

## THE ROLE OF PUBLIC INTERNATIONAL LAW IN THE WTO: HOW FAR CAN WE GO?

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How does the World Trade Organization (WTO) relate to the wider corpus of public international law? What, in turn, is the role of public international law in WTO dispute settlement? This paper aims at resolving these two difficult questions. No straightforward answers to them can be found in WTO rules.<sup>1</sup> Yet answering them has major ramifications both for the WTO (is the WTO a largely “self-contained regime” or is it not?<sup>2</sup>) and for international law (is the future of international law further fragmentation or increased unity?<sup>3</sup>). This exercise will be conducted under the law as it stands today—that is, the law as it may be invoked at present before the WTO “judiciary” (panels and the Appellate Body). Of course, WTO members (viz., the WTO “legislator”) could clarify or change the relationship between WTO rules and other rules of international law.<sup>4</sup> However, it is unlikely that such changes will occur any time soon. In part I, I examine the general relationship between public international law and WTO law. I then assess, more specifically, the role of public international law in WTO dispute settlement in part II and offer some conclusions in part III.

### I. THE WTO AS A PART OF PUBLIC INTERNATIONAL LAW

#### *The Creation and Interplay of Rules in Public International Law*

International law, unlike domestic legal systems, is “decentralized” in that it has no central legislator creating its rules. The creators of international law are at the same time the main subjects of international law, namely states. States as subjects of international law, unlike individuals in domestic law, do not elect an “international legislator,” which is then mandated to make law on their behalf.<sup>5</sup> Moreover, states as creators of law are complete equals.

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<sup>1</sup> The notion “WTO rules” is used here to denominate all rules of law created in the context of the WTO, not just those in the so-called WTO covered agreements listed in Appendix 1 to the Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU]. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6 (1995) [hereinafter LEGAL TEXTS], reprinted in 33 ILM 1144 (1994) [hereinafter WTO Agreement]. For the DSU, Apr. 15, 1994, see WTO Agreement, Annex 2, LEGAL TEXTS, *supra*, at 404, reprinted in 33 ILM at 1226. See also *infra* note 37.

<sup>2</sup> See Pieter Jan Kuijper, *The Law of GATT as a Special Field of International Law*, 1994 NETH. Y.B. INT’L L. 227; Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT’L L. 111.

<sup>3</sup> See Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS [R.C.A.D.I.] 101 (1998); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848 (1995); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?* 31 N.Y.U. J. INT’L L. & POL. 679 (1999); Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, 9 ASIL BULL., No. 9, 1995, at 2.

<sup>4</sup> They could do so, for example, by providing authoritative interpretations of WTO rules, by granting certain waivers, or by amending WTO rules (respectively, under Articles IX:2, IX:3, or X of the WTO Agreement).

<sup>5</sup> To date, a limited exception is international organizations, insofar as they themselves (not their members) create rules of international law (the so-called acts of international organizations).

The law created by state *A* and state *B* has the same legal value as that created by state *C* and state *D*. International law is a law of cooperation, not subordination.<sup>6</sup> Its creation depends essentially on the consent of states, be it explicit or only implicit. The lack of consent by a given state generally means that it cannot be held to the rule in question (*pacta tertiis nec nocent nec prosunt*).<sup>7</sup> As a result, since each state is largely its own lawmaker, the legal relationship between states varies enormously depending on the states concerned (much more than the relationship between individuals under domestic law where legislation and other generally applicable law largely outweigh private contracts).

Although international law does not have a central legislator—and is essentially a compilation of varying bilateral legal relationships (even if these relationships are increasingly effected by multilateral treaties)—international law *does* include an element with features of international legislation, namely general international law, composed of general customary international law and general principles of law. The rules of general international law, in principle, are binding on *all* states. Each new state, as well as each new treaty, is automatically born into it. General international law fills the gaps left by treaties. More important, being composed largely of rules on the law of treaties, state responsibility, the interplay of norms, and the settlement of disputes, general international law ensures the existence of international law as a legal system. General international law is not limited, however, to these “secondary” rules of law, as they might be called (or a “toolbox” for the creation, operation, interplay, and enforcement of other rules of law). It also includes “primary” rules of law directly imposing rights and obligations on states (which “secondary” rules impose only indirectly through other rules of law), such as customary law and general principles of law on the use of force, genocide, and human rights.<sup>8</sup> Looked at from this angle, general international law does resemble domestic legislation (or even domestic constitutions).<sup>9</sup>

In contrast, however, to much domestic legislation (and all domestic constitutions), general international law does *not* have an inherent legal value that is superior to other rules of law (subfederal law, administrative regulations, and contracts in domestic law; treaties in international law).<sup>10</sup> On the contrary, general customary international law and general principles of law are often characterized as vague, whereas treaties are much more explicit. The lack of any inherent hierarchy between general international law and treaties—as well as, more generally, between any two rules of international law—is explained on the ground that both derive, in one way or another, from the will or acquiescence of states. As they derive from the same source (essentially state consent), they must in principle be equal in value.

<sup>6</sup> Charles Rousseau, *De la Compatibilité des normes juridiques contradictoires dans l'ordre international*, 39 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 133, 150–51 (1932) (“Le droit des gens est un droit de coordination et non de subordination. L'accord des sujets de droit y est la seule source de droit et les normes qui résultent de cet accord de volontés sont d'égale valeur juridique.”).

<sup>7</sup> See, e.g., Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Arts. 34–38, 1155 UNTS 331 (dealing with treaties and third parties) [hereinafter Vienna Convention].

<sup>8</sup> Hart gave prominence to the distinction between primary and secondary rules: “secondary are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” H. L. A. HART, *THE CONCEPT OF LAW* 92 (1961). The scope of the “secondary” rules referred to here (as well as in Hart's book) is much wider than the notion of “secondary” rules used by the International Law Commission (ILC) in its discussions on the draft articles on state responsibility (where it is limited to the definition and consequences of breach of primary rules, excluding secondary rules such as those on the creation, application, revision, or termination of primary rules). See, e.g., James Crawford, *First Report on State Responsibility*, UN Doc. A/CN.4/490, at 4 (1998). Professor Crawford's reports on state responsibility and the draft articles are available online at <<http://www.un.org/law/ilc/index.htm>>.

<sup>9</sup> See Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 153, 160 (1958).

<sup>10</sup> See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3 (1998); NGUYEN QUOC DINH, PATRICK DAILLIER, & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 114 (1999) (stating that “pour les sources, il n'existe pas de hiérarchie en droit international” (emphasis omitted)); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES*, para. 85 (2d rev. ed. 1997) (noting that “an *a priori* hierarchy of sources is an alien concept” to the structure of the international legal order); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1974–75 *BRIT. Y.B. INT'L L.* 273, 274.

A prominent (but still disputed<sup>11</sup>) exception to this absence of hierarchy in international law is rules of *jus cogens*. Pursuant to the Vienna Convention on the Law of Treaties, rules of *jus cogens* (by their very nature, part of general international law) prevail over all, past and future, treaty norms.<sup>12</sup> One further exception can be found: the rules created by different organs of the same international organization often have an inherent hierarchical status corresponding to the hierarchical status of the organ that made the rule.

This general lack of hierarchy in international law has major consequences. First, by concluding a treaty, states can contract out of or deviate from general international law (other than *jus cogens*). States do so regularly,<sup>13</sup> for example, in the final provisions of treaties on how to amend the treaty (thus contracting out of rules of general international law on the law of treaties<sup>14</sup>) and in treaty provisions setting up a tailor-made enforcement mechanism (thus deviating from certain rules of general international law on state responsibility<sup>15</sup>). Importantly, unless the treaty contracts out of a rule of general international law, this rule is valid and also applies with respect to the newly concluded treaty.<sup>16</sup> As noted earlier, each new state, as well as each new treaty, is automatically born into general international law. The treaty must exclude the rules of general international law that the parties do not want to apply with respect to the treaty, not the reverse (i.e., the treaty does not have to list all such rules that are to apply to it). Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of international law. Much the way private contracts do not need to list all the relevant legislative and administrative provisions of domestic law for them to be applicable to the contract, so treaties need not explicitly set out rules of general international law for them to be applicable to the treaty (for example, the text of the Vienna Convention does not have to be attached to the new treaty for general international law rules on the law of treaties to be applicable to it). The same applies as regards existing treaties: any new treaty not only is subsumed under general international law, but is created within the wider corpus of public international law, including preexisting treaties. These preexisting treaties, insofar as they relate to the new treaty, automatically interact with it.

Second, since treaty rules and rules of customary law have the same binding force<sup>17</sup> and the notion of *acte contraire* is alien to international law,<sup>18</sup> not only can treaties contract out of, or overrule custom (custom being the main source of general international law), but also custom, in principle, can replace a treaty norm. Once a custom has been validly established and proven, an earlier contradictory treaty rule must give way to it unless it can be proved that the earlier treaty continues to apply as *lex specialis*.<sup>19</sup> In practice, this continuing existence is often manifest.

<sup>11</sup> See, for example, Prosper Weil, *Towards Relative Normativity in International Law*, 77 AJIL 413 (1983), and the negotiating history of paragraph 6 of Article 311 of the 1982 UN Convention on the Law of the Sea, 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (1989).

<sup>12</sup> See Vienna Convention, *supra* note 7, Arts. 53, 64.

<sup>13</sup> Most often the very reason to conclude a treaty (other than to codify customary law) is to change general international law.

<sup>14</sup> See Vienna Convention, *supra* note 7, Arts. 39, 40. This possibility of *lex specialis* contracting out of Vienna Convention rules is confirmed, inter alia, in *id.*, Art. 5, stating that the Convention is "without prejudice to any relevant rules" of international organizations.

<sup>15</sup> See State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, Art. 56, UN Doc. A/CN.4/L.600 (2000) (providing that "[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law.") [hereinafter Draft Articles 2000].

<sup>16</sup> We come back to this issue in text at note 41 *infra*.

<sup>17</sup> Resolution: Problems Arising from a Succession of Codification Conventions on a Particular Subject, Conclusion 11 (Hierarchy of Sources), [1995] 2 Y.B. INST. INT'L L. 441 ("There is no *a priori* hierarchy between treaty and custom as sources of international law."); NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW 21 (1994) (stating that "it is accepted that the binding force of conventional and customary rules is the same"); *supra* note 10.

<sup>18</sup> NGUYEN, DAILLIER, & PELLET, *supra* note 10, at 289.

<sup>19</sup> KONTOU, *supra* note 17, at 146; VILLIGER, *supra* note 10, paras. 302–28; [1995] 1 Y.B. INST. INT'L L. 245.

Third, the absence of any inherent hierarchy of treaty norms (other than rules of *jus cogens*) means that, in principle, the treaty norms concluded under the auspices of the United Nations Environment Programme (UNEP) have the same legal status as those concluded in the World Intellectual Property Organization (WIPO), the WTO, or a bilateral treaty. No a priori hierarchy exists between WTO rules and other treaty rules. All treaty rules derive from the consent of the states involved. Deriving from the same source, they must be equally binding in nature. Nevertheless, in practice, treaties themselves,<sup>20</sup> as well as general international law rules on the interaction between them (in particular, the *lex posterior* rule in Article 30 of the Vienna Convention<sup>21</sup>), do set out rules on the priority of different treaty norms. *In abstracto*, however, one treaty norm, once validly concluded, is as legally binding as any other. As a result, in principle, any treaty norm existing today (other than a rule of *jus cogens*) can be changed tomorrow, as between any number of states and with the consent of these states, by another treaty norm. Only explicit prohibitions<sup>22</sup> or conflict rules in preexisting treaties,<sup>23</sup> and general international law rules on the interplay of norms,<sup>24</sup> can prevent states from thus “changing their minds.”

#### *WTO Rules as Rules of Public International Law*

With one possible exception, no academic author (or any WTO decision or document) disputes that WTO rules are part of the wider corpus of public international law.<sup>25</sup> Like international environmental law and human rights law, WTO law is “just” a branch of public international law. To public international lawyers, my call in the April 2000 issue of this *Journal* for WTO rules to “be considered as creating international legal obligations that are part of public international law”<sup>26</sup> is a truism.<sup>27</sup> To many negotiators and other WTO experts in Geneva, however, it comes as a surprise. Not a single legal argument has been (or, in my view, can be) put forward in their support. The fact that many negotiators of the WTO treaty<sup>28</sup> (in numerous countries representatives of a trade ministry de-linked from that of foreign affairs) did not *think* of public international law when drafting the WTO treaty is not a valid legal argument. At most, it amounts to an excuse for the WTO treaty not to have dealt more explicitly with the relationship between WTO rules and other rules of international law.<sup>29</sup>

<sup>20</sup> See text at note 64 *infra*.

<sup>21</sup> See also Vienna Convention, *supra* note 7, Arts. 41, 59.

<sup>22</sup> E.g., United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 311(6), 1833 UNTS 397 [hereinafter LOS Convention].

<sup>23</sup> E.g., UN CHARTER Art. 103.

<sup>24</sup> E.g., Vienna Convention, *supra* note 7, Arts. 41, 53.

<sup>25</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 25 (1997); Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?* 3 J. INT'L ECON. L. 27 (2000); Donald McRae, *The Contribution of International Trade Law to the Development of International Law*, 260 RECUEIL DES COURS 111 (1996); Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189 (1999). For earlier sources confirming that the GATT was no more than a specialized branch of public international law, see IGNAZ SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* (1989); Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 87 RECUEIL DES COURS 1 (1996 I). The possible exception is Judith Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AJIL 416, 416–17 (1996) (stating that “WTO rules are simply not ‘binding’ in the traditional sense”).

<sup>26</sup> Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AJIL 335, 336 (2000).

<sup>27</sup> See Mariano García Rubio, *Unilateral Measures as a Mean[s] of Enforcement of WTO Recommendations and Decisions* n.22 (Hague Academy of International Law, forthcoming 2001) (calling it “difficult . . . to envisage any other possible status for rules emanating from a[] treaty concluded among States under international law, as the WTO Agreement”).

<sup>28</sup> “WTO treaty” is used here to denominate the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL TEXTS, *supra* note 1, at 2, *reprinted in* 33 ILM at 1125 (1994) (which includes not only the WTO Agreement with its four annexes, but also a series of ministerial declarations and decisions).

<sup>29</sup> Compare, for example, the WTO treaty to the LOS Convention, *supra* note 23, an equally broad and universal regulatory treaty that carefully regulates its relationship with other rules of international law in Article 311 (containing no less than six paragraphs).

Stating that WTO rules are just a part of public international law is one thing. It is quite another to submit that there is nothing special about WTO rules. In many respects WTO rules are *lex specialis* as opposed to general international law. But contracting out of *some* rules of general international law (for example, as does the WTO dispute settlement mechanism vis-à-vis certain rules of general international law on state responsibility) does not mean that one has contracted out of *all* of them, nor a fortiori that WTO rules were created completely outside the system of international law. Much has been written about so-called self-contained regimes.<sup>30</sup> However, all references to this notion concerned certain international legal regimes (in particular, those of diplomatic immunities, the European Community, and human rights treaties) that, in terms of their compliance mechanism or secondary rules, may somehow be self-contained, without any or only limited “fallback” on general international law. No one has spoken of self-contained regimes in the sense of treaty regimes that are completely isolated from all rules of general international law (including the law on treaties, judicial proceedings, and matters such as the use of force and human rights), let alone treaty regimes concluded completely outside the international legal system.<sup>31</sup> As noted above, states, in their treaty relations, can contract out of one, more, or, in theory, all rules of general international law (other than those of *jus cogens*), but they cannot contract out of the system of international law. As soon as states contract with one another, they do so automatically and necessarily within the system of international law.

WTO rules are thus rules of international law that, in certain respects, constitute *lex specialis* vis-à-vis certain rules of general international law. However, this does not mean that WTO rules are *lex specialis* vis-à-vis all rules of international law. WTO rules regulate the trade relations between states (as well as separate customs territories<sup>32</sup>). Nonetheless, in today’s highly interdependent world, a great number, if not most, state regulations in one way or another affect trade flows between states. Hence, WTO rules, essentially aimed at liberalizing trade, have a potential impact on almost all other segments of society and law. For example, liberalizing trade may sometimes jeopardize respect for the environment or human rights. Equally, enforcing respect for human rights or environmental standards may sometimes require the imposition of trade barriers.

Moreover, trade restrictions are resorted to increasingly in pursuit of all kinds of nontrade objectives, ranging from respect for human rights<sup>33</sup> and the environment<sup>34</sup> to confirmation

<sup>30</sup> See the discussions by Kuijper and Simma, *supra* note 2, and the reports on state responsibility by Riphagen, Arangio Ruiz, and Crawford to the ILC. [1981] 2 Y.B. Int’l L. Comm’n, pt. 1, at 79, UN Doc. A/CN.4/SER.A/1981/Add.1 (Part 1); [1982] 2 *id.*, pt. 1, at 22, UN Doc. A/CN.4/SER.A/1982/Add.1 (Part 1); [1983] 2 *id.*, pt. 1, at 3, UN Doc. A/CN.4/SER.A/1983/Add.1 (Part 1); [1985] 2 *id.*, pt. 1, at 3, UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1); [1991] 2 *id.*, pt. 1, at 1, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 1); [1992] 2 *id.*, pt. 1, at 1, UN Doc. A/CN.4/SER.A/1992/Add.1 (Part 1); Third Report on State Responsibility, UN Doc. A/CN.4/507/Add.1, para. 157, & Add.4, para. 415 (2000) [hereinafter Crawford, Third Report].

<sup>31</sup> Even the highly developed (and arguably “domestic”) legal system of the European Community at times refers back to general international law. Pieter Jan Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25 LEGAL ISSUES EUR. INTEGRATION 1 (1998). Also, for practical purposes a workable treaty could not possibly be set up outside the system of international law, completely de-linked, for example, from the law of treaties and general principles of law.

<sup>32</sup> See WTO Agreement Art. XII.1 and Explanatory Notes (defining the term “country”). Hereinafter, when the word “state” is used in the context of the WTO treaty, it should be read as including separate customs territories.

<sup>33</sup> See, e.g., United States—Measures Affecting Government Procurement, WTO Doc. WT/DS88 & 95 (Feb. 14, 2000) (involving U.S. trade sanctions against Myanmar); United States—The Cuban Liberty and Democratic Solidarity Act, WTO Doc. WT/DS38 (Apr. 24, 1998) (involving U.S. trade sanctions against Cuba). Reports of WTO panels and the Appellate Body are available online at <<http://www.wto.org>>.

<sup>34</sup> See United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Docs. WT/DS58/R (May 15, 1998) (panel), & WT/DS58/AB/R (Nov. 6, 1998) (Appellate Body) [hereinafter U.S.—Shrimp/Turtle] (note that Appellate Body reports are designated by “AB” in the report number); Chile—Measures Affecting Transit and Importation of Swordfish, WTO Doc. WT/DS193 (suspended Mar. 23, 2001) [hereinafter Chile—Swordfish]. The latter complaint was also brought before the International Tribunal for the Law of the Sea but suspended on the basis of a provisional arrangement. Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Com.) (Mar. 15, 2001), at <[http://www.un.org/Depts/los/ITLOS/Order1\\_2001Eng.pdf](http://www.un.org/Depts/los/ITLOS/Order1_2001Eng.pdf)>.

of territorial borders.<sup>35</sup> Such resort creates a huge potential for interaction between WTO rules and other rules of international law, as WTO rules cut across almost all other rules of international law. It also means that in certain respects these “all-affecting” WTO rules are framework rules only or *lex generalis*. Indeed, the WTO forms a general and increasingly universal framework for all (or almost all) of the trade relations between states. Although GATT/WTO rules replaced a myriad of other bilateral and regional arrangements, they do allow for certain more detailed or further-reaching regional and bilateral arrangements,<sup>36</sup> as well as a series of exceptions related to the environment and national security, among other things. In these respects, WTO trade liberalization rules are general or *lex generalis* permitting the continuation or creation of more focused or detailed rules of international law (such as certain rules on the environment, human rights, or the law of the sea, as well as on customs unions and free trade areas). In this sense, WTO rules are not the alpha and omega of all possible trade relations between states. Other, more detailed or special rules of international law (in terms of either subject matter or the number of states bound by them) continue to be highly relevant.

*The Relationship Between WTO Rules and Other Rules of International Law*

With the preceding two sections in mind, we can now portray the universe of international law relevant to the WTO as consisting of the following:

(1) WTO rules<sup>37</sup> that add previously nonexistent rights or obligations to the corpus of international law (such as nondiscrimination principles in trade in services);

(2) WTO rules that contract out of general international law (such as rules in the Dispute Settlement Understanding on the “suspension of concessions,” which contract out of general international law rules on countermeasures) or deviate from, or even replace, other preexisting rules of international law (such as bilateral quota or tariff arrangements<sup>38</sup> and the Tokyo Round codes);

(3) WTO rules that confirm preexisting rules of international law, be they of general international law (such as DSU Article 3.2 confirming that WTO covered agreements are to be interpreted “in accordance with customary rules of interpretation of public international law”) or preexisting treaty law (such as GATT 1994 incorporating GATT 1947 and the TRIPS Agreement incorporating parts of certain WIPO conventions<sup>39</sup>);

(4) non-WTO rules that already existed when the WTO treaty was concluded (on April 15, 1994) and that are (a) relevant to and may have an impact on WTO rules; and (b) have not been contracted out of, deviated from, or replaced by the WTO treaty. These non-WTO rules consist mainly of general international law, in particular rules on the law of treaties, state responsibility, and settlement of disputes, but also of other treaty rules that regulate or have an impact on the trade relations between states (such

<sup>35</sup> See *Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WTO Doc. WT/DS188 & 201 (May 5, 2000) (involving trade sanctions as a result of a maritime delimitation dispute). This dispute is also pending before the International Court of Justice. *Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.) (filed Dec. 8, 1999), at <<http://www.icj-cij.org>>.

<sup>36</sup> See *infra* text at note 92.

<sup>37</sup> “WTO rules,” as defined in note 1 *supra*, includes the 1994 WTO treaty as well as all subsequent WTO rules, not just those in subsequent agreements between WTO members, but also those constituted by acts of the WTO as an international organization (such as waivers and decisions of the Dispute Settlement Body [hereinafter DSB]), unilateral acts of WTO members, and, potentially, customary law specific to WTO members and the WTO treaty.

<sup>38</sup> See *European Communities—Measures Affecting Importation of Certain Poultry Products*, WTO Doc. WT/DS69/AB/R, para. 81 (July 23, 1998) [hereinafter EC—Poultry].

<sup>39</sup> General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 1, at 21, reprinted in 33 ILM 1154 (1994) [hereinafter GATT 1994]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, LEGAL TEXTS, *supra*, at 365, reprinted in 33 ILM 1197 (1994) [hereinafter TRIPS Agreement].

as certain rules in environmental or human rights conventions and customs unions or free trade arrangements); and

(5) non-WTO rules that are created subsequently to the WTO treaty (post-April 1994) and (a) are relevant to and may have an impact on WTO rules; (b) either add to or confirm existing WTO rules or contract out of, deviate from, or replace aspects of existing WTO rules; and (c) if the latter is the case, do so in a manner consistent with interplay and conflict rules in the WTO treaty and general international law.<sup>40</sup>

*Confirming some rules of general international law does not amount to excluding all others.* A trap to be avoided with respect to the third category of rules outlined above (but one often fallen into by authors and WTO negotiators alike<sup>41</sup>) is to take the explicit confirmation of some preexisting rules of international law in the WTO treaty (such as DSU Article 3.2 confirming customary international law rules on interpretation) as proof that the treaty has contracted out of all other rules of international law (pursuant to the adage *expressio unius est exclusio alterius*). As already noted, rather than explicitly confirm (or make a *renvoi* to) preexisting rules of general international law for those rules to apply to it, the WTO treaty had to exclude those rules that were not to apply. As a result, any explicit confirmation of rules of general international law in the WTO treaty must be seen as made *ex abundante cautela*.<sup>42</sup> The absence of explicit contracting out must be regarded as a continuation or implicit acceptance of the rules in question.<sup>43</sup> As one early source put it: "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."<sup>44</sup>

Both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) later confirmed this line of thinking. In the *Chorzów Factory* case, the PCIJ confirmed it in respect of the obligation to make reparation for a breach of international law: "Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." It is, indeed, "a general conception of law, that any breach of an engagement involves an obligation to make reparation."<sup>45</sup> The ICJ has made similar statements with respect to rules on treaty termination for breach and exhaustion of local remedies. In the 1971 *South West Africa* Advisory Opinion, the ICJ confirmed the right of termination of a treaty for breach (*in casu*, the mandate for South West Africa) and found that, for this right not to be applicable to the mandate,

it would be necessary to show that the mandates system . . . excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties . . . . The silence of a treaty as to the existence

<sup>40</sup> See text at note 90 *infra*.

<sup>41</sup> See Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 342–43 (1999); *infra* note 175.

<sup>42</sup> This point applies only in respect of *general* international law. Indeed, to the extent that the WTO treaty confirmed and incorporates preexisting treaty rules, such as rules of certain WIPO conventions, WTO members not only confirmed their legal commitment to these rules (with some members agreeing to these rules for the first time), but also extended that commitment by subjecting these rules to the automatic and compulsory dispute settlement system of the WTO. See text at note 123 *infra*.

<sup>43</sup> *Accord* García Rubio, *supra* note 27.

<sup>44</sup> Georges Pinson (Fr.) v. United Mexican States, 5 R.I.A.A. 327, 422 (Perm. Ct. Arb. 1928) (trans. by author). Or as McNair stated: "Treaties must be applied and interpreted against the background of the general principles of international law." A. D. MCNAIR, *THE LAW OF TREATIES* 466 (1961). According to Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 BRIT. Y.B. INT'L L. 48, 76:

It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the parties. It is part of international law and must be interpreted against the general background of its rules and principles.

<sup>45</sup> *Chorzów Factory* (Ger. v. Pol.), Merits, 1928 PCIJ (ser. A) No. 17, at 29 (Sept. 13).

of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law. . . .<sup>46</sup>

In the *ELSI* case, the acting Chamber of the ICJ had

no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.<sup>47</sup>

The Iran-U.S. Claims Tribunal has also confirmed this approach.<sup>48</sup>

In international law, there is thus a presumption in favor of continuity or against conflict, in the sense that if a treaty does not contract out of a preexisting rule, that rule (being of the same inherent value as the new one<sup>49</sup>) continues to exist.<sup>50</sup> Only if it can be shown that the new treaty does contradict or aim at contracting out of a rule of general international law will the preexisting rule be dis-applied with respect to the treaty in question. The extent to which such contracting out has occurred is a question of treaty interpretation.<sup>51</sup>

The most prominent WTO rule explicitly confirming rules of general international law, DSU Article 3.2, supports the main thesis of this article. Article 3.2 provides in relevant part that WTO covered agreements must be clarified “in accordance with customary rules of interpretation of public international law.” First, as the Appellate Body acknowledged in its very first report, “[t]hat direction [in Article 3.2 of the DSU] reflects a measure of recognition that the *General Agreement* [GATT] is not to be read in clinical isolation from public international law.”<sup>52</sup> Although, in theory, there was no need for Article 3.2 to confirm customary rules of interpretation of public international law (these rules would have applied anyhow),<sup>53</sup> in practice, to many WTO negotiators it was a revelation. And, indeed, to those maintaining that WTO rules are not rules of international law, it amounts to a death blow. For if WTO rules must be interpreted in accordance with rules of public international law, then surely they must *be* rules of public international law. Second, the international law rules thus explicitly confirmed (defined in case law as being Articles 31–33 of the Vienna Convention<sup>54</sup>) in turn support the thesis advanced here, albeit only in the specific field of treaty interpretation. Article 31(3)(c) of the Vienna Convention directs that in interpreting a

<sup>46</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 47, para. 96 (June 21).

<sup>47</sup> *Electronica Sicula S.p.A (ELSI) (U.S. v. Italy)*, 1989 ICJ REP. 15, 42, para. 50 (July 20).

<sup>48</sup> *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, para. 112 (1987):

As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. . . . [H]owever, . . . the rules of customary law may be useful in order to fill in possible *lacunae* of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.

<sup>49</sup> Except for rules of *jus cogens*.

<sup>50</sup> *Oppenheim's International Law* refers to a “presumption that the parties intend something not inconsistent with generally recognised principles of international law, or with previous treaty obligations towards third states.” 1 OPPENHEIM'S INTERNATIONAL LAW 1275 (Robert Jennings & Arthur Watts eds., 1996) [hereinafter OPPENHEIM] (referring to ICJ decisions). As regards the right to reparation, Crawford refers to “a presumption against the creation of wholly self-contained regimes in the field of reparation.” Crawford, Third Report, *supra* note 30, para. 157.

<sup>51</sup> Crawford submits, for example, that, in terms of state responsibility, the DSU is an example where it is “clear from the language of a treaty or other text that only the consequences specified flow.” Crawford, Third Report, *supra* note 30, Add.4, para. 420. In my view, this is not so clear. *Accord* Mariano García Rubio, *supra* note 27; Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000).

<sup>52</sup> United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 17 (Mar. 20, 1996) [hereinafter U.S.—Gasoline].

<sup>53</sup> To my knowledge, the WTO treaty is the only international legal instrument that explicitly confirms international law rules of interpretation. For a plausible reason, see *infra* note 60.

<sup>54</sup> U.S.—Gasoline, *supra* note 52, at 17; Japan—Taxes on Alcoholic Beverages, WTO Doc. WT/DS8/AB/R, at 10 (Nov. 1, 1996) [hereinafter Japan—Taxes].



treaty, account must be taken not only of the treaty itself (*in casu*, the WTO treaty), but also of “any relevant rules of international law applicable in the relations between the parties.”<sup>55</sup> However, besides international law rules on treaty interpretation, many other rules of general international law not explicitly confirmed in the WTO treaty must be applied with respect to the treaty; that is, as long as it does not contract out of these rules. In terms of the law of treaties, certain rules on the conclusion, invalidity, application, modification, suspension, or termination of treaties come to mind, but also rules on state responsibility, on judicial settlement of disputes, and on how to solve conflicts between norms must apply.<sup>56</sup>

In terms of customary international law, this approach was confirmed in, for present purposes, a crucially important panel report (not appealed). The panel found as follows:

We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. *Customary international law applies generally to the economic relations between the WTO Members.* Such international law applies to the extent that the WTO treaty 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.*<sup>57</sup>

On these grounds, the panel applied “general rules of customary international law on good faith and error in treaty negotiations,”<sup>58</sup> in particular Article 48 of the Vienna Convention.<sup>59</sup> The panel correctly rejected the argument *a contrario* that the reference in DSU Article 3.2 only to rules of treaty interpretation of customary international law means that all other international law is excluded.<sup>60</sup> The panel limited its reference to customary international law, but it should have referred to the broader class of general international law, including both general customary international law and general principles of law.<sup>61</sup>

*Interplay with pre-1994 treaties.* As seen, the WTO treaty was created against the background of general international law, a law that by its very nature applies to all WTO members without exception. But it also emerged in the context of other preexisting treaties, both bilateral and multilateral, binding on all or only some WTO members. The drafters of the WTO treaty must have been aware of this background. At least for international law purposes, it is not as if the United States were a different person depending on whether it acts in WIPO, UNEP, or the WTO, or on whether it is represented by the Office of the Trade Representative or the Department of State. Just as there are no sealed compartments between

<sup>55</sup> See text at note 252 *infra*.

<sup>56</sup> This horizontal relationship between a new treaty, say, the WTO treaty, and other international law (and how the two interact) is to be distinguished from the vertical relationship between national law and international law (as well as the debated effect international law has in domestic legal systems). WTO and other rules of international law are part of one and the same legal system, which is public international law (unless one disputes that WTO law is international law). In contrast, national law and international law, even in countries upholding a monist view, remain in essence two separate legal systems with international law permeating national law only if certain conditions (on preciseness, unconditionality, etc.) are met.

<sup>57</sup> Korea—Measures Affecting Government Procurement, WTO Doc. WT/DS163/R, para. 7.96 (June 19, 2000) (emphasis added) (footnote omitted) [hereinafter Korea—Government Procurement].

<sup>58</sup> *Id.*, para. 7.101.

<sup>59</sup> *Id.*, paras. 7.123–126.

<sup>60</sup> *Id.*, para. 7.96 n.753:

The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.

<sup>61</sup> To be entirely correct, the panel should also have specified that only general customary international law applies as between all WTO members; not special or local customary law between certain WTO members only.

general international law and WTO law, no such compartments separate the WTO treaty from other treaties. Obviously, whereas general international law is binding on all WTO members, any of these non-WTO treaties with which the WTO treaty freely interacts only have effect as between those WTO members that accepted these treaties (*pacta tertiis nec nocent nec prosunt*). Some of these pre-1994 non-WTO treaty rules have been terminated<sup>62</sup> or replaced<sup>63</sup> by the WTO treaty. Most of the others continue to exist. In the event of conflict, those that continue to exist must either give way to WTO rules or, conversely, prevail over them, depending on the applicable conflict rules. The latter rules may be found in three different places: the non-WTO treaty, the WTO treaty itself, and general international law.

First of all, conflict rules in the non-WTO treaty that allegedly contradicts the WTO treaty include those in Article 103 of the UN Charter, Article 311 of the LOS Convention, Article 22(1) of the Convention on Biological Diversity,<sup>64</sup> Article 40 of the North American Agreement on Environmental Cooperation,<sup>65</sup> Article 4 of the European Energy Charter Treaty,<sup>66</sup> and the preamble to the Cartagena Protocol on Biosafety.<sup>67</sup> Second, although rules on how to solve conflicts between WTO and other norms of international law might be found in the WTO treaty itself, surprisingly enough<sup>68</sup> it says little about its relationship to other rules of international law. Thus, it does not include a general conflict clause setting out its relationship with preexisting international law. Nor does it explicitly state that it is to prevail over preexisting law or that it is without derogation from preexisting law.<sup>69</sup> It contains relatively limited exceptions with respect to GATT 1947 and related instruments,<sup>70</sup> UN Charter obligations for the maintenance of international peace and security,<sup>71</sup> the WIPO conventions incorporated into the TRIPS Agreement,<sup>72</sup> certain dispute settlement provisions,<sup>73</sup> and regional trade arrangements.<sup>74</sup> As for rules of the International Monetary Fund (IMF), the Declaration on the Relationship of the WTO with the IMF<sup>75</sup> states, in essence, that GATT 1994 rules prevail over IMF rules unless otherwise provided for in the GATT itself.<sup>76</sup> The Declaration on Trade and Environment<sup>77</sup> covers preexisting environmental conventions. However, rather than setting out conflict rules itself, this declaration establishes the WTO

<sup>62</sup> As were the Tokyo Round codes, for example, on technical barriers to trade and dumping.

<sup>63</sup> As GATT 1947 was replaced by GATT 1994. For GATT 1947, see General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT 1947].

<sup>64</sup> Convention on Biological Diversity, June 5, 1992, 31 ILM 818 (1992).

<sup>65</sup> North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 ILM 480 (1993).

<sup>66</sup> European Energy Charter Treaty, *opened for signature* Feb. 1, 1995, 34 ILM 360 (1995).

<sup>67</sup> Cartagena Protocol on Biosafety, Jan. 29, 2000, 39 ILM 1027 (2000).

<sup>68</sup> But probably because of a lack of preoccupation with public international law (and political deadlock on those rules of international law WTO negotiators did have in mind).

<sup>69</sup> Note, in contrast, the very elaborate Article 311 of the LOS Convention, "Relation to other conventions and international agreements." See, in this respect, Emmanuel Roucouanas, *Engagements parallèles et contradictoires*, 206 RECUEIL DES COURS 222 (1987 VI).

<sup>70</sup> It can be presumed that all pre-1994 GATT-related instruments that were not incorporated into the WTO treaty (in particular, into GATT 1994) were terminated or at least superseded by the WTO treaty. See the discussion of *EC—Poultry* in text at note 215 *infra*.

<sup>71</sup> GATT Article XXI(c), a limited mirror image of Article 103 of the UN Charter.

<sup>72</sup> Article 2.2 of the TRIPS Agreement, *supra* note 39, provides that "[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."

<sup>73</sup> Article 11.3 of the SPS Agreement provides that "[n]othing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement." Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex IA, LEGAL TEXTS, *supra* note 1, at 69 [hereinafter SPS Agreement].

<sup>74</sup> GATT Art. XXIV; GATS Art. V; see text following note 91 *infra*. For GATS, see General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex IB, LEGAL TEXTS, *supra* note 1, at 325, *reprinted* in 33 ILM 1168 (1994) [hereinafter GATS].

<sup>75</sup> LEGAL TEXTS, *supra* note 1, at 447.

<sup>76</sup> See text at note 218 *infra*.

<sup>77</sup> LEGAL TEXTS, *supra* note 75, at 469.

Committee on Trade and Environment, one of whose major tasks is to examine the relationship between the WTO treaty and multilateral environmental agreements. So far, this mandate has not resulted in any clear rules on conflicts.<sup>78</sup>

Third, and most important for WTO purposes (given the absence of explicit conflict rules in the WTO treaty itself), further rules on how to solve normative conflicts must be sought in general international law, for example, as reflected in Article 30 of the Vienna Convention. As regards most conflicts, the WTO treaty does not contract out of these rules; hence, they must also apply to WTO rules and how they interact with other rules of international law. The lack of an inherent hierarchy of rules of international law (other than *jus cogens*) makes the intention of the parties bound by both rules paramount in deciding which one ought to prevail (i.e., have the parties in some way expressed a preference for either rule?).<sup>79</sup> If such an expression of intention cannot be conclusively determined, resort must first be had to the *lex posterior* rule in Article 30 for conflicts between treaty norms. For other conflicts (such as those between a treaty and custom), this rule equally applies, once again on the ground that all rules of international law (other than *jus cogens*) have the same binding force, so that any later rule (i.e., any later expression of state consent) overrules an earlier contradictory rule.<sup>80</sup>

With respect to successive treaties between exactly the same states (Article 30(3)), the *lex posterior* rule follows logically since states are their own lawmakers, possessing the contractual freedom to “change their minds” (a later expression of consent prevails over an earlier one). The same applies to conflicts between a treaty and a subsequent inter se agreement as between states that agreed to both the original treaty and the inter se agreement (under Article 30(4) (a) the inter se agreement, as the later rule prevails). As between a state bound by both the original treaty and the inter se agreement, and another state bound only by the original treaty, the solution in Article 30(4) (b) (only the original treaty, not the inter se agreement, applies) results directly from the *pacta tertiis* principle. In this sense, Article 30 does not add normative solutions but simply confirms the logical consequences of other general principles of international law.

Indeed, when it comes to the “hard cases,” Article 30 in and of itself hardly offers any solutions.<sup>81</sup> The “hard cases” are conflicts between treaty norms for which it is difficult or unreasonable to utilize one point in time as the moment at which they were matched with state consent. This is what happens with many multilateral treaty norms that form part of a regulatory framework or legal system created at one point in time but that continues to exist and evolve over a mostly indefinite period. Most rules of modern multilateral conventions fit this pattern (including rules of the WTO, many environmental conventions, human rights treaties, and the LOS Convention). They are part of a framework or system that is continuously confirmed, implemented, adapted, and expanded, for example, by means of judicial decisions, interpretations, new norms, and the accession of new state

<sup>78</sup> The committee, however, did endorse “multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature” and said it preferred that trade disputes arising in connection with a multilateral environmental agreement be resolved through the mechanisms established by that agreement. WTO Doc. WT/CTE/1, para. 171 (1996). *But see* text following note 143 and note 147 *infra*. For an interesting, though inconclusive, evaluation of the relationship between the WTO treaty and earlier environmental conventions, see Robert Housman & David M. Goldberg, *Legal Principles in Resolving Conflicts Between Multilateral Environmental Agreements and the GATT/WTO*, in *THE USE OF TRADE MEASURES IN SELECT MULTILATERAL ENVIRONMENTAL AGREEMENTS* 297 (Robert Housman et al. eds., 1995) [hereinafter *TRADE MEASURES*].

<sup>79</sup> Article 30(2) of the Vienna Convention, *supra* note 7, confirms that the *lex posterior* rule in Article 30(3) is of residual value only.

<sup>80</sup> *See* text at note 17 *supra*.

<sup>81</sup> Sinclair already noted that regarding the interplay between multilateral treaties, Article 30 is “in many respects not entirely satisfactory.” IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (2d ed. 1984). But *see* text at note 93 *infra*, the discussion on Article 41, explicitly referred to in Article 30(5), which does offer some solutions.

parties (for which both the consent of the new party and the reciprocal acceptance of all, or a majority of, the existing parties are required). Not only were such treaty norms consented to when they originally emerged, but they continue to be confirmed, either directly or indirectly, throughout their existence, in particular when monitored and evolving within the context of an international organization (e.g., the WTO).<sup>82</sup> It would be absurd and inconsistent with the genuine will of states to “freeze” such rules into the mold of the time when they were originally created and to label them an expression of state consent limited to, say, April 15, 1994.<sup>83</sup> This type of treaty norm belongs to what I term “continuing treaties” and does not reflect a once-and-for-all expression of state consent.<sup>84</sup> As a result, when such a treaty norm conflicts with another treaty norm, in particular another continuing treaty norm, the “guillotine” approach of time of conclusion (the later in time prevailing) may not make sense and could lead to arbitrary solutions. Would it not be absurd to conclude that for state *A*, which signed the Cartagena Biosafety Protocol in 1999 and subsequently acceded to the WTO, WTO rules prevail; whereas for state *B*, as an original (1994) WTO member, the Protocol prevails? Or, conversely, to say that for state *C*, a WTO member that acceded to the Convention on Climate Change only in 1997, the Convention prevails over WTO rules; whereas for state *D*, a WTO member that agreed to the Climate Change Convention when it was concluded in 1992, WTO rules prevail? More absurd still, did WTO rules, as between member states of the European Community (EC), prevail over the 1991 Maastricht Treaty simply because they were concluded later in time? And was this situation reversed in 1997 with the conclusion of the Amsterdam Treaty, once again simply because that treaty succeeded WTO rules *ratione temporis*?

In my view, this type of conflict can be resolved only by resorting to the intention of the parties to both treaties, even if it should be merely implicit<sup>85</sup> or has to be deduced from general principles of law or logic. Quite often this intention may be reflected in the structure or scope of the rules in question, be it *ratione materiae* or *ratione personae*.<sup>86</sup> Indeed, could one not say, reverting to the examples cited earlier, that a WTO rule prohibiting a certain type of trade restriction without product limitation (say, generally all import restrictions) must give way to an explicit right or even obligation in an environmental convention to restrict trade in a specified type of product? Equally, could it not be said that because of the

<sup>82</sup> See, e.g., DENYS SIMON, L'INTERPRÉTATION JUDICIAIRE DES TRAITÉS D'ORGANISATIONS INTERNATIONALES 378 (1981). He states that

l'accord de volontés qui a présidé à la conclusion de la convention ne s'est pas épuisé dans la rédaction d'un texte; l'application d'une telle convention suppose nécessairement le renouvellement permanent de l'adhésion des Etats membres au contenu de normes juridiques dont l'instrument signé ne constitue qu'une expression solennelle, mais, par essence, éphémère.

<sup>83</sup> For the proposition that it is the time of conclusion that counts, not the time of entry into force, see E. W. Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty*, 1998 BRIT. Y.B. INT'L L. 75. Note, for example, that if one were to take the singular act of conclusion of a multilateral treaty seriously, it could well be argued that GATT 1947 (as incorporated without any change in GATT 1994) remains, pursuant to Article II:4 of the WTO Agreement, a “legally distinct” instrument concluded not in 1994, but in 1947, so that in terms of timing, GATT remains the earlier treaty vis-à-vis, for example, pre-1994 environmental treaties. At the same time, new WTO agreements (such as the 1994 SPS Agreement) would then be later in time, an absurd result with respect to “continuing treaties.”

<sup>84</sup> Such “continuing treaties” are, indeed, “continuing acts,” as referred to in Article 14(2) of the ILC Draft Articles 2000, *supra* note 15. See Joost Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 1995 BRIT. Y.B. INT'L L. 415. In support, see the references in note 254 *infra*.

<sup>85</sup> Such as the very first preambular paragraph to the WTO Agreement (referring to “the objective of sustainable development”) and the opinions expressed by GATT secretariat experts during the preparation of environmental conventions, stating that these conventions were consistent with GATT rules. Cases in point are the Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 UNTS 3; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 UST 1087, 993 UNTS 243 [hereinafter CITES]; see Housman & Goldberg, *supra* note 78, at 303; TRADE MEASURES, *supra* note 78, ch. III. In extreme cases a conflict of norms may even be unresolvable and constitute a lacuna as a result of which a judge must pronounce a *non liquet*.

<sup>86</sup> Elements of Article 41 of the Vienna Convention, *supra* note 7, may also turn out to be decisive, see text at note 93 *infra*.

further-reaching nature and special character of EC treaties *ratione personae* (i.e., as treaties between a limited number of like-minded states), WTO rules should give way, as between EC member states, to these treaties.<sup>87</sup> Although for reasons of legal certainty, a presumption could be established in favor of the theoretically “later-in-time rule” (if such a determination in time is even possible),<sup>88</sup> this presumption should be rebuttable concerning continuing treaty norms, not only by referring to an explicit conflict clause in either treaty, but also by referring to more implicit intentions of the parties to be deduced, for example, from the logic of one treaty’s being more special than another.<sup>89</sup> Making the *lex posterior* rule rebuttable with respect to continuing treaty norms would not contravene the language of Article 30. Indeed, in these cases, no “successive treaties” exist, only “simultaneous treaties,” so that arguably Article 30 does not apply at all.

*WTO rules and post-1994 rules of international law.* As pointed out above,<sup>90</sup> the universe of international law relevant to the WTO was not exhausted in April 1994. The WTO was not created in a vacuum (it emerged in the context of general international law and other treaties), nor does its legal existence continue in a vacuum. As much as the WTO treaty altered the landscape of international law in April 1994, so post-1994 rules can change the universe of law relevant to the WTO. WTO members can conclude, and have indeed concluded, new treaties that may have an impact on the WTO treaty. These new, post-1994 treaties may simply add to or confirm preexisting rules, but they may also terminate, contradict, or suspend WTO rules. Insofar as they conflict with existing WTO rules, the new treaty rules may prevail over the contradictory WTO rules or may, in contrast, have to give way to such WTO rules. Everything will depend, again, on the conflict rules set out in the WTO treaty, those in the new post-1994 treaty,<sup>91</sup> or those of general international law outlined earlier. Of course, only WTO members that agreed to the new treaty can be bound by it. The rights and obligations of WTO members that are not parties to the new treaty cannot be affected (*pacta tertiis*).

Special attention must be given to what is referred to in international law as inter se modifications of the WTO treaty. Treaty modification refers to the situation where only some of the parties to a multilateral agreement conclude an inter se agreement to modify the treaty as between themselves. In contrast to amendment,<sup>92</sup> for example, the WTO treaty does not provide for an equally extensive *lex specialis* contracting out of general international law rules on modification. As a result, in most cases one must “fall back” on these rules of general international law. In this regard, Article 41 (1) of the Vienna Convention provides as follows:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:

<sup>87</sup> That is, of course, to the extent EC rules are not prohibited by WTO rules, in which case WTO rules should prevail over EC rules. The situation envisaged here is rather one where an EC member state would invoke a right under WTO rules to restrict trade that contradicts an obligation under EC rules to promote free trade (EC rules being generally more advanced in terms of trade liberalization).

<sup>88</sup> After all, in the Vienna Convention, *supra* note 7, no direct reference is made to *lex specialis* (except for rules of international organizations, Article 5). To read the requirement of “same subject-matter” in Article 30 as incorporating the *lex specialis* rule is not convincing. If a conflict between two rules does arise, *see* text at note 104 *infra*, they must necessarily relate to the same subject matter (even if one is more special than the other). *See* OPPENHEIM, *supra* note 50, at 1212 n.2; Vierdag, *supra* note 83, at 100.

<sup>89</sup> It is difficult to speak of *lex specialis* as a genuine and decisive legal rule on how to solve conflict. Here, it is rather a rule of logic that may provide information on the “current expression of consent” of the parties.

<sup>90</sup> *See* category 5 rules in text at note 40 *supra* and *supra* note 37.

<sup>91</sup> *See*, for example, the preamble to the Cartagena Protocol on Biosafety, *supra* note 67.

<sup>92</sup> WTO Agreement Art. X.

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.<sup>93</sup>

For WTO purposes, a distinction should be made between two types of inter se modifications: (1) those further liberalizing trade as between some WTO members only, for which the WTO treaty has explicit rules; and (2) those restricting trade in contrast to trade flows called for under the WTO treaty (again, as between some WTO members only), on which the WTO treaty is silent. An example of the former is a free trade arrangement. An example of the latter is an agreement between two WTO members not to invoke GATT Articles III and XI<sup>94</sup> vis-à-vis certain trade restrictions they both consider to be justified (even though, in principle, they are contrary to GATT rules, including, for example, Article XX).<sup>95</sup> This second category of inter se modifications could also include inter se agreements regarding a particular WTO dispute in which two WTO members decide not to invoke certain procedural rights granted to them in the DSU, or an inter se agreement between some members broadening the scope for “compulsory licensing” of essential drugs (in deviation of TRIPS Article 31).

The first type of inter se modification (further liberalization as between some WTO members only) is explicitly dealt with in the WTO treaty itself (another example of its contracting out of general international law). The WTO treaty prohibits such modifications unless they (1) extend the increased liberalization to all WTO members (in accordance with WTO rules on most-favored-nation treatment); or (2) conform with the conditions in GATT Article XXIV (GATS Article V) on regional arrangements. Being “prohibited by the treaty” in the sense of Article 41(1)(b) of the Vienna Convention, they cannot validly modify WTO rules as between the WTO members that concluded the inter se agreement, and a fortiori, they cannot affect the WTO rights and obligations of members that are not party to the inter se agreement.

In contrast, the WTO treaty does not provide for *lex specialis* regarding the second type of inter se modifications (mainly agreements to restrict trade as between some WTO members only). Indeed, nothing in the treaty prevents a limited number of WTO members from signing an agreement, for example, not to invoke GATT Articles III or XI in respect of certain trade restrictions they both believe to be justified (but which they know or fear do not meet, say, GATT Article XX). Since this kind of inter se modification is “not prohibited by the [WTO] treaty,” only the two conditions in Article 41(1)(b) of the Vienna Convention apply: (1) the inter se agreement may not “affect the enjoyment by the [other WTO members that are not parties to the inter se agreement] of their rights under the [WTO] treaty or the performance of their obligations”; (2) nor may that agreement relate to a WTO provision “derogation from which is incompatible with the effective execution of the object and purpose of the [WTO] treaty as a whole.”

<sup>93</sup> We assume that this article represents customary international law binding on all WTO members. The thrust of Article 41 is explicitly confirmed, for example, in Article 311(3) of the LOS Convention, *supra* note 23. See also Article 58 of the Vienna Convention on inter se suspension.

<sup>94</sup> Articles III and XI outlaw, respectively, discrimination regarding imports as opposed to domestic products and the imposition of quantitative border measures.

<sup>95</sup> Article XX allows for trade restrictions, for example, that are “necessary” to protect human health.

Another example is an inter se agreement between some WTO members only to impose an import ban on hormone-treated beef as between themselves alone, notwithstanding the WTO reports on European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Docs. WT/DS26/R, WT/DS26/AB/R (Feb. 13, 1998) (declaring such a ban inconsistent with the SPS Agreement) [hereinafter EC—Hormones].

With respect to the first condition, although an inter se derogation from WTO rules (say, an agreement to restrict trade as between two members where WTO rules prohibit such a restriction) will probably affect trade flows with certain third parties (most probably in a positive way), the WTO rights and obligations of these third parties must, and normally will, remain unaffected by the inter se agreement. If not, the agreement will contravene not only the first condition in Article 41(1)(b), but also the principle *pacta tertiis nec nocent nec prosunt*.<sup>96</sup> As for the second condition, it is difficult to predict exactly which WTO rights are so important that “giving them away” inter se (without affecting the rights of third parties) would threaten the effective execution of the object and purpose of the WTO treaty as a whole (if any such rights even exist). Indeed, since most WTO rights and obligations can be reduced in theory to reciprocal rights and obligations as between two WTO members,<sup>97</sup> it is difficult to see how inter se modifications that are not prohibited by the WTO treaty itself could nevertheless prejudice “the effective execution of the object and purpose of the treaty as a whole.”<sup>98</sup>

This reference to “the effective execution of the object and purpose of the treaty as a whole” is reminiscent of the distinction introduced by Sir Gerald Fitzmaurice between treaties imposing obligations of (1) a reciprocal nature; (2) an interdependent nature; and (3) an integral nature.<sup>99</sup> The Vienna Convention on Diplomatic Relations is named as an example of a “reciprocal” treaty, in which the obligations, like most WTO treaty provisions, can be reduced to a bilateral state-to-state relationship. The example given of an “interdependent” treaty is a disarmament treaty. There, obligations are not purely bilateral, and the performance of one party’s obligations depends on performance by all the other parties. Whenever one party violates its obligations, it necessarily does so toward all the others and further performance would be of little use. Finally, the 1948 Genocide Convention serves as an example of an “integral” treaty. The binding nature of the obligations in question is autonomous and absolute. The treaty cannot be reduced to state-to-state obligations, nor does it depend on the performance of other parties. Inter se agreements modifying “interdependent” and, in particular, “integral” treaties are most likely to affect the rights of third parties, as well as be incompatible with “the effective execution of the object and purpose of the treaty as a whole.”<sup>100</sup> Inter se agreements modifying “reciprocal” agreements, in contrast, are less prone to have this effect. In this light, many obligations in environmental treaties arguably have an “interdependent” (some even an “integral”) nature, whereas most obligations in human rights treaties might be seen as falling into the class of “integral” obligations. Hence, inter se modifications of these (“interdependent” or “integral”) environmental and human rights treaties (including modifications by the WTO treaty itself) might have difficulty passing the test of Article 41 of the Vienna Convention—much more, indeed, than modifications of the “reciprocal” WTO treaty, for example, by an inter se environmental or human rights agreement. Since Article 30(5) of the Vienna Convention

<sup>96</sup> If the rights of a third party are nevertheless affected, this party can bring a claim before a WTO panel, which should enforce its WTO rights over and above the inter se agreement to which the WTO member in question is not a party. See *infra* part II.

<sup>97</sup> Even if these rights and obligations derive from a multilateral treaty. The system of WTO countermeasures provides proof of how “bilateral” in nature the WTO still is, as countermeasures take the form only of state-to-state “suspensions of concessions or other obligations,” not collective sanctions. Pauwelyn, *supra* note 26, at 342.

<sup>98</sup> The ILC commentary to Article 41 of the Vienna Convention, *supra* note 7, notes that “[h]istory furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States.” The one example provided is that of “an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty.” DIETRICH RAUSCHNING, *THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES* 303 (1978).

<sup>99</sup> [1958] 2 Y.B. Int’l L. Comm’n 27–28, 41–45, UN Doc. A/CN.4/SER.A/1958/Add.1, in particular the suggested Article 19.

<sup>100</sup> The language of Article 41(1)(b)(ii) actually stems from Reservations to the Convention on Genocide, Advisory Opinion, 1951 ICJ REP. 23 (May 28) (proscribing reservations to a treaty that are not compatible with its object and purpose), and is confirmed in Articles 19(c), 58, and 60 of the Vienna Convention.

makes reference to Article 41, one must keep these considerations prominently in mind when applying the *lex posterior* rule as well.

If (but only if) inter se modifications of the WTO treaty meet the conditions set out above, they will validly change the legal relationship between the WTO members that are party to the modification.<sup>101</sup> Once again, however, the inter se modification cannot alter the rights and obligations of third parties.

The landscape of treaty rules is not the only one that may be changed since 1994. General international law, in particular customary law, may also be modified. In that event, the conflict rule set out above applies, that is, in case of conflict the later custom must prevail over the earlier treaty norm unless the intention to continue applying the treaty as *lex specialis* can be shown.<sup>102</sup> Since most WTO rules are continuing treaty norms, this intention will normally be readily found. As Kontou observed: “A prior treaty that was intended to be an exception from the general regulation of the subject-matter will ... remain in force as originally drafted, notwithstanding any subsequent developments in custom.”<sup>103</sup> For example, if customary law rules on countermeasures were to change, the DSU provisions on “suspension of concessions,” which contract out of some of these customary rules and continue to do so given the “continuing” nature of the DSU, would not, in my view, be required to give way to these changes. In contrast, if certain principles on the settlement of disputes not contracted out from by the WTO treaty (say, rules on burden of proof) were to change, these changes would necessarily also apply to the WTO.

#### *Defining Conflicts in International Law*

Much has been said so far on how to solve conflicts between rules of international law. A logically prior step, however, is to define when two rules actually contradict each other. I pointed out earlier (concerning the creation of treaties in the context of general international law) that international law recognizes a presumption against conflict.<sup>104</sup> The presumption derives from the fact that all international law is created in the context of preexisting law, which continues to exist unless new law overturns it. The presumption is grounded on the absence of any inherent legal hierarchy between existing and new rules of international law (other than *jus cogens*). In the context of assessing whether two specific treaty norms are indeed in conflict, it means that states negotiating a new treaty will have the old treaty in mind and continue to abide by it unless explicit wording to the contrary shows the drafters’ intention to deviate from it. Thus, it is assumed that the later rule builds on and follows what the earlier rule has said.<sup>105</sup> In most cases, potential conflicts can be “interpreted away.”<sup>106</sup> As already mentioned, Article 31(3)(c) of the Vienna Convention directs that, in interpreting WTO rules, account should be taken of “any relevant rules of international law applicable in the relations between the parties.” First of all, several broadly worded exceptions in the WTO treaty allow for trade restrictions resulting from, for example, environmental standards (such as GATT Article XX). These WTO exceptions must be read, to the extent possible, to harmonize with other rules of international law. Second, many other WTO rules, as well as non-WTO rules that allegedly conflict with WTO rules, are open textured and allow for several interpretations. If a harmonious interpretation of two allegedly conflicting norms is feasible (without exceeding the realms of treaty interpretation and

<sup>101</sup> The effect of such changes on WTO dispute settlement is discussed in the section on practical consequences of the approach suggested here, *infra* p. 566.

<sup>102</sup> See text at note 17 *supra*.

<sup>103</sup> KONTOU, *supra* note 17, at 24.

<sup>104</sup> See text at note 49 *supra*.

<sup>105</sup> See Indonesia—Certain Measures Affecting the Automobile Industry, WTO Doc. WT/DS54/R, para. 14.28 & n.649 (July 23, 1998) [hereinafter Indonesia—Autos].

<sup>106</sup> See text at note 207 *infra*.



actually changing the treaty), such an interpretation must be preferred. Only when a harmonious reading is not feasible does a legal conflict arise. Because treaty interpretation permits this often ample room for maneuvering (of both the WTO and the non-WTO rules), genuine legal conflicts should be rather scarce.

The exact definition of conflict in international law is unclear. Wilfred Jenks, for example, argues that “[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.”<sup>107</sup> The WTO Appellate Body in *Guatemala—Cement* seems to follow this strict definition, defining conflict as “a situation where adherence to the one provision will lead to a violation of the other provision.”<sup>108</sup> This means, in effect, that in all other cases (not involving mutually exclusive obligations) the rule of international law that imposes the (strictest) obligation always prevails (not because of rules on how to solve conflict, but as a result of the very definition of conflict).

In my view, this definition of conflict is too strict. Imagine, for example, that a WTO rule imposes an obligation not to restrict certain trade flows, but a later non-WTO rule (say, an environmental convention) grants an explicit right to restrict trade. Under the strict definition of legal conflict, set out above, there would be no conflict. Indeed, complying with the WTO rule (not restricting trade flows) would not mean violating the later environmental rule. It would simply mean forgoing the right (to restrict trade) granted by the environmental rule. In the absence of a conflict, the *lex posterior* rule of Article 30 would not even be activated. Thus, the (stricter) WTO rule would simply apply over and above the new (more lenient) environmental rule, not as a result of conflict rules but as a result of the very definition of conflict. However, for the new environmental rule to have any effect, it should be recognized that in these circumstances as well there *is* conflict, namely, conflict between an obligation in the WTO and an explicit right granted elsewhere.<sup>109</sup> Here, too, the later-in-time rule should prevail, in principle. If not, one would consistently elevate obligations in international law over and above rights in international law. The approach adopted so far in the WTO on the definition of conflict (recognizing conflict only when one legal obligation prevents the fulfillment of another legal obligation) calls to mind analogies with the interplay of human rights treaties. Generally, a succession of human rights treaties can result only in giving individuals, the beneficiaries of human rights, an accumulation (not a loss) of human rights. Article 60 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides, for example: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”<sup>110</sup> But this principle of “accumulation only” in the field of human rights derives from a repeated and explicit conflict clause in human rights treaties (one that could arguably be considered part of special customary law in the field of human rights). WTO treaties, however (with the limited exception of TRIPS Article 2(2)<sup>111</sup>), contain no provision stating that whenever a state, or for that matter a trader, has been granted a right to free trade, that right can only be complemented by additional free trade rights but not detracted from by an opposing right of other states to restrict trade.

<sup>107</sup> C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 1953 BRIT. Y.B. INT'L L. 401, 426.

<sup>108</sup> *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R, para. 65 (Nov. 5, 1998); see also *Indonesia—Autos*, *supra* note 105, para. 14.99.

<sup>109</sup> This situation falls within the wider definition of conflict, as found in the panel report *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R, para. 7.159 (Sept. 25, 1997) [hereinafter *EC—Bananas*]. This panel included within the notion of conflict “the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.” In my view, this interpretation is correct.

<sup>110</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221.

<sup>111</sup> See note 72 *supra* and corresponding text.

Consequently, it must be possible for an explicit right to restrict trade,<sup>112</sup> agreed upon by certain or all WTO members either in or outside the WTO, to overrule a WTO obligation of free trade. The WTO treaty was not negotiated for the benefit only of exporters or free traders, the way human rights treaties were negotiated for the benefit of individuals. The WTO treaty provides for an overall framework regulating the trade relations between states. It must consequently take account of interests in favor of both trade liberalization and non-trade values necessitating trade restrictions.

In summing up part I of this article, we note that the thesis presented here gives entirely new meaning to the, at first sight, innocent statement that WTO law is part of public international law. The WTO is not a secluded island but part of the territorial domain of international law. In addition, this "membership" does not involve closed doors or sealed-off compartments but, rather, cross-fertilization. WTO law enriches public international law. In April 1994, it enhanced preexisting rights and obligations, and new WTO rules continue to do so today. But the reverse is equally true: public international law (to the extent the WTO has not contracted out of it) is enriching and continues to enrich WTO law. The relationship may not always be harmonious. In the event of genuine legal conflict, an appropriate definition of conflict and rules on how to solve it set out in the WTO treaty, the non-WTO treaty, or general international law must provide the solution. Apart from the prohibition on deviating from *jus cogens*, this solution must be derived first and foremost from the common intention of the parties to both treaties (obviously, a WTO member not bound by the non-WTO rule cannot be held to it). The WTO treaty itself provides very little guidance in this respect, so that conflict rules of general international law (in particular, Articles 30 and 41 of the Vienna Convention, but also elements related to *lex specialis*) will often be decisive in showing the way.

## II. THE ROLE OF PUBLIC INTERNATIONAL LAW IN WTO DISPUTE SETTLEMENT

International law lacks not only a central "legislator" and an inherent hierarchy of its rules (other than *jus cogens*),<sup>113</sup> but also a unified international "judiciary" to which all pertinent disputes could be referred.<sup>114</sup> The jurisdiction of an international court or tribunal cannot be presumed. It must be granted by the consent of states in explicit terms.<sup>115</sup> Peaceful settlement is the only available means to settle disputes.<sup>116</sup> However, general international law does not oblige states actually to settle disputes or, a fortiori, to submit all disputes to one given court. States are free to choose the court or tribunal they want.<sup>117</sup> The jurisdiction of an international adjudicator depends on the parties' consent. States may decide to authorize an ad hoc arbitrator to settle their dispute. In that case they will often specify, by consent, both the subject matter in dispute and the applicable law. States may also decide to create a standing judicial body (such as the ICJ, the International Tribunal for the Law of the Sea [ITLOS], and the WTO Appellate Body) and grant their consent *ex ante* for this body to hear not so much a given dispute but a certain type of dispute (for example, disputes on certain subjects or claims under a given convention). When doing so, states are required to specify, in advance, certain general procedural rules to be followed by the parties and the court in

<sup>112</sup> I stress that the right should be one that was granted or negotiated explicitly. The residual right in general international law sometimes referred to as "what is not prohibited is allowed," based on *S.S. Lotus* (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, cannot, of course, be sufficient to overrule a conflicting obligation.

<sup>113</sup> See text at notes 5–12 *supra*.

<sup>114</sup> There is, of course, the ICJ, the "principal judicial organ of the United Nations." UN CHARTER Art. 92. But the Court has compulsory jurisdiction only as between some states and as regards certain subject matters (such as those defined under the optional clause system of Article 36(2) of the ICJ Statute).

<sup>115</sup> For exceptions, see the section on implied jurisdiction *infra* p. 555.

<sup>116</sup> UN CHARTER Art. 2(3).

<sup>117</sup> *Id.*, Art. 33(1).

question. These general procedural rules or statutes may include a provision on the “applicable law.”<sup>118</sup> Whereas the consent to jurisdiction and the definition of the applicable law in ad hoc arbitration are mostly clear and precise, the reference *ex ante* to a standing judicial body often results in jurisdictional objections by the defending state and makes discussions on applicable law more frequent. Consequently, despite the lack of a general hierarchy of rules of international law, the need for explicit consent for legal claims to be brought before an international court or tribunal means that, in a sense, a “two-class society” does exist, namely, between rules of international law that can be judicially enforced before a court with compulsory jurisdiction and those that cannot.<sup>119</sup>

### *The Nature of WTO Dispute Settlement*

At first glance, one may doubt whether the DSU actually provides for the *judicial* settlement of disputes. First, contrary to the Appellate Body, WTO panels are not standing bodies but ad hoc tribunals created pursuant to predetermined procedures in the DSU. Panels must be established ad hoc for each case by the WTO Dispute Settlement Body<sup>120</sup> (they cannot be established by the mere will of the disputing parties). Still, their establishment is quasi-automatic pursuant to the negative consensus rule in DSU Article 6(1). In terms of their mode of establishment, panels could thus be qualified as encompassing a mixture between arbitration and judicial dispute settlement. Yet when it comes to their actual function and way of handling disputes, the DSU leaves no doubt that panels are judicial in nature. Second, the legal findings and conclusions of both panels and the Appellate Body culminate only in “recommendations” to the defending party. These recommendations must still be adopted by the Dispute Settlement Body to obtain their legally binding force as between the parties to the dispute. Once again, this body takes its decision by negative consensus, i.e., quasi-automatically (under DSU Articles 16.4 and 17.14). At most, this procedure could mean that the WTO judiciary includes the WTO Dispute Settlement Body. In practice, however, both panels and the Appellate Body are established, operate, and reach their legal conclusions in an entirely independent and law-based fashion. They are judicial tribunals in the international law sense.

WTO members granted compulsory jurisdiction to this WTO “judiciary” *ex ante* and on a claim-specific basis (claims under WTO covered agreements only). It was not granted general jurisdiction to adjudicate all trade disputes between WTO members (i.e., on a subject matter basis). Importantly, it is generally accepted that no counterclaims (not even counterclaims under WTO covered agreements) can be made. If a defendant wishes, in turn, to lodge a complaint about the acts of the plaintiff, it must start a new procedure.<sup>121</sup> The importance of the WTO judiciary’s holding compulsory jurisdiction for all WTO claims cannot be overestimated.<sup>122</sup> As noted above, WTO rules have an “all-affecting” character, which means that even disputes with a relatively limited trade aspect can be brought before the WTO (such as the trade aspects of human rights disputes and disputes over high seas fishing or territorial borders<sup>123</sup>). In addition, compulsory jurisdiction is available to a state against which

<sup>118</sup> ICJ STATUTE Art. 38; LOS Convention, *supra* note 23, Art. 291.

<sup>119</sup> The fact that a rule cannot be judicially enforced does not mean, though, that it will not be complied with. Compliance mechanisms other than judicial settlement may be as effective or even more effective in certain cases than third-party adjudication.

<sup>120</sup> That is, a political WTO body on which all WTO members, without exception, have a seat.

<sup>121</sup> DSU Art. 3.10.

<sup>122</sup> Also, for example, as compared to Part XV of the LOS Convention. See, in particular, the recent arbitration award, Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Jurisdiction and Admissibility, 39 ILM 1359 (2000), at <<http://www.oceanlaw.net/cases/tuna2a.htm>> [hereinafter Bluefin Tuna Award], where the arbitrators held that they did not have jurisdiction.

<sup>123</sup> See *supra* notes 33, 34, 35.

trade restrictions are imposed. But a state wanting to enforce compliance, for example, with most environmental rules has no recourse to international jurisdiction. In the alternative, trade sanctions can be imposed, but there again the victim of the sanctions (i.e., the alleged violator of the environmental rule) may complain to the WTO. The state imposing the sanctions cannot in most instances resort, say, to UNEP for judicial settlement.<sup>124</sup> All of these factors increase the potential and importance of interplay between the WTO and other rules of international law in WTO dispute settlement.

### *The Jurisdiction of WTO Panels*

*Substantive jurisdiction.* As seen, the jurisdiction of WTO panels is limited to claims under WTO covered agreements. Under its Article 1.1, the DSU applies to “disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU].” These provisions allow for so-called violation complaints (claims of violation of WTO rules), nonviolation complaints, and situation complaints<sup>125</sup> (hereinafter referred to jointly as claims under WTO covered agreements or WTO claims). DSU Article 3.2 confirms that the jurisdiction of WTO panels is limited to claims under WTO covered agreements, stating that the DSU mechanism “serves to preserve the rights and obligations of Members under the covered agreements.” The standard terms of reference of WTO panels are

[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB . . . and 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). (DSU Art. 7.1)

Finally, DSU Article 11 instructs panels to “make an objective assessment of . . . the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Consequently, no claims of violation of rules of international law other than those set out in WTO covered agreements can be brought before a WTO panel. Similarly, a WTO panel does not have jurisdiction to consider claims under WTO rules other than those included in WTO covered agreements (such as the ministerial decisions and declarations that are part of the Final Act, but not of the WTO Agreement; or rules set out in a mutually acceptable solution agreed upon in the context of a WTO dispute). Nor does it have jurisdiction to rule on claims of violation of non-WTO rules, such as environmental or human rights conventions or rules of general international law (including rules of customary law and/or *ius cogens*). A WTO panel may only decide these other claims if the parties to the dispute in question grant it this jurisdiction ad hoc and by mutual consent, for example, by explicitly agreeing on special terms of reference pursuant to DSU Article 7.3 or by referring the dispute, including these other claims, to arbitration under DSU Article 25.<sup>126</sup>

Although a WTO panel has jurisdiction only over WTO claims, it should be recalled that some WTO rules (of category 3 outlined above<sup>127</sup>) explicitly confirm and incorporate pre-existing non-WTO treaty rules. These non-WTO rules have thereby become WTO rules that can be judicially enforced by a panel.<sup>128</sup> Other WTO rules do not incorporate non-WTO rules but do refer to them explicitly. In this way these non-WTO rules can become part of

<sup>124</sup> *But see supra* note 119.

<sup>125</sup> *See, e.g.*, GATT Art. XXIII(1)(a), (b), (c).

<sup>126</sup> DSU Article 25 is not limited to claims under WTO covered agreements. The only requirement is that the disputes “concern issues that are clearly defined by the parties.” DSU Art. 25.1.

<sup>127</sup> *See* text at note 39 *supra*.

<sup>128</sup> *See supra* note 42.

a WTO claim (though not having been incorporated, they cannot be judicially enforced independently of other WTO rules). An example of “incorporation” is the TRIPS Agreement, which assimilates, *inter alia*, provisions of the Bern, Paris, and Rome Conventions. Examples of “explicit reference” are the SPS Agreement, the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Subsidies and Countervailing Measures (SCM Agreement<sup>129</sup>), which mention international standards adopted in the Codex Alimentarius Commission (SPS Agreement), the International Agency for Research on Cancer<sup>130</sup> (TBT Agreement), and the Arrangement on Guidelines for Officially Supported Export Credits of the Organisation for Economic Co-operation and Development (SCM Agreement). The incorporated rules in the TRIPS Agreement are legally binding as such in the WTO.<sup>131</sup> The non-WTO rules in the other WTO Agreements serve only as a benchmark or basis for the assessment of a distinct WTO-specific obligation. Thus, the international standards referred to in the SPS Agreement (say, codex standards) cannot serve as the basis for an independent claim of breach before a WTO panel, but when WTO members base their sanitary measures on such standards, they will be presumed to conform with the SPS Agreement as well.<sup>132</sup>

*Implied or incidental jurisdiction.* Even though the substantive jurisdiction of any international court or tribunal must be granted explicitly by the parties involved, once such a forum has been seized of a specific matter, it has certain implied jurisdictional powers that derive directly from its very nature as a judicial body. This so-called incidental or implied jurisdiction is also inherent in the mandate of WTO panels (as international bodies of a judicial nature). Elements of this incidental jurisdiction are the jurisdiction (1) “to interpret the submissions of the parties” in order to “isolate the real issue in the case and to identify the object of the claim”,<sup>133</sup> (2) to determine whether one has substantive jurisdiction to decide a matter (the principle of *la compétence de la compétence*); and (3) to decide whether one should refrain from exercising validly established substantive jurisdiction.<sup>134</sup> To this one could add the jurisdiction to decide all matters linked to the exercise of substantive jurisdiction and inherent in the judicial function<sup>135</sup> (such as claims under rules on burden of proof, due process, and other general international law rules on the judicial settlement of disputes or state responsibility, including the power to order cessation, assurances of non-repetition, and reparation for breach).<sup>136</sup> The jurisdiction to indicate provisional measures, explicitly conferred on some courts and tribunals,<sup>137</sup> is not generally recognized as part of their implied jurisdiction.<sup>138</sup>

<sup>129</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 1, at 138 [hereinafter TBT Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra*, at 264 [hereinafter SCM Agreement].

<sup>130</sup> This agency is referred to, for example, in European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products, WTO Doc. WT/DS135/R, para. 8.186 (Apr. 5, 2001) [hereinafter EC—Asbestos]. Whereas the SPS Agreement refers to three specific “sister institutions” (Codex Alimentarius Commission, International Office of Epizootics, and International Plant Protection Convention), *see* SPS Agreement Art. 3.1 & Annex A, para. 3, the TBT Agreement refers to international standards developed by any “[b]ody or system whose membership is open to the relevant bodies of at least all Members,” TBT Agreement Art. 2.4 & Annex 1, para. 4.

<sup>131</sup> See, for example, with respect to the Bern Convention, United States—Section 110(5) of the US Copyright Act, WTO Doc. WT/DS160/R (July 27, 2000) [hereinafter U.S.—Copyright].

<sup>132</sup> SPS Agreement Arts. 3.1, 3.2.

<sup>133</sup> Nuclear Tests (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 262, para. 29 & 427, 466, para. 30.

<sup>134</sup> The WTO jurisprudence outlined *infra* at p. 563 supports this conclusion.

<sup>135</sup> See the very broad statements on the ICJ’s implied jurisdiction in Northern Cameroons (Cameroon v. UK), 1963 ICJ REP. 15, 29 (Dec. 2); Nuclear Tests, 1974 ICJ REP. at 259–60, para. 23 & 463, para. 23.

<sup>136</sup> It could be argued that to the extent the WTO treaty did not contract out of the general international law principle prescribing reparation for breach of international law, WTO panels, in their enforcement of WTO claims, should be empowered to recommend the granting of reparation as part of their implied jurisdiction. *See* text at note 45 and note 51 *supra*.

<sup>137</sup> ICJ STATUTE Art. 41; LOS Convention, *supra* note 23, Art. 290.

<sup>138</sup> *See* Hugh Thirlway, *The Law and Procedure of the ICJ 1960–1989*, 1998 BRIT. Y.B. INT’L L. 1, 19.

The Appellate Body confirmed that WTO panels have *la compétence de la compétence* in *United States—Anti-Dumping Act of 1916*, where it referred 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>139</sup> The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case (in deciding, contrary to the ruling of the trial chamber, that it did have jurisdiction to review the validity of its establishment by the Security Council) noted that this implied jurisdiction “is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive document of . . . tribunals.” Indeed, observed the chamber, “[t]o assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council ‘intended’ to entrust it with, is to envisage the International Tribunal exclusively as a ‘subsidiary organ’ of the Security Council.”<sup>140</sup> In addition, the implied jurisdiction to decide whether one should refrain from exercising substantive jurisdiction finds reflection in WTO jurisprudence in the prominent role of the so-called principle of judicial economy. This principle was referred to in *United States—Shirts and Blouses* as providing that “[a] panel need only address those claims which must be addressed in order to resolve the matter in issue.”<sup>141</sup> It should be stressed that the question of jurisdiction is to be examined by the court or tribunal *proprio motu*.<sup>142</sup> In *United States—Anti-Dumping Act of 1916*, the Appellate Body correctly rejected the EC argument that the United States had raised a jurisdictional objection before the panel in an untimely manner since an international tribunal “is entitled to consider the issue of its own jurisdiction on its own initiative.”<sup>143</sup>

*WTO claims in a wider dispute mainly about non-WTO matters.* The issue may arise as to whether a WTO panel has jurisdiction to hear WTO claims even though the underlying or predominant element of disagreement derives from other rules of international law that cannot be judicially enforced in the WTO (such as rules on the law of the sea, territorial delimitation, and human rights). This jurisdictional issue must be distinguished from the issue of the role of non-WTO rules before a WTO panel once that panel has decided to hear a case (discussed further below<sup>144</sup>). First of all, recall that a WTO panel has the implied jurisdiction to decide whether, and to what extent, it has substantive jurisdiction over a given dispute. What is more, it must exercise this jurisdiction on its own initiative. Second, no burden of proof is involved in establishing jurisdiction. As indicated by the ICJ in *Border and Transborder Armed Actions*, “The existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law . . . .”<sup>145</sup> With respect to questions of law, the principle *jura novit curia* applies: the judge knows the law; it is not for either party to establish it. Still, an important question remains: whether in case of doubt the Court should

<sup>139</sup> *United States—Anti-Dumping Act of 1916*, WTO Doc. WT/DS136/AB/R, para. 54 n.30 (Sept. 26, 2000).

<sup>140</sup> *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 18, 15 (Oct. 2, 1995). Prof. Georges Abi-Saab, now a member of the WTO Appellate Body, was a judge on this appeals chamber.

<sup>141</sup> *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses*, WTO Doc. WT/DS33/AB/R, at 19 (May 23, 1997) [hereinafter *U.S.—Shirts and Blouses*]. In the Appellate Body report *Australia—Measures Affecting the Importation of Salmon*, WTO Doc. WT/DS18/AB/R, para. 223 (Nov. 6, 1998), this principle was further refined as meaning, in the WTO context:

A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members.”

<sup>142</sup> *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 ICJ REP. 69, 76, para. 16 (Dec. 20). There, the ICJ opened a phase of the proceedings devoted to jurisdiction and admissibility on its own initiative.

<sup>143</sup> *United States—Anti-Dumping Act of 1916*, *supra* note 139, para. 54 n.30. The Appellate Body agreed with the panel that “some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.” *Id.*, para. 54 (quoting panel report, WTO Doc. WT/DS136/R, para. 5.17 (Sept. 26, 2000)).

<sup>144</sup> See p. 559 *infra*.

<sup>145</sup> 1988 ICJ REP. at 76, para. 16.

decide that it has jurisdiction or decline jurisdiction instead. On this issue, the ICJ noted that it will “only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction.”<sup>146</sup> Under WTO jurisprudence, the level or degree of proof required may be slightly lower, amounting to a *presumption* (in favor of jurisdiction) not sufficiently rebutted by the defendant.<sup>147</sup>

With these considerations in mind, one can imagine two possible solutions to the problem of panel jurisdiction over predominantly non-WTO disputes. First, it could be submitted that as soon as a WTO member brings a claim pursuant to the consultation and dispute settlement provisions of WTO covered agreements (i.e., a WTO claim), a WTO panel has jurisdiction to hear and decide the claim notwithstanding the fact that the wider dispute underlying the claim also or even predominantly involves other rules of international law. In most (if not all) cases, this will be the preferred solution. The WTO does not provide for compulsory dispute settlement only in the event a WTO member *wants* to bring a WTO claim to the WTO. DSU Article 23.1 prescribes that “[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objectives of the covered agreements, they shall have recourse to, and abide by, the [DSU].” A WTO panel has interpreted this provision as being an “exclusive dispute resolution clause.”<sup>148</sup> DSU Article 11 also supports the competence of panels to examine WTO claims, even if non-WTO rules are of crucial or higher importance in the context of the wider dispute. This provision directs panels to “make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”<sup>149</sup> The standard terms of reference of WTO panels provide to similar effect (DSU Art. 7.1).

Support for such “salami slicing” of disputes<sup>150</sup> can be found in the *Nicaragua* case, where the ICJ declared that it had jurisdiction over certain claims under customary international law brought by Nicaragua against the United States. The Court did so even though the United States had not accepted ICJ jurisdiction over “disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court,” and even though the multilateral treaty rules largely overlapped with the customary law invoked by Nicaragua.<sup>151</sup> Moreover, in the *Hostages* case the ICJ found that “no provision of the Statute or Rules contemplates that the Court should decline to take

<sup>146</sup> *Id.* (quoting *Chorzów Factory* (Ger. v. Pol.), Jurisdiction, 1927 PCIJ (ser. A) No. 9, at 32 (July 26)).

<sup>147</sup> See Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?* 1 J. INT’L ECON. L. 227 (1998).

<sup>148</sup> United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R, para. 7.43 (Jan. 27, 2000) [hereinafter U.S.—Section 301]. But see the limited exception provided for in SPS Agreement Art. 11.3, *supra* note 73.

<sup>149</sup> Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT’L & COMP. L.Q. 647, 653 (1998), refers to DSU Article 11 as an “implied powers” clause that “should be interpreted broadly so that the panels and Appellate Body can decide all aspects of a dispute.”

<sup>150</sup> A term used by Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT’L & COMP. L.Q. 37, 41 (1997).

<sup>151</sup> The Court here quoted a U.S. reservation to ICJ jurisdiction. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, para. 67 (Nov. 26) [hereinafter *Nicaragua*]. On the overlap of treaty and custom, see *Nicaragua, supra*, Merits, 1986 ICJ REP. 14, para. 175 (June 27). For forceful critiques, see the dissenting opinions by Judges Schwebel, 1984 ICJ REP. at 613–14, 616 (noting, for example, that “Nicaragua’s claims are so integrally and essentially bound up with the treaty provisions on which they rely that, if those provisions cannot be pleaded, there is no case which the Court can consider,” and calling the “salami-slicing” approach in this instance “an unreal, artificial, highly constricted—and yet unduly unconstrained—process”); Oda, 1986 ICJ REP. at 219; and Jennings, *id.* at 530. Oda had a strong point in saying that “the Court should have proved, not that it can apply customary and general international law independently, but that the dispute referred to it in the Applicant’s claims had *not* arisen under these multilateral treaties.” In that case, the Court actually did somewhat confuse the issue of applicable law (custom versus treaty) with that of jurisdiction (over certain disputes).

cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.”<sup>152</sup> Thomas Schoenbaum mentions the possibility of requesting an ICJ advisory opinion if a WTO panel must decide a matter of non-WTO law, a procedure he considers “extremely cumbersome.”<sup>153</sup> In assessing non-WTO rules, however, panels could be assisted by other international tribunals or organizations through the operation of DSU Article 13.1, which allows a panel to “seek information and technical advice from any individual or body which it deems appropriate.”<sup>154</sup>

As a second way of dealing with predominantly non-WTO disputes, one could argue that in certain extreme cases the dispute no longer genuinely concerns WTO claims (even though such claims could technically be made) but, rather, other rules of international law that the WTO claims are inextricably linked to and that these WTO claims are dependent on to be decided.<sup>155</sup> In such extreme cases it could then be submitted that the history, prior procedures, and substantive content of the dispute indicate that the real issue of the case (i.e., the genuine object of the claim) is related to non-WTO claims as to which a WTO panel does not have jurisdiction. On these grounds, the WTO panel could either decide that it does not have substantive jurisdiction over the dispute or find that it does have jurisdiction but does not consider it appropriate to exercise this jurisdiction.<sup>156</sup> In this respect, one should recall that WTO panels, like any international court or tribunal, have the implied jurisdiction “to interpret the submissions of the parties” so as to “isolate the real issue in the case and to identify the object of the claim.”<sup>157</sup> As was confirmed in WTO jurisprudence on the principle of judicial economy, WTO panels also have the implied jurisdiction to decide whether or not to exercise substantive jurisdiction even if, in theory, this jurisdiction was conferred upon them. Support for this second solution or “incorporation” (*auxiliarum principali sequitur*) approach<sup>158</sup> can be found in the recent *Southern Bluefin Tuna* arbitration award. There, the tribunal found that the dispute, “while centered in the 1993 [trilateral Convention for the Conservation of Southern Bluefin Tuna], also arises under [the LOS Convention].” However, it added that “[t]o find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the [1993 Convention] would be artificial.”<sup>159</sup> Since the tribunal later declared that it did not have jurisdiction over the 1993 Convention part of the dispute, it automatically declined jurisdiction over the LOS Convention part (notwithstanding the compulsory jurisdiction in Part XV of the latter) on the ground of its “single dispute” theory.

Although for present purposes the sticking point is a related subject matter or claim over which WTO panels have no jurisdiction, it is instructive to recall that the ICJ has found that it cannot decide a case when doing so would necessarily imply making a ruling with respect

<sup>152</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 19, para. 36 (May 24).

<sup>153</sup> Schoenbaum, *supra* note 149, at 653 n.43.

<sup>154</sup> See, e.g., U.S.—Copyright, *supra* note 131 (which requested information from WIPO).

<sup>155</sup> See the dissenting opinion of Judge Schwebel in *Nicaragua*, *supra* note 151. Recall also that a WTO panel cannot hear counterclaims, a restriction that may limit its ability actually to resolve a dispute, see *Chile—Swordfish*, *supra* note 35 (in the WTO only the European Community complained, but in ITLOS both parties submitted claims).

<sup>156</sup> See William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?* 4 J. INT’L ECON. L. 95 (2001) (discussing what he termed “issue avoidance techniques” such as standing, mootness, ripeness, political appropriateness, and judicial economy).

<sup>157</sup> *Supra* note 133 and corresponding text. In the more recent *Fisheries Jurisdiction* case, the ICJ redefined Spain’s complaint relating to Canada’s lack of entitlement to exercise jurisdiction on the high seas into a dispute “arising out of or concerning conservation and management measures” regarding which Canada had made a reservation. On that basis, the Court found that it did not have jurisdiction to hear the case. *Fisheries Jurisdiction (Spain v. Can.)*, Jurisdiction, 1998 ICJ REP. 429, 437 (Dec. 4).

<sup>158</sup> The Appellate Body used this approach, not to decide on jurisdiction but on which WTO rules to apply, in *EC—Asbestos*, *supra* note 130, WTO Doc. WT/DS135, para. 62 (Mar. 12, 2001).

<sup>159</sup> *Bluefin Tuna Award*, *supra* note 122, paras. 52, 54. But see the forceful separate opinion by Sir Kenneth Keith.



to states regarding which it has no jurisdiction.<sup>160</sup> In any event, for a WTO panel to dismiss a case because it has no substantive jurisdiction, or because it does not consider it appropriate to exercise this jurisdiction, is not the same as proclaiming a *non liquet*. In a *non liquet* a panel would find that it has substantive jurisdiction and that its exercise would be appropriate, but nevertheless conclude that it cannot come to a substantive legal conclusion on the ground that there is no law to be applied or that the applicable law is unclear. WTO dispute settlement, as a claim-specific mechanism, generally precludes *non liquet* (which is often portrayed as prohibited under general international law<sup>161</sup>). A WTO claim is either valid (and the complainant wins) or unfounded (and the complainant loses). A panel should not normally be allowed to conclude that the WTO rules invoked are unclear (*jura novit curia*) and on that basis proclaim a *non liquet*.

The need for a WTO panel actually to decide whether non-WTO rules have been violated could arise particularly in a so-called nonviolation case. In assessing whether certain governmental measures, though not violative of WTO rules, have affected the legitimate expectations that could have been derived from a trade concession, a WTO panel could be called upon to refer to such non-WTO rules as international competition law or international labor or environmental law. A complainant could invoke these non-WTO rules along the following lines:

When we obtained your trade concession (duty-free access for our computers), we did so in the expectation that you would continue to respect international labor standards (in particular, not to employ children under the age of ten). Now you have violated these non-WTO rules (children under the age of ten assemble computers in your country). This violation of labor standards does not violate WTO rules as such, but it nullifies the trade value of your concession, a nullification that we could not have foreseen (you are now able to produce much cheaper computers than before and outsell our computers, which are produced with full respect for international labor standards). Therefore, in the WTO we should be compensated for this nullification under the heading of nonviolation.

The nonviolation claim in our example may thus require a WTO panel to decide whether employing children under the age of ten violates non-WTO international labor standards that are binding as between the disputing parties. The Appellate Body, however, has recently confirmed that the nonviolation remedy “should be approached with caution and should remain an exceptional remedy.”<sup>162</sup> This trend goes against endorsing the broad interpretation paraphrased above.

#### *The Applicable Law Before a WTO Panel*

Once it has been determined that a WTO panel has jurisdiction to hear a case, the panel must ascertain the law to be applied so as to resolve the WTO claims concerned. The applicable law before a WTO panel is delimited by four factors:

(1) *The claims that can be brought before a WTO panel.* Because of the limited substantive jurisdiction of WTO panels, only legal claims under WTO covered agreements may be examined. A panel’s mandate covers only claims set out with sufficient clarity in the

<sup>160</sup> Monetary Gold Removed from Rome in 1943 (Italy v. Fr., UK, & U.S.), 1954 ICJ REP. 19, 32 (June 15) (stating that “Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.”) This finding was confirmed more recently in East Timor (Port. v. Austl.), 1995 ICJ REP. 90, 102, para. 28 (June 30). See also Turkey—Restrictions on Imports of Textile and Clothing Products, WTO Doc. WT/DS34/R, paras. 9.4–13 (Nov. 19, 1999) [hereinafter Turkey—Textiles].

<sup>161</sup> See Prosper Weil, “The Court Cannot Conclude Definitively . . .” Non Liqueur Revisited, 36 COLUM. J. TRANSNAT’L L. 109 (1997). For a potential exception, see *supra* note 85.

<sup>162</sup> EC—Asbestos, *supra* note 158, para. 186.

panel request.<sup>163</sup> Counterclaims are not allowed within the same procedure.<sup>164</sup> A panel may also be required to make other findings pursuant to its implied jurisdiction<sup>165</sup> or to come to a legal conclusion within the purview of the WTO claims themselves.<sup>166</sup>

(2) *The defenses invoked by the defending party.* Except for matters or defenses that it must consider *ex officio* (such as its own jurisdiction), a WTO panel must limit its examination to defenses invoked by the defending party (*non ultra petita*).

(3) *The scope of the relevant rules* *ratione materiae*, *ratione personae*, and *ratione temporis*. Within the framework of the claims and defenses thus before it, a WTO panel can employ only those rules which apply to the facts and circumstances of the case before it.

(4) *Conflict rules in the WTO treaty, general international law, and other non-WTO treaties.* If two or more rules apply to the facts and circumstances of the case and are contradictory (pursuant to the definition of conflict described earlier<sup>167</sup>), a WTO panel must apply the relevant conflict rules. When two rules in WTO covered agreements conflict, the WTO treaty states in a series of provisions which one should prevail. For example, conflicts between the WTO Agreement and any of the multilateral trade agreements (such as the GATT, GATS, TRIPS, and DSU) must be resolved in favor of the WTO Agreement (Art. XVI:3). In the event of conflict between the GATT 1994 and another agreement on trade in goods in Annex 1A to the WTO Agreement, the other Annex 1A agreement prevails.<sup>168</sup> If no conflict rules can be found for intra-WTO conflicts in the WTO treaty itself or for conflicts between WTO rules and other rules of international law, the conflict rules of general international law must be resorted to,<sup>169</sup> as well as any conflict rules in the non-WTO treaty containing the contradictory rule of international law.<sup>170</sup>

Crucially, and this is one of the main points of this article, the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements. Much has been said above about the creation and continuing existence of the WTO treaty in the wider context of general international law and other non-WTO treaties, be they pre- or post-1994. This context and background (essentially, that WTO rules belong to the rules of international law) does not suddenly evaporate when WTO claims are transferred to a WTO panel. As submitted earlier, there is arguably a “two-class society” between those rules of international law that can be judicially enforced and those that cannot. In that sense, rules of international law may indeed operate at two levels: the first and most general level being that of the entire corpus of public international law where all rules of international law freely interact; and the second and more specific level being that of a court of international law with jurisdiction to enforce only a limited number of rules. Rules in WTO covered agreements operate at both the first and the second levels. However, these two levels do not exist in “splendid isolation.” An obvious link joins them. In particular, if at the

<sup>163</sup> DSU Arts. 6.2, 7.1.

<sup>164</sup> *Id.*, Art. 3.10.

<sup>165</sup> See text following note 132 *supra*.

<sup>166</sup> Of course, to the extent that this necessity to rule on non-WTO matters has not led the panel to find that it does not have substantive jurisdiction in the first place or that it does not consider it appropriate to exercise such jurisdiction. See text at note 144 *supra*.

<sup>167</sup> See text at notes 104–12 *supra*.

<sup>168</sup> Other conflict rules to solve intra-WTO conflicts can be found in the Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, Art. 21, LEGAL TEXTS, *supra* note 1, at 39; TBT Agreement Art. 1.5; and DSU Art. 1.2. Surprisingly, the WTO treaty does not include conflict rules to solve contradictions between provisions in GATT, GATS, and TRIPS. On the GATT/GATS overlap, see John Gaffney, *The GATT and the GATS: Should They Be Mutually Exclusive Agreements?* 12 LEIDEN J. INT'L L. 135 (1999); and the more recent Appellate Body report Canada—Certain Measures Affecting the Automotive Industry, WTO Doc. WT/DS139/AB/R & WT/DS142/AB/R (June 19, 2000). On intra-WTO conflict more generally, see Elisabetta Montaguti & Maurits Lugard, *The GATT 1994 and Other Annex 1A Agreements: Four Different Relationships?* 3 J. INT'L ECON. L. 473 (2000).

<sup>169</sup> See text following note 78 *supra*.

<sup>170</sup> See text at note 67 *supra*.

first, more general level of the entire corpus of international law, WTO rules are somehow changed, that change will necessarily be felt in and penetrate the second, more concrete level of WTO dispute settlement. (The exact consequences of such change will be discussed below.<sup>171</sup>) Like the WTO treaty itself, the WTO dispute settlement system set up by that treaty was not created and does not exist in a legal vacuum. That system is merely an instrument to enforce WTO covered agreements as they were created and necessarily continue to exist in the wider corpus of international law. It is not frozen into April 1994 law or limited to the four corners of WTO covered agreements (even if it is limited to enforcing claims under these agreements). No treaty can be created outside the system of international law, nor can a court or tribunal that enforces claims under a treaty. The *Lockerbie* cases perfectly illustrate this point. There, the ICJ had jurisdiction to consider Libyan claims only under the Montreal Convention. However, this did not stop it from also examining other international law, in particular UN Security Council Resolution 748 invoked in defense by the United Kingdom and the United States, as part of the applicable law.<sup>172</sup>

*Relevant DSU provisions and WTO jurisprudence.* The DSU limits the jurisdiction of WTO panels and the Appellate Body. It does not limit the potentially applicable law before them. Unlike the LOS Convention and the Statute of the ICJ,<sup>173</sup> the DSU does not include an explicit provision on “applicable law.” The repeated references to “providing security and predictability to the multilateral trading system,” preserving “the rights and obligations of Members under the covered agreements” (DSU Art. 3.2), protecting the “benefits accruing to it directly or indirectly under the covered agreements,” and maintaining the “proper balance between the rights and obligations of Members” (DSU Art. 3.3), as well as the panel function of assessing the “applicability of and conformity with the relevant covered agreements” (DSU Art. 11), relate to the jurisdiction or substantive mandate of WTO panels to judicially enforce only WTO covered agreements, not to the law that may be applied in doing so.

DSU Article 7 is more directed to applicable law.<sup>174</sup> Paragraph 1 sets out the standard terms of reference of panels and instructs them to examine the matter referred to them “in the light of the relevant provisions” of the covered agreement(s) cited by the parties to the dispute. Paragraph 2 obliges panels to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” However, and again crucially for the thesis in this paper, despite this obligation to address and possibly apply these WTO rules, nothing in the DSU or any other WTO rule precludes panels from addressing and, as the case may be, applying other rules of international law so as to decide the WTO claims before them.<sup>175</sup> As outlined earlier with respect to the WTO treaty, the DSU, a judicial

<sup>171</sup> See text following note 208 *infra*.

<sup>172</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 114, para. 42 (Apr. 14).

<sup>173</sup> LOS Convention, *supra* note 23, Art. 291; ICJ STATUTE Art. 38.

<sup>174</sup> We deal with DSU Articles 3.2 and 19.2 in text at note 199 *infra*.

<sup>175</sup> *Accord Lorand Bartels, Applicable Law in WTO Dispute Settlement Proceedings*, J. WORLD TRADE (forthcoming 2001); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AJIL 398, 399 (1998). *Contra* Eric Canal-Forgues, *Sur l'Interprétation dans le droit de l'OMC*, 105 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 11 (2001) (“[s]’agissant d’abord du droit applicable il est acquis que les groupes spéciaux . . . ne peuvent s’en tenir . . . aux seuls ‘accords visés’ ”); Charney, *supra* note 3, at 219 (“sources of general international law outside of the agreements appear to arise only in the context of treaty interpretation rules”); Gabrielle Marceau, *A Call for Coherence in International Law—Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 110 (1999) [hereinafter Marceau, *Call*] (concluding less categorically that “[i]t seems, therefore, that under the DSU not all sources of law may be applied or enforced by WTO adjudicating bodies”); Gabrielle Marceau, *WTO Agreements Cannot Be Interpreted in Clinical Isolation from Public International Law at 3* (World Bank Seminar on International Trade Law, Oct. 24–25, 2000) (on file with author) [hereinafter Marceau, *WTO Agreements*] (“Under the DSU only provisions of the ‘covered agreements’ can be the ‘applicable law’ applied and enforced by panels and the Appellate Body”); Trachtman, *supra* note 41, at 342 (stating that the explicit language in the DSU “would be absurd if rights and obligations arising from other international law could be applied by the DSB” and that “[w]ith so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable”).

system aimed at enforcing certain rules of international law, need not refer explicitly to or confirm all other potentially relevant rules of international law, be they pre- or post-1994. Such reference or confirmation occurs automatically as a result of the simple fact that the DSU was created and continues to exist in the wider context of international law. Thus, other rules of international law apply automatically unless the DSU or any other WTO rule has contracted out of them. As the panel in *Korea—Government Procurement* noted (in a footnote!) about the rules of customary international law that it referred to in examining the nonviolation complaint before it: “We do not see any basis for arguing that the terms of reference [in DSU Article 7.1] are meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel.”<sup>176</sup>

Unlike Article 291 of the LOS Convention and Article 38 of the ICJ Statute, the DSU does not explicitly confirm its creation and existence in international law. However, there was no need for the DSU to do so, as it cannot have been otherwise.<sup>177</sup> Implicit confirmation that WTO panels, when examining WTO claims, may be required to refer to and apply other rules of international law can be found in DSU Articles 3.2,<sup>178</sup> 7.1, and 11. The obligation in Article 11 to assess the applicability of WTO rules objectively may require a panel—depending on the claims, defenses, and facts of the matter before it—to refer to and apply other rules of international law. These other rules may show that the relevant WTO rules do not apply and have therefore not been violated. However, failure to look at these other rules would preclude an “objective assessment of . . . the applicability of . . . the relevant covered agreements.” The reference in Article 11 to making all “other findings” (or, in the words of DSU Article 7.1, all “such findings”) as will assist the DSB in resolving the WTO claims before it further acknowledges that WTO panels may need to resort to and apply rules of international law beyond WTO covered agreements. Hence, to deduce from the explicit references in paragraphs 1 and 2 of DSU Article 7 (quoted above) to some law (i.e., WTO covered agreements) that all other law is thereby implicitly excluded is erroneous. Indeed, in practice the terms of reference of WTO panels do not read as requiring an examination “in the light of the relevant provisions in . . . the covered agreement(s) cited by the parties to the dispute” but, rather, an examination in the light of the relevant provisions of the covered agreements cited by the complainant in its panel request. Does this exclusive reference to the provisions invoked by the complainant imply that no other law (not even the defenses invoked by the defending party) can be considered? Surely not. The same reasoning applies to the references in the DSU to resort to WTO covered agreements. These references cannot be read as excluding all other law. Or does the law explicitly referred to in Article 38 of the ICJ Statute preclude the Court’s consideration and application of other rules of international law? It does not. The ICJ, like WTO panels, as a court under international law, regularly refers to law not explicitly mentioned in Article 38, in particular unilateral acts of states and acts of international organizations.<sup>179</sup>

WTO jurisprudence also confirms that the DSU, or any other WTO rule, should not be interpreted as limiting the applicable law before a WTO panel to WTO covered agreements. In practice, panels and the Appellate Body alike have frequently referred to and applied

<sup>176</sup> *Korea—Government Procurement*, *supra* note 57, para. 7.101 n.755.

<sup>177</sup> As noted by the First Committee in the *travaux préparatoires* of the ICJ Statute concerning the addition to Article 38 of the obligation for the Court to decide “in accordance with international law”: “The lacuna in the old Statute with reference to this point did not prevent the [PCIJ] from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court.” 13 U.N.C.I.O. Docs. 164, 284, 392 (1945), *quoted in* 3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996*, at III.375 (1997).

<sup>178</sup> Implicitly incorporating Article 31(3)(c) of the Vienna Convention, *supra* note 7. See text at note 252 *infra*.

<sup>179</sup> NGUYEN, DAILLIER, & PELLET, *supra* note 10, at 356–81. In the *Continental Shelf* case (Tunisia v. Libya), the ICJ confirmed that disputing parties, by agreement, may add to the applicable law as prescribed in Article 38 (*in casu*, “new accepted trends” in the law of the sea), but that they cannot detract from it (“the Court is, of course, bound to have regard to all the legal sources specified in Article 38”). *Continental Shelf (Tunis. v. Libya)*, 1982 ICJ REP. 18, 37, 38 (Feb. 24).

other rules of international law in examining WTO claims. They have done so not only in interpreting WTO covered agreements.<sup>180</sup> More important, WTO panels and the Appellate Body have applied other rules of international law independently of construing a given WTO provision. In their examination of WTO claims, they have applied rules of general international law, in particular on (1) issues of judicial dispute settlement (such as standing,<sup>181</sup> representation by private counsel,<sup>182</sup> *la compétence de la compétence*,<sup>183</sup> burden of proof,<sup>184</sup> the treatment of municipal law,<sup>185</sup> the acceptability of amicus curiae briefs,<sup>186</sup> authority to draw adverse inferences,<sup>187</sup> and judicial economy<sup>188</sup>); (2) the law of treaties (such as the principle of nonretroactivity<sup>189</sup> and error in treaty formation<sup>190</sup>); and (3) state responsibility (such as provisions on countermeasures<sup>191</sup> and attribution<sup>192</sup>), referring each time to the work of the ILC on the subject. Moreover, WTO panels and the Appellate Body have also applied WTO rules that are not part of WTO covered agreements (such as the Declaration on the Relationship of the WTO and the IMF<sup>193</sup> and acts of WTO organs such as waivers<sup>194</sup>), as well as non-WTO rules that are not part of general international law (such as the Lomé Convention<sup>195</sup> and unilateral acts of WTO members<sup>196</sup>). In the absence of an inherent hierarchy of rules of international law (other than *jus cogens*), there is no reason to apply general international law, but not, for example, non-WTO treaties—always to the extent, of course, that both disputing parties are legally bound by them and it is done in the examination of WTO claims.<sup>197</sup> Finally, confirmation that the WTO judiciary does not apply only WTO covered agreements can be found in its repeated references to GATT/WTO jurisprudence and publicists. These sources do not, in and of themselves, represent rules of international law. However, as noted in Article 38(1) (d) of the ICJ Statute (where they are mentioned as two of the five legal sources that the Court must “apply”), they are “subsidiary

<sup>180</sup> See text at note 237 *infra*.

<sup>181</sup> EC—Bananas, *supra* note 109, para. 133.

<sup>182</sup> *Id.*, para. 10.

<sup>183</sup> See U.S.—Anti-Dumping Act, *supra* note 139, para. 54 n.30.

<sup>184</sup> U.S.—Shirts and Blouses, *supra* note 141, at 14.

<sup>185</sup> India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS50/AB/R, para. 65 (Jan. 16, 1998) [hereinafter India—Patent].

<sup>186</sup> U.S.—Shrimp/Turtle, *supra* note 34, para. 107.

<sup>187</sup> Canada—Measures Affecting the Export of Civilian Aircraft, WTO Doc. WT/DS70/AB/R, para. 202 (Aug. 20, 1999).

<sup>188</sup> See *supra* note 141 and corresponding text.

<sup>189</sup> Brazil—Measures Affecting Desiccated Coconut, WTO Doc. WT/DS22/AB/R, at 15 (Mar. 20, 1997); *accord* EC—Bananas, *supra* note 109, para. 235; Canada—Patent Protection Term, WTO Doc. WT/DS170/AB/R, paras. 71–74 (Oct. 12, 2000).

<sup>190</sup> Korea—Government Procurement, *supra* note 57, paras. 7.123–126.

<sup>191</sup> EC—Bananas, *supra* note 109, WTO Doc. WT/DS27/ARB, para. 6.16 (arb. Mar. 17, 2000) (noting “the general international law principle of proportionality of countermeasures”); Brazil—Export Financing Programme for Aircraft, WTO Doc. WT/DS46/ARB, para. 3.44 & nn.45, 48 (arb. Aug. 28, 2000) [hereinafter Brazil—Aircraft] (the objective of countermeasures is to “effectively induce compliance”).

<sup>192</sup> Canada—Measures Affecting the Importation of Milk, WTO Doc. WT/DS103/R & WT/DS113/R, para. 7.77 & n.427 (Oct. 27, 1999) [hereinafter Canada—Milk] (supporting provincial milk marketing boards as an “agency” of Canada); *see also* Turkey—Textiles, *supra* note 160, para. 9.33.

<sup>193</sup> See *supra* note 75 and text at note 218 *infra*.

<sup>194</sup> EC—Bananas, *supra* note 109, para. 164. A distinction should be made between treaties or rules agreed upon by WTO members (such as amendments pursuant to Article X of the WTO Agreement or renegotiations under either Article XXVIII of GATT or Article XXI of GATS) and rules set out in acts by WTO organs that are part of the WTO as an international organization (such as waivers pursuant to Article IX:3 of the WTO Agreement or DSB decisions to suspend concessions pursuant to DSU Article 22.6). The former acts by WTO members alter WTO covered agreements (and hence automatically become part of those agreements). The latter acts by WTO organs are not strictly speaking part of WTO covered agreements. When applying such acts, the WTO judiciary is thus applying WTO rules that are not part of WTO covered agreements.

<sup>195</sup> EC—Bananas, *supra* note 109, para. 167.

<sup>196</sup> U.S.—Section 301, *supra* note 148, para. 7.114.

<sup>197</sup> For a possible exception with respect to treaty interpretation, see text following note 259 *infra*.

means for the determination of rules of law.” Clearly, if WTO panels and the Appellate Body were not allowed to refer to or apply any source of law other than WTO covered agreements, all of the WTO cases referenced above would be legally incorrect.

*Under the DSU, should WTO rules always prevail?* One might ask whether it is even possible, under international law, generally to limit the applicable law before an international court or tribunal. Of course, its jurisdiction can be limited and, depending on the claims, defenses, and facts of a specific case, the applicable law will also be narrowed down in a given dispute. But could a court of international law, generally and *ex ante*, exclude consideration of rules of international law other than those it was asked to enforce? I do not think so. Other international law can be excluded as a result of contracting out by the treaty or a general conflict clause in favor of the treaty.<sup>198</sup> However, such a contracting-out or conflict clause does not concern the potentially applicable law in settling disputes as much as which of several potentially applicable laws is to prevail.

A commentator has suggested that DSU Article 3.2, as confirmed in DSU Article 19.2, is this kind of general conflict clause in favor of WTO rules.<sup>199</sup> The last sentence of Article 3.2 provides: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 19.2 states: “In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” Should these provisions be read as saying that WTO panels, the Appellate Body, and the DSB cannot ever add to or diminish the rights and obligations explicitly set out in WTO covered agreements? Do these provisions mean that no other law, be it pre- or post-1994, can ever influence WTO covered agreements and that, in the event of conflict between these agreements and another rule of international law, the WTO rule must always prevail? In my view, the answer is no. DSU Articles 3.2 and 19.2 do not address the jurisdiction of panels, the applicable law before them, or the relationship between WTO covered agreements and all past and future law. Rather, they deal with the inherent limits a WTO panel must observe in interpreting WTO covered agreements. In exercising this judicial function of interpretation, WTO panels may clarify the meaning of WTO covered agreements, but they may not “add to or diminish the rights and obligations provided in the covered agreements.”<sup>200</sup> To put it differently, as judicial organs, WTO panels may not create new rights and obligations; they must apply those that WTO members agreed to. Once again, this limitation on the function of WTO panels was made *ex abundante cautela*. Even without its enunciation, WTO panels would have been subject to it as an inherent limitation of the judicial function prescribed in general international law.

However, stating what the judiciary can do with the law differs greatly from stating what the legislature (i.e., WTO members) has done, or can do, with the law. Articles 3.2 and 19.2 specify that the WTO judiciary, like any other judiciary, cannot “change” the WTO treaty. A conflict clause, in contrast, would (1) tell us that WTO members, when negotiating the treaty, did not want any other existing rules of international law to prevail over the WTO treaty; and (2) direct WTO members that in their future dealings they must not change or

<sup>198</sup> See *supra* notes 173, 179. Article 291 of the LOS Convention, *supra* note 23, on “applicable law” is on point. The reference to “rules of international law not inconsistent with this Convention” does not amount to a general exclusion of all international law other than that in the Convention. It simply refers back to and confirms the conflict rules in Article 311 of the Convention. If Article 311 directs that a rule in the LOS Convention is to prevail over another rule, then Article 291 simply confirms that this should also be so in the judicial enforcement of the Convention rule, i.e., that the other rule (“inconsistent with this Convention”) may not be applied over and above the Convention rule.

<sup>199</sup> Bartels, *supra* note 175.

<sup>200</sup> The immediate context of the relevant passage in Article 3.2 confirms this reading. The sentence directly follows the instruction for panels to clarify WTO covered agreements “in accordance with customary rules of interpretation of public international law.” This is a clear indication that the last sentence of Article 3.2 also deals with the interpretive function of panels.

overrule the rights and obligations in the WTO treaty (except pursuant to the amendment procedures and other provisions in the treaty itself). To make an analogy with the ICJ: the Statute prescribed in 1945 that the Court must “decide in accordance with international law”—a phrase interpreted in the *South West Africa* cases to mean that the ICJ’s “duty is to apply the law as it finds it, not to make it.”<sup>201</sup> This provision can hardly be interpreted to mean that the law the ICJ may look at is limited to that of 1945, nor that international law as it existed in 1945 must always and necessarily prevail over all subsequent rules of international law. The drafters of the WTO treaty could have inserted a conflict clause stating that the WTO treaty is to prevail over all past and future international law, similarly to Article 103 of the UN Charter.<sup>202</sup> Although such a clause would have had only limited effect,<sup>203</sup> the contractual freedom of WTO members would have permitted them to do so (within the limits of *jus cogens* and the principle of *pacta tertiis*). But if the drafters had wanted the WTO treaty to play the role of a second UN Charter, prevailing over all other law, would they not have said so? For example, would they not have put a nonderogation clause in the WTO Agreement itself, instead of twice inserting a sentence at the end of a provision on the interpretive function of WTO panels in a technical instrument, the DSU?

As further evidence of the proposition advanced here that WTO dispute settlement both encompasses more than WTO covered agreements (as well as more than interpreting these agreements in the light of other rules of international law<sup>204</sup>) and does not include a general and automatic conflict clause in favor of WTO covered agreements, consider the following extreme example. Imagine that the WTO treaty included an agreement regulating the slave trade. Would a WTO panel be obliged to apply and enforce this agreement at the request of a WTO member complaining about trade restrictions regarding slaves imposed by another member? If the DSU were read as precluding reference to international law other than WTO covered agreements (i.e., as a mechanism created outside the system of international law) and/or as containing a conflict clause to the effect that WTO rules always prevail, a WTO panel would be so obliged. This example confirms the absurdity of portraying the DSU as some alien mechanism divorced from, and superior to, all other international law. Following the theory put forward in this paper, the defending party in our hypothetical dispute would be allowed to invoke Article 53 of the Vienna Convention as a legal defense against the WTO slave trade agreement (the applicable law for defenses not being inherently limited<sup>205</sup>). Article 53 provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” On that ground, the WTO panel would be obliged to find the WTO slave trade agreement invalid, hence inapplicable to and unenforceable against the WTO member in question. Nevertheless, given the limited jurisdiction of WTO panels (claims under WTO covered agreements only), the WTO member concerned could not itself bring a complaint to the WTO against the WTO member trading in slaves.<sup>206</sup>

<sup>201</sup> *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, 1966 ICJ REP. 48 (July 18).

<sup>202</sup> See also, but in a much more limited way, Article 311(6) of the LOS Convention, *supra* note 23.

<sup>203</sup> As the ILC Commentary to Article 30 of the Vienna Convention, *supra* note 7, reads: “Article 103 [UN Charter] apart, clauses in treaties which purport to give the treaty priority over another treaty, whether earlier or later in date, do not by themselves appear to alter the operation of the general rules of priority set out in paras. 3 and 4 of [Art. 30],” *quoted in RAUSCHNING, supra* note 98, at 233. Indeed, the only type of priority clause given explicit effect in Article 30(2) is one stating that the new treaty is “subject to, or that it is not to be considered as incompatible with, an earlier or later treaty.” See also Wolfram Karl, *Conflicts Between Treaties*, in [Instalment 7] ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468, 471 (1984) (stating the view that “[c]lauses which claim priority over future treaty engagements are futile,” given that they can always be overruled by later agreement of all parties or some of them alone, as long as the conditions in Article 41 of the Vienna Convention are met).

<sup>204</sup> See text at note 237 *infra*.

<sup>205</sup> See text following note 170 *supra*.

<sup>206</sup> It could, however, resort to Article 66(a) of the Vienna Convention and bring the other WTO member before the ICJ (if that other member is a party to the Vienna Convention).

*Practical Consequences of the Approach Suggested Here*

*The worst case.* At worst, the WTO rule is not enforced, and the WTO panel does not have jurisdiction to enforce the non-WTO rule. As seen, the jurisdiction of WTO panels is limited. The applicable law before them is not. What is the practical result of allowing WTO defending parties to invoke other rules of international law, be they part of general international law or of non-WTO treaties? First, it should be stressed that a defending party can invoke only those rules by which both itself and the complaining party are bound.<sup>207</sup> The complaining party cannot see its WTO rights diminished on the basis of a rule of international law by which it is not bound. Second, as we have repeated more than once, other rules of international law, including post-1994 treaties, cannot form the legal basis of a WTO complaint. Claims can be brought only under WTO covered agreements.

Within these limits, however, the practical consequences of a defending party's ability to invoke, for example, a rule of customary law, or an environmental or human rights convention or bilateral treaty to which both disputing parties are bound, in its defense against a WTO claim, must be determined by the relevant conflict rules referred to earlier.<sup>208</sup> These rules may be spelled out in the WTO treaty itself, the treaty from which the contradictory rule derives, or general international law. If the relevant conflict rule indicates that the WTO rule in question prevails over the conflicting norm of international law, the WTO rule must be applied (and the complainant wins). If, in contrast, the relevant conflict rule demonstrates that the other rule of international law overrides or even invalidates the WTO rule, then the WTO rule cannot be applied (and the defendant wins), irrespective of whether the WTO treaty itself includes an exception or justification for the measure at hand. The latter case, however, does not result in requiring the WTO panel to judicially enforce the other rule of international law (say, the contradictory environmental norm). A WTO panel can only enforce claims under WTO covered agreements. To be able to enforce these other rules, a WTO panel would need expanded jurisdiction. Recalling the two levels at which WTO covered agreements operate (the general level of the entire corpus of international law, and the more concrete level of WTO dispute settlement), we can conclude that what has been taken away or overruled at the first level can no longer be enforced at the second level (i.e., a WTO rule that has been terminated or overruled under international law can no longer be enforced in WTO dispute settlement). What WTO members themselves have taken out of WTO covered agreements at the first level cannot be put back by a WTO panel in the second level. For a panel to do so anyway would amount to (using the words of DSU Articles 3.2 and 19.2) "adding" to obligations of the defendant that, pursuant to other rules of international law and the way they interact with WTO rules, no longer exist. If a panel follows the approach suggested here and dis-applies the WTO rule in these circumstances, the panel would not be "diminishing" the rights of the complainant. Rather, the complaining WTO member would have done so by agreeing to the conflicting non-WTO rule in the first place. Thus, the WTO panel would not create law but merely give effect to law created elsewhere by the WTO member itself. On the other hand, for claims under these non-WTO rules to filter through to the second level of WTO dispute resolution, an express intention to expand the jurisdiction of WTO panels would be required.

*Is the uniformity of WTO law at risk?* Critics may submit that the WTO treaty explicitly provides how it can be amended<sup>209</sup> so that it can essentially be affected only by the consent of all WTO members. Following this line of thinking, one could argue that for a WTO panel

<sup>207</sup> For a possible exception under treaty interpretation, see p. 575 *infra*.

<sup>208</sup> See text at notes 64–103 *supra*.

<sup>209</sup> The general rule is that amendments should be adopted by consensus (WTO Agreement Art. X:1). However, if consensus is not reached, most amendments can be adopted by a two-thirds majority of WTO members (and others only upon acceptance by all WTO members) (Art. X:3–5).



to take cognizance of non-WTO rules as part of a defense, especially rules binding on only the disputing parties, contravenes WTO amendment procedures and threatens the uniformity of WTO law. This reasoning implies, however, that the WTO treaty is an island created and existing outside the sphere of international law. One of the main objectives of this paper was to show that it is not. Thus, the WTO treaty can be affected by amendment, but also by the conclusion of other treaties or the existence or emergence of other rules of international law pursuant to, for example, the rules in the Vienna Convention on the application of successive treaties (Art. 30), inter se modifications (Art. 41), and treaty interpretation (Art. 31(3)(c)).<sup>210</sup> The WTO treaty did not contract out of these general international law rules on the interplay of norms, let alone the system of international law. Hence, these rules must apply to the WTO treaty. The WTO treaty changed the 1994 landscape of international law, but post-1994 treaties can also change this landscape, including the legal relationships between WTO members in the WTO. International law does not comprehend inherent hierarchies of norms; nor does it require an *acte contraire* for a norm to be affected by another one.<sup>211</sup> Moreover, if WTO members could affect the WTO treaty only through formal amendment (i.e., if the WTO were in essence a separate legal system like domestic or, to some extent, EC law), it would basically mean that every act in the trade relationship between WTO members would be regulated exclusively and eternally by the 1994 provisions of the WTO treaty unless a consensus of WTO members decided otherwise. Ironically, this immobility in the WTO would simply increase together with WTO membership. Indeed, the more WTO members there are, the more difficult it becomes to muster a consensus for formally amending WTO rules.<sup>212</sup> The WTO would become more than a collection of rules “written in stone”; it would also be transformed into a “safe haven” for WTO members wanting to backtrack on obligations entered into elsewhere.

The effect of the approach suggested here, that WTO rules would apply differently to different WTO members depending on whether or not they have accepted other non-WTO rules, may complicate the matrix of rights and obligations between WTO members. But this is an unavoidable consequence of not having a centralized legislator in international law.<sup>213</sup> In addition, from a practical point of view, should we expect—in our complex world with 141 WTO members of widely diverging interests—each and every WTO member to bear the same obligations vis-à-vis each and every other WTO member? Surely not. Still, this consequence would ensue if formal amendments were required as a prerequisite to affecting the WTO treaty.<sup>214</sup> The WTO seeks to promote nondiscrimination and trade liberalization in the context of regulatory diversity. Unlike the European Community, for example, it does not generally extend its reach to harmonization in nontrade matters in pursuit of some sort of federation of nation-states. Finally, giving effect to non-WTO rules as suggested here must be distinguished from *interpreting* the WTO treaty differently depending on the disputing WTO members involved. In my view, the latter is not allowed and would definitely threaten the uniformity of WTO law. This issue is explored below, but first we take a closer look at certain WTO disputes in the light of the theory advanced in this paper.

*Certain past disputes in the light of the theory presented here.* WTO panels have sometimes been asked to judicially enforce pre-1994 GATT instruments that were not included in WTO

<sup>210</sup> In addition, besides other treaties, subsequent practice and custom can affect the WTO treaty (irrespective of amendment provisions). See Karl, *supra* note 203, at 387–89. See generally KONTOU, *supra* note 17. Indeed, if such implicit forms of consent as subsequent practice and custom can alter or revise a treaty notwithstanding amendment provisions in the treaty itself or the Vienna Convention, then a fortiori formal inter se agreements to which certain WTO members have explicitly agreed (such as a post-1994 environmental convention) must have the capacity to affect WTO rules as between the parties to these agreements.

<sup>211</sup> See text at notes 13–24 *supra*.

<sup>212</sup> This point is made by Marceau, *supra* note 175, at 124.

<sup>213</sup> See text at note 5 *supra*. Even today, each WTO member has unique obligations depending, inter alia, on the provisions in its schedules of concessions.

<sup>214</sup> See Petros C. Mavroidis, *Trade and Environment After the Shrimps-Turtles Litigation*, 34 J. WORLD TRADE 73, 77 (2000).

covered agreements. The answer to such requests was obvious: only those GATT rules that were incorporated into WTO covered agreements (including member-specific schedules of concessions) can be the subject of claims before a panel because the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements. In *EC—Poultry*, the Appellate Body found that the so-called Oilseeds Agreement concluded bilaterally between the European Community and Brazil in the framework of renegotiations under GATT Article XXVIII (as part of the resolution of a previous 1990 oilseeds dispute) was not a “covered agreement” subject to the DSU, or part of the multilateral obligations accepted by Brazil and the Community pursuant to the WTO Agreement. As a result, the Appellate Body concluded that “it is Schedule LXXX [the relevant 1995 EC schedule of concessions attached to the WTO Agreement into which only parts of the Oilseeds Agreement had been incorporated], rather than the Oilseeds Agreement, which forms the legal basis for this dispute.”<sup>215</sup> The Appellate Body added that, in its view,

it is not necessary to have recourse to either Article 59.1 [termination of a treaty by conclusion of a later treaty] or Article 30.3 [application of successive treaties] of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case.<sup>216</sup>

The arbitrators in *EC—Hormones* faced a similar problem. The United States claimed autonomous beef quota rights on the basis of bilateral U.S.-EC agreements not incorporated in WTO covered agreements. The arbitrators repeated what was said in *EC—Poultry*, namely, that the bilateral agreements do not set out “rights under any of the WTO agreements covered by the DSU” and that “[t]he rights thus alleged are derived from bilateral agreements that cannot be properly enforced on their own in WTO dispute settlement.”<sup>217</sup> But if, in these two disputes, (1) the bilateral agreement had been invoked as a defense (not a claim); (2) the relationship between the bilateral agreement and the relevant GATT rules had not been addressed in the WTO treaty; and (3) pursuant to conflict rules of international law, the bilateral agreement would *prevail* over the GATT rule, under the theory presented here the bilateral agreement could operate as a valid defense dis-applying the relevant WTO rule allegedly violated by the defendant. However, as invoked in both of these disputes (as part of a claim), the theory here supports the outcome.

In *Argentina—Footwear*, the Appellate Body examined whether a 3 percent statistical tax found by the panel to be violative of GATT Article VIII could be excused by means of an allegedly conflicting obligation imposed on Argentina in a memorandum of understanding it had concluded with the IMF. This memorandum stated that the fiscal measures to be adopted by Argentina include “increases in import duties, including a temporary 3 per cent surcharge on imports.” The Appellate Body found that on the basis of the record before the panel, it did “not appear possible to determine the precise legal nature of this Memorandum.”<sup>218</sup> In addition, “Argentina did not show an irreconcilable conflict between the provisions of its ‘Memorandum of Understanding’ with the IMF and the provisions of Article VIII of the GATT 1994.”<sup>219</sup> Even if there were a conflict, the Appellate Body observed, “nothing in the *Agreement Between the IMF and the WTO*, the *Declaration on the Relationship of the WTO with the IMF* or the *Declaration on Coherence* . . . justifies a conclusion that a Member’s commitments to the IMF shall prevail over its obligations under Article VIII of

<sup>215</sup> *EC—Poultry*, *supra* note 38, para. 81.

<sup>216</sup> *Id.*, para. 79.

<sup>217</sup> *EC—Hormones*, *supra* note 94, WTO Doc. WT/DS26/ARB, para. 50 (arb. July 12, 1999).

<sup>218</sup> *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc. WT/DS56/AB/R, para. 65 (quoting the IMF memorandum) & para. 69 (Apr. 22, 1998).

<sup>219</sup> *Id.*, para. 69.

the GATT 1994.”<sup>220</sup> The Appellate Body found that only the Declaration on the Relationship of the WTO with the IMF—a ministerial decision that constitutes part of the WTO Final Act, but not part of WTO covered agreements—says anything about the legal relationship between the WTO and the IMF. This declaration states, in essence, that the relationship between WTO and IMF rules regarding trade in goods shall continue to be governed by provisions of GATT 1947, which means that only the exceptions provided for in these provisions for IMF-related measures can be used to justify GATT violations. On the basis of this conflict rule, the Appellate Body found that since no IMF-related exceptions under GATT Article VIII are to be found in the GATT itself, independent IMF rules, such as the memorandum in question, could not justify Argentina’s violation of GATT Article VIII.<sup>221</sup>

If the Appellate Body had thought that the IMF memorandum could not possibly cure the violation of GATT Article VIII simply because the memorandum is not part of WTO covered agreements, it could have said so. But it did not. Rather, it assessed whether the IMF memorandum conflicts with GATT rules and considered which of the two rules should prevail in case a conflict arises. The conclusion reached is fully warranted and supports the thesis presented in this paper. The Appellate Body did not limit its examination to WTO covered agreements. It looked beyond those agreements and also took account of both IMF rules and the Declaration on the Relationship of the WTO with the IMF, a legal instrument not included in WTO covered agreements. This declaration contains an explicit conflict clause in favor of GATT rules. But if the allegedly conflicting rule were not an IMF rule, but one found, for example, in an environmental convention binding on both parties, how should the Appellate Body react? Under the theory suggested here, as in *Argentina—Footwear*, it should not confine itself to the WTO covered agreements but apply the environmental rule as a possible defense and in the event of conflict between it and WTO rules (say, GATT Articles III and XX), apply the relevant conflict rules of general international law (in the absence of any treaty-based conflict rules). Should the applicable conflict rule determine that the environmental rule prevails (e.g., as *lex specialis*), the Appellate Body would then be obliged not to apply the contradictory WTO rule and the complainant would lose. However, it would not have jurisdiction to hear claims of violation of the environmental rule.

In *EC—Hormones*, the Appellate Body was faced with an EC claim that the so-called precautionary principle constitutes customary international law, or at least a general principle of law. The Appellate Body found that it was “unnecessary, and probably imprudent, for [it] in this appeal to take a position on this important, but abstract, question.”<sup>222</sup> It noted, though, that “the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.”<sup>223</sup> It further remarked that “the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.” Nevertheless, it recognized that the principle “finds reflection” in several SPS provisions. Noting that “the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal . . . principles of treaty interpretation,” the Appellate Body finally agreed with the panel that “the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*.”<sup>224</sup> In my view, this outcome is fully justified. But not so the legal reasoning.

<sup>220</sup> *Id.*, para. 70.

<sup>221</sup> *Id.*, paras. 69–74.

<sup>222</sup> *EC—Hormones*, *supra* note 94, para. 123.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*, paras. 124–25. It is unclear whether the European Community referred to the “precautionary principle” either (1) as an element to be looked at in the interpretation of Article 5 of the *SPS Agreement*; or (2) as a non-WTO rule of international law in defense of a violation of Article 5. Although the former seems more accurate (the Community was claiming that because its measures were precautionary in nature, they satisfied the requirements of Article 5), the latter hypothesis is more interesting and is the one we further examine in this paper.

As already noted, there was no need for the SPS Agreement to refer explicitly to the precautionary principle for this principle to be a possible defense in WTO dispute settlement, nor a fortiori for it to be a rule of general international law to be referred to in the interpretation of SPS provisions pursuant to Article 31 (3) (c) of the Vienna Convention. I believe that the Appellate Body was obliged to rule on whether this principle is part of customary law binding on the disputing parties.<sup>225</sup> Had this been the case, the Appellate Body should have acknowledged that a rule of customary law, if later in time and in conflict with an earlier (SPS) treaty rule, must prevail over the treaty rule (no inherent hierarchy existing between treaty and custom), unless it found an intention to continue applying the (SPS) treaty rule as *lex specialis*. In the circumstances, however, it was difficult to establish (1) that the “precautionary principle” is a rule of customary international law; (2) that it emerged subsequent to the WTO treaty; (3) that it indeed conflicted with SPS rules (the European Community, for example, had not invoked SPS Article 5.7, which explicitly provides for a form of precautionary approach); and (4) that WTO members did not want the SPS Agreement to continue as *lex specialis* (in particular, given the “continuing” nature of the WTO treaty). Hence, the Appellate Body was correct in concluding that “the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*.” But it did so too categorically and without deciding certain crucial questions it should have answered before coming to that conclusion.

As mentioned above, the panel in *Korea—Government Procurement* rightly found that customary rules of international law apply both to WTO treaties and to treaty formation under the WTO to the extent that the WTO Agreements do not contract out from it.<sup>226</sup> More particularly, the panel applied rules on error in treaty formation under a U.S. claim of nonviolation (GATT Article XXIII:1(b), as referred to in the Government Procurement Agreement (GPA)). The panel saw similarities between the nonviolation provision in the WTO and the rules on error in treaty formation in international law: both are based on the principle of good faith. The panel noted that the traditional interpretation of the nonviolation provision is aimed at “protecting the reasonable expectations of competitive opportunities through negotiated concessions.”<sup>227</sup> Hence, it concerns good faith implementation of the content of the WTO treaty. Error in treaty formation, the panel continued, is not addressed to the content of the treaty. Rather, it attacks the very validity of the treaty on the ground of error in its negotiation. Thus, the panel reasoned, error in treaty formation is about good faith negotiation of the WTO treaty. On the basis of these two legal principles (nonviolation and error in treaty formation), the panel found, in my view correctly, that “[p]arties have an obligation to negotiate in good faith just as they must implement the treaty in good faith.”<sup>228</sup> So far, so good. But then the panel, instead of applying these two principles independently to the case at hand, injected the principle of error in treaty formation into the nonviolation rule. It did so on the ground that “[t]o do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes.” More precisely, the panel stated: “If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments . . . , then nothing could be done about them within the framework of the WTO dispute settlement mechanism.”<sup>229</sup> The panel was right to rephrase the U.S. claims somehow. We have seen that WTO panels hold implied jurisdiction to interpret the parties’ submissions with a view to isolating the real issue in the case and identifying

<sup>225</sup> Or at least to assume that it was customary law and on that basis further examine whether it could possibly overrule SPS treaty rules.

<sup>226</sup> See text at note 57 *supra*.

<sup>227</sup> *Korea—Government Procurement*, *supra* note 57, para. 7.98. The multilateral Government Procurement Agreement, *amended* Apr. 15, 1994, is Annex 4(b) to the WTO Agreement.

<sup>228</sup> *Korea—Government Procurement*, *supra* note 57, para 7.100.

<sup>229</sup> *Id.*, para 7.101.

the object of the claim.<sup>230</sup> In *Korea—Government Procurement*, however, the panel perhaps went beyond this mandate by actually deciding a claim that was never put to it by the United States (the United States itself never claimed error, definitely not in its request for a panel, and did so only vaguely in its submissions). As far as the specifics of nonviolation are concerned, it involves the upsetting of the competitive opportunities that can legitimately be expected from a concession (even if the upsetting is not illegal as such). However, in the absence of a concession (which was the case here, as the panel acknowledged), there can be no question of upsetting anything. The fact that nonviolation, as it is generally understood, does not provide for relief for error in treaty formation (and that in its absence “nothing could be done about [it]” in WTO dispute settlement) is not a good enough reason suddenly to expand nonviolation so as to include error (especially if it is done without regard to the actual words of GATT Article XXIII:1 (b)<sup>231</sup>). Consequently, since error in treaty formation does not seem to be a claim as to which WTO panels have been granted jurisdiction, the panel should not have ruled on it (even if the United States had actually made the claim).<sup>232</sup> That being said, such an error could well be invoked as a defense before a WTO panel as a ground for invalidity (this rule being one of customary international law from which the WTO treaty did not contract out). Moreover, a complaint based on error could also be brought under Article 66 of the Vienna Convention, at least to the extent that both parties were bound by that Convention.

#### *Fact-Finding and Interpretation by WTO Panels*

The law that a WTO panel must apply in a given dispute cannot always be easily determined. It is not a question of turning stones over and finding law underneath. Panels must first verify and establish the relevant facts of a case. Second, they must then have a first interpretive look at the law invoked by the parties (or the law they may have to apply *ex officio*). If, on the basis of these facts, the applicable law is readily determined and no conflict arises between different rules, the matter will end here, with the applicable law either being violated or not, or justifying the challenged measure or not (depending, for example, on whether the conditions in GATT Article XX are met). In contrast, if the facts of the case suggest at first glance that two rules must be applied and these two rules seem to be in conflict (under the definition of conflict set out earlier), resort to interpretation must again be taken. As a third step, the WTO panel will then need to verify whether it is feasible to interpret the two seemingly applicable rules in a harmonious manner. Fourth, if it is not possible, and the two rules are indeed confirmed as contradictory, the panel must apply the conflict rules referred to above (i.e., those in the WTO treaty, general international law, or the non-WTO treaty from which the contradictory rule derives). As seen, the relevant conflict rule will determine which of the two rules is to prevail.<sup>233</sup>

We next examine two roles, not yet discussed, that rules of international law other than those in WTO covered agreements may play in this step-by-step process: first, as facts to be considered in the application of WTO rules; and second, as law to be referred to in the interpretation of WTO rules. Both processes are crucial as “conflict avoidance” techniques.<sup>234</sup>

<sup>230</sup> See text at note 133 *supra*.

<sup>231</sup> This provision requires, for example, that Korea had impaired benefits or impeded the attainment of objectives by means of the “application” of a “measure,” something error in treaty formation does not involve.

<sup>232</sup> The only way it could be said to fall within a WTO panel’s jurisdiction would be to argue that it amounts to Korea’s impeding the attainment of an objective under the GPA (i.e., the objective of having a valid agreement in the first place) “as the result of the existence of any other situation” (namely, the situation of error in favor of the United States) in the sense of GATT Article XXIII.1 (c) pursuant to a so-called situation complaint.

<sup>233</sup> See the example of the slave trade agreement referred to in text at notes 205–06 *supra*.

<sup>234</sup> See text at note 104 *supra*.

*Other rules to be considered as facts.* In establishing the relevant facts of a dispute and applying WTO rules to these facts, non-WTO rules may constitute proof of certain factual circumstances that must be present, for example, if WTO rules are not to be violated. The standard example is a multilateral environmental convention that calls for the imposition of certain trade restrictions to protect the environment from product X, which is considered harmful to human health under the convention. Even if this convention is not binding on all WTO members, or on the disputing parties in the particular case (in particular, the complainant), the fact that, say, sixty countries including half of the WTO membership have ratified the convention may constitute significant proof under GATT Article XX(b) that the defendant's measure is, indeed, "necessary for the protection of human health."<sup>235</sup>

The role non-WTO rules may play as "facts" can thus be especially important in defending trade restrictions prescribed in an environmental convention against nonparties.<sup>236</sup> Even if those nonparties (members of the WTO) are not legally bound by the convention and a WTO panel could therefore not apply this non-WTO rule (with a view to prevailing over the relevant WTO rule, depending on the conflict rule to be applied), the convention could nonetheless constitute strong support for the defendant's contention that the trade restriction is "necessary" pursuant to GATT Article XX(b). Recall, however, that the non-WTO rule then exerts influence not as a legal right or obligation, but as proof of an alleged fact ("necessary to protect health"), meaning that it may not be conclusive. The complainant may be able to disprove the veracity of or rebut the factual evidence reflected in the non-WTO rule. Without such an option, a group of WTO members might conclude a convention stating, for example, that hormone-treated beef is dangerous. In doing so, they might hope to bind nonsignatories that could challenge their ban on hormone-treated beef in the WTO. In these circumstances, a WTO panel would not be compelled to accept the premise that hormones are dangerous as an established fact. It would need to weigh that premise in the convention against other evidence on the record and might conclude, as it did in *EC—Hormones*, that science does not support a ban on hormone-treated beef.

*Other rules in the interpretation of WTO covered agreements.* Interpretation, at least in the relatively strict sense referred to in Articles 31 and 32 of the Vienna Convention,<sup>237</sup> consists of giving meaning to the terms of a treaty. It is a matter of definition. For a non-WTO rule to play a role in this process, (1) the WTO term in question must be broad and ambiguous enough to allow for input by other rules; and (2) the other rule must say something about what the WTO term should mean, i.e., there must be some connection with a WTO term for a non-WTO rule to impart meaning to the interpretive process.<sup>238</sup> This was the case in *U.S.—Shrimp/Turtle*, where the Appellate Body interpreted the WTO term "exhaustible natural resources" in GATT Article XX(g) with reference to, inter alia, the LOS Convention, the Convention on Biological Diversity, and CITES.<sup>239</sup> Moreover, for a non-WTO rule to be relevant in treaty interpretation, that is, to cast light on what WTO members meant when

<sup>235</sup> See Marceau, *Call*, *supra* note 175, at 131.

<sup>236</sup> See, e.g., Montreal Protocol, *supra* note 84, Art. 4; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, Art. 4(5), 28 ILM 657 (1989).

<sup>237</sup> Not the wider sense it is sometimes given with reference to all possible actions that a judge can undertake (including, for example, applying other international law and the decision referred to earlier of determining which of two seemingly applicable laws must prevail).

<sup>238</sup> As the ICJ stated in *Fisheries Jurisdiction*, *supra* note 157, para. 68, with respect to interpretation:

It is one thing to seek to determine whether a concept is known to a system of law, in this case international law . . . : the question of the existence and content of the concept within the system is a matter of definition. It is quite another matter to seek to determine whether a specific act falling within the scope of a concept . . . violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality.

<sup>239</sup> *U.S.—Shrimp/Turtle*, *supra* note 34, paras. 128–32.

using, for example, the term “exhaustible natural resources” in GATT, that non-WTO rule must reflect the “common intentions” of *all WTO members*.<sup>240</sup> The crucial question is what WTO members meant when referring to “exhaustible natural resources” in Article XX, not what the disputing parties understand by this term. Finally, interpretation must be limited to giving meaning to rules of law. It cannot extend to creating new rules.<sup>241</sup> The Appellate Body confirmed that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”<sup>242</sup> (pursuant to the principle of effectiveness: *ut res magis valeat quam pereat*). At the other end of the spectrum, the Appellate Body also stated that the “principles of interpretation [in the Vienna Convention] 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>243</sup> Elsewhere, the Appellate Body emphasized that “it is certainly not the task of either panels or the Appellate Body to amend the DSU. . . . Only WTO Members have the authority to amend the DSU . . . .”<sup>244</sup> Hence, within the process of treaty interpretation, non-WTO rules cannot add meaning to WTO rules that goes either beyond or against the “clear meaning of the terms” of WTO covered agreements. Interpretations *contra legem* are prohibited. Interpretation would thus permit reading the WTO term “exhaustible natural resources” as including certain living species with reference to international environmental law (as not running counter to the “clear meaning of the terms”);<sup>245</sup> but it would prohibit reading this term as including resources that are “clearly” not exhaustible (such as tomatoes) or “clearly” not natural (such as plastic).

The above restrictions linked to the process of treaty interpretation demonstrate that the role of non-WTO rules in the interpretation of WTO covered agreements must be limited. Contrary to what certain authors seem to imply,<sup>246</sup> treaty interpretation with reference to other rules of international law is not a panacea for all problems of interplay between WTO and other rules of international law. Solutions must be found, rather, in the areas discussed in previous sections (not dealing with interpretation). Crucially, to say that treaty interpretation may not add to or diminish the “clear meaning of the terms” in WTO covered agreements does not prevent other legal processes (based on the consent of the WTO members concerned) from leading to the dis-application of WTO rules. As already indicated, WTO panels may apply non-WTO rules and these rules may overrule WTO rules. But this result does not come from interpreting a WTO rule with reference to other rules; it comes from having two rules that are applicable to a given dispute and giving preference to the one that should prevail under international law.

With the above limits to treaty interpretation in mind, we now consider the four provisions in Articles 31 and 32 of the Vienna Convention (the rules of customary law on interpretation embraced by the Appellate Body<sup>247</sup>) that may allow for reference to rules of international law other than those set out in the WTO treaty itself or in agreements or instruments signed in connection with its conclusion:

<sup>240</sup> See text at note 252 *infra*.

<sup>241</sup> See text at note 199 *supra*.

<sup>242</sup> U.S.—Gasoline, *supra* note 52, at 23, *confirmed in*, inter alia, Japan—Taxes, *supra* note 54, at 12.

<sup>243</sup> India—Patent, *supra* note 185, para. 46. See ILC Commentary to Vienna Convention Arts. 31, 32, RAUSCHNING, *supra* note 98, at 252–53 (“the [ICJ] has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain”).

<sup>244</sup> United States—Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/AB/R, para. 92 (Jan. 10, 2001).

<sup>245</sup> See text at note 239 *supra*.

<sup>246</sup> Canal-Forgues, *supra* note 175, at 5; Charney, *supra* note 3, at 219; Marceau, *Call*, *supra* note 175, at 110; Marceau, WTO Agreements, *supra* note 175, at 3; Trachtman, *supra* note 41, at 343.

<sup>247</sup> See *supra* note 54 and corresponding text.

- “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (Art. 31(3)(a));<sup>248</sup>
- “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (Art. 31(3)(b));
- the nonexhaustive category of “supplementary means of interpretation” (Art. 32); and
- “any relevant rules of international law applicable in the relations between the parties” (Art. 31(3)(c)).

The first two provisions—subsequent agreement and subsequent practice—are essentially limited (given the large membership of the WTO) to agreements in the specific WTO context (note the strict requirement, also in respect of subsequent practice, that agreement between the parties on interpretation or application of WTO rules must be established<sup>249</sup>). However, the rules (and especially the practice establishing rules) referred to in these two provisions must not necessarily be contained in WTO covered agreements. As for the third provision—“supplementary means of interpretation”—the Appellate Body in *EC—Poultry* referred to the Oilseeds Agreement between the European Community and Brazil as “part of the historical background of the concessions of the European Communities for frozen poultry meat.”<sup>250</sup> This factor limits the relevance of non-WTO rules under Article 32 to those existing at the time of conclusion of the WTO treaty (April 15, 1994). The fourth provision—other “relevant rules of international law”—is the most interesting one for present purposes. It provides for reference to rules that are neither part of WTO covered agreements nor part of the law created within the GATT/WTO context. Finally, referring to non-WTO rules in the interpretation of WTO claims validly before it is something a WTO panel can, and should, do at its own initiative, as part of its own legal reasoning (*jura novit curia*).<sup>251</sup>

With regard to the relevant rules applicable in the relations between the parties, we pointed out earlier and the ICJ confirmed in the *Right of Passage* case that “[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.”<sup>252</sup> Article 31(3)(c), in contrast to “supplementary means of interpretation,” allows for reference to both rules of international law existing at the time of conclusion of the WTO treaty, and rules of international law that emerged subsequently and exist at the time of interpretation. The former is referred to as “contemporaneous interpretation”; the latter amounts to what is called “evolutionary interpretation.” The intention of the parties must determine the method to be applied.<sup>253</sup> However, since most WTO treaty provisions are “continuing” ones,<sup>254</sup> “evolutionary interpretation” will often be the preferred solu-

<sup>248</sup> Article IX of the WTO Agreement has contracted out of Article 31(3)(a) on subsequent agreements “between the parties” regarding interpretation. It suffices, in the WTO, that three quarters of WTO members agree to an interpretation of the WTO treaty for that interpretation to be authoritative.

<sup>249</sup> *But see infra* note 262.

<sup>250</sup> *EC—Poultry*, *supra* note 38, para. 83.

<sup>251</sup> This explains the Appellate Body’s chastisement of a panel for not having considered certain non-WTO rules (legal instruments created in the context of the World Customs Organization) that were obviously related to the WTO rules under interpretation, even though the parties to the dispute had not invoked these non-WTO rules. European Communities—Customs Classification of Certain Computer Equipment, WTO Doc. WT/DS62/AB/R, paras. 89–90 (June 26, 1998) [hereinafter *EC—Computer Equipment*]. In contrast, for a panel to refer to non-WTO rules as facts, outlined *supra* in text following note 234, it seems that one of the parties must first raise these non-WTO rules. That party then also has the burden of proof in this respect.

<sup>252</sup> *Right of Passage over Indian Territory* (Port. v. India), Preliminary Objections, 1957 ICJ REP. 125, 142 (Nov. 26).

<sup>253</sup> Rosalyn Higgins, *Some Observations on the Inter-Temporal Rule in International Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 173 (Jerzy Makarczyk ed., 1999).

<sup>254</sup> See text following note 78 *supra* and, in particular, *supra* note 82. Focusing more on treaty interpretation, see *Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, Advisory Opinion, 1955 ICJ REP. 67, 106 (June 7); OPPENHEIM, *supra* note 50, at 1268.



tion.<sup>255</sup> The non-WTO rules referred to in Article 31(3)(c) may derive from any source of international law, that is, treaty provisions, customary international law, or general principles of law.<sup>256</sup> The article does not restrict these rules as to either the timing of their establishment or their source. In WTO jurisprudence reference has been made, for example, to the principle of good faith and the doctrine of *abus de droit*,<sup>257</sup> “customary usage in international trade,”<sup>258</sup> and “the fundamental rule of due process.”<sup>259</sup>

But who must be bound by the non-WTO rule for it to impart meaning to a WTO term pursuant to Article 31(3)(c) (all WTO members, the disputing parties, or just one of them)? As noted, the non-WTO rule must reflect the “common intentions” of the WTO members by being agreed upon or tolerated—be it explicitly, implicitly, or by acquiescence only—by all WTO members. Article 31(3)(c) refers to rules “applicable in the relations between the parties.” Article 2(1)(g) of the Vienna Convention defines “party” as “a State which has consented to be bound by the treaty and for which the treaty is in force.” Hence, Article 31(3)(c) refers to parties to the treaty, not parties to a particular dispute under that treaty. After all, how could a bilateral agreement between the disputing parties, concluded outside the WTO context, play a role in the interpretation of WTO covered agreements when, pursuant to Article 31(3)(a) and (b), agreements or practice within the WTO context can play this role only if accepted, either explicitly or implicitly, by all WTO members? As the Appellate Body put it in *EC—Computer Equipment*: “The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined ‘expectations’ of *one* of the parties to a treaty.”<sup>260</sup> At the same time, Article 31(3)(c) refers to “the parties,” not “all the parties.”<sup>261</sup> As a result, and particularly in the light of the ILC commentary to Article 31(3)(b),<sup>262</sup> the requirement is not that all the parties to the WTO treaty must have formally and explicitly agreed, one after the other, to

<sup>255</sup> An approach that was followed in U.S.—Shrimp/Turtle, *supra* note 34, paras. 128–32 (stating in paragraph 129 that the term “exhaustible natural resources” in GATT Article XX “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment,” not as it was understood in 1947).

<sup>256</sup> In the *Golder* case, 57 ILR 201, 217 (Eur. Ct. H.R. 1975), for example, it was held that the reference to “relevant rules of international law” includes general principles of law. SINCLAIR, *supra* note 81, at 119, states that this reference “may be taken to include not only the general rules of international law but also treaty obligations existing for the parties.”

<sup>257</sup> U.S.—Shrimp/Turtle, *supra* note 34, para. 158. In footnote 157 at paragraph 166 of this report, the first and so far the only explicit reference to Article 31(3)(c) is made. See also U.S.—Tax Treatment for “Foreign Sales Corporations,” WTO Doc. WT/DS108/AB/R, para. 166 (Mar. 20, 2000) (referring to the principle of good faith as “at once a general principle of law and a principle of general international law”); Brazil—Aircraft, *supra* note 191, paras. 2.10–.11 & n.15.

<sup>258</sup> EC—Poultry, *supra* note 38, para. 146 (in order to conclude that the term “c.i.f. import price” in Article 5.1(b) of the Agreement on Agriculture refers simply to the c.i.f. price without customs duties and taxes).

<sup>259</sup> EC—Computer Equipment, *supra* note 251, para. 70 (in interpreting DSU Article 6.2); see also EC—Hormones, *supra* note 94, para. 133 & n.138 (referring to “fundamental fairness,” “due process,” and “natural justice” in the context of DSU Article 11).

<sup>260</sup> EC—Computer Equipment, *supra* note 251, para. 84.

<sup>261</sup> Article 31(2)(a), for example, uses the expression “all the parties” when it comes to agreements relating to the treaty made in connection with its conclusion.

<sup>262</sup> The commentary to Article 31(3)(b) states as follows:

The text provisionally adopted in 1964 spoke of a practice which “establishes the understanding of all the parties”. By omitting the word “all” the Commission did not intend to change the rule. It considered that the phrase “the understanding of the parties” necessarily means “the parties as a whole”. It omitted the word “all” merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.

Quoted in RAUSCHNING, *supra* note 98, at 254. As a result, if “parties” in Article 31(3)(b) means “all the parties” without requiring that all of them have explicitly agreed with (or actually engaged in) the practice, there is no reason to give a different meaning to “parties,” as the term is used in Article 31(3)(c).

the new non-WTO rule; nor even that this rule must otherwise legally bind all WTO members; but, rather, that this new rule can be said to be at least implicitly accepted or tolerated by all WTO members, in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the WTO term concerned.

In some cases, especially in interpreting the schedule of concessions of a particular WTO member, the intention of one WTO member, or a bilateral agreement between two WTO members that originally negotiated the concession, may assist greatly in ascertaining the common intentions of WTO members.<sup>263</sup> Whether it does so will depend on the WTO rule in question and the extent to which it can be established that other WTO members hold a contrary understanding. Of course, if the non-WTO rule is legally binding on all WTO members (like a general principle of law or general customary international law), the non-WTO rule must be regarded as an expression of “common understanding.” Still, there may be cases where a non-WTO rule is not legally binding on all WTO members, but still reflects the “common understanding” of all WTO members. In *U.S.—Shrimp/Turtle*, for example, the Appellate Body, in its interpretation of GATT Article XX(g), referred to rules of international law that were not binding on all WTO members, not even on all parties to the dispute.<sup>264</sup> To the extent that these non-WTO rules gave meaning to Article XX(g), the Appellate Body held that they reflected “the contemporary concerns of the community of nations.”<sup>265</sup> Here, the Appellate Body skated on thin ice without much explanation. It did not even refer to Article 31(3)(c); nor did it explain why rules binding on only some WTO members (not including all of the disputing parties) nonetheless reflected “concerns” common to all WTO members that could, in turn, impart meaning to a WTO term. However, in view of the reasons stated above, the approach is defensible under Article 31(3)(c), at least to the extent that these non-WTO rules do reflect a “common understanding” of all WTO members.

*Interpretation of non-WTO rules in the light of the WTO treaty.* Given that WTO panels may be called on to apply rules of international law other than those in WTO covered agreements, a few words should be said about how panels should interpret these other rules (not necessarily treaty rules). First, they must do so in accordance with “customary rules of interpretation of public international law.”<sup>266</sup> Second, if the non-WTO rule is a treaty rule, the guidelines set out in the section on how to interpret WTO treaty terms must be respected.<sup>267</sup> Thus, interpretation of the non-WTO rule must take account of other rules of international law that reflect the “common understanding” of the parties to the non-WTO treaty, including, in particular, the WTO treaty itself. Hence, although it may be that a non-WTO rule (say, a bilateral environmental agreement between the disputing parties only) cannot be referred to in interpreting the WTO treaty (since it does not reflect the “common understanding”

<sup>263</sup> See *EC—Computer Equipment*, *supra* note 251; *EC—Poultry*, *supra* note 38; *Canada—Milk*, *supra* note 192. But as noted in OPPENHEIM, *supra* note 50, at 1268: “An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration.”

<sup>264</sup> *U.S.—Shrimp/Turtle*, *supra* note 34, para. 130 nn.110–13.

<sup>265</sup> *Id.*, para. 129. The GATT panel in *United States—Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June 10, 1994, not adopted), in contrast, read Article 31 (with particular focus on Article 31(3)(a)) as allowing reference only to non-WTO rules of international law that had been accepted by all GATT contracting parties. Since CITES was not so accepted, the panel refused to take it into account. *Id.*, para. 5.19.

<sup>266</sup> DSU Art. 3.2. Note that this provision is not limited to treaty interpretation. For the proposition that different rules may apply as regards, for example, custom and unilateral acts of states, see *Nicaragua*, Merits, *supra* note 151, para. 178 (custom); *Fisheries Jurisdiction*, *supra* note 157, para. 46 (unilateral declarations).

<sup>267</sup> For example, the Appellate Body had to interpret a non-WTO rule in *EC—Bananas*, *supra* note 109, WTO Doc. WT/DS27/AB/R, at 167 (Sept. 9, 1997) (“we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver”).

of all WTO members), that rule must still be interpreted with reference to WTO treaty rules, which are binding on both parties to the bilateral agreement and thus necessarily reflect *their* “common understanding” of the non-WTO rule. As a result, interpreting non-WTO rules in the light of the WTO treaty is to be resorted to by panels as an instrument of “conflict avoidance.” Only if the WTO rule, as interpreted in the light of other rules (excluding, in our example, the bilateral agreement), cannot be reconciled with the non-WTO rule, as interpreted in the light of the WTO treaty, does a genuine conflict arise. Once again, if such a conflict arises, relevant conflict rules (not the process of treaty interpretation) must determine which rule is to prevail: the WTO rule or the other rule.

### III. CONCLUSION

The model developed in this paper leads to five major conclusions. First, both the WTO treaty and WTO dispute settlement are integral parts of public international law. They are not “closed” or “self-contained” regimes; they were created in the wider context of general international law, as well as other treaties. This other international law continues to apply in the WTO unless the WTO treaty has contracted out of it. Depending on the relevant conflict rules, pre-1994 non-WTO rules may prevail over the WTO treaty.

Second, the WTO treaty, WTO panels, and the Appellate Body were not only created in the wider context of public international law; they continue to exist in that context. The WTO treaty is not static. It is inherently dynamic. Depending on the relevant conflict rules, post-1994 non-WTO rules may prevail over the WTO treaty.

Third, although the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements (combined with elements of implied jurisdiction), the international law they may apply in resolving these claims is not limited. It potentially includes all rules of international law. In practice, this inclusiveness means that a defendant should be allowed to invoke non-WTO rules as a justification for breach of WTO rules, even if the WTO treaty itself does not offer such justification (say, with respect to human rights). However, such a justification should be recognized only when both disputing parties are bound by the non-WTO rule and that rule prevails over the WTO rule pursuant to conflict rules of international law. Hence, public international law fills gaps left open by the WTO treaty and the WTO treaty must be interpreted in the light of other rules of international law. But this is not the only window of opportunity for public international law. More important, non-WTO rules may actually apply before a WTO panel and overrule WTO rules.

Fourth, interpretation may result in “interpreting away” apparent conflicts, but it does not resolve genuine conflicts between WTO rules and other rules of international law. Moreover, any interpretation of the WTO treaty must be based on the common intentions of all WTO members, not merely those of the disputing parties.

It is crucial to distinguish between (1) panel jurisdiction, (2) applicable law, and (3) the process of interpreting the WTO treaty. Equally important is the distinction between amending the WTO treaty and accepting *inter se* modifications to it. The limited *jurisdiction* of panels has led to unjustified restrictions on the distinct matter of *applicable law* before a panel. In turn, the realization by some that a panel should be allowed to consider more than WTO covered agreements (a matter of *applicable law*) has led commentators wrongly to accept even non-WTO rules that do not reflect the common intentions of all WTO members as reference material in *interpreting* WTO treaty terms. Moreover, those authors correctly accepting that potentially all international law may be *applicable law* before a panel have erroneously restricted the impact of these non-WTO rules (in the sense that, in their view, WTO rules always prevail) with reference to restrictions on treaty *interpretation* (e.g., DSU

Art. 3.2). Finally, the strict requirements imposed to *amend* the WTO treaty have been wrongly invoked as an obstacle to allowing inter se *modifications* to the treaty.

Within this framework more work is needed to clearly define those rules of general international law from which the WTO treaty did not contract out (and hence should also apply in the WTO), and point out those non-WTO rules that conflict with the WTO treaty and must prevail over it. The latter necessitates application of the broad definition of conflict defended here and consideration of the WTO treaty as a “continuing treaty” with *lex generalis* features vis-à-vis many other nontrade agreements, and setting out reciprocal rights and obligations that allow for a variety of inter se modifications in a context of regulatory diversity.

Fifth, the interaction between WTO law and public international law is not one-sided. It is a continuing process of cross-fertilization. Just as public international law enriches WTO law, so WTO law should further develop international law. General international law, in particular its “secondary” rules on the law of treaties, state responsibility, and judicial settlement of disputes, is the dynamic engine of treaty-based regimes such as the WTO. These rules are also essential to ensuring the coherence and integrity of public international law as the legal system encompassing the WTO. Hence, if the WTO neglected other rules of international law, it would not only impoverish the WTO legal system and risk reducing it to a uniform one-rule-fits-all framework implemented as a trade-only “safe haven.” In addition, it would threaten the unity of international law.