
Overcoming Jurisdictional Isolationism at the WTO—FTA Nexus: A Potential Approach for the WTO

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Abstract

The proliferation of free trade agreements which share dispute settlement jurisdiction with the WTO has added to claims of disintegration within international trade law. Recent WTO jurisprudence is indicative of the limits of WTO members' ability to invoke provisions of an FTA as a 'jurisdictional defence' where the dispute implicates trade measures under both WTO and FTA rules. Such uncertainty in the law has the potential not only to create issues of incoherent jurisprudence, but also to threaten the stability and predictability of the multi-lateral trading system. These issues are likely to continue to arise as FTAs continue to grow in abundance while the Doha round is stalled. Based on analysis of a selection of state-state disputes before other fora such as the International Court of Justice, this article argues that in the interest of the effective administration of justice, the WTO's judicial organ should use its inherent power of comity to decline to exercise jurisdiction so that the dispute can be resolved by an FTA tribunal where a dispute is inextricably connected with a dispute under an FTA and that exercising jurisdiction would not be reasonable in the circumstances.

1 Introduction: The Fragmentation of International Law

International law is increasingly being described as fragmented, arising from the specialization of its different branches and the functionalist theory of international organization

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that underpins the United Nations system.¹ While this increased functional specialization has occurred apace with the development of greater expertise in issue areas such as trade law and human rights law, the result of such specialization has been a degree of fragmentation both between and within purportedly discrete strands of international law which prioritize different norms.² This article focuses on one facet of the broader issues surrounding fragmentation of international law: the jurisdictional nexus between WTO and state–state dispute settlement under free trade agreements (‘FTAs’). Part 2 of the article discusses the issues of forum selection and jurisdictional overlap in the international trade law context, using two WTO cases as examples of the emerging problem of jurisdictional isolationism. Part 3 considers the effectiveness and limitations of the Vienna Convention on the Law of Treaties. Part 4 considers the ability of international tribunals to apply judicial comity by declining to exercise jurisdiction where there are related proceedings before more than one tribunal, analysing a selection of state–state disputes before other fora such as the International Court of Justice. Part 5 applies this approach to the WTO. First, it notes prior Appellate Body jurisprudence which demonstrates a willingness to go beyond a strict textual approach to treaty interpretation and consider the purpose of the multilateral trading system as a whole. This Part then proposes a basis upon which the WTO could apply comity when dealing with the problem of competing jurisdiction in a situation where a dispute arises in parallel or successively under both WTO and FTA rules, based on an interpretation of the WTO tribunal’s inherent judicial powers. The article concludes that, given the circumscribed mandate of the WTO’s judicial organ, the power to apply comity should be exercised sparingly in order to maintain the legitimacy of the WTO’s dispute settlement mechanism.

2 The Relationship between WTO and FTAs: Emerging Problems

A *Overlapping Jurisdiction and Forum Selection*

The subject matter of WTO agreements overlaps with FTAs such as NAFTA³ and MERCOSUR,⁴ as well as economic courts such as those in Africa⁵ and Central

¹ See the Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 Apr. 2006, at para 34.

² This is exacerbated by the fact that treaties are negotiated by different clusters of states and are adjudicated on by a ‘non-hierarchical proliferation’ of judicial bodies: Kingsbury, ‘Is the Proliferation of International Courts and Tribunals a Systemic Problem?’, 31 *NYU J Int’l L and Politics* (1999) 679, at 680. See also Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, 31 *NYU J Int’l L and Politics* (1999) 919.

³ North American Free Trade Agreement (NAFTA), opened for signature on 17 Dec. 1992, entered into force on 1 Jan. 1994, 32 *ILM* (1993) 289. NAFTA has similar dispute settlement provisions to the subsequent US–Chile and US–Singapore FTAs.

⁴ Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Republic of Uruguay, 26 Mar. 1991, 30 *ILM* 1041 (establishing Mercosur–Mercado Común del Sur).

⁵ E.g., the Protocol on Trade to the Treaty of the Southern African Development Community, opened for signature on 17 Aug. 1992, entered into force on 24 Aug. 1996, 32 *ILM* 116.

America.⁶ As a result, disputes at the WTO may overlap with disputes under FTAs and within customs unions.⁷ Customs unions and closely integrated regional trade agreements often confer exclusive jurisdiction on the dispute settlement mechanism, precluding members from bringing the dispute to the WTO.⁸ FTAs, by contrast, usually allow parties to choose their preferred forum, although many of these agreements prevent the parties from bringing the claim a second time to another tribunal.⁹ Neither of these jurisdictional arrangements prevents states from re-framing their dispute under WTO law. NAFTA, for example, contains a choice of forum clause, but makes any choice exclusive: once dispute settlement procedures have been initiated under either NAFTA or the WTO, the other forum is not supposed to have jurisdiction.¹⁰ Similar choice of forum clauses appear in US–CAFTA,¹¹ MERCOSUR,¹² the EU–Chile FTA, and other FTAs.¹³

⁶ E.g., the Andean, Caribbean, and Central American Courts of Justice; the Economic Court of the Commonwealth of Independent States, the Common Market of Eastern and Southern Africa, the Economic Community of West Africa. See Petersmann, 'Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade', 27 *U Pennsylvania J Int'l Economic L* (2006) 273, at 290.

⁷ More broadly, WTO jurisdiction overlaps with that of non-trade-focused dispute settlement fora, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea, and the Permanent Court of Arbitration. WTO disputes may be linked to broader disputes before these tribunals, although the WTO may be seen as a more effective forum for resolving disputes given the relative speed of delivering judgments and perceived greater enforcement powers created by the threat of cross-sectoral retaliation. Because the WTO dispute settlement mechanism is competent to examine only breaches of WTO law, it does not prevent other fora such as the ICJ from successively or simultaneously examining other aspects of a particular dispute. Parallel proceedings in WTO and a non-trade law tribunal to date have had the effect of bringing proceedings to a standstill: see *Nicaragua – Measures Affecting Imports from Honduras and Colombia* (WT/DS188, WT/DS201, request for consultations received on 17 Jan. 2000 and 6 June 2000 respectively) began in 1999, although a panel has not yet been composed to examine the dispute; and was lodged in parallel to the *Case Concerning Maritime Delineation between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*). At the time of writing, hearings on the merits of the dispute had been heard and the Court was deliberating: see www.icj-cij.org/docket/index.php?pr=1908&p1=3&p2=1&case=120&p3=6, last accessed on 27 July 2007. The *Case Concerning Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (*Chile v. European Communities*) Case No 7, available at: www.itlos.org/start2_en.html, and *Chile – Measures Affecting Transit and Importation of Swordfish* dispute (WT/DS193, request for consultations received on 19 Jan. 2000) consists of claims before both the WTO and UNCTOS. Both aspects of the dispute are currently suspended by mutual agreement of the parties, pursuant to a provisional arrangement.

⁸ Pauwelyn, 'Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions', 13 *Minnesota J Global Trade* (2004) 231. A notable exception is Mercosur, in which parties have a choice of forum, including the WTO.

⁹ *Ibid.*, at 285.

¹⁰ NAFTA Art. 2005(6). However, the respondent may compel certain types of disputes to be held under NAFTA: Art. 2005(3)–(4), relating to the environmental side agreements; sanitary and phyto-sanitary measures; or if a third NAFTA party requests the dispute to be settled under NAFTA.

¹¹ United States–Central America Free Trade Agreement, Art. 20.3 (Choice of Forum).

¹² Olivos Protocol for the Settlement of Disputes in Mercosur, opened for signature on 18 Feb. 2002, entered into force on 10 Feb. 2004, 42 *ILM* (2003) 1.

¹³ US bilateral FTAs such as US–Singapore, US–Australia, and US–Central America–Dominican Republic contain similar dispute settlement provisions. See www.ustr.gov/assets/trade_agreements/bilateral/, last accessed on 1 Jan. 2007.

Given the proliferation of FTAs in recent years and their substantive overlap with WTO law, forum selection has become an important part of international trade policy. An array of political and economic factors creates different incentives to choose a certain forum.¹⁴ A particular jurisdiction might be chosen where the procedural rules (such as the ability to block the appointment of panellists to hear the dispute) or substantive rules (for example, exceptions to general rules to allow for protection of certain industries)¹⁵ favour the complainant.¹⁶ A state may view its dispute as specific to its regional context and consider that dispute settlement under an FTA is the best approach. Conversely, if the applicable laws are the same in the WTO and the FTA, the state may prefer to litigate at the WTO so as to allow other members to participate as third parties, thereby framing the issue as commercial rather than political. The possibility of appellate review at the WTO is another consideration, as is the strength of the WTO's compliance mechanism compared with the power-based aspects of dispute settlement and an often greater impact of power disparities between parties to FTAs.¹⁷

Overlap of jurisdiction in international trade law coupled with the rise in adjudicative fora which have compulsory jurisdiction (such as the WTO) increases the risk of forum shopping and conflicting decisions being delivered and hence of fragmentation of international law. This can occur where divergent judgments emanate from two different international dispute settlement fora with the same or a similar normative lens, such as the WTO and NAFTA.¹⁸ Divergent results from different fora (faced with similar facts and law to apply) can diminish legal security, as actors are less likely to be able to predict the outcome of a proposed course of action and anticipate the legal consequences of their actions.¹⁹ While the WTO operates *de facto stare decisis*²⁰ allowing for pragmatic evolution of jurisprudence across many different subject areas,²¹ this cohesion has not been as consistent when confronted with jurisdictional issues. A key issue, therefore, is where tribunals share overlapping jurisdiction in a non-hierarchical manner, how the different dispute settlement fora relate to one another, and which tribunal should hear a dispute or closely related disputes that arise simultaneously or successively.²² In particular, a key question is whether a tribunal such

¹⁴ See Petersmann, *supra* note 7, at 297; Pauwelyn, *supra* note 10, at 246.

¹⁵ See, e.g., Report of the Appellate Body, *Canada – Certain Measures Concerning Periodicals* WT/DS31/AB/R, 30 June 1997. 'Cultural industries' are excluded from the purview of NAFTA.

¹⁶ Petersmann, *supra* note 7, at 282.

¹⁷ Davey, 'Dispute Settlement in the WTO and RTAs: A Comment', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006), at 356.

¹⁸ See Koskeniemi, *supra* note 1, Petersmann, *supra* note 7.

¹⁹ Pauwelyn, 'Choice of Jurisdiction: WTO and Regional Dispute Settlement Mechanisms: Challenges, Options and Opportunities', speaker's notes, ICTSD/GIAN-RUIG dialogue, 'The Mexico-Soft Drinks Dispute: Implications for Regionalism and for Trade and Sustainable Development', 30 May 2006, available at: www.ictsd.org/dlogue/2006-05-30/2006-05-30-docu.htm, at 2; Koskeniemi, *supra* note 1, at para 52.

²⁰ While the WTO dispute settlement process has no formal system of *stare decisis*, in practice Appellate Body and Panel decisions are said to create legitimate expectations. See Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8,10-11/AB/R, 4 Oct, 1996, at 12.

²¹ Petersmann, *supra* note 7, at 358.

²² See, generally, Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *NYU J Int'l L and Politics* (2007) 791.

as that of the WTO should be cognizant of any broader context of dispute and then decline jurisdiction or suspend the proceedings pending the outcome of a related dispute. At the WTO–FTA nexus, how the WTO treats issues of competing jurisdiction is crucial to the problem of the potential for duplicated or fragmented jurisprudence, and the effectiveness of the dispute settlement process for member states.

B Case Law at the Nexus of the WTO and FTAs

1 *The Appellate Body's Treatment of FTAs: Discerning Parties' Interests or the Meaning of Treaty Language*

The WTO's Appellate Body has been required on several occasions to consider the applicability of an FTA to a particular dispute or discuss the FTA as contextual material for its decision. This has generally been confined to determining the interest of the parties or the meaning of a relevant treaty term, rather than drawing on the jurisprudence of other international fora. This approach is similar to the Appellate Body's approach to other international treaties such as multilateral environmental agreements.²³ For example, in *United States Tax Treatment for Foreign Sales Corporations (Article 21.5)*²⁴ the Appellate Body considered a range of FTAs as a means to discern the definition of the term 'foreign-source income' in terms of interpreting the Subsidies and Countervailing Measures Agreement.²⁵ In *Chile – Price Band*,²⁶ where Argentina brought the dispute to the WTO because it was unable to resolve the dispute bilaterally under its FTA with Chile,²⁷ the Panel held that a provision in an FTA between Argentina and Chile which explicitly made the FTA provisions subject to the parties' obligations under WTO law meant that the parties to the FTA had not intended that different rules for the same subject matter would be applicable in the WTO context.²⁸ In *European Communities – Measures Affecting the Importation of Certain Poultry Products*²⁹ the Appellate Body used the Oilseeds Agreement³⁰ as a supplementary means of interpretation. Apart from these references, the Appellate Body has to date

²³ E.g., the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* took into account a number of MEAs as a means both to define relevant treaty terms and to clarify parties' rights and obligations: WT/DS58/AB/R, 12 Oct. 1998, at paras 130–134.

²⁴ *United States – Tax Treatment for 'Foreign Sales Corporations'* (Art. 21.5 – EC), WT/DS108/AB/RW, 14 Jan. 2002.

²⁵ Paras 141–145. Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts (1994), at 264.

²⁶ *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, 3 May 2002, at para. 7.84.

²⁷ Economic Complementarity Agreement No 35 between Chile and MERCOSUR, signed on 25 June 1996, entered into force on 1 Oct. 1996.

²⁸ *Chile – Price Band*, *supra* note 26, at paras 7.81–7.86.

²⁹ *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, 23 July 1998, at para. 83.

³⁰ A bilateral agreement negotiated by the European Communities and Brazil under Art. XXVIII of the GATT 1947, as part of the resolution of the GATT dispute in *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, adopted on 25 Jan. 1990, BISD 37S/86; and DS28/R, 31 Mar. 1992.

been unwilling to refer to FTA jurisprudence, defer to judgments emanating from other dispute settlement fora, suspend proceedings pending the outcome of related proceedings, or otherwise apply comity towards other tribunals. In contrast to the Appellate Body's approach, NAFTA decisions in cases such as *High Fructose Corn Syrup*³¹ and the series of *Softwood Lumber* cases³² have exhibited willingness to consider and refer to WTO jurisprudence.³³

2 Case Law at the WTO–FTA Jurisdictional Nexus

The *Mexico – Soft Drinks*³⁴ and *Argentina – Poultry*³⁵ disputes provide examples of the potential for fragmentation that can arise at the WTO–FTA jurisdictional nexus. These cases demonstrate the reluctance of the WTO tribunal to suspend proceedings or decline to exercise jurisdiction due to a related dispute before another tribunal. Each case is discussed in turn.

(a) *Mexico – Soft Drinks*

In this case, the United States complained that certain Mexican trade measures breached its national treatment obligations under GATT. Mexico had initially invoked NAFTA's dispute settlement procedures in relation to the US' restrictions on imports of Mexican sugar, claiming that these measures were contrary to a sugar-specific agreement under NAFTA in which the US had committed to granting market access for Mexican sugar. An issue that arose at the interlocutory stage of the proceedings was the most appropriate forum to hear the dispute, which engaged both NAFTA and WTO rules.³⁶

Chapter 20 of NAFTA (which sets out settlement procedures for state–state disputes) envisaged that NAFTA parties would agree to a standing roster of panellists to be called upon to hear disputes. As this arrangement never eventuated and a roster was never agreed to, disputants are required to agree to the composition of an arbitral panel to hear a dispute on a case-by-case basis. This allows one party to obstruct the dispute settlement process by refusing to agree to the formation of a particular panel.³⁷ Using this opportunity, the US blocked the establishment of a panel, stymieing Mexico's attempt

³¹ *Imports of High-Fructose Corn Syrup Originating in the United States of America (Dumping)*, MEX-USA-98-1904-01, 3 Aug. 2001, 15 Apr. 2002.

³² Available at: www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380, last accessed on 1 Jan. 2007.

³³ Charmody, *supra* note 9, at 674. This is not necessarily problematic if one views the Appellate Body as an epistemically superior forum and that its appellate nature adds legitimacy to the international dispute settlement regime.

³⁴ Report of the Panel, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 Oct. 2005; Report of the Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 Mar. 2006.

³⁵ Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 22 Apr. 2003, at para 7.38.

³⁶ This dispute was one of many different sweetener-related disputes between Mexico and the US since NAFTA's inception, including anti-dumping litigation at the WTO and under NAFTA's investor–state dispute settlement provisions. See G.C. Hulbauer and J.J. Schott, *NAFTA Revisited: Achievements and Challenges* (2005), at 310–327. See also Trujillo, 'Shifting Paradigms of Parochialism: Lessons for International Trade Law', 3 *J Int'l L & Int'l Relations* (2007) 41.

³⁷ NAFTA, Art. 2011. See Pauwleyn, *supra* note 20; Davey, *supra* note 17, at 351, and de Mestral, 'NAFTA Dispute Settlement: Creative Experiment or Confusion?', in Bartels and Ortino (eds), *supra* note 17, at 363.

to resolve its complaint. In an attempt to compel the US to agree to the composition of a NAFTA panel, Mexico retaliated by levying an import tax on soft drinks sweetened with non-cane sugar, which led to the US initiating dispute settlement at the WTO.³⁸

NAFTA's Chapter 20 also contains a forum exclusion provision, which provides that once dispute settlement procedures have been initiated under either NAFTA or the WTO agreements, that forum is to be used to the exclusion of the other.³⁹ However, in preliminary argument Mexico did not invoke this provision nor argue that there were any jurisdictional impediments to the Panel hearing the case.⁴⁰ Instead, attesting that the WTO dispute was inextricably linked to the NAFTA dispute, Mexico requested that the Panel decline to exercise jurisdiction.⁴¹ The crux of Mexico's argument was that the Panel, as an international tribunal, possessed 'certain implied jurisdictional powers that derive from [tribunals'] nature as adjudicative bodies', including 'the power to refrain from exercising jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as NAFTA provisions'.⁴²

Mexico was unsuccessful. The Panel's decision to exercise jurisdiction was based on several provisions of the Dispute Settlement Understanding (DSU),⁴³ which the Panel considered did not permit it to choose whether to exercise otherwise valid jurisdiction. Article 11 (*Function of Panels*) of the DSU states, *inter alia*, that 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. In the Panel's view, this provision compelled it to exercise jurisdiction. Further, referring to the Appellate Body's previous statement that the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes,⁴⁴ the Panel reasoned that declining to exercise jurisdiction would amount to failure to perform the Panel's duties and have the effect of 'diminishing' the rights of the US, contrary to Articles 3.2 and 19.2 of the DSU.⁴⁵

³⁸ Mexico and the US have had two other disputes at the WTO concerning anti-dumping duties levied by Mexico on US imports of high-fructose corn syrup. *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 22 June 2001; *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS101, request for consultations received on 4 Sept. 1997, currently inactive. Additionally, some US manufacturers instituted investor-state proceedings under Ch. 11 of NAFTA against the soft drinks tax, claiming that the tax constituted discrimination and expropriation.

³⁹ Art. 2005(6) of NAFTA provides: '[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other'.

⁴⁰ Panel Report, *Soft Drinks*, *supra* note 3, at para. 7.13; Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 44.

⁴¹ Panel Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 4.182.

⁴² Panel Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 4.103.

⁴³ Understanding on Rules and Procedures Governing the Settlement of Disputes, opened for signature on 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, entered into force on 1 Jan. 1995.

⁴⁴ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 Oct. 1998, at para. 223.

⁴⁵ Panel Report, *Mexico – Soft Drinks*, *supra* note 3, at paras 7.4–7.9.

Referring to Article 3.10 of the DSU, which states ‘Members should not link complaints and counter-complaints in regard to distinct matters’, the Panel also noted that the fact that it only had authority to rule on claims of breaches of WTO law meant that ‘resolution of the present WTO case cannot be linked to the NAFTA dispute’.⁴⁶ While its comments concerning its circumscribed subject-matter jurisdiction are correct, the Panel’s reasoning appears to be based on a flawed assertion that considering the dispute in its broader jurisdictional context would require the panel to go beyond its mandate and issue rulings on the consistency of the parties’ measures with NAFTA. In this regard, the Panel appeared to conflate the applicable law before it with jurisdictional issues.

In upholding the Panel’s findings, the Appellate Body approached the issue of jurisdiction by applying a strict textual methodology to interpreting the provisions of the DSU. Stating that it considered that the language of the DSU was expressed in the imperative (‘members *shall* have recourse to ... the rules and procedures of the DSU’; ‘panels *shall* address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute’; and ‘a panel *should* make an objective assessment of the matter before it’),⁴⁷ the Appellate Body opined that ‘it is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it’.⁴⁸ While acknowledging that panels have inherent powers (such as exercising judicial economy),⁴⁹ the Appellate Body opined that despite the existence of these powers, the relevant provisions of the DSU *require* panels to make a ruling on the merits of the dispute once jurisdiction has been established.⁵⁰ Reiterating the Panel’s rights discourse, the Appellate Body also stated that a member who initiates a dispute ‘is *entitled* to a ruling by a WTO panel’,⁵¹ presumably meaning a ruling on the substantial complaint. According to the Appellate Body, declining to exercise jurisdiction would ‘disregard or modify’ the provisions of the DSU.⁵²

The Panel’s and Appellate Body’s reasoning in *Soft Drinks* seemed tied to the theory that declining to exercise jurisdiction would diminish the US’ right to seek redress for

⁴⁶ *Ibid.*, at paras 7.11, 7.15.

⁴⁷ DSU, Arts 7.2, 11 (emphasis added).

⁴⁸ Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 47. The Appellate Body also noted another previous decision: ‘[i]n this regard, we further note the Appellate Body’s statement that, “as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute”’: Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Article 21.5 – US)*, WT/DS132/AB/RW, *supra* note 38, 22 Oct. 2001, at para. 36.

⁴⁹ *Ibid.*, at para. 45.

⁵⁰ *Ibid.*, at paras 48–53.

⁵¹ Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 52.

⁵² *Ibid.*, at para 46, noting its previous decision in *India – Patents* which stated: ‘[a]lthough panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. ... Nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU’: Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 Dec. 1997, at para. 92.

Mexico's violation of its obligations.⁵³ The analysis appears to be couched in terms of losing all opportunities to have the dispute adjudicated. It does not take account of the fact that there was another tribunal that could hear both the US' and Mexico's complaints together. Clearly, the value of the WTO tribunal's analysis would differ if there were no other forum to hear the dispute: declining jurisdiction then would seem to be inappropriate (save for highly exceptional circumstances) as the parties would not have access to justice.

(b) *Argentina – Poultry*

The *Argentina – Poultry* case demonstrates the problems that can arise where, faced with an unfavourable judgment delivered in one jurisdiction, a disputant seeks to re-litigate the dispute before another tribunal. In this case, Brazil took a complaint to the WTO following an adverse ruling from the MERCOSUR tribunal in relation to the same subject matter. In preliminary argument, Argentina requested that the Panel refrain from exercising jurisdiction, on the basis of the prior MERCOSUR tribunal ruling. It framed its legal argument in terms of breach of the obligation of good faith, estoppel, and an argument based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).⁵⁴ These arguments were dismissed by the Panel.

In reaching its ruling on jurisdiction, the WTO Panel considered a provision in MERCOSUR's Brasilia Protocol, which allowed a complaining party choice of forum but not exclusivity. The Panel noted that since the dispute had been filed at the WTO the parties had signed a new dispute settlement protocol which provides for exclusive jurisdiction once a forum has been elected.⁵⁵ Recognizing the problem that the non-exclusive forum selection clause gave rise to, the Panel remarked that the fact that the MERCOSUR parties had introduced the new rules indicated that they recognized that it was currently permissible to bring a dispute under WTO rules following a MERCOSUR dispute.⁵⁶ Because the former Protocol was still in force, the WTO considered that it was required to exercise jurisdiction notwithstanding the prior ruling on the same matter at issue, and did not consider whether, in the circumstances, it would be appropriate to do so.

3 The Impact of the VCLT

A Article 31(3)(c)

Most analysis of WTO–FTA nexus issues to date has been based on principles of treaty interpretation under the VCLT such as the rules on conflict and interplay of

⁵³ In terms of the meaning of Art. 23 of the DSU: Appellate Body Report, *Soft Drinks*, *supra* note 3, at para. 53.

⁵⁴ At para. 7.19. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, entered into force on 27 Jan. 1980. In this regard Argentina argued that the MERCOSUR ruling was a relevant rule of international law applicable in the relations between parties, and should be taken into account 'for the purposes of interpretation of the current dispute' (at para. 6.6).

⁵⁵ Art. 1 of the Protocol to Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum.

⁵⁶ Panel Report, *Argentina – Poultry*, *supra* note 63, at para. 7.38. In this regard the Panel indicated that, in future, the WTO tribunal would recognize and give effect to these provisions. However, it has not yet had the opportunity to do so.

norms;⁵⁷ as well as the feasibility of adapting private international law rules such as *res judicata*, *forum non conveniens*, and *lis alibi pendens*, which many commentators agree is difficult in the WTO context.⁵⁸ It is well settled that the WTO dispute settlement mechanism only has jurisdiction to decide on claims of violations of rules under the WTO covered agreements, and cannot, for example, decide whether a rule contained in an FTA has been violated. However, Article 31(3)(c) of the VCLT provides that a treaty interpreter should, when interpreting treaty text, take into account ‘any relevant rules of international law applicable in the relations between the parties’. While the DSU provides that Panels must ‘clarify the existing provisions of those agreements’ and that ‘recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’,⁵⁹ it does not limit the sources that the WTO can utilize when ‘clarifying’ the provisions of the WTO agreements, nor directly address situations where WTO members have entered into treaties with other members which influence their rights and obligations within the WTO framework, including jurisdictional issues.⁶⁰ The WTO tribunal’s limited jurisdiction does not limit the sources of law that it is competent to utilize when interpreting WTO agreements,⁶¹ meaning that panels and the Appellate Body must consider customary international law, WTO law, and applicable external sources of international treaty law (such as a relevant FTA) together, in accordance with rules on the interplay and conflict of norms.

However, utilizing Article 31(3)(c) of the VCLT by taking into account FTAs when interpreting WTO rules such as the DSU may not assist. In the recent *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* case⁶² a Panel held that the obligation to take account of exogenous rules of international law when interpreting WTO law applied only to those rules that were binding on *all* WTO members, and not, for example, those treaty-based rules of international law that were binding between the disputants but not all other members, such as FTAs.⁶³ This interpretation

⁵⁷ See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); Koskeniemmi, *supra* note 1.

⁵⁸ These rules have varying degrees of prerequisites: e.g., requiring a dispute to be already decided by another forum; requiring another forum to have accepted jurisdiction, and so on. They do not appear to capture the circumstances where a party has blocked the establishment of a dispute settlement panel, such as in *Soft Drinks*. For analysis of the application of these rules to international trade and investment disputes see Shany, ‘Contract Claims vs. Treaty Claims: Mapping Sources of Conflict between ICSID Decisions on Multisourced Investment Claims’, 99 *AJIL* (2005) 835, at 844; Petersmann, *supra* note 7, at 355–365; Pauwelyn, *supra* note 10, at 290–296.

⁵⁹ DSU, Art. 3.2.

⁶⁰ Pauwelyn, ‘How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits’, 37 *J World Trade* (2003) 997, at 1003.

⁶¹ Koskeniemmi, *supra* note 1, at para. 45. But see Trachtman, ‘Jurisdiction in WTO Dispute Settlement’, in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005), at 136; and Trachtman, ‘Book Review of Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law’, 98 *AJIL* (2004) 855.

⁶² WT/DS291, WT/DS292, WT/DS293, 29 Sept. 2006.

⁶³ With regard to using exogenous rules of international law as a means of clarifying parties’ rights and obligations under WTO law, a broader approach (espoused by Pauwelyn) is that the applicability of any such rule of international law is contingent on whether it reflects the ‘common intentions’ of WTO members.

means that most rules of international law cannot be taken into account as in interpretive aid in WTO dispute settlement, as it is unlikely that many rules of international law (except rules of customary international law) bind all 149 WTO members.⁶⁴ This in turn creates greater potential for fragmentation between WTO and other international law, including at the WTO–FTA nexus, because it is axiomatic that members of an FTA will be a subset of WTO members. Accordingly, Article 31(3)(c) is currently of limited use in WTO litigation, unless a subsequent panel or the Appellate Body takes a different approach.

B Using Non-WTO Law as a ‘Defence’ to Jurisdiction

It is arguable that a forum exclusion rule in an FTA (such as Article 2005 of NAFTA) could be used when interpreting WTO rules, to determine whether the WTO’s judicial organ has jurisdiction or whether jurisdiction more appropriately rests with another tribunal. Such a ruling appears possible provided that the FTA rule provides exclusive jurisdiction to another tribunal or provides that a case cannot be brought to the WTO following a decision from another forum, binds the disputants so as to modify their obligations to each other under covered agreements, or even contracts out of WTO jurisdiction in certain areas.⁶⁵ This approach, if followed, both would give effect to the intentions of the parties to the FTA and could assist in maintaining the coherence of international trade jurisprudence through avoidance of duplication of judgments in relation to the same dispute. However, *Soft Drinks* demonstrates that forum exclusion provisions may not prevent the respondent in the original forum from bringing related proceedings before another tribunal.⁶⁶

Other rules of treaty interpretation have potential to assist in cases where a legal claim is brought under WTO and FTA rules. Pauwelyn proposes that where parallel proceedings arise before the WTO and an FTA which does not contain an explicit conflict clause, in exceptional cases – where the subject matter, scope, and substance of the dispute are the same – issues of jurisdiction should be resolved by reference to rules such as *lex posterior*⁶⁷ and *lex specialis*.⁶⁸ Where application of these rules signals that the jurisdiction of one forum must prevail, he argues that the other forum should find it does not have the jurisdiction to hear the dispute.⁶⁹ According to Pauwelyn, this is possible as long as the relevant treaty provision binds all disputants and does not affect the rights of other WTO members.⁷⁰ However, application of these

⁶⁴ See Henckels, ‘GMOs in the WTO: A Critique of the Panel’s Legal Reasoning in *EC – Biotech*,’ 7 *Melbourne J Int’l L* (2006) 278, at 292.

⁶⁵ Pauwelyn, *supra* note 58, at 1013. See also Pauwelyn, *supra* note 20, at 4.

⁶⁶ At the time of writing, the WTO tribunal has not yet had the opportunity to consider a dispute where there have been successive proceedings concerning the same subject matter, such as *Argentina – Poultry*.

⁶⁷ Art. 30 VCLT, *supra* note 54.

⁶⁸ Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands’, 25 *Michigan J Int’l L* (2004) 903, at 912–1015.

⁶⁹ Pauwelyn, *supra* note 58, at 1015.

⁷⁰ Pauwelyn, *supra* note 20, at 5.

rules may not provide a sufficiently robust outcome: Koskeniemmi cautions that the *lex specialis* and *lex posterior* rules should not be applied in an automatic way, and should be weighed and balanced along with other principles and in the circumstances of the particular case.⁷¹ He notes that the *lex specialis* rule, which was not codified in the Vienna Convention, ‘may be offset by normative hierarchies or informal views about “relevance” or “importance”’.⁷² In his view, the *lex specialis* rule appears to have ‘a limited role as a subsidiary means in conflict resolution’ in the WTO context.⁷³

C The Limits of the Vienna Approach

Given that the international legal system has no formal hierarchy of norms (apart from *jus cogens*) or of dispute settlement fora,⁷⁴ while the VCLT framework is the starting point for treaty interpretation, it does not appear to resolve problems where there is conflict between treaty fora at the jurisdictional – as opposed to applicable law – level. As noted above, recent WTO jurisprudence has constrained the use of Article 31(3)(c) in the WTO context, meaning that it is unlikely that a panel would take into account an FTA when interpreting the DSU and find that it did not have jurisdiction. In addition, the conflict rules of *lex specialis* and *lex posterior* may not always resolve these issues. In relation to the two WTO–FTA cases previously discussed, the WTO Agreement is *lex posterior*, and while an argument can be made that NAFTA and MERCOSUR are *lex specialis* given their regional context, this arguably elevates these instruments to a superior status that is counterbalanced by the WTO dispute settlement organ being viewed by members as having greater adjudicative legitimacy.⁷⁵

Failure to let a dispute settlement system to function the way it is supposed to gives rise to the question of how far states should persist in participating in that regime, where it is not achieving its putative objectives. In cases such as those discussed above, the failure of a dispute settlement regime to function adequately means that it is arguable that members of that regime should be able to turn to general international law in search of a just outcome for the dispute. These cases are illustrative of circumstances in which fragmentation cannot be dealt with through VCLT principles, but must be examined at the jurisdictional stage.

⁷¹ Koskeniemmi, *supra* note 1, at paras 226, 233.

⁷² *Ibid.*, at para. 58.

⁷³ See *India – Quantitative Restriction on Imports of Agricultural, Textile and Industrial Products*, 6 Apr. 1999, WT/DS90/R, at para. 4.20: ‘[i]n any event, the principle of *lex specialis* is only subsidiary’: cited by Koskeniemmi, *supra* note 1, at para. 75. Romano also notes that these principles’ abstractness and generality renders them unlikely to provide practical assistance to questions of overlapping jurisdiction: Romano, *supra* note 22, at 847.

⁷⁴ However, there is an informal hierarchy of norms, depending on the lens through which the dispute is being viewed: Koskeniemmi, *supra* note 1, at para. 86.

⁷⁵ This is evidenced by, for example, NAFTA parties’ tendency to take disputes to the WTO rather than use NAFTA dispute settlement procedures (particularly in relation to non-trade remedy cases).

4 Jurisdiction as a Normative Matter: The Use of Comity to Decline Jurisdiction

A *The Inherent Powers of International Tribunals*

Jurisdiction of international tribunals is based on state consent. Underpinning this consent is a concern that tribunals do not exceed their mandate by exercising jurisdiction when it is not appropriate to do so.⁷⁶ While the jurisdiction of most tribunals (including the WTO) is compulsory,⁷⁷ some tribunals (such as the ICJ)⁷⁸ require both states' consent to hear a particular dispute. Accordingly, jurisdiction is frequently challenged as an interlocutory issue before fora such as the ICJ.⁷⁹ While jurisdiction is generally derived from the instrument that establishes the particular tribunal, state consent need not be explicitly granted to a tribunal's inherent powers, which exist by virtue of general principles of international law and jurisdictional norms, and which apply unless expressly limited or modified by parties.⁸⁰

A tribunal has inherent powers to make and exercise rules that are reasonably necessary for the administration of justice or to ensure the orderly conduct of the judicial system within the scope of its jurisdiction.⁸¹ The ICJ's inherent powers are described as 'providing it with the power to take such action as might be required to ensure that the exercise of its subject-matter jurisdiction is not frustrated'.⁸² International tribunals have inherent powers which exist without reference to the text of the tribunal's constitutive document.⁸³ These inherent powers derive from a tribunal's judicial character and allow a tribunal to respond flexibly and holistically where unforeseen circumstances justify a different approach, and where the use of the power is necessary to regulate matters such as those that were not foreseen when the treaty was enacted. Inherent powers have application to a range of situations and circumstances that may come before a tribunal, and include the tribunal's power to find that it does not have jurisdiction at the outset and the power to decline to exercise jurisdiction once it has been established (even where jurisdiction is compulsory rather than consensual).⁸⁴

⁷⁶ C. Amerasinghe, *Jurisdiction of International Tribunals* (2003), at 50.

⁷⁷ Romano, *supra* note 22, at 796.

⁷⁸ Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1031 [1976] Year Book of the United Nations, 1052, Ch. II, Art. 36: Competence of the Court. Additionally, states may make declarations accepting the Court's jurisdiction as compulsory (although only a minority of states have done so). See Romano, *supra* note 22, at 817, noting that the ICJ's consensual jurisdiction is logically connected to its broad *ratione materiae*.

⁷⁹ Amerasinghe, *supra* note 76, at 51.

⁸⁰ *Ibid.*, at 96.

⁸¹ Regarding international tribunals' possession of inherent powers see *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)* [1963] ICJ Rep 3, at 29; *Nuclear Tests (Australia and New Zealand v. France)* Judgment [1974] ICJ Rep 253, at 271.

⁸² Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', (2007) 10 *J Int'l Economic L* (2007) 795, at 830.

⁸³ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 92, Separate Opinion of Judge Higgins, at para. 10.

⁸⁴ As evidenced by the *MOX Plant* UNCLOS arbitral tribunal decision, discussed in the next section.

B Comity

Comity is a principle of judicial restraint used principally in domestic legal systems to resolve issues created by overlapping jurisdictions.⁸⁵ It allows a court to decline to exercise jurisdiction over matters that would be more appropriately heard by another tribunal. Comity's status and contours in international law are somewhat nebulous – it is described as 'a concept with almost as many meanings as sovereignty',⁸⁶ with varied normative bases of maintaining amicable relationships between sovereign states, expediency, and courtesy.⁸⁷

Comity, in the sphere of public international law, does not impose a legal obligation on tribunals, given that their existence is dependent on factors such as state consent to their jurisdiction, differing legal bases and parameters for tribunals' existence, and the lack of formal legal or functional relationship between them.⁸⁸ Rather, comity is a flexible doctrine enabling the co-operation of tribunals in the international legal order.⁸⁹ It is said to function as a 'bridge' between international law and international politics in the sense that it can rationalize the tension between an international dispute settlement forum's jurisdiction and the non-hierarchical nature of such fora.⁹⁰ In the sense that it functions as a principle for resolving issues of overlapping jurisdiction, it operates to permit a tribunal to limit its own jurisdiction where exercise of that jurisdiction would be unreasonable or inappropriate in the particular circumstances.

International tribunals are often loath to use their inherent discretionary power to apply comity and co-operate with other fora,⁹¹ arising, perhaps, from a market-driven desire to maintain the esteem and relevance of the judicial body,⁹² as well as the need to secure continuing funding.⁹³ But there is evidence of international tribunals applying comity where they consider it to be the best way to address issues of overlapping jurisdiction or to preserve the integrity of the administration of justice. As Slaughter notes, international tribunals are increasingly co-operating to resolve disputes and recognize one other as 'participants in a common judicial enterprise'.⁹⁴ Discerning a 'distinct shift toward the recognition, on a case by case basis, of a "natural" or "most appropriate" forum among the courts of the world', she predicts the emergence of a doctrine of comity in public international law that defines tribunals' mutual relations.⁹⁵ Slaughter describes this emerging doctrine as having a basis in mutual respect

⁸⁵ See the analysis of the emergence of the doctrine, chiefly in the US jurisdiction, in Paul, 'Comity in International Law', 32 *Harvard Int'l LJ* (1991) 1. See also Slaughter, 'A Global Community of Courts', (2003) 44 *Harvard Int'l LJ* (2003) 191, at 205; Romano, *supra* note 22, at 849.

⁸⁶ Slaughter, 'Court to Court', 92 *AJIL* (1998) 708.

⁸⁷ Paul, *supra* note 85, at 6.

⁸⁸ Romano, *supra* note 22, at 850–851.

⁸⁹ Slaughter, *supra* note 85.

⁹⁰ Paul, *supra* note 85, at 6.

⁹¹ Petersmann, *supra* note 7, at 360.

⁹² See Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', 55 *Int'l and Comp LQ* (2006) 791, at 799.

⁹³ Romano, *supra* note 22, at 869.

⁹⁴ Slaughter, *supra* note 85, at 193.

⁹⁵ *Ibid.*, at 194.

for the integrity and competence of tribunals. In order for the doctrine to crystallize, tribunals must co-operate, bearing in mind an imperative to maintain the legitimacy of the interconnected strands of international law and efficiently resolve litigation.⁹⁶ Judicial comity is, therefore, a means of integrationism whereby a tribunal such as that of the WTO can stay proceedings or decline to exercise jurisdiction where there are related proceedings before an FTA tribunal. In this regard, refusing to exercise jurisdiction does not mean deference to a superior judicial body.⁹⁷

The next section of the article seeks inspiration from other fora faced with jurisdictional issues and situations that gave rise to a need for judicial innovation in order to produce an outcome that accorded with the *telos* of the particular justice system being administered.

C International Tribunals' Use of Inherent Powers

1 The International Court of Justice

(a) *Legality of the Use of Force*: Use of Inherent Powers to Decline Jurisdiction

The *Legality of the Use of Force*⁹⁸ case occurred in the context of the Federal Republic of Yugoslavia's (and later, Serbia and Montenegro's) ambiguous status with regard to its membership of the United Nations. Serbia and Montenegro had previously argued that the court had jurisdiction to hear their complaint against bombing by 10 NATO countries in Kosovo. Following these states' application to join the UN and accession to the Genocide Convention, the states changed their pleadings in the *Use of Force* case, resiling from specified heads of jurisdiction without proffering others, arguing that they had not been UN members nor parties to the Statute of the ICJ when the cases were originally filed in 1999. Instead, the applicants simply asked the Court 'to decide on its jurisdiction'.⁹⁹ This appeared to be done with the intention of procuring an opinion on jurisdiction with favourable implications for the *Bosnia Genocide* case, in which they were the respondents.¹⁰⁰ This gave rise to the peculiar situation whereby both the applicant and the respondents appeared to be arguing that the Court did not have jurisdiction.

Emphasizing its freedom to select the grounds on which its jurisdiction would be based, the majority of the Court found that it had no jurisdiction *ratione personae*.¹⁰¹

⁹⁶ *Ibid.*, at 206–210.

⁹⁷ Slaughter describes it thus: 'it does not import subordination or even the more subtle constraints of ritual deference': Slaughter, *supra* note 86, at 711.

⁹⁸ *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Serbia and Montenegro v. United Kingdom) Preliminary Objections*, Judgment of 15 Dec. 2004 [2004] ICJ Rep 279.

⁹⁹ *Ibid.*

¹⁰⁰ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 Feb. 2007, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=4, last accessed on 25 Mar. 2008.

¹⁰¹ The judgment was contentious because it was arguably inconsistent with the approach taken earlier in the *Bosnia Genocide* case: *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections [2004] ICJ Rep 279, at para. 29. See Gray, 'Legality of Use of Force', 54 *Int'l and Comp LQ* (2005) 787, at 792.

The judges were divided in their reasoning to decline to exercise jurisdiction to hear the cases. Of particular note are the separate opinions of Judges Higgins and Kooijmans, who, along with five other judges, agreed with the outcome of the case but profoundly disagreed with the reasoning of the majority. Judges Higgins and Kooijmans opined that the Court should use its inherent powers to decline jurisdiction. In so doing, they looked beyond the specific issues of the case more broadly to determine the *telos* of the system that the Court was administering, which they found to be the administration of justice and removing the cause of the dispute between the two parties.

In her separate opinion, Judge Higgins noted that ‘the Court’s inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules’.¹⁰² She opined that ‘the very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has’.¹⁰³ Her opinion considered the dissenting judgment in the *Nuclear Tests* cases, which stated that the use of the power to decline jurisdiction ‘must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require’.¹⁰⁴ Judge Higgins also referred to the judgment of the Court in the *Northern Cameroons (Cameroon v. United Kingdom)*¹⁰⁵ case, in which the Court held that even if it had jurisdiction, it was not compelled in every case to exercise that jurisdiction.

According to Judge Higgins, the central question was ‘whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process’.¹⁰⁶ In Judge Higgins’ view, the ‘disorderly’ conduct of the applicant and ‘incoherent manner of proceeding’¹⁰⁷ were sufficient reason for the Court to exercise its inherent power to remove the cases from the List in order ‘to ensure orderly conduct of its judicial function’.¹⁰⁸ Similarly, Judge Kooijmans criticized Serbia and Montenegro’s failure to identify any ground for jurisdiction as ‘incompatible with the respect due to the Court’.¹⁰⁹ Noting the majority decision’s finding that it could not decline to hear a case because of the motives of one of the parties or because its judgment might influence another case,¹¹⁰ he opined that, given the variety of circumstances that come

¹⁰² *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 98, Separate Opinion of Judge Higgins, at para. 10.

¹⁰³ *Ibid.*, at para. 11.

¹⁰⁴ *Ibid.*, at para. 12, citing *Nuclear Tests (Australia and New Zealand v. France)* [1974] ICJ Rep 253, Joint Dissenting Opinion, at 322, para. 22.

¹⁰⁵ *Northern Cameroons (Cameroon v. United Kingdom)* [1963] ICJ Rep 152.

¹⁰⁶ Her reasoning was based on the fact that the applicant had not conformed with Art. 38(2) of the Statute of the ICJ, which requires an applicant to ‘specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based’: *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 92, Separate Opinion of Judge Higgins, at paras 12, 14.

¹⁰⁷ *Ibid.*, at para. 16.

¹⁰⁸ *Ibid.*, at paras 15–16.

¹⁰⁹ *Ibid.*, Separate Opinion of Judge Kooijmans, at para. 24.

¹¹⁰ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 92, at para. 40.

before the Court, it is acceptable, in unusual circumstances, for the Court to take note of the implications of its judgment in another pending case, when deciding on matters of jurisdiction.¹¹¹

(b) *LaGrand Case*: Examining the Object and Purpose of the Dispute Settlement Mechanism

The *LaGrand Case (Germany v. United States)*,¹¹² concerned the status of provisional measures under the Statute of the International Court of Justice, in the context of an application by Germany for a stay of execution of a German national by the United States government. In this case, the ICJ held that a teleological interpretation of its constitutive document allowed it to read in a special approach to be taken in unusual circumstances, where necessary to safeguard and avoid prejudice to the rights of the disputants.¹¹³ In granting the provisional measures, the ICJ moved away from a strict textual approach to its constitutive document and looked more broadly at the purpose of the scheme it administered. The Court determined, for the first time, the parameters of provisional measures' legal effects. It did this by considering the context of the treaty text which deals with provisional measures within the object and purpose of the Statute as a whole.¹¹⁴ The Court found that the purpose of provisional measures was to prevent the broader purpose of dispute settlement being frustrated if a party could take steps that would permanently and adversely affect other parties' rights,¹¹⁵ noting that the object and purpose of the Statute are to enable the Court to settle international disputes by binding decisions, which aids the administration of justice. Accordingly, the Court found that Article 41 is intended to prevent the Court from being hampered in the exercise of its functions if the respective rights of the parties to the case are not preserved; and where the circumstances require that the parties' rights be preserved pending the final judgment (in this case, 'irreparable prejudice that appeared to be imminent'), measures should be binding.¹¹⁶

B *United Nations Convention on the Law of the Sea*

(a) *MOX Plant Case*: Applying Comity by Deferring to Regionalism

The *MOX Plant Case*¹¹⁷ concerned the question of the correct jurisdiction to decide a dispute about discharge of radioactive waste into the Irish Sea by a United Kingdom

¹¹¹ *Ibid.*, Separate Opinion of Judge Kooijmans, at para. 9.

¹¹² *LaGrand Case (Germany v. United States)* [2001] ICJ Rep 104.

¹¹³ *Ibid.*, at para. 102.

¹¹⁴ Art. 41, Statute of the International Court of Justice.

¹¹⁵ Kirgis, 'World Court Rules Against the United States in *LaGrand Case* Arising from a Violation of the Vienna Convention on Consular Relations', (2001) *ASIL Insights*, American Society of International Law, available at: www.asil.org, last accessed 2 Jan. 2007.

¹¹⁶ *LaGrand Case*, *supra* note 105, at para. 102.

¹¹⁷ *MOX Plant case, Request for Provisional Measures Order (Ireland v. United Kingdom)*, 3 Dec. 2001, 41 ILM (2002) 405. Arts 288(1) and 293(1) of the UN Convention on the Law of the Sea (UNCLOS) provide that the Law of the Sea Tribunal has 'jurisdiction over any dispute concerning the interpretation and application of this Convention', requiring the Tribunal to 'apply this Convention and other rules of international law not incompatible with this convention'. However, there have been only 13 cases considered by the Tribunal: see www.itlos.org, last accessed on 2 Jan. 2007.

processing plant. It raised issues under the jurisdiction of three different instruments: the United Nations Convention on the Law of the Sea (UNCLOS),¹¹⁸ the Convention on the Protection of the Marine Environment of the North-East Atlantic,¹¹⁹ and the European Community Treaty.¹²⁰ The arbitral tribunal established under UNCLOS to consider the merits of the case displayed a degree of deference to the dispute's regional context by suspending the proceedings.¹²¹ This was done on the basis that it was likely that aspects of the dispute fell within the exclusive jurisdiction of the ECJ,¹²² which called into question the tribunal's jurisdiction over aspects of the claims before it.¹²³ Subsequently, in 2003, the tribunal suspended the proceedings. The tribunal stated:

bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States ... it would be inappropriate ... to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.¹²⁴

¹¹⁸ United Nations Convention on the Law of the Sea (UNCLOS), opened for signature on 10 Dec. 1982, Doc A/CONF.62/122, entered into force on 16 Nov. 1994, 1833 UNTS 397. UNCLOS provides for partly compulsory and partly consensual jurisdiction. Parties may choose any means by which to settle disputes, but if this does not resolve the dispute, either disputant may invoke the compulsory dispute settlement process provided in the treaty. However, UNCLOS also provides that if the disputants are parties to another instrument which provides for a dispute settlement procedure, that process applies instead of the UNCLOS procedures unless the parties to the dispute otherwise agree (Arts 280–282). The dispute settlement mechanisms provided under UNCLOS itself include recourse to the ICJ, to the International Tribunal for the Law of the Sea, or to an arbitral tribunal (Art. 287).

¹¹⁹ See *Dispute Concerning Access to Information Under Article 9 of the Ospar Convention, Final Award (Ireland v. United Kingdom)*, 2 July 2003, 2 ILM (2003) 1118.

¹²⁰ The constitutional relationship between the EC and its Member States adds another level of complexity to choice of forum issues in relation to trade matters. The EC's common commercial policy is vested in the EC itself. (Art. 133 EC Treaty), meaning that EC Member States cannot take each other to WTO dispute settlement and must resolve the issue by way of the ECJ. If an EC Member State is aggrieved by the conduct of a third party, the EC must take the claim to the WTO on behalf of that Member State. However, in relation to some GATS and TRIPS issues, the WTO and the EC share competence, meaning that there is potential for a dispute to arise where the scope of each forum's competence is less than clear. This divided competence may impact on the coherence of treaty rights and obligations. See Koskeniemi, *supra* note 1, at para. 219.

¹²¹ The Tribunal's order to suspend proceedings was made under its rules of procedure, which state that 'subject to these rules, the Arbitral Tribunal may conduct the proceedings in such manner as it considers appropriate': *MOX Plant case (Provisional Measures)*, *supra* note 117, Art. 8, Rules of Procedure, Arbitral Tribunal Constituted under Art. 287 and Annex 1, Art. 1 of UNCLOS; see www.pca-cpa.org, last accessed on 2 Jan. 2007.

¹²² *MOX Plant Case (Provisional Measures)*, *supra* note 117. It also noted that even if the content of the rights and obligations under these conventions was similar or identical, their application by one tribunal might result in a different outcome from their application by another tribunal on account of: 'differences in the respective context, object and purpose, subsequent practice of parties and travaux préparatoires': *MOX Plant Case (Provisional Measures)*, *supra* note 117, at para. 51.

¹²³ *Ibid.*

¹²⁴ *MOX Plant Case*, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, 24 June 2003, available at: www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf, at paras 21–28, last accessed on 25 Mar. 2008. Subsequently, the tribunal made a further order suspending the proceedings until any judgment of the ECJ; Order No 4, Further Suspension of Proceedings on Jurisdiction and Merits, 13 Nov. 2003, available at: www.pca-cpa.org/upload/files/MOX%20Order%20No4.pdf, last accessed on 25 Mar. 2008.

(b) *Southern Bluefin Tuna Case*: A Holistic View of a Multi-faceted Dispute

In the *Southern Bluefin Tuna Case*, which concerned Japan's 'experimental' fishing programme allegedly in excess of its quota allocation under international agreements, Japan argued that the 1993 Convention for the Conservation of Southern Bluefin Tuna (a treaty concluded between the three parties to the dispute and providing for consensual jurisdiction of the ICJ or arbitration) was both *lex specialis* (being tuna-specific) and *lex posterior*. According to Japan, this meant that the UNCLOS arbitral tribunal hearing the case had no jurisdiction. Noting that both instruments were applicable to the dispute and rejecting Japan's *lex specialis* argument, the UNCLOS arbitral tribunal found that carving out the UNCLOS elements of the dispute (which were broader than parties' obligations under the Tuna Convention) for adjudication would be inappropriate. The Tribunal stated that it was common for more than one treaty to bear upon a particular dispute in terms of substantive content and overlap in dispute settlement jurisdiction. Given this, the Tribunal held that it would be artificial to find that the UNCLOS dispute was distinct from the Tuna Convention dispute. Having declared it had no jurisdiction over the Bluefin Tuna Convention, the tribunal then declined to exercise jurisdiction over the UNCLOS legal issues.¹²⁵

5 A Potential Approach for the WTO

A *The Telos of the WTO's Dispute Settlement System and its Role in the International Legal Sphere*

A key driver for establishing the GATT was the creation of 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'.¹²⁶ Some 50 years later, the Marrakesh Agreement elaborated on this aim, stating that the parties to the agreement resolved 'to develop an integrated, more viable and durable multilateral trading system'.¹²⁷ The DSU provides that the WTO's dispute settlement system 'is a central element in providing security and predictability to the multilateral trading system',¹²⁸ and clarifies that 'the aim of the dispute settlement mechanism is to secure a positive solution to a dispute'.¹²⁹ The *telos* or institutional goal of the

¹²⁵ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan, Jurisdiction and Admissibility)*, Award of 4 Aug. 2000, XXIII UNRIAA (2004) 23, at paras 38(c) and 52. In doing so the tribunal revoked a previous order for provisional measures made by the International Tribunal for the Law of the Sea, which found that there was jurisdiction under UNCLOS as the parties had not been able to agree on settling the dispute under the Tuna Convention. See the discussion of the case in Romano, *supra* note 22, at 831–834, noting that the arbitral tribunal found that its jurisdiction was contingent on the consent of the disputants. Romano also notes that this decision has attracted criticism and is unlikely to be considered of significant precedential value.

¹²⁶ Havana Charter for an International Trade Organization, Final Act of the UN Conference on Trade and Development, Art. 1.

¹²⁷ Preamble, Marrakesh Agreement Establishing the World Trade Organization, opened for signature on 15 Apr. 1994, entered into force on 1 Jan. 1995, 1867 UNTS 154.

¹²⁸ DSU, Art. 3.2.

¹²⁹ *Ibid.*, Art. 3.7

WTO's dispute settlement mechanism can therefore be described as solving or removing the dispute in a manner acceptable to the disputants, thereby maintaining the viability, security, and predictability of the multilateral trading system. In order to do this, the WTO tribunal must maintain its adjudicative legitimacy by acting within its mandate. It should also be cognizant of its role as one of many dispute settlement fora, both within international trade law and within the broader group of international courts and tribunals. The WTO tribunal's current approach leaves it open to the perception that its jurisdictional analysis is based on policy considerations of promoting the primacy of the WTO's dispute settlement system as opposed to a more integrationist approach, in which it is 'an arbiter with a global role in a broader scheme of public international law'.¹³⁰ Given this, there is scope for the WTO tribunal to take a holistic view and consider applying comity when deciding whether it is the appropriate forum for adjudicating a given dispute.

B Rising Above Arid Textualism – the Appellate Body's Willingness to Consider Linkages and Teleology

In its early decision in *Japan – Alcoholic Beverages*, the Appellate Body commented on the role of WTO dispute settlement within the global trading system:

WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability sought for the multilateral trading system'.¹³¹

The DSU provides that the WTO's judicial organ functions to 'preserve' the rights and obligations of members and to 'clarify' the existing provisions of WTO agreements.¹³² Since its inception, the WTO's judicial organ (particularly the Appellate Body) has consistently emphasized the virtues of a textual approach to treaty interpretation, as required by the VCLT. This arguably increases its adjudicative legitimacy *vis-à-vis* the days of 'GATT-pragmatism',¹³³ allowing the WTO to avoid, to an extent, allegations of judicial activism and political manoeuvring. However, as Zang argues, this strict textualism can obscure the underlying policy issues that are read into the particular textual approach that is selected, occluding the objective of flexibility and adaptability that the Appellate Body propounded in *Japan – Alcoholic Beverages*, and rendering its legal reasoning formalistic.¹³⁴ There are some situations in which the negotiated

¹³⁰ Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?', 40 *NYU J Int'l L and Politics* (2007) 259, at 266.

¹³¹ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 21, at 31 (referring in that case to GATT Art. III, *National Treatment*).

¹³² DSU, Art. 3.2.

¹³³ See Zang, 'Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate', 33 *Syracuse J Int'l L and Commerce* (2006) 393.

¹³⁴ *Ibid.*, at 415. In addition, Mitchell notes that the WTO tribunal 'may be inclined to distort provisions of the WTO agreements in order to find a textual basis for a particular norm rather than acknowledging that the norm derives from a principle that is not necessarily recorded explicitly in the agreements': Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', (2007) 10 *J Int'l Economic L* (2007) 795, at 835.

text alone cannot provide all the answers; and in order to sustain its legitimacy and relevance, it is arguable that the Appellate Body should not ‘have its hands tied completely by the text’.¹³⁵ Indeed, the VCLT requires that the ordinary meaning of treaty terms be considered both in their context and in the light of the object and purpose of the treaty as a whole.¹³⁶ An argument can be made that the Appellate Body in *Soft Drinks*, in rigidly sticking to the textual approach and emphasizing what it perceived to be imperatives in the DSU, was an example of such arid textualism. The Appellate Body’s reasoning did not test its interpretation of the text against an overall inquiry into the object and purpose of the DSU or the broader *telos* of state–state dispute settlement, as the ICJ demonstrated in *LaGrand*. Nor did the Appellate Body explicitly examine the competing norms at issue: textualism and its role in maintaining the integrity of the WTO’s adjudicative legitimacy, *vis-à-vis* the desirability of flexible accommodation of unanticipated and exceptional circumstances as a means of maintaining the effective administration of justice.

By comparison, previous Appellate Body jurisprudence has explicitly engaged in such normative trade-offs. The seminal Appellate Body decision in *US – Shrimp*¹³⁷ is an example of this analysis where there are competing values at stake. While this approach obviously differs from that in *Mexico – Soft Drinks* in terms of the relevant trade-offs (trade/non-trade values compared with competing jurisdictions), the Appellate Body’s reading of GATT’s Article XX showed a willingness to balance the objectives of liberalized trade and environmental protection, discussing the competing objectives at play and recognizing the linkages between different international agreements. The Appellate Body decision in *EC – Tariff Preferences*¹³⁸ is a more recent example of the Appellate Body stepping back to consider the teleology of the relevant provisions at a higher level. In that case, the Appellate Body was required to consider the relationship between GATT’s most-favoured nation rule¹³⁹ and the Enabling Clause, which permits members to derogate from the most-favoured nation rule so as to allow industrialized countries to grant tariff preferences to developing countries.¹⁴⁰ In making its decision, the Appellate Body exhibited preparedness to go beyond the treaty text and trade off the competing norms that exist within the WTO framework itself, without reference to other international instruments: non-discrimination and special and differential treatment for developing countries.¹⁴¹ It considered the object and purpose of the preamble to the Marrakesh Agreement, as it had

¹³⁵ Zang, *supra* note 133, at 425.

¹³⁶ VCLT, *supra* note 56, Art. 31(1).

¹³⁷ Appellate Body Report, *United States – Shrimp*, *supra* note 23.

¹³⁸ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 Apr. 2004.

¹³⁹ GATT, GATT 1994, opened for signature on 15 Apr. 1994, entered into force on 1 Jan. 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, Art. 1.1.

¹⁴⁰ GATT Doc L/4903, 28 Nov. 1979, BISD 26S/203.

¹⁴¹ Additionally the Panel in this case noted that ‘the dictionary definition itself is not dispositive as to whether the enabling clause excludes the application of Article 1.1’: Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, 1 Dec. 2003.

done in *US – Shrimp*, as well as the object and purpose of the Enabling Clause itself, situating the Enabling Clause within the ‘positive efforts’ called for in the preamble to the Marrakesh Agreement, which exhorts industrialized countries to enhance the economic development of developing countries. In this regard, the Appellate Body linked the object and purpose of the provision at issues into the *telos* of the broader regime, in a manner similar to that of the ICJ in *LaGrand*. The Appellate Body found that the permissibility of differential treatment between developing countries meant that the allocation of the burden of proof could derogate from its general approach to exceptions provisions in WTO law. Discussing the ways in which the Enabling Clause was situated within various pronouncements of the GATT contracting parties, UNCTAD and WTO members which affirmed the important link between trade and development,¹⁴² it stated: ‘we regard the particular circumstances of this case as dictating a special approach, given the fundamental role of the Enabling Clause in the WTO system’.¹⁴³ This discussion emphasized the need for practicality, noting that allowing open-ended challenges of preference systems would go against the intention of Members when the Generalized System of Preferences scheme was established.¹⁴⁴

Attempting to base the power to apply comity in the text, particularly in relation to specific words as opposed to the DSU as a whole, would be likely to continue the problems of arid textualism which Zang identifies. In addition, where this approach is applied to FTAs, the negotiated text of the instrument establishing a particular tribunal may not be sufficiently accommodating and risks a strained interpretation. As is argued below, the WTO’s discretionary power to apply comity need not necessarily be grounded in the text and can be distilled from the existence of the tribunal’s inherent judicial powers.

C The WTO Tribunal’s Inherent Powers

As the WTO’s judicial organ, panels and the Appellate Body possess inherent judicial powers by virtue of being an international judicial tribunal.¹⁴⁵ This is evidenced by their ability to regulate their own procedures, consider claims of estoppel,¹⁴⁶ exercise judicial economy, and admit *amicus* briefs, as well as the Appellate Body’s practice

¹⁴² Appellate Body Report, *EC – Tariff Preferences*, *supra* note 130, at paras 106–118. Based on this analysis, the Appellate Body found that rather than merely raising an allegation of inconsistency with the most favoured nation clause, as is usually required when a party’s compliance with an exceptions provision is challenged, the complainant was required to identify specific provisions of the enabling clause against which the respondent party’s conduct was impugned.

¹⁴³ Appellate Body Report, *EC – Tariff Preferences*, *supra* note 130, at para. 106 (emphasis added).

¹⁴⁴ *Ibid.*, at paras 113–114.

¹⁴⁵ See Mitchell, *supra* note 134, at 829.

¹⁴⁶ See Mitchell, ‘Good Faith in WTO Dispute Settlement’, 7 *Melbourne J Int’l L* (2006) 339, at 358.

of ‘completing the analysis’ of panels.¹⁴⁷ While the WTO tribunal’s inherent judicial powers, like the inherent powers of international tribunals generally, ‘cannot be precisely delineated’,¹⁴⁸ inherent powers include the power to apply comity by declining to exercise jurisdiction in certain situations. The Appellate Body has confirmed that Panels have *la compétence de la compétence*,¹⁴⁹ suggesting that Panels should determine whether they have jurisdiction on their own initiative, whether or not the parties refer the question of jurisdiction in a timely manner.¹⁵⁰ The DSU neither specifically authorizes nor appears to prohibit a panel to decline jurisdiction where the same dispute has been ruled upon by another tribunal or suspend proceedings on its own motion so that related proceedings can be heard in another forum, although it provides that a panel may suspend proceedings at the request of the complaining party.¹⁵¹ In relation to its own powers, the Appellate Body has said that it ‘has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements’,¹⁵² meaning that these provisions do not prohibit panels and the Appellate Body from suspending proceedings pending the outcome of a related dispute.¹⁵³ The Appellate Body has also remarked that panels ‘have a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated’,¹⁵⁴ but has cautioned that ‘this discretion does not extend to disregarding or modifying the substantive provisions of the DSU’.¹⁵⁵

¹⁴⁷ Some commentators dispute that the WTO’s judicial organ possesses inherent powers, on the basis that the WTO tribunal is an atypical judicial body: see Weiss, ‘Inherent Powers of National and International Courts’, in F. Ortino and E.-U. Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (2004), at 189. Weiss is of the view that the power to accept *amicus* briefs and the Appellate Body’s tendency to ‘complete the analysis’ do not indicate inherent powers because these powers are not ‘necessary’ for the functioning of the dispute settlement system. See also Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, 53 *Int’l and Comp LQ* (2006) 861, at 885, suggesting that the WTO’s judicial organ does not possess inherent powers, on the basis of the expressed opinions of some WTO members and on the basis that its functions are too dependent on members’ consent. However, Bartels is of the view that panels and the Appellate Body may suspend proceedings, pending the outcome of other proceedings, but not decline to hear a particular dispute.

¹⁴⁸ Mitchell, *supra* note 135, at 831.

¹⁴⁹ Report of the Appellate Body, *United States – Anti-Dumping Act of 1916*, WT/DS162/AB/R, 28 Aug. 2000, at para. 54, n. 30. See also *United States – Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)* WT/DS217/AB/R, 16 Jan. 2003.

¹⁵⁰ Appellate Body Report, *Mexico – High Fructose Corn Syrup*, *supra* note 36, at para. 36. See also Pauwelyn, *supra* note 58, at 1006.

¹⁵¹ DSU, Art. 12.12: ‘the panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months ... if the work of the panel has been suspended for more than 12 months, the authority for the establishment of the panel shall lapse’.

¹⁵² Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* WT/DS138/AB/R, 7 June 2000, at para. 39.

¹⁵³ Bartels, *supra* note 80, at 893. However, he notes that panels and the Appellate Body are supposed to comply with the time limits set out in Arts 12.8–9 and 17.5 of the DSU.

¹⁵⁴ Report of the Appellate Body, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 13 Feb. 1998, at para. 152, n. 138.

¹⁵⁵ Appellate Body Report, *India – Patents*, *supra* note 53, at para. 92.

D The Inherent Power to Decline Jurisdiction Exists Independently of the Treaty Text

The majority of the ICJ in *Legality of the Use of Force* noted that the Court must reach its own conclusion on jurisdictional matters independently of the parties' pleadings,¹⁵⁶ as the Appellate Body has similarly remarked in *Mexico – High-Fructose Corn Syrup*.¹⁵⁷ The *Soft Drinks* and *Poultry* decisions are incongruent with the ICJ's pronouncements. Even though Mexico (in *Soft Drinks*) had framed its jurisdictional request (perhaps misguidedly) in terms of judicial economy rather than comity, and Argentina (in *Poultry*) had framed its legal arguments by reference to estoppel, *abus de droit*, and the use of the VCLT, an argument can be made that the Panel and the Appellate Body were unduly dismissive of the question of jurisdiction, particularly given their inherent powers to reframe the jurisdictional issues. In both cases, rather than satisfying itself about the grounds and ambit of its jurisdiction, the WTO tribunal appeared to accept the parties' pleadings at face value. Both the Panel and the Appellate Body in *Mexico – Soft Drinks* came from a starting point that the DSU explicitly fettered their discretion to exercise jurisdiction, perhaps failing to appreciate that extraordinary circumstances can justify derogation from usual practice. This reasoning implies that all options available to panels or all actions they can perform must have a textual basis.

It is argued that panels' 'margin of discretion' referred to by the Appellate Body,¹⁵⁸ extends to the inherent power to exercise judicial restraint and apply comity where this is the most appropriate course of action. The inherent power to find no jurisdiction *in limine litis* or to decline to exercise jurisdiction arises notwithstanding the text of the DSU, unless these inherent powers are specifically extinguished or modified in the text. In *Use of Force*, Judge Kooijmans noted that 'the fact that the Rules only speak of removing a case from the List by unilateral action of the applicant ... or joint action by the parties ... cannot deprive the Court of its inherent power, as master of its own procedure, to strike *proprio motu* a case from the List'.¹⁵⁹

E Using the WTO's Inherent Power to Apply Comity

It is therefore suggested that in order to avoid the perception that its jurisdictional analysis is based on a parochial desire to maintain the legitimacy and relevance of the tribunal seised of a particular case, the WTO tribunal should take a more holistic approach, both in terms of any broader dispute and in terms of the administration of justice more generally. In this regard, the WTO should, when faced with overlapping or

¹⁵⁶ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 92, at para. 36; *Nuclear Tests (Australia v. France)* (Merits) [1974] ICJ Rep 253, at 262. See also J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 447–448.

¹⁵⁷ Appellate Body Report, *Mexico – High-Fructose Corn Syrup*, WT/DS132AB/RW, *supra* note 49, at para. 36. See also Pauwelyn, *supra* note 58, at 1006.

¹⁵⁸ Report of the Appellate Body, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 13 Feb. 1998, at para. 152, n. 138.

¹⁵⁹ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 92, Separate Opinion of Judge Kooijmans, at para. 22.

successive disputes, move beyond introspection and ‘err on the side of declining jurisdiction whenever jurisdiction is contested’.¹⁶⁰ Where a dispute before one tribunal is inextricably connected to another antecedent or concurrent dispute, in a manner similar to that in the bifaceted *Bluefin Tuna* dispute, it is arguable that, based on a ‘single dispute theory’, one forum should apply comity by declining to exercise jurisdiction or suspending the proceedings, pending the outcome of the dispute in the other forum. This integrationist approach is cognizant of legal pluralism (that states and individuals are subject to a multiplicity of rights and obligations under different sources of law),¹⁶¹ and that parallel claims under WTO and FTA law, while framed in accordance with the law of each jurisdiction, are not distinctive. It is also a pragmatic means of avoiding a panoply of potentially conflicting judgments. Using the inherent power of comity also avoids dealing with tricky questions on the nature of the relationships between international instruments where the VCLT principles do not assist, where Pauwelyn’s theory of ‘jurisdictional defence’ using *lex specialis* and *lex posterior* is of uncertain application, and where private international law rules (such as *res judicata*) are not applicable to the particular case.¹⁶²

According to Judges Higgins and Kooijmans in *Use of Force*, the conduct and motives of the disputants (including motives in relation to a case before another tribunal) were relevant considerations when deciding whether to exercise jurisdiction. According to this reasoning, it would be legitimate for the WTO tribunal to examine the conduct of the parties in the broader context of the dispute, including a related dispute under an FTA, and, if appropriate, use the inherent power of comity to deny attempts to abuse the tribunals’ processes. While a member’s intention is not relevant to a claim of breach of WTO obligations, examining the conduct and assumed intentions of the parties and the history of the dispute may shed some light on whether it is appropriate for a tribunal to decline to exercise jurisdiction in favour of another tribunal. Examining the disputants’ conduct in relation to other fora as a relevant consideration when deciding whether to exercise jurisdiction does not require a tribunal to give judicial pronouncement on the legality of the disputants’ conduct under the other instrument, as Mexico argued the WTO tribunal should have done in *Soft Drinks*.¹⁶³ The *Poultry* case seems relatively straightforward in this regard. However, in relation to *Soft Drinks* this is a complex question, made all the more difficult by the conduct of both parties to the dispute, particularly since Mexico (the ‘victim’) had effectively engaged in ‘international civil disobedience’ in an attempt to pressurize the US to agree to the composition of a NAFTA panel.¹⁶⁴ While it appears that the US was acting

¹⁶⁰ Romano, *supra* note 22, at 801.

¹⁶¹ See Shany, *supra* note 56, at 844.

¹⁶² *Ibid.*, at 850.

¹⁶³ Mexico, citing the *Factory at Chorzów* case, argued that, as a result of the US having prevented Mexico from having recourse to the NAFTA dispute settlement mechanism by ‘illegally’ refusing to nominate panellists to the NAFTA panel, the Panel should decline to exercise jurisdiction: PCIJ, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No 9, at 31; Appellate Body Report, *Soft Drinks*, *supra* note 3, at para. 56.

¹⁶⁴ Bhala and Gantz, ‘WTO Case Review 2006’, 24 *Arizona J Int’l and Comp L* (2007) 299, at 329.

obstructively by failing to agree to the composition of a NAFTA panel, this is clearly not as egregious as the conduct that Serbia and Montenegro had engaged in before the ICJ in *Use of Force*, in relation to trying to avoid prosecution for genocide before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Nevertheless, it is suggested that the WTO should have taken note of these matters when deciding whether to exercise jurisdiction.

F Setting a Threshold for Applying Comity

In *Soft Drinks*, apparently concerned with a floodgates-type situation, the Panel opined that if broader issues of the sweetener-related disputes under NAFTA were considered in WTO dispute settlement, ‘there would be no practical limit to the factors which could legitimately be taken into account, and the decision to exercise jurisdiction would become political rather than legal in nature’.¹⁶⁵ While the floodgates argument is perhaps unnecessarily alarmist, the concerns raised by the Panel and the Appellate Body in this dispute are relevant in considering the circumstances in which the power to apply comity should be exercised. As Romano notes, legitimacy of international tribunals is especially crucial where judges exercise inherent powers without explicit textual authority. Accordingly, tribunals must exercise such powers ‘in the interest of the overall system’.¹⁶⁶ The approach proposed in this article – exercising inherent powers either to decline to find jurisdiction or to refrain from exercising jurisdiction that has been validly established – if untrammelled, might carry risks of uncertainty in the adjudication of trade disputes, giving rise to questions about whether a broad discretion to decline to exercise properly established and constituted jurisdiction would ‘tend to weaken the adjudicatory authority of judicial tribunals insofar as such authority would come to be regarded as not based on compelling grounds once jurisdiction is vested in them but controlled by an element of choice’.¹⁶⁷ These concerns are likely to arise in the event that the WTO tribunal does exercise its inherent powers in the manner proposed, particularly given the disquiet among some WTO members about the Appellate Body’s perceived ‘judicial activism’ in relation to its inherent powers (such as, for example its decision in *EC – Hormones* and subsequent cases to accept unsolicited *amicus* briefs) and the WTO tribunal’s purported accumulation of power due to the reverse consensus rule.¹⁶⁸

In *Use of Force*, Judge Higgins held that the use of the power to apply comity and decline to exercise jurisdiction should be employed only ‘when the most cogent considerations of judicial propriety so require’.¹⁶⁹ Concerns that use of the inherent power to

¹⁶⁵ Panel Report, *Soft Drinks*, *supra* note 3, at para. 7.17.

¹⁶⁶ Romano, *supra* note 22, at 869.

¹⁶⁷ Amerasinghe, *supra* note 76, at 238.

¹⁶⁸ See Weiss, *supra* note 80, at 177. See also Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 *AJIL* (2004) 247, at 262.

¹⁶⁹ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 99, Separate Opinion of Judge Higgins, at para. 12, citing *Nuclear Tests (Australia and New Zealand v France)* [1974] ICJ Rep 253, Joint Dissenting Opinion, at 322, para. 22.

apply comity has the potential to weaken the efficacy of the dispute settlement system can be ameliorated by restricting the use of the power to exceptional circumstances.¹⁷⁰ While Judge Higgins' opinion was given in a situation where there was no other tribunal able to hear the particular dispute, meaning that considerations of access to justice required a very high threshold, the threshold for applying comity could be lower where there are related proceedings before more than one tribunal – something less than 'highly exceptional circumstances'.¹⁷¹ At the WTO–FTA nexus, the threshold at which one tribunal could apply comity is suited to situations where there is an inextricable connection to an antecedent or concurrent dispute under another trade instrument,¹⁷² such that it would more reasonable and appropriate for another tribunal to exercise jurisdiction, bearing in mind the need to ensure stability and predictability in the international trading system by way of effective resolution of disputes. Such a threshold is relatively transparent (in so far as criteria based on 'reasonableness' can be), and would, in this regard, assist in maintaining the integrity of the judicial body and provide a level of certainty for state and private actors.

Applying comity in such circumstances accords with the Appellate Body's pronouncement in *EC – Tariff Preferences* in which it stated that in atypical situations, a preparedness to go beyond the orthodoxy was justified where it considered that the particular circumstances of the case dictated a 'special approach' in the interests of the administration of the dispute settlement regime.¹⁷³ Where the threshold is reached, applying comity is likely to assist in maintaining the security and predictability of the trading system – and thereby its legitimacy – in the longer term.

G Adherence to the Text: the Possibility of Renegotiating Forum Selection Clauses

It is arguable that, in *Soft Drinks*, had Mexico relied on the forum exclusion clause in NAFTA as a jurisdictional defence, this would have been a stronger argument than relying on the doctrine of comity, which has no basis in the relevant treaty texts. While this would have been possible in *Soft Drinks*, the approach proposed in this article is intended to be flexible, accommodating situations where no forum exclusion provision exists in an FTA, as was the case when the *Poultry* dispute was decided under MERCOSUR. A related critique of using inherent powers rather than relying on the particular forum selection and exclusion clauses in the relevant instruments is based on the fact that FTA signatories have accepted the jurisdiction of both the FTA dispute settlement tribunal as well as that provided for in the DSU. In relation to

¹⁷⁰ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, *supra* note 99.

¹⁷¹ *Ibid.*

¹⁷² Report of the Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, *supra* note 34. Mexico's appellant's submission, at para. 73. This is a higher threshold than that suggested by Mexico at the Panel stage: 'where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO': Panel Report, *Mexico – Soft Drinks*, *supra* note 3, at para. 4.103.

¹⁷³ Appellate Body Report, *EC – Tariff Preferences*, *supra* note 130, at para. 106.

NAFTA where the problematic dispute settlement provisions remain extant, it is arguable that the solution lies in the renegotiation of relevant NAFTA provisions, rather than relying on the WTO tribunal to accommodate such design flaws – and that the responsibility for deciding which forum should hear the dispute should rest with the governments of member states, which are better suited to such political negotiations and compromises. However, as Romano notes, solving problems of conflicting or overlapping jurisdiction through renegotiation and amendment of the ‘complex jumble of dispute settlement clauses’ in international treaties is not viable, given the political and diplomatic hurdles such a process would sustain.¹⁷⁴ It appears unlikely that the more dominant members of FTAs (such as the US) would be amenable to the renegotiation of legal loopholes that suit their trading interests. In this regard, less powerful members of FTAs are in an invidious position. In addition, while there have been calls for reform of the DSU for a number of reasons, including that the DSU contains no rules on judicial restraint,¹⁷⁵ the mandated review of the DSU to improve and clarify its provisions (originally due to be completed by 1999) has been stalled for a number of years and shows no sign of progress in the near future.¹⁷⁶

6 Some Conclusions

With the proliferation of FTAs in recent years and the Doha Round in abeyance, coherence in international trade jurisprudence is becoming increasingly important. Cohesion of the international judicial system is dependent on the behaviour of the relevant legal actors (both litigants and tribunals), and tribunals must be cognizant of the overarching objectives of the system in which they operate and what is within their powers to achieve and maintain coherence over.¹⁷⁷ The *Soft Drinks* and *Poultry* disputes are examples of the legal problems caused by overlapping jurisdiction in international trade law, raising questions about the links between international trade dispute settlement fora and the powers of these fora where a dispute arises before more than one tribunal and implicates trade measures under both WTO and FTA rules. This article has argued that these disputes are indicative of the myopia that can characterize jurisprudence where a tribunal’s decision does not reflect cognizance of the interconnectedness between its jurisdiction and that of other fora, and does not use its inherent powers to overcome the risk of both fragmented jurisprudence and injustice for actors in the system. However, the Appellate Body has previously exhibited willingness to look at the broader teleology of the regime it is administering, including the content of non-WTO rules and procedures of international law, such as state practice under

¹⁷⁴ Romano, *supra* note 22, at 848.

¹⁷⁵ See Kennedy, ‘Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?’, (2007) 39 *George Washington Int’l L Rev* (2007) 47, at 50–51.

¹⁷⁶ See WTO, *New Negotiations on Dispute Settlement Understanding*, available at: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations, last accessed on 11 Jan. 2008.

¹⁷⁷ See Abi-Saab, *supra* note 2, at 927.

other international treaties. It has also on occasion considered legal claims without a strict textual basis, and has exercised inherent powers such as judicial economy.

This article has, somewhat ambitiously, departed from a VCLT approach, traversing a selection of cases from other jurisdictions in order to suggest a pragmatic approach that may assist in resolving issues of competing jurisdiction where closely related proceedings arise before the WTO and an FTA. This approach would see the WTO tribunal use its inherent power to apply comity by suspending proceedings or declining to exercise jurisdiction. This approach is likely to lessen the risk of contradictory or inconsistent judgments being promulgated, therefore assisting in maintaining the viability, security, and predictability of the multilateral trading system through effective use of judicial processes. However, it is acknowledged that the use of inherent powers such as this may be controversial, given the current debate about the nature of WTO law in the context of the broader corpus of public international law. For these reasons, the power to exercise comity should be used sparingly, and only in cases of inextricable connection to another trade dispute, in order to maintain the legitimacy of the WTO's judicial organ and avoid allegations of improper use of such powers.