Overlapping Jurisdiction between WTO Dispute Settlement and Bilateral Mechanisms: Analysis of WTO DSB and Chile-USA FTA

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ABSTRACT
Dispute settlement mechanisms to international trade conflicts are widely varied and can be used selectively since employment of these mechanisms undeniably support on-going process of the world’s economy development. This paper is intended to give analysis of overlapping jurisdictions between dispute settlement systems to trade conflicts between countries, herein the case of FTA between Chile-USA and the dispute settlement system under WTO regime. This comparative analysis is expected to give motivation for further research and studies on the same or related fields.

บทคัดย่อ
การจัดระบบคัดสิทธิ์ทางการค้าปรากฏในหลายรูปแบบโดยสามารถเลือกใช้ได้ตามความเหมาะสม ด้วยเหตุที่ถึงการจัดระบบคัดสิทธิ์ทางการค้าสามารถช่วยให้กระบวนการพิจารณาหลักฐานของโลกดำเนินต่อไปได้อย่างราบรื่น บทความจริงนี้ได้เขียนขึ้นโดยละเอียดประเด็นเกี่ยวกับการขัดแย้งที่เกิดขึ้นในทางต่าง ๆ กลไกการจัดระบบคัดสิทธิ์ทางการค้าซึ่งสามารถพบเห็นได้ทั่วไป โดยเลือกศึกษาเรื่องที่เกิดขึ้นระหว่างช็อกคล่องว่าด้วยข้อตกลงการค้าเสรีระหว่างสาธารณรัฐชิลีและสหรัฐอเมริกาที่ขัดแย้งการจ้างค่าโดยพ้นจากสิทธิมุมมองที่จะให้การศึกษาเรื่องที่เกิดขึ้นในกรณีเป็นการจับปะแสให้เกิดการศึกษาข้อตกลงไปในอนาคตอาจได้เรื่องต่อไปกับเหตุการณ์ที่เกิดขึ้นต่อไป

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2 The analysis of FTA between Chile-USA was chosen as the topic of this article, as Chile has different perspective on the making of FTA and other free trade instruments. It is widely known that Chile opens itself to all forms of trade agreement even though numerous domestic entrepreneurs, reportedly, have suffered adverse impacts thereby and finally ended up with breaking down of their businesses. The FTA between Chile and USA therefore exposes a significant development of bilateral trade, which gives a fascinating framework when it is studied along with the WTO system.
INTRODUCTION
Open-minded attitude of Chile on free trade has made itself an interesting country to study. In this study FTA between Chile-USA has been selected for discussion in order to reflect a model of other countries which Thailand should also take into account. As South American countries are prospective economies to Thailand, study on trade relations of these countries should thus be conducted to enhance the preparedness of Thailand. Dispute settlement mechanism is a significant issue, which contributes to trade liberalization, that this research has mainly focused.

RESEARCH METHODOLOGY
As a documentary research, it has been conducted through thorough studies, mostly, of various documents, including treaties, articles, rulings and jurisprudence relevant to international trade law.

HYPOTHESIS
Despite conflicts of jurisdictions between optional dispute mechanisms, international law provides feasible rules and regulations, that help settle these conflicts. Contentious states tend to apply cases before the most effective mechanism.

This writing will approach the models of the both dispute settlement systems in two parts. The first part will present 'parallel analysis' of the both mechanisms, raising significant issues relating to their differences. The second part will illustrate the 'relationship' between the both systems to affirm that they do not live separately, but rather sometimes react to each other.

I. PARALLEL ANALYSIS BETWEEN THE DISPUTE SETTLEMENT MECHANISMS OF THE CHILE-USA FTA AND OF THE WTO
Development of international trade rules under the WTO regime results in well-established regulations which always influence other international trade regulations of bilateral, regional and multilateral regimes3. It is therefore not surprised that the FTA also reflects such WTO well-established regulations in its provisions. However much influence the FTA has received from the WTO, its regulations have been adaptively designed for the sake of the two countries.

A. Submission of Complaint
   1. Jurisdiction Scope
      a. Ratione Personae
      The both systems are restrictively accessible to contracting States in accordance with Article 1.1 of the DSU and Article XXIII:1 of the GATT 1994 and Article 22.3 of the FTA. Either of individual, private sector, or non–governmental organization does not have standing to bring claims before Panel (WTO) or Arbitral Panel (FTA). Nevertheless there remain indirect channels which, this article suggests, these private entities may apply.

Under the WTO regime, if private entities want to pursue their interests or rights, a simple means is to convince a State to enforce their rights before panel4. Implementation of their interests and rights therefore depends on decision of that State. For the FTA, private entities may do the same if they would like to enforce their rights. However, concerning this matter, private entities should consult Article 22.19 of the FTA, which would grant them explicit opportunity to implementation of their interests and rights. Article 22.19 of the FTA provides that if an issue of interpretation or application of the Agreement arises in any domestic judicial or administrative proceeding of a Party, the court or administrative body could solicit the views of a contracting Party to the FTA and the next step of the same provision could be then followed5. With regard to this provision, if an individual is undergoing judicial or administrative procedure, he/she could invoke before the court or administrative body to solicit the view of a Party, as detailed in Article 22.19. This means helps such individual implement their interests and rights at a level, even though they could not invoke directly before an Arbitral Panel. However the problem is that implementation of their interests and rights is uncertain. It depends on discretion of the court or administrative body and on relevant domestic laws of the country, where the case has been litigated.

Submission of amicus curiae is a means that private entity could apply in order to make their views indirectly acknowledged by Arbitral Panel (FTA) or Panel (WTO). This topic will be discussed in details later.

Nevertheless the FTA recognizes right of individual to dispute settlement in the area of investment. Section B of the Chapter 10 does provide investor–State dispute settlement mechanism. The individual could refer to concerning provisions under this

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3 For instance, NAFTA, ASEAN, and MERCOSUR have been influenced by WTO on many aspects.; STOLL, P., "Article 22 of the DSU", in WOLFRUM, R. (Ed.), "WTO - Institution and Dispute Settlement", Leiden: Nihhoff, 2006, p. 554-555.


5 Article 22.19(1) reads, "If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Party. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible."
chapter to access this specific dispute settlement mechanism accordingly.

b. Rationale Materiæ

Jurisdiction scope ratione materiæ of the both mechanisms are restricted, that is, the WTO system requires that panels exercise jurisdiction to the claims based on the GATT 1994 in the case of Article XXIII. In other words the complaints are inadmissible when based on other international law provisions which do not form part of the WTO legal system. Similarly the FTA requires that the jurisdiction of Arbitral Panel is restricted to the claims based on the Chile–USA Free Trade Agreement. However the issue of jurisdiction scope ratione materiæ of both systems is distinguished from the issue of applicable law. The Panel (WTO) or the Arbitral Panel (FTA) could refer to applicable law other than WTO agreements or the FTA respectively. The issue of applicable law will be discussed later.

However it is worth to make a historical remark on the issue of ratione materiæ. Once upon a time, the GATT 1947 arbitration has addressed in EC–Article XXVIII Case that complaints based on bilateral agreement may be brought before it. The statement of the arbitration is quite interesting as followed:

"In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT Arbitration procedures."  

This statement of the arbitration is quite interesting, but is no more recognized by the WTO regime as affirmed by Article 7 of the DSU, which clearly requires that terms of reference shall be based on “the covered agreements” cited by the parties to the dispute. The word “the covered agreements” has been well-defined as WTO agreements. Provisions of bilateral agreement could not be the basis for jurisdiction of the Panel, but could be applicable law as will be discussed later.

2. Basis of Complaint

DSU provides three basis of complaint: (i) violation complaint under Article 4.2 of the DSU and Article XXIII:1(a) of the GATT 1994; (ii) non-violation complaint under Article 26 of the DSU and Article XXIII:1(b); (iii) situation complaint under Article XXIII:1(c). The FTA has sorted into three basis of complaint according to Article 22.2 which include: (i) dispute regarding interpretation or application of the FTA; (ii) a measure of a Party is inconsistent with the obligation of the FTA; (iii) a measure of a Party causes nullification or impairment in the sense of Annex 22.2.

A remark regarding this topic which should be made is about standing of the both Parties to request for interpretation of their rights and obligations, which is clearly stated in Article 22.2(a) of the FTA. Unlike Article 22.2(a) of the FTA, the DSU does not provide procedure to request for interpretation, but does recognize right to seek for authoritative interpretation in Article 3.9, which makes clear that the DSU does not bar a Member from seeking authoritative interpretation of provisions or a covered agreement in accordance with Article IX:2 WTO Agreement or similar provisions of Plurilateral Trade Agreement. The Parties therefore could seek for interpretation if they are allowed to do so according to other WTO provisions. They could not submit request for interpretation to a Panel which does not exercise its jurisdiction to interpreting WTO provisions, but rather to settling dispute between the Parties.

Article 22.2(a) of the FTA, however, provides a different framework, establishing right of the Parties to submit request for interpretation of rights and obligations. This basis of complaint is quite useful because in case of ambiguity the interpretation is needed to prevent the parties from exercising their arbitrary discretion, which possibly results in repugnancy of their conducts to binding regulations. Such interpretation complaint is tremendously practical on the bilateral latter, but is arduous on the multilateral latter. This may be the reason that Article 3.9 of the DSU leaves the task to other authoritative body in the WTO, otherwise numerous cases would unnecessarly flow to Panels, the Appellate Body and the DSB, creating abundant works which definitely result in delay of resolution to contentious cases.

B. Proceedings of Dispute Settlement

1. Prerequisite to Submission of Complaint

‘Consultation process’ is the prerequisite to the dispute settlement proceeding of the both mechanisms. Under the DSU a Panel is entitled to resolve conflicts after the Parties have rendered consultation process in accordance with the DSU provisions and other provisions in the covered agreements. The requirement is also set forth in the FTA, that is, the complaining Party shall put its effort to consultation process in accordance with Article 22.4 (Chapter 22–Dispute Settlement). Consultation process is also specifically prescribed in certain areas, i.e., Technical Barrier to Trade (Article 7.8), Financial Services (Article 12.6), Labor (Article

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7 EC – Article XXVIII, BISD 37/S/80, at 84.


18.6), Environment (Article 19.6), making such process equivalent to consultation under Article 22.4. After satisfying consultation process requirement under either of these specific provisions, the complaining Party could then bring the claim before the Arbitral Panel.

2. Establishment of Panel

The DSU requires that the complaining Party has to make a request of Panel in writing to the competent DSB to appoint panelists. After the establishment of the panel, the parties are required not to oppose the panel, except for compelling reasons. But in practice, parties often reject the nominations without much justification. The composition, in practice, is a contentious process. Differently the FTA still preserves the right of the Parties to establish an Arbitral Panel. Firstly the both Parties have to agree on the chair of the panel and each side then has to select a panelist from the roster according to Article 22.9 of the FTA.

3. Work of Panels

Terms of Reference

Article 7 of the DSU operates terms of reference which a Panel shall rely on when adjudicating on a dispute submitted to it. The provision recognizes two kinds of terms of reference, standard terms of reference and special terms of reference. This provision makes clear that Panels shall exercise their authority in relation with the terms of reference by not adjudicating upon claims relating to legal provisions other than those cited by the Parties to the dispute. In other words, they have to take into account the principle of non ultra petita. For the FTA, Article 22.10(4)-(5) of the FTA and the rules 4-5 of the rules of procedures operate its terms of reference. These provisions also recognize the both kinds of terms of reference.

b. Burden of Proof

The both systems do not contain specific rules concerning burden of proof in their proceedings. For the FTA, Arbitral Panels may confront certain problems concerning this matter, since the both contracting Parties apply different legal systems, Chile of civil law, and USA of common law, in which the rules applied when parties adduce evidence are slightly different. However, concerning this matter, the Appellate Body in US–Wool Shirts and Blouses Case has once noted in a part of its report, which reads:

"...it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

This methodology would be helpful if applied also in the hearings before Arbitral Panels of the FTA. The Appellate Body has made a merit in extracting the methodology which the countries of the both legal systems agree upon.

c. Working Procedures

i. Rules of Working Procedures

Working procedures of Panel and the Appellate Body (WTO) are subject to the DSU, the Appendix 3 of the DSU and the Rules of Conduct while working procedures of the Arbitral Panel of the FTA are subject to the FTA and the Rules of Procedures. These instruments of the both systems contain basic regulations, for instance, avoidance of conflict of interests, maintenance of confidentiality of information, prohibition of ex parte communication.

Working procedures of WTO Panels have been criticized by Prof. Ehlermann in the statement as reads:

"In contrast to the Appellate Body's own Working Procedures (Article 17.9 of the DSU), there are no such standard procedural rules for panel proceedings, although their existence would be desirable. The Working Procedures set out for panels in Appendix 3 to the DSU are very rudimentary, which is why Article 12.1 authorizes panels to adopt..."
additional or different rules after consulting the parties."

His statement draws attention of this article which believes that such ‘standard procedural rules’ could help the Panel in fact finding, which leads to application of concerning substantive law of the WTO. Investigation of facts is a big problem which shall not be overlooked. Inadequacy of fact finding may leads to the pertinent incorrect application of law, which could not be solved at the Appellate Body step.

This experience of the WTO should be taken into consideration for the FTA working procedures, in which the Arbitral Panel may confront the same problems. To set out or to consolidate standard procedural rules at this bilateral relation is not as difficult as at the multilateral, given that the FTA Commission is entitled to modify the Rules of Procedures in accordance with Article 22.10(3) of the FTA.

ii. Investigation of Facts

Both the Panel (WTO) and the Arbitral Panel (FTA) have to perform objective assessment in adjudicating on disputes. In implementing this task, the DSU and the FTA have established the authority upon both Panels to seek for information and to consult experts in conformity with concerning provisions. Article 13 of the DSU encourages that the requested Party should ‘respond promptly and fully’ to any such request for information. If a Member violates this obligation the Panel may draw ‘negative inferences’ upon non-cooperating Member as affirmed by the Appellate Body in the Canada Aircraft Case. This interpretation, as criticized by academics, goes beyond the ordinary meaning of the text and derives the competence of the Panel from its normal function.

A part from the authority to seek for information of the both Panels, an always interesting point is submission of amicus curiae, which is contentious under the WTO regime, even though Appellate Body has already addressed this issue in the US–Shrimp Case. But under the FTA this issue has been addressed in the relevant provisions themselves.

The DSU itself does not contain provisions concerning amicus curiae, but the FTA has addressed this issue in Article 22.10 of the FTA and No. 42-51 of the Rules of Procedures. The latter system clearly recognizes an opportunity of non-governmental entities to submit written views regarding the dispute, even though the Arbitral Panel does not solicit the submission. The amicus curiae provisions of the FTA reflect characters of such bilateral relation, which, by nature, is significantly different from multilateral. The participation of non-governmental organization on the bilateral relation is more recognizable than on the multilateral relations, since the bilateral relation deals with interests merely between two countries, who seek to preserve their proper standings. The Arbitral Panel (FTA) therefore has to take into consideration this ideology by collecting useful information pertinent to implementing the common interests of the both countries.

It is thoughtful to consider Article 22.10(1)(d) of the FTA and Rule No. 41 of the Rules of Procedure, which set off a prerequisite to submission of amicus curiae, that is, such non-governmental organization has to be located in the parties’ territories. The provisions are seemingly prescribed to prevent some problems which would possibly happen from unexpected sanctions outside the countries. On multilateral relations, the submission of amicus curiae briefs is inevitably more restrictive, since WTO Panels are responsible for securing ‘positive solution’ to dispute and for making ‘objective assessment’ to the dispute. The role of the WTO is therefore not only to secure interest of only two contentious Parties, but also to other Members. As experienced in the US–Shrimp Case, this decision met the protest of nearly all WTO members, who were afraid that the DSB would be exposed to intense pressure from NGOs. However, in its aftermath, the Panels accepted amicus curiae briefs (in accordance with the Appellate Body’s decision) but regularly exercise their discretionary authority not to consider these submissions.

C. Applicable Law

1. Applicable Law of WTO Panel

WTO Panels, when adjudicating on dispute, have to consult provisions in ‘covered agreements’ (the WTO Agreements and its annexes), which have been referred to by its complainant in terms of reference. Article 3.2 of the DSU further provides that ‘customary rules of interpretation of public international law’ shall be regarded when WTO regulations are applied. The rules of interpretation are substantively contained in Article 31 of the Vienna Convention on the Law of Treaty 1969.

20 Prof. Ehrlermann further suggests that standard working procedures would contribute to the investigation of facts only if it were possible to solve the structural problem.


22 Ibid., p. 548-549.


26 "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their contexts and in the light of its object and purpose".
which provides principles and methodology of interpretation.

In addition, ‘customary international law’ and ‘general principle of law’ are also sources of law for WTO Panels as the Appellate Body in the US-Gasoline Case\(^\text{26}\) has stated, “...the GATT is not to be read in clinical isolation from public international law.”, which means that WTO provisions are not to be read alone, but rather along with general rules of international law which may help Panels interpret rights and obligations of the Parties in each case. This methodology has been affirmed in various cases. In the Turkey-Textiles Case, for example, the Panel has applied ‘principles of state responsibility’ when facing a question which WTO provisions alone could not answer\(^\text{27}\). In the US-Gasoline Case, the Appellate Body has adopted ‘principle of effective treaty interpretation’ (ut res magis valeat quam percipiat)\(^\text{28}\).

Moreover other international agreements shall be taken into account, if incorporated into the WTO rules, as affirmed in the EC–Article XXVIII Case\(^\text{29}\) and the Canada–Pharmaceutical Patents Case\(^\text{30}\).

2. Applicable Law of FTA Arbitral Panel

Likewise the dispute settlement system under the Chile–USA FTA not only relies on its Agreement, but also on other rules of international law, referred to or incorporated in its provisions. Article 1.3 of the FTA, for example, stipulates that the both parties affirm “existing rights and obligations” of the both parties under the WTO Agreement and other agreement to which both parties are party. In other words, it provides that, with regard to this FTA, the both parties may invoke their rights and obligations in reference with other binding rules of international law and the Panel has to apply to the extent possible in its proceedings. Many WTO provisions have been referred to in provisions of the FTA, for instance, Article 3.2 (National Treatment), Article 6.2(1) (SPS measure), Article 7.2 (TBT measure), resulting in recognition of their rights and obligations under the WTO in this instrument. Furthermore, like the WTO Panel, Arbitral Panels of this FTA has to apply rules of interpretation under the VCLT 1969 as well as ‘customary international law’ and ‘general principle of law’ according to Article 38 of the ICJ Statute as within its competence established by this FTA.

3. Article XXIV of the GATT 1994 vs. Applicable Law of the Both Panels

Application of FTA provisions may cause a repugnancy to obligations under the WTO regime, especially most-favored nation treatment obligation, since FTA requires that its contracting Parties provide reciprocal benefits to each other. Article XXIV of the GATT 1994 therefore allows this derogation to happen under certain specific conditions\(^\text{31}\) in order to support WTO Member States to achieve closer economic integration. Chile–USA FTA is a “free trade agreement” which meets the criteria to derogation according to Article XXIV of the GATT 1994. Upon this respect, when the complaint has been brought to a Panel (WTO), the Panel has to profoundly consider this agreement as derogation to certain obligations of the responding Party. On the other hand, when the complaint has been brought to an Arbitral Panel (FTA), the Arbitral Panel shall also determine whether the FTA relevant provisions are justified under Article XXIV\(^\text{32}\) in conjunction with other WTO relevant provisions. Implementation.

Reports of WTO Panels and of the Appellate Body do not have binding effect upon the Parties until adopted by the DSB, but the final report of the FTA does have such effect automatically on receipt of the final report of the panel according to Article 22.14(1) of the FTA.

The both systems do not require their Panels to suggest the ways that the responding party should perform to implement recommendations and rulings. WTO jurisprudence makes clear that the suggestions of Panels do not have binding effect upon the responding Party. The responding Party therefore obtains discretion to choose the ways to meet the recommendations and the rulings of the Panel. Neither does the FTA provide the role of the Panel. The discretion of the Panel (FTA) also falls upon the responding Party to implement the determinations and recommendations.

However “principle of prompt compliance” is applicable to the both systems after release of ‘adopted report’ (WTO) or ‘final report’ (FTA). If the responding Party does not implement the rulings

\(^{26}\) Appellate Body Report, US–Gasoline Case, WT/DS2/AB/R; Appellate Body Report, US–Shrimp Case, WT/DS8/AB/R; Appellate Body Report, EC–Hormones Case, WT/DS26/AB/R, WT/DS48/AB/R, para. 6. In this case (EC–Hormones Case) the EU claimed that the precautionary principle should be taken into account as a “general customary rule of international law or at least a general principle of law”. While eventually dismissing the argument on other grounds, the Appellate Body in no way foreclosed the possibility of taking into account such rules of international law as a matter of principle.; MARCEAU, G., Supra Note 23, p. 41.; Supra Note 6.

\(^{27}\) The Panel had to face the question whether India could bring procedures against Turkey in view of measures taken by the customs union between Turkey and the EC. The Panel made it clear that “where States act through a common organ, each State is separately answerable for the wrongful act of the common organ”; Panel Report, Turkey–Textiles, WT/DS34/R, para. 9.42.; STOLL, P., Supra Note 9, p. 299.


\(^{29}\) Award by the Arbitrator, EC–Article XXVIII Case, BISD 375/80, at 9.


\(^{32}\) Article XXIV of the GATT 1994 shall be read in conjunction with the Understanding on the Interpretation of Article XXIV of the GATT 1994; Ibid.
of the report, the both systems provide the mechanisms to pursue their performance. The FTA provides 'a sharp resolution' on this matter. Article 22.15 requires that the responding party, if fails to perform its obligation within the period of time, shall enter into negotiation process. And if the both Parties could not agree upon on the process, the complaining party may, by submitting written notice to the other party, suspend the application of benefit. But the WTO system does not allow this sharp resolution to happen easily, since the DSU provides mechanisms to enforce the responding party, which work effectively.

The DSU requires that the responding Party shall disclose at a meeting of the DSB to indicate how it will implement the recommendations and rulings of the DSB. At the same meeting 'reasonable period of time', in which the responding party shall perform its obligation, is designated as well. If the reasonable period of time is not agreed upon, Article 21.3(c) provides that the both parties may establish 'arbitration to help determine' such period of time. During the reasonable period of time, in which the responding party is implementing the recommendations and rulings of the DSB, if there is a dispute concerning the inconsistency with a covered agreement, the complaining party can request establishment of a Panel under Article 21.533 to determine whether such implementation is in conformity with WTO law. The proceeding under this Article are not only aimed at establishing whether the adopted measures are consistent with the DSB recommendations and ruling, but also whether they are consistent with the relevant provisions of the covered agreement(s) as affirmed by the Appellate Body in the Canada–Aircraft (Article 21.5–Brazil) Case34.

If the recommendations and rulings of the DSB are not implemented within a reasonable period of time, the complaining party may seek for 'compensation or the suspension of concessions or other obligations'. If the latter is applied, the complaining party is required to get 'authorization from the DSB'. This requirement does not exist in the FTA dispute settlement, that is, the complaining party may apply the suspension after submitting written notice to the responding Party according to Article 22.15(2) of the FTA. In addition, Article 22.3 establishes the procedures that the prevailing Party shall respect when applying this measure. The provision also allows the prevailing Party to apply 'cross – retaliation' or suspension in another sector under the same Agreement and suspension under another WTO Agreement. Even though no provisions in FTA stipulate about cross-retaliation, the prevailing Party may seek for 'cross–retaliation' as well, since Article 22.15 of the FTA does not identify the characters of suspension, but rather grants discretion to the prevailing Party. If therefore could seek for suspension of benefit, even 'cross-sector'. Nevertheless for the both systems when retaliation is applied, the 'principle of equivalency' shall be respected, as required by Article 22.15(2) of the FTA and Article 22.4 of the DSU, that is, the level of suspension shall be equivalent to the level of the nullification or impairment.

Moreover the both mechanisms recognize standings to reconvension of Arbitral Panel (FTA) and of Arbitration (WTO). Article 22.15(3) of the FTA provides that if the complained Party considers the level of benefits manifestly excessive, it may seek for reconvension of the panel. Article 22.6 provides that if the Member concerned objects to the level of suspension proposed, the matter shall be referred to arbitration.

II. RELATIONSHIP BETWEEN THE DISPUTE SETTLEMENT SYSTEMS OF THE CHILE-USA FTA AND OF THE WTO

A. Relationship before Submission of Complaint

A Panel (WTO) and an Arbitral Panel (FTA) exercise overlapping jurisdiction in many aspects as mentioned above. The relationship between the both systems deals with choice of forum matter, that is, the complaining party is entitled to choose one of the both systems to resolve conflicts. The provisions of the FTA and of the WTO do not provide right upon the respondent Party to negate the jurisdiction of the Arbitral Panel/the Panel, if already established, as long as the basis of claim is consistent with the relevant provisions.

The choice of forum matter is clearly stated in Article 22.3 of the FTA, which recognizes the right of the complaining Party to select a forum under WTO Agreement or under other agreement which the both countries are party. The complaining Party may choose the forum which will best serve its interest. 'Preferential treatment' for developing countries, for instance, is an issue which Chile may take into consideration because if the complaint is submitted to Arbitral Panel of the FTA, Chile does not enjoy preferential treatment, which is not available on the bilateral relation. But if the complaint is submitted to WTO panel, it gets preferential and flexible treatment from consultation process till implementation process, as once experiencing in the Chile–Alcoholic Beverages (Article 21.3) Case35.

33 In principle the subject - matter of an Article 21.5 proceeding will be a new measure, distinct from the measure in the original proceeding. In most disputes, the original Panel members are called upon again to rule on the implementation matter.; STEINMAN, A., "Article 21 of the DSU", WOLFRUM, R. (Ed.), "WTO - Institution and Dispute Settlement", Leiden: Nijhoff, 2006, p. 515

34 Appellate Body Report, Canada–Measures Affecting the Export of Civilian Aircraft–Recourse by Brazil to Article 21.5 of the DSU (Canada-Aircraft (Article 21.5–Brazil) ) Case, WT/DS70/AB/RW.

35 Award of the Arbitrator, Chile–Alcoholic Beverages (Article 21.3) Case, WT/DS87/15, WT/DS110/14.
Effectiveness, rules of proceeding of forum, period of time, are also important factors on which the complaining Party may rely when selecting a forum. Also different details of the both systems, as mentioned above, should be considered. In some cases the bilateral system does not provide sufficient mechanism, especially when rights of several States are injured, the forum established by the bilateral mechanism could not afford the participation of all States. The WTO mechanism would better serve the interest of the complaining party since other injured States could participate in the proceedings as well.

B. Relationship after Submission of Complaint

Relationship after submission of complaint is not mentioned in any provisions of the FTA nor of the WTO Agreements. The dispute settlement processes of both systems are clearly cut from each other after the complaining Party has made decision to select a jurisdiction. For example, once the Parties have achieved altogether consultation process under the FTA system, the complaining party is not entitled to bring the claim before a WTO panel, making ‘cross-complaint’ or ‘cross-proceeding’ since the relevant provisions of the DSU do not allow to do so, given that the phrase employed in Article 2 of the DSU is “a covered Agreement”, which definitely means WTO provisions that discuss about consultation process, not including consultation process of the FTA. Article 22.4 of the FTA, vice versa, does in the same manner by employing the word “this Agreement”, which means the Chile-USA Free Trade Agreement.

The question arising at this moment is “Should the relationship (after submission of complaint) between the both systems be created?” Some logic examples should be drawn to discuss here before answering the question.

For the first example, during the proceeding at the FTA Panel, the both Parties would like to terminate the proceedings before the FTA panel and switch to continue the proceedings before the WTO Panel. For the second example the complainant has chosen a WTO panel as the forum, but the consultation process has been failed, and the both Parties have agreed upon to continue the proceedings before the FTA Arbitral Panel, which, they think, may serve their common interest better than the WTO Panel.

The first example could not be done, since WTO Panels do not have role to respond pending case regulated by bilateral agreement. But the second example is possible to do, since it deals with the application of bilateral agreement. A possible resolution to the second problem is to interpret Articles 22.4 and 22.6 by extending scope of requirements to include consultation process done under the WTO system. The interpretation for the second example, could create relationship between the both systems for other proceeding as well, in order ‘to harmonize the both systems of dispute settlement’ and ‘to make the FTA system responsive to the WTO system’.

This article proposes ‘to make the FTA system responsive to the WTO system’ rather than to make the latter responsive to the former, as the first possibility simply deals with the relation between the only two countries. If the relationship between the both systems is well-created by this proposition, ‘the both dispute settlement mechanisms’ will no more clearly cut as nowadays and the harmonization of the both systems will be enhanced, definitely leading to implementation of ‘the maximum interests of the both countries’.

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36 VAN DEN BOSSCHE, P., Supra Note 10, p. 4.

37 In other words, the both countries, which react on these two significant dimensions, will not unnecessarily confront with phenomena of ‘fragmentation of international law’ or of ‘spaghetti bowling effect’, which are not desirable for this case because these phenomenon could lead to uncertainty of application of binding international regulations resulting from conflicts of concerning regulations.
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TREATISES


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