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# *WTO Dispute Settlement and Human Rights*

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## **Abstract**

*The World Trade Organization (WTO) dispute settlement system could be seized of a dispute carrying human rights claims or arguments in support of either a complaint or a defence. How would WTO adjudicating bodies address this issue? It is suggested that WTO law must evolve and be interpreted consistently with international law, including human rights law. Thus, a good faith interpretation of the provisions of the WTO, including its exception provisions, should lead to a reading and application of WTO law consistent with human rights. The recent Doha Declaration on TRIPS and Public Health is a good example of such a possible coherent reading of WTO provisions taking into account potentially relevant human rights law. WTO adjudicating bodies cannot formally interpret other treaties and customs and thus cannot apply or enforce other treaties or customs or determine the legal consequences of rights and obligations that WTO Members may have under other treaties or by custom; these may be examined only when necessary for the interpretation of WTO law and/or as a factual determination. WTO Members do not appear to have granted WTO remedies for the enforcement of rights and obligations other than those under the 'covered agreements'. Since states are bound simultaneously by all their international rights and obligations, WTO Members in violation of human rights law may be liable, but this responsibility cannot be enforced by WTO adjudicating bodies. Yet human rights can be respected through good interpretation and application of WTO provisions.*

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## 1 Introduction

The relationship between the dispute settlement mechanism of the World Trade Organization (WTO) and human rights law<sup>1</sup> is only a small part of the wider issue of ethics and trade. The human rights aspects of trade actions cover a wide spectrum of moral, ethical, political, social and legal issues. Allegations of conflicts between, on the one hand, trade considerations and rules, and, on the other hand, respect for human rights, are regularly made. Some believe that WTO obligations somehow encourage, lead to, authorize or permit human rights violations, and that the WTO treaty should therefore be condemned.<sup>2</sup> Others have argued that violators of human rights are necessarily also violators of WTO rules.<sup>3</sup> Still others want to use human rights considerations to justify deviations from WTO market access rules<sup>4</sup> or to make preferences and other advantages conditional on compliance with human rights.<sup>5</sup>

<sup>1</sup> On WTO and human rights generally, see Ala'i, 'A Human Rights Critique of the WTO: Some Preliminary Observations', 33 *George Washington International Law Review* (2000–2002) 537–533; Appleton, 'The World Trade Organization: Implications for Human Rights and Democracy', 29 *Thesaurus Acroasiuum* (2000) 415–462; Bhagwati, 'Trade Linkage and Human Rights', in Jagdish Bhagwati and Mathias Hirs (eds), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (1998) 241–250; Cleveland, 'Human Rights Sanctions and the World Trade Organization', in F. Francioni (ed.), *Environment, Human Rights and International Trade* (2001) 199–261; Cohn, 'The World Trade Organization: Elevating Property Interests Above Human Rights', 29 *Georgia Journal of International and Comparative Law* (2001) 247–440; Flory and Ligneul, 'Commerce international, droits de l'homme, mondialisation: les droits de l'homme et l'Organisation mondial du commerce', in *Commerce mondiale et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques* (2001) 179–191; Lim, 'Trade and Human Rights: What's At Issue?', 35 *Journal of World Trade* (2001) 275–300; Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law', 37 *Common Market Law Review* (2000) 1363–1382; Qureshi, 'International Trade and Human Rights from the Perspective of the WTO', in F. Weiss, E. Denters and P. de Waart (eds), *International Economic Law with a Human Face* (1998) 159–173; Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization', 11 *American University Journal of International Law and Policy* (1996) 1–46.

<sup>2</sup> In addition to a series to activists' allegations, one may also refer to the first report of the Expert Group of the SubCommission on Human Rights, 15 June 2000, which became known as the 'Nightmare Report' (having qualified the WTO as the 'nightmare' of human rights and developing countries) — E/CN.4/Sub.2/2000/13.

<sup>3</sup> Robert Howse and Makau Mutua have written: '[I]t is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the processes that WTO agreements require.' Howse and Mutua, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization' (International Center for Human Rights and Democratic Development, Policy Paper, 2002) at 17. I would tend to agree with José Alvarez (commenting on Howse and Mutua's paper) that: 'Many human rights violators routinely comply with international economic agreements and many prominent defenders of human rights, including the United States, have trouble adhering to and complying with some international agreements.' See Alvarez, 'Trade and the Environment: Implications for Global Governance: How Not to Link: Institutional Conundrums of an Expanded Trade Regime', 7 *Widener Law Symposium Journal* (2001) 1.

<sup>4</sup> E.g. the invocation of GATT Articles XX or XXI or GATS Articles XIV or XIVbis.

<sup>5</sup> E.g. the labelling requirements referring to human rights considerations and the possibility of human rights considerations in GSP preferences.

Some recall that WTO Members are liable for the human rights consequences of their trade actions. The inconsistent positions of states in human rights and trade fora are also often alleged. Many suggest that conflicts between systems of laws (trade and human rights) and therefore systems of values must ultimately be addressed as matters of policy through political arenas, and that dispute settlement, by itself, is unlikely to resolve the issues.<sup>6</sup>

In attempting to break down and expound the relevant aspects of this debate, I will examine one small aspect of this multidimensional issue of trade and human rights: the WTO dispute settlement mechanism and human rights law. It is possible that the WTO dispute settlement system will be seized of a dispute carrying human rights arguments in support of either the complaint or the defence. In this context, a WTO dispute settlement panel may be called upon to answer the following questions. Can a WTO panel accept human rights allegations when there are no references to human rights in the WTO treaty? Can a WTO Member invoke a human rights provision to refuse to comply with a WTO provision? Does human rights law have direct application in the WTO system of law and before WTO adjudicating bodies? Can a member invoke human rights considerations in its interpretation of WTO rights and obligations? Does the WTO or international law authorize members to adopt measures that take into consideration human rights abuses occurring exclusively in another state and with no direct effect in that member's territory? These questions are but some aspects of the issue of the relationship between the WTO dispute settlement system and human rights law.

The concept of 'dispute settlement' is broad. An important systemic issue of dispute settlement is concerned with the concept of 'applicable law', i.e. the system of legal norms binding on WTO Members, as WTO Members, and providing for effective remedies. I suggest that WTO law is a specific subsystem of international law with specific rights and obligations, specific claims and causes of action, specific violations, specific enforcement mechanisms and specific remedies in case of their violation. The WTO dispute settlement system is also concerned with the distinct but parallel question of the limited jurisdiction and incapacity of the WTO adjudicating bodies to apply and enforce<sup>7</sup> norms other than those of the WTO. The methods and tools used by WTO adjudicating bodies in the interpretation of the 'WTO applicable law' are also important. In this paper, I will develop these three aspects in relation to human rights law.

Unless otherwise prescribed, WTO provisions must evolve and be interpreted consistently with international law, including human rights law. It is suggested that a good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law. The recent Doha

<sup>6</sup> See e.g. Alvarez, *supra* note 3.

<sup>7</sup> 'Enforce' will be defined as providing for effective remedies.

Declaration on TRIPS and Public Health<sup>8</sup> is a good example of such coherent reading of WTO provisions taking into account potentially relevant human rights law. Part 2 of this paper suggests that the issue of whether WTO Members can invoke human rights law to refuse to comply with WTO obligations (including allegations of ‘conflicts’ between WTO and other norms of international law) can only be adequately answered by examining the nature of the ‘WTO applicable law’ — a specific subsystem of law — and the limited competence and jurisdiction of WTO adjudicating bodies. International law recognizes *lex specialis* systems which provide a specific system of treaty control and remedies. It is doubtful that WTO Members wanted to make WTO remedies available for human rights enforcement. Part 3 discusses the interpretation of the WTO applicable law taking into account, when relevant, human rights law.

Yet, even if their occurrence would be very rare, pure conflicts between WTO law and human rights, including *jus cogens*, are conceptually possible, and Part 4 examines the issue. In case of conflicts, WTO adjudicating bodies do not appear to have the competence either to reach any formal conclusion that a non-WTO norm has been violated, or to require any positive action pursuant to that treaty or any conclusion that would enforce a non-WTO norm over WTO provisions, as in doing so the WTO adjudicating bodies would effectively add to, diminish or amend the WTO ‘covered agreements’. A distinction exists between the binding obligations of states (WTO Members) — for which states are at all times responsible — and the ‘applicable WTO law’. ‘WTO applicable law’ refers to the law binding on states, as WTO Members, which can be enforced (by effective remedies) by WTO adjudicating bodies which have been granted compulsory and exclusive jurisdiction over such WTO matters. A special focus is given to *jus cogens*. Arguably, because of its very nature, *jus cogens* would be part of all laws and thus would have direct effect in WTO law. The customary prohibition against any violation of *jus cogens* is such as to invalidate *ab initio* any violating provision, a legal reality that binds all states and all institutions. Situations of pure conflicts between WTO provisions and *jus cogens* are, however, difficult to conceive. In most, if not all, cases, the strong presumption against a violation of *jus cogens* will lead to an interpretation of WTO law which avoids such a violation. Some may argue that WTO panels and the Appellate Body do not have the capacity to determine the nullity of a WTO treaty provision for violation of *jus cogens*, as they only have the capacity to recommend that a national measure be brought into conformity with the covered agreements (although WTO provisions must be interpreted in taking into account relevant human rights law). In all cases, however, WTO Members in violation of human rights law remain subject to rules on state responsibility and liable for the consequences of that violation. In short, there is no perfect coherence between the human rights and WTO systems of law and jurisdiction.

<sup>8</sup> WT/MIN(01)/DEC/2. See also the reference to that Decision in the Statement from the Committee on Economic, Social and Cultural Rights, 29 November 2001, paras 15 and 18.

Finally, in Part 5, I touch upon what is probably the most important and complex issue in the trade and human rights debate, that of WTO jurisdiction: to what extent can WTO Members' trade regulatory and preferential distinctions take into account, be based on, react to, or force policy and regulatory changes to, human rights situations taking place entirely and exclusively in another member's territory? Issues related to and encapsulated in the debate over WTO jurisdiction include: (1) whether and how WTO provisions permit WTO Members to act upon extra-jurisdictional matters; (2) whether and how foreign policy considerations are to be used in regulatory and preferential distinctions; (3) the state of WTO law on process and production methods (PPMs); and (4) issues relating to conflicts and overlaps with other legislative and judicial jurisdictions.

## 2 The 'Limited Jurisdiction' of WTO Adjudicating Bodies<sup>9</sup> and the 'WTO Applicable Law'

The nature and process of the WTO dispute settlement mechanism and the reach of Article 23 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), will often 'attract jurisdiction' over any dispute having trade impacts, including those alleging human rights considerations. A formal debate over the relationship between WTO law and human rights law may very well take place before WTO adjudicating bodies, if raised by the disputing members. In this context, the issue of the 'applicable law' between WTO Members and the distinct but related issue of the suggested incapacity of panels and the Appellate Body to make recommendations enforcing autonomous norms of international law, such as those on human rights, must be examined.

### *A The DSU will Attract Jurisdiction in Favour of WTO Adjudicating Bodies*

The WTO dispute settlement mechanism can be triggered easily and quickly, and panels and the Appellate Body will often be expected to make rapid rulings, arguably at the exclusion of other jurisdictions and on any WTO-related complaint.<sup>10</sup>

<sup>9</sup> On this issue, see generally Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard International Law Journal* (1999) 333; Marceau, 'A Call for Coherence in International Law', 33 *Journal of World Trade* (1999) 87; Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 35 *Journal of World Trade* (2001) 1081; Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* (2001) 595; Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 *Journal of World Trade* (2001) 499; Schoenbaum, 'WTO Dispute Settlement: Praise and Suggestions for Reform', 47 *International and Comparative Law Quarterly* (2000) 647; Palmeter and Mavroidis, 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 398.

<sup>10</sup> As further developed, the argument that WTO adjudicating bodies can only apply and assess WTO law does not preclude a human rights body from ruling that the same measure is not permissible under a human rights treaty. Each treaty deals with a different set of rights and obligations, all binding on Members simultaneously.

### 1 *The Presumed Legal and Economic Interests will be Sufficient to Initiate a WTO Dispute Settlement Mechanism*

Unlike requirements for standing in many international tribunals, the conditions for initiating DSU proceedings are easily met. In *US — Wool Shirts and Blouses*, the Appellate Body noted: ‘If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then dispute settlement is available.’<sup>11</sup> Similarly, in *EC — Bananas III*, the Appellate Body stated that: ‘[A] Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII(1) of the GATT 1994 and of Article 3(7) of the DSU suggests, furthermore, that a Member is *expected to be largely self-regulating* in deciding whether any such action would be “fruitful”.’<sup>12</sup> Since the United States was a producer of bananas, and had a *potential export interest*, it had sufficient interest to initiate a WTO panel based on the allegation that the EC bananas regime was inconsistent with WTO law, ‘as it is more likely than ever to *affect them, directly or indirectly*’.<sup>13</sup> Although in practice a member must have some authentic interest at stake to initiate WTO dispute settlement proceedings, the *Korea — Dairy* panel rejected the notion that evidence of any economic or legal interest must be provided before WTO proceedings can be triggered.<sup>14</sup>

Allegations that WTO trade is affected would generally suffice to trigger formally the regular WTO dispute settlement process through a simple request in writing for consultations, copied to the Dispute Settlement Body (DSB). Human rights may be discussed during the confidential consultations; but after the mandatory 60-day consultation, a complaining member has a right to require the establishment of a panel. Human rights considerations and arguments will be examined once the panel process, described below, is engaged. Arguments based on human rights considerations — in support of the complaint or the defence — would not in any way change the automatic procedures of the DSU.

### 2 *Quasi-Automaticity, Reversed Consensus and the Rapidity of the WTO Dispute Settlement Mechanisms*

The WTO dispute settlement mechanisms operate according to a principle of ‘reversed consensus’ (also called ‘negative consensus’). According to this principle, many procedural steps happen automatically, within pre-determined time-limits, unless, by

<sup>11</sup> Appellate Body Report, *United States — Measures Affecting Imports of Woven Shirts and Blouses from India* (‘*US — Wool Shirts and Blouses*’), WT/DS33/AB/R, adopted on 23 May 1997, DSR 1997:I, 13.

<sup>12</sup> Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (‘*EC — Bananas III*’), WT/DS27/AB/R, adopted on 25 September 1997, DSR 1997:II, para. 135 (emphasis added).

<sup>13</sup> Appellate Body Report, *EC — Bananas III*, para. 136 (emphasis added).

<sup>14</sup> It did, however, note: ‘Even assuming that there is some requirement for economic interest, we consider that the European Communities, as an exporter of milk products to Korea, had sufficient interest to initiate and proceed with these dispute settlement proceedings.’ Panel Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* (‘*Korea — Dairy*’), WT/DS98/R, adopted on 12 January 2000, para. 7.14.

consensus, WTO Members agree otherwise.<sup>15</sup> When requested, a panel must be established, reports of the panel and Appellate Body must be adopted by the DSB (composed of all members) and retaliatory sanctions must be authorized. The entire dispute process should be completed within 9 to 12 months and, so far, panels and the Appellate Body have respected quite well the deadlines set down in the DSU.<sup>16</sup> After the adjudication process, if immediate implementation is not possible, a 'reasonable period of implementation' is given to the losing party, which varies between 8 and 15 months.<sup>17</sup> At the expiry of that period of implementation, the parties, if they disagree on the consistency of the implementing measure with the WTO rules, must return to the panel and the Appellate Body before sanctions can be authorized by the DSB. A quick arbitration process is also available if parties do not agree on the level of retaliatory sanctions.<sup>18</sup>

This mechanism is rapid compared with any other international adjudication process, and it is now very difficult for any party to a dispute to block it for long. WTO Members find these aspects quite convenient, and the mechanism is well used. Again, allegations and arguments relating to human rights considerations would not in any way affect the quasi-automaticity of this rapid process.

### *3 The Reach of Article 23 of the DSU: Compulsory, Prescriptive and Exclusive Jurisdiction*

Article 23 of the DSU, entitled 'The Strengthening of the Multilateral System', provides that:

(1) When 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 objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

(2) Members shall: (a) *not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.<sup>19</sup>

<sup>15</sup> For instance, Article 6(1) of the DSU envisages that, after the period of consultations, the complaining party can request the establishment of a panel which 'shall be established at the latest the second time the matter appears on the agenda of the DSB, unless by consensus the WTO Members decide not to do so'. In practice, a complaining member will never agree to participate in a consensus decision not to establish a panel that it has just requested (unless it otherwise obtains satisfaction). The same is true for the adoption of panel and Appellate Body reports and for the imposition of sanctions: when requested, such actions must take place unless by consensus WTO Members decide not to do so. To ensure the effectiveness of the process, each time the action of the DSB is formally required, any member can call a meeting of the DSB on 10–15 days' notice.

<sup>16</sup> See Davey, 'Has the WTO Dispute Settlement Exceeded Its Authority?', 4 *Journal of International Economic Law* (2001) 79.

<sup>17</sup> See Monnier, 'The Time to Comply with an Adverse WTO Ruling — Promptness Within Reason', 35 *Journal of World Trade* (2001) 825.

<sup>18</sup> Article 22 of the DSU.

<sup>19</sup> Emphasis added.

Article 23 of the DSU is possibly one of the most fundamental provisions of the DSU. Not only does it prohibit unilateral measures or countermeasures, and arguably some state 'behaviour' that would potentially 'threaten the multilateral trade system',<sup>20</sup> but it also provides that the WTO has exclusive jurisdiction to provide remedies for violation of the WTO treaty.<sup>21</sup>

Article 23(1) of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23(2) articulate specific and clearly defined forms of prohibited unilateral action contrary to Article 23(1) of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They *all* concern the obligation of Members of the WTO not to have recourse to unilateral action.<sup>22</sup>

As a means of ruling out unilateral measures, Article 23 of the DSU was drafted so that, when they become WTO Members, states, in advance of any dispute, renounce the use of unilateral trade countermeasures other than in conformity with WTO law, and provide WTO adjudicating bodies with the exclusive jurisdiction to address violations of WTO provisions.<sup>23</sup> The WTO is one of the rare systems of treaty law that has managed to regulate countermeasures by powerful states.

<sup>20</sup> In the Panel Report, *United States — Sections 301–310 of the Trade Act of 1974* ('US — Section 301 Trade Act'), WT/DS152/R, adopted on 27 January 2000, this seems to have been one of the conclusions reached by the Panel — in that case, the threat of unilateral determinations by a powerful state, the United States. The panel was of the view that the 'indirect effect' of the admittedly non-mandatory US section 301, the risk of unilateral determination (both having a 'chilling effect' on members and the marketplace), as well as the overall systemic damage of any spill-over effect of such discretionary legislation, were such — in particular, in light of the economic power of the United States — as to lead to a conclusion that the United States, in maintaining section 301, appeared *prima facie* to be in violation of Article 23 of the DSU'. An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is that such unilateral actions threaten the stability and predictability of the multilateral trade system. Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO.' Panel Report, *US — Section 301 Trade Act*, para. 6.14, see also paras 7.71–7.94.

<sup>21</sup> See Panel Report, *US — Certain EC Products*, WT/DS165/R, para. 6.133.

<sup>22</sup> Unilateral measure is defined here as measures other than those explicitly authorized by the WTO. See Appellate Body Report, *United States — Import Measures on Certain Products from the European Communities* ('US — Certain EC Products'), WT/DS165/AB/R, adopted on 10 January 2001, para. 111. See the Panel Report in *EC — Certain EC Products*, para. 6.133: 'In short the regime of counter-measures, reprisals or retaliatory measures has been strictly regulated under the WTO Agreement. It is now only in the institutional framework of the WTO/DSB that the United States could obtain a WTO compatible determination that the European Communities violated the WTO Agreement, and it is only in the institutional framework of the WTO/DSB that the United States could obtain the authorization to exercise remedial action.' The footnote to this quote added: 'Therefore, in the WTO context, the provision of Article 60 of the Vienna Convention on the Laws of Treaties (1969) on this matter does not apply since the adoption of the more specific provisions of Article 23 of the DSU.'

<sup>23</sup> Alain Pellet argues that Article 54 of the new Rules on State Responsibility, by not defining what types of measures, can be viewed as authorizing the use of countermeasures, even by a state not directly affected by a violation of some *erga omnes* obligations. Article 54 should be interpreted taking into account the GATT/WTO prohibition against unauthorized trade countermeasures.

It is possible to ‘opt out’ of the standard DSU procedure by resorting to arbitration under Article 25 of the DSU, if both parties agree. But the arbitration process provided for in Article 25 remains under the auspices of the DSU, notably for its implementation (Articles 21 and 22 of the DSU).<sup>24</sup> In this paper I will refer to the general dispute mechanism of panels and the Appellate Body, and not to the possibility offered by Article 25, which is rarely used.<sup>25</sup>

The exclusive jurisdiction of the WTO adjudicating bodies to deal with allegations of WTO violations does not resolve the complicated issue of overlaps and conflicts of jurisdiction touched upon in Part 5.D below. What exactly is the reach of Article 23 in a situation where the same facts have given rise to a complaint before a human rights jurisdiction? A WTO Member may seek redress for a violation of a human rights treaty before a human rights court. Yet, WTO Members seem to have precluded themselves from engaging in any debate on whether human rights courts would order remedies having any trade-related impact inconsistent with WTO law. At the same time, WTO Members have human rights commitments, and all states must respect all their international rights and obligations at all times.

But, at present, in international law, there does not seem to be any complete coordination between systems of international law. A single measure may violate one treaty but not another, especially if the two treaties do not deal with the same matters or deal with different aspects of the same matter. It is thus possible to envisage a situation where a human rights forum would reach a conclusion that a measure (that is also (part of) a WTO measure) is inconsistent with a human rights treaty, while the WTO adjudicating body may reach the conclusion that the same measure is consistent with the WTO treaty. As required under international law, the measure would have to be modified to comply with human rights law while continuing to be compatible with WTO law; and most of the time this should be feasible. The point is that the conclusions of the WTO adjudicating bodies would only relate to the WTO aspects of the measure and would not affect or deal with the compatibility of the same measure with human rights law. WTO adjudicating bodies do not have the competence to interpret and assess formally whether a WTO measure is compatible with human rights law. States must comply with all their international obligations at all times.

<sup>24</sup> For Ohlhoff and Schloemann, the system contained in Articles 4–22 of the DSU only applies where the parties to the dispute cannot agree on the resolution of the dispute by ‘expeditious arbitration’ within the WTO, which according to Article 25 can ‘as an alternative means of dispute settlement facilitate the solution of certain disputes that concern issues clearly defined by both parties’. See Ohlhoff and Schloemann, ‘Rational Allocation of Disputes and “Constitutionalisation”’: Forum Choice as an Issue of Competence’, in James Cameron and Karen Campbell (eds), *Dispute Resolution in the WTO* (1998) 318.

<sup>25</sup> Note that, in recent proceedings under Article 22(2) and (6), the United States and the European Communities have used Article 25 arbitration to arbitrate the level of sanctions resulting from the refusal of the United States to bring its measure into conformity with the TRIPS Agreement. See *US — Copyright Section 110(5) (Article 25(3))*, WT/DS160/ABR25/1.

## B *The WTO Panels and the Appellate Body have a Delegated and Limited Jurisdiction*

WTO panels and the Appellate Body are creations of the DSU, extending the provisions of Articles XXII and XXIII of GATT 1947. Article 3(1) of the DSU provides that: 'Members affirm their adherence to the principles of management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.' All WTO multilateral trade agreements, except GATS, contain a cross-reference to the provisions of Articles XXII and XXIII of GATT and the DSU.<sup>26</sup> GATS refers only to the DSU as it has its own Articles XXII and XXIII on dispute settlement.

Under Article XXIII of GATT 1947, contracting parties were given the authority to assess whether a benefit accruing to a contracting party had been nullified or impaired (or the attainment of the objectives of the GATT was being impeded) as a result of a violation of the GATT.<sup>27</sup> Early on, a smaller group of experts was mandated by the contracting parties to make recommendations as to whether a GATT provision had been violated. The recommendations of such a panel had to be adopted by all the contracting parties to be binding.<sup>28</sup>

Pursuant to GATT Articles XXII and XXIII and the DSU, WTO Members have delegated to panels and to the Appellate Body the power to adjudicate their disputes and to make recommendations to the DSB. The parameters of this delegation and the competence of the WTO adjudicating bodies are determined in the DSU and in the Marrakesh Agreement Establishing the WTO. The DSU defines the jurisdiction (mandate) of panels (and the Appellate Body) with reference to: (1) allegations of WTO violations by the complaining party(ies); (2) the specific type of remedies/conclusions that panels and the Appellate Body may recommend; and (3) the prohibition on adding to or diminishing WTO law.

### *1 The Mandate of Panels: To Determine Whether Provisions of the WTO 'Covered Agreements' Have Been Violated: Articles 1, 4, 7 and 11 of the DSU*

Pursuant to Article 1(1), the DSU will apply to disputes brought under the 'covered agreements'. The 'covered agreements', listed in Annex 1 to the DSU, are all the WTO

<sup>26</sup> See Article 4(11) of the DSU and its footnote that list them all.

<sup>27</sup> Article XXIII also envisages the possibility of disputes on the basis of non-violation and situation complaints. Non-violation claims would imply allegations that a member's action, although not in violation of the WTO, has been such as to nullify the trade benefits of another complaining member. On the issue of non-violation, see the Appellate Body discussion in *EC — Measures Affecting Asbestos and Products Containing Asbestos* ('*EC — Asbestos*'), WT/DS135/AB/R, adopted on 5 April 2001, paras 182–190; *Japan — Measures Affecting Consumer Photographic Film and Paper* ('*Japan — Film*'), WT/DS44/R, adopted on 22 April 1998, para. 10.37; see also *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products* ('*India — Patents (US)*'), WT/DS50/AB/R, adopted on 16 January 1998, paras 36–45; and *European Communities — Customs Classification of Certain Computer Equipment* ('*EC — Computer Equipment*'), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted on 22 June 1998, paras 75–82.

<sup>28</sup> For a detailed description of the evolution of the dispute settlement mechanism of the WTO, see MTN.GNG/NG13/W/4/Rev.1.

multilateral trade agreements (i.e. all the WTO agreements except the Trade-Related Review Mechanism), and the plurilateral agreements unless otherwise notified to the DSB.<sup>29</sup> The term ‘covered agreements’ would also include WTO decisions and secondary legislation, if any. Article 4 provides that consultations can be initiated on allegations of violations of any of the *covered agreements*. Article 7(1) states that the mandate of the panel is;

To examine, in the light of the relevant provisions in . . . the *covered agreement(s)* . . . the matter referred to the DSB by the Member . . . 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)*.<sup>30</sup>

Article 7(2) adds that ‘Panels shall address the relevant provisions in any *covered agreement or agreements* cited by the parties to the dispute . . .’.<sup>31</sup> Article 11 of the DSU also suggests that the jurisdiction of the panels is limited to the covered agreements. It requires a panel to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant *covered agreements*, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the *covered agreements*’.<sup>32</sup> Finally, Article 19(1) provides that the standard recommendation is that the losing member ‘brings its measure into conformity with that [*covered*] *agreement(s)*’.

In sum, the mandate of the panels and the Appellate Body is defined and limited: to interpret WTO law and determine whether a provision of the covered agreements has been violated. In doing so, the panels and the Appellate Body apply and enforce WTO law. Formally, the WTO adjudicating bodies only have the capacity to interpret and apply WTO law and cannot interpret, let alone reach any legal conclusion of a violation of or compliance with, other treaties or customs. Claims of human rights violations could not be pursued before WTO adjudicating bodies. It is, therefore, suggested that WTO adjudicating bodies cannot enforce or give direct effect to human rights provisions between WTO Members other than pursuant to WTO provisions including the general exceptions. However, the WTO adjudicating bodies should presume that WTO Members must comply with their human rights obligations and therefore they should interpret and apply WTO law accordingly.

## *2 Panels and the Appellate Body are Prohibited from Adding to or Diminishing the Rights and Obligations of the WTO Agreement*

Articles 3(2) and 19(1) of the DSU are unambiguous. Article 3(2) provides: ‘Recommendations and rulings of the DSB cannot add to or diminish the rights and

<sup>29</sup> As did the Committee on Government Procurement; see WT/DSB/7 and GPA/5.

<sup>30</sup> Emphasis added.

<sup>31</sup> Emphasis added.

<sup>32</sup> Emphasis added.

obligations provided in the covered agreements.’ Article 19(1) provides: ‘In their findings and recommendations, panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.’ Human rights instruments are not listed in the ‘covered agreements’. WTO panels and the Appellate Body cannot enforce or give effect to human rights provisions, to the extent that such provisions would add to or diminish WTO rights and obligations. This does not reduce the obligation of WTO adjudication bodies to interpret and apply WTO law in conformity with human rights law.<sup>33</sup>

### 3 *Standard and Limited Conclusions by WTO Adjudicating Bodies*

As further discussed in section 2.C.3 below, the DSU provides for a standard panel or Appellate Body recommendation. If they find that a measure is in violation of a covered agreement, WTO adjudicating bodies must recommend that the concerned member ‘bring the measure found inconsistent into conformity with the provisions of the covered agreements’. No other conclusion or remedy is envisaged. At best, WTO adjudicating bodies can make ‘suggestions’<sup>34</sup> for the manner in which the measure should be brought into conformity, but such suggestions are not binding and cannot be enforced. Therefore, a WTO adjudicating body could not demand or even suggest that members change their laws to bring them into conformity with non-WTO norms, unless they could relate such suggestions to compliance with a provision of a covered agreement.

### 4 *The ‘Implied Powers’ Resulting from the Obligation to Adjudicate WTO Disputes with Objectivity*

Thomas Schoenbaum has suggested that Article 11 of the DSU, which calls on panels to ‘make such other findings as will assist the DSB in making the recommendations or in giving the rulings’, is ‘an implied powers clause which should be interpreted broadly so that the panels and Appellate Body can decide all aspects of a dispute’.<sup>35</sup> As argued in this paper, many international and national legal instruments will need to be examined and interpreted to the extent necessary to interpret and apply the WTO provision. But these considerations will be performed only to the extent necessary to interpret and apply WTO law, not to decide ‘all aspects of a dispute’.<sup>36</sup>

<sup>33</sup> Recently, on the occasion of the Appellate Body’s call for *amicus curiae* briefs in the *EC — Asbestos* dispute, members did not hesitate to remind the Appellate Body that the WTO Members retain the exclusive power for making WTO law. The Appellate Body itself seems to have accepted this message when it stated, in *US — Certain EC Products*, 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 or to adopt such interpretations . . . Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO’.

<sup>34</sup> Article 19(1) *in fine* provides: ‘In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations.’

<sup>35</sup> Schoenbaum, *supra* note 9, at 653.

<sup>36</sup> See the Appellate Body Statement in para. 162 of the *EC — Bananas III* Report: ‘Thus, 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*.’ (emphasis added). For a more extensive discussion of this issue of what can be

Article 11 of the DSU can, however, be read as providing panels with the necessary power and even the obligation to adopt practices and follow judicial principles to ensure that the application of the covered agreements and the administration of the dispute settlement process are done objectively. WTO adjudicative bodies have indeed made reference to general principles of law with a view to ensuring the effectiveness of the adjudication process.<sup>37</sup> In *EC — Bananas III*, the Appellate Body rejected the GATT practice of refusing private counsel before panels and stated that: ‘we can find nothing in the [WTO Agreement], the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings.’<sup>38</sup> The Appellate Body used the same technique when, in *US — Shirts and Blouses*, it introduced the concept of the burden of proof into WTO law,<sup>39</sup> or when, in *Brazil — Desiccated Coconut*,<sup>40</sup> it referred for the first time to ‘due process’. This objectivity in Article 11 of the DSU also calls for a good faith interpretation of the substantive and procedural provisions of WTO law, in light of general international law that binds WTO Members.<sup>41</sup> This would include notably the right and obligation of panels to adopt specific rules of procedure on due process etc., as emphasized by the Appellate Body on a few occasions.

### 5 Panellists and Members of the Appellate Body are Mainly ‘Trade’ Experts

Another element demonstrating that WTO Members did not want to give general jurisdiction to the WTO adjudicating bodies is the fact that panellists and members of

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interpreted in domestic law and international law instruments, see Marceau and Morrissey, ‘Clarifications of the DSU Brought by WTO Jurisprudence’, in Joe Macmahon (ed.), *Trade and Agriculture* (2001) 143.

<sup>37</sup> In this sense, they may be seen as ‘adjuvants’ to WTO dispute settlement process. See Marceau, ‘WTO Agreements Cannot Be Read in Clinical Isolation from Public International Law’ (World Bank Seminar on International Trade Law, 24–25 October 2000).

<sup>38</sup> Appellate Body in *EC — Bananas III*, para. 10.

<sup>39</sup> Appellate Body in *US — Shirts and Blouses*, at 14: ‘In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.’

<sup>40</sup> Appellate Body in *Brazil — Desiccated Coconut*, at 21: ‘First, terms of reference fulfil an important due process objective ...’ See also the reference to due process in the Appellate Body reports on *EC — Hormones*, para. 154; *India — Patents*, para. 95; *Argentina — Textiles*, para. 79, n. 68; *EC — Computer Equipment*, para. 70; and *Australia — Salmon*, paras 272 and 278.

<sup>41</sup> One may argue that the need for panels to maintain full objectivity has led members, for instance, to adopt expanded Rules of Conduct, regulating the impartiality, independence and conflicts of interests of panellists, members of the Appellate Body, experts and staff involved in the WTO dispute settlement mechanism. WT/DSB/RC/1. See Marceau, ‘Rules on Ethics for the New WTO Dispute Settlement Mechanism’, 32 *Journal of World Trade* (1998) 57.

the Appellate Body are trade experts, not experts in human rights or labour or environmental law for instance. Article 8(3) of the DSU refers only to the GATT/WTO/trade competence of such panellists: 'Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.' The same is expected from the Appellate Body members: 'The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally.'<sup>42</sup>

It is doubtful that WTO Members wanted their WTO 'judges' to interpret and apply treaties other than that of the WTO (such as human rights treaties etc.) while requiring that such WTO panellist or members of the Appellate Body have mainly an expertise in GATT/WTO and trade matters.

### ***C The WTO Applicable Law: A Specific Subsystem of International Law***

A single jurisdiction, a single tribunal, may be authorized or required to use different 'applicable law' in different circumstances. The 'jurisdiction' (or competence) of WTO panels and the Appellate Body and the relevant 'applicable law' between two WTO Members are two legally distinct concepts.<sup>43</sup> The issue of the 'applicable law' is relevant because it points to the set of rights and obligations that binds states, as WTO Members, independently of and in parallel to the capacity of the WTO adjudicating bodies. The applicable law is the law that can be given (direct) 'effect' between WTO Members, as WTO Members, and which can be enforced before WTO adjudicating bodies which have exclusive jurisdiction over WTO matters. Thus, the WTO applicable law is the system of law (rights and obligations) that provides for effective remedies in case of their violation. As a 'self-contained regime', WTO law is a subsystem which is 'intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party'.<sup>44</sup> The expression 'self-contained regime' is, however, analytically destructive in that it may present WTO law as an hermetic system, and we all know that it is not; the WTO is not in clinical isolation from public international law. Rather, it may be more fruitful to refer

<sup>42</sup> Article 17(3) of the DSU.

<sup>43</sup> On this issue, see Pauwelyn, *supra* note 9, at 554; and Bartels, *supra* note 9, at 502.

<sup>44</sup> Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985) 111, at 117.

to WTO law as a system of *lex specialis*, within the meaning of Article 56 of the International Law Commission's Rules on State Responsibility.

In the WTO treaty, the applicable law, and the jurisdiction/competence of panels and the Appellate Body, are both defined with reference to the covered agreements. The provisions on the limited jurisdiction of panels mirror those on the applicable law between WTO Members. Articles 1, 3, 4, 7, 11 and 19 of the DSU identify the WTO as a subsystem of international law which contains its specific rights and obligations (the covered agreements), specific causes of action, specific remedies and specific countermeasures. Specific rights and obligations, specific remedies and a specific dispute settlement mechanism are mandatory and countermeasures have been regulated, WTO Members can be seen as having set up a system that contains a specific applicable law, a *lex specialis* system. This is not to say that WTO law should not evolve and be interpreted consistently with general international law. But if WTO law is a specific subsystem of international law, WTO provisions 'cannot be overruled by situations and considerations belonging to another subsystem',<sup>45</sup> such as those of human rights law. A full evaluation of whether the WTO is a self-contained or a *lex specialis* regime would require a comparison of the various rules on state responsibility with those of the DSU, the Marrakesh Agreement Establishing the WTO and many WTO multilateral trade agreements. In this paper, I have only examined some aspects of this issue with reference to the DSU.

### 1 *Specific Rights and Obligations*

The obligations of the WTO Members are those contained in the covered agreements identified in Annexes 1 and 2, together with relevant secondary legislation. WTO obligations and rights are those of the covered agreements without any derogation, either by expansion or by contraction. Article II of the Marrakesh Agreement Establishing the WTO provides that WTO Members are bound by that Agreement as well as the provisions of Annexes 1, 2 and 3; Article XVI(5) provides that reservations to WTO obligations are possible only pursuant to provisions of the multilateral trade agreements, and none of them contains any procedure for making a reservation. Such WTO rights and obligations must, however, be interpreted consistently with international law.

### 2 *Specific Causes of Actions: Specific Claims*

Under WTO law, the specific and main cause of action is that one or more provisions of one or more covered agreements has or have been violated (Articles 4 and 7 of the DSU). It is generally accepted that claims of WTO violations can relate only to violations of the covered agreements.<sup>46</sup>

Still, strictly speaking, Articles XXII and XXIII of GATT and the DSU provide three causes of action. The WTO dispute settlement mechanism can be triggered if there is: (1) a violation of any provision of the covered agreements; (2) in case of non-violation,

<sup>45</sup> *Ibid.*, citing the ILC 'Riphagen II Report' (Preliminary Report, *Yearbook of the International Law Commission*, vol. 2, Part 1 (1980, 128–129; Third Report, UN Doc. A/CN.4/354 (Riphagen)/Add.1), para. 39.

<sup>46</sup> Articles 3, 6 and 7 of the DSU.

if the measure nullified or impaired the benefits provided by the covered agreements;<sup>47</sup> or (3) the so-called situation complaints. The latter two causes of actions (non-violation and situation complaints) are ‘exceptional’, their application is very rare and subject to the doctrine of ‘reasonable expectations’. ‘Non-violation’ complaints are rooted in the GATT’s origins as an agreement intended to protect the reciprocal tariff concessions negotiated among the contracting parties under Article II.<sup>48</sup>

Could it be argued that a violation of a human rights provision, albeit not a violation of the WTO covered agreements, is such as to nullify and impair the benefits resulting from the covered agreements, and therefore form the basis of a WTO non-violation claim? It is most doubtful, in light of the conditions and criteria developed by the jurisprudence. Non-violation made sense at a time when the GATT’s substantive provisions were limited: ‘*In the absence of substantive legal rules in many areas relating to international trade*, the “non-violation” provision of Article XXIII(1)(b) was aimed at preventing contracting parties from using non-tariff barriers or other policy measures to negate the benefits of negotiated tariff concessions.’<sup>49</sup> Moreover, the situation that is claimed to be the source of nullification must be one that did not exist at the time of the tariff negotiations now being impaired, and that cause of nullification (here, the human rights violation) must not have been reasonably expected to occur. Most human rights treaties and the adherence (or lack of adherence) thereto by WTO Members, existed before the entry into force of the WTO treaty. It is generally accepted that ‘non-violation’ claims are a reflection of some good faith implementation of the GATT contract, but should not be used so as to introduce into the WTO law, provisions that do not exist.<sup>50</sup>

### 3 Specific System of Enforcement

As discussed above, Article 23 of the DSU has been interpreted as prohibiting any form of non-authorized unilateral action, and provides that grievances relating to WTO rights and obligations can be brought only before WTO adjudicating bodies in accordance with the DSU procedures, reinforcing the idea that the DSU provides a *lex specialis* system pursuant to Article 55 of the Rules on State Responsibility. But Article 23 of the DSU does not and cannot prohibit states (who are WTO Members) seizing other jurisdictions, such as human rights fora, and requesting an assessment of the compatibility of a trade measure with human rights obligations. The overlap and coexistence of various systems of law and jurisdiction and the lack of coherence between them is discussed in Part 5 of this paper.

<sup>47</sup> See, in general, Petersmann, ‘Violation Complaints and Non-Violation Complaints in International Law’, 34 *German Yearbook of International Law* (1991) 175.

<sup>48</sup> See the Appellate Body Report, *India — Patents (US)*, para. 41.

<sup>49</sup> See *ibid* (emphasis added).

<sup>50</sup> See Cottier and Schefer, ‘Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present, Future’, in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997).

#### 4 Specific Remedies

The DSU provides for the ‘necessary means of defence against, and sanction for, illicit activities by [members of the WTO]’.<sup>51</sup> This corresponds to the criteria used by the International Court of Justice (ICJ) in the *Teheran Case* when it declared that the rules on diplomatic relations were a self-contained regime. The DSU explicitly addresses and regulates many aspects of the Rules on State Responsibility and ‘adapts’ them to its specific needs, especially with regard to remedies. Article 19 of the DSU provides:

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the member concerned could implement the recommendations.
2. 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.

In providing explicitly what can be done in addition to cessation and non-repetition, the system of regulation of remedial actions for WTO violations can be read as excluding remedies under international law rules on state responsibility.<sup>52</sup> In *US — Certain EC Products*, the Appellate Body seems to have concluded that, once the challenged measure has been removed (cessation), no further remedial action is possible; the standard remedy (to ‘bring your measure into conformity’) would not include the possibility, for instance, of obtaining financial compensation for lost trade opportunities:<sup>53</sup>

We note, though, that there is an obvious inconsistency between the finding of the Panel that ‘the 3 March Measure is no longer in existence’ and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel had found no longer exists.<sup>54</sup>

<sup>51</sup> In *United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*, 19 ILM (1980) 139, available at [www.icj-cij.org/icjwww/idecisions.htm](http://www.icj-cij.org/icjwww/idecisions.htm), the International Court of Justice was of the view that the only recourses available to Iran were those envisaged in the Vienna Convention on Diplomatic Relations: ‘[D]iplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic consular missions’; ‘[t]he rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving state’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions, and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving state to counter any such abuse’.

<sup>52</sup> As a self-contained or *lex specialis* system. The Rules on State Responsibility provide for the consequences of illegal acts. First and in all cases, cessation and non-repetition (Article 30); secondly, reparation which may take the form of restitution, compensation and satisfaction, either singly or in combination (Article 34); thirdly, in exceptional circumstances, countermeasures to induce performance (Articles 49 and 54).

<sup>53</sup> But, in the absence of effective remedy, setting aside the peculiar political and legal contexts of this dispute, the Appellate Body’s conclusion confirms that it considers itself capable of issuing declaratory rulings.

<sup>54</sup> See Appellate Body Report, *US — Certain EC Products*, para. 81.

In addition to imposing immediate cessation,<sup>55</sup> the DSU specifically regulates the consequences of wrongful acts or violation of WTO provisions, including numerous aspects of Members' remedial actions, their implementation and their supervision by the DSB.

1. Regulation of the period of implementation, when immediate implementation is not possible, i.e. the 'reasonable period' (Article 21(1) of the DSU):

- including the possibility of arbitration on that reasonable period in case of disagreement between the parties (Article 21(3) of the DSU).

2. The requirement that following the first six months of the reasonable period and until full satisfaction the losing party must somehow provide excuses and promise to correct its measure (thus not to continue or repeat the illegal act):

- the non-implemented DSB recommendations remain on the DSB agenda.
- 10 days before each DSB meeting the member at fault must provide a written 'status report' of its progress in the implementation of the recommendations and rulings (Article 21(6) of the DSU).
- at each of those meetings the member at fault must thus provide to the DSB an explanation on the status of its implementation, together with a public explanation as to how it intends to implement and remedy the illegal situation within the reasonable period of time.
- obligation of the faulty member to reply to any other WTO Member entitled to raise any matter relating to the issue of implementation of DSB recommendations and thus request information and ask questions to the concerned member(s).

The purpose of this multilateral surveillance mechanism is to guarantee an effective implementation, thus non-repetition, and to ensure that effective satisfaction will result from the reasonable period of implementation.

3. The compulsory and exclusive jurisdiction of WTO adjudicating bodies (Articles 21(5) and 23(2)(a) of the DSU) to determine the WTO compatibility of the remedial action (the implementing measure).

4. The regulated possibility of temporary, voluntary and WTO compatible trade-compensation pursuant to Articles 3(7) and 22(1) of the DSU.

5. If the matter is one brought by a developing country the DSB is obliged to consider whether further action might take place (Article 21(7) of the DSU).

6. If the dispute was initiated by a developing country, the DSB is obliged to consider (alternative and) appropriate action. In doing so it shall take into account not only the trade coverage of the measures but also their impact on the economy of the developing country (Article 21(8) of the DSU).

As mentioned above, Article 23 of the DSU prohibits the use of non-authorized

<sup>55</sup> See the call for immediate cessation and performance in Articles 3(7), 21(1), 21(3) and 22(1) of the DSU and the jurisprudence on Article 21(3) where it is now accepted that immediate implementation is the rule and the allowance of a reasonable period of time is the exception. Monnier, *supra* note 17, at 825.

unilateral measures, and the use of countermeasures or retaliatory actions are also strictly regulated:

7. The necessary prior authorization of the membership before the (winning) Members can use retaliatory sanctions (Article 22(2)–22(6) of the DSU) once all the prior procedural safeguards have been respected.

8. The obligation to rely on WTO arbitration for the determination of the level of sanctions unless parties agree on such level (Article 22(6)–22(7) of the DSU).

9. The level of countermeasures is also regulated and WTO arbitrators are given exclusive jurisdiction to determine a level of suspensions of obligations having trade effects equivalent to the level of nullification of benefits (a criteria distinct from the ‘appropriate’ or ‘proportionate’ benchmark under general international law).

10. Special rules govern the level of retaliation in the case of violations of exports subsidy commitments.

11. The permission to use cross-retaliation when sanctions in the same sector are not practicable (Article 22(3) of the DSU).

12. The regulation of cross-retaliation, first in the same sector and if not practicable or effective in another sector or in another agreement (Article 22(3) of the DSU).

13. Exclusive jurisdiction of the WTO arbitrator to assess whether retaliation has been performed according to the rules and principles of the DSU (Articles 22(3), (4) etc. and 22(6) of the DSU) and the level of suspension of concessions—retaliation.

14. The prohibition against countermeasures during the retaliation arbitration process (Articles 22(6) and 23(2)(c) of the DSU).

The WTO system appears to be limiting remedies for WTO violations to ‘DSU cessation, non-repetition and satisfaction’ and to have regulated in an extensive manner the legal consequences of WTO violations. To discuss fully the issue of WTO remedies and whether WTO law and the DSU are *lex specialis* (within the meaning of Article 56 of the Rules on State Responsibility) or ‘self-contained’, one must examine the so-called trade remedies provisions of the WTO which authorize and regulate in great detail remedial countermeasures against dumped imports and subsidized imports causing injury as well as all the provisions of the Draft Rules on State Responsibility. I have not done so here.

### *5 The Covered Agreements Cannot be Changed or Amended Without Using the WTO’s Specific Procedures*

It is difficult to conceive of situations where a panel would set aside a WTO provision in favour of another treaty or a customary provision claimed to have superseded the relevant WTO provision, without changing the relevant covered agreement (the WTO rights and obligations), at least between the two disputing states.<sup>56</sup> Generally, those human rights and WTO rights and obligations would be cumulatively binding, but enforceable in different jurisdictions and under different systems of state responsibility.

<sup>56</sup> The specific issue of *jus cogens* as being directly applicable in WTO law because of its very nature is discussed in Part 4 below.

Under general international law,<sup>57</sup> a treaty can be amended by another treaty provision only if it does not affect the rights or the obligations of other states under the superseded treaty provision. Could it be argued that two WTO Members can modify (a concept distinct from amending) their bilateral rights and obligations without affecting the rights of other WTO Members? For instance, two WTO Members could require that human rights be respected as a condition for trade *between them alone* without any market access benefit. Arguably, the other WTO Members — not subject to such human rights requirements — could not claim that their market access rights would be reduced by the existence of this bilateral requirement; they may not therefore initiate any WTO dispute process. Can two WTO Members ‘add to or diminish’ their respective WTO rights and obligations if they do not affect the trade opportunities of third party WTO Members? Can WTO adjudicating bodies enforce such a modification of, addition to or diminution of the covered agreements? States can increase their human rights enforcement level, if this does not affect the rights of other WTO exporting Members (recalling the availability of exception).

If the WTO obligations are always the same for all members — and it can be argued that they are — any non-authorized bilateral modification of WTO rights and obligations may simply not be possible without affecting the rights of other WTO Members and without violating the rules of Article IX of the Marrakesh Agreement Establishing the WTO (on amendment). The GATT/WTO basic rule on the most-favoured-nation principle (MFN) may effectively reduce the possibility of allegations being made that a non-WTO norm supersedes a WTO norm, unless all members agree. It is worth noting the concluding remarks of the Appellate Body in the recent *US — Section 211 Appropriation Act*, where the Appellate Body stated that, when a member’s TRIPS-related measure *affects some members*, the obligations of national treatment and the most-favoured-nation principle oblige the provision of similar advantages to *all members*.<sup>58</sup> This seems to reduce the possibility of bilateral modification of the WTO treaty provisions when it reduces or discriminates (*de facto*) against other WTO Members’ potential market access rights.

## 6 The WTO as a Single Agreement

The WTO is a single undertaking, a single treaty. During the Uruguay Round negotiations, the term ‘single undertaking’ was widely used. It refers to two different concepts: the ‘single political undertaking’, which refers to the method of negotiation (‘nothing is agreed until everything is agreed’, which was not inconsistent with the possibility of early implementation (early harvest)); and the ‘legal single undertaking’, which refers to the notion that the results of the negotiations would form a ‘single package’ to be implemented as one single treaty.<sup>59</sup> The effective interpretation of the WTO single undertaking calls for a coherent and harmonious reading of all its

<sup>57</sup> Article 41(1)(b)(i) of the Vienna Convention.

<sup>58</sup> Appellate Body Report, *United States — Section 211 Omnibus Appropriation Act of 1998* (‘*US — Section 211 Appropriations Act*’), WT/DS176/AB/R, adopted on 1 February 2002, para. 363.

<sup>59</sup> Both concepts are reflected in Part I:B(ii) of the Uruguay Round Declaration: ‘The launching, the *conduct* and the *implementation of the outcome* of the negotiations shall be treated as *parts of a single undertaking*.’

provisions.<sup>60</sup> This obligation to read the WTO as a whole and in a coherent manner reinforces the idea that members wanted to set up an international system of rules and obligations specific to their trade relations, a system that would be coherent in itself and within which rights, obligations and related state action would be the result of an overall balance of concessions.

### D Conclusion: The Limited 'Domain' of WTO Law

Joel Trachtman early on insisted on the 'limited domain' of the WTO dispute settlement mechanism, noting the fact that panels and the Appellate Body are prohibited from adding to or diminishing rights and obligations of members under the WTO Agreement.<sup>61</sup> I would like to suggest that the WTO applicable law is also of a 'limited domain'. This limited jurisdictional domain of WTO law and of WTO adjudicating bodies does not, however, reduce the obligations of WTO Members to comply at all times with their other international law obligations, including those on human rights. This limited domain of the WTO only exacerbates the lack of coordination between the WTO system of law and other systems of international law, such as that of human rights law.

As discussed above, the WTO treaty sets out in great detail the legal consequences of violations of WTO obligations. Remedies and countermeasures are explicitly regulated. The issue of whether or not a specific system is *lex specialis* is one of interpretation of the WTO treaty, with a view to identifying the intention of the founding members of the WTO. It is suggested that WTO Members wanted to regulate trade countermeasures and WTO remedial actions in a specific and coherent manner. In this context, it is relevant to read from Pieter Jan Kuijper, EC legal adviser to the DSU negotiations on this matter. For him, the position of the European Communities was always that GATT was a self-contained regime in that the only remedies and countermeasures available were those authorized by GATT. After reporting that the United States never accepted this view under the GATT, Kuijper (writing immediately after the negotiations) stated:

It is perhaps too early to say if the GATT, which was a self-contained system of international law only in aspiration but not in reality, has moved decisively in the direction of such a

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However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.' BISD 33S/19 (emphasis added).

<sup>60</sup> 'We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously . . . In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously". An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. This was a simple application of the principle of effective interpretation.' Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products ('Korea — Dairy')*, WT/DS98/AB/R, adopted on 12 January 2000, para. 74.

<sup>61</sup> Trachtman, *supra* note 9, at 333.

self-contained system in the form of the WTO. It is obvious, however, that the intention was there.<sup>62</sup>

The ILC itself seems to have considered the WTO as a self-contained regime. In its third 2000 general report, the ILC wrote about the then Draft Rules on State Responsibility:

It was further noted that the draft Articles would not apply to self-contained regimes, such as those on the environment, human rights and international trade, which had been developed in recent years.<sup>63</sup>

After suggesting that there is a presumption against the creation of wholly self-contained regimes in the field of reparations, James Crawford added: 'There are, no doubt, to a greater or lesser degree, elements of *lex specialis* in the work of the Dispute Settlement Mechanism of the World Trade Organization, the focus of which is firmly on cessation rather than reparation.'<sup>64</sup>

The fact that the WTO may be a self-contained or a *lex specialis* regime should not have any negative or hermetic connotation. A legal subsystem that is *lex specialis* is a specific system of law that provides for specific obligations and the specific consequences of their violation. There is nothing pejorative in having a *lex specialis* regime.<sup>65</sup> On the contrary, the qualification of the WTO as a *lex specialis* regime — far from being insensitive and unreceptive to general international law — is evidence of a high level of legal sophistication in regulating and adapting general norms of the rules on state responsibility. A self-contained regime does not imply that a subsystem of law would 'suffice' in itself. Rather, it refers to specific *rights and obligations* that provide for *effective remedies* in case of their *violation*. In the WTO, these three variables are specifically regulated. Thus, it is not unreasonable to suggest that the WTO is a specific system, as described in Article 55 of the Rules on State Responsibility. In this sense, WTO law 'cannot be overruled by situations and considerations belonging to another

<sup>62</sup> Kuijper, 'The Law of GATT as a Special Field of International Law — Ignorance, Further Refinement or Self-Contained System of International Law', 25 *Netherlands Yearbook of International Law* (1994) 227, at 252. Pieter Kuijper also cites Laurence Boisson de Chazournes, who argued that GATT was potentially a self-contained system, in Laurence Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1992) 182–186.

<sup>63</sup> 2000 Report of the CDI, A/CN.4/504, para. 15.

<sup>64</sup> ILC Third Report, A/CN.4/507/Add.1, para. 157. In the French version, the term utilized was even stronger when describing the DSU as a *régime spécial de réparation*.

<sup>65</sup> An interesting issue relates to the similarities and differences between the concept of 'self-contained' regime as used by the ICJ in the *Teheran* case and the concept of *lex specialis* of Article 56 of the Rules on State Responsibility. Would the latter authorize an exclusion of the general rules, on a provision-by-provision basis where the former would envisage a subsystem which generally excludes the general rules on state responsibility? Although it was not initially the case, this seems to be the interpretation suggested by James Crawford, Special Rapporteur to the ILC group on State Responsibility, when he wrote: 'This is always a question of interpretation in each case. In some cases it will be clear from the language of a treaty or other text that only the consequences specified flow. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable.' ILC, Third Report, A/CN.4/507/Add.4, para. 420.

subsystem'.<sup>66</sup> Yet the WTO must 'breathe' the rest of international law, and its interpretation will reflect this. States, members of the WTO, remain fully bound and responsible for any violation of their international law obligations but they cannot use the WTO remedial machinery to enforce them. There is a distinction between the law that is applicable and providing effective remedies to states, as WTO Members, and the international obligations that bind states under other systems of law.

It may thus be important to recall two of the conclusions of Bruno Simma in his famous piece on self-contained regimes:<sup>67</sup>

For these reasons, the adoption of self-contained regimes is to be welcomed if these *leges speciales* increase the effectiveness of the primary rules concerned and introduce procedures and collective decisions.

The rationale for the replacement/supersession of the general legal consequence of international wrongs by 'self-contained regimes' will, in some cases, be the conviction that the application of the general regime would be unsuitable or even counterproductive for the effectiveness of the legal relationship concerned. Therefore, to 'tailor' special consequences in accordance with the peculiarities of 'their' primary rules will be attempted. In subsystems constituted by international organizations, the higher degree of integration among the Member States will call for correspondingly higher-developed sanctioning mechanisms. . . . Consequently, the readiness to concede a fall-back on the general rules ought in each case to depend upon a careful evaluation of the *raison d'être* behind a 'self-contained regime'.

The WTO dispute settlement mechanism, with its regulation of remedial actions and countermeasures, offers increased efficiency over the general rules on state responsibility. The possibility of using cross-retaliation in case of impracticable situations seems evidence of a desire to increase the effectiveness of the general rules on state responsibility. Under GATT, the practice of states was not to use the remedies available under general international law. Problems relating to the proper evaluation of past trade restrictions and the identification of affected interest groups have led WTO Members to favour very specific and adapted systems of remedies and state responsibility.

Even if the WTO applicable law seems to exclude the direct application of rules on state responsibility,<sup>68</sup> or some of them, these rules — to the extent they are customary — bind WTO Members, as states, and remain a relevant *benchmark* for the interpretation of WTO law which is presumed to evolve consistently with international law. In the recent *US — Cotton Safeguard* dispute, the Appellate Body, after analyzing the safeguard provisions of the WTO Agreement on Textiles and Clothing, stated:

Our view is *supported* further by the rules of general international law on state responsibility,

<sup>66</sup> Simma, *supra* note 44, citing the ILC Riphagen II Report, *supra* note 45, at para. 39.

<sup>67</sup> Simma, *supra* note 44, at 135–136.

<sup>68</sup> See the Panel Report in *US — Certain EC Products*, par. 6.133, quoted *supra* note 22.

which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.<sup>69</sup>

This is true for all international law rights and obligations of members. They are binding and must be respected by members but they are not part of WTO law and cannot be enforced by WTO adjudicating bodies. The limitations of the WTO applicable law have, arguably, been confirmed by the Appellate Body in *EC — Poultry*, where the Appellate Body had to assess the legal value of a bilateral agreement (the Oilseed Agreement) between Brazil and the EC. The Appellate Body stated:

In our view, it is not necessary to have recourse to either Article 59(1) or Article 30(3) of the Vienna Convention. As such, it [the Schedule of the EC] forms part of the multilateral obligations under the WTO Agreement. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC — Oilseeds*. As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the WTO Agreement, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the WTO Agreement. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the WTO Agreement, the Oilseeds Agreement is not one of those legal instruments.<sup>70</sup>

In *EC — Bananas III*, the panel and Appellate Body referred to the Lomé Convention 'only to the extent necessary to interpret [the WTO provision]'.<sup>71</sup> In *Korea — Various Measures on Beef*, the panel examined various bilateral agreements between Korea and the disputing parties, not with a view to 'enforcing' the content of these bilateral agreements, but for the purpose of interpreting an ambiguous WTO provision, i.e. an entry into Korea's Schedule.<sup>72</sup> The WTO applicable law is constituted by the covered agreements and legal instruments adopted pursuant to the covered agreements. The WTO applicable law is the 'covered agreements' used in its broad sense so as to include decisions adopted thereunder.

Lorand Bartels has argued that the DSU does not place any *a priori* restrictions on the sources of international law applicable in a WTO dispute. For him, Articles 3(2) and 19(1) of the DSU act as conflict rules, which ensure that the covered agreements

<sup>69</sup> Appellate Body Report, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ('US — Cotton Yarn'), WT/DS192/AB/R, adopted on 5 November 2001, para. 120. The same is true for the use of the principle of 'due diligence' in paras 67, 76, 77 and 79 and with its use of 'good faith' in para. 81 of the same report.

<sup>70</sup> *European Communities — Measures Affecting the Importation of Certain Poultry Products* ('EC — Poultry'), WT/DS69/AB/R, adopted on 23 July 1998, para. 79.

<sup>71</sup> Appellate Body finding in para. 162 of *EC — Bananas III*.

<sup>72</sup> Panel Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ('Korea — Various Measures on Beef'), WT/DS161 and 169/R, adopted on 10 January 2001, paras 539 *et seq.*

prevail over any other norms to the extent of any inconsistency.<sup>73</sup> Although the ultimate result of Bartels' suggestion is the one recommended in this paper, there is no justification or benefit in considering Articles 3(2) and 19(1) of the DSU as conflict rules. Nothing in the wording of Articles 3(2) and 19(1) seems to indicate any intention by the drafters to envisage a conflict situation (which they have done on other occasions with Article XVI(4) of the Marrakesh Agreement and the General Interpretative Note to Annex 1A). For Bartels, therefore, in a situation of the treaty being silent, rules of general international law would find direct application — since there could not be any 'true conflict'. I suggest that the application (or direct effect) of non-WTO law provisions into the WTO legal system will always lead to an addition to or diminution of the covered agreements.

Joost Pauwelyn has argued that: '[T]he jurisdiction of WTO panels is limited. The applicable law before them is not.'<sup>74</sup> For Pauwelyn, members are presumed to have accepted the binding effect and the direct application of general international law into WTO law. For him, general international law can fill in the gaps in the WTO treaty, and provisions of non-WTO treaties binding on the parties can be invoked in defence of alleged WTO violations. If the relevant customary conflict rules demonstrate that a non-WTO rule must prevail, 'then the WTO rule cannot be applied (and the defendant wins)'. For Pauwelyn, this would not result in 'requiring the WTO panel to judicially enforce the other rule of international law', and 'the panel would not be "diminishing" the rights of the complainants, as the complainant would have agreed to these conflicting rules in the first place'. For Pauwelyn, when panels are giving full effect to a non-WTO rule that will supersede a WTO rule, a panel is not 'enforcing' the 'non-WTO rule' because the WTO Members are presumed to have accepted the application of conflicting rules of general international law. 'Thus, the WTO panel would not create law but merely give effect to law created elsewhere by the WTO Member itself.'<sup>75</sup>

The difficulty with Pauwelyn's reading is that the WTO adjudicating bodies will need to interpret the other treaty to decide on its compliance or violation by the WTO Member concerned and to determine the related legal consequences for the WTO treaty's provisions. The WTO adjudicating bodies are not courts of general jurisdiction and they cannot interpret and apply all treaties involving WTO Members, as states. Otherwise, WTO adjudicating bodies would end up 'interpreting' human rights treaties. (Note that under the general exceptions, panels may look at other treaties, other reports of international bodies . . . as factual matters, to assess compliance with the exception provisions.) The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO treaty. WTO adjudicating bodies cannot give direct effect to human rights in any way that would set aside or amend a WTO provision. If they were to allow a non-WTO provision on human

<sup>73</sup> Bartels, *supra* note 9, at 506.

<sup>74</sup> Pauwelyn, *supra* note 9, at 566.

<sup>75</sup> *Ibid.*

rights<sup>76</sup> to supersede and set aside a WTO provision and therefore to give a legal effect to and enforce a non-WTO provision in superseding a WTO provision, they would be adding to or diminishing the WTO covered agreements (or amending them). Fortunately, such situations of conflict will occur very rarely, and, through good faith interpretation, the WTO law and human rights law can generally be applied harmoniously and effectively.

The drafters of the WTO treaty never wanted to provide non-WTO norms with direct effect in WTO law, nor allow states to benefit from free use of the WTO remedial mechanism to enforce rights and obligations other than those of the WTO treaty. Many provisions of the DSU and the Marrakesh Agreement Establishing the WTO demonstrate that members were of the view that WTO provisions ‘cannot be overruled by situations and considerations [i.e. provisions] belonging to another subsystem’.<sup>77</sup> In this sense, norms of human rights law of equal hierarchical value to WTO treaty provisions, which would add to or diminish the provisions of the covered agreements, cannot find direct application between WTO Members, as WTO Members.<sup>78</sup> In all cases, states (that may also be WTO Members) remain fully bound by their human rights obligations, and their responsibility may be called for in case of violation.<sup>79</sup> But not before WTO adjudicating bodies.

Whether the WTO law is a self-contained regime or whether only some of its provisions, notably those on remedies and the use of countermeasures, are *lex specialis* to general rules on state responsibility, it seems clear that the WTO law — the WTO covered agreements — constitutes a specific subsystem of law responsive to general international law.<sup>80</sup> This issue becomes relevant only in the very rare situations of conflicts or inconsistencies between the WTO provisions and another treaty or custom. In most cases, the good faith interpretation of the WTO treaty, taking into account relevant human rights law, will suffice to avoid conflicts. Moreover, Articles XX and XXI of GATT may be seen as a treaty recognition that members may give priority to certain policies (possibly including human rights) over trade rules. WTO Members who are parties to human rights treaties maintain their rights outside the WTO jurisdiction pursuant to rules of state responsibility or other human rights treaty

<sup>76</sup> The situation with *jus cogens* is different, as explained in Part 4.C below, because *jus cogens*, being hierarchically superior to WTO law, would have direct effect and be part of WTO law.

<sup>77</sup> Simma, *supra* note 44, citing the ILC Riphagen II Report, *supra* note 45, at para. 39, defining self-contained regimes.

<sup>78</sup> It will be argued in Part 4.C below that norms of *jus cogens*, hierarchically superior to WTO treaty provisions, cannot be violated. Any such violation would automatically annul any contrary treaty provisions. Therefore, *jus cogens* may be argued to have direct effect in WTO law.

<sup>79</sup> At the same time and as argued below, the WTO system contains provisions allowing and justifying members to deviate from the market access rules to give priority to identified policy objectives. Human-rights-related discrimination may be covered by one of the WTO justification provisions.

<sup>80</sup> A subsystem of international law would be self-contained if it did not receive the direct application of any of the general provisions of the Rules on State Responsibility. Otherwise, a subsystem would be viewed as accepting all general rules to supplement the specific rules of the subsystem or regime.

enforcement mechanisms. The lack of coordination and coherence between the WTO and other systems of international law, and the potential overlap of their respective jurisdictions, are issues discussed in Part 5.D below.

### **3 Taking into Account General International Law, including Human Rights Law, when Interpreting the WTO Applicable Law**

The limited domain of the WTO does not mean that the WTO Agreement exists in an hermetically sealed system, closed off from general international law and human rights law. On the contrary, states must implement all their obligations in good faith,<sup>81</sup> including human rights and WTO obligations. Moreover, the principles of interpretation in the DSU *require* panels and the Appellate Body to use or take into account various general principles of law, customs and relevant treaties, including those relating to relevant human rights, when interpreting and assessing compliance with WTO provisions.

#### ***A Interpretations that will Avoid Conflicts with Members' Relevant Human Rights Obligations***

In its first dispute, the Appellate Body made it clear that the WTO Agreement could not be read in 'clinical isolation from public international law'.<sup>82</sup> Article 3(2) of the DSU requires the WTO agreements to be interpreted in light of customary rules of interpretation which leads, among other references, to the Vienna Convention on the Law of Treaties ('Vienna Convention'). Article 31(1) of the Vienna Convention offers tools to perform this exercise, the first of which is the ordinary meaning of the terms of the treaty, in light of the object and purpose of that treaty. Article 31(2) describes what can be considered as 'context'. Article 31(3)(b) refers to any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Article 31(3) mandates that related actions of the parties, as well as other relevant rules of international law, must be taken into account together with the context.

<sup>81</sup> Article 26 of the Vienna Convention provides: 'Every treaty in force is binding upon the parties to it *and must be performed by them in good faith*' (emphasis added).

<sup>82</sup> Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline* ('US — Gasoline'), WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996:I, p. 18.

### 1 Article 31(3)(c) of the Vienna Convention

Article 31(3)(c) of the Vienna Convention is particularly relevant when interpreting treaty obligations, such as those of the WTO Agreement, which interact with various other treaties. Article 31(3)(c) provides that: ‘There shall be taken into account, together with the context (c) any relevant rules of international law applicable in the relations between the parties.’ What is the purpose and the reach of Article 31(3)(c)?

#### (a) ‘Rules of international law’

Some may distinguish ‘rules’ from ‘obligations’, where the former is broader.<sup>83</sup> The term ‘rules of international law’ seems to refer to all sources of international law. Custom, general principles of international law (Article 38(1)(b) of the ICJ Statute)<sup>84</sup> or general principles of (domestic) law accepted by nations (Article 38(1)(c) of ICJ Statute), including those relating to human rights, would have to be ‘taken into account’ in the interpretation of WTO provisions. Some treaties would also have to be taken into account (Article 38(1)(a) of the ICJ Statute). But which ones? The rest of Article 31(3)(c) sheds light on this question.

#### (b) ‘Applicable in the relations between the parties’

The requirement that any such rule be ‘applicable in the relations between the parties’ implies that the international law rule must be binding on the parties. But which

<sup>83</sup> Robert Howse has argued that the health policies of the World Health Organization (WHO) are rules of international law covered by Article 31(3)(c) and as such should be used in the interpretation of the TRIPS Agreement. Howse, ‘The Canadian Generic Medicines Panel, A Dangerous Precedent in Dangerous Times’, 3 *Journal of World Intellectual Property* (2000) 493.

<sup>84</sup> Panels and the Appellate Body have made use of general principles of international law to support their interpretation based on the ordinary meaning of the terms of the WTO Agreement. For instance, in *Canada — Term of Patent Protection* (‘Canada — Patent Term’), WT/DS170/AB/R, adopted on 12 October 2000, in discussing the non-retroactivity of some provisions of the TRIPS Agreement, the Appellate Body stated that: ‘This conclusion is supported by the general principle of international law ... which established a presumption against the retroactive effect of treaties’ (Appellate Body Report, *Canada — Patent Term*, para. 71). In *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (‘US — Shrimp’), the Appellate Body stated that ‘[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith’ (Appellate Body Report, *US — Shrimp*, WT/DS58/AB/R, adopted on 6 November 1998, para. 158, and in its review report, WT/DS58/AB/RW, paras 123 *et seq.* In *United States — Tax Treatment for Foreign Sales Corporations* (‘US — FSC’), WT/DS108/AB/R, adopted on 20 March 2000, para. 106, the Appellate Body stated that Article 3(1) of the DSU was an expression of the good faith general principle of law (para. 106). In *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (‘US — Hot-Rolled Steel’), WT/DS184/AB/R, adopted on 23 August 2001, para. 101, the Appellate Body stated: ‘We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the [Anti-Dumping] Agreement, as well as other covered agreements.’ In *US — Cotton Yarn*, the Appellate Body referred to the principle of due diligence when interpreting the investigation obligations of members under Article 6 of the Agreement on Textiles; it also drew parallels with the principle of proportionality and the rules on state responsibility, and referred to the ‘pervasive general principle of good faith that underlies all treaties’ (*ibid.*, at para. 81).

parties? One narrow interpretation would read ‘parties’ as meaning all WTO Members. In other words, for a non-WTO rule of international law to be used to interpret WTO obligations, it and the WTO Agreement would require identical membership. This may be particularly problematic for treaties. In *US — Tuna (EEC)*, the GATT unadopted panel decided to exclude any consideration of the Convention on International Trade in Endangered Species (CITES) because it was a multilateral agreement signed only by some of the parties to the GATT.<sup>85</sup> While this approach provides a conceptually clear standard, it suffers from a number of problems. It would reduce the number of outside treaties and legal principles that could be used to interpret WTO obligations under Article 31(3)(c), and this leads only to inconsistencies and incoherence between systems of law. Few international agreements, if any, will have identical memberships, although some may include all WTO Members or even a wider membership than the WTO. But to require that such a non-WTO treaty have at least the WTO Membership would also create illogical situations. As WTO Membership grows, fewer international agreements will match its membership. This is especially so since the WTO admits non-sovereign members: it would make it impossible for the WTO to have an identical membership to any treaty. This would lead to the paradoxical result that the WTO would, at least in theory, become more isolated from other international systems of law as its membership grows. In addition, there may be principles and provisions in an international treaty (with smaller membership than that of the WTO) which have become a customary rule of international law binding on all countries, even if non-signatory to that treaty (the treaty becomes evidence of this custom). Moreover, from a legal perspective, the ‘identical membership’ approach does not seem to be consistent with the principle adopted by the Appellate Body in *US — Shrimp*, which examined CITES and a number of other multilateral environmental agreements, many of which did not have the same membership as the WTO.<sup>86</sup> Yet it considered that there was evidence of sufficient consensus on some of the definitions contained therein.

Another, more sophisticated criteria, yet still stringent, would be to allow the use of rules in treaties open to broad and potentially universal *membership*. For instance, Article 3 of Annex 1 to the Sanitary and Phytosanitary (SPS) Agreement, Articles 4 and 5 of the Technical Barriers to Trade (TBT) Agreement and Article VI(5) of the GATS refer to standards developed in relevant international (or even regional) organizations as being those organizations whose membership is *open to* all Members of the WTO.<sup>87</sup>

<sup>85</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna* (‘*US — Tuna (EEC)*’), 16 June 1994, unadopted, DS29/R, para. 5.19.

<sup>86</sup> Note that the Appellate Body did not specify which Article 31 provision it relied on when using these international environmental agreements to interpret the Article XX(g) term ‘exhaustible natural resources’. However, these agreements could be characterized as ‘relevant rules on international law applicable in the relations between the parties’ under Article 31(3)(c).

<sup>87</sup> See e.g. the TBT Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 (Annex 4 to G/TBT/9).

Joost Pauwelyn has suggested that, when interpreting WTO provisions, account can be taken only of international law rules that ‘reflect the “common intention” of the WTO Members’ by being agreed or tolerated — be it explicitly, implicitly or by acquiescence — by all WTO Members.<sup>88</sup> On the other hand, Pauwelyn would provide bilateral treaties with direct effect in suggesting that they be allowed to supersede a WTO norm. It is difficult to understand why such a non-WTO norm, enforced by WTO adjudicating bodies and thus newly part of the legal context of other WTO provisions, could not be ‘taken into account’ in the interpretation of a WTO provision while it is forced into the WTO applicable law. Arguably, using Pauwelyn’s criteria, the silence of members would authorize the use of non-WTO norms that would be strictly binding only on a small group of states.

It seems true that the rule of international law to be used for interpreting the WTO treaty must be of ‘relevant international communality’ but that the rule’s membership is no guarantee of its authentic relevance. International rules may be found in regional treaties. A provision of NAFTA or of the EC Treaty, for instance, can be of direct interest, relevance and guidance for the interpretation of a provision of the WTO treaty, to the extent that such a provision may be evidence of specific international relevance.

From a technical point of view, this interpretation is supported by the different usage of ‘parties’ throughout Article 31 in general and in Article 31(3)(c) in particular. Article 31(2)(a) refers to ‘any agreement relating to the treaty which was made between *all* the parties’, and Article 31(2)(b) refers to an instrument by ‘*one or more* parties’ and accepted by ‘the *other* parties’. Therefore, it could be argued that the use, without these qualifications, of ‘the parties’ in Article 31(3)(b) and (c) allows consideration of treaties signed by a subset of the WTO Membership that is less than all the parties, but more than one of the parties, that is *accepted* by the other parties.<sup>89</sup>

For example, for the interpretation of WTO law, the Appellate Body has used, and otherwise made reference to, treaties with different memberships than that of the WTO. In *EC — Bananas III*, the WTO provision under examination was the Lomé waiver, adopted pursuant to Article IX of the Agreement Establishing the WTO. The Appellate Body used the Lomé Convention in its interpretation of the WTO waiver. This was logical since the waiver, albeit multilaterally approved, was concerned with special rights and obligations of a group of WTO Members. The Lomé Convention was thus ‘relevant’. In *EC — Computer Equipment*,<sup>90</sup> the Appellate Body reproached the panel for not referring to the Harmonised System of Classification treaty (the ‘HS treaty’) when interpreting the WTO Schedule of the United States, even though the membership of the HS treaty was different to that of the WTO, although binding on the

<sup>88</sup> Pauwelyn, *supra* note 9, at 575–576.

<sup>89</sup> See also Palmeter and Mavroidis, ‘The WTO Legal System: Sources of Law’, 92 *American Journal of International Law* (1998) 398.

<sup>90</sup> Appellate Body Report, *EC — Computer Equipment*. See also, on this issue, Marceau, ‘A Call for Coherence’, *supra* note 9, at 123–127. See also Bartels, ‘Article XX of GATT and the Rules of Public International Law on Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights’, 36 *Journal of World Trade* (2002) forthcoming.

two disputing parties. In *US — Shrimp*,<sup>91</sup> the Appellate Body examined the term ‘exhaustible natural resources’ in light of both the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals — albeit here it can be argued that the definition therein was generally accepted by all WTO Members. In *EC — Poultry*,<sup>92</sup> the Appellate Body said that the bilateral agreement between Brazil and the European Communities could also be relevant (under Article 32 of the Vienna Convention) when interpreting Brazil’s Schedule, even though it was not part of WTO law.

In other words, Article 31(3)(c) would potentially reach a series of international norms. What finally determines which international law rules are to be used for the interpretation of a specific treaty is rather the relevance of the particular rule of international law in light of the nature of the WTO provisions that are being interpreted in the dispute. (In the context of human rights, many of the relevant provisions are customary or included in treaties with very broad membership.)

(c) ‘Relevant rules of international law’

The third element — and a crucial one — of Article 31(3)(c) is the reference to ‘relevant’ rules of international law. It is suggested that the reach of the provision will be determined with reference to the type and nature of the WTO obligation at issue. Since many of the WTO obligations are multilateral in their nature, international law rules to be used for their interpretation should also be multilateral in their nature, but some WTO obligations are either negotiated bilaterally or have application between only a small group of WTO Members.

In the interpretation of Article XXIV on regional trade agreements, Article 31(3)(c) could possibly point to the state practice of a smaller group of WTO Members, such as treaties establishing regional organizations. In *Korea — Various Measures on Beef*, the panel examined various bilateral agreements between Korea and the disputing parties. Such legal instruments were examined, not with a view to ‘enforcing’ the content of these bilateral agreements, but strictly for the purpose of interpreting an ambiguous WTO provision, i.e. Note 6(e) to Part IV of Korea’s Schedule, a multilaterally agreed treat provision.<sup>93</sup>

Article 31(3)(c) is a tool, an indicator of the norms/rules of international law that must be taken into account in the interpretation of specific treaty provisions such as those of the WTO. The assessment of which is a relevant rule of international law is to

<sup>91</sup> Appellate Body Report, *US — Shrimp*, n. 111. It noted, in relation to the former, that both Thailand and the United States had signed but not ratified the Convention. And it noted, in relation to the latter, that India and Pakistan had ratified, but that Malaysia, Thailand and the United States are not parties to, the Convention. The Appellate Body did not explicitly refer to Article 31(3)(c).

<sup>92</sup> Appellate Body Report, *EC — Poultry*, para. 82.

<sup>93</sup> Panel Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea — Various Measures on Beef*), WT/DS161 and 169/R, adopted on 10 January 2001, paras 539 *et seq.*

be done on a case-by-case basis in light of the nature of the WTO provisions at issue, keeping in mind that there may be different degrees of relevance. In fact, Article 31(3)(c) can be viewed as an obligation on the interpreter to be ‘aware of’ — and to take into account — what is otherwise international law between the WTO disputing parties. In all cases, the reliance on relevant provisions of general international law and their necessary examination by a panel would always be performed ‘only to the extent necessary to interpret [the WTO provision]’ and to assess compliance with WTO law.<sup>94</sup>

## 2 Evolutionary Interpretation

Article 31(3)(c) also subsumes the principle of ‘evolutionary interpretation’,<sup>95</sup> a principle that is of particular importance when dealing with concepts such as those of ‘human rights’ or the invocation of GATT Article XX(a) ‘public morals’ or Article XX(e) ‘prison labour’, which have constantly evolved since the creation of the United Nations. In *US — Shrimp*, when interpreting the term ‘exhaustible natural resources’ in Article XX(g), the Appellate Body referred to a number of non-WTO sources of international law after having noted that that concept had evolved. The Appellate Body stated:

The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They 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. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble to the WTO Agreement — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges ‘the objective of *sustainable development*’. From the perspective embodied in the preamble to the WTO Agreement, we note

<sup>94</sup> Appellate Body, *EC — Bananas III*, para. 162, referring to the Lomé Convention. Note also that domestic legislation may also need to be interpreted. In *India — Patents (US)*, the Appellate Body said that, in certain circumstances, it was permissible to refer to national law: ‘There was simply no way for the Panel to make this determination *without engaging in an examination of Indian law*. But in this case, the Panel was not interpreting Indian law “as such”; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement’ (emphasis added). Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (‘India — Patents (EC)’)*, WT/DS79/AB/R, adopted on 2 September 1998, paras 67–68. In *United States — Anti-Dumping Act of 1916 (‘US — 1916 Act’)*, WT/DS136/R, adopted on 26 September 2002, para. 6.48, the panel stated that, even if the text of the law in question was clear on its face, it was necessary to examine the domestic application of that law, its historical context and legislative history and subsequent declarations of US authorities in order to assess its compatibility with WTO law. See also GATT Panel Report, *United States — Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345. In all those reports, the domestic law was interpreted to determine compliance with WTO law.

<sup>95</sup> For an examination of the use of the ‘evolutionary interpretation’ principle in other fora, see Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions’, *supra* note 9, at 1088–1089; and ‘A Call for Coherence’, *supra* note 9, at 120–123.

that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.<sup>96</sup>

Sinclair stated, in respect of Article 31(3)(c), that:

there is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as 'public policy' or 'the protection of morals'.<sup>97</sup>

The ICJ did the same in the *Case of the Aegean Sea Continental Shelf (Greece v. Turkey)*.<sup>98</sup> In the NAFTA context, an Arbitration Group concluded that the use of the term 'GATT' in the cross-reference from the provisions of the FTA and NAFTA had to be interpreted to mean GATT as it evolved into the WTO Agreement.<sup>99</sup> The European Court of Justice has made use of such evolutionary principles of interpretation.<sup>100</sup> The European Court of Human Rights has also sanctioned the use of the principle of evolution, in considering the Convention 'as a living instrument which must be interpreted in the light of present-day conditions'.<sup>101</sup>

In sum, Article 31(3)(c) of the Vienna Convention aims at promoting some 'coherence' in international law, so that the treaty is interpreted so as to avoid

<sup>96</sup> Appellate Body Report, *US — Shrimp*, paras 129–130.

<sup>97</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) 139. See also Yasseen, 'L'Interpretation des traités d'après la Convention de Vienne sur le droit des traités', 151 *Recueil des Cours* (1976-III) 64; and Olawale-Elias, 'The Doctrine of Inter-temporal Law', 74 *American Journal of International Law* (1980) 292.

<sup>98</sup> 'It follows that, in interpreting and applying reservation (b) with respect to the present dispute the Court has to take into account the evolution which has occurred in the rules of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf.' *Case of the Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports (1978) 4, paras 78–80. See also *Namibia (Legal Consequences) Advisory Opinion*, ICJ Reports (1971) 31. The International Court of Justice (ICJ) has made use of an 'evolutionary' approach in certain cases, including most recently in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, 37 ILM 162 (1998), available at [www.icj-cij/iccjwww/idecisions.htm](http://www.icj-cij/iccjwww/idecisions.htm), where it stated: '[The] Treaty is not static, and is open to adapt to emerging norms of international law.'

<sup>99</sup> Arbitral Panel Established Pursuant to Article 2008 of the North American Free Trade Agreement, Final Report, *In the Matter of Tariffs Applied by Canada to Certain US Origin Agricultural Products*, 2 December 1996.

<sup>100</sup> See also the conclusion of the ECJ in Case C–283/81, *CILFIT Srl v. Ministro della Sanita* [1982] ECR 3415, at 3430: 'Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'

<sup>101</sup> The most significant cases in which the European Court of Human Rights applied an evolutionary interpretation are: *Tyrrer*, ECHR (1978) Series A, No. 26, adopted on 28 April 1978, para. 31; and *Marckx*, ECHR (1979) Series A, No. 31, adopted on 13 June 1979, para. 41. See also the judgment in Case C–283/81, *CILFIT Srl v. Ministro della Sanita* [1982] ECR 3415, at 3430, where an evolutionary interpretation was used by the ECJ. See also Gaudin, 'Les principes d'interprétation de la Cour de justice des Communautés européennes et la subsidiarité', 8 *Revue des affaires européennes* (1998) 10.

conflicts with other treaties. The WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules of international law, including human rights law. In this context, it should generally be possible to interpret WTO provisions in a way that allows and encourages WTO Members to respect all their international law obligations, including those of human rights law.

### *B The Use of Human Rights Provisions in the Interpretation of WTO Provisions*

Human rights law which is relevant and applicable to the parties to a dispute would have to be taken into account when interpreting WTO provisions that deal with a subject-matter that is also addressed by a specific or general human rights law.

The sources of human rights law are important. A particular difficulty in dealing with human rights treaties is the fact that they are often drafted in rather general terms, and frequently there is no consensus on their interpretation. José Alvarez identifies this problem well in a commentary on Howse and Mutua's paper.<sup>102</sup> What is the 'right to health'? What is the 'right to food', and what does such a right entail in terms of the rights and obligations of states? And why and how are they relevant to WTO obligations? As mentioned in the previous section of this article, the 'relevance' of the non-WTO rule is determinant in the identification of which non-WTO rules can be used in the interpretation of WTO applicable law.

#### *1 Examples of Suggestions of Human Rights Provisions that may be Relevant in the Interpretation of WTO Provisions*

Robert Howse and Makau Mutua have argued that the WTO treaty (including the reference to sustainable development in the preamble thereto), provisions of the TRIPS Agreement, and Article XX should be interpreted in light of the (even subsequent) treaty commitments of the relevant parties and in light of customary international law.<sup>103</sup>

Before the Doha WTO Ministerial Conference, some suggested<sup>104</sup> that the 'human right to health'<sup>105</sup> was determinant when interpreting the TRIPS Agreement,

<sup>102</sup> Alvarez, *supra* note 3, at 3.

<sup>103</sup> Howse and Mutua, *supra* note 1.

<sup>104</sup> For instance, see the unpublished paper of Richard Elliott, 'International Human Rights Law, Access to Medicines, and the Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights' (unpublished paper, Legal Assistance Center, Windhoek, Namibia, November 2001); Prove, 'Human Rights Within the WTO Framework' (paper presented at the Evangelical Academy, Bad Boll, Germany, 3 December 2001, on files with the author).

<sup>105</sup> What is the right to health? Human rights activists refer generally to a series of treaties and international declarations that offer definitions and criteria for such right to health. Specific references and criteria exist in Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination, Article 12(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, and Articles 23, 24 and 27 of the Convention on the Rights of the Child. Regional human rights treaties which declare that human beings have a right to health would include Article XX of the Helsinki Final Act, Article 1 of the Declaration on the Rights of Disabled Persons, Article 27 of the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, the Declaration of Alma Ata on Primary Health Care, the Preamble to and Article 1 of the Declaration on the Right to Development as well as the Cairo Declaration on Population and Development, the 1995 Copenhagen Declaration on Social Development and the 1995 Beijing Declaration and Programme of Action on the

including the developing countries' right to make full use of the compulsory licensing provisions of Article 31 of the TRIPS Agreement, or to make use of parallel imports. In the opinion of proponents of this human rights argument,<sup>106</sup> the TRIPS Agreement, in particular in light of the preamble and Articles 1, 7 and 8 which call for a 'balanced' reading of the Agreement, should be interpreted in light of Articles 55 and 56 of the United Nations Charter, Articles 25 and 27 of the Universal Declaration on Human Rights and Articles 12 and 2 of the International Covenant on Economic, Social and Cultural Rights (as further discussed in General Comment Nos 14 and 3 of the Human Rights' Committee), all referring to the right to health. Robert Howse further argued that even the WHO Policy Statement relating to the issue before the WTO panel should have been taken into account when interpreting the balancing requirements under Articles 7 and 8 of the TRIPS Agreement.

Caroline Dommen has argued that human rights could be invoked by Brazil to defend (part of) its health programme challenged under the TRIPS Agreement by the United States.<sup>107</sup> For her, Brazil could rely on Article 2 of the International Covenant on Economic, Social and Cultural Rights obliging states to take steps individually and through international assistance to the best of its ability with a view to progressively achieving the full realization of the rights set out in the Covenant, including an adequate standard of living, housing, work, education, food, health, etc.

At the Bern Conference<sup>108</sup> in August 2001, Simon Walker submitted a report by the UN High Commissioner for Human Rights on 'The Impact of the TRIPS Agreement on Human Rights', which advocated a 'human rights approach to the TRIPS Agreement'.<sup>109</sup> Referring to Articles 7 and 8 of the TRIPS Agreement, which call for an interpretation and application of the TRIPS Agreement conducive to social and economic welfare and a balance of rights and obligations, the report makes at least 10 recommendations where the TRIPS Agreement could be interpreted and enforced in line with human rights. The report contains multiple examples of possible interpretations of the WTO taking into account human rights law. Arguably, the Doha Declaration on TRIPS addressed some of those issues and as such would constitute an expression of the possibility of reconciling WTO provisions and relevant human rights law.

Some have suggested that the 'human right to food'<sup>110</sup> may be invoked by developing countries when interpreting provisions of the Agreement on Agriculture. Mauritius has invoked the right to food in the context of the issues of food security and

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Rights of Women. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and the United Nations Millennium Declaration could also serve as useful instruments — whether in and of themselves binding or not — when interpreting WTO provisions dealing with health matters.

<sup>106</sup> See e.g. Howse, *supra* note 83.

<sup>107</sup> See WT/DS199. See Dommen, 'Covenant on Economic, Social and Cultural Rights: A Treasure Chest of Support for Developing Countries' Concerns in the WTO', *Bridges*, January–April 2001, 21.

<sup>108</sup> World Trade Forum, International Trade and Human Rights, Bern 13–14 August 2001.

<sup>109</sup> E/CN.4/Sub.2/2001/13.

<sup>110</sup> What is this human right to food? Article 11 of the Covenant on Economic, Social and Cultural Rights (as detailed in the General Comment No. 12), Article 24(2)(c) of the Convention on the Rights of the Child,

non-trade concerns for developing countries. Mauritius argued<sup>111</sup> before the Committee on Agriculture that, pursuant to Article 20 of and the preamble to the Agreement on Agriculture, non-trade concerns should be taken into account in the continuation of the reform process, and this includes the developing countries' right to food. In support of its contention, Mauritius stated that, during the last 50 years, a number of international legal instruments relating to nutritional concerns and the right to food have been developed. For Mauritius, the fundamental right of everyone to be free from hunger is recognized, and the provision of guaranteed access to adequate food is the responsibility of the state. For Mauritius, when interpreting the obligation (including those of negotiation) under the Agreement on Agriculture, the problems of both food-importing and food-exporting countries should be taken into account 'to ensure an equitable distribution of world food supplies in relation to need'.<sup>112</sup>

Mauritius then referred to a series of international instruments that shed further light on the content of the right to food: (1) the Universal Declaration of Human Rights, Article 25(1) of which states that everyone has the right to a standard of living adequate for the health and well-being of himself and his family; (2) the International Covenant on Economic, Social and Cultural Rights, adopted by the UN in 1996, Article 11(1) of which recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food; and (3) the 1996 World Food Summit, which emphasized that access to sufficient and adequate food is a right of everyone (Objective 7(4) of the Plan of Action adopted by consensus at the Summit underlines that 'governments, in partnership with all actors of civil society, will, as appropriate ... make every effort to implement the provisions of Article 11 of the Covenant'). For Mauritius, the government commitments relating to the right to food are basically result-oriented, and the international conventions do not prescribe any specific policy instrument. WTO instruments should therefore be used accordingly.<sup>113</sup>

## 2 Conclusion

The above list of examples does not diminish the difficulty of identifying which 'rule of international human rights law' would be relevant when interpreting a specific WTO

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Article 12(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 25 of the Universal Declaration on Human Rights, the first Commitment of the 1996 Rome World Food Summit Political Declaration and Plan of Action, Article 10(b) of the Declaration on Social Progress and Development, Articles 1 and 2(3) of the Declaration on the Right to Development and Articles 1 and 2 of the Universal Declaration on the Eradication of Hunger and Malnutrition, offer specific parameters for defining the concept.

<sup>111</sup> See Document G/AG/NG/W/36/Rev.1.

<sup>112</sup> Article 11(2)(b) of the International Covenant on Economic, Social and Cultural Rights.

<sup>113</sup> It should be noted that Mauritius invoked such human rights law provisions, not in a dispute settlement context, but in support of its interpretation of Article 20, dealing with the obligation of members to undertake negotiations, and Mauritius claimed that negotiations and WTO policy reform ought to be undertaken in a way that is consistent with other multilateral commitments.

provision or when assessing compliance with a WTO provision. The preliminary identification of all international instruments dealing with the right to food or the right to health is too imprecise to be relevant to the interpretation of a specific WTO provision. However, the Committee on Economic, Social and Cultural Rights has adopted a series of interpretations of many provisions of the International Covenant on Economic, Social and Cultural Rights,<sup>114</sup> although the legal value (and the general acceptance by states) of such a Committee report is not clear. At least these comments can be viewed as statements by human rights experts of the Human Rights Committee that can be used as expert doctrine for the interpretation of human rights law.

The link with WTO law is not clearer. In the context of import restrictions imposed for human rights considerations, a WTO Member may want to justify its actions by invoking the exception for 'public morals' in GATT Article XX(a) and GATS Article XIV(a), or for 'prison labour' in GATT Article XX(e), or exceptions such as those for 'security' or 'emergency in international relations' pursuant to GATT Article XXI and GATS Article XIVbis. There is no WTO jurisprudence interpreting such concepts, and it is far from clear whether the violation of human rights could be covered by any WTO exceptions. These concepts may have been used in other treaties and under other systems of law.<sup>115</sup>

### ***C The Normative and Flexible Nature of Certain Provisions of WTO and Human Rights Laws***

Many WTO obligations are flexible in nature and are drafted so as to provide WTO Members and panels with the necessary 'flexibility' to enforce WTO norms or to assess WTO compliance. For instance, GATT Article XX and GATS Article XXI exceptions are more in the nature of 'standards', as opposed to specific 'rules' — to borrow the

<sup>114</sup> The Committee on Economic, Social and Cultural Rights in its general comment defines or narrows the otherwise potentially ambiguous application of the right to food and what obligations are imposed on state parties as a result of this right. For comments on the right to food, see E/C.12/1999/5; on the right to health, see E/C.12/2000/4.

<sup>115</sup> The evolution of the GATT exceptions bring about interesting questions of interpretation. For instance, faced with the absence of a reference to 'prison labour' in the list of GATS exceptions of Article XIV, it may be possible for a panel to conclude that the term 'public morals' of GATS Article XIV(a) has evolved (from the GATT days) to include 'prison labour'. At the same time, it would be difficult to conclude that the reach of GATT Article XX(a) 'public morals' is effectively narrower than that of GATS Article XIV(a) referring to similar 'public morals and public order' concept. How can a single measure be exempted under GATS for a policy reason condemned under GATT? Has the term 'public morals' in GATT Article XX evolved to cover what the term 'public morals and public order' of GATS Article XIV(a) now covers? Questions would arise if the 'security' exceptions (in GATT Article XXI or GATS Article XIVbis) were invoked to justify trade restrictions based on human rights. Can the interpretation of GATT Article XXI(b)(iii) 'emergency in international relations' remain impermeable to the evolution of the concept of 'threat to peace and security' in general international law authorizing the use of force and other Chapter VII measures by the Security Council and individual states when faced with a crisis and massive violations of human rights taking place entirely in another state?

analytical framework and distinction introduced by Joel Trachtman.<sup>116</sup> Their application will call for further ‘completion’ — by panels — of the specific parameters of such WTO prescriptions, in light of the specific circumstances of each dispute. Trachtman also suggested that, under the GATT Article XX type of provision, panels are requested to ‘complete the WTO contract’ or ‘fill in gaps’<sup>117</sup> intentionally left by the WTO legislators.

Although I agree with Joel Trachtman’s analytical framework, I have difficulties with the use of terms such as ‘gap’ or ‘to be completed’, as they carry the connotation that something was missing from the text of the WTO. Nothing was missing. As suggested by Trachtman, some provisions of the GATT, such as Article XX, were intentionally drafted in general terms to allow for the flexibility that is necessary for a single norm to be used in numerous and distinct factual circumstances. Article XX refers to policy considerations and imposes behavioural obligations, which can be best drafted only in general terms and which will require panels to balance various factual and legal elements on a case-by-case basis. It is also worth recalling this passage from *Japan — Alcoholic Beverages II*:

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

In determining whether a measure is ‘necessary to protect public morals’,<sup>118</sup> pursuant to GATT Article XX(a) or GATS Article XIV(a), while following the criteria established by the recent jurisprudence on this matter,<sup>119</sup> a panel should be entitled to

<sup>116</sup> Trachtman, ‘Trade and ... Problems’, 9 *EJIL* (1998) 32, at 45.

<sup>117</sup> Trachtman, *supra* note 9, at 346; and Trachtman, *supra* note 116.

<sup>118</sup> On the interpretation and application of the ‘public morals’ exception of GATT Article XX(a), see Marie-Joëlle Redor, ‘L’ordre public: Ordre public ou ordres publics; Ordre public et droits fondamentaux’, in *Actes du colloque de Caen* (2001); Feddersen, ‘Focussing on Substantive Law in International Economic Relations: The “Public Morals” of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’, 7 *Minnesota Journal of Global Trade* (1998) 75; and Charnovitz, ‘The Moral Exception in Trade Policy’, 38 *Virginia Journal of International Law* (1998) 689.

<sup>119</sup> The recent jurisprudence — see the Appellate Body Report, *Korea — Various Import Measures on Fresh, Chilled and Frozen Beef* (‘Korea — Various Measures on Beef’), WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001, paras 161–164, reiterated in *EC — Asbestos*, paras 171–172 — has established that the determination of whether a measure which is not ‘indispensable’ may nevertheless be ‘necessary’ involves a process of weighing and balancing a series of factors which include: (1) the importance of the common interests or values protected by the measure; (2) the efficacy of such measures in pursuing the policies aimed at; and (3) the accompanying impact of the law or regulation on imports or exports. The more vital or important the policies it is aimed at, the easier it would be to accept as ‘necessary’ a measure designed for that purpose. Criteria have also been developed to ensure that, while a member has a *prima facie* right to maintain the types of measures necessary to enforce chosen policies, that member should be able to demonstrate its good faith, in that its measures are not applied in a discriminatory manner or as disguised restriction on trade.

examine the participation of concerned members in relevant human rights treaties: (1) as evidence of the ‘importance of the values and common interests’ protected by the measure; (2) as evidence of the efficacy of the chosen measure; and (3) as evidence of the good faith and consistent behaviour of the concerned member. Moreover, in *US — Shrimp (Article 21(5) DSU)*,<sup>120</sup> the Appellate Body made clear that the examination of the United States’ participation in other similar regional or bilateral treaties was a factual matter relevant in the assessment of its good faith efforts; the same could be done with relevant human rights treaties. Other factual elements could include declarations in national and international fora, decisions of human rights jurisdictions, other relevant general declarations by states on the importance and primacy of human rights, and relevant resolutions of the International Labor Organization (ILO) or the General Assembly, all of which would constitute public knowledge or factual information which the panel can obtain pursuant to Article 13 of the DSU.

In sum, the type of WTO obligation and the existence of policy exceptions in Articles XX and XXI are such as to ensure that a good faith interpretation of the WTO and human rights law will most often avoid conflicts of obligations between human rights and WTO law.

## 4 Irreconcilable Conflicts between WTO Provisions and Human Rights Law

Despite the theoretical concept that states should be able to meet all their international obligations simultaneously, irreconcilable conflicts remain possible. In *Argentina — Textiles and Apparel*, the Appellate Body stated that: ‘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 GATT 1994.’<sup>121</sup> Irreconcilable conflicts between the WTO and other treaties’ provisions may, therefore, exist. So what should or could a panel do when faced with such a conflict?

### A Definition of a Conflict

The issue of the definition of what is a ‘conflict’ is relevant to the discussion on the relationship of the WTO to other treaties. Ultimately, only when there is a conflict between two treaty provisions must one of them be set aside (either as suspended or abrogated: Articles 30(4), 41 and 60 of the Vienna Convention). When faced with more specific rights, the rule on *lex specialis* may find application. In all other situations, a state’s obligations and rights are cumulative and must all be complied with simultaneously.

The fact that a single member (or many members) may be in compliance with the WTO Agreement and in violation of a human rights treaty does not imply that there is

<sup>120</sup> Appellate Body Report, *US — Shrimp (Article 21(5) — Malaysia)*, WT/DS58/AB/RW, adopted on 21 November 2001, para. 130.

<sup>121</sup> Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel (‘Argentina — Textiles and Apparel’)*, WT/DS56/AB/R, adopted on 22 April 1998, DSR 1998:III, para. 69.

a conflict between the provisions of the WTO Agreement and those of any specific human rights treaty. Rather, conflict is a specific and narrow concept:

[T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously ... Not every such divergence constitutes a conflict, however ... Incompatibility of contents is an essential condition of conflict.<sup>122</sup>

Furthermore:

[A] conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary.<sup>123</sup>

Joost Pauwelyn reports<sup>124</sup> that other authors favoured a narrow definition of conflicts. He reports that Karl wrote that: ‘*Technically speaking*, there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.’ Also, Kelsen, Klein and, much later, Wilting<sup>125</sup> adopted a similarly strict definition of ‘conflict’, covering only mutually exclusive obligations.

Thus, for a conflict to exist between a WTO provision and a provision of a human rights treaty, evidence must be put forward that the WTO mandates or prohibits an action that a human rights treaty conversely prohibits or mandates. Such situations would be rare. In fact, one would have to be able to demonstrate that compliance with the WTO *necessitates* violation of a human rights treaty.

In the WTO context, this narrow definition of a conflict was used by the panel in

<sup>122</sup> Wolfram Karl, ‘Conflicts Between Treaties’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 7 (1984) 468–473, at 468. See also Jenks, ‘The Conflict of Law-Making Treaties’, 29 *British Yearbook of International Law* (1953) 425. In such a case, it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with each other, failing any evidence to the contrary. See also Vierdag, ‘The Time of the “Conclusion” of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’, 64 *British Yearbook of International Law* (1988) 100; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law*, vol. I, Parts 2–4 (1992) 1280; Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, 33 *British Yearbook of International Law* (1957) 211, at 237; and Sinclair, *supra* note 97, at 97.

<sup>123</sup> Jenks, *supra* note 122.

<sup>124</sup> See Pauwelyn, ‘Conflict of Norms in Public International Law: The Example of the WTO’ (unpublished PhD thesis, University of Neuchâtel, 2001).

<sup>125</sup> Karl, *supra* note 122, at 468; Kelsen, *Théorie générale des normes* (trans. O. Beaud, 1996) 161: ‘Un conflit entre deux normes existe quand ce que l’une pose comme obligatoire est incompatible avec ce que l’autre pose comme obligatoire, et quand l’obéissance ou l’application de l’une des deux normes implique de façon nécessaire ou possible la violation de l’autre.’ Wilhelm Wilting, *Vertragskonkurrenz im Völkerrecht* (1996) 4.

*Indonesia — Automobile* and in *Guatemala — Cement I*,<sup>126</sup> when the Appellate Body, while discussing the possibility of conflicts between the special and additional rules of the DSU for anti-dumping disputes, and the general provisions of the DSU, stated: ‘A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.’ Recently, in *US — Hot Rolled Steel*, the Appellate Body confirmed a narrow definition of ‘conflict’.<sup>127</sup>

Joost Pauwelyn has explored in great depth the issue of ‘conflicts’ in international law and in WTO law, and favours a broad definition of a conflict. He refers to the Appellate Body’s conclusion in *United States — Tax Treatment for ‘Foreign Sales Corporations’*, and argues that the Appellate Body accepted that one provision setting out an exemption (permissive rule: GATT Article XVI(4)) was opposed to another imposing negative obligations (not to impose certain export subsidies: Agreement on Agriculture). The Appellate Body recognized that ‘very substantial differences’ existed which had to be dealt with, and priority was given to the rules of the Agriculture Agreement over those of the Agreement on Subsidies and Countervailing Measures (the ‘SCM Agreement’). For him, this means that the Appellate Body is changing its position on the narrow definition of a conflict.<sup>128</sup> He adds, as does Lorand Bartels,<sup>129</sup> that the concept of conflict should in any case be expanded to ensure that ‘rights’ of WTO Members are fully respected. I understand Pauwelyn’s suggestion to include the premise that rules dealing with conflicts are clear; conflicts should be recognized and the application of conflict rules should be favoured to ensure certainty and transparency.

‘Rights’ within a treaty (such as the WTO), and rights included in other treaties, must indeed be respected and enforced. There is, however, no need to expand the concept of conflict to do so, as other rules of international law guarantee the respect, and in some circumstances the primacy, of provisions allowing for rights over other provisions imposing obligations.

It is suggested that ‘conflicts’ should continue to be interpreted narrowly. An expanded definition of conflicts would lead to providing a third party (an adjudication

<sup>126</sup> Appellate Body Report, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico* (*‘Guatemala — Cement I’*), WT/DS60/AB/R, adopted on 25 November 1998, DSR 1998:IX, para. 65.

<sup>127</sup> Appellate Body Report, *US — Hot-Rolled Steel*, paras 55 and 62.

<sup>128</sup> Pauwelyn, *supra* note 124, at 100–122. Pauwelyn refers to the Appellate Body’s conclusion in *US — FSC*: ‘It is clear from even a cursory examination of Article XVI(4) of the GATT 1994 that it *differs very substantially* from the subsidy provisions of the SCM Agreement, and, in particular from the export subsidy provisions of both the SCM Agreement and the Agreement on Agriculture Article XVI(4) of the GATT 1994 does not apply to “primary products”, which include agricultural products. *Unquestionably*, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the Agreement on Agriculture must *clearly* take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI(4) of the GATT 1994’ (emphasis in the original).

<sup>129</sup> Bartels, ‘The Relationship Between Treaties’ (paper for Center for International Environmental Law, 2001).

body or an interpreter) with the power to set aside provisions that have been voluntarily negotiated by states. To take into account explicit ‘rights’ provided for (within a treaty or in another treaty), one may use the *lex specialis derogat generalis* principle of interpretation which favours the application of a more specific provision over a general one. Therefore, it may appear from the intention of the parties and in application of the *lex specialis* principle that a state is allowed to exercise a more specific right provided for in an earlier or later treaty provision, albeit appearing to be inconsistent with a subsequent or earlier treaty obligation drafted in general terms.

Within the WTO treaty, effective interpretation ensures that the rights of Articles XX and XXIV of GATT are enforced and not reduced to *inutile* provisions. This is done through a necessity test. There is no principle of effective interpretation between treaties. Governments change as do their political ideologies, and with the passing of time a single state may end up signing two different treaties or treaties with contradictory obligations or provisions. But a conflict is a conflict, even though conflicts between different treaties may occur more readily than conflicts within a single treaty where all the provisions were negotiated at the same time and coherently.

Since the main objective of rules of interpretation is to identify the intention of the parties, it is suggested that ‘conflicts’ between treaty provisions should continue to be interpreted narrowly. An expanded definition of conflicts would permit a third party, the adjudicating bodies (not the states themselves), to set aside a previously negotiated treaty provision in favour of the exclusive application of a superseding provision.

Even if one agrees with a broad definition of conflict—to include inconsistencies between rights and obligations, one must recognize that the identification of which of the two conflicting provisions is to supersede the other is not a simple exercise. *Lex posterior* cannot be the only rule, because *lex posterior generalis non derogat priori specialis* (‘a later law, general in character, does not repeal an earlier law which is special in character’<sup>130</sup>). This principle seems to have been recognized by the International Court of Justice in the dispute over the Gabčíkovo-Nagymaros Project<sup>131</sup> and by the WTO Appellate Body in the *EC — Hormones* case.<sup>132</sup> In both these cases, the

<sup>130</sup> See the discussion by Gaetan Verhoosel on the Gabčíkovo-Nagymaros case, ‘Gabčíkovo-Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court’, 6 *European Environmental Law Review* (1997) 252.

<sup>131</sup> 37 ILM 162 (1998), available at [www.icj-cij/iccjwww/idecisions.htm](http://www.icj-cij/iccjwww/idecisions.htm). Hungary was of the view that the ICJ had to decide the case on the basis of general principles of international law, among which it included the precautionary principle. Slovakia refuted the argument by making reference to the maxim *lex posterior generalis non derogat legi priori speciali*. The ICJ agreed with Slovakia when it concluded that, ‘since neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty . . . “newly developed norms of environmental law” could be relevant as long as they are agreed on by the parties and incorporated into the treaty at issue’.

<sup>132</sup> In that dispute, the European Communities contended that Article 5(1) of the SPS Agreement should have been interpreted in light of the precautionary principle. The Appellate Body and the panel did not take a position on the status of the precautionary principle in international law. The Appellate Body considered it ‘unnecessary, and probably imprudent’ to take a position on such an important ‘but abstract’ question. It was of the view that aspects of this principle had been taken into account in the drafting of the SPS Agreement, and in any case ‘the principle has not been written into the SPS

courts were of the view that it was not necessary to determine the ‘status’ of the precautionary principle since, even if they had found that it had attained the status of customary law, such a principle would not have superseded and extinguished the obligations arising for the parties under the treaty provision in dispute.<sup>133</sup> As a consequence, it is difficult to see how a customary rule on human rights (which always tend to be general), arising after the WTO treaty, could completely supersede a WTO treaty provision, unless the Members consent or the *lex posterior generalis* has a peremptory character (*jus cogens*).

But no single rule — the presumption against conflicts, effective interpretation, *dubio mitius*, *lex posterior*, *lex specialis*, and the presumption against a violation of *jus cogens* — provides an absolute and simple indication of which norm is to prevail. So these rules are better used in the ‘interpretation’ of WTO provisions than to exclude the application of specific provisions. More importantly, states must be presumed to be of good faith in their negotiation, practice and interpretation of their international rights and obligations. A good faith interpretation of the human rights and WTO obligations and rights of states should lead to their simultaneous consistent application.

Therefore, if human rights provisions are put forward in argument, a WTO panel should first decide whether human rights law is relevant and, if so, it shall interpret the WTO provision by taking into account the relevant human rights law, with a view to avoiding conflict. In rare cases, when this is not possible, the panel would then be faced with a true conflict. As argued in the first part of this article, in the rare eventuality of a conflict between a WTO provision and a human rights provision, the WTO panel should conclude that the human rights law does not have direct effect in WTO law, that the panel does not have the competence to formally interpret and enforce other treaties and customs and that the panel is prohibited from reaching any conclusion that would add to or diminish the covered agreements. It would then be for states to address the conflict between the system of WTO trade law and the system of human rights.<sup>134</sup>

Another distinction must be drawn between ‘direct conflicts’ between two treaties’

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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’. Appellate Body Report, *EC — Hormones*, paras 126–127.

<sup>133</sup> See the Panel Report in *EC — Hormones*, paras 8.157 and 8.158 (US) and paras 8.160 and 8.161 (Canada); and paras 210–125 of the Appellate Body Report.

<sup>134</sup> Milton Church suggested that it may be useful to note that, as with MEAs, two categories of potential conflicts may occur, and WTO Members may want to negotiate such a distinction: (a) conflict with a provision in a human rights treaty stating a substantive human right (e.g. prohibiting forced labour); or (b) conflict with a provision in a human rights treaty setting out certain measures that the parties to the treaty (or an institutional body) could/should take to protect a substantive human right (e.g. trade bans on goods produced with forced labour). Any conflict with the WTO is more likely to concern category (b) rather than (a) — i.e. conflict with the means by which states are seeking to protect/achieve certain human rights, rather than a conflict with those human rights. The legal distinction may be minimal, but from a political point of view a type (a) conflict with the WTO would be more explosive and embarrassing than a type (b) conflict. E-mail exchange of 14 February 2002. On this issue, in the case of MEAs, see e.g. Marceau and Gonzalez, ‘The Relationship Between the Settlement Systems of the WTO and MEAs’, in

provisions and a conflict in the *application* of a treaty, i.e. when a specific implementation of a treaty provision by a specific WTO Member or the exercise of a WTO right leads to a conflict of obligations for that state. This becomes even more relevant in discussing *jus cogens* below.

### **B Inconsistencies with Human Rights Provisions other than those of a Jus Cogens Nature**

In international law (through the operation of Articles 30 and 59 of the Vienna Convention), a treaty obligation entered into after the entry into force of the WTO treaty (*lex posterior*) or which is more specific (*lex specialis*) than the relevant WTO provisions could supersede a WTO provision. Articles 30 and 59 of the Vienna Convention, nonetheless, refer to ‘successive treaties relating to the *same* subject-matter’.<sup>135</sup> Accordingly, one view may be that the human rights treaty and the relevant WTO provisions are not in ‘conflict’ because the WTO provision and the human right provision would not be dealing with the same subject-matter.<sup>136</sup> Another view could be that ‘subject-matter’ refers to the object and purpose of the specific overlapping treaty provisions.

But can these rules of conflict extinguish the rights and obligations that WTO Members have under the WTO treaty? In Part 2 of this paper, I suggested that the WTO applicable law is limited to the covered agreements including institutional actions pursuant to the covered agreements. Therefore, human rights provisions that are not included in the WTO covered agreements or invoked through them cannot have direct effect or be enforced through the effective remedy system of the WTO. As suggested in Part 2.B.3 above, it is difficult to imagine a practical situation in which a human rights provision would supersede a WTO provision without at the same time amending a provision of the relevant covered agreement, at least with regard to WTO Members parties to any such superseding treaty.<sup>137</sup> Can two WTO Members modify their WTO rights and obligations as between themselves only? Can the DSB (in adopting recommendations of panels and the Appellate Body) ‘add to or diminish’ the WTO rights and obligations of two disputing members even if the trade opportunities

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*Trade and Environment, the WTO, and MEAs* (Heinrich Böll Foundation and Woodrow Wilson Center, 2001) 71.

<sup>135</sup> For a discussion of those principles as used in the WTO dispute settlement see Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions’, *supra* note 9, at 1086–1095.

<sup>136</sup> Note that very few human rights treaties would include explicit provision allowing for countermeasures or trade actions. This may be invoked when assessing whether the subject-matter of the human rights treaty at issue is trade and human rights. But, as far as the right to use countermeasures and to invoke state responsibility, the Rules on State Responsibility do provide the victim of human rights treaties violation with remedial rights.

<sup>137</sup> Article 41(2) of the Vienna Convention.

of other WTO Members are not directly affected? Articles 3(2) and 19 of the DSU (which prohibit any addition to or subtraction from the provisions of the covered agreements) seem to answer no.

If the WTO applicable law cannot be interpreted so as to avoid conflict with human rights provisions (a rare occurrence), WTO adjudicating bodies would not be able to enforce non-WTO provisions or give them direct effect in the WTO applicable law, to the extent that the superseding provision would set aside, add to, diminish or amend the rights and obligations of the covered agreements. Setting aside *jus cogens*, states do have the right to create judicial and remedies systems that would not be able to enforce all the international obligations of the same states in other treaties or customs. Having said this, these non-WTO norms are binding on the same states (also WTO Members), and, if Members violate them, they will be held responsible but in another jurisdiction (and the rules on state responsibility also apply). This human rights responsibility cannot be pursued before or enforced by WTO adjudicating bodies. Both systems of state responsibility operate in parallel. This demonstrates the lack of coherence in today's international jurisdictional and judicial systems.

### C Conflicts with Obligations Jus Cogens

Conflicts between a WTO provision and *jus cogens* (a peremptory norm of international law) is a more complex issue because of the very nature of *jus cogens*.<sup>138</sup> Violations of *jus cogens* norms are strictly prohibited, and *jus cogens* automatically annuls or modifies any inconsistent provisions. Is this prohibition limited to states parties to the Vienna Convention?<sup>139</sup> Has *jus cogens* reached a customary status pervasive in all systems of law? What are those norms of *jus cogens*? When and how can *jus cogens* be invoked? What are the consequences if a WTO provision appears

<sup>138</sup> On *jus cogens* generally, see for instance Robledo, 'Le ius cogens international: sa genèse, sa nature, ses fonctions', 172 *Recueil des Cours* (1981) 9; Gaja, 'Jus Cogens Beyond the Vienna Convention', 172 *Recueil des Cours* (1981) 271, at 316; Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1992) 82, at 108; Saulle, 'Jus Cogens and Human Rights', in *Studi in onore di R. Ago* (1987); L. Hannikainen, *Peremptory Norms, Jus Cogens, in International Law* (1988); G. Gaja, *Obligations Erga Omnes, International Crimes and Ius Cogens* (1989); Conforti and Labella, 'Invalidity and Termination of Treaties: The Role of National Courts', 1 *EJIL* (1990) 44–66; De Simone, *Jus cogens e diritti umani nelle relazioni internazionali* (1994); N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994); and R. Kolb, *Théorie du ius cogens international* (2001). On *jus cogens* and WTO law, see for instance Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT', 10 *Minnesota Journal of Global Trade* (2001) 62; Alvarez, *supra* note 3; Charnovitz, *supra* note 118; Charnovitz, 'The Globalization of Economic Human Rights', 25 *Brooklyn Journal of International Law* (1999) 113, at 124; Charnovitz, 'The WTO and the Rights of the Individual', 36 *Intereconomics* (2001) 98, at 108; R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the WTO* (2000); Pauwelyn, *supra* note 9, at 535 *et seq*; Petersmann, *supra* note 1, at 1382; and G. Schwarzenberger, *Economic World Order? A Basic Problem of International Economic Law* (1970).

<sup>139</sup> Article 53 of the Vienna Convention provides that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'; and Article 64 provides that 'if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Article 44(5) prohibits the separability of the conflicting provision in the case of situations covered by Article 54.

inconsistent with *jus cogens*? Can a WTO panel or the Appellate Body identify a norm as having reached a *jus cogens* status? Can WTO adjudicating bodies determine the consequences of a *jus cogens* violation by a WTO provision or a member's specific application of a WTO norm? Can WTO adjudicating bodies violate *jus cogens*? In this section, I am not able to answer all these questions. I only suggest lines of thinking.

The Fédération Internationale des Ligues des Droits de l'Homme (FIDH)<sup>140</sup> submitted that Articles 55<sup>141</sup> and 56<sup>142</sup> of the UN Charter must be interpreted in light of the Covenants and the Universal Declaration of Human Rights, which cover all human rights (not only *jus cogens*), and therefore the obligation of states to take actions and measures for the protection of human rights includes *all* human rights. Moreover, since Article 56 is part of the UN Charter, and Article 103 of the UN Charter states that in case of conflict the UN Charter supersedes any other treaty, the provisions of Article 56, interpreted to include *all* human rights, will supersede any other treaty obligation, including those of the WTO Agreement.

This reading is quite expansive. Generally, only a few human rights are recognized as having acquired the status of *jus cogens*,<sup>143</sup> providing them with normative hierarchical superiority over WTO provisions in cases of conflict.<sup>144</sup>

The customary nature of such peremptory norms is recognized by Article 26 of the Rules on State Responsibility:<sup>145</sup>

<sup>140</sup> Fédération Internationale des Ligues des Droits de l'Homme, 'Rapport l'OMC et les droits de l'homme' No. 320, November 2001.

<sup>141</sup> Article 55 of the UN Charter provides: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

<sup>142</sup> Article 56 of the UN Charter provides: 'All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.'

<sup>143</sup> The distinction between *erga omnes* obligations and *jus cogens* is not discussed in this paper. Some argue that all human rights are *erga omnes* in that any state has sufficient legal interest to complain before an international tribunal about a human right violation by any other state. But the qualification of *erga omnes* would not provide the human rights provision with any hierarchical normative supremacy over other treaty or customary provisions, as *jus cogens* would.

<sup>144</sup> On the question of hierarchy of the sources of international law with regard to *jus cogens*, see Alvarez, *supra* note 3, at 9: 'The UN Charter does not resolve the question of hierarchy of law, or put differently, whether human rights law has primacy over other domains of international law.'

<sup>145</sup> 'Resolution Adopted by the General Assembly [on the Report of the Sixth Committee (A/56/589 and Corr.1)]: Responsibility of States for Internationally Wrongful Acts', A/RES/56/83, adopted on 12 December 2001 without a vote. See the 'Report of the International Law Commission on the Work of its Fifty-Third Session', Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), chapter IV.E.1. On the new Rules on State Responsibility, see Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* (2001) 963; and James Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

*Compliance with peremptory norms.* Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

In paragraph 5 of the commentary to Article 26, the ILC stated:

The criteria for identifying peremptory norms of general international law are stringent. Article 53<sup>146</sup> of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of states as a whole. So far, relatively few peremptory norms have been recognized as such. *But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.* Those peremptory norms that are clearly accepted and recognized include the *prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.*<sup>147</sup>

Many WTO provisions are drafted in terms of a general prohibition, giving members flexibility in the implementation of their WTO obligations. Because of the nature of WTO obligations and the subject-matters they cover, it is difficult to envisage a direct or primary 'conflict' between a WTO provision and one of the peremptory norms listed above. Moreover, the drastic consequences of a conflict with *jus cogens* are such as to call for a strong presumption of conformity with *jus cogens*.<sup>148</sup> The ILC itself seems to recognize that interpretative principles will resolve all or most apparent and direct conflicts with *jus cogens*:

Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such question without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. *If such a case were to arise, it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most conflicts.*<sup>149</sup>

One may argue that it is possible for a WTO provision 'apparently lawful on its face

<sup>146</sup> Article 53 of the Vienna Convention provides that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.

<sup>147</sup> 'Report of the International Law Commission on the Work of its Fifty-Third Session', Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), chapter IV.E.2, p. 208 (emphasis added).

<sup>148</sup> Especially in light of Article 44(5) of the Vienna Convention, which precludes the separability of treaty provisions in situations of Article 53.

<sup>149</sup> Report of the International Law Commission on the Work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), p. 207 (emphasis added).

and innocent in its purpose' to be *implemented* by a member in such a way as to violate *jus cogens*. Can a WTO panel or the Appellate Body reach a conclusion that a national measure implementing a WTO right or obligation is in violation of *jus cogens*? Arguably, a panel or the Appellate Body can only determine whether a national measure violates a WTO provision, not *jus cogens*. But it may be possible for a panel or the Appellate Body to determine that any violation of *jus cogens* would be inconsistent with the true interpretation/application of the WTO provision. The panel would then be reading the WTO provision so as to avoid conflicts with *jus cogens*. If this is not possible, the WTO provision 'vanishes' legally. The panel would be faced with a form of WTO *non liquet* and should report to the DSB accordingly.<sup>150</sup>

Hélène Ruiz-Fabri has emphasized<sup>151</sup> the important link between the procedure and the substantive norm in matters relating to *jus cogens*, at least as far as the Vienna Convention is concerned. The pre-notification requirement (Article 65 of the Vienna Convention), the reference to consultations and conciliation (Article 65(3) of the Vienna Convention and Article 33 of the UN Charter) and the ICJ dispute settlement system (Article 66(a) of the Vienna Convention) were negotiated to ensure that allegations of *jus cogens* are not abused and as a necessary protection of conventional obligations: *pacta sunt servanda*.<sup>152</sup> Although Article 66 'supplements' other dispute settlement mechanisms, she has argued that there does not appear to exist at the moment any universal jurisdiction — other than the General Assembly or the International Court of Justice — that has the structural and institutional capacity to make declarations regarding *jus cogens*. She doubts that the Appellate Body has the capacity to 'apply' the Vienna Convention as such since it is mandated to apply the

<sup>150</sup> Note that panels already report in this way when unable to respect the standard timetable for the panel process (Article 12(9) of the DSU). In light of the sensitivity of human rights, a panel may do the same when faced with a conflict with any human rights provision. This suggestion originates from Joel Trachtman in an exchange of e-mails with Robert Howse continuing the discussion held during the ASIL/World Trade Forum Conference in Bern on 13–14 August 2001.

<sup>151</sup> Ruiz-Fabri, 'Commentaire sur l'article 66 de la Convention de Vienne', in Corten and Klein (eds), *Les Conventions de Vienne sur le droit des traités de 1969 et 1986 — Commentaire article par article* (forthcoming); and Cosnard, 'Commentaires sur l'article 65 de la Convention de Vienne', in Corten and Klein, *ibid.*

<sup>152</sup> Article 65 of the same Convention is entitled 'Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty'. It provides that 'a party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor. If an objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.' Paragraph 4 of Article 65 states that: 'Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.' Finally, Article 66 states that: 'If, under paragraph 3 of Article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.'

covered agreements.<sup>153</sup> If she accepts the existence of some *ordre public de droit international*, including norms of *jus cogens*, she deplores the lack of any effective procedural and institutional mechanism to operationalize such norms:<sup>154</sup>

C'est au minimum l'idée que certaines normes auraient une supériorité substantielle, qu'elles ne sauraient être écartées par des volontés particulières et que leur transgression serait considérée comme d'une gravité particulière. Mais les institutions juridiques qu'on a imaginées pour traduire cette supériorité, en sorte d'y relier les caractéristiques qui sont celles des règles d'ordre public, sont inabouties ou assez largement ineffectives. Les raisons ont été bien identifiées: elles sont d'ordre structurel et résident principalement dans le défaut des éléments organiques qui garantiraient et donneraient vie à ces institutions.

Others believe that *jus cogens* must be respected and enforced at all levels and in all fora because of the very nature of such a principle. In case of conflicts between a WTO and a *jus cogens* norm, can a panel or the Appellate Body take the view that the pervasive nature of *jus cogens* has already terminated the conflicting separable WTO provision<sup>155</sup> and that they are only stating the state of WTO law, as affected by *jus cogens*? The panel would not be adding to or diminishing WTO law since the covered agreements would have been changed automatically by *jus cogens* even before the panel was even requested. Or, is it rather that the relevant WTO provision has 'disappeared' and the panel then be faced with a form of WTO *non liquet*?<sup>156</sup> All these questions call for further reflection and research.

In practice, the situation may pose itself differently, and good faith interpretation may solve the fear of conflicts with *jus cogens*. The relevant norm of *jus cogens* will be used in the interpretation of the challenged WTO provision or the national measure, and this should generally suffice to avoid conflicts with such peremptory norms of international law. This may be the real impact of such a concept — it affects the general thinking of people, governments and judges.<sup>157</sup> Faced with an allegation of *jus cogens*, a panel or the Appellate Body may simply state something like 'even in

<sup>153</sup> Ruiz-Fabri, 'La contribution de l'OMC à la gestion de l'espace juridique mondial', in C. Kessedjan and E. Loquin (eds), *La mondialisation du droit* (2000) 347–380. But the Vienna Convention could be used as an interpretative tool.

<sup>154</sup> Ruiz-Fabri, 'L'ordre public en droit international', in *Actes du colloque de Caen* (2001); M.-J. Rdorf (ed.), *Ordre public et ordres publics: ordre public et droits fondamentaux* (2001) 87–108. See also Combacau, 'Le droit international: bric-à-brac ou système?', 31 *Archives de philosophie du droit* (1986) 85.

<sup>155</sup> Article 44(5) of the Vienna Convention indicating that non-separability would not be customary.

<sup>156</sup> On *non liquet*, see Bourgeois, 'WTO Dispute Settlement in the Field of Anti-Dumping Law', 1 *Journal of International Economic Law* (1998) 259, at 271, where the author argues that unregulated areas in the WTO could be considered as *non liquet*, allowing panels and the Appellate Body to refuse jurisdiction. See also Trachtman, *supra* note 9, at 337; and Pauwelyn, *supra* note 9, at 559. On *non liquet* generally, see Hulstroi, 'Three Sources — No River: A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and General Principles of Law', 54 *Australian Journal of International Law* (1999) 219; and Weil, 'The Court Cannot Conclude Definitively . . . : Non Lique Resisted', 36 *Columbia Journal of Transnational Law* (1997) 109.

<sup>157</sup> Ruiz-Fabri, *supra* note 154; Simma and Alston, *supra* note 138, at 82; Alvarez, *supra* note 3.

admitting that we have the capacity to apply and enforce *jus cogens* or the human rights law, we do not need to examine this question as we are of the view that the provision at issue, when properly interpreted, does not have the meaning suggested by the parties and rather means that . . .'. If this is not possible, if compliance with WTO law implies a violation of human rights, both systems of responsibility (that of the WTO and that applicable to the specific human rights violation) will operate in parallel. In the case of *jus cogens*, the inconsistent WTO provision is automatically invalidated.

Another angle must be examined. The WTO has its own international legal personality. As such, the WTO is bound by international law insofar as its functional international personality permits it to be so bound. Treaties signed by the WTO institution are subject to the provisions of the 1989 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, provisions of which, including those on *jus cogens*, are similar to those of the 1969 Vienna Convention for treaties between states.<sup>158</sup> Could one say that a panel's conclusion that would tolerate, lead to, or encourage a member to violate its human rights obligations, would bring about the international responsibility of the WTO? Should we, rather, conclude that in such a case the WTO would not be the legal person taking the illegal measure that would violate human rights law? The WTO Member taking the measure would be in violation of *jus cogens*, not the WTO itself.<sup>159</sup> It seems that all that the WTO adjudicating bodies would do is to examine the measure and decide whether it is inconsistent with the relevant WTO law interpreted consistently with international law, including human rights law. It would not take any position on whether the same measure violates or complies with human rights or *jus cogens*, as the adjudicating bodies are not capable of so doing. If the same measure is consistent with WTO law but not with human rights law, the state must change its measure so that it complies with its human rights obligations while continuing to comply with WTO law. All rights and obligations of states are cumulative, and compliance with WTO law does not offer any justification for violating human rights law. But it is not for WTO adjudicating bodies to decide whether human rights treaties have been violated.

#### ***D The Remaining State Responsibility of Members Violating a Human Rights Law***

The issue of the state responsibility of WTO Members for violations of human rights law is not a matter of WTO dispute settlement. WTO Members remain responsible for

<sup>158</sup> But the operationalization of the rules on dispute settlement does not concern a treaty between the WTO institution and states or other organizations.

<sup>159</sup> It would be interesting to discuss the issue of the immunity of the WTO as an international organization in such a case of allegation of violation of *jus cogens*.

the consequences of human rights violations. In a situation where a human rights provision could potentially supersede a WTO provision — but as such could not be received into the WTO legal system and could not be enforced by WTO panels — the state invoking the human rights violation would remain entitled to invoke the application of the general international law rules on state responsibility against the other states (also WTO Members) or of other relevant systems of law.<sup>160</sup>

The ILC's Draft Rules on State Responsibility<sup>161</sup> address the consequences of the violation of international obligations, including those relating to human rights (whether peremptory norms or others).<sup>162</sup> The cumulative application of Articles 42<sup>163</sup> and 48 leads to the conclusion that violations of some human rights provisions<sup>164</sup> entitle the states directly injured or specifically affected, as well as a wider group of states, to claim state responsibility. The states directly injured or specifically affected could use countermeasures. The other states could also invoke the state responsibility of the state violating an *erga omnes* obligation, and seek from a judicial organ the remedial actions listed in Article 48(2):<sup>165</sup> (i) cessation of the internationally

<sup>160</sup> Article 30(5) provides that: 'Paragraph 4 [*lex posterior*] is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a state from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another state under another treaty.'

<sup>161</sup> A/C.6/56/N.20, in A/RES/56/83, adopted on 12 December 2001 without a vote, taking note of the set of rules annexed to the resolution.

<sup>162</sup> For a discussion on the Rules on State Responsibility, see Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* (2001) 963; and James Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

<sup>163</sup> Article 42 provides that: 'Invocation of Responsibility by an Injured State. A State is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to: (a) That State individually; or (b) A group of States including that State, or the international community as a whole, and the breach of the obligation: (i) Specially affects that State; or (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.' In its first commentary, the ILC wrote: 'Article 42 provides that the implementation of state responsibility is in the first place an entitlement of the "injured state". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual state or possibly a small number of states and the legal interests of several or all states in certain obligations established in the collective interest. The latter are dealt with in Article 48.'

<sup>164</sup> The directly injured states (whose individuals, for example, may have been the object of human rights violations) would be considered as injured states. Commentaries 12 and 13 distinguish between Article 42(b)(i), under which a state may be 'specially affected' by the violation of a collective obligation (the term 'specially affected' is taken from Article 60(2)(b) of the Vienna Convention) and would cover a slightly wider group than the states directly injured, and Article 42(b)(ii) under which a breach per se affects every other state to which the obligation is owed — that is, *erga omnes* obligations — for which all states can invoke the state responsibility of the concerned state.

<sup>165</sup> Article 48 addresses the issue of *erga omnes* obligations, the violation of which entitles any state to assert the state responsibility of the violator, although the state injured and/or specifically affected may, in addition, use countermeasures against the violating state. Article 48 states: 'Invocation of responsibility by a state other than an injured State. 1. Any State *other than an injured State* is entitled to invoke the State responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a

wrongful act; (ii) assurances and guarantees of non-repetition in accordance with Article 30; and (iii) performance of the obligation of reparation in accordance with preceding Articles, in the interest of the injured state or of the beneficiaries of the obligation breached. Alain Pellet argues that the wording of Article 54 of the Rules on State Responsibility<sup>166</sup> can be interpreted so as to allow countermeasures for all states in all situations (even states not directly affected by an *erga omnes* violation), as long as they are consistent with international law. Would this include the WTO prohibition against unilateral trade measures in Article 23 of the DSU? Remember that WTO Members may find justification to deviate from the general market access rules of the GATT when they invoke Articles XX or XXI of GATT. These provisions ‘bridge’ with many other systems of law.

In other words, the violation of human rights, albeit not enforceable before WTO adjudicating bodies, does not free the violating state from any remedial obligations. The benefits obtained in one forum (say, the WTO) may be (partly) balanced by the application of the rules on state responsibility in another forum.<sup>167</sup> Most times, good faith interpretation and application of WTO provisions, taking into account relevant human rights law, and the exercise of exception provisions, will suffice to coordinate WTO and human rights legal systems.

## E Conclusion

This article has suggested the following:

1. The general principle of good faith implies that states are presumed: (i) to have negotiated their treaties — WTO and human rights — in good faith, taking into account all relevant international obligations and rights of the parties; and (ii) to comply with all their international law obligations in good faith.
2. There is an obligation to interpret WTO provisions by taking into account other relevant rules of international law, including relevant human rights law dealing with the same subject-matter.

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group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with Article 30; and (b) Performance of the obligation of reparation in accordance with preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.’

<sup>166</sup> Article 54 provides: ‘Measures taken by States other than an injured State. This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.’

<sup>167</sup> This resembles the difficult situation of mutually exclusive and overlapping jurisdictions such as is the case between NAFTA and the WTO. When two fora claim to have exclusive jurisdiction, the use of one of them may lead to a violation of the other treaty. For further discussion of this issue of overlapping jurisdictions see Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions’, *supra* note 9, at 1081.

3. This leads to a soft presumption against conflicts between the WTO and human rights treaties.
4. Situations of direct conflict between the provisions of the WTO and those of human rights law are difficult to conceive.
5. But if conflicts were to be identified, the WTO is a specific subsystem of international law in which non-WTO law (including human rights law) cannot find direct application.
6. In all cases, WTO adjudicating bodies cannot 'enforce' the human rights if in doing so they add to or diminish provisions of the covered agreements.
7. WTO Members maintain their rights and obligations under the rules of state responsibility in situations where a measure (presumed consistent with WTO law) is inconsistent with human rights law, so that the benefits obtained in one forum may be nullified by the consequences of the violation in another forum.
8. This lack of coordination between jurisdictions (WTO and human rights) must be brought back to the states for them to decide between the two systems of rights and obligations which they have created.
9. As to *jus cogens*, it is not clear whether WTO adjudicating bodies have the legal capacity to make any declaration relating to, in particular, the nullity *ab initio* of any conflicting WTO provision, but the strong presumption against any *jus cogens* violation is such that direct conflicts with WTO provisions will not occur.<sup>168</sup>
10. Faced with a situation of conflicts with human rights law (including *jus cogens*) in the application or implementation of WTO law by a WTO Member, the WTO adjudicating body should be encouraged to report to the DSB, emphasizing the limitations of the WTO and the DSU on the matter.
11. The WTO adjudicating bodies are not courts of general jurisdiction and they cannot interpret and apply treaties and customs provisions and resolve conflicts with human rights treaties as they consider best. They can only interpret and apply WTO law, but they should do this consistently with international law.

## 5 The Overall 'Jurisdiction' Issue Inherent to Human Rights Considerations in Trade-related Measures<sup>169</sup>

Human rights policy interacts with international trade law at many points leading to specific actions, which could eventually be taken to the WTO dispute settlement system. For instance, Joel Trachtman<sup>170</sup> has identified US legislation that could be seen as having human rights aspects, the effects of these measures on international trade,

<sup>168</sup> Could WTO Members or the WTO itself envisage the possibility of asking the International Court of Justice for an advisory opinion as to the direct application of *jus cogens* in all systems of laws?

<sup>169</sup> On the issue of WTO jurisdiction generally, see Trachtman, 'Institutional Linkage: Transcending the Trade and ...', 96 *AJIL* (2002) 77; and Trachtman, 'United States Restrictions of Tuna', 86 *AJIL* (1992) 142.

<sup>170</sup> To be published as part of 'International Trade and Human Rights Foundations and Conceptual Issues', in Thomas Cottier and Frederick M. Abbot (eds) and Simon Lacey (associate ed.), *World Trade Forum*, vol. 5 (forthcoming from the University of Michigan Press, Ann Arbor, MI, 2003).

as well as their WTO compatibility. He refers to: domestic regulations where the regulatory distinctions are concerned with human rights (which calls for an Article III analysis and the related process and production method (PPM) issues); border restrictions based on human rights considerations (which requires assessments of the WTO exceptions provisions, Articles XX and XXI of GATT and Articles XIV and XIVbis of GATS, in light of the existing jurisprudence); government procurement criteria based on human rights considerations (which would have to be assessed with reference to obligations contained in the Government Procurement Agreement); and the Enabling Clause's criteria and gradation mechanisms as well as conditions attached to the General System of Preferences (GSP) when related to human rights considerations (which would call for an assessment of members' rights *vis-à-vis* 'preferences', the issue of like products, exceptions etc.). Frank Garcia's discussion<sup>171</sup> of the reference to human rights considerations in regional trade agreements and their compatibility with GATT Article XXIV (and GATS Article V) in light of the relevant jurisprudence could be further explored.<sup>172</sup> Krista Schefer<sup>173</sup> has identified situations where human rights are used in foreign policy instruments that may include trade components. From a WTO dispute settlement perspective, the WTO compatibility of such bilateral or multilateral agreements could also be challenged.

To this list of measures involving human rights considerations, one may add the possibility of labelling requirements with human rights references<sup>174</sup> (involving the application of the TBT, GATT or even parallel GATS provisions); other regulatory distinctions applicable to trade in 'services' (involving the examination of the criteria of Articles VI, XVI and XVII of GATS); human rights considerations in investment regulations (which raise TRIMS,<sup>175</sup> SCM, GATT Articles I and III, and GATS issues) and in rules of origin (and the related agreement); as well as human rights considerations in the application of the agriculture commitments (including the green box and the requested development box).

The purpose of the present section is to suggest that, when human rights considerations are used in trade-related measures,<sup>176</sup> three difficult (and overlapping) issues in WTO law are highlighted. First, there is the status of process and production

<sup>171</sup> *Ibid.*

<sup>172</sup> For a discussion of the new WTO jurisprudence on Article XXIV, see Marceau and Reiman, 'When and How Are Regional Trade Agreements Compatible with the WTO', 28 *LIRI* (2001) 297.

<sup>173</sup> To be published as part of 'International Trade and Human Rights Foundations and Conceptual Issues', in Thomas Cottier and Frederick M. Abbot (eds) and Simon Lacey (associate ed.), *World Trade Forum*, vol. 5 (forthcoming from the University of Michigan Press, Ann Arbor, MI, 2003).

<sup>174</sup> On the issue of social labelling see Carlos Lopez-Hutado, 'Social Labelling and WTO', 5 *Journal of International Economic Law* (2002) forthcoming.

<sup>175</sup> Agreement on Trade-Related Investment Measures.

<sup>176</sup> This is to some extent a legal issue distinct from that where a member invokes a human rights provision to refuse to comply with a WTO obligation — and when interpretation cannot reconcile both sets of norms — which calls for a discussion on conflicts between the WTO and human rights law discussed previously.

methods (PPMs). Secondly, there is the status of preferences and regulatory distinctions based on policy considerations other than trade. Human rights considerations can be part of a PPM distinction (such as child labour used for the production of goods and services); they may also be part of a (general or specific) policy of a concerned member. Often, the human rights action or violation in question takes place abroad, i.e. outside the territory and jurisdiction of the state imposing the human-rights-based measure.<sup>177</sup> In both cases, the human rights violation has no direct effect on the territory of the member taking the measure. This brings us to the third issue, that of the status of the extra-territorial jurisdiction of WTO law. Can states act or react extra-territorially under WTO law and under general public international law? I would like to suggest a few points about these general issues with a view to encouraging further discussion of this matter in the more specific context of human rights.

### A *The Issue of PPMs*

The first set of issues relates to the status of PPM-type of distinction in WTO law. The question is whether WTO Members are entitled to consider two goods as being unlike if they were processed and produced differently, so that they can be distinguished in the application of domestic regulations. Authors have written on the issue of PPMs in the context of the trade and environment debate, and I apologize for not referring to this rich literature.<sup>178</sup> To sum up the situation, it may be said that the GATT case law does not seem to accept that WTO Members may consider goods as 'unlike' on the basis of PPM considerations for the purpose of regulatory distinctions under Article III.

The Appellate Body in *EC — Asbestos* found that the determination of likeness requires consideration of evidence which indicates whether the products are in a competitive relationship in the marketplace, as the purpose of Article III is to prohibit protectionism.<sup>179</sup> In determining whether this competitive relationship exists in practice, the Appellate Body<sup>180</sup> seems to have focused a good deal on the physical characteristics of the products, namely, their carcinogenicity or toxicity. Although the Appellate Body stated that each of the four criteria must be examined each time,<sup>181</sup>

<sup>177</sup> The human rights considerations *in the importing country* may also be invoked as a justification of regulatory distinction or preferences, in particular in the interpretation and application of the Agreement on Agriculture (the right to food) or the SPS/TBT/III (the right to health) or the TRIPS Agreement (the right to health), GATS and the general and security exceptions.

<sup>178</sup> See Charnovitz, 'The Law of Environmental "PPMs" in the World Trade Organization', 27 *Yale Journal of International Law* (2002) 59. Marceau and Trachtman, 'TBT, SPS and GATT: A Map of WTO Law on Domestic Regulation on Goods', 36 *Journal of World Trade* (2002) (forthcoming).

<sup>179</sup> Appellate Body Report, *EC — Asbestos*, paras 97–99. The difficulty is to appreciate the links between the determination of the competitive relationship and the focus on the physical characteristics of the products, or even the sum of the four identified criteria.

<sup>180</sup> And, even more so, the dissenting member of the Appellate Body for whom the particularly different physical characteristic — toxicity — of the products at issue was irrefutable evidence against their 'likeness'; Appellate Body Report, *EC — Asbestos*, paras 151–153.

<sup>181</sup> *Ibid.*, at paras 102, 109, 111, 113, 139 and 140.

despite the possibility of conflicting evidence from those criteria,<sup>182</sup> it arguably gave a heavier weight to physical characteristics or at least to differences in physical characteristics in requiring a high burden of proof on the member that wants to contradict the physical evidence.<sup>183</sup> Yet the Appellate Body insisted on the possibility of treating like goods differently as long as in doing so the competing imported products are not treated less favourably.<sup>184</sup>

Thus, although the jurisprudence seems to suggest that ‘likeness’ refers to ‘likeness in physical properties’, the issue of whether differences in processing histories (including human rights considerations) can, in certain cases, cause ‘unlikeness’, has not yet been addressed by the Appellate Body. Human rights considerations, by definition, will rarely affect the *physical* characteristics of imported products. It is therefore an issue that we must examine in depth.

### ***B Policy Considerations Not Directly Related to Specific Imports***

Some commentators are of the view that states do not have jurisdiction to prescribe another state’s activities with respect to standards related to domestic policy preferences such as working conditions or the remuneration of workers. According to Brigitte Stern, even a good intent/desirable policy goal cannot be used to justify illegal extra-territorial action.<sup>185</sup> Treaties may, however, provide otherwise. Do Articles III or XX authorize the consideration of the human rights policy of the exporting countries unrelated to specific imports? Can such policy considerations be used as criteria for providing trade preferences, including those in regional trade agreements?

An early GATT panel, *Belgian Family Allowances*,<sup>186</sup> considered a levy on imports purchased by Belgian governmental entities which originated from countries deemed to have a system of family allowances less generous than that in Belgium. The panel found the social policy consideration irrelevant in assessing the consistency of the levy with the requirement that like products be treated equally.

Under the WTO, the Appellate Body decision in *US — Shrimp* made clear that certain policies can be taken into consideration under certain subparagraphs of Article XX.<sup>187</sup> The question is, evidently, which ones. Article XX contains a closed list of such policies, which, by nature, deserve to be interpreted in an evolutionary manner.

The application of the ‘necessity’ requirements under Article XX(b), and the obligation to implement treaty provisions in good faith, operate to ensure that its

<sup>182</sup> *Ibid.*, at para. 120.

<sup>183</sup> *Ibid.*, at paras 117, 118 and 136.

<sup>184</sup> Appellate Body Reports in *Korea — Various Measures on Beef*, at paras 135–144 and *EC — Asbestos*, at para. 100.

<sup>185</sup> Stern, ‘Can the United States Set Rules for the World? A French View’, 31 *Journal of World Trade* (1997) 5, at 23.

<sup>186</sup> Working Party Report, *Belgian Family Allowances* (‘*Belgium — Family Allowances*’), adopted on 7 November 1952, BISD 1S/59.

<sup>187</sup> Appellate Body Report, *US — Shrimp*, para. 121.

allowance of policy considerations is not abused.<sup>188</sup> Importantly for the Appellate Body, the policy considerations which have so far justified unilateral action reflect a 'shared policy value'.<sup>189</sup> The problem is how to identify and weigh which policy considerations are international values, so as to be permissible Article XX justifications.<sup>190</sup> It is not even clear whether only internationally shared values would be covered by Article XX policy, as the Appellate Body has already authorized members to set standards at the level they consider appropriate, even above international standards.<sup>191</sup> A finding of a shared policy value serves to fulfil these good faith and necessity requirements, but is it sufficient to provide extra-territorial jurisdiction? Does Article XX allow measures based on policy considerations taking place abroad? Can WTO trade considerations be based on acts (or the absence thereof) taking place extra-territorially and having no direct (trade or commercial) effects in the importing member's territory?<sup>192</sup>

### C The Issue of 'Jurisdiction' in WTO Law

These last questions address the issue of jurisdiction in WTO law, which in fact includes, and overlaps with, the two above-mentioned debates on PPMs, and other regulatory distinctions based on policy considerations. Under international rules on state responsibility, states are generally prohibited from using countermeasures to influence another state's policies within its own territory, unless it can base its actions on specific treaty language or on violations of an obligation.<sup>193</sup> Since the ICJ judgment in *Congo v. Belgium*,<sup>194</sup> it is still doubtful whether states have any customary extra-territorial jurisdiction in case of human rights violations committed abroad against non-nationals. Yet a treaty may authorize certain actions or reactions against situations taking place abroad. How does the WTO Agreement deal with the issue of extra-territoriality?

Some of the subparagraphs of GATT Article XX and GATS Article XIV are explicitly concerned with actions taken abroad. One clear example is Article XX(e), relating to the products of prison labour. As the *Tuna II* GATT unadopted panel recognized with

<sup>188</sup> See Appellate Body Reports on *US — Gasoline*, at 22; and *US — Shrimp*, paras 151 and 158–160.

<sup>189</sup> See e.g. Sands, 'Unilateralism, Values, and International Law', 11 *EJIL* (2000) 291.

<sup>190</sup> 'It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants in this appeal, indeed, by the vast majority of the nations of the world.' Appellate Body Report, *US — Shrimp*, para. 135.

<sup>191</sup> Appellate Body Report, *EC — Asbestos*, para. 178, referring to *EC — Hormones*.

<sup>192</sup> Reference to the discussion on extraterritorial jurisdiction by the ICJ in *Congo v. Belgium*, 14 February 2002, No. 121 and the separate opinions of Judges Guillaume and Higgins, Kooijmans and Buergerthal is made in the next section.

<sup>193</sup> See the Rules on State Responsibility, A/C.6/56/N.20, in A/RES/56/83, adopted on 12 December 2001 without a vote, taking note of the set of rules annexed to the resolution. See also Stern, *supra* note 185, at 21; Stern, 'Quelques observations sur les règles internationales relatives à l'application extra-territoriale du droit', 32 *AFDI* (1986) 7; Stern, 'Une tentative d'élucidation du concept d'application extra-territoriale', 3 *Revue Québécoise de droit international* (1986) 49–78; and Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law', 76 *American Journal of International Law* (1982) 280–320.

<sup>194</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002, available at [www.icj-cij/iccjwww/idecisions.htm](http://www.icj-cij/iccjwww/idecisions.htm).

respect to Article XX(g), the safe harbours of the other subparagraphs are not explicitly limited to responses to events or actions within domestic jurisdiction.<sup>195</sup>

Reference to ‘shared values’ in the interpretation of Article XX(g) in *US — Shrimp* may be seen as an attempt to formulate a coherent jurisdictional test to assess when a country has a sufficient interest in a policy such that Article XX will excuse unilateral action against a producer who violates that policy. Yet, the Appellate Body explicitly stated that it was not deciding the issue of jurisdiction in WTO law (hiding behind the fact that the challenged fishing practices had effects in US territorial waters).<sup>196</sup> However, the Appellate Body seemed to suggest that the interest in the regulated product need not be a strictly territorial one:<sup>197</sup>

We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g).<sup>198</sup>

The question, which follows from this analysis, is whether this ‘nexus’ between the measure and the listed policy objectives in Article XX is the analytical matrix which will be used under other subparagraphs of Article XX more directly implicated when trade action is taken with respect to human rights violations. In *US — Gasoline*, the Appellate Body said that, given the different textual constructions of the various subparagraphs, it would be unreasonable to suppose that the members intended to require ‘the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized’.<sup>199</sup> This suggests that the ‘nexus’ required will vary, based on the particular policies and the legal provision at issue.<sup>200</sup>

The softened requirement for a ‘nexus’ can also be viewed in parallel to the growing

<sup>195</sup> DS29/R, para. 5.20.

<sup>196</sup> See the Appellate Body Report, *US — Shrimp*, para. 133: ‘[W]e observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. The sea turtle species here at stake, i.e. covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.’

<sup>197</sup> Philippe Sands suggests that *US — Shrimp* made a great conceptual departure from *Tuna* by finding that a state could extend national conservation measures to activities beyond national jurisdiction — that is, assert jurisdiction over a producing country — if it showed a legitimate interest (this is the nexus between state and regulated resource/product), and also demonstrated that the policy was recognized as desirable. Philippe Sands, *supra* note 189, at 299–300.

<sup>198</sup> Appellate Body Report, *US — Shrimp*, para. 133.

<sup>199</sup> Appellate Body Report, *US — Gasoline*, at 17.

<sup>200</sup> Bernhard Jansen has argued that there may be situations where it is justified to take trade measures to pursue non-economic objectives, even in the absence of any evident attachment to the territorial jurisdiction of the importing state. In the environmental context, he argues that, where an endangered species is confined to the territory of a single state which takes action to threaten its survival and is not prepared to negotiate with the international community, public international law may evolve in such a way as to accept universal jurisdiction in certain circumstances. This proposal can be viewed as a way of saying that, where the policy implicated is a clearly shared value, and the violator a clear outlaw, the need for a formal traditional jurisdiction over the regulated product itself can be very attenuated. Bernhard Jansen, ‘The Limits of Unilateralism from a European Perspective’, 11 *EJIL* (2000) 309. On the

consideration for a 'universal jurisdiction' over violations of certain universal values, which would include some human rights. Even after the ICJ judgment in *Congo v. Belgium*,<sup>201</sup> some may argue that universal jurisdiction in favour of national or international courts has already been recognized for some international crimes. A parallel concept of universal 'legal interest' now seems codified by the ILC Rules on State Responsibility, where all states would have sufficient interest to claim the responsibility of the state violating *erga omnes* norms.<sup>202</sup> However, these Rules would only authorize a state to use an identified international dispute settlement mechanism to claim state responsibility for violations of *erga omnes* obligations. It is doubtful, or at least not clear, whether rules on state responsibility allow states not directly affected to use countermeasures against the state violating human rights law<sup>203</sup> and how this provision would relate to the WTO prohibition against non-authorized trade countermeasures.

Developments in the context of Chapter VII of the UN Charter may be used as benchmarks for WTO law in this area. Traditionally, violations of human rights within a state's domestic market were protected from retaliatory action by other states pursuant to Article 2(4) of the Charter.<sup>204</sup> In recent years, however, massive violations of human rights have been used as the legal basis for action under Chapter VII of the UN Charter, which requires a determination of a 'threat to peace, breach of the peace, or act of aggression' in order to justify measures not involving armed force or those involving force so as 'to maintain or restore international peace and security'. Actions

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issue of the extra-territorial jurisdictional reach of measures enforcing human rights, Lorand Bartels suggests that Article XX is to be read consistently with the rules governing a WTO Member's right to exercise legislative jurisdiction over activities and things located outside of its territory; this provision should apply to save various trade measures designed to promote and protect human rights outside of the territory of the regulating member. Bartels, *supra* note 90.

<sup>201</sup> See the additional opinion of Judges Higgins, Kooijmans and Buergenthal, at paras 54 and 58: 'This incoherent practice cannot be said to evidence a pre-condition to any exercise of universal criminal jurisdiction. The fact that, in the past, the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, *outside any territorial jurisdiction*, is not determinative. The only prohibited rule (repeated by the Permanent Court in the *Lotus* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal cooperative overt acts designed to secure their presence within a state wishing to exercise jurisdiction.' Note the opposing opinion of Judge Guillaume, at para. 13: 'Having found that neither treaty law nor international customary law provide a state with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory ...' See also Stern, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', 40 *German Yearbook of International Law* (1997) 280.

<sup>202</sup> See Article 42 of the Draft Rules on State Responsibility.

<sup>203</sup> Responsibility of States for Internationally Wrongful Acts, adopted by the General Assembly as A/RES/56/83, on 12 December 2001, without a vote. See the discussion in Part 4.D above.

<sup>204</sup> Article 2(4) of the UN Charter provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

taken with respect to Liberia, Iraq, Somalia, Bosnia, Rwanda and Kosovo have all had as their legal basis internal matters and their impact on human beings. Antonio Cassese has suggested that a new rule of international law may be in the process of crystallization, whereby certain large-scale human rights violations create an automatic threat to peace and trigger the authorization of self-defence or unilateral action, where Security Council authorization proves impossible to obtain.<sup>205</sup> If such unilateral force can be used against massive violations of human rights, the WTO may be interpreted in parallel so as to allow trade measures to react against some such violations.<sup>206</sup>

### D *Overlaps/Conflicts of Jurisdictions*

It is possible that a single dispute or related aspects of the same dispute may be adjudicated before different fora, such as the Human Rights Committee, a national court, a regional court and a WTO panel or the Appellate Body. Different jurisdictions may reach different or inconsistent conclusions.

At present, in international law, international jurisdictions are multiplying. So far, however, coordination rules have not yet been agreed upon to limit states in their decision to choose between two jurisdictions. A call for order was made by the President of the International Court of Justice, Judge Schwebel,<sup>207</sup> and again by the present President, Judge Guillaume,<sup>208</sup> against the dangers of forum-shopping and the development of a fragmented and contradictory international law. Principles of international commercial law such as *forum non conveniens*, *res judicata*, *lis pendens*, abuse of process, and procedural rights etc., cannot find application in the overlap of jurisdictions between public international law tribunals.<sup>209</sup> States' choices seem based on economic, political and legal opportunities. Moreover, some treaties contain prescriptive jurisdiction clauses that can easily clash with other jurisdictions.<sup>210</sup> Hence the need to encourage coordination between the WTO and other jurisdictions

<sup>205</sup> Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 23.

<sup>206</sup> On the issue, see also Ruiz-Fabri, 'Droits de l'homme et souveraineté de l'état: les frontières ont-elles été substantiellement redéfinies', in *Mélanges en l'honneur de Michel Fromont* (2001) 371.

<sup>207</sup> Judge Stephen M. Schwebel, President of the ICJ, Address to the Plenary Session of the General Assembly of the United Nations, 26 October 1999, reproduced on the website of the ICJ, [www.icj-cij.org](http://www.icj-cij.org).

<sup>208</sup> See e.g. the Note by Gilbert Guillaume, 'La mondialisation et la Cour internationale de justice', 2 *Forum* (ILA) (2000) at 242.

<sup>209</sup> On the issue of overlaps of jurisdictions, see Lowe, 'Overlapping Jurisdictions in International Tribunals', 20 *Australian Yearbook of International Law* (2000) 1; and Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', *supra* note 9, at 1081.

<sup>210</sup> See the example of the NAFTA and the WTO, which both contain an exclusive jurisdiction clause for matters relating to SPS measures. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', *supra* note 9, at 1116–1118.

(including those addressing human rights), although at present nothing limits the jurisdiction of WTO panels and the Appellate Body once that jurisdiction exists.

The issue of the WTO's jurisdiction is most complex and certainly not limited to the application of the WTO exceptions provisions. Whether regulatory distinctions or preferences can relate to human rights violations taking place in another state's territory (with no direct effect on the nationals or the territory of the importing country) will be relevant for their WTO assessment under GATT, TBT, TRIMS, GATS and TRIPS, the Enabling Clause and other types of preferences. Can WTO Members claim universal jurisdiction over human rights violations and use trade measures accordingly under Articles XX or XXI? Would WTO Members find support in the relevant Rules on State Responsibility? Do Articles 48 and 54 of the Rules on State Responsibility allow states not directly injured to use countermeasures? How would this be possible in light of Article 23 of the DSU? As suggested by Joel Trachtman, all these sensitive issues relate to how states decide to allocate jurisdiction between legislative and judicial functions within each state, among states themselves, among states and international organizations and between international organizations.<sup>211</sup>

## 6 Some Thoughts in Conclusion

WTO Members must comply, in good faith, with their human rights obligations and with their WTO obligations at the same time without letting a conflict arise between the two sets of legislation. Hence, it is only reasonable to expect that WTO adjudicating bodies would interpret WTO provisions taking into account all the relevant international obligations of the disputing states. Accordingly, in light of the inherent flexibility of many of the WTO obligations, including Articles XX and XXI of GATT, WTO Members can simultaneously respect both their human rights and their WTO rights and obligations. It is not for WTO adjudicating bodies to determine whether human rights have been violated or respected, but for states to act consistently with international law.

Panels and the Appellate Body do not have the capacity to interpret, apply or enforce other treaties or customs; they are not courts of general jurisdiction and their mandate and jurisdiction is well defined and limited. Yet, since WTO law must be interpreted as having been drafted, and as evolving, consistently with international law, conflicts with human rights treaties should not occur. But in the event of irreconcilable conflict between a WTO provision and human rights law, and/or between a specific application or implementation by a WTO Member and human rights law, WTO adjudicating bodies cannot reach a conclusion that a human rights provision has superseded a WTO provision, as in doing so they would need to interpret and apply international obligations other than those of the WTO; they would also be adding to, diminishing or amending the WTO treaty, contrary to the DSU. In case of irreconcilable conflicts, panels and the AB should report to the DSB.

It is therefore possible that a single measure may be considered consistent with the

<sup>211</sup> Trachtman, *supra* note 169.

relevant WTO covered agreements but inconsistent with a human rights treaty or customs, and *vice versa*. Compliance with WTO law does not justify or excuse human rights violations. Members must ensure that all their measures comply with both WTO law and human rights law. WTO Members remain responsible and liable for their human rights violations, but their responsibility cannot be pursued or enforced before WTO adjudicating bodies. In other words, the systems of state responsibility for trade and human rights matters are not yet coordinated and have evolved in parallel courses. In situations of conflict between the system of human rights law and that of WTO law, it may be best considered as a matter for states to decide, rather than for WTO adjudicating bodies.