

ARTICLES

JUSTICE AS CONFLICT RESOLUTION: PROLIFERATION, FRAGMENTATION, AND DECENTRALIZATION OF DISPUTE SETTLEMENT IN INTERNATIONAL TRADE

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ABSTRACT

Prevention and resolution of conflicts on the basis of agreed-upon rules and just procedures are common objectives for national and international law at both the public and private level (Section 1). The diversity of national and international dispute settlement fora and procedures gives incentives for forum and rule shopping not only in private commercial law (Section 2) but also increasingly in public international economic law (Section 3). Effective litigation strategies examine the respective advantages and disadvantages of Alternative Dispute Resolution ("ADR") methods and fora (Section 4). ADR options are increasingly important in various categories of dispute settlement proceedings at the World Trade Organization ("WTO") (Section 5). Optimal dispute prevention and settlement strategies require distinguishing the different categories of international trade disputes according to their underlying conflicts of interests, promoting legal consistency between international and domestic dispute settlement proceedings, and decentralizing certain kinds of international economic disputes over private

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rights (Section 6). Jurisdictional competition, forum and rule shopping, and the increasing number of mutually conflicting judgments by national and international courts call for international cooperation among judges so as to promote greater respect for international law throughout transnational judicial networks (Section 7).

1. JUSTICE AS CONFLICT RESOLUTION: THREE CONCEPTIONS OF JUSTICE

In a world of individual and social diversity, with unlimited demand for limited resources and knowledge, the rational egoism and limited altruism of individuals makes conflicts of interest inevitable.¹ Every human being is confronted, throughout one's life, with a need to prevent or settle internal conflicts (e.g., between passion and rationality in one's mind) and external conflicts (e.g., among self-interested individuals in families, cities, and other social units).² Just as individual rationality requires impartially examining, reviewing, and judging contested facts and contrary arguments in one's own mind, social rationality requires fair procedures and rules for the peaceful prevention or settlement of disputes in a manner respecting the basic rights of parties to a dispute (e.g., *audi alteram partem*). National and international legal systems make rational attempts at elaborating such principles and procedures. The evolution of rules and procedures for dispute prevention and settlement reflects diverse human values and experiences. That evolution will remain contested as long as such rules and procedures are not perceived as just. Three different, but complementary, conceptions of justice are likely to influence the search for more effective dispute prevention and settlement.

1.1. Justice as Fair Procedures

Since Plato's *Republic* and Aristotle's *Politics*, the dependence of conflict resolution on adversary reasoning and self-imposed principles and rules — such as moral fairness principles for peace within individuals and constitutional rules for peace in democratic repub-

¹ See generally JOHN B. DAVIS, *THE THEORY OF THE INDIVIDUAL IN ECONOMICS: IDENTITY AND VALUE* (2003) (examining the concept of the "individual" in social sciences and the tension that arises from the clash between the world within an individual and the world outside).

² *Id.*

lics—has remained the central theme of legal philosophy.³ Plato and Aristotle defined social justice as harmony under the governance of reason, holding perceived psychological and social conflicts as evils.⁴ Modern legal, political, and economic theories, by contrast, acknowledge the inevitability and normality of conflicts and the impossibility of substantive harmony in extended, antagonistic societies.⁵ Under these theories, respect for individual freedom entails an understanding that internal and social conflicts are not necessarily signs of vice but may merely reflect legitimate struggles for law.⁶ When a friend wished U.S. Supreme Court justice Oliver Wendell Holmes well in doing justice, he responded, “That is not my job It is my job to apply the law[,] . . . to see that the game is played according to the rules whether I like them or not.”⁷ Yet the widespread criticism leveled by society regarding the lack of “input-legitimacy” (in terms of respect for human rights and democratic procedures) and “output-legitimacy” (in terms of consumer welfare, fulfillment of human rights, and protection of the environment) of WTO rules and jurisprudence (e.g., on trade-related health and environmental issues like genetically modified organisms and the protection of dolphins and sea turtles) illustrates that power-oriented rules of international law and state-centered dispute settlement procedures are often perceived as securing neither procedural nor substantive justice. In the modern age of universal human rights and the moral imperative of maximizing freedom under the rule of law, judges may challenge the procedural justice of power-oriented rules and may focus not only on the rights and interests of the parties to a dispute but also on the

³ See CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 8–12, 191–99 (2d ed. 1963) (examining ancient philosophers’ conceptualizations of participation in justice, equality, and the common man).

⁴ *Id.* at 191–99.

⁵ Compare, e.g., STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 79–98 (2000) (examining the philosophical notion that justice in conflict resolutions is best provided by fair procedures) with LOUIS M. BROWN, *MANUAL OF PREVENTIVE LAW* 3–10 (1950) (examining the “preventive law” concept that certain measures are necessary to create substantive fairness and avoid leaving victims of litigation financially and emotionally weakened).

⁶ See RUDOLF VON JEHRING, *DER ZWECK IM RECHT* (1877) (arguing that the law finds its purpose progressively through an unending struggle for individual rights). This conception of the law can be traced to ancient times. For instance, Sophocles’ *Antigone* challenged the king’s ruling that she be prevented from burying her brother by invoking a “natural” law higher than the king’s law.

⁷ THOMAS SOWELL, *THE QUEST FOR COSMIC JUSTICE* 169 (1999).

consistency of their judgments with the progressive extension of universal rules of justice.⁸

Mutually beneficial private and public trade laws belong to the oldest fields of international law and, since ancient times, have influenced the development of many other areas of international law. As all international legal relations raise economic questions, it is not surprising that the dispute settlement procedures in international trade law—in, for example, the European Community (“EC”) and at the WTO—are among the most developed in international law and have also influenced non-economic dispute settlement practices at, among other places, the European Court of Justice (“ECJ”). For centuries, international trade law has evolved from local, national, and bilateral towards multilateral trade regulation and dispute settlement systems. This serves to better protect the rational long-term interests of individuals and states (in areas such as the rule of law, open markets, and consumer welfare) against their oftentimes conflicting short-term interests (such as interests in efficient breaches of contractual obligations). The legal and institutional changes also influence the culture and outcome of negotiations and politics by, for example, promoting principled bargaining and deliberative politics over positional bargaining,⁹ rule-oriented over power-oriented dispute settlement procedures,¹⁰ and judicial protection of general citizen interests over bureaucratic and rent-seeking group interests.

⁸ See ALLEN D. ROSEN, *KANT'S THEORY OF JUSTICE* 47–65 (1993) (examining universal law in light of Kant's “moral imperative”). See generally Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1, 7–20 (1998) (examining how Kantian theories of antagonistic human behavior and universal rules of justice lead to increasingly precise national and international constitutional protections).

⁹ See JÜRGE STEINER ET AL., *DELIBERATIVE POLITICS IN ACTION: ANALYSING PARLIAMENTARY DISCOURSE* 16–32 (2004) (exploring both the advantages of principled over positional bargaining, as well as negotiation and political theories explaining why institutional rules can improve the quality and output of political negotiations and discourse). See generally ROGER FISHER & WILLIAM ÜRY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 1–14 (Bruce Patton ed., Penguin Books 2d ed. 1991) (explaining the risks associated with positional bargaining).

¹⁰ Cf. ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 66–70 (1997).

1.2. *Justice as Respect for Basic Rights*

Prior to the constitutional recognition of human rights, theories of justice tended to focus on procedural justice,¹¹ such as fair procedures and requirements of reasonableness and good faith, notwithstanding the manifold power-oriented limitations of legal rules since antiquity—for example, the discrimination against women, slaves, and citizens without property. Public international law, like national legal systems, evolved from power-oriented rules regarding state sovereignty, which attached more importance to power and order (i.e., effective government control of a population in a given territory) than justice and democratic legitimacy.¹² To the extent that conflicts more reflect a struggle for power than a search for just rules, peaceful conflict prevention may fail. Today, the universal recognition of inalienable human rights requires that justice be defined more comprehensively in terms of procedural and substantive human rights, as well as the other constitutional rights held by individuals.¹³

The human right of “access to justice” is almost universally recognized today, reflecting the worldwide recognition that fairness and justice in dispute settlement procedures is necessary both at home and abroad.¹⁴ In European integration law, individual legal

¹¹ Cf. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 327–50 (1995) (focusing on procedural justice in the field of international law, emphasizing the traditional weight placed on power and order over justice).

¹² Cf. Rosemary Foot, *Introduction* to *ORDER AND JUSTICE IN INTERNATIONAL RELATIONS* 1–17 (Rosemary Foot et al. eds., 2003) (discussing order and justice within the context of international relations, examining what impact the emphasis on order has had on international law); JANNA THOMSON, *JUSTICE AND WORLD ORDER: A PHILOSOPHICAL INQUIRY* 188–96 (1992) (exploring the importance of order from a philosophical standpoint, taking into account both cosmopolitan and communitarian points of view).

¹³ See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 1–2 (Will Kymlicka et al. eds., 2004) (arguing that international and domestic legal systems should conform to moral principles, including principles of justice); see also Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 *LOYOLA L.A. L. REV.* 407, 408–15 (2003) (describing how international constitutional law developed when inalienable human rights were recognized).

¹⁴ See Angela Ward, *Access to Justice*, in *THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS* (Steve Peers & Angela Ward eds., 2004) 123, 123–26 (examining how the European Union (“EU”) charter treats access to justice as a fundamental right, emphasizing the importance of such access as a human right); see also Carol Harlow, *Access to Justice as a Human Right: The European Convention and*

and judicial remedies, based on both European Union ("EU") law and the European Convention on Human Rights ("ECHR"), have been progressively extended to protect not only civil and political rights but also economic and social rights, as well as market freedom, from undue national and intergovernmental restrictions. The WTO Agreement provides few comprehensive legal and judicial guarantees that individual traders, producers, and other economic operators will be able to have access domestic courts or arbitration (e.g., pursuant to Article 4 of the WTO Agreement on Preshipment Inspection).¹⁵ Like the domestic implementation of WTO rules, the legal and judicial guarantees of access to courts (*vis-à-vis* trade restrictions) continue to differ from country to country, varying according to each's constitutional and legal traditions.¹⁶ In the EC and the United States, domestic courts hardly ever apply and enforce the international WTO obligations of the country concerned; in line with the mercantilist traditions of the General Agreement on Tariffs and Trade ("GATT") and WTO negotiations, only export industries are granted legal and judicial remedies against violations of WTO rules by foreign governments (e.g., under Section 301 of the U.S. Trade Act and the EC's Trade Barriers Regulation).¹⁷ The variety of national and international rules and procedures for the settlement of international economic disputes has led to an increased proliferation and fragmentation of dispute settlement fora and jurisprudence in international trade law. In international trade and investment disputes, forum and rule shopping continues to be popular practice, not only by governments but also by individual producers, investors, traders, and other economic operators hoping for their own justice. This remains a fundamental challenge in international economic law.

the European Union, in *THE EU AND HUMAN RIGHTS 187*, 191–96 (Phillip Alston et al. eds., 1999) (examining how access to courts within the European Community ("EC") is considered a human right).

¹⁵ Cf. Ernst-Ulrich Petersmann, *supra* note 10, at 194–96.

¹⁶ Compare the country studies in *IMPLEMENTING THE URUGUAY ROUND AGREEMENTS*, (John H. Jackson & Alan O. Sykes, eds., 1997) with Ernst-Ulrich Petersmann, *On Reinforcing WTO Rules in Domestic Laws*, in *RETHINKING THE WORLD TRADING SYSTEM* (John J. Barcelo III & Hugh Corbet eds., 2006, forthcoming).

¹⁷ Cf. CANDIDO TOMAS GARCIA MOLYNEUX, *DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND THE EUROPEAN UNION* (2001).

1.3. *Justice as Constitutional Order*

Respect for procedural justice and basic rights may not be possible outside a constitutional order that limits abuses of power and protects basic equal rights both at home and abroad.¹⁸ In Europe, the ECJ interprets the EC Treaty as a “constitutional charter,”¹⁹ just as the European Court of Human Rights (“ECtHR”) interprets the ECHR as the constitutional charter of Europe,²⁰ providing for the protection of human rights across Europe as an objective “constitutional order.”²¹ The ECJ, the Court of the European Free Trade Area (“EFTA”), and national courts also recognize and protect human rights and private market freedoms against national and intergovernmental restrictions in the economic sphere.²²

The human rights obligations of United Nations (“UN”) Member States to respect, protect, and promote human rights challenge the power-oriented premises of state-centered rules. They require a review of the traditional approaches to international dispute prevention (by state-centered rulemaking and rule implementation) and settlement (by negotiations and third-party adjudication among governments), using those obligations as balancing principles for reconciling state-centered international law rules with individual human rights.²³ An increasing number of European and U.S. lawyers draw attention to the constitutional dimensions of WTO laws and jurisprudence for limiting and legitimizing multilevel trade governance.²⁴ Yet the intergovernmental dispute settlement proce-

¹⁸ See Petersmann, *supra* note 13, at 422 (discussing constitutional rights to democratic governance and constitutional order as a “third principle of justice”).

¹⁹ See PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2006) (discussing the constitutional jurisprudence of the European Court of Justice (“ECJ”).

²⁰ See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. at 65 (1978) (showing a ruling based on the European Convention of Human Rights (“ECHR”).

²¹ See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A.) at 7, para. 75 (1995) (Preliminary Objections) (arguing that optional clauses for obligations weaken the convention as the constitutional order for the EC).

²² See, e.g., *Ward*, *supra* note 14, at 124–25 (referencing the relevant jurisprudence in chapters on access to justice and internal market remedies).

²³ Cf. Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29–94 (Thomas Cottier et al. eds., 2005).

²⁴ Cf. Ernst-Ulrich Petersmann, *Introduction to CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* (Christian Joerges &

dures at the International Court of Justice ("ICJ") and the WTO continue to focus on the equal rights of states rather than the rights of individuals. The differences in the applicable rules and dispute settlement procedures at national, regional, and worldwide levels and the often overlapping jurisdiction of alternative dispute settlement fora (e.g., for disputes over intellectual property rights) favor forum and rule shopping as well as mutually inconsistent judgments (where national courts disregard intergovernmental rules), giving rise to complex problems for national and international courts (see Sections 2 and 3 below).

1.4. *Fragmentation and Unity of International Law*

The fragmentation of international dispute settlement procedures is closely related to the fragmentation of international agreements in particular subject-areas (such as trade, environmental, criminal, and human rights law) and their respective rules about amendments, responsibility, and dispute settlement. In its study *Difficulties Arising from the Diversification and Expansion of International Law*, the International Law Commission distinguishes three types of normative conflicts and fragmentation: (1) fragmentation through conflicting interpretations of general international law rules by different international courts; (2) fragmentation and conflicts arising when a particular rule claims to exist as an exception (*lex specialis*) to general law; and (3) fragmentation and conflicts between different special international treaty regimes.²⁵ The ever-expanding scope of international economic law gives rise to numerous potential conflicts with other special and general rules of international law, such as conflicts between international trade and environmental agreements.²⁶

No international treaty can be applied without recourse to general international law rules (e.g., *pacta sunt servanda*), just as no le-

Ernst-Ulrich Petersmann eds., 2006).

²⁵ See Int'l Law Comm'n, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 10, U.N. Doc. A/CN.4/L.644 (July 18, 2003) (discussing changes in international law).

²⁶ See, e.g., Ernst-Ulrich Petersmann, *The WTO Dispute over Genetically Modified Organisms: Interface Problems of International Trade Law, Environmental Law and Biotechnology Law*, in *BIOTECHNOLOGY AND INTERNATIONAL LAW* (Francesco Francioni ed., 2006) (addressing potential conflicts between WTO rules and the 2000 Cartagena Protocol to the 1992 UN Convention on Biodiversity).

gal system can develop coherently without recourse to general principles of law.²⁷ International courts increasingly acknowledge the need for interpreting international treaties with due regard to the general international law obligations of the contracting parties and the general principles of law underlying special treaty regimes. The WTO Appellate Body, for instance, has consistently emphasized since its first report that WTO law “is not to be read in clinical isolation from public international law.”²⁸ WTO jurisprudence increasingly refers to the “basic principles underlying this multilateral trading system,”²⁹ as well as general principles of national and international law, for interpreting and balancing the specific treaty rights and obligations of WTO members. Notwithstanding the fragmentation of specialized international treaty regimes and related dispute settlement procedures, the customary rules of international treaty interpretation may require courts to act as guardians of unity in international law.

2. FORUM AND RULE SHOPPING IN PRIVATE AND PUBLIC TRADE LAW: COMMON PROBLEMS

For centuries, the demand for predictability and legal certainty in private commerce (*ubi commercium, ibi ius*) has been a driving force for the emergence of commercial customs (*lex mercatoria*) and institutions (e.g., arbitration) for the prevention and settlement of commercial disputes. Even though individual dispute settlement procedures and institutions vary immensely in different fora and legal contexts (e.g., in Anglo-Saxon countries versus civil law countries based on Roman law), sometimes continuing to reflect struggles for power (e.g., in cases of judicial self-restraint *vis-à-vis* so-called political questions), some of the diverse legal and judicial traditions have slowly merged in transnational arbitration and other dispute settlement practices. The steady expansion of the global division of labor entails ever more international disputes over transnational private economic activities (e.g., commercial

²⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1–13 (1977) (addressing the fact that every legal system consists not only of rules but also general principles).

²⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, art. 31, WT/DS2/AB/R (Apr. 20, 1996).

²⁹ Preamble of the Agreement Establishing the World Trade Organization, in *The Legal Texts – Results of the Uruguay Round* (1994) (edited by the GATT Secretariat); see also *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

contracts and non-contractual products liability) and government regulation of economic transactions. The more that countries involve themselves in international production and trade, the more concurrent jurisdictions may exist for settling disputes concerning international economic transactions. Due to the diversity of national laws, procedures, and judicial systems, the outcome of private transnational litigation and the applicable procedures—substantive law, speed, and legal costs—are often influenced by the choice of venue in which the litigation will take place.

The complainant may choose a jurisdiction in order to benefit from the procedural advantages of the chosen forum (e.g., low filing fees, possibility of class actions, pretrial discovery, jury trials, large damage awards, and the non-recovery of costs rule in U.S. courts). The particular procedures involved may also influence the application of substantive domestic or foreign law and the outcome of disputes. The jurisdiction chosen by a complainant may be contested by the defendant, who can request a stay of the proceedings, apply for anti-suit injunctions, or submit counterclaims to a different jurisdiction. The burgeoning of international law firms and multinational companies with offices and legal expertise in many countries facilitate transnational litigation strategies. In case of concurrent jurisdictions, court battles over the most convenient jurisdiction, against exorbitant jurisdiction, and overabusive forum and rule shopping have become ever more frequent in private international litigation because they often influence the outcome of disputes.³⁰ Courts increasingly respect forum selection agreements if they reflect the free will of the parties and are neither unfair, unreasonable, nor inconsistent with the public policy in the jurisdiction of the competent court in question. Governments have facilitated the creation of forum selection agreements by means of international agreements on the allocation of jurisdiction, the mutual recognition and enforcement of foreign civil judgments and arbitral awards, and the codification of legal criteria for the limitation of abusive forum shopping by determining the “natural” or “most appropriate” forum with which the dispute has the closest

³⁰ See generally ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION (2003) (describing the incentives for and conceptual responses to forum shopping); WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION (1995) (exploring forum selection agreements and why forum selection matters to such a great extent).

and most real connection.³¹

In public international trade law, problems of forum and rule shopping emerged as a result of the 1979 Tokyo Round Agreements, which offered special dispute settlement procedures and substantive rules different from those found in the GATT of 1947.³² These problems were largely addressed by legally integrating and coordinating—in the substantive dispute settlement rules of the WTO—the various multilateral trade agreements annexed to the 1994 WTO Agreement and covered by its Dispute Settlement Understanding (“DSU”),³³ notwithstanding the recognition of “special or additional rules and procedures contained in the covered agreements” listed in Appendix 2 of the DSU.³⁴

Outside WTO law, most international judicial bodies operate in “splendid isolation,” without explicit regulation of the jurisdictional interaction between international courts and with little, if any, regard for the jurisprudence of other international tribunals. While WTO dispute settlement bodies cite judgments of the ICJ frequently, the ECJ refers only rarely to decisions of other international courts (such as the ECtHR, EFTA and WTO dispute settlement rulings); the ICJ has hardly ever cited decisions of international tribunals other than its predecessor, the Permanent Court of International Justice (“PCIJ”). Forum shopping and multiple litigations have become frequent in the legally and institutionally fragmented international law of human rights, but they remain rare in most other areas of public international law.³⁵ Jurisdictional clashes among international courts and judicial challenges to WTO jurisdiction (similar to challenges to the EC Court’s jurisdiction by national constitutional courts in some EC Member States) have been avoided so far.³⁶

³¹ Cf. YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 130–31 (2003) (discussing the reasons for forum shopping).

³² See Petersmann, *supra* note, 10 at 271–84 (listing the twenty-four settlement proceedings under the Tokyo Round Agreements on subsidies, anti-dumping, and government procurement).

³³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

³⁴ See *id.* at 1227–30 (providing further details).

³⁵ See, e.g., Lawrence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999) (discussing the fragmentation of human rights law with regard to forum shopping).

³⁶ One of the rare instances of conflicting judicial interpretations of general

The citizen-oriented approaches of European courts, the state-centered approach of the ICJ, and the openness of the WTO dispute settlement system to nongovernmental organizations (“NGOs”) (e.g., regarding submission of *amicus curiae* briefs), non-state actors (e.g., Hong Kong and Taiwan), and intergovernmental organizations (e.g., the EC) reflect the diverse regulatory approaches taken by governments. Judicial governance by the EC Court, EFTA, and the ECtHR on the basis of agreed-upon international rules has become accepted inside Europe but continues to be opposed in state-centered and power-oriented worldwide organizations, where the scope of compulsory jurisdiction (e.g., by the ICJ) remains much more restricted. For instance, while U.S. administrative agencies have implemented more than twenty adverse WTO dispute settlement findings against trade restrictions imposed by the United States, Congress has—in the eight WTO disputes where U.S. federal law was found to be inconsistent with WTO obligations—been reluctant to bring the relevant statutes in conformity with U.S. obligations under WTO law.³⁷ Capital-exporting countries like the United States have tended to favor investor-state arbitration as long as such arbitration is directed against capital-importing countries; some investor-state arbitral awards challenging U.S. legal practices, such as the International Center for the Settlement of Investment Disputes (“ICSID”) arbitration award in the case *Loewen Group, Inc. v. United States*, have, however, provoked hostile criticism (e.g., by the media and non-governmental organizations in the United States) that an international arbitral tribunal had dared to criticize the “unfairness” of U.S. court procedures,³⁸ even though

international law rules arose in the 1999 Tadic judgment made by the Appeals Chamber of the International Criminal Tribunal of the former Yugoslavia, which construed the “effective control” test for the establishment of state responsibility for acts its military forces commit differently than the International Court of Justice (“ICJ”) did in its *Nicaragua* judgment. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, paras. 115-45 (July 15, 1999) (explaining why the “effective control” test articulation from *Nicaragua* is not persuasive).

³⁷ See Update of WTO Dispute Settlement Cases, *Note by the Secretariat*, WT/DS/OV/23 (Apr. 7, 2005) (referencing relevant WTO documents discussed below). The eight WTO dispute settlement rulings requiring action by Congress relate to legislation on Foreign Sales Corporations, the 1916 U.S. Antidumping Act, the Byrd Amendment, Section 211 of the U.S. Appropriations Act (relating to the trademark “Havana Club”), Section 111 of the Copyright Act (relating to Irish music copyrights), recent amendments to the Anti-Dumping Act (relating to hot-rolled steel from Japan), U.S. cotton subsidies, and internet gambling.

³⁸ *Loewen Group, Inc. v. United States*, *Arbitral Award*, International Centre for the Settlement of Disputes [ICSID] ARB(AF)/98/3 (June 26, 2003) (concerning

the international arbitral tribunal in this case found that it lacked jurisdiction under the applicable rules of the North American Free Trade Agreement ("NAFTA") and refused to correct the observed "miscarriage of justice" by the U.S. court in question.³⁹

The diverse national and international dispute settlement procedures in private and public international trade law reveal many common features and problems:

1. increasing recourse to treaty-based international arbitration (e.g., at the WTO, the ICSID, and the International Chamber of Commerce ("ICC") and under the Law of the Sea Convention, the 1994 Energy Charter Treaty, and NAFTA);
2. frequent composition of arbitral tribunals by not only lawyers but also non-legal experts in trade, banking, insurance, telecommunications, and sports arbitration;
3. NGO challenges to arbitration confidentiality (e.g., under NAFTA, ICSID, and the dispute settlement proceedings at the WTO), including requests to allow the admission of *amicus curiae* briefs, private access to documents, ad hoc agreements to permit public access to WTO panel proceedings, and recognition of the right to use private legal counsel, increasingly involved in the drafting of legal submissions by governmental complainants and defendants;
4. growing influence of public international law (including general principles regarding treaty interpretation, good faith, estoppel, abuse of rights, and human rights) on the applicable law in commercial arbitration, mixed investor-state arbitration (e.g., in the more than 100 arbitration proceedings under ICSID rules), and trade disputes (e.g., references to human rights in ECJ jurisprudence on trade restrictions and to multilateral

a Mississippi jury award of \$500 million damages against a foreign investor).

³⁹ *Id.* para. 241-42. See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 383-87 (2003) (discussing the hostile response to an increasing number of anti-U.S. North American Free Trade Agreement ("NAFTA") arbitrations).

environmental agreements in WTO dispute settlement reports);

5. expanding scope of the "arbitrability" of private disputes (e.g., over antitrust rules and intellectual property rights) and intergovernmental economic disputes which, even if formally conducted among states (e.g., at the WTO), are often initiated by private complainants (e.g., the WTO disputes such as the *Kodak-Fuji* case between the United States and Japan over alleged anti-competitive practices in Japan and the *Havana Club* case between the European Union and the United States over the trademark claims of two competing liquor companies in Europe and the United States) and carried out like "private-public partnerships" (e.g., in the conduct of WTO dispute settlement proceedings);⁴⁰
6. judicial methods of interpreting public policy clauses (e.g., GATT Article XX and Article 30 of the EC Treaty) by recourse to the constitutional principles and public policies maintained by the countries involved (e.g., requirements of necessity and proportionality for government restrictions);
7. increasing recognition by national and international courts (most notably in Europe) of the advantages associated with international collaboration among judges to promote legal consistency of judgments by different courts;
8. recourse to ADR, such as use of special fact-finding procedures (e.g., pursuant to Annex V of the WTO Agreement on Subsidies) and mediation at the WTO, arbitrators-as-facilitators, and other methods of commercial arbitration (e.g., the already more than 3,000 domain name disputes under the arbitration and mediation rules of the World Intellectual Property Organi-

⁴⁰ See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) (discussing the blurring of the public and private in international trade law).

zation (“WIPO”));

9. successive or parallel dispute settlement proceedings in national, regional, or worldwide fora (e.g., on anti-dumping duties, countervailing duties, safeguard measures, or EC import restrictions on bananas and genetically modified goods), with some mutually incoherent rulings if national courts and regional courts disregard the relevant WTO obligations of the countries concerned only to be challenged later in WTO dispute settlement proceedings;
10. concurrent and partly overlapping jurisdiction of national and international courts, which requires potential complainants to carefully examine their litigation options and strategies—for example, the more limited legal remedies available at WTO dispute settlement proceedings over intellectual property rights compared with those available in intellectual property disputes at the ICJ, the ICSID, WIPO arbitration, domestic courts, or under NAFTA.

3. TEN REASONS FOR INCREASINGLY OVERLAPPING JURISDICTIONS AND FORUM SHOPPING IN PUBLIC INTERNATIONAL TRADE LAW

For a number of reasons, trends in favor of overlapping jurisdictions, forum shopping, concurrent or successive trade disputes, and related court proceedings in different fora over the same legal claims are likely to expand in public international trade law:

1. Many intergovernmental WTO disputes overlap with prior, parallel, or future related disputes at national and regional levels (e.g., at the ECJ and under NAFTA). For example, parallel to the WTO dispute settlement proceedings against EC import restrictions on bananas and biotech products, related disputes were pending before the ECJ and national courts in the EC. Imports of Canadian lumber into the United States have been subject to numerous dispute settlement panel proceedings under NAFTA and at the WTO over the past few years. The more than 340 formal complaints submitted to the

WTO between 1995 and 2006 have led to more than 110 panel reports, more than seventy Appellate Body reports, and more than forty arbitration award and compliance panel reports.⁴¹ Compared with only 200 dispute settlement proceedings under GATT between 1948 and 1994,⁴² only three NAFTA panel proceedings pursuant to Chapter 20 over the past ten years, and less than 100 adversarial proceedings before the ICJ since 1946, the rapidly increasing number of WTO panel, appellate and arbitration proceedings reflects increasingly universal WTO membership, the ever-broader scope of WTO law, and the judicialization of dispute settlement in almost all areas of the WTO, even in highly fact-oriented areas (like the 2003 panel report on U.S. safeguard measures on steel products spanning more than 900 pages) and in new fields of WTO law like services trade and intellectual property rights.

2. With the phasing out of the various transitional WTO provisions for less developed countries and certain kinds of disputes (e.g., disputes about agricultural subsidies covered by the "Peace Clause" in Article 13 of the WTO Agreement on Agriculture), the number of WTO disputes is likely to increase rapidly. In terms of binding treaty obligations, precision of rules, compulsory jurisdiction of national and international (quasi-)judicial dispute settlement proceedings, and the number of WTO panel, appellate and arbitration reports, WTO law is progressively evolving into the most legalized area of worldwide international law.
3. WTO agreements overlap with other international agreements, such as the Paris Convention on Industrial Property and the Bern Convention for the Protection of

⁴¹ See WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/23 (Apr. 7, 2005) (providing legal analyses for these rules). See also THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 558-73 (Francesco Ortino & Ernst-Ulrich Petersmann eds., 2004).

⁴² WORLD TRADE ORGANIZATION, *GUIDE TO GATT LAW AND PRACTICE* 771-787 (1995).

Literary and Artistic Work, each of which provides for different dispute settlement fora (e.g., the ICJ). For instance, in the EC-U.S. dispute over the EC's airport noise regulations limiting the use of "hushkits" by airplanes (mainly from the United States), the United States chose to submit the dispute to the dispute settlement procedures of the International Civil Aviation Organization rather than to the dispute settlement procedures of the WTO Agreement on Technical Barriers to Trade or, since the EC noise regulations restricted air transport services, the General Agreement on Trade in Services ("GATS").⁴³ The increasing number of multi-lateral environmental agreements ("MEAs") with trade provisions and special dispute settlement procedures⁴⁴ also offers examples of overlapping or competing jurisdictions for the settlement of trade-related disputes both inside and outside the WTO, such as at the ICJ or via special dispute settlement procedures provided for in the MEAs themselves. Thus, disputes over "emission trading" under the Vienna Convention and the Montreal Protocol for the protection of the ozone layer, over pharmaceutical companies sharing traditional knowledge held by indigenous people about species protected by the UN Convention on Biodiversity, or over trade in biotech food regulated by the Cartagena Protocol to the UN Convention on Biodiversity may influence the interpretation of related WTO rules and dispute settlement rulings, just as WTO jurisprudence—like on the Agreement on Trade-Related Intellectual Property Rights ("TRIPS")—may influence the dispute settlement practice in other jurisdictions (e.g., WIPO arbitration procedures).

4. Since the 1990s, an increasing number of new world-

⁴³ See Kenneth W. Abbott, *US-EU Disputes over Technical Barriers to Trade and the "Hushkits" Dispute*, in *TRANSATLANTIC ECONOMIC DISPUTES—THE EU, THE US AND THE WTO* 247, 247–280 (Ernst-Ulrich Petersmann & Mark Pollack eds., 2003) [hereinafter *TRANSATLANTIC ECONOMIC DISPUTES*].

⁴⁴ See CESARE ROMANO, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES* (2000).

wide courts have been established, each possessing jurisdiction that overlap or interact with the jurisdiction of WTO dispute settlement proceedings. For example, when Chile restricted access to its ports by European fishing vessels on the ground that they were overfishing swordfish in the Pacific in violation of the EC's obligations under the Law of the Sea Convention ("LOS"), the EC requested the establishment of a WTO dispute settlement panel to examine the alleged violations of trade rules (e.g., GATT Article V on freedom of transit). Chile submitted the dispute to the International Tribunal for the Law of the Sea ("ITLOS") instead. As the LOS Convention includes explicit references to GATT rules (e.g., on subsidies) and LOS Convention rules may be relevant for the interpretation of various WTO exceptions, parallel or mutually relevant dispute settlement proceedings at the WTO and ITLOS may also occur in future disputes.

5. Just as WTO rules are occasionally invoked and applied at the ECJ and in dispute settlement panels set up under NAFTA, an increasing number of regional economic courts—such as EFTA, the Andean, Caribbean, and Central American courts of justice, the Southern Common Market ("MERCOSUR") Permanent Court of Review, the Economic Court of the Commonwealth of Independent States ("CIS"), and the various regional economic courts in Africa, including the Common Market of Eastern and Southern Africa and the Economic Community of West Africa—are likely to interpret and apply, either directly or indirectly, WTO or regional economic rules based on corresponding WTO provisions (e.g., GATT's free trade area and customs union rules). As the legal and judicial remedies of domestic and regional courts tend to go beyond those of WTO dispute settlement bodies (e.g., regarding reparation for the discriminatory taking of property rights), private economic operators adversely affected by violations of WTO rules may prefer recourse to domestic and regional courts rather than to WTO dispute settlement

proceedings.

6. Many intergovernmental WTO disputes are triggered by complaints from private producers, investors, traders, consumer associations, or other nongovernmental groups. Such complainants may prefer to submit their legal claims—for example, over intellectual property rights protected under TRIPS or over investor rights protected by market access, national treatment, or additional commitments under GATS—to mixed international arbitration, which grants direct access to private complainants and enables them to handle and control their claims without political interference by their home governments. For example, a pharmaceutical company claiming violations of its patent rights resulting from parallel imports into a foreign WTO member state or from compulsory licenses granted by a foreign WTO government may prefer to submit its dispute to the mediation and mixed arbitration procedures of WIPO⁴⁵ or, in the case of production and foreign investments abroad, to mixed arbitration at the ICSID (whose jurisdiction also includes disputes over intellectual property rights)⁴⁶ or under NAFTA Chapter 11.⁴⁷
7. Some WTO agreements explicitly provide for private access to domestic courts so as to examine whether, for instance, national government procurement practices have violated that government's obligations under the WTO Agreement on Government Procurement.⁴⁸ Arti-

⁴⁵ See WIPO Arbitration and Mediation Center, *Expedited Arbitration Rules*, in WIPO ARBITRATION AND MEDIATION RULES 57 (1999) (describing the WIPO mediation and arbitration rules allowing "mixed" arbitration between private and state parties).

⁴⁶ See generally CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001).

⁴⁷ On the different intergovernmental dispute settlement procedures (Chapter 20), mixed arbitration procedures (Chapter 11) and private access to binational panel procedures for the review of final anti-dumping and countervailing duty determinations (Chapter 19) in the NAFTA Agreement, see Course on Dispute Settlement, *Regional Approaches, Module 6.1: NAFTA*, UNCTAD/EDM/Misc.232/Add.24 (2003) (prepared by L. Ojeda & C. Azar).

⁴⁸ On the different intergovernmental and private-state dispute settlement

cle XX of the WTO Agreement on Government Procurement is noteworthy in granting private parties direct access to national challenge procedures before domestic courts or other independent review bodies, each of which must provide for prompt correction of a breach of the relevant WTO agreement or compensation for the loss or damages suffered. The WTO Agreement on Pre-Shipment Inspection even provides for private access to private or mixed international arbitration inside the WTO in order to examine any violations of relevant legal obligations within very short time frames.⁴⁹

8. The universal recognition of human rights and the proliferation of legal and judicial remedies against human rights violations provided for in regional and UN human rights treaties mean that international disputes over human rights may have repercussions for the interpretation and application of WTO rules, and vice versa. For example, just as the ECJ examined trade restrictions and other economic regulations (e.g., on biotech food) in the light of human rights, including a "fundamental right to human dignity and integrity,"⁵⁰ WTO dispute settlement bodies may also be confronted with references to human rights (as well as corresponding government obligations to protect and promote human rights) as relevant legal contexts for the judicial

procedures under the 1996 WTO Agreement on Government Procurement, see Course on Dispute Settlement, *World Trade Organization, Module 3.12: Government Procurement*, UNCTAD/EDM/Misc.232/Add.27, 3-15 (2003) (prepared by Perez Gabilondo).

⁴⁹ The "independent review" procedure provided for in Article 4 of the WTO Agreement on Pre-Shipment Inspection was set up to limit legal liability for damages caused by dispute settlement rulings. The procedure was invoked for the first time in 2005.

⁵⁰ Case C-377/98, *Netherlands v. Eur. Par. & Coun.*, 2001 E.C.R. I-07079, para. 52. On economic and social rights under the ECJ, see ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS—A LEGAL PERSPECTIVE (Tamara K. Hervey & Jeff Kenner eds., 2003) (presenting several articles with varying viewpoints on economic and social rights under the EU Charter of Fundamental Rights).

interpretation of WTO rules.⁵¹ The various reports by the UN High Commissioner for Human Rights on the human rights implications of WTO agreements offer many examples for the potential relevance of human rights for the interpretation of WTO rules.⁵² ECJ jurisprudence interpreting the customs union rules in the EC Treaty in conformity with the human rights guarantees in the ECHR illustrates that judicial balancing of human rights and trade rules may require methodological approaches different from those of international trade law.⁵³ Just as judgments of the ECtHR (e.g., on the right to the inviolability of the home and protection

⁵¹ A computer search of references to human rights in WTO panel and Appellate Body reports indicates very few reports where parties, third-parties, experts, panelists, or the Appellate Body referred to human rights. Neither the WTO Ministerial Declaration of November 2001 on access to medicines nor Article 27.3(b) of the Agreement on Trade-Related Intellectual Property Rights ("TRIPS") Agreement on patenting plant varieties refers to human rights, even though the Africa Group invoked human rights as criteria for interpreting TRIPS during negotiations on the Declaration.

⁵² See, e.g., U.N. Econ. and Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Report of the High Commissioner on Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, ¶¶ 10-19, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) (discussing how the TRIPS Agreement is relevant to human rights).

⁵³ See Case C-112/00, *Schmidberger*, *Internationale Transporte und Planzüge v. Austria*, 2003 E.C.R. I-5659, para. 16 (ruling on whether the failure of authorities to ban a demonstration amounted to an unjustified restriction of the free movement of goods). The Court held that while the Austrian authorization of an environmental demonstration blocking road traffic on the Austrian motorway was a trade barrier contrary to Article 30 of the EC Treaty, it was justified by freedom of expression and assembly concerns (Articles 10 and 11 of the ECHR). *Id.* at para. 59. The Court avoided squeezing this human rights justification into the traditional trade law exception in Article 34 or into its rule of reasonable interpretation in Article 30 of the EC Treaty. Rather, it directly applied human rights law as a new justificatory category, referring to the "wide margin of discretion" that competent authorities have to find a "fair balance" between common market freedoms and human rights, as well as the need to determine "whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights." *Id.* at para. 82. Such a fair balance must also be struck in the interpretation of WTO rules. The ECJ balancing approach rightly implies that invocation of human rights as a justification of trade restrictions may not automatically trump trade rules designed to limit protectionist abuses (e.g., procedural WTO requirements to carry out a transparent risk-assessment procedure before prohibiting the importation of hormone-fed beef).

of freedom of speech in the commercial field) have implications for the judicial interpretation and application of the trade and economic provisions in the EC Treaty,⁵⁴ the case law of the UN and regional and national human rights bodies have legal relevance for the future interpretation of WTO rules.⁵⁵

9. WTO law may be applicable to, or provide relevant legal context for, investment disputes covered today by more than 2100 bilateral investment treaties ("BITs"), with comprehensive guarantees for intergovernmental, investor-state, and national dispute settlement proceedings.⁵⁶ For instance, WTO law and disputes over discrimination of foreign services suppliers or intellectual property rights may be relevant for interpreting the national treatment obligations of host states in related investment disputes covered by BITs and ICSID jurisdiction. Additionally, the preferential legal and judicial remedies offered by bilateral BITs may be inconsistent with the nondiscrimination requirements under GATS Articles II and XVII. Providers of services and holders of intellectual property rights will have to examine very carefully the alternative dispute settlement fora for enforcing their private rights and the corresponding gov-

⁵⁴ See Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in THE EU AND HUMAN RIGHTS, *supra* note 14, at 757-780 (comparing ECJ and ECHR case law). On the often broader judicial protection that human rights courts give freedom of commercial speech, see *Hertel v. Switzerland*, 1998 Eur. Ct. H.R. 77, sec. 10, para. 27 (concluding that restrictions on freedom of speech imposed under the Swiss Unfair Competition Law were in violation of Article 10 of the ECHR).

⁵⁵ See, e.g., U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002) (examining issues concerning human rights and trade).

⁵⁶ See Gaetan Verhoosel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 493-506 (2003) (explaining the effect of WTO law on bilateral investment treaties ("BITs")); see also U.N. CONF. ON TRADE & DEV., TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS: AN OVERVIEW, UNCTAD/ITE/IIT/13, U.N. Sales No. E.99.II.D.23 (1999) (discussing the developments in the international legal framework for foreign direct investment); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 136 RECUEIL DES COURS 234, 234-329 (1997) (providing an example of the same).

ernment obligations. In the field of international telecommunications, for example, the WTO panel report for *Mexico – Measures Affecting Telecommunications Services* illustrates that market access, national treatment, and other commitments (e.g., for competition rules) accepted by WTO members for the liberalization of international telecommunications services are justiciable and enforceable through the WTO dispute settlement system.⁵⁷ By contrast, the alternative arbitration procedures of the International Telecommunications Union (“ITU”) have never been applied thus far:

[T]raditional ITU dispute settlement procedures, with their application restricted to ITU Member States and limited to matters related to the interpretation and application of the ITU instruments, are not of any use to the ever growing number of private sector telecommunications services and equipment providers independent of governments or quasi-governmental organizations.⁵⁸

10. The numerous WTO guarantees of private access to domestic courts (e.g., GATT Article X, Article 13 of the Anti-Dumping Agreement, Article 23 of the Agreement on Subsidies, and TRIPS Articles 32 and 41-50) have given rise to an increasing number of parallel or successive dispute settlement proceedings in domestic courts and before WTO dispute settlement bodies on, for example, the review of anti-

⁵⁷ See Panel Report, *Mexico – Measures affecting Telecommunications Services*, WT/DS204/R (April 2, 2004) (addressing the dispute surrounding provisions in Mexico’s domestic laws and regulations on telecommunications).

⁵⁸ Alfons A.E. Noll, *The Various Approaches to Dispute Settlement Concerning International Telecommunications*, in *ARBITRATION IN AIR, SPACE AND TELECOMMUNICATIONS LAW* 161, 171 (2002). Noll distinguishes between purely telecommunication sector-specific disputes and those that are more concerned with trade in telecommunications services that are regulated by the GATS. He suggests coordinating International Telecommunications Union (“ITU”) dispute settlement procedures (limited to ITU instruments and Member States) and WTO dispute settlement procedures pursuant to Article V of the WTO Agreement and Section 7 of the General Agreement on Trade in Services (“GATS”) Annex on Telecommunications.

dumping determinations, countervailing duty determinations, government procurement practices, and regulation of intellectual property rights. As goods and services are produced and consumed by individuals, WTO dispute settlement panels have emphasized that "one of the primary objects of the GATT/WTO . . . is to produce certain market conditions which would allow . . . individual activity to flourish" by protecting the international division of labor against discriminatory trade restrictions and other distortions.⁵⁹ Yet the same dispute settlement panel also emphasized that "[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect."⁶⁰ In other words, neither institution created rights and obligations that extend beyond WTO members to individual traders, producers, and consumers. WTO obligations have been recognized as an "integral part of the Community legal order" inside the EC and have been incorporated into the domestic laws of many WTO member States. But the ECJ—like the domestic courts of some other WTO members—has concluded from the intergovernmental structures and reciprocity principles of WTO law that the "purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals" who, as a consequence, "cannot rely on them before the courts

⁵⁹ See Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, ¶ 7.73 *et seq.*, WT/DS152/R (Dec. 22, 1999) (addressing the EC's concern regarding the specific, strict time limits within which unilateral determinations and trade sanctions must be laid out) [hereinafter Trade Act of 1974 Panel Report].

⁶⁰ See *id.* at ¶ 7.72.

The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudice any decisions by national courts on this issue.

Id. at n.661.

and . . . any infringement of them will not give rise to non-contractual liability on the part of the Community."⁶¹ As a result of the widespread disregard of WTO rules by domestic courts, parallel or successive dispute settlement proceedings in domestic courts and before WTO dispute settlement panels often lead to conflicting or otherwise inconsistent decisions entailing legal insecurity, high transaction costs, and challenges to the legitimacy of intergovernmental WTO rules and secretive WTO dispute settlement procedures.

In contrast to the vast literature and judicial practice concerning forum shopping and ADR in private international litigation, the respective merits and venue choices of concurrent jurisdictions for international disputes over governmental restrictions (e.g., taxes and non-tariff trade barriers) and governmental trade distortions (e.g., subsidies and trade discrimination), as well as the related problems of ADR, have not been studied extensively in public international trade law. Many of the several hundred bilateral, regional, and worldwide trade and economic agreements provide for political and legal dispute settlement procedures with overlapping jurisdictions and alternative dispute resolution mechanisms. Therefore, choosing the right dispute prevention and settlement forum as well as avoiding less advantageous dispute settlement fora are important tasks in international trade policy and public trade law, as will be discussed in Section 4. Section 5 discusses examples and case studies of ADR in public international trade and investment law. Views on the optimal negotiation or judicial forum may differ depending on whether one focuses on the interests of the governments involved or on the private economic interests affected by the dispute. Section 6 distinguishes five different categories of international trade disputes based on the conflicts of interests underlying the dispute concerned and recommends different conflict

⁶¹ Case T-201/00, *Etablissements Biret et SA v. EU Council*, 2003 E.C.R. I-10497 ¶¶ 62–65.

[I]t is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions in the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules.

Id. at ¶ 63.

prevention and dispute settlement procedures for each category of international dispute. Section 7 concludes with a few policy recommendations for additional international rules on the prevention of international trade disputes and the coordination of concurrent jurisdictions for judicial dispute settlement proceedings.

4. ALTERNATIVE DISPUTE SETTLEMENT METHODS IN INTERNATIONAL ECONOMIC LAW: AN OVERVIEW

Disputes are characterized by: (1) specific disagreements concerning matters of fact, law, or policy between (2) two or more parties so that (3) a claim or assertion by one party is met with refusal, counterclaim, or denial by another. In order to distinguish disputes from divergent claims, disputes may be defined by the additional criterion that (4) one or more parties requires the dispute to be settled by recourse to additional dispute settlement procedures.⁶² The close interrelationships between intergovernmental and private disputes are reflected in many WTO dispute settlement reports—for instance when WTO panels emphasized that disputes among trading countries and violations of WTO rules usually result from discriminatory treatment by WTO member governments of producers, traders, or other individual participants in the market place:

Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from the WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.⁶³

This Section begins with a brief overview of the ten traditional dispute settlement methods in public international law (Section 4.1). It then explains why, from a citizen's perspective, these intergovernmental methods are often neither legally effective nor economically efficient methods for preventing or settling disputes among private producers, investors, traders, consumers, and for-

⁶² See Franklin Berman, *Legal Theories of International Dispute Prevention and Dispute Settlement: Lessons for the Transatlantic Partnership*, in *TRANSATLANTIC ECONOMIC DISPUTES*, *supra* note 43, at 451-64 (explaining alternative dispute settlement procedures).

⁶³ Trade Act of 1974 Panel Report, *supra* note 59, at ¶ 7.77.

eign governments (Section 4.2). As many intergovernmental WTO disputes are triggered by private complaints (e.g., pursuant to the complaint procedures provided for in Section 301 of the U.S. Trade Act or the corresponding procedures in the EC's Trade Barriers Regulation) and many WTO dispute settlement proceedings are carried out through private-public partnerships among the private complainants and their government representatives in the WTO,⁶⁴ examining one's best alternative to a negotiated agreement ("BATNA")⁶⁵ and the most appropriate ADR methods must be the starting point for successful litigation or dispute prevention strategies (Section 4.3).

4.1. *The Ten Traditional Dispute Settlement Methods in Public International Law and WTO Law*

The numerous international dispute settlement treaties concluded since the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes⁶⁶ tend to distinguish ten different international dispute settlement methods: (1) bilateral or multilateral negotiations; (2) good offices; (3) mediation; (4) inquiries; (5) conciliation; (6) ad hoc or institutionalized arbitration; (7) judicial settlement by permanent courts; (8) "resort to regional agencies or arrangements" or (9) to "other peaceful means of their own choice";⁶⁷ and (10) dispute settlement by the UN Security Council (e.g., pursuant to Articles 34–38 of the UN Charter), other UN organs, or other international organizations.⁶⁸ Many international treaties, including the UN Charter and the WTO Agreement, view these political and legal procedures as complementary options and define the conditions for their use. The international law principles of free choice of means and international consent are preconditions

⁶⁴ See SHAFFER, *supra* note 40.

⁶⁵ See FISHER & URY, *supra* note 9 (noting the importance of examining one's best alternative to a negotiated agreement ("BATNA")).

⁶⁶ See KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW: TEXTS AND MATERIALS* (2d ed. 2001) (providing a standard compilation of texts and materials on dispute settlement in public international law); see also UNITED NATIONS, *HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES* (1992) (describing the settlement of disputes between states and disputes involving parties other than states).

⁶⁷ The quoted texts are from U.N. Charter, art. 33, para. 1 (listing the alternative dispute settlement procedures under the UN Charter).

⁶⁸ For explanations of the differences among these procedures, see, e.g., J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (3rd ed. 1998).

for international adjudication and require that—apart from the general international law obligation to “settle their international disputes by peaceful means”⁶⁹—no single method of dispute settlement is legally privileged over any other, unless countries agree otherwise (e.g., in Article 23 of the DSU and Article 292 of the EC Treaty).

After the creation of the Permanent Court of Arbitration in 1899 and the PCIJ in 1920, negotiations have remained the principal means for the prevention or settlement of disputes among states. Bilateral negotiations and third-party-assisted political methods of dispute settlement can offer important advantages, including: (1) greater flexibility, privacy, and control by the parties over the outcome; (2) comparatively less costs; (3) the ability to take into account political as well as legal considerations; and (4) avoidance of “winner-loser” situations. However, notwithstanding the increasing number of international treaty provisions on good offices, mediation, inquiry, and conciliation, these third-party-assisted diplomatic means of international dispute settlement (e.g., commissions of inquiry and conciliation commissions) are less frequently invoked in international economic relations than alternative legal methods of adjudication, arbitration, or (quasi-)judicial dispute settlement mechanisms.⁷⁰ Diplomatic methods of dispute settlement, such as voluntary export restraints, are often criticized as being power-oriented and not sufficiently focused on the merits of each party’s case. They are thought to weaken the previously agreed-upon rules and undermine legal security.

Legal dispute settlement methods enable rule-oriented, legally binding decisions by independent judges that are based on due process of law and substantive rules upon which the parties have previously agreed as reflecting the long-term interests of the parties to the dispute. According to Article 92 of the UN Charter,⁷¹ the ICJ was to become the “principal judicial organ” for the settlement of disputes among UN Member States.⁷² Yet less than a third of the

⁶⁹ U.N. Charter art. 2.3.

⁷⁰ See *id.*; see also Christine Chinkin, *Alternative Dispute Resolution under International Law*, in *REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA* 123, 124 (Malcolm D. Evans ed. 1998) (noting that despite the range of institutional methods of dispute resolution, they are not used universally).

⁷¹ U.N. Charter art. 92, para. 1.

⁷² See SHANY, *supra* note 31, at 273 (citing several characteristics of the ICJ that make it “a leading candidate” as a “universal appellate court”).

191 UN Member States have accepted the compulsory jurisdiction of the ICJ,⁷³ an acceptance often subject to reservations. The fewer than 100 contentious disputes submitted to the ICJ since 1946 mainly concerned disputes over territorial delimitation and bilateral treaties. Only a few economic and investment disputes were submitted to the ICJ;⁷⁴ international trade disputes were hardly ever decided by the ICJ or by its predecessor, the PCIJ.⁷⁵ Due to the lack of standing of individuals and nongovernmental, as well as intergovernmental, organizations before the ICJ⁷⁶ (in addition to the long duration and numerous shortcomings of ICJ procedures), the prospects of transforming the ICJ into a true world court with mandatory universal jurisdiction—e.g., for resolving jurisdictional disputes resulting from competing jurisdictional claims (similar to the task of the ECJ in relation to disputes arising under the Brussels and Lugano Conventions on the jurisdiction of national courts for transboundary disputes)—are slim. Most states appear unwilling to “accept the empowerment of the ICJ to hear many cases, which [they] have excluded from its compulsory jurisdiction for a good reason (e.g., lack of sufficient expertise in specific complex fields of law).”⁷⁷ Just as many ECHR Member States have submitted reservations limiting the jurisdiction of the UN Human Rights Commit-

⁷³ See Statute of the International Court of Justice art. 36, para. 2 & 5, June 26, 1945, 59 Stat. 1055, T.S. No. 933; see also SHANY, *supra* note 31, at 274, n.12 (“Only 64 of the 190 parties to the ICJ statute have accepted the compulsory jurisdiction of the ICJ.”).

⁷⁴ See Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT’L L. 391, 442 (1991) (“[T]he ICJ rarely enters into the world of international trade and investment . . .”).

⁷⁵ See U.N. Conference on Trade and Dev., *Dispute Settlement General Topics 1.2: International Court of Justice*, 5, 35–37, UNCTAD/EDM/Misc.232/Add.19 (2003) (prepared by Pemmaraju S. Rao) (stating that the Permanent Court of International Justice (“PCIJ”) handled only twenty nine cases and gave twenty seven advisory opinions); Günther Jaenicke, *International Trade Conflicts before the Permanent Court of International Justice and the International Court of Justice*, in ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW 43, 44 (Ernst-Ulrich Petersmann & Günther Jaenicke eds., 1992) (remarking that many states use separately negotiated treaties to submit disputes between the parties to the ICJ rather than accepting the “optional clause” of art. 36 of the ICJ statute).

⁷⁶ See Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?*, 31 N.Y.U. J. INT’L L. & POL. 753, 789 (1999).

⁷⁷ See SHANY, *supra* note 31, at 273–77 (discussing roles the ICJ could play in resolving jurisdictional disputes, as well as barriers that prevent its accession to those roles).

tee for complaints under the Optional Protocol to the UN Covenant on Civil and Political Human Rights if the same complaint is pending before the ECtHR, so too have WTO members and members of regional economic integration agreements (e.g., the EC, the European Economic Area, and NAFTA) provided for exclusive jurisdiction of regional and worldwide economic courts (e.g., the ECJ, EFTA, and WTO dispute settlement bodies) rather than for ICJ jurisdiction over related trade and human rights disputes. Any conflicts of jurisdiction and related problems of forum choice must be decided by the dispute settlement body seized by the complainant.

The legal methods for the settlement of international economic disputes are characterized by an increasing proliferation of worldwide and regional courts and quasi-judicial dispute settlement procedures (e.g., at the WTO), with increasing reliance on alternative dispute settlement methods such as mixed international arbitration between a state and a private party or private commercial arbitration administered by an intergovernmental organization (e.g., the WIPO arbitration center or WTO commercial arbitration in complaints against preshipment inspection companies). All the major alternative dispute settlement methods under public international law (e.g., bilateral and multilateral consultations, good offices, conciliation, mediation, panel and appellate review procedures, arbitration, and national and international adjudication) are available in WTO law for the prevention and settlement of international trade disputes. In contrast to the restrictive ICJ practice under Articles 62 and 63 of its Statute with regard to intervention by third parties,⁷⁸ GATT and WTO dispute settlement proceedings are characterized by frequent participation of third parties in consultations, panel proceedings, and appellate review as a means of avoiding conflict and preventing separate, additional disputes.⁷⁹

⁷⁸ See CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 178-80 (1993) (arguing that while Article 63 of the ICJ statute was intended to provide intervention as a right, the ICJ has interpreted it much more narrowly); SHABTAI ROSENNE, *INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE* 1, 3 (1993) (stating that "the Court's decisions on intervention under Article 62 . . . are unduly restrictive," in part because the ICJ requires "an interest of a legal nature" in addition to the requirement of Article 81¶ 2(c) that there be some "basis of jurisdiction . . . between the State applying to intervene and the parties to the case").

⁷⁹ Cf. WTO SECRETARIAT, LEGAL AFFAIRS DIV. AND APPELLATE BODY, *A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM* 47, 50, 65-66 (2004) (discussing procedures for intervention in consultations, adjudicatory panels, and the appellate process); Mary E. Footer, *Some Aspects of Third Party Intervention in GATT/WTO Dispute Settlement Proceedings*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO*

The rights under Article 4.11 of the DSU⁸⁰ of third-party WTO members with a “substantial trade interest” to request joining consultations under GATT Article XXII⁸¹ (or under the analogous provisions of other covered agreements) are frequently exercised, just as multiple complaints by more than one WTO member pursuant to Article 9 of the DSU are frequent in WTO dispute settlement practice. In the 1996 and 1997 panel proceedings against the EC’s import restrictions for bananas, for instance, there were five complainants, eight WTO members intervening in support of these “multiple complainants,” and twelve WTO member countries intervening in support of the EC as defendant (the fifteen EC Member States participated in the dispute as part of the EC delegation without a formal status as codefendants or third parties).

4.2. *Why Intergovernmental Dispute Settlement Methods Are Often Suboptimal in International Economic Law*

Most international trade and economic transactions take place between private producers, investors, traders, and consumers. International trade disputes are about how to reconcile the respective interests of producers, investors, traders, and consumers with the public interests of the exporting and importing countries involved. Optimal dispute prevention and dispute settlement methods should aim at regulating these conflicts of interests in a non-discriminatory and welfare-enhancing manner (i.e. by limiting welfare-reducing border discrimination) and should legally protect and empower all the actors involved to defend their legitimate rights and resolve disputes under decentralized, fair procedures. Effective dispute prevention and settlement are characterized by ever more precise national, international, and transnational guarantees of equal freedoms and by rules of law limiting abuses of power in national, international, and transnational relations for the benefit of legally protected freedom, nondiscriminatory conditions of competition, and respect for human rights. As rules do not en-

DISPUTE SETTLEMENT SYSTEM 211, 235–44 (Ernst-Ulrich Petersmann ed., 1997) (discussing the prevalence of third-party intervention in a variety of dispute-resolution processes under the Dispute Settlement Understanding); Friedl Weiss, *Third Parties in GATT/WTO Dispute Settlement Proceedings*, in LIBER AMICORUM PAUL DE WAART 458–72 (1998) (discussing the role of third parties in the WTO dispute resolution process).

⁸⁰ See DSU, *supra* note 33, art. 4.11.

⁸¹ See generally GATT, *supra* note 29, art. 22.

force themselves, rule of law depends on effective legal and judicial remedies, as reflected in the human right of access to justice. The struggle for rights and the judicial protection and balancing of rights are often necessary elements for the clarification, progressive development, and effectiveness of rules.

From the point of view of private economic operators, following the traditional international law rules on prior exhaustion of local remedies⁸² and subsequent espousal of private claims against foreign governments by the home state in order to initiate diplomatic protection and intergovernmental court proceedings often means that international legal and judicial remedies may only become available many years after the dispute arose. For example, the judgment by the ICJ in the *ELSI* dispute between the United States and Italy over the treatment of U.S. investors in Palermo was rendered in 1989, more than 25 years after the investment dispute arose in Italy.⁸³ The *ELSI* judgment has been subject to severe criticism in academic literature.⁸⁴ The two and a half years between the institution of ICJ proceedings on February 6, 1987 and the rendering of final judgment on July 20, 1989,⁸⁵ as well as the twelve public hearings held by the ICJ so it could listen to the numerous agents, counsel, and advocates representing the two states,⁸⁶ indicate that ICJ proceedings tend to last longer and cost more than ICSID arbitration or WTO panel proceedings. The lack of private access to the ICJ, the virtual absence of damage awards rendered by the ICJ, and the rare use of expert and witness testimony before the ICJ⁸⁷ are among the many reasons why private access to EC courts, EFTA, NAFTA or ICSID arbitration, without prior exhaustion of local remedies,⁸⁸ are often perceived by businesses as more appro-

⁸² See F. A. Mann, *Foreign Investment in the International Court of Justice: The ELSI Case*, 86 AM. J. INT'L L. 92, 101 (1992) (referring to the traditional international rules on exhaustion of local remedies).

⁸³ See *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 23-40 (July 20) (detailing the extended history of the case) [*ELSI*].

⁸⁴ See Mann, *supra* note 82, at 93-99 (critiquing ICJ procedures and reasoning).

⁸⁵ See *ELSI*, 1989 I.C.J. at 17 (describing the history and general overview of the case).

⁸⁶ See *id.* at 18 (noting the number of sittings).

⁸⁷ See Mann, *supra* note 82, at 94-95 (describing the inexperience of many of the court's judges with respect to witnesses, as well as the need for better witness procedures).

⁸⁸ According to Article 26 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (Aug. 27, 1965), 17 U.S.T.

priate for the settlement of international trade and investment disputes and reparation claims.⁸⁹

In private national and international commercial law, ADR is increasingly recognized as an important alternative to adversarial arbitration or court litigation, where higher costs, longer duration, and (sometimes) reduced predictability (e.g., in cases involving juries and punitive damages) are viewed as less advantageous.⁹⁰ The various ADR methods, such as mediation, neutral expert appraisal, and mini-trials, differ from judicial procedures in that there is an agreed-upon intervention of a disinterested third party who helps the parties settle their dispute in a more flexible, expeditious, confidential, and less costly manner without rendering a legally binding decision.⁹¹ The voluntary, nonbinding and informal character of some ADR proceedings ensures that parties can exercise control over their dispute and allows them to focus on producing “win-win” solutions that save time and costs and strengthen personal and business relationships among the parties to the dispute.⁹² ADR is considered particularly beneficial for international commercial relations and disputes among parties from different legal systems and cultures, especially if both parties are interested in continued long-term cooperation, their dispute is not about a principal point of law, and there is no discrepancy regarding their respective bargaining power and positions.⁹³ Once a mutually ac-

1270, 575 U.N.T.S. 159 (1966), “[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

⁸⁹ See, e.g., Murphy, *supra* note 74, at 442 (1991) (“Typically, the ICJ does not have extensive expert and witness testimony, although increased use of such testimony have [sic] become more prevalent the past several years.”).

⁹⁰ See, e.g., A. J. Eijsbouts, *ADR and Arbitration: Advantages and Disadvantages in Commercial Disputes*, in INTERNATIONAL LAW AND THE HAGUE’S 750TH ANNIVERSARY 223, 223–28 (Wybo P. Heere ed., 1999) (discussing the merits of Alternative Dispute Resolution (“ADR”)); Piet A. Wackie Eysten, *Alternative Dispute Resolution in Commercial Disputes*, in INTERNATIONAL LAW AND THE HAGUE’S 750TH ANNIVERSARY at 219 (Wybo P. Heere ed., 1999) (echoing comments by Eijsbouts); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 31 (3rd ed. 1999) (giving increasing costs and the possibility of lengthy proceedings of litigations which require the time of corporate leaders as reasons to employ ADR).

⁹¹ See *id.* at 24–31, 33, 36, 38–39.

⁹² See *id.* at 32–33, 33 n.37, 41 (discussing the possibility of achieving “win-win” results through ADR and situations in which ADR can be conducive to future business dealings).

⁹³ See *id.* at 41–42 (highlighting situations which might call for ADR and those that do not).

ceptable settlement agreement is signed, the result of ADR may become legally binding, ideally without leaving a loser and without being limited to traditional court remedies (such as specific performance, rescission of the contract, or damages).⁹⁴

4.3. *Public-Private Partnerships in WTO Litigation: The Need to Examine One's BATNA*

Only WTO members may be parties to WTO dispute settlement proceedings. Yet many WTO complaints are triggered by private domestic complaints, for instance pursuant to Section 301 of the U.S. Trade Act⁹⁵ and the EC's corresponding Trade Barriers Regulation.⁹⁶ This private origin of many WTO disputes is reflected in the designation of many WTO disputes by the names of the companies involved (e.g., Kodak-Fuji, Pernod-Ricard, and Bacardi-Martini). WTO litigation is typically characterized by "the formation of public-private partnerships to pursue varying, but complementary, goals."⁹⁷ This blurring of public and private interests in international trade law renders it even more important to clarify: whose interests should intergovernmental consultations, mediation, conciliation, panel, Appellate Body or arbitration proceedings at the WTO serve?

The answer given by public international lawyers—that governments are supposed to serve the public interest—cannot explain the political reality that governments often violate their WTO obligations or resort to intergovernmental WTO dispute settlement proceedings in order to protect powerful group interests in exchange for their political support. For example, several WTO complaints initiated by the United States, such as against EC import restrictions on bananas, were linked to election campaign promises in exchange for financial campaign contributions in U.S. federal elections. In the case of WTO complaints by less-developed WTO members with limited administrative and legal resources, the private petitioners (e.g., an export industry) sometimes prepare the complaint, cover the costs for outside legal counsel, and participate with the governmental legal team of the WTO member presenting

⁹⁴ See *id.* at 32–39 (describing various forms of ADR, some of which are binding and offer a wide variety of advantages).

⁹⁵ Trade Act of 1974, 19 U.S.C. § 2411 (2000).

⁹⁶ Council Regulation 3286/94, 1994 O.J. (L 349) 71. See MOLYNEUX, *supra* note 17 (discussing the sources of complaints relating to EC law).

⁹⁷ SHAFFER, *supra* note 40, at 4.

the complaint in the intergovernmental dispute settlement proceeding. Also, NAFTA rules and dispute settlement procedures are often characterized by a one-sided focus on business interests, which, compared to European integration law, appear less constrained by public interest clauses.⁹⁸ Dispute prevention and resolution may therefore require multilevel negotiations not only between governments but also among the private parties concerned, as well as among the private parties and their respective governments.

Negotiation theories emphasize the importance of bearing in mind one's BATNA so as to make sure that the negotiation produces better results than those that may be obtained unilaterally without negotiation. If the primary interest lies in judicial clarification of the contested meaning of an existing legal obligation so as to avoid future disputes, unilateral recourse to compulsory jurisdiction (e.g., a WTO panel, the EC Court of Justice, or a national court) may be the preferred BATNA. If the BATNA of a weaker party does not include the possibility of unilaterally submitting the dispute to previously agreed-upon compulsory jurisdiction (e.g., in disputes involving the majority of UN members that have not recognized the compulsory jurisdiction of the ICJ), a more powerful party may be tempted to use its bargaining power and oppose a request by a weaker party to submit the dispute to third-party adjudication. Game theory teaches that the principle of predictable "tit-for-tat" offers the best strategy for promoting reciprocal cooperation among egoists in a decentralized context where, as in many fields of international law, there is no central authority that can enforce agreed-upon international rules.⁹⁹

For example, the fact that least-developed countries ("LDCs") have only rarely been complainants or defendants in WTO panel proceedings appears to be due not to a lack of disputes but rather to a preference for settling disputes involving LDCs without recourse to costly WTO dispute settlement proceedings, particularly in view of the fact that most of their exports take place under vol-

⁹⁸ See generally North American Free Trade Agreement ch. 11, U.S.-Can.-Mex., Jan. 1 1994, 32 I.L.M. 612 (providing, for example in art. 1110, that nationalized or expropriated investments should be compensated according to fair market value) [hereinafter NAFTA].

⁹⁹ See ROBERT AXELROD, THE EVOLUTION OF COOPERATION 31, 175, 178-79 (1984) (describing the victory of a "tit-for-tat" strategy in a computerized Prisoner's Dilemma tournament and suggesting that the results of the tournament are evidence that a "tit-for-tat" approach can promote the evolution of cooperation without recourse to authority).

untary tariff preferences granted under the 1979 GATT Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries (“Enabling Clause”)¹⁰⁰ and pursuant to special WTO waivers—such as those for EC tariff preferences under the Cotonou Agreement with seventy-seven African, Caribbean, and Pacific countries.¹⁰¹ Notwithstanding the legal services offered to LDCs by the independent Advisory Center for WTO Law,¹⁰² LDCs may conclude that they lack the legal, economic, and professional resources for costly and time-intensive WTO litigation, as well as adequate private support from their export industries to prepare a WTO complaint. The prospective trade remedies offered by WTO law¹⁰³ may also be less attractive for LDCs than alternative financial reparation that may be available in alternative dispute settlement proceedings. However, given the asymmetries in bargaining power between LDCs and their developed trading partners, some LDCs (like Bangladesh) have recourse to the special legal services offered by the Advisory Center and, to a limited extent, by the WTO (e.g., Article 27:2 of the DSU) for clarifying their relevant rights, obligations, and most advantageous dispute settlement strategies. Joint multilateral consultations, renegotiation of WTO rules (e.g., in the Doha Development Round), or requests for ad hoc waivers may be more favorable dispute prevention strategies for LDCs than WTO litigation. The fact that both WTO legal advisers as well as the Advisory Center have, in a number of cases, advised less-developed countries against ini-

¹⁰⁰ *But cf.* Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.60, 7.177 WT/DS264/R (Dec. 1, 2003), WT/DS246/AB/R (Apr. 7, 2004) (finding certain EC trade preferences inconsistent with Article I:1 of GATT 1994 and the Enabling Clause) [hereinafter Panel Report].

¹⁰¹ *See The Cotonou Agreement: Overview of the Agreement 2000*, available at http://europa.eu.int/comm/development/body/cotonou/overview_en.htm (last visited Apr. 8, 2006) (discussing the economic strategies employed under the Agreement and the anticipated benefits thereof).

¹⁰² The Advisory Center on WTO Law was created by an international agreement signed by twenty-nine countries at the WTO Ministerial Meeting in Seattle on December 1999 and entered into force in July 2001. The Center is an international organization independent from the WTO and currently has thirty-seven member countries. In addition to the twenty-seven less-developed member countries, forty-three least-developed countries are entitled to the services of the Center without being members. ACWL – Members: Introduction, http://www.acwl.ch/e/members/members_e.aspx (last visited Apr. 8, 2006). Its annual reports are published on its website at http://www.acwl.ch/e/tools/doc_e.aspx.

¹⁰³ *See* DSU, *supra* note 33, arts. 3.7 & 19.

tiating WTO panel proceedings illustrates that dispute avoidance remains a primary objective of the WTO dispute settlement system.

5. ADR AT THE WTO: SOME CASE STUDIES

Prior to the entry into force of the WTO Agreement in 1995, international trade, investment, and intellectual property law had evolved in separate institutional frameworks (i.e., through GATT, WIPO, and the World Bank group) that provided for separate dispute settlement procedures (e.g., GATT Article XXIII,¹⁰⁴ the ICJ, and the ICSID). By contrast, WTO law covers not only international trade in goods and services but also trade-related intellectual property rights and trade-related investments (e.g., under the WTO Agreements on Trade-Related Investment Measures (“TRIMS”),¹⁰⁵ GATS,¹⁰⁶ and the Agreement on Government Procurement¹⁰⁷). The DSU offers members the choice of bilateral and multilateral consultations,¹⁰⁸ good offices, conciliation and mediation,¹⁰⁹ dispute settlement panels,¹¹⁰ appellate review,¹¹¹ and arbitration.¹¹² Article 23 of the DSU requires WTO members to settle their disputes about the interpretation and (non-)application of WTO rules using WTO dispute settlement procedures.¹¹³ This obligation to have recourse to “compulsory WTO jurisdiction” does not, however, obviate the need to examine ADR options.¹¹⁴

¹⁰⁴ GATT, *supra* note 29, art. 23.

¹⁰⁵ Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts – Results of the Uruguay Round 143 (1999) 1868 U.N.T.S. 186 [hereinafter TRIMS]. [not reproduced in I.L.M.].

¹⁰⁶ See General Agreement on Trade in Services, art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts – Results of the Uruguay Round, 1869 U.N.T.S. 185, 33 I.L.M. 1167 (1994) [hereinafter GATS].

¹⁰⁷ See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 (1996).

¹⁰⁸ See DSU, *supra* note 33, art. 4.

¹⁰⁹ *Id.* art. 5.

¹¹⁰ *Id.* arts. 6–16.

¹¹¹ *Id.* art. 17.

¹¹² *Id.* arts. 22–23 (providing enforcement procedures for the WTO dispute settlement system); *Id.* art. 25 DSU (providing for mutually agreed-upon arbitration).

¹¹³ *Id.* art. 23.

¹¹⁴ ADR is usually defined as “an umbrella term that refers generally to alter-

5.1. *The Havana Club Dispute in the WTO: Private Intellectual Property Disputes Should Not Be Converted into International Political Disputes Unnecessarily*

The *Havana Club* dispute between the EC and the United States in the WTO arose from a private commercial dispute between Pernod-Ricard, a France-based multinational distiller and distributor, and Bacardi-Martini, a U.S.-based multinational distiller and distributor, over their rights in the trademark "Havana Club."¹¹⁵ Each company was fully cognizant that its respective claims to the trademark remained controversial in view of the nationalization of the trademark rights by the Cuban government in the early 1960s. After having litigated their dispute in U.S. courts, the companies succeeded in transforming their private dispute into an intergovernmental challenge of world trade rules with the risk of transatlantic trade sanctions. Submission of their private dispute to private third-party arbitration or mediation (e.g., at WIPO's arbitration center) might have avoided the international political dispute and might have clarified the private rights involved more quickly and effectively.

The intergovernmental EC complaint was directed against Section 211 of the Omnibus Appropriations Act, passed by the United States in 1998. The prime issue before the WTO panel and Appellate Body was whether Section 211, notably its ban on the protection and recognition of trademarks and trade names in connection with Cuban business relations, was compatible with TRIPS.¹¹⁶ The Appellate Body, applying the rules of TRIPS and the Paris Convention on Industrial Property, confirmed the panel's view that Article

natives to the court adjudication of disputes such as negotiation, mediation, arbitration, mini-trial and summary jury trial." JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 1-2* (2001). In this book, the term ADR is used to refer to all alternative political and legal national and international dispute resolution options. See also U.N. Conf. on Trade and Dev., *Course on Dispute Settlement: Good Offices, Mediation and Conciliation of International Trade and Investment Disputes* (2003) (prepared by K. Venkata Raman) (surveying ADR procedures and practices in international law) [hereinafter *Course on Dispute Settlement*].

¹¹⁵ See Frederick M. Abbott & Thomas Cottier, *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 ("Havana Club")*, in *TRANSATLANTIC ECONOMIC DISPUTES*, *supra* note 43, at 429–47 (providing a thorough case study of the Pernod-Ricard/Bacardi-Martini dispute).

¹¹⁶ Appellate Body Report, *United States – § 211 of the Omnibus Appropriations Act of 1998*, ¶ 99, WT/DS176/AB/R (Jan. 2, 2002).

6 *quinquies* of the Paris Convention requires accepting trademarks for registration in the same form, without eliminating member discretion to apply rules concerning other rights in marks.¹¹⁷ TRIPS Articles 15 and 16 were found not to prevent individual WTO members from making their own determination regarding the ownership of marks within the boundaries established by the Paris Convention.¹¹⁸ TRIPS Article 42 regarding procedural rights was held not to obligate a member to permit adjudication of each substantive claim regarding trademark rights a party might assert if that party is fairly determined *ab initio* not to be the holder of an interest in the subject mark.¹¹⁹ In sum, the Appellate Body confirmed the right of the United States to refuse registration and enforcement of trademarks it determines to have been confiscated in violation of international law.

Contrary to the WTO panel findings that certain formal legal differences in the treatment of U.S. and foreign nationals in the relevant U.S. legislation did not amount to a violation of the national treatment obligations of TRIPS Article 3, the Appellate Body found that—even though the likelihood of effective discrimination might be small—the mere possibility of additional procedural hurdles for non-U.S. nationals was “inherently less favorable” and contrary to Article 3.¹²⁰ Similarly, the Appellate Body found that formally different treatment of Cuban nationals and those from other foreign countries established a *prima facie* inconsistency with the obligation of most-favored-nation treatment under TRIPS Article 4.¹²¹ Yet, since the EC’s main claim that the United States lacked the power to deny ownership of the subject mark was not upheld by the Appellate Body, the risk of transatlantic trade sanctions in order to enforce these very strict interpretations of Articles 3 and 4—with adverse effects on EC and U.S. traders and consum-

¹¹⁷ See *id.* ¶¶ 147–48 (describing the scope of Article 6 *quinquies* and upholding the Panel).

¹¹⁸ See *id.* ¶¶ 156–64, 195 (considering what would constitute a violation of the provisions of Article 15 and finding that Article 16.1 does not speak to trademark ownership).

¹¹⁹ See *id.* ¶ 226 (“There is nothing in the *procedural* obligations of Article 42 that prevents a Member . . . from legislating whether or not its courts must examine *each and every* requirement of substantive law at issue before making a ruling.”) (emphasis added).

¹²⁰ See *id.* ¶¶ 289, 296 (giving a sample situation in which someone might be discriminated against, in reversing the Panel).

¹²¹ *Id.* ¶ 309.

ers not involved in this dispute – was the dangerous result of transforming “a fairly ordinary commercial trademark dispute between two well-financed private enterprises into a matter of high politics.”¹²²

5.2. *WTO Disputes Over Trade-Related Investment Measures May Be Settled More Effectively Outside the WTO*

The four WTO disputes discussed thus far under TRIMS, and the increasing number of WTO disputes over the rights of private services suppliers, foreign investors, and intellectual property holders under GATS and TRIPS often involve disputes not only over rights and obligations of WTO members but also private rights and claims of injury caused by illegal government measures. Since about one-third of world trade is intra-firm trade among subsidiaries of multinational corporations, illegal trade restrictions may at the same time result in illegal treatment of foreign investors. Most BITs provide that the legal obligations of host states to grant most-favored-nation treatment or national treatment to foreign investors must be determined in light of the relevant international law rules, which may include the WTO obligations of the host state concerned. Even if the intergovernmental dispute is submitted to the WTO, the private economic operators may challenge the foreign government measure through investor-state arbitration pursuant to the dispute settlement procedures of Chapter 11 of NAFTA,¹²³ in the ECJ (e.g., by Ecuadorian and U.S. banana-exporting companies challenging the EC import restrictions), or in other domestic courts. Under general international and WTO law, private recourse to domestic or regional courts and “mixed” investor-state arbitration do not preclude the host state of an investor from initiating WTO dispute settlement proceedings.¹²⁴

Both inside and outside the WTO, such trade-related investment disputes may raise new legal and procedural questions:

To what extent can WTO dispute settlement bodies apply investment and intellectual property rules agreed upon by both parties to a dispute outside the WTO framework (e.g., one under the

¹²² Abbott & Cottier, *supra* note 115, at 439.

¹²³ See NAFTA, *supra* note 98, chp. 11, arts. 1115–38, (establishing arbitration procedures for investor and states).

¹²⁴ See Verhoosel, *supra* note 56, at 495 (arguing that investors may be able to seek arbitration under a BIT while still seeking action by their governments).

WIPO Copyright Treaty¹²⁵ or the WIPO Performances and Phonograms Treaty¹²⁶ concluded in December 1996, not yet formally incorporated into TRIPS)?

Given the traditional limitation of the applicable law in WTO panel and appellate review procedures to WTO law and a few principles of general international law, can the complainant invoke the general international law rules on state responsibility in an investment dispute before a WTO panel and request reparation for an injury suffered?

Are there certain categories of disputes which, in the interest of both the complainant and the defending country, could be more effectively settled by "arbitration within the WTO as an alternative means of dispute settlement," as provided for in Article 25 of the DSU?¹²⁷

Since WTO law does not specify arbitration procedures, could parties to arbitration at the WTO use the Permanent Court of Arbitration ("PCA") Optional Rules for Arbitrating Disputes Between Two States¹²⁸ as a basis for mutually agreed-upon arbitration at the WTO?

Pursuant to Article 33 of the PCA arbitration rules, the "arbitral tribunal shall apply the law chosen by the parties, or[,] in the absence of an agreement, shall decide such disputes in accordance with international law."¹²⁹ Could the parties to the dispute request that the arbitral tribunal apply not only WTO law but also other rules of international law, including a BIT accepted by both parties?

If the defending country does not agree to such arbitration "within the WTO,"¹³⁰ could the complaining country unilaterally invoke the compromisory clause contained in many BITs providing for ICJ or ICSID jurisdiction and challenge discriminatory regulations of the host state not only under the nondiscrimination obligations of WTO law before a WTO panel but also under the non-

¹²⁵ WIPO Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 1, 2186 U.N.T.S. 152.

¹²⁶ WIPO Performances and Phonograms Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 1, 2186 U.N.T.S. 245.

¹²⁷ DSU, *supra* note 33, art. 25.

¹²⁸ See The Secretary-General and the International Bureau, *Permanent Court of Arbitration*, in PERMANENT COURT OF ARBITRATION BASIC DOCUMENTS 41-68 (1998) (providing the optional rules for arbitrating disputes between two states).

¹²⁹ *Id.* at 62.

¹³⁰ DSU, *supra* note 33, art. 25.

discrimination requirements of the BIT before the ICJ or ICSID arbitral tribunal?

Can other substantive and procedural international treaty obligations, such as those under multilateral intellectual property conventions administered by WIPO which often provide for jurisdiction of the ICJ, be invoked parallel to WTO dispute settlement proceedings?

Which categories of investment or intellectual property disputes could, in the interest of both the private investor and the host state, be more efficiently handled by less politicized mixed arbitration procedures between the investor and the host state in the framework of ICSID or WIPO arbitration procedures? Under what conditions can violations of WTO obligations mean that treatment of adversely affected investors is not "in accordance with international law" as required by BITs and NAFTA?¹³¹ Does the lack of WTO guarantees for reparation of damages influence the interpretation of the relevant rules on state responsibility under BITs in the case of WTO rules violations? What are the advantages, disadvantages, and potential legal problems associated with bringing trade and investment disputes to the WTO, ICJ, PCA, ICSID, and WIPO, compared with domestic courts or private arbitral tribunals (e.g., applying the arbitration procedures of the UN Commission on International Trade Law ("UNCITRAL") or the ICC?

As reflected in Article 19 of the DSU,¹³² there is a longstanding limitation on legal remedies under GATT and WTO law. Private investors and holders of intellectual property rights may prefer to submit disputes over alleged violations of their rights to dispute settlement fora other than the WTO in order to secure legal rulings not only on the illegality and termination of the contested government measures but also on reparation of injury. Most BITs protect foreign investments in a broadly defined manner, including protecting investor and intellectual property rights covered by GATS and by TRIPS. While earlier BITs often only provided for recourse to the ICJ or ad hoc arbitration of state-to-state disputes, modern BITs also include provisions for investor-state arbitration pursuant to the procedures of the ICSID, UNCITRAL, ICC, or other arbitra-

¹³¹ NAFTA, *supra* note 98, art. 1105, para. 1. See generally Verhoosel, *supra* note 56, at 497-99 (discussing the NAFTA jurisprudence and the very restrictive "Notes of interpretation" adopted by the NAFTA Free Trade Commission in July 2001).

¹³² DSU, *supra* note 33, art. 19.

tion institutions. Most modern BITs offer a choice among different arbitral regimes and no longer insist on prior exhaustion of local remedies. Under the ICSID and some BITs, resorting to investor-state arbitration may preclude recourse to state-to-state dispute settlement for the same dispute. While investor-state arbitration may provide for the award of monetary damages, arbitral tribunals may lack the power to order a host state to revoke or modify an illegal government measure.¹³³

GATT and WTO disputes over trade-related investment measures illustrate that discriminatory local purchase requirements, as well as performance or licensing requirements imposed on foreign investors in violation of the national treatment requirements of GATT and WTO law, may also violate the national treatment requirements in BITs and give rise to investor-state arbitration on claims of injury where reparations are sought. The WTO panel report on *Indonesia – Certain Measures Affecting the Automobile Industry*,¹³⁴ which was adopted by the WTO on July 23, 1998,¹³⁵ illustrates some of the advantages and potential disadvantages of investment disputes in the WTO:

- a) The short time of less than one year between the composition of the Panel on July 29, 1997 and the adoption of the lengthy panel report (some 398 pages) by the Dispute Settlement Body (“DSB”) on July 23, 1998 shows the relative speed of WTO dispute settlement proceedings.
- b) The WTO panel dealt with three initially different complaints by Japan, the EC, and the United States. Following Article 9 of the DSU, the DSB established a single panel to

¹³³ For more information on the dispute settlement procedures under BITs and how they compare to WTO dispute settlement procedures, see Working Group on the Relationship between Trade and Investment, *Note by the Secretariat: Consultation and Settlement of Disputes Between Members*, WT/WGTI/W/134 (Aug. 7, 2002.).

¹³⁴ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R (July 2, 1998) [hereinafter July 2 Panel Report]. This panel report has remained the only case in which a violation of TRIMS was established. In the three other WTO disputes in which claims under TRIMS were raised, the panels declined to make a ruling on the alleged violations on grounds of “judicial economy” because the panels were not persuaded that the TRIMS provisions concerned were more specific than the relevant GATT provisions examined by the panels.

¹³⁵ *Id.*

examine these complaints. The Panel organized its examination and presented its findings to the DSB, pursuant Article 9.2 of the DSU, "in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints [were] in no way impaired."¹³⁶ These multiple complainant procedures are frequent in WTO dispute settlement practice and enable important synergies for all parties involved.

c) India and Korea intervened as third parties in the WTO panel proceeding in support of Indonesia.¹³⁷ Frequent practice of third party intervention in WTO dispute settlement proceedings offers important advantages (e.g., in terms of prevention of additional disputes among the countries involved) and compares favorably with the rare recourse to third-party intervention in practice at the ICJ.¹³⁸

d) Simultaneous to the establishment of the Panel in June 1997, the DSB agreed to the EC's request for the initiation of an "information-gathering procedure" pursuant to Annex 5 of the WTO Agreement on Subsidies and Countervailing Measures.¹³⁹ These rather unique "Procedures for Developing Information Concerning Serious Prejudice," which were subsequently also invoked by the United States and took place under the chairmanship of the Ambassador of Hong Kong as "representative of the DSB," require every WTO member to "cooperate in the development of evidence to be examined by a panel in procedures under . . . Article 7."¹⁴⁰

¹³⁶ DSU, *supra* note 33, art. 9.2.

¹³⁷ July 2 Panel Report, *supra* note 134, para. 1.16.

¹³⁸ See, e.g., SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, 1481-555* (3rd ed. 1997) (discussing the background of intervention by third parties).

¹³⁹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *The Legal Text—Results of the Uruguay Round* 164 (1999), 1869 U.N.T.S. 164. ("[T]he DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the . . . amount of subsidization, the value of total sales of the subsidized firms, [and] information necessary to analyze the adverse effects caused by the subsidized product.").

¹⁴⁰ *Id.* para. 1.

The comprehensive factual information formally established through this independent fact-finding procedure was subsequently used in the panel proceeding. The procedure illustrates the manifold advantages of institutionalized dispute settlement proceedings inside a worldwide organization, with special expertise and procedures beneficial for dispute settlement proceedings.¹⁴¹

e) In April 1998, all parties requested the Panel to review, in accordance with Article 15.2 of the DSU, certain aspects of the interim panel report that had been transmitted to the parties in March 1998.¹⁴² The final Panel Report noted that various factual and legal findings of the interim panel report were clarified or modified so as to take into account the comments received by all parties on the interim report.¹⁴³ This interim panel review procedure, pursuant to Article 15 of the DSU, was inspired by a similar procedure in the Canada-U.S. Free Trade Agreement¹⁴⁴ and continues to be rather unique in international dispute settlement practice when compared to the procedures of international courts and arbitral tribunals.

f) The Panel findings began with a number of preliminary rulings which the Panel had adopted at its first substantive meeting with the parties. It clarified the obligations of the private lawyers representing Indonesia and members of its delegation, the jurisdiction of the Panel regarding certain loans provided under Indonesia's National Car Program, the submission and protection of business proprietary information, and the claim by Indonesia that panel findings were no longer necessary because the National Car Program had been terminated.¹⁴⁵ The preliminary rulings (e.g., on the right to be represented by private lawyers before a

¹⁴¹ See, e.g., the administrative, technical and legal advice given to WTO panels by the WTO operational and legal divisions.

¹⁴² July 2 Panel Report, *supra* note 134, ¶ 13.1.

¹⁴³ *Id.* ¶ 13.2.

¹⁴⁴ Free Trade Agreement art. 1807, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281.

¹⁴⁵ July 2 Panel Report, *supra* note 134, ¶ 14.9.

WTO panel)¹⁴⁶ illustrate that WTO dispute settlement procedures offer effective remedies to deal quickly with preliminary objections in accordance with the general rules of international law.

g) The Panel began its legal findings with a general statement on the methods of treaty interpretation applied by the Panel:

Throughout this report, we have based our analysis on the ordinary meaning to be given to the terms of the provisions under examination in their context and in the light of their object and purpose. In our analysis of the scope and purpose of these provisions[,] we have also taken into account past GATT and WTO panel reports and Appellate Body reports when we considered them relevant and applicable in the present dispute. We are aware, however, that they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.¹⁴⁷

WTO panel and Appellate Body reports continue to differ from most other international dispute settlement rulings by their frequent findings on the methods of treaty interpretation (as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties)¹⁴⁸ and their emphasis on the ordinary meaning of applicable WTO rules.

h) The Panel concluded, *inter alia*, that (1) the local content requirements of Indonesia's National Car Program had violated TRIMS Article 2; (2) the sales taxes had discriminated in favor of domestic motor vehicles in violation of GATT Article III:2; (3) customs duties and sales taxes had also discriminated in favor of national cars imported from Korea in violation of GATT Article I; and (4) the EC had demonstrated that Indonesia had caused, through the use of sub-

¹⁴⁶ *Id.* ¶ 14.1.

¹⁴⁷ *Id.* ¶ 14 n.639.

¹⁴⁸ Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

sidies provided through the National Car Program, serious prejudice to the interests of the EC within the meaning of Article 5(c) of the Subsidies Agreement.¹⁴⁹ A number of other complaints, including a U.S. complaint that Indonesia had breached its obligations under TRIPS with respect to the acquisition and maintenance of trademark rights, were rejected by the Panel.¹⁵⁰ Compared with many other international dispute settlement proceedings, which tend to focus on one or two governmental measures, the Panel report illustrates the often simultaneous examination of a large number of government measures (here, discriminatory customs duties, taxes, purchase requirements, subsidies, acquisition, and maintenance of trademarks) in WTO dispute settlement proceedings. On the worldwide level, such disputes over customs duties, taxes, purchase requirements, subsidies, and trademarks are hardly ever submitted to the ICJ or to international arbitral tribunals. This is because Article 23 of the DSU requires WTO members to settle their disputes under its “covered agreements.”

i) Unlike most other international dispute settlement proceedings, WTO panel reports are subject to appeal pursuant to Article 17 of the DSU. In this dispute, Indonesia did not, however, make use of this legal remedy.

j) The detailed DSU rules for the multilateral surveillance of the implementation of dispute settlement recommendations and rulings, as well as for compensation and suspension of concessions, are quite unique when compared to other worldwide dispute settlement procedures. Even though Indonesia had indicated its intention to comply with the dispute settlement ruling by the DSB, the EC requested that the “reasonable period of time” for the implementation of the dispute settlement findings be determined by arbitration pursuant to Article 21.3 of the DSU.¹⁵¹ The

¹⁴⁹ July 2 Panel Report, *supra* note 177, § XIV.

¹⁵⁰ *Id.* ¶ 15.1.

¹⁵¹ Award of the Arbitrator, *Indonesia - Certain Measures Affecting the Automobile Industry*, ¶ 12, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (Dec. 7, 1998) [hereinafter *Indonesia Award*].

arbitrator determined that, taking into account Indonesia's status as a developing country and its then-dire economic and financial crisis, "the reasonable period of time for the implementation by Indonesia of the recommendations and rulings in this case is twelve months from the date of adoption of the Panel Report by the DSB, that is twelve months from 23 July 1998."¹⁵² In July 1999, Indonesia informed the DSB that it had effectively implemented the prescribed recommendations and rulings.

Since the complaining countries had not requested reparation of injury, the Panel made no findings in this respect. According to Article 19, paragraph 1 of the DSU:

[w]here 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.¹⁵³

It remains to be clarified in future WTO legal practice whether this text, as well as the admonition in paragraph 2 that "the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements," exclude recourse to the general international law rules on state responsibility and reparation of injury caused by violations of WTO rules.¹⁵⁴

5.3. *Arbitration Within the WTO Could Permit Extending the Applicable Law and Remedies by Mutual Agreement*

Even though most domestic legal systems limit abusive forum shopping as well as parallel and successive judicial proceedings over the same legal claims among the same parties, they recognize the legal autonomy of private parties to resolve their dispute by way of mutually agreed-upon arbitration, subject to a few exceptions for non-arbitrable legal matters such as criminal law, where national courts assert exclusive jurisdiction. Similarly, the DSU

¹⁵² *Id.* ¶ 25.

¹⁵³ DSU, *supra* note 33, art. 19.1.

¹⁵⁴ *Id.* art. 19.2

provides for exclusive jurisdiction of WTO dispute settlement bodies “[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements,”¹⁵⁵ without precluding mutually agreed-upon “arbitration within the WTO”¹⁵⁶ or unilateral recourse to international arbitration pursuant to procedures specified in a number of other DSU provisions,¹⁵⁷ the WTO Agreement on Subsidies,¹⁵⁸ and GATS.¹⁵⁹

According to Article 25.1 of the DSU, “[e]xpedition arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.”¹⁶⁰ Article 25 goes on to provide:

Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreement to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.¹⁶¹

The DSU does not specify whether arbitration within the WTO requires procedural links with the WTO dispute settlement system (e.g., WTO membership of all parties to the dispute and provision of “secretarial and technical support” by the WTO Secretariat as per Article 27.1 of the DSU)¹⁶² or substantive legal links (e.g., the application of WTO law in the dispute). The text of Article 25 suggests that these questions are left to the mutual agreement of the parties, subject to review by the DSB.¹⁶³ Article 3.5 of the DSU stipulates that “arbitration awards . . . shall be consistent with [the

¹⁵⁵ *Id.* art. 23.1.

¹⁵⁶ *Id.* art. 25.

¹⁵⁷ *Id.* arts. 21.3, 22.6, 22.7, 26.1.

¹⁵⁸ Agreement on Subsidies and Countervailing Measures, *supra* note 139, arts. 4.11, 7.10, 8.5.

¹⁵⁹ GATS, *supra* note 106, arts. 21–22. See generally Valerie Hughes, *Arbitration within the WTO*, in THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 41, at 75 (discussing the circumstances under which the DSU calls for exclusive jurisdiction of WTO dispute settlement bodies).

¹⁶⁰ DSU, *supra* note 33, art. 25.1

¹⁶¹ *Id.* art. 25.2.

¹⁶² *Id.* art. 27.1.

¹⁶³ *Id.* art. 25.

covered] agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements."¹⁶⁴

There has been only a single arbitration under Article 25 to date. In *United States – Section 110(5) of the U.S. Copyright Act – Recourse to Article 25 of the DSU*, the EC and the United States requested that the arbitrators determine the level of nullification or impairment of benefits resulting from the inconsistency of Section 110(5) of the U.S. Copyright Act with TRIPS Article 9, as previously determined in a WTO panel report adopted by the DSB.¹⁶⁵ The arbitrators determined that the level of EC benefits being nullified or impaired as a result of Section 110(5) amounted to \$1,100,000 per year.¹⁶⁶ Following protracted negotiations and successive status reports by the United States on its progress in implementing the WTO dispute settlement findings, the EC and United States informed the DSB in June 2003 of a mutually satisfactory temporary arrangement for financial compensation of the EC copyright holders concerned.

If WTO members do not want to elaborate case-specific arbitration procedures, they can have recourse to optional standard arbitration procedures, such as the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States* of 1992.¹⁶⁷ These rules have been elaborated for use in arbitrating disputes arising under public international law treaties and can be modified for use in connection with multilateral treaties. They are based on UNCITRAL arbitration rules with changes in order to:

- a) reflect the public international law character of such disputes and state practice pertaining to such treaties;
- b) indicate the role of the Secretary-General and the International Bureau of the PCA at the Hague for the administration of such arbitration proceedings; and

¹⁶⁴ *Id.* art. 3.5.

¹⁶⁵ Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000).

¹⁶⁶ Award of the Arbitrator, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/ARB25/1 (Nov. 9, 2001).

¹⁶⁷ *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States*, in PERMANENT COURT OF ARBITRATION BASIC DOCUMENTS, *supra* note 128, at 41–68.

- c) provide freedom for the parties to choose to have an arbitral tribunal of one, three, or five persons.

PCA publications emphasize that experience in arbitration since 1981 suggests that UNCITRAL arbitration rules, although originally designed for commercial arbitration, “provide fair and effective procedures for peaceful resolution of disputes between states concerning the interpretation, application, and performance” of public international law treaties,¹⁶⁸ and also “provide fair and effective procedures for peaceful resolution of disputes involving international organizations and States.”¹⁶⁹ PCA rules are optional and emphasize party autonomy and flexibility:

- a) the rules, and the services of the Secretary-General and the International Bureau of the PCA, are available for use by international organizations and by all states, even to those disputes in which the states concerned are parties to either the 1899 or 1907 Hague Convention for the Pacific Settlement of International Disputes;
- b) the choice of arbitrators is not limited to persons who are listed as members and potential arbitrators on the roster of the PCA;
- c) parties have complete freedom to agree upon any individual or institution (e.g. the WTO Director-General) as “appointing authority” if the parties cannot agree on the nomination of the arbitrators. The PCA rules provide that the PCA Secretary-General will designate an appointing authority if the parties do not agree upon the authority or if the authority they choose does not act;
- d) PCA “Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts” suggest certain modifications concerning the optional rules for naming arbitrators and sharing costs.¹⁷⁰

¹⁶⁸ *Id.* at 45.

¹⁶⁹ *Id.* at 101.

¹⁷⁰ *Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes*

Mutually agreed-upon arbitration within the WTO, pursuant to both Article 25 of the DSU and PCA optional arbitration rules, could offer a number of advantages, provided that both parties agree:

- a) The optional rules are flexible enough to permit agreement among the parties that the arbitration be held at the WTO premises, with the WTO Secretariat serving as registry, providing secretariat and legal services, and acting as a channel of communications between the parties.
- b) The parties could also agree on applying other DSU rules (e.g., on the choice of arbitrators, periods of time, hearing of experts) on a subsidiary basis to the extent they are consistent with PCA arbitration rules.

PCA optional rules on the choice of applicable law would enable parties to a dispute to choose not only WTO law as applicable but also any other treaty rule (e.g., in bilateral investment treaties and WIPO conventions) as well as general rules of international law (e.g., on reparation of injury caused by violation of international law rules). A major advantage of arbitration within the WTO could thus be the avoidance of multiple complaints inside and outside the WTO; this could avoid the risk of mutually conflicting rulings if WTO panels base their findings only on WTO law while arbitration outside the WTO does not take into account WTO law in view of the requirement in Article 23 of the DSU to "seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . [by] recourse to . . . the rules and procedures of this Understanding."¹⁷¹

Article 25.3 of the DSU not only provides for the possibility of participation by third-party WTO members in arbitration within the WTO but also requires that "arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto."¹⁷² Article 3.5 of the DSU stipulates that:

Arising under Multilateral Agreements and Multiparty Contracts, in PERMANENT COURT OF ARBITRATION BASIC DOCUMENTS, supra note 128, at 217-20.

¹⁷¹ DSU, *supra* note 33, art. 23.

¹⁷² *Id.* art. 25.3.

[A]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.¹⁷³

The discussion of arbitration awards in the DSB would not affect their legally binding effect among the parties to the dispute but could prove beneficial for clarifying interface problems between WTO law and the other fields of international law.

According to Article 25.4 of the DSU, "Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards."¹⁷⁴ Arbitration within the WTO therefore offers another advantage over arbitration outside the WTO, such as the availability of DSU rules for multilateral surveillance of implementation of dispute settlement rulings, compensation, and suspension of concessions as "temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time."¹⁷⁵ Article 23 of the DSU on "Strengthening of the Multilateral System," notably the prohibition of unilateral determinations of violations of WTO rules and the requirement to respect WTO dispute settlement procedures and rulings, likewise applies to "an arbitration award rendered under this Understanding."¹⁷⁶

Compared with DSU rules, PCA optional arbitration rules offer additional provisions, including interpretation and correction of awards, additional awards as to claims presented in the arbitral proceedings but omitted from the award, and determination and apportionment of the costs of arbitration in the award.

This short survey suggests that, for certain categories of disputes, the possibility of "[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement" could be more advantageous in terms of dispute settlement procedures,¹⁷⁷ applicable substantive international law, and available legal remedies than

¹⁷³ *Id.* art. 3.5.

¹⁷⁴ *Id.* art. 25.4.

¹⁷⁵ *Id.* art. 22.1.

¹⁷⁶ *Id.* art. 23.2.

¹⁷⁷ DSU, *supra* note 33, art. 25.

normal WTO panel and appellate review procedures.

5.4. *Simultaneous or Successive Recourse to WTO Dispute Settlement Procedures and the ICJ*

As many WTO members have accepted the jurisdiction of the ICJ pursuant to Article 36 of the ICJ Statute, an intergovernmental dispute in the WTO may be linked to related legal claims and dispute settlement proceedings in the ICJ. For instance, in the maritime delimitation dispute between Nicaragua, Colombia, and Honduras, Nicaragua submitted its maritime dispute with Honduras to the ICJ in December 1999. Colombia requested WTO consultations with Nicaragua in January 2000¹⁷⁸ and the establishment of a WTO panel in May 2000¹⁷⁹ to examine whether Nicaragua's trade sanctions in response to the maritime dispute were inconsistent with its GATT obligations. Honduras requested WTO consultations over the alleged inconsistencies of Nicaragua's countermeasures with GATT and GATS in June 2000 and reserved its third-party rights to intervene in the WTO panel proceeding between Nicaragua and Colombia.¹⁸⁰ In such parallel dispute settlement proceedings in the WTO and in the ICJ, the legal findings of one forum (e.g., on the legal justifiability of trade restrictions under the general international law rules on state responsibility and countermeasures) may be influenced by the legal findings in the other forum (e.g., on the violation of Nicaragua's rights under the law of the sea).

Concurrent trade-related investment disputes at the WTO and ICJ appear unlikely for a number of reasons. In contrast to the increasing number of international investment disputes under ICSID and NAFTA dispute settlement rules, states remain very reluctant to submit international investment disputes to the ICJ and the classical international law rules on the treatment of aliens and the protection of foreign-owned property. Similar to the few investment disputes submitted to the PCIJ—the 1926 and 1928 judgments of

¹⁷⁸ Request for Consultations by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188/1 (Jan. 20, 2000).

¹⁷⁹ Request for the Establishment of a Panel by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2 (Mar. 28, 2000). This panel was not composed.

¹⁸⁰ Request for Consultations by Honduras, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS201/1 (June 13, 2000).

the PCIJ in the *Chorzow Factory* case,¹⁸¹ the 1925 and 1927 judgments in the *Mavrommatis Palestine Concession* cases,¹⁸² the 1934 judgment in the *Oscar Chinn* case – the 1970 judgment by the ICJ in the *Barcelona Traction* case¹⁸³ and its 1989 judgment in the *ELSI* case¹⁸⁴ are illustrative of the fact that the ICJ seems to be perceived by most foreign investors and their home governments as a sub-optimal legal framework for the settlement of modern investment disputes.¹⁸⁵

Even though many WTO members have accepted the jurisdiction of the ICJ under multilateral WIPO conventions on the protection of intellectual property rights, no intellectual property dispute has ever been submitted to the ICJ to date. Yet some of the more than twenty dispute settlement proceedings under TRIPS¹⁸⁶ involved legal claims based, for example, on the Paris Convention on Industrial Property¹⁸⁷ and the Bern Convention for the Protection of Literary and Artistic Works,¹⁸⁸ each of which could have also been submitted to the ICJ pursuant to the dispute settlement provisions in these WIPO conventions.

Several other international agreements providing for the dispute settlement jurisdiction of the ICJ, such as Articles 84 and 86 of the 1944/1968 Convention on International Civil Aviation,¹⁸⁹ could

¹⁸¹ *Chorzow Factory* (F.R.G. v. U.S.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

¹⁸² *Mavrommatis Palestine Concession* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11-12 (Aug. 30) (noting the rule of exhaustion of local remedies as required by the case's holding).

¹⁸³ See *The Barcelona Traction, Light, and Power Company, Limited*, 1970 I.C.J. 3, 32 (Feb. 5).

¹⁸⁴ See *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20) [ELSI].

¹⁸⁵ See *supra* text accompanying notes 82-83; MUTHUCUMARASWAMY SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 340 (2000). On the decreasing role of the ICJ for the settlement of international economic disputes, see Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189, 202-04 (1999).

¹⁸⁶ See Frederick M. Abbott, *WTO Dispute Settlement Practice Relating to the Agreement on Trade-Related Intellectual Property Rights*, in *THE WTO DISPUTE SETTLEMENT SYSTEM*, *supra* note 41, at 421 (analyzing TRIPS disputes); Mitsuo Matsushita, *Appellate Body Jurisprudence on the GATS and the TRIPS Agreement*, in *THE WTO DISPUTE SETTLEMENT SYSTEM*, *supra* note 41, at 421 (analyzing the TRIPS jurisprudence of the Appellate Body).

¹⁸⁷ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (last revised at Stockholm, July 14, 1967).

¹⁸⁸ Bern Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (amended Oct. 2, 1979).

¹⁸⁹ Convention on International Civil Aviation, Dec. 7, 1944, arts. 84, 86, 61

also be relevant for related dispute settlement proceedings in the WTO (e.g., on international air transport services). WTO law includes few provisions dealing explicitly with such jurisdictional overlaps. For instance, section 2 of the GATS Annex on Air Transport Services provides that "[t]he Agreement, including its dispute settlement procedures, shall not apply to measures affecting (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights."¹⁹⁰ A different kind of regulation of jurisdictional problems is to be found in section 4, which provides that, "[t]he dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted."¹⁹¹ Article 22.3 of GATS offers an example for the possibility of international arbitration in the case of competing jurisdictions for consultations (Article 22) and dispute settlement (Article 23):

A Member may not invoke Article 27, either under this Article or Article 23, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.¹⁹²

If disputes outside the WTO (e.g., at the ICJ) also involve rights and obligations under WTO law, Article 23.1 of the DSU requires WTO members to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . [by] recourse to . . . the rules and procedures of this Understanding."¹⁹³ WTO law does not prevent the submission of

Stat. 1180, 15 U.N.T.S. 295.

¹⁹⁰ GATS, *supra* note 106, at Annex on Air Transport Services §2.

¹⁹¹ *Id.* at Annex on Air Transport Services §4.

¹⁹² GATS, *supra* note 106, art. 22.3.

¹⁹³ DSU, *supra* note 33, art. 23.1.

disputes over related obligations under other international treaties to the ICJ. If the dispute before the WTO dispute settlement bodies is limited to WTO law and the dispute before the ICJ is related to other international treaty rights and obligations, the simultaneous examination of all treaty obligations in order to reach a comprehensive settlement of the dispute may be in the interest of both parties. Should there be objections by the defending country to arbitration within the WTO on all of these treaty rights and obligations, the complaining country may unilaterally submit the WTO dispute to WTO panel proceedings and initiate ICJ proceedings for the protection of its other international treaty rights.

Neither the DSU¹⁹⁴ nor general international law rules (e.g., on *litis pendens*) seem to stand in the way of such simultaneous or successive WTO and ICJ dispute settlement proceedings on different, yet related, legal claims. In order to avoid incoherent dispute settlement findings, some coordination among concurrent and related dispute settlement proceedings in different fora is desirable. While WTO panel and Appellate Body reports have repeatedly referred to the jurisprudence of the ICJ, no ICJ judgment has so far referred to WTO law or jurisprudence. The differences in procedures for the settlement of disputes at the ICJ and the WTO might hinder such practical coordination. For example, the procedural requirement of prior exhaustion of local remedies—which was emphasized by the ICJ in its *ELSI* judgment—has never been applied in GATT and WTO dispute settlement practice.¹⁹⁵ In contrast to ICJ procedures, WTO dispute settlement procedures tend to be much quicker, are not limited to sovereign states, favor third-party intervention, and permit *amicus curiae* briefs. If, as in the case of many BITs, an international investment treaty provides for jurisdiction of an arbitral tribunal over the ICJ, some of these procedural differences and potential problems could be avoided by mutual agreement among the parties to the dispute—for instance, on the composition of the WTO panel and arbitral tribunal by the same arbitrators and the application of coherent dispute settlement procedures.

5.5. *Simultaneous or Successive Recourse to WTO, ICSID, or WIPO*

¹⁹⁴ See, e.g., *id.* at art. 23.1 *et. seq.* (establishing WTO dispute resolution mechanisms as the only mechanisms by which disputes related to WTO law can be resolved).

¹⁹⁵ Cf. Ernst-Ulrich Petersmann, *supra* note 10, at 240–44.

Dispute Settlement Procedures

Instead of requesting that its home state espouse and defend its legal claims by means of intergovernmental dispute settlement proceedings at the WTO, the ICJ, or under intergovernmental arbitration procedures, a foreign private investor, a service supplier protected under GATS, or an intellectual property holder protected under TRIPS might prefer to de-politicize and control its dispute with a foreign government—for example, so as to avoid adverse effects of intergovernmental dispute settlement proceedings on its future business in the host country. If, as in the case of many BITs, the investment agreement provides for either intergovernmental arbitration or mixed investor-state arbitration pursuant to ICSID arbitration procedures, the private complainant may directly invoke the ICSID clause in the BIT and submit its investment dispute to investor-state arbitration pursuant to ICSID procedures. ICSID arbitration proceedings offer various advantages when compared with intergovernmental arbitration, adjudication, or WTO panel proceedings.

ICSID conciliation (e.g., on the use of revision clauses in investment contracts) or arbitration procedures between the host state and the foreign investor can be kept confidential.¹⁹⁶ By avoiding the politicization frequent in intergovernmental disputes, ICSID procedures may increase the prospects for a mutually agreed-upon solution that safeguards the continued future operation of investments and the long-term interests of both parties.¹⁹⁷ The majority of the conciliation and arbitration cases registered by ICSID tend to conclude with settlements by the parties on agreed-upon terms before the rendering of an award.

The jurisdiction of the ICSID over “any legal dispute arising directly out of an investment”¹⁹⁸ is broad since the definition of the covered “investment disputes” is left to agreement among the par-

¹⁹⁶ The ICSID Secretariat is a neutral body that assists in the administration of conciliation and arbitration proceedings but does not itself engage in actual conciliation or arbitration.

¹⁹⁷ Cf. L. Michael Hager & Robert Pritchard, *Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets*, 14 ICSID REV. 1, 2-4 (1999) (arguing that ADR which takes the form of “deal mediation” “can be used to build the collaborative relationships which yield durable agreements in international commerce” and giving examples of deals which went forward thanks to the application of ADR).

¹⁹⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 88, art. 25.1.

ties. The “Additional Facility Rules” of 1978 authorize the ICSID Secretariat to administer conciliation and arbitration proceedings between states and nationals of other states which fall outside the scope of the ICSID Convention if one of the parties is not an ICSID Member State (or a national of an ICSID contracting state) or if the dispute does not arise directly out of an investment, provided it is not an ordinary commercial dispute.

Prior exhaustion of local remedies may not be necessary for ICSID arbitration.¹⁹⁹ ICSID arbitration may therefore lead to much quicker international judgments when compared with investment disputes before the ICJ that, as in the *ELSI* case, might be admissible only after exhaustion of local remedies that may take many years of court proceedings in the host country.

In the absence of agreement to the contrary, an ICSID tribunal “shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”²⁰⁰ Therefore, international law may not only be invoked to fill *lacunae* in the applicable host state’s law but also prevails in case of conflicts with the national law of the host state. Taking into account the applicable municipal law as well might avoid legal discrepancies, such as those that appeared in the ICJ’s *ELSI* judgment where the requisitioning of a foreign investment in clear violation of domestic law was held lawful under a Treaty of Friendship, Commerce, and Navigation (“FCN”) designed to protect foreign investors.²⁰¹

ICSID awards “shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”²⁰² Unlike private commercial arbitration, which tends to be subject to control and annulment by national courts in the case of grave irregularities, ICSID arbitration is self-contained in the sense that annulment procedures and other legal remedies against ICSID judgments are reduced to the mechanisms offered by the ICSID Convention itself.²⁰³ Moreover, “[e]ach Con-

¹⁹⁹ See *id.* art. 26 (providing that states may waive the general international law requirement of prior exhaustion of local remedies in order to consent to ICSID arbitration).

²⁰⁰ See *id.* art. 42.1.

²⁰¹ See Mann, *supra* note 82, at 100 (offering a criticism of the *ELSI* judgment on this point).

²⁰² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 88, art. 53.1.

²⁰³ See generally Aron Broches, *On the Finality of Awards: A Reply to Michael*

tracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."²⁰⁴ However, "[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."²⁰⁵

Even though several of the more than twenty multilateral treaties on intellectual property administered by WIPO provide for settlement of disputes by the ICJ, no intellectual property dispute has been submitted to the ICJ. The 1995 WIPO Draft Treaty on the Settlement of Disputes among States in the Field of Intellectual Property²⁰⁶ likewise continues to be opposed by the United States and other developed countries. The WIPO Arbitration and Mediation Center was established in 1994 in response to a perceived need for specially designed intellectual property dispute resolution procedures based upon mediation, arbitration, or expedited arbitration rules open to all persons regardless of nationality, residence, or other links to WIPO Member States.²⁰⁷ In addition:

A state entity may be party to a dispute submitted to a procedure administered by the Center, provided that the State entity has, like any other party to a dispute that is referred to the Center, validly expressed its consent in writing to the

Reisman, 8 ICSID REV. 92, 96 (1993) (noting criticism of the expansive reasoning used in some cases, notably *Klöckner Industrie-Anlagen GmbH v. Cameroon* and *Amco Asia Corp. v. Indonesia* to annul ICSID tribunal decisions). Broches notes that after *Maritime Int'l Nominees Establishment v. Guinea*, the earlier trend of asserting a quasi appellate review has been reversed.

²⁰⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 88, art. 54.1.

²⁰⁵ *Id.* art. 55.

²⁰⁶ World Intellectual Property Organization [WIPO], *Proposed Treaty on the Settlement of Disputes Between States*, SD/CE/VII/2 (Feb. 10, 1995).

²⁰⁷ See Francis Gurry, *The Dispute Resolution Services of the World Intellectual Property Organization*, 2 J. INT'L ECON. L. 385, 385 (1999) (noting that the WIPO Arbitration and Mediation Center "commenced operations in October 1994"). See generally WIPO EXPEDITED ARBITRATION RULES: RECOMMENDED CONTRACT CLAUSES AND SUBMISSION AGREEMENTS 5-72 (1994) (providing rules employed by the WIPO Arbitration and Mediation Center in mediations, arbitrations, and expedited arbitrations). For additional information, including WIPO arbitration and mediation rules, see generally <http://arbitr.wipo.int/center/index.html> (last visited April 8, 2006).

reference of the dispute to such a procedure.²⁰⁸

Since 2000, the newly developed WIPO electronic dispute resolution system for disputes over internet domain names²⁰⁹ has led to several thousand dispute settlement rulings about abusive registration of domain names on the Internet. The infrequent recourse to WIPO mediation and arbitration rules²¹⁰ can be attributed to the fact that, although the rules are said to accommodate the specific characteristics of intellectual property disputes (e.g., need for expert opinions, qualified arbitrators, admission of site visits, and experiments) and offer many advantages (including savings of time and cost, as well as party autonomy to choose the language and applicable law used), most private disputes over intellectual property rights continue to be settled in national courts or through commercial arbitration based on UNCITRAL or ICC rules that differ little from WIPO arbitration rules.²¹¹ Since many national legal systems remain reluctant *vis-à-vis* the submission of intellectual property disputes to arbitration, there also continues to be uncertainty amongst practitioners regarding the arbitrability of intellectual property disputes and the recognition and enforcement of such arbitral awards.²¹²

Mixed mediation or arbitration procedures between private and governmental entities in WIPO could offer similar advantages to ICSID procedures as compared to the more politicized WTO dispute settlement mechanisms. Yet that there are already more

²⁰⁸ World Intellectual Property Organization [WIPO], *THE SERVICES OF THE WIPO ARBITRATION CENTER* 18 (1995). In mediation and arbitration, state entities may also act as claimant and respondent. Cf. FREDERICK ABBOTT ET AL., *THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS*, PART TWO 1734-38 (1999) (defining mediation, arbitration, and expedited arbitration, as well as describing the procedure for arbitration).

²⁰⁹ See Gurry, *supra* note 207, at 396-98 (indicating that an online system for resolving disputes over domain names was under development and laying out concerns with regard to online dispute resolution generally).

²¹⁰ See, e.g., the case reported in *Activities of the WIPO Arbitration and Mediation Centre*, December 1999. The dispute settlement has remained confidential.

²¹¹ See generally HANS VAN HOUTTE, *THE LAW OF INTERNATIONAL TRADE* 384 n.6 (1995) (noting countries which have adopted or been inspired by the United Nations Commission on International Trade Law ("UNCITRAL") model).

²¹² See Jacques Werner, *Intellectual Property Disputes and Arbitration: A Comment on a Recent ICC Report*, 1 J. WORLD INTELL. PROP. 841, 842 (1998) (indicating that, because intellectual property rights are state-granted, there is some debate as to "whether a private arbitrator could decide that a right granted by a State authority is null and void, and if so, whether his decision would bind the state . . .").

than twenty WTO dispute settlement procedures under TRIPS suggests that multinational firms and other private entities favor petitioning their home government to initiate complaints over non-compliance with TRIPS obligations at the WTO. EC and U.S. trade legislation provides explicitly for such private remedies in response to other countries' noncompliance with TRIPS obligations. In addition, WTO member governments seem to prefer the compulsory jurisdiction and effective procedures of the WTO dispute settlement system rather than mixed or intergovernmental dispute settlement procedures through WIPO.

This current attitude could, however, change if the increasing number of intellectual property disputes in the WTO begin to have problems (perhaps because of limits on the scope of WTO law, on the legal remedies available, or on secretarial resources within the WTO) or if the commercial interests of private complainants in preserving ongoing business relationships prompts a preference for more discreet mixed dispute settlement procedures. Despite its limited case docket, the WIPO Arbitration Center seems to be innovating and influencing the procedures for the settlement of certain categories of intellectual property disputes.²¹³ The increasing recourse to ICSID dispute settlement procedures suggests that there might develop a similar demand for mixed arbitration or mediation of intellectual property disputes with governmental authorities where both parties prefer a speedy and confidential ad hoc solution of their dispute. The arguments in favor of decentralizing international investment disputes also hold for intellectual property disputes.

5.6. *Inconsistencies Between International and Domestic Judicial Review of Contingent Protection Measures*

Numerous WTO agreements include guarantees of private access to domestic courts. Article 13 of the Anti-Dumping Agreement, for example, requires members to "maintain judicial, arbitral or administrative tribunals [which can provide] . . . prompt [and independent] review of administrative actions relating to final determinations and reviews of determinations . . ." ²¹⁴ In the United

²¹³ See, e.g., Gurry, *supra* note 207, at 396-98 (describing a new Internet-based system of dispute resolution established by the WIPO Arbitration Center).

²¹⁴ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts—Results of the Uru-

States, parties that are involved in a final determination or in the final results of a review may have recourse to independent tribunals to challenge a determination by the U.S. Department of Commerce or the U.S. International Trade Commission.²¹⁵ Specifically, parties may challenge the final agency determination before the U.S. Court of International Trade, the Court of Appeals for the Federal Circuit, or the U.S. Supreme Court. Alternatively, in certain cases involving merchandise from Canada or Mexico, parties have the option of appearing before a dispute panel established under Chapter 19 of NAFTA.²¹⁶

Parallel or successive dispute settlement challenges of import restrictions, anti-dumping determinations, or countervailing duty determinations—e.g., in WTO dispute settlement proceedings, in regional courts (e.g., the ECJ), or in NAFTA panels and domestic courts—have become frequent in international trade relations. Yet among all the WTO agreements, only the Agreement on Government Procurement explicitly requires domestic courts to apply, and examine violations of, relevant WTO rules.²¹⁷ Because legislation in the EU and the United States on domestic implementation of WTO law limits the direct application of WTO rules in domestic courts,²¹⁸ many domestic court decisions ignore WTO rules and dispute settlement rulings, just as WTO dispute settlement rulings are sometimes inconsistent with domestic court decisions (e.g.,

guay Round, 1868 U.N.T.S. 201 [Not reproduced in I.L.M.].

²¹⁵ See, e.g., 19 U.S.C. § 1516 (2003) (allowing certain parties to appeal decisions regarding duties on imports to the U.S. Court of International Trade).

²¹⁶ See NAFTA, *supra* note 98, chp. 19, art. 1904 (providing for judicial review of final antidumping and countervailing duty determinations by NAFTA panels).

²¹⁷ See generally Agreement on Government Procurement, *supra* note 107, art. 20.2–8 (establishing standards for adjudicating complaints regarding the Agreement).

²¹⁸ See David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, in IMPLEMENTING THE URUGUAY ROUND AGREEMENTS, *supra* note 16, at 212 (describing the process by which the Uruguay Round agreements are given effect in U.S. law and stating that “the Uruguay Round Agreements themselves are unlikely to be directly applied in any proceeding other than a proceeding brought by the United States for the purpose of enforcing obligations under the agreements”); Petersmann, *supra* note 8, at 18–23 (providing an overview of the process by which EU law gained efficacy in domestic courts and suggesting implications EU and WTO law have for efforts to alter the UN charter); cf. Meinhard Hilf, *Negotiating and Implementing the Uruguay Round: The Role of EC Member States—The Case of Germany*, in IMPLEMENTING THE URUGUAY ROUND AGREEMENTS, *supra* note 16, at 134 (“[T]he European Court has ruled that at least GATT law shall not be considered as being directly applicable in the legal order of the EC.”).

those on dumping or injury caused by dumped imports). Such incoherence between domestic, regional, and WTO jurisprudence undermines legal security and the legitimacy of courts while increasing international transaction costs.²¹⁹ For example, the more than ten GATT and WTO panel, appellate, and arbitration reports delivered since 1993 on the inconsistency between the EC's import restrictions on bananas under GATT and GATS were preceded, paralleled, or followed by more than forty-five EC Court judgments that tended to ignore the violations of relevant GATT and WTO rules, as well as WTO dispute settlement rulings against the EC.²²⁰ At the national level in Germany, adversely affected banana importers challenged the EC's illegal import tariffs on bananas in the tax courts, the illegal import quotas and refusals of import licenses for bananas in administrative courts, and illegal restrictions of individual freedom of trade in violation of GATT, WTO, and EC law before the German Constitutional Court.

Even though these national, regional, and worldwide dispute settlement findings were directed against the same EC import restrictions, only a few national courts in Germany took into account the relevant GATT and WTO dispute settlement findings in refusing to apply the EC import restrictions given their legal inconsistency with WTO law.²²¹ The EC Court persistently ignored GATT and WTO dispute settlement findings, as well as the EC Treaty obligations to construe and apply EC law in conformity with international law, in the more than forty-five proceedings before the ECJ against the EC import restrictions on bananas.²²² Since most do-

²¹⁹ See SHANY, *supra* note 31, at 54-56 (providing examples of mutually inconsistent NAFTA, GATT, and WTO dispute settlement findings concerning the same trade measures, as well as discussing frequent submission of trade disputes among NAFTA members to multiple bodies concurrently).

²²⁰ See Petersmann & Pollack, *in* TRANSATLANTIC ECONOMIC DISPUTES, *supra* note 43, at 121-39 (detailing overviews and analyses of these GATT, WTO, and EC disputes); see also JOSÉ CHRISTIAN CASCANTE & GERALD G. SANDER, DER STREIT UM DIE EG-BANANENMARKTORDNUNG 110 (1999) (arguing that the ECJ erred when it decided in a case involving an EC member as a party that conflicts between GATT and EC rules regarding banana importation were irrelevant).

²²¹ On the legal primacy of WTO law over EC regulations, see Ernst-Ulrich Petersmann, *Darf die EG das Völkerrecht ignorieren?*, [1997] EUR. J. BUS. L. 325, 325-31.

²²² See PIERRE PESCATORE, LA PLACE DE L'EUROPE DANS LE COMMERCE MONDIAL 445, 458 (1994) (offering a criticism of the frequent "judicial protectionism" by the ECJ and its often introverted neglect of international law); see also Case C-53/96, *Hermès Int'l v. FHT Mktg. Choice BV*, 1998 E.C.R. I-3603, art. 30 (1997) (finding that "[i]t should . . . be possible in future [sic] for individuals to invoke compliance

mestic legal systems require judges to construe domestic law in conformity with international law, many international disputes could be avoided if domestic judges would take more seriously their obligation to defend the rule of law and protect domestic citizens against protectionist violations of international guarantees of freedom and non-discrimination—such as those in WTO law.

6. HOW SHOULD LEGAL CONSISTENCY BETWEEN INTERNATIONAL AND DOMESTIC DISPUTE SETTLEMENT PROCEEDINGS BE PROMOTED? THE NEED TO DISTINGUISH BETWEEN INTERNATIONAL TRADE DISPUTES ACCORDING TO THEIR UNDERLYING CONFLICTS OF INTERESTS

A government's reaction to a complaint by another government or a private complainant depends on an examination of the conflicts of interests and the relevant rules and procedures involved. Optimal dispute prevention and settlement strategies must target the source of conflicts of interests.²²³ Five different categories of international trade disputes can be distinguished according to their underlying conflicts of public and private interests; the optimal dispute prevention and settlement rules and procedures are likely to differ for each major category of international trade dispute.²²⁴ The successful recourse to mediation and conciliation in recent WTO practice raises the question of whether ADR should not be institutionalized more effectively in the WTO context for certain kinds of primarily political disputes.²²⁵ The ongoing legalization and judicialization of international trade relations calls for stronger horizontal and vertical judicial networks. This will render international and domestic dispute settlement proceedings more legally coherent, strengthen rule of law, and encourage the prevention or settlement of international disputes at the optimal national and international levels.²²⁶

with the appropriate provisions of the WTO agreements . . . before the courts"); *cf.* EC Treaty art. 300 (establishing requirements for a binding agreement between the Community and its Members).

²²³ See *infra* Section 6.1.

²²⁴ See *infra* Section 6.2.

²²⁵ See *infra* Section 6.3.

²²⁶ See *infra* Section 6.4.

6.1. *Optimal Dispute Prevention and Dispute Settlement Strategies Must Target the Source of Conflicts of Interests*

International economic relations and international economic law evolve through autonomous decisions made by private and public economic operators (e.g., investors, producers, traders, consumers, and government procurement agencies) and through multi-level governance by transnational corporations, local and national governments, regional organizations (e.g., the EC), and worldwide institutions (e.g., the WTO). International economic disputes reflect conflicts among these diverse private and public, national and international, interests. Just as negotiations and rule-making at the international level are preceded, influenced, and followed by domestic negotiations between government representatives, parliamentarians, and domestic constituencies, so must international dispute settlement procedures promote prevention and settlement of disputes directly at the source of the conflicts of interests at the national, regional, or worldwide level of decision-making. Hence, rules and procedures for the prevention and settlement of international trade disputes are needed in national laws at the level of international relations among states, in transgovernmental relations among government agencies (e.g., in international cooperation among competition authorities), in transnational relations among private economic actors (e.g., in private commercial arbitration), and in mixed relations among private and foreign public actors (e.g., in investor-state arbitration pursuant to ICSID procedures). The more legitimate and coherent these national, international, and transnational dispute prevention and settlement rules are, the more effective they are likely to be.

6.1.1. *Many international trade disputes involve conflicts among private interests rather than among state interests*

The classic international law paradigm of a dispute among states over conflicting national interests (e.g., in the determination of a territorial boundary) is misleading for many international trade and investment disputes involving the interests of private economic operators. Most international trade disputes have their origin in domestic conflicts of interests inside states, notably in conflicts among self-interested producers who are seeking protectionist measures to assist in their competition with imports and among the liberal trade interests of consumers and exporters. All WTO members have committed themselves to the legal and judi-

cial protection of long-term citizen interests in reciprocal trade liberalization, non-discriminatory conditions of competition, and the rule of law, although all of these are subject to comprehensive safeguard clauses and public interest exceptions permitting restrictions of trade if, for instance, imports “cause or threaten serious injury to domestic producers”²²⁷ or if import restrictions are necessary for the protection of non-economic public interests.²²⁸ In constitutional democracies, private conflicts of interests among producers, traders, and consumers should be decided by domestic courts in accordance with the applicable national and international rules ratified by domestic parliaments, while being mindful of WTO law.

6.1.2. *Choosing between dispute prevention and settlement*

The distinction between prevention and settlement of a dispute is fluid and depends on the perception of the parties involved. Many foreign policy conflicts (e.g., those over EC import restrictions on genetically modified organisms) were, for several years, deliberately left legally unsettled in the hope of reaching a negotiated solution. For example, in the GATT/WTO dispute over the EC import prohibitions on hormone-fed beef, the United States did not insist on establishment of a dispute settlement panel until it succeeded in replacing the 1979 Tokyo Round Agreement on Technical Barriers to Trade with the more stringent rules (e.g., those on science-based risk assessment procedures) in the WTO Agreement on Phytosanitary Standards.²²⁹ By first renegotiating the relevant substantive rules, the United States ensured the success of its subsequent WTO complaint.²³⁰ The Doha Ministerial Declaration on Access to Medicines of November 2001 and the

²²⁷ GATT, *supra* note 29, art. 19.1(a).

²²⁸ *Id.* arts. 20–21 (allowing protectionist measures for a variety of purposes, including the protection of “public morals” and national security).

²²⁹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Agreement on Sanitary and Phytosanitary Standards].

²³⁰ See Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, United States, ¶ 9.1, WT/DS26/R (Jun. 30, 1997) (declaring the EC to have violated the Agreement on the Application of Sanitary and Phytosanitary Measures); see also Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R (Jan. 16, 1998) (upholding in part the Panel Report).

subsequent WTO waiver granted from Article 31(f) of TRIPS in August 2003 are further illustrations of successful dispute prevention through negotiation and clarification of WTO rules in a manner rendering WTO dispute settlement proceedings challenging compulsory licenses, parallel imports of low-priced medicines, or importation of generic drugs more unlikely.²³¹ A few months prior to the Doha Ministerial Declaration, Brazil and the United States had negotiated a mutually satisfactory solution that enabled the suspension of the WTO panel proceeding on the U.S. complaint that the "local working" requirement and threat of compulsory licenses in Brazil's patent legislation amounted to a violation of GATT Article III and TRIPS Articles 27 and 28.²³²

6.1.3. *Choosing among different negotiation strategies*

Governments, like private negotiators, have to choose between power-oriented negotiations (with explicit or implicit reference to their relative power and bargaining chips) and rule-oriented negotiations or adjudication aimed at enforcement of rules that were previously agreed upon by both parties.²³³ Negotiation theories²³⁴ distinguish between three different kinds of negotiation strategies:

1. soft bargaining over positions in which a negotiator wants to avoid personal conflict with the other side and makes concessions readily in order to reach agreement and an amicable resolution;
2. hard bargaining over positions over which a negotiator

²³¹ Cf. Symposium, *Health and the WTO*, 5 J. INT'L ECON. L. 821, 822 (2002) (discussing "[t]he place of health in international trade law").

²³² See Panel Report, *Brazil – Measures Affecting Patent Protection*, WT/DS199 (Jan. 8, 2001) (providing details regarding the preliminary case).

²³³ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109 (1997) (distinguishing between rule-oriented and power-oriented negotiation methods); see also Ernst-Ulrich Petersmann, *supra* note 10, at 66–70.

²³⁴ See FISHER & URY, *supra* note 9, at 13 (providing a table depicting negotiation strategies appropriate to various negotiating situations); see also ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 142–44 (1994) (suggesting the use of appropriate negotiating strategies necessary to deal productively with conflict, which is unavoidable); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES* 3–15 (1988) (describing the groundwork which must obtain for dispute resolution efforts to be successful); JOHAN KAUFMANN, *CONFERENCE DIPLOMACY: AN INTRODUCTORY ANALYSIS* 23–25 (1968) (defining and discussing negotiation methods applied at international conferences).

sees the divergent positions as a contest of wills and wants to win by taking extreme positions and holding out longer;

3. principled negotiations in which a negotiator looks for mutual gains and a “wise agreement” by separating the personal relationship from the substantive problem, focusing on interests (rather than positions), inventing options for mutual gain, and insisting that the agreement reflect some fair standard independent of the naked will of either side. Positional bargaining may not only be power-oriented and damage the personal relationship between parties but may also lead to unwise agreements with high implementation costs. By separating people from the problem, principled negotiations help to maintain a mutually beneficial relationship among parties, to base the substantive agreement on objective principles that reflect the agreed-upon long-term interests of all parties, and to serve as fair standards for settling disputes over conflicts among their short-term interests.

The appropriate legal strategy may depend not only on the governmental determination of the public interest but also on the private interests and factual, legal, and financial inputs from private actors involved in the economic dispute. The interests may go beyond an individual dispute to secure a package deal resolving a number of different disputes or may reflect systemic interests in judicial clarification of controversial rules in order to prevent future disputes. In constitutional democracies, governments are required to promote the public interest, as defined by the constitutional rights of their citizens, by enacting democratic legislation, protecting general consumer welfare, guaranteeing consumer-driven competition and non-discriminatory regulation of market failures, and by preventing governmental failures.

6.2. Five Different Categories of International Trade Disputes

The habits of lawyers when distinguishing GATT disputes from GATS, TRIPS, ICJ, ICSID, WIPO, EC, and other international economic disputes (e.g., in regional courts and private arbitration) are due to the fact that the relevant procedures and substantive

rules for the prevention or settlement of a dispute differ depending on the applicable law. The legal expertise required for the proper conduct and evaluation of disputes in these diverse areas of international economic law also differs considerably. No single international lawyer can follow the vast jurisprudence and legal practice in all these areas. Legal experts specialized in ICJ, ICSID, or WIPO dispute settlement proceedings tend to be different from those specialized in WTO, NAFTA or EC disputes. In most developed and less-developed countries, governments involved in dispute settlement proceedings can no longer rely exclusively on the in-house legal services within their national ministries of justice, economic affairs, or foreign affairs. Even the EU and the United States, with their vast legal resources, often include specialized outside lawyers (e.g., from private law firms or academia) in their legal teams preparing litigation strategies, written submissions, rebuttals, and rejoinders.

In order to design effective dispute prevention and settlement strategies, different kinds of economic disputes must be distinguished according to the public and private interests involved.²³⁵

6.2.1. *Secondary disputes over prohibited trade discrimination: Domestic legal and judicial remedies can prevent intergovernmental disputes*

Most WTO disputes are about discriminatory import restrictions or export subsidies that are inconsistent with the self-imposed WTO obligations of governments (e.g., GATT Articles I-III) and, according to welfare economics, reduce the consumer welfare of domestic citizens. Even though WTO law permits various kinds of import protection (e.g., pursuant to GATT Articles II, VI and XIX) and domestic subsidies, governments are often pressured to resort to prohibited and non-transparent forms of trade protection for the benefit of powerful domestic interest groups in exchange for political support (e.g., for election campaigns and other domestic legislation). Such intergovernmental disputes over welfare-reducing trade discrimination can be described as secondary conflicts among states that arise when governments fail to use first best policy instruments, such as the nondiscriminatory inter-

²³⁵ See generally Ernst-Ulrich Petersmann, *Prevention and Settlement of Transatlantic Disputes*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US AND THE WTO*, *supra* note 43, at 34, 583.

nal regulation of either market failures or supply of public goods, at home for domestic political reasons.

Reciprocal WTO commitments and domestic implementation and enforcement of WTO rules can assist governments in overcoming the producer biases of national trade policymaking by committing governments to reciprocal guarantees of the rule of law and the protection of general citizen welfare. In constitutional democracies, such government failures can be prevented most effectively by empowering adversely affected citizens to defend the rule of law by enforcing precise, unconditional, and democratically-approved WTO prohibitions of trade discrimination in domestic courts. As confirmed by the EC's common market rules, national judges have long-standing expertise in enforcing such prohibitions of discrimination in economic and other fields of law (e.g., human rights, labor, and constitutional law). Many WTO dispute settlement proceedings might be prevented by empowering domestic citizens and national judges to protect the rule of law (including compliance with precise and unconditional WTO guarantees of freedom, non-discrimination, and the rule of law) against discriminatory interest-group politics and administrative protectionism in violation of the democratically-approved WTO obligations of governments.

6.2.2. *Primary disputes over non-discriminatory internal regulation: The need for judicial deference at national and international levels*

The increasing number of regulatory disputes over non-discriminatory internal regulations—such as product, production, tax, health, and environmental regulations—reflect different conflicts of interests. Economic and democratic theory explain that nondiscriminatory internal regulations may legitimately differ from country to country as long as they comply with relevant non-discrimination, necessity, and other legal requirements (e.g., for transparent risk-assessment and approval procedures for national standards pursuant to the WTO Agreement on the Application of Sanitary and Phytosanitary Standards).²³⁶ Respect for democracy, the sovereign equality of states, regulatory competition, and international regulatory cooperation tend to be first-best policy instru-

²³⁶ Agreement on Sanitary and Phytosanitary Standards, *supra* note 229, arts. 7–8.

ments, requiring positive and negative comity, mutual recognition of equivalent standards,²³⁷ or internationally agreed-upon harmonization of divergent national rules. Such intergovernmental disputes require national and international judicial deference *vis-à-vis* legitimate, democratic rule-making. As foreign interests tend to be under-represented in this sort of behind-the-border regulation, related disputes often involve claims of indirect de facto discrimination prohibited by WTO Article XVII.²³⁸ In cases of non-discriminatory measures (e.g., prohibition of genetically modified organisms), there may be primary conflicts of interests due to legitimate regulatory and democratic divergences (e.g., more science-based health standards in the United States than in Europe) that often cannot be overcome through international adjudication.

6.2.3. *"High policy disputes" to be prevented and settled through political negotiations*

International dispute settlement practice (e.g., in GATT and at the WTO) suggests that there may be high policy disputes whose political dimensions are inappropriate for judicial proceedings. The security exceptions in GATT and WTO law²³⁹ are drafted and interpreted so broadly that economic sanctions for foreign policy reasons (e.g., sanctions in response to expropriations of foreign property in Cuba, apartheid policy in South Africa, or the military occupation of the Malvinas islands by Argentina) have been rarely challenged in GATT and WTO dispute settlement proceedings. The 1984 GATT panel report on Nicaragua's complaint against U.S. import restrictions imposed for foreign policy reasons concluded that the import restrictions violated GATT Article XIII:2. As the United States had not invoked any GATT exceptions, the panel re-

²³⁷ For examples of mutual recognition of equivalent standards, see the Agreement on Technical Barriers to Trade, art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Agreement on Technical Barriers to Trade]; Agreement on Sanitary and Phytosanitary Standards, *supra* note 229, art. 4; and GATS, *supra* note 106, art. 7.

²³⁸ See, e.g., GATT, *supra* note 29, art. 3 (requiring national treatment for taxation and regulation); GATS, *supra* note 106, arts. 2, 17 (outlining most favored nation treatment); see also Francesco Ortino, *WTO Jurisprudence on De Jure and De Facto Discrimination*, in WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 41, at 217.

²³⁹ See, e.g., GATT, *supra* note 29, art. 21 (stating that nothing in the Agreement prevents parties from taking any action it considers necessary for the protection of essential security interests with respect to fissionable material or arms in wartime).

port did not examine whether the violation of Article XIII:2 could be justified under GATT Article XXI.²⁴⁰ Both parties recognized that Nicaragua's rights to take countermeasures under GATT Article XXIII:2 were not practical in view of the U.S. trade embargo, and that the termination of the U.S. sanctions depended on a resolution of the foreign policy conflict.

In the WTO dispute over the Helms-Burton legislation extending U.S. sanctions against Cuba to companies from the EC that engaged in business transactions with Cuba, the EC requested the establishment of a WTO dispute settlement panel when bilateral consultations failed to settle the dispute. The EC thereby strengthened its negotiation position by demonstrating that a WTO dispute settlement ruling against the United States was a credible BATNA. Afterwards, the EC preferred to negotiate—in the shadow of the law—a bilaterally agreed-upon settlement of the dispute as part of a broader Understanding with Respect to Disciplines for the Strengthening of Investment Protection, which both parties proposed for inclusion into a multilateral investment agreement.²⁴¹ By drawing attention to legally available alternatives and transforming the bilateral dispute into a multilateral dispute prevention strategy, the EC succeeded in elaborating a mutually beneficial political solution.

Third-party adjudication in the WTO may be inappropriate in areas of broad foreign policy discretion. Until recently,²⁴² less-developed WTO members never challenged the political conditions attached to the voluntary Generalized System of Preferences ("GSP") granted by developed countries through GATT or WTO dispute settlement proceedings. India carefully limited its successful WTO panel proceeding in 2003 to the drug arrangements for combating drug production and trafficking in Pakistan, without

²⁴⁰ See Panel Report, *United States – Trade Measures Affecting Nicaragua: Communication from Nicaragua*, L/5802 (May 6, 1985); GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, C/M/188 (June 28, 1985) (detailing the dispute between Nicaragua and the United States). On this dispute and other GATT practices relating to Article XXI, see WORLD TRADE ORGANIZATION, *GUIDE TO GATT LAW AND PRACTICE* 600-08 (noting the interpretation and application of Article XXI).

²⁴¹ See Hugo Paemen, *Avoidance and Settlement of "High Policy Disputes": Lessons from the Dispute over "The Cuban Liberty and Democratic Solidarity Act"*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE U.S. AND THE WTO*, *supra* note 43, at 361-70.

²⁴² For the complaint by India challenging the consistency of the EC's conditions for the granting of tariff preferences, see *supra* note 100.

challenging the human rights conditionality and environmental conditionality of the EC's GSP. Judicial deference towards policy discretion also explains the longstanding GATT and WTO jurisprudence that legislation authorizing future violations of WTO rules is presumed to be WTO-compatible as long as such violations are not mandated and remain a matter of discretion.²⁴³

6.2.4. *International disputes over private rights should be left to domestic courts and transnational arbitration*

Most disputes over foreign trade restrictions, investments, and intellectual property rights are settled through negotiations, recourse to domestic courts, or mixed investor-state arbitration (e.g., pursuant to ICSID, UNICTRAL, or NAFTA Chapter 11 rules). Less than ten percent of all WTO disputes refer to intellectual property claims based on TRIPS, to claims that trade-related investment measures are inconsistent with GATS rules protecting services suppliers, or to TRIMS protections for foreign investors.²⁴⁴ While most WTO disputes challenge general legislative or regulatory measures, some of them relate to private commercial disputes among private companies, like the WTO dispute over the conflicting claims of EC and U.S. competitors over the trademark "Havana Club."²⁴⁵

Some of the more than twenty investor-state arbitration proceedings under NAFTA Chapter 11 over private claims demanding compensation for regulatory takings have been widely criticized because of an alleged producer bias of NAFTA rules in favor of

²⁴³ On the GATT and WTO jurisprudence that legislation mandating a violation of WTO obligations can be WTO-incompatible, while legislation giving executive discretion to violate those obligations may be WTO-compatible, see Sharif Bhuiyan, *Mandatory and Discretionary Legislation: The Continued Relevance of the Distinction under the WTO*, 5 J. INT'L ECON L. 571, 573 (2002) (explaining the distinction made between mandatory and discretionary legislation in GATT and WTO jurisprudence).

²⁴⁴ For a discussion of the four WTO disputes relating to TRIMS, see Martha Lara de Sterlini, *The Agreement on Trade-Related Investment Measures*, in THE WORLD TRADE ORGANIZATION: LEGAL, POLITICAL AND ECONOMIC ANALYSIS 537, 537 (Patrick F.J. Macrory et al. eds., 2005) (providing an overview of TRIMS and related WTO jurisprudence).

²⁴⁵ See Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones): Complaint by the United States*, WT/DS26/R (Aug. 18, 1997); see also Appellate Body Report, *United States – Section 211 Omnibus: Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002) (adopted Jan. 2, 2002) (noting the panel's conclusions on Section 211). See generally Abbott & Cottier, *supra* note 115.

broadly defined investor rights based on the traditional international minimum standards for the protection of aliens, non-transparent arbitration proceedings, and their one-sided focus on private rights over public interests.²⁴⁶ Rather than politicizing and transforming disputes over private rights into intergovernmental WTO disputes with the possibility of welfare-reducing trade sanctions, governments should leave such disputes to domestic courts and transparent international court proceedings based on nondiscriminatory rules, as it is done inside the EC where the EC Treaty “in no way prejudice[s] the rules in Member States governing the system of property ownership.”²⁴⁷ Since private property is protected in the national constitutional laws of all EC Member States, and every EC Member State also accepted the guarantees of private property in Protocol 1 to the ECHR, disputes over regulatory takings by EC Member States are decided on the basis of nondiscriminatory rules and transparent procedures in national courts subject to review by the ECtHR. Just as traders and investors from other EC Member States are protected in a nondiscriminatory manner by domestic courts inside the EC based on national and internationally agreed-upon rules, disputes involving traders and investors from other WTO member countries could be settled most effectively by domestic courts, provided that they duly note international law, including democratically approved WTO rules.

6.2.5. *Surveillance of implementation of WTO dispute settlement rulings may lead to political and legal follow-up disputes*

The adoption of dispute settlement findings by the WTO entails “recommendations” and/or legally binding rulings²⁴⁸ that usually settle the legal dispute over the correct interpretation of WTO rules. This clarification of the primary legal rights and obligations of the WTO members concerned does not, however, necessarily ensure a definitive political settlement of the dispute by means of compliance with the secondary WTO obligations “to secure the withdrawal of the measures concerned if these are found

²⁴⁶ See generally INT’L INST. FOR SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTORS RIGHTS (2000), available at http://www.iisd.org/pdf/trade_citizensguide.pdf (last visited Apr. 8, 2006) (outlining the use of NAFTA Chapter 11 by multinational corporations to challenging public regulations, and the problems therein).

²⁴⁷ EC Treaty art. 295.

²⁴⁸ See DSU, *supra* note 33, art. 21; GATT, *supra* note 29, art. 23.

to be inconsistent with the provisions of any of the covered agreements."²⁴⁹ In the WTO disputes over EC import restrictions on bananas and hormone-fed beef, or over the U.S. export subsidies for foreign sales corporations ("FSCs"), the WTO dispute settlement rulings were not implemented within the "reasonable period of time"²⁵⁰ and led to follow-up disputes over the consistency of WTO implementing measures and the amount of countermeasures pursuant to Article 22 of the DSU. Even if the legal dispute settlement findings have been accepted at the international level, their domestic implementation (e.g., through changes of domestic legislation) may entail additional legal, political, and economic disputes at the WTO (e.g., "compliance panel proceedings" pursuant to Article 21 of the DSU) or at home—for instance, in the political efforts at getting a parliamentary majority for new legislation and fending off interest group claims for financial compensation. The DSU rules on "Surveillance of Implementation of Recommendations and Rulings,"²⁵¹ and "Compensation and the Suspension of Concessions"²⁵² recognize the different legal and political dimensions of such follow-up disputes by providing for recourse to arbitration and special panel procedures with short deadlines.

6.3. Institutionalizing ADR Methods for Certain Kinds of WTO Disputes

In contrast to the frequent recourse to mediation and conciliation for the settlement of private international business disputes, Article 5 of the DSU on good offices, conciliation, and mediation has been invoked in WTO practice only rarely. Under GATT 1947, there had been only three cases in which the provisions on good offices, mediation, and conciliation by the Director-General (e.g., in paragraph 8 of the 1979 GATT Understanding on Dispute Settlement) had been resorted to.²⁵³ All three cases involved complaints against developed countries. Two of these mediation efforts by the

²⁴⁹ See DSU, *supra* note 33, art. 3.7.

²⁵⁰ *Id.* art. 21.

²⁵¹ *Id.*

²⁵² *Id.* art. 22.

²⁵³ For analysis of cases such as the dispute between the EC and the United States regarding EC tariff treatment of citrus products in 1982, between the EC and Japan concerning pricing and trading practices for copper in Japan in 1987, and between the EC and Canada concerning Article XXIV negotiations in 1988, see Course on Dispute Settlement, *supra* note 114.

Director-General, or by his representative, were not successful (i.e., the mediation by the Director-General in the 1982 *Citrus Preferences* dispute between the EC and the United States and the good offices by the Director-General in the 1992 *Banana* dispute between developing countries and the EC). The very limited success of the mandatory conciliation phase in the Subsidies Committee pursuant to the 1979 Tokyo Round Agreement on Subsidies has prompted WTO members to refrain from making conciliation compulsory under the dispute settlement provisions of the WTO Agreement on Subsidies prior to submission of the dispute to a WTO panel.

In a communication dated July 17, 2001, the Director-General notified WTO members of his willingness to assist them in good offices, mediation, and conciliation pursuant to Article 5.6 of the DSU and emphasized the need for making Article 5 operational.²⁵⁴ The communication set out detailed procedures for requesting action pursuant to Article 5 of the DSU.²⁵⁵ For the first time in GATT and WTO dispute settlement practice, applicants are requested to specify the nature of their Article 5 demand in view of the legal differences between good offices, conciliation, and mediation.²⁵⁶ As neither the Director-General nor his deputy are trained mediation and conciliation experts, the procedures enable the Director-General to allow Secretariat staff and/or outside consultants to assist in the process and ensure that such support staff has no direct involvement in the dispute in question either before or after the Article 5 procedure. The communication states that:

[T]he Director-General does not expect to provide “advisory opinions,” strictly speaking, although informal non-legal advice regarding the best path to finding a solution may be appropriate. Legal conclusions regarding a particular dispute are best left to the formal dispute settlement process. Rather, Article 5 proceedings should be seen more

²⁵⁴ See Communication from the Director-General, *Article 5 of the Dispute Settlement Understanding*, WT/DSB/25 (July 17, 2001) (noting current practices related to Article 5 DSU) [hereinafter Communication from the Director-General].

²⁵⁵ *Id.* Attachment B.

²⁵⁶ See *id. passim*. Good offices, conciliation, and mediation are three different ways the Director-General may participate in resolving differences between Member States. Good offices focus on logistical and Secretariat support. Conciliation involves direct participation in negotiations. Mediation entails proposing solutions (if appropriate). The Director-General may change roles with some flexibility.

as efforts to assist in reaching a mutually agreed-upon solution. It should also be recalled that Article 25 provides for Arbitration and the Director-General does not wish to encroach upon this provision of the DSU.²⁵⁷

Article 5 of the DSU was invoked for the first time in September 2002 in a joint request for mediation by the Philippines, Thailand, and the EC. The purpose of the requested mediation process was:

[T]o examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in ACP states. In the event that the mediator concludes that undue impairment has in fact occurred, the mediator could consider means by which this situation may be addressed.²⁵⁸

In the spring of 2003, the EC accepted the unpublished mediation proposal and implemented it through an EC regulation.

The "Procedures for Requesting Action Pursuant to Article 5 of the DSU" – as attached to the Communication from the Director-General dated July 17, 2001 – do not deal with all the ADR techniques that are commonly used in private business law in order to avoid recourse to court litigation (such as mini-trials).²⁵⁹ In WTO law no less than in private business law, ADR methods and forum choice become increasingly important in certain kinds of disputes (e.g., involving trade-related intellectual property rights, private investment rights of services suppliers, and government procurement contracts) which may be submitted, alternatively or simultaneously, to domestic, regional, or worldwide dispute settlement procedures in national or regional courts, transnational ICSID and WIPO arbitration, or intergovernmental WTO dispute settlement proceedings. The successful WTO mediations in 2002 and 2003 suggests that disputes over trade-distorting effects of trade preferences (e.g., under the GSP, customs unions, and free trade areas)

²⁵⁷ *Id.*

²⁵⁸ Communication from the Director-General, *Request for Mediation by the Philippines, Thailand, and The European Communities*, ¶ 3, WT/GC/66, (Oct. 16, 2002).

²⁵⁹ Communication from the Director-General, *supra* note 254.

may be easier to settle through recourse to political third-party mediation in the WTO than through quasi-judicial procedures, especially if the complainant appeals to the political discretion of preference-granting countries rather than—as in the case of India's complaint against the EC's tariff preferences for combating drug production in Pakistan—challenges the legal inconsistency of discriminatory tariff preferences with GATT Article I and the Enabling Clause.²⁶⁰

Why is it that ADR is increasingly being recognized as an important alternative to adversarial arbitration or court litigation whose higher costs, longer duration, and sometimes less predictability (e.g., in case of juries and punitive damages) are viewed as less advantageous than ADR in private national and international commercial law but apparently not in public international law?²⁶¹ State practice in multilateral treaty relations with compulsory jurisdiction (such as WTO law) suggests that governments prefer to invoke and enforce their rights in "private/public partnerships in WTO litigation."²⁶² Private economic operators may be reluctant to compromise the rule of law through ad hoc solutions to individual disputes that may undermine future legal predictability and certainty. The preconditions and potential advantages of ADR in private commercial relations (e.g., private control over the dispute, and the avoidance of long, unpredictable, and costly court proceedings and jury verdicts) are very different from those in WTO dispute settlement proceedings that tend to be short, predictable and less costly than private arbitration (the costs of WTO dispute settlement proceedings tend to be covered by the governments involved). WTO dispute settlement proceedings are also likely to create precedents for the future interpretation of WTO rules in future disputes affecting other governments and private economic operators beyond the control of parties to a dispute.

As in private business law, the interests of the economic operators affected by violations of WTO rules may not necessarily correspond to the self-interests of their attorneys or to the diplomatic interests of their home governments. The legal remedies available in alternative fora may vary considerably (e.g., reparation of injury

²⁶⁰ See Panel Report, *supra* note 100.

²⁶¹ See e.g. Berman, *supra* note 62, at 451-64 (discussing alternative dispute resolution and international law).

²⁶² See generally SHAFER, *supra* note 40 (discussing public/private partnerships in detail).

and financial compensation being available on the basis of general international law principles of state responsibility in ICJ and ICSID but not in WTO proceedings). Private producers, investors, importers, exporters, and service suppliers may have good reasons to handle and control certain dispute settlement proceedings themselves (e.g., in domestic court proceedings or mixed international arbitration proceedings) rather than requesting their home government to take up their complaint in the WTO. The initiative by the WTO Director-General in July 2001 for more effective mediation and conciliation procedures should not preclude further consideration of the usefulness of an "ADR Centre" financed by private industries (and complementing the Advisory Centre for WTO Law established in 2001). This would offer—for certain categories of disputes, such as the independent review procedures outlined in Article 4 of the WTO Agreement on Preshipment Inspection for Disputes Among Pre-shipment Inspection Companies and Exporters—the option of alternative neutral evaluation, mini-trials, and other ADR techniques by trained mediators.

6.4. Need for Promoting Comity Among International Tribunals and Judicial Cooperation in the Enforcement of the Rule of Law

The legalization of international trade relations and the proliferation of international courts have led to more judicial dispute settlement in international relations.²⁶³ In addition to the increasing number of worldwide and regional courts and (quasi-)judicial dispute settlement procedures (e.g., pursuant to regional and worldwide human rights, trade, and environmental agreements), individual access to justice has become recognized as a human right²⁶⁴ and contributes to the emergence of a global community of courts.²⁶⁵ An increasing number of worldwide and regional trade agreements explicitly guarantee individual access to domestic courts and judicial remedies against illegal trade restrictions. If export industries, for example in the United States, want to chal-

²⁶³ See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191, 191 (2003) (describing the increasing use of international dispute resolution courts and tribunals). Shany lists more than twenty new international adjudicative mechanisms and quasi-judicial procedures established since the mid-1980s. See SHANY, *supra* note 31, at 5-7.

²⁶⁴ See generally Harlow, *supra* note 14, *passim* (arguing access to legal services is an important part of a human rights agenda).

²⁶⁵ See Slaughter, *supra* note 263.

lenge foreign trade restrictions, they may either petition the U.S. government to initiate intergovernmental dispute settlement proceedings in worldwide or regional fora (e.g., at the WTO or pursuant to NAFTA Chapter 20²⁶⁶), or they may initiate judicial proceedings themselves in foreign courts or regional courts (e.g., in the EC Court, EFTA, NAFTA panel proceedings pursuant to Chapter 19, or mixed arbitration pursuant to NAFTA Chapter 11). Export industries in developing countries, by contrast, often lack the financial and legal resources for equivalent transnational or intergovernmental litigation strategies.²⁶⁷

The increasing number of international courts and (quasi-) judicial procedures have been established independently on the basis of different treaties with different objectives and constituencies. Hence, there is no formal hierarchy between the different international courts. For example, even though the ICJ has jurisdiction to adjudicate any legal dispute between states, UN Member States remain free to submit their legal disputes to other international courts of general jurisdiction (like the PCA) or specialized jurisdiction (like the UN Law of the Sea Tribunal).²⁶⁸ Competing jurisdictions are also frequent for private international complaints—for example, complaints based on regional or worldwide human rights instruments.²⁶⁹ Even after intergovernmental judicial proceedings

²⁶⁶ See NAFTA, *supra* note 98, ch. 20 (outlining institutional arrangements and dispute settlement procedures).

²⁶⁷ For more information on developing countries' frequent lack of legal infrastructure allowing private and public partnerships to challenge foreign trade restrictions (e.g., domestic legislation similar to Section 301 of the U.S. Trade Act or the EC's Trade Barriers Regulation for cooperation among the government agencies in preparing a WTO dispute settlement proceeding and private economic interest), see generally Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO (International Centre for Trade and Sustainable Development 2003).

²⁶⁸ The non-exclusive jurisdiction of the ICJ is emphasized in Article 95 of the UN Charter. See U.N. Charter art. 95 ("Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.").

²⁶⁹ See SHANY, *supra* note 31, at 8 ("[O]n some forty occasions human rights complaints have been lodged by the same individuals under more than one human rights mechanism . . ."). There have also been cases of overlapping jurisdiction between the UN Human Rights Committee and the ILO's Freedom of Association Committee since both monitor freedom of association. *Id.* at 48. The ILO also had to deal with cases previously submitted to regional human rights procedures.

have been initiated, ADR mechanisms remain important, as reflected in those ICJ judgments which call for further negotiations among parties to a dispute, define the legal principles to be taken into account in such alternative dispute settlements, or otherwise induce parties to reach a negotiated settlement.²⁷⁰

The clauses for submission of disputes to the ICJ in the conventions on the protection of intellectual property rights administered by WIPO or in the Constitution of the International Labour Organization have never been used for submitting such economic and social disputes to the ICJ. Whereas earlier FCNs²⁷¹ used to include compromise clauses providing for the settlement of disputes by the ICJ, most modern BITs now provide for investor-state and interstate arbitration rather than for ICJ jurisdiction. Regional economic integration²⁷² and WTO law²⁷³ often provide for exclusive jurisdiction to their respective dispute settlement bodies if "Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements" ²⁷⁴ Such exclusive jurisdiction clauses have, however, not prevented simultaneous or successive trade disputes at the WTO and in regional fora (e.g., the ECJ and NAFTA panels) to scrutinize the same governmental measures from different legal perspectives. According to NAFTA Article 2005,

[s]ubject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.²⁷⁵

²⁷⁰ See, generally, INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, 324-69 (Connie Peck & Roy S. Leeds eds., 1997) (debating past and future development of the ICJ).

²⁷¹ See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Arg., July 27, 1853, 10 Stat. 1005.

²⁷² See, e.g., EC Treaty art. 292 ("Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."). Similar exclusive jurisdiction provisions exist in the Andean Community and in the Central American Integration for the international courts set up by these agreements.

²⁷³ DSU, *supra* note 33, art 23.

²⁷⁴ *Id.* art 23.1.

²⁷⁵ NAFTA, *supra* note 98, art. 2005, ¶ 1.

Paragraph 6 of Article 2005, however, prescribes that, “[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4” (i.e., the special dispute settlement procedures for disputes relating to environmental, sanitary, phytosanitary, or standards-related measures).²⁷⁶

Competing and overlapping jurisdictions for the resolution of the same legal dispute pose legal problems if they lead to conflicting judgments, legal insecurity, or a waste of scarce legal and other resources in the case of multiple litigation. In private national and international law, such problems are countered by legislative and judicial limitations of unilateral forum shopping (e.g., judicial disregard of forum selection agreements that are neither fair nor reasonable), parallel proceedings (e.g., refusal of jurisdiction in case of *lis alibi pendens*), and the abuse of rights (e.g., *electa una via* principle). The *lis alibi pendens* rule prohibiting initiation of another judicial proceeding during a pending judicial proceeding on the same legal claims among the same parties and the *res judicata* rule precluding relitigation of the final judgment of a competent tribunal have been accepted by international courts as generally-recognized principles of law and judicial comity among courts in the exercise of their judicial function.²⁷⁷ The application of these private law rules on competing and overlapping jurisdictions by international courts in the field of public international law, however, remains rare and leaves open many questions. Some of these questions could be legally clarified in the cooperation agreements among the WTO and other international organizations with distinct dispute settlement procedures, such as WIPO and ITU.

GATT and WTO dispute settlement panels were often requested to take into account the precedential legal effects of earlier GATT dispute settlement rulings or decisions – such as on the con-

²⁷⁶ *Id.* art. 2005, ¶ 6. In the recent U.S. complaint against *Mexico-Tax Measures on Soft Drinks and other Beverages*, the Appellate Body confirmed the WTO jurisdiction to decide this complaint and noted “that Mexico has expressly stated that the so-called ‘exclusion clause’ of Article 2005.6 of the NAFTA had not been exercised.” ¶ 54, WT/DS308/AB/R (March 6, 2006).

²⁷⁷ See SHANY *supra* note 31, at 279. (defining *lis alibi pendens* and *res judicata*). The principle that *electa una via* (election of one forum) may preclude the plaintiff from submitting the same dispute among the same parties to another tribunal is closely related to the principle contained in the *lis alibi pendens* rule.

sistency of national balance-of-payments restrictions with GATT Article XVIII or on preferential tariffs and other discriminatory preferential trade arrangements with GATT Article XXIV—when newly established dispute settlement panels examined the legality of the same government measures previously reviewed by other GATT bodies. A 1989 GATT panel examined, for a third time, complaints against EC import restrictions on apples and

construed its terms of reference to mean that it was authorized to examine the matter referred to it by Chile in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination²⁷⁸

In July 1985, the United States requested that the GATT Council apply the legal findings of a previously adopted panel report on *Japanese Measures on Imports of Leather*²⁷⁹ to quantitative restrictions on leather footwear maintained by Japan, since “the same administrative and legal scheme was used to restrict imports of leather footwear as was used for leather.”²⁸⁰ Other GATT members expressed “reservations regarding the proposal that one panel’s recommendations could be applied to another dispute; surely, only a panel could determine whether the cases in question were totally identical.” The Council agreed to establish a new dispute settlement panel.²⁸¹ The 1983 GATT report of the panel, *United States - Imports of Certain Automotive Spring Assemblies*,²⁸² was adopted “on

²⁷⁸ GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 703 (1994) [hereinafter GATT ANALYTICAL INDEX].

²⁷⁹ Panel Report, *Panel on Japanese Measures on Imports of Leather*, L/5623 (Mar. 2, 1984).

²⁸⁰ GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 17-19 July 1985*, 37, C/M/191 (Sept. 11, 1985).

²⁸¹ *Id.*

²⁸² Panel Report, *United States - Imports of Certain Automotive Spring Assemblies*.

the understanding that this shall not foreclose future examination of the use of Section 337 [of the U.S. Tariff Act of 1930] to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement."²⁸³ The 1989 GATT panel report *United States Section 337 of the Tariff Act of 1930* again examined complaints (this time by the EC) challenging the use of Section 337 in connection with patent enforcement and, contrary to the 1983 panel findings against Canada's similar complaints, found the discriminatory restrictions to be inconsistent with GATT Article III:4 and not necessary or otherwise justifiable under GATT Article XX(d).²⁸⁴

When Brazil requested the GATT Council to establish a dispute settlement panel to examine the U.S. denial of most-favored-nation treatment of non-rubber footwear imports from Brazil in March 1991, the United States objected on the ground "that this matter had already been adjudicated" under GATT in 1988 and "re-adjudication would violate the fundamental jurisprudential principle of *res judicata*—a final decision on a matter constituted an absolute bar to subsequent action thereon . . . the earlier Panel had taken all of Brazil's arguments into account in reaching its decision"; the Panel was established at the following GATT Council meeting in view of the fact that, *inter alia*, the 1988 panel proceeding had taken place under a separate agreement (the 1979 Tokyo Round Agreement on Subsidies), and the earlier panel report had not been adopted.²⁸⁵ Similar to this dispute settlement practice under GATT 1947, several WTO dispute settlement panels have clarified the extent to which earlier WTO decisions (e.g., on the consistency of balance of payments restrictions with GATT Article XVIII and the consistency of free trade area agreements with GATT Article XXIV), and dispute settlement rulings are to be taken into account by subsequent dispute settlement panels.²⁸⁶

Even if WTO dispute settlement bodies are not formally bound

blies, L/5333 (May 26, 1983).

²⁸³ GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 26 May 1983*, 10, C/M/168 (June 14, 1983).

²⁸⁴ Report of the Panel, *United States – Section 337 of the Tariff Act of 1930*, L/6439, (Nov. 7, 1989) GATT B.I.S.D. (36th Supp.) at 393-96 (1990).

²⁸⁵ See GATT ANALYTICAL INDEX, *supra* note 278, at 704.

²⁸⁶ See Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOR OF JOHN H. JACKSON* 325 (Marco Bronckers & Reinhardt Quick eds., 2000).

to follow their earlier jurisprudence (*stare decisis*), there is hardly any GATT or WTO dispute settlement report that does not justify its interpretation of GATT and WTO rules by reference to legal or (quasi-)judicial interpretations adopted in previous GATT and WTO practices and precedents. The mutual coordination of multiple dispute settlement rulings under the variety of GATT and WTO dispute settlement procedures evolves pragmatically case-by-case rather than by recourse to general WTO rules on forum shopping and parallel and successive proceedings. WTO dispute settlement reports apply general international law rules in the light of the jurisprudence of other international courts (notably the ICJ) or refer to treaties (e.g., on the protection of the environment) concluded among WTO members outside the WTO, even though such judicial comity has so far hardly been shown by other international courts *vis-à-vis* WTO jurisprudence. Parallel proceedings before national and international courts are frequent in WTO dispute settlement practice; yet, in conformity with the jurisprudence of other tribunals, they are not perceived as jurisdictional conflicts because the complainants, legal claims, and applicable law tend to differ.

7. CONCLUSIONS: JURISDICTIONAL COMPETITION AS INCENTIVE FOR JUDICIAL COOPERATION AND FOR THE PROMOTION OF THE RULE-OF-LAW THROUGH JUDICIAL NETWORKS

Businesses increasingly resort to new ways of resolving transnational disputes by international arbitration or mediation so as to limit the risks and costs of being involved in litigation in foreign courts that risk disregarding relevant international trade rules and commercial practices.²⁸⁷ This contribution contends that the proliferation of dispute settlement fora also in public international economic law is, *prima facie*, a positive legal development reflecting an enhanced willingness by governments to strengthen the rule of international law in transnational relations. As the very broad scope of WTO law overlaps with numerous other international and regional agreements, cooperation among international and national courts becomes ever more important for maintaining the rule of law and reducing transaction costs, particularly in international relations among producers, investors, traders, and consumers. Simi-

²⁸⁷ See Jennifer Hughes, *Businesses Adopt New Ways of Resolving Disputes*, FIN. TIMES, June 22, 2004, available at 2004 WLNR 9774826 (mentioning a twenty-five percent rise in demand for international arbitration in the past five years).

lar to the increasing reliance on private international arbitration, intergovernmental "expeditious arbitration within the WTO as an alternative means of dispute settlement"²⁸⁸ could enable private parties and governments to broaden the applicable law and further improve the applicable procedures for the settlement of international economic disputes in the WTO, with better regard to other relevant international economic rules (e.g., on intellectual property rights, investor rights, legal remedies, human rights, labor, and social rights) than may be possible in normal WTO panel proceedings or in arbitration proceedings outside the WTO.

The rule-oriented WTO dispute settlement system clearly mitigates power disparities in international relations and helps governments limit power politics inside their countries (e.g., by limiting protectionist abuses of trade policy discretion in favor of rent-seeking interest groups by requiring independent judicial remedies inside countries like China that did not have such legal institutions prior to WTO membership). The clarification of GATT and WTO rules through GATT and WTO dispute settlement findings is increasingly influencing other multilateral WTO negotiations and, in some instances (e.g., the U.S.-EC oilseed dispute settlement findings leading to the 1992 Blair House Agreement), has been of crucial importance for the successful conclusion of trade agreements under GATT and at the WTO.²⁸⁹ While the progressive clarification of international trade rules through WTO jurisprudence (e.g., over thirty-five WTO dispute settlement findings on antidumping rules and over forty WTO dispute settlement interpretations of WTO subsidy rules) continues to be implemented in the administrative practices of WTO governments within a reasonable period of time, domestic legislatures are often reluctant to adjust domestic legislation, just as domestic courts may be reluctant to adjust their judicial practices in light of WTO jurisprudence.

The frequent legal inconsistencies between (quasi-)judicial rulings of WTO dispute settlement bodies, regional trade courts (e.g.,

²⁸⁸ DSU, *supra* note 33, art. 25.

²⁸⁹ For empirical evidence of the influence of GATT dispute settlement proceedings on the conclusion of the 1979 Tokyo and 1994 Uruguay Round Agreements, as well as the influence of recent WTO dispute settlement proceedings (e.g. on cotton, dairy, and sugar subsidies) on the Doha Development Round negotiations at the WTO, see Ernst-Ulrich Petersmann, *Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 127 (Ernst-Ulrich Petersmann ed., 2005).

the EC Court and NAFTA panels), and domestic courts regarding the interpretation and application of international trade law confirm that—in international trade law no less than in other fields of public international law—national and international courts do not yet constitute a coherent legal and judicial system. Outside regional systems (like EC, European human rights, and, to a lesser extent, NAFTA, MERCOSUR and Andean common market law), judicial coordination and cooperation among international courts, as well as among national courts, to avoid inconsistent decisions—even on the legality of the same government measures (e.g., the EC import restrictions on bananas)—remains rare. The inherent power of courts to exercise comity towards and cooperate with other tribunals in the maintenance of the rule of law are rarely used among international courts.²⁹⁰ The proliferation of international dispute settlement fora and the (sometimes explicit) admission (e.g., under NAFTA, Article 1 of the MERCOSUR Olivos Protocol, and many bilateral free trade agreements) of free choice among competing jurisdictions encourages forum and rule shopping so as, for example, to win a dispute at the WTO which might be lost under NAFTA, MERCOSUR, or in other regional dispute settlement proceedings between the same parties.²⁹¹ Competition among different international courts, however, does not yet present a major problem in international trade. Whereas forum shopping and shopping in private international commercial law may seriously inconvenience private parties attacked against their will in distant fora applying foreign law, respondent parties in intergovernmental litigation usually have the resources to defend themselves in international courts whose jurisdiction they have voluntarily accepted.

²⁹⁰ See Friedl Weiss, *Inherent Powers of National and International Courts*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, *supra* note 41, at 177.

²⁹¹ As NAFTA law permits choosing between NAFTA or WTO panels, NAFTA Member States have so far resorted to only three panel proceedings pursuant to Chapter 20 of NAFTA and—notably in case of Canada and Mexico—prefer submitting disputes to the more judicialized WTO dispute settlement proceedings. Less-developed WTO members have more favorable rights under WTO dispute settlement proceedings (e.g., in the case of differential treatment and legal assistance) than in many alternative regional dispute settlement fora (e.g., in case of complaints against the EC under the Cotonou Agreement). Whereas many free trade agreements (e.g., between Chile and Korea as well as between Australia and the United States) reserve the option of submitting disputes over WTO rules to the WTO, some bilateral and multilateral free trade area agreements (including the current draft texts for a Free Trade Area of the Americas (“FTAA”)) favor bilateral dispute settlement procedures that are favorable for countries with large legal resources (like the U.S.) but risk legal fragmentation.

While the ICJ has been criticized for neglecting its constitutional function in the UN legal system in favor of a pragmatic arbitration-like resolution of many interstate disputes,²⁹² the regular intervention by third parties in WTO and EC Court proceedings illustrates that—in regional and worldwide economic law—the systemic and constitutional functions of compulsory adjudication are well recognized by states and courts. There are several reasons that explain these different judicial practices (e.g., regarding third-party intervention), such as the clearer focus of ICJ dispute settlement proceedings on national interests (e.g., national borders, war, and peace), the mixture of private, public, bilateral, and multilateral interests in many trade disputes (e.g., about trade discrimination), or the elaboration of international court procedures by states (e.g., in the case of the DSU) rather than by judges (particularly regarding the internal procedures of the ICJ). As most trade restrictions affect several countries, purely bilateral dispute settlement proceedings remain an exception at the WTO. About one third of WTO dispute settlement cases involve multiple complainants; third parties intervene in more than eighty percent of all cases pursuant to Article 10 of the DSU.²⁹³

Similar to the frequent criticism leveled by EC member governments of the judicial governance and bold constitutional jurisprudence by the ECJ, the already more than 200 WTO dispute settlement reports are occasionally criticized—not only by academics but also by WTO member governments—for contributing to an institutional imbalance between the strong “judicial branch” of the WTO and its apparently less efficient “rule-making” and “executive” branches.²⁹⁴ For example, when the WTO Appellate Body construed Articles 13 and 17 of the DSU as permitting unsolicited *amicus curiae* briefs by NGOs, a special meeting of the WTO’s General Council was convened and expressed strong criticism:

The Appellate Body had unfortunately ignored the over-

²⁹² See Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999) (arguing that the proliferation of international courts will add to the fragmentation of the international system); see also Ernst-Ulrich Petersmann, *supra* note 76, at 753 (arguing that worldwide compulsory adjudication of international disputes is not as utopian as some have suggested).

²⁹³ DSU, *supra* note 33, art. 10.

²⁹⁴ See, e.g. Claus Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, *supra* note 41, at 499, 523–30.

whelming sentiment of Members against acceptance of unsolicited *amicus curiae* briefs. By introducing this additional procedure, which amounted to soliciting *amicus curiae* briefs from NGOs, the Appellate Body had indicated that it wanted to go one step further in total disregard of the views of the overwhelming majority of the WTO membership.²⁹⁵

When the Appellate Body reports in *Canada – Measures affecting the Importation of Milk and the Exportation of Dairy Products* were discussed in the WTO Dispute Settlement Body, many WTO members criticized the new test that the Appellate Body read into the Agreement on Agriculture for the purpose of determining “whether a ‘payment’ exist[ed] under Article 9.1(c) . . .”²⁹⁶ It noted that the “[c]ost of production appeared nowhere in the text of the Agreement on Agriculture, nor was it clear why ‘proper value,’ which itself was a term that did not appear in the Agreement on Agriculture, equated to cost of production It was odd that the WTO would not consider the market as being a good indicator of the value of goods.”²⁹⁷ It also noted that “[t]he finding of the Appellate Body clearly went beyond the ordinary meaning of the words in the Agreement on Agriculture The Appellate Body had failed a fundamental obligation of the treaty interpreter The Appellate Body had clearly gone beyond what WTO members had agreed upon in the Uruguay Round negotiations.”²⁹⁸

This institutionalized dialogue between the (quasi-)judicial WTO dispute settlement and political bodies, the adoption of dispute settlement reports by the DSB, and periodical, political WTO negotiations on further improvements to the DSU are likely to strengthen rather than weaken the evolution of the WTO dispute

²⁹⁵ GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 22 November 2000*, ¶ 31, WT/GC/M/60 (Jan. 23, 2001).

²⁹⁶ Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (Recourse to Article 21.5 of the DSU by New Zealand and the United States), ¶ 56, WT/DS113/AB/RW, WT/DS103/AB/RW (Dec. 3, 2001).

²⁹⁷ GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 18 December 2001*, ¶ 33, WT/DSB/M/116 (Jan. 31, 2002). The panel finding, which had used both domestic market prices as well as world market prices as benchmarks for determining “payments in kind,” had been reversed by the Appellate Body without any convincing arguments.

²⁹⁸ GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 17 January 2003*, ¶ 14, WT/DSB/M/141 (Feb. 14, 2003).

settlement system. In contrast to cases where interstate disputes capable of being referred to the ICJ were instead submitted to ad hoc arbitration,²⁹⁹ WTO members have not yet resorted to mutually agreed-upon arbitration as an alternative to WTO panel or appellate proceedings.³⁰⁰ The legitimacy and limited legal remedies of WTO jurisprudence remain, nonetheless, under siege. For example, many of the trade-related “human rights cases” in the ECJ could similarly arise at the WTO, for instance when freedom of trade (GATT Article XI:1) or freedom of transit (GATT Article V) are restricted in order to protect the human rights of demonstrators blocking motorways,³⁰¹ consumers objecting to genetically modified food,³⁰² or scientists using their freedom of speech to draw attention to the dangers of microwave ovens.³⁰³ There is not a single GATT or WTO panel, appellate, or arbitration report whose legal findings have, in the past, referred to the human rights obligations of WTO members. Just as the EC Court has occasionally avoided ruling on the human rights dimensions of trade disputes,³⁰⁴ WTO dispute settlement bodies also prefer to avoid making findings on the human rights dimensions of WTO disputes. Even though the numerous “general exceptions” in WTO agreements (e.g., GATT Article XX, permitting “measures necessary to protect public morals”) offer ample legal possibilities for justifying trade restrictions

²⁹⁹ For an example of where the ICJ could have been seized based on the optional clause declarations of all three states involved, see *Southern Bluefin Tuna Case* (Austl. & N. Z. v. Japan), 39 I.L.M. 1359 (2000).

³⁰⁰ But see Brazil’s WTO complaint against Argentina’s safeguard restrictions on cotton imports in *Notification of Mutually Agreed Solution, Argentina – Transitional Safeguard Measures of Certain Imports of Woven Fabrics of Cotton and Cotton Mixtures Originating in Brazil*, WT/DS190/2 (June 30, 2000), where a related part of the complaint was decided by ad hoc arbitration in the Southern Common Market (“MERCOSUR”). See also SHANY, *supra* note 31, at 59 (“The potential for competition between the WTO and regional economic integration regimes was also shown by a recent trade-related dispute between two members of MERCOSUR, Brazil and Argentina, which was referred to the WTO while similar proceedings were pending before the arbitration machinery of MERCOSUR . . .”).

³⁰¹ See *Case C-112/00, Eugene Schmidberger Internationale Transporte Planzüge v. Austria*, 2003 E.C.R. I-5659.

³⁰² See *Case C-377/98, Netherlands v. Eur. Parl. & Coun.*, 2001 E.C.R. I-07079.

³⁰³ See *Hertel v. Switzerland*, 1998 Eur. Ct. H.R. 77.

³⁰⁴ See *Case C-159/90, Soc’y for the Prot. of Unborn Children in Ir., Ltd. v. Grogan*, 1991-8 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991) (the Court held that the Irish advertising ban against a student organization distributing information on foreign abortion services was not covered by EC law).

in order to protect human rights,³⁰⁵ WTO panels lack legal expertise in the field of human rights and have never clarified how WTO obligations should be balanced and reconciled with the human rights obligations of WTO members. WTO jurisprudence is, however, increasingly emphasizing the need for balancing international trade, environmental, and other treaty obligations on the basis of general legal principles such as non-discrimination, necessity, proportionality, due process of law, and transparency.³⁰⁶ However, legal complaints in human rights bodies against legal decisions of WTO bodies remain unlikely. Just as the European Commission on Human Rights declined jurisdiction to review alleged human rights violations in EC Court proceedings,³⁰⁷ UN human rights bodies are unlikely to assert jurisdiction over claims that WTO dispute settlement bodies have disregarded UN human rights instruments.

Similar to the increasing number of human rights complaints that have been lodged by the same individuals under more than one regional or worldwide human rights instrument,³⁰⁸ the number of judicial challenges in national, regional, and worldwide fora to the same governmental trade restrictions (e.g., on bananas) is likely to increase in the future. For instance, the refusal by several EC member governments to approve genetically modified organisms ("GMOs") and to implement the 2002 EC Directive on the public release of GMOs is currently being challenged at the WTO (e.g., by Canada and the United States), in the ECJ (e.g., by the EU Commission), and in national courts (e.g., by the private applicants and patent holders). Concurrent jurisdictions of, forum shopping among, and parallel litigation in national, regional, and worldwide fora create the risk of incompatible judgments and fragmentation of law. This is especially the case if judges fail to construe national and regional trade law in conformity with the WTO obligations of

³⁰⁵ See Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 J. WORLD TRADE 241 (2003) (outlining a human rights approach to international trade).

³⁰⁶ See Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos and EC-Sardines*, 37 J. WORLD TRADE 199 (2003) (discussing the comprehensive WTO jurisprudence and treaty requirements for "nondiscrimination" and "necessity").

³⁰⁷ See *Melchers v. Germany*, Application No. 13258/87, 33 Y.B. EUR. CONV. ON H.R. 46 (1990) (refusing to extend *ratione materiae* jurisdiction).

³⁰⁸ See SHANY, *supra* note 31, at 60 (referring to forty human rights complaints that have been brought before both global and regional complaints procedures).

Member States and other international agreements concluded among WTO members outside the WTO (e.g., the rules on GMOs in the Cartagena Protocol to the UN Convention on Biodiversity). Prevention and settlement of disputes in international relations may also fail if international courts rely exclusively on state-centered rules without due regard to private rights of transnational actors.

The few general international law rules limiting parallel or successive disputes among the same parties leave open many questions. For instance, the *lis alibi pendens* rule prohibiting the commencement of one judicial proceeding during the pendency of the same dispute in a different judicial body does not apply to courts of different national, regional, and worldwide legal systems unless such a prohibition has been explicitly provided (e.g., in NAFTA Article 2005:6). The same seems to be true of the *res judicata* requirement that parties to a dispute must respect the final judgment of a competent court; the ECJ, for example, has often ignored GATT and WTO dispute settlement rulings on the illegality of EC trade restrictions that were subsequently challenged before the EC Court.³⁰⁹ The frequent parallelism among national, regional, and WTO dispute settlement proceedings confirms that, in contrast to the *electa una via* principle limiting multiple litigation by the same parties, private complaints in domestic courts challenging a governmental measure do not preclude a state party from challenging the same measure in intergovernmental dispute settlement proceedings, even if the intergovernmental dispute has been initiated at the request of the same private party that has challenged the government measure in a pending domestic court proceeding as well. Even though neither WTO, EC, nor NAFTA dispute settlement bodies apply a *stare decisis* doctrine requiring the strict application of judicial rulings from one case in similar future cases fea-

³⁰⁹ See Naboth van den Broek, *Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order*, 4 J. INT'L ECON. L. 411 (2001) (discussing the EC's treatment of WTO agreements); Geert Zonnekeyn, *EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions: Advocate General Alber Proposes a 'Copernican Innovation' in the Case Law of the ECJ*, 6 J. INT'L ECON. L. 761 (2003) (focusing on some of the more controversial issues dealt with in the *Biret* opinions). The judgment in Case C-377/02, *Van Parys v. Belgisch Interventie-en Restitutiebureau*, 2005 O.J. (C 106) 4 confirms that the ECJ refuses to apply the WTO obligations of the EC even if the legal inconsistency between an EC act and WTO law was formally established in a legally binding ruling by the WTO Dispute Settlement Body and the period for implementing the WTO ruling has expired.

turing different parties, national and international courts should cooperate more actively in protecting the rule of international law.

WTO dispute settlement bodies often apply stricter standards of judicial review compared to the more deferential "margin of appreciation" doctrine applied by human rights courts and the "political question" doctrines applied by domestic courts *vis-à-vis* foreign policy discretion.³¹⁰ Competing jurisdictions among courts, as well as academic criticism of introverted domestic judgments disregarding the international obligations of the country concerned, may contribute to improving the quality and overall consistency of judicial reasoning. There is also a case to be made for using the cooperation agreements among the WTO and other intergovernmental organizations for promoting coordination and cooperation among their respective dispute settlement procedures. While the coordination of competing jurisdictions among international courts may be left to judicial practice, the need for interpreting and applying domestic and international trade rules in a more consistent manner requires explicit, reciprocal recognition among trading countries (as, e.g., in Article XX of the WTO Agreement on Government Procurement). Without such explicit recognition that national governments and domestic courts must interpret and apply domestic and international trade law as a coherent legal system for the benefit of citizens, conflicts between national, regional, and worldwide trade rules and related jurisprudence will carry on to the detriment of citizens and the rule of international law.

³¹⁰ See MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003) (exploring the alternate standards of review in WTO dispute resolutions).