BILATERALISM AND MULTILATERALISM: CAN PUBLIC INTERNATIONAL LAW RECONCILE BETWEEN THEM? REAL OPTIONS FOR FURTHER DEVELOPMENTS IN WTO JURISPRUDENCE

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INTRODUCTION

Overlap of jurisdiction has received little attention in international trade law. Although issues of jurisdictional conflict have long been addressed in national law and in private international law,[1] it is hard to find a similar systematic and comprehensive study exploring this topic in the realm of public international law. Overlap of jurisdiction and conflict of laws is no longer a purely academic question in international law, but has become an important practical query in light of the current proliferation of international tribunals.[2] Judicialization is indeed occurring in a meaningful sense within the pockets of international trade law, however there are ever increasing number of questions which do not have answers.[3]

The WTO legal system is an increasingly complex system.[4] It has a central multilateral regime (the World Trade Organization ("WTO")) and

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1 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (New York: Oxford University Press, 2003) at 2.

2 Joost Pauwelyn, "Choice of jurisdiction: WTO and regional dispute settlement mechanisms: challenges, options and opportunities" (Speech presented to the ICTSD/GIAN-RUIG dialogue on the "Mexico Soft Drinks dispute: implications for regionalism and for trade and sustainable development") at 2, online: International Centre for Trade and Sustainable Development <http://www.ictsd.org/dlogue/2006-05-30/dialogue_materials/Joost_Pauwelyn_speaker_notes.pdf> [Pauwelyn, "Choice of Jurisdiction"].

3 Joel Trachtman, "Regulatory Jurisdiction and the WTO" (2007) 10 J. Int'l Econ. L. 631.

4 Sungjoon Cho, "Defragmenting World Trade" (2006) 27 Nw. J. Int'l L. & Bus. 39.

includes over three hundred preferential trade agreements at the bilateral level alone.[5] The introduction of the term "Spaghetti Bowl"[6] by Bhagwati in 1996 sparked extensive research from the policy and economic perspective, but not from a legal perspective.[7] Much of the existing literature about the multilateral trading system and the bilateral/regional free trade agreements has been written by economists. Although economic analysis may supply an empirical basis for the matter, it generally fails to provide legal analysis of the interaction between bilateral free trade agreements and the WTO legal system.

This paper focuses on overlap of jurisdiction in the context of the WTO in light of the dramatic increase of Bilateral Free Trade Agreements ("BFTAs"), using a holistic approach to examine the public international law perspective on this issue. The first part of this paper discusses the current status of international trade and highlights the proliferation of BFTAs. The second part is divided into three subsections: the first defines overlap of jurisdiction; the second discusses the compulsory nature of the jurisdiction under WTO; and the third takes up the case study of a BFTA (the U.S.-Oman Free Trade Agreement) in its relation with the multilateral trading system. The third part lays down the relevant general principles of public international law to the problem and suggests proposals and reforms for the WTO and BFTAs.

PART I: CURRENT INTERNATIONAL TRADE LAW

This part will examine the current status of international trade law in the globalization era and how it stands in light of the explosion of regional/bilateral free trade agreements. This will then be followed by a discussion about the explosion of BFTAs.

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[5] Christina Davis, "Overlapping Institutions in Trade Policy" (Paper presented to The Politics of International Regime Complexity Symposium, delivered at the Roberta Buffett Center for International and Comparative Studies, Northwestern University, 2007), online: Roberta Buffett Center for International and Comparative Studies <http://www.cics.northwestern.edu/WorkingPaper/Working_Paper_ComplexitySymposium.pdf>.

[6] The Spaghetti Bowl phenomenon is a complex system of criss-crossing trade preferences, where products in one particular country enjoy access on widely varying terms depending on their alleged origin.

[7] Jagdish Bhagwati, "Preferential Trade Agreements: The Wrong Road" (1996) 27 Law & Pol'y Int'l Bus. 865.

International Trade in the Era of Globalization

International economic law is a strand of public international law that governs economic relations between states.[8] It includes international monetary law, international trade law, competition and antitrust law, intellectual property law and law and development.[9] The end of the Cold War signified the emergence of international trade law as a well-defined area of legal scholarship; but turning a blind eye to the bigger picture of international law in general would provide a distorted view of the current status of the international trade system. Peter Van den Bossche mentioned that international law has traditionally excluded international trade law from its purview. As McRae explains, "[t]he rationale of international law is extremely different if not the contrary to the rationale of international trade law. While the first is about the independence of states, the latter is about the interdependence of states and founded in the concepts of economic welfare and specialization."[10] Nevertheless, this opinion overlooked the transformation of international law in general in the last 50 years – from a discipline that defined itself on the concept of co-existence, territorial integrity and political independence to a discipline that emphasizes the cooperation of the states and incorporation of the concepts of interdependence, such as WTO law, environment and human rights.[11] Moreover, this has been voiced by WTO jurisprudence when the Appellate Body in the *Periodicals* case decided that the "WTO system can not be in a clinical isolation of international law."[12]

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[8] Stephan Zamora found this definition too confining. He offered a definition of international economic law as the law that comprises a broad collection of laws and customary practices that govern economic relations between actors in different nations. It includes the examination of both law and policy issues on multiple levels, including private law, local law, national law, and international law. See also John H. Jackson, William J. Davey & Alan O. Sykes, *Legal Problems of International Economic Relations,* 4th ed. (St. Paul, MN: West Publishing Co., 2004) at 170.

[9] Jeffrey Atik, "Uncorking International Trade, Filling the Cup of International Economic Law" (2000) 15 Am. U. Int'l L. Rev. 1231.

[10] Donald McRae, "The Contribution of International Trade Law to the Development of International Law" in Hague Academy of International Law, *Recueil des Cours* (Paris: Sirey, 1996) at 114-115.

[11] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2005) at 61.

[12] *Canada – Certain Measures Concerning Periodicals* (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report), online: World Trade Law <http://www.worldtradelaw.net/reports/wtoab/canada-periodicals(ab).pdf> [*Periodicals* case].

The rapid growth of international judicial bodies has become a significant feature of international law,[13] and in particular the international trading system. Coherence of international trade law is needed for maintaining its credibility, legitimacy, and effectiveness. The explosion of trade agreements has put all these values at stake: the dispute settlement mechanisms which exist in every trade agreement might compromise each of the important values that underline the need for systematic coherence and jeopardize the prospects for the long term success of international trade law. Hence, it would be in the interest of the success of international trade to explore the coherent strengthening measures, including jurisdiction regulating rules, particularly in the light of an increasing competition between jurisdictions in the trading system. By contrast, domestic legal systems have long addressed judicial bodies' competition operating within the same national legal system or between courts of different nations.[14] Although there are significant conceptual and other differences between the international and national legal systems, the national methods that different legal systems have introduced may inspire the international legal system to reform its own jurisdiction regulating regime.[15]

Pauwelyn described international law as a universe of interconnected islands.[16] The problem of fragmentation and the need for a unitary view of international law is becoming acute in WTO law for several reasons:[17] (1)violation claims of the WTO are subject to the compulsory jurisdiction of the WTO panels and Appellate Body;[18] (2)many international disputes have an economic or trade angle, so that the disputes – though not entirely a trade dispute – may end up before the WTO where they must deal with the questions of the overlap of jurisdiction;[19] (3)countries are engaged in regional or bilateral free trade deals whose provisions and dispute settlement systems overlap with the multilateral WTO system.[20] Sungjoon concluded that the trading system is fragmented by the surge of regionalism that is taking place

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13 Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law" (2004) 25 Mich. J. Int'l L. 848.
14 Shany, *supra* note 1 at 22.
15 *Ibid.*
16 Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands" (2004) 25 Mich. J. Int'l L. 903 at 905 [Pauwelyn, "Bridging Fragmentation and Unity"].
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

everywhere. She calls on reinstating multilateralism through checking regionalism.[21]

On the international trade law level, all trade agreements – bilateral, regional and multilateral – include dispute settlement provisions.[22] These provisions signify how states have gradually moved toward committing themselves to judicial or quasi-judicial dispute settlement mechanisms (rule-based systems) by deserting the tradition of resolving trade disputes through negotiation-based systems.[23] The ever-growing numbers of cases relying on international law are being brought to an expanding range of courts. Over-specialization, irreconcilable holdings and conflicting obligations are real threats in the WTO legal system;[24] however the WTO legal system is denser, more active and more important than ever before. Arguably, this may or may not lead to the fragmentation of international trade law.

The increased density, volume and complexity of international trade norms requires correspondingly sophisticated dispute settlement institutions to guarantee the operation of the new legal arrangements and the continued clarification and the development of their norms. The greater commitment to the rule of law in international trade relations at the expense of power-oriented diplomacy, and no doubt the unprecedented success of the Dispute Settlement Understanding under the WTO ("DSU"),[25] triggered the advancement of international trade law into a new level of effectiveness. It is no longer possible for a recalcitrant party to frustrate the dispute settlement before trade panels by withholding his/her consent or refusing to cooperate with the available procedure.[26] Although this success at the WTO level can be a sign of the transformation of international law, it is usually not credited with having such an impact.

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[21] Cho, *supra* note 4 at 87.

[22] David Gantz, "Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties" (1999) 14 Am. U. Int'l L. Rev. 1025.

[23] Rachel Brewster, "Rule-Based Dispute Resolution in International Trade Law" (2006) 92 Va. L. Rev. 251.

[24] William Burke White, "International Legal Pluralism" (2004) 25 Mich. J. Int'l L. 963.

[25] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 33 I.L.M. 1226 (Annex 2 of the *Marrakesh Agreement*) [Dispute Settlement Understanding ("DSU")].

[26] Raj Bhala, *International Trade Law: Theory and Practice*, 2d ed. (Lexis Publishing: Newark 2001) at 214.

Proliferation of Bilateral Free Trade Agreements (BFTA)

For decades, multilateralism has been the prevailing trend in international trade.[27] Now that multilateralism is deadlocked, many countries who were traditionally reliant on the multilateral trade liberalization are increasingly considering preferential trade agreements as the centrepiece of their trade policy.[28] Bilateral trade agreements are reciprocal, consensual and inclusive of parties while being exclusionary of non-parties.[29] Strongly motivated to maximize their trade interactions, states tended to take advantage of the framework provided by both the multilateral trading system and the regional/bilateral trading entities. As a result, we have complex procedural and substantive obligations under these agreements.[30] Each bilateral free trade agreement has its own dispute settlement mechanism; consequently there is a parallel dispute settlement mechanism in each track: both bilateral and multilateral.[31]

Enhancement of global trade was the rationale behind the endorsement of free trade agreements in the enabling clause. GATT article XXIV(4) provides that: "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."[32] Despite the anticipated tension between bilateralism/regionalism and multilateral trade interests, international instruments historically have tried to reconcile them.[33] Article XXIV of GATT[34] specifically endorsed customs unions and free

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[27] Mitsuo Matsushita *et al.*, *The World Trade Organization, Law, Practice, and Policy* (Oxford: Oxford University Press, 2004) at 345.

[28] Y.S. Lee, "Bilateralism Under the World Trade Organization" (2006) 26 Nw. J. Int'l L. & Bus. 357.

[29] Leon Trakman, "The Proliferation of Free Trade Agreements: Bane or Beauty?" (2008) 42 J. World Trade 367 at 372.

[30] Davis, *supra* note 5 at 1.

[31] Sydney M. Cone, III, "The Promotion of Free Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and Imperial Preference" (2005) 26 Mich. J. Int'l L. 563.

[32] Article XXIV(5) of GATT says "[a]ccordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area."

[33] Trakman, *supra* note 29 at 4.

[34] The Enabling Clause, more formally known as the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries," was adopted under GATT in 1979. The Enabling Clause is exercised primarily through the Generalized System of Preferences ("GSP"), under which developed countries can offer preferential market access (such as zero or very low

trade agreements between members. By and large, it has been recognized that the legal discipline of free trade under GATT is broken.[35]

For example, the United States was the most ardent supporter of the multilateral trading system. During the first track in the U.S. trade policy, it was the major player in the Uruguay round. In the second track, the United States shifted its trade policy to a unilateral approach.[36] This policy embraces the ability of the United States to use its trade restrictions to bolster the effectiveness of the multilateral trading system. A third track has been developed via bilateral and regional negotiations for the establishment of the free trade agreement. The United States is aggressively committed to negotiating FTAs with many countries; not just those close to the United States in terms of politics and culture. The shift in the U.S. trading policy from multilateralism to bilateralism has manifested itself recently through the explosion of free trade agreements signed by the United States.[37]

Most writings have focused on two forms of economic integration: regionalism and multilateralism. Bilateralism is a crucial form of economic integration that has been overlooked in most, if not all, writings. I would disagree with most economists when they classify BFTAs and bilateral investment treaties ("BITs") as a sub-variant of regionalism under the premise that WTO law does not distinguish between regionalism and bilateralism. This is not accurate; bilateralism is a mode of integration where the bargaining dynamic is very different from that in regional agreements. Bilateralism provides greater liberalization in the sectors affected; unlike regional agreements, which

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tariff rates) to developing countries even when such access is non-reciprocal and is not extended to all developing countries. In addition, the Enabling Clause provides the legal basis for developing countries to enter into regional arrangements amongst themselves that do not rise to the level of comprehensiveness of an FTA, and for the Global System of Trade Preferences ("GSTP") under which various developing countries grant each other trade concessions that are not extended to the WTO membership at large. See generally, WTO Trade and Development Committee, "Work on Special and Differential Provisions," online: World Trade Organization <http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm>.

[35] Zakir Hafez, "Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs" (2003) 79 N.D. L. Rev. 879.

[36] Jeffrey A. Frankel *et al.*, *Regional Trading Blocs in the World Economic System* (Washington, D.C.: Institute for International Economics, 1997).

[37] David Livshiz, "Public Participation in Disputes Under Regional Trade Agreements: How Much Is Too Much—The Case of a Limited Right of Intervention" (2005) 61 N.Y.U. Annual Survey of American Law 529 at 545.

cover broader sectors but do not go into such depth.[38] Bilateral FTAs, which were originally intended to complement the multilateral trading system, turned out to be the standard of international trade. The most-favoured-nation principle – one of the pillars of the WTO – soon became a *de facto* least-favoured-nation treatment. Bilateral FTAs institutionalize protectionism because they facilitate intra-bloc trade, raise new barriers to extra-bloc trade and disassociate a bloc from the rest of the world as a result of their preferential nature.[39]

Legal scholars are generally interested in the interaction between the different kinds of dispute settlement mechanisms under different free trade agreements. Free trade agreements are comprehensive and detailed; they cover not only goods and services but also other subjects like intellectual property, investment and the environment.[40] These areas are also covered by multilateral agreements, thus creating parallel bodies of law: one being bilateral and the other multilateral. This interaction demonstrates the difficulties surrounding the issues of the overlap of jurisdictions and the current state of WTO law.

Proliferation arises in many contexts. It may be the multiplication of forums (proliferation *ratione fori*), which encompasses the constellation of courts and tribunals. It may be the multiplication of actors (proliferation *ratione peronae*), or the expansion of the specific areas of law (proliferation *ratione materiae*). Finally, it may be the expansion of spatial jurisdiction through the intermingling of national and international courts (proliferation *ratione loci*).[41] This paper will be devoted to the fourth type of proliferation, which refers to the sharp increase of regional dispute settlement forums. International law has experienced an elastic supply of dispute settlement mechanisms and procedures. Since the early 1990s, the following mechanisms have been established: the Appellate Body of the WTO, the International Tribunal for the Law of the Sea, the two ad hoc International Criminal Tribunals, the UN Compensation Commission, the International Criminal Court and the African Court on Human and Peoples' Rights, the World Bank Inspection Panel and its counterparts at the Asian Development Bank and the Inter-American Development Bank, the NAFTA dispute settlement mechanisms, the Andean Community-MERCOSUR framework, and several other regional/bilateral economic tribunals.[42]

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[38] Trakman, *supra* note 29 at 15.
[39] Cho, *supra* note 4 at 42.
[40] Cone, *supra* note 31 at 565.
[41] Benedict Kingsbury, "Is the Proliferation of International Courts and Tribunals a Systematic Problem?" (1999) 31 N.Y.U. J. Int'l L. & Pol. 679 at 681.
[42] *Ibid.* at 680.

The proliferation of dispute settlement mechanisms is generating plenty of concerns, including forum shopping, parallel litigation, lack of finality, incompatible judgments, *res judicata*, *forum non-conveniens* and an accelerated fragmentation of the law. Given the lack of binding precedent under international law, combined with the poor level of jurisdictional coordination, these concerns threaten the coherence of international law.[43]

Three major downsides come with bilateral free trade agreements. First, trade rules may arise that do not rest on accepted principles, but rather on the happenstance of forum shopping.[44] Second, nations with superior resources have a significant advantage when initiating and pursuing trade disputes. This is particularly true in the context of a bilateral free trade agreement between two nations with greatly disparate economic strength. Finally, the availability of a non-WTO dispute settlement system will almost always result in the abandonment of multilateralism in favour of spheres of regional/bilateral influence.[45]

PART II: OVERLAP OF JURISDICTION IN INTERNATIONAL TRADE LAW

This part examines the potential for overlap between the dispute settlement mechanisms of OFTA (a bilateral free trade agreement between the United States and Oman) and the WTO. It essentially asks whether it is conceivable that a single dispute between OFTA members falls under the jurisdiction of both the OFTA dispute settlement mechanism on trade and the WTO. It elaborates on the different factors that may influence OFTA members to bring a dispute to either the OFTA or the WTO forum.

Overlap of Jurisdiction

Jurisdiction does not have a single meaning under international law,[46] but it generally refers to a state's legitimate assertion of authority

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[43] Locknie Hsu, "Applicability of WTO Law in Regional Trade Agreements: Identifying the Links" in Lorand Bartels & Federico Ortino, eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 525 at 527.

[44] Cone, supra note 31 at 581.

[45] *Ibid.*

[46] Kenneth Randall, "Universal Jurisdiction Under International Law" (1988) 66 Tex. L. Rev. 785.

to affect legal interests.[47] Jurisdiction may describe a state's authority to make its law applicable to certain actors, events, or things (legislative jurisdiction); a state's authority to subject certain actors or things to the processes of its judicial or administrative tribunals (adjudicatory jurisdiction); or a state's authority to compel certain actors to comply with its laws and to redress noncompliance (enforcement jurisdiction).[48] In WTO law, jurisdiction refers to the scope of panel or Appellate Body power to "hear claims and proceedings, examine and determine the facts, interpret and apply the law, make orders and deliver judgments."[49] Mitchell drew distinctions between three elements of jurisdiction: subject matter jurisdiction (the jurisdiction to entertain certain types of claims and proceedings); applicable law (the law that the jurisdiction can apply and interpret to deliver the judgment); and inherent jurisdiction (the intrinsic power derived from its nature as judicial body).[50]

A situation in which the same dispute or related aspects of the same dispute could be brought before two distinct institutions or two different dispute settlement systems is known as overlap of jurisdiction.[51] Overlap of jurisdiction takes several forms: (a) when two forums claim to have exclusive jurisdiction over the matter; (b) when one forum claims to have exclusive jurisdiction and the other one offers jurisdiction on a permissive basis for dealing with the same matter or a related one; or (c) when the dispute settlement mechanisms of two different forums are available to examine the same or similar matters.[52] Two requirements have to be met. The first is the existence of two different sets of dispute settlement mechanisms which are clearly established under the WTO DSU and an FTA. The second key element is the adjudication of the same matter.

The potential for conflict between dispute settlement forums in the WTO legal system is growing. Over the past twenty years, dispute settlement chapters in trade agreements have developed from simply providing for flexible ad hoc tribunals to providing highly procedural

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47 *Ibid.* at 786.
48 *Ibid.*
49 Andrew D. Mitchell, "The Legal Basis for Using Principles in WTO Disputes" (2007) 10 J. Int'l Econ. L. 795 at 821.
50 *Ibid.*
51 Kyung Kwak and Gabrielle Marceau, "Overlaps and Conflicts of Jurisdiction Between the WTO and RTAS" (Paper presented to Conference on Regional Trade Agreements World Trade Organization, 26 April 2002) at 2, online: World Trade Organization <http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf>.
52 *Ibid.* at 3.

bodies that implement trade agreements.[53] This revolution in the international trade institutions has created new challenges, involving more of an opportunity for overlap of jurisdiction between the dispute settlement mechanisms under free trade agreements and WTO, giving rise to potential claims under more than one treaty. This includes potential conflicts between rulings of the WTO Dispute Settlement Body ("WTO DSB") and those of the FTA tribunals, as well as conflicts between rulings of one FTA tribunal and another and between FTA tribunals and other specialized or general tribunals operating within public or private international law. For the purposes of this article, the analysis will be limited to the overlap between bilateral FTA tribunals and the WTO DSB.

The many dispute settlement mechanisms engendered by free trade agreements may result in the rise of rules of trade law that are not based on accepted principles but rather on the happenstance of the forum selection.[54] Overlap of jurisdiction, as Pauwelyn correctly pointed out, has resources implications;[55] hence developing countries are concerned with this issue. The repeated litigation threat before dispute settlement mechanisms is a huge burden on the limited budget of developing countries, considering their lack of experience in WTO litigation.[56] Consider a country like Oman when it was confronted with claims before the WTO and bilateral free trade agreement tribunals simultaneously.

The Compulsory Nature of the Jurisdiction of Panels under WTO/DSU

The most prolific of all international dispute settlement systems, the WTO dispute settlement body has been operating since 1 January 1995[57] and is based on GATT panels, which hark back to 1947.[58] The improvement of the GATT dispute settlement mechanism was a top priority on the agenda of the Uruguay round negotiations, and the United States successfully advocated for more rule-oriented techniques, deviating away from power-oriented techniques.[59] Because of this change, most members of the international community (around 150 member-states of the WTO) enjoyed, for the first time in the history of

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53 Cone, *supra* note 31 at 583.
54 *Ibid.* at 584.
55 Pauwelyn, "Choice of Jurisdiction," *supra* note 2 at 2.
56 The US and EU are the main players in WTO disputes, the US appears as complainant and respondent in more than third the cases number in WTO.
57 Jackson, *supra* note 8 at 246.
58 Van den Bossche, *supra* note 11 at 174.
59 Gantz, *supra* note 22 at 1032.

international law, a binding dispute settlement mechanism.[60] Dispute settlement mechanisms under the WTO DSU have been considered the major achievement of the Uruguay round; they have added a reliable and respected method of prompt and effective adjudication resting on an accessible, understandable and thoughtful body of international economic law.

Article 23 of the DSU[61] mandates exclusive and compulsory jurisdiction to the Dispute Settlement Body for any WTO violations. A WTO member is entitled to trigger the quasi-automatic WTO dispute settlement mechanism if it alleges that a measure from another WTO member affects or impairs its trade benefits.[62] "[T]he dispute settlement body… is really the heart of the multilateral trading system" said Renato Ruggiero, the former Director General of the WTO.[63] It is no doubt the single most important achievement in the trading negotiations.

However, the exclusive nature of the WTO Body's jurisdiction does not prohibit FTA tribunals from exercising jurisdiction over the claims arising from their provisions that run parallel to, or overlap with, the WTO provisions. The parties to any FTA incorporate WTO provisions by reference or replicate the wording of the WTO provisions.[64] Nevertheless, it is the specific treaty clause that prevents other jurisdictions from adjudicating WTO law violations.[65] Thus, the jurisdiction of the WTO Body is limited to claims under WTO-covered

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[60] *Ibid.* at 1028.

[61] *Supra* note 25. Article 23.1 provides that: "When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." 23.2 provides that: "In such cases, members shall: (a)not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding."

[62] Kwak and Maraceau, *supra* note 51 at 3

[63] Alan Friedman, "Q&A: WTO Chief Voices Growing Confidence" *International Herald Tribune* (29 July 1996), online: International Herald Tribune <http://www.iht.com/articles/1996/07/29/wto.t_0.php>.

[64] Andrew Mitchell and Tania Voon, "Free trade agreements and Public international law" (2007), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123263> at 3 (with author's permission).

[65] Kwak and Maraceau, *supra* note 51 at 5.

agreements.[66] Examining two relevant cases in WTO jurisprudence will be worthwhile.

The *Soft Drinks*[67] case between the United States and Mexico is considered one of the cases in which both the WTO panel and the Appellate Body defined jurisdiction under WTO law. In this case, Mexico suffered from US restrictions on Mexican sugar under NAFTA. However, for over five years Mexico had tried to enforce those quota rights without success as the US continued to block the appointment of panel members on a NAFTA chapter 20 tribunal (which Mexico sought to establish to examine US restrictions on Mexican sugar).[68] Because of this blockage, Mexico decided to retaliate by imposing tax on American sugar. Accordingly, the United States brought a claim about Mexican sugar before the WTO. Mexico conceded that the panel had jurisdiction, but argued that, because of the ongoing NAFTA proceeding, the WTO panel should not exercise its jurisdiction. Because the WTO case was inextricably linked to an earlier NAFTA case, Mexico argued, the WTO ought to defer to NAFTA. The panel decided that it had no discretion to decline to exercise its jurisdiction under the WTO DSU.[69] In response, the Appellate Body found that, once jurisdiction was confirmed, panels must exercise it and can not decline to do so.[70] The panel and the Appellate Body refused to examine the consistency of the US actions with NAFTA by saying, "[w]e see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes."[71] It seems this ruling reinforces the specific nature of the WTO panel's jurisdiction; however, the Appellate Body expressly left open this possibility when they said that, "[w]e express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[72]

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66 Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) at 443 [Pauwelyn, "Conflict of Norms"].

67 *Mexico – Tax Measures on Soft Drinks and Other Beverages* (2005), WTO Doc. WT/DS308/R (Panel Report), online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.pdf> [*Soft Drinks* case, panel report].

68 *Ibid.*

69 *Ibid.*

70 *Mexico – Tax Measures on Soft Drinks and Other Beverages* (2006), WTO Doc. WT/DS308/AB/R (Appellate Body Report), online: World Trade Organization <http://www.worldtradelaw.net/reports/wtoab/mexico-sweetenertax(ab).pdf> [*Soft Drinks* case, Appellate Body report].

71 *Ibid.* at para. 56.

72 *Ibid.* at para. 54 [emphasis added].

Joost Pauwelyn commented on this case by drawing a triple distinction, asking if non-WTO treaties can play a role in WTO dispute settlement:

a- Jurisdiction of the WTO panels: claims under WTO-covered agreements only, as confirmed in *Soft Drinks* case.[73] The compulsory/exclusive nature of jurisdiction under the WTO.

b- Interpretation of WTO provisions: reference may be made to outside treaties, pursuant to a decision of the appellate body that the WTO is not in a clinical isolation of international law, and Article 31 of the Vienna Convention on the Law of Treaties ("VCLT").[74]

c- Applicable law: the panel can use outside treaties, in particular as a defense against WTO jurisdiction or a defense to the merits of the case.[75] This where BFTAs can be used to decline jurisdiction.

In my view, without drawing any distinctions, the crucial question is whether the forum exclusion which appears in OFTA qualifies as "other circumstances" which may provide legal impediments that would preclude a panel from ruling on the merits of the case before it. The result might have differed had Mexico or the United States called on the WTO panel to enforce or apply the NAFTA choice of forum clause by declining jurisdiction or accepting that it lacked jurisdiction. In other words, had Mexico requested a NAFTA panel to resolve the dispute under NAFTA and then subsequently requested the establishment of a WTO panel to resolve the same dispute under WTO law, the WTO panel might have concluded that the choice of forum clause in NAFTA Article 2005 prevented it from adjudicating the dispute, given the measure at question was US restrictions on Mexican sugar. Perhaps this is what the appellate body had in mind when it spoke of "legal impediment". An express choice of forum clause preventing resort to both the WTO and an FTA panel might qualify as "legal impediment".[76]

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[73] Pauwelyn, "Choice of Jurisdiction," *supra* note 2 at 5.
[74] *Ibid.*
[75] *Ibid.* at 6.
[76] *United States – Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada* (2003), WTO. Doc. WT/DS257/R (Panel Report), online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/257r_a_e.pdf> [*Softwood Lumber*

The *Softwood Lumber*[77] case is another example for an overlap of judgments between the WTO and NAFTA. A WTO panel ruled that the imports of Canadian softwood lumber threaten to cause material injury to US competitors.[78] However, the NAFTA Extraordinary Challenge Committee confirmed an earlier Chapter 19 NAFTA panel conclusion that the evidence on record does not support a finding of threat of material injury.[79] With NAFTA finding in favour of Canada and the WTO in favour of the United States, the overlap of jurisdiction and judgments appears to be among the foremost of the problems that may jeopardize the legitimacy of the international trade system.

Pauwelyn mentioned that the WTO-NAFTA Spaghetti Bowl is real. Free trade negotiators should keep the overlapping jurisdictions in mind and explicitly regulate the issue within the provisions of the agreement.[80]

Study Case of OFTA (US-Oman Free Trade Agreement)

OFTA is a bilateral free trade agreement between the US and Oman, signed on 19 January 2006.[81] The growth of bilateralism around the globe has led to the creation of new legal regimes that are often more specific than global regimes. The chances for friction are increased by the new legal regimes. Accordingly, multiple sets of international regulations may apply to a given situation, thus creating complex arguments about which regulation to apply.[82] Multiplicity inevitably risks conflicts among the obligations incumbent on a state, even though the trade regimes established under the bilateral and multilateral levels may be technically different. It is not possible to divorce one from the other due to the similarities in the rights and obligations of their respective provisions – a violation of a term under the bilateral agreement would easily be deemed a violation of the WTO agreement. A settlement reached by one dispute settlement mechanism will only resolve the dispute within that system

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case, panel report]. This expression, "legal impediment," appeared in the *Soft Drinks* case, Appellate Body report, *supra* note 70.

77 *Ibid.*

78 *Ibid.*

79 Dr. Ivan Eastin, *Current Status of the Softwood Lumber Dispute Between the US and Canada*, online: CINTRAFOR <http://www.cintrafor.org/RESEARCH_TAB/Softwood%20Lumber/Current%20Status%20of%20SW%20Lumber%20Dispute.pdf>.

80 Joost Pauwelyn, "Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' is Cooking" (2006) 9 J. Int'l Econ. L. 197 [Pauwelyn, "Adding Sweeteners to Softwood Lumber"].

81 Hafner, *supra* note 13 at 850.

82 *Ibid.*

and not necessarily for the purpose of another one. Therefore, this fact undermines the tendency towards a homogenous WTO law and could stimulate uncertainty with regard to the standards to be applied to a given case.[83]

The DSU applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1."[84] These are the covered agreements, which in practice are almost all WTO agreements. Since the United States and Oman are also WTO members, and since many provisions in OFTA import WTO provisions, there is the potential for overlap between the OFTA provisions on trade and WTO agreements as applied to OFTA members. As a result, many trade disputes between OFTA members can be brought to the trade dispute settlement mechanism of either OFTA or the WTO.

Given the combination of the breadth of the subject matter of OFTA, the broad jurisdictional scope of Chapter 20,[85] and the wholesale incorporation of GATT/WTO provisions into OFTA by reference, it is almost inevitable that the Chapter 20 dispute settlement mechanism will from time to time be required to deal with GATT/WTO legal issues as well as those arising exclusively under OFTA. It is also possible that a WTO dispute panel will be required on occasion to decide peripheral OFTA issues relevant to the matter before the panel.[86]

For example, if Oman were to impose new quantitative import restrictions on leather products from the United States, then the United States could bring a claim to the OFTA tribunal or to the WTO under Article XI of GATT 1994. Similarly, if the United States were to impose internal taxes or regulations that favour national tobacco products as against tobacco products imported from Oman, then Oman could bring a complaint to OFTA under article 2.2 or to the WTO under Article III[87] of GATT 1994. This is because both provisions impose an obligation to provide national treatment, or rather an obligation not to treat imports differently from domestic products once inside the country.

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[83] Pawuelyn, "Adding Sweeteners to Softwood Lumber," *supra* note 80 at 200.
[84] *Supra* note 25 at Article 1(1).
[85] *U.S. – Oman Free Trade Agreement*, online: Office of the United States Trade Representative <http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html> [OFTA].
[86] Gantz, *supra* note 22 at 1038.
[87] Article III of GATT 1994 is about national treatment on internal taxation and regulation. It is basically the basis of national treatment principle in WTO agreements.

OFTA is a bilateral trade agreement;[88] the WTO is a worldwide organization. As the following demonstrates, each of these contexts has its own advantages, depending on the particular interests involved. On the one hand, one of the tasks of OFTA is "to create new employment opportunities and raise the standard of living for their citizens by liberalizing and expanding trade between [the two nations]."[89] Settling a dispute between OFTA members under the OFTA umbrella may be particularly important where the dispute involves sensitivities or complexities that are unique to the OFTA region. On the other hand, OFTA members may also see benefits in bringing a dispute with another OFTA member to the worldwide level of the WTO. To do so may exert more pressure on the defendant country, since more countries would then be notified of an alleged violation. This could be particularly helpful for Oman as a complainant because it does not have much influence in the OFTA context. Moreover, when the disputed measure not only affects the OFTA members but also other members of the WTO, the complainant may find valuable support with other nations that it would not otherwise have under the OFTA mechanism.

This provided the two parties, the United States and Oman, with choice of forum alternatives. The overlapping or common substantive provisions of the two trade regimes, along with subtle differences in jurisdiction, procedures, and substantive content, are providing opportunities and challenges for the government trade attorneys of both countries in deciding how best to resolve disputes among the two nations.[90] Are the choices really as broad as they appear, or in many instances are they more apparent than real? Does one mechanism offer more opportunity for political manipulation or delays than the other? Does the quality of the analysis and decision making differ as between the two entities? Is one mechanism more successful than the other in ensuring enforcement of decisions? What are the implications, if any, of decisions rendered under Chapter 20 for the OFTA parties? Is it too easy for parties to bring multiple actions in parallel fora? Finally, what factors should influence OFTA member government decisions and the efforts of private parties to encourage their respective governments to defend important interests with regard to forum selection?

Article 20.4 (Choice of Forum) of OFTA, provides that:

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[88] The United States and Oman signed the US-Oman free trade agreement [OFTA], *supra* note 85, on 19 January 2006. This Agreement was the second of its kind between the United States and a Gulf-Arab country, after the United States signed one with Bahrain in 2004. It will shortly enter into force.

[89] See OFTA, *supra* note 85 at Preamble.

[90] Gantz, *supra* note 22 at 1026.

1. Where a dispute regarding any matter arises under this agreement and under the WTO agreement, or any other agreement to which both parties are party, the complaining party may select the forum in which to settle the dispute.

2. The complaining party shall notify the other party in writing its intention to bring a dispute to a particular forum before doing so.

3. Once the complaining party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora. (emphasis added)

The forum shopping clause in OFTA or any BFTA is considered to be anticipatory forum shopping – where parties to a dispute are in a contractual relationship, they have the opportunity to anticipate and minimize problems through express provision for venue or mode of dispute resolution in their contract by means of a jurisdiction or arbitration agreement.[91] Paragraph 3 of article 20 is an exclusive forum clause – once the matter is brought before either forum, the procedure initiated shall be used to the exclusion of any other. Paragraph one, on the other hand, is an elective forum shopping clause because the complaining party is not mandated to refer to the dispute settlement mechanism instituted by the FTA.[92]

No doubt the interest of each party differs. Suppose there is a dispute between Oman and the United States on anti-dumping measures initiated by the Ministry of Trade in Oman against American products. The United States will find two forums to use; the United States definitely wants to win its case, so it will choose the forum which will most probably deliver a decision in its favour. There are a lot of elements which the US government will consider before deciding to take the dispute to the WTO or FTA forum.

On the other side, imagine a dispute between Oman and the United States on some US measures against Omani products, provided Oman

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[91] Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford: Oxford University Press, 2003) at 275-276.

[92] There are two kinds of jurisdictions clauses. The first is compulsory jurisdiction, like the one specified in article 23 of the WTO DSU. The complaining party is mandated to refer their disputes to an institution established by the constituting treaty. The second kind is a forum choice clause, where the settlement of a dispute is allowed either in the WTO forum or the constituting treaty forum at the discretion of the complaining party.

considers it a violation of US obligations under the FTA and these happen to be the same provisions and obligations under the WTO. Which forum will be amenable to Oman (a developing country with very limited resources and not much experience in WTO litigation), the panels under the FTA or the WTO? Or, do they go for multiple filings? Marceau mentioned that states do not pursue multiple dispute settlement proceedings needlessly, working instead towards ensuring that their grievances are brought before the most appropriately equipped fora for settling their disputes.[93]

Although the decision to choose one forum over the other will be made on a case-by-case basis – and a host of political, legal and practical considerations will be taken into account[94] – it is, nevertheless, reasonable to suggest that certain factors would be carefully reviewed before reaching a decision. "Forum shopping" is a phrase which has entered into the common parlance of courts or judicial bodies dealing with transnational disputes during the last three decades.[95] Practically it is undoubtedly older than that, for it constitutes a totally rational response to a situation where a range of forums is available for the resolution of a given dispute. In these circumstances, it is not surprising that plaintiffs (complainant in arbitration) or their legal advisors will be perceptive to differences between litigating in particular forums and will select that forum which offers the best prospects for the most favourable outcome from the plaintiff's perspective.[96]

Forum shopping has been used in WTO law by the complainants, like in the *Periodicals* case,[97] where the United States chose the WTO venue rather than the NAFTA forum because the latter has a cultural industries exception. WTO members exercise forum shopping after considering several elements, particularly: (1) how members of the panel are appointed, (2) the remedies available under each forum, (3) any procedural or political advantages in having this case before a certain forum, and (4) the timelines of the proceedings.[98]

The factors which both parties would look at when choosing a forum are:

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93 Marc L. Bush, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade" (2007) 61 International Organization 735 at 740.
94 Gantz, *supra* note 22 at 1097.
95 Andrew Bell, *supra* note 91 at 335.
96 *Ibid.*
97 *Supra* note 12.
98 Gantz, *supra* note 22 at 1097.

1- **How members of the panel are appointed –** Neutrality and expertise are two major elements in the appointment of panelists. I believe the process in the WTO is more objective as the citizens of the members whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.[99] The corresponding OFTA Article is 20.7(3)(b), which provides that "[e]ach party shall appoint one panelist, in consultation with the other party, within 30 days after the matter has been referred to a panel."[100] There is no such requirement in the WTO. OFTA Article 20.7(4)(b), however, provides that the panelists "be independent of, and not be affiliated with or take instructions from, either party." The expertise of the panelists is a crucial factor, too – the WTO panel is likely to have more expertise, given that most of the panelists are former or present government official representatives to GATT or the WTO.[101]

2- **The code of conduct of the panels –** While the WTO already has existing working procedures mentioned in article 12,[102] with the option to establish other rules if the parties to the dispute so agree, OFTA does not have rules of procedures. OFTA Article 20.8 obliges the two parties upon entry into force of the agreement to

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[99] See Article 8.3 of the Dispute Settlement Understanding, *supra* note 25. This Article provides that, "[c]itizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise."

[100] Article 20.7(4) of OFTA, *supra* note 85, provides that, "the panelists chosen pursuant to paragraph 3 shall:
(a)be chosen strictly on the basis of objectivity, reliability, and sound judgment and have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements;
(b)be independent of, and not affiliated with or take instructions from, either party; and
(c)comply with a code of conduct to be established by the joint committee.

[101] Gantz, *supra* note 22 at 1098.

[102] Article 12.1 of the Dispute Settlement Understanding, *supra* note 25, provides that, "panels shall follow the working procedures in appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

establish model rules of procedure, which shall ensure the number of requirements set forth in provisions (a) to (f).[103]

3- **The remedies available under each forum –** WTO remedies range generally between compensation and suspension of concessions.[104] OFTA Article 20.10 provides that "the Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel."[105] This provision opens the door for political negotiations. In a dispute between Oman and the United States, suppose that Oman won a case against the United States. Both parties would have to agree on resolution of the dispute, so the final report of the FTA panel is not a binding decision. It leaves room for parties to negotiate recommendations and modify the report, but there is a limitation in that the resolution has to conform with the determinations and recommendations of the panel. It is far from clear how this limitation will actually limit the agreement of the parties. While the DSU does not have same provision, the report of the panel has to be implemented by the member concerned within 60 days of the release of the report. The WTO has a more effective enforcement system, as the WTO procedures for surveillance and for suspension of concessions are more developed than those of BFTA.

4- **Any procedural or political advantages in having this case before a certain forum –** In the interim report stage at the WTO,

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[103] Article 20.8 provides that, "the parties shall establish by the date of entry into force of this agreement model rules of procedure, which shall ensure:
(a) a right to at least one hearing before the panel and that, subject to subparagraph (f), such hearings shall be open to the public;
(b) an opportunity for each Party to provide initial and rebuttal submissions;
(c) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be public, subject to subparagraph (f);
(d) that the panel shall consider requests from nongovernmental entities located in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties;
(e) a reasonable opportunity for each Party to submit comments on the initial report presented pursuant to Article 20.9.1; and
(f) the protection of confidential information."

[104] Gantz, *supra* note 22 at 1098.

[105] See Article 20.10 of OFTA, *supra* note 85.

there is no single case where the panel has changed its findings. This would be met with a lot of resistance within from other WTO members, so most of the changes are limited to minor issues. Under OFTA, there is more of a chance that the panel will be affected by the influence of one of the parties – probably here the United States. OFTA Article 20.9(3) provides that, "[a]fter considering any written comments by the parties on the initial report, the panel may modify its report and make any further examination it considers appropriate." The language of OFTA is more general, which gives more leeway to the panel to change its finding under the justification that it has to undergo further examination. The WTO panel can not make such changes because the comments of the parties should be discussed in a meeting and incorporated as precise aspects of the report. To sum up, the initial report stage will be a time where one of the parties will exercise its leverage to maintain and secure advantages that may impair the impartiality of the whole process. Consequently, though BFTAs often appear to have WTO-like rule-based dispute settlement, they often in fact exhibit aspects of power-based dispute settlement.

5- **The availability of an appeal –** Unlike the WTO DSU, the FTA is a one-stage system. It does not have a standing appellate body; therefore there is no chance of reviewing the decision of the panels. Appellate review is one of the features that distinguish the WTO; hence it has a higher degree of predictability and consistency than the FTA tribunal.[106] This could be mitigated by the fact that the OFTA tribunal would use the GATT and WTO panel and Appellate Body decisions as precedents.

6- **The timeliness of the proceedings –** On this count, there is little variance between the two forums. OFTA has a three-step process.[107] This process begins with a request for consultations,[108] and "[e]ither Party may request the consultation with the other Party with respect to any matter described in Article 20.2 by delivering written notification to the other Party. If

106 Gantz, *supra* note 22 at 1092.
107 *Ibid.*
108 See Article 20.5(1) of OFTA, *supra* note 85.

a Party requests consultations, the other Party shall reply promptly to the request for consultations and enter into consultations in good faith."[109] Then,

> [i]f the consultations fail to resolve a matter within 60 days of the delivery of a Party's request for consultations under Article 20.5, 20 days where the matter concerns perishable goods, or such other period as the Parties may agree, either Party may refer the matter to the joint committee by delivering written notification to the other Party. The joint committee shall endeavor to resolve the matter.[110]

The matter may then be referred to a dispute settlement panel "[i]f the Joint Committee has not resolved a matter within 60 days after the delivery of the notification described in Article 20.6, 30 days where the matter concerns perishable goods, or such other period as the Parties may agree."[111] In general, delays in the process are less likely in the WTO than chapter 20, due to the existence of an independent secretariat and a mechanism for choosing panelists from a permanent roster. As long as there is no permanent OFTA roster, a party has some control over the proceedings simply by drawing out the selection process. Thus, an OFTA party that wishes to go slow initially may wish to encourage dispute resolution under Chapter 20 rather than the WTO, where it is more difficult for a party to delay the initial proceedings.[112]

7- **The applicable law –** Despite the marked convergence between WTO law and any free trade agreement like NAFTA and OFTA, there are still some differences between the two laws. The distinction gets murky when it comes to the interpretation of the provisions in these agreements. The WTO panels would rely on BFTAs as rules of international law for the interpretation of the treaties under both Articles 3.2 DSU and 31.3(c) of the Vienna Convention on the Law of Treaties,[113] while the FTA tribunal will

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109 *Ibid.*
110 *Ibid.* at Article 20.6
111 *Ibid.* at Article 20.7.
112 Gantz, *supra* note 22 at 1092.
113 Isabelle Van Damme, "What Role Is There for Regional International Law in the Interpretation of the WTO Agreements?" in Lorand Bartels & Federico Ortino,

use the WTO law as a context for the interpretation of the obligations of the parties under the BFTA. Nevertheless, BFTA panels will be limited to the provisions of the FTA if it is not mirrored in WTO law, particularly in respect of third-wave trade agreements signed lately by the Bush administration.[114]

8- **Whether or not the complainant wants to set a precedent –** Marc Bush argued that sometimes the complainant prefers to set a regional precedent rather than a multilateral one.[115] He distinguishes between two types of countries: liberal and less liberal.[116] Although his arguments may be relevant in the context of forum shopping between regional FTAs and the WTO, they are of less importance in the relationship between bilateral FTAs and WTO. Steinberg highlighted the importance of the ruling not only in its implications for the national measures that are subject of the decision, but also in its precedential value and how it bears on its other trade partners.[117] On a related front, there may be political advantages for seeking the multilateral option by bringing the complaint to the WTO. Other WTO members could support the position; whether by amicus briefs, joining the action as third party, or through peer pressure. Such a tactic is likely to be used by Oman.[118] In the context of a negotiated settlement, another consideration may be if the settlement needs to be implemented only with regard to a single nation rather than for multiple plaintiffs.[119] The failure to comply with a BFTA ruling is an irritant in bilateral relations; failure to comply with WTO ruling is not only bilateral irritant, but has multilateral consequences. The non-compliance is raised at least monthly at

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eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 553 at 566.

[114] Andrew L. Stoler, "The Australia – United States FTA as a 'Third Wave' Trade Agreement: Beyond the WTO Envelope" in Andrew Mitchell, eds., *Challenges and Prospects for the WTO* (London: Cameron May, 2005) 253 at 256. There are three types of FTA: the first wave, which is pre-1995 GATT trade agreements; the second wave, being FTA that mirror WTO provisions; and the third wave, which goes beyond the provisions of the WTO agreements.

[115] Bush, *supra* note 93 at 740.

[116] *Ibid.* at 745.

[117] *Ibid.* at 746.

[118] *Ibid.* at 760.

[119] Gantz, *supra* note 22 at 1104.

the WTO report and the defending party will be accused of cavalierly undermining an otherwise successful dispute settlement mechanism. Thus, countries are more likely to comply with a WTO ruling to avoid the hassle of the multilateral consequences.[120]

PART III: COMPARING INTERNATIONAL REGIMES

The WTO is a special branch of public international law. This part provides a comparative analysis of how other international regimes have addressed the problem of overlapping fora; it elaborates on the general principles of law that international courts and tribunals may apply to resolve problems of jurisdictional overlap in situations where the relevant treaties/agreements have no explicit conflict clauses.[121] It then provides concrete proposals to amend some WTO provisions so as to avoid duplication of dispute settlement proceedings and to steer parties to the forum that is, according to a decision made by OFTA members, best suited to resolve a particular dispute.

Can We Find Any Solutions in International Law

The forum exclusion clause that exists in almost every FTA may be effective in solving the problem of overlap of jurisdiction between FTA tribunals, however its impact outside that system (in relation to WTO DSB) may depend on the application of the Vienna Convention on the Law of Treaties.[122] This would require us to investigate the status of free trade agreements under public international law in general before we proceed with some suggestions and recommendations for the resolution of this potential problem.

Public international law is the aggregate of the legal norms governing the international relations of nation-states.[123] WTO law is public international law.[124] Trade relations qualify as an international relation between countries, and WTO agreements set out legal norms – not merely a collection of gentlemen's agreements, usages or rules of

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120 William J. Davey, "Dispute Settlement and RTAs: A Comment" in Lorand Bartels and Federico Ortino, eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 343 at 356.

121 Mictchell and Voon, *supra* note 64 at 5.

122 *Ibid.*

123 Barry E. Carter *et al.*, *International Law*, 5th ed. (New York: Aspen, 2007) at 1-2.

124 Van den Bossche, *supra* note 11 at 61.

disputes. On a related front, WTO agreements and free trade agreements are treaties – a recognized source of public international law – defined as international agreements concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.[125] Article 3.2 of the WTO DSU provides that treaties "clarify the existing provisions of the covered WTO agreements in accordance with customary rules of interpretation of public international law."[126]

Free trade agreements result in the development of the two parallel systems of jurisprudence: the WTO mechanism and the bilateral/regional trade agreement mechanism.[127] The disjuncture in the field of dispute settlement leads a claimant into either a free trade area approach or a WTO approach. This result has the potential of creating uncoordinated bodies of jurisprudence that purport to govern similar or even identical legal issues.[128]

Pauwelyn classified three kinds of WTO rules:[129]

1- WTO rules that come with non-existent rights or which establish new norms that never existed in international law before, like non-discrimination principles in trade in services.[130]

2- WTO rules that deviate from general international law, like suspension of concessions in contrast to countermeasures, and other pre-existing rules of international law, such as bilateral quotas.[131]

3- WTO rules that confirm the pre-existing rules of international law, like DSU Article 3.2, which provides that WTO covered agreements are to be interpreted in accordance with customary rules of interpretation of public international law.[132] In such

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125 Carter, *supra* note 123 at 93.
126 See Article 3.2 of the Dispute Settlement Understanding, *supra* note 25.
127 Cone, *supra* note 31 at 565.
128 *Ibid.* at 564.
129 Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 A.J.I.L. 535 at 540 [Pauwelyn, "The Role of Public International Law in the WTO"].
130 *Ibid.*
131 *Ibid.*
132 *Ibid.*

situations, the Vienna Convention on the Law of Treaties comes into play.

There are also two kinds of non-WTO rules still applicable to WTO disputes:

1- Non-WTO rules that preceded the WTO are:

   a. Relevant to and may have impact on WTO rules;

   b. Have not been contracted out of, deviated from, or replaced by the WTO treaty.[133]

2- Non-WTO rules that came after the signing of the WTO covered agreements:

   a. Are relevant to and may have impact on WTO rules;[134]

   b. Either add to or confirm existing WTO rules or contract out of, deviate from, or replace aspects of existing WTO rules.[135]

General Principles of Public International Law

In the following part, we will discuss how general principles of public international law play out in the context of the WTO legal system. General principles of law and principles of customary international law are used by WTO panels to clarify the provisions of the WTO, thus enhancing security and predictability in international trade.[136] Moreover, Mitchell proposed that these principles can be used beyond interpretation either to resolve procedural matters or in the exercise of the inherent jurisdiction of WTO tribunals.[137]

a. Res Judicata

Res judicata is a well-established principle of public international law.[138] States generally tend to comply with judicial decisions or, at least, do not openly challenge it. The doctrine of *res judicata* refers to the

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133 *Ibid.*
134 *Ibid.*
135 *Ibid.*
136 Mitchell, *supra* note 49 at 799.
137 *Ibid.*
138 Shany, *supra* note 1 at 245.

effects of a judgment on subsequent litigation. The principle of *res judicata* fosters reliance on judicial action, preventing the wasted use of judicial machinery and the possibility of inconsistent results.[139] Nonetheless, three conditions must be met in order for the principle of *res judicata* to apply: (1) the identity of parties must be the same; (2) the identity of object or subject matter must be the very same issue that is in question; and (3) the legal cause of action must be identical.[140]

For *res judicata* to qualify as an international custom, two requirements are needed: (1) the objective element; represented by the extensive, widespread and consistent practice of states over time, and (2) *opinio juris*, which is a subjective element which evidences the belief of the states that this practice is required.[141] To prove an international custom, examining the practice of international tribunals is crucial. *Res judicata* has been subject to sporadic and inconsistent practice by international tribunals, which places serious doubt on the question of whether the first requirement has been met. On a state level, states sometimes waive the effects of *res judicata* by agreeing to adjudicate a previously-settled matter before another new forum.

In principle, a legal finding by an OFTA panel under an OFTA claim does not have binding or *res judicata* force before a WTO panel examining a claim under WTO provisions. In that case, although the parties and subject matter may well be the same, the legal cause of action is different as it arises under a different treaty/agreement. Nonetheless, when the WTO and OFTA provisions under which the respective claims are made are in substance the same (for instance, both raise a violation of the national treatment principle), one could argue that the doctrine of collateral estoppels applies. This principle applies when a litigant attempts to retry an issue which has been finally determined on

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[139] Harvard Law Review, "Developments in the Law: *Res Judicata*" (1952) 65 Harv. L. Rev. 818 at 820 ["Developments in the Law: *Res Judicata*"]. According to the article, "*res judicata*" is used broadly to cover all the binding effects of former adjudications. "Merger" and "bar" are used to denote the effects of *res judicata* between the same parties where the same cause of action is involved. "Collateral estoppel" covers the operation of *res judicata* in a subsequent suit on a different cause of action involving some of the issues determined in the initial action. Where a judgment is not rendered on the merits so as to extinguish the cause of action by merger or bar, the term "direct estoppel" is used to denote the effect of that judgment when the same cause of action is brought a second time.

[140] Joost Pauwelyn, "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions" (2004) 13 Minn. J. Global Trade 231 at 237 [Pauwelyn, "Global, Regional, or Both?"].

[141] Mitchell, *supra* note 49 at 800.

the merits. Collateral estoppel, also known as issue preclusion, applies when: (i) the issue is identical with the issue decided in the prior proceeding; (ii) the issue was necessarily decided in the prior proceeding; and (iii) the litigant had a full and fair opportunity to litigate the issue in the prior proceeding.[142] If collateral estoppels were to apply before a WTO panel, then a WTO panel could preclude Oman from bringing an issue previously decided by an OFTA panel between the same parties. A WTO panel also could apply this doctrine to the determination of facts and to the legal characterization of facts by the previous OFTA panel, or vice versa.

However, a panel recently refused to apply the basic principle of estoppels in respect of a claim defended by Argentina.[143] Argentina argued that, because Brazil had challenged the same measure previously before MERCOSUR, they could not bring the case again before the WTO. Argentina explicitly refused to invoke the principle of *res judicata*. Although the panel refused to decide on whether or not the principle of estoppels can apply before a WTO panel, it used the following three conditions for estoppels to be activated: "(i) a statement of fact which is clear and unambiguous; (ii)this statement must be voluntary, unconditional, and authorized; (iii)there must be reliance in good faith." When applying the first condition, the panel did not consider that Brazil had made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. The *Protocol of Brasilia*,[144] under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. On these grounds, the panel refused to apply the principle of estoppels and continued to examine Brazil's claims.[145]

There are some general principles of law which deal with the determination of jurisdiction. When deciding jurisdictional issues in the absence of conflict clauses in the relevant treaties, an international court or tribunal may decide that the more specific treaty provision that confers jurisdiction prevails over the more general one. In circumstances where the parties have made special provision for a certain category of disputes, in the absence of an indication to the contrary it must be

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142 Developments in the Law: *Res Judicata*, *supra* note 139 at 821.
143 Shany, *supra* note 1 at 245.
144 *Protocol of Brasilia for the Solution of Controversies*, MERCOSUR, 17 December 1991, online: Foreign Trade Information System <http://www.sice.oas.org/trade/mrcsr/brasilia/pbrasilia_e.asp> [*Protocol of Brasilia*].
145 Shany, *supra* note 1 at 245.

supposed that they intended that it is this special provision and not some more general acceptance of the jurisdiction of another tribunal that should be applied to a dispute in that category. The principle of *lex specialis* is an argument that runs in favour of the OFTA panel having jurisdiction over a particular dispute, rather than the WTO panel, in the absence any new provisions that would regulate their relationship. Moreover, the fact that the OFTA mechanism was created later in time than the WTO mechanism could provide further support for this claim, especially since the Vienna Convention expressly adopts the *lex posterior* principle.

b. Forum Non-Conveniens

Forum non-conveniens is one of the common law doctrines.[146] Under American law, it is one of the limitations on the subject matter within the jurisdiction of the courts. If, upon motion by a party, the court finds that the interests of substantial justice require an action to be heard in the court of some other state, it may stay or dismiss the action in whole or in part. In deciding whether to grant the motion, the court must weigh the convenience of the court for both the plaintiff and the defendant.[147] Unless the balance of the various factors favours the defendant, the plaintiff's choice of forum should not be disturbed. Some scholars have proposed the application of this doctrine to the international legal system.[148] This doctrine could lead an international court or tribunal to decline to exercise jurisdiction on the ground that that some other forum is more appropriate, in the sense of being more suitable for the ends of justice. In domestic legal systems, criteria at play in deciding on the appropriate forum commonly include nexus factors, expenses, availability of witnesses, the law governing the transaction, the place where the parties reside or carry on business, and the interests of the parties. Shany doubts the ability to transpose this doctrine to international law.[149]

Nonetheless, under WTO law it is unlikely that a WTO panel would refuse to examine claims under WTO rules, simply because the OFTA dispute settlement mechanism is more specific and more recent. In the *Soft Drinks* case, Mexico tried to argue that NAFTA is a more appropriate forum to adjudicate the dispute between Mexico and the

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146 Laurel E. Miller, "*Forum Non-Conveniens* and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions" (1991) 58 U. Chi. L. Rev. 1369 at 1371.
147 *Ibid.*
148 Shany, *supra* note 1 at 246.
149 *Ibid.*

United States, but the panel and Appellate Body rejected this argument and confirmed that the panel has no authority to decline jurisdiction on WTO claims. However, we should make a distinction between WTO claims and FTA claims. In the latter, it is possible that if one of the parties brings an FTA claim to a WTO panel, *forum non-conveniens* could be used as a defense for declining jurisdiction.

c. Forum Exclusion Clauses (Treaty Clauses)

Forum exclusion clauses provide that, when a dispute arises regarding a matter under both OFTA and WTO, the complaining party may choose where to go. Once such choice is made, however, the other forum can no longer be used. If triggered in the *Soft Drinks* case, it would mean that the WTO panel would not have jurisdiction. This question of whether the WTO panel would give effect to forum clauses in FTAs is, however, crucial. It can be an important solution to the problem of overlap and duplication between WTO and FTA procedures.

A question will arise about how forum exclusion clauses will fit into WTO jurisprudence. Is it within the interpretation process of WTO provisions or under the process of applicable law? Forum exclusion clauses will, sooner or later, be introduced before a WTO panel. The link between the WTO and FTAs is obvious: GATT article XXIV,[150] which recognizes FTAs and Article 30 of the Vienna Convention on the Law of Treaties, explicitly provides that later treaties can override earlier ones.[151]

d. Lex Posteriori

Article 30(2) of the Vienna Convention on the Law of Treaties provides that, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[152]

Article 21.3(2)(a) of OFTA provides that "[n]othing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the

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[150] Article XXIV(5) of GATT provides: "accordingly, the provisions of this agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area."

[151] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 at Article 30 (entered into force 27 January 1980) [*VCLT*].

[152] *Ibid.* at Article 30(2).

extent of the inconsistency."[153] This OFTA provision falls under article 30(2) of the Vienna Convention on the Law of Treaties, which provides: "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Therefore, the conflict rule in OFTA points at the superiority of the tax convention.

Nonetheless, FTAs can explicitly or impliedly confirm that the Vienna Convention rules apply. For example, Article 21.9(2) of the Australia-United States Free Trade Agreement ("AUSFTA") provides that: "[t]he panel shall consider this Agreement in accordance with applicable rules of interpretation under international law as reflected in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (1969)."[154] Pauwelyn argued that impliedly the FTA interpretation would be within the VCLT rules in the same way as WTO covered agreements in the WTO jurisprudence. In OFTA, however, it is completely different. Article 20.1 provides: "[t]he Parties shall endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation."

The VCLT reflects the *lex posterior*,[155] but whether this rule is enough to provide an answer to the overlap of jurisdiction is problematic. Burke White expressed his concerns about *lex posterior* and how effective this doctrine in resolving conflicts.[156] He mentioned that *lex posterior* and *lex specialis* are insufficient to resolve the overlap problem.

e. Comity

The principle of comity – found in the domestic conflict of laws norms – holds that a jurisdiction should show respect for and some degree of deference to other judgments operating in other jurisdictions.[157] There is no compelling reason to restrict the application of the principle of comity to jurisdictional interactions involving domestic issues only. Conversely, the same considerations can be found in the international level – like the need to coordinate multiple proceedings.[158] This rule could

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153 See OFTA, *supra* note 85 at Article 21.3.2.
154 *U.S. – Australia Free Trade Agreement*, 18 May 2004 (entered into force 1 January 2005), online: Office of the United States Trade Representative <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html?ht=> [AUSFTA].
155 Hafner, *supra* note 13 at 859.
156 Burke-White, *supra* note 24 at 971.
157 Shany, *supra* note 1 at 261.
158 *Ibid.*

be used for the promotion of a unified international law system. Giving credit to other judgments from different jurisdictions concerning the same matter can contribute effectively to the creation of a framework for judicial interaction.[159]

Some argue that comity could bring the solution for competing jurisdictions. It can ensure consistency and coherence whilst enabling the international courts to meet their duty to exercise their power in an equitable and independent manner.[160] On the contrary, comity can not be introduced into international law so easily. There should be some consistent practice by the international trade law courts so the WTO panel could apply it when they have a previous judicial decision from an FTA panel. It can base its decision upon comity in relying on this decision and abstaining from going through the merits of the case if the claim in substance constitutes the same claim which was adjudicated before in the different jurisdiction.

It will be assumed that the principle of comity can be introduced into WTO jurisprudence. The reasoning of the comity principle simply means that credit is given to the other jurisdiction. The same is possible in the WTO context, where the WTO panel could be obliged to give credit and deference to the judgments of the FTA panels. The WTO agreements already authorize the establishment of FTA panels, which impliedly means that the judgments of those panels should be respected or at least taken into consideration in interpreting WTO law.

There seems to be little judicial practice and not enough international agreement to treat comity as one of the principles of customary international law.[161] Moreover, comity is not even a clear principle in domestic law; not all countries use the principle of comity to defer to foreign judgments.[162] Even in the United States, comity has only been recently introduced in the *Zapata* case.[163] It is hard to recognize comity as a general principle of law under article 38(1)(c) of the International Court of Justice statute.[164]

Other scholars are expanding the concept of comity, but there is doubt from the outset as to whether it is even an accepted international principle. Another aspect of comity is inter-judicial dialogue, which has

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159 *Ibid.* at 260.
160 *Ibid.* at 260-262.
161 *Ibid.* at 262.
162 *Ibid.*
163 *The M/S Bremen v. Zapata Off-Shore Co.*, 92 S. Ct. 1907 (1972) [*Zapata* case].
164 *International Court of Justice Statute*, 26 June 1945, 33 U.N.T.S. 993 [ICJ Statute].

serious implications for the unity of the international legal order as it provides actors at all levels with means to communicate, share information, and possibly resolve potential conflicts before they even occur. Direct conversation between judges and recognition of another's jurisdiction can help mitigate conflicting outcomes and ensure coherent rulings. Anne Slaughter describes the dialogue between international judges as developing new understandings of comity that go beyond deference to dialogue by positive comity.[165] Arguably, expansion of the doctrine of comity may be one of the solutions for the daunting problem of overlap of jurisdiction in the realm of international trade.[166]

The principle of comity in WTO law has not been explored. It is hard to believe that a WTO panel can decline jurisdiction under the principle of comity. On the other hand, comity may be used as one of the elements that can justify a ruling on declining jurisdiction.

In the *Pyramids* case, the ICSID tribunal stated that, when the jurisdiction of two unrelated and independent tribunals extend to the same dispute, 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. The *Pyramids* case dealt with a jurisdiction competition between international and domestic tribunals. In the WTO context, however, the competition is to be between two international tribunals: the FTA panel and the WTO. Shany has questioned if comity can work in WTO law due to the strict procedures and deadlines where there is lack of discretion to stay the proceedings.[167]

PART IV: CONCLUSION

With the emergence of the bilateralism era represented in the explosion of BFTAs, multilateralism is no longer the main focus of legal scholarship on international trade. The importance of bilateralism is revealed by the fact that it is distinct and separate from regionalism. Bilateral/regional fora lead to dispute settlement mechanisms springing up across the landscape of the global trade system. Accordingly forum shopping, overlap of jurisdictions and judgments and *res judicata*, among a host of other things, are issues that will need to be dealt with in the near future.

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165 See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).
166 Burke White, *supra* note 24 at 972.
167 Shany, *supra* note 1 at 261.

Overlap of jurisdiction is at the heart of the legitimacy crisis in the international trade system. With the increase in bilateral free trade agreements and their dispute settlement mechanisms, litigation produced by the BFTAs will probably greatly exceed the litigation produced by the WTO. Hence, the exclusive focus on the WTO dispute settlement mechanism is no longer appropriate.[168] Negotiators of FTAs also have to realize this problem and try to think through some innovative means to avoid or resolve jurisdictional overlapping in order to incorporate these means into their trade arrangements. The need to strengthen the coherence of the WTO legal system calls for new methods to be explored in order to unify the international trading judiciary. Measures should also be taken to alleviate the procedural problems associated with jurisdictional overlaps, *inter alia*, by introducing additional jurisdiction-regulating rules capable of providing greater levels of coordination and harmonization to the relations between the various *ad hoc* panels. It is submitted that the combined effect of a judicial system with more organized, coherent jurisdictional inter-fora relations will result in the strengthening of the unity of international trade law.

I would urge the WTO members to think seriously of the appellate body as the main player in unifying the international trading system. For the Appellate Body to earn a place as the higher court in a non-hierarchical order, it must seize opportunities to assert control over FTA tribunals and to provide an authoritative interpretation of general international law rather than continue to base decisions on narrow or fact-specific grounds. If the International Court of Justice is the principal judicial organ of the UN, the Appellate Body should assume the full mantle of its role as the principal judicial organ of the WTO.[169] The expansion of the jurisdiction of the Appellate Body is inevitable due to the growing norms of international trade law. There is, however, little likelihood that members of the WTO would agree on empowering the Appellate Body with some form of reference jurisdiction.

Last but not least, I find that international law is still able to provide some useful guidance on the matter; contrary to scholars who point out that, under international law's current status, no rules seem to offer any effective answer to resolve the overlap of jurisdiction in WTO contexts and regional trade agreements. Pauwelyn broadly suggested

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168 Livschiz, *supra* note 37 at 532.

169 Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, D.C.: American Enterprise Institute, 2001) at 176. He argues that the Appellate Body has become the real power in the WTO system; the Appellate Body has demonstrated a strong determination to have the final word on all legal issues.

that the application of non-WTO findings to WTO claims though the provisions of the WTO DSU do not support this assertion. However, using non-WTO law to determine if there is jurisdiction or not is not the same. The inherent jurisdiction[170] of WTO panels, *res judicata*, comity and other principles can be used to resolve the overlap of jurisdiction with FTA tribunals, thus filling the gap that exists in multilateralism. International law principles will continue to interpret and complement WTO rules, provided they are further developed not only in the WTO jurisprudence but in international tribunals in general.

[170] Inherent jurisdiction (also termed incident or implied jurisdiction) is the jurisdiction that flows from the nature of the judicial function and does not depend on specific provisions in the instrument establishing the court or tribunal.