test to precisely draw the dividing line between abusive and non-abusive exercises of rights. There is no established practice in this area. Some national legal systems apply a 'subjective test' requiring a subjective intention to harm (Austria and Italy); some others employ an 'objective test' according to which a harmful effect of a particular abuse is required (Germany, Greece, Luxembourg, Portugal, and Spain); still other legal systems adopt an approach that requires the satisfaction of either of these factors (Belgium, France, and the Netherlands).[198] The abuse test formulated by the ECJ in *Emsland-Starke* cited in the last paragraph required both the objective and subjective elements. Choosing the right elements would be extremely burdensome because a tribunal has to justify that the choice is made on rational bases. This is not to say that WTO tribunals are unable to design a test to verify the circumstances in which an initiation of a parallel or subsequent proceeding in the WTO and RTA context become abusive; surely, they can do so as they are not 'purely mechanical agencies'.[199] The issue is that, given the excessive judicial discretion required, it would be particularly challenging for such a test to move beyond dispute and avoid the criticism of judicial activism from the WTO members.

If WTO tribunals were to establish an abuse test, the limited mandate and the culture of judicial restraint of WTO dispute settlement seem to suggest that they would choose the safe way by raising very high standards at which an exercise of rights may be regarded as abusive. Certainly, if abuse of rights may be seen as a particular application of the principle of good faith as mentioned above, then there seems to be abundant evidence indicating that WTO tribunals would not lightly find that a WTO member fails to act in good faith. It was emphasized in *Chile – Alcohol Beverage* that WTO tribunals should not presume that Members have acted in bad faith.[200] Particularly, the Appellate Body stated that:

> Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith. [201]

Similarly, in *US-Offset Act*, the Appellate Body held that:

> [n]othing ... in the covered agreements support the conclusion that simply

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198 Lenaerts, above n 137, 1127.

199 Lauterpacht, *The Development of International Law*, above n 173, 165.

200 Appellate Body Report, *Chile — Taxes on Alcoholic Beverages* WTO Doc WT/DS87/AB/R, WT/DS110/AB/R (13 December 1999) *(Chile – Alcohol Beverage)* [74].

201 Ibid.

> because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.[202]

This ruling implies that a treaty violation is necessary but not sufficient for a finding that a member has not acted in good faith.[203] This is a high threshold because it could mean that even an initiation of a parallel or subsequent proceeding in violation of specific provisions of the constitutive instruments, arguably including Article 23 of the DSU or a jurisdiction clause under an RTA, may still not be sufficient to be considered as an action in bad faith. Notably, a finding of an abuse of rights was effectively avoided in *EC - Sugar*.[204] In this case, the EC argued that '[t]he circumstances of this dispute are such that the exercise by the Complainants of their right to bring a claim against the EC sugar regime is manifestly unreasonable and, therefore, inconsistent with Article 3.10 of the DSU'.[205] The EC claimed that the complainants were exercising their rights 'in an 'unreasonable and 'abusive manner'".[206] The Appellate Body did not analyze these claims and quickly jumped to the conclusion that it found 'nothing in the Panel record to suggest that the Complaining Parties acted inconsistently with Article 3.10 of the DSU or the principle of good faith. Accordingly, we agree with the Panel that the Complaining Parties acted in good faith'.[207]

These rulings, as found by Mitchell, 'demonstrate[…] reluctance on the part of the Appellate Body and WTO Tribunals generally to hold that Members have acted in bad faith'.[208] This approach, nevertheless, is consistent with the general trend in international dispute settlement where international courts and tribunals tend to 'presume that states act in good faith', and 'they do not lightly find bad faith'.[209] Abuse of rights thus, 'remains as a matter of last resort in the practice of all courts. The abuse must be flagrant or manifestly excessive... the courts are reluctant to intervene in case the use is simply unreasonable'.[210] In this context, if WTO tribunals were to create an abuse test for procedural issues such as

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202 Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/AB/R, WT/DS234/AB/R (16 January 2003) (*US-Offset Act (Byrd Amendment)*) [298].

203 Mitchell, *Legal Principles in WTO Disputes*, above n 19, 137.

204 Mitchell and Heaton, above n 28, 616.

205 Appellate Body Report, *European Communities — Export Subsidies on Sugar*, WTO Doc WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (28 April 2005) (*EC - Export Subsidies on Sugar*) [54] (quoting the EC's Appellant's Submission).

206 Ibid [304] (quoting the EC's Appellant's Submission).

207 Ibid [319].

208 Mitchell and Heaton, above n 28, 619.

209 Andrew D Mitchell, 'Good faith in WTO Dispute Settlement' (2006) 7 *Melbourne Journal of International Law* 339, 344.

210 Sajo, ´Abuse of Fundamental Rights', above n 192, 42.

jurisdictional conflicts, it is likely that they would set very high thresholds, which can effectively enable them to avoid a finding that a member has failed to act in good faith and thus committed an abuse of rights. Even though this is understandable because WTO tribunals operate in a limited mandate and a judicial restraint culture, it also means that abuse of rights would be unlikely to operate in WTO disputes where a jurisdictional conflict with RTA disputes arises.

Importantly, even if WTO tribunals can develop an abuse test, and its requirements can be satisfied, it is still questionable whether the principle is an adequate tool to deal with WTO-RTA conflicts of jurisdictions. It has been observed elsewhere that 'any doctrinal quest for bad faith suggesting an abuse of rights seems more like a conclusory label than an analytical tool - a way of avoiding the tough questions rather than answering them'.[211] Similarly, Gordley found that 'under the name of abuse of rights, many different rules can be collected together'.[212]

These observations seem to be relevant in the WTO-RTA context. In fact, if a party initiates a new WTO dispute where essentially the same dispute is pending before, or already decided by, an RTA forum, in order to apply abuse of rights to decline jurisdiction, a WTO tribunal may need to examine a number of important questions. First of all, it may be essential to clarify whether that party has the right to initiate the new dispute before the WTO forum. If yes, in order to determine whether that right is abused, it may need to be further examined whether a duty has been violated by that party, or whether there is any serious and legitimate interest in the exercise of that right.[213] In any event, an examination of whether any WTO provision has been violated is a primary step in establishing an abuse of rights. This is because the Appellate Body in *US - Offset Act* already suggested that a violation of good faith cannot arise in the absence of a violation of a treaty provision.[214] This criterion was developed in the context of substantive breach, but may arguably be applicable equally to a breach of a procedural right under the DSU as well,[215] for example, a violation of Article 23. In light of this requirement, if no provisions of WTO law are found violated, there would be no abuse of rights. Nevertheless, if specific provisions of the WTO are found violated, it is unreasonable to hold WTO members responsible for the breach of a more

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211 Walsh, above n 15, 294.

212 Gambaro, above n 145, 569.

213 Gordley, above n 145, 42–6.

214 Appellate Body Report, *US - Offset Act*, WTO Doc WT/DS217/AB/R, WT/DS234/AB/R [298]. For a discussion on this point, see Andrew D. Mitchell, *Legal Principles in WTO Disputes*, above n 19, 111–2, 137.

215 DSU Article 1.1 specifies that the DSU applies to disputes concerning, among others, 'this Understanding taken in isolation or in combination with any other covered agreement'.

general principle of abuse of rights rather the than the specific provisions of WTO law. Obviously, Gordley seems correct in observing that where specific provisions could be found violated, '[i]t is hard to see what is gained by speaking of an abuse of rights'.[216]

4 *The Consistency of Abuse of Rights with WTO law*

If an initiation of a parallel or subsequent proceeding before WTO dispute settlement were found as abusive, the application of abuse of rights would lead to a decline of jurisdiction by a WTO tribunal. It does not imply that abuse of rights should not be applied at the WTO, but the question is whether such an application is consistent with WTO or not. At first glance, the WTO consistency of abuse of rights appears similar to that of *res judicata, lis pendens,* and rigid comity, that is, a decline of jurisdiction by a WTO tribunal in favour of an RTA jurisdiction on the basis of abuse of rights would result in a direct inconsistency with various provisions of the DSU, particularly Article 23, which grants exclusive jurisdiction to WTO dispute settlement over WTO disputes.

However, the WTO-consistency of abuse of rights might not be so straightforward. If it can be established that an initiation of a WTO dispute constitutes an abuse of rights, then the position that a decline of jurisdiction may take away parties' rights to have a full and fair day in court would lose its weight. The DSU, particularly its Article 23, is designed to secure the right of WTO members to have WTO disputes decided by WTO dispute settlement. However, if a WTO member abuses this right, that member, in the first place, does not have a genuine interest in initiating a WTO dispute, for which the DSU provides protection. Moreover, even though a decline of jurisdiction based on abuse of rights would be inconsistent with Article 23 of the DSU, the principle can still be justified because it 'derives from general values of fairness and correctness supposedly existing at the deepest level of the legal system'.[217] This is exactly where the framework established by Franck on the distinction between consistency and coherence becomes relevant. Specifically, to Franck, even though a rule creates 'inconsistencies within rules and the application of rule systems',[218] it is still considered as 'coherent and legitimate' if it can connect to 'the skein of general legal principles which make up the body of the law'.[219]

Even if the inconsistency with the DSU might be justified overall, it does not seem to make abuse of rights more attractive because the justification is grounded on the presumption that an abuse of rights could be found in WTO disputes. However, analogous to an abuse of substantive rights, it is

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[216] Gordley, above n 145, 44.
[217] Michele Taruffo, 'General Report' in Michele Taruffo (ed) *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (Kluwer Law International, 1998) 3, 6.
[218] Franck, *Fairness in International Law and Institutions*, above n 42, 40.
[219] Ibid 38.

arguable that the exercise of the right to access to justice could only be seen as abusive if it, at the minimum, violates specific WTO provisions. If no WTO provisions are violated, the initiation of a proceeding would not be an abuse. Conversely, if an initiation of a proceeding is found violated WTO provisions, it is unlikely that WTO tribunals would invoke the general concept of abuse of rights to replace the specific WTO provisions. Obviously, if there is an abuse, before it is caught by the principle of abuse of rights, it would already be captured by specific WTO provisions. In either case, a finding of an abuse of rights of access to justice seems to be improbable in WTO disputes.

IV CONCLUSION

This article has examined the principles of comity and abuse of rights to assess their applicability in WTO disputes as tribunals' inherent powers to resolve WTO-RTA jurisdictional conflicts. The article first established that the applicability of jurisdiction-regulating norms such as comity and abuse of rights in WTO disputes as tribunals' inherent powers might depend on various factors, particularly, the legal status, determinacy, ability to operate in WTO disputes, and WTO-consistency of these norms. The article then used these criteria to evaluate the applicability of comity and abuse of rights. It has been found that the legal status, determinacy, ability to operate in WTO disputes, and WTO-consistency vary substantially between comity and abuse of rights; and most importantly, none of these norms appears to satisfy all of these criteria to an acceptable degree. As a result, neither comity nor abuse of rights might be satisfactorily applied in WTO disputes as tribunals' inherent powers to resolve jurisdictional conflicts between dispute settlement mechanisms of the WTO and RTAs.