
The Place of the WTO and its Law in the International Legal Order

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I am particularly honoured by your invitation to this Second Biennial Conference of the European Society of International Law. Indeed, I am both honoured and pleased, not only because I am in Paris, but above all because I support the ESIL project, one of the objectives of which is to develop a deeper understanding of trade law and to promote closer cooperation among all those working in the field of international law.

Admittedly, I have only distant memories of the Hague Academy of International Law where I once worked on estoppel, but the general theme of this conference – International Law: Do We Need It? – convinced me that there was room, this evening, for a non-specialist. It is in that capacity that I will be speaking to you, in the hope that I can contribute the views of a practitioner on the role and place of WTO law within the international legal order. In doing so, I am seeking to establish a constructive dialogue between doctrine and practice with the aim of improving normative and institutional coherence within the international legal order.

Trade is to be found at the origin of entire segments of public international law, and it accounts for one of its main sources: the treaty. Indeed, one of the first international legal instruments to leave a trace in history was the commercial treaty between Amenophis IV and the King of Alasia (Cyprus) in the 14th century BC. This treaty exempted Cypriot traders from customs duty in exchange for the importation of a certain quantity of copper and wood. Nothing has fundamentally changed since then: at the beginning of the 21st century we still have bilateral trade agreements. But they now have to be reported to the WTO, so that they may be checked for consistency with international trade rules.

The international legal order, on the other hand, has evolved dramatically. The great empires have disappeared into the annals of history. Philippe le Bel and Jean Bodin's jurists progressively conceptualized the notion of sovereignty; the treaties of

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Westphalia ushered in a society defined by the pre-eminence of sovereign states, the 1815 Congress of Vienna laid the foundations of multilateralism, and the 19th century saw the first international organizations come to light. With the creation of the League of Nations, followed by the United Nations system and, finally, with the disintegration of the Eastern Bloc, the 20th century witnessed the evolution from traditional international law between states towards a contemporary and universal international law open to new players, including international organizations and non-governmental organizations.

Thus, the international legal order has experienced a number of upheavals. But its evolution has been neither linear nor homogeneous – which is why international society still bears the marks of several historical stages in the process.

As a metaphorical illustration, let us take the three physical states of matter: gas, liquids and, finally, solids. Today's international legal order is simultaneously composed of these three states. Gas is the coexistence of particles devoid of any hierarchical differentiation: the Westphalian order made up of sovereign states organized according to an essentially 'horizontal' logic with a decentralized responsibility mechanism. The solid state is reflected in the European Union, the perfect example of an international integration organization which produces rules that it interprets 'autonomously' and whose primacy and direct applicability is guaranteed through a system of judicial remedy. The judicialization of responsibility of Member States for violations of Community law is a cornerstone of this integrated legal order. Between the gaseous state and the solid state, there remains the liquid state. It is to this category that the World Trade Organization belongs. Neither entirely vertical nor entirely horizontal in essence, resembling an organization for intergovernmental cooperation in certain respects while being closer to an international integration organization in others, the WTO represents a unique legal order or system of law. At the risk of oversimplification, in fact, I will draw no distinction between a system of law, a legal system and a legal order. The reason why the international legal order exists in several physical states is that it is evolving; and the WTO is both a product and a vehicle of that evolution.

Indeed, the WTO is an international organization that brings together two concepts of international law. Leaving aside one or two specificities, it is a permanent negotiating forum between sovereign states and is therefore a cooperation organization akin to international conferences established under traditional international law. But it also comprises a sophisticated dispute settlement mechanism which makes it an integration organization, rooted in contemporary international law. In simple terms, the WTO's sophisticated dispute settlement mechanism makes it a distinctive organization.

Above all, the WTO comprises a true legal order. If we take up Professor Jean Salmon's definition, 'a body of rules of law constituting a system and governing a particular society or grouping', we see that there exists, within the international legal order, a specific WTO legal order. The WTO system has two essential attributes: valid rules and enforcement mechanisms. But the fact that it is specific does not mean that it is insular or isolated. These are the two points that I will be discussing here today in

an effort to explain firstly how this legal system fits into the international legal order and, secondly, how it links in with the other legal systems.

Let us begin with the first point, and examine what makes the WTO a unique legal system within the international legal order.

The WTO is an international organization. This may seem obvious, and yet it took over 50 years to achieve that outcome. This protracted effort to acquire a legal existence has left its mark.

The GATT, which was replaced by the WTO in 1995, was a provisional agreement that entered into force in January 1948 and was to disappear with the treaty creating the International Trade Organization (ITO). Since that treaty never entered into force, the GATT remained, for a half a century, an agreement in simplified form which, in principle, did not provide for any institutional continuity. Thus, the GATT did not have 'Members' but 'contracting parties', a term which highlighted the purely contractual nature of the arrangement. Without an international organization in the strict sense of the term, and therefore without a separate international legal personality, the GATT could only operate through its *contracting parties* and, for its everyday work, with the support of the Interim Commission for the International Trade Organization (ICITO), a provisional commission responsible for establishing the ITO.

Thus, it was almost 50 years later, with the Marrakesh Agreement, that a truly international organization was finally created, i.e., according to the definition given by the International Law Commission in its draft articles on the responsibility of international organizations, 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'. In order to avoid any ambiguity, the Agreement Establishing the WTO states in Article VIII that the Organization shall have legal personality.

The implications of this status are numerous. The Marrakesh Agreement states that Members shall accord the WTO such privileges and immunities as are necessary for the exercise of its functions. Thus, its legal personality comprises an international facet, which enables it to act at the international level, and an internal personality, which enables it to conclude contracts for the purposes of its day-to-day operations and, among other things, to employ its 600 permanent staff members. As with all international organizations, the competencies of the WTO are limited by the principle of speciality. But alongside its subject-matter competence, which is explicitly provided for in its constituent instrument, the WTO also has implicit competencies. Thus, the main consequence of this status of international organization is that it enables the WTO to have its own will, which is expressed in a legislative output within the limits fixed by its constituent instrument, and to interact with other international players.

As a true international organization, the WTO now comprises an integrated and distinctive legal order: it produces a body of legal rules (1), making up a system (2), and governing a community (3).

- (1) A body of legal rules, first of all. The WTO is a treaty comprising some 500 pages of text accompanied by more than 2,000 pages of schedules of commitments. Moreover, 50 years' worth of GATT practice and decisions – what is known as

the ‘GATT *acquis*’ – have been incorporated into what constitutes the new WTO treaty. WTO rules are regularly renegotiated. While it is true that the WTO Secretariat and the WTO bodies do not have any general power to adopt formally binding rules, the WTO bodies are able to adopt effective decisions that provide pragmatic responses to specific needs; and in that sense, they do produce a kind of secondary legislation. The system is no longer based solely on the principles of a certain diplomacy which often led, under the GATT, to the adoption of negotiated solutions that reflected the relative power of the states involved. The WTO does not produce equity, in the meaning given to the term by public international law – rather, it produces legality.

- (2) These legal rules form an integrated system. Indeed, the WTO agreements are integrated in a ‘single undertaking’, which forms an entity that is meant to be coherent. A number of provisions recall this fact, in particular Article II:2, which states that the multilateral trade agreements ‘are integral parts’ of the Agreement Establishing the WTO and are ‘binding on all Members’. This is why they are annexed to the Agreement Establishing the WTO. In the *Indonesia – Autos* dispute, the panel which ruled in the first instance recalled that there was a presumption against conflict between the different provisions of the WTO treaty since they formed part of agreements having different scopes of application or whose application took place in different circumstances. On several occasions, the Dispute Settlement Body (DSB) reaffirmed that Members must comply with all of the WTO provisions, which must be interpreted harmoniously and applied cumulatively and simultaneously. Thus, the WTO treaty is in fact a ‘single agreement’, which has established an ‘organized legal order’.
- (3) WTO law governs a community, namely its Members. In *United States – Section 301*, the panel confirmed the existence of a GATT/WTO legal order and even seemed to suggest that this order was characterized by its ‘[i]ndirect impact on individuals’. For, by contrast, ‘when an actual violation takes place . . . in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable “chilling effect” on the economic activities of individuals’. The qualification of nations as no longer only objects of WTO law, but also as subjects, is still disputed. Leaving that debate aside, I would say that the WTO rules above all effectively govern the community of its Members, since failure to comply is punishable in the framework of the DSB. In other words, they do form a new legal order as defined above.

However, this integrated legal system is not ‘clinically isolated’: there is a presumption of validity in international law and the rules of its treaties must therefore be read in harmony with the principles of international law. Thus, the WTO legal order respects, *inter alia*, the sovereign equality of states, good faith, international cooperation, and the obligation to settle disputes peacefully, not to mention the rules of interpretation of conventions which the Appellate Body, for example, applies without hesitation. The WTO respects general international law, while at the same time

adapting it to the realities of international trade. In joining the international legal order, the WTO has produced its own unique system of law.

Leaving aside the doctrinal debate on the autonomy of international economic law, it is clear that WTO law is largely a circumstantial application of international law in general. I shall illustrate this with two examples, two principles of general international law which the WTO has brought to life in its own manner and on which it has left a lasting imprint: the sovereign equality of states and the obligation to settle disputes peacefully.

The sovereign equality of states requires formal equality between states of different sizes and power. This principle is fully respected at the WTO. While most international economic organizations have a restricted body alongside their plenary body, the WTO is unusual in that the totality of its Members participate, as a matter of law, in all of its bodies – from the Ministerial Conference, which meets at least once every two years, to the General Council, which functions during the interim period, not to mention each of the councils and committees. All of the decisions are taken according to the principle ‘one government/one vote’ and by consensus. While it is true that this rule of consensus is responsible for a certain sluggishness in the negotiations, it does enable all states, whatever their share in international trade, to express their views and to participate on an equal footing.

The principle of equality is also reflected concretely in the substantial rules of the WTO. For example, in the form of the principle of non-discrimination it can be found in the most-favoured-nation clause and the national treatment rule. It also underlies the principle of reciprocity, which is at the heart of the negotiating mechanism. Indeed, as recalled by the UN Secretary-General before the General Assembly in 2004, equality is a fundamental requirement:

At the international level, all States – strong and weak, big and small – need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From trade to terrorism, from the law of the sea to weapons of mass destruction, States have created an impressive body of norms and laws.¹

But as Kofi Annan points out, these rules must also be fair – which is why the WTO goes beyond formal equality and seeks to establish real equality. True equality can only exist between equals. When it comes to trade, some of the less developed countries require certain flexibilities if trade and development are to continue to exist side by side. So the developing countries can enjoy non-reciprocal benefits, in particular special and differential treatment. This deviation from the GATT principles for the developing countries was made official in 1964, with the addition to the GATT text of Part IV, ‘Trade and Development’.

Article XXXVI.8 states that ‘[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.’ And there is

¹ Address by Kofi Annan at the opening of the general debate of the 59th Session of the General Assembly, New York, 21 Sept. 2004, available at <http://www.un.org/Pubs/chronicle/2004/issue3/0304p4.asp>.

also the so-called Enabling Clause, which provides for the establishment of a ‘generalized system of preferences’ that authorizes the developed countries to grant tariff advantages to the developing countries as an exception to the most-favoured-nation clause. These are positive discrimination mechanisms to ensure effective equality among Members. They are in no way inconsistent with the sovereign equality of states – on the contrary, precisely as in the case of domestic laws, where social legislation is an essential corollary to equal dignity of men and women, this adaptation of applicable rules to the real situation of states is a way of ensuring more genuine equality. You will probably recognize here the very pertinent remarks of my old friend Professor Alain Pellet.

The WTO, then, rests largely on the principle of sovereign equality of states. But this does not mean that it is incapable of showing the kind of pragmatism that befits the area of trade in applying the principles of traditional international law.

Let me add, with regard to the sovereignty of states, that, in principle, only sovereign states are equal. This is why, in principle, the traditional international organizations are made up of states only. It is true that the WTO remains an inter-state framework. However, once again it has been able to adapt to the evolution of international society and the emergence of new actors.

Members may be ‘customs territories’, so that Chinese Taipei has been able to join the WTO, and Hong Kong has been able to continue participating as an autonomous Member following its return to China. Similarly, the participation of the European Community as a WTO Member is unique. In the 1970s, the Commission participated *de facto* in GATT meetings, substituting for the European Economic Community Members to express a common position. With the creation of the WTO, this practice was formalized. The Organization’s constituent treaty provides that the number of votes of the European Communities and their Member States shall in no case exceed the number of their Member States. What is new here is above all the participation of the Community alongside its Member States.

Also worth mentioning in this respect is the growing participation of NGOs – a term which the WTO interprets in a very broad sense. Article V:2 of the Agreement Establishing the WTO stipulates that ‘[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO’. There has been no detailed arrangement to date, but the General Council adopted guidelines in 1996 specifying the nature and scope of relations between the WTO Secretariat and the NGOs. These new rules have served as the basis for a policy of greater transparency towards the NGOs. This does not mean, however, that they are allowed into the actual negotiating forum: the WTO remains an inter-state negotiating framework. Nor are the NGOs given access to the Dispute Settlement Body, although they have been allowed a growing role in the proceedings through *amicus curiae* briefs since the report of the Appellate Body in *United States – Shrimps*.

It is in fact necessary to preserve the inter-state framework of the WTO while keeping an ear open to the non-state actors that represent civil society. This balance aims to ensure that the WTO acts in the general interest which, in principle, is embodied in

the state, while the NGOs defend – quite legitimately – interests that are often specific. Nevertheless, the WTO, in recognizing the role of NGOs, is contributing to their impact within the international legal order. Thus, the WTO has also acted as a vehicle in the evolution of international law towards its contemporary form, and indeed is a driving force in the progressive transformation of international society into an international community.

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Let us turn to another example of the WTO respecting general international law while adapting it to the constraints of its own legal order: the principle of the obligation to settle disputes by peaceful means.

This obligation is a principle that lies at the heart of general international law and is enshrined in the United Nations Charter. Twenty-five years later, the General Assembly voted the famous Declaration on the seven principles of peaceful coexistence, which recalls that ‘States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered’.² Thus, when they created the international organizations, the states ensured that their chief goal was to maintain peace through appeasement and prevention of international tensions. They then introduced the dispute settlement systems. In this context, the creation of a multilateral trading system was a means of ensuring both peace through law and peace through prosperity.

The implementation of the principle of the obligation to settle disputes by peaceful means, with bodies created to that end, is a way of institutionalizing international responsibility, the main characteristic of which, in traditional international law, is decentralization. It has now been established that states are responsible for any negative impact of their wrongful acts; but the determination of their responsibility and, above all, its implementation, remain essential to the effectiveness and efficiency of any legal system. One of the WTO’s distinctive features is its sophisticated dispute settlement mechanism which, as I mentioned earlier, tends to make it more of an integration organization, ‘solid’ rather than ‘liquid’. Under Article 56 of the text of the International Law Commission on ‘Responsibility of States for Internationally Wrongful Acts’, which appears as an annex to General Assembly Resolution 56/83, the WTO dispute settlement mechanism is a special system, or *lex specialis*. Consequently, the DSB can go beyond general international law on the road to communitizing WTO law – that is, consolidating its legal system in the wake of an institutionalization of international responsibility.

Although still influenced by its origins, when, in the words of Professor Canal-Forgues, it was more of a quasi-judicial conciliation mechanism, the WTO dispute settlement system introduced a new ‘jurisdiction’ which ensures the enforcement of

² Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217 (1970), at 121.

rulings and recommendations. At the same time, the procedure tends to preserve the fundamental requirements of fair trial. It is a compulsory jurisdiction that is broadly accessible to Members; it decides according to law; the procedure for adopting decisions is quasi-automatic; rulings are made by independent persons, and their implementation is subject to continuous multilateral monitoring until full satisfaction of the complainant where a violation has been found. Moreover, the Appellate Body functions more or less like a court of cassation, which hears only matters of law. This confirms the essentially legal nature of the system.

Above all, WTO jurisdiction is compulsory for all WTO Members. No Member may oppose the initiation of a dispute settlement procedure by another Member. In other words, that Member must submit to WTO law. Contrary to what may happen in other international forums, for example the International Court of Justice, all WTO Members have, by definition, accepted the compulsory and exclusive jurisdiction of the DSB for all matters relating to the WTO agreements.

In order to avoid fragmentation of the dispute settlement mechanisms that existed under the GATT regime, the Marrakesh agreements also sought to preserve the unity of the system under the DSB. Thus, the settlement of all disputes relating to WTO rules has been placed under the auspices of a single institutional body, the Dispute Settlement Body, and is subject to a single body of rules and procedures contained in the Understanding. In other words, it is an integrated system.

An important, and in many ways innovative, feature of this system is the presumption of legal and economic interest in bringing proceedings, which confirms the hypothesis of a ‘communitization’ of WTO law: each Member State can enforce WTO law whether or not it has a direct and personal interest – in the interests, so to speak, of the ‘community of states parties’. This principle, which dates back to the GATT period, was revived by the Appellate Body in *EC – Bananas*, when it confirmed that the United States had sufficient interest to bring proceedings against the European Community, even though, in practical terms, the Americans did not export bananas. In other words, any state may initiate dispute settlement procedures on the basis of a claim that another Member is not complying with its obligations under WTO law.

Everything is done to ensure that the complaint, if it is substantiated, is followed by concrete effects. After the adoption by the panel, and possibly the Appellate Body, of their ‘recommendations’, WTO Members continue to monitor and to follow up on the implementation by the losing country of the conclusions of the case. Furthermore, if the conclusions are not fully implemented, the winning party that so requests may impose countermeasures in the form of trade sanctions.

What can we conclude from all of these mechanisms? First of all, they are the confirmation of a certain ‘communitization’ that is under way at the WTO, with an institutionalization of international responsibility. The idea is essentially to ensure respect for the rule rather than reparation, a clear sign of the transformation of a society into a community. It is no longer the interest of the adversely affected party that counts, but the common interest. Indeed, violation of the law that applies to the community is in itself an infringement of the rights of all of the Member states, which are all entitled

to feel that they have been adversely affected. In other words, responsibility is generated by an objective 'fact': it is the result of non-compliance, whatever the consequences may be.

But what is interesting about the institutionalization of international responsibility by the DSB is that sovereign states ultimately retain a certain control over the result of the peaceful settlement of disputes. When it comes to enforcing the consequences of a DSB decision, we revert to law in its most traditional form, since the decision in fact authorizes the state that has won the case to exercise its right to countermeasures. The countermeasures are determined by the state itself, which is free within the limits of the treaty and subject to arbitration, to decide on their scope. These countermeasures (formerly 'unarmed reprisals') are the product of international law in its most traditional form: the right of each state to take the law into its own hands. Thus, there is a margin of controlled freedom or sovereignty, a balance between the decentralized responsibility of traditional international law and the complete jurisdictionalization of the peaceful settlement of disputes. The WTO is one of the rare systems to have truly succeeded in regulating countermeasures applied by the powerful states by making their application contingent on the prior collective approval of Members.

In the final score, I share the view of Professor Ruiz-Fabri: to all intents and purposes the WTO is a true jurisdiction, since the political control that the DSB is able to exercise remains largely theoretical. The 'reverse' consensus mechanism practically automatically requires the DSB to reach a decision as long as the complainant remains determined to pursue the case.

Thus, WTO law is a body of legal rules making up a system and governing a community. As such, the WTO incorporates an integrated and distinctive legal order. Bringing together traditional international law, which it respects, and contemporary international law, which it is helping to promote, the WTO has become a part of the international legal order as a *sui generis* legal system. But how does WTO law link to the legal systems of other international organizations within the international legal order?

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This leads me to the second part of my talk, which will examine the link between the legal system of the WTO and the legal systems of other international organizations.

The effectiveness and legitimacy of the WTO depend on how it relates to norms of other legal systems and on the nature and quality of its relationships with other international organizations. In order to address more specifically the place and the role of the WTO's legal system in the international legal order, I will briefly discuss how the WTO's provisions operate and treat other legal norms, including norms developed by other international organizations. I will first address this issue from a normative point of view, and then from an institutional perspective. I will show that the WTO, far from being hegemonic, as it is sometimes portrayed to be, recognizes its limited competence and the specialization of other international organizations. In this sense the WTO participates in the construction of international coherence and reinforces the international legal order.

The WTO, its treaty provisions and their interpretation, confirms the absence of any hierarchy between WTO norms and those norms developed in other forums: WTO norms do not supersede or trump other international norms.

In fact, the GATT, and now the WTO, recognizes explicitly that trade is not the only policy consideration that Members can favour. The WTO contains various exception provisions referring to policy objectives other than trade, often under the responsibility of other international organizations. Our Appellate Body has managed to operationalize these exception provisions so as to provide Members with the necessary policy space to ensure, if they wish, that their actions in various forums are coherent.

Let me give a few examples of how our system deals with non-trade concerns and norms developed in other forums and you will see why I believe that the WTO has been pro-active in stimulating efforts of international coherence.

The WTO is of course a ‘trade’ organization; it comprises provisions that favour trade opening and discipline trade restrictions. The basic philosophy of the WTO is that trade opening obligations are good, and even necessary, to increase people’s standards of living and well-being. But, at the same time the GATT, and now the WTO, contains provisions of ‘exceptions’ to these market access obligations. The old – but still in force – Article XX of GATT provides that nothing prevents a Member from setting aside market access obligations when a Member decides, unilaterally, that considerations other than those of trade must prevail. This can happen when, for instance, a Member has made commitments in other forums, say on an environmental issue, when such an environmental commitment may lead to market access restrictions.

The revolution brought about by WTO jurisprudence was to offer a new teleological interpretation of the WTO that recognizes the place of trade in the overall scheme of states’ actions and the necessary balance that ought to be maintained between all such policies.

How is this done within the WTO legal order?

First, and very simply, the WTO treaty was considered and interpreted as a ‘treaty’. In the very first WTO dispute, an environment-related dispute (*US – Gasoline*), the Appellate Body concluded that the Panel had overlooked a fundamental rule of treaty interpretation, expressed in the Vienna Convention on the Law of Treaties (Vienna Convention). I am sure this sounds very obvious to international legal experts! The Appellate Body first recalled that this general rule on treaty interpretation had attained the status of a rule of customary or general international law. It was important to do so because, as you may know, neither the USA nor the EC have ratified the Vienna Convention on Treaties. Then, the Appellate Body made its first statement, now famous, on the nature of the relationship between the WTO and the international legal order: ‘the GATT is not to be read in clinical isolation from public international law’.

Recalling that pursuant to Article 31 of the Vienna Convention, terms of treaties are to be given ‘their ordinary meaning, in their context and in the light of the Treaty’s object and purpose’, the Appellate Body noted that the Panel Report had failed to take adequate account of the different words actually used for each of the Article XX exceptions. This led to a reading that offered much more flexibility in the

so-called environment exception and a categorical turnabout in 50 years of GATT jurisprudence.

In relying on the steps and principles of the Vienna Convention, panels as well as the Appellate Body have since often referred to the 'context' of the WTO treaty and to non-WTO norms when relevant. I have been told that no other international dispute system is so attached to the Vienna Convention! In my view, this insistence on the use of the Vienna Convention is a clear confirmation that the WTO wants to see itself as being as fully integrated into the international legal order as possible.

The linkage between the WTO and other sets of international norms was also reinforced when the Appellate Body stated that in the WTO, exception provisions – referring to such non-trade concerns (environment, morality, religion, and so on) – are not to be interpreted narrowly: exceptions should be interpreted according to the ordinary meaning of the terms of such exceptions. In this context, our Appellate Body has insisted that exceptions cannot be interpreted and applied so narrowly that they have no relevant or effective application.

The Appellate Body further expanded the availability of WTO exceptions in the following manner. In the WTO, exceptions are subject to what we call a 'necessity test', a test having features of a 'proportionality' requirement. When assessing whether a measure is 'necessary' for any non-WTO concern, a new and additional balancing test is to be used.

Such an assessment will have to balance (1) the 'value' protected by such a measure – and the more important this 'value', the easier it will be to prove the necessity (and the importance of the value will affect the entire balancing process); (2) the choice of the measure selected to implement such a non-trade concern – is it a complete or partial ban on trade? Is it a labelling requirement? Is it a discriminatory tax?; and, finally, (3) the trade impact of the restriction.

Once a measure prioritizing a non-trade value or standard is considered 'necessary', there is always an assessment as to whether the measure is indeed applied in a non-protectionist manner, pursuant to the chapeau of Article XX. Here again the Appellate Body has said that when assessing whether a measure complies with Article XX, a 'balance' between WTO market access obligations and a government's right to favour policies other than trade must always be kept.

Our jurisprudence has determined that the 'control' exercised by the chapeau of Article XX of GATT, against disguised protectionist measures, is in fact an expression of the 'good faith' general principle or an expression of the principle against the '*abus de droit*'. I quote:

the task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception . . . and the rights of the other Members under varying substantive provisions . . . The location of the line of equilibrium . . . is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.³

³ Appellate Body Report on *US – Shrimp*, at para. 159.

But let's not get dizzy or sea sick! Here again, faced with tensions between Members' market access obligations and the right to favour non-WTO considerations (and norms of other legal systems), the Appellate Body has introduced a form of 'balancing test' or 'proportionality test' between sets of values, or between sets of rights and obligations.

I hope it is now clear that WTO Members' trade restrictions imposed to implement non-trade considerations will be able to prevail over WTO market access obligations so long as they are not protectionist. In other words, the WTO provisions themselves recognize the existence of non-WTO norms and other legal orders and attempts to limit the scope of application of its own provisions, thereby nourishing sustainable coherence within the international legal order.

Another fundamental principle of the WTO is that Members can set national standards at the level they wish, as long as such Members are consistent and coherent. For example, in the dispute between Canada and the European Communities over the importation of asbestos-related material, the Appellate Body stated clearly that France was entitled to maintain its ban since it was based on authentic health risks and standards recognized in other forums and no alternative measures could guarantee zero risk as required by the EC regulation.

An additional feature of the WTO that confirms its integration into the international legal order, is the legal value and status it provides to international standards and norms developed in other forums. For instance, the Sanitary and Phytosanitary (SPS) Agreement states that Members' measures based on standards developed in Codex Alimentarius, the International Office of Epizootics and the International Plant Protection Convention are presumed to be compatible with the WTO. So, while Codex, and others do not by any means legislate in the normal or full sense, the norms that they produce have a certain authority in creating a presumption of WTO compatibility when such international standards are respected. The SPS Agreement provisions thus provide important incentives for states to base their national standards on, or conform their national standards to, international standards. Therefore the WTO encourages Members to negotiate norms in other international forums, which they will then implement coherently in the context of the WTO.

I could give you further examples, but let me simply point to the preamble of the Marrakesh Agreement Establishing the WTO which, contrary to that of the GATT, explicitly refers to sustainable development as an objective of the WTO. While it is not yet clear whether sustainable development has crystallized into a general principle of law, the reference to such an important non-trade principle shows that the signatories of the WTO were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.

In the famous *US – Shrimps* dispute, this preambular language was considered to indicate that further flexibility should be introduced when interpreting 'natural resources' in the environment exception, and that it added, I quote: 'colour, texture and shading to the rights and obligations' of WTO provisions. It also made explicit reference to the need to interpret WTO provisions – and especially the old GATT provisions – in an 'evolutionary manner', taking into account the ordinary meaning

of the terms of the WTO at the time of the dispute, rather than at the time of their drafting in 1947. This allowed the Appellate Body to consider contemporary treaties that define 'natural resources' and to conclude that these definitions should also be used in the WTO so as to ensure some international coherence with respect to natural resources.

I agree therefore with Professor *Abi-Saab*, a member of our Appellate Body, that in using general principles of public international law in its interpretation of the WTO provisions, the Appellate Body has confirmed that the WTO is operating within the compound of the international legal order.

The WTO does, therefore, take into account other norms of international law. Absent protectionism, a WTO restriction based on non-WTO norms will trump WTO norms on market access. In so doing, it expands coherence between systems of norms or legal order. Moreover, I believe that in leaving Members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations. In sum, the WTO is well aware of the existence of other systems of norms and of the fact that it is not acting alone in the international sphere.

Existing relations between the WTO and other international organizations again reflect efforts of coherence within the international legal order. Now that the WTO is an authentic international organization with full legal personality, it has set up an important network of formal and *de facto* arrangements with other actors on the international scene. The greater the coherence within the international legal order, the stronger the international 'community'.

Let us look briefly at the actual interactions between the WTO and other international organizations. There are, for example, explicit WTO provisions on IMF/World Bank/WTO coherence with an explicit mandate to the Director General. There exists a series of inter-agency cooperation on technical assistance and capacity-building with several international organizations. Indeed the current Round of negotiations is to some extent premised on coherence, as we are suggesting a new 'Aid-for-Trade programme' which brings together several multilateral organizations and regional development banks to assist developing countries in reaping the benefits of trade opening!

We also have formal cooperation agreements with other international organizations. For example, in the area of standard-setting, we now have a mechanism – the Standards and Trade Development Facility – involving the WTO, World Bank, Food and Agriculture Organization (FAO), World Health Organization and the World Organization for Animal Health. Some 75 international organizations have regular or *ad hoc* observer status in WTO bodies. The WTO also participates as an observer in many international organizations. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continue to evolve in a pragmatic manner. The WTO Secretariat maintains working relations with almost 200 international organizations in activities ranging from statistics, research, standard-setting, to technical assistance training.

As I wrote in 2004,⁴ I am a firm advocate of international coherence. I would not dare to say that ‘international coherence’ is a general principle of international law! But I recall that international cooperation is one of the United Nations’ objectives, as stated in Article 1 of the UN Charter. I believe that efforts towards international coherence are the only way to ensure the peaceful evolution of international relations and of our international legal system. But international coherence is also crucial to ensuring the legitimacy of the WTO and the effectiveness of trade rules.

The WTO’s mantra in favour of trade openness plays a vital role in Members’ growth and development, but it is not a panacea for all the challenges of development; neither is it necessarily easy to accomplish, nor in many circumstances can it be effective unless it is embedded in a supportive economic, social and political context and a coherent multi-faceted policy framework. Trade opening can only be politically and economically sustainable if it is complemented by policies which address, at the same time, capacity problems (whether human, bureaucratic or structural); the challenges of distribution of the benefits created by freer trade; the need for a sustainable environment; respect for public morals, and so forth. This is also about international legal coherence.

All of these policies are intertwined with the other treaty obligations of WTO Members. Hence, further international coherence will only assist in getting the best out of the WTO! Since WTO norms are not hierarchically superior or inferior to any other norms (except *jus cogens*) states must find ways to coordinate all of these policies in a coherent manner. I believe that the WTO favours and encourages such coherence.

But this is not enough, and the description I just put forward is, to some extent, misleading. Although I personally believe in the need for more global governance, I am a ‘pragmatic practitioner’. This brings me twice back down to earth! States often find themselves faced with opposite – even contradictory – sets of international obligations. Moreover, as treaties proliferate, so do dispute settlement systems as well as the potential for clashes with the WTO’s compulsory and binding dispute settlement mechanism.

Let me give you one example and you will quickly see the ‘cracks’ in the coherence of our international legal order. The *EC – Swordfish* dispute was concerned with the following situation. In 1999, Chile enacted swordfish conservation measures, by regulating gear and limiting the level of fishing through the denial of new permits. Chile effectively prohibited the utilization of its ports for landing and service to EC long liners and factory ships that disregarded minimum conservation standards. The EC challenged those measures as being contrary to its WTO transit. Chile demanded that the EC enact and enforce conservation measures for its fishing operations on the high seas, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). Chile responded to the EC’s WTO challenge by initiating the dispute settlement provisions of UNCLOS and invited the EC to the International Tribunal on the Law of the Sea (ITLOS). The substantive issues before the WTO included the right of Chile to benefit from the application of Article XX of GATT on the conservation of natural

⁴ P. Lamy, *La démocratie monde* (2004).

resources, when acting pursuant to UNCLOS. The issue before UNCLOS could have included whether or not Chile was entitled to regulate and limit access to swordfish as part of a conservation programme.

In such a situation, it is conceivable that both instances would have examined whether UNCLOS effectively requires, authorizes or tolerates Chile's measures, and whether the Chilean measures were compatible with UNCLOS, an element that could influence a WTO panel in its decision as to whether or not Chile may benefit from the application of the exception provision on the environment. It is, therefore, conceivable that the two forums may reach different conclusions on the same facts or on the interpretation of the applicable law.

Fortunately, in that dispute, the parties reached an agreement to suspend both their disputes before ITLOS and before the WTO. But in the absence of a mutual agreement, the WTO panel would have proceeded much faster than that of ITLOS. Short of any agreement between the parties and in the absence of any international rule as to how these two different mechanisms should interact, many scenarios may emerge. In light of the quasi-automaticity of the compulsory and binding WTO dispute mechanism, it is unlikely that a WTO panel would decline jurisdiction because another dispute process – albeit more relevant and better equipped – has been seized for a similar or related dispute. And if both processes were triggered at the same time, it is quite probable that the WTO panel process would proceed much faster than any other process.

This is where part of the imbalance of our international legal order remains. Although the WTO, through its dispute settlement system, can show that it does take into account the norms of other legal orders, many still challenge the fact that it will be for the WTO judge to determine the balance, the 'line of equilibrium' between trade norms and norms of other legal orders. Indeed, at present, if a measure has an impact on trade, the matter can always be taken to the WTO dispute settlement system fairly simply and quickly. The WTO adjudicating body will then have to determine whether the trade restriction can find justification in the exception provisions of the WTO. In assessing the invocation of such WTO exception justification, the WTO judge may in fact be deciding on the relative hierarchical value between two sets of norms.

Indeed, if a WTO Member invokes the environment exception to justify a trade restriction adopted pursuant to a multilateral environment agreement (MEA), in practice, it is the WTO judge who will determine whether, and the extent to which, compliance with such an MEA can provide a WTO justification for trade restriction. If, in support of its invocation of the WTO exception for public morals, a Member points to an International Labor Organization (ILO) resolution condemning a specific state for violation of core labour standards, it is the WTO judge who will finally decide on the legal value and impact of such an ILO resolution on international trade and its opposability to trade rules.

But I believe there is no reason to provide the WTO with the exclusive authority to operate the much-needed coherence between norms from different legal orders. The lack of coherence of our international legal system is amplified by the relative power of the WTO and in particular its dispute settlement mechanism. This shows the

discrepancy between the WTO's very powerful enforcement mechanism and the traditional decentralized system of countermeasures still used in several legal orders. I do not think that the solution lies in weakening our dispute system. Many aspects of the WTO need to be improved, but I believe that the WTO dispute settlement system works well. The solution to the potential imbalance I have alluded to lies, I believe, in strengthening the enforcement (the effectiveness) of other legal orders so as to rebalance the relative power of the WTO in the international legal order.

This would not solve all our problems because we would then find ourselves with several powerful legal orders for which coordination would still be lacking! We also need to address the fragmentation of international law and the disorganized multiplication of international legal sub-systems. Until then, legal orders and legal systems will continue to co-exist and coherence will depend on ad hoc solutions based on the goodwill and interests of the jurisdictions concerned. Several unsatisfactory solutions have been suggested, including a referral to the International Court of Justice (ICJ) in situations of concurrent jurisdictions. A call for order has already been made by the ICJ against the dangers of fragmented and contradictory international law. The International Law Commission has undertaken important work in that direction.

* * *

Let me now conclude. Today's international legal order will be able to evolve peacefully only to the extent that the existing legal orders evolve through mutual respect. There is no exception to this rule, and the WTO is well aware of its importance.

The WTO has evolved from the GATT's closure. States signatories to the GATT wanted to reinforce the status of the international trading system and provided it with a formal international organization: the WTO. This international organization is now up and running well; it even produces effective norms of derivative law (*droit dérivé*). The legal value and enforcement of those norms adopted by WTO bodies are matters for debate but the WTO normative capacity, including as a forum for permanent negotiations and its powerful but open dispute settlement mechanism, confirms the *sui generis* nature of its legal order.

In addition, the WTO makes full use of its international legal personality and is now collaborating actively with other international organizations. But there is more. In setting up a system whereby good faith norms developed in other forums are presumed to be WTO-consistent, the WTO not only gives due deference to other legal systems but it also stimulates negotiations in such other specialized forums and reinforces the coherence of our legal order. In this sense the WTO is an engine, a motor energizing the international legal order. This is, in my view, the place and role of the WTO and its legal order in the international legal order: a catalyst for international mutual respect towards international coherence and even for increased global governance, which I believe is needed if we want the world we live in to become less violent, be that social, political, economic or environmental violence.