

## TEN YEARS OF THE WTO DISPUTE SETTLEMENT SYSTEM: PAST, PRESENT, AND FUTURE

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### I. WTO DISPUTE SETTLEMENT PRACTICE FROM 1995 TO 2005: LESSONS FROM THE PAST

Most dispute settlement procedures under the General Agreement on Tariffs and Trade (GATT) of 1947<sup>1</sup> and under the 1994 Agreement Establishing the World Trade Organization

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(WTO)<sup>2</sup> resulted from previous dispute settlement practices based on GATT Article XXIII and were progressively codified (e.g., in 1966, 1979, 1982, 1989, 1994) in response to particular GATT and WTO legal problems.<sup>3</sup> The close interaction between rule-making and dispute settlement in GATT took a new turn with the 1994 WTO Agreement. The frequent use of the idea of constructive ambiguity as a diplomatic method for facilitating political consensus on the conclusion of the WTO agreements, and the compulsory jurisdiction provided for in the WTO Dispute Settlement Understanding (DSU)<sup>4</sup> as a means to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,”<sup>5</sup> entailed a far-reaching delegation of quasi-judicial powers to WTO dispute settlement bodies. This method of negotiating incomplete agreements and delegating behind a veil of uncertainty, the clarification of contested treaty interpretations to an interdependent system of WTO dispute settlement bodies reduced bargaining costs and enhanced the effectiveness of collective bargaining. Yet, many WTO governments remain reluctant to accept the systemic consequences of this judicialization of WTO rules for the future evolution of the “member-driven” WTO system.<sup>6</sup>

Most trade diplomats continue to perceive the WTO as a separate trade regime that must remain focused on *national* interests and on promotion of economic development through trade liberalization and trade regulation. WTO jurisprudence, by contrast, focuses on an objective assessment of the common intentions of all 149 WTO members and interprets WTO law as part of a broader international legal system, which requires WTO members to comply with all of their international legal obligations in good faith. Both the national as well as the quasi-judicial perspectives may differ from the cosmopolitan civil society perspectives that are increasingly voiced by non-governmental organizations (NGOs), inter-parliamentary meetings such as WTO Ministerial conferences, and in *amicus curiae* submissions to WTO dispute settlement bodies. For instance, some NGOs question the legitimacy of power-oriented, producer-driven economic regulation in the WTO—such as trade-distorting restrictions and export subsidies for cotton and sugar—the lack of constitutional safeguards for transparent, democratic rule-making in the WTO or the one-sided focus of WTO negotiations on producer welfare rather than on general consumer welfare.<sup>7</sup> Independent judicial review and transparent governance by discussion with civil society promote legitimacy and rule of law by limiting power-oriented trade policies. Trade diplomats, however, often remain reluctant to accept that the legitimacy and coherence of

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<sup>1</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>2</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14 [hereinafter WTO Agreement].

<sup>3</sup> See generally ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 71 (1997) (discussing decisions and understandings adopted by GATT contracting parties, which influenced GATT dispute settlement procedure).

<sup>4</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU] (regarding the jurisdiction and applicable law for the WTO dispute settlement bodies).

<sup>5</sup> *Id.* art. 3.4.

<sup>6</sup> See World Trade Organization, *The WTO*, at [http://www.wto.org/english/thewto\\_e/thewto\\_e.htm](http://www.wto.org/english/thewto_e/thewto_e.htm) (last visited Feb. 2, 2006) (“The WTO is a rules-based, member-driven organization—all decisions are made by the member governments, and the rules are the outcome of negotiations among members.”).

<sup>7</sup> See generally PETER SUTHERLAND ET AL., *REFORMING THE WORLD TRADE SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE* (Ernst-Ulrich Petersmann et al. eds., 2005).

national and intergovernmental trade governance are likely to benefit from the more effective judicial checks and balances in the WTO, the now regular inter-parliamentary meetings during WTO Ministerial conferences, and from the ever-stronger insistence by civil society organizations that market access to negotiations and rule-making in the WTO must remain consistent with the non-economic concerns of societies.

**A. *Lacunae in WTO Law and Lack of Legal Guidance by WTO Members***

The more than 340 invocations of the WTO's DSU since 1995, and the more than 200 WTO dispute settlement findings, in more than 100 panel reports, 70 appellate reports, 20 arbitration awards, more than 15 compliance panel reports and other dispute settlement findings, have revealed widespread disagreements over the interpretation of WTO rules as well as shortcomings of the WTO dispute settlement system.<sup>8</sup> In some instances, WTO dispute settlement bodies felt compelled to fill gaps in WTO rules, such as regarding burden of proof and due process of law, by resorting to general rules of international law. Some shortcomings, such as the sequencing problem resulting from certain inconsistencies between Articles 21 and 23 of the DSU,<sup>9</sup> have been dealt with in the WTO negotiations held since 1997 in order to review and improve WTO dispute settlement procedures. Even though WTO members have submitted more than sixty proposals for additional reforms of the WTO dispute settlement system, it appears likely that WTO members will continue to further develop the DSU only very prudently without radical reforms.<sup>10</sup> Other shortcomings have been dealt with in the increasing number of regional trade agreements and regional dispute settlement mechanisms among WTO members,<sup>11</sup> as well as in the 1999 Agreement among WTO members establishing the Advisory Center on WTO Law in order to assist less-developed countries (LDCs) in using WTO dispute settlement procedures more effectively.<sup>12</sup> The WTO Dispute Settlement Body (DSB) has so far never decided *not* to

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<sup>8</sup> See, NOHYOUNG PARK ET AL., *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 531, 541 (Frederico Ortino & Ernst-Ulrich Petersmann eds., Kluwer Law International Ltd. 2004)(providing a systematic analyses of GATT and WTO jurisprudence); see generally ERNST-ULRICH PETERSMANN, *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (Kluwer Law International Ltd. 1997)(providing similar analyses of GATT and WTO jurisprudence).

<sup>9</sup> DSU, *supra* note 4, arts. 21–22. The sequencing problem results from the fact that the time-periods prescribed in Articles 22.2 and 22.6 of the DSU for the authorization of countermeasures, listed as between 30 and 60 days after expiry of the reasonable period of time, are not sufficient to previously complete the compliance review procedure under Article 21.5 that requires 90 days for the panel plus possible appeal. The requirement in Article 23 of the DSU that WTO members follow the procedures outlined in both Articles 21 and 22 without unilateral determination of a violation of WTO obligations or nullification of benefits under WTO law could not be complied with under the WTO without additional agreements making these time periods mutually coherent.

<sup>10</sup> See generally NOHYOUNG PARK ET AL., *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003*, *supra* note 8 at 541 (analyzing numerous reform proposals).

<sup>11</sup> See generally ERNST-ULRICH PETERSMANN ET AL., *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US AND THE WTO*, 297(Ernst-Ulrich Petersmann & Mark A Pollack, eds., 2003) (discussing US and EU trade relations through transatlantic mutual recognition agreements). See generally LEANDRO ARAUJO ET AL., *INTER-GOVERNMENTAL DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES*, 207-331 (Julio Lacarte & Jaime Granados eds., 2004); Locknie Hsu, *Dispute Settlement Systems in Recent Free Trade Agreements of Singapore*, 4 J. WORLD INV. 277, 277-314 (2003).

<sup>12</sup> See FRIEDER ROESSLER, *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995 – 2003*, *supra* note 8, at 87-90 (analyzing various proposals and provisions of DSU and according special and differential treatment to developing countries).

adopt a panel or Appellate Body report,<sup>13</sup> notwithstanding the widespread criticism by WTO members of certain dispute settlement findings.<sup>14</sup> Nor have the WTO Ministerial Conference or the General Council adopted authoritative interpretations of WTO rules,<sup>15</sup> for instance in order to correct certain controversial legal interpretations, such as on the admissibility of *amicus curiae* briefs, by WTO dispute settlement bodies.<sup>16</sup> It also appears unlikely so far that WTO members will reach consensus on overruling legal interpretations developed by WTO dispute settlement bodies, such as on the zeroing methodology for the calculation of dumping margins, as part of future Doha Round agreements. Since the entry into force of the WTO Agreement in 1995, WTO members have accepted an ever more comprehensive clarification and progressive development of WTO rules through WTO jurisprudence without much guidance by the political WTO bodies on the lessons to be drawn from this jurisprudence and from its frequent criticism by individual WTO members (e.g., in the DSB).

### ***B. Strengths and Weaknesses of the WTO Dispute Settlement System***

The fact that most requests for consultations under the DSU are *not* submitted to third party adjudication panels, and that requests for the establishment of a dispute settlement panel have been regularly granted by the DSB without undue delay, are signs of a functioning dispute settlement system. The increasing involvement of LDCs in WTO dispute settlement proceedings, the decreasing number of appeals from panel cases, and the relatively high record

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<sup>13</sup> See DSU, *supra* note 4, arts. 16-17 (allowing DSB not to adopt a Panel or Appellate Body Report).

<sup>14</sup> For example, when the Appellate Body reports in *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Second Recourse and Article 21.5 of the DSU by the New and the United States were discussed in the WTO Dispute Settlement Body, many WTO members criticized the new below average total production cost standard developed by the Appellate body. The representative of the United States stated that the new test that the Appellate Body has read into the text of the Agreement on Agriculture for the purposes of determining whether a ‘payment’ existed under Article 9.1(c) . . . . [C]ost of production appeared nowhere in the text of the Agreement on Agriculture, nor was it clear why ‘proper value’, which itself was a term that did not appear in the Agreement on Agriculture equated to cost of production . . . . [I]t was odd that the WTO would not consider the market as being a good indicator of the value of goods. General Council, *Minutes of Meeting*, ¶ 33, WT/DSB/M/116 (Dec. 18, 2001). The panel finding, which had used both domestic market prices as well as world market prices as benchmarks for determining payments in kind, had been reversed by the Appellate Body without convincing arguments. The representative of Canada also criticized that

the finding of the Appellate Body clearly went beyond the ordinary meaning of the words in the Agreement on Agriculture . . . . [T]he Appellate Body had failed a fundamental obligation of the treaty interpreter . . . . [T]he Appellate Body had clearly gone beyond what WTO members had agreed in the Uruguay Round negotiations.

General Council, *Minutes of Meeting*, ¶ 14, WT/DSB/M/141 (Jan. 17, 2003).

<sup>15</sup> See WTO art. IX (granting the Ministerial Conference and the Geneva Council the exclusive authority to adopt interpretations of WTO agreements).

<sup>16</sup> For example, when the WTO Appellate Body construed Articles 13 and 17 of the DSU as permitting unsolicited *amicus curiae* briefs by non-governmental organizations, a special meeting of the WTO’s General Council was convened and expressed strong criticism. The representative of India, in particular, stated that the Appellate Body had unfortunately ignored the overwhelming sentiment of Members against acceptance of unsolicited *amicus curiae* briefs. By introducing this additional procedure, which amounted to soliciting *amicus curiae* briefs from NGOs, the Appellate Body had indicated that it wanted to go one step further in total disregard of the views of the overwhelming majority of the WTO membership.

General Council, *Minutes of Meeting*, ¶ 31, WT/GC/M/60 (Nov. 22, 2000).

of implementation of WTO dispute settlement rulings within a “reasonable period of time”<sup>17</sup> offer further evidence that the WTO dispute settlement system functions reasonably well. Most WTO members share the view that the five phases of the WTO dispute settlement system do not require urgent reforms. The five phases are: (1) consultations on a political settlement of the complaint; (2) quasi-judicial panel proceedings aimed at resolving legal disputes; (3) appellate review of “issues of law covered in the panel report and legal interpretations developed by the panel”;<sup>18</sup> (4) implementation of dispute settlement rulings under the surveillance by the DSB; and (5) exceptional authorization of countermeasures in case of non-compliance with WTO dispute settlement findings). The WTO dispute settlement practices have improved progressively with the adoption of the following measures: the repeated revisions of the Appellate Body’s working procedures; *ad hoc* agreements on both additional panels’ working procedures and the transparency of panel proceedings; additional third party rights; the sequencing of compliance panel procedures and authorization of countermeasures; resort to cross-retaliation by LDCs; and financial compensation in cases of both non-compliance and continued violations of copyrights. These measures are in line with the pragmatic evolution of past GATT dispute settlement practices and respond to the concerns that diplomatically agreed proposals for new WTO dispute settlement procedures, such as establishment of a new permanent WTO dispute settlement panel and new legal remedies, may entail unforeseen constructivist mistakes. The lack of agreement on an early harvest in the Doha Round negotiations on DSU reforms similar to the 1989 dispute settlement reforms during the Uruguay Round negotiations, and the member-driven bottom-up approach favored by the current chairman of the Doha Round negotiations on further improvements to the DSU, in contrast to the much more assertive leadership by the former chairman of the Uruguay Round negotiations on dispute settlement reforms, bear witness to this widely positive evaluation of the WTO dispute settlement system.

There is also broad agreement that the WTO dispute settlement procedures remain confronted with many weaknesses that may not be remedied in the Doha Round negotiations, in part because WTO members are not ready to transform the WTO dispute settlement procedures into a more effective judicial system with more effective legal remedies such as reparation of injury pursuant to the general international law rules on state responsibility for violations of international law. Several examples are illustrative. First, even though, due to their *ad hoc* selection for only one or a few dispute settlement panels and their inadequate remuneration, most WTO panelists are less and less familiar with the several hundred GATT and WTO dispute settlement reports, and their legal autonomy and independence from the WTO Secretariat are no longer effectively secured,<sup>19</sup> WTO members appear to be unwilling to replace the *ad hoc* dispute settlement panels, mainly composed by and with WTO diplomats, by a permanent WTO dispute settlement panel with more independent, legal experts. Second, as WTO dispute settlement procedures may last more than three years even in case of obviously illegal trade measures, such as the EC’s import restrictions on bananas and the United States’ safeguard measures on steel, until they may lead to the termination of illegal trade measures or to sanctions following the

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<sup>17</sup> See DSU, *supra* note 4, art. 21 (granting the DSB the authority to oversee the implementation of the recommendations).

<sup>18</sup> *Id.* art. 17.6.

<sup>19</sup> For example, at a WTO conference at Singapore’s National University on September 2, 2005, Singapore’s Ambassador Tommy Koh (who chaired several WTO dispute settlement panels) criticized the WTO practice of *not* paying a *per diem* to government officials serving as WTO panellists as “ridiculous.”

expiry of the reasonable period of time, the dispute prevention functions of the WTO dispute settlement procedures remain weak. Third, there is no provisional relief during WTO dispute settlement procedures. Fourth, the DSU does not provide compensation for past harm suffered or for reimbursement of the legal expenses of the winning party to the dispute. Fifth, LDCs often remain disadvantaged in WTO dispute settlement proceedings due to lack of legal resources, financial resources, legal rights under, among other things, the Generalized System of Preferences, and effective sanctioning power. Sixth, although many intergovernmental WTO disputes—over private intellectual property rights and administrative trade restrictions—could be avoided by more effective legal and judicial remedies in domestic courts, most WTO governments continue to prevent their domestic courts from applying WTO rules, enforcing WTO dispute settlement findings, and exercising effective judicial control over trade policy-making.

### **C. *Future Challenges for WTO Jurisprudence***

These and other deficiencies of WTO dispute settlement procedures are among the many challenges confronting future WTO dispute settlement efforts. Only a few are likely to be addressed by WTO members through agreements on further improvements to the WTO dispute settlement rules and procedures. Notwithstanding the separate track of the DSU reform negotiations in the Doha Round, there is a clear lack of leadership and ambition in these member-driven negotiations. Hence, the ultimate outcome may only be a pragmatic compromise on a few core reforms proposed by the major trading countries and LDCs. These might include reforms on the composition of panels, enhanced transparency in panel proceedings, more effective special and differential treatment of LDCs, additional third-party rights, accelerated time frames for dispute settlement procedures involving safeguard measures, provision for remand procedures, clarification of the “sequencing” issue, and new procedures for termination of retaliation authority.

Even if such improvements become possible in the Doha Round negotiations, WTO dispute settlement bodies will remain confronted with requests to clarify the often contested meaning of numerous other WTO rules. For example, as every international agreement remains incomplete, the “judicial function” may require the clarification of “gaps” in WTO dispute settlement procedures, such as on preliminary rulings, if that should prove necessary “to preserve the rights and obligations of Members under the covered agreements” without “add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements.”<sup>20</sup> Part II of this article focuses on three challenges for future WTO judges. In Part II.A, I discuss the increasing importance of contextual and functional methods of international treaty interpretation and the controversies over the relevance of non-WTO rules of international law for interpreting WTO rules. In Part II.B, I discuss the legal obligation of all WTO members to comply with their international legal obligations in good faith; the limited jurisdiction of WTO dispute settlement bodies; the limited scope of applicable rules of international law in WTO dispute settlement proceedings; and the increasing judicial clarification of “the basic principles. . . underlying this multilateral trading system,”<sup>21</sup> which provide as an open-ended source of WTO law to be clarified through WTO practice so as to ensure “procedural due process of law”, “security and

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<sup>20</sup> DSU, *supra* note 4, art. 3.2.

<sup>21</sup> WTO Agreement, Preamble.

predictability to the multilateral trading system.”<sup>22</sup> In Part II.C, I discuss that the legitimate role of WTO judges in the diverse areas of the WTO legal system (e.g., regarding trade in goods, trade in services, intellectual property rights), questions of judicial policy and of judicial restraint *vis-à-vis* other WTO bodies and WTO members, judicial independence, judicial balancing of market access rights with WTO provisions protecting non-economic policies, and cooperation among international judges and courts.

Like in any other system of separation of powers and checks and balances among legislative, administrative and judicial governance institutions, it is of crucial importance for the future evolution of the WTO dispute settlement system that the WTO’s rule-making bodies, such as the WTO members, WTO Ministerial Conference, WTO General Council, administrative bodies such as the WTO Secretariat, and also civil society continue to scrutinize—and, if necessary, criticize—future legal findings of the political and quasi-judicial WTO dispute settlement bodies such as the DSB, dispute settlement panels, the Appellate Body, and WTO arbitrators. Such deliberative politics and governance by discussion offer the best methods of gradually improving WTO rules and of strengthening political support by cosmopolitan constituencies for the rules-based world trading system.<sup>23</sup>

#### ***D. WTO Jurisprudence as an Essential Part of Multilevel Trade Governance***

In constitutional democracies and also in the cosmopolitan world trading system, the legislative, administrative and judicial functions of governance should be conceived and designed as mutually complementary safeguards for the protection of the rule of law, the rights of domestic citizens, and their general interests (e.g., in consumer welfare).<sup>24</sup> The already more than 100 WTO dispute settlement rulings have become an ever more important component of multilevel trade governance at national and intergovernmental levels. As rule-making by consensus among 148 WTO members is inevitably more difficult than agreement among three panel or Appellate Body members on legal interpretations of WTO rules, it appears misleading to lament that “the quasi-judicial arm has already proven to be much stronger than the political arm of the WTO”.<sup>25</sup> The large number of international agreements concluded in the context of the WTO since 1995 (e.g., on the accession of more than twenty-five new WTO members, liberalization and regulation of services, harmonization of accounting standards, waivers from WTO obligations in order to promote public access to medicaments, preferential treatment of LDCs, control of trade in conflict diamonds etc.), and the enormous administrative work in the WTO’s numerous negotiating and administrative bodies (like the Trade Policy Review

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<sup>22</sup> DSU, *supra* note 4, art. 3.2.2.

<sup>23</sup> On the plea by WTO Director-General Pascal Lamy for “cosmopolitics” and “cosmopolitan constituencies” in support of global public goods (like a liberal world trading system), see STEVE CHARNOVITZ, *THE WTO AND COSMOPOLITICS*, in *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT*, *supra* note 3 at 437.

<sup>24</sup> This citizen-oriented conception of the WTO objective of sustainable development is not shared by many trade diplomats and WTO governments which perceive the WTO as a power-oriented instrument of advancing macro-economic growth and national interests as defined by the respective rulers.

<sup>25</sup> Claus-Dieter Ehlermann, *Six Years on the Bench of the World Trade Court: Some Personal Experiences as Member of the Appellate Body of the WTO*, in *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT*, *supra* note 3, at 499, 527.

Mechanism), bear witness to the multiple activities of the WTO's political, administrative and rule-making bodies.<sup>26</sup>

Both member-driven rule-making and the case-specific WTO jurisprudence are legally limited by the WTO Agreement, which confers only limited powers on the rule-making, administrative and quasi-judicial WTO bodies and asserts legal primacy over the multilateral agreements incorporated into the Annexes of the WTO Agreement, as well as over the domestic laws and regulations of WTO members.<sup>27</sup> It appears legitimate that several recent WTO disputes (such as *US–Upland Cotton*, *EC–Export Subsidies on Sugar*, *EC–Biotech Products*, and *EC–Geographical Indications* pursued not only the settlement of bilateral disputes, but also the multilateral clarification of WTO obligations in order to improve bargaining positions (e.g., of cotton and sugar-exporting countries) in the Doha Round of trade negotiations.<sup>28</sup> The more trade negotiators perceive WTO negotiations and WTO dispute settlement proceedings as complementary tools for the progressive development of WTO rules, the more WTO dispute settlement bodies should limit their case-specific legal interpretations with caution and circumspection, and the stronger the need for clearer guidance by WTO members as well as by public discussions on the many “principled problems” that will continue to challenge WTO jurisprudence and its political acceptability by governments and civil society.

## II. SOME PRINCIPLED CHALLENGES FOR FUTURE WTO JURISPRUDENCE

### A. *Treaty Interpretation as a “Holistic Task”*

According to Article 3.2 of the DSU, the “dispute settlement system of the WTO . . . serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”<sup>29</sup> The Appellate Body used its first two reports to clarify that the rules of interpretation of public international law laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) have “attained the status of a rule of

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<sup>26</sup> For references to these additional WTO agreements and WTO practices see the annual “World Trade Reports” published by the WTO. These reports can be found at <http://docsonline.wto.org/>.

<sup>27</sup> WTO Agreement, art. XVI. On the different constitutional, legislative, administrative and quasi-judicial functions of the WTO, see Ernst Ulrich Petersmann, *From ‘Member-Driven Governance’ to Constitutionally Limited ‘Multilevel Trade Governance’ in the WTO*, in *THE WTO AT 10: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* (Giorgio Sacerdoti *et al.* eds., 2006).

<sup>28</sup> Appellate Body Report, *United States--Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005) (adopted March 21, 2005); Panel Reports, *European Communities--Export Subsidies on Sugar*, ¶ 8.3, WT/DS265/R, WT/DS266/R, & WT/DS283/R (Oct. 15, 2004) (unofficial reports issued to the Parties Sept. 8, 2004), *aff'd*, Appellate Body Reports, WT/DS265/AB/R, WT/DS266/AD/R, & WT/DS283/AB/R (Apr. 28, 2005); Request for the Establishment of a Panel by the United States, *European Communities--Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23, (Aug. 8, 2003); WTO Panel Report, *European Communities--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005). For detailed empirical evidence that many of the more than 45 WTO dispute settlement panels involving agricultural, fishery, or forestry products have been established over the preceding years with a view to improving the bargaining power of the complaining countries in WTO negotiations and progressively developing WTO rules through agreed WTO dispute settlement rulings, see Ernst-Ulrich Petersmann, *Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture*, in *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT*, *supra* note 3, at 127-44.

<sup>29</sup> See DSU, *supra* note 4, art. 3.2.

customary or general international law.”<sup>30</sup> In the course of its jurisprudence, the Appellate Body has increasingly acknowledged that the requirement in Article 31 VCLT – i.e. that “a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”<sup>31</sup>—constitutes “one holistic rule”<sup>32</sup> whose different elements (text, context, object and purpose) may be difficult to separate: “Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.”<sup>33</sup>

## 1. LIMITS OF TEXTUAL INTERPRETATION

The Appellate Body reads Article 31 VCLT as requiring a certain sequence in the interpretative process and a legal hierarchy to be given to the text of the particular provision to be interpreted:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.<sup>34</sup>

The frequent recourse to dictionaries in the Appellate Body’s reports has prompted some observers to criticize that the Shorter Oxford Dictionary has become one of the covered agreements, and that the greater weight attached to the ordinary meaning of the terms of the treaty than to the context and purpose of the treaty reflects an unwillingness by the Appellate Body “to situate its legal analyses within a framework which firmly articulates both the normative and policy considerations and consequences of its decisions.”<sup>35</sup> Other commentators have welcomed the Appellate Body’s rigorous textual interpretation as “providing security and predictability to the multilateral trading system”<sup>36</sup> and as protecting WTO jurisprudence from

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<sup>30</sup> Appellate Body Report, *United States--Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Apr. 29, 1996, ¶ 16, WT/DS2/AB/R (Apr. 29, 1996); Appellate Body Report, *Japan--Taxes on Alcoholic Beverages*, WT/DS8/AB/R at 104 (Oct. 4 1996); Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679 [hereinafter VCLT].

<sup>31</sup> VCLT, *supra* note 30, art. 31.

<sup>32</sup> Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Dec. 22, 1999).

<sup>33</sup> Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 176, WT/DS269,286/AB/R (Sept. 12, 2005).

<sup>34</sup> Appellate Body Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 114 (Oct. 12, 1998) [hereinafter *US-Shrimp*].

<sup>35</sup> See Henrik Horn & Joseph Weiler, *EC-Trade Description of Sardines: Textualism and its Discontent*, in THE WTO CASE LAW OF 2002 (Henrik Horn & Petros Mavroidis eds., 2005). For example, from a systematic and functional perspective, the Appellate Body’s literal and evolutionary interpretation of exhaustible natural resources. See *US-Shrimp*, *supra* note 34 at 128, which states that XX(g) is not limited to the conservation of “mineral” or “non-living” natural resources. Moreover, including animals may undermine the system of GATT art. XX, such as the necessity test prescribed in Article XX(b) for the protection of “human, animal, or plant life or health.”

<sup>36</sup> See DSU, *supra* note 4, art. 3.2.

criticism that dispute settlement findings “add to or diminish the rights and obligations provided in the covered agreements”.<sup>37</sup> WTO jurisprudence seems to confirm that the results of literal interpretation have been more easily acceptable for WTO members than other legal interpretations based on functional arguments (such as the need to “complete the analysis”) or contextual arguments (such as multilateral environmental agreements accepted by *some* WTO members only). Yet, in *US-Gambling*, the Appellate Body itself acknowledged that “dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized.”<sup>38</sup>

According to the Appellate Body, “the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.”<sup>39</sup> An important corollary of the interpretative “principle of effectiveness” is, according to the Appellate Body, “that a treaty should be read as a whole, and, in particular, its sections and parts should be read as a whole.”<sup>40</sup>

## 2. INCREASING IMPORTANCE OF CONTEXTUAL INTERPRETATION

The limits of textual interpretation became particularly evident in WTO disputes over the interpretation of tariff bindings under GATT 1994 and of specific commitments under the GATS. GATT tariff bindings and GATS commitments tend to be drafted unilaterally by the WTO Member concerned, on the basis of internationally agreed-upon classification systems (like the Harmonized System Convention),<sup>41</sup> before being incorporated into WTO law as an integral part of the multilateral WTO rules. The Appellate Body has clarified that the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention.<sup>42</sup>

Yet, GATT and WTO jurisprudence has long since recognized that GATT schedules on tariff bindings may have to be construed with due regard to the Harmonized Commodity Description and Coding System and its Explanatory Notes.<sup>43</sup> As the Harmonized System Convention itself has not been ratified by all WTO members, this Convention does not qualify as an “agreement” and “context” in the sense of Article 31.2(a). The Appellate Body acknowledged, however, that the broad consensus among GATT Contracting Parties to use the Harmonized System as the basis for their WTO Schedules of Tariff Commitments constitutes an

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<sup>37</sup> *See Id.* art. 3.2.

<sup>38</sup> Appellate Body Report, *United States Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 164, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US-Gambling*].

<sup>39</sup> Appellate Body Report, *United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 65, WT/DS213/AB/R (Nov. 28, 2002).

<sup>40</sup> Appellate Body Report, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/AB/R (Nov. 14, 1999).

<sup>41</sup> International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, pmbl., 1989 U.K.T.S. 15 (Cnmd. 695).

<sup>42</sup> *US-Gambling*, *supra* note 38 at ¶ 159.

<sup>43</sup> *See, e.g.*, Appellate Body Report, *European Communities--Customs Classifications of Certain Computer Equipment*, WT/DS62/AB/R (Jun. 5, 1998); Appellate Body Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269,286/AB/R (Sept. 12, 2005) [hereinafter *EC-Chicken Cuts*].

agreement and context (within the meaning of Article 31.2(a) of the VCLT) for the purpose of interpreting tariff commitments in the WTO members' schedules.<sup>44</sup> In *Mexico-Telecommunications*<sup>45</sup> and *US-Gambling*,<sup>46</sup> the WTO Panels also referred to the Services Sector Classification List and the 1993 Scheduling Guidelines as interpretative tools, even though these documents had been prepared by the GATT Secretariat rather than by the parties to the negotiations. Regarding the interpretation of GATS Schedules of Specific Commitments, the Appellate Body reversed the Panel findings in *US-Gambling*<sup>47</sup> that the 'Services Sectoral Classification List'<sup>48</sup> and the '1993 Scheduling Guidelines' were "context" for the interpretation of GATS Schedules of commitments: "We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty."<sup>49</sup>

3. INTERPRETATIVE GUIDANCE BY SUBSEQUENT PRACTICE AND  
"RELEVANT RULES OF INTERNATIONAL LAW APPLICABLE  
IN THE RELATIONS BETWEEN THE PARTIES" (ARTICLE 31.3 VCLT)

Just as future WTO jurisprudence will have to define more precisely the scope of "context" (e.g., the delimitation between paragraphs a and b of Article 31.2 of the VCLT), so has the interpretative relevance of subsequent agreements and other "relevant rules of international law applicable in the relations between the parties"<sup>50</sup> assumed increasing importance in WTO dispute settlement proceedings. Whereas most WTO members perceive WTO law as a separate trade regime with limited trade policy competences, WTO dispute settlement bodies are increasingly confronted with legal claims and arguments that WTO law must be interpreted and applied as part of a broader international legal system. In *US-Shrimp*, the legal interpretations by the Appellate Body were influenced by its finding that the "contemporary concerns of the community of nations about the protection and conservation of the environment" needed to be taken into account.<sup>51</sup> In the pending WTO dispute settlement proceeding regarding the EC's import restrictions for genetically modified organisms (GMOs), the EC referred to this interpretative principle in support of the EC's claim that WTO rules (such as on "like products" and labeling requirements) must be construed with due regard to the 1992 UN Convention on Biodiversity,<sup>52</sup> its 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity,<sup>53</sup> and the right under general international law to take precautionary measures.<sup>54</sup> Yet,

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<sup>44</sup> *EC-Chicken Cuts*, *supra* note 44.

<sup>45</sup> Panel Report, *Mexico--Measures Affecting Telecommunications Services*, ¶¶ 7.59, 7.43. WT/DS204/R (Apr. 2, 2004).

<sup>46</sup> *US-Gambling*, *supra* note 38.

<sup>47</sup> *Id.*

<sup>48</sup> GATT Secretariat, Services Sectoral Classification List, MTN.GNS/W/120 (July 10, 1991).

<sup>49</sup> *US-Gambling*, *supra* note 38 at 176.

<sup>50</sup> VCLT, *supra* note 30, art. 31.3.

<sup>51</sup> *US-Shrimp*, *supra* note 34, at 129.

<sup>52</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

<sup>53</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027.

<sup>54</sup> See Ernst-Ulrich Petersmann, *The WTO Dispute over Genetically Modified Organisms: Interface Problems of International Trade Law, Environmental and Biotechnology Law*, in *BIOTECHNOLOGY AND INTERNATIONAL LAW* (Francesco Francioni & Riccardo Pavioni eds., 2006).

can the interpretation of WTO rules be guided by international law rules that have not been accepted by all WTO members? Does the limited dispute settlement function permit WTO dispute settlement panels to take into account other rules of international law that, even though not accepted by all WTO members, have been accepted by all the parties to the dispute concerned?<sup>55</sup>

Already in its first report in *US-Gasoline*, the Appellate Body noted the DSU requirement to interpret the covered agreements “in accordance with customary rules of interpretation of public international law.”<sup>56</sup> This requirement “reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”<sup>57</sup> Notably the WTO agreements on technical barriers to trade (TBT),<sup>58</sup> sanitary and phytosanitary measures (SPS),<sup>59</sup> the General Agreement on Trade in Services (GATS),<sup>60</sup> the GATS schedules of “specific commitments,”<sup>61</sup> and the Agreement on Trade-Related Intellectual Property Rights (TRIPS)<sup>62</sup> include numerous references to international agreements concluded outside the WTO, such as rules adopted by international standardizing bodies,<sup>63</sup> “international systems for conformity assessment,”<sup>64</sup> international agreements related to technical regulations,<sup>65</sup> the International Plant Protection Convention and other international (phyto)sanitary standards,<sup>66</sup> international air transport, telecommunications and other agreements regulating international services, and intellectual property agreements negotiated in the context of the World Intellectual Property Organization. The number of WTO dispute settlement reports referring to public international law rules and principles, including general principles of law (such as on burden of proof, good faith, due process of law, and *jura novit curia*), continues to increase steadily, both with regard to questions of procedural law as well as regarding substantive rights and obligations of WTO members.

WTO jurisprudence distinguishes between factual references to international agreements as part of the “objective assessment of the facts of the case,”<sup>67</sup> and use of international

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<sup>55</sup> The VCLT uses the term “party” in the sense of “contracting party” rather than “party to a dispute”. Yet, as Article 31.2(a) of the VCLT speaks of “all parties”, and Article 31.2(b) of “one or more parties,” the mere reference to “parties” in Article 31.3(c) could be construed as referring to several, but not necessarily all the parties of the agreement concerned.

<sup>56</sup> DSU, *supra* note 4, art. 3.2.

<sup>57</sup> Appellate Body Report, *United States--Standards for Reformulated and Conventional Gasoline*, arts. 31, 16, WT/DS2/AB/R (May 20, 1996).

<sup>58</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreement on Trade in Goods, 33 I.L.M. 1125 (1994) [hereinafter TBT].

<sup>59</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreement on Trade in Goods, 33 I.L.M. 1125 (1994) [hereinafter SPS].

<sup>60</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994) [hereinafter GATS].

<sup>61</sup> *Id.*, arts. XV–XX.

<sup>62</sup> Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

<sup>63</sup> TBT, *supra* note 58, art. 5.

<sup>64</sup> *Id.*, art. 9.

<sup>65</sup> *Id.*, art. 10.

<sup>66</sup> SPS, *supra* note 59, art. 3.

<sup>67</sup> DSU, *supra* note 4, art. 11.

agreements as applicable “legal standard.” In *US-Shrimp (Article 21.5 – Malaysia)*<sup>68</sup>, for example, the Appellate Body found that to avoid “arbitrary or unjustifiable discrimination,” the United States had to provide all exporting countries “similar opportunities to negotiate” an international agreement. Given . . . the decided preference for multilateral approaches voiced by WTO members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles . . . , the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other . . . . The Panel rightly used the Inter-American Convention as a factual reference in this exercise of comparison. . . . The mere use by the Panel of the Inter-American Convention *as a basis for a comparison* did not transform the Inter-American Convention into a “legal standard.” Furthermore, although the Panel could have chosen a more appropriate word than “benchmark” to express its views, Malaysia is mistaken in equating the mere use of the word ‘benchmark’, as it was used by the Panel, with the establishment of a legal standard.<sup>69</sup>

Similarly, in the interpretation of the term “conservation of exhaustible natural resources” in GATT Article XX(g),<sup>70</sup> the Appellate Body referred to other international agreements as evidence of facts rather than as applicable legal standards:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary.’ It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. . . .<sup>71</sup>

This “evolutionary interpretation” of GATT Article XX(g) meant that the stricter “necessity requirement” (in GATT Article XX(b) for measures protecting “animal or plant life or health” was effectively replaced by the looser “relating to” requirement (in GATT Article XX(g))—without any convincing explanation or need in view of the increasingly flexible, judicial interpretation of the term “necessary” as referring to “a range of degrees of necessity.”<sup>72</sup> This example of “judicial rule-making” illustrates the potential dangers of “creative jurisprudence” abusing the potential universe of contextual, interpretative arguments in an “eclectic” manner. In *EC-Customs Classification*,<sup>73</sup> the relationship between the variety of contextual interpretative arguments likewise remained unclear. Even though the Appellate Body could not classify the Harmonized System Convention as “relevant rules of international law applicable in the relations between the parties” (in the sense of Article 31.3(c) of the VCLT) because several WTO members never ratified this Convention, it interpreted the EC’s tariff commitments in the context of the Harmonized System Convention and, arguably, reached the

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<sup>68</sup> Appellate Body Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 122, 130 WT/DS58/AB/RW (Oct. 22, 2001).

<sup>69</sup> *Id.*

<sup>70</sup> GATT, *supra* note 1, art. xx(g).

<sup>71</sup> *Id.* ¶ 130.

<sup>72</sup> See Appellate Body Report, *Korea--Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161 WT/DS161/AB/R (Dec. 11, 2000) (“We believe that, as used in the context of Article XX(d), the reach of the word ‘necessary’ is not limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable.’ . . . The term ‘necessary’ refers, in our view, to a range of degrees of necessity. At one end of this continuum lies ‘necessary’ taken to mean as ‘making a contribution to.’ We consider that a ‘necessary’ measure is, in this continuum, located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’”)

<sup>73</sup> *EC-Chicken Cuts*, *supra* note 46.

same interpretative results. Similarly, in *US-Gambling*, the Appellate Body reversed the Panel's finding that the "Services Sectoral Classification List"<sup>74</sup> and the "1993 Scheduling Guidelines"<sup>75</sup> could be used as context (in the sense of Article 31.2 VCLT), but used the same documents as "supplementary means of interpretation" (pursuant to Article 32(a) VCLT) with essentially the same interpretative results.<sup>76</sup>

The factual and legal determination of "relevant subsequent practice" for purposes of treaty interpretation pursuant to Article 31.3 VCLT entails similar uncertainties. The Appellate Body found, in *Japan – Alcoholic Beverages II*, that "subsequent practice" within the meaning of Article 31.3(b) requires a "concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties (to a treaty) regarding its interpretation."<sup>77</sup>

In *US-Gambling*, the Appellate Body clarified that establishing "subsequent practice" within the meaning of Article 31.3(b) involves two elements: "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision."<sup>78</sup> In *EC-Customs Classification*, the Appellate Body shared the Panel's view that not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice. Nevertheless, practice by some but not all parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a 'concordant, common and discernible pattern' on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the WTO Agreement. We acknowledge, however, that, if only some WTO members have actually traded or classified products under a given heading, this circumstance may reduce the availability of such 'acts or pronouncements' for purposes of determining the existence of 'subsequent practice' within the meaning of Article 31(3)(b).<sup>79</sup>

Yet, in establishing agreement of parties that have not engaged in a particular trade practice, lack of reaction should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaties, including those that have not actually engaged in such practice.<sup>80</sup>

In conclusion, contextual interpretation and judicial recourse to "supplementary means of interpretation"—which, according to the Appellate Body, are not exhaustively defined in Article

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<sup>74</sup> GATT Secretariat, Services Sectoral Classification List, MTN.GNS/W/120 (July 10, 1991).

<sup>75</sup> Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (Sept. 3, 1993).

<sup>76</sup> See *US-Gambling*, *supra* note 38, at 176, 59, n.210. The Panel Report in Panel Report, *Mexico--Measures Affecting Telecommunications Service*, WT/DS204/R (Apr. 2, 2004), deliberately left open the legal question of whether the 1993 Scheduling Guidelines qualified as "context" or as a "supplementary means" of interpreting Mexico's GATS commitments: "In any case, we consider that the source, content and use of the Explanatory Note make it part of the 'circumstances' of the conclusion of the GATS, within the meaning of Article 32 of the Vienna Convention. We may therefore properly have recourse to the Explanatory Note to confirm our understanding of the ordinary meaning of Article I:2(a) of the GATS" (para. 7.44).

<sup>77</sup> Appellate Body Report, *Japan--Taxes on Alcoholic Beverages*, ¶ XX WT/DS8,10,11/AB/R (Oct. 4, 1996).

<sup>78</sup> *US-Gambling*, *supra* note 38 at 192.

<sup>79</sup> *EC-Chicken Cuts*, *supra* note 46 at 259.

<sup>80</sup> *Id.* at 273.

32 of the VCLT<sup>81</sup>—are neither mathematical nor mechanical methods of clarifying the contested meaning of WTO rules, but inevitably involve normative and functional considerations that call for strict “constitutional checks and balances” in order to remain politically legitimate and acceptable. The less legislative guidance WTO members give regarding the textual meaning and objectives of WTO rules, the broader remains the “judicial margin of appreciation” of WTO dispute settlement bodies in the “objective assessment of the matter before it,”<sup>82</sup> including the contested meaning and clarification of applicable WTO rules.

4. THE IMPACT OF “OBJECT AND PURPOSE” ON THE “ORDINARY MEANING” OF TREATY TERMS AND ON THE “BALANCING” OF RIGHTS AND OBLIGATIONS

WTO jurisprudence increasingly attaches importance to the “object and purpose” not only of specific WTO provisions, but also of the WTO Agreements as a whole. In its first report on *US-Gasoline*, the Appellate Body noted that it was “important to underscore that the purpose and object of the introductory clauses of [GATT] Article XX is generally the prevention of ‘abuse of the exceptions of . . . Article [XX].’”<sup>83</sup> It continued: “If those exceptions are not to be abused or misused, . . . , the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”<sup>84</sup>

In *US-Shrimp*, the Appellate Body further clarified that “[t]he standards of the chapeau, in our view, project both substantive and procedural requirements.”<sup>85</sup> It noted, further, that [t]he task of interpreting and applying the chapeau is, . . . , essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.<sup>86</sup>

Similar to the longstanding GATT jurisprudence on “non-violation complaints” protecting the balance of reciprocal GATT market access commitments, the chapeau of Article XX embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.<sup>87</sup>

A “balancing test” is also applied in determining the “necessity” of trade restrictions: [D]etermination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of

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<sup>81</sup> *Id.* at 283.

<sup>82</sup> DSU, *supra* note 4, art. 11.

<sup>83</sup> GATT, *supra* note 1, art. XX.

<sup>84</sup> *Id.*

<sup>85</sup> *US-Shrimp*, *supra* note 34 at 160.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 156.

the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.<sup>88</sup>

In *EC-Asbestos*, the Appellate Body emphasized that the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.<sup>89</sup>

In *US-Gambling*, the Appellate Body agreed with the Panel that the WTO jurisprudence relating to GATT Article XX was also relevant for interpreting the general exceptions in GATS Article XIV, notably regarding the need for a “two-tier analysis” of a measure that a Member seeks to justify under GATS Article XIV, as well as the need for “a process of weighing and balancing a series of factors” in the determination of the “necessity” of restrictions for the protection of “public morals” and “public order.”<sup>90</sup>

In *US-Gambling*, the Appellate Body used seven balancing factors: (1) the ‘relative importance’ of the interests or values furthered by the challenged measure; (2) the contribution of the measure to the realization of the ends pursued by it; (3) the restrictive impact of the measure on international commerce; (4) a comparison between the challenged measure and possible alternatives in the light of the importance of the interests at issue; (5) the absence of another “reasonably available” WTO-consistent alternative; (6) respect for the right of each WTO Member “to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV”; and (7) a differentiated distribution of the burden of proof between the responding party invoking an affirmative defence (e.g., that the respondent needs to establish a *prima facie* case that its measure is “necessary” for the protection of public morals or public order) and the complaining country (which may have to prove the availability of a WTO-consistent alternative measure in “the universe of less trade-restrictive alternative measures”).<sup>91</sup> This ever more complex “process of weighing and balancing a series of factors” and of policy objectives in the judicial interpretation of WTO rules illustrates the increasing sophistication of the judicial standards for the review of trade restrictions.

In *EC-Customs Classification*, the Appellate Body clarified that “the security and predictability of ‘the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade’ is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.”<sup>92</sup>

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<sup>88</sup> *Korea-Various Measures on Beef*, *supra* note 72 at 164.

<sup>89</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 171, WT/DS135/AB/R (Mar.12, 2001).

<sup>90</sup> *US-Gambling*, *supra* note 38. *See also Id.* at 292 (noting that “[a] panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV” and that “[w]here the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.”).

<sup>91</sup> On the “process of weighing and balancing a series of factors” see ¶¶ 305-311 of *US-Gambling*, *supra* note 38.

<sup>92</sup> Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 82, WT/DS62/AB/R (June 5, 1998).

In *US-Gambling*, the Appellate Body agreed with the Panel's findings that "the importance of the security and predictability of Members' specific commitments . . . is equally an object and purpose of the GATS."<sup>93</sup>

In *EC-Customs Classification*, the Appellate Body further clarified that it is well accepted that the use of the singular word "its" preceding the term "object and purpose" in Article 31(1) of the Vienna Convention indicates that the term refers to the treaty as a whole . . . Thus, the term "its object and purpose" makes it clear that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety. At the same time, we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or *vice versa*. To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.<sup>94</sup>

The numerous difficulties of balancing the "object and purpose of a treaty provision" with the "object and purpose of the entire treaty" were illustrated in *EC-Tariff Preferences* by the Appellate Body's reversal of the Panel's legal interpretations of the non-discrimination requirements under the "Enabling Clause." In response to India's challenge of the EC's generalized system of tariff preferences (GSP), a WTO dispute settlement panel held, in December 2003, that the term "non-discriminatory" in the WTO's "Enabling Clause" required "that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations" and preferential treatment for the least-developed among the LDCs.<sup>95</sup> On appeal, the Appellate Body recognized that "Members' respective needs and concerns at different levels of economic development may vary according to the different stages of development of different Members."<sup>96</sup> Hence, the term 'non-discriminatory' . . . does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that . . . identical treatment is available to all similarly-situated GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.<sup>97</sup> Furthermore, the existence of a "development, financial [or] trade must be assessed according to an objective standard,"<sup>98</sup> and "the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences" without imposing "unjustifiable burdens on other Members."<sup>99</sup>

In response to this important clarification of the development and non-discrimination objectives of the Enabling Clause, the EU Commission has proposed a new GSP system aimed at promoting "sustainable development" by differentiating tariff preferences depending on whether LDCs have ratified and effectively implemented the major U.N. human rights conventions, ILO

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<sup>93</sup> *US-Gambling*, *supra* note 38 at 188-89.

<sup>94</sup> *EC-Customs Classification*, *supra* note 92 at 238.

<sup>95</sup> Panel Report, *European Communities--Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.176, WT/DS246/R (Dec. 1, 2003).

<sup>96</sup> Appellate Body Report, *European Communities--Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 161, WT/DS246/AB/R (Apr. 7, 2004).

<sup>97</sup> *Id.* at 173.

<sup>98</sup> *Id.* at 161-63.

<sup>99</sup> *Id.* at 164-67.

conventions, U.N. environmental convention, U.N. conventions on drugs and the U.N. Convention against corruption.<sup>100</sup>

If such “objective standards” and development objectives should be challenged by LDCs, future WTO jurisprudence may have to clarify whether WTO rules and objectives (such as “sustainable development,” and non-discriminatory treatment of LDCs) can justify differential tariff treatment depending on the compliance of LDCs with U.N. and ILO conventions. As the jurisdiction of WTO panels is limited to examining legal claims under the covered WTO agreements, WTO dispute settlement bodies should leave it to the WTO Members concerned to prove the existence of alleged violations of U.N. and ILO conventions (e.g., by invoking special dispute settlement procedures available under such conventions).

In *EC-Customs Classification*, the Appellate Body rightly cautioned “against interpreting WTO law in the light of the purported ‘object and purpose’ of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty as a whole.”<sup>101</sup> Yet, the various WTO objectives (such as “the objective of sustainable development” proclaimed in the Preamble to the WTO Agreement<sup>102</sup>) are so broad that divergent claims over their interpretation appear inevitable. For example, is the judicial admission of amicus curiae briefs consistent with the intergovernmental structures of WTO rules? Should the “sustainable development” objective be construed in accordance with the U.N. Declarations on the “human right to development”?<sup>103</sup> Or should it be construed in accordance with the long tradition in economic thought (from Adam Smith to Friedrich Hayek and Nobel Prize-winning economist Amartya Sen) that trade and economic development are only *instruments* for promoting individual freedom as the ultimate goal of economic life and the most efficient means of enhancing economic development?<sup>104</sup> Does the explicit recognition (e.g., in the TRIPS Agreement and in the 2001 WTO Agreement on the Accession of China) of WTO obligations to protect private procedural rights, property rights and “rights to trade”, including “the right to import and export goods,”<sup>105</sup> confirm that WTO rules protect not only rights and obligations among WTO Members, but also legal “security and predictability” for the benefit of private traders and other market participants? Or do the “sovereignty” of WTO Members and the intergovernmental structures of WTO law exclude such citizen-oriented legal interpretations, as suggested by the Appellate Body’s reversal of the Panel finding in *India-Patents* “that the

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<sup>100</sup> Communication from the Commission, *Developing Countries, International Trade and Sustainable Development: The Function of the Community’s Generalised System of Preferences (GSP) for the ten-year period from 2006 to 2015*, at 10, COM (2004) 461 final (July 7, 2004) (describing new GSP sustainable development incentives).

<sup>101</sup> *EC-Customs Classification*, *supra* note 92 at 239.

<sup>102</sup> WTO Agreement, Preamble.

<sup>103</sup> See, e.g., Robert Howse, *Mainstreaming the Right to Development into International Trade Law and Policy at the WTO*, ECOSOC Doc. E/CN.4/Sub.2/2004/17 (2004) (arguing that construction is in accordance with U.N. Declarations).

<sup>104</sup> On defining economic development not only in macroeconomic terms, but also in terms of individual decisional autonomy, individual “immunity from encroachment,” and substantive “opportunity to achieve,” see AMARTYA SEN, *RATIONALITY AND FREEDOM* (2002); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 35 (1960) (“Economic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself).”).

<sup>105</sup> This right is explicitly recognized in China’s Accession Protocol. See Accession of the People’s Republic of China, Part 1.5, WT/L/432 4 (Nov. 10, 2001) (formalizing the PRC’s accession to the Marrakesh Agreement establishing the WTO).

legitimate expectations of Members and private rights holders concerning conditions of competition must always be taken into account in interpreting the TRIPS Agreement”?<sup>106</sup>

**B. *Applicable Law and Limited Jurisdiction of WTO Dispute Settlement Bodies***

Many WTO Members appear to construe the limited terms of reference of WTO panels,<sup>107</sup> and the specific prohibition of adding to or diminishing “the rights and obligations provided in the covered agreements”,<sup>108</sup> as implying that both legal claims as well as legal defenses in WTO dispute settlement proceedings must be based on the WTO agreements, unless otherwise agreed. In case of such “standard terms of reference,”<sup>109</sup> WTO dispute settlement bodies have no mandate to directly apply non-WTO rules of international law if such *direct application* (in contrast to the *interpretation* of WTO rules in conformity with “any relevant rules of international law applicable in the relations between the parties” pursuant to Article 31.3(c) of the VCLT) could result in adding or diminishing the rights and obligations provided in the covered agreements.

The Appellate Body has so far not pronounced on the controversial legal question of whether non-WTO rules of international law may constitute not only relevant legal context for interpreting WTO rules,<sup>110</sup> but may also be *directly applicable* in WTO dispute settlement proceedings.<sup>111</sup> Professor Joost Pauwelyn, for instance, has argued that non-WTO international law may be applicable.<sup>112</sup> Pauwelyn has argued that: (1) notwithstanding the limited jurisdiction of WTO dispute settlement bodies for hearing only claims based on WTO law; (2) general international law and non-WTO agreements may be directly applicable law in WTO dispute settlement proceedings; (3) non-WTO rules (such as human rights, environmental and labor law) may therefore be used as legal defences in WTO dispute settlement proceedings; (4) in view of their integral compliance obligations vis-à-vis the community as a whole, such human rights, environmental, and labor law obligations of WTO Members may justify departures from reciprocal WTO obligations that can be modified bilaterally without permission of a third-party WTO Member.<sup>113</sup>

While it is undisputed that general international law applies to the conduct of states unless they have effectively “contracted out of it,” the consistency of Pauwelyn’s broad interpretation of the jurisdiction and applicable law in WTO dispute settlement proceedings with the explicit limitation (e.g. in Articles 3, 7, 11, 19 DSU) of the jurisdiction of WTO dispute settlement bodies to the “covered agreements” remains contested in both WTO practice as well as in legal literature.<sup>114</sup> Likewise, Pauwelyn’s related views on WTO obligations as bilateral in

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<sup>106</sup> See Appellate Body Report, *India--Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 45, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter *India—Patents*].

<sup>107</sup> See DSU, *supra* note 4, art. 7 (stating the terms of reference for panels).

<sup>108</sup> *Id.* arts. 3.2, 19.2.

<sup>109</sup> *Id.* art. 7.

<sup>110</sup> See *infra* Section II.A.2.

<sup>111</sup> See *infra* Section II.B.3.

<sup>112</sup> See generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003) (developing rules on how norms of international law interact).

<sup>113</sup> *Id.*

<sup>114</sup> See e.g., Joel P. Trachtman, Book Review, 98 AM. J. INT’L L. 855, 855-861 (2004) (criticizing Pauwelyn’s book) and Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 753, 753-814 (2002) (offering a different interpretation of dispute settlement in the human rights context).

nature and subject to mutually agreed *inter se* modifications, and of the higher legal rank of integral *erga omnes* obligations under human rights law and environmental law, remain controversial (e.g. in view of the amendment procedures in Articles IX and X of the WTO Agreement,<sup>115</sup> and the inconsistency of bilaterally agreed-upon trade restrictions with the multilateral WTO objectives of non-discriminatory conditions of competition and trade).<sup>116</sup> Neither GATT and WTO practice nor U.N. practice has so far identified any concrete examples of conflicts between GATT/WTO rules and general international law (such as the universal human rights obligations of all WTO Members). Recourse to the general legal principles “underlying this multilateral trading system” offers a source of WTO law<sup>117</sup> that may enable WTO dispute settlement bodies to avoid pronouncing on the politically controversial question of “direct applicability” of non-WTO law in WTO dispute settlement proceedings.

The WTO Agreement sets out specific secondary rules (dealing with changes of the “primary” WTO rights and obligations, dispute settlement, legal responsibility for breaches of WTO obligations) that claim priority over the secondary rules provided by general international law. Yet, no international treaty can function as a “self-contained regime” (*lex specialis*) completely separated from general international law (including, but not limited to, *pacta sunt servanda*, good faith interpretation of treaty rules, respect for sovereign equality, non-use of force, and other *jus cogens* rules of international law). For instance, in case of dissolution of a WTO Member that is party to a WTO dispute, the general international law rules on state succession and legal responsibility may be applicable to the claims made by or against the dissolved state. In numerous provisions of the WTO Agreement, all WTO Members have recognized that WTO law consists not only of specific treaty rights and obligations, but also of “basic principles and . . . objectives underlying this multilateral trading system”.<sup>118</sup> Originally under GATT, these objectives and principles tended to be defined by economists and politicians without regard to international law. WTO jurisprudence, by contrast, has begun to identify the

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<sup>115</sup> WTO AGREEMENT, arts. IX and X.

<sup>116</sup> International law only permits *inter se* agreements among some of the parties to an international agreement if they are consistent with the object and purpose of the agreement concerned. See VCLT, *supra* note 30, art. 41.1(b) (requiring treaty modifications to be compatible with the treaty as a whole). In GATT and WTO jurisprudence, bilaterally agreed-upon departures from GATT and WTO rules protecting non-discriminatory conditions of competition are traditionally presumed to “nullify or impair” competitive benefits to the detriment of third-party WTO members. Human rights may have a higher constitutional rank in domestic laws and as part of international *jus cogens*. It is doubtful, however, whether U.N. human rights treaties can claim such a higher legal rank in international law with regard to other international treaties (like the WTO Agreement) that protect freedom, non-discrimination, rule of law, consumer welfare vis-à-vis discriminatory, welfare-reducing national restrictions. Such human rights values underlying WTO rules may be no less important than other human rights values that are invoked as justifying trade restrictions. WTO jurisprudence rightly insists on balancing the rights and obligations concerned with due respect for the diversity of national value systems (such as through “public order” conceptions).

<sup>117</sup> See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (discussing the general recognition that every legal system today consists not only of rules but also of more general principles). See also GÖTZ J. GÖTTSCHE, *DIE ANWENDUNG VON RECHTSPRINZIPIEN IN DER SPRUCHSPRAXIS DER WTO-RECHTSMITTELINSTANZ* (2005) (exploring the recognition of almost 40 different “principles” in WTO law and WTO jurisprudence).

<sup>118</sup> WTO Agreement, Preamble. Apart from the Preamble to the WTO Agreement, the term “principle” is explicitly mentioned in numerous GATT provisions (namely, Articles III, VII, X, XIII, XX, XXIX, and XXXVI) as well as other WTO provisions (such as Articles. X GATS, 7,8,62 TRIPS) and WTO Ministerial Declarations. Whereas rules apply only to specific situations based on a clearly defined “if-then-structure”, principles are more open norms, applicable to many more factual situations and requiring the balancing of diverse principles in order to concretise their legal relevance for the interpretation or supplementation of rules.

general international *legal principles* underlying the 1) *procedural* WTO rules (such as good faith interpretation, due process of law, transparency, prohibition of abuse of rights, judicial economy); 2) *substantive* WTO rules (such as rule of law, legal security, most-favored-nation treatment, national treatment); and 3) other relevant rules of international law applicable in the relations between the parties (such as sovereign equality of states, duties to cooperate).

Legal “principles” have proven to be increasingly important not only for promoting due process of law in WTO dispute settlement proceedings;<sup>119</sup> they may also legitimize and facilitate the mutual balancing of substantive WTO rules, notably the market access rights of WTO Members and the broad WTO exceptions protecting their sovereign rights to pursue non-economic objectives and policies.<sup>120</sup> Recourse to such principles helps to adapt incomplete treaty rules to the dynamically changing trading practices and may help to avoid the controversies about the limited scope of jurisdiction and direct applicability of non-WTO law in WTO dispute settlement proceedings.

1. INTERPRETATION OF WTO LAW IN CONFORMITY WITH GENERAL INTERNATIONAL LAW

WTO law, like any other comprehensive system of law with compulsory jurisdiction for the peaceful settlement of disputes over reciprocal rights and obligations and the contested interpretation of general rules, cannot realize many of its objectives (such as “providing security and predictability to the multilateral trading system”<sup>121</sup>) without recourse to general legal principles, as they are explicitly recognized in numerous provisions of the WTO Agreement. As every WTO Member has to comply with all of its international legal obligations in good faith, the application of certain WTO rules — such as the determination of a violation of a WTO obligation, or the task of the DSB to make dispute settlement “recommendations and rulings . . . aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements”<sup>122</sup> — may require not only the *interpretation* of WTO rules taking into account “any relevant rules of international law applicable in the relations between the parties”<sup>123</sup> but also common concerns of WTO Members reflected in non-WTO legal instruments. Many WTO provisions (such as GATT Article XXI and GATS Article XIV *bis* regarding U.N. Charter obligations) also recognize the need for the *application* (for example, by the political WTO bodies and the DSB or other organizations) of non-WTO rules in order to enable WTO Members to comply with U.N. law and other international legal obligations. The numerous explicit requirements - in many areas of WTO law regulating trade in goods, services, and intellectual property rights - to respect multilateral international agreements concluded outside the WTO, and to “monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations,”<sup>124</sup> confirm that WTO Members did not intend to apply WTO rules as a “self-contained regime” without regard to their other obligations under international law. As every WTO Member has ratified the U.N. Charter, U.N. human rights conventions and other international agreements (such as ILO conventions, the constitutive agreements of other worldwide organizations), the interpretation and application of WTO rules may be influenced by

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<sup>119</sup> See *infra* Section II.B.4.

<sup>120</sup> See *infra* Section II.B.5.

<sup>121</sup> DSU, *supra* note 4, art. 3.

<sup>122</sup> *Id.* art. 3.4.

<sup>123</sup> VCLT, *supra* note 30, art. 31.3(c).

<sup>124</sup> SPS, *supra* note 59, art. 3.5.

non-WTO rules and legal obligations under general international law. The WTO jurisprudence filling the numerous gaps in WTO dispute settlement procedures often relies not only on the ordinary meaning of specific WTO provisions,<sup>125</sup> but also on their declared objectives as a justification of the inherent powers of WTO dispute settlement bodies (such as inherent powers to adopt preliminary rulings, to open panel proceedings to the public, and extend third party rights with the consent of the parties to the dispute).

## 2. THE DISTINCTION BETWEEN APPLICABLE LAW AND JURISDICTION

The question of interpreting WTO rules in conformity with non-WTO rules<sup>126</sup> must be distinguished from questions concerning the limited coverage of the DSU,<sup>127</sup> the limited terms of references of WTO Panels,<sup>128</sup> the Appellate Body,<sup>129</sup> and "arbitration within the WTO".<sup>130</sup> It remains to be clarified to what extent this limited jurisdiction also limits the power of WTO dispute settlement bodies to directly apply non-WTO rules if one party or all parties to a WTO dispute require(s) such application of non-WTO rules. For example, can the limited power to adopt agreed "special terms of reference" under Articles 7.3, 25.2 of the DSU justify dispute settlement findings based on non-WTO rules? Would such dispute settlement findings add to or diminish the rights and obligations provided in the covered agreements (which include rights under the DSU)? Would it run counter to the explicit task of WTO dispute settlement proceedings (such as to provide "security and predictability to the multilateral trading system" and "preserve the rights and obligations of Members under the covered agreements")<sup>131</sup> if the parties to the dispute request a WTO Panel to apply *inter se*-agreements that supersede general WTO provisions among the parties to the dispute? Do the standard terms of reference provided in Article 7.1 of the DSU prevent a WTO Panel from applying non-WTO rules unilaterally invoked by the defendant as a justification of departures from WTO rules? Could it undermine the WTO dispute settlement system if WTO dispute settlement findings were inconsistent with general international law (for instance, universal human rights) or subsequent international agreements concluded outside the WTO? Should such conflicts between WTO rules and non-WTO rules be settled outside the WTO (for example, in the special dispute settlement procedures of multilateral environmental agreements like the 2000 Cartagena Protocol on Biosafety which – according to its Preamble – shall neither "be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements" nor be "subordinate to other international agreements")? Unless these questions will be clarified by WTO Members, in the context of their negotiations on further improvements of the DSU, WTO dispute settlement bodies may find it difficult to avoid requests for clarifying such controversial legal issues. In the pending dispute over the EC's approval procedures for GMOs, the Panel was requested to examine the legal relationships between the various WTO agreements and other worldwide

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<sup>125</sup> See, e.g., DSU, *supra* note 4, arts. 11, 17 (providing the textual basis for the admissibility of *amicus curiae* submissions).

<sup>126</sup> See *supra* Section II.B.1.

<sup>127</sup> DSU, *supra* note 4, art. 1.

<sup>128</sup> *Id.* arts. 7, 19.

<sup>129</sup> *Id.* arts. 17, 19.

<sup>130</sup> *Id.* arts. 21-25.

<sup>131</sup> *Id.* art. 3.2.

agreements such as the Convention on Biodiversity,<sup>132</sup> its Biosafety Protocol and regional legal regimes such as EC law on the basis of conflict clauses in WTO law as well as in the Biosafety Protocol and in general international law principles including freedom of contract, the principles on *lex specialis*, *pacta sunt servanda*, and *pacta tertiis non nocent non prosunt*.

The limited scope of jurisdiction of the political and quasi-judicial WTO dispute settlement bodies must be distinguished from the question of applicable law.<sup>133</sup> For instance, WTO panels have no jurisdiction to judicially enforce compliance with non-WTO rules. Yet, arbitration within the WTO “is subject to mutual agreement of the parties”<sup>134</sup> might extend the scope of applicable law beyond WTO law, for example by extending the legal and judicial remedies to cover reparation of injury and financial compensation. WTO law nowhere specifically excludes the right of WTO Members to extend the jurisdiction of WTO dispute settlement bodies so as to interpret and apply WTO rules in conformity with other international legal obligations of WTO Members. The task of the DSB suggests that “a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements”<sup>135</sup> may not be achieved by dispute settlement recommendations that violate other legal obligations of all WTO Members. There is no empirical evidence in the GATT and WTO dispute settlement practice since 1948 that GATT and WTO Members have ever adopted any such dispute settlement rulings in violation of other international legal obligations of all GATT and WTO Members. For instance, even though WTO law includes no specific references to the human rights obligations of WTO Members, the various reports by the U.N. High Commissioner for Human Rights on the human rights dimensions of WTO rules have nowhere identified a clear conflict between WTO rules, WTO dispute settlement findings, and the universal human rights obligations of WTO Members, notwithstanding the possibility of such conflicts in the domestic implementation and application of WTO rules in individual WTO Members.<sup>136</sup> This empirical evidence seems to confirm the view that WTO rules are flexible enough to be interpreted and applied in conformity with the human rights obligations of all WTO Members.<sup>137</sup>

### 3. APPLICABLE LAW IN WTO PANEL PROCEEDINGS

In WTO dispute settlement practice, panels and the Appellate Body have explicitly rejected interpreting WTO rules “in clinical isolation” from other fields of international law; they increasingly resort to multilateral environmental agreements (MEAs) and general rules of international law in *interpreting* WTO rules, and examine the legal consistency of regional trade

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<sup>132</sup> See United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143 (requiring prior informed consent of the state of origin when genetic material is exported).

<sup>133</sup> See *infra* Section II.B.3.

<sup>134</sup> DSU, *supra* note 4, art. 25.2.

<sup>135</sup> DSU, *supra* note 4, art. 3.4.

<sup>136</sup> For a discussion of the various U.N. reports, see Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the U.N. High Commissioner for Human Rights and by the International Labor Organization: Is It Relevant for WTO Law and Policy?*, 7 J. INT’L ECON. L. 605 (2004).

<sup>137</sup> See *e.g.*, Ernst-Ulrich Petersmann, *Trade and Human Rights I*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 623 (P.F.J. Macrory et al., eds., 2005); Sheldon Leader, *Trade and Human Rights II*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 663 (P.F.J. Macrory et al., eds., 2005).

agreements with WTO law.<sup>138</sup> There is broad agreement that the DSU requires the complainant to base its legal claims on the “covered agreements.”<sup>139</sup> WTO lawyers disagree on whether the DSU implicitly authorizes WTO dispute settlement panels to apply non-WTO law as a defense against WTO complaints and to “fill gaps” in WTO rules and dispute settlement procedures;<sup>140</sup> or whether the DSU limits the mandate of WTO dispute settlement bodies to the application of the “covered WTO agreements” not only regarding legal claims but also legal defenses and gap-filling.<sup>141</sup> Both views recognize that many WTO rules explicitly refer to international treaties negotiated outside the WTO, and that the requirement to clarify WTO rules “in accordance with customary rules of interpretation of public international law”<sup>142</sup> calls for taking into account “any relevant rules of international law applicable in the relations between the parties.”<sup>143</sup> The controversy over the scope of the applicable law in WTO dispute settlement proceedings is thus closely related to the previously mentioned questions of jurisdiction and methods of treaty interpretation: (1) whether the correct interpretation of the limited jurisdiction of WTO dispute settlement panels is to exclude direct application of non-WTO international law in WTO dispute settlement proceedings or an implicit authorization by the DSU to apply non-WTO international law not only for interpreting WTO rules but also as directly applicable law; and (2) whether the customary rules of international treaty interpretation (as codified in Article 31.3(c) of the VCLT) allow taking into account only international law rules accepted by *all* the parties to the treaty concerned; or whether the dispute settlement function of WTO dispute settlement bodies justifies taking into account international rules accepted by all the parties to the dispute (even if some are third-party WTO Members, which will not be legally affected by the dispute settlement rulings at issue), have not accepted the non-WTO rules concerned.

So far, WTO dispute settlement panels and the Appellate Body have been reluctant to directly apply bilateral agreements<sup>144</sup> or legal defenses directly based on general international law.<sup>145</sup>

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<sup>138</sup> See Pauwelyn, *supra* note 113, at 244-72 (analyzing treaty interpretation as a conflict-avoidance tool). On WTO jurisprudence relating to free trade agreements, see generally Lorand Bartels, *WTO Dispute Settlement Practice on Article XXIV GATT*, in *THE WTO DISPUTE SETTLEMENT SYSTEM* (Federico Ortino & Ernst-Ulrich Petersmann, eds. 2004). The recent WTO Panel Report, *Mexico--Tax Measures on Soft Drinks*, rejected Mexico’s claim that its discriminatory taxes in violation of GATT Article III were justified as a counter-measure in response to previous violations of the North American Free Trade Agreement (NAFTA) by the United States. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005). On WTO jurisprudence relating to MEAs, see generally E. Opuku Awuku, *WTO Dispute Settlement Practice and Trade-Related Environmental Measures*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003* 177, 179–82 (Federico Ortino & E. U. Petersmann eds., 2004).

<sup>139</sup> DSU, *supra* note 4, art. 7.

<sup>140</sup> See, e.g., Pauwelyn, *supra* note 113 at 459-61 (discussing choice of law in the resolution of claims).

<sup>141</sup> See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333 (1999) (arguing that WTO dispute resolution panels only apply to WTO law); see also Trachtman, *supra* note 114 (critically reviewing Pauwelyn’s book); Marceau, *supra* note 114 (offering a different interpretation of dispute settlement in the human rights context).

<sup>142</sup> DSU, *supra* note 4, art. 3.

<sup>143</sup> VCLT, *supra* note 30, art. 31.3(c).

<sup>144</sup> The Appellate Body’s refusal, in 1998, to apply the bilateral oilseeds agreement in the *EC-Poultry* dispute is one illustration. See Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 79, WT/DS69/AB/R (July 13, 1998) (“The Oilseeds Agreement . . . is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC-Oilseeds*. As such, the Oilseeds Agreement is not a ‘covered agreement’ [under] Articles 1 and 2 of the DSU.” (citation omitted)).

<sup>145</sup> For example, the Appellate Body refused to determine whether the precautionary principle was applicable as a rule of customary international law in the 1998 case regarding meat hormones:

They have wisely avoided dispute settlement findings on the controversy whether non-WTO international law is applicable directly, and whether non-WTO law can waive or amend WTO rules outside the formal WTO procedures for waivers and amendments as per Articles IX and X of the WTO Agreement.<sup>146</sup> In most WTO disputes, interpreting WTO rules – as well as the “principles underlying this multilateral trading system” - in conformity with general international law to the extent necessary for accomplishing the WTO dispute settlement functions (such as allocating burden of proof, determining a “violation” of WTO obligations, providing “security and predictability” in terms of DSU Article 3) is likely to lead to the same legal findings as in the case of the more controversial, “direct” application of general international law.<sup>147</sup>

4. JUDICIAL CLARIFICATION OF “THE BASIC PRINCIPLES . . . UNDERLYING THIS MULTILATERAL TRADING SYSTEM”:  
THE EXAMPLE OF PROCEDURAL “DUE PROCESS OF LAW”

The WTO Agreement does not explicitly address numerous procedural legal issues that may be raised in WTO dispute settlement proceedings. For instance, how should the DSB or a WTO dispute settlement panel have reacted if – in the dispute over the EC’s import restrictions

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We consider . . . that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation. It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the SPS Agreement . . . . The precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement . . . . It is reflected also in the sixth paragraph of the preamble and in Article 3.3.

*European Communities--Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 123-24, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998).

<sup>146</sup> In the Panel Report on Korean government procurement, the Panel noted as *obiter dictum* that [c]ustomary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) (*adopted* Jun. 2000). The findings avoid specifying the extent to which specific WTO and DSU provisions should be interpreted as implicitly authorizing or preventing the panels’ application of general international law rules for accomplishing their dispute settlement functions.

<sup>147</sup> Pauwelyn, for his part, argues that

it [is] more appropriate to draw a line between interpretation with reference to other norms and application of other norms. Others end up with the same result—that is, a Panel can refer to non-WTO rules binding only on the disputing parties—based solely on a wider notion of treaty interpretation under Articles 31 and 32 of the Vienna Convention.

Joost Pauwelyn, *How To Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?*, 37 J. WORLD TRADE 997, 1004 (2003). Pauwelyn’s view that human rights arguments can be used in WTO dispute settlement proceedings only if both parties to the dispute have ratified the relevant human rights agreement, appears too narrow in cases where a WTO Member invokes its national human rights standards as a justification for trade measures designed to protect the human rights of its own domestic citizens. For example, even though the United States has not ratified the U.N. Convention on Economic, Social, and Cultural Rights, any of the more than 110 WTO members that have ratified this convention may invoke economic, social, and cultural rights as relevant context for the interpretation of WTO rules and for the justification of national trade measures protecting such rights of their own citizens in their domestic jurisdictions.

on bananas - Germany had intervened in support of the WTO complaints against the EC? Could Germany have requested the establishment of a WTO Panel to examine its legal claim that the EC restrictions (adopted by a majority decision of the EC Council against the opposition of Germany) had violated Germany's rights and obligations under WTO law? How should WTO panels respond to a legal claim by another WTO Member country from another regional trade agreement (e.g., NAFTA or MERCOSUR) that the "matter"<sup>148</sup> referred to the panel falls within the exclusive jurisdiction of the regional dispute settlement system and has already been decided by a regional dispute settlement ruling (*res judicata*)?<sup>149</sup>

In *EC-Hormones*, the Appellate Body held that "the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."<sup>150</sup> Many interpretations of WTO dispute settlement procedures were based on "the demands of due process that are implicit in the DSU,"<sup>151</sup> on "requirements of good faith, due process and orderly procedure,"<sup>152</sup> and on the premise that Regarding the jurisdiction of panels, the Appellate Body clarified in *Mexico-Corn Syrup* that panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed.<sup>153</sup>

Hence, as WTO panels must check their own jurisdiction at their own initiative, interpreting the jurisdiction of WTO dispute settlement bodies might require taking into account agreements among the parties to the dispute that limit or exclude WTO jurisdiction.<sup>154</sup> Other procedural issues, such as the increasing WTO jurisprudence on the legitimate scope of judicial economy, may fall within the discretionary authority of panels. Regarding third party rights, for example, in *US-1916 Act*, the Appellate Body noted that "a Panel's decision whether to grant 'enhanced' participatory rights to third parties is thus a matter that falls within the discretionary

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<sup>148</sup> DSU, *supra* note 4, art. 7.

<sup>149</sup> See Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.28, WT/DS241/R (Apr. 22, 2003) (adopted May 19, 2003) (discussing Brazil's complaint against Argentina's anti-dumping duties on poultry). The numerous NAFTA Chapter 19 disputes on U.S. measures on imports of lumber from Canada, and the various WTO dispute settlement proceedings relating to the same U.S. restrictions and countervailing duties, concern different "matters" (i.e., the legal claims in NAFTA Chapter 19 disputes over the inconsistency of the U.S. measures with U.S. law differ from the legal claims in WTO dispute settlement proceedings relating to the alleged WTO-inconsistency of the US measures).

<sup>150</sup> *Supra* note 145, at ¶ 152, n.138.

<sup>151</sup> *Supra* note 106, at ¶ 94.

<sup>152</sup> Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ¶ 47, WT/DS132/AB/R (Oct. 22, 2001) [hereinafter *Mexico—Corn Syrup*].

<sup>153</sup> *Mexico-Corn Syrup*, *supra* note 152, at 36 (citation omitted).

<sup>154</sup> See, e.g., Treaty Establishing the European Community, art. 292, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty] (discussing exclusive jurisdiction of the ECJ), available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf); North American Free Trade Agreement, art. 2005, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA] (discussing exclusive jurisdiction of NAFTA panels), available at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?CategoryId=42](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42).

authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process.”<sup>155</sup>

WTO panels and the Appellate Body do not always specify whether they refer to general principles of national law or of international law in the interpretation and application of WTO dispute settlement rules and procedures,<sup>156</sup> for example, if they refer to “requirements of good faith, due process and orderly procedure,”<sup>157</sup> or to the “widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.”<sup>158</sup> Nor do they always specify whether such principles are recognized in WTO law, such as “the demands of due process that are implicit in the DSU.”<sup>159</sup> As “the procedural rules of WTO dispute settlement are designed to promote . . . the fair, prompt and effective resolution of trade disputes,”<sup>160</sup> many general principles of law (such as rules on the distribution of the burden of proof, *jura novit curia*) and of international law (such as the interpretive principle of in *dubio mitius* as a corollary of respect for state sovereignty<sup>161</sup>) may be classifiable as “basic principles underlying this multilateral trading system” that are implicit in, or required by, the WTO dispute settlement rules and procedures in order to realize their respective objectives (such as “providing security and predictability to the multilateral trading system”<sup>162</sup>). The clarification of these “basic principles” of WTO law, and their occasional departures from other general principles of international law (such as with respect to the legal interest to sue, *locus standi*),<sup>163</sup> remains a challenge for future WTO jurisprudence, and may defer the need to take a position on the controversy over whether non-WTO rules may be “directly applicable” by WTO dispute settlement bodies.

##### 5. JUDICIAL REVIEW OF TRADE MEASURES BASED ON GENERAL INTERNATIONAL LAW RULES: THE EXAMPLE OF UNIVERSAL HUMAN RIGHTS OBLIGATIONS OF WTO MEMBERS

The GATT and WTO jurisprudence has contributed to the progressive clarification of many substantive GATT and WTO rules, such as those regarding the prohibition of subsidies<sup>164</sup>

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<sup>155</sup> Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 150, WT/DS136/AB/R (Aug. 28, 2000) [hereinafter *Anti-Dumping Act*].

<sup>156</sup> This is criticised by CORINNA SANDROCK, ALLGEMEINE RECHTSGRUNDSÄTZE IM VERFAHRENSRECHT DER WTO (2004). See, e.g., Pauwelyn, *supra* note 115, 125-26.

<sup>157</sup> *Mexico-Corn Syrup* at 47, *supra* note 155.

<sup>158</sup> See *United States—Anti-Dumping Act of 1916*, *supra* note 158, n.30 (applying the rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative).

<sup>159</sup> *India-Patents* at 94, *supra* note 109.

<sup>160</sup> Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporation,”* ¶ 166, WT/DS108/AB/R (Feb. 24, 2000).

<sup>161</sup> This interpretative principle was applied by the Appellate Body in *EC-Hormones* as being “widely recognized in international law.” *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 165, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998).

<sup>162</sup> DSU, *supra* note 4, art. 3.2.

<sup>163</sup> In the WTO dispute over the EC import restrictions on bananas, the EC claimed that the US had no “legal right or interest” as it did not export any bananas (¶ II.21, WT/DS27/R). The Appellate Body confirmed the finding by the Panel that the DSU did not require a “legal interest to sue” (¶ 132, WT/DS27/AB/R).

<sup>164</sup> Agreement on Subsidies and Countervailing Measures, art. 3, WTO Agreement, *supra* note 2, Annex 1A, Legal Instruments—Results of the Uruguay Round 275 (1999), 1867 U.N.T.S. 14 [not reproduced in I.L.M.] [hereinafter Subsidies Agreement] (prohibiting subsidies).

and the clarification of anti-dumping duties.<sup>165</sup> Many of the substantive WTO rules are based on centuries-old legal principles such as the most-favored nation treatment or national treatment, or refer to international agreements concluded outside the WTO (for example, the intellectual property conventions<sup>166</sup> referred to in the TRIPS Agreement). In all countries, judicial review of democratic government regulation of markets is faced with fundamental problems of legitimacy. These legitimacy problems increase if, as in the case of the WTO several factors are present: (1) market access commitments assert legal primacy over domestic laws<sup>167</sup>; (2) the dispute settlement procedures prescribe judicial deference vis-à-vis protectionist producer regulations<sup>168</sup> and are dominated by trade bureaucrats, without adequate guarantees of judicial independence by, for example, WTO panelists; and (3) the applicable law and “balancing principles” include no reference to human rights, democratic procedures, consumer welfare or social justice.<sup>169</sup>

All WTO Members have committed themselves to respect for human rights in international law, through the UN human rights instruments and the UN Charter, as well as in their domestic laws.<sup>170</sup> Even though the diversity of human rights traditions is reflected in the diversity of national, regional and worldwide human rights rules and practices, every WTO Member has human rights obligations. The increasing number of human rights arguments in economic disputes in the ECJ and in the European Court of Human Rights (ECHR) suggests that it may only be a matter of time until human rights arguments will also be invoked by WTO Members in WTO dispute settlement proceedings, for instance in order to justify measures for the protection of “public morals”<sup>171</sup> or “public order”<sup>172</sup> or human rights-consistent interpretations of other WTO rules. Past GATT/WTO practice suggests several factors which offer enough flexibility for WTO dispute settlement bodies to interpret WTO rules in conformity with the human rights obligations of the WTO Members concerned: (1) the “public interest clauses” in WTO law;<sup>173</sup> (2) the WTO “exceptions”;<sup>174</sup> (3) the broad mandate of panels;<sup>175</sup> and

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<sup>165</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 2, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement].

<sup>166</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, 12 U.S.T. 2377, 496 U.N.T.S. 43 [hereinafter Rome Convention].

<sup>167</sup> See WTO Agreement, *supra* note 2, art. 16.4.

<sup>168</sup> See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6. (providing that the authorities’ evaluation of facts is not to be overturned if it was unbiased and objective) [hereinafter: Anti-dumping Agreement].

<sup>169</sup> See generally Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407 (2003) (discussing the need for, and difficulties of, constitutionalizing international economic markets).

<sup>170</sup> See, e.g., Chinese Constitution, art. 33, available at <http://english.people.com.cn/constitution/constitution.html>.

<sup>171</sup> GATT, *supra* note 1, art. 20(a).

<sup>172</sup> GATS, *supra* note 60, art. 14.

<sup>173</sup> See, e.g., TRIPS, *supra* note 62, arts. 7, 8 (stating principles for legislation by members).

<sup>174</sup> See, e.g., GATT, *supra* note 1, art. 20 (providing for general exceptions); GATS, *supra* note 60, art. 14 (providing for general exceptions); TRIPS, *supra* note 62, art. 30 (authorizing limited exceptions to patent rights).

<sup>175</sup> See, e.g., DSU, *supra* note 4, art. 7 (establishing a mandate to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)”).

(4) the admissibility of *inter se* agreements among WTO Members (for example, on the “human rights conditionality”<sup>176</sup> of trade preferences granted by the EC and US).

Arguably, even though the WTO agreements do not refer specifically to human rights, the numerous WTO provisions on the sovereign rights of WTO Members to protect “public morals” and “public order” already include “social clauses” and “human rights clauses” enabling WTO Members to comply with their respective national and international human rights obligations. Yet, it remains an important challenge for future WTO jurisprudence to develop appropriate methodologies for interpreting and applying WTO rules in conformity with human rights. Human rights law and WTO jurisprudence suggest that, in examining the potential impact of human rights on the interpretation of WTO rules, four kinds of international trade regulations must be distinguished, and might require different balancing principles. They are: (1) sanctions for the promotion of human rights abroad; (2) preferences for the promotion of human rights abroad; (3) restrictions for the protection of human rights inside the domestic jurisdiction; and (4) human-rights-related non-discriminatory regulation. Each is discussed in the sections below.

a. International trade sanctions for the promotion of human rights abroad

In past, in GATT and WTO dispute settlement practice concerning international trade sanctions, the respondent countries often refrained from requesting establishment of a GATT panel (for example, in the case of trade sanctions against Argentina and Cuba). In the few cases where a GATT working party (such as, in the case of US trade sanctions against Czechoslovakia) or a GATT panel (such as, in the case of trade sanctions against Nicaragua and South Africa) examined the trade embargoes, human rights arguments were not addressed in the dispute settlement findings. If a WTO dispute settlement body has to examine the influence of human rights law on the interpretation of WTO rules in international relations among WTO Members, it must respect their sovereign equality (for example, as regards ratification of international human rights conventions) and the margin of appreciation of each WTO Member in designing its domestic human rights legislation and prioritizing scarce resources for the realization of human rights and social needs.

The sovereign freedom of WTO Members might, however, be limited, as reflected in the UN resolutions “that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice.”<sup>177</sup> Because GATT Article 21 explicitly provides that “nothing in this Agreement shall be construed . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security,”<sup>178</sup> U.N. Security Council resolutions prescribing economic sanctions can justify departures from WTO rules.<sup>179</sup> The legal relevance of other U.N. resolutions on the interpretation of WTO rules needs to be examined case-by-case. For instance,

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<sup>176</sup> See generally Diego J. Liñán Noguera & Luis M. Hinojosa Martínez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 307 (2001) (discussing the legal basis of human rights conditionality in international trade instruments).

<sup>177</sup> U.N. Human Rights Commission, Sub-Commission on Promotion and Protection of Human Rights, Res. 1999/30, U.N. Doc. E/CN.4/Sub.2/Res/1999/30 (Aug. 26, 1999).

<sup>178</sup> GATT, *supra* note 1, art. 21.

<sup>179</sup> See U.N. Charter, art. 103 (providing that any treaty provision that conflicts with the U.N. Charter is overridden).

the resolution adopted in 2000 by the International Labor Organization (ILO) on action against Myanmar in response to grave breaches of the ILO's Forced Labor Convention only *recommended* that ILO members review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member state concerned and take appropriate measures to ensure that the said member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations made.<sup>180</sup>

While this ILO recommendation may influence the interpretation of WTO rules (such as, GATT Article 20), it neither envisaged trade sanctions not waived (pursuant to the specific WTO rules for amendments and waivers) the various WTO obligations limiting recourse to discriminatory trade restrictions.<sup>181</sup> Examination of the WTO-consistency of trade restrictions in response to alleged violations of human rights in international relations among WTO Members may also have to take into account whether the WTO Members concerned have specifically committed themselves to respect for human rights in their trade relations.<sup>182</sup> Multilateral agreements on the collective promotion of human health<sup>183</sup> and of other human rights values<sup>184</sup> may support recourse to human rights arguments as relevant context for interpreting WTO rules (such as GATT Article 20(b) on protection of human health against the risks of smoking<sup>185</sup>). As WTO Members are often likely to invoke their higher *national* or *regional* human rights obligations rather than lower minimum standards in U.N. human rights law, WTO dispute settlement bodies might also have to examine whether – in reconciling the sovereign rights of importing and exporting WTO Members under human rights laws and international trade law – human rights arguments have to be based on universally accepted U.N. standards or whether they can also be justified by higher national or regional standards.

b. International trade preferences for the promotion of human rights abroad

In response to India's challenge of the discriminatory effects of certain preferences granted under the EC's generalized system of tariff preferences (GSP), the WTO Appellate Body clarified:

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<sup>180</sup> Resolution adopted by the International Labour Conference at its 88th Session (June 2000), <http://www.ilibio.org/obl/reg.burma/archives/200106/msg00071.html> (last visited Nov. 7, 2006).

<sup>181</sup> Myanmar, a WTO Member, refrained from invoking WTO dispute settlement procedures against the trade sanctions imposed by various WTO members, for example, under the Burmese Freedom and Democracy Act 2003, July 28, 2003, 117 Stat. 864, adopted by the U.S. Congress. Some WTO lawyers claim that—in the event of a conflict between WTO rules (prohibiting discriminatory trade embargos) and the ILO recommendation, “the later and more specific norm, the ILO recommendation should then prevail over the WTO prohibition.”) Pauwelyn, *supra* note 150, at 1023. This appears to differentiate too little among the various legal safeguards in WTO rules which may justify well-targeted sanctions (e.g., vis-à-vis products produced in violation of ILO standards), but may legally limit recourse to sanctions if they aggravate the human rights situation in the target country, as in the case of Myanmar.

<sup>182</sup> See, e.g., Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Union and Its Member States, of the Other Part, signed in Cotonou on 23 June 2000, Council Directive 2000/483, 2000 O.J. (L 317) 3 (EC) [hereinafter Cotonou Agreement] (including human rights clauses in a trade agreement between the EC and less-developed WTO members).

<sup>183</sup> See, e.g., World Health Organization, Framework Convention on Tobacco Control, May 21, 2003, 42 I.L.M. 518.

<sup>184</sup> See, e.g., Kimberley Process Certification Scheme, <http://www.kimberleyprocess.com:8080/site/content/KPCS.pdf> (limiting illicit trade in “conflict diamonds”).

<sup>185</sup> GATT art. 20(b).

that the term ‘non-discriminatory’ . . . does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that . . . identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the ‘development, financial and trade needs’ to which the treatment in question is intended to respond;<sup>186</sup>  
the existence of a ‘development, financial [or] trade need’ must be assessed according to an *objective* standard;<sup>187</sup>

while noting that “the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences,” without imposing “unjustifiable burdens on other Members”.<sup>188</sup>

The EU Commission has proposed a new GSP system aimed at promoting sustainable development by differentiating tariff preferences depending on whether less-developed countries (LDCs) have ratified and effectively implemented major UN human rights conventions, ILO conventions, UN environmental conventions, UN conventions on drugs, and the UN Convention against corruption.<sup>189</sup> This use of UN human rights law as an objective standard for differentiating trade preferences among LDCs may give rise to future WTO disputes on whether preference-granting WTO members have correctly interpreted and applied UN human rights standards as justifying trade preferences for, and discrimination among, less-developed countries. As the jurisdiction of WTO panels is limited to examining legal claims under the covered WTO agreements, WTO dispute settlement bodies should leave it to the WTO members concerned to prove the existence of alleged violations of human rights (such as by invoking special dispute settlement procedures available under human rights conventions or under regional trade agreements) and the “special ‘development needs’ . . . [to be] addressed through tariff preferences.”<sup>190</sup> WTO dispute settlement procedures seem to offer adequate flexibility for avoiding the direct application of international human rights law by WTO dispute settlement bodies.

c. International trade restrictions for the protection of human rights inside the domestic jurisdiction

The WTO disputes over the EC's import restrictions on hormone-fed beef<sup>191</sup> and asbestos,<sup>192</sup> illustrate that WTO rules grant importing countries broad regulatory discretion

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<sup>186</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 173, WT/DS246/AB/R (Apr. 7, 2004).

<sup>187</sup> *Id.* ¶ 163.

<sup>188</sup> *Id.* ¶ 164, 167.

<sup>189</sup> Communication from the Commission, *Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalised System of Preferences (GSP) for the ten-year period from 2006 to 2015*, at 10, COM (2004) 461 final (July 7, 2004) (describing new GSP sustainable development incentives).

<sup>190</sup> *Id.* at 6.

<sup>191</sup> Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶ 253, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) (adopting a deferential standard for reviewing EC Members decisions to apply protections based on the management and assessment of the health risks

regarding restrictions of imported goods with proven health risks (such as asbestos) as well as for precautionary measures for goods with potential health risks (such as beef produced using growth hormones). UN human rights conventions prescribe minimum standards that do not prevent WTO members from accepting higher human rights standards in regional human rights conventions (such as the European Convention on Human Rights and the EU Charter of Fundamental Rights) or in national human rights laws. Therefore, the WTO-consistency of import restrictions designed to protect the human rights of *domestic* citizens (such as health protection measures pursuant to GATT Article XX(b),<sup>193</sup> and Articles 30-31 of the TRIPS Agreement<sup>194</sup>) may be influenced by *national* or *regional* human rights law as a legitimate crystallization of the minimum standards in UN human rights conventions and the broad public order provisions in WTO law. The following examples illustrate that many human rights arguments in trade disputes in the EC Court of Justice (ECJ) and in the European Court of Human Rights could be similarly raised in WTO dispute settlement proceedings.

i. The Omega Case in the ECJ

In *Omega*, the ECJ held that a prohibition of imported foreign services was legally justified on the ground that it was necessary for protecting public policy by prohibiting a commercial activity affronting human dignity (laser games simulating acts of homicide).<sup>195</sup> The respondent government (the municipality of the German city of Bonn) justified the prohibition by the constitutional protection of human dignity as a human right in Article 1 of the German Basic Law as well as in Article 1 of the Charter of Fundamental Rights of the European Union. UN human rights conventions, by contrast, recognize respect for human dignity as a legal principle and source of inalienable human rights, but *not* as a human right in itself.<sup>196</sup> If the same import restrictions on the supply of international services (laser games simulating acts of homicide) had been challenged in a WTO dispute settlement proceeding, the importing country (Germany) and the EC could have invoked the same human rights arguments in support of the legal justification of the import restrictions as being “necessary to protect public morals or to

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surrounding beef produced by using certain growth hormones, thereby allowing EC Members to be cautious in the face of scientific uncertainty).

<sup>192</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 192, WT/DS135/AB/R (Mar. 12, 2001) (*adopted* Apr. 5, 2001) (rejecting Canada’s argument that the French decree banning all varieties of asbestos-containing products was in violation of tariff and trade barrier agreements).

<sup>193</sup> See GATT, *supra* note 1, art. XX(b) (excepting from prevention the adoption of measures “necessary to protect human, animal or plant life or health”).

<sup>194</sup> TRIPS, *supra* note 62, arts. 30-31 (allowing Members to provide limited exceptions to the exclusive rights of patent holders, and to use the subject matter of a patent without authorization in cases of national emergency or crisis).

<sup>195</sup> Case C-36/02, *Omega v. Bonn*, 2004 E.C.R. I-9609, 1 C.M.L.R. 4, 91 (2005).

<sup>196</sup> In the Preambles of the 1966 UN Covenants on Civil and Political Human Rights (ICCPR) and on Economic, Social and Cultural Human Rights (ICESCR), the more than 150 signatory states of these human rights covenants recognized “that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and “that these rights derive from the inherent dignity of the human person.” See Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 111 (David Kretzmer & Eckart Klein eds., 2002) (analyzing the role of human dignity in the human rights conventions).

maintain public order” in terms of GATS Article XIV(a).<sup>197</sup> These WTO concepts recognize that public morality and public order may legitimately vary from one community to the other. WTO dispute settlement bodies have already recognized the legitimate discretion of the national authorities concerned to define “public morality” and “public order” in conformity with their respective national values.<sup>198</sup>

Among international lawyers, it remains controversial whether the customary methods of international treaty interpretation (as codified in Article 31(3)(c) of the VCLT<sup>199</sup>) permit the *worldwide* WTO dispute settlement bodies to take into account *regional* human rights guarantees (like the legal guarantee of respect for human dignity in Article 1 of the EU Charter of Fundamental Rights<sup>200</sup>) as a “relevant rule of international law applicable in the relations between the parties” to a WTO dispute settlement proceeding. Even if Article 31(3)(c) of the VCLT is construed as referring to international law rules accepted by *all* parties to the treaty concerned (i.e. all WTO members), WTO dispute settlement bodies may have to acknowledge that the right to protect “public order” inside their domestic jurisdiction may imply the right of the importing country to apply higher national human rights standards than in the exporting country or bilateral human rights clauses incorporated into *inter-se* agreements between the importing and exporting WTO members concerned in conformity with WTO law (for example, the human rights clauses in the trade and development agreements between the EC and approximately 150 other countries).

ii. The Schmidberger Case in the ECJ

In *Schmidberger*, the ECJ examined the extent of an EC member state’s obligation to ensure the free movement of goods and freedom of transit in situations where a demonstration permitted by the Austrian authorities on the most important Alpine transit route between Austria and Italy had the effect of blocking this motorway for nearly 30 hours.<sup>201</sup> If the private transport company – which claimed that the failure of the Austrian authorities to ban the demonstration amounted to a trade restriction inconsistent with Article 28 of the EC Treaty<sup>202</sup> – had been registered in another WTO Member (e.g. the United States), the home state of the foreign exporter or transport provider could have initiated an intergovernmental WTO dispute settlement proceeding on a similar legal complaint (i.e. inconsistency of the authorization of the political demonstration with GATT and GATS obligations to protect freedom of transit). This could have confronted the WTO dispute settlement bodies with the same methodological question of how to

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<sup>197</sup> GATS, *supra* note 60, art. XIV(a) at 1177 n.5 (1995) (“The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”).

<sup>198</sup> See, e.g., Panel Report, *United States--Measures Affecting the Cross-Border Supply of Gambling*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) (“... the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. . . . Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems and scales of values.”).

<sup>199</sup> VCLT, *supra* note 30, art. 31(3)(c) (specifying that “any relevant rule of international law applicable in the relations between the parties” shall be taken into account, together with the context, in interpreting treaties).

<sup>200</sup> Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 (promulgating that “[h]uman dignity is inviolable. It must be respected and protected.”). See also Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 47 (restating Article 1 of the Charter of Fundamental Rights as Article II-61, in Title I of Part II of the new Constitution).

<sup>201</sup> Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659, 2 C.M.L.R. 34, 1069 (2003).

<sup>202</sup> EC Treaty, *supra* note 154, art. 28.

reconcile the trade obligations of the WTO Member concerned (Austria) with its human rights obligations to protect the freedom of expression and freedom of assembly of the demonstrators (as guaranteed in Articles 10 and 11 of the European Convention on Human Rights (ECHR)).<sup>203</sup>

In its judgement of June 12, 2003, the ECJ confirmed its settled case-law that the prohibition of trade restrictions in Article 28 of the EC Treaty also applies where a member state abstains from adopting the measures required in order to deal with *private* obstacles to the free movement of goods which are not caused by the state. The ECJ stated that “a demonstration which resulted in the complete closure of a major transit route . . . for almost 30 hours . . . must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 [now Articles 28 and 29] of the Treaty, read together with Article 5 [now Article 10] thereof, unless that failure to ban [the demonstration] can be objectively justified.”<sup>204</sup> The ECJ recalled its longstanding jurisprudence that both the EC and EC member states are required to respect fundamental rights, and that measures incompatible with human rights are not acceptable in the EC. The Court then examined how to reconcile the EC Treaty guarantees of free movement of goods with the protection of freedom of expression and freedom of assembly, as guaranteed in Articles 10 and 11 of the ECHR. The Court followed from the express wording of Articles 10 and 11 that “the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed. . . . In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.”<sup>205</sup>

The Court then emphasized the following two balancing principles. *First*, the competent national government authorities “enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.”<sup>206</sup> In this respect, the Court concluded that “the national authorities were reasonably entitled . . . to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.”<sup>207</sup> In a subsequent case relating to an alleged interference of Austrian consumer protection regulations with freedom of expression, the ECJ clarified that the “discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and . . . [consumer protection and fair trading] varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom did not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review [by the Court] is limited to an examination of the reasonableness and proportionality of the interference.”<sup>208</sup>

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<sup>203</sup> European Convention on Human Rights arts. 10 and 11, Nov. 4, 1950, 213 U.N.T.S. 221, 231-32 [hereinafter ECHR] (stating that there is a universal right to freedom of expression and freedom of peaceful assembly).

<sup>204</sup> Case C-112/00, Schmidberger, 2 C.M.L.R at 1086.

<sup>205</sup> *Id.* at 1089.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1091.

<sup>208</sup> Case C-71/02, Karner Industrie-Auktionen v. Troostwijk, 2004 O.J.(C 106) 7, 2 C.M.L.R. 5, 75 (2004).

*Second*, rather than examining the human rights concerned under the ‘rule of reason’ exception to Article 28, or as a justification under Article 30 of the EC Treaty, the Court ruled that “[t]he fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the EC Treaty [now Articles 28 and 29], read together with Article 5 of the EC Treaty [now Article 10] thereof.”<sup>209</sup> Such a judicial method of deliberately avoiding to “pigeonhole a justification based on the need to respect for human rights into one of the justificatory categories”<sup>210</sup> of the EC Treaty might be more difficult for WTO dispute settlement bodies to follow. This difficulty arises because WTO law and WTO jurisprudence neither recognize human rights nor a “rule of reason” as basic principles of WTO law that inherently limit the reasonable scope of WTO rights and obligations. Contrary to the methodology used by the ECJ for reconciling the trade and human rights obligations of EC member states inside the EC, WTO dispute settlement bodies are likely to take into account human rights justifications of trade restrictions only in the context of affirmative defenses (such as GATT Article XX<sup>211</sup> and GATS Article XIV<sup>212</sup>) invoked by the WTO Member concerned.

d. Human-rights-related non-discriminatory trade regulation

As efficient economic regulations for the promotion of social welfare should avoid discriminatory distortions, most rules for the promotion of human rights either need no legal justification under WTO law (such as GATT Article III) or are easily justifiable under the numerous WTO exceptions for non-economic policy measures (such as GATT Article XX). The proposals for further harmonization of domestic laws in the context of the WTO – for instance, by elaborating additional WTO rules on intellectual property rights, liberalization and regulation of public services (e.g. educational, health and telecommunications services, supply of water, electricity), trade facilitation, competition, environmental and investment rules – have prompted many NGOs to raise human rights concerns.<sup>213</sup> For example, future WTO rules on private rights (such as the private “rights to trade” protected in the WTO Protocol on the accession of China<sup>214</sup>), anti-competitive private practices, legal protection of confidential private data, private access to financial assistance in the context of trade-facilitation, limitations on private intellectual property rights, and the administration of a WTO Register for private geographical indications may give rise to legal claims in WTO dispute settlement proceedings that the administration of such WTO obligations, and related domestic implementing regulations, may be inconsistent with human rights. For instance, how should WTO dispute settlement bodies respond to legal claims denying patents of genetic material on grounds of respect for human rights<sup>215</sup> or respect for the UN Convention on Biodiversity<sup>216</sup> entails a violation of the TRIPS

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<sup>209</sup> Case C-112/00, Schmidberger, 2 C.M.L.R at 1092.

<sup>210</sup> Case C-112/00, Schmidberger, annot. Christopher Brown, 40 C.M.L.R. at 1504 (2003).

<sup>211</sup> GATT art. XX, *supra* note 1 (listing general exceptions to the GATT).

<sup>216</sup> GATS, *supra* note 62, art. XIV (listing security exceptions).

<sup>213</sup> See generally HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005); Practical Guide to the WTO for Human Rights Advocates, 2004, *available at* <http://www.3dthree.org/en/complement.php?IDcomplement=36&IDcat=4&IDpage=14> (last visited Nov. 7, 2006).

<sup>214</sup> World Trade Organization, Accession of the People’s Republic of China, WT/L/432 (Nov. 10, 2001), *available at* <http://www.uschina.org> (explicitly protecting right to trade).

<sup>215</sup> See, e.g., Convention on Human Rights and Biomedicine, E.T.S. No. 164, 36 I.L.M. 817, 830 (1997) (codifying the denial of patents on human rights grounds).

Agreement?<sup>217</sup> The following examples from the jurisprudence in European courts on the balancing of market freedoms and fundamental rights illustrate the complexity and diversity of balancing principles used by WTO members regarding non-discriminatory trade-related regulations.

i. ECJ jurisprudence on trade-related biotechnology rights

In a judgment on an application by the Netherlands for annulment of EC Directive 98/44<sup>218</sup> on the legal protection of biotechnological inventions, the EC Court considered, *inter alia*, the plea that the patentability of isolated parts of the human body provided for by Article 5(2) of the Directive reduced living human matter to a means to an end, undermining human dignity. It was also claimed that the absence of a provision requiring verification of the consent of the donor or the recipient of products obtained by biotechnological means undermined the right to self-determination. The Court affirmed, without further explanation, that “it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.”<sup>219</sup> If a similar complaint had been brought by another WTO Member challenging the consistency of the EC Directive with the EC’s obligations under WTO law, the limited jurisdiction of WTO dispute settlement panels - and the more limited scope of the applicable law in WTO dispute settlement proceedings - would have prevented a WTO dispute settlement body from arriving at similar conclusions. For example, the universal commitments in UN human rights conventions to respect human dignity would *not* justify a conclusion that WTO members must respect human dignity as a human right in the interpretation and application of WTO rules.<sup>220</sup> In contrast to the legal admissibility of direct actions challenging EC legal acts in the EC Court of Justice, the DSU does not provide for direct complaints by WTO members against acts of WTO bodies (e.g. a “waiver decision” by the WTO Ministerial Conference is required). Only indirectly may WTO dispute settlement bodies be confronted with legal complaints that obligations under the WTO Agreement<sup>221</sup> and DSU rules<sup>222</sup> must be construed in conformity with the human rights obligations of WTO members.<sup>223</sup> Both WTO as well as ECJ jurisprudence seem to apply stricter standards of judicial review to *discriminatory* trade measures than to *non-*

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<sup>216</sup> United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143 (requiring prior informed consent of the state of origin when genetic material is exported).

<sup>217</sup> See Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 AM. J. INT’L L. 641 (2004) (arguing that the assertion of ownership rights to genetic material may prompt a TRIPS dispute).

<sup>218</sup> Council Directive 98/44, art. 5(2), 1998 O.J. (L 213) 13 (EC) (addressing the patentability of isolated parts of the human body).

<sup>219</sup> Case C-377/98, *Netherlands v. Parliament*, 2001 E.C.R. I-7079, ¶ 70.

<sup>220</sup> See *Id.*; Dicke, *supra* note 199. See also 4 GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: HUMAN RIGHTS (Roger Brownsword ed., 2004) (notably chapters 12 and 13).

<sup>221</sup> See, e.g., GATT, *supra* note 1, art. XVI.4 (prohibiting export subsidies on other than primary products resulting in sale below domestic market price).

<sup>222</sup> See generally, DSU *supra* note 5.

<sup>223</sup> Article 1 of the DSU acknowledges that “the rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning the rights and obligations under the provisions of the Agreement Establishing the World Trade Organization ... and of this Understanding.” *Id.* art. 1.

*discriminatory* regulations based, for example, on the WTO Agreements on Technical Barriers to Trade and (Phyto)Sanitary Measures.<sup>224</sup>

The ECJ has noted that, in interpreting fundamental rights, the EC judicature “must take into account” the case law of the European Court of Human Rights (ECtHR).<sup>225</sup> Yet, the ECJ balances economic freedoms with other “fundamental rights” case-by-case without explicit recognition of human rights as hierarchically superior to “fundamental economic rights.” The ECtHR, by contrast, imposes a higher burden of proof on those who claim that economic freedoms should prevail over fundamental political rights; the Court tends to apply a strict interpretation to the scope of exception clauses in the ECHR, but recognizes a margin of appreciation of national authorities regarding the necessity of non-discriminatory, domestic restrictions, such as economic regulation, balancing different human rights values.<sup>226</sup>

ii. Human rights and unfair competition rules:  
The Hertel case in the European Court of Human Rights

In *Hertel v. Switzerland*, the ECtHR had to review the consistency of Swiss court judgements on unfair competition and freedom of commercial speech with the guarantees of freedom of expression.<sup>227</sup> The different balancing approaches applied by the Swiss courts and by the ECtHR illustrate that – even within Europe – views on the proper balancing of economic and non-economic freedoms differ considerably. If confronted with similar problems in the interpretation of trade and unfair competition rules, such as in the TRIPS Agreement and Article 10*bis* of the Paris Convention, WTO dispute settlement bodies may need to exercise even more deference vis-à-vis divergent national legal and constitutional traditions. On the basis of the “principle that there is no hierarchy of fundamental rights,” the commercial court in the Canton of Berne considered it necessary to weigh the right to freedom of trade and industry as guaranteed by the Swiss Constitution against the constitutional rights invoked by Dr. Hertel (such as freedom of expression and freedom to carry out scientific research).<sup>228</sup> Based on the Swiss Unfair Competition Act, the court prohibited Dr. Hertel “from stating that food prepared in microwave ovens is a danger to health and leads to changes in blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process.”<sup>229</sup> The Swiss Federal Court dismissed the appeal by Dr. Hertel, *inter alia* on the ground that the “smooth operation of competition and economic freedom, freedom of expression, scientific freedom and freedom of the press must be guaranteed

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<sup>224</sup> See Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38 J. WORLD TRADE 1, 25-29, 33 (2004).

<sup>225</sup> See generally Allan Rosas, *The Legal Sources of EU Fundamental Rights: A Systemic Overview*, in UNE COMMUNAUTÉ DE DROIT. FESTSCHRIFT FÜR G.C.R.IGLESIAS 87 (Ninon Colneric et al. eds., 2003).

<sup>226</sup> See, e.g., Donna Gomien, David Harris & Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter 211-19* (1996) (discussing these two principles and their inherent tensions in the jurisprudence of the European Court of Human Rights).

<sup>227</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, Eur. T.S. No.5, 213 U.N.T.S. 221 (establishing the rights to freedom of expression as well as the conditions for its exercise).

<sup>228</sup> *Hertel v. Switzerland*, 59 Eur. Ct. H.R. (ser. B) at 22 (1998) (citing a 1993 judgement of the Commercial Court allowing an application under the Federal Unfair Competition Act for comments on the health hazards of microwave ovens).

<sup>229</sup> *Id.* at 23 (quoting the 1994 judgement of the First Civil Division of the Federal Court).

as well as possible, but at the same time limited so that the various constitutional objectives may be reconciled in practice.”<sup>230</sup>

The ECtHR proceeded from the premise that exceptions to freedom of expression (Article 10) must be construed strictly, and that the margin of appreciation of the Swiss authorities in matters of commercial speech was reduced by the fact that the statements by Dr. Hertel had been part of “a debate affecting the general interest, for example over public health.”<sup>231</sup> The majority of the judges considered the Swiss court injunction as not “necessary in a democratic society,” and therefore a violation of Article 10 of the ECHR.<sup>232</sup> The three dissenting judges argued that the ECtHR should respect the considerable margin of appreciation of national authorities in unfair competition cases rather than “substitute its own evaluation for that of the national courts, where those courts considered, on reasonable grounds, the restrictions to be necessary.”<sup>233</sup> By way of implementing the ECtHR judgement, the Federal Court revised the previous court injunction and acknowledged the freedom of Dr. Hertel to make public statements on the dangerous effects of the use of microwave ovens; but the Federal Court subjected the freedom of expression of Dr. Hertel to the condition that such statements must also refer “to current differences of opinion” so as to avoid unfair distortions of competition.<sup>234</sup> In response to another application by Dr. Hertel, the ECtHR dismissed the second complaint because the applicant was allowed to express his views, albeit subject to limitations.<sup>235</sup>

Article 2 of the TRIPS Agreement incorporates the unfair competition rules of the Paris Convention on the Protection of Industrial Property (Article 10 *bis*) into the TRIPS Agreement. WTO law also includes other prohibitions of anti-competitive practices, false or misleading information that can be enforced through national and WTO dispute settlement proceedings so as to limit market failures (such as information asymmetries) and protect the proper functioning of markets (in their role as information mechanisms and dialogues about values).<sup>236</sup> WTO dispute settlement bodies may, therefore, be asked to interpret national and international competition and intellectual property regulations in conformity with the human rights obligations of WTO members. As freedom of information and expression, including freedom of speech and of the press, are of constitutional importance for the proper functioning of *economic* markets no less than of *political* markets (i.e. democracy), the European jurisprudence and balancing principles on reconciling economic and non-economic fundamental freedoms may offer lessons for future WTO jurisprudence.

Even though the WTO Agreement has been drafted in terms of rights and obligations of WTO members, many WTO rules recognize obligations to protect the private rights of market participants, such as private “rights to trade,”<sup>237</sup> procedural rights (for example, in customs valuation, antidumping, countervailing duty, safeguards, government procurement procedures,

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 47.

<sup>232</sup> *Id.* at 51 (internal quotes omitted).

<sup>233</sup> *Id.* at annex (a)(dissenting opinion of Judge Bernhardt, para. 3).

<sup>234</sup> Bundesgericht [BGer] [Federal Court] Mar. 2, 1999, 125 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 185 (Switz.).

<sup>235</sup> Decision of the Eur. Ct. H.R. of 17 January 2002, Application No. 53440/99.

<sup>236</sup> See, e.g., Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/4prote\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/4prote_e.htm). See also Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004) (applying the comprehensive competition rules included in the GATS Protocol on Telecommunications).

<sup>237</sup> See, e.g., WTO Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

pre-shipment inspection procedures), property rights and judicial remedies. Some WTO Agreements (such as Article XX of the Agreement on Government Procurement<sup>238</sup> and Article 4 of the Agreement on Preshipment Inspection<sup>239</sup>), and the domestic trade laws of many WTO members (such as Art. 300(7) EC)<sup>240</sup>, require WTO members and domestic courts to interpret domestic trade regulations in conformity with WTO obligations for the benefit of individual citizens. The UN High Commissioner for Human Rights has also rightly pointed out that—what are referred to as rights of WTO members in the numerous public interest clauses and general exceptions in WTO law—may be obligations under UN human rights law. Future WTO jurisprudence is likely to be increasingly confronted with such legal claims that, in the review of the WTO-consistency of national legislative, administrative or judicial trade measures, international and domestic trade rules must be construed with due regard to the obligations of all WTO members to comply with all their international law obligations in good faith, including their universal human rights obligations.

## 6. THE ROLE OF THE JUDGE IN THE WTO LEGAL SYSTEM

The WTO dispute settlement institutions include political bodies (like the DSB), quasi-judicial bodies (like WTO panels, the Appellate Body) and arbitrators.<sup>241</sup> WTO panels and the Appellate Body issue only advisory reports with recommendations addressed to WTO members; their findings become legally binding only upon adoption by the DSB.<sup>242</sup> Hence, panels and the Appellate Body exercise only “quasi-judicial” functions, different from those of truly independent courts. Even though WTO panels and the Appellate Body have asserted inherent powers (e.g. to examine their jurisdiction *proprio motu*, to adopt interim rulings, to admit *amicus curiae* briefs, to “complete the legal analysis” at the appellate level)<sup>243</sup>, analogies with the inherent powers of national and international courts may be misleading.<sup>244</sup> WTO jurisprudence remains characterized by deference vis-à-vis WTO members and the political WTO bodies,<sup>245</sup> the scope of which may differ depending on the particular context of WTO rules.<sup>246</sup> The independence of WTO dispute settlement bodies remains legally and institutionally limited,<sup>247</sup> and could be reinforced by international cooperation among judges.<sup>248</sup>

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<sup>238</sup> WTO Agreement on Government Procurement, Apr. 15, 1994, art. XX, LT/UR/A-4/PLURI/2.

<sup>239</sup> WTO Agreement on Preshipment Inspection, Sept. 20, 1986, art. 4.

<sup>240</sup> EC Treaty, *supra* note 154, art. 300(7).

<sup>241</sup> See DSU, *supra* note 4, arts. 21, 22 and 25 (establishing arbitration as an alternative means of dispute resolution).

<sup>242</sup> See *Id.* arts. 17, 18, 19 and 20 (setting forth procedures to govern appellate body recommendations and the adoption of such recommendations by the DSB).

<sup>243</sup> See Friedl Weiss, *Inherent Powers of National and International Courts*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 177, 179–82 (Federico Ortino & E.-U. Petersmann eds., 2004).

<sup>244</sup> See *Id.* at 190 (arguing that the WTO dispute settlement agreement is undergoing an evolutionary process and therefore it is premature to speak of inherent powers).

<sup>245</sup> See *infra* Section II.B.6.a.

<sup>246</sup> See *infra* Section II.B.6.b.

<sup>247</sup> See *infra* Section II.B.6.c.

<sup>248</sup> See *infra* Section II.B.6.d.

a. Judicial deference vis-à-vis WTO members and political WTO bodies

In *India-Quantitative Restrictions*, the Appellate Body rejected the claim that the lack of any determination by the WTO Committee on Balance-of-Payments Restrictions of an inconsistency of India's import restrictions with GATT Article XVIII<sup>249</sup> should have prompted the WTO dispute settlement bodies to refrain from making legal findings on this controversial legal issue in order to respect the "institutional balance" between the political and the quasi-judicial WTO bodies:

If the exercise of judicial restraint were to lead in practice . . . to panels refraining from considering disputes regarding the justification of balance-of-payments restrictions, such exercise of judicial restraint would . . . be inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU.<sup>250</sup>

Likewise, in *Turkey-Textiles*,<sup>251</sup> the Appellate Body recognized the right of panels to examine the consistency of regional trade agreements with GATT Article XXIV<sup>252</sup> even if the WTO Committee on Regional Trade Agreements had refrained from making such legal findings. The 1994 GATT Understandings on the Interpretation of Articles XVIII<sup>253</sup> and XXIV<sup>254</sup> clearly confirm the applicability of Article XXIII<sup>255</sup> to matters arising from the application of Articles XVIII and XXIV. Accordingly, the Appellate Body rightly acknowledged that the political review procedures in the political WTO Committees did not exclude the jurisdiction of WTO dispute settlement panels. The clear WTO rules could not be disregarded in order to safeguard an "institutional balance" that is not provided for in WTO law.<sup>256</sup>

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<sup>249</sup> GATT Article XVIII sets forth procedures for the oversight of a developing nation's import restrictions taken for balance of payment reasons.

<sup>250</sup> Appellate Body Report, *India—Quantitative Restrictions*, ¶ 108, WT/DS90/AB/R (Aug. 23, 1999).

<sup>251</sup> Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999).

<sup>252</sup> GATT Article XXIV permits the formation of customs unions and free trade areas between the territories of contracting parties, provided certain conditions are met. GATT, *supra* note 1, art. XXIV(5).

<sup>253</sup> See Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125, 1158.

<sup>254</sup> See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125, 1161.

<sup>255</sup> Article XXIII sets forth the procedures that Members shall follow when seeking redress of a "violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements." GATT art. XXIII (1).

<sup>256</sup> See Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 325, 325-46 (Marco Bronckers & Reinhard Quick eds., 2000) for a criticism of this WTO jurisprudence as undue "judicial activism." See also Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861 (2004)(arguing that the solution to potential judicial activism is not to weaken the powers of the panels and Appellate Body, but rather to make them stronger in certain circumstances); J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 N.W. J. INT'L L. & BUS. 353 (2002)(contending that the WTO should develop social regulatory policy through contractual treaty regimes rather than judicial activism); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) (arguing that political constraint has prevented judicial lawmaking at the WTO from becoming so expansive as to undermine the sovereignty of powerful states).

The respective powers of WTO dispute settlement bodies depend not only on the explicit rules in the DSU, but also on the broader legal and institutional context of WTO law. For instance, the Appellate Body stated:

It is not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only WTO members have the authority to amend the covered agreements or to adopt such interpretations. Determining what the rights and obligations under the covered agreements ought to be is not the responsibility of panels and the Appellate Body; it is clearly the responsibility solely of the Members of the WTO.<sup>257</sup>

The proposals by Chile and the United States, in the Doha Round negotiations on improvements and clarifications of the DSU, for “providing some form of additional guidance to WTO adjudication bodies concerning (i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful), and (ii) rules of interpretation of the WTO agreements”<sup>258</sup> illustrate the dynamic interrelationships between WTO members and WTO dispute settlement bodies. This interaction was also reflected in the strong criticism by the WTO’s General Council of the Appellate Body’s acceptance of unsolicited *amicus curiae* briefs.<sup>18</sup> It is further illustrated by the limited power of the Appellate Body to draw up its own working procedures “in consultation with the chairman of the DSB and the Director-General, and communicated to the Members for their information.”<sup>259</sup> The various communications in which the Appellate Body notified and explained its successive amendments of the 1996 Working Procedures for Appellate Review,<sup>260</sup> explicitly took account of Members’ comments and “urge[d] Members to take action themselves to deal with the numerous problems that arise in appeals that run over WTO holiday periods.”<sup>261</sup>

The DSB, panels and the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>262</sup> However, acquiescence by WTO members and WTO bodies in controversial dispute settlement practices – such as the “completi[on] of the legal analysis” by the Appellate Body in order to promote the “prompt settlement” of disputes

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<sup>257</sup> Appellate Body Report, *United States—Import Measures on Certain Products from the European Union*, ¶ 92, WT/DS165/AB/R (Dec. 11 2000).

<sup>258</sup> Dispute Settlement Body – Special Session, Chile and United States – Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, ¶ 6, TN/DS/W/28 (Dec. 23, 2002).

<sup>18</sup> Special Meeting of the General Council – Communications from the Appellate Body to the Chairman of the Dispute Settlement Body on “European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,” WT/GC/M/60 (Jan. 23, 2001) (discussing the communication from the Appellate Body to the Chairman of the Dispute Settlement Body at the request of the Informal Group of Developing Countries).

<sup>259</sup> DSU, *supra* note 4, art. 17.9.

<sup>260</sup> The Working Procedures for Appellate Review were first adopted by the Appellate Body in 1996. See Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/1 (Feb. 15, 1996). The Procedures were subsequently amended in 1997, 2002, 2003 and 2004. See Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/2 (Feb. 28, 1997); Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/3 (Jan. 24, 2002); Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/4 (May 1, 2003); Appellate body, *Working Procedures for Appellate Review*, WT/AB/WP/W/9 (Oct. 7, 2004); Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/5 (Jan. 5, 2005).

<sup>261</sup> *Id.*

<sup>262</sup> DSU, *supra* note 4, arts. 3.2, 19.2.

even if the legal claims were not examined in the panel report<sup>263</sup> – may evolve into “subsequent practice”<sup>264</sup> confirming the judicial interpretations of WTO law. Yet, dispute settlement practices may also be outlawed or changed by WTO members through new Doha Round agreements (e.g. limiting future *amicus curiae* briefs, authorizing the Appellate Body to remand certain issues of fact and of law to first-level panels).

The legal and institutional restraints on WTO jurisprudence are also acknowledged in the interpretative methods applied by WTO dispute settlement bodies. For example, the Appellate Body has held that:

[t]he legitimate expectations of the WTO members are reflected in the language of the WTO Agreement itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there, or the importation into a treaty of concepts that were not intended.<sup>265</sup>

Thus, some WTO dispute settlement panels have exercised “judicial economy” by refraining from making findings on controversial legal interpretations if the legal findings are not necessary for “achieving a satisfactory settlement of the matter in accordance with the rights and obligations” of WTO members,<sup>266</sup> and the same legal issues are under consideration in political WTO negotiations on additional WTO rules.<sup>267</sup> For instance, contrary to the legal findings of a few GATT 1947 dispute settlement panels that illegal antidumping duties had to be reimbursed in accordance with the general international law rules on state responsibility, such dispute settlement findings have not been repeated under the WTO in light of Article 19 of the DSU,<sup>268</sup> and the controversial Doha Round negotiations on explicitly introducing such a new WTO obligation.<sup>269</sup> Rather, arbitrations under Article 21.3(c) of the DSU<sup>270</sup> have emphasized “the

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<sup>263</sup> *Id. art. 3.3.*

<sup>264</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art.31.3(b) (providing that there may be taken into account, when interpreting a treaty, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation).

<sup>265</sup> Appellate Body, *India—Patent Protection*, ¶ 45, WT/DS50/AB/R (Dec. 19, 1997).

<sup>266</sup> DSU, *supra* note 4, art. 3.4.

<sup>267</sup> See Panel Report, *Mexico-Telecommunications*, ¶ 7.3, WT/DS/204/R (Apr. 2, 2004) (emphasizing that “[o]ur legal findings are . . . limited to the disputed meaning and scope of certain GATS obligations and commitments of Mexico in the very particular context of this bilateral dispute, and do not go beyond what we consider indispensable for deciding on the legal claims submitted to this Panel.”).

<sup>268</sup> DSU, *supra* note 4, art. 19 (providing that when a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, the panel or Appellate Body must recommend that the Member bring the measure into conformity with the agreement).

<sup>269</sup> Negotiating Group on Rules, *Canada—Dispute Settlement*, TN/RL/GEN/48 (June 30, 2005) (proposing inclusion of a new provision in both the Agreement on Implementation of Article VI of GATT and the Agreement on Subsidies and Countervailing Measures banning enforcement of WTO-inconsistent rules).

<sup>270</sup> DSU, *supra* note 4, art. 21.3(c) (providing that if it is impracticable for a Member to immediately comply with the panel or Appellate Body’s recommendations, the Member shall be afforded a “reasonable period of time” to do so. A reasonable period of time may be determined through binding arbitration within ninety days after the adoption of the recommendations and rulings. Generally, a reasonable period of time should not exceed fifteen months.).

well-established principle that ‘choosing the means of implementation is, and should be, the prerogative of the implementing Member.’<sup>271</sup>

WTO dispute settlement bodies have also emphasized the need to respect the sovereign decisions of WTO members on their respective *levels of protection* of human, animal and plant life or health, the environment, national security and “public morals”. For example, in the *Australia-Salmon case*,<sup>272</sup> the Appellate Body emphasized that the establishment of an appropriate level of protection “is a prerogative of the Member concerned and not of a panel or of the Appellate Body.”<sup>273</sup> However, “in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied.”<sup>274</sup> WTO dispute settlement panels cannot one-sidedly rely on declarations of the defending party concerning the alleged purpose of the contested measure without making an “objective assessment of the facts,”<sup>275</sup> and of the claims of the complaining party regarding the regulatory purpose of a contested measure by another WTO Member. In this respect, WTO law may require stricter standards of review than the judicial deference warranted under some domestic constitutional systems for review by national judges and EC judges of legislative measures.<sup>276</sup>

b. The scope of judicial deference depends on the particular context of WTO law

WTO jurisprudence tends to define its standards of judicial deference depending on the particular text, context, objective and purpose of the WTO rules concerned (e.g. the specific rules in the SPS and TBT Agreements),<sup>277</sup> without resorting to general standards of judicial deference such as those applied by the EC Court of Justice.<sup>278</sup> Even if the respondent WTO Member bears

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<sup>271</sup> Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 52, WT/DS217/14, WTDS234/22 (June 13, 2003).

<sup>272</sup> Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998).

<sup>273</sup> *Id.* at 199.

<sup>274</sup> *Id.* at 207.

<sup>275</sup> DSU, *supra* note 4, art. 11 (providing that in assisting the DSB in discharging its responsibilities, the panel should make “an objective assessment of the matter before it”).

<sup>276</sup> In *EC-Hormones*, the Appellate Body found that “the applicable standard is neither *de novo* review as such, nor ‘total deference’, but rather the ‘objective assessment of the facts.’” Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 165, WT/DS26/AB/R (Jan. 16, 1998). In *Japan—Measures Affecting the Importation of Apples*, the Appellate Body confirmed that favoring “Japan’s approach to risk and scientific evidence over the views of the experts conflicts with the Appellate Body’s articulation of the standard of ‘objective assessment of the facts.’” Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶ 165, WT/DS245/AB/R (Nov. 26, 2003). Drawing the line between permissible “objective assessment” and prohibited “*de novo* review” raises many other problems. See Appellate Body Report, *United States—Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, ¶ 78, WT/DS192/AB/R (Oct. 8, 2001) (providing that conducting a *de novo* review would be inconsistent with the standard of a panel’s review under article 11 of the DSU).

<sup>277</sup> SPS, *supra* note 59, art. 11 (providing that a panel shall seek advice from experts chosen by the panel in consultation with the parties to the dispute); TBT, *supra* note 58, art. 14 (providing that the dispute settlement provisions can be invoked in cases where a member considers that another member has not achieved satisfactory results).

<sup>278</sup> See, e.g., Case C-127/95, *Norbrook Labs. v. Ministry of Agric.*, 1998 E.C.R. I-1531, ¶ 90 (“In a sphere in which the Community legislature is called on to undertake complex assessments based on technical and scientific

the burden of invoking and proving “affirmative defenses” (e.g. the general exceptions in GATT Article XX,<sup>279</sup> GATS Article XIV,<sup>280</sup> the security exceptions in GATT Article XXI<sup>281</sup>), WTO jurisprudence tends to respect non-economic measures based on such “public interest clauses” with considerable deference vis-à-vis non-economic policy goals. The role of the judge in disputes over the interpretation, application or enforcement of WTO rules may differ depending on whether the legal claims relate to (non)discriminatory regulations of trade in goods, services or private intellectual property rights at the intergovernmental level among WTO members or involving private economic operators. For instance, in contrast to GATT rules and TBT rules, many SPS provisions ascribe a special role to science in the assessment and prevention of the risks, as well as in the determination of the WTO-consistency of SPS measures:

Members shall ensure that any sanitary or phytosanitary measure . . . is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.<sup>282</sup>

Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification.<sup>283</sup> SPS measures must be “based on an assessment . . . of the risks”<sup>284</sup> which “shall take into account available scientific evidence.”<sup>285</sup> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.<sup>286</sup> Hence, even non-discriminatory environmental measures consistent with GATT rules and TBT rules may violate the SPS Agreement in the absence of “sufficient scientific evidence.”<sup>287</sup> If the three WTO panellists lack adequate scientific expertise,<sup>288</sup> WTO dispute settlement panels have repeatedly made use of their right to “seek information from any relevant source and . . . consult experts to obtain their opinion on certain aspects of the matter,”<sup>289</sup> including with respect to “a factual issue concerning a scientific or

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information which is liable to change rapidly, judicial review of the exercise of its powers must be limited to examining whether it has been vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.” (citation omitted)). EC jurisprudence defines “misuse of powers as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.” Case C-156/93, *Eur. Parl. v. Comm’n of the Eur. Cmities*, 1995 E.C.R. I-02019, ¶ 31.

<sup>279</sup> GATT, *supra* note 1, art. XX (providing general exceptions which allow any contracting parties to adopt public-interest measures).

<sup>280</sup> GATS, *supra* note 60, art. XIV (providing security exceptions which allow any member to take any actions which it considers necessary for the protection of its essential security interests).

<sup>281</sup> GATT, *supra* note 1, art. XXI (providing security exceptions which allow any contracting party to take any actions which it considers necessary for the protection of its essential security interests).

<sup>282</sup> SPS, *supra* note 59, art. 2.2.

<sup>283</sup> *Id.* art. 3.3.

<sup>284</sup> *Id.* art. 5.1.

<sup>285</sup> *Id.* art. 5.2.

<sup>286</sup> *Id.* art. 5.7.

<sup>287</sup> *Id.* art. 2.2

<sup>288</sup> *Id.* art. 3.3.

<sup>289</sup> WTO Members have so far not made use of the possibility of nominating five (rather than three) members of a dispute settlement panel, including technical experts.

other technical matter raised by a party to the dispute,”<sup>290</sup> in order to objectively assess whether there is “sufficient scientific evidence”<sup>291</sup> and a “scientific justification”.<sup>292</sup> The more important the social value protected by WTO rules is, the more it may influence the legal interpretation of the WTO rules concerned and the exercise of judicial deference:

It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument.<sup>293</sup>

In view of the few general legal obligations under the GATS (compared with the more comprehensive GATT obligations for trade in goods), the methods applied by WTO dispute settlement bodies in interpreting national schedules of sectoral services commitments may differ from those applied in the interpretation of general GATT rules and of GATS services commitments in sectors subject to more stringent international regulation.<sup>294</sup> Likewise, WTO disputes involving commitments under the TRIPS Agreement to protect private intellectual property rights of “nationals of other Members,”<sup>295</sup> or the “independent review procedures” pursuant to Article 4 of the WTO Agreement on Preshipment Inspection providing for arbitration within the WTO regarding disputes among private “preshipment inspection entities and exporters,”<sup>296</sup> may require particular legal and judicial balancing principles in view of the *private* rights involved.

c. Should the diplomatic panel jurisprudence be further legalized?

The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>297</sup> adopted by the DSB on December 11, 1996, prescribe the following “Governing Principle”:

Each person covered by these Rules ... shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that

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<sup>290</sup> DSU, *supra* note 4, art. 13.2.

<sup>291</sup> *Id.*

<sup>292</sup> SPS, *supra* note 59, art. 2.2.

<sup>293</sup> Appellate Body Report, *Korea--Various Measures on Beef*, ¶ 162, WT/DS161/AB/R (Dec. 11, 2000).

<sup>294</sup> *See, e.g.*, Panel Report, *Mexico--Measures Affecting Telecommunications Services*, ¶ 7.3, WT/DS/204/R (Apr. 2, 2004) (“Our focus on telecommunications may mean that certain elements of our findings in this particular services sector may not be relevant for other services sectors with different legal, economic and technical contexts. Our findings also do not adversely affect the large degree of regulatory autonomy which WTO members, individually and collectively, retain under the GATS . . .”).

<sup>295</sup> TRIPS, *supra* note 62, art. 1.3.

<sup>296</sup> Agreement on Preshipment Inspection, *supra* note 240.

<sup>297</sup> World Trade Org., Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (Dec. 11, 1996) [hereinafter Rules of Conduct].

through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.<sup>298</sup>

Since the enactment of the WTO Agreement, no formal violation of the “proper performance of . . . [the] dispute settlement duties” of panelists,<sup>299</sup> Appellate Body members, arbitrators, experts and Secretariat members appears to have been formally established, notwithstanding rare cases of self-disclosure of potential conflicts of interests or matters that could “give rise to justifiable doubts as to[] that person’s independence or impartiality.”<sup>300</sup> As provided for in Article 17.7 of the DSU,<sup>301</sup> the Appellate Body is legally assisted and administratively supported by an Appellate Body Secretariat composed of highly qualified legal experts; this Secretariat is only linked to the WTO Secretariat administratively, but is otherwise separate so as to ensure the independence of the Appellate Body. Even though the appointment of Appellate Body members provides only for a part-time occupation, their legal status (a four-year term, once renewable), expertise, financial compensation and support by the Appellate Body Secretariat offer strong incentives for their judicial independence. This is confirmed by the fact that, similar to the practice of national and international tribunals claiming “inherent powers” necessary for the proper functioning of courts, the Appellate Body has likewise defended its inherent powers to “complete the legal analysis” of legal claims not addressed in the panel findings and to admit *amicus curiae* briefs, even against the will of the majority of WTO members.

Unlike the permanent Appellate Body, WTO panels are *ad hoc* bodies composed by experts who, in practice, are often paid only a modest *per diem* (600 Swiss Francs) for the limited number of days of their work at the WTO in Geneva. Their other full-time professional commitments are frequently so demanding that many panelists have only limited time to devote to panel proceedings. Most panelists are nominated only once or a few times to serve on a WTO dispute settlement panel, and have neither comprehensive knowledge of WTO jurisprudence nor time and incentives for reading regularly the several hundred GATT and WTO dispute settlement reports. Hence, the ever more comprehensive factual and legal findings in WTO panel reports are drafted by the WTO Secretariat staff assisting the panel, often with very little input by individual panelists that may have expertise in certain areas such as telecommunications, and without being familiar with other areas of WTO rules and jurisprudence.

In some parts of WTO panel proceedings (including hearings with the parties), some panelists have been available only via telephone due to their other conflicting professional commitments. Notably, in WTO disputes (e.g., on trade remedies, anti-dumping and countervailing duties) where the Secretariat staff assisting the panels comes from WTO divisions that are simultaneously involved in political WTO negotiations on reforms of the applicable WTO rules, the Secretariat’s legal advice may be influenced by its political advice given in the context of WTO negotiations. From a legal perspective, it would appear desirable to remedy these deficiencies of current WTO panel proceedings by establishing – as proposed by the EC in the Doha Round negotiations on improvements to the DSU – a permanent WTO panel body or, alternatively, a “roster of dedicated and experienced panelists” that are available at all times to

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<sup>298</sup> *Id.* § II.

<sup>299</sup> *Id.* § III(2).

<sup>300</sup> *Id.* § III(1).

<sup>301</sup> DSU, *supra* note 4, art. 17.7 (“The Appellate Body shall be provided with appropriate administrative and legal support as it requires.”).

serve on a panel upon request and shall remain abreast of WTO dispute settlement activities and other relevant WTO developments. Without such institutional reforms, the *de facto* independence and actual capacity of individual panelists to draft their own panel findings appears less and less effectively secured.

Yet, due to the preference of WTO diplomats for nominating trade diplomats as panelists and the strong influence by the WTO Secretariat, WTO panel proceedings are likely to continue operating as a “diplomatic jurisprudence” which — thanks to the quasi-judicial supervision by the WTO Appellate Body and the political supervision by the intergovernmental DSB — may offer a unique mix of economic, political and legal dispute settlement perspectives.

d. International cooperation among judges and courts?

Due to the mercantilist biases and reciprocity principles characteristic of international trade law, many national and regional courts do not apply WTO rules, and employ higher standards of judicial deference vis-à-vis national and EC trade restrictions than WTO panels and the Appellate Body may be entitled to exercise under the DSU.<sup>302</sup> So far, the reality of multi-level trade governance among national and international political and administrative bodies lacks effective support by multi-level judicial cooperation among national and international courts.

The only two EC Court judgments on trade disputes among EC member states since the adoption of the EC Treaty in 1958 demonstrate that many intergovernmental disputes over national trade restrictions and private rights (e.g. intellectual property rights) could be avoided — if domestic courts were authorized to apply and enforce WTO rules. Yet, as long as many WTO members (including the EC and the US) explicitly enjoin their domestic courts from applying WTO rules unless specifically permitted,<sup>303</sup> the intergovernmental WTO dispute settlement procedures offer a “second best remedy” that continues to operate more effectively than the international dispute settlement procedures in all other worldwide organizations.

The judgments of the International Court of Justice (ICJ) only rarely refer to the jurisprudence of other international courts, except for judgments by the ICJ’s predecessor, the Permanent Court of International Justice. The WTO Appellate Body, by contrast, frequently refers to judgments of the ICJ and of other international courts, just as the International Tribunal for the Law of the Sea, ICSID arbitral tribunals, the EC Court of Justice and the European Court of Human Rights increasingly refer to the jurisprudence of other international courts. Such international cooperation among international judges may strengthen the rule of international law and the overall coherence of the international legal system, for instance in the increasing number of trade disputes that are also under review in regional dispute settlement mechanisms (such as NAFTA panels, the EC, EFTA and MERCOSUR courts). It may further help WTO dispute settlement bodies in finding the proper balance between the market access commitments of WTO members and the WTO provisions protecting non-economic concerns of national governments.

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<sup>302</sup> See generally THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION (Thomas Cottier & Petros C. Mavroidis eds., 2003) (considering cases submitted to the WTO in which the judge exceeded its authority, comparing the WTO with the operations of national judicial systems having different levels of integration, and exploring potential directions for the future of dispute settlement in the WTO).

<sup>303</sup> See generally IMPLEMENTING THE URUGUAY ROUND (John H. Jackson & Alan O. Sykes eds., 1997) (examining the implementation of the GATT Agreement and its national and international legal and constitutional ramifications, studying a major trading entity in each chapter); Ernst U. Petersmann, *On Reinforcing WTO Rules in Domestic Laws*, in RETHINKING THE WORLD TRADING SYSTEM (John J. Barcelo III & Hugh Corbett eds., 2005).

In European integration, the legitimacy and effectiveness of the EC Court was greatly enhanced by international cooperation among judges, private support for EC jurisprudence, and the use of national legal and judicial systems as effective enforcement mechanisms.<sup>304</sup> Similarly, the WTO legal and dispute settlement system could be rendered more effective if national, regional and WTO trade rules and judicial safeguards were integrated into a mutually complementary, interlocking “constitutional system” for the protection not only of the rights of governments, but also of the rights of private traders, producers, investors and consumers interested in the decentralized protection of the rule of law, open markets and social justice. The contractual and reciprocal nature of public international trade law renders illusory hopes for a public *common law* of international trade.<sup>305</sup> Yet, the compulsory jurisdiction of WTO dispute settlement bodies and of regional trade courts sets incentives for legal and judicial protections and progressive “constitutionalization” of international trade rules for the benefit of welfare-increasing cooperation among free citizens across frontiers.

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<sup>304</sup> See generally MIGUEL P. MADURO, WE THE COURT – THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998) (arguing that the best source of legitimacy for European law lies in new forms of representation and participation helping to reform both the market and the State).

<sup>305</sup> But see THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE (Joseph H.H. Weiler ed., 2000) (arguing that the emergence of regional organizations, such as in the EU and the North American Free Trade Area, are a reflection of a will to cooperate in the global market-place, and that the WTO has emerged as the equivalent of the United Nations Charter for the world trading system).