How WTO Jurisprudence Can Help Resolve Interpretive Uncertainties Generated by Canada's Domestic Free Trade Agreements

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ABSTRACT

With the Supreme Court of Canada's resounding rejection of a more trade-liberalizing interpretation of Section 121 of the constitution in *R v Comeau*, Canada's domestic ecosystem of internal free trade agreements takes on a heightened significance. The dispute resolution provisions of the *Canadian Free Trade Agreement* and a host of provincial/territorial bilateral and multilateral trade liberalization agreements offer litigants an alternative venue to the courts for addressing domestic non-tariff barriers to trade. However, there lacks a readily available means for CFTA dispute resolution panels to understand the relationships within the network of internal arrangements.

This paper advances the justification for a CFTA panel to import WTO jurisprudence and attendant customary international law for managing the interpretive uncertainties arising out of Canada's domestic system of internal free trade agreements. It then offers applicable insights from WTO panel and Appellate Body reports that bear relevance on potential issues that a CFTA may confront in interpreting the obligations of provinces and territories under the Agreement.

KEY WORDS: Canadian Free Trade Agreement; Agreement on Internal Trade; Domestic Trade Agreements; Trade Law; WTO Jurisprudence

I. INTRODUCTION

The year 2019 marks the twenty-fifth anniversary of the signing of Canada's first internal free trade agreement. Drafted in the likeness of

international trade treaties, the *Agreement on Internal Trade* ("AIT") was a political agreement amongst all Canadian provinces, territories and the federal government to strike down laws and regulations hindering the enterprise of domestic market integration. When the *Canadian Free Trade Agreement* ("CFTA") replaced the AIT in 2017, it continued the AIT's agenda of eliminating policies that hamper the free flow of people, goods, services and investments between provinces and territories.

In addition to setting out obligations and a dispute resolution mechanism, the CFTA (as did the AIT) endorses the creation of supplementary bilateral and multilateral internal arrangements to advance the agenda of liberalized internal trade at CFTA Article 1203 ("Article 1203 Agreements").[1] This permissive allowance has precipitated an explosion in the number of such agreements between provinces and territories since the signing of the AIT in July of 1994. Importantly, many of these Article 1203 arrangements maintain their own dispute resolution mechanisms.

With an expanding number of Article 1203 free trade agreements, and in light of recent reforms which improve the strength of the CFTA's dispute resolution mechanism, Canada's internal trade ecosystem requires a coherent and consistent method to manage the relationship between the agreements. Otherwise, uncertainty will prevail on a number of related issues - Can a complainant validly launch actions on the same claim in two different fora? May a CFTA Panel validly decline to rule, and instead send the litigants to an Article 1203 Agreement dispute forum? What weight should a CFTA panel accord a finding from an Article 1203 Agreement's dispute resolution body? This paper advances the justification for relying on World Trade Organization ("WTO") jurisprudence, and offers implications from Panel and Appellate Body reports for Canada's domestic arrangements.

This paper starts by providing the constitutional and political context for the CFTA. It then explores the ways in which the text of the CFTA interacts with those of the Article 1203 Agreements. Such an exercise makes apparent the tensions that a CFTA Panel may encounter as a result of Canada's network of internal trade agreements. This paper then proceeds to justify the importation of WTO jurisprudence and attendant principles of customary international law into a CFTA Panel's interpretive task. Finally, after demonstrating the relevance and aptness of WTO law for informing the

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1 *Agreement on Internal Trade – Consolidated Version*, online: Agreement on Internal Trade <https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf>, Art. 1800 (accessed 23 January 2019) [AIT].

relationship between the CFTA and Article 1203 Agreements, this paper examines three interpretive issues that may arise, and invokes WTO jurisprudence to help resolve the uncertainties.

II. BACKGROUND AND CONTEXT FOR THE *CANADIAN FREE TRADE AGREEMENT*

A. The Constitutional Impetus for Internal Trade Agreements

Canada's national ambition for an economic union started with Confederation over one hundred and fifty years ago, and continues to the present day. Legislators drafting the *British North America Act* of 1867 – the core of Canada's constitution - included section 121, which proclaimed that goods from one Province "shall be admitted free into each of the other Provinces."[2] Though one might expect from the presence of section 121 that Canada would grow up to become a tightly integrated economic unit, this has not been the case. The Supreme Court of Canada has endorsed a narrow interpretation of the phrase "admitted free," stemming as far back as *Gold Seal Ltd. v. Dominion Express Co.* in 1921, and most recently re-asserted in *R v Comeau* in 2018.[3] For a law to violate the meaning of section 121, it must "in essence and purpose [restrict]…[trade] across provincial borders."[4] Laws that yield merely "incidental effects" on interprovincial trade are not prohibited by the terms of the constitution.[5]

Section 121 provides a litigant easy ammunition against a province which imposes tariffs on goods imported from another province – an ongoing practice at the time of Confederation.[6] However, the constitutional provision is of little use with respect to "behind the border" measures which impede on the free flow of goods, services, people and capital. Non-tariff barriers commonly found within the texts of 'second generation' trade agreements are

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2 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 121. (The *British North America Act, 1867* was renamed the *Constitution Act, 1982* with the patriation of the Constitution.)

3 *Gold Seal Ltd v Dominion Express Co*, 62 SCR 424, at para 152; *R v Comeau*, 2018 SCC 15, at para 90.

4 *Comeau,ibid* at para 8.

5 *Ibid*, at para 88.

6 P.B. Waite, *The Confederation Debates in the Province of Canada, 1865*, (Montreal: McGill-Queen's University Press, 2006) at 44-46 (Hon. George Brown speaking to Parliament on February 8, 1865).

largely free from Canadian constitutional strictures.[7] In *Comeau,* the Court explained why it was wary of an expanded interpretation of the constitution's free trade provision. The unanimous Court wrote that Canada's constitution maintains a delicate balance of powers between the federal and provincial governments, and that it is problematic to interpret the Constitution in a manner that "disregards regional autonomy."[8] Full economic integration, the Court explained, would harm the ability of provincial governments to act freely.[9]

There had been an attempt to strengthen section 121 in the lead-up to the Charlottetown Accords, so that it might be better capable of invalidating non-tariff measures that produce discriminatory conditions.[10] However, it failed, as did the Accord itself, which laid to rest any idea of constitutional change at least for the time being. Even if lawmakers had managed to strengthen and expand section 121, it is likely that a mechanism to identify justifiable exceptions to the blanket rule of non-discriminatory treatment for out-of-province trade would have still been required.[11] Thus, trade-distorting provincial regulations grounded in sufficiently justifiable reasons would have remained untouched by the courts.

In addition to the judiciary's interpretation of section 121, other strands of doctrine under Canada's constitution impact the nature of the domestic economic union. These lines of jurisprudence stem from the federal government's section 91(2) trade and commerce power, the provincial government's section 92(13) power over property and civil rights, section 91's peace, order and good government provision in favour of the federal government, and section 6's mobility rights guarantee.[12]

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7 Fafard P and Leblond P "21st century Trade Agreements: Challenges for Canadian Federalism," (2012), at 8, *The Federal Idea,* online: <http://ideefederale.ca/documents/challenges.pdf> (accessed 23 January 2019).

8 *Comeau, supra* note 3, at para 82.

9 *Ibid*, at para 85.

10 Katherine Swinton, "Courting our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995) 25 CBLJ 280, at 281, 288; Noemi Gal-Or, "In Search of Unity in Separateness: Interprovincial Trade, Territory, and Canadian Federalism" (1998) 9 Nat'l J Const L 307, at 313.

11 J. Robert S. Prichard with Jamie Benedickson, "Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade" in Michael Trebilcock *et* al, eds., *Federalism and the Canadian Economic Union* (Toronto, Ontario Economic Council, 1983), at 34.

12 See generally, Michael Trebilcock, "The Supreme Court and Strengthening the Conditions

Though it is outside the scope of this paper to evaluate the contemporary state of law flowing from each of these provisions, it is important to take a step back and consider the appropriateness of a Canadian court as the arbiter in disputes over trade barriers. The determination of what constitutes a trade barrier, or even a justifiable trade barrier, necessitates the evaluation of a complex set of facts, a review of secondary (and perhaps tertiary) economic effects, and an assessment of the grounds for exemption.[13] Requiring a court to determine whether a trade-distorting policy is justifiable in light of local or provincial circumstances would cause the judicial branch of government to tangle itself up in the intricate process of policy-making.[14] As discussed later on, it is difficult to accurately quantify the benefits and costs from trade barriers. It may even be impossible to measure whether, for example, the local benefit from a province's consumer protection or environmental laws outweighs the cost to the national economy from the trade distortion. In this light, it would be inappropriate for unelected judges to decide on indeterminate policy trade-offs that are best left to an elected legislature that voters can directly hold accountable.

B. Costs of Internal Trade Barriers

Discriminatory barriers erected by provincial and territorial governments impose costs on Canada's economy. A number of economists have published studies that seek to quantify the cost of the barriers. Ever since the onset of this literature in the 1980s, results have varied significantly. In 1983, Whalley estimated that existing barriers to the flow of goods cost Canada one-half of one percent of Canadian GNP each year ($590 million CAD).[15] In 1991, Rutley estimated economy-wide effects for all forms of trade, not just goods, of $6.5 billion per year.[16]

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for Effective Competition in the Canadian Economy" (2001) 80 Can B Rev 542.

13 Prichard, *supra* note 11, at 35.

14 Swinton, supra note 10, at 290.

15 John Whalley, "Induced Distortions of Interprovincial Activity: An Overview of Issues" in Michael Trebilcock et al, eds., Federalism and the Canadian Economic Union (Toronto, Ontario Economic Council, 1983), at 190-92.

Henceforth, all monetary figures are quoted in Canadian dollars.

16 Todd Rutley "'Canada 1993': A Plan for the Creation of a Single Economic Market in Canada," (Canadian Manufacturers' Association Report on Interprovincial Trade, 1991).

However, over the course of the past four decades, the state of collected data has improved.[17] In addition, not only have the statistics grown in quality and granularity, but research techniques and empirical methodology have also advanced. Using the better data and improved methods, a new wave of literature emerged in the first half of the 2010s attempting to evaluate the cost of barriers to trade. In 2015, Albrecht and Tombe set about quantifying the magnitude and consequences of internal trade costs in a variety of sectors. They found large internal trade costs that impeded productivity and welfare.[18] According to their work, reducing internal trade costs by 10% increases aggregate welfare by 0.9%, equivalent to a real GDP increase of $17 billion.[19] Full-fledged trade liberalization within Canada could contribute between $50 billion and $130 billion to Canadian GDP.[20] In their 2014 study, Agnosteva, Anderson and Yotov estimate that in 2002, internal border barriers between provinces reduced interprovincial manufacturing trade by nearly 20%, worth approximately $20.3 billion.[21] Accounting for the impact of distance and contiguity, these authors evaluate the interprovincial border to be equivalent to a 5.6% border tax.[22]

Quantifying the economic cost of internal trade barriers is highly important for generating a national discourse on domestic trade liberalization. This lesson can be imported from the experience of Australia.[23] Australia is a nation similar to Canada in its Westminster-style parliamentary regime and use of executive federalism for intergovernmental relations.[24] Integral to its relatively successful internal trade liberalization is an independent body called the Productivity Commission, which is tasked with the job of studying the

17 Lukas Albrecht & Trevor Tombe, "Internal trade, productivity and interconnected industries: A quantitative analysis." (2016) 49:1 Canadian Journal of Economics/Revue canadienne d'économique 237, at 238.

18 Albrecht and Tombe, at 238.

19 Ibid, at 239.

20 Ibid, at 261.

21 Delina E. Agnosteva, James E. Anderson, and Yoto V. Yotov "Intra-national trade costs: Measurement and aggregation" (2014) No. w19872. National Bureau of Economic Research, at 1, 3.

22 Agnosteva, Anderson, Yotov, *ibid* at 39.

23 Cliff Walsh, "Australia" in George Anderson eds., *Internal Markets and Multi-Level Governance* (OUP, 2012), at 44.

24 George Anderson, "Internal Markets in Federal or Multi-level Systems" in George Anderson eds., *Internal Markets and Multi-Level Governance* (OUP, 2012) at 199.

benefits of national reform.[25] The Commission's empirical work better informs policy leaders, shapes the broader debate around internal markets, and fosters a climate for reform.[26] In Canada, this work is occasionally undertaken by academics, sponsored by industry, or in rare circumstances, examined and published by the federal government.

Robust measurements as to the effect of discriminatory barriers are important in order to guide attention to and discussion on the issue. However, estimates will often underestimate the true economic costs of internal trade barriers. Thomas Courchene noted several reasons for this result: estimates (i) neglect dynamic efficiency losses, (ii) fail to capture the complacency produced by protectionism, (iii) ignore the stifling of entrepreneurship, and (iv) do not account for the fact that firms may be of less-than-optimal size as a result of protectionism.[27]

Not only do estimates understate the costs of internal trade barriers, but they also neglect the full quantum of benefits flowing from discriminatory regulations.[28] Empirical studies largely focus on cost in terms of GDP, but national income is only a rough proxy for national welfare.[29] Calculated costs do not incorporate the impossible-to-quantify benefits that accrue from provincial and territorial policies that create trade distortions. For example, it is hard to empirically show the environmental or consumer benefit of certain measures, let alone formulate a pecuniary value of the benefit.[30] As a result, the measured cost in dollar-terms may be misleading.

Finally, an important intangible cost not captured in economic estimates is the harm to national unity and Canada's sense of self. In discussing the AIT, Robert Knox argued that "the *Agreement* is not about numbers. It is about Canadians' expectations concerning their economic union."[31] Obstacles to

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25 Cliff Walsh, *supra* note 23 at 32.

26 *Ibid*, at 44; Anderson, *supra* note 24 at 198.

27 Thomas J. Courchene, "Analytical Perspectives on the Canadian Economic Union", in Michael Trebilcock *et* al, eds., *Federalism and the Canadian Economic Union* (Toronto, Ontario Economic Council, 1983) at 95.

28 Prichard, *supra* note 11 at 15.

29 J.R. Melvin, "Political Structure and the Pursuit of Economic Objectives" in Michael Trebilcock *et* al, eds., *Federalism and the Canadian Economic Union* (Toronto, Ontario Economic Council, 1983) at 118.

30 David Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion?" (1995) 25 Can Bus LJ 257, at 269-70.

31 Robert Knox, "Improving How the Agreement on Internal Trade Currently Works" (2002)

trade create a balkanized Canada, and they weaken the social fabric uniting Canadians in their federal state. Canadian internal market cohesion promotes personal opportunity, and creates space to "find employment, carry on a profession, or build a business."[32] Thus, barriers may harm realization of the full individual, and create schisms between Canadians living in different provinces and territories.

C. The Agreement on Internal Trade

The constitution's inability to strike down discriminatory provincial laws and regulations that impede interprovincial trade was an important factor that spawned the creation of Canada's first domestic free trade agreement: the *Agreement on Internal Trade* ("AIT"). In this light, the AIT may be viewed as a "shadow constitution," working outside the bounds of typical constitutional reform.[33] Brought into effect in 1995, the AIT was a comprehensively negotiated political agreement amongst Canada's ten provinces, two territories,[34] and the federal government. At the conclusion of complex, multi-party negotiations, the AIT consisted of eighteen chapters, and touched on a broad range of domestic regulation. The AIT was a positive-list agreement, wherein anything not explicitly addressed in its text was not covered. Its stated purpose included promoting open markets, stimulating economic growth and stability, and, where possible, eliminating barriers to free movement of all factors of production.[35] The AIT covered ten sectors, but established "horizontal commitments" in respect of procurement, investment, labour mobility, consumer related standards and environmental protection, whereby these five provisions are applicable across all of the AIT's contents.[36] It also established "vertical commitments" in respect of agricultural and food

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2 Asper Rev Int'l Bus & Trade L 273, at 274.

32 Bryan Schwartz, "Lessons from Experience: Improving the Agreement on Internal Trade" (2002) 2 Asper Rev. Int'l Bus & Trade L. 273, at 303.

33 Gal-Or, *supra* note 10 at 338.

34 Nunavut was not yet a territory at the drafting of the AIT.

35 G. Bruce Doern & Mark Macdonald, "Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade" (Toronto: University of Toronto Press, 1999) at 11.

36 Robin Hansen & Heather Heavin, "What's 'New' in the New West Partnership Trade Agreement? The NWPTA and the Agreement on Internal Trade Compared," (2010) 73 Sask. L. Rev. 197, at 199.

products, alcoholic beverages, natural resource processing, communication and transportation.[37]

In addition to the shortcomings of the constitution and the recently failed attempts at constitutional reform, the AIT's formation was a product of an era during which trade policy was in "aggressive ascendancy."[38] As of 1994 when AIT negotiations began, Canada's trade policy community had been engaged in nearly ten years of continuous negotiation, inclusive of the GATT-WTO Uruguay Round, the Canada-US Free Trade Agreement, and the North American Free Trade Agreement ("NAFTA").[39] There was a heightened degree of salience for, and competence in, the complexities of liberalized trade rules.

This exposure to trade policy was taking place at both the provincial *and* federal levels of government, which further ripened conditions for an internal trade agreement.[40] Canada's unique federal arrangement meant that officials at both the federal and provincial levels of government had gained experience and familiarity in the process of trade negotiation. This was because by the 1990s, trade agreements were increasingly addressing issues that fall within provincial jurisdiction. In addition to tariffs, the WTO, NAFTA and FTA rules were tackling issues such as subsidies, industrial policy grants, local content requirements and national treatment obligations.[41] Many international trade agreements that Canada was entering into directly trammeled upon areas of provincial jurisdiction under section 92 of the constitution. Though the federal government alone has the power to enter into trade agreements with foreign powers, the buy-in of the provinces on new trade commitments is necessary to follow through on Canada's anticipated international obligations. This state of affairs is a product of the *Labour Conventions* case, wherein the Privy Council ruled that the Canadian federal government's treaty-making power does not permit it to implement federal law that intrudes on provincial jurisdiction even if it is in order to comply with a treaty.[42] Thus in order to

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37 Hansen & Heavin, *ibid* at 199.

38 Doern & Macdonald, *supra* note 35, at 17.

39 *Ibid*, at 24-25.

40 *Ibid*, at 29 (citing Filip Palda, "Provincial Trade Wars: Why the Blockade Must End" (Vancouver: Fraser Institute, 1994) and K. Norrie, R. Simeon and M. Krasnick, "Federalism and Economic Union in Canada" (Toronto: University of Toronto Press, 1986).

41 *Ibid* at 17, 22.

42 Trebilcock, *supra* note 12, at 546; *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326.

ensure that Canada would actually abide by commitments with foreign sovereigns, of paramount importance was consultation and engagement with provincial officials. Agreement from the provinces is so critical for the success of Canada's international trade agreements that prior to the recent Comprehensive Economic and Trade Agreement ("CETA") negotiations, the EU actually insisted that the provinces be present and participate in the bargaining process.[43] As a result of the repeated engagement with the provinces and territories on matters implicating their jurisdiction, federal and provincial officials were frequently in consultation with one another on trade policy, which in turn generated the capability of the sub-national jurisdictions to negotiate an internal trade agreement.[44]

D. The Canadian Free Trade Agreement

Over the course of its lifetime, the AIT underwent fourteen protocols of amendment. These revisions either modified extant chapters, or provided wholly new provisions that had undergone consideration during the 1994-1995 negotiation process, but which could not attract consensus at the time. In August 2014, the Council of the Federation – a congress of Canada's 13 provincial and territorial Premiers – announced that the Premiers had agreed to a wholesale renewal of the AIT.[45] An important catalyst for the re-negotiation of the AIT was the ongoing CETA negotiation. Written in negative list structure (wherein everything is deemed to fall under the Agreement unless stated otherwise) unlike the AIT's positive list structure, CETA had the potential to give foreign companies better access to the Canadian market than out-of-province Canadian companies. The AIT needed to be converted to a negative list structure in order to avoid this unsettling and politically embarrassing result.

After twenty-one rounds of negotiation, including five Ministerial rounds, the Premiers announced an 'agreement in principle' on the new Canadian Free Trade Agreement on July 22, 2016, and it came into force on July 1,

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43 Ohiocheoya Omiunu, "The Evolving Role of Sub-National Actors in International Economic Relations: Lessons from the Canada-European Union CETA" 48 *Netherlands Yearbook of International Law* 173, at 188.

44 Doern and Macdonald, *supra* note 35, at 29.

45 The Council of the Federation, "Premiers Will Lead Comprehensive Renewal of Agreement on Internal Trade" (August 29, 2014) <http://canadaspremiers.ca/wp-content/uploads/2014/01/internal_trade-final.pdf> (accessed 23 January 2019).

2017.[46] In addition to the adoption of the negative list approach in place of the positive listing method, the CFTA brought with it a reformed dispute settlement mechanism, making it a more appealing venue for litigants to launch a claim. The CFTA increased the maximum monetary penalty up to $10 million, whereas under the AIT, the greatest potential penalty was capped at $5 million.

E. The CFTA and Canada's Other Internal Trade Agreements

Article 1203 of the CFTA explicitly contemplates the creation of supplemental bilateral or multilateral agreements amongst parties to the CFTA ("Article 1203 Agreements"), so long as they liberalize trade to a greater extent than found in the CFTA. This provision was not new: the CFTA's Article 1203 is the successor to the AIT's Article 1800. Specifically, 1203(1) provides that "the Parties recognize that it is appropriate to enter into bilateral or multilateral arrangements in order to enhance trade, investment, or labour mobility." Article 1203(2) identifies the specific parameters surrounding a supplemental bilateral or multilateral agreement. First, it must liberalize trade, investment or labour mobility to a greater extent than under the CFTA. Second, it must be disclosed to all CFTA parties 60 days prior to its implementation. Finally, signatories to the supplemental agreement must be willing to extend membership to the new agreement to any CFTA member that wishes to accept the terms.[47]

Indeed, a number of provinces have entered into bilateral and multilateral agreements under the authority of CFTA Article 1203 and its AIT predecessor. The number of formal agreements of this sort has exploded since the creation of the AIT in 1994. These agreements include: (1) the *New West Partnership Agreement* between British Columbia, Alberta, Saskatchewan and Manitoba ("NWPTA"); (2) the *Trade and Cooperation Agreement* between Ontario and Quebec; (3) the *Labour Mobility and the Recognition of Qualifications, Skills and Work Experience in the Construction Industry Agreement* between New Brunswick and Quebec; (4) the *Agreement on the Opening of Public Procurement* between New

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46 The Council of the Federation, "Premiers Strike an Agreement in Principle on Internal Trade," (July 22, 2016) <http://www.canadaspremiers.ca/premiers-strike-an-agreement-in-principle-on-internal-trade/> (accessed 23 January 2019).

47 *Canadian Free Trade Agreement - Consolidated Version*, online: Canadian Free Trade Agreement < https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf >, Art. 1203 (accessed 23 January 2019) [henceforth, "CFTA"].

Brunswick and Quebec; (5) the *Economic and Regulatory Partnership Agreement* between New Brunswick and Nova Scotia; (6) the *Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry Agreement* between Ontario and Quebec; and (7) the *Atlantic Procurement Agreement* between New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.

F. Dispute Resolution Mechanisms in Article 1203 Agreements

The CFTA maintains its own dispute resolution mechanism in Chapter 10 of the agreement. However, many of the Article 1203 Agreements also possess their own unique dispute resolution mechanisms. It is in this context that an interpretive concern arises: as the number of internal agreements expands, and as access to, and strength of, dispute resolution mechanisms improve, how should CFTA dispute panels navigate the relationship between the CFTA and Article 1203 Agreements? The text of the CFTA is not fully informative as to how a Panel might deal with such situations. However, it does cite WTO law as a means of interpreting the obligations of parties to the internal trade agreement.[48] This paper argues that the most appropriate, coherent and consistent means of resolving conflicts between the CFTA and Article 1203 Agreements is by way of established WTO jurisprudence and customary international law (CIL). After establishing the suitability of WTO and CIL, this paper will draw from those bodies of law helpful insight for three foreseeable conflicts in light of the burgeoning network of domestic trade arrangements.

G. CFTA and its Prescribed Rules of Interpretation

Before importing rules from the international context, this paper must do two things. First, it needs to outline how the texts of the CFTA and Article 1203 Agreements do (and do not) explicitly address one another. Only in doing so first may this paper find the gaps that WTO jurisprudence and attendant CIL need to fill. Second, this paper must justify the usage of WTO rulings resolve the interpretive uncertainties generated by Canada's web of internal free trade agreements.

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48 See CFTA, *ibid*, Art. 1208(b).

H. Textual Links Between the CFTA and Article 1203 Trade Agreements

References found in Article 1203 trade agreements are to the AIT, rather than the CFTA. Since the intergovernmental renegotiation that produced the CFTA, no Article 1203 Agreement has been revised to reflect the AIT's replacement. However, CFTA Article 1211 explicitly provides that all parties to the AIT agreed to replace that agreement with the CFTA.[49] Fundamentally, Article 1203 Agreements credit their existence to the explicit allowance of AIT's Article 1800 (the predecessor to CFTA Article 1203). As such, denying the linkage to the CFTA's replacement provisions would throw the very existence of Article 1203 agreements into question. Thus, in principle, Article 1203 Agreements' references to AIT Articles are re-imposed to often-identical provisions found within the CFTA.

1. Textual Management of Overlapping Obligations

Certain of the Article 1203 Agreements maintain a means to resolve conflicting agreement obligations. The *New West Partnership Trade Agreement*'s (NWPTA)'s Article 1(2) provides that where there is an inconsistency between the NWPTA and the AIT, "the provision that is more conducive to liberalized trade, investment and labour prevails among the Parties."[50] The bilateral Ontario-Quebec Trade and Cooperation Agreement maintains a nearly identical provision at Article 1.4(2).[51] Though it may not always be clear which of two conflicting obligations is more 'liberalizing,' many 1203 Agreements provide a starting point for resolving an apparent tension.

2. Rules Governing Parallel Proceedings

In addition to the instructions for instances of conflicting obligations, some of the Article 1203 Agreements contain explicit provisions on the matter of launching claims in multiple fora. For example, Article 24(6) of the NWPTA provides that when a Party or person believes "that a measure is inconsistent with this Agreement and any other trade agreement, that Party or person must

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49 CFTA, *ibid,* Art. 1211(1) provides: "Subject to paragraphs 2 and 3, the parties to the Agreement on Internal Trade agreed that the Agreement on Internal Trade is terminated as of the effective date and is thereafter replaced by [the CFTA]."

50 See NWPTA, *supra* 36, Art 1(2)

51 *Trade and Cooperation Agreement Between Ontario and Quebec,* 2009. https://www.ontario.ca/document/trade-and-cooperation-agreement-between-ontario-and-quebec-0>, Article 1.4(2) (accessed 23 January 2019) [henceforth, "OQTCA"].

choose which agreement's dispute resolution process to use and, once chosen, will have no recourse to the other process regarding that same measure."[52] Thus on its face, the NWPTA precludes a litigant from launching action on the same claim concurrently in both the NWPTA's dispute resolution process and in the CFTA's Chapter 10 process. However, not all Article 1203 Agreements contain this sort of clause. For example, it is absent from the Ontario-Quebec Agreement on Labour Mobility in the Construction Industry.

The CFTA maintains a similar provision with respect to the launching of actions in multiple fora, though it is a less forceful provision as compared to the NWPTA's Article 24(6). CFTA Article 1000(3) provides that "Parties shall make every effort to avoid parallel Proceedings regarding the same measure. If multiplicity of proceedings becomes an issue, a Party may refer the matter to the Committee for recommended action."[53] From a plain reading of the text, the CFTA would prefer that Parties avoid litigation on the same claim in multiple venues, but it does not carry the same preclusive effect as the text of 24(6) of the NWPTA. At the time of the re-drafting of the CFTA, negotiators were well aware of the forum preclusion provisions in the NWPTA, and yet the drafters chose not to adopt similar, forceful language.[54] Thus, the implication stemming from the CFTA's negotiation history and the text itself is that the CFTA does not preclude parallel proceedings *per se*.

Due to an absence of CFTA or Article 1203 Agreement jurisprudence on the issue, it is unclear how a CFTA panel might handle instances of parallel proceedings. Is it the implication that commencing dispute resolution proceedings under the Quebec-Ontario *Labour Mobility Agreement for the Construction Industry*, for example, could nullify a complainant's right to plead before a CFTA panel?

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52 NWPTA, *supra* 36, Art. 24(6).

53 CFTA, *supra* 47 Art. 1000(3).

54 From 2006 until 2010, the Parties to the AIT had facilitated a working group to examine the text of the NWPTA's precursor (the *Trade, Investment and Labour Mobility Agreement*) to determine elements that might be incorporated into the AIT. For that entire duration, the TILMA maintained Article 24(3) which is identical to Article 24(6) of the NWPTA. See Internal Trade Secretariat, *Annual Report 2009/2010* (Winnipeg, Internal Trade Secretariat), at 6; Internal Trade Secretariat, *Annual Report 2008/2009* (Winnipeg, Internal Trade Secretariat), at 7; Internal Trade Secretariat, *Annual Report 2007/2008* (Winnipeg, Internal Trade Secretariat), at 6; Internal Trade Secretariat, *Annual Report 2006/2007* (Winnipeg, Internal Trade Secretariat), at 6.

3. Interpretive status of Article 1203 Agreement Dispute Settlement Findings

Neither the CFTA nor any Article 1203 agreements explicitly address the weight to accord findings and rulings from Article 1203 trade agreement dispute resolution bodies. How might findings in an Article 1203 Agreement Dispute Settlement body bear on the evaluations by a CFTA Panel or Appeal Panels?

I. Rules for Interpreting the CFTA

At Article 1208, drafters of the CFTA provided rules of interpretation for dispute resolution panels, compliance panels, and appellate panels (collectively, "Presiding Bodies").[55] Most of the rules offered at Article 1208 can usefully guide interpretation of the CFTA as a stand-alone agreement, but they do not inform a panel has to how Article 1203 trade agreements implicate CFTA obligations. For guidance on a CFTA Presiding Body's interpretive task for this subset of unaddressed uncertainties, it should look to Article 1208(2)(b):

> "In interpreting the provisions of this Agreement, a Presiding Body may take into account any relevant interpretations and findings contained in reports of:
> (a) Other Presiding Bodies established under this Agreement;
> (b) WTO Panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body as well as decisions by other international tribunals; and
> (c) Presiding Bodies established under the Agreement on Internal Trade"[56]

Though AIT panels have considered WTO law in earlier dispute resolutions, no prior case has touched on the interaction of Article 1203 Agreements and the AIT/CFTA.[57] This paper will proceed to justify the use of WTO jurisprudence and explain the implications it may hold for domestic trade agreements.

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55 CFTA, *supra* 47. Art. 1208; See CFTA Art. 1041 (Presiding Body is a general term which includes a Panel, Compliance Panel, or Appellate Panel)

56 CFTA, *ibid* Art. 1208(2).

57 Past CFTA Panels and Appellate Bodies have examined WTO jurisprudence. See e.g. *Report of Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Quebec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives* (26 January 2015) (Article 1704 Appellate Panel Report), online: Internal Trade Secretariat, < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/AIT%20Final%20appeal%20decision%20jan%2026.pdf> at paras 67, 113, 132 (accessed 23 January 2019).

J. WTO's Sources of Law

The rules governing the WTO dispute settlement procedures are found in the *Dispute Settlement Understanding* ("DSU").[58] Under the DSU, WTO Panels and the Appellate Body are to interpret the obligations of its Members found in covered agreements, including the General Agreement on Tariffs and Trade 1994 ("GATT 1994").[59] Scholars comment that the range of sources of international law available to a WTO Panel or the Appellate Body in the course of its work can be found at Article 38(1) of the *Statute of the International Court of Justice*.[60]

> They include:
> International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> International custom, as evidence of a general practice accepted by law;
> The general principles of law recognized by civilized norms;
> Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[61]

Notably, Article 3.2 of the DSU explicitly invites WTO Panels and the Appellate body to "clarify the existing provisions of [covered] agreements in accordance with customary rules of interpretation of public international law."[62] Consequently, in the process of importing the logic and holdings from WTO law into the domestic context, a CFTA panel might indirectly internalize additional sources of international law. Most relevant is the *Vienna Convention on the Law of Treaties* ("VCLT"). Maintaining the status of CIL, the VCLT is a commonly cited text by WTO Panels and the Appellate Body when they examine the relationship between covered and non-covered agreements.[63]

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58 David Palmeter & Petros c. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92:3 the American J Int'l L, at 398.

59 DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1994, 1869 UNTS 401, 33 ILM 1226, (entered into force 1 January 1995) (emphasis added) ["DSU"], Article 2(1).

60 Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" (2001) *J. World Trade* 35 (2001), at 499. Palmeter, *supra* note 58, at 398; The Honourable Justice Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ, at 4-5.

61 United Nations, *Statute of the International Court of Justice*, 18 April 1946, Art. 38(1).

62 DSU, *supra* note 59, Art 3.2.

63 Makane Moise Mbengue, "Rules of Interpretation (Article 32 of the Vienna Convention

K. The Appropriateness of Using International Law to Inform Domestic Trade Obligations

Taking a step back, one might note that using international law to inform the obligations between provinces and territories within the same nation would seem at odds with the underlying assumptions of international law. Fundamentally, provinces lack international sovereign status. While the Government of Canada may legislate beyond its borders (though it may not validly enforce those laws extra-territorially), a provincial government cannot erect laws for the purpose of interfering with another province.[64] The *Montevideo Convention* provides the conditions for statehood in customary international law. The state must have (i) established territory, (ii) permanent population, (iii) government, and (iv) ability to enter into relations with other states.[65] With respect to the fourth condition, Canadian provinces do conclude agreements with other countries, but in principle, such exercises are under the control of the federal government or require its approval.[66] In a federation such as Canada, provinces do not have the quality of a state within the meaning of international law.[67]

Observers have nonetheless noted the internalization of international customary norms into the domestic legal context.[68] Canada's own common law embraces the incorporation doctrine, whereby certain forms of international law are taken into consideration by the Canadian judiciary without any explicit legislation or executive action effecting this result.[69] For example, the Supreme Court of Canada has used customary international law to inform the principles of fundamental justice under the constitution, and to

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on the Law of Treaties)" (2016) 31:2 *ICSID Review* – Foreign Investment LJ 388, at 388. See also, World Trade Organization Secretariat, "A Handbook on the WTO Dispute Settlement System" (CUP, 2003), at 4.

64 Gal-Or, *supra* note 10, at 320.

65 Dumitriţa Florea & Narcisa Galeş "Sovereign State–The Classic Basic Subject Of Public International Law" (2012) 12:2(16) *The USV Annals of Economics and Public Administration* 262, at 264.

66 France Morrissette, "Provincial Involvement in International Treaty Making: The European Union as a Possible Model." (2011) 37 Queen's LJ 37, at 577 n 26.

67 Florea & Gales, *supra* note 64, at 269.

68 Edward Morgan, "Internalization of Customary International Law: A Historical Perspective" (1987) 12:1 Y J Int'l L at 63; LeBel, *supra* note 60, at 4.

69 *Ibid*, at 4, 13.

identify the extent of the constitution's jurisdiction.[70] Moreover, in *Reference re Secession of Quebec*, the Court's opinion "treated customary international law as a consideration in the articulation of its legal reasoning."[71] If Canadian courts are willing to import customary international law to help interpret both the constitution as well as domestic legislation, it is justifiable for – and perhaps even incumbent upon - a CFTA Presiding Body to also use applicable WTO and customary international law to interpret obligations under domestic trade agreements.

The impetus for internalizing international law into the domestic free trade agreements is most notably provided by the processes which created both the CFTA and the AIT. Canada's First Ministers rejected the route of Constitutional reform to liberalize internal trade, and initiated the AIT during a decade filled with international trade negotiations. The AIT itself was an instrument to better harmonize with Canada's extant international trade obligations. Negotiations for both the AIT and the CFTA took place over the course of a number of negotiating rounds, as per tradition in international trade agreements. In the renegotiation process for the CFTA, the recently negotiated Canada-EU Free trade agreement CETA, was used as the base text upon which to draft the CFTA. Moreover, as discussed below, the text of the CFTA includes many of the same governing principles, and even the same phraseology, as that of the GATT 1994. The context and process giving rise to Canada's internal free trade arrangements illustrate a purposeful importation of customs and practices found in the tradition of international trade agreements. Consequentially, the rules governing the interrelationship amongst international trade agreements are highly relevant and useful for the Canadian domestic context.

By way of their recourse to internal free trade agreements following the failures at constitutional amendment after the Charlottetown Accords, Canada's First Ministers sparked the domestic uptake of the international norm of employing free trade agreements to liberalize trade. The First Ministers directed the drafting of a document that incorporates innumerable concepts found only within the domain of international trade law: a government-to-government dispute resolution mechanism; a non-discrimination provision for like-products with allowances for legitimate

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70 *Ibid*, at 13-14 (LeBel points to *Suresh v Canada*, 2002 SCC 1 at para 60; and *R. v Hape*, 2007 SCC 26 at para 39).

71 *Ibid*, at 13 (LeBel notes *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 19-23)

objectives; and many others.[72] The importation of international law principles and the full legal *acquis* of the WTO simply gives full effect to the domestication of international concepts, as had been the objective undergirding both the AIT's creation, and the CFTA's succession. Moreover, the CFTA explicitly invites the usage of WTO Panel and Appellate Body reports at Article 1208(2)(b).[73] Notably, there is no textual evidence to suggest that the drafters of the CFTA wished to cabin the extent to which WTO jurisprudence might be applied.

L. Language Overlap

In addition to the global similarities between the domestic free trade exercise and international trade liberalization, in many instances, the language found in the text of the CFTA is exactly the same as that which is found in the GATT 1994 Agreement.

For instance, CFTA Article 202(3) allows for measures that are inconsistent with the CFTA so long as:

a) the purpose of the measure is to achieve a legitimate objective;
b) the measure is necessary to achieve that legitimate objective;
c) the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail; and
d) the measure is not applied in a manner that would constitute a disguised restriction on trade

This provision is a nearly identical formulation of the preamble to GATT Article XX:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or *a disguised restriction on international trade* [...]"[74]

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72 See CFTA, *supra* note 47, Arts. 1000-1041, 201, 202.

73 CFTA *ibid,* Art. 1208(2):

> In interpreting the provisions of this Agreement, a Presiding Body may take into account any relevant interpretations and findings contained in reports of:
>
> (b) WTO Panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body as well as decisions by other international tribunals

74 Preamble to Article XX, GATT 1994 (emphasis added).

The result of identical verbiage is two-fold. First, it reaffirms the tethering of the domestic free trade agenda with the international enterprise of liberalized flows of people, goods, services and investments. Second, and perhaps more importantly, it allows CFTA Presiding Bodies to apply WTO jurisprudence seamlessly in CFTA disputes. With the identical textual linkages, CFTA Presiding Bodies can credibly import and take advantage of the WTO's robust jurisprudence on terms of art such as "arbitrary or unjustifiable discrimination" – a term that has been the subject of considerable exploration and refinement.[75] In order to give consistent effect to the importation of WTO law as it guides CFTA dispute resolution, a sub-group of WTO holdings that describes the interaction of trade agreements cannot be disregarded. To give full force to the expressly created parallels between the GATT 1994 and the CFTA, the complete body of WTO law must be available to a Presiding Body. This would include decisions and principles governing the manner in which WTO obligations interact with those of Regional Trade Agreements between WTO Members (i.e. NAFTA). To do otherwise would require a Panel to arbitrarily select an alternative set of principles to guide its work.

An additional, and crucially important, parallel between the WTO and the CFTA to give weight to the assertion that WTO jurisprudence can inform how Canada's domestic trade agreements interact comes by way of the parallels between CFTA Article 1203(2), and GATT Article XXIV. Just as CFTA Article 1203 recognizes supplemental bilateral/multilateral free trade agreements amongst CFTA members, the GATT 1994 maintains an analogous Article XXIV, which explicitly contemplates the creation of Regional Trade Agreements ("RTAs") amongst WTO Members.[76] The GATT Article XXIV also maintains analogous notification requirements to CFTA Article 1203(2)(b) wherein GATT mandates timely disclosure of new RTAs to other WTO Members. Under the CFTA, Parties seeking to form an Article 1203 Agreement must disclose the details of the new agreement 60 days before

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75 See e.g. Appellate Body Report, *US – Importation Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) at para 150; Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) at 23, 28-29; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007) at paras 229-30 [*Brazil – Retreaded Tyres*].

76 Jennifer Hillman, "Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO: What Should the WTO Do?" (2009) 42 Cornell Int'l L. J. 129, at 202.

implementation.[77] With these substantially similar formulations providing for the possibility of supplementary trade agreements, WTO Panel and Appellate Body decisions regarding the interaction between GATT 1994 and its Article XXIV RTAs can be credibly imported to inform the relationship between the CFTA and its Article 1203 Agreements.

As a result of the similarities in both context and substance between the CFTA and the GATT 1994, and in order to give the intentions of Canada's First Ministers full effect, CFTA panels should observe WTO jurisprudence and its citations to customary international law when navigating the relationships between the CFTA and Article 1203 Agreements.

III. LESSONS FROM WTO JURISPRUDENCE

Having established the appropriateness of WTO jurisprudence and CIL to inform the relationship between Canada's internal trade agreements, this paper will now examine how WTO jurisprudence can inform a CFTA Presiding Body's interpretive task. Specifically, three foreseeable uncertainties may arise that will require recourse to international law. First, the power of a Panel to dismiss a case in favour of an alternative dispute forum; second, re-litigation before a CFTA Panel of the same issue either subsequent or concurrent to its litigation before an Article 1203 Agreement dispute resolution body; and last, conflicting obligations between the CFTA and an Article 1203 trade agreement.

A. *Power of a CFTA Panel to Dismiss a Case in Favour of an Alternative Dispute Resolution Forum*

The ecosystem of free trade agreements presents multiple venues for a party to launch a claim. For example, Alberta could advance dispute settlement proceedings against Saskatchewan on the same issue before either a NWPTA Panel or a CFTA Panel. Can a CFTA Panel validly decline to exercise its jurisdiction in favour of Article 1203 Agreement dispute settlement venues?

The case of *Mexico – Soft Drinks* is instructive on this issue. Its implication for the CFTA is that a CFTA Panel cannot decline to rule once it has established jurisdiction on a matter. In the case before the WTO DSB, Mexico made a plea of *forum non conveniens*, arguing that the WTO Panel should decline to hear the case brought by the United States, as a NAFTA tribunal

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77 CFTA, *supra* note 47, Art. 1203.

was a more appropriate mechanism.[78] In affirming the Panel's findings, the WTO Appellate Body pointed to several provisions in the DSU and determined that once a Panel's jurisdiction to hear a case is established, a Panel is not entitled to choose freely whether to exercise its jurisdiction.[79] To determine whether this same reasoning applies to CFTA Panels, we must examine the linkages between the identified provisions in the DSU and the text of the CFTA.

To justify its finding, the Appellate Body provided that Article 23 of the DSU establishes a right, and that failure to rule once jurisdiction is established diminishes that right and is thus violates Articles 3.2 and 19.2 of the DSU.[80] The relevant portion of Article 23 cited by the Appellate Body in its reasoning provides that "[w]hen Members seek the redress of a violation" of a covered agreement, "they *shall* have recourse to…the rules and procedures" of the DSU.[81] Thus, the Appellate Body found that Article 23 creates a 'right' to recourse once jurisdiction has been established. When read together, Articles 3.2 and 19.2 suggest that recommendations and rulings of the DSB, Appellate Body or Panels "cannot add to or diminish the rights and obligations provided in the covered agreements."[82] By failing to rule once jurisdiction is established, a Panel violates Articles 3.2 and 19.2 by 'diminishing' the right provided by Article 23.

The CFTA does not possess identical provisions to those found at Articles 3.2, 19.2 and 23 of the DSU. However, the internal logic of the CFTA produces the same effect. Similar to DSU Article 23, the CFTA creates a right to dispute resolution. It does so by way of its Preamble. The preamble to the CFTA provides that the Agreement represents the agreed-to "balance of the Parties' rights and obligations."[83] Because the Agreement maintains an accessible dispute resolution mechanism within the agreed-upon text at

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78 Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (March 6, 2006), at para 3, 10 [*Mexico – Soft Drinks*]; Armand de Mestral, "Dispute Settlement Under the WTO and RTAs: an Uneasy Relationship," (2013) 16:4 J of Int'l. Ec L 777, at 798.

79 *Mexico – Soft Drinks*, at para 53.

80 *Ibid*.

81 DSU, *supra* note 59, Art. 23.

82 *Mexico – Soft Drinks*, *supra* note 77, 21 at n 102.

83 Preamble to the CFTA.

Chapter 10, the recourse to the dispute mechanism forms part of the set of rights and obligations under the Agreement.

The CFTA then requires a Panel to respect the established rights found in the Agreement's Preamble. Akin to the effect of DSU Articles 3.2 and 19.2, under the *Rules of Interpretation* outlined by CFTA Article 1208, a Panel is to interpret the Agreement in accordance with the principles of the Preamble.[84] Thus, 1208 instructs a CFTA panel to observe a Party's right to access the dispute resolution mechanism as established by the Preamble. As a result, a Panel is to act in light of a Party's right to the dispute settlement mechanism.

The textual support for the contention that a dispute panel is required to rule once jurisdiction is established clearly differs between the WTO's DSU and the CFTA. However, both the DSU and CFTA maintain similar internal logic: access to the dispute settlement mechanism is elevated to the status of a 'right,' and the governing agreement text instructs the Panel that it is to respect the rights of the Parties.

B. Re-litigation and Parallel litigation before a CFTA Presiding Body

When there are multiple fora available to a litigant to launch its claim, a number of variables guide the decision as to where to launch the legal case. In the context of the WTO, with Article XXIV's invitation to create an RTA, would-be complainants are invited to forum shop.[85] Where to launch a claim will depend on, among other variables, (i) the desired outcome of the dispute, and (ii) the value of the precedent that the case will set.[86] Could a litigant launch a claim in not just one, but multiple fora?

Not only can complainants select a preferred forum, they might choose to raise the same claim in multiple dispute settlement venues to obtain the preferred judgment. In the international context, this might entail launching a case at the WTO, as well as under a dispute resolution mechanism provided by an RTA. In the domestic context, this would involve a complainant launching a claim under both the CFTA as well as under an Article 1203 Agreement. Parallel litigation in the domestic context could even include launching a claim under a domestic political agreement and also in the court

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84 CFTA, *supra* note 47, Art. 1208(1).

85 Marc L. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade" (2007) 61:4 In'l Org 735, at 738.

86 *Ibid*, at 736.

system by way of a constitutional claim. This multiplication of procedures generates two problems. First, respondents face a duplicated strain on resources.[87] Second, the potentiality of divergent outcomes creates uncertainty for litigants as well as those who will rely on the precedent.[88]

As discussed earlier, certain Article 1203 Agreements preclude this from ever happening. For example, Article 24(6) of the NWPTA prohibits a Party or person from using the other trade agreement's dispute resolution process once either the NWPTA or the CFTA dispute mechanism is selected to combat a particular non-conforming law.[89] Article 12.2.5 of the *Ontario-Quebec Trade and Cooperation Agreement* maintains an identical provision.[90] However, the *New Brunswick-Quebec Labour Mobility Agreement for the Construction Sector*, for example, lacks such a provision. The CFTA's Article 1000(3) creates a 'soft' requirement to avoid parallel proceedings, but it does not contain the strong language of prohibition found within the NWPTA. Even before the CFTA was re-negotiated, provincial and territorial trade officials were aware of the content of the NWPTA.[91] Thus, it was arguably a purposeful decision of CFTA drafters to avoid the forceful effect found in the NWPTA provision. Because of the ambiguity at CFTA Article 1000(3) and the lack of an analogous provision to NWPTA's Article 24(6) in many Article 1203 trade agreements, the potential exists for parallel or subsequent proceedings on the same issue. The existence of Article 1000(3) may heighten a CFTA Presiding Body's concern for parallel proceedings or forum shopping, but it lacks the same preclusive effect as NWPTA's Article 24(6).

The re-litigation of the same issue previously decided on by a RTA's dispute mechanism is exactly what occurred in *Argentina – Poultry*.[92] Brazil initiated proceedings in a MERCOSUR ad hoc tribunal, which found for Argentina.[93] Given the unfavorable judgment, Brazil subsequently brought the

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87 Adam Hyams & Gonzalo Villata Puig, "Preferential Trade Agreements and the World Trade Organization: Developments to the Dispute Settlement Understanding" (2017) 44:3 *Legal Issues of Economic Integration*, 237, at 243.

88 *Ibid.*

89 See NWPTA Art. 24(6).

90 See OQTCA Art. 12.2.5.

91 See *supra* note 54.

92 Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (April 22, 2003) at para. 2.10 [*Argentina – Poultry*].

93 de Mestral, *supra* note 77, at 797; *Argentina – Poultry* at para. 2.10; Paula Wojcikiewicz

case before the WTO DSB. Hoping to avoid re-litigation of the issue, Argentina made two arguments to support the contention that in light of the MERCOSUR proceedings, the Panel should refrain from ruling on Brazil's case brought forth to the WTO.[94] First, Argentina claimed that by bringing a case before the WTO after the conclusion of MERCOSUR proceedings, Brazil had violated the principle of 'good faith', which "warrant[ed] invocation of the principle of estoppel."[95] The Panel rejected this argument. It held that a violation of 'good faith' required that the very act of bringing the proceeding before the WTO must itself violate a substantive provision of the WTO covered agreements.[96] Moreover, it must be "more than mere violation."[97]

Unlike the CFTA, the WTO DSB contains an explicit requirement of 'good faith' in dispute settlement proceedings under Article 3.10: "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."[98] In contrast, the CFTA maintains a 'good faith' requirement only in provisions that deal with the apportioning of monetary penalties.[99] However, 'good faith' is a well-established principle within the world of customary international law.[100] Moreover, at Article 1020(1), in person-to-government dispute proceedings the CFTA allows Panels to summarily dismiss proceedings in favour of the respondent if the complaint is "vexatious" or if the "complaint constitutes an abuse of process." Moreover, a complainant may be deemed to be either vexatious or abusing the process by simply initiating a procedure in a second jurisdiction.[101] Thus, it is reasonable to read a 'good faith' requirement into the CFTA dispute resolution process.

Almeida, "The Case of MERCOSUR" in Robert Howse *et* al., eds. *The Legitimacy of International Trade Courts and Tribunals: Studies on International Courts and Tribunals*, (CUP. 2018) at 231.

94 *Argentina – Poultry, supra* note 92 at paras 6.6, 7.18.

95 *Ibid.*

96 *Ibid*, at para 7.36

97 *Ibid.*

98 Andrew Mitchell, "Good faith in WTO Dispute Settlement" (2006) 7 Melbourne J of Int'l L, 339 at 352; DSU Article 3.10.

99 CFTA Arts. 1011, 1028; CFTA Annex 1040, Part C.

100 Mitchell, *supra* note 97, at 342-44.

101 Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties" (2001) 35:6 J of World Trade 1081, at 1113.

The implication of *Argentina – Poultry* is that launching a second proceeding before the CFTA on the same issue that was litigated in an Article 1203 dispute settlement body is not a *per se* breach of 'good faith.' The act of launching the claim must somehow violate a substantive provision of the CFTA. Because Article 1000(3) does not create a firm obligation, a Party does not necessarily violate the Agreement for launching a parallel or subsequent proceeding on the same issue.

Argentina's second argument was that under Article 31.3(c) of the *Vienna Convention of Law and Treaties* ("VCLT") the WTO Panel is required to rule in the same way as the MERCOSUR ad hoc tribunal. The Panel quickly rejected this idea, providing that a panel is not bound to a ruling from another WTO DSB Panel, let alone from a RTA's dispute settlement body.[102] Nothing within the DSU requires the direct application of a ruling from an RTA. Similarly, there is no textual requirement found within the CFTA that requires a CFTA panel to rule in a particular fashion as a result of an outcome in an Article 1203 Agreement dispute resolution mechanism. Importing the WTO ruling to a CFTA dispute, a panel is not bound to apply the holdings of Article 1203 Trade Agreement dispute settlement bodies.

A subsequent case, *Brazil – Retreaded Tyres*, advanced the jurisprudence on this latter issue even farther, suggesting that compliance with an Article 1203 Agreement dispute resolution body's ruling is not in itself a sufficient justification for a non-conforming measure under the CFTA. Just prior to the *Retreaded Tyres* WTO case, Uruguay had successfully obtained a favourable ruling against Brazil in a MERCOSUR ad hoc tribunal for Brazil's ban on imported used tyres.[103] As a result, Brazil implemented changes to its domestic legislation in order to comply with the MERCOSUR tribunal's finding of discrimination. The changes merely exempted its MERCOSUR partners from the Brazilian ban on imports of used tyres. When the European Communities subsequently launched its complaint at the WTO against Brazil's ban and MERCOSUR exemption, Brazil claimed that the legislation did not violate the 'arbitrary or unjustifiable' element of Article XX's chapeau.[104] Under WTO law, a country may implement a measure that violates GATT Article III's national treatment obligation so long as it does so in compliance with Article XX, inclusive of Article XX's chapeau. Brazil argued that its domestic

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102 *Argentina – Poultry, supra* note 91, at para 7.41.

103 *Brazil – Retreaded Tyres, supra* note 74, at para 226.

104 *Ibid*, at para 62.

scheme was neither arbitrary nor unjustifiable as "it finds origin in Brazil's obligation to implement a ruling of a MERCOSUR tribunal, which required it to allow MERCOSUR imports of remolded tyres."[105] The Appellate Body overturned the Panel's holding, and provided that though Brazil's decision to comply with the MERCOSUR ruling was not 'capricious' or 'random,' "discrimination can result from a rational decision or behaviour, and still be 'arbitrary or unjustifiable.'"[106] As such, compliance with an RTA dispute panel ruling does not in itself save a non-conforming measure.

Like the WTO's GATT 1994 Article XX, CFTA Article 202 provides permissible grounds for a measure that is inconsistent with provincial/territorial national-treatment obligations. Just like the preamble to GATT Article XX, CFTA Article 202(3)(c) maintains the requirement that the non-conforming measure not be 'arbitrary and unjustifiable.' With the availability of Article XX jurisprudence validly at the disposal of a CFTA panel, the finding in *Brazil – Retreaded Tyres* is thus instructive to a CFTA panel that is ruling on a case related to the compliance orders of an Article 1203 Agreement dispute panel. It is possible for a compliance requirement outlined by an Article 1203 dispute panel to satisfy the requirements of that agreement, but still violate a Party's CFTA obligations.

C. *Overlap and Conflict in Obligations*

Unlike GATT 1994, the ecosystem of Canadian internal trade agreements provides a degree of instruction for instances of overlap and conflict with CFTA obligations. In several Article 1203 Agreements to date, a provision is included which instructs the Article 1203 Agreement dispute resolution body that where the CFTA and an Article 1203 agreement maintain inconsistent provisions, the provision that is more conducive to liberalized trade is to prevail.[107]

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105 *Ibid*, at para 65.

106 *Ibid*, at para 232.

107 See e.g., *New West Partnership Agreement*, <http://www.newwestpartnershiptrade.ca/pdf/NewWest_Partnership_Trade_Agreement_2016.pdf> Art. 1(2) (accessed 23 January 2019); *Ontario-Quebec Trade and Cooperation Agreement*, <https://www.ontario.ca/document/trade-and-cooperation-agreement-between-ontario-and-quebec-0>, Art. 1.4(2) (accessed 23 January 2019); *New Brunswick-Quebec Labour Mobility Agreement for the Construction Industry*, <https://www2.gnb.ca/content/dam/gnb/Departments/petl-epft/PDF/Publications/Que-NB/2008112NBQC.pdf>, Art. 7.1 (accessed 23 January 2019).

The CFTA itself only provides such a provision at Chapter 7 (Labour Mobility). Specifically, at Article 703, the Agreement provides that in respect of Chapter 7 mobility provisions, if there is an inconsistency between the CFTA and any other agreement between two or more parties on the same issue, "the agreement that is more conducive to labour mobility in that particular case prevails to the extent of the inconsistency."

These 'agreement inconsistency' provisions are unique in that they do not find any parallels in WTO covered agreements or jurisprudence. In fact, it is beyond the scope of the WTO adjudicating bodies to conclude whether a treaty provision in a non-WTO agreement has been violated.[108] In contrast, many Article 1203 agreements give their dispute resolution bodies the authority to determine violations of the CFTA, and the CFTA grants a CFTA Presiding Body the express authority to determine violations of an Article 1203 Agreement's mobility provisions. These 'agreement inconsistency' provisions found in the Canadian context ask a CFTA or Article 1203 dispute panel to "amend" the agreement that they are tasked to interpret. Under general international law, as per Article 41(1)(b)(i) of the VCLT, this is only allowed so long as those members who are not parties to the 'superseding' agreement don't have their rights affected.[109]

This observation from the international context is important in the Canadian domestic context as its own body of reliable jurisprudence develops. As CFTA Panels interpret the labour mobility provisions found within the text of the Agreement, Article 703 grants the Panel explicit permission to consider supplemental Article 1203 Agreements between the parties on the same issue. However, the value of this precedent becomes extremely limited once this process of invocation takes place. Presiding Bodies should treat such a ruling carefully in subsequent cases on the same issue between parties who are not also members of the same supplemental Article 1203 Agreements.

IV. CONCLUSION

This paper explores the insights that WTO jurisprudence offer CFTA Presiding Bodies in order to understand how Canada's internal free trade agreements interact. However, the reality is that very few disputes are launched in any venue at all. Under the AIT, only 13 disputes resulted in a Panel report,

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108 Marceau, *supra* note 100, at 1103.

109 Marceau, *supra* note 100, at 1104.

of which only two went before an Appeal Panel. There has yet to be a Panel report for a case launched under the CFTA. None of the Article 1203 Agreements have generated a dispute that resulted in published findings by the applicable dispute settlement body.

With disputes themselves a rare occurrence, the likelihood of re-litigation in an alternative forum – a potentiality explored earlier – has an even lower probability of taking place. It can be argued that this paper's exercise is purely academic. With the recent innovation of the Regulatory Reconciliation and Cooperation Table as part of the CFTA, there may be even fewer instances that present a need to launch a dispute. Nevertheless, the success and entrenchment of the AIT/CFTA and companion Article 1203 Trade Agreements over the last quarter century has firmly implanted a tradition of internal trade agreements to forge Canada's economic union. With the proliferation of internal free trade agreements amongst Canada's provinces and territories, dispute settlement Panels may encounter challenges in interpreting obligations within a complex ecosystem of trade agreements. This paper advances a means by which to bring clarity and consistency in resolving inter-agreement conflicts amidst Canada's network of internal trade arrangements.