McGill Journal of Dispute Resolution

Revue de règlement des différends de McGill

Looking Back at Canada — Periodicals: Autopsy of a Missed Opportunity to Address the Problem of Conflicting Provisions in the World Trade Organization and Preferential Trade Agreements' Dispute Settlement Systems

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Canada — Periodicals was a perfect, yet missed, opportunity for the WTO to tackle the problem of potentially conflicting outcomes under its own dispute settlement system and those of Preferential Trade Agreements such as NAFTA. This paper advances that Canada erred in simply acquiescing to WTO jurisdiction in this dispute, where that of NAFTA could legitimately have been raised and would clearly have been more advantageous to its position. At the time the dispute arose in 1997, Canada should have brought two arguments in front of the WTO dispute settlement body to get the case analysed under NAFTA. First, it should have asked for the dispute to be moved from the WTO to a NAFTA tribunal, arguing it was a more suitable venue under a forum non conveniens rationale. Second, it should have advocated for the WTO Panel or Appellate Body's consideration of NAFTA provisions in its own proceedings. Looking at subsequent case law, it appears the second option would have had a greater chance of prevailing than the first. This gives us insight on how a case akin to Canada - Periodicals ought to be treated if it arose today.

L'arrêt Canada — Périodiques représente une opportunité manquée de la part de l'OMC d'affronter le problème d'incohérence des décisions rendues par son organe de règlement des différents et celles émises sous les accords commerciaux préférentiels tes que l'ALÉNA. Cet article suggère que le Canada a erré en acquiesçant à la juridiction de l'OMC relativement à cette affaire, compte tenu du fait que des recours sous l'ALÉNA auraient été à son avantage. À l'époque, en 1997, le Canada aurait pu invoquer deux arguments devant le corps de règlement de différends de l'OMC afin que la situation soit évaluée sous l'ALÉNA. Primo, que la juridiction de l'ALÉNA aurait subsisté sur la base du principe forum non conveniens. Secundo, que les organes de règlement des différends de l'OMC aurait dû directement appliquer les dispositions de l'ALÉNA dans le cadre de la procédure. En analysant la jurisprudence successive, le deuxième argument semble être préférable. Cela nous indique la façon dont de causes semblables à Canada-Périodiques devraient être traitées.

I. Introductory Remarks

The current dispute settlement system of the World Trade Organization ("WTO"), as set out in the *Understanding on Rules and Procedures governing the Settlement of Disputes*[1] ("*DSU*"), annex 2 of the 1994 *Agreement Establishing the World Trade Organization*[2] ("*GATT 1994*"), is undoubtedly one of the strongest existing frameworks of dispute resolution currently in existence under an international trade agreement and a vast improvement on the previous mechanism of the *General Agreement on Tariffs and Trade* of 1947.[3] As Gabrielle Marceau and Julian Wyatt have noted:

> The Uruguay Round of 1986—1994 transformed trade law's dispute settlement system from an archetype of unenforceable, politically dominated international dispute settlement to a legally rigorous, *de facto* compulsory, well-functioning and enforceable system which may have even become, in some respects, the envy of the international law world.[4]

Proof of this success is the vast body of jurisprudence that the WTO has been generating since the *DSU* was put into place. As it continues to thrive however, the Dispute Settlement Body ("DSB") must also contend with a new and important challenge: how to interact with a proliferating body of preferential trade agreements ("PTAs").

PTAs are now practically universal among WTO members.[5] Many of them are no longer geographically regional and they are often of great economic significance.[6] Why would this be a problem for the WTO and its dispute settlement body? PTAs, especially sophisticated ones, generally develop and include in their agreements their own dispute resolution mechanism. Chapters XIX and XX of the *North American Free Trade Agreement* ("*NAFTA*") on dispute settlement procedures are a good example.[7] This juxtaposition of multiple potential forums of dispute resolution, each abiding by their respective set of rules, poses a risk of conflict in cases that touch on both *GATT 1994* and PTA provisions.

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1 WTO, *Understanding on Rules and Procedures governing the Settlement of Disputes*, 33 ILM 1226 (1994), online: World Trade Organization <https://docs.wto.org>.

2 *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995) [*GATT 1994*].

3 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948).

4 Gabrielle Marceau & Julian Wyatt, "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO" (2010) 1:65 Oxford Journal of International Dispute Settlement 67 at 67-68 [Marceau & Wyatt].

5 Lorand Bartels & Federico Ortino, eds, *Regional Trade Agreements and the WTO Legal System* (New York City: Oxford University Press, 2006) at 1 [Bartels & Ortino].

6 *Ibid*.

7 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*].

In fact, such conflicts have already arisen numerous times at the WTO. As of last year, the DSB had been faced with at least 13 cases where the impact of a PTA was argued in some way in front of a WTO Panel or Appellate Body.[8] PTAs can creep into WTO proceedings in a variety of contexts.[9] However, what is clear overall in the decisions rendered thus far is that there is an undeniable tension between the text and dispute settlement framework of the WTO and the proper functioning of PTAs entered into by WTO members. WTO Panels and appellate bodies have tended to err on the side of caution, ensuring certainty and predictability of the WTO dispute settlement process by promoting WTO rules and refusing to overly acknowledge the influence of PTAs in their rulings.

This reluctance can also be explained by a concern for unequal bargaining power between the parties to PTAs, who under the WTO system have a statutorily equal practice. As William J Davey and André Sapir interestingly observe, a large number of existing PTAs are between G2 (the European Union and United States) and non G2 WTO members.[10] For example, "Canada, the largest US PTA partner, is four times smaller than the US in terms of world trade. Similarly, Mexico, the largest EC regional partner is six times smaller than the EC."[11] This asymmetry in bargaining power could easily lead to uneven PTAs where smaller powers are less preserved than under the WTO system. As Marceau and Wyatt have further remarked: "indeed, very few international dispute settlement systems are obligatory, offer a two-tiered first instance and appellate review structure and the possibility of a more practical award in effect authorizing the successful party to take counterbalancing countermeasures."[12] This could explain the DSB's desire not to give PTA decisions or rules too much deference.

Regardless of the motives behind the WTO's tendency to turn a blind eye to PTAs in its own rulings, what is undeniable is the problem that this "watertight compartments" approach now poses. The failure to address the tension between the sometimes opposing forces of WTO and PTA obligations were rather visible in the case of *Canada — Certain Measures Concerning Periodicals*, which led to shocking results.[13] In that dispute, the United States initiated a complaint against Canada at the WTO for violation of articles III and XI of *GATT 1994*, with regards to a series of national measures Canada had passed on the banning and tax treatment of special edition and split-run periodicals of U.S. origins.[14] The measures were incontestably protective and had been passed to favour the Canadian newspaper industry in the face of increasing American competition. However, under *NAFTA*, the United States and Canada had agreed to carve out an exception to the liberalization of their trade practices for "cultural industries", which allowed

8 Armand de Mestral, "Dispute Settlement under the WTO and RTAs: An Uneasy Relationship" (2013) 16:4 J Int Econ L 777 at 789 [De Mestral, "Dispute Settlement"].

9 *Ibid* at 789-790.

10 William J Davey & André Sapir, "The Soft Drinks Case: The WTO and Regional Agreements" (2009) 8:1 World Trade Review 5 at 21 [Davey & Sapir].

11 *Ibid.*

12 Wyatt & Marceau, *supra* note 4 at 68.

13 *Canada — Certain Measures Concerning Periodicals* (1997), WT/DS31/AB/R (Appellate Body Report), online: World Trade Organization <https://doc.wto.org> [*Canada — Periodicals*].

14 *Ibid* at 1.

the implementation of measures exactly such as the one set forth by Canada.[15] The goal of the *NAFTA* "cultural industries" exception was to ensure that cultural goods and services were treated differently from other commercial products to allow for the preservation of national cultural characteristics. Nevertheless, when a WTO Panel and Appellate Body considered the United States' claims in *Canada — Periodicals*, no mention of *NAFTA* was ever made, either at the initiation of Canada or the DSB itself, and the case was resolved in favour of the United States. Basically, as Armand De Mestral, who has criticized this decision at length, stated: this "allows a state to make a commitment in one treaty, which can be negated by proceeding before the DSB."[16]

Canada — Periodicals was a missed opportunity. This paper advances that Canada should not have simply acquiesced to WTO jurisdiction. At the time the case arose in 1997, it could have raised two defences to get its *NAFTA* exception recognized. First, it could have asked for the dispute to be moved to a *NAFTA* tribunal, arguing it was a more suitable venue under a *forum non conveniens* rationale. Second, it could have advocated for the WTO Panel or Appellate Body's consideration of the *NAFTA* "cultural industries exception" in its own proceedings. Looking at subsequent case law, it appears the second option would have had a greater chance of prevailing than the first. This gives us insight about how a case akin to *Canada — Periodicals* ought to be treated if it arose today.

I propose to proceed in three steps. First, I lay out the facts of *Canada — Periodicals* in detail, as well as the reasoning underlying both the Panel and the Appellate Body rulings. Second, I suggest that if Canada had attempted to get the matter moved to a *NAFTA* Chapter XX tribunal, it would have failed, as a survey of subsequent WTO caselaw clearly shows. This does not mean Canada should not have tried to argue this, however, since the state of the law was not settled at the time on the utility of *forum non conveniens* in the WTO context. Third, I explore the viability of the alternative defence which Canada also failed to raise but which had more potential to be successful: the consideration of *NAFTA* provisions by a WTO tribunal in WTO proceedings, relying on rules of interpretation in the *Vienna Convention on the Law of Treaties* ("VCLT"), most specifically article 31(3)(c).[17] I conclude by recommending that this approach be implemented in the future, to harmonize PTA and WTO law.

II. Factual Overview of *Canada — Periodicals*

A. The Disputed Measures and WTO Rulings

The matter of *Canada — Periodicals* arose at the WTO in 1996 when the United States lodged its complaint against Canada. In 1997, a Panel then rendered its report, which was appealed by Canada. The final decision of the Appellate Body came out later that same year. The original complaint by the United States was based on three Canadian measures. The first was *Tariff Code 9958*. It prohibited "the importation into Canada of any periodical that was a 'special edition.'" In this context, 'special edition' was meant to cover periodicals including advertisements aimed

15 See *NAFTA*, *supra* note 7, art 2106.
16 De Mestral, "Dispute Settlement", *supra* note 8 at 812.
17 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [*VCLT*].

specifically at Canada and not identical to those included in the periodical version circulated in the country of origin, i.e. the United States.[18] The second measure challenged was the *Excise Tax Act* "which imposed, in respect of each split-run edition of a periodical, a tax equal to 80 per cent of the value of all the advertisements contained in the split-run edition." 'Split-run edition' was defined as:

> An edition of an issue of a periodical that is distributed in Canada, in which more than 20 percent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals, and contains and contains an advertisement that does not appear in identical form in all of the excluded editions.[19]

Finally, the third measure under review was one affecting the postal rate system, under which different postal fees were applied to domestic and foreign periodicals.[20]

Upon examination of these measures and in light of the United States' complaint, a WTO Panel found that (1) *Tariff Code 9958* violated article XI:1 of *GATT 1994* and could not be justified under article XX(d) of *GATT 1994* as the quantitative restrictions imposed by the measure were not warranted to secure compliance with Canada's *Income Tax Act*;[21] (2) the *Excise Tax Act* contravened article III:2 first sentence of *GATT 1994* since Canadian domestic non-split run and U.S. split-run imported periodicals were like products and the U.S. periodicals were clearly discriminated against;[22] (3) the Canadian postal scheme was inconsistent with article III:4 of *GATT 1994* but justified under art III:8(b) of *GATT 1994* because though a discrimination existed, differences in postal rates involved a payment of subsidies.[23] The Panel concluded by recommending that Canada amend the first two measures.[24]

What is however most striking in the Panel Report is that Canada failed to raise the cultural industries exception in article 2106 of *NAFTA* either as a justification for its measures in the WTO proceedings or as an argument to move the dispute to the *NAFTA* sphere. Rather, it focused entirely on *GATT 1994* where its case was much weaker. Canada maintained this strategy when appealing the Panel's finding and concentrated on three *GATT 1994* defenses: (1) the *General Agreement on Trade in Services* ("*GATS*") rather than *GATT 1994* should apply to the *Excise Tax Act* as advertising services do not fall under *GATT 1994*'s purview;[25] (2) if *GATT 1994* is

18 "WTO Dispute Settlement: One-Page Case Summaries 1995-2009" (2010) at 11, online: World Trade Organization <http://www.wto.org/english/res_e/booksp_e/dispu_settlement_e.pdf>; *Canada — Periodicals*, *supra* note 13 at 1.

19 *Canada – Periodicals*, *supra* note 13 at 1.

20 *Ibid*.

21 *Ibid* at 2.

22 *Ibid*.

23 *Ibid*.

24 *Ibid*.

25 *Ibid* at 4. As the Appellate Body summarized: "In Canada's view, since the provision if magazine advertising services falls within the scope of the General Agreement on Trade and Services, and Canada has not undertaken any commitments in respect of the provision of advertising services in its Schedule of

nonetheless ruled to apply, there should be no finding of an article III violation because domestic and imported periodicals are neither like, nor directly competitive, under article III:2 and there was no discrimination;[26] and (3) the conclusions of the Panel with regards to postal rates should be upheld as the payments were indeed national subsidies.[27] Once more, the existence of a *NAFTA* exception was entirely omitted.

In the end, the Appellate Body's ruling was even more severe than the Panel's had been toward Canada. Not only was *GATT 1994* rather than *GATS* deemed applicable to the *Excise Tax Act* and the findings of violations upheld,[28] but the Appellate Body also concluded that the Panel had erred regarding the postal scheme as a subsidy – thus the preferential rates were not justifiable under article III:8(b) of *GATT 1994*.[29] The WTO therefore recommended that Canada amend all of its measures.[30] This forced Canada to negotiate a solution with the United States, which involved a "3 method plan."[31] First, U.S. split-run periodicals were allowed to have 18% of the advertising aimed at Canadian audiences. Second, if the advertising contained 0% Canadian content, foreign publishers could deduct 50% of their advertising expense from their income taxes. They could in turn deduct 100% of their expense when 80% Canadian content was included. Thirdly and finally, any new periodical set up in Canada had to have the majority of its content be Canada-related. As a side concession, the U.S. also recognized Canada's right to allow up to 50 million dollars in subsidies to the Canadian periodicals industry every year.[32]

B. Canada's Failure to Raise *NAFTA* Article 2106 at Any Stage of the WTO Decision-making Process and its Consequences

The outcome of *Canada — Periodicals* was an unquestionable loss for Canada. The original protective measures for its periodical industry had garnered a great deal of public support, making their failure all the more resounding.[33] So why then did Canada not attempt to raise a *NAFTA* defense at the WTO, either to move the proceedings or to get the cultural industries exception between the United States and itself recognized at the WTO forum? Commentators, such as De Mestral, seem to think it was an omission. He explained Canada's silence by noting that it "did not consider that it was entitled to raise a defense based on *NAFTA* before the WTO."[34] But could Canada really have made such a blatant and careless mistake? Or did it rather assess that

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Specific Commitments, Canada is not bound to provide national treatment to members of the WTO with respect to the provision of advertising services in the Canadian market."

26 *Canada – Periodicals*, *supra* note 13 at 5-7.
27 *Ibid* at 7-9.
28 *Ibid* at 17-32. It is interesting to note however that the Appellate Body deemed the split U.S. periodicals and non-split Canadian periodicals to be 'directly substitutable' rather than 'like' as the Panel had concluded.
29 *Ibid* at 32-34.
30 *Ibid* at 35.
31 Armand de Mestral, "NAFTA Dispute Settlement: Creative Experiment or Confusion?" in Bartels & Ortino, *supra* note 5 at 365, n 13 [De Mestral, *NAFTA Dispute Settlement*].
32 *Ibid*.
33 *Ibid* at n 12.
34 *Ibid* at 365.

a PTA based argument would likely be doomed in the WTO DSB, an assumption that was partly confirmed by later jurisprudence?

It is impossible to ascertain Canada's motivations, or lack thereof in *Canada — Periodicals*. What is certain in any case is that, under *NAFTA*, Canada's "periodicals measures" would have been found allowable and lawful as per article 2106. The ability of the United States to instead evade its PTA obligation, entered into willingly, and rely on a WTO remedy, which guaranteed a more favorable outcome, severely compromised the utility of article 2106 and even *NAFTA* altogether. De Mestral even went as far as calling the legacy of this case a "disaffection" from the *NAFTA* dispute settlement mechanism.[35] Figures seem to support this assertion. Only three cases have been adjudicated under Chapter XX of *NAFTA* since its inception.[36] Furthermore, of those three cases, only one offered the complainant a choice of venue between *NAFTA* and the WTO.[37] The other two cases touched strictly on *NAFTA* based provisions. This avoidance of Chapter XX is facilitated by the ability of complainants, under article 2005 of *NAFTA*, to take matters arising under both the WTO and *NAFTA* to be decided under either procedure.

This ability of complainants to elect their forum in disputes where the WTO and *NAFTA* overlap should not translate into *NAFTA*-specific obligations and exceptions being altogether disregarded in WTO dispute settlement. Otherwise, wouldn't those obligations and exceptions be entirely ineffective insofar as they touched upon *GATT* obligations? This is what *Canada — Periodicals* seems to imply. Although it is true that it would have been difficult if not impossible for Canada to try to get the matter moved to a *NAFTA* arbitration panel by arguing *forum non conveniens*, it could have contended, possibly successfully, that the WTO should consider the *NAFTA* exception in article 2106 in its own proceedings. The next two sections address these two points in turn.

III. The Inability to Argue *Forum Non Conveniens* in WTO Proceedings

As I have just noted, article 2005 of *NAFTA* technically allowed the United States in *Canada — Periodicals* to choose the forum in which to initiate its complaint against Canada – the WTO based on the *GATT* or a *NAFTA* Tribunal based on the *NAFTA* PTA – this choice being binding and final upon both parties. It is unsurprising that the United States opted for the WTO, since an action under *NAFTA* would have failed when faced with article 2106. Canada could have tried, however, to retaliate by making an argument to the WTO Panel, in a preliminary hearing, that *NAFTA* would be a better forum to hear the dispute, due to its specific provision with regard

35 De Mestral, *NAFTA Dispute Settlement, supra* note 31 at 364. See also William J Davey, "Dispute Settlement in the WTO and RTAs: A Comment" in Bartels & Ortino, *supra* note 5 at 350.

36 *Re Cross-Border Trucking Services* (*Mexico v United States*) (2001), USA-MEX-98-2008-01 (Ch 20 Panel), online: NAFTA Secretariat <https://www.nafta-sec-alena.org>; *Re US Safeguard Action taken on Broom Corn Brooms from Mexico* (*Mexico v United States*) (1998), USA-97-2008-01 (Ch 20 Panel), online: NAFTA Secretariat <https://www.nafta-sec-alena.org> [*Broom Corn Brooms from Mexico*]; *Re Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products* (*United States v Canada*) (1996), CDA-95-2008-01 (Ch 20 Panel), online: NAFTA Secretariat <https://nafta-sec-alena.org>.

37 *Broom Corn Brooms from Mexico*, *supra* note 36.

to cultural industries. This line of argumentation was in fact brought to later WTO Panels when similar conflicts with PTAs arose. It was however unsuccessful as the following cases go to show. It is possible that Canada anticipated this argument would fail, but does not mean it should not have attempted to raise it in the first place, as other countries did after it.

A. The *Mexico — Soft Drinks* Decision

In the entire body of WTO case law, only two cases have directly addressed whether a *forum non conveniens* argument can be raised to get a matter moved from the WTO to a PTA decision body in the early stages of a dispute. The first, and most commonly cited, is *Mexico — Tax Measures on Soft Drinks and Other Beverages*.[38] At the root of this dispute was Mexico's enactment of tax measures under which (1) soft drinks that did not use cane-sugar sweeteners were subject to a 20% tax on transfer and importation ("the soft drinks tax"), (2) specific services when rendered for the purpose of transferring such products were also subject to a 20% tax ("the distribution tax") and (3) distributors were bound to follow specific bookkeeping requirements.[39] The United States initiated proceedings against Mexico at the WTO in 2004, claiming that these measures violated the principle of national treatment and, more specifically, articles III:2 and III:4 of the *GATT 1994*.[40] In response to the United States' complaint, Mexico requested that the Panel "decline to exercise its jurisdiction in the case" and instead send the matter to an arbitration panel constituted under chapter XX of *NAFTA*.[41]

The Panel considered but rejected Mexico's request in a preliminary ruling.[42] It declared that: "under the DSU, it had no discretion to decide whether or not to exercise jurisdiction in a case properly before it."[43] The Panel grounded this conclusion, effectively closing the door to *forum non conveniens*, in articles XI and XXIII of the *DSU*. It stated that article XI "compels a WTO Panel to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties to the dispute."[44] As for article XXIII, the Panel found that it "makes it clear that a WTO member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by another Member has the right to bring the case before the WTO dispute settlement system".[45]

Mexico appealed and challenged the Panel's preliminary ruling on jurisdiction. In front of the Appellate Body, the discussion centered primarily on whether or not WTO Panels had the discretion to decline to exercise their jurisdiction in disputes reasonably grounded in the *GATT 1994*, in view of a *forum non conveniens* claim.[46] The Appellate Body answered in the negative.

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38 *Mexico — Tax Measures on Soft Drinks and Other Beverages* (2005), WT/DS308/R (Panel Report), online: WTO <http://docs.wto.org> [*Mexico-Taxes on Soft Drinks* (PR)]; (2006) WT/DS308/AB/R (Appellate Body Report), online: WTO <https://docs.wto.org> [*Mexico — Taxes on Soft Drinks* (AB)].

39 *Mexico — Taxes on Soft Drinks* (AB), *supra* note 38.

40 *Ibid*.

41 *Mexico — Taxes on Soft Drinks* (PR), *supra* note 38 at para 4.2.

42 *Ibid* at Annex B.

43 *Ibid* at para 7.1.

44 *Ibid* at para 7.8.

45 *Ibid* at para 7.9 [emphasis added].

46 *Ibid* at paras 42, 43 for the Mexican and U.S. positions respectively.

It established that although Mexico was right in observing that the WTO DSB had some inherent adjudicative power and could, for example, rule on the issue of its own jurisdiction,[47] it did not follow that "from the existence of these inherent adjudicative powers, once jurisdiction has been validly established, WTO Panels would have the authority to decline to rule on the entirety of the claims that are before them in the dispute."[48]

Ultimately, the Appellate Body ruled that the *DSU* was clear on this issue: (1) the terms of reference in article VII make it plain that Panels are required to make findings on matters before them;[49] (2) article XI further lays out the obligation of WTO Panels to make an objective assessment of the matter before them, which is impossible if jurisdiction is declined;[50] and finally article XXIII explicitly declares members entitled to a ruling by the WTO if they seek it.[51] The impact of this ruling, as commentators have noted, was to definitively close the door to the possibility of WTO Panels declining to exercise their jurisdiction to the profit of PTA decision-making bodies, since the "Appellate Body seems to have held that for a Panel to refuse to hear a case would be tantamount to denying a WTO Member's right to having a dispute heard under the *DSU*."[52]

In particular, Joost Pauwelyn and Luiz Eduardo Salles interestingly pointed out that part of the reason for the Appellate Body's ruling in *Mexico — Soft Drinks* was probably the result of Mexico's poor legal strategizing.[53] By conceding from the onset that the WTO had jurisdiction and should only decline to exercise it, Mexico shot itself in the foot, especially since it could not identify a legal impediment justifying the non-use of said jurisdiction. Instead, according to Pauwelyn and Salles, Mexico should have argued either that the WTO did not have jurisdiction at all, or that it had lost it due to *NAFTA*'s fork in the road clause at article 2005. Especially since the members of the Appellate Body had reserved the right to exercise discretion if a "legal impediment" were to preclude it from retaining jurisdiction in a future case, this line of argument may have resonated with them.[54]

B. Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric

This 2012 dispute is a recent illustration of the enduring applicability of the conclusions drawn in *Mexico — Soft Drinks*. In its Report, the Panel rejected an argument to move a matter to a PTA forum rather than proceed at the WTO and reasserted the inability of WTO Panels to discretionarily decline jurisdiction unless a legal impediment is present.[55] The basis of this case was a safeguard legislation passed by the Dominican Republic in 2010, which imposed a 38%

47 *Mexico — Taxes on Soft Drinks* (PR), *supra* note 38 at para 42.
48 *Ibid* at para 46.
49 *Ibid* at para 41.
50 *Ibid* at para 51.
51 *Ibid* at para 52.
52 De Mestral, "Dispute Settlement", *supra* note 8 at 799-800. See also Marceau & Wyatt, *supra* note 4.
53 Joost Pauwelyn & Luiz Eduardo Salles, "Forum Shopping before International Tribunals" (2009) 42 Cornell Int'l LJ 77 at 112 [Pauwelyn & Salles].
54 *Mexico — Taxes on Soft Drinks* (AB), *supra* note 38 at para 54.
55 *Dominican Republic — Safeguard Measures on Polypropylene Bags and Tubular Fabric* (2012), WT/DS415/R (Panel Report) at paras 7.92-7.96 [*DR — Polypropylene Bags*].

ad valorem tax on imports of polypropylene bags and tubular fabrics. Partial exemptions were, however, granted to a handful of countries.[56] Because of this, Costa Rica, El Salvador, Guatemala and Honduras lodged a complaint with the WTO in late 2010, claiming violations of articles I, II and XIX of the *GATT 1994*.[57] In response, the Dominican Republic requested a preliminary hearing in the hopes that the WTO would decline to exercise jurisdiction over the case. It argued that the dispute was not truly concerned with *GATT 1994*, but rather hinged on the violations of two PTAs: the *Central American — Dominican Republic FTA and the Dominican Republic — CAFTA FTA* between the United States, Central America and the Dominican Republic. These agreements provided for 0% ad valorem taxation.[58] The Dominican Republic further claimed that for the WTO to adjudicate this dispute would be "an abusive and improper use of rights provided by the *DSU*."[59]

The Panel nevertheless rejected the Dominican Republic's argument, confirming the interpretation adopted in *Mexico — Soft Drinks*, and allowed the WTO claim to proceed.[60] It also declared that PTAs were irrelevant to WTO decision-making on jurisdiction. Even when a PTA is breached, as was the case here, if a WTO covered agreement is also breached, then there is nothing to stop WTO members to seek recourse at the DSB.[61] In short, the language of the Panel is clear. The presence of an applicable PTA is still no justification to argue *forum non conveniens* when a valid WTO claim exists.

C. *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*

Still in 2012, a dispute erupted between Mexico and the United States regarding a series of U.S. measures on the labeling of tuna as 'dolphin safe.'[62] Mexico initiated a WTO claim declaring that the measures were discriminatory as per *GATT 1994* and the *Agreement on Technical Barriers to Trade*.[63] One of the United States' original arguments in response to this claim was that the matter should be moved to a *NAFTA* arbitral tribunal following the fork-in-the-road provision at *NAFTA* 2005(4). 2005(4) sets out that for sanitary and phytosanitary measures, if the respondent wants a dispute moved to *NAFTA* from another forum, the claimant must comply.[64] The provision would therefore imply, in this case, that the claim in front of the WTO was inadmissible and a WTO Panel should defer to a *NAFTA* Tribunal.

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56 De Mestral, "Dispute Settlement", *supra* note 8 at 802. The parties which were granted partial exemptions were as follow: Columbia, Indonesia, Mexico and Panama.

57 *Ibid* and *DR — Polypropylene Bags*, *supra* note 55 at para 1.

58 *Ibid* at para 7.92. It is unclear whether an action through the dispute resolution mechanisms provided by those PTAs would actually have proven more successful for the Dominican Republic.

59 *Ibid*.

60 *Ibid* at para 7.96.

61 *Ibid* at para 7.94.

62 *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*Mexico v United States*) (2012), WT/DS381/AB/R (Appellate Body Report), online: WTO <http://docs.wto.org>.

63 *Agreement on Technical Barriers to Trade* 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995). See also De Mestral, "Dispute Settlement", *supra* note 8 at 802.

64 *Ibid*.

This American argument is an interesting echo to what was posed by Pauwelyn and Salles in their commentary on the *Mexico — Soft Drinks* case. The authors, as noted above, had contended that Mexico should have advanced an admissibility rather than solely jurisdictional defense to get its dispute moved to the *NAFTA* realm. More specifically, they stated:

> Based on such a forum-selection clause, the panel should decline to rule on the substance of the claims made before it based on the inadmissibility of the specific WTO complaint (to be distinguished from the field-jurisdiction of the panel over the facts, which remains intact).[65]

As a WTO Panel is highly unlikely not to decline to exercise its jurisdiction, an admissibility-based argument for a change of forum may be the best solution moving forward to get disputes adjudicated under PTAs. However, the chances of success of this legal construction remain to be seen.

Unfortunately, the United States in *US Tuna II* chose to drop its contention about admissibility before the Panel issued a report and so the viability of such an argument was not addressed by the WTO. It is a shame as it would have been fascinating to see how a Panel would have addressed the tension between *NAFTA* article 2005 and article 23 of the *DSU* providing WTO members an automatic right of redress. Although Pauwelyn and Salles seemed confident that this approach would resonate with the WTO dispute settlement body, not all commentators are as optimistic. Kyung Kwak and Gabrielle Marceau, for example, deemed it unlikely that the WTO would ever halt its proceedings to send a dispute to a PTA settlement body so long as there was a valid WTO based claim, since the WTO DSB process is quasi-automatic.[66] They added that what would likely arise, at best, would be parallel proceedings in the two forums. There is therefore an ongoing and unresolved debate as to whether an admissibility defense could lead to a change of forum when argued in front of the WTO.

D. Other WTO Decisions on the Interaction of the WTO and PTA Forums for Dispute Resolution

There were three other WTO disputes, though not as on point for the purposes of our analysis of *Canada — Periodicals* and the change of venue defense specifically, where nations also attempted to raise PTA decision-making in WTO proceedings. The first was *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, a 2003 case which was actually the first to raise the tension between PTAs and the WTO at all.[67] In this case, a WTO Panel allowed Brazil to pursue a claim against Argentina based on its newly enacted anti-dumping measures despite the fact that Brazil had previously been handed a negative award on the same grounds in a *Mercado Común del Sur* ("*MERCOSUR*") proceeding. The Panel justified its separate handling of the case and refusal to consider the *MERCOSUR* award by pointing to the lack of an express fork in the

65 Pauwelyn & Salles, *supra* note 53 at 118.

66 Kyung Kwak & Gabrielle Marceau, "Overlaps and Conflicts of Jurisdiction between the WTO and RTAs" in Bartels & Ortino, *supra* note 5, 465 at 468-470.

67 *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil* (*Brazil v Argentina*) (2003), WT/DS241/R (Panel Report), online: WTO <http://docs.wto.org> [*Argentina — Poultry*].

road clause in the *MERCOSUR* agreement.[68]

Similarly, another case which encountered and avoided the problem posed by PTA decision-making mechanisms was *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada — Recourse to Article 21.5 of the DSU*.[69] In this matter, Canada sought to produce decisions of a *NAFTA* Chapter XIX arbitral tribunal as evidence in front of a WTO Panel to demonstrate that its claims were well founded.[70] Though the Panel refused to rule on the weight of the said evidence, it did include a reference to it in two footnotes, when summarizing Canada and the United States' arguments. In any case, it ultimately found for the United States, thereby implicitly demonstrating that it placed little to no reliance on the *NAFTA* rulings.[71]

Finally, the 2007 WTO Panel ruling in *Brazil — Measures Affecting Imports of Retreaded Tyres* addressed whether a PTA based obligation could stand as a justification for a *GATT 1994* violation.[72] At the origin of this dispute was Brazil's enacting of a measure banning importation of retreaded and used automobile and truck tires for environmental reasons. Uruguay brought a successful challenge to the ban in a *MERCOSUR* tribunal, forcing Brazil to revise its legislation and exclude *MERCOSUR* members from its scope.[73] This, in turn, resulted in the European Community bringing its own complaint to the WTO for *GATT 1994* violations. The Appellate Body eventually found for the European Community, but only after it recognized—affirming Panel conclusions on this point—that Brazil's legislative revisions had been necessary and provisionally justified.[74] To reach this conclusion, the DSB did not rule on the obligations laid out by *MERCOSUR*, but did explore at length the impact of measures which violate *GATT 1994* yet are taken pursuant to a PTA and even considered the possibility—in future and appropriate cases—of including PTA provisions in the body of law examined by WTO Panels.[75] This idea will be further explored in the next section. In any case and although this was *obiter*, as De Mestral commented: after *Brazil — Retreaded Tyres*, "the PTA ceases to be something that dare not speak its name."[76]

E. The Conclusions Drawn from the Jurisprudence on *Forum Non Conveniens*

What the above survey of existing jurisprudence on the treatment of PTAs in WTO rulings tells us, particularly with regards to change of venue arguments, is that Canada would have failed in *Canada — Periodicals* if it had tried to argue that the WTO ought to decline to exercise its jurisdiction in favour of a NAFTA Chapter 20 tribunal. It clearly appears from *Mexico — Soft*

68 See also De Mestral, "Dispute Settlement", *supra* note 8 at 797.

69 *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (*Canada v United States*) (2005), WT/DS277/RW (Article 21.5 Panel Report), online: WTO <http://docs.wto.org> [*US — Softwood Lumber*].

70 De Mestral, "Dispute Settlement", *supra* note 8 at 798.

71 *US — Softwood Lumber*, supra note 69 at n 12, 17.

72 *Brazil — Measures Affecting Imports of Retreaded Tyres* (*European Communities v Brazil*) (2007), WT/DS332/R (Panel Report), online: WTO <http://docs.wto.org> [*Brazil — Retreaded Tyres* (PR)]; (2007), WT/DS332/AB/R (Appellate Body Report), online: WTO <http://docs.wto.org> [*Brazil — Retreaded Tyres* (AB)].

73 De Mestral, "Dispute Settlement", *supra* note 8 at 800.

74 *Brazil — Retreaded Tyres* (AB), *supra* note 72 at para 258.

75 *Brazil — Retreaded Tyres* (PR), *supra* note 72 at para 7.283.

76 De Mestral, "Dispute Settlement", *supra* note 8 at 801.

Drinks and *Dominican Republic — Polypropylene Bags* that the WTO will not decline jurisdiction to send a matter to a more appropriate forum so long as a valid claim exists under one of its covered agreements.[77] Canada's silence on this issue in *Canada — Periodicals* was therefore more misguided than actually hurtful to its case. Granted, Canada should have tried to raise this argument, since it had not yet been addressed by the WTO at the time, but it would have ultimately been unsuccessful to get the dispute moved. It remains a mystery whether Canada anticipated this argument not to be viable and actively chose not to raise it or if its failure to do so was an oversight.

The only potentially viable argument to convince a WTO Panel to send a dispute to a PTA decision-making body would have been an inadmissibility claim, as was attempted but later abandoned by the United States in *US — Tuna II*. Whether or not such an argument would succeed is, however, unknown. What is sure is that it would only have a chance so long as the concerned PTA contains a valid fork in the road provision that is sufficiently express, such as the one found in *NAFTA* article 2005, and which was not included in *MERCOSUR*, the agreement at issue in *Argentina — Poultry*. Could Canada have raised this argument in *Canada — Periodicals*? It seems unlikely as the nature of the measures in play in that dispute are not covered by the scope of *NAFTA* article 2005(3) or (4) which touches on specified environmental agreements; SPS measures; and environment, health, safety, or conservation standards.[78] Canada therefore had no recourse to get the dispute moved to a *NAFTA* arbitral tribunal.

IV. The Alternative: Allowing the Consideration of PTAs by WTO Panels

A. Deferral vs Consideration: The Incorrect Association of Two Concepts in WTO Jurisprudence

Canada's inability to get the dispute referred to a *NAFTA* tribunal in *Canada — Periodicals* does not mean it had no way of getting a WTO Panel to consider the cultural industries exception of *NAFTA* article 2106. Canada was not without recourse, though it may have thought the opposite based on the incorrect association of two important concepts in WTO jurisprudence. Those are (1) whether the WTO can decline jurisdiction over a dispute touching on a PTA (as explored in the previous section); and (2) whether the WTO can consider PTAs in its own rulings.[79]

Mexico — Soft Drinks is a good example, and possibly the origin, of this mistaken association. In its argument to the Appellate Body, Mexico noted that when predominant elements of a dispute were derived from rules of international law, which could not be enforced by the WTO (i.e. PTAs), then the WTO should decline to exercise jurisdiction.[80] Mexico's intention was clearly to state that the WTO could not consider and enforce PTA provisions in order to convince the DSB that it would be appropriate to defer jurisdiction of the dispute to a *NAFTA* tribunal. However,

77 Pauwelyn & Salles, *supra* note 53 at 110-113.

78 See Rafael Leal Arcas, "Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding" (Legal Studies Research Paper, Queen Mary University of London, School of Law, 2005) [Unpublished].

79 De Mestral, "Dispute Settlement", *supra* note 8 at 812.

80 *Mexico — Taxes on Soft Drinks* (AB), *supra* note 38 at para 42.

this strategy backfired as the Appellate Body rejected the change of venue argument but agreed wrongly that the DSB was indeed confined to examining only the covered agreements framed by article 3.2 of the *DSU*. In short, it ruled that not only did the *DSU* provide an automatic forum at the WTO for disputes under covered agreements but that the law of those agreements was also to be the sole one considered.[81]

Why should the first conclusion justify the second? The inability to escape WTO jurisdiction should not directly translate into the impossibility of considering any international law outside the scope of the *DSU*. William Davey in fact criticized this part of the *Mexico — Soft Drinks* ruling, accurately deeming it "incorrect and inconsistent with prior Appellate Body precedent."[82] This is well observed, especially considering that a Panel can, for its own purposes, determine whether two parties were acting consistently with a PTA even if the PTA was not a covered agreement. *Turkey — Restrictions on Imports of Textile and Clothing Products* is the first and, to this day, most cited illustration of this practice.[83] It tackled article XXIV of the *GATT 1994* on customs union and free trade agreements shortly after it came into force. Article XXIV allows and even highlights the desirability of customs unions and free trade agreements. At paragraph 4, it declares:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade agreement should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

In *Turkey — Textiles*, Turkey argued in front of a WTO Panel and Appellate Body, in response to a complaint from India, that it was justified in reintroducing quotas on textiles imported from India despite its trade commitments under *GATT 1994* because of the establishment of a customs union with the European Community, which required such quotas.[84]

The Appellate Body, in a effort to balance the force of *GATT 1994* and its explicit commitment to customs unions, ruled that for a measure contravening *GATT 1994* to be justified for the purposes of XXIV, the measure in question had to (1) satisfy the substantive requirements of article XXIV and come about at the time of formation of the customs union, and (2) be necessary to the existence of the customs union, with no other viable alternatives available.[85] The consideration of a PTA or customs union rule was therefore validated in this context, as a means to see if a violation of a WTO covered agreement was justified. There is therefore no doubt that the examination of a PTA can be a "preliminary step in making a WTO ruling."[86]

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81 Davey & Sapir, *supra* note 10 at 15.

82 *Ibid* at 18.

83 *Turkey — Restrictions on Imports of Textile and Clothing Products* (*India v Turkey*) (1999) WT/DS34/R (Panel Report), online: WTO <http://docs.wto.org> [*Turkey — Textiles* (PR)]; (1999), WT/DS34/AB/R (Appellate Body Report), online: WTO <http://docs.wto.org> [*Turkey — Textiles* (AB)].

84 De Mestral, "Dispute Settlement", *supra* note 8 at 790.

85 *Turkey — Textiles* (AB), *supra* note 83 at para 58.

86 Davey & Sapir, *supra* note 10 at 18.

Another example, this one pointed out by Davey, is *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, "where the Panel (and the Appellate Body) had to take a position on the meaning of the *Lomé Convention* in order to rule on whether an EC measure was covered by the so-called Lomé waiver, which permitted EC measures 'required' by the Lomé convention."[87] The point in considering the *Lomé Convention* at the DSB, much like it had been in *Turkey — Textiles*, was not to determine and adjudicate existing rights under a non-WTO agreement but rather a means to determine whether obligations under WTO agreements had been breached.

In view of these two examples, it is clear that the sweeping assertion of the Appellate Body in *Mexico — Soft Drink* is misguided and should not be respected.[88] The association between deferral of jurisdiction and scope of legal analysis at the WTO is incorrect. PTAs clearly have a place in DSB decision-making. The only debate that remains is to decide to what extent.

Canada — Periodicals poses a different tension between the WTO and *NAFTA* than that seen in *Turkey — Textiles* or *EC — Bananas III*. Here, the consideration of a PTA would take a new form. It would not be utilized to determine whether a breach of a WTO covered agreement was justified under article XXIV of *GATT 1994* because of its necessity to the existence of a PTA. Also, it would no longer touch a measure passed at the time of PTA formation. It was not necessary to have a cultural industries exception or to implement a measure falling within it for the purposes of the proper existing and functioning of *NAFTA*. Rather, the cultural industries exception was a choice and a commitment, its application optional but agreed upon. Does this mean it ought to be excluded from the WTO DSB process altogether? If so, this would allow a state to undertake certain obligations in one treaty and then evade them by initiating a dispute at the WTO instead, as was done by the United States in *Canada — Periodicals* with impunity. This is both unfair to the parties and a strong blow to the effectiveness of PTAs, which the WTO had undertaken to tolerate.[89]

B. The Solution Moving Forward: Reliance on the Interpretation Principles of the *Vienna Convention on the Law of Treaties*

There is, in my view, one way in which Canada could have viably argued for the consideration of article 2106 of *NAFTA* by a WTO Panel, expanding the scope of inclusion of PTAs into the DSB process. The solution would have been to rely on article 31(3)(c) of the *VCLT*.[90] Article 3.2 of the *DSU* provides not only that the WTO dispute settlement system serves to clarify existing provisions of the covered agreements, but also that it must do so "in accordance with customary rules of interpretation of international law." Such rules of interpretation include the *VCLT*, which has the potential to serve as a great tool of harmonization between the WTO and PTAs.[91] After all,

87 Davey & Sapir, *supra* note 10 at 18; *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (1997), WT/DS27/R/ECU (Panel Report), online: WTO <http://docs.wto.org> [*EC — Bananas III* (PR)]; (1997) WT/DS27/AB/R (Appellate Body Report), online: WTO <http://docs.wto.org> [*EC — Bananas III* (AB)].

88 Davey & Sapir, *supra* note 10 at 16.

89 See *GATT 1994*, *supra* note 2, art XXIV(4).

90 See *VCLT*, *supra* note 17.

91 Richard K Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008) at 260.

the purpose of article 31(3)(c) is to promote "systemic integration within the international legal system" and one of its roles is to "resolve conflicting obligations arising under different treaties."[92]

The provision establishes that "relevant rules of international law applicable in the relations between the parties" must be taken into account to interpret an agreement under dispute adequately. Are PTAs included in the "relevant rules of international law" of which the *VCLT* speaks? Based on the preparatory work of the International Law Commission, it seems this is what *VCLT* drafters intended.[93] As some commentators have observed, early drafts of 31(3)(c) included a reference to "rules of general international law" rather than simply "international law."[94] Although the term "general" was never explicitly defined, it was understood to limit the scope of the "relevant rules" applicable to customary law and general principles, thereby excluding treaties creating specific obligations between parties.[95] However, the term "general" was later deleted, after much debate, and did not appear in the final provision. The suggestion that "customary" should replace "general" was also not taken up.[96] The drafters made the active decision of leaving the terms "relevant rules of international law" unqualified. As Richard Gardiner noted in his treatise on *VCLT* interpretation, "the deletion of 'general' must suggest strongly that treaties are included in the unqualified use of 'international law'."

WTO jurisprudence also tends to support this generous interpretation. In *Argentina — Poultry*, a *VCLT* argument was advanced by Argentina but failed to get a previous *MERCOSUR* award considered and given effect to in the WTO proceedings.[97] However, this result does not forestall the notion that PTAs are a part of "rules of international law" for the purposes of article 31(3)(c) of the *VCLT*. The problem in that case was that Argentina was not seeking, via the *VCLT*, the interpretation of WTO law in light of a potential *MERCOSUR* conflict, but was rather trying to dictate WTO Panel behavior by effectively forcing the application of a *MERCOSUR* award. If the *MERCOSUR* PTA had been properly raised as a tool of interpretation under the *VCLT*, the court would have possibly allowed its consideration, for harmonization purposes. The *Argentina — Poultry* ruling, although seemingly adverse to the *VCLT* interpretation I have suggested, can therefore be distinguished from cases seeking the genuine consideration of PTA provisions, not purely the enforcement of the awards from PTA dispute resolution mechanism.

Canada — Periodicals could have been such a case, if it had sought WTO consideration of the exception at article 2106 of *NAFTA* in the context of Canada's *GATT* obligations. Granted, the result would arguably have been the same: a negation of WTO law. Whether it is through the recognition of a *NAFTA* arbitral award at the WTO or the consideration of the *NAFTA* exception at article 2106 by a WTO DSB to mitigate *GATT* obligations, Canada would ultimately have been able to escape liability for its *GATT* violation. However, regardless of the similarity in outcome,

92 Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279 at 280; Gardiner, *supra* note 91 at 260.
93 *Ibid* at 262-63.
94 *Ibid* at 262.
95 *Ibid*.
96 "*Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session*" *Yearbook of International Legal Commission* 1996, vol 1, part 2 (New York: UN, 1996) at 183-200.
97 *Argentina — Poultry*, *supra* note 67 at para 7.41.

the latter process of consideration is allowable under the *VCLT*, making all the difference. As Gardiner has further stated:

> Setting to one side peremptory norms of general international law (*jus cogens*), as described in article 53 of the Vienna Convention and being rules from which departure is not permitted, states may generally come to their own agreements on the rules that are to apply between themselves, provided they do not violate their obligations to others. Even when rules are set out in a multilateral treaty, permitted reservations modify the rules applicable in relation between parties and permissive rules may be exercised in ways which create a variety of possible obligations. Thus, article 31(3)(c) has been drawn wide enough to cover rules of international law subject to, or including, any permissible modification or extension by treaty applicable to those states involved in the particular interpretative process.[98]

This implies that article 31(3)(c) can be relied on to bring in reservations to a multilateral treaty made between specific parties to a dispute. In other words, it would allow Canada to raise article 2106 of *NAFTA* as an exception agreed to with the United States to the provisions of the *GATT 1994*.

The chances of success of such an argument seem all the greater when examined in light of the WTO decision in *Brazil — Retreaded Tyres*. An interpretative recourse to the *VCLT* was not explicitly advanced in this case but in its ruling, the Panel conceded that, on a case by case basis, PTAs could be considered to justify or mitigate violations under the *GATT 1994*.[99] Here, compliance with a *MERCOSUR* award successfully provided, in the eyes of the DSB, a reasonable basis for Brazil's exclusion of certain countries from its environmental ban. In addition, "the panel goes even so far as to suggest that a PTA may in appropriate cases be part of public international law which may be relevant to the decision on a complaint under the DSU."[100] This seems to offer a clear opening for raising the argument that a PTA is part of the "rules of international law" to be considered when interpreting a law in light of the *VCLT*.

C. The Lingering Challenge to this Approach: Scope of Application of 31(3)(c)

Although *Brazil — Retreaded Tyres* is an encouraging case for the wider inclusion of PTAs in the WTO DSB process, the Panel was careful to refer to the specific circumstances of the case and not to enact a general rule. This begs the question: in what framework can PTAs be considered part of the "rules of international law" for the purposes of the *VCLT* to aid in the interpretation of WTO agreements? The biggest hurdle to broadening the scope of inclusion of PTAs in DSB decision-making via the *VCLT* seems to be the debate around the definition of "parties" in article 31(3)(c). The provision states that rules of international law can be considered when interpreting an agreement under dispute when it is "applicable in the relations between the parties." What is meant by parties here? Only the parties in dispute? If so, PTAs easily pass this test and be included in the body of law to be considered by the DSB when two of its members are facing each other in a WTO action. But what if what is meant is all of the member states of the agreement under dispute?

98 Gardiner, *supra* note 91 at 264.

99 *Brazil — Retreaded Tyres* (PR), *supra* note 72 at para 7.283.

100 De Mestral, "Dispute Settlement", *supra* note 8 at 801.

There seems to be no consensus on this question and it has been most considered at the WTO.[101] *Canada — Periodicals* would have provided a great opportunity to address this issue.

Three main theories have been advanced on how to interpret the scope of "parties" in article 31(3)(c) of the *VCLT*.[102] The first, and most restrictive, lays out that all parties to the agreement under dispute must be party to any other international law being used to interpret it. When thinking of WTO agreements such as *GATT 1994* with 159 members, this interpretation severely limits the potential impact of the *VCLT* and *de facto* excludes all bilateral treaties.[103] This narrow approach has on one occasion been embraced by the WTO in *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*.[104] It is interesting to note however that, in this case, the treaty the WTO Panel refused to consider, the *Convention on Biological Diversity*, had not been ratified by the United States (a party to the dispute, and not just the WTO at large). Therefore, the Panel relied on a narrow interpretation of "parties" under 31(3)(c) when even a broad and more inclusive one would have sufficed to refute the consideration of the *Convention*. In the end, the Panel validated an approach that it did not even apply itself to the fullest. What if the party that had not been a member of the *Convention* had not been the United States but one extraneous to the dispute? Would the Panel have maintained its stance? Nothing in the decision allows one to say for certain that it would have. What is clear however is that, under this approach, an argument in *Canada — Periodicals* for the inclusion of *NAFTA* provisions at the WTO through the *VCLT* would have failed, as all the members of the *GATT 1994* are not a party to *NAFTA*.

The second and much more inclusive approach would be to assume that the parties involved in a dispute must be the ones involved in any other agreement used to interpret said dispute. This provides for a greater level of consideration of bilateral treaties at the WTO but has unfortunately little existing support in caselaw. The best example of a case where this theory was favorably portrayed, possibly unintentionally, at the WTO is *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5 Malaysia)*.[105] Here, a Panel, while reviewing an earlier phase Appellate Body decision, noted that it was acceptable for the Appellate Body to have relied on international agreements to which the parties in dispute were members. Then, the Panel immediately mentioned article 31(3)(c) of the *VCLT*. This juxtaposition may have implied than the two concepts were related, the later justifying the former.[106] But the association was not explicitly made. In any case, if this approach prevailed, Canada could have successfully had article 2106 of *NAFTA* considered in by the DSB in *Canada — Periodicals*.

The last theory, offering an "in-between option" of sorts, was crafted by Joost Pauwelyn and requires that the rule being invoked as an interpretative guide must have been "implicitly accepted" by all parties to the treaty being interpreted.[107] In other words, this implies, using

101 Gardiner, *supra* note 91 at 269.
102 Gardiner, *supra* note 91 at 270; McLachlan, *supra* note 92.
103 Gardiner, *supra* note 91 at 271.
104 *EC — Bananas III* (PR), *supra* note 87 at para 7.68.
105 *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (2001), WT/DS58/RW at para 5.57 (Panel Report), online: WTO <http://docs.wto.org>.
106 Gardiner, *supra* note 91 at 273.
107 Joost Pauwelyn, *Conflicts of Norms in International Law* (New York: Cambridge University Press, 2003)

Canada — Periodicals as an example, that as long as all the members of *GATT 1994* implicitly accepted *NAFTA*, it could be included in the DSB's decision-making via the *VCLT* in disputes involving *NAFTA* members. This is less restrictive than the first approach as it does not require the entire membership of the agreement under dispute to be actually bound to the rules of law used to interpret it.[108] It focuses on common intention rather than formalities.[109] However, it is also more strict than the broader second approach as there needs to be some level of consent, even if implied, on the part of all the members of the agreement under dispute for specific rules of law to be included in its interpretative analysis. Under this view, Canada would also have likely succeeded in getting its cultural industries exception considered by the DSB in *Canada — Periodicals*. After all, wouldn't article XXIV(4) of *GATT 1994*, which seems to encourage, or at the very least tolerate, the creation of PTAs and customs unions, provide the "implicit acceptance" required by Pauwelyn? It seems to me that it aptly meets such a criteria and that this opens the door for bilateral agreements to be considered by the WTO.

Any of the above three theories could be embraced by the WTO moving forward and no coherent pattern has yet emerged. In 2002, a WTO Panel in *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products* even went as far as to explicitly decline to resolve the matter of the interpretative scope of 31(3)(c) of the *VCLT*.[110] More recently, the Panel in *Brazil — Retreaded Tyres*, though it does not address this point head on, seems to have indirectly aligned itself with either the second or third approach since it considered *MERCOSUR* in its ruling, which does not bind the vast majority of the WTO membership, in a dispute involving *MERCOSUR* members.[111]

Canada — Periodicals missed its opportunity to be the first case that raises this debate. There clearly is a need for more certainty and predictability on this point of law at the WTO, rather than a set of disparate rulings that contradict each other. It is unclear whether Canada would have prevailed by arguing the inclusion of article 2106 of *NAFTA* into the WTO through the *VCLT,* depending on the scope accorded to "parties" under *VCLT* article 31(3)(c), but the argument was its best chance and a battery of compelling points could have been laid out to convince a Panel to favor the second or third approach to the *VCLT* scope:

First, any party should be awarded full opportunity to defend itself and justify its behavior when passing a *GATT 1994*-violating measure, especially if it was under the impression that it was justified in its behavior because of a PTA exception.[112]

Second, allowing the consideration of bilateral agreements at the WTO does not mean

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at 257-63 [Pauwelyn, *Conflicts of Norms*].

108 Pauwelyn, *Conflicts of Norms, supra* note 107 at 275.

109 *Ibid* at 260.

110 *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (*Argentina v Chile*) (2002), WT/DS207/R at para 7.85 (Panel Report), online: WTO <http://docs.wto.org>. See also Pauwelyn, *Conflicts of Norms*, *supra* note 107 at 262.

111 *Brazil — Retreaded Tyres* (PR), *supra* note 72 at para 7.283.

112 Joost Pauwelyn, "The Application of Non-WTO Rules of International Law in WTO Dispute Settlement" in Patrick Macrory, Arthur Appleton, & Michael Plummer, eds, *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2003) 1405 at 1416-17 [Pauwelyn, *Application of Non-WTO Rules*].

either (1) that the DSB can now use PTAs at its discretion or (2) that proceedings can be initiated under the *DSU* based on PTA violations. With regards to (1), in both the second and third theories of *VCLT* interpretation laid out above, PTAs can only be raised at the WTO if either the parties in dispute are bound to them or, even more demandingly, if all WTO members are implicitly in agreement with it. The second option would imply that the PTA in question is compliant with the substantive requirements of article XXIV of *GATT 1994*, which lay out the type of PTAs that the WTO community desires and approves of. There are therefore very little risks of excess use. As for (2), there is an important distinction to be made between initiating a claim based on a *NAFTA* breach at the WTO and considering a *NAFTA* mitigating factor in the context of a WTO breach. The *VCLT* would only be a means to facilitate the latter and enlighten whether a WTO violation was justified and should be interpreted as such.[113] There is no danger to the WTO *DSU* overall structure or its rules of application. The more inclusive *VCLT* interpretative approaches solely provide for a comprehensive and just adjudicative process in appropriate cases.

Third, these two theories, unlike the first narrower construction, would allow for greater harmonization of the international legal system. They would each equally provide the WTO with a well-framed argument to give effect to the legal obligations undertaken by parties in other relevant treaties. With regards to PTAs, since the WTO actually encourages and desires their proliferation, such an argument should be welcomed especially since it is defined enough to protect against floodgates and excessive use.

Fourth, a more open interpretative approach towards the *VCLT*, whichever one of the two is chosen, would promote more responsible PTA drafting and negotiating by WTO members. If states know their PTAs will definitely be enforced and they cannot just avoid them by suing in a different forum, as the United States did in *Canada — Periodicals*, they will be more attentive to the obligations they undertake. This would provide for indirect but efficient quality control. At least if PTAs are going to proliferate, they should do so well.

Finally, allowing for the consideration of PTAs by the WTO DSB using the *VCLT* as a tool, would not threaten the WTO member-states' equality of bargaining power. As I alluded to at the very beginning of this paper, some authors attribute the reluctance of the WTO to allow PTA considerations into the DSB process to the fact that PTAs are often concluded between parties with wildly uneven bargaining chips, creating dispute settlement schemes which could unduly favor one of the parties.[114] Here, this would not be a concern as the WTO would still be the forum of choice. It is in fact a great way of giving effect to PTA provisions and legitimizing their existence without having to defer to PTA settlement bodies.

V. Conclusion

As PTAs continue to proliferate, it is becoming increasingly urgent to address their relationship with the WTO, particularly in the context of dispute settlement, to avoid jurisdictional and substantive conflicts. *Canada — Periodicals* provided a striking example of such a conflict.

113 Pauwelyn, *Application of Non-WTO Rules, supra* note 112.
114 Davey & Sapir, *supra* note 10 at 18.

The outcome of the case and the WTO's disregard for Canadian and American obligations under *NAFTA* sent the message that countries could make commitments in PTAs that they could later evade via forum shopping. Canada, in that dispute, failed to raise two important arguments: that the matter should be moved to a *NAFTA* arbitral tribunal and, alternatively, that *NAFTA* provisions should be taken into account in the WTO proceedings. It had the opportunity to make *Canada — Periodicals* the first DSB dispute to actively address the interaction of PTAs with the WTO and failed to take it.

The first argument focusing on the need to move the dispute from the WTO DSB to a *NAFTA* arbitral tribunal would have likely failed in *Canada — Periodicals*, as later case law indicates, but is not always doomed. Although the DSB rid itself in *Mexico — Soft Drinks* of its own ability to decline to exercise its jurisdiction over a case, this does not mean parties cannot challenge jurisdiction before it is found or contend it was lost through a PTA fork-in-the-road clause, of the type found in *NAFTA* article 2005 when it is applicable.

Canada in *Canada — Periodicals* might have been successful if it had advocated for the WTO's consideration of *NAFTA* article 2106 in its own proceedings. There is no reason why the inability to escape WTO jurisdiction should translate into an inability to escape the scope of its covered agreements. In fact, a narrow opening was already carved out for the consideration of PTAs in *Turkey — Textiles*, where the DSB found that the examination of a PTA could be a preliminary step in determining whether a *GATT* breach was justifiable in certain circumstances. Building on this foundation, Canada could have made the argument that this opening should be expanded by relying on article 31(3)(c) of the *VCLT*, which calls for the use of "relevant rules of international law" when interpreting treaties. As PTAs are "relevant rules of international law," they could arguably be used to interpret *GATT* provisions. The success of this logic, however, depends on the scope of "relevant rules" deemed allowable, which is currently the subject of doctrinal debate. Until it is settled, it is impossible to ascertain whether this argument would have succeeded in *Canada — Periodicals*.

This paper suggests, in closing, that the scope of "relevant rules" for the purposes of *VCLT 31*(3)(c) should be understood broadly, to include PTAs. This would ensure, in cases such as *Canada — Periodicals*, that parties have full opportunity to defend themselves. In addition, it would present little risk of excessive use of PTAs at the WTO and would protect the delicate balance of bargaining power between WTO members. The quality of PTA drafting would likely also improve, as parties would be held accountable for their undertakings regardless of the forum in which they initiate disputes. Finally, and most importantly, a broader scope would facilitate the harmonization of the international legal system, providing an effective solution for the WTO and PTAs to functionally coexist in the future.